SOCIETY'S MORAL RIGHT TO PUNISH: A FURTHER EXPLORATION OF THE DENUNCIATION THEORY OF PUNISHMENT

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I. INTRODUCTION

When society uses its muscle to regulate conduct—to make certain actions criminal—it does so by punishing or threatening

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to punish wrongdoers. By what authority or for what reason can society bring its weight to bear on an individual who has violated that society’s rules? For centuries, philosophers have sought to identify society’s moral right to fine, incarcerate, or even execute a convicted criminal.\(^1\) Punishment requires that we do evil to a person, and evil in any form is difficult to justify. Yet, few serious scholars would advocate stopping all punishment.\(^2\) They instead seek rationales or justifications for the imposition of punishment.

The commonly identified theories of punishment are either utilitarian, in that punishment is justified because it leads to a better society by reducing crime, or they are retributive, in that punishment is justified because the convicted criminal is morally deserving of punishment. The utilitarian looks at the way punishment affects the potential lawbreakers. If punishment lessens crime, and less crime means a better, safer society, then punishment is appropriate. The retributivist looks at the person who has done the bad act and justifies punishment by focusing on moral culpability. While each of these schools of thought presents arguments as to why punishment may be desirable or necessary, neither presents a completely compelling argument for society’s right to inflict punishment on a specific individual.\(^3\) If society does have such a right, however, it should be possible to identify the source of that right.

One of the reasons for the failing of these two doctrines is that while they may recognize crime’s impact on law-abiding society, they do not even attempt to deal with punishment’s effect on law-abiding society. Just as punishment may impact on potential lawbreakers, it may also impact on those who abide by the law. To fully understand society’s right to inflict punishment, one must recognize punishment’s full impact on all segments of society, not just the potential lawbreakers. Only the

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1. See Murphy, Marxism and Retribution, 2 Phil. & Pub. Aff. 217, 222 (1972) ("Kant, Hegel, Bonsanquet, Green—all tended to entitle their chapters on punishment along the lines explicitly used by Green: ‘The Right of the State to Punish.’") (citing T. Green, Lectures on the Principles of Political Obligation 180-205 (1885)).

2. See Rawls, Two Concepts of Rules, 64 Phil. Rev. 3, 4 (1955) ("Only a few have rejected punishment entirely, which is rather surprising when one considers all that can be said against it.")

3. See E. Pincus, The Rationale of Legal Punishment 2 (1966) (noting that utilitarian theories and retributive theories are "contraries" and that "neither theory is alone adequate to provide a satisfactory rationale for punishment").

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denunciation theory of punishment considers punishment’s impact on law-abiding society.

The denunciation theory of punishment holds that punishment is justified when the offender has violated the rules that society has used to define itself. The wrongdoer is deserving of punishment because he or she has harmed society and because they were aware of that harm when the wrongful act was undertaken. Society is the proper entity to inflict the punishment because it was the victim of the crime. Punishment leads to good social consequences by discouraging future acts of crime and by reinforcing societal values. Punishment thus serves to strengthen the ties that bind people together in a society and to satisfy the obligations that society (as an entity) owes to its members. As such, where other theories of punishment fail, the denunciation theory of punishment identifies the source of society’s right to inflict punishment on a specific individual.

II. IDENTIFYING CRIMINAL LAW

Before one can identify society’s right to enforce criminal law, one must first identify criminal law and distinguish it from non-criminal law. Criminal law controls offenses against the state, while civil law regulates conduct between individual citizens. Civil actions, like those sounding in tort and contract, are based upon the private rights and wrongs of individuals.\(^4\) The primary purpose of civil lawsuits is to right a wrong that one individual has done to another. Their aim is to restore the injured party, or make the injured party whole.\(^5\) Civil suits normally involve one individual or entity bringing suit against another individual or entity. The typical remedy is an award of money damages to the aggrieved plaintiff.\(^6\)

Criminal actions, on the other hand, are filed and prosecuted by the state, not an aggrieved individual. The goal of a criminal prosecution is not to restore the injured party, but to...
punish the violator. The typical remedy is imposition of a fine or incarceration of the wrongdoer. Thus, offending another individual may create a duty to remedy the wrong, but it does not subject one to punishment. Offending the state, however, does constitute a crime, and the state will impose punishment.

This raises the very interesting problem of identifying those acts that will be considered criminal by the state, subjecting the violator to punishment, and those acts that will be regulated by civil laws. Although "crime" may be defined as a violation against the state, few criminal acts are actually directed against the state. Most crimes, even murder, are actually directed against another person, not the state. Why then do societies recognize certain conduct as criminal, as offending the state, while other wrongful acts, like breaching a contract or committing a tort, are not seen as criminal? This question can only be answered by looking at the reasons why humans form societies and then identifying what the society must do to satisfy those needs.

7. G. Fletcher, RETHINKING CRIMINAL LAW 409 (1978) ("As a test for when processes are criminal, the Supreme Court unskeptically invokes the concept of 'punishment' as the relevant criterion."); see, e.g., Allen v. Illinois, 478 U.S. 364, 373-74 (1986) (Illinois Sexually Dangerous Persons Act found not in conflict because it is not aimed at punishment).

8. The distinction between criminal and civil law is somewhat clouded because criminal laws are ultimately used to enforce civil laws and because certain acts can be regulated by both civil and criminal law. See generally PHILOSOPHY OF LAW 167 (J. Feinberg & H. Gross 2d ed. 1980) (hereinafter PHILOSOPHY OF LAW). Thus, if I am awarded damages for a wrong you have done to me (a violation of civil law), you cannot ignore the judgment. If you were to fail to pay the judgment, you could face criminal charges. Moreover, some acts violate both civil and criminal law. Thus, it is a crime to assault another who is not your legal adversary; society views this as an offense against society itself. The same assault is also a tort, an offense against the individual and a violation of civil law. The tort law remedy would be to make the defendant pay money to the injured party for the damages. The criminal law remedy would be to punish the offender with a fine or incarceration.

9. For that reason, murder is regulated by civil law in at least some societies. See, e.g., Brooks, Parents of Brionis Murdered in Sudan New Lawscent Judgment, Wall St. J., Jan. 26, 1990, at A7, col. 4 (under Islamic law, or Sharia, blood heirs of a murder victim may choose to receive cash compensation from the defendant in lieu of punishment, and the court is obligated to accept the relatives' decision). Treasure and tax evasion are the only common crimes which can be said to harm society directly.

10. See E. Pincus, supra note 3, at 82 ("The retributivist legislator would, presumably, want to prohibit and penalize deeds it would be morally wrong to do. But we have not laws against lying, ingratitude, or lust."); T. Aquinas, SUMMA THEOLOGIAE Q. 96 Art. 2 Qq. (Patrick of the English Dominicans Province trans. 1947) ("human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained.")

A. The Formation of Society and Adoption of Criminal Laws

Humans join into societies (or states), it is widely believed, to protect themselves from outside forces, either forces of nature or other groups of people. Individuals are vulnerable, but numbers provide strength and protection. The protection a society affords, however, is severely limited if members of the society are each free to pursue their own interests by whatever means they wish, especially if those means include acts of violence. In order for society to have any meaning, some regulation of conduct is necessary. Accordingly, the society develops rules which are enforced by threatened punishment or the actual imposition of sanctions. These rules are the criminal laws of that society.

Most criminal laws are prohibitions of certain acts; hence,
criminal laws generally limit the range of actions which an individual might legally perform. Since we the people comprise the society, we establish criminal laws to regulate and limit our own conduct. In defining crimes and identifying those acts which are prohibited, the society both reflects and molds its own values. The rules we establish are based on the values that we cherish, and they reflect the societal consensus on appropriate behavior. Moreover, by establishing them as laws, these values are preserved and become further ingrained into the fabric of the society as values, not just as laws. Thus, criminal laws are the rules by which we define what we stand for as a society. As members of a society, individuals receive the benefits society offers, but they are also bound by limitations put on their freedom by the society's criminal laws. The individual must abide by the criminal laws so that all can receive the benefits that society offers. The social contract model has been used to explain the obligation of the individual to recognize society's rules. However, regardless of whether the individual recognizes such an obligation, society demands compliance with these rules and will punish a violator.

B. Individual Rights

Society regulates many forms of conduct, but its authority is not without limit. When seeking to determine the legitimacy of a criminal law, rights of the individual and the minority, sometimes called natural rights, must be considered. A law is not just simply because the majority favors it. As our founders drafted the first rules to regulate our society, they adopted a democracy tempered by constitutional provisions to protect the minority (or the individual) from the tyranny of the majority. The Constitution sets forth what we might call the fundamental or natural rights of all individuals. These rights cannot be abridged, regardless of the will of the majority. Thus, the majority is stopped from prohibiting certain conduct if that conduct is protected by our Constitution. Accordingly, regardless of the will of the majority, no criminal law in this country could make it illegal to hold to a certain faith, because the Constitution provides for freedom of religion.

