1 Retributivism

Introduction

Retributivism is perhaps the most familiar and most misunderstood theory of punishment.¹ It is important to note that retributivism is not vengeance, nor is it any one single position. Retributivism is a rich, venerable tradition with a variety of supporters who each defend different retributivist variations. The aim of this chapter is to shed light on precisely what marks out a retributivist theory from other theories of punishment, as well as highlight the most important varieties of retributivism.

What is retributivism?

Defining retributivism is both simple and complex. It is a simple task as two interrelated concepts are at the heart of most retributivist theories. Yet, this task is complex because different theories understand these concepts in very different ways.

Desert and proportionality form the conceptual core of most retributivist theories. Retributivists claim that criminals deserve punishment in proportion to their crime. There are many senses in which persons may be said to deserve something. For example, a hardworking student may be thought to ‘deserve’ good marks or a criminal deserves to leave prison early due to good behaviour. In both these cases, someone deserves some result based upon a view of merit. However, we also use ‘desert’ in a negative sense. We might claim that someone deserves to lose his political office because of incompetence, or perhaps we say that a person deserves punishment because she committed a crime. In these cases, someone deserves some result based upon demerit.

Retributivists give desert a central place, but only to the latter sense of desert as demerit, or what we might call retributivist desert. Someone is thought to have desert not merely on account of his committing a wrongful act, but on account of his committing an illegal act. There are many actions that are wrong, but not punishable because they are not illegal. For example, lying or adultery may be wrong. Both actions betray the trust of others.
We may discourage or look down upon people who tell lies or cheat on their partners. However, unless either involves breaking the law, it may be wrong, but it is not illegal. Punishment is only justified as a response to crime in relation to desert. Perhaps all crimes are wrongful acts. However, not all wrongful acts are crimes, as cases such as lying or adultery may illustrate. When we punish someone because he deserves to be punished, we are punishing him because he deserves punishment on account of his performing an illegal act.

We do not punish people simply by virtue of the fact they have committed a wrongful act. Retributivism punishes criminals for the wrongful acts they performed: retributivism is backward-looking. We do not punish a criminal for what we think she might do tomorrow, but what she has done. We look backwards in time to a past action. It is what happened in the past that might justify punishment and not what might happen sometime in the future. Retributivists find consequences irrelevant. If we want to know what someone deserves, then we must look to his past action.

Retributivists endorse a conception of proportionality in addition to desert. The two concepts are interlinked. We punish criminals not only because they are deserving of punishment, but we punish them in proportion to what they deserve. Desert is clearly of central importance for retributivists as it not only indicates who we might punish, but it also informs us of how much we might punish. When we know no more than that someone deserves punishment, it does not tell us how much punishment is justified for this person. For example, if all we knew was that a person had broken a law, then we might find that person deserving of punishment but lack any clear idea of how much punishment is deserved. If we had more information—such as that the person had murdered someone—we gain a clearer sense of how much punishment might be deserved. So punishable desert is not only something that a criminal possesses, but something she possesses in degrees: the more desert, the greater the punishment.

We can now get a better sense of not only where retributivists agree, but also about where they might disagree. A retributivist theory will have a particular position on desert and proportionality whereby punishment is justified for persons who deserve it and the severity of punishment is in proportion to what these persons deserve. A murderer and a thief might both deserve punishment on account of their each being a criminal. However, the murderer may be deserving of a more punitive punishment on account of his having greater desert for his more wrongful crime.

**Retributivism is not vengeance**

Retributivist punishments are sometimes misunderstood as a form of vengeance. We punish criminals because they have committed an illegal action; the law is avenged when criminals are punished to the degree they deserve. This commonplace view is mistaken. An example may make this plain.

Perhaps the most classic version of retributivism is found in the Code of Hammurabi’s *lex talionis*, more commonly known as ‘an eye for an eye and a tooth for a tooth’. On this view, a criminal deserves punishment in strict proportion to the harm he causes others.

When we see statements such as ‘an eye for an eye’, it may look like vengeance. However, the *lex talionis* has two characteristic features that distinguish it and other retributivist theories from vengeance. First, punishments is an act of public justice. When we punish someone for taking an eye or a tooth, we do so because the criminal has broken a law. She is punished by her community as a just punishment for a violation of law. The *lex talionis* does not endorse private acts, such as my attacking others on a whim in the name of punishment. Instead, a wrong must be committed that demands redress from the criminal justice system. There must be a law broken and justice is dispensed in public.

Second, retributivist punishments have limits. On the one hand, if you take someone’s eye, then it is unjust to kill you—or ritualistically disembowel you. You are to be punished in proportion to the degree that you deserve. On the other hand, vengeance is something I seek against individuals who harm me personally. It is easy to lose all sense of proportion when carrying out a punishment on someone who injured me or those I love. As a community, we might be appalled by the thought that a murderer should be executed. Nevertheless, we might also easily sympathize with the victim’s family and their support for the murderer’s death.

These two features of retributivist punishment distinguish it from vengeance. Vengeance is an act of private justice without limits: I seek vengeance when I desire to injure another; I injure another to a degree I am satisfied with and not only to what he may deserve. Retributivist punishment is an act of public justice within limits: we seek retribution when we desire only to punish someone to the degree he deserves according to public laws and procedural justice. Punishment is only justified when it is deserved, not when it satisfies private anger or bloodlust. Retribution is clearly not vengeance.

We might ask next if retributivism is the opposite of vengeance, namely, mercy. Many retributivists are opposed to mercy or pardons. For example, Michael Moore says:

> But retributivism goes further. As a theory of a kind of justice, it obligates us to seek retribution through the punishment of the guilty. This means that officials have a duty to punish deserving offenders and that citizens have a duty to set up and support institutions that achieve such punishments.

The retributivist argues that criminals deserve punishment on account of their wrongdoing. If they deserve punishment, then justice demands we punish. We do injustice if we fail to punish criminals, because they then do not receive what they deserve.
It is unsurprising to find some retributivists uncomfortable with mercy and pardons. Both are often an attempt to bring about the best consequences from a situation, a perspective most retributivists reject. For example, the South African Truth and Reconciliation Commission has been criticized by many retributivists because the Commission did not punish those who testified that they had broken laws, often performing quite serious offences. Simply saying sorry is insufficient: we should expect the criminal to make more of a sacrifice and suffer some kind of pain; otherwise, we may view his apology as insufficiently sincere. Some degree of mercy can be acceptable, but only within certain limits and as long as some degree of punishment is administered.

This view is certainly coherent. A retributivism that argued against punishing deserving criminals might find itself in trouble. The problem is not consistency, but its relation to future public policy. There comes times when greater good is achieved in pardoning a criminal than punishing him. Retributivists will respond that this may be so, but it does not justify failing to punish deserving persons. Retributivists are not consequentialists.

The question becomes how wedded retributivists are to the idea we must punish the deserving. If a situation arose where freeing a murderer would avoid a bloody revolution, should we make an exception? Kant famously tells us that ‘if justice goes, there is no longer any value in human beings living on the earth’. It is better for the revolution to take place because we upset justice, than avoid it through injustice. Consequences are irrelevant, even in some troublesome cases. Of course, not all retributivists agree, but only because they believe consequences matter once their importance moves beyond a certain threshold. Nevertheless, retributivism is not vengeance nor easily compatible with mercy.

Moral responsibility and wickedness

What does it mean to say that a person deserves punishment? Thus far, this has been understood in the simplest of terms: a person deserves punishment on account of his performing a criminal act. This is true, although retributivist desert is more complicated than this, as I will now explain. We have seen that retributivists recognize that a punishment is deserved if in proportion to what is deserved. Desert is something we possess in degrees and some criminals will be more deserving of punishment than others. The problem is ascertaining the amount of punishment a person deserves.

Retributivist desert relies upon a notion of moral responsibility. Whether or not we are deserving of retributivist punishment depends upon our degree of moral responsibility. We are morally responsible for our free choices. If a criminal intends to murder Alice and acts on his intentions, then the criminal is morally responsible for her death. He deserves punishment in proportion to his responsibility. Now take a second example. If a criminal intends to steal money from Brian and acts on her intentions, then she is morally responsible for this theft. The thief likewise deserves punishment precisely because of her moral responsibility for a criminal act. Suppose that in both cases each criminal plans his or her crime with an equal amount of preparation. If both are equally morally responsible for planning their crimes, then we might think that they each share equal desert and should be punished in equal severity. This is precisely how we might understand retributivist punishment given what we have seen thus far, but this would be a mistake.

For retributivists, it is not only the case that we punish someone on account of her moral responsibility, but also on account of her committing a wicked act. Let me explain. I am morally responsible for an act when I commit the act freely: it is an action I have chosen for myself. This is different than causal responsibility. If someone pushes me into you and you drop your phone, then I am causally responsible for your dropping your phone. I am not morally responsible.

The distinction between causal and moral responsibility may become clearer if we consider the difference between self-defence and murder. In both cases, Andrew may be seen holding a bloody knife over the dead body of Bob. Whether Andrew is causally or morally responsible for Bob’s death is crucial to determining if Andrew deserves punishment. If Andrew stabs Bob in an act of self-defence, then Andrew is causally responsible for Bob’s death. In this case, Andrew is causally responsible because he caused Bob’s death: Bob would have lived if Andrew did not defend himself. However, Andrew is not morally responsible because he did not intend to harm Bob. This is because Andrew only stabs Bob in self-defence. Bob might have lived if Andrew did not defend himself, but Bob would never be in this situation if he had not first threatened Andrew’s life. If Andrew did not stab Bob in self-defence and Bob’s death was intentional, then Andrew is both causally responsible and morally responsible for Bob’s death. Andrew is causally responsible for Bob’s death on account of his stabbing Bob. Andrew is morally responsible because he intended to harm Bob. The distinction between causal and moral responsibility is crucial because retributivists punish a criminal’s moral responsibility for his act. It is not enough that a person stabs another person. What matters is the killer’s moral responsibility for his crime. The fact that Andrew killed Bob does not entail that Andrew is a murderer. It is centrally important whether or not Andrew is morally responsible for killing Bob.

