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

RONALD J. RYCHLAK*

I. INTRODUCTION

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

* Associate Professor of Law, The University of Mississippi. This paper grew out of a presentation made at Wabash College, on February 20, 1990, as part of the Goodrich Lecture Series. The author would like to thank Professors William Edmundson, Michael Hoffheimer, Edward McLean, Joseph Rychlak, and Mike Vitiello for helpful insight into theories of punishment.

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

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

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

1. *See* Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217, 222 (1973) ("Kant, Hegel, Bosanquet, Green—all tended to entitle their chapters on punishment along the lines explicitly used by Green: 'The Right of the State to Punish.' ") (citing T. GREEN, LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION 180-205 (1885)).

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

3. *See* E. PINCOFFS, THE RATIONALE OF LEGAL PUNISHMENT 2 (1966) (noting that utilitarian theories and retributive theories are "contraries" and that "neither theory is alone adequate to provide a satisfactory rationale for punishment").

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

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

II. IDENTIFYING CRIMINAL LAW

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

Criminal actions, on the other hand, are filed and prosecuted by the state, not an aggrieved individual. The goal of a criminal prosecution is not to restore the injured party, but to

4. *See* W. Harvey, Law and Social Harmony: What the Gods Would Destroy, They First Discover in the Constitution (paper presented at Wabash College, Feb. 7, 1990, as part of the Goodrich Lecture Series; publication pending with the Intercollegiate Studies Institute).

5. Punitive damages may be available in certain tort actions, but the primary focus of tort remedies is to make the plaintiff whole, while the primary focus of criminal penalties is to punish the defendant.

6. While an award of money damages is the typical remedy for civil actions at law, injunctive relief may be appropriate in some cases. *See* Rychlak, *Common Law Remedies for Environmental Wrongs: The Role of Private Nuisance*, 59 MISS. L.J. 657, 663 (1990).

punish the violator.[7] The typical remedy is imposition of a fine or incarceration of the wrongdoer. Thus, offending another individual may create a duty to remedy the wrong, but it does not subject one to punishment. Offending the state, however, does constitute a crime, and the state will impose punishment.[8]

This raises the very interesting problem of identifying those acts that will be considered criminal by the state, subjecting the violator to punishment, and those acts that will be regulated by civil laws. Although "crime" may be defined as a violation against the state, few criminal acts are actually directed against the state. Most crimes, even murder, are actually directed against another person, not the state.[9] Why then do societies recognize certain conduct as criminal, as offending the state, while other wrongful acts, like breaching a contract or committing a tort, are not seen as criminal?[10] This question can only be answered by looking at the reasons why humans form societies and then identifying what the society must do to satisfy those needs.

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

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

9. For that reason, murder is regulated by civil law in at least some societies. *See, e.g.*, Brooks, *Parents of Britons Murdered in Sudan Now Pass Judgment*, Wall St. J., Jan. 26, 1990, at A1, col. 4 (under Islamic law, or Sharia, blood heirs of a murder victim may choose to receive cash compensation from the defendant in lieu of punishment, and the court is obliged to accept the relatives' decision). Treason and tax evasion are the only common crimes which can be said to harm society directly.

10. *See* E. PINCOFFS, *supra* note 3, at 82 ("The retributivist legislator would, presumably, want to prohibit and penalize deeds it would be morally wrong to do. But we have not laws against lying, ingratitude, or lust."); 1 T. AQUINAS, SUMMA THEOLOGICA Q. 96 Art. 2 Obj. 3 (Fathers of the English Dominican Province trans. 1947) ("human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained").

A. *The Formation of Society and Adoption of Criminal Laws*

Humans join into societies (or states), it is widely believed, to protect themselves from outside forces, either forces of nature or other groups of people.[11] Individuals are vulnerable, but numbers provide strength and protection.[12] The protection a society affords, however, is severely limited if members of the society are each free to pursue their own interests by whatever means they wish, especially if those means include acts of violence. In order for society to have any meaning, some regulation of conduct is necessary.[13] Accordingly, the society develops rules which are enforced by threatened punishment or the actual imposition of sanctions.[14] These rules are the criminal laws of that society.

Most criminal laws are prohibitions of certain acts; hence,

11. *See* J. WILSON, THINKING ABOUT CRIME 26 (2d rev. ed. 1983) ("It was out of a desire for self-defense, after all, that many of the earliest human settlements arose."). This theory is based on the social contract model of society advanced by many philosophers, including Hobbes, Locke, and Rousseau. Under it, man moved from the "original position" or "state of nature" into societies by agreeing to rules set forth in the social contract. *See, e.g.*, E. BURKE, *Reflections on the Revolution in France*, in 3 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 359 (4th ed. 1871) ("society is, indeed, a contract"); T. HOBBES, OF MAN, BEING THE FIRST PART OF LEVIATHAN, *reprinted in* 34 THE HARVARD CLASSICS 323, 407-17 (C. Eliot ed. 1910) (describing the operation of the social contract); J. LOCKE, OF CIVIL GOVERNMENT 118-24 (W. Carpenter 1924); J. RAWLS, A THEORY OF JUSTICE 17-22 (1971); J. ROUSSEAU, THE SOCIAL CONTRACT (1792), *reprinted in* J.-J. ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSE ON THE ORIGIN OF INEQUALITY 18-19 (L. Crocker ed. 1967) ("the social contract . . . is reducible to the following terms: 'Each of us puts in common his person and his whole power under the supreme direction of the general will; and in return we receive every member as an indivisible part of the whole.' "). *But see* J.S. MILL, ON LIBERTY 70 (D. Spitz ann. ed. 1975) (1859) ("[s]ociety is not founded on a contract, and . . . no good purpose is answered by inventing a contract in order to deduce social obligations from it"). Plato argued that people live in political communities because no individual is self-sufficient and society offered the possibility of specialization of labor. *See* PLATO, THE REPUBLIC *443.

12. *E.g.*, H.L.A. HART, THE CONCEPT OF LAW 189-95 (1961).

13. "A law, properly speaking, regards first and foremost the order to the common good." T. AQUINAS, *supra* note 10, at Q. 90 Art. 3 Obj. 3. The need for rules to advance the common good is reflected in the following passage:

> we assume that it is necessary to set some rules if men wish to survive, simply because human beings, being without enough instinctual equipment, are incapable of carrying on common activities necessary for their survival unless they are shown, told, taught, how to conduct themselves, what to do, and what to refrain from doing. And we assume that it is *desirable* to set *other* rules if the common life is to enhance the well-being . . . and reduce the misery and unhappiness . . . of all.

E. PINCOFFS, *supra* note 3, at 119 (emphasis in original).

14. "[I]t is the fear of punishment that law makes use of in order to ensure obedience: in which respect punishment is an effect of law." T. AQUINAS, *supra* note 10, at Q. 92 Art. 2 Obj. 4.

criminal laws generally limit the range of actions which an individual might legally perform. Since we the people comprise the society, we establish criminal laws to regulate and limit our own conduct.[15] In defining crimes and identifying those acts which are prohibited, the society both reflects and molds its own values. The rules we establish are based on the values that we cherish, and they reflect the societal consensus on appropriate behavior.[16] Moreover, by establishing them as laws, these values are preserved and become further ingrained into the fabric of the society as values, not just as laws.[17] Thus, criminal laws are the rules by which we define what we stand for as a society.[18]

As members of a society, individuals receive the benefits society offers, but they are also bound by limitations put on their freedom by the society's criminal laws. The individual must abide by the criminal laws so that all can receive the benefits that society offers.[19] The social contract model has been used to

15. It is probably more appropriate to say that we establish our laws to regulate our neighbor's conduct.

16. *See* Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. PA. L. REV. 1195, 1231 (1979) ("It is an uncontroversial truth that the criminal law rests on the enforcement of 'public morality' . . . ."); Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, 13 GA. L. REV. 1395, 1414 (1979) (same); Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 669 (1963) ("Virtually the entire penal code expresses the community's ideas of morality, or at least of the most egregious immoralities.").

17. For instance, many of our constitutional rights are not "implicit in the concept of ordered liberty." *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (double jeopardy prohibition not required in all just criminal systems); *see also* Adamson v. California, 332 U.S. 46, 54 (1947) (prohibition against self-incrimination not required in all just systems). However, these rights are central to the *American* scheme of justice. *See* Benton v. Maryland, 395 U.S. 784, 794 (1969) (double jeopardy prohibitions apply to the states through the fourteenth amendment) (overruling *Palko*); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (privilege against self-incrimination applies to the states through the fourteenth amendment). Thus, many constitutional protections, such as the right to free speech and a free press, are not only legal truisms, but have become societal values as well. These rights, it is reasonable to assume, have become central to the American criminal law system because of their placement in the Bill of Rights.

18. The laws a society decides to enforce can vary from one society to another because societies define themselves in different ways. A society might be based on pure majority rule, or an individual or group in power might structure the law to maintain control. Much has been written about how these rules become law. Obviously "natural law" has had a profound impact on the American legal system, *see infra* note 22, but it would be easy enough to envision, if not identify, societies which have laws seemingly in conflict with natural law.