Constitutional provisions are so ingrained in the fabric of our society that few would seriously question abstract notions such as freedom of speech, freedom of the press, or freedom of religion. When these notions are reduced to concrete examples, politic under one government, put himself under an obligation to every one of that society to submit to the determination of the majority; see also A. DE TOQUEVILLE, The Tempting of America 121-22 (1990) (discussing the way society provides protection by requiring compliance with its laws).

20. See supra note 11 and accompanying text.
21. See supra note 11.
22. Natural law theories obviously had a great influence on the founding fathers of the United States. See E. BARKER, Traditions of Civility 308-11 (1948); see also The Declaration of Independence para. 1 (U.S. 1776) (the colonies broke away from England to assume that station to which "the Laws of Nature and of Nature's God entitle them").
however, they may conflict with the majority's wishes and therefore be controversial. A recent example centers on burning the flag of the United States. Most Americans find that act repugnant and hence (through their state legislators), made that act illegal. However, since burning the flag is a form of protest against the government, the Supreme Court determined that this act is protected by the first amendment as an act of free speech. Hence, the will of the majority in seeing that the flag not be burned was repressed by the fundamental right of the minority to engage in free speech.

Under the American constitutional system, when the majority makes a law, the minority is required to abide by it unless there is a constitutional restriction on the majority's power. When the majority finds some act repugnant, but the act is protected by the Constitution, the initial reaction may be to seek to amend the Constitution. Fortunately that is not a simple matter, otherwise constitutional provisions and protections would flow with the ebb and tide of current political power. There may also be calls to ignore the Constitution and the defendant's constitutional rights. If the defendant did not consider the rights of the victim, why should the defendant's rights be considered? Of course, if certain criminal defendants are deprived of their rights, then who is to say when others will be similarly deprived? Despite this reasonable answer, the general public might not be easily swayed.

The law-abiding public, through its legislatures, has structured the criminal law system to reflect its values and beliefs. It may be unreasonable to expect people to quietly accept constitutional arguments that do not reflect the ideals to which they aspire. Society has obligations to the majority as well as the minority or the individual. One of those obligations is to enforce the criminal laws and thereby assure the majority that its definition of justice is being served. At times, constitutional or natural rights come into apparent conflict with the majority's will. The structure of power has much to do with how this conflict will be resolved.

That which is recognized as "natural law" is dependent on society's recognition of a "law giver." In the United States, the giver of constitutional law (which is closely related to natural law) is, ultimately, the United States Supreme Court. If the Supreme Court finds a fundamental right in the Constitution, the will of the majority cannot override that determination without amending the Constitution. Thus, if the Supreme Court finds a right to privacy, which gives a woman the right to abort an unwanted pregnancy, states cannot outlaw abortion without amending the Constitution, regardless of the will of the majority. A philosopher who sits on the mountain top and finds a "natural right" giving the fetus the right to live is powerless to affect the law. Indeed, even if the majority of the populace would recognize such a right, the Supreme Court could not be overridden without amending the Constitution. Thus, natural or constitutional law is dependent on the "giver" of such law.

26. Of course, not all commentators believe that first amendment protections actually extend this far. R. Bork, supra note 19, at 126-28.
27. Id. at 49 (unless there is a constitutional prohibition, the minority is at the mercy of the legislative majority).
28. This situation can be seen in the recent war against drugs, where some people seem willing to sacrifice constitutional protections in order to obtain convictions of drug dealers. See, e.g., Uncivil Liberties: Debating Whether Drug-War Tactics Are Eroding Constitutional Rights, NEWSWEEK, Apr. 23, 1990, at 18. It might even be argued that this attitude was enacted as national policy with the invasion of Panama and the capture of Manuel Noriega. Similar arguments, however, have been made about numerous unpopular criminal defendants. See generally R. DEERING, LAW AND SOCIETY: CRIMINAL LAW AND WORK 141 (1970) (discussing the negative public reaction to the procedural rights provided to Robert Kennedy's assassin, Sirhan Sirhan).
When the giver of natural law recognizes rights that are in conflict with the will of the majority, the populace may attack the structure which supports the giver. Nonetheless, when structuring criminal laws, the society must consider these natural, basic, or constitutional rights before it can legitimately regulate conduct of the individual. If no such rights are infringed, society can legitimately prohibit the activity in question. If such rights are infringed, the will of the majority should normally be suppressed. Thus, with the rights of the individual and the minority contemplated, the society is free to regulate conduct by establishing a criminal law system in keeping with the majority’s definition of justice.

III. THE EFFECTS OF PUNISHMENT ON POTENTIAL LAWBREAKERS

The rules that people create as they form societies are enforced by the society itself, not individual members of the society. The collective entity determines whether the person so charged did break the rules, and it imposes punishment when appropriate. Society is willing to lend its muscle to regulate individual activity so that it can serve the purposes it was intended to serve: maintaining stability, providing for the common protection, and advancing society in accordance with the majority’s wishes. Punishment serves these ends by modifying the behavior of potential lawbreakers in at least three ways: by deterring people from engaging in crime, by rehabilitating lawbreakers, and by isolating dangerous people away from the rest of society.\(^{31}\)

\(^{31}\) These three effects of punishment on potential lawbreakers are often identified as separate theories of punishment. E.g., J. KAPLAN & R. WEISBERG, CRIMINAL LAW 3-29 (1986). Hence, one commentator might advocate the deterrence theory of punishment, while another will advocate the rehabilitative theory, while still a third writes of the incapacitation theory. In fact, these effects exist regardless of the theory. Thus we may imprison someone in order to deter others, but we will also “benefit” from the incapacitation effect. Rehabilitation might require some additional effort on the part of the penal institution, but essentially it is more appropriate to speak of these as effects of punishment rather than separate theories. Nonetheless, much has been written about each of these effects as a separate theory of punishment. Thus, this discussion is limited to a relatively short description of each effect and the potential problems it involves. See also infra notes 82-86 and accompanying text.

A. Deterrence

The first and most often cited effect of punishment is deterrence. Aquinas said, “It is not always through the perfect goodness of virtue that one obeys the law, but sometimes it is through fear of punishment...”\(^{32}\) If you spank a child, you hope the child will not repeat the wrong.\(^{33}\) If you spank the child in front of his or her siblings, you hope all will be deterred from committing the bad act in the future.\(^{34}\) Most people would accept the underlying premise that punishment can deter crime, but this theory raises some interesting questions when it is asserted as a justification for punishment.\(^{35}\)

The deterrence theory assumes that people are endowed with a free will and that they behave rationally.\(^{36}\) In other
words, it assumes that criminals weigh the consequences of their acts. Does a drug addict undertake a cost-benefit analysis before going out to rob a store? Do criminals even know the risks? That would require knowledge of the likelihood of being caught and convicted (certainty of punishment), as well as the harshness of the sentence (severity of punishment). If the criminal thinks capture can be avoided, it is unlikely that there will be any deterrent effect, regardless of the severity of any potential punishment. Thus, observers of popular social sciences are likely to argue that certainty of punishment, not severity of punishment, is the key to effective deterrence. While this may be true, certainty of punishment from a practical standpoint is not attainable. Hence, one must question whether there can ever be a true deterrent effect.

These questions are clearly difficult to test, which means that the theory is hard to validate. The deterrence theory, however, is put into action everyday in courtrooms around the nation as individuals are fined, imprisoned, or even executed.

43. See H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 53 (1968) (describing rehabilitation as "[the] most immediately appealing justification for punishment"). When rehabilitation is the aim of the punishment, the term of punishment cannot be determined beforehand. Rather, the wrongdoer must be evaluated on a regular basis, to determine whether he or she has been rehabilitated. This, of course, leads to inequality in terms of similar crimes receiving dissimilar punishment. See M. FRANKEL, CRIMINAL SENTENCES 3-11 (1973). See also infra note 111 and accompanying text.