Our gaining clarity on the difference between causal and moral responsibility is important, but does not explain the full retributivist picture. It is not enough that I be morally responsible for a criminal act. The murderer and the thief may both be equally responsible for their crimes, all things considered. The retributivist will not want to punish them both equally. Instead, the retributivist will want to punish the murderer more than the thief. The reason is because retributivists do not merely punish persons to the degree they are morally responsible for committing a crime, but rather
to the degree they are morally responsible for committing a wicked action. This moral responsibility is the measure of punishable desert.\footnote{Immanuel Kant provides us with an illuminating example:}

whatever undeserved evil you inflict upon another within the people, you inflict upon yourself. If you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself.\footnote{We punish theft, assault, murder, and other crimes as ‘undeserved evils’. All evils are not equal. If they were, then we would punish thieves and murderers the same. As Kant makes clear, we punish these crimes differently: execution of a murderer may be justified, but not for thieves. The more evil an act, the more punishment it deserves. Murder and theft are both evils, but murderers face a more severe punishment than thieves precisely on account of murder being a more evil act than theft.}

We seem to have solved our problem. Retributivists punish criminals in proportion to their desert. Retributivist desert is clearly complex, although it has a clear structure. Desert flows from an action. It pertains to violations of the law, not immorality outside the law. We have desert when we are morally, not causally, responsible for breaking the law. We are more morally responsible for actions that are wicked, rather than less wicked. So when the murderer intentionally executes the death of his victim, the murderer deserves punishment because he is morally responsible for a wicked and illegal act. We punish the murderer with a view towards the degree of evil in his act. Retributilist desert is far from a simple notion, but we can still identify its central structure.

The problems with desert

A new series of problems arises with the solving of the last problem. This section will focus on three major problems, namely, the problem of punishing evil, the problem of amoral crimes, and the problem of knowing a criminal's intentions. I will take each in order.\footnote{The problem is that retributivists punish criminals to the degree they deserve. How much is deserved corresponds to the wickedness of the crime. The problem is ascertaining wickedness. Let us suppose that all crimes are wicked and leave aside the question of whether any crimes are amoral. Can we make sense of the thought that some crimes are more evil than others? If this is a non-starter, then we cannot punish the wickedness of crimes and retributivism fails.}

The problem of punishing evil

The first problem is that retributivists punish criminals to the degree they deserve. How much is deserved corresponds to the wickedness of the crime. The problem is ascertaining wickedness. Let us suppose that all crimes are wicked and leave aside the question of whether any crimes are amoral. Can we make sense of the thought that some crimes are more evil than others? If this is a non-starter, then we cannot punish the wickedness of crimes and retributivism fails.

For one thing, the immorality of crimes must be comparable. We must have a gold standard by which we can assess the wrongness of crimes. Without such a standard, we will be unable to ascertain how we should punish crimes differently, if at all. The problem is that we live in an age of relativism. Modern societies are characterized by citizens adhering to different and reasonable conceptions of the good. Whose morality do we use to measure the wrongness of crimes? Mine? Yours? We are unable to use both because then inconsistencies in our moral views will lead to injustices in our acceptable punishments. At most, we need a singular vision of morality that offers us some standard by which we can rank the wrongness of crimes. At the very least, we need a common moral standard that coherently brings together the moralities held by the community's members. The problem is that it seems unfair to assert one view of morality over others even if this makes the criminal law more consistent, and it is difficult to see how competing views of morality can be unified if these views are truly different. The task of simply 'punishing evil' is more complicated than it may first appear. This is not least because we each understand this idea in sometimes very different ways.

The problem of amoral crimes

A second problem is that it is unclear how retributivists should best distinguish punishable evils from non-punishable evils.\footnote{Examples might include murder, theft, rape, and assault. These acts would be immoral even if legal. Such acts are often classified as mala in se crimes. Mala in se crimes are different than so-called mala prohibita crimes. Mala prohibita crimes are wrongful only in virtue of being illegal. These are crimes which are not clearly immoral. It must be said that philosophers disagree widely on what crimes, if any, are mala prohibita. The more common examples include traffic offences, drug offences, prostitution, and perhaps treason.}

Retributivism has an easy time with mala in se crimes, such as murder. The retributivist punishes murderers for breaking the law and in proportion to the wickedness of their act. Mala prohibita crimes cause a real problem for retributivists because while they might punish persons for committing mala prohibita crimes, retributivists cannot do so in proportion to the wickedness of the act.

For example, let us consider mala prohibita crimes such as traffic offences. Imagine a motorist is caught driving faster than the speed limit on a lonely, country road. The motorist has clearly broken the law and, thus, she has committed a wrong. However, is the act immoral? Perhaps we might think so if the motorist sped at considerable excess of the lawful limit or if
she demonstrated a lack of due concern for the safety and well being of others. We might then think she is wrong whether or not a law is broken. Yet, let us suppose the motorist is an off duty police officer well trained over many years at high-speed driving, perhaps practising her driving skills. What serves as the uppermost safe speeding limit on this particular stretch of road will differ between a common motorist and the motorist well trained in high-speed pursuits. The only wrong in this case is the fact the motorist sped above the legal limit, not that she endangered others or showed them a lack of due concern. In this case, speeding is a *mala prohibita* crime: it is wrong only because it is illegal. The retributivist who wants to punish the off duty police officer because she broke the law cannot set the punishment in proportion to her wickedness because none is present.14

Actions that are crimes, but not immoral, then pose a real problem for retributivist accounts.15 The question then becomes whether any options are available for retributivists to overcome this problem. One solution is to change the laws so that all crimes are both illegal acts and immoral. Thus, perhaps we legalize the use of drugs and availability of prostitution. We might continue to impose penalties on miscreant drivers, but perhaps remove traffic offences from the criminal law and include them elsewhere, such as in tort. However, until the law is changed substantially so that it better accommodates their penal theory, retributivists will continue to have the problem that retributivism does not fully accommodate the criminal law and perhaps many of the *mala prohibita* crimes we would want punished.16

A different strategy is to claim that no crime is *mala prohibita*, strictly speaking.17 This view claims that it is unwise to evaluate crimes individually in terms of their morality. Perhaps it is the case that certain crimes, such as traffic offences, are not wicked acts *in themselves* and so appear to be *mala prohibita* crimes. This may not be the best perspective. Instead, if we understand our laws as serving a common good, it is then wrong to violate them because they are our laws and they serve the common good. In this light, all crimes are both illegal and wrongful acts although some crimes are more wrong than others. This strategy appears to serve the retributivist well. The retributivist already claims some crimes are more wrong than others, such as murder being a more wicked act than theft. One problem with this perspective is that critics may reject the view that suspect *mala prohibita* crimes truly serve the common good. A second problem is that retributivists require some moral standard to justify general criminalization, but also to determine the different degrees of moral wrongness of each crime. This is a problem of legal moralism discussed previously. Either all crimes are wrong in equal measure and, in turn, demanding equal retributivist punishment for petty thieves and murderers alike or we require some further moral standard to distinguish crimes that are minor from crimes that are more serious. Either way, the strategy of claiming no crime is *mala prohibita* may run into serious problems.

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### The problem of ascertaining criminal intentions

In order to impose retributivist punishments, we must ascertain the moral responsibility of criminals with some certainty. It is not enough that we know that Victoria stabbed Louise. We must discover Victoria’s moral responsibility. How can we do this? If we could read Victoria’s mind at the time she stabbed Louise, then we might be best placed to discern Victoria’s moral responsibility. Of course, we are unable to read each other’s minds. We cannot know with certainty precisely what is Victoria’s moral responsibility because we cannot know her intentions in committing a crime with any certainty. This problem is spelled out well by Kant in an important passage:

> The real morality of actions, their merit or guilt, even that of our own conduct, thus remains entirely hidden from us. Our imputations can refer only to the empirical character. How much of this character is ascribable to the pure effect of freedom, how much to mere nature, that is, to faults of temperament for which there is no responsibility, or to its happy constitution, can never be determined, and upon it therefore no perfectly just judgments can be passed.18

We cannot make perfect judgements of the moral responsibility of others. The best we can manage is to make an educative guess based upon the empirical evidence.

Whilst the question of ascertaining a criminal’s past mindset may appear unimportant, nothing could be further from the truth. It is the case that we believe the murderer who kills impulsively rather than from deliberate premeditation is a less dangerous offender. We believe that circumstances and character defects which affect a criminal’s autonomy also affect his punishable desert. So it matters if the criminal is a child as he is thought incapable of making fully autonomous decisions. It also matters if aggravating or mitigating circumstances are present. Aggravating factors are often thought to include provocations relating to disability, race, religion, and sexual orientation; mitigating factors are often thought to include factors such as the impact on third parties and whether a crime was committed under duress.19 No such factors may excuse the wrongdoing or the need for punishment. Instead, the point is that a criminal’s moral responsibility matters for us in determining appropriate punishments. We cannot avoid this problem. The issue then is how best to address it.