19. *See* J.S. MILL, *supra* note 11, at 70 ("[E]very one who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest."); J. LOCKE, *supra* note 11, at 165 ("every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society to submit to the determination of the majority"); *see also* R. BORK, THE TEMPTING OF AMERICA 121-22 (1990) (discussing the way society provides protection by requiring compliance with its laws).

explain the obligation of the individual to recognize society's rules.[20] However, regardless of whether the individual recognizes such an obligation, society demands compliance with these rules and will punish a violator.

B. Individual Rights

Society regulates many forms of conduct, but its authority is not without limit. When seeking to determine the legitimacy of a criminal law, rights of the individual and the minority, sometimes called natural rights, must be considered. A law is not just simply because the majority favors it. De Tocqueville wrote:

> when I feel the hand of power lie heavy on my brow, I care but little to know who oppresses me; and I am not the more disposed to pass beneath the yoke, because it is held out to me by the arms of a million men.[21]

As our founders drafted the first rules to regulate our society, they adopted a democracy tempered by constitutional provisions to protect the minority (or the individual) from the tyranny of the majority.[22] The Constitution sets forth what we might call the fundamental or natural rights of all individuals. These rights cannot be abridged, regardless of the will of the majority.[23] Thus, the majority is estopped from prohibiting certain conduct if that conduct is protected by our Constitution. Accordingly, regardless of the will of the majority, no criminal law in this country could make it illegal to hold to a certain faith, because the Constitution provides for freedom of religion.[24]

Constitutional provisions are so ingrained in the fabric of our society that few would seriously question abstract notions such as freedom of speech, freedom of the press, or freedom of religion. When these notions are reduced to concrete examples,

20. *See supra* note 11 and accompanying text.

21. 2 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 13 (H. Reeve trans. rev. ed. 1900).

22. Natural law theories obviously had a great influence on the founding fathers of the United States. *See* E. BARKER, TRADITIONS OF CIVILITY 308-11 (1948); *see also* The Declaration of Independence para. 1 (U.S. 1776) (the colonies broke away from England to assume that station to which "the Laws of Nature and of Nature's God entitle them").

23. This has been called the "Madisonian dilemma." R. BORK, *supra* note 19, at 139.

24. U.S. CONST. amend. I.

however, they may conflict with the majority's wishes and therefore be controversial. A recent example centers on burning the flag of the United States. Most Americans find that act repugnant and hence (through their state legislators), made that act illegal. However, since burning the flag is a form of protest against the government, the Supreme Court determined that this act is protected by the first amendment as an act of free speech.[25] Hence, the will of the majority in seeing that the flag not be burned was repressed by the fundamental right of the minority to engage in free speech.[26]

Under the American constitutional system, when the majority makes a law, the minority is required to abide by it unless there is a constitutional restriction on the majority's power.[27] When the majority finds some act repugnant, but the act is protected by the Constitution, the initial reaction may be to seek to amend the Constitution. Fortunately that is not a simple matter, otherwise constitutional provisions and protections would flow with the ebb and tide of current political power. There may also be calls to ignore the Constitution and the defendant's constitutional rights.[28] If the defendant did not consider the rights of the victim, why should the defendant's rights be considered? Of course, if certain criminal defendants are deprived of their rights, then who is to say when others will be similarly deprived? Despite this reasonable answer, the general public might not be easily swayed.

The law-abiding public, through its legislatures, has structured the criminal law system to reflect its values and beliefs. It may be unreasonable to expect people to quietly accept constitutional arguments that do not reflect the ideals to which they

25. Texas v. Johnson, 109 S. Ct. 2533 (1989); United States v. Eichman, 110 S. Ct. 2404 (1990).

26. Of course, not all commentators believe that first amendment protections actually extend this far. R. BORK, *supra* note 19, at 126-28.

27. *Id.* at 49 (unless there is a constitutional prohibition, the minority is at the mercy of the legislative majority).

28. This situation can be seen in the recent war against drugs, where some people seem willing to sacrifice constitutional protections in order to obtain convictions of drug dealers. *See, e.g., Uncivil Liberties?: Debating Whether Drug-War Tactics Are Eroding Constitutional Rights*, NEWSWEEK, Apr. 23, 1990, at 18. It might even be argued that this attitude was enacted as national policy with the invasion of Panama and the capture of Manuel Noriega. Similar arguments, however, have been made about numerous unpopular criminal defendants. *See generally* R. DEMING, MAN AND SOCIETY: CRIMINAL LAW AT WORK 141 (1970) (discussing the negative public reaction to the procedural rights provided to Robert Kennedy's assassin, Sirhan Sirhan).

aspire.[29] Society has obligations to the majority as well as the minority or the individual. One of those obligations is to enforce the criminal laws and thereby assure the majority that its definition of justice is being served. At times, constitutional or natural rights come into apparent conflict with the majority's will. The structure of power has much to do with how this conflict will be resolved.

That which is recognized as "natural law" is dependent on society's recognition of a "law giver." In the United States, the giver of constitutional law (which is closely related to natural law) is, ultimately, the United States Supreme Court. If the Supreme Court finds a fundamental right in the Constitution, the will of the majority cannot override that determination without amending the Constitution. Thus, if the Supreme Court finds a right to privacy, which gives a woman the right to abort an unwanted pregnancy, states cannot outlaw abortion without amending the Constitution, regardless of the will of the majority. A philosopher who sits on the mountain top and finds a "natural right" giving the fetus the right to live is powerless to affect the law. Indeed, even if the majority of the populace would recognize such a right, the Supreme Court could not be overridden without amending the Constitution. Thus, natural or constitutional law is dependent on the "giver" of such law.[30]

29. As an example, consider the abortion issue. Abortions were once declared illegal in most states, presumably because most people thought that abortion was wrong. If the majority had felt otherwise, the laws would have been changed through the political process. Many people, perhaps a majority in some states, still view abortion as murder and would like to declare it illegal. The Supreme Court, however, found a right of privacy emanating from the "penumbras of the Bill of Rights" and used these emanations to hold that the state did not have a compelling interest in the protection of a human fetus during the early stages of pregnancy. Roe v. Wade, 410 U.S. 113, 163 (1973).

It may be hard to understand how the state has an interest in protecting one's life, one's house, one's car, one's dog, and even one's pocket knife, but not an unborn child. If abortion is seen as murder, the greater good of stopping murder may justify ignoring political (or even constitutional) niceties. This is an emotional issue not simply because the society has politically decided to condone abortion. Rather, this issue is so inflammatory because our society now condones abortion, regardless of the will of the majority. Criminal laws define the society, and people may wish to define their society so as to protect the unborn, but they have been estopped from doing so. According to the Supreme Court, the Constitution makes it impossible for the state to prohibit what the majority may view as murder.

30. St. Thomas Aquinas, the great natural law philosopher, defined law as "a dictate of practical reason emanating from the ruler who governs a perfect community." T. AQUINAS, *supra* note 10, at Q. 91 Art. 1 Obj. 3. However, even he recognized that the ruler might not properly apply "practical reason." *Id.* at Q. 90 Art. 1 Reply Obj. 2-3. Aquinas argued that in such a case the ruler's will reflects not the force of law, but that

When the giver of natural law recognizes rights that are in conflict with the will of the majority, the populace may attack the structure which supports the giver. Nonetheless, when structuring criminal laws, the society must consider these natural, basic, or constitutional rights before it can legitimately regulate conduct of the individual. If no such rights are infringed, society can legitimately prohibit the activity in question. If such rights are infringed, the will of the majority should normally be suppressed. Thus, with the rights of the individual and the minority contemplated, the society is free to regulate conduct by establishing a criminal law system in keeping with the majority's definition of justice.

III. THE EFFECTS OF PUNISHMENT ON POTENTIAL LAWBREAKERS

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

"the sovereign's will would savor of lawlessness rather than of law." *Id.* If, however, the ruler had control over the forces of power, the ruler's skewed reasoning would be enforced.

31. These three effects of punishment on potential lawbreakers are often identified as separate theories of punishment. *E.g.*, J. KAPLAN & R. WEISBERG, CRIMINAL LAW 3-23 (1986). Hence, one commentator might advocate the deterrence theory of punishment, while another will advocate the rehabilitative theory, while still a third writes of the incapacitation theory. In fact, these effects exist regardless of the theory. Thus we may imprison someone in order to deter others, but we will also "benefit" from the incapacitation effect. Rehabilitation might require some additional effort on the part of the penal institution, but essentially it is more appropriate to speak of these as effects of punishment rather than separate theories. Nonetheless, much has been written about each of these effects as a separate theory of punishment. Thus, this discussion is limited to a relatively short description of each effect and the potential problems it involves. *See also infra* notes 82-86 and accompanying text.

A. Deterrence

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

The deterrence theory assumes that people are endowed with a free will and that they behave rationally.[36] In other

32. T. AQUINAS, *supra* note 10, at Q. 92 Art. 1 Reply Obj. 2. There is also biblical support for the deterrence effect. *See Deuteronomy* 19:16-21. The Krishna faith teaches that "[w]hen the miscreants are punished *in an exemplary manner*, automatically all good fortune follows . . . . That will bring about peace and harmony all over human society." 3 A.C. BHAKTIVEDANTA SWAMI PRABHUPĀDA, ŚRĪMAD-BHĀGAVATAM 252 (1978) (emphasis added) [hereinafter ŚRĪMAD-BHĀGAVATAM].

33. Deterring the offender from repeating the crime is known as specific deterrence, while deterring others is known as general deterrence. *E.g.*, J. KAPLAN & R. WEISBERG, *supra* note 31, at 5-12.

