Crime and the Right to Punish: An American Dilemma

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Introduction

“Anyone who maims another shall suffer the same injury in return; fracture for fracture, eye for eye, tooth for tooth; the injury inflicted is the injury to be suffered.”¹ This famous passage from the Hebrew bible is generally associated with the creation of the principle of retribution. However, anthropologists have suggested that the first written law codes introducing retribution were actually produced in Babylonia (modern day Iraq) between 1870-1750BCE. Known as the Hammurabi, these law codes were more comprehensive and organized than Biblical Law.² As the Hammurabi was codified over 4000 years ago, modern legal systems have deviated from its principles to develop arbitration between criminals and victims enabling the use of rehabilitation programs. Unfortunately, in the United States, rehabilitation programs have yet to drastically reduce recidivism and as incarceration rates continue to soar, many are left questioning what the role prisons should be in modern society. This paper will present a rights based appeal to rehabilitation before presenting an argument for retributivism in order to determine whether or not these two seemingly different schools of thought are necessarily incompatible.

A Brief History of the American Prison System

Still in its infancy as a nation, America’s earliest prisons were modeled after the utilitarian influenced systems of Holland, Spain and England. However, in the 40 years after the American Revolution in 1776, Americans began to deviate from the prescribed models of Europe. In 1790 the Pennsylvania legislature commanded the construction of a cell house in Philadelphia’s Walnut Street Jail. The cell house was intended to house convicted felons in solitary confinement with the ultimate goal of reform not punishment.³ Based on the benevolence and humanitarian concerns of 18th century enlightenment philosophers such as Jeremy Bentham as well as the predominant Quaker religion, the cell house disposed of torture and public humiliation in favor of incarceration and rehabilitation. Rehabilitation in the cell house was typically achieved through hard labor as inmates were forced to labor not only as a means of reform but also to draw in income for the maintenance of the prison. Although communities complained that using inmate labor was drawing business away from

¹ Leviticus 24:19-20
² Roth 2002, p. 21
³ Ibid., p. 25
local merchants, the overall success of the Walnut Street Jail enabled it to become the standard for American prisons in the 1820’s and 1830’s.\footnote{Ibid., p. 25}

By the 1850’s prisons were established and well-functioning parts of the American legal system. Although the end of the Civil War in 1865 created an immense strain on the penal system, as the abolition of slavery and the return of war veterans to every corner of the land led to an immense increase in crime, the prison system prison remained an institution based on reform. As early as the 1870’s, prisons instituted programs featuring educational and vocational training. John Roberts writes that: “the adult reformatory movement in the last quarter of the 19\textsuperscript{th} century also reflected a belief that certain classes of inmates could be redeemed and would benefit from separate housing and special rehabilitative programs.”\footnote{Roberts 2001, p. 8} Not surprisingly, even 30 years after the induction of these programs nearly all African-Americans were still excluded from participating.

Just as in the years after the 1865, America saw crime control become one of the nation’s most significant political and social issues in the 1920’s and 1930’s, as prisons quickly filled up with bootleggers, gangsters and public enemies. Led by FBI director J. Edgar Hoover the federal government became increasingly involved in crime fighting and prevention as evidenced by the 1929 Wickersham Commission which was created to investigate both the effectiveness of the criminal justice system and the prison system. In the following Wickersham Report in 1931, Hoover indicated that the “lawlessness” of America was linked to the failure of prisons to adequately rehabilitate their inmates.\footnote{Roth 2002, p. 25} In response to the report, the idea of individualized treatment became the new standard of incarceration. Prisons were now required to compile case histories on each inmate and present their findings to secondary committees that were to classify the inmates and place them in the proper rehabilitation programs.

By the 1960’s, this idea of individualized treatment had evolved into something called the medical model. The medical model acknowledged the treatment and rehabilitation of prisoners as a problem that would require the establishment of specialized academic fields. Sam Houston University, Southern Illinois University and the University of Florida were
among the first universities to offer programs in correctional issues and as a result many of the professions’ leaders in the 1970’s were educated at these three universities.\(^7\)

Unfortunately, it did not take long for the luster of the medical model to tarnish as prisons were forced to cope with increasingly more violent and disruptive offenders in the 1980’s and 1990’s. In a response to the increased numbers of inmates, work assignments were no longer required and rehabilitation was an option only available for those prisoners who wished to participate.

\(^7\) Roberts 2001, p. 6
CHAPTER TWO: REHABILITATION IN MODERN AMERICA

Introduction
In the previous chapter, I described the role that rehabilitation has historically had in the American prison system. While retributivism has long been a codified way of dealing with criminal behavior, rehabilitation has also proven itself to be of equal importance. However, it has yet to be said what constitutes rehabilitation and what philosophical arguments are used to justify its presence in the American penal system. In this chapter I will both define the term rehabilitation as well as construct three inmate rights based arguments in favor of its continued use.

What is rehabilitation?
A cursory examination of the term rehabilitation yields the synonyms: re-socialization and reform. The application of these terms indicates that rehabilitation seeks to alter in some way the behavioral instincts of those individuals who act against the accordance of societal norms. Robinson and Crow take the notion of rehabilitation one step further:

“…offender rehabilitation can imply not just behavioral change, but also a symbolic process whereby an individual is permitted to shed the negative label of ‘offender’ and be reinstated within the community after a period of exclusion or censure.”