Retributivists have been aware of this problem since Kant, proposing several solutions. One solution is behavioural. This view claims that how we act is the product of our intentions. When someone buys a newspaper or drives her car, she is acting precisely how she intended. In order to know her intentions at any given time, all we need to do is note her actions. This once popular view has since been largely discredited. An example may help to
explain why. If someone gives you flowers, what are his intentions? Is it a sign of friendship or something more? Is it a sign of sympathy or a random act of kindness? How do we know that the act is not mistaken? Mistakes happen all the time and not least in criminal justice. If Betsy receives flowers from Jonathan, it may be because Jonathan intended Betsy to receive the flowers. However, it may be that Jonathan did send Betsy the flowers, but mistook her identity: Jonathan actually wants Claire to receive the flowers, but mistakenly thinks Betsy is her name. We need to read Jonathan’s mind to know if his actions accurately reflect his intentions. When mistakes happen, we are back in the thick of the problem: actions are no more a precise tool to help us unlock the intentions and moral responsibility of others.

A second solution is more pragmatic. It combines an examination of what we do with an attempt to discover the underlying reasons why we do what we do. We see countless examples in trial dramas and popular detective television shows. Was Mrs Jones murdered and, if so, by whom? The detective’s task is both to discover who had the physical opportunity to murder Mrs Jones, but also to discover who had the motive to murder her. A motive is not the same as intention. Both motives and intentions cannot be known with precision. The difference is that the existence of motives depends upon empirical evidence, whereas the existence of intentions does not. I may have the intention to eat a sandwich or steal a bicycle, but if I do not act on my intention then there is no evidence of my having a motive to perform either act. For this reason, detectives try to uncover empirical evidence that presents an explanation of why it is that the accused is morally responsible for a wrongful act. If someone accused of murdering another had the opportunity and benefited from the death, this evidence helps us estimate whether or not the accused had intended to murder another. It may not be conclusive, but this mixture of both noting physical movements and possible reasons why someone might have been the last to see the victim alive without witnesses after midnight, etc. is seen as the best pragmatic attempt we can make to ascertain the moral responsibility of another for wrongdoing.

It must be said that this second attempt has much in its favour. Our courts convict persons beyond reasonable doubt, not beyond all possible doubt. We guess the moral responsibility of alleged wrongdoers because we both cannot know it for certain and because we believe finding persons morally responsible for the actions important. An example may make this clearer. Suppose Andrew and David are both arrested for assault. Andrew was caught on CCTV cameras instigating a fight between himself and another person. David assaulted a person who he genuinely believed had just robbed an elderly woman. Andrew and David both assaulted innocent people and should be held to account. However, we would not punish them equally. Instead, we would punish Andrew more than David. Andrew is more guilty for performing the same crime on account of his being more in the wrong. David was wrong to misidentify his victim. Perhaps David deserves punishment. Yet, by all accounts, David assaulted his victim in a last minute, albeit mistaken, attempt to apprehend a criminal. David was not intending to harm anyone until he was led to think someone had robbed an elderly woman. Andrew was wilfully attempting to harm someone. Both actions are wrong, but clearly Andrew’s action is much worse.

Of course, whether or not this decision is correct will depend on our best judgement of the evidence: does the CCTV camera really prove Andrew is looking for a fight? Do we have reason to accept David’s testimony that his crime was the result of an honest case of mistaken identity? Retributivists and most non-retributivists would argue that this guesswork is intractable given the problem of intentionality, namely, our inability to know the intentions of others with certainty. What people intend to do matters and we make our best guess as to these intentions. Our courts perform this task countless times every day since the origins of the trial. This epistemological problem of knowing another’s desert is real, but it is intractable and manageable as our courts demonstrate.

There is a third solution retributivists offer to the problem of knowing the intentions of others: retributivist sentiments, such as resentment, indignation, remorse, blame, and guilt. This view claims that the law reflects essential characteristics of our emotional makeup. We feel guilt, blame, and other emotions. We blame others for actions we feel are wrong. When we blame others, we want them to face up to their wrongdoing, possibly requiring sanctions. So we know how to set punishments in proportion to what criminals deserve because the proper amount is found in our hearts: we know intuitively through the proper use of our sentiments what a criminal deserves. We then avoid the worry we need to read minds.

The problem with this solution is that even if it were true that most, if not all, persons possessed retributivist sentiments, it is far from clear how this solves the problem at hand. In order for us to have a meaningful understanding of the link between desert and proportional punishment, we will all have to possess the same strength of blame, guilt, and other emotions, which is highly doubtful. For example, most, if not all, people regard murder as the most serious of crimes. However, reasonable people disagree on whether execution or alternative sanctions are most appropriate. Retributivist sentiments may lead reasonable people to substantially different ideas about punishment.

The discussion thus far has focused on problems and attempted solutions to the issue of whether or not we can discern the intentions of others. We need to know what others intended in order to understand the amount of moral responsibility. This discussion is epistemological. A related worry is metaphysical, concerning whether moral responsibility exists to be discovered. Some critics of retributivism have charged that the theory is false because criminal behaviour is a product of the social environment rather than a criminal’s free choice.
available choices for me, my choices may well become limited to more
criminal options than if my conditions were different. The argument is not
that the environmental determines all behaviour, only that it is responsible
for some of it. Our moral responsibility is less when our environment is
an important factor. Whether or not this is a real problem for retributivists
will depend on the empirical evidence. There is evidence to suggest that
gender, age, socio-economic conditions, and other factors largely beyond
one’s control are more likely to be present in certain offenders. However,
these are probabilities, not certainties. A space for moral responsibility
is still left for the retributivist. His problem is knowing how much there is
to find.

Making punishment fit the crime

We have discussed the importance of both desert and proportionality for
retributivists. This led us to consider the importance of moral responsibility
and ascertaining a criminal’s intentions in order to know the amount of
his punishable desert. Now let us suppose that we know how deserving
a criminal is of punishment. How do we determine how much punishment
he deserves? There are several different ways retributivists determine punish-
ishment in relation to desert. This list is not exhaustive and these ways are
combinable.

The guilty should suffer

Why think guilt entails the infliction of pain? Most retributivists either
claim that punishment must cause pain or avoid the question altogether.
However, if punishment is painful, we still need an argument why it is that
we are justified in causing pain to others, including the guilty. When
a person performs a crime, he has broken the law. Retributivists not only
punish someone for breaking the law, but in proportion to their wrongdoing.
Retributivists punish criminals for their wrongful acts, causing them pain,
but too often find it unnecessary to justify this practice beyond the view that
criminals should suffer for their guilt. Herbert Hart defines retributivism
as “the application of the pains of punishment to an offender who is morally
guilty.”24 One retributivist, Leo Zaiert, argues further that the true core of
retributivism is the view that punishing the deserving is “intrinsically good”.25

It seems clear that this link between evil deeds and painful punishment is
found in most major religious traditions, traditions that have surely
informed our conventional thinking about crime and punishment. For
example, the Bible is replete with many number of passages that make clear
a connection between evil deeds and painful consequences. St Paul tells us
that: “God will be the just Judge of all the world. He will give each one
whatever his deeds deserve … he will terribly punish those who … walk in
evil ways … He will punish sin wherever it is found”.26 We find God

punishing those who do evil to the degree they deserve. Of course, in this
example, God’s punishment is distributed on Judgement Day when the
world comes to an end. His punishment is not given to us today in our
earthly existence, but awaits us upon our death. In some respects, retributi-
vism’s punishment is a more complex theory that attempts much that is set out
in the passage above, such as punishing us for our evil deeds to the degree
we deserve. However, neither adequately sets out why pain is necessary. The
claim is that pain is a necessary response to evil actions because God has
decreed it. Whether or not we accept this claim is a matter of personal faith.
However, with retributivists, that we must fight evil with pain for its own
sake seems equally an article of faith.

Strict equality

Classic retributivists, such as Kant, argue in favour of strict equality between
the evil in our criminal act and the pain of our punishment. Recall the
passage we discussed earlier by him that ‘whatever undeserved evil you
inflict upon another within the people, you inflict upon yourself … if you
kill him, you kill yourself’.27 The argument is not simply that what we do
unto others should be done to us. It can be formulated differently, namely,
the wickedness of crime is equal to the harm of punishment. We, thus, repay
an evil act with evil.

It is first worth pointing out that a standard criticism of strict equality is
false, namely, that it endorses overly harsh punishments.28 Strict equality
demands that I am punished only as much as I deserve, no more or less.
It is not lenient because it does not justify a weaker punishment than
I deserve. Yet, it is also not harsh because it does not justify a punishment
greater than I deserve. By definition, strict equality retributivists cannot
justify harsh punishments. It may be the case that strict equality may justify
punishments we find objectionable, such as the death penalty. However, if we
can demonstrate that a criminal does not deserve capital punishment, then
we can prove that strict equality does not endorse punishments we find
objectionable.29

There are some problems with strict equality worth noting. First, it is
unclear that the wickedness of crimes and their punishments are of a similar
character. The evil of crime and its punishment seem two different things.
Crime is an evil that ought not be done, whereas punishment ought to be
done as a matter of justice. Another way of putting this point is to argue that
crimes and punishments are different in character for a different reason: what can serve as a crime and a punishment differ. For example, it is
a crime to rape another or engage in bestiality with an animal. However,
the acts of rape and bestiality are crimes, not punishment: no one claims we
should rape prisoners or engage in animal abuse. So the varieties of wick-
edness that are crimes are different in kind from the varieties of punishment
we use in response to crimes.
A second problem is that it is unclear why two wrongs should equal a right. If both crime and punishment are evil, then it seems we might opt for less evil in the world and forgo punishment and, thus, bypass retributivism and choose a different response to crime.