34. *See* Lipkin, *The Moral Good Theory of Punishment*, 40 U. FLA. L. REV. 17, 30 n.36 (1988) ("General deterrence theories are concerned with punishment's effect on other people and on crime rates."); United States v. O'Driscoll, 586 F. Supp. 1486, 1486 (D. Colo. 1984), *aff'd*, 761 F.2d 589 (10th Cir.), *cert. denied*, 475 U.S. 1020 (1985) (sentencing required to deter others from committing bad acts in the future); *see also* 2 M. PLOSCOWE, CRIME AND CRIMINAL LAW 296 (1939) (noting the inconsistency of using the death penalty to deter others but having the execution "in the gray dawn of morning" with "only a handful of witnesses").

35. By focusing on deterrence exclusively, many observers overlook other valid reasons for inflicting punishment. This may have happened with the California Supreme Court, where Chief Justice Rose Bird and two other justices were voted out of office in 1986, largely due to a perception that they were too lenient on criminals. Baum, *Judicial Election and Appointment at the State Level*, 77 KY. L.J. 645, 647 n.7 (1989); *see, e.g.*, People v. Burroughs, 35 Cal. 3d 824, 836-54, 678 P.2d 894, 902-15, 201 Cal. Rptr. 319, 327-40 (1984) (Bird, C.J., concurring) (arguing that the felony murder doctrine should be abolished because it has no deterrent effect, but overlooking other valid effects of punishment). Criminologists, however, have questioned whether deterrence actually does work. *See* J. WILSON, *supra* note 11, at 50; *see also* N. WALKER, SENTENCING IN A RATIONAL SOCIETY 56 (1969) ("[d]eterrence has become a dirty word in penological discussion").

36. *See* Rychlak & Rychlak, *The Insanity Defense and the Question of Human Agency*, 8 NEW IDEAS IN PSYCHOL. 3, 4 (1990) (noting the problem with a criminal law system that assumes free will while most mental health professionals doubt the validity of this concept). The retributive school also bases punishment on a concept of free will. *Id.* ("the Law presumes that a person acts according to his or her free will"); J. DRESSLER, UNDERSTANDING CRIMINAL LAW 6-7 (1987); *see also infra* notes 100-06 and accompanying text.

words, it assumes that criminals weigh the consequences of their acts. Does a drug addict undertake a cost-benefit analysis before going out to rob a store? Do criminals even know the risks? That would require knowledge of the likelihood of being caught and convicted (certainty of punishment), as well as the harshness of the sentence (severity of punishment).[37] If the criminal thinks capture can be avoided, it is unlikely that there will be any deterrent effect, regardless of the severity of any potential punishment. Thus, observers of popular social sciences are likely to argue that certainty of punishment, not severity of punishment, is the key to effective deterrence.[38] While this may be true, certainty of punishment from a practical standpoint is not attainable.[39] Hence, one must question whether there can ever be a true deterrent effect.

These questions are clearly difficult to test,[40] which means that the theory is hard to validate.[41] The deterrence theory, however, is put into action everyday in courtrooms around the nation as individuals are fined, imprisoned, or even executed.[42]

37. "On the average, no more than three out of one hundred felonies result in the imprisonment of the offender." J. WILSON, *supra* note 11, at 118.

38. *See id.* at 119. There is, however, at least limited data to support the argument that increased police patrols (increased certainty) helps reduce crime, though the cost for each deterred felony is quite high. *Id.* at 61-74.

39. Actual certainty of punishment, even if possible, would surely be far too burdensome and expensive to accomplish. Aside from the monetary cost, constitutionally provided civil rights would have to be forfeited. Accordingly, if deterrence is dependent on both factors, increasing the penalty is the cost-efficient way to deter crime.

40. *See* M. PLOSCOWE, *supra* note 34, at 298 ("For centuries the deterrent effects of punishment have been debated, but the dispute has produced more heat than light."); N. WALKER, *supra* note 35, at 56-61 (discussing the factors that would have to be taken into account when making a rational decision as to whether to engage in criminal activity). *See generally* Kennedy, *A Critical Appraisal of Criminal Deterrence Theory*, 88 DICK. L. REV. 1, 1-13 (1983) (discussing the problems associated with deterrence theory).

41. *See* J. WILSON, *supra* note 11, at 48-57, 181-88. Because it is hard to test, criminologists have been accused of reaching conclusions that reflect their personal political beliefs, but which are not supported by any credible evidence. *Id.* at 48-51, 54-57. The deterrent effect of the death penalty is especially subject to debate. Wilson argues that there is no credible evidence concerning its deterrent effect or lack thereof. He concludes that "even if the data are correct, the best they can show is that some people, under the mistaken belief that they might be executed, are reluctant to use guns in crime." J. WILSON, THINKING ABOUT CRIME 193-94 (1975). That result alone would, however, seem to indicate that the death penalty does have a deterrent effect. *See generally supra* note 34.

42. *See, e.g.*, United States v. O'Driscoll, 586 F. Supp. 1486, 1486 (D. Colo. 1984), *aff'd*, 761 F.2d 589 (10th Cir.), *cert. denied*, 475 U.S. 1020 (1985) (sentencing required to deter others from committing bad acts in the future).

B. *Rehabilitation*

The second effect of punishment on potential lawbreakers is rehabilitation.[43] Society takes the offender, provides education, and makes him or her a better person.[44] This, of course, assumes that the offender is capable of being rehabilitated.[45] If the person can be rehabilitated, the next question is whether society has the right (or obligation) to rehabilitate a person who does not want to be rehabilitated.[46] We are, after all, rehabilitating the criminal for our benefit, not his or her benefit.[47] Arguments may then

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

44. A system could exist which would rehabilitate the wrongdoer without inflicting punishment. R. DUFF, TRIALS AND PUNISHMENTS 146 (1986); *see also* E. PINCOFFS, *supra* note 3, at 97-114 (comparing treatment to punishment). When a legal proceeding is not aimed at punishment, but rather at rehabilitation, the defendant may not be granted the full range of constitutional protections given to a criminal defendant. *See, e.g.*, Allen v. Illinois, 478 U.S. 364, 375 (1986) (defendant in action brought under the Illinois Sexually Dangerous Persons Act not accorded fifth amendment rights because the Act is not criminal in nature). There was once a question as to constitutional protections afforded juvenile offenders. If the goal were solely to rehabilitate, not to punish, then constitutional rights afforded the defendant in a juvenile trial would not be the same as those afforded someone facing punishment. G. FLETCHER, *supra* note 7, at 413. The Supreme Court, however, has held that juveniles are entitled to receive due process safeguards. *In re* Gault, 387 U.S. 1, 33, 41-42, 55-56 (1967) (providing juvenile offender with the right to counsel, notice of charges, privilege against self-incrimination, and a right to cross-examine witnesses). Nonetheless, juveniles still may not receive a full range of constitutional protections. *See* Marcotte, *Criminal Kids*, A.B.A. J., Apr. 1990 at 61, 61 ("[S]ome legal experts charge that juveniles still get the 'worst of both worlds'—neither the due-process safeguards guaranteed adults despite Supreme Court rulings nor the solicitous care intended for children."). *See generally* A. GWYN, WORK—EARN AND SAVE (1963) (general discussion of the benefits of the rehabilitative approach).

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

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

47. *See* H. PACKER, *supra* note 43, at 53-58. A related theory of punishment, the

arise as to how best to rehabilitate.[48] As a practical matter, it has been suggested that many of our prison systems have exactly the opposite effect, serving instead as schools of crime.[49]

C. *Incapacitation*

A third effect of punishment is incapacitation. If we take the criminals off the street, they will not be out there committing crimes.[50] One might compare imprisonment with quarantine. Regardless of any personal culpability, indeed even if the criminal is seen as being ill, incarceration is justified much as enforced

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

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

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

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

isolation of a person with a contagious disease might be justified.[51] Discounting crimes committed in prison, this theory works by definition, assuming incapacitated criminals would otherwise commit new crimes[52] and assuming that they are not replaced on the streets by new criminals.[53]

Incapacitation would work better if the offenders most likely to continue breaking the law were incapacitated.[54] This, however, is not easy to determine. Moreover, even when we are able to identify common factors among likely repeat offenders, other considerations may prevent us from imposing a longer sentence.[55] Should a frequently unemployed person be punished more severely than an employed person? Should juvenile records be considered? If drug or alcohol addiction is a disease, should that weigh against the convict at sentencing?[56] White collar criminals are less likely to be repeat offenders, yet many people are upset when these offenders are given relatively minor

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

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

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

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

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

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

Id. at 154-55.

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

sentences. In fact, recent federal legislation was directed at correcting this perceived inequity.[57] The answers to all of these questions will reflect our acceptance or rejection of incapacitation as an effect which justifies punishment. Even strong advocates of utilitarian principles of punishment must acknowledge some troubling concerns associated with this theory.

IV. The Effects of Punishment on Law-Abiding Society

When society fails to punish wrongdoers, or when it punishes innocent people, not only must the effect on the likely lawbreakers be considered, but also the effect on those not inclined to break the law. These are two distinct, important reactions. When society fails to punish, those who may wish to violate the laws will feel more free to do so. This would stem from application of the deterrence theory. The second result is that the law-abiding people may no longer feel confident that the system will enforce the laws. These people have made sacrifices and forfeited certain rights in exchange for the protection that the society affords.[58] If society fails to provide protection, individuals may take over that role, leading to a form of frontier justice. Alternatively, law-abiding people may come to accept a high degree of lawlessness. In either case, society will have fallen apart.

