
DETERRENCE V. PUNITIVE: WHAT SHOULD CRIMINAL JUSTICE FOCUS ON?

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ABSTRACT

The criminal justice system and its stakeholders have debated often regarding rationales behind punishment. While punishment may be perceived as the norm, decoding rationales behind them help justify the extent of punishment that the State may impose on an accused. Two of the most well-discussed rationales of punishment include the Deterrence theory and the Punitive or Retributive theory. Deterrence theory argues that the fear of punishment dissuades individuals from committing crimes, while retribution emphasizes moral responsibility, insisting that offenders must be punished in proportion to their wrongdoing, in a bid to fairly balance the distribution of burdens and benefits. This paper critically examines both theories, exploring their philosophical foundations, judicial interpretations, and practical applications within modern legal frameworks. This paper further examines the limitations of both theories through the Kramer Test, which evaluates punishments based on two principles, including the minimal invasion principle and humane treatment principle. The paper intends to showcase how tilting disproportionately on one theory alone tends to violate at least one or both prongs of the Kramer Test. Therefore, a justice system solely relying on either approach is inadequate. A balanced model is necessary, a model that incorporates the most effective aspects of both theories while more importantly prioritizing rehabilitation. Ultimately the goal of the criminal justice system should not be to merely punish offenders or deter potential offenders but also address the underlying causes of crime, offering opportunities for reformation and reintegration. Viewing offenders as individuals in need of intervention fosters a more humane, efficient approach to justice.

1. Introduction:

Humans are social animals who seek solace in interdependency. Society thrives only when individuals maintain harmony and unity amongst one another. A mutual respect for each other's rights helps preserve order in the society. The most successful civilizations in history were indicative of collective human efforts, devoted to progress in disciplines like science, philosophy, literature, architecture, arts, religion, law, commerce etc. that helped build communities around them. For growth and progress to sustain, individuals have to act in coherence towards one another. However, from the beginning of time, a minority of antisocial elements have existed, who have marred societal purity through their abhorrent actions, bringing themselves under the scrutiny of law enforcement agencies. The criminal justice system was developed over time to fulfil the role of addressing these antisocial elements and their reprehensible deeds, in accordance with public opinion and societal values. It was held justified as per collective moral conscience that these offenders be punished for their unlawful acts. The rationale for imposing these penalties lies in deterring future offenses, punishing immoral conduct, and ensuring an overall compliance with the law.¹ In the United Kingdom, the Criminal Justice Act of 2003 outlines several purposes of sentencing, including punishment, crime reduction, offender reform and rehabilitation, public protection, and reparations for victims.² These purposes collectively underscore the objectives of sentencing offenders. However, within this framework, two purposes often provoke debate between one another, namely the purpose of crime reduction which represents the deterrent theory and the purpose of punishing offenders which represents the punitive theory. While deterrence aims to prevent future crimes by instilling fear of penal consequences in potential offenders, retribution seeks to rectify the “wrongs” committed by the offenders with the enforcement of punishment. Deterrent theory argues that emphasizing punishment with the perspective of deterrence can lower crime rates by dissuading potential offenders through the threat of punishment. Conversely, the punitive approach asserts that punishment upholds justice by ensuring appropriate consequences for offenders, in a bid to seek vengeance. While deterrence focuses on preventing future crimes by instilling fear of consequences, retribution involves penalizing the offenders at hand for their actions. Hence, it is clear that deterrence tends to focus on the

¹ Thomas E. Hill, *Kant on Punishment: A Coherent Mix of Deterrence and Retribution?* 5 JAHRBUCH FÜR RECHT UND ETHIK / ANNUAL REVIEW OF LAW AND ETHICS 291 (1997), <https://www.jstor.org/stable/43593597>.