Another problem is more practical: do states impose punishments that criminals deserve? Some philosophers have argued forcefully that they do not. A common feature of all modern common law systems is plea bargaining. In plea bargaining, the accused admits guilt for a lesser offence, receiving a lesser punishment than she would otherwise ‘deserve’, all things considered. The state justifies this on consequentialist grounds: in coming to an agreement between the state and the offender, a trial is avoided, as well as taxpayers’ money and the courts’ time. In fact, far less than 10 per cent of all criminal cases result in a full trial. All retributivists have broad misgivings over plea bargaining and pardons. In these cases, the criminal does not receive his just deserts: he is not punished to the degree his crime deserves. This is most acute for strict equivalence retributivists as we find that in the vast majority of cases criminals are punished less than they deserve. Perhaps strict equivalence proponents must argue for all criminals to stand trial, spiralling the costs of criminal justice. The fact is that modern common law states are highly unlikely to conform to this demand. Thus, not only does strict equality suffer from a number of problems already highlighted, but it is also impractical.

A final problem is the impossibility of ascertaining strict equality. This problem takes two forms. First, it is perhaps arguable that strict equality entails executing a murderer, but what is entailed in punishing a thief or a con artist? Do we steal our money back from the thief? Do we force the con artist into a trick? How do we punish the rapist if raping him is unacceptable to us? Strict equality is unhelpful beyond language like ‘eye for an eye’, ‘a tooth for a tooth’, or a ‘life for a life’. When we ask about punishing the overwhelming majority of crimes, such as burglary, theft, rape, and others, we lack answers. The second problem pertains to our previous discussion of intentions. If we can only have our best guess of another’s desert, then we may have a good sense of how deserving another is of punishment. However, strict equality does not demand that we merely discern a ballpark estimate of criminal desert. Instead, it demands that we accurately ascertain desert: we do the criminal an injustice if we believe his desert too little or too much as in both cases we will fail to punish his crime with a punishment that is in strict proportion. Strict equality is a position that retributivists no longer defend due to these many concerns.

**Desert within limits**

The view that has taken strict equality’s place as the retributivist position of choice can be called ‘desert within limits’. Desert sets an upper ceiling on the severity of punishment, although punishment need not ever be set at this maximum amount and may well fall below. We punish persons to the degree they deserve within certain limits. This view rejects our ability to punish with strict equality, as well as the ability of philosophy to tell us *exactly* how much punishment is justified. For example, if someone assaults another in the street, these retributivists will argue that a given range of punishment may be justified. It is not the case that 354 days in prison is less just than 355 days in prison. Such narrow distinctions are beyond penal theory. Instead, what we can do is we say that perhaps more than 300 days’ imprisonment is too much and a sentence of less than two weeks’ imprisonment too little, depending upon the circumstances. A range of acceptable punishments are available: no one acceptable punishment is less justified than another. On this view, retributivism justifies a range of potentially equal just punishments for a crime above a threshold and below a ceiling.

The promise of this perspective is its acknowledgement of the need for some discretion. If we are punishing persons to the degree they deserve, then we need the discretion to account for the many particularities of a specific case. It would be a mistake to set the punishment for all assaults as a single sentence and force it on all convicted assailants. The mistake is that setting out in advance the punishment of others may not cohere with what they deserve. If persons are not getting what they deserve, then the punishment is not retributively justified.

One problem with this view is that it is unclear why we should accept limits in the first place. If what matters is a criminal’s desert, then it seems pointless to set limits on how he might be punished *independently* of assessing his desert. We might argue that whether a car thief should earn five years imprisonment should be determined by an assessment of his desert and not the use of discretion within a pre-set range of options.

A second problem concerns how clearly lines may be drawn. For example, G. W. F. Hegel argues that retribution can aim for nothing more than ‘an approximate fulfilment’. So perhaps a retributivist cannot argue with confidence that a criminal deserves only 100 days in prison, no less and no more. Instead, retributivism justifies an approximation, such as three to six months. We are to work out for ourselves which specific amount within this justified range is most appropriate for an offender given the particular circumstances. But the problem is this: if we cannot do better than offer an approximation, then where are lines to be drawn? Perhaps sentences between three and six months are justified, but how are we to determine that two months would be too few or seven months too many from the standpoint of retributivist desert? There may be many pragmatic reasons to draw lines of different sorts. We might worry that like cases are treated too differently. But what is too different if approximations are the best we can offer? This is not a problem for other theories of punishment. For example, a deterrent theorist might find that only punishments within a specific range best ensure deterrence. How do we know which range best ensures desert satisfaction? This problem of retributivist approximation
is about the ‘intrinsic uncertainty’ concerning the relative justice and injustice of borderline cases. This is not an argument against retributivism, but a problem for how we draw lines between what is ‘deserved’ and what is not.

Pay back

A different retributivist position holds that when we punish a deserving criminal, the criminal ‘pays back’ an owed debt stemming from his crime. The view that criminals repay their crimes in being punished may derive from retributivism’s Latin roots, re and tribuo, meaning ‘to pay back’. We see this as well in how we speak of criminals: we claim that we want to see them ‘pay’ for their offence.

The trouble with this view is that it is difficult to make sense of punishment as repayment beyond a metaphor. For example, how does a criminal ‘pay back’ anyone else when serving six months imprisonment for a victimless crime? All retributivism demands is that a criminal be punished for his crime to the degree he deserves. The criminal does not owe a debt as such. It is then difficult to see how punishment might serve as a repayment for what he owes.

Unfair advantage

Other retributivists claim that we punish criminals to the degree that they deserve in order to remove their unfair advantage. Most of us obey the law and this constrains our interactions. The criminal chooses to avoid such constraints and take advantage of his disobeying the law for his own benefit. For example, the criminal may choose to ignore laws protecting property and break into my home to steal my possessions. The thief has benefited from breaking the law: he has stolen my possessions. Punishment should aim to remove this unfair advantage he unlawfully enjoys.

A problem with this view is that it is not always clear that criminals enjoy any advantage in committing crimes, especially mala in se crimes. We would not want to say that the rapist or the murderer is enjoying an advantage over others. Instead, we would claim that they do harm to themselves in choosing evil, becoming a person of defamed character.

The position that we should endeavour to remove unfair advantages is more defensible if it claimed no more than that criminals should be punished for illegal acts. We all are obliged to follow our state’s laws. Those who choose to disobey our laws act unfairly and should be punished. This view can be defended, but not on the grounds that criminals are enjoying a privilege in choosing evil. Even a liberal may admit that our laws should be designed to best enable all citizens to flourish, even if the laws constrain what we are permitted to do. However, this view is more defensible because it does away with the position we should remove unfair advantages with the removal of unfairness. Thinking of retributivist punishments as removing unfair advantage continues to appear problematic.

Annullment

A variation of the view that punishment should remove an unfair advantage claims instead that punishment should annul crime. This view has been attributed to Hegel, although it is questionable whether he truly endorsed it. Nevertheless, we can find passages where Hegel at least appears to endorse such a position. For example, Hegel says: ‘The cancellation of crime is retribution in so far as the latter, by its concept, is an infringement of an infringement’. The argument is that retributivist punishment is not merely a response to crime, but a cancellation of crime. We annul crime when we punish it properly.

The general idea does have something appealing about itself. When a criminal breaks the law, he does something wrong. Punishment should fix the damage caused and restore what was lost. Indeed, Hegel refers to the punishment of crime as ‘the restoration of right’. If we did not punish crimes, criminal actions and lawful actions would live side by side. That is, there would be no substantive difference between lawful and unlawful acts if neither were punished. When we choose to punish, we choose to prioritize lawful acts over crime; we defend our rights in punishing those who violate them.

The problem with this view of retributivism as annulment is that it seems impossible to enact. Perhaps a thief who steals our purse might return it to us intact and undamaged. Perhaps someone who broke our fence can restore it to its previous condition. Beyond a small handful of cases, talk of ‘annulling’ or ‘cancelling’ crime seems more metaphoric than real. How do we ‘cancel’ murder when we cannot bring the dead back to life? Why think we can ‘annul’ an assault on me when no one can reverse the pain I feel in recovering from treatment and weeks lost in recuperation? If a woman is impregnated by a rapist, how exactly can such a horrific experience be ‘cancelled’? There is something appealing about punishment reversing time, allowing us to live life again as if a crime had not taken place. The problem is that once crime has occurred, it might be dealt with but probably not reversed entirely. Perhaps we may restore rights, but we cannot turn back the clock.

Proportional retributivism

It is particularly common for retributivists to argue that retributivism sets punishment in proportion to crime, but that it does this in a particular way. They claim we should rank separately crimes and punishments in terms of ‘value’, punishing a crime with the lowest value with the punishment having the lowest value, and then likewise with other values of crimes. For example, Jeffrey Reiman says:
Proportional retributivism, then, in requiring that the worst crime be
punished by the society’s worst punishment and so on, could be under-
stood as translating the offender’s just desert into its nearest equivalent
in the society’s table of morally acceptable punishments.39

The problem is that how punishments get chosen as possible penalties for
crimes is not performed in a retributivist way. As Reiman points out,
the appropriate punishment for a crime is not chosen on account of the
criminal’s particular action as such. Instead, punishments are selected
in accordance with considerations entirely alien and indifferent to the
criminal’s individual act. That is, society may choose punishments that
are most ‘morally acceptable’ to them. However, it may well be that a
criminal deserves a punishment that is not acceptable to the society. Perhaps
the society can then justify punishing the criminal differently than retributi-

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vism demands. Nevertheless, we cannot claim to be retributivists while
refusing to punish criminals to the degree their crimes deserve. Whether or
not proportional retributivism appropriately links crime and punishment
seems more an issue of luck.