When the public believes that society is failing in some manner, individuals respond. The deterrence theory of punishment indicates that fewer convictions and lighter punishments lead to increased crime; more convictions and stricter penalties lead to decreased crime. These reactions indicate how potential lawbreakers respond to punishment. To judge the impact that punishment has on the rest of society, however, focus must be

57. One of the reasons Congress enacted the Sentencing Reform Act of 1984 was to see that white collar criminals serve time in prison, instead of receiving probation. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.). The Act survived constitutional challenges in Mistretta v. United States, 109 S. Ct. 647 (1989). Another problem, which is related to the incapacitation theory of punishment, is that it does not justify punishment of offenders, like convicted embezzlers or perjurers, who have clearly done wrong, but will never be placed in a position of trust where the crime could be repeated. H. Packer, *supra* note 43, at 51-52.

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

placed on the law-abiding citizens and the victims of crime. How do they respond to differing degrees of punishment? The three responses to a perceived "public failure" identified herein are reformation, resignation, and retaliation. Examples of each can readily be found within this past decade.

A. *Reformation*

Reformation is the most legitimate public response to a perceived failing in the criminal law system because it is a process provided for in the system.[59] If the system is failing, people can use political power to fix it. Fifteen years ago drunk driving was not considered a serious offense. Violators were often given a minor fine or other small penalty and told not to do it again. Victims of drunk drivers, however, were offended by this treatment. They saw their friends, spouses, and children being killed and maimed by people who should have been imprisoned for previous violations. Accordingly, they decided to change the system.

Mothers Against Drunk Drivers (MADD) has had a profound impact on our criminal law system. By mobilizing political forces, MADD changed attitudes and changed laws. A convicted drunk driver no longer merely pays a small fine; today convicted drunk drivers in most states face serious penalties. Moreover, a drunk driver who causes an accident leading to a death is no longer guaranteed a maximum charge of involuntary manslaughter. Today in many states the drunk driver can face murder charges.[60] These changes in the criminal law system were brought about by the efforts of citizens who perceived a failing in the system.

Despite the MADD experience, reformation is not always progressive. For instance, if it is perceived that criminals are going free because of their constitutional protections, calls will be made to limit those protections.[61] While this might not be positive, it at least is not a total abandonment of the system. Raising issues this way forces public discussion and debate. This

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

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

61. *See supra* note 28 and accompanying text.

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

B. Resignation

When members of society decide that a problem cannot be controlled, or the system cannot be repaired, they may resign themselves and learn to live with the problem. Currently, the United States is waging a war on drug abuse. A review of available statistics, however, indicates that we may be losing the war.[62] One response that is currently receiving strong support is simply to give up and legalize these drugs.[63] Supporters of this position point to Prohibition's failure and draw an analogy to today's drug laws. Since the criminal system seems unable to deal with the drug problem, they argue, why even try? It is, in essence, a resignation to the conclusion that our society has failed to reach this goal that the people have set for it.

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

62. *See, e.g.*, *The Drug War*, A.B.A. J., Feb. 1990, at 42, 42-67. It is, of course, very difficult to determine with any degree of accuracy the amount of any illegal activity taking place. COMMISSION ON THE REVIEW OF THE NAT'L POLICY TOWARD GAMBLING, GAMBLING IN AMERICA 64 (2d Interim Report 1976) [hereinafter GAMBLING] ("The Commission believes that neither this nor any other survey is able to measure accurately the specific dollar level of an illegal activity . . . ."); Blakey & Kurland, *The Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923, 998 n.338 (1978); Rychlak, *Video Gambling Devices*, 37 UCLA L. REV. 555, 572 n.84 (1990).

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

try to create nice homes for their families, when it seems impossible to find a way out of this gang-controlled environment? Why not lose one's self in a haze of drug and alcohol abuse?[64] If society cannot stop the bad guys, how can an individual? And if no one can stop them, people must resign themselves to living with these problems the best way possible, which may be unproductive, or even destructive.

The resignation effect is most severe when it affects those charged with enforcing the criminal laws. When that happens, the society's will, reflected in the criminal law, is not enforced. Control of illegal gambling is one such example. A 1971 New York State legislative committee found that an arrested gambler faced only a two percent chance of going to jail, and that even then received only a light sentence.[65] This treatment did not go unnoticed by the police. "A substantial majority of the delegates to the 1975 National Conference of the Fraternal Order of Police agreed that prosecutors would rather not be bothered with gambling cases, and that judges usually give light fines and/or suspended sentences in gambling cases."[66] Naturally, since police have this perception, they see little reason to devote substantial effort to controlling gambling.[67] Since the laws then go unenforced, the criminal law system's failure is magnified.

Resignation is most likely when the outlawed activity is one that can be termed "victimless." Drug abuse, prostitution, and gambling are often cited as crimes that are hard to detect and which divert police and judicial resources away from serious crimes.[68] Thus, the argument goes, these laws need not be

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

65. NATIONAL INST. ON LAW ENFORCEMENT & CRIM. JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE, THE DEVELOPMENT OF THE LAW OF GAMBLING: 1776-1976, at 197 (1977) (citing REPORT OF THE NEW YORK STATE JOINT LEG. COMM. ON CRIME, ITS CAUSES, CONTROL, AND EFFECT ON SOCIETY (1971)).

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

67. *See id.* at 574-77.

68. It is only fair to note that drug addiction is often associated with other criminal activity. *See* J. WILSON, *supra* note 11, at 204 ("Estimates of the proportion of all property crime committed by addicts range from 25 to 67 per cent."). The cause and effect

enforced. But society can and does establish goals for its own advancement.[69] If the goals a society sets for itself are worthy,

relationship, however, is less than clear. A 1974 study indicates that from 1920 until 1950, 75% of heroin users had no criminal background prior to their addiction. 2 THE ENCYCLOPEDIA OF CRIME AND JUSTICE 640 (S. Kadish ed. 1983) (citing Greenberg & Adler, *Crime and Addiction: An Empirical Analysis of the Literature*, 3 CONTEMP. DRUG PROBS. 221 (1974)). "Conversely, studies of persons first addicted after 1950 show that the majority had a history of pre-addiction criminality. . . . As [narcotic] drug use came to be generally considered a severely antisocial behavior, only more deviant individuals within a subculture providing access to narcotics initiated and maintained use." *Id.* Since some prior contact with criminality was found to be a necessary condition for most addicts, it might be argued that drug use was a result of criminal activity rather than a cause of it. Other findings from this study, however, seem to cut against this argument. Narcotics addiction usually leads to economic deprivation. Actual addicts (as compared to occasional users) had difficulty holding steady employment. To support their habits, about one-third of the addicts relied on pushing drugs. About half of the women addicts in the study admitted to engaging in prostitution, and about 70% of most addicts' income is from illegal sources. *Id.*

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

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

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

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

then offending those goals harms society.[70] As such, resignation is not an appropriate response to difficulty of enforcement.

C. *Retaliation*

When people no longer feel safe relying on the system for protection, the society has failed in its most basic duty. When society fails in this duty, one must question the value of maintaining the society. This questioning may lead individuals to enforce the law themselves.[71] If the system is failing, why

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

> It can be asserted that the community, too, evolves a super-ego under whose influence cultural development proceeds. . . .
>
> The cultural super-ego has developed its ideals and set up its demands. Among the latter, those which deal with the relations of human beings to one another are comprised under the heading of ethics. People have at all times set the greatest value on ethics, as though they expected that it in particular would produce especially important results.

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

70. *See supra* note 69.

71. Oliver Wendell Holmes is often associated with the proposition that individuals will resort to private vengeance if the law will not punish. *See* O.W. HOLMES, THE COMMON LAW 40 (1881) ("It certainly may be argued, with some force, that it has never ceased to be one object of punishment to satisfy the desire for vengeance."). *See generally* Hoffheimer, *Justice Holmes: Law and the Search for Control*, 1989 Y.B. SUP. CT. HIST. SOC'Y 98, 112 (discussing Holmes's theory of criminal law). This attitude is certainly reflected in popular culture. For example, Charlie Daniels' 1989 hit song, "Simple Man" is about a simple vision of justice, which includes a short rope and a high tree. One of the lines refers to "some panty-waist judge [who] sets the drug dealers free." The Charlie Daniels Band, "Simple Man," *Simple Man* (CBS Records 1989); *see* Harris, *Stargazing*, MUSIC CITY NEWS, Dec. 1989, at 34, 36 (discussing this song). Hank Williams, Jr.'s song "If the South Woulda Won" complains about how convicted drug dealers are currently treated and compares that to how the world would be if he had his way: "If they were proven guilty, then they would swing quickly, instead of writing books and smiling on T.V." H. Williams, Jr., "If the South Woulda Won," *Wild Streak* (Klamer Bros. Records Inc. 1988). This attitude is not limited to country music. Charles Bronson has made at least three *Death Wish* movies, which are based on a character whose family was killed by a gang, and who then takes the law into his own hands. *See* R. EBERT, ROGER EBERT'S MOVIE HOME COMPANION 145-48 (1988 ed.). Clint Eastwood's *Dirty Harry* movies and his *The Outlaw Josey Wales* movie contain similar themes, *id.* at 156, 418-19, as do Mel Gibson's *Mad Max* and *Lethal Weapon* movies. *Id.* at 322-25, 345.