² Anup Surendranath, Neetika Vishwanath & Preeti Pratishruti Dash, *Penological Justifications as Sentencing Factors in Death Penalty Sentencing*, 6 JOURNAL OF NATIONAL LAW UNIVERSITY DELHI (2021).

society around and the upcoming future, a picture larger than just the offender. Retribution on the other hand is very offender-centric and seeks to make “right” the “wrong” committed by him. Despite efforts to balance these justifications within the criminal justice system, conflicts between deterrence and retribution have always persisted, prompting constant debates about where the focus of the criminal justice system should lie. This paper aims to explore both theories in detail and assess their individual effectiveness and intended purpose, aiming to determine which theory is more suitable, efficient and viable in its application in the real world.

2. Punitive or Retributive theory:

The first theory regarding the imposition of punishment upon an offender is known as the punitive or the retributive approach. This theory originates from the principle of *lex talionis*, which posits that a criminal deserves the same harm inflicted upon them as the harm they caused the victims through their offense.³ It is the very nature of their wrongdoing that justifies the imposition of punishment upon them. The punitive approach is grounded on the belief that an individual can exercise free will at all times.⁴ It assumes that each person is a rational agent and is capable of making decisions independently of external influences and internal disturbances. Since it assumes that individuals always act freely, the punitive approach presupposes that every decision is made without external coercion or internal compulsion. Consequently, individuals are deemed solely “responsible” when making a choice between lawful and unlawful behaviour. When an individual then knowingly engages in unlawful behaviour, they are considered “deserving” of punishment.⁵ Philosopher Georg Hegel, like Aristotle, argued that humans are free agents perpetually capable of discerning right from wrong. Since these decisions have repercussions and are made willingly, the individuals responsible for committing said offences must be held accountable for their actions.⁶ Therefore, the punitive approach can be viewed as form of seeking law-sanctioned vengeance. The proportion of the punishment to be imposed upon the offenders is gauged by the severity of the crime, including factors such as its heinousness and the harm inflicted on the victim.⁷ These punishments are justified not only as a necessary evil in the eyes of the criminal justice system

³ Michael Davis, *A sound retributive argument for the death penalty*, 21 CRIMINAL JUSTICE ETHICS 22 (2002).

⁴ Claire Finkelstein, *Death and retribution*, 21 CRIMINAL JUSTICE ETHICS 12 (2002).

⁵ Hung-En Sung, *Differential Impact of Deterrence vs. Rehabilitation as Drug Interventions on Recidivism After 36 Months*, 37 JOURNAL OF OFFENDER REHABILITATION 95 (2003).

⁶ M. A. Pauley, *The Jurisprudence of Crime and Punishment from Plato to Hegel*, 39 THE AMERICAN JOURNAL OF JURISPRUDENCE 97 (1994).

⁷ *Supra Note* at 2.

but also as intrinsically “good” because they mete out to offenders the same harm they caused to their victims.⁸ Without repercussions for wrongdoing, society would descend into chaos. If miscreants are not punished for their actions, there would be no fear.⁹ This is not a favourable state to live in, since those who have ill-intent towards others can get away with unlawful conduct.¹⁰ For instance, the imposition of the death penalty for murder is seen as a logical consequence in response to the offenders' inner wickedness. On the other hand, life imprisonment is deemed insufficient for punishing murderers as the punishment would fall short of the “inherent wickedness” that murders are deemed to possess. Only death can cure them of their inherent evilness.¹¹

Plato advocated for the punitive theory, saying that individuals who commit murder deserve the punishment of death due to the "shame" associated with such heinous acts. According to him, their inner "evilness" justifies for the application of an equivalent punishment. Socrates posited that it is a greater injustice for guilty individuals to escape punishment than to be rightfully punished. This brings out their intention of imposing punishment upon offenders. He argued that the overall deservedness of punishment outweighs the inherent cruelty of inflicting suffering upon offenders through punitive measures. Immanuel Kant shared similar sentiments, asserting that a murderer "must die" as only the death penalty can establish parity between the crime and its consequences, aligning the severity of punishment with the gravity of the offense.¹² This perspective elucidates the primary purpose of punishment, which is to restore a sense of fairness and balance. Punishment aims to rectify or counteract the harm caused by a crime, essentially "righting the wrong" in order to nullify the negative repercussions. According to Hegel, this process reinstates a state of equality between crime and punishment.¹³ H. L. A. Hart's argument in support of the punitive theory, centres on the principle of distribution, emphasizing that a fair distribution of benefits and burdens is crucial for maintaining societal equilibrium, by ensuring that everyone gets what they deserve. By choosing to commit a crime voluntarily, an offender forfeits their right to