An example may make this worry more clear. Suppose we list six acts as
crimes, such as murder, rape, freedom of expression, assault, illegal parking,
and arson. We then list six different punishments, such as torture, death,
lifetime imprisonment, 15 years imprisonment, 10 years imprisonment,
and £50 fine. These lists include crimes we might find objectionable and
would not criminalize (e.g., freedom of thought) as well as include pun-
ishments we might find objectionable and would not impose on offenders (e.g.,
torture). We next rank them each most serious or severe to least serious or
severe. For example, we might rank crimes by increasing seriousness begin-
ing with illegal parking and moving to more serious crimes such as theft,
assault with a weapon, and murder. We might also rank punishments in a
similar way, such as starting with a monetary fine and leading to lifetime
imprisonment.

Proportional retributivists next link together the most serious crimes with
the most severe punishment through to the least serious and severe crimes
and punishments. In this case, we link the least severe crime – illegal
parking – with the least severe punishment – a monetary fine. The result is
that illegal parking should be punished by a fine. We also link the most
severe crime and punishment on our lists to determine that murder should
be punished by lifetime imprisonment. Similarly, we link crimes and pun-
ishments between these two extremes in the same way. The attractiveness
of this approach is that proportional retributivism is able to provide
us with a clear method of linking acceptable crimes with acceptable
punishments. We will avoid imposing unjustified crimes and overly harsh
punishments because we can remove them from our lists before linking
proportionate crimes and punishments we accept. There is perhaps much to
be said for this position.

I hope that these illustrations help highlight the key problem with pro-
portional retributivism, namely, that it is not clearly a retributivist theory
of punishment. Retributivists link punishment with crime due to pro-
portionality and desert. The connection between crime and punishment is
internal: the degree of justified punishment is found in the desert of the
criminal. This internal connection is lost with proportional retributivism.

Do we punish a rapist with 15 years imprisonment because he deserves
it? No, we punish him in this way because rape is the second most serious
crime and 15 years imprisonment the second most severe punishment. If we
added treason to the list ahead of rape, then rapists would merit a different
punishment. The relationship between crime and punishment is external,
beyond the strong link between desert and punishment that characterizes
retributivism. We may still be persuaded by the claims of so-called ‘pro-
portional retributivists’. My point here is merely to say that this view
does not merit the name ‘retributivist’.

Negative retributivism

This brings us to a final perspective: negative retributivism. I will discuss this
view in greater detail in chapter 5, but a few words can be said here first.
This chapter has argued that retributivists claim a link between desert and
proportionality: call this the standard view of retributivism. A majority of
retributivists adhere to this view, although this chapter has also stressed
that retributivists understand the relationship between desert and propor-
tionality in several different ways. This view of retributivism is sometimes
called ‘positive’ (or ‘moral’) retributivism.

A different view is ‘negative’ retributivism. Negative retributivists
reject the link between desert and proportional punishment, but accept the
view that desert is a necessary condition of punishment. They argue that
punishment is only justified if someone deserves to be punished. However,
the severity of punishment may be determined by factors beyond desert,
such as favourable consequences. In this way, negative retributivists adopt
only half of retributivism’s traditional core: negative retributivists agree
that we can only punish deserving persons (and not the innocent), but they
reject the need to endorse proportionality in substituting different con-
side rations in its place. This is an important break from traditional retributi-
vism where ‘the consequences of punishment are irrelevant’.40

As a result, a positive retributivist might punish a murderer more than a
thief because the murderer is more deserving of a more severe punishment.
The negative retributivist might also punish the murderer more than the
thief, but on non-retributivist grounds, such as the need to protect the public
or deterrence. Thus, both retributivisms might endorse similar punishments,
but with different justifications. Likewise, both retributivisms might endorse
quite dissimilar punishments. For example, a negative retributivist might
punish a thief more than a positive retributivist if the safeguarding of public
property necessitated disproportionate punishments for their protection, over and above what the thief would deserve otherwise. More importantly, the positive retributivist must punish a deserving criminal: if the criminal is not punished, then he will not receive what is deserved. Negative retributivists are not compelled to punish deserving persons: they need only not punish undeserving persons.

Negative retributivists avoid the problem of how to link crime and punishment through desert by taking the back door: they deny that any such link need exist. However, there seems a case to be answered given that most of us do think murderers deserve greater punishment than thieves precisely because greater punishment is deserved. Therefore, a criminal’s desert should determine his just punishment. Avoiding the difficult question of how we decide such matters does not make the problem disappear.

Conclusion

It should now be clear why retributivism is both the best known and perhaps most misunderstood theory of punishment. It is best known because of its clear relationship with Biblical justice and perhaps also with our common sense or our everyday intuitions about justice. We believe criminals should be punished for what they have done in proportion to the evil they have performed. However, retributivists have a complex understanding of desert, proportionality, and how these lead us to justifying punishment, often taking any number of different forms. Each view has its shortcomings, but it does not take away from retributivism’s primary hold on us today: any theory of punishment that permitted the punishment of the innocent would be implausible. Retributivism offers one important approach to explain why this is the case concerning the centrality of desert. The problem is how best to determine it. This problem leads to a further difficulty of determining whether retribution ‘works’. This may yield as many answers as there are retributivist theories of punishment.

In the following chapters, we will examine competing theories of punishment. Each can be seen as a response to retributivism, often borrowing from it. All contemporary theories of punishment will attempt to show how they too punish only the deserving and without employing harsh punishments. We will now consider what these theories are and how well they perform this task.

2 Deterrence

Introduction

Deterrence has traditionally been understood as the primary alternative to retributivism. Both have been at loggerheads for literally centuries. It is easy to see why. Retributivists give special attention to a criminal’s desert for a past injustice: it is primarily a backward-looking theory of punishment. Deterrence is primarily a forward-looking theory of punishment: deterrence proponents give special attention to deterring future criminality. Therefore, deterrence offers us a very different focus and understanding of the purpose of punishment. This chapter will clarify the leading theories of deterrence to determine their promise and potential problems.

What is deterrence?

Deterrence theories of punishment claim that the general justification of punishment is deterrence. Deterrence proponents argue that a key feature of punishment should be its ability to make crime less frequent, if not end. Punishment that merely harmed criminals and lacked any clear beneficial effects may even be seen as cruel. Instead, punishment may be justified on account of the good consequences that it makes possible. These may include deterrence of criminality.

Deterrence proponents have traditionally argued that people are deterred by the threat of punishment. Many classic defenders of deterrence have been utilitarians. Generally speaking, utilitarians argue that we seek pleasure and avoid pain. The threat of punishment is a pain to be avoided. Punishment deters because we want to avoid the pains of punishment. For example, David Hume argues:

'Tis indeed certain, that as all human laws are founded on rewards and punishments, 'tis suppos'd as a fundamental principle, that these motives have an influence on the mind, and both produce the good and prevent the evil actions."
Utilitarians often assume that individuals are naturally selfish. We are influenced by external influences, not least social influences including the threat of punishment. The idea is that punishment may have a deterrent effect upon us because we are naturally selfish and we would normally choose to avoid the pain of punishment. We choose to be law abiding after making a rational choice calculus: the burdens of potential punishment outweigh the benefits from crime.

Deterrent punishment helps realize an important good. The political community has enacted a criminal law. If the criminal law is just, then it is right that we encourage others to act in accordance with it and avoid criminality. Punishment can play a positive role in protecting the security of us all in deterring potential criminals. This idea has its roots in Plato's writings:

It is appropriate for everyone who is subject to punishment rightly inflicted by another either to become better and profit from it, or else be made an example to others, so that when they see him suffering whatever it is he suffers, they may be afraid and become better.

This defence of deterrence is shared by a great many today. For example, Ted Honderich argues that punishment 'may be acceptable simply because it deters'. Acceptance of deterrence may lie in the beneficial consequences it might produce.

Deterrent punishments can take several forms, such as general or specific deterrence. General deterrence is often understood as the public threat of punishment and specific deterrence as the individual's experience of punishment. An alternative view of this distinction is between macro-deterrence (general deterrence) and micro-deterrence (specific deterrence).

Macro-deterrence concerns society in general. It asks how we might best construct deterrent punishments for society at large. This analysis focuses on the crime and steps that could be taken to deter persons from crime. Macro-deterrence judges success on the basis of how well punishment acts as a general deterrence.

Micro-deterrence focuses on the criminal. It asks how we might deter an individual from crime. This view finds expression in a brief essay by John Stuart Mill: 'You do not punish one person in order that another may be deterred. The other is deterred, not by the punishment of the first, but by the expectation of being punished himself'. Micro-deterrence judges success on the basis of how well punishment acts as a specific deterrent for particular individuals.

Macro-deterrence and micro-deterrence offer different perspectives on how we might approach the construction of deterrent punishments. However, these different perspectives need not translate into conflicting viewpoints. Instead, the two should be understood as working together in approaching the same project from different angles. Furthermore, they may overlap so that general and specific deterrence may be achieved together.

The way we construct deterrent punishments may take several forms, such as fear, incapacitation, and reform. The first form is the traditional understanding of deterrence. Deterrent punishments are public threats: individuals are deterred from criminality by the fear of threatened punishment if they engage in criminality. This fear of threatened pain is what motivates individuals to remain law abiding. If the public is sufficiently afraid of threatened punishment, then the public will not offend.

The second form of constructing deterrent punishments is incapacitation. This view, first argued for by William Paley, has a long history as well. The incapacitation approach argues that the criminal can be said to be deterred from criminality by virtue of his becoming imprisoned. For example, the idea is that all potential criminals have something in common: they are not imprisoned. Whatever prison's deterrent effects upon the general public, prison has an undeniable deterrent effect on imprisoned criminals: they cannot commit crimes while imprisoned. The incapacitation approach does suffer from at least two serious problems. The first is that it may compel us to imprison everyone. If our desired goal is to deter as much crime as we can and no imprisoned person can commit crime, then we can deter more crime by imprisoning more people. Moreover, we can deter all crime when we imprison (virtually) everyone.