If Holmes is correct, and punishment keeps people from taking matters into their own hands, then punishment may be justified on a utilitarian basis, because punishment will prevent individuals from carrying out acts of violence. *See* A. VON HIRSCH, *supra* note 49, at 52. Sir Francis Bacon suggested that revenge might not be objectionable when the law

should anyone rely on it? Bernhard Goetz may have felt this way.[72] He previously had been accosted on the New York subway. He felt that the criminal justice system had let him down. It was not protecting him as it should. He had lost faith. Accordingly, he decided to defend himself. When four youths approached him one night, he pulled out his gun and emptied it into them.[73] Society had failed him,[74] and if society would not punish the evil doers, he would.[75]

Clearly, the criminal law system impacts not only on lawbreakers and potential lawbreakers. It also directly affects the actions of the victims and of law-abiding society. To maintain order in society, the legal system must not only provide for a safe society, it must also provide for a society that is satisfied with the workings of the system. The law-abiding populace must be assured that those who have done wrong are punished,

provides no remedy. F. BACON, *Of Revenge*, in ESSAYS, OR COUNSELS CIVIL AND MORAL 13 (G. Clarke ed. 1905) ("The most tolerable sort of revenge is for those wrongs which there is no law to remedy . . . ."). It might even be suggested that man is a vengeful animal, and it is unwise for society to attempt to overlook this primal urge. *See* H. PACKER, *supra* note 43, at 37-39; *see also* G. FLETCHER, *supra* note 7, at 417 (referring to "the fashionable consequentalist argument that it is socially desirable to channel the hostile energies of society into the punishment of criminals" rather than risk "private vendettas and blood feuds"); M. PLOSCOWE, *supra* note 34, at 290, 295 (noting a public desire for vengeance).

72. One account of the Goetz incident is set forth in M. LESLY, SUBWAY GUNMAN (1988).

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

74. The importance of perception must be noted. Suppose, for instance that the previous muggers of Mr. Goetz had received a light punishment, but Mr. Goetz thought that the punishment had been severe. He would not have lost faith in the system. He might not have armed himself, and the shooting might never have taken place. On the other hand, if the penalty had been severe, but Mr. Goetz thought that the penalty was light, he probably would have acted in the same manner that he did act. Thus, alerting the general public to the punishment of criminals is important to society.

Perception is also important to the general deterrent effect of would-be criminals. For instance, we would like kidnappers to think that we will not pay ransom. If that is what they believe, then potential kidnappers will decide that the crime will not pay and they will not kidnap people in the future. However, we may decide to pay the kidnapper in a given case without violating this wish, if we can keep the payment a secret. Thus, in the "arms for hostages" deal that haunts the Reagan presidency, it was not the act of trading arms to obtain hostages that endangered future American lives, it was that the deal became public.

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

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

V. JUSTIFICATIONS FOR PUNISHMENT

When society regulates conduct, it does so by punishing or threatening to punish those who violate the law. Punishment entails doing evil. By what authority or for what reason can society do evil to an individual who has violated that society's rules? As Tolstoy asked, "By what right [do] some people punish others?"[76] In general, it may be argued that the state is under a duty not to punish.[77] Certainly society could not justify random punishment of all people, including those who abide by the law. By the same token, allowing flagrant violations of the criminal law to go unpunished might undermine the basic stability of the society. Society must be able to justify its infliction of punishment on an individual before punishment can be legitimate.[78]

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

> He asked a very simple question: "Why, and with what right, do some people lock up, torment, exile, flog, and kill others, while they are themselves just like those whom they torment, flog, and kill?" And in answer he got deliberations as to whether human beings had free will or not. Whether signs of criminality could be detected by measuring the skulls or not. What part heredity played in crime. Whether immorality could be inherited. What madness is, what degeneration is, and what temperament is. How climate, food, ignorance, imitativeness, hypnotism, or passion act. What society is. What are its duties, etc., etc.
>
> These disquisitions reminded him of the answer he once got from a little boy whom he met coming home from school, Nekhlúdoff asked him if he had learned his spelling.
>
> "I have," answered the boy.
>
> "Well, then, tell me, how do you spell 'leg'?"
>
> "A dog's leg, or what kind of leg?" the boy answered, with a sly look.
>
> Answers in the form of new questions, like the boy's, was all Nekhlúdoff got in reply to his one primary question. He found much that was clever, learned much that was interesting, but what he did not find was an answer to the principal question: By what right some people punish others?
>
> Not only did he not find any answer, but all the arguments were brought forward in order to explain and vindicate punishment, the necessity of which was taken as an axiom.

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

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

78. *See* Lipkin, *supra* note 34, at 23 n.20 ("any relatively complete moral theory must deal with the problem of justifying punishment"). *But see* E. PINCOFFS, *supra* note 3, at 46

A problem arises, however, because punishment is hard to justify on a moral basis. Philosophers have long sought to identify society's moral right to fine, incarcerate, or even execute a convicted criminal.[79] Punishment presents a threat to the values of autonomy, personal dignity, and self-realization, which are all values which the state seeks to nurture.[80] Yet few serious scholars would advocate stopping all punishment.[81] Instead they offer justifications or theories of punishment. The utilitarian school justifies punishment because it serves a greater good by decreasing crime and creating a safer society. The retributive school justifies punishment on a moral basis. The criminal has done wrong and deserves to be punished. Neither of these schools presents an entirely compelling case for society's infliction of punishment on a given individual. Only the denunciation theory, which focuses on law-abiding society, presents valid reasons for society's right to inflict punishment on a wrongdoer.

A. The Utilitarian Theory of Punishment

The utilitarian theory of punishment justifies inflicting punishment because a greater good will be served in the long run.[82] Thus, by punishing the offender today, there will be less crime tomorrow, and society will be improved. If the improvement to society, seen as a good, outweighs the harm done to the offender, seen as an evil, then punishment is justified.[83] David Hume wrote:

(quoting K. MENNINGER, THE HUMAN MIND 448 (1945)) (" 'The reasons usually given to justify punishment do not explain why it exists. They serve only to conceal the truth, that the scheme of punishment is a barbaric system of revenge, by which society tries to "get even" with the criminal.' ").

79. *See supra* note 1.

80. *See* Murphy, *supra* note 1, at 223 (discussing the difficulty that philosophers have had with this quandary).

81. *See supra* note 2.

82. Jeremy Bentham is typically identified as the founder of the utilitarian school of punishment. *See generally* J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J. Burns & H.L.A. Hart eds. 1970) (1789) [hereinafter PRINCIPLES]; J. BENTHAM, THE LIMITS OF JURISPRUDENCE DEFINED (C.W. Everett ed. 1945) [hereinafter LIMITS OF JURISPRUDENCE].

83. Murphy, *supra* note 1, at 219. One problem presented by this equation is that utilitarians have not identified how to measure the good or the evil. For instance, should the criminal's pleasure be weighed in the "good" column? If a utilitarian is really making no moral judgment, then that is the proper measure. And if all, save the victim, receive pleasure from the crime, might not the crime be justified in the eyes of the utilitarian (thus leading to no punishment)? *See generally* Wexler, *The Moral Confusions in Positivism, Utilitarianism and Liberalism*, 30 AM. J. JURIS. 121, 130-31 (1985).

> When any man, even in political society, renders himself, by his crimes, obnoxious to the public, he is punished by the laws in his goods and person; that is, the ordinary rules of justice are, with regard to him, suspended for a moment, and it becomes equitable to inflict on him, for the *benefit* of society, what, otherwise, he could not suffer without wrong or injury.[84]

This theory focuses on how punishment affects potential criminals by dissuading them from engaging in criminal activity. Punishment is justified because of the greater good it will bring.[85]

Often the three effects of punishment on potential lawbreakers (deterrence, incapacitation, and rehabilitation)[86] will be identified as separate utilitarian theories of punishment.[87] A utilitarian, however, should not be required to single out any specific effect of punishment to support that theory. The utilitarian is interested in the net benefit society derives from a decrease in crime, which flows from the punishment.[88] As long as punishment leads to an improved society because there is less crime, and that improvement outweighs the harm or evil intrinsic in punishment, the utilitarian can justify punishment.

While many people find solace in the principles advanced by the utilitarian school, it has not gone without criticism.[89] One of the foremost opponents of the utilitarian school was Immanuel Kant, who argued that punishing one person for the

84. D. HUME, *Of Justice*, in AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS (1751), *reprinted in* PHILOSOPHY OF LAW, *supra* note 8, at 304, 305 (emphasis in original).

85. *But see* E. PINCOFFS, *supra* note 3, at 121 (tranquilization or annihilation of the human race would be more effective at discouraging crime than punishment is).

86. *See supra* notes 32-57 and accompanying text.

87. *See, e.g.*, J. KAPLAN & R. WEISBERG, *supra* note 31, at 5-23. The Supreme Court of Alaska described the various objectives of punishment as the

> rehabilitation of the offender into a noncriminal member of society, isolation of the offender from society to prevent criminal conduct during the period of confinement, deterrence of the offender himself after his release from confinement or other penological treatment, as well as deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender, or in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves.