It is of importance to note that rehabilitation in the sense Robinson and Crow intend it, refers unwaveringly to those individuals who have been convicted of a crime (action against the laws of society). Edgardo Rotman also took a similar tact as Robinson and Crow in his 1990 book Beyond Punishment: A New View on the Rehabilitation of Criminal Offenders. Rotman argued that the notion of rehabilitation should not be confined to merely returning offenders to a state of adequacy. The primary aim, he wrote, should be the social and psychological betterment of offenders upon their release from prison; the driving ideal being not just the improvement of society through the re-instatement of upstanding citizens but also the marketed decrease in recidivism. In effect, rehabilitation can be boiled down to the theory that a penal regime should set its sights on the treatment of offenders.

Two Models: Authoritarian and Liberty Centered
While a noble goal, many rehabilitation experts agree that in order to fulfill the aims of modern of rehabilitation, prisons must transform their iron bars and concrete walls into an environment conducive to self-improvement. However, this view is not universal. Proponents

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8 Robinson 2008, p. 2
of the authoritarian rehabilitation model maintain that punishment and rehabilitation can go hand in hand. The authoritarian model made popular in America in the 18th century, made rehabilitation programs an integral part of an inmate’s stay in prison. These programs were not the ones present in modern 21st century America and featured such intrusive treatments such as brainwashing, the use of prescription drugs as well as back breaking labor. Participation was mandatory and given the nature of incarceration, inmates were not at liberty to decline treatment. The authoritarian model essentially “deal[t] with the human being fundamentally as a set of reflexes,” meaning that prisons could mold their inmates as if balls of clay into well-functioning, agreeable members of society. While this model may well have been a way to combine punishment and rehabilitation, modern rehabilitation advocates have dismissed the authoritarian model as both barbaric and contrary to re-socialization goals.

Courtesy of new humanistic based theories of rehabilitation, the authoritarian model has been replaced in recent years by liberty centered rehabilitation programs and ultimately the liberty centered model. This model strives to change the public perception of offenders from that of a worthless miscreant to a human with future potential. The model’s supporters insist that an offender’s entire life be considered including his or her future as a means of determining proper program candidates. The fact that these programs are largely voluntary underlines the fundamental thinking behind the liberty centered model. This model as Rotman puts it “grants primacy to the actual human being rather than a metaphysical fixations…which long served to justify the oppressive intervention of the state.” Unlike its predecessor, the liberty centered model does not advocate coercion as means to motivate inmates to reform as it holds that no true transformation of an offender can be effected by outside agency or secondary parties such as participation in mandatory state programs. Therefore, meaningful change can only result from intelligent, willing participation in programs designed to enable the offender to actively interact with the negative social influences that caused him or her to offend in the first place. With this goal in mind, American prisons adhering to this model offer educational opportunities, vocational training, psychiatric treatment, post-release support and various other services to convicted criminals.

Inmate Rights and Autonomy

While I have suggested that authoritarian and liberty centered models are drastically dissimilar, there is an important underlying justification that weaves itself through both

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9 Rotman 1990, p. 8
10 Ibid., p. 8
models: the notion of inmate rights. Rotman claims that even more alarming than the archaic modes of rehabilitation used in the authoritarian model, was the “threat to individual autonomy.”¹¹ He further concludes that it was not until the recognition of the prisoner as a possessor of rights in the 1955 United Nations Minimum Rules for the Treatment of Prisoners mandate that the tension between rehabilitation and individual autonomy was resolved.

One could of course make an argument that there are varying degrees of autonomy and that in some instances it is beneficial to give up a portion of one’s autonomy to be granted greater autonomy later. While an interesting point, to avoid any confusion, for the purposes of this paper, autonomy will be strictly defined as a person’s ability to exercise self-determination and freedom from coercion. This may incite one further objection that needs to be addressed before moving on. If one is imprisoned, does that not constitute a degree of lost autonomy? This is a difficult objection to address as the nature of prison does indicate that an inmate’s autonomy has been altered. It seems that the best way of dealing with this objection is to accept it and re-define autonomy within the prison context. In order to formulate a working definition of autonomy for this paper, I will define it as: a person’s freedom from coercion once already within the bounds of prison. This definition is admittedly narrow in scope but I fear that any further discussion of the terminology will only needlessly cause confusion on a minor point so I will continue on with the proposed definition of autonomy.

Although Rotman suggests that there is a connection between rehabilitation and inmate autonomy, he unfortunately does not present a philosophical argument explaining on what grounds an inmate who has willfully violated a societal norm should be in possession of any rights at all. Indeed the retributivist would be quick to argue that an inmate forfeited his rights when he committed a crime. In fairness to Rotman, it is entirely possible that he takes for granted that his readers would agree with the proposition of inmate rights and thus does not agree that any justification need be presented. Even if this is the case, his assumption is still clearly not enough to justify the abolition of the authoritarian model. Therefore, I will attempt to lend support to his claim for inmate rights by appealing to a rather unorthodox argument based on the principle of human dignity.

¹¹ Ibid., p. 69
American philosopher Ronald Dworkin argued in his 1993 publication *Life’s Dominion* that human life has intrinsic value. While the purpose of Dworkin’s work was to stimulate discussion about abortion and euthanasia, it nonetheless has bearing on the case of inmate rights as it attempts to prove that humans are inherently valuable, an assertion that can then be used as a launching board to justify human rights. Dworkin begins his discussion by appealing to the notion that conservatives as well as liberals have: “that it is intrinsically regrettable when human life, once begun, ends prematurely.” Dworkin suggests that the foundation of this assumption is that human life must therefore have some sort of intrinsic value. This is a controversial statement and one which philosopher David Hume takes exception to. Hume, among other philosophers, did not follow this line of reasoning and in turn proposed that an object, thing, or event could only be valuable in so far as it serves someone’s or something’s interest; Hume calls this instrumental value. Dworkin responds to the objection by using two examples: that of art and that of nature. Dworkin agrees with Hume that both art and nature have an instrumental value, that is to say they are valuable not as ends in of themselves but as a means of achieving something else. In simpler terms, art and nature are instruments whereby they are examples of the creation of beauty. However, Dworkin does not end the discussion there; he further asserts that art and nature are not valued only instrumentally but also intrinsically.