This position is highly objectionable because incapacitation is not reducible to punishment, nor vice versa. Recall that we should understand punishment as a response to crime: punishment must be of a person for breaking the law. The first problem for incapacitation is that it might justify the imprisonment of innocent persons in order to prevent future crime. The second problem is that criminality does not stop at the prison gate: criminals can and do (and perhaps always have) committed crimes within prisons. Such crimes include assaults and abuse of controlled substances. Not only might incapacitation insufficiently guard against objectionable implications, but it rests on a mistake about the geography of crime, namely, that crimes are not confined to public places or private homes, but they may take place in prisons as well. Criminality is possible both within and outside prisons. A deterrent theory of punishment must recognize this fact about the geography of crime, a feature too often overlooked and unnoticed.

A final form that deterrence might take is reform. Future criminality might be deterred because criminals have become reformed. I will highlight this further understanding of deterrence as reform in the next chapter.

Deterrence and crime reduction

Deterrence is about crime reduction, but not all crime reduction is evidence of deterrence. This is because deterrence is one approach amongst many to
reduce crime. One method of crime reduction may be the rehabilitation of offenders. Rehabilitated offenders are reformed and refrain from future criminality, which assists crime reduction efforts. But this is not deterrence. Deterrence theories aim to reduce crime by deterring potential criminal offenders. They are deterred where they choose against crime because they desire to avoid punishment. Crime reduction may be a result of deterrence, but deterrence is not the only method for achieving crime reduction. It is important to recognize that deterrence is one of many penal strategies for achieving crime reduction because it highlights that there may be significant differences in how we approach crime reduction. So if there was evidence that crime has been reduced over a period of time, then this is not necessarily evidence that crime reduction was a result of deterrence. Deterrence may always aim at crime reduction, but not all crime reduction is a result of deterrence.

**Deterrence and desert**

The problem most commonly associated with deterrence is the problem of punishing the innocent: deterrence should be rejected because it could justify the punishment of innocent persons. This problem is frequently used by retributivist to argue that retribution should be preferred over deterrence because only retribution takes criminal desert seriously. Let me explain this debate further.

Retributivists argue – in what we might call the standard view – that punishment should be distributed only where it is deserved. Retribution is a deontological theory in that punishment is not justified by its effects, but desert. Deterrence is instead a consequentialist theory whereby punishment is justified where it has specific consequences, such as a deterrent effect. This difference gives rise to a disagreement about how we justify the punishment of criminals. One criticism of deterrence is that, as Hegel argues, ‘to justify punishment in this way is like raising one’s stick at a dog; it means treating a human being like a dog instead of respecting his honour and freedom’.

For critics like Hegel, deterrence fails to honour people in failing to offer them reasons for good citizenship and avoidance of criminality.

We might respond that this criticism misses its target. Deterrence does offer reasons to citizens to refrain from criminality: if citizens engage in crime, the state threatens to impose punishment. Nor need this be problematic where citizens believe. Deterrence proponents might also claim that retributivists are no better. Both declare that criminals will be punished in advance. One important difference is that deterrence proponents believe that the threat of punishment may have a deterrent effect. We should expect potential criminals to reconsider participating in criminal activity to avoid the possibility of punishment. Retributivists may accept a similar analysis. While retributivists might argue that the severity of punishment is not set with a view of any future deterrent effect, retributivists may still claim that the ‘wrongness’ of a crime should weigh on the conscience of potential criminals and contribute to their reconsidering any criminal activity. Deterrence proponents are mistaken to believe that the only deterrent effect to be found is in the threat of punishment and not the gravity of a crime’s wrongfulness.

Deterrence proponents might reply that its aim is to reduce criminal activity by rendering it sufficiently unattractive. One relevant factor will be the threat of punishment, but a second factor will be the criminal act itself. Citizens may find criminal activity unattractive because they wish to avoid the possibility of punishment, but also because they agree with the laws governing their relations. Cesare Beccaria says:

> What are the true and most effective laws? They are those pacts and conventions that everyone would observe and propose while the voice of private interest, which one always hears, is silent or in agreement with the voice of the public interest.

The result is that perhaps deterrence does aim to manipulate the incentive structure for citizens in order to reduce crime. No plausible theory of punishment claims that criminal activity is desirable or good. If punishment could be used to reduce crime by winning the agreement of citizens and deterring potential criminals, then these should be compelling arguments in its favour. This raises a deeper concern often raised by retributivists against deterrence. Let us accept that the reduction of crime is desirable or even good. The traditional argument against deterrence is that it might permit the punishment, or even execution, of the innocent. The objection is as follows. Deterrence proponents believe that punishment is justified, at least in part, by its deterrent effects. If these effects were obtained by punishing the innocent, then punishment would be justified because it would have a deterrent effect. If deterring potential criminals is what matters, then this does not rule out our only punishing criminals. The objection is that we should never punish the innocent for crimes they did not commit. Deterrence is an objectionable penal aim because it might justify punishing innocent people.

This concern is not lost on leading proponents of deterrence. In fact, it is difficult to find any major figure who accepts the possibility of punishing the innocent under any circumstances: the worry that deterrence approaches would lead to the punishment of the innocent is largely a criticism about deterrence approaches and not a policy that deterrence proponents espouse.

All place clear limits on how deterrence should be pursued. Examples abound. Plato argues that the criminal should receive ‘due punishment for the wrongdoing he commits’. Fichte similarly claims that ‘in a well-governed state, no innocent person should ever be punished’. Bentham likewise rejects the punishment of the innocent. Beccaria is a
possible exception. He argues it is necessary to execute an innocent person if his death was 'the only real way of restraining others from committing crimes'. However, this is not much of a concession to critics of deterrence approaches if we believed that such cases might be so rare as to be virtually non-existent.

We might then argue that deterrence theories are at best impure. Each would appear to accept some retributivist core that punishment must first be deserved before it can be punished and never imposed on the innocent. The difference would then appear to be that deterrence theories link the severity of punishment with expected future effects rather than the gravity of a crime's wrongfulness. If true, these deterrence theories might be understood as negative retributivist theories of punishment. Negative retributivists argue that desert is necessary, but not sufficient for punishment. Punishment is distributed where other non-desert factors obtain.\textsuperscript{17}

Deterrence proponents need not accept that their 'deterrence' theories are in fact a species of retributivism. Another compelling perspective is the following.\textsuperscript{18} The state issues threats: if citizens perform a crime, then they will be punished for it. The state then punishes those persons who have failed to heed such threats.\textsuperscript{19} So the state only punishes those persons for which the threat and, thus, the state aims to deter without punishing the innocent. The state punishes to make good on its original threat to punish crimes: these threats would lack substance if the state failed to make good on its promise. Only those who break the law are subject to punishment: 'The threat is addressed to each individually, and each is punished because he, individually, chose to ignore the threat; the others, and their potential behaviour, are irrelevant'.\textsuperscript{20} This understanding of deterrence punishes only the guilty, but not on grounds of desert. Deterrence theories can avoid justifying the punishment of innocent people.

One final consideration is criminals who resist deterrence: the problem of the undeterrible. Retributivists, on the standard view, would punish the undeterrible because punishment is deserved. Future consequences are irrelevant. This is untrue for deterrence, where future consequences take centre stage. The undeterrible are not a major problem for theories of macrodeterrence: while some may not be deterred, punishment may be justified where it leads to reductions in crime for the general population. The situation is different with the microdeterrence of an individual offender. If a person is genuinely resistant to changing his behaviour in response to any deterrent efforts, then specific deterrence would fail in like cases. The problem of undeterrible criminals raises an important difficulty for microdeterrence accounts. If certain persons cannot be deterred, then punishment is not justified because it will not have any deterrent effect on them. Punishment might only be justified on grounds of macrodeterrence were it possible to have a deterrent effect on others, or the deterrible.

**Deterrence and difference**

Deterrence theories of punishment aim to deter potential criminals from criminality. Our focus is on constructing a suitable deterrent for members of a political community. This is a consequentialist approach: the deterrent proponent aspires to secure a particular consequence, namely, reduced criminality. The target is the political community and this raises several potential problems concerning the problem of difference.

The first potential problem is that we cannot hope to find any single punishment that might have the same deterrent effect for everyone everywhere. A penal threat may have a greater effect upon you than me. There are several reasons why this is the case. One reason is that deterrence is specific to local social conditions: what works as a deterrent in one political community may lack a similar effect in other communities. So a punishment may have a different deterrent effect or none at all in different political communities. Furthermore, this problem may not merely exist between political communities, but it may also exist within political communities. Call this the problem of domestic difference. Some social groups within the same political community may respond differently to the same deterrent threats. A second reason why deterrent punishments may differ between communities is that deterrence is linked with particular crimes and these crimes may differ from one community to the next. Therefore, deterrent punishments for crimes may not hold universally where there is disagreement between different political communities on what is included within the criminal law. This is only a problem for a global theory of deterrent punishment: deterrence may only be a genuine possibility within a political community.

The second potential problem is that what may deter today may not deter tomorrow. This is the problem of time and changing effects. Whatever knowledge we have of deterrent effects is always knowledge of the past: the owl of Minerva takes flight at dusk.\textsuperscript{21} The fact that some were deterred last year or even yesterday may be no guarantee that we can expect a similar number to be deterred today or next month. The deterrent power of punishment constantly changes over time in response to social conditions. Therefore, the deterrent potential of any punishment is always in flux and subject to constant change. One problem is that this potential may only be known after the fact; the deterrent potential of present punishments is always a matter of guesswork to some degree. We can never say that any one punishment is always best to maximize the deterrence of potential criminals for any crime. This is because we can only guess at likely future effects and these effects are subject to constant revision.