44. A system could exist which would rehabilitate the wrongdoer without inflicting punishment. R. DUFF, TRIALS AND PUNISHMENTS 44 (1986); see also E. PINSOPPS, supra note 3, at 97-114 (comparing treatment to punishment). When a legal proceeding is not aimed at punishment, but rather at rehabilitation, the defendant may not be granted the full range of constitutional protections given to a criminal defendant. See, e.g., Allen v. Illinois, 478 U.S. 364, 375 (1986) (defendant in action brought under the Illinois Sexually Dangerous Persons Act not accorded fifth amendment rights because the Act is not criminal in nature). There was once a question as to constitutional protections afforded juveniles. If the prisoners were solely to rehabilitate, not to punish, then constitutional rights afforded the defendant in a juvenile trial would not be the same as those afforded someone facing punishment. G. FLETCHER, supra note 7, at 413. The Supreme Court, however, has held that juveniles are entitled to receive due process safeguards. In re Gauli, 387 U.S. 1, 33, 41-42, 55-56 (1967) (providing juvenile offender with the right to counsel, notice of charges, privilege against self-incrimination, and a right to cross-examine witnesses). Nonetheless, juveniles still may not receive a full range of constitutional protections. See M. PINSOPPS, supra note 3, at 97-114 (comparing treatment to punishment). Some legal experts charge that juveniles still get the "worst of both worlds"—neither the due-process safeguards guaranteed adults despite Supreme Court rulings nor the solicitous care intended for children.). See generally A. OWEN, WORK—EARN AND SAVE (1983) (general discussion of the benefits of the rehabilitative approach).

45. Some criminologists have expressed doubts about the criminal law system's ability to rehabilitate. J. WILSON, supra note 11, at 162. At the very least, rehabilitation requires the system to provide more individualized treatment of the wrongdoer. M. PINSOPPS, supra note 34, at 294-95 ("the indeterminate sentence, probation, parole, [and] the reformatory" all stem from an interest in rehabilitation). This individual attention should result in less recidivism. If it does not, the added expense of this individualized attention might not be justified. See id. at 297-99.

46. For instance, what of the outspoken political agitator, who may feel that his or her only crime is one of conscience? Rehabilitation in such case might be seen as immoral. See generally AMERICAN FRIENDS serv. COMM., STRUGGLE FOR JUSTICE (1971) (arguing that a corrupt society has no right to rehabilitate a political prisoner). If the criminal does not want to be rehabilitated, rehabilitation might not be possible. S. SABENOW, INSIDE THE CRIMINAL MIND 6 (1984) ("All the traditional rehabilitative programs in the world will be of no use unless the criminal changes his thinking") (emphasis in original).

47. See H. PACKER, supra note 43, at 53-58. A related theory of punishment, the...
arise as to how best to rehabilitate. As a practical matter, it has been suggested that many of our prison systems have exactly the opposite effect, serving instead as schools of crime.

C. Incapacitation

A third effect of punishment is incapacitation. If we take the criminals off the street, they will not be out there committing crimes. One might compare imprisonment with quarantine. Regardless of any personal culpability, indeed even if the criminal is seen as being ill, incarceration is justified much as enforced

"moral good"

therein is focused on rehabilitating the wrongdoer's moral identity. Lipkin, supra note 34, at 32 ("Essentially, the moral good theory is one that benefits the wrongdoer by helping the person to achieve moral insight and knowledge."). The moral good theory presumably would be directed at the wrongdoer's own good, not that of society. This effect of punishment on a potential law breaker, however, does not significantly differ from the traditional rehabilitation effect. Lipkin argues that utilitarians citing the rehabilitation effect are not concerned about the wrongdoer's moral character, but only with the net improvement to society (due to decreased criminal activity). Id. at 32-33. On the contrary, the rehabilitative theory is focused on the wrongdoer deciding to refrain from bad acts in the future not because of a fear of punishment (which would stem from a deterrent effect), but because the person will no longer want to engage in crime. Presumably, that lack of desire will spring from a reformed morality. This observation is not of recent origin. Aquinas noted that punishment, even if not intended to rehabilitate the offender's morality, may serve that purpose: "From becoming accustomed to avoid evil and fulfill what is good, through fear of punishment, one is sometimes led on to do so likewise, with delight and of one's own accord. Accordingly, even by punishing, leads men on to being good." T. AQUINAS, supra note 10, at Q. 92 Art. 2 Reply Obj. 4. Similarly, Plato said "that form of legislation is best which through punishment also tends to arouse in the criminal himself inclinations in harmony with the law... The law shall make a man hate injustice and love the... (the literature of the just, this is the noblest work of the law.)" M. PLATOE, supra note 34, at 293. As such, the moral good theory adds little to traditional incapacitation theory.

48. See H. PACKER, supra note 43, at 55 (society does not know how to rehabilitate); Marcotte, supra note 44, at 61 ("Social scientists have proved to be remarkably incapable of diagnosing and prescribing treatment for youths problems.").

49. See J. WILSON, supra note 41, at 166-67 (referring to a growing belief among judges that prisons do not rehabilitate); Lipkin, supra note 34, at 33 n.46 (noting how rehabilitation is often regarded as a "monumental failure"); A. von HIRSCH, DOMINO JUSTICE 12-18 (1976) (evaluating the evidence and determining that even where the programs were well planned and financed, rehabilitation did not seem to work). But see J. WILSON, supra note 11, at 147 ("In general, there is no evidence that the prison experience makes offenders a whole more criminal, and there is some evidence that certain kinds of offenders (especially certain younger ones) may be deterred by a prison experience.").

50. See generally J. FLOOD & W. YOUNG, DANGEROUSNESS AND CRIMINAL JUSTICE (1981) (discussing incapacitation of the dangerous person). Incapacitation was the theory, behind many punishments which today seem cruel and unusual. See M. PLATOE, supra note 34, at 293 ("Many of the so-called 'characteristic' punishments employed on the Continent during the Middle Ages were also designed to incapacitate the offender from repeating his crime. Blasphemers had their tongues torn out. Pickpockets had their hands cut off. Sex offenders were castrated.").

51. Schoeman, On Incapacitating the Dangerous, 16 AM. PHIL. Q. 27, 32 (1979). Of course, as Schoeman notes, an illness is not a product of choice, while a criminal act may be so classified. Id. at 29. As he also notes, one who is unwilling to accept the idea of quarantine as legitimate is unlikely to view the incapacitation theory with much favor. Id. at 30. But see Lipkin, supra note 34, at 27 n.27 (calling Schoeman's argument unsuccessful); E. FINCOPPS, supra note 3, at 97-102 (discussing the possibility that no criminal is morally blameworthy).

52. Most studies show that this is a reasonable assumption. See, e.g., J. WILSON, supra note 11, at 146 ("Every study of prison inmates shows that a large fraction (recently, about two-thirds) of them had prior criminal records before their current incarceration..."").

53. Although this qualification would seem intuitive, it has not gone without question. See E. VAN DEN HAAG, PUNISHING CRIMINALS 52-55 (1975) (arguing that other persons do commit new crimes when the first offender is incapacitated).

54. See J. WILSON, supra note 11, at 151 ("[Iincarcerating one robber who was among the top 10 percent in offense rates would prevent more robberies than incarcerating eighteen offenders who were at or below the median."). H. PACKER, supra note 43, at 49-53 (noting the need to establish the likelihood of repeat offenses in order to justify imposing punishment under this theory).

55. One study identified seven characteristics which, together, are "highly predictive" of whether the offender is likely to return to crime. J. WILSON, supra note 11, at 154. The factors included whether the offender:

1. was convicted of a crime... before age sixteen, (2) used illegal drugs as a juvenile, (3) used illegal drugs during the previous two years, (4) was employed less than 50 percent of the time during the previous years, (5) served time in a juvenile facility, (6) was incarcerated in prison more than 30 percent of the previous two years, and (7) was previously convicted for the present offense.

Id. at 154-55.

56. Although many sociologists have recognized alcoholism as a disease, this matter remains subject to debate. See H. PINGARETTE, HEAVY DRINKING: THE MYTH OF ALCOHOLISM AS A DISEASE (1988). But see Powell v. Texas, 392 U.S. 514, 562 (1968) (Fortas, J., dissenting) (arguing that "alcoholism is not within the control of the person involved") (quoting A. ULLMAN, TO KNOW THE DIFFERENCE 22 (1960)).

isolation of a person with a contagious disease might be justified.

Discounting crimes committed in prison, this theory works by definition, assuming incapacitated criminals would otherwise commit new crimes and assuming that they are not replaced on the streets by new criminals.

Incapacitation would work better if the offenders most likely to continue breaking the law were incapacitated. This, however, is not easy to determine. Moreover, even when we are able to identify common factors among likely repeat offenders, other considerations may prevent us from imposing a longer sentence.

Should a frequently unemployed person be punished more severely than an employed person? Should juvenile records be considered? If drug or alcohol addiction is a disease, should that weigh against the convict at sentencing? White collar criminals are less likely to be repeat offenders, yet many people are upset when these offenders are given relatively minor
sentences. In fact, recent federal legislation was directed at correcting this perceived inequity. The answers to all of these questions will reflect our acceptance or rejection of incapacitation as an effect which justifies punishment. Even strong advocates of utilitarian principles of punishment must acknowledge some troubling concerns associated with this theory.