In Dworkin’s philosophy something is intrinsically valuable if its’ worth can be established independently of what people enjoy, want, need or assume is good for them. In other words, something is intrinsically valuable if it can be established that they are important in and of themselves. It is important to note that at this point in his argument, Dworkin begins to use the term intrinsically valuable and sacred, interchangeably. Dworkin proposes that something is sacred when, if deliberately destroyed, it would “dishonor” that which ought to be honored. This argument is somewhat circular and requires further explanation which Dworkin does, by distinguishing between two processes by which something can be made sacred for a given culture or person. The first process is through designation; a culture or individual declares something sacred and thus it is sacred. As this first process lacks any additional philosophical justification, it will not be further detailed.

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12 Dworkin 1993, p. 69
13 Ibid., p. 71
14 Ibid., p. 74
The second process is characterized by history. Again using the example of art, Dworkin claims that it is not what the work of art is associated with or symbolizes but rather the process by which it came into being that makes it valuable. Dworkin continues with this line of reasoning when he discusses the value of individual species. He suggests that the instinct to preserve endangered species comes from a deep seated belief that “it would be a shame if human acts and decisions caused [a species] to disappear.”\textsuperscript{15} Although he does acknowledge that there may be other reasons to protect endangered species, he nonetheless maintains that the initial instinct of preservation comes from the belief that it would be a shame for a species to become extinct. Dworkin then draws a similarity between one’s reverence for art and the concern for the survival of a given species, as the destruction of animal life is in effect the destruction of evolutionary creation, or art. The concern for the preservation of species also takes form in the case of the human species as Dworkin presupposes that through evolution and nature man was created. Perhaps controversially, he concludes that one’s respect for art parallels the respect one has for the art of creation and the concern one has for the survival of a species indicates a respect for what nature has created either divinely or secularly.\textsuperscript{16} Thus, as human life has ties both to art and nature it is intrinsically valuable.

If one is inclined to agree with Dworkin’s conclusion that human life has intrinsic value, then just as in the case of the endangered species, there must be a way to protect it. Dworkin seems to agree as he too attempted to formulate an argument for human rights. According to what he called the derivative objection to abortion, abortion is wrong on the grounds that just as killing an adult human, it violates the person’s right not to be killed. The relevance to this paper is not the moral permissibility of abortion or murder but rather the claim that a person could have a right to protect their intrinsic value from corruption. Fellow American philosopher Joel Feinberg’s essay \textit{Nature and Value of Rights} lends further support to the aforementioned claim. He writes: “having rights is what is necessary for self-respect, dignity, and other things of value.”\textsuperscript{17} Feinberg described rights in terms of claims: claims against and claims to. Moving away from the abortion example one can think of claims as Feinberg depicts them in the case of the inmate as well. The inmate by virtue of his status as a member of an intrinsically valuable species thus has a claim against the violation of his autonomy and

\textsuperscript{15} Ibid., p. 75
\textsuperscript{16} Ibid., p. 77
\textsuperscript{17} Feinberg 1980, p. 156
subsequently a claim for his autonomy (autonomy in this sense meaning physical autonomy from coercion i.e., the protection of his valuable status).

Interestingly, for Feinberg, the possession of rights is only one piece of the human rights puzzle. He suggests that in order for rights to be of value, one must empirically know that he has them. In a society where the individuals are inherently in possession of rights but do not know that they are, in Feinberg’s opinion, are deficient in respect for themselves and for others although in theory they have dignity. In traditional rehabilitation theory, while the inmate may have had claims to autonomy, the prison cell where he spent the vast majority of his time kept this fact from him. It is easy to see how the coercive tactics of an authoritarian model for rehabilitation would enable not only the penal system but also the general public to view criminals in a less than human way. Thus, Rotman’s contention that it was not until the 1955 United Nations mandate for prisoner rights that inmates were viewed in a manner befitting a human seems to support Feinberg’s notion. With this in mind, Feinberg concludes that human rights can simply be boiled down to possessing both the knowledge and the ability to make claims against and claims to.

Speaking from a purely consequentialist point of view, the necessity of inmate rights can be explained by the belief that true remorse and change can only be affected through the criminal’s own agency. If, as in the authoritarian centered model, the inmate is subjected to brainwashing or stimulated chemically to reform, there is a concern that rehabilitation will not have met its goal of returning the inmate to a state of true social conformity. Authors Studt, Messinger, and Wilson make a similar argument in their case study C-Unit: Search for Community in Prison. Their study was conducted as a means to discover an effective model of inmate rehabilitation that would lead to a significant drop in recidivism. What the authors discovered is that rehabilitation was not just a practical matter but a moral matter, where the classification of inmates as “bad” or in some way lesser than law abiding citizens, led to the so called corruption of rehabilitation programs. Purposing the reinstatement of restricted autonomy and human dignity for the inmates, Studt, Messinger and Wilson asserted that when inmates are granted the conditions to support their desire to walk with dignity, then most offenders will reveal some capacity to act according to socially prescribed norms. Therefore, even if one is disinclined to agree that inmates by virtue of being human should be

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18 Ibid., p. 156
19 Studt 1968, p. 4
granted human dignity and autonomy, a purely consequentialist perspective from not only the C-Unit case study but also from Edgardo Rotman, seems to suggest that granting inmates these basic rights is the key to meaningful rehabilitation.