⁸ John Danaher, *Kramer's Purgative Rationale for Capital Punishment: A Critique*, 9 CRIMINAL LAW AND PHILOSOPHY 225 (2013).

⁹ H. L. A. Hart, *The Presidential Address: I—Prolegomenon to the Principles of Punishment*, 60 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY (1960).

¹⁰ Rob White, *Community Corrections and Restorative Justice*, 16 CURRENT ISSUES IN CRIMINAL JUSTICE 42 (2004).

¹¹ *Supra Note* at 1.

¹² B. Sharon Byrd, *Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution*, 8 LAW AND PHILOSOPHY 151 (1989), <https://www.jstor.org/stable/3504694>.

¹³ *Supra Note* at 6.

avoid suffering consequences and then comes under the class of peoples who can be punished. Their actions disrupt the equitable distribution of benefits and burdens within society. They gain unlawful benefits in the form of pecuniary means, satisfaction of committing the offence, freedom etc. Thus, by imposing punishment, the unfair benefits gained by the offender are revoked, and burden is placed, restoring a balanced state that existed prior to the offense.¹⁴

One of the limitations of the retributive theory lies in the impracticality and moral unacceptability of inflicting exactly identical punishment upon an offender as the harm caused by him. A strict adherence to the principle of *lex talionis*, would rationalize subjecting rape convicts to rape as a form of retribution. However, this is an unacceptable form of punishment in a society that considers rape as one of the most immoral acts possible. Rather than seeking revenge or vengeance, the retributive aspect of the criminal justice system should aim for a morally permissible punishment, which is closest in kind to the offense committed, known as the moral equivalence aspect of *lex talionis*. Besides the characteristic of a challenging implementation, the punitive or retributive theory has faced criticism for being an outdated rationale for punishment. Primarily because it lacks utility for a broader purpose and appears as a purely sadistic method of solely inflicting suffering on criminals. The punitive approach fails to draw a distinction between the offender and their offense, reducing their identity to only the crime they have committed, in absolute disregard of their history and context. Overlooking of significant causal factors such as socio-economic background, aggravating circumstances, or mitigating factors exposes the superficiality of this justification for punishment. While punishing criminals who disrupt societal peace is imperative, it cannot be the sole focus of the justice system, at least not the central focus of it. Marchese Beccaria rejected the retributive approach to criminal justice arguing that punishment should not be about tormenting or afflicting a sensitive being. He posited that the purpose of punishment is to prevent offenders from causing further harm and to deter others from committing similar acts, showcasing his preference towards deterrence.¹⁵

3. Deterrence theory:

The theory of deterrence operates on the premise of imposing policies or practices that dissuade rational individuals from engaging in criminal activities. A criminal justice system

¹⁴ Richard W. Burgh, *Do the Guilty Deserve Punishment?* 79 THE JOURNAL OF PHILOSOPHY 193 (1982).

¹⁵ *Supra Note* at 6.