IV. THE EFFECTS OF PUNISHMENT ON LAW-ABIDING SOCIETY

When society fails to punish wrongdoers, or when it punishes innocent people, not only must the effect on the likely law-breakers be considered, but also the effect on those not inclined to break the law. These are two distinct, important reactions. When society fails to punish, those who may wish to violate the laws will feel more free to do so. This would stem from application of the deterrence theory. The second result is that the law-abiding people may no longer feel confident that the system will enforce the laws. These people have made sacrifices and forfeited certain rights in exchange for the protection that the society affords. If society fails to provide protection, individuals may take over that role, leading to a form of frontier justice. Alternatively, law-abiding people may come to accept a high degree of lawlessness. In either case, society will have fallen apart.

When the public believes that society is failing in some manner, individuals respond. The deterrence theory of punishment indicates that fewer convictions and lighter punishments lead to increased crime; more convictions and stricter penalties lead to decreased crime. These reactions indicate how potential lawbreakers respond to punishment. To judge the impact that punishment has on the rest of society, however, focus must be placed on the law-abiding citizens and the victims of crime. How do they respond to differing degrees of punishment? The three responses to a perceived “public failure” identified herein are reformation, resignation, and retaliation. Examples of each can readily be found within this past decade.

A. Reformation

Reformation is the most legitimate public response to a perceived failing in the criminal law system because it is a process provided for in the system. If the system is failing, people can use political power to fix it. Fifteen years ago drunk driving was not considered a serious offense. Violators were often given a minor fine or other small penalty and told not to do it again. Victims of drunk drivers, however, were offended by this treatment. They saw their friends, spouses, and children being killed and maimed by people who should have been imprisoned for previous violations. Accordingly, they decided to change the system.

Mothers Against Drunk Drivers (MADD) has had a profound impact on our criminal law system. By mobilizing political forces, MADD changed attitudes and changed laws. A convicted drunk driver no longer merely pays a small fine; today convicted drunk drivers in most states face serious penalties. Moreover, a drunk driver who causes an accident leading to a death is no longer guaranteed a maximum charge of involuntary manslaughter. Today in many states the drunk driver can face murder charges. These changes in the criminal law system were brought about by the efforts of citizens who perceived a failing in the system.

Despite the MADD experience, reformation is not always progressive. For instance, if it is perceived that criminals are going free because of their constitutional protections, calls will be made to limit those protections. While this might not be positive, it at least is not a total abandonment of the system. Raising issues this way forces public discussion and debate. This


58. Two of the rights forfeited upon entering society are the right to do whatever is required for self-preservation and the right to punish violators of crimes committed in the state of nature. J. LOCKE, supra note 11, at 158-59; see also E. BURKE, supra note 11, at 309 (a fundamental rule of civilized society is “that no man should be judge in his own cause”).

59. “Both the amendment process, specified in the Constitution, and the processes of legislation are means by which the design of order and liberty can be elaborated and improved.” R. BORK, supra note 19, at 118-19.

60. See, e.g., Pears v. State, 698 P.2d 1198, 1201 (Alaska 1985) (murder conviction stemming from drunk driving); People v. Watson, 30 Cal. 3d 290, 637 P.2d 279, 179 Cal. Rptr. 43 (1981) (drunk driver who causes a fatal accident can be convicted of second degree murder).

61. See supra note 28 and accompanying text.
reaction may lead to results with which one might disagree, but at least there will be some public consensus on the issue. Society itself will act, not just individuals. Reformation, however, requires wide public support to work. An individual, seeing society's failures, might be more inclined toward a less constructive reaction unless there seems to be enough political clout to reform the system.

B. Resignation

When members of society decide that a problem cannot be controlled, or the system cannot be repaired, they may resign themselves and learn to live with the problem. Currently, the United States is waging a war on drug abuse. A review of available statistics, however, indicates that we may be losing the war. One response that is currently receiving strong support is simply to give up and legalize these drugs. Supporters of this position point to Prohibition's failure and draw an analogy to today's drug laws. Since the criminal system seems unable to deal with the drug problem, they argue, why even try? It is, in essence, a resignation to the conclusion that our society has failed to reach this goal that the people have set for it.

Resignation can also have a devastating effect on the personal level. This can be seen, for instance, in many of our inner cities, where the problem is magnified. Children are told that they should study and try to improve themselves, yet they see no one who succeeds. Drug dealers and other criminals receive all the rewards (cars, clothes, and money) and rarely are punished. Children who work to better themselves face ridicule and ostracism. In this environment it would be quite easy to take the position that there is no hope for the future. Why should teenagers study to improve themselves? Why should older persons

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63. See, e.g., France, The Drug War: Should We Fight or Switch, A.B.A. J., Feb. 1990, at 42, 43 (comparing the war on drugs to the Vietnam war). There are, of course, those who view this as an issue of civil liberties. A libertarian would support legalization of drug use even if we were winning the war on drugs. See infra note 69. The discussion here is not addressed to that issue.

64. This reaction can be distinguished from the reaction of turning to crime. The deterrent effect of punishment focuses on preventing people from turning to crime. The resignation effect is focused on encouraging people not to give up on society and not to give up on their life. A dramatic illustration of the resignation effect involves the brother of one of Ted Bundy's slain victims. This young man refused to speak in anything other than monosyllables after his sister's body was found. S. MICHAUD & H. AYNESWORTH, THE ONLY LIVING WITNESS 327 (1983) (also noting other relatives of victims who were deeply affected and changed by Ted Bundy's crimes).


66. Ryachak, supra note 62, at 576 n.117 (citing GAMBLING, supra note 62, at 55 n.30).

67. See id. at 574-77.

68. It is only fair to note that drug addiction is often associated with other criminal activity. See J. WILSON, supra note 11, at 204 ("Estimates of the proportion of all property crime committed by addicts range from 25 to 67 per cent.").
enforced. But society can and does establish goals for its own advancement. If the goals a society sets for itself are worthy, relationship, however, is less than clear. A 1974 study illustrates that from 1920 until 1950, 75% of heroin users had no criminal background prior to their addiction. 2 THE ENCYCLOPEDIA OF CRIME AND JUSTICE 640 (S. Kadish ed. 1983) (citing Greenberg & Adler, Crime and Addiction: An Empirical Analysis of the Literature). “Moral Right to Punish” cases not included. Studies of persons first addicted after 1950 show that the majority had a history of pre-addiction criminality. As [narcotic] drug use came to be generally considered a severely antisocial behavior, only more deviant individuals within a subculture providing access to narcotics initiated and maintained use.” Id. Since some prior contact with criminality was found to be a necessary condition for most addicts, it might be argued that drug use was a result of criminal activity rather than a cause of it. Other findings from this study, however, seem to cut against this argument. Narcotics addiction usually leads to an economic deprivation. Actual addicts (as compared to occasional users) had difficulty holding steady employment. To support their habits, about one-third of the addicts relied on pushing drugs. About half of the women addicts in the study admitted to engaging in prostitution, and about 70% of most addicts’ income is from illegal sources. Id.

69. A civil libertarian would argue that since criminal laws restrain personal liberty and freedom, they should be strictly limited to those matters which in some way infringe on the rights of another. See J.S. Mitte, supra note 11, at 10-11 (“The individual for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others”). But see PHILOSOPHY OF LAW, supra note 8, at 168 (“Liberty may be precarious but it is by no means the only thing of value.”). The libertarian argues that if the conduct at issue does not harm another individual, then the conduct should not be outlawed. See, e.g., Rabin v. State, 537 P.2d 494, 509 (Alaska 1975) (“The state cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals.”). In essence, society does not have an inherent interest in an activity which harms no third person.

The libertarian analysis, however, overlooks the fundamental difference between civil and criminal law. Civil law protects the individual from being wronged by another. Criminal law protects the society from being wronged. See supra notes 4-9 and accompanying text. Society is wronged not only when a third party is harmed, but also when harm is done to the society itself or when harm is done to the actor. Thus, society is not limited to a minimal protection of property and personal rights. See supra note 63. Instead, see: Its Scope. In Other Words: In What Sense Is It A Mean, reprinted in PHILOSOPHY OF LAW, supra note 8, at 293 (arguing that the state should aim at the enforcement of social values). Society, as an entity, may aspire to higher goals. If education is a societal value, and an educated populace is a societal goal, society may require that the public be educated. Similarly, society may place restrictions on food and drug preparation and may regulate the practice of medicine, dentistry, or law. These matters, all of which are ultimately enforced under the criminal law system, are completely appropriate matters for a society to regulate because they relate to society’s aspirations.