**Analysis of Inmate Rights and Autonomy**

Although I am inclined to agree with Dworkin’s assertion that human life is intrinsically valuable, I remain unconvinced by his reasoning. The notion that something is intrinsically valuable because the destruction of it would be considered a dishonor of creation seems circular and presupposes value before proving it. A stronger approach may have been to reconstruct Hume’s instrumental value argument. Using Hume’s argument, human life therefore is valuable to the person living it because it serves his purpose of living. There is some circularity in this argument as well but it seems far more convincing from a purely rational point of view to suggest that life is important to the individual. Thus, while intuitively I do agree with Dworkin’s claim, his argument is not sufficient enough to convince me rationally. However, while I do not agree with Dworkin’s approach to the justification of human rights, I do agree that rights are necessary as a means of preventing the frustration of an individual’s aims in life.

In terms of an inmate’s right to be free from coercion once inside the prison walls, as Studt, Messinger and Wilson’s argument would seem to suggest, this right can be justified consequentially. It is intuitive that an individual will be more likely to reach true catharsis if he is able to do so of his own volition. What is not intuitive is the claim that society must view the offender humanely in order for this catharsis to take place. Studt, Messinger, and Wilson appear to take for granted is that an inmate caused harm to another individual. David Lerman succinctly describes a crime as “not just an offense against the individual, it is an offense against the whole social fabric of the country.”

Studt, Messinger and Wilson’s assertion that the inmate should be able to walk with dignity fails to recognize the widely supported notion of retribution for crimes committed. The very foundation of prison is that it is meant to be an uncomfortable place of punishment not a transitional community as they suggest. Certainly, true rehabilitation and seamless re-socialization are legitimate goals but the means to achieve them should not be paved in gold. Some sort of restitution for the victim should be present. In the functioning of the current American judicial system, restitution

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20 Lerman 2001, p. 161
21 Studt 1968, p. 8
comes in the form of punishment, specifically incarceration. If while incarcerated the inmate is allowed to hold his head high and walk with dignity, I suggest that meaningful restitution has not be achieved.

A Constitutional Right to Rehabilitation

I objected to rehabilitation as Studt, Messinger and Wilson presented on the grounds that it neglected to sufficiently acknowledge that an offender had caused harm not only to an individual but also to society in general. That is not to say that there is not validity in the institution of rehabilitation. In the following two sections I will describe two different arguments that I believe adequately argue for the inmate right to rehabilitation.

The first argument I will describe is the argument that prison is meant to be the punishment for crimes, not the vessel by which inmates are further punished. Edgardo Rotman cites the American Eighth Amendment (the prohibition of cruel and unusual punishment) as the linchpin of this argument. The Eighth Amendment was interpreted in judicial rulings in the 1970’s to be related to prison conditions and how they either hindered or contributed to penal goals. After several inmate instigated cases were presented before judiciaries it was finally decided that “a penal system cannot be operated in such a manner that it impedes an inmate’s ability to attempt rehabilitation.” This decision means that the lack of rehabilitative programs in prisons is a key element in determining whether or not a prison is unconstitutional. Of course, the lack of rehabilitation programs is not enough to deem a prison unconstitutional. So long as prison is not causing the unchecked deterioration of the mental and social health of inmates it can still be considered constitutional. Under this view the law expects inmates to foresee the loss of liberty as prescribed by their sentence but not any additional harm that was not intended by law.

A major development in the argument for the constitutional rights of inmates occurred in 1975. In the case Laaman v. Helgemoe, a prisoner claimed that the New Hampshire State Prison where he was an inmate had confiscated non-contraband items, put the prison on lockdown without sufficient grounds and that illegal searches had occurred. The case quickly ballooned up to be an indictment of prison conditions and prisoner treatment. The presiding judge determined that:

22 Rotman 1990, p. 81
“Punishment for one crime, under conditions which spawn future crime and more punishment, serves no valid legislative purpose and is so totally without penological justification that it results in the gratuitous infliction of suffering in violation of the Eighth Amendment.”

This decision, as Rotman points out, established a negative indirect right to rehabilitation as a means for preserving an inmate’s right to protect him or herself from social or mental deterioration while incarcerated. Two corollaries to the right to rehabilitation are first, that the inmate has the freedom to pursue avenues of rehabilitation and secondly, that the prison provides adequate mental healthcare. Essentially, the creation of the Eighth Amendment spurred on a push towards reinstating inmates with a portion of the rights that they possessed prior to their conviction. The Eighth Amendment effectively forced prisons to recognize their inmates as right possessing agents at a constitutional level which ultimately provided the basis for the right to rehabilitation.

Rehabilitation and Future Productivity

The second formulation of the rights based approach to rehabilitation is the argument that without the option of rehabilitation an inmate is denied the opportunity for future productive years in society and in effect becomes just a cog in the wheel of the penal system. Barry Krisberg, president of the San Francisco-based National Council on Crime and Delinquency, aptly commented that prison is increasingly becoming a rite of passage among young individuals in tough neighborhoods, as nearly everyone they know has been to prison. Krisberg even went so far as to claim that serving a prison sentence is for the current generation what going into the Army was like for the baby-boom generation: a mandatory fact of life. With the stigma of prison slowly eroding away, the fear of life behind iron bars is becoming ever less threatening.