The use of the same punishment may have different deterrent effects in different communities and be subject to constant change over time. These issues highlight the deep complexity associated with deterrence and the challenges for presenting global theories of deterrence. These concerns do
not entail that we cannot know whether there are deterrent effects from the threat of punishment, but rather that such knowledge is complex and difficult to acquire.

The data on deterrence

Deterrence proponents offer a theory of punishment linked to empirical claims. They argue not only that punishment should be designed to bring about deterrence, but that punishment has a deterrent effect. Deterrence is an evidence-based approach to criminal justice. So what do the data reveal?

The big problem for deterrence theories is that punishment does not appear to have much, if any, confirmed deterrent effect. There is much disagreement about the best measures of deterrence and indications of success or failure, but several conclusions have become established in recent years concerning criminals who have been imprisoned. Many reoffend upon release. For example, most criminals who are imprisoned receive sentences of 12 months or less. Approximately 60 per cent will reoffend and often within weeks of release. One study of American prisoners released since 1994 found that two-thirds were arrested for a serious misdemeanour or felony within three years, and half of these were reconvicted for new crimes. The study concluded that 'no evidence was found that spending more time in prison raises the recidivism rate'.

These results have been confirmed in several international studies which have also cast doubt on whether there is any link between time served and reoffending. For example, the British Prime Minister's Strategy Unit has concluded that 'there is no convincing evidence that further increases in the use of custody would significantly reduce crime'. Increasing prison sentences may be popular with the public, but the evidence is that such policies place greater pressures on taxpayers for no substantive improvements upon recidivism rates. The public may often support 'tough on crime' policies whereby penal tariffs rise ever higher, but such support lacks sufficient evidence that it works. The main consequence is much higher costs without improvements in crime reduction.

Perhaps surprisingly, even threats of severe punishment have not been conclusively shown to possess a deterrent effect, and decreased offending has not been strongly linked with increasing the severity of punishments. One example is California's so-called 'Three Strikes and You're Out' law. This motto refers to baseball where a batter is 'out' after receiving three strikes. Anyone convicted of a third strike-eligible crime faces a minimum 25 year imprisonment. This is irrespective of the seriousness of the crimes committed. It might be expected that - even if an unreasonable policy - such a high penal tariff would have some clear deterrent effect, but the findings are surprising. The deterrent effect appears small and is estimated at about 2 per cent or less. The policy has led to an explosion in the prison population and contributed to the further problem of prison overcrowding. Thus, even fairly severe threats of punishment have not conclusively demonstrated a clear deterrent effect, but these penal experiments have contributed to ever higher costs for little, if any, public benefit.

A common criticism is that imprisoning criminals makes them better criminals. For example, criminals may be thought to become transformed into criminal labourers through imprisonment: the 'professional' thief, for example. Some claim that imprisonment may even be criminogenic because it may contribute to more crime and not less. The contributing problems are that imprisonment often leads to offenders 'losing their jobs, their homes and their families'. While we would expect those with the longest prison sentences to be most likely to reoffend, this is not supported by most evidence. Most released prisoners will reoffend, but these persons often serve sentences of less than one year. Recidivism rates drop for all criminals serving more than one year in prison: the longer a criminal is imprisoned, the less likely he is to reoffend upon release. This may have more to do with the crimes associated with longer sentences and the greater professional support these inmates can expect to receive, as well as the age of offenders upon release. It is worth noting that criminals given suspended sentences and community sentences reoffend less often than criminals imprisoned for under a year. If our aim is to reduce crime rates, then the use of prison may be counterproductive. This may be counterintuitive: we might expect the burdens of imprisonment to deter better than community service, but deterrence proponents must support policies that best meet their preferred penal goals. If alternatives to prison work best, then these alternatives should be endorsed.

None of this need deny that crime rates have ever fallen. Instead, the issue is that where we find lower crime rates there are often non-deterrence factors to account for such changes. For example, there is evidence that crime rates may be linked to the number of males aged between 15 and 24 years: the greater the number of males, the higher the expected crime rates. There is also evidence that increased economic insecurity leads to both rising crime rates and a greater public fear of crime. It has been claimed that 'individuals who are worried about their economic stability may be more likely to fear criminals, who could further threaten their increasingly tenuous economic positions'. Furthermore, Steven Levitt and Stephen Dubner argue:

It is true that a stronger job market may make certain crimes relatively less attractive. But that is only the case for crimes with a direct financial motivation—burglary, robbery, and auto theft—as opposed to violent crimes like homicide, assault, and rape. Moreover, studies have shown that an unemployment decline of 1 percentage point accounts for a 1 percent drop in nonviolent crime.
One clear result is that a strong job creation strategy ensuring low unemployment rates is not only good economics, but a good criminal justice policy leading to lower crime rates and lower public fear of crime.

Not all studies have failed to find substantive deterrent effects. However, these studies often conclude that these effects are modest at best. For example, the results often reveal that the effects of deterrence upon crime rates is at most between about a 2 to 5 per cent decrease in crime following a 10 per cent increase in the prison population. If this is true, then prison may have an identifiable deterrent effect. However, the effects do not appear large and come at a significant cost to taxpayers.

Judging success

Discussions about the data on deterrence inevitably raise important questions about what constitutes 'success' for any deterrence theory of punishment. We have at least three options:

1. Deterrent theories of punishment aim for any deterrent effect.
2. Deterrent theories of punishment aim for any substantial effect.
3. Deterrent theories of punishment aim for a complete effect.

The first option is too weak and the third is too strong. The first option claims that the aims of deterrent punishment are satisfied where any deterrent effect may be identified. This is too weak. Suppose we have two different punishments. The difference between them is that one punishment is known to deter a small handful and the other punishment lacks any known effect. The deterrence proponent would seem compelled to prefer a punishment with any deterrent effect over an alternative that lacked any effect. But would this remain true if a very small effect were only made possible by way of inflicting great pain? The deterrence proponent is not a retributivist: she does not link a punishment's severity with what is deserved, but rather what has a deterrent effect. But this is not quite right. Deterrence proponents argue that deterrence is a central justification of punishment. Therefore, deterrence should not have a mere negligible presence, but it should play a clearer role in punishing. If deterrence is the justification of punishment, then it must also play some clear – and not merely tangential – role. Deterrence is reductivist: its goal is the reduction of crime. A deterrent approach that can promise no more than little, if any, reduction in crime is not much worth its name.

The third option is too strong. While we may hope that a great many will be deterred from criminality, we cannot expect our hope will be realized. There is a little appreciated fact about crime that I call the fact of crime in society. It is a fact that any society will have crime if it has a criminal law. This fact is not always recognized by proponents of deterrence. For example, Johann Gottlieb Fichte argues:

Punishment is not an absolute end ... Punishment is a means for achieving the state's end, which is public security; and its only purpose is to prevent offenses by threatening to punish them. The end of penal law is to render itself unnecessary. The threat of punishment aims to ... never be necessary.

However noble its aim of seeing punishment wither on the vine one day, it is pure fantasy to believe that crime will ever disappear so long as we are governed by the rule of law. Laws are not made to be broken, but are broken inevitably nonetheless by carelessness as well as design. There is little point in creating a utopia of crimelessness, but much promise in aspiring to restrict the fact of crime in society as best as is possible. Penal theorists may disagree on the ultimate justification of punishment, but they should all prefer less crime and lower recidivism.

The fact that crime is ever present does not mean we should accept crime however it is found. Deterrence proponents should not be satisfied with punishments with negligible deterrent effects nor aspire to full or 'perfect' deterrence. Instead, deterrence proponents defend deterrence as a substantial consequence of justified punishment. This leads us to endorse the second option. A successful deterrence theory is one that can demonstrate a substantial deterrent effect. So what would such an effect look like? It is difficult to pinpoint any specific figure, but surely 2–5 per cent falls far below any plausible indication of a 'substantial deterrent effect'. Nevertheless, our knowledge about the deterrence effects, if any, for any crime is 'exceedingly thin'.

Deterrence, intuitions, and knowledge limits

Many deterrence proponents naturally assume that punishment has a deterrent effect notwithstanding contrary findings by existing studies. For example, James Q. Wilson says:

People are governed in their daily lives by rewards and penalties of every sort ... To assert that 'deterrence doesn't work' is tantamount to either denying the plainest facts of everyday life or claiming that would-be criminals are utterly different from the rest of us.

It is assumed that we, the community, know the laws that govern us. Ignorance of the law is no defence from future punishment. It is also assumed that the burdens of punishment should outweigh expected benefits from possible criminal activity. Where this obtains, individuals engaged in a cost-benefit analysis will rationally choose to avoid crime. It would be irrational to commit a crime where the costs outweigh expected benefits. The deterrent effect of punishment is intuitively true. Evidence to the contrary is opposed to our most basic intuitions about criminal justice. Or so deterrence proponents may argue.
There are many reasons why the intuitive justification of deterrence is problematic. First, there is little evidence to suggest that criminals weigh costs and benefits in the way many deterrence models assume. Criminals appear to rely on little more than guesswork about their possible likelihood of arrest and conviction. But this is not all. In short, deterrence may assume too much. Michael Davis says: "Deterrent" does not have any relation to actual or probable crime without assumptions about the rationality of criminals, the efficiency of police, the likelihood that the penalty will not itself make the crime glamorous, and so on. How many people would have stolen a car last week, if the laws had been different? How many people were deterred from any crime because of any specific legislation? If punishment deters criminals, then it might be possible to have some idea about how to answer these questions. Yet, such answers remain elusive.