Sigmund Freud recognized the existence of societal goals, and the necessity of laws extending beyond the mere protection of person and property if those goals were ever to be achieved. Freud wrote:

Reality shows us that civilization is not content with the ties we have so far allowed it. It aims at binding the members of the community together in a libidinal way as well and employs every means to that end. It favours every path by which strong identification can be established between the members of the community, and it summons up aim-inhibited libido on the largest scale so as to strengthen the communal bond by relations of friendship. In order for these aims to be fulfilled, a restriction upon sexual life is unavoidable.

then offending those goals harms society. As such, resignation is not an appropriate response to difficulty of enforcement.

C. Retaliation

When people no longer feel safe relying on the system for protection, the society has failed in its most basic duty. When society fails in this duty, one must question the value of maintaining the society. This questioning may lead individuals to enforce the law themselves. If the system is failing, why

S. FREUD, CIVILIZATION AND ITS DISCONTENTS 55-56 (J. Strachey ed. 1962). Freud explained further as follows:

It can be asserted that the community, too, evolves a super-ego under whose influence cultural development proceeds.

The cultural super-ego has developed its ideals and set up its demands. Among the latter, those which deal with the relations of human beings to one another are comprised under the heading of ethics. People have at all times set the greatest value on ethics, as though they expected that in particular would produce especially important results.

Id. at 88-89. Thus, society can and does have goals which extend beyond the mere protection of the individual, and those goals can be protected by use of the criminal law system. Harm to society can come about not only through, for instance, a theft of treasure, but also when society’s goals and values are injured. Such harm might be accomplished without injuring (or endangering) any individual, or at least no individual other than the actor. Nonetheless, society suffers. As such, society can legitimately use criminal sanctions to prohibit certain actions, even though there is no victim in the traditional sense.

70. See supra note 69.

71. Oliver Wendell Holmes is often associated with the proposition that individuals will resort to private vengeance if the law will not punish. See O. HOLMES, THE COMMON LAW 40 (1881) (“It certainly may be argued, with some force, that it has never ceased to be one object of punishment to satisfy the desire for vengeance.”). See generally Hoffheimer, Justice Holmes: Law and the Search for Control, 1989 Y.B. SUP. CT. HIST. SOC. 98, 112 (discussing Holmes’s theory of criminal law). This attitude is certainly reflected in popular culture. For example, Charlie Daniels’s 1989 hit song, “Simple Man” is about a simple vision of justice, which includes a short rope and a high tree. One of the lines refers to “some party-wait judge [who] sets the drug dealers free.” The Charlie Daniels Band, “Simple Man,” (CBS Records 1989); see Harris, Stargazing, MUSIC CITY NEWS, Dec. 1989, at 34, 36 (discussing this song). Hank Williams, Jr.’s song “If the South Woulda Won” complains about how convicted drug dealers are currently treated and compares that to how the world would be if he had his way. “If they were proven guilty, then they would swing quick, instead of writing books and smiling on T.V.” H. Williams, Jr., “If the South Woulda Won,” Wild Streak (Klammer Bros. Records Inc. 1988). This attitude is not limited to country music. Charles Bronson has made at least three Death Wish movies, which are based on a character whose family was killed by a gang, and who then takes the law into his own hands. See R. Ebert, ROGER EBERT’S MOVIE HOME COMPANION 145-48 (1988 ed.). Clint Eastwood’s Dirty Harry movies and his The Outlaw Josey Wales movie contain similar themes, id. at 156, 418-19, as do Mel Gibson’s Mad Max and Lethal Weapon movies. Id. at 322-25, 345.
should anyone rely on it? Bernhard Goetz may have felt this way. He previously had been accosted on the New York subway. He felt that the criminal justice system had let him down. It was not protecting him as it should. He had lost faith. Accordingly, he decided to defend himself. When four youths approached him one night, he pulled out his gun and emptied it into them. Society had failed him, and if society would not punish the evil doers, he would.

Clearly, the criminal law system impacts not only on lawbreakers and potential lawbreakers. It also directly affects the actions of the victims and of law-abiding society. To maintain order in society, the legal system must not only provide for a safe society, it must also provide for a society that is satisfied with the workings of the system. The law-abiding populace must be assured that those who have done wrong are punished, provides no remedy. F. Bacon, Of Revenge, in ESSAYS, OR COUNSELS CIVIL AND MORAL 13 (G. Clarke ed. 1905) ("The most tolerable sort of revenge is for those wrongs which there is no law to remedy . . . .") It might even be suggested that man is a vengeful animal, and it is wise for society to attempt to overlook this primal urge. See H. Packer, supra note 43, at 37-39; see also G. FLETCHER, supra note 7, at 417 (referring to "the fashionable consequentalist argument that it is socially desirable to channel the hostile energies of society into the punishment of criminals" rather than risk "private vendettas and blood feuds"); P. PLOSCOWA, supra note 34, at 290, 295 (noting a public desire for vengeance). 72. One account of the Goetz incident is set forth in M. LESLY, SUBWAY GUNMAN (1988).

73. Goetz was indicted for several crimes, including attempted murder. Id. at vii-ix. He was acquitted on all counts except criminal possession of a weapon. Id. at xii.

74. The importance of perception must be noted. Suppose, for instance, that the previous muggers of Mr. Goetz had received a light punishment, but Mr. Goetz thought that the punishment had been severe. He would not have lost faith in the system. He might not have armed himself, and the shooting might never have taken place. On the other hand, if the penalty had been severe, but Mr. Goetz thought that the penalty was light, he probably would have acted in the same manner that he did act. Thus, altering the general public to the punishment of criminals is important to society. Perception is also important to the general deterrent effect of would-be criminals. For instance, we would like kidnappers to think that we will not pay ransom. If that is what they believe, then potential kidnappers will decide that the crime will not pay and they will not kidnap people in the future. However, we may decide to pay the kidnapper in a given case without violating this wish, if we can keep the payment a secret. Thus, in the "arms for hostages" deal that haunts the Reagan presidency, it was not the act of trading arms to obtain hostages that endangered future American lives, it was that the deal became public.

75. It is possible that the Goetz situation might also be described as a reaction to heightened criminal activity, and not solely as a reaction to society's failure to punish the guilty. A lynching situation would better reflect an action solely directed to a perceived failure of the system. But the Goetz situation is at least partially a reaction to his perception of the system's failure. At one point in his confession, when discussing the previous mugging, Goetz said that his difficulty in getting police to take action after the prior mugging was "an education" that taught him "that the city doesn't care what happens to you." M. LESLY, supra note 72, at 58.

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and that those who are innocent are protected. Otherwise, society will fail in its most basic duty.

V. JUSTIFICATIONS FOR PUNISHMENT

When society regulates conduct, it does so by punishing or threatening to punish those who violate the law. Punishment entails doing evil. By what authority or for what reason can society do evil to an individual who has violated that society's rules? As Tolstoy asked, "By what right [do] some people punish others?" In general, it may be argued that the state is under a duty not to punish. Certainly society could not justify random punishment of all people, including those who abide by the law. By the same token, allowing flagrant violations of the criminal law to go unpunished might undermine the basic stability of the society. Society must be able to justify its infliction of punishment on an individual before punishment can be legitimate.

76. L. TOLSTOY, RESURRECTION 363 (L. Maude trans. 1899). The complete passage, which must trouble anyone engaged in punishment theory, states:

He asked a very simple question: "Why, and with what right, do some people lock up, torment, exile, flog, and kill others, while they are themselves just like those whom they torment, flog, and kill?" And in answer he got deliberations as to whether human beings had free will or not. Whether signs of criminality could be detected by measuring the skulls or not. What part heredity played in crime. Whether immorality could be inherited. What madness is, what degeneration is, and what temperament is. How climate, food, ignorance, imitativeness, hypnotism, or passion act. What society is. What are its duties, etc., etc., etc.

These disquisitions reminded him of the answer he once got from a little boy whom he met coming home from school. Nekhliudoff asked him if he had learned his spelling:

"I have," answered the boy.

"Well, then, tell me, how do you spell 'leg'?"

"A dog's leg, or what kind of leg?" the boy answered, with a sly look.

Answers in the form of new questions, like the boy's, was all Nekhliudoff got in reply to his one primary question. He found much that was clever, learned much that was interesting, but what he did not find was an answer to the principal question: By what right do some people punish others?

Not only did he not find any answer, but all the arguments were brought forward in order to explain and vindicate punishment, the necessity of which was taken as an axiom.

Id. at 362-63; see also infra note 78.

77. See Brady, A "Rights-Based" Theory of Punishment, 97 ETHICS 792, 793 (1987) ("Ordinarily, a citizen has a claim-right against the state not to be punished, that is, the state is under a duty not to punish.") Thus, when society decides to inflict punishment, it must be able to provide justification.