Krisberg’s underlying message is that prison as a system of warehousing convicted criminals is failing to achieve two of the primary goals of the penal system: to deter criminal activity and prevent inmates from re-offending once beyond prison bars. Indeed, the recidivist rates in America have been projected at to be 60% by some news outlets such as the BBC. The high recidivist rate is even more dramatic when coupled with the 2001 statistic that out of every

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23 Ibid., p. 82
24 Herman page 74
100,000 Americans are in prison. As the numbers seem to indicate, without adequate rehabilitation, the majority of inmates are condemned to a life with dim prospects. If rehabilitation as has been previously argued, restores human dignity to the inmates thereby enabling them to undergo a metamorphosis into productive members of society, then it would seem that rehabilitation is not only morally justified but also consequentially justified. However as Travis C. Pratt author of Addicted to Incarceration: Corrections Policy and the Politics of Misinformation in the United States aptly suggests: “even if we could make a child molester a functioning member of society through rehabilitation programs, there still remains the normative question of whether or not we should be in the business of doing so in the first place.”

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25 Murphy 2001, p. 108
26 Pratt 2009, p. 99
CHAPTER THREE: RETRIBUTIVISM AND THE SOCIAL CONTRACT

Introduction
In the previous chapter I argued for rehabilitation in two distinct ways: firstly, on the grounds that as human life is intrinsically valuable, humans are privy to rights as a means for protecting and asserting its’ value and secondly, that an inmate has the right to rehabilitation. A corollary to these claims is that the inmate and the non-offending citizen are not inherently different and thus deserving of rights. Retribution and the stronger claim, just desert, stand in direct opposition to this idea and instead propose that according to the Social Contract, individuals who transgress against society forfeit their right to liberty as citizens of society. This chapter will outline an argument for the social contract as well as make a rights based argument for retribution.

What is Retributivism?
Retributivism is the backward-looking claim “that committing an offense in the past is sufficient to justify punishment now, whether or not this will produce any beneficial [future]27 consequences.”28 Unlike a consequentialist approach to punishment, the retributivist relies on the principle of desert whereby punishment is strictly a response to anti-social behavior. Retribution then, is quite simply the principle that punishment is morally permissible if a person has committed an offense against another member of society. There are two recognized groups of retributivists: the reluctant retributivist and the deep retributivist. The reluctant retributivist accepts the principle of retribution on account that is a “less unacceptable” method of dealing with criminal activity than any other currently used system.29 Deep retributivists on the other hand, assert that the punishment of offenders is a fundamental principle that requires no further justification. Somewhere between these two extremes lies the more neutral principle of just desert, which suggests that an offender is deserving of punishment by virtue of his delinquency. Of the three types of recognized retributivism, just desert is the only one that appeals to non-fundamental principles for justification, as such, from this point on I will use just desert and retributivism interchangeably.

27 The author’s own addition.
28 Boonin 2008, p. 85
29 Ibid., p. 85
Before moving on to the justifications offered for just desert, the notion of punishment as it will be applied in this paper needs to be outlined. Despite not describing a particular list of acceptable punishments, unlike vengeance, retributivism does maintain that there are limits to punishment. According to retributivist principles, punishment should only be meted out in proportion to the offense committed. For example, if one were to commit a relatively minor crime it would unjust to sentence the offender to death. In fact, this was the purported problem with Former President Bill Clinton’s “three strikes law,” which sentenced criminals who committed three felony offences to extended and mandatory incarceration. It was cases like that of 19 year old Andre Terial Wilks who received 25 years to life for committing two purse snatching crimes and one breaking and entering charge,\(^\text{30}\) that led to the ultimate dismissal the law on the grounds that the punishment was far too harsh given the crime. What the three strikes law indicated was that there must be a clearly established pathway that links the severity of the punishment with the degree of harm caused by the crime. Without this correlation, as David Boonin author of *The Problem of Punishment* writes, it is possible for a punishment to be morally impermissible. If, Boonin and opponents to the three strikes law are right in assuming that in some instances punishment can be morally impermissible, then the relevant question is what punishments are morally justified?

**Morally Permissible Punishment of Offenders**

In the strictest sense of the word retribution, nearly all punishments can be morally justified if an offense is irreprehensible enough. For example, in medieval England a widely recognized form of punishment for stealing was the physical removal of the thief’s hand. The justification being, that if one does not have hands, he or she cannot steal again; thus, the seemingly harsh nature of the punishment was permissible as there was a clear connection between the offense and the punishment. As 18\(^{th}\) century Italian philosopher Cesare Beccaria suggested, the most effective brake on crime is not the harshness of the punishment but rather the unerringness of punishment.\(^\text{31}\) The American penal system seems to agree with Beccaria as it has been redefined by the Eighth Amendment. As was mentioned in the previous chapter the Eighth Amendment banned the use of torturous corporeal punishment and instead relies on incarceration and in some extreme instances, the death penalty. Although in recent years, the judicial system has begun to institute new programs designed to be alternatives to

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\(^{30}\) Cannon 2001, p. 62  
\(^{31}\) Bellamy 1995, p.63
imprisonment, these programs have not been widely adopted. Consequently, I will restrict the use of the word punishment in this paper to mean incarceration.

I have asserted that in order for a punishment to be permissible it must relate to an offense, but what constitutes an offense? One could certainly argue that an offense is any violation of human rights, including as Feinberg argued, the frustration of an individual’s ability to make claims from or claims to. Unfortunately, this definition does little in the way of reducing vagueness and must therefore be refined. As I have defined punishment in the context of the American penal system, for the purposes of clarity, this paper will define an offense, more narrowly as a transgression against the written law codes that govern the society where one resides.