State v. Chaney, 477 P.2d 441, 444 (Alaska 1970).

88. *But see* E. PINCOFFS, *supra* note 3, at 42-43 (suggesting a situation in which the goals of rehabilitation and deterrence might conflict).

89. "[U]tilitarianism, once regarded as the great inspiration of progressive social thought, also possesses a darker sinister side permitting the sacrifice of one individual to secure the greater happiness of others." H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 194 (1983).

purpose of benefiting others was morally wrong.[90] Kant, like Hegel, John Rawls, and Karl Marx,[91] argued that utilitarian attitudes were incompatible with a sense of moral justice. Kant wrote:

> Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else and can never be confused with the objects of the Law of things . . . . His innate personality [that is, his right as a person] protects him against such treatment . . . . He must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens.[92]

Thus, that punishment may improve society does not truly identify society's moral right to inflict punishment. There must also be a sense that the criminal deserves punishment.[93]

An example of utilitarian thought, and the problem identified by Kant, recently took place in my classroom. The State of Georgia enforces a law requiring doctors and teachers to report suspected child abuse. At least three teachers have been charged for failing to comply and face up to one year imprisonment. In one of those cases an investigation established that the child had not been abused, but charges remain against the teacher.[94]

90. *See* I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE *331-32; *see also* E. PINCOFFS, *supra* note 3, at 2-9 (discussing Kant's position).

91. *See* J. RAWLS, *supra* note 11; Rawls, *supra* note 2, at 5 ("The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not; and it is better irrespective of any of the consequences of punishing him."); Murphy, *supra* note 1, at 217-18 (quoting Karl Marx); E. PINCOFFS, *supra* note 3, at 9-11 (outlining Hegel's position).

92. I. KANT, *supra* note 90, at *331. Kant further wrote:

> Even if a civil society were to dissolve itself by common agreement of all its members . . . the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice.

Id. at *333.

93. If a judge were actually to follow a utilitarian theory of punishment, the judge might be required to punish a defendant who was widely believed to be guilty, even if the judge knew the defendant to be innocent. E. PINCOFFS, *supra* note 3, at 34 ("How, as a utilitarian, could he *fail* to punish a man guilty in the eyes of everyone but himself, if an example were needed?").

94. Brannigan, *Arrests Spark Furor Over the Reporting of Suspected Abuse*, Wall St. J., June 7, 1989, at B8, col. 3.

When I presented this case to my class, many students were aghast.[95] They did not believe that punishment would be appropriate in this case. One student, however, noted that if this teacher were punished, others would take note and abide by the law—a perfect example of the utilitarian viewpoint. Punishment will deter other would-be lawbreakers, and there will be less "crime" and a safer society in the future.[96] For the utilitarian, focused on deterring crime by having an impact on the group of people who might be prone to commit crimes in the future, punishment in this case could be justified.[97]

The problem, of course, is that pure utilitarian thought does not take moral culpability into account. This is what H.L.A. Hart called the "darker sinister side" of utilitarianism.[98] It permits "the sacrifice of one individual to secure the greater happiness of others."[99] As such, while the utilitarian does identify several beneficial consequences that may flow from punishment, utilitarianism does not ultimately provide a legitimate basis for society's right to inflict punishment on an individual.

B. The Retributive Theory of Punishment

The retributive theory of punishment is focused on the defendant's act and moral culpability. As such, it has been argued that this theory recognizes the value of the person and the person's place in society.[100] Punishment is not justified because society will be improved, but because the criminal, "as a free agent, has exercised *his* choice in such a way as to make the

95. Some of the negative reaction can be attributed to the law itself, which, by imposing a duty to report, raises some "big brother" type concerns. *See id.*

96. *See* E. PINCOFFS, *supra* note 3, at 33 ("sometimes the best way to minimize mischief would be to punish an innocent man").

97. Would punishment be justified under a retributive theory of punishment? If the law requiring teachers to report suspected abuse is just, and if the teacher had suspicions, then a report should have been made, regardless of whether the suspicions later turned out to be ill founded. As such, punishment might be justified under that school of thought as well.

98. H.L.A. HART, *supra* note 89, at 194; *see also* Lipkin, *supra* note 34, at 32 ("[D]eterrence theory . . . justifies punishment for bringing about the socially desirable goals of stability and order irrespective of its effect on the offender.").

99. H.L.A. HART, *supra* note 89, at 194.

100. Efforts have been made to reconcile the retributive school and the utilitarian school by focusing on the different concerns to which they are addressed. Thus, it may be argued that the reason a society has any punishment is for the utilitarian purpose of bettering that society, but the reason any individual receives punishment is because of that person's moral culpability. Rawls, *supra* note 2, at 5-7; *see also* E. PINCOFFS, *supra* note 3, at 68-71 (discussing the factors a sentencing judge must take into consideration).

punishment a necessary consequence."[101] As such it may be said that punishment is "the systematic *moral* response to wrongdoing . . . ."[102] Guilt is both a necessary and a sufficient reason for inflicting punishment.[103] Therefore, it is argued, the integrity of the person is acknowledged.[104] If a person is treated merely as an instrument rather than as the author of his or her actions, then the person is denied the role of creator and loses the satisfaction of personal achievement.[105] As such, it has been argued that there is a fundamental *right* to punishment, which stems from the "fundamental human right to be treated as a person . . . ."[106]

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

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

103. J. MURPHY, KANT: THE PHILOSOPHY OF RIGHT 141 (1970). Similarly, F.H. Bradley wrote:

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

F.H. BRADLEY, ETHICAL STUDIES 26-27 (2d ed. 1927), *quoted in* E. PINCOFFS, *supra* note 3, at 13-14.

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

K. Marx, *Capital Punishment*, N.Y. Daily Tribune, Feb. 18, 1853, *reprinted in* Murphy, *supra* note 1, at 217-18.

105. PHILOSOPHY OF LAW, *supra* note 8, at 523.

106. Morris, *Persons and Punishment*, THE MONIST, Oct. 1968, *reprinted in* PHILOSOPHY OF LAW, *supra* note 8, at 582. Morris argues that "a right to punishment . . . derives from a fundamental human right to be treated as a person . . . [and] denial of this right implies the denial of all moral rights and duties," hence the denial of the right to be human. *Id.*; *see also* M. SCHELER, FORMALISM IN ETHICS AND NON-FORMAL ETHICS OF VALUES 366 (M. Frings & R. Funk trans. 1973) (moral right to punishment); Gardner, *The Right to be Punished—A Suggested Constitutional Theory*, 33 RUTGERS L. REV. 838 (1981) (presenting the right to punishment as a constitutional right). *But see* Deigh, *On the Right to Be Punished: Some Doubts*, 94 ETHICS 191 (1984).

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

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

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

108. *Cf. supra* note 89. Some commentators feel that there may be too much excess baggage associated with the notion of retribution, thus, they have developed a theory of punishment based on "desert." *E.g.*, A. VON HIRSCH, *supra* note 49, at 69-73; Weinreb, *supra* note 101. Proponents of the desert model argue that it focuses on the culpability of the offender, while retributive theory focuses on the harm caused. *See* Weinreb, *supra* note 101, at 68-70. Traditional retributive theory, however, has long been focused on culpability, not harm caused. *See supra* text accompanying notes 100-06; *see also* THE KORAN 72-73 (1984) (G. Sale trans. 1734) (prescribing more severe retributive punishments for those who kill knowingly than for those who kill by mistake).

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

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

111. In juvenile courts, where rehabilitation is more clearly a goal than it is in regular criminal courts, sentences are often indeterminate. *Inside Chicago's Juvenile Courts*,

would indicate that the murderer should serve a shorter sentence than the pickpocket.[112] A similar argument could be made under the incapacitation theory (a frequent pickpocket might be a greater risk to society than a one-time murderer). A sense of justice or proportionality, which stems from an idea of retribution, however, indicates that the murderer should receive the longer sentence.[113] Thus, the retributive theory would not justify giving a light sentence to a murderer, even if the murderer were quickly rehabilitated, just as it would not tolerate a severe sentence imposed on a pickpocket, even if there had been no noticeable rehabilitation of the offender.[114]

Retribution has been defended by looking at "the criminal act as the source of the offender's obligation to suffer punishment."[115] This idea is that "the offender is duty-bound to suffer punishment, [because] his [*intentional*] offense [has] create[d] an imbalance of benefits and burdens in the society as a whole."[116] Because the defendant's act was intentional, punishment is justified.[117] This stems from application of a type of social contract wherein each party agrees to rules for the good of all, and each agrees to abide by the rules or suffer the consequences.[118] Ide-

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

112. *See generally* H. PACKER, *supra* note 43, at 51; J. WILSON, *supra* note 11, at 191.

113. *See* E. PINCOFFS, *supra* note 3, at 4-9.

114. Schedler, *Retributive Punishment and the Fall of Satan*, 30 AM. J. JURIS. 137, 137 (1985) (under "the retributive [theory] . . . the severity of punishment should always accord with one's culpability . . ."). Finding an exact correlation between the crime and an appropriate punishment, however, may be quite difficult. M. PLOSCOWE, *supra* note 34, at 291. *See generally* Davis, *How to Make the Punishment Fit the Crime*, 93 ETHICS 726 (1983).

115. G. FLETCHER, *supra* note 7, at 417; *see also* M. PLOSCOWE, *supra* note 34, at 290 (noting "a long line of philosophers who justify punishment on the theory that he who does evil must suffer evil").