78. See Lipkin, supra note 34, at 23 n.20 ("any relatively complete moral theory must deal with the problem of justifying punishment"). But see E. PINCOFFS, supra note 3, at 46
A problem arises, however, because punishment is hard to justify on a moral basis. Philosophers have long sought to identify society's moral right to fine, incarcerate, or even execute a convicted criminal.⁴⁷ Punishment presents a threat to the values of autonomy, personal dignity, and self-realization, which are all values which the state seeks to nurture.⁴⁸ Yet few serious scholars would advocate stopping all punishment.⁴⁹ Instead they offer justifications or theories of punishment. The utilitarian school justifies punishment because it serves a greater good by decreasing crime and creating a safer society. The retributive school justifies punishment on a moral basis. The criminal has done wrong and deserves to be punished. Neither of these schools presents an entirely compelling case for society's infliction of punishment on a given individual. Only the denunciation theory, which focuses on law-abiding society, presents valid reasons for society's right to inflict punishment on a wrongdoer.

A. The Utilitarian Theory of Punishment

The utilitarian theory of punishment justifies inflicting punishment because a greater good will be served in the long run.⁵² Thus, by punishing the offender today, there will be less crime tomorrow, and society will be improved. If the improvement to society, seen as a good, outweighs the harm done to the offender, seen as an evil, then punishment is justified.⁵³ David Hume wrote:

(Quoting K. Menninger, The Human Mind 448 (1945)) (“The reasons usually given to justify punishment do not explain why it exists. They serve only to conceal the truth, that the scheme of punishment is a barbaric system of revenge, by which society tries to “get even” with the criminal.”).

⁷⁹. See supra note 1.
⁸⁰. See Murphy, supra note 1, at 223 (discussing the difficulty that philosophers have had with this quandary).
⁸¹. See supra note 2.
⁸³. Murphy, supra note 1, at 219. One problem presented by this equation is that utilitarians have not identified how to measure the good or the evil. For instance, should the criminal’s pleasure be weighed in the “good” column? If a utilitarian is really making no moral judgment, then that is the proper measure. And if all, save the victim, receive pleasure from the crime, might not the crime be justified in the eyes of the utilitarian (thus leading to no punishment)? See generally Wexler, The Moral Confusions in Positivism, Utilitarianism and Liberalism, 30 Am. J. Juris. 121, 130-31 (1985).

84. D. Hume, Of Justice, in An Enquiry Concerning the Principles of Morals (1751), reprinted in Philosophy of Law, supra note 8, at 304, 305 (emphasis in original).
85. But see E. Pincofs, supra note 3, at 121 (tranquilization or annihilation of the human race would be more effective at discouraging crime than punishment is).
86. See supra notes 32-57 and accompanying text.
87. See, e.g., J. Kaplau & R. Weissberg, supra note 31, at 5-23. The Supreme Court of Alaska described the various objectives of punishment as the rehabilitation of the offender into a noncriminal member of society, isolation of the offender from society to prevent criminal conduct during the period of confinement, deterrence of the offender himself after his release from confinement or other penological treatment, as well as deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender, or in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves.
89. “[U]nutilitarianism, once regarded as the great inspiration of progressive social thought, also possesses a darker sinister side permitting the sacrifice of one individual to secure the greater happiness of others.” H.L.A. Hart, Essays in Jurisprudence and Philosophy 194 (1983).
The purpose of benefiting others was morally wrong. Kant, like Hegel, John Rawls, and Karl Marx, argued that utilitarian attitudes were incompatible with a sense of moral justice. Kant wrote:

Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else and can never be confused with the objects of the Law of things... His innate personality [that is, his right as a person] protects him against such treatment... He must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens.

Thus, that punishment may improve society does not truly identify society's moral right to inflict punishment. There must also be a sense that the criminal deserves punishment.

An example of utilitarian thought, and the problem identified by Kant, recently took place in my classroom. The State of Georgia enforces a law requiring doctors and teachers to report suspected child abuse. At least three teachers have been charged for failing to comply and face up to one year imprisonment. In one of those cases an investigation established that the child had not been abused, but charges remain against the teacher.

When I presented this case to my class, many students were aghast. They did not believe that punishment would be appropriate in this case. One student, however, noted that if this teacher were punished, others would take note and abide by the law—a perfect example of the utilitarian viewpoint. Punishment will deter other would-be lawbreakers, and there will be less “crime” and a safer society in the future.

The problem, of course, is that pure utilitarian thought does not take moral culpability into account. This is what H.L.A. Hart called the “darker sinister side” of utilitarianism. It permits “the sacrifice of one individual to secure the greater happiness of others.”

B. The Retributive Theory of Punishment

The retributive theory of punishment is focused on the defendant's act and moral culpability. As such, it has been argued that this theory recognizes the value of the person and the person's place in society. Punishment is not justified because society will be improved, but because the criminal, “as a free agent, has exercised his choice in such a way as to make the...
punishment was a necessary consequence.”104 As such it may be said that punishment is “the systematic moral response to wrongdoing . . . .”102 Guilt is both a necessary and a sufficient reason for inflicting punishment.103 Therefore, it is argued, the integrity of the person is acknowledged.104 If a person is treated merely as an instrument rather than as the author of his or her actions, then the person is denied the role of creator and loses the satisfaction of personal achievement.103 As such, it has been argued that there is a fundamental right to punishment, which stems from the “fundamental human right to be treated as a person . . . .”106

101. E. PINCOFS, supra note 3, at 8 (emphasis in original); see also Weinreb, Desert, Punishment, and Criminal Responsibility, 49 LAW & CONTEMP. PROBS. 47, 47 (1986) (arguing that “desert” is necessary in any theory of punishment); Rychlak & Rychlak, Free Will is a Viable, Verifiable Assumption, 8 NEW IDEAS IN PSYCHOL. 43, 46 (1990) (the ability to exert one’s free will is a prerequisite to a finding of guilt).

102. Lipkin, supra note 34, at 81 (emphasis in original). This approach toward punishment was formalized as part of the canon law by at least the twelfth century. G. McHugh, CHRISTIAN FAITH AND CRIMINAL JUSTICE 21-22 (1978).

103. J. Murphy, Kant: The Philosophy of Right 141 (1970). Similarly, F.H. Bradley wrote:

If there is any opinion to which the man of uncultivated morals is attached, it is the belief in the necessary connexion of punishment and guilt. Punishment is punishment, only where it is deserved. We pay the penalty, because we owe it, and not on any other account; and if punishment is inflicted for any other reason whatever than because it is merited by wrong, it is a gross immorality, a crying injustice, an abominable crime, and not what it pretends to be. We may have regard for whatever considerations we please—our own convenience, the good of society, the benefit of the offender; we are fools, and worse, if we fail to do so. Having once the right to punish, we may modify the punishment according to the useful and the pleasant; but these are external to the matter, they can not give us a right to punish, and nothing can do that but criminal desert. This is not a subject to waste words over; if the fact of the vulgar view is palatable to the reader, we have no hope, and no wish, to make it so.


104. From the point of view of abstract right, there is only one theory of punishment which recognizes human dignity in the abstract, and that is the theory of Kant, especially in the more rigid form given it to him by Hegel. Hegel says: “Punishment is the right of the criminal. It is an act of his own will. The violation of right has been proclaimed by the criminal as his own right. His crime is the negation of right. Punishment is the negation of this negation, and consequently an affirmation of right, solicited and forced upon the criminal by himself.”

K. MARX, CAPITAL PUNISHMENT, N.Y. Daily Tribune, Feb. 18, 1853, reprinted in Murphy, supra note 1, at 217-18.

105. PHILOSOPHY OF LAW, supra note 5, at 523.

106. Morris, Persons and Punishment, THE MONIST, Oct. 1968, reprinted in PHILOSOPHY OF LAW, supra note 5, at 528. Morris argues that “a right to punishment . . . derives from a fundamental human right to be treated as a person . . . and denial of this right implies the denial of all moral rights and duties,” hence the denial of the right to be

Retribution, to the extent that it adds the requirement of guilt into the punishment equation, must play an important part in any just criminal system. There is a need in mankind to see that justice is done. Retribution is based on moral culpability. If the criminal deserves punishment, it should be inflicted.107 If the criminal is not morally culpable, however, no punishment is justified, regardless of any potential good effect it may have on society.108 The utilitarian theories might justify punishment for the greater good of the greater number, regardless of moral blameworthiness, but retribution does not justify punishment without moral culpability.109

Retribution provides a sense of proportionality in a sentencing scheme. The utilitarian theories do not really offer justification for punishing a murderer more severely than a pickpocket.110 Under a deterrent theory, the longer the sentence, the greater is the deterrent effect, regardless of the severity of the crime. Similarly, under a rehabilitation theory, a murderer might be rehabilitated quite quickly, but a pickpocket might be difficult to rehabilitate.111 In that case, the rehabilitation theory


107. J. WILSON, supra note 41, at 164 (“We also want, or ought to want, sentences to give appropriate expression to our moral concern over the nature of the offense . . . .”). See also supra note 101.