There are some transgressions that do not warrant punishment as I have defined it. Offenses that are classified as minor infractions for example; jay walking, parking in a handicapped space, or smoking in a designated no smoking area, cause relatively insignificant harm to society. In these cases, incarceration is far too harsh of a punishment given the degree of harm. The trouble with allowing certain transgressions to go unpunished is that they create a slippery slope whereby increasing numbers of crimes could potentially go unpunished as a precedent had been set. Perhaps in these cases a fine could be issued to monetarily compensate for harm done, so long as the offense does not go unpunished there is little concern for the nature of the punishment of such minor offenses. Those offenses in America that are considered worthy of incarceration are what this paper is more concerned with as incarceration means a potential loss of liberty, there is a more pressing need to make a justified argument for the infringement of an individual’s rights.

Moore and Kershnar’s Formulation of the Right to Punish

In addition to Kant’s right to punish, Michael Moore and Stephen Kershnar have also developed an argument for the right to punish. David Boonin writes in his book The Problem of Punishment that Moore and Kershnar begin by presenting examples they believe will invoke a specific intuitive response before arguing that the theory that most successfully accounts for our intuitions is desert, which they claim can be used to justify punishment. An

Some of the proposed alternatives are: mediation, restoration, and public shaming. While there has been some support for these programs, they have yet to be widely mandated.

Boonin 2008, p. 87
argument from this point of view typically uses an example of a horrendous crime committed by an unrepentant offender. Boonin ascertains that the most commonly referred to case is that of the unrepentant Nazi war criminal. If one has the intuition that the Nazi war criminal should be punished for his crimes, Moore and Kershnar contend that it is possible to direct one to a similar conclusion in less extreme cases. Essentially, by getting one to agree to the premise that punishment is morally permissible in some cases, Moore and Kershnar suggest that is it then possible to generalize about the permissibility of punishment in general.

Unfortunately, when subjected to scrutiny this argument is doomed to fail. As Boonin explains, Moore is right to assume that individuals would have the intuition that the remorseless mass murderer should be punished. However, that intuition is supported by the fact that punishment has been a part of human since the earliest human societies. Boonin continues, “The problem of punishment…arises not because people do not have this belief, but precisely because they do have it and are then led to wonder if the belief can be justified.” Therefore, relying on the fact that individuals intuitively believe in punishment is not enough to justify its usage and indeed can only serve as a reminder of the fact that a justification still needs to be established.

*The Social Contract*

Another argument that can be used to justify the use of incarceration, despite its consequences for the loss of liberty, is social contract theory. Michael Lessnoff, author of *Social Contract Theory*, suggests that contract theory is not as many may suppose: the theory “that ‘society’ is the result of a contract made by (non-social or pre-social) individuals.” Lessnoff is adamant that humans are by nature social and given that the concept of a contract is social, it presupposes that there was social life before the instatement of such a contract. This supposed contract then was not a way to bring solitary individuals together but rather a means for establishing a political or civil society. According to Lessnoff, the employment of social contract theory is a means by which legitimacy can be granted not only to political authority but also to the obligations of rulers and subjects. Conversely, contract theory is also the means by which limits can be set on relations between rulers and subjects. Social contract theory presupposes that men are naturally free and equal and thus must consent to enter into

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34 Ibid., p. 89
35 Lessnoff 1990, p. 2
the contract before they can legitimately be subjected to the political power of another.\textsuperscript{36} However, in Lessnoff’s opinion the consent of an individual is not enough to legitimate political power as a contract is bilateral or multilateral in nature.

Essentially, when one consents to a contract he is contracting himself to another individual or another party; if one member of either party reneges on the contract than it is voided. Immanuel Kant seems to agree with this assumption as he confers: “in a contract by which a thing is acquired, it is not acquired by acceptance of the promise, but only by the delivery of what was promised.”\textsuperscript{37} What Kant, as well as Lessnoff are arguing, is that a contract can only be fulfilled or legitimated if all engaged parties uphold its provisions. In the context of a society, a social contract effectively binds every individual and places upon them obligations and duties to each other. In the Rawlsian model of social contract theory, the obligations and duties of the contracted is to provide the basis of social justice. For Rawls, social justice relies heavily on the principles of equality and justice as fairness thus, a social contract is just if all parties participating in the contract are equally well provided for.

While Rawls was predominantly concerned with social justice goals, Kant focused his use of the theory on security; security meaning the preservation of an individual’s rights as well as the individual’s physical security. Given that without the promise of security one is not truly free, Arthur Ripstein suggests that security can also be conceived of as a version of freedom as independence.\textsuperscript{38} Kant presupposes that “before a public lawful condition is established, individual men, peoples, and states can never be secure against violence from one another.”\textsuperscript{39} His rationale is that without the bounds of society, man is free to establish his own idea of what is right or good, which in some cases may be the infliction of harm upon another. Harm in this case does not need to be confined to corporeal harm but can also be harms against another man’s property. Interestingly, Kant does not argue that a state of nature where a man is not bound by social contract has to be inherently unjust merely because it is natural. His argument is rather that a state where man is not engaged in a social contract will be devoid of justice as there is no greater authority to appeal to when there are disputes overs rights. For example, it would be difficult to establish property rights if the owner of the property was

\textsuperscript{36} Ibid., p. 3
\textsuperscript{37} Kant 1991, p. 94
\textsuperscript{38} Ripstein 2009, p. 177
\textsuperscript{39} Kant 1991, p. 124
constantly in flex and subject to the will of the strongest individual. Therefore, the heart of Kant’s argument is not necessarily the need for equality but rather the need for security.