that lacks any deterrence mechanism is swiftly deemed ineffective and purposeless, as it fails to contribute meaningfully to the broader societal framework of ensuring safety and security for all.¹⁶ Thus, the rationale behind deterrence justifies the imposition of punishments if they effectively deter criminal behaviour in people.¹⁷ The primary function and justification of punishment under this theory is to dissuade potential lawbreakers from violating laws. The consistent, severe, publicly announced imposition of negative consequences for unlawful behaviour serves the purpose of deterring offenders from repeating the same acts in the form of specific deterrence or deterring others from committing similar acts in the form of general deterrence.¹⁸ From a utilitarian perspective, punishment is justified under the deterrence theory, when its beneficial outcomes outweigh the harm of intentionally causing suffering to individuals. Attaching punishment to legal rules is crucial in order to ensure compliance with those rules, for it is the fear of repercussions in the form of punishment that discourages potential offenders from engaging in unlawful actions. By inflicting punishment on offenders, the deterrent theory aspires on achieving a state of affairs with fewer law violations and, consequently, reduced overall suffering in society. The theory justifies the abrogation of an offender's right to avoid suffering on the basis that it upholds the rights of a larger population to live free from harm.¹⁹ Effective deterrence therefore requires that the punishments be swift, certain, and severe enough to dissuade both the current offender and potential future offenders from committing similar acts as they witness the fate of those engaging in unlawful conduct. The exchange between Protagoras and Socrates illustrates their views that punishment should not be administered solely for the sake of the crime committed but also for the sake of shaping future societal behaviour.²⁰ Socrates argues that a deterrent penalty serves as a "beneficial" measure because it instils discipline in society, inspiring respect and fear for the criminal justice system.²¹ The deterrent theory serves as a conscious reminder to society that undue leniency and insufficient sentences can undermine justice and fail to ensure that such crimes would not be repeated again.²² Hence, implementing deterrent punishments is essential for controlling and reducing socially harmful behaviours, eventually contributing to a safe and peaceful

¹⁶ *Supra Note* at 3.

¹⁷ *Supra Note* at 8.

¹⁸ *Supra Note* at 1.

¹⁹ *Supra Note* at 14.

²⁰ *Supra Note* at 6.

²¹ *Supra Note* at 5.

²² *Supra Note* at 2.

society.²³

In May 1980, a Constitution Bench of the Supreme Court, in the case of *Bachan Singh v. State of Punjab*²⁴, affirmed the constitutionality of the death penalty. The Court dismissed arguments questioning the efficacy of the death penalty as a deterrent, pointing out that in many countries including India, a significant portion of the population gets deterred from committing heinous crimes due to the existence of the death penalty as a punishment and as a stronger deterrent than life imprisonment. While acknowledging the absence of conclusive evidence proving the death penalty's effectiveness as a deterrent, the Court noted that since there is absence of evidence to the contrary, it leans towards the deterrence theory as a justification for the death penalty. The Court emphasized the necessity of imposing stringent punishments in order to instil fear of the law and deter the commission of such crimes in the future by anyone.²⁵ Thomas Hobbes argued that an act, practice or policy implemented by the State, lacking a deterrent effect whether specific or general, does not meet the criteria for punishment. He believed that the purpose of punishment is not to seek vengeance but rather to compel obedience to the law. Hobbes viewed the justice system as a means to focus on the potential future benefits through the deterrence approach rather than dwelling on making right the past wrongs through the retribution approach. This perspective resonates with Jeremy Bentham's views, who prioritized rehabilitation and deterrence as the primary objectives of punishment. This underscores that the fundamental purpose of punishment is to deter potential criminals, instead of inflicting offenders.²⁶

One of the limitations of the deterrent theory is its tendency to justify any degree of punishment as long as it generates a greater marginal deterrent effect than other options. Proponents of the death penalty argue that since death creates a stronger deterrent effect compared to alternative punishments, the use of death penalty can be justified for serving the broader consequentialist goal.²⁷ Death penalty carries multiple doubts such as violation of one's right to life that weaken its strength as a form of punishment, however the deterrent theory assesses the effectiveness of the death penalty only from a singular perspective. But this rationale would justify any extreme and severe punishments, regardless of how oppressive they

²³ *Supra Note* at 5.

²⁴ *Bachan Singh v. State of Punjab*, (1982)3SCC24.

²⁵ *Supra Note* at 2.

²⁶ *Supra Note* at 6.