108. Cf. supra note 89. Some commentators feel that there may be too much excess baggage associated with the notion of retribution, thus, they have developed a theory of punishment based on “desert.” E.g., A. VON HIRSCH, supra note 49, at 69-73; Weinreb, supra note 101. Proponents of the desert model argue that it focuses on the culpability of the offender, while retributive theory focuses on the harm caused. See Weinreb, supra note 101, at 68-70. Traditional retributive theory, however, has long been focused on culpability, not harm caused. See supra text accompanying notes 103-06; see also THE KORAN 72-73 (1984) (G. Sale trans. 1734) (prescribing more severe retributive punishments for those who kill knowingly than for those who kill by mistake).

109. For instance, if a person suffering from epilepsy were subject to violent outbursts, incarceration might protect society, thus serving the greater good. Punishment would not be appropriate, however, under a theory taking moral culpability into consideration.

110. See K. KANT, supra note 90, at *332. (“Only the Law of retribution (ius talionis) can determine exactly the kind and degree of punishment . . . .”) G. FLETCHER, supra note 7, at 416 (disparity in sentencing would not seem unjust if focus were on individualized treatment for rehabilitation). But see PRINCIPLES, supra note 82, at 70-73 (identifying factors to be considered by a utilitarian in order to impose an appropriate punishment). LIMES OF JUSTICE, supra note 82, at 290-91.

111. In juvenile courts, where rehabilitation is more clearly a goal than it is in regular criminal courts, sentences are often indeterminate. Inside Chicago’s Juvenile Courts,
would indicate that the murderer should serve a shorter sentence than the pickpocket. A similar argument could be made under the incapacitation theory (a frequent pickpocket might be a greater risk to society than a one-time murderer). A sense of justice or proportionality, which stems from an idea of retribution, however, indicates that the murderer should receive the longer sentence. Thus, the retributive theory would not justify giving a light sentence to a murderer, even if the murderer were quickly rehabilitated, just as it would not tolerate a severe sentence imposed on a pickpocket, even if there had been no noticeable rehabilitation of the offender.

Retribution has been defended by looking at "the criminal act as the source of the offender's obligation to suffer punishment." This idea is that "the offender is duty-bound to suffer punishment, [because] his [intentional] offense has created[d] an imbalance of benefits and burdens in the society as a whole." Because the defendant's act was intentional, punishment is justified. This stems from application of a type of social contract theory.

A.B.A. J., Apr. 1990, at 62. Thus, a juvenile convicted of a more serious crime might very well serve a shorter sentence than one convicted of a less serious crime. Compare M. PLOSCOWE, supra note 34, at 294 (indeterminate sentence required when rehabilitation is the aim).

...
who violates the speed limit on an interstate highway is not morally bad, but society will make the speeder pay a fine. Moreover, not all immoral acts will be punished by society. When former President Jimmy Carter made his famous confession in Playboy magazine, “I’ve committed adultery in my heart,” he was acknowledging that he had sinned. Morality is concerned with intent, regardless of whether it is accompanied by an act. If criminal punishment were to be predicated on intent unaccompanied by action, then there could be no free thought. Thus, the law always required more than a mere moral shortcoming to justify punishment.

Even if moral culpability alone does establish the wrongdoer’s obligation to suffer punishment, it does not establish society’s right to inflict that punishment. Punishment from God might be justified when a person has sinned, but society does not have the right to punish such wrongdoing. That a person is deserving of punishment does not mean that a particular entity has the right to inflict that punishment, even if certain utilitarian benefits would flow from that punishment. Thus, retributive theories fail to provide a legitimate source of power for society’s right to inflict punishment, as opposed to the wrongdoer’s obligation to suffer punishment.

Retribution has been widely criticized, because it seems to be punishment for its own sake, without any goal of bettering society. The Old Testament approach of “an eye for an eye, a tooth for a tooth,” may seem barbaric in today’s society. If the focus is put on pleasure that people receive from watching the criminal suffer, retribution can be seen as hedonistic. This, of course, violates our sense of justice and opens retribution to charges of mere vindictiveness. However, even if one could defend retribution against these charges, retribution still does not identify society’s right to inflict punishment, only the wrongdoer’s obligation to suffer it.

VI. Denunciation Theory

The denunciation theory of punishment says that those who disobey criminal laws should be held up to the rest of society and denounced as violators of the rules that define what the society represents. This theory holds that society must register its disapproval of wrongful acts and reaffirm the values violated by these acts. Punishment declares that this society will not tolerate this conduct, regardless of any future deterrent effect (or lack thereof). Viewed this way, denunciation seems to have much in common with the retributive theory of punishment; however, to the retributive theories. See Lipkin, supra note 34, at 28 n.31 and authority cited therein.

126. See Matthew 5:27-28 (New English Bible) (“You have learned that they were told, ‘Do not commit adultery.’ But what I tell you is this: If a man looks on a woman with a lustful eye, he has already committed adultery with her in his heart.”). Comedian George Carlin has a hilarious routine on his album Class Clown in which he discusses how it is a sin to “wanna” sin. G. Carlin, “The Confessional,” Class Clown (Little David Records 1972).
127. Rychlak & Rychlak, supra note 36, at 4-5. There are, of course, certain circumstances under which criminal liability attaches for failure to act when there is an obligation to act. See, e.g., Model Penal Code § 2.01(3) (1985) (criminal liability for omissions).
129. See Murphy, supra note 1, at 227 (retribution has been criticized as “primitive, unenlightened and barbaric”); E. PINCOFFS, supra note 3, at 43 (“Retributivists are often accused of wishing to have revenge upon the criminal, and deceiving themselves and others by disguising this wish as a demand of justice.”); Lipkin, supra note 34, at 29 n.34 (“Retributive theories often are criticized for being primitive, barbaric, or a mere rationalization for vengeance.”). However, the past twenty years has brought a “rebirth”...
denunciation does not look only to the wrongdoer’s moral culpability. It also looks to certain utilitarian aims or benefits which flow from the infliction of punishment.\(^{134}\)

One of the most visible aims of denunciation is the maintenance of social cohesion.\(^{135}\) Punishing those who violate society’s rules helps draw law-abiding society together by reaffirming societal values. Denunciation can also serve to educate the public as to social rules or laws and to direct community anger away from vengeance.\(^{136}\) Since each of these benefits can be said to improve the society, denunciation clearly has utilitarian aspects. The most important aim of the denunciatory theory, however, is to reassure the majority of society that the system does work.

Denunciation serves to satisfy the majority’s need to know that its rules (reflecting its values and goals) are being enforced. In other words, denunciation shows law-abiding society not only that the criminal law system works, but that the society itself works. Utilitarian principles may lead to a safe society, by discouraging crime, but they do nothing to assure that law-abiding society is satisfied with the criminal law structure that it has put into place. Denunciation is focused on precisely that point.

A. The Focus of the Denunciation Theory

When we think of the impact that severe penalties and strict enforcement of the laws have on individuals, we tend to think of deterrence. We think of how this approach will affect the likely lawbreakers. However, when we realize that our criminal laws reflect what we stand for as a society,\(^{137}\) it is good to ask how law enforcement impacts on all members of society, not just the potential criminals. Only the denunciation theory focuses on that impact.

Utilitarian theories are focused on shaping the behavior of convicted criminals, or persons who might be tempted to engage in criminal activity—the potential lawbreakers. The effects of punishment a utilitarian will identify (deterrence, incapacitation, and rehabilitation), all focus on decreased criminal activity by modifying the behavior of potential lawbreakers.\(^{138}\) The hope is to prevent them from engaging in criminal activity by discouraging them with threats of punishment, by locking them up, or by reforming them so that they will not want to engage in crime. Retribution is also focused on the wrongdoer’s conduct and blameworthiness for behavior in the past. As such, it too considers punishment’s impact on the lawbreaker. Denunciation, however, focuses not on lawbreakers or potential lawbreakers. Instead, it is focused on the majority of society, those people who would not be inclined to break the rules, regardless of the potential for punishment. In short, denunciation deals with criminal law’s impact on the law-abiding segment of society.\(^{139}\)

To understand this point, we must ask, “what effect does punishment have on John Q. Public?” He goes to work each day, pays his taxes, and buys his bread. He would not steal, vandalize, or otherwise break the law, regardless of the risk of criminal sanctions. He plays by the rules that the society has established. He believes in those rules; they reflect his values.