**Security of Human Rights**

In his work *Metaphysics of Morals*, Kant outlined three criteria for contracts providing security. Firstly, there must be a pledge where each party agrees to abide by the provisions of the contract. Secondly, each party must assume liability for their promise to uphold the provisions. Thirdly, one must be willing to vouch for their fulfillment of the contract. The fulfillment of the premises is what Kant describes as Public Right. Public Right is the system of laws that are formed by a society on the grounds that each individual affects the other and therefore there must be a rightful condition (constitution) allowing the individuals to enjoy their established rights as humans. Kant saw this constitution or condition of citizens being united, as a prerequisite of state’s wellbeing; wellbeing referring to the condition “which reason, by a categorical imperative, makes it obligatory for us to strive for.” A categorical imperative can most succinctly be described as acting in accordance with those maxims that, if universally recognized, would be morally acceptable.

In the Kantian model, a citizen of this kind of a society would have three key attributes. First, he would possess lawful freedom which would enable him to obey no other law than those governing the society. Second, he would be privy to civil equality and thus have the right to ensure moral reciprocity, meaning that he cannot be morally bound to any individual in a way that that individual could not in turn be bound to him. Third, this citizen would have civil independence or the acknowledgement that his existence and preservation of his own rights and powers is incumbent on his membership in society. Given the security of rights provided by a social contract, it is assumed that individuals would consent to membership and therefore also consent to punishment if they transgress against the agreement. One may claim that in the American system, incarceration is an evil done to individuals as it implies an extreme loss of liberty. Incarceration does absolutely infringe upon the rights granted to citizens but as Kant clearly proclaims “no wrong is done to someone who consents.” An individual would be unlikely to directly consent to punishment but his participation in society

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40 Ibid., p. 103
41 Ibid., p. 129
42 Ibid., p. 125
43 Ibid., p. 125
is nevertheless a consensual agreement that entails repercussions for contractual breaches. As Kant envisions it, consenting to a social contract denotes that there is also a right to punish.

**Kantian Right to Punish**

Kant begins his discussion on the right to punish by asserting that it is the right of the ruler to inflict pain upon a subject if he commits a crime. In the American context, the ruler is replaced by the judicial system and a jury of one’s peers. The functioning of the judicial process in America somewhat lessens the impact of Kant’s assertion but the spirit of his claim is still applicable if one simply replaces the term ruler with judicial branch. The right a ruler has to deal out punishment must also be refilled to fit into a modern Western context. Rather than the Kantian notion of inflicting pain, which I understand to mean corporeal damage, the judicial branch has the right to sentence an individual to incarceration. If one can accept these two changes as mere updates to Kant’s original assertion, then it is possible to continue with his line of reasoning employing the use of modern terminology. As has been previously stated, there are other modes of punishment employed in America for minor offenses but I will not be discussing them further as the impacts of incarceration are far greater when it comes to individual’s rights.

The right to punish is very closely connected with the idea of social equality expressed by the social contract, as punishment can be viewed as a means for maintaining equality. It can be argued that when an individual commits a crime he is taking an unfair advantage of society and procuring for himself that which belongs to another. Whether the crime is theft or murder, the criminal is taking away an individual’s right to security as well as their right to autonomy. In Kant’s philosophy this anti-social act is enough to assert that a criminal is no longer fit to be a citizen as he has violated the agreement reached within the social contract. Laden within the contract’s promise of the right to security is the right to enforce laws meant to protect citizens. Kant took this idea one step further as he suggested that “whoever steals makes the property of everyone else insecure and therefore deprives himself (by the principle of retribution) of security...” The idea of reciprocity is inherent in the social contract and Kant is very apt to reason in this manner because it illustrates the argument for the right to punish in clear terms.

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44 Ibid., p. 140
45 While incarceration is the predominant form of punishment in some cases the death penalty has been awarded.
46 Ibid., p. 142
Although Kant does support the right to punish he simultaneously makes an attempt to protect citizens from unlawful punishment:

“[Punishment] must always be inflicted upon [an individual] only because he has committed a crime. For a man can never be treated merely as a means to the purposes of another or be put among the objects of rights to things.”

To safeguard against underserved punishment, Kant claimed that punishment could only be inflicted because someone has committed a crime. Society cannot therefore preemptively strike against individuals who may have had intent but did not go through with the crime. Conversely, punishment cannot be used for any other purpose than a means of social restitution for a previously committed crime. By acknowledging the right to punish only in those circumstances where a crime has been committed, Kant is effectively preserving one’s right to be treated as an ends and not a means to an ends. Thus, like the goal of rehabilitation, the right to punish can be understood as a means for preserving individual rights.

The Merits of Social Contract Theory and the Right to Punish

More than the previously discussed arguments made in favor of rehabilitation, the right to punish under the justification of social contract theory appeals to my personal intuitions about proper societal responses to crime. The social contract that Kant formulates in *Metaphysics of Morals* is attractive because much like Dworkin’s philosophy, it supports the idea of human rights. Even more attractive however, is the responsibility it places on individuals to behave according to social norms. In retributivist philosophy there seems to be a clear correlation between cause and effect or more specifically, crime and punishment.