²⁷ *Supra Note* at 8.

may be, as long as they deter violations of the law effectively. For instance, harsh penalties might be deemed acceptable for minor offenses if they prove successful in dissuading most potential offenders, exceeding the morally permissible limit of punishment.²⁸ Another critique of the deterrence theory is the challenge in assessing the actual deterrent impact of the specific punishments. Quantifying the direct deterrent effect of punishments on criminals is difficult, as is determining whether increasing the severity of punishment would lead to a measurable decrease in the targeted crimes. There is a lack of substantial evidence to support the notion that harsher punishments, such as the death penalty, significantly enhance deterrence as opposed to life imprisonment. Additionally, several fallacies accompany the deterrence theory, including the rationality fallacy and the knowledge fallacy. The rationality fallacy questions the assumption that criminals always act after undergoing a rational decision-making process, often overlooking the role of external stimuli. On the other hand, the knowledge fallacy raises concerns about how much the public understands about the potential punishments and its consequences when committing crimes. These arguments collectively weaken the deterrence approach, highlighting its failure of making the process offender centric.²⁹

4. The Kramer Test:

Matthew Kramer highlights that in addition to the individual shortcomings of each theory, both the deterrence and retributive rationales fail to meet the standards of the Minimal Invasion Principle and the Humane Treatment Principle. This first principle asserts that a policy or practice endorsed by the state is justified only if it represents the least intrusive method of achieving a morally justifiable objective. Consequently, practices such as prolonged torture, burning at the stake, or executing close relatives of convicts are deemed unacceptable under this principle due to their extreme invasiveness and nature of violating human dignity. Kramer delineates dignity as encompassing three key elements, namely, the capacity to experience intense pain, the ability to derive positive experiences, and the status of being a rational agent capable of setting and pursuing complex goals. Any approach that leans excessively towards either deterrence or retribution risks infringing upon an individual's dignity across these three dimensions. Moreover, it is essential for punishments to adhere to the Humane Treatment Principle, meaning that punishments should not only serve to inflict pain but also maintain a humane standard. Under a deterrence-based justification, there is no inherent upper limit on the

²⁸ *Supra Note* at 1.

²⁹ *Supra Note* at 2.

types of punishments that could be deemed acceptable, as long as they were empirically proven to have a greater deterrent effect. Kramer uses the example of boiling individuals in oil versus administering lethal injections to illustrate this point. Similarly, a retributivist perspective that emphasizes equality and fittingness in punishment, may lead to the endorsement of inhumane practices such as sadistic torture, rape, or murder of the offender if they subjected their victims to similar circumstances. Hence, a system solely based on either on deterrence or retribution would fail to meet both prongs of the Kramer test, which stipulates that a punishment is morally acceptable only if it represents the most minimally invasive measure and qualifies under the humane treatment principle, into order to achieve a desirable end.³⁰

5. Conclusion:

The thorough analysis presented in the aforementioned paper underscores the inherent risks associated with the criminal justice system's exclusive focus on either punitive or deterrent theories of punishment. Consequently, what is required on a global scale is a collection of the most effective aspects from both theories. This approach would facilitate maintaining equilibrium rather than leaning excessively towards one ideology. It is imperative to develop practices that not only hold offenders accountable but also effectively deter others from committing similar offenses. Achieving the right balance between deterrence and retribution hinges on various factors, including the nature of the crime, the intent and circumstances of the offender, and prevailing societal values. Furthermore, there is a pressing need to prioritize reformation and rehabilitation initiatives. Treating offenders solely as embodiments of "evil" that require purification or as mere examples of deterrence in order to dissuade others is ineffective and unfair. Adopting a compassionate view of offenders as individuals in need of help, introduces a more empathetic and humane dimension to the justice system. It helps the system to develop punishments that abide by the Kramer test, of being humane and minimally invasive. Often, offenders engage in criminal acts due to unresolved personal issues. A society committed to aiding such individuals in distress is likely to yield greater success in reducing crime rates compared to one that perceives them as burdens. In essence, offenders should be regarded akin to patients under intensive care of a hospital, leading to recognition of the fact that what they need is help and not hate.

³⁰ *Supra Note* at 8.