116. G. FLETCHER, *supra* note 7, at 417 (emphasis added) (citing H. MORRIS, ON GUILT AND INNOCENCE 34-36 (1976)); *see also* E. PINCOFFS, *supra* note 3, at 5-6; Murphy, *supra* note 1, at 229-30. Some commentators view retribution as a way of making the criminal repay the victim. *See, e.g.*, Sterba, *Is There a Rationale for Punishment?*, 29 AM. J. JURIS. 29, 33 (1984). However, this is moving away from a rationale for punishment, towards a rationale for a civil remedy. *See supra* notes 4-10 and accompanying text.

117. It is this concern for intent which renders *mens rea* so important in criminal law. *See* Rychlak & Rychlak, *supra* note 36, at 5-6.

118. Murphy, *supra* note 1, at 226 (quoting I. KANT, CONCERNING THE COMMON SAYING: THIS MAY BE TRUE IN THEORY BUT DOES NOT APPLY IN PRACTICE (1793)); *see also* A. VON HIRSCH, *supra* note 49, at 47 (identifying deserved punishment as being based on fair dealing among free individuals). *See generally supra* note 11.

ally, the retributivist would want even the defendant to acknowledge that punishment is justified.[119] In essence, the offender truly must pay a contractual debt to society.[120]

A related theory holds that retribution is associated with an idea of "fair distribution."[121] Thus, it may be argued that the criminal, having been unfairly benefited by illegal activity, must repay that which has been received, and restore those who have been harmed.[122] There is a certain appeal to this approach. It seems to avoid many of the moral judgments that perplex those in search of a retributive justification for punishment, but it does not answer the question of society's right to punish. This rationale merely justifies the imposition of civil remedies;[123] it does not justify the further imposition of a punishment.[124] As such, this approach to the retributive theory completely fails to justify the infliction of "punishment" on a wrongdoer.

Although the retributivist can set forth legitimate grounds for the punishment of a specific individual, retribution does not provide an adequate basis for society's moral right to inflict that punishment. If, as the retributive theory seems to indicate, moral culpability is the justification for inflicting punishment, criminal laws must be equated with morality. Yet not all crimes are immoral, and not all immoral acts are criminal. Someone

119. *See* E. PINCOFFS, *supra* note 3, at 7 ("Kant wants the justification of punishment to be such that the criminal 'who could get no glimpse of kindness behind this harshness' would have to admit that punishment is warranted."); *see also* Lipkin, *supra* note 34, at 41-42 (identifying the possibility of a wrongdoer who may not want to be punished, but who would recognize that it is a necessary consequence of the bad act). Followers of the Krishna faith are instructed that a "responsible devotee" should want to receive punishment for sins, so as to prevent the devotee from sinning again and to prevent others from suffering the punishment. SRIMAD BHAGAVATAM, *supra* note 32, at 353.

120. Murphy, *supra* note 1, at 228-29 (quoting I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (1797)).

121. *See* Sterba, *supra* note 116, at 33-36; Lipkin, *supra* note 34, at 29 n.33 ("When an offender violates the law, she disturbs the balance by receiving the benefits while avoiding the burdens. Punishment restores the level of burdens . . . ."); M. PLOSCOWE, *supra* note 34, at 290 (Punishment . . . is the atonement for the wrong committed by the crime.").

122. This is, of course, not truly possible in cases like rape or murder. Moreover, merely correcting a wrong (for example, by returning a stolen item to its rightful owner) may make the victim whole, but it does not erase the "profound effect" that the crime has had on the wrongdoer. Lipkin, *supra* note 34, at 47-48. Nor does it erase the feelings of fear and discomfort that burden the victims and those who know of the crime. *See* S. SAMENOW, *supra* note 46, at 3-4 (identifying a state where the law-abiding public is fearful of venturing outside); *see also* Ferguson, *Fear, Anger and Revenge*, NEWSWEEK, Jan. 15, 1990, at 9 (a "gentle, giving person" who has been victimized once too often).

123. *See supra* notes 4-10 and accompanying text.

124. *See supra* note 7 and accompanying text.

who violates the speed limit on an interstate highway is not morally bad, but society will make the speeder pay a fine. Moreover, not all immoral acts will be punished by society. When former President Jimmy Carter made his famous confession in *Playboy* magazine, "I've committed adultery in my heart," he was acknowledging that he had sinned.[125] Morality is concerned with intent, regardless of whether it is accompanied by an act.[126] Crime, however, requires that intent be accompanied by a wrongful act.[127] If criminal punishment were to be predicated on intent unaccompanied by action, then there could be no free thought. Thus, the law has always required more than a mere moral shortcoming to justify punishment.[128]

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

Retribution has been widely criticized, because it seems to be punishment for its own sake, without any goal of bettering society.[129] The Old Testament approach of "an eye for an eye, a tooth for a tooth," may seem barbaric in today's society.[130] If the focus is put on pleasure that people receive from watching the criminal suffer, retribution can be seen as hedonistic.[131] This, of course, violates our sense of justice and opens retribution to charges of mere vindictiveness.[132] However, even if one could defend retribution against these charges, retribution still does not identify society's right to inflict punishment, only the wrongdoer's obligation to suffer it.

VI. DENUNCIATION THEORY

The denunciation theory of punishment says that those who disobey criminal laws should be held up to the rest of society and denounced as violators of the rules that define what the society represents.[133] This theory holds that society must register its disapproval of wrongful acts and reaffirm the values violated by these acts. Punishment declares that this society will not tolerate this conduct, regardless of any future deterrent effect (or lack thereof). Viewed this way, denunciation seems to have much in common with the retributive theory of punishment; however,

125. *Playboy Interview: Jimmy Carter*, 23 PLAYBOY 63, 86 (1976).

126. *See Matthew* 5:27-28 (New English Bible) ("You have learned that they were told, 'Do not commit adultery.' But what I tell you is this: If a man looks on a woman with a lustful eye, he has already committed adultery with her in his heart."). Comedian George Carlin has a hilarious routine on his album *Class Clown* in which he discusses how it is a sin to "wanna" sin. G. Carlin, "The Confessional," *Class Clown* (Little David Records 1972).

127. Rychlak & Rychlak, *supra* note 36, at 4-5. There are, of course, certain circumstances under which criminal liability attaches for failure to act when there is an obligation to act. *See, e.g.*, MODEL PENAL CODE § 2.01(3) (1985) (criminal liability for omissions).

128. *See* Proctor v. State, 15 Okla. Crim. 338, 343, 176 P. 771, 772 (Okla. Crim. App. 1918) (mere intent, without action, is insufficient to establish criminal liability); *cf.* H. PACKER, *supra* note 43, at 73-75 (discussing the offense of imagining the king's death).

129. *See* Murphy, *supra* note 1, at 227 (retribution has been criticized as "primitive, unenlightened and barbaric"); E. PINCOFFS, *supra* note 3, at 43 ("Retributivists are often . . . accused of wishing to have revenge upon the criminal, and deceiving themselves and others by disguising this wish as a demand of justice."); Lipkin, *supra* note 34, at 29 n.34 ("Retributive theories often are criticized for being primitive, barbaric, or a mere rationalization for vengeance."). However, the past twenty years has brought a "rebirth" to the retributive theories. *See* Lipkin, *supra* note 34, at 28 n.31 and authority cited therein.

130. *Leviticus* 24:17-22 (New English Bible); *Deuteronomy* 19:21 (New English Bible); *see also Deuteronomy* 21:18-21 (New English Bible) ("when a man has a son who is disobedient and out of control, and will not obey the voice of his father or the voice of his mother . . . all the men of the town shall stone him to death"); THE KORAN, *supra* note 108, at 72 ("retaliation is ordained you for the slain: the free *shall die* for the free, and the servant for the servant, and a woman for a woman")(emphasis in original); *cf.* THE WISDOM OF CONFUCIUS 60 (Peter Pauper Press 1963) (when asked how a son should act when his father has been killed, Confucius responded, " 'He should sleep on straw with his shield for a pillow; he should not take office; he must be determined not to live with the slayer under the same heaven. If he meet him in the market-place or in the court, he should not go back for his weapon, but fight him.' "). *But see* Coker v. Georgia, 433 U.S. 584, 620 (1977) (Burger, J., dissenting) ("As a matter of constitutional principle, [the test to determine severity of punishment] cannot have the primitive simplicity of 'life for life, eye for eye, tooth for tooth.' "); Regina v. Sargeant, 60 Crim. App. 74, 77 (1974) ("The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law.").

131. PHILOSOPHY OF LAW, *supra* note 8, at 520; *see also* E. PINCOFFS, *supra* note 3, at 25 n.1 ("since in our own time there are few defenders of retributivism, the position is most often referred to by writers who are opposed to it").

132. Although the concept of punishment for the sake of vindictiveness is more often associated with the retributive theory of punishment, the utilitarian school is not free from charges of cruelty. *See supra* text accompanying notes 96-99.