For example, deterrence presupposes knowledge about crimes, possible sanctions, the likelihood of arrest and conviction. There are many reasons to believe these articles of faith do not cohere with reality. First, only a few citizens will have knowledge about even a majority of crimes and perhaps no one knows them all. If citizens are to conduct a rational choice assessment weighing the costs and burdens of criminal activity, then they must have sufficient knowledge about what counts as criminal activity. Most lack this knowledge. Punishment fails to serve its deterrent function where citizens do not know what is criminalized. Perhaps punishment might have a more limited deterrent function on a crime-by-crime basis. For example, many may be unaware about the full range of property crimes, but many will know that murder is criminalized. Punishment may only have a deterrent function for those crimes that citizens have sufficiently satisfactory knowledge about. The problem is that citizens lack such knowledge about most crimes. Citizens cannot be deterred from crimes that they are unaware of.

Second, citizens lack knowledge about most crimes and they lack knowledge about possible sanctions for most crimes. This is perhaps a more serious problem than the first. While citizens may not know all crimes, they might still identify a plentiful core acknowledging arson, burglary, murder, and theft amongst others. However, their knowledge of what possible sanctions would relate from a conviction for any of these crimes is even worse. I have lectured on criminal law and punishment in several countries and before many distinguished audiences: not once has anyone been able to correctly identify the tariff for arson for any jurisdiction. Can you? This is despite the fact that all recognize arson as a serious crime. If academics, lawyers, and policymakers are unsure about how much punishment is, then there is reason to believe the lay public would perform no better. The problem is that punishment cannot have a deterrent effect where citizens do not know how their crimes might be punished.

Third, suppose we possess satisfactory knowledge about crimes and their possible punishments. We would still require satisfactory knowledge about the likelihood of our arrest and conviction. The facts are startling: the majority of crimes are unsolved. Murders have the highest detection rates, but these are often no better than about 80 per cent. Do you know the likelihood of your being arrested or convicted for benefit fraud or illegal trading? Or for any crime? Punishment cannot have a deterrent effect where citizens do not know crimes, how their crimes might be punished, the likelihood of arrest for crimes, nor the likelihood of punishment.

There is a further issue concerning imprisonment. Many prisoners remain imprisoned beyond their official release date. There are an estimated 2,500 prisoners in the UK alone in this position. The justification is that they remain imprisoned because they have been found to remain a threat to the general public. It is unclear whether or not this improves future deterrence for crimes that may involve imprisonment. On the one hand, this may be relatively unknown by persons potentially affected and so not enter into risk calculations about engaging in crime. On the other hand, the possibility that a prison sentence represents a minimal term and may be for life could have a potential deterrent effect if it is communicated effectively to persons potentially affected. It is perhaps shocking how little effort governments expend on informing the public about possible criminal sanctions. Whatever the reality of deterrence, there is a clear need for improved communication between governments and their citizens to better educate them about criminal punishment.

Many deterrence proponents claim that it is at least intuitively true that punishment has a deterrent effect. We have seen that few studies have shown any substantial deterrent effect. Furthermore, there is little reason to believe that citizens could be deterred by punishment for most crimes. This is because citizens lack sufficient relevant knowledge necessary for deterrence to obtain. Citizens do not know most crimes, know less about possible punishments for crimes, and know little, if anything, about the likelihood of arrest and conviction. It is clear that there is a need for greater communication about such matters with the general public to improve their knowledge in these areas. The intuitive evidence for deterrence seems limited to persons with perfect information about crimes, punishments, and other factors that no one has in fact. The conclusion to be drawn is not that deterrence is impossible, but rather that it is substantially more difficult to determine and perceive than we may initially recognize. Nevertheless, there remains something attractive about a society where crime reduction works, all things considered. But whether crime reduction should be achieved through deterrence or an alternative approach is another consideration.

Should government deter?

Consider the proper role of government. Should government deter? This concern may take many forms, such as whether governments should endorse
some alternative justification of punishment. I do not want to address such matters here, but instead focus on a very specific concern that is often overlooked in discussions about deterrence. Surprisingly, this concern arises within the writings of John Stuart Mill, an advocate of deterrence. He offers the following worry: ‘the preventive function of government, however, is far more liable to be abused’. Perhaps governments should deter. The problem is this power is most likely to become abused.

Let me address this worry in the following way. It may be argued that a central task of any government is enforcing its laws. The government will have a clear interest in addressing criminality. Deterrence is one way of addressing criminality: governments should address criminality by deterring it, leading to crime reduction. One classic objection to deterrence is that governments fail to treat their citizens with the dignity that they deserve. Deterrence measures may lead governments to treating their citizens as a means to some goal rather than an end in their own right.

We might reply that we use people as a means all the time. For instance, we use taxi drivers to take us to our destinations or we use waitresses to serve us our meals and so on. The question is not whether we use others, but rather whether we use others in a justifiable way. There is a difference between paying another for a consensual service and demanding someone is imprisoned. Nevertheless, this difference does not reflect a problem with the respect of dignity for the imprisoned. Respect can be secured in our ensuring a person is only imprisoned for criminality: no person need be treated merely as a means by deterrence theories of punishment. Thus, deterrence can address people as moral agents and deterrence need not be understood as little better than addressing people like animals.

Mill’s worry is not that deterrence denies dignity to others, but that deterrence is more liable to abuse by governments than alternative theories of punishment. Recall that there is a link between the justification of law and the justification of punishment: there can be no justified punishment for an unjustified law. If laws are justified, then it becomes possible to justify punishment for criminality. One problem is that governments may use greater threats to deter persons from violating unjustified laws. This might make a bad situation much worse.

Let me explain this point further. Suppose, following Cesare Beccaria, that deterrent punishments should aim to ‘make the strongest and most lasting impression on the minds of men, and inflict the least torment on the body of the criminal’. If our aim is to make the biggest impression with the least damage to the criminal, then perhaps our use of punishment should aspire to mislead the public into believing punishments are much worse than they are. This brings us to a famous illustration by Jeremy Bentham: ‘If hanging a man in effigy would produce the same salutary impression of terror upon the minds of people, it would be a folly or cruelty ever to hang a man in person. The effect from punishment is of crucial significance for deterrence proponents. If this effect might be gained without harming anyone through punishment, then such an alternative may prove tempting. Deterrence does not aim to be cruel, but to reduce crime, and such an alternative might fulfill this ambition.

Beccaria argues that ‘it is better to prevent crimes than to punish them’. If this is true, then the state may be tempted to broadcast mock punishment in attempts to mislead the public. But this need not be the only result. Instead, governments might attempt to reduce crime without resorting to misleading the public. One reason would be concerns about the likely impact of the public gaining knowledge about any deceit. Mock executions may prove effective where the public are deceived, but backfire catastrophically where the public learn the truth about such matters. Many governments have moved to a greater emphasis on strict liability with the easier convictions this approach brings, albeit for often relatively minor punishments. While governments have many reasons to reduce crime, most do not appear to run afoul of Mill’s warning about the likelihood of the abuse of power in the pursuit of prevention strategies. This does not conclusively prove that government should deter, but instead offers some evidence to believe that Mill’s warning is not a deciding objection against deterrence.

Conclusion

This chapter has considered the problems and prospects of deterrence approaches. The problems are considerable. First, there is little evidence that deterrence works in any substantive sense. Most studies show limited, if negligible, effects for even severe threats of punishment. Second, there is little evidence that intuitive judgements about deterrence hold much water. These judgements rest upon various assumptions about the knowledge people have about criminal justice that they do not possess. Where we find reduced crime rates, there are often other factors that seem best to explain these changes.

There is also a curious paradox. The public strongly support a ‘tough on crime’ approach despite a lack of evidence that this approach has any significant beneficial effects. In fact, voters are more likely to vote for candidates who claim a ‘tough on crime’ policy even where those voters might otherwise favour alternative approaches, such as rehabilitation. Deterrence theories of punishment claim justification because they lead to crime reduction. The problem is that the evidence is inconclusive at best and perhaps even counterintuitive.

There are also clear prospects. The fact that conclusive evidence is lacking does not entail that no evidence can be found, but only that the jury is still out. People may have limited knowledge about criminal justice, but so then we might rely on a more modest understanding of how deterrence might apply. The threat of punishment is clearly one possible factor for potential criminals to desist from engaging in crime. Moreover, crime reduction
is desirable: we would prefer a society with less crime to others, all things considered.

The project of deterrence may prove more challenging to offer than its defenders have claimed, but it remains an approach to punishment of real importance.

3 Rehabilitation

Introduction

Rehabilitation is the major alternative theory of punishment to retribution and deterrence. Its popularity has decreased over the last few decades. There was an explosion in interest from academics and public policymakers during the 1960s, which began to decline in the late 1970s. This fall in interest is partly explained by the public’s growing impatience concerning conclusive findings that rehabilitation was more effective than other punitive approaches at crime reduction combined with the concern that rehabilitation is too lenient. Rehabilitation theories have been making a comeback, sometimes now referred to as the ‘New Rehabilitation’ although the aims and methods are broadly similar.1

This chapter will examine the leading approaches to rehabilitation and why its proponents believe it is a compelling theory of punishment. We will then consider the available evidence on our ability to rehabilitate offenders. While rehabilitation theories continue to offer us a fresh approach, its promise remains unfulfilled and its possibility is potentially suspect. These challenges may encourage us to understand how we might improve this important project rather than jettison it altogether.

What is rehabilitation?

A rehabilitation theory of punishment holds that punishment should aim at the reformation of offenders and assist their transition from criminal to law abiding citizen. Rehabilitation is successful where criminals come to reject crime out of choice.

Rehabilitation theories of punishment attempt to address a central problem in criminal justice. The great majority of imprisoned criminals will be released eventually.2 So what next? How do we best ensure they do not reoffend upon release? Other theories of punishment appear to have relatively little to say about this issue. For example, retributivists might say that the point of punishment is to punish and not to reform.3 Criminals should not receive help from us, but they should be punished by us. Deterrence