When everyone obeys the law, John is on equal footing with his neighbors. However, if John is paying his taxes while his neighbor avoids paying them (or while the neighbor profits from

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134. Denunciation, when identified by commentators, is often grouped with the retributive theory of punishment. See, e.g., S. KADISH, S. SCHULHOFFER & M. PAUSSEN, CRIMINAL LAW AND ITS PROCESSES 187-91 (4th ed. 1988) (classifying a passage from Durkheim under the heading “Retribution and Related Themes”). However, denunciation could equally be called utilitarian. See J. DRESSLER, supra note 36, at 8 (identifying denunciation as a hybrid of utilitarianism and retribution). Although they are similar in some respects, denunciation is clearly distinct from retribution as a theory.

135. See E. DURKHEIM, supra note 133, at 108-09.

136. J. DRESSLER, supra note 36, at 8.

137. See supra notes 12-16 and accompanying text.

138. See, e.g., R. CROSS & A. ASHWORTH, THE ENGLISH SENTENCING SYSTEM 121 (3d ed. 1981) (“the aim of the penal system is to reduce crime by making as many people as possible want to obey the criminal law”). Edmund Pincoffs has enunciated a more extreme position: Punishment is not the most effective possible method for discouraging crime. Probably the most effective way to discourage—better, abolish—crime is to abolish the human race. Or if this seems a little extreme, no doubt we could go a long way toward the elimination of crime by the use of drugs: the tranquilization of the human race.

E. PINCOFFS, supra note 3, at 121 (emphasis in original).

139. It has been argued that retribution can be carried out in private, as long as punishment is actually inflicted, but that denunciation requires that punishment be announced to the public and that the public think that punishment is inflicted, regardless of whether it actually is carried out. N. WALKER, PUNISHMENT, DANGER AND STIGMA: THE MORALITY OF CRIMINAL JUSTICE 28-30 (1980). This tends to trivialize the denunciation theory. The same could be said about any deterrent effect that a utilitarian might identify. Thus, it could be argued that as long as it is thought that punishment has been inflicted, the full deterrent effect should be realized. See van den Haag, Punishment as a Device for Controlling the Crime Rate, 33 RUTGERS L. REV. 706, 707 (1981); see also supra note 74. In order for either deterrence or denunciation to be truly effective, punishment must be carried out. Lipkin, supra note 34, at 31, n.38. Anything less would amount to a public violation of legal justice. I. KANT, supra note 90, at 133-32.
some other form of crime), the neighbor gains an unfair advantage. As long as the neighbor's cheating goes undetected, John exists in blissful ignorance. When, however, John discovers the neighbor's cheating, he can rightfully feel angered. If advantage. As long as the neighbor's cheating goes undetected, there is therefore, has an obligation to fulfill the role of judge and "punisher" and, because of the social contract, it has the right to do so. The denunciation theory of punishment recognizes this obligation. It alone is focused on how punishment affects law-abiding society, as contrasted with how punishment affects potential lawbreakers.

The observation that denunciation is focused on the law-abiding public, while the other theories are focused on the lawbreakers and potential lawbreakers, might be challenged by a utilitarian. The utilitarian will counter that, while the direct effect of punishment may be on potential lawbreakers (in terms of discouraging or preventing them from committing crimes), the long-term effect is to provide a safe society for the law-abiders. Hence, the utilitarian would argue that other theories also are focused on the law-abiding public. This argument, however, confuses a safer society with a satisfied society. To have a "satisfied" society, and not just a "safe" society, the public attitude about punishment, not just public concern for safety, must come into play.

Society is satisfied when wrongdoers are punished and when those who have not done wrong are not punished. As with the case of the Georgia teacher, a utilitarian would see that punishment could lead to a safer society and thereby justify punishment. It may well be, however, that law-abiding members of society would not want to see punishment inflicted in this case. The utilitarian has focused on law-abiding society's interest in a safer environment, but has completely missed the concept of law-abiding society's interest in a just scheme of punishment. While it is completely proper to consider society's interest in decreasing crime, that interest alone is insufficient to justify punishment of a given individual.

Denunciation is often identified as being related to retribution because both theories have a requirement of moral culpability. Retribution requires punishment when the wrongdoer has violated society's rules—when he or she has committed bad acts. For that reason, it is sometimes said that retribution looks backward, to the crime. The utilitarian theories, by contrast, look to how punishment will affect society in the future. Thus, utilitarians are said to look forward. Denunciation is focused on society's attitude (after the crime has been committed—hence, in the future) as it looks back on the crime (in the past). Thus it is both forward looking and backward looking. This accounts for its ability to identify not only the offender's obligation to suffer punishment, but also the society's right to inflict it.

B. The Effectiveness of the Denunciation Theory

Various justifications have been set forth for the denunciation theory of punishment. One is that declaring society's disapproval of this conduct will strengthen people's disapproval of it, thereby reducing its frequency. This, of course, is closely analogous to the deterrence theory of punishment. Another justification is that denunciation promotes social cohesion. Other commentators have declined to assign any future benefit to the punishment; they simply note the "immediate satisfaction

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140. A similar argument could be structured using a different crime for the example.
141. See Sterba, supra note 116, at 35 (deterrence theory is "aim[ed] at the well being of law-abiding members of a society").
142. See supra notes 94-97 and accompanying text.
mere value that the classroom was a place for education and that classroom activities should not be interrupted. With their values reasserted, and confident now that society (the university) was enforcing the rules as they had been written, the previously silent students stood up and voiced their beliefs. Thus, enforcement of the criminal laws had an effect on the non-lawbreakers as well as those who might have been inclined to break society's rules.153

Returning to our John Q. Public discussion,154 and the possible reactions to a perceived failure by the society, we see that announcing punishment to the general public may in fact have beneficial consequences. Letting others know that wrongdoers are being punished should encourage feelings of helplessness and desires for personal retaliation. As such, the denunciation theory is actually utilitarian in effect, not merely retributive. Denouncing criminals and criminal behavior will lead to good societal ends, as a utilitarian would desire.

C. The Role of the Public in Criminal Law Enforcement

The denunciation effect requires that public sentiment be taken into consideration when convicted criminals are sentenced. This concept could appear frightening to some who fear the tyranny of the majority and see denunciation as merely an excuse for imposing punishment in some cases where it might not otherwise be justified. However, when one realizes the community's total involvement in the criminal justice system, consideration of the community's opinion in the sentencing phase is a modest proposal.

As discussed earlier, criminal laws are drafted to reflect the society's values.155 Acts do not become "criminal" unless the society is offended by them. If the society is offended, the legislature, representing the people, drafts a law to regulate that conduct. If a defendant is charged with violating that rule of law, even if the letter of the law has been violated, community opinion may prevent the defendant from being convicted. The prosecutor may exercise discretion to refrain from bringing charges. That discretion may be affected by political pressure brought about by public opinion. If the prosecutor decides to prosecute, the grand jury may decide not to indict. Even if the defendant ultimately goes to trial, the jury (which serves as society's repre-

149. N. WALKER, supra note 139, at 29. This may open the theory to charges of mere vindictiveness. See supra note 132.
150. Kaplan, Foreword to LAW AND SOCIETY at xii-xvi (1983).
151. Id. at xiv.
152. Id. at xv.
153. Id.
154. See supra notes 139-41 and accompanying text.
155. See supra notes 15-18 and accompanying text.
representative in the courtroom)\textsuperscript{156} may decide not to convict—even though the law has been technically violated.

Community opinion thus serves to form the law, to shape the decision to prosecute, and to make the ultimate decision on guilt or innocence. It would be disingenuous to suggest that law-abiding society has no interest in the ultimate imposition of punishment. To the extent that there is room for abuse by the majority in the criminal law system, consideration of public attitudes when identifying appropriate punishments is not a particularly frightening prospect. It is only reasonable to consider law-abiding society’s interest when determining the appropriateness of punishment.

VII. CONCLUSION

The public has established a criminal law system that reflects the values and goals held dear by law-abiding society. These people need to know that the system is serving its purpose. Failure to assure the public that the criminal justice system is working leads to an undermining of the system and ultimately, either active or passive rejection of the society. If any society is to advance, the general public must have faith in the system. This requires assurance that punishment is inflicted when, but only when, it is deserved.

In order to be certain that punishment is properly meted out, there must be a theory that can justify society’s right to inflict punishment when deserved, but which forbids punishment when it is not deserved. Traditional retribution and utilitarian theories fail at this task. Only the denunciation theory succeeds. The denunciation theory is successful at this because it is the only theory that considers punishment’s effect on law-abiding citizens. This profound effect must be considered when identifying society’s moral right to punish, and when it is, the many problems that have plagued theories of punishment present less difficulty.

\textsuperscript{156} Rychlak \& Rychlak, supra note 36, at 13.