133. Emile Durkheim is usually credited with having first advanced the denunciation theory of punishment. *See* E. DURKHEIM, ON THE DIVISION OF LABOR IN SOCIETY 108-09 (G. Simpson trans. 1933); *see also* DURKHEIM AND THE LAW 61-63 (S. Lukes & A. Scull eds. 1983). Many commentators have noted the denunciatory or expressive function of punishment. *See, e.g.*, Lipkin, *supra* note 34, at 28 and authority cited therein.

denunciation does not look only to the wrongdoer's moral culpability. It also looks to certain utilitarian aims or benefits which flow from the infliction of punishment.[134]

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

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

A. The Focus of the Denunciation Theory

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

Utilitarian theories are focused on shaping the behavior of convicted criminals, or persons who might be tempted to engage

134. Denunciation, when identified by commentators, is often grouped with the retributive theory of punishment. *See, e.g.*, S. KADISH, S. SCHULHOFER & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 187-91 (4th ed. 1983) (classifying a passage from Durkheim under the heading "Retribution and Related Themes"). However, denunciation could equally be called utilitarian. *See* J. DRESSLER, *supra* note 36, at 8 (identifying denunciation as a hybrid of utilitarianism and retribution). Although they are similar in some respects, denunciation is clearly distinct from retribution as a theory.

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

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

137. *See supra* notes 15-18 and accompanying text.

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

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

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

138. *See, e.g.*, R. CROSS & A. ASHWORTH, THE ENGLISH SENTENCING SYSTEM 121 (3d ed. 1981) ("the aim of the penal system is to reduce crime by making as many people as possible want to obey the criminal law"). Edmund Pincoffs has enunciated a more extreme position:

> Punishment is *not* the most effective possible method for discouraging crime. Probably the most effective way to discourage—better, abolish—crime is to annihilate the human race. Or if this seems a little extreme, no doubt we could go a long way toward the elimination of crime by the use of drugs: the tranquilization of the human race.

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

139. It has been argued that retribution can be carried out in private, as long as punishment is actually inflicted, but that denunciation requires that punishment be announced to the public and that the public think that punishment is inflicted, regardless of whether it actually is carried out. N. WALKER, PUNISHMENT, DANGER AND STIGMA: THE MORALITY OF CRIMINAL JUSTICE 28-30 (1980). This tends to trivialize the denunciation theory. The same could be said about any deterrent effect that a utilitarian might identify. Thus, it could be argued that as long as it is thought that punishment has been inflicted, the full deterrent effect should be realized. *See* van den Haag, *Punishment as a Device for Controlling the Crime Rate*, 33 RUTGERS L. REV. 706, 707 (1981); *see also supra* note 74. In order for either deterrence or denunciation to be truly effective, punishment must be carried out. Lipkin, *supra* note 34, at 31, n.38. Anything less would amount to a public violation of legal justice. I. KANT, *supra* note 90, at *331-32.

some other form of crime),[140] the neighbor gains an unfair advantage. As long as the neighbor's cheating goes undetected, John exists in blissful ignorance. When, however, John discovers the neighbor's cheating, he can rightfully feel angered. If society puts the cheating to an end and punishes the neighbor, John should be satisfied that the system worked as it was intended. If, however, society discovers the cheating but does not punish the cheater, John can rightfully feel that society has failed him.

John (like all other members of the society) has agreed to abide by the society's criminal laws, and has turned over the role of judge and "punisher" to the collective entity. In exchange, society has promised that it will enforce those laws. Society, therefore, has an obligation to fulfill the role of judge and "punisher" and, because of the social contract, it has the right to do so. The denunciation theory of punishment recognizes this obligation. It alone is focused on how punishment affects law-abiding society, as contrasted with how punishment affects potential lawbreakers.

The observation that denunciation is focused on the law-abiding public, while the other theories are focused on the lawbreakers and potential lawbreakers, might be challenged by a utilitarian. The utilitarian will counter that, while the direct effect of punishment may be on potential lawbreakers (in terms of discouraging or preventing them from committing crimes), the long-term effect is to provide a safe society for the law-abiders. Hence, the utilitarian would argue that other theories also are focused on the law-abiding public.[141] This argument, however, confuses a safer society with a satisfied society. To have a "satisfied" society, and not just a "safe" society, the public attitude about punishment, not just public concern for safety, must come into play.

Society is satisfied when wrongdoers are punished and when those who have not done wrong are not punished. As with the case of the Georgia teacher,[142] a utilitarian would see that punishment could lead to a safer society and thereby justify punishment. It may well be, however, that law-abiding members of society would not want to see punishment inflicted in this

140. A similar argument could be structured using a different crime for the example.

141. *See* Sterba, *supra* note 116, at 35 (deterrence theory is "aim[ed] at the well being of law-abiding members of a society").

142. *See supra* notes 94-97 and accompanying text.

case.[143] The utilitarian has focused on law-abiding society's interest in a safer environment, but has completely missed the concept of law-abiding society's interest in a just scheme of punishment. While it is completely proper to consider society's interest in decreasing crime, that interest alone is insufficient to justify punishment of a given individual.

Denunciation is often identified as being related to retribution because both theories have a requirement of moral culpability. Retribution requires punishment when the wrongdoer has violated society's rules—when he or she has committed bad acts. For that reason, it is sometimes said that retribution looks backward, to the crime.[144] The utilitarian theories, by contrast, look to how punishment will affect society in the future. Thus, utilitarians are said to look forward.[145] Denunciation is focused on society's attitude (after the crime has been committed—hence, in the future) as it looks back on the crime (in the past). Thus it is both forward looking and backward looking.[146] This accounts for its ability to identify not only the offender's obligation to suffer punishment, but also the society's right to inflict it.

B. The Effectiveness of the Denunciation Theory

Various justifications have been set forth for the denunciation theory of punishment. One is that declaring society's disapproval of this conduct will strengthen people's disapproval of it, thereby reducing its frequency.[147] This, of course, is closely analogous to the deterrence theory of punishment. Another justification is that denunciation promotes social cohesion.[148] Other commentators have declined to assign any future benefit to the punishment; they simply note the "immediate satisfaction

143. That was certainly the consensus of my students. I make no affirmation as to whether they reflect "laws abiding" society.

144. J. DRESSLER, *supra* note 36, at 6; A. VON HIRSCH, *supra* note 71, at 46 ("The focus on the past is critical.").

145. *See* A. VON HIRSCH, *supra* note 71, at 45-55; Lipkin, *supra* note 34, at 30 n.35 (noting that the deterrence theory of punishment is focused on the future and is aimed at reducing crime).

146. Because of this dual approach, it has been called a hybrid theory. J. DRESSLER, *supra* note 36, at 8.

147. W. LAFAVE & A. SCOTT, CRIMINAL LAW 25 (2d ed. 1986) (referring to punishment's educative effect).

148. This is the justification set forth by Durkheim. E. DURKHEIM, *supra* note 129, at 108-09 (punishment's "true function is to maintain social cohesion intact"). This, of course, assumes that social cohesion is a good thing. *See* N. WALKER, *supra* note 139, at 28.

[which is given] to people who know [of] and disapprove of the offense . . . ."[149] To evaluate the propriety of the theory adequately, however, we should first examine its effect in detail.

Does denunciation really affect the law-abiding majority? It is hard to apply a theory like this to a test. Certain observations, however, might indicate whether the theory holds water. Professor John Kaplan identified a couple of examples that suggest that there is a denunciation effect.[150] One took place during the period of the Vietnam war, on the Stanford University campus. At that time there was a pattern of disrupting classes by marching, yelling, and chanting about U.S. military involvement in Vietnam. Students who disrupted classes were brought before the university disciplinary board, convicted, and slapped on the wrists. One penalty Kaplan cited was suspension for the summer session. Thus, while the action was not condoned, everyone knew there was no real punishment. Finally, after several years of classroom disruptions, the disciplinary board decided to impose a true penalty. The board wrote an opinion explaining that universities are places to learn and that those who disrupt classes strike at the very heart of the education process. The protesters were suspended indefinitely and told "to reapply in two years so that it could be determined whether they were 'ready to live in a civilized community.' "[151]

The deterrence theory worked; classroom disruptions became less frequent. More interesting, however, was the reaction of those students who had been onlookers to the disruptions. The students in the disrupted classes had previously stood silently by while the protests took place. However, when a group of students organized a classroom protest after this punishment had been announced, "[t]o their—and the faculty's—enormous surprise, the students in the class stood up and hooted and yelled at them, 'Get the hell out of here! You don't belong here!' The disrupters left, literally in tears."[152]

As Professor Kaplan concluded, the denunciation theory worked as planned. The punishment reaffirmed the university's value that the classroom was a place for education and that classroom activities should not be interrupted. With their values

149. N. WALKER, *supra* note 139, at 29. This may open the theory to charges of mere vindictiveness. *See supra* note 132.

150. Kaplan, *Foreword* to LAW AND SOCIETY at xii-xvi (1983).

151. *Id.* at xiv.

152. *Id.* at xv.

reaffirmed, and confident now that society (the university) was enforcing the rules as they had been written, the previously silent students stood up and voiced their beliefs. Thus, enforcement of the criminal laws had an effect on the non-lawbreakers as well as those who might have been inclined to break society's rules.[153]

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

C. *The Role of the Public in Criminal Law Enforcement*

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

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

153. *Id.*

154. *See supra* notes 139-41 and accompanying text.

155. *See supra* notes 15-18 and accompanying text.

sentative in the courtroom)[156] may decide not to convict—even though the law has been technically violated.

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

VII. CONCLUSION

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

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

156. Rychlak & Rychlak, *supra* note 36, at 13.