The connection between social contract theory and punishment is eloquently outlined in Plato’s dialogue *Crito*. The dialogue begins in Socrates’ prison cell not long after he was condemned to death for “corrupting the minds” of Athenian youths. Socrates is visited by his friend Crito who has made plans to smuggle him out of the city before his execution can be carried out. Much to Crito’s dismay, Socrates refuses his help on the grounds that “[he] had seventy years in which [he] could have left the country, if [he] was not satisfied with [it] or felt that the agreements were unfair.” As he did not leave, he effectively consented to live, or die, by the city’s laws. What Socrates was arguing was that when one chooses to live in one

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47 Ibid., p. 140-141
48 Hamilton 1961, p. 38 line 52e
society over any other, he consents to abide by its rules whether or not he finds them pertinent. The social contract Kant describes is a more modern argument in the same vein. As a society comes to fruition under a set of predetermined laws, individuals are obliged to follow them. In order to deter further transgressions a system of punishment is necessary to protect the rights of those individuals that are living within the bounds dictated by the contract.

Retribution and Equality

Retributivism in the framework of the social contract considers an individual’s actions, not his life circumstances, when deciding a course of punishment which at least externally, promotes sentencing equality. Some, such as Cesare Beccaria, suggest that inequality in sentencing will diminish the effectiveness of punishment as a crime deterrent. Beccaria writes: “if an equal punishment is laid down for two crimes which damage society unequally, men will not have a stronger deterrent against committing the greater crime if they find it more advantageous to do so.”49 A potentially beneficial prerequisite of retribution is that it does not take into account extraneous considerations about the criminal’s motivation, family situation or life in general. The criminal is judged solely on the crime which enables the judicial system to deal with criminals who commit the same crime equally. Rehabilitation cannot make the same claim as it openly endorses the notion of individuality and therefore advocates for different societal responses for “dissimilar” individuals. In the case of an individual with a severe mental disability, perhaps this is a valid response as he or she is lacking the mental capacity to fully differentiate between social and antisocial behavior. However, by considering individual factors about the rational criminal the rehabilitation advocate is abiding by the idea of separate but equal. Retributivism, because it is supported by the social contract, maintains that social equality should be upheld even in society’s response to deviance. With equality widely being considered a right, the retributivist can claim that it is supporting human rights in a more meaningful way than the rehabilitationist does.

49 Bellamy 1995, p. 21
CHAPTER FOUR: REHABILITATION AND RETRIBUTIVISM RE-EXAMINED

Introduction
In the previous chapters I have presented, as well as constructed, arguments for rehabilitation and retributivism. In this final chapter I will make one last appeal to the use of retributivism over rehabilitation before discussing in what context retributivism and rehabilitation can co-exist.

Retributivism as the More Ethical Approach to Crime
More so than rehabilitationist theory, social contract theory respects human rights. Kant is very adamant that respect for individuals implies that they cannot be treated as a means to ends but should be treated as an end in and of themselves. Apart from my reconstructed argument using Dworkin’s assumption that human life is intrinsically valuable, rehabilitationist arguments typically treat individuals as a means. Rehabilitation supposes that if inmates can be reformed, then crime rates will be significantly reduced. Despite the rights jargon used by the rehabilitationist, the fundamental assertion is that inmate rights are valuable for their consequences. While Studt, Messinger and Wilson advocate very strongly for an inmate’s right to human dignity they are quick to intertwine its value with the positive consequence of “true” reform.

This same argument can made when discussing the case of Laaman v Hegelmoe. The Eighth Amendment was used to predominantly justify rehabilitation on the grounds of its beneficial consequences for society. There was some pretense that denying an inmate the opportunity to participate in rehabilitation programs was in effect causing unlawful harm as the inmate’s stay in prison was meant to be the only harm suffered by the criminal. This claim ties in nicely to the assertion that denying an inmate rehabilitation is most assuredly frustrating his ability to be a productive member of society upon his release. Unfortunately, an argument for future productivity presupposes that rehabilitation programs are in fact successful. While it has been supposed that this is the case, America’s increasing crime rates and the subsequent number of prisoners ranks among the highest in the world, in fact it is second only to Russia. 50 Certainly, one could suggest that the reason rehabilitation programs have not yet produced radically reduced crime rates is because they have not been properly instituted. This

50 Murphy 2001, p. 108
may be the case, but the fact remains that rehabilitation programs as they are currently used in the American penal system, have yet to statistically prove their value.

Apart from the numbers game, I believe that the most potent objection to rehabilitation as it has been outlined in this paper is the denial of justice for the victim of an offender’s crime. Kant very emphatically insists that:

“The principle of punishment is a categorical imperative, and woe to him who crawls through the windings of eudemonism in order to discover something that releases the criminal from punishment or even reduces its amount.”

While this passage airs on the side of rhetoric, it nevertheless indicates an intuition that I believe many Americans have. In 1972 the General Social Survey (GSS) began asking Americans whether or not they felt the judicial system dealt too harshly or not harshly enough with criminals. In 1998 the number of Americans who felt that the penal system was not harsh enough with criminals topped off around 80 percent.

Nonetheless, retributivism cannot be morally legitimated by intuitions. A moral justification is that by enabling inmates to have access to rehabilitation programs that offer them social benefits while behind bars, is giving them an unfair advantage over law abiding citizens. Inmate rehabilitation programs supply inmates with educational opportunities, vocational training, psychiatric treatment, post-release support and various other services to convicted criminals. By contrast, the average law abiding citizen would have to pay for each of these services and what is more, he is in fact paying for the inmates to have access to these services. In effect, rehabilitation programs of this nature are an unwarranted reward for social deviance. Again Kant has a valid assertion against these tax payer funded programs; “but since state will not provide for [the criminal] free of charge, he must let it have his powers for any kind of work if pleases (in convict or prison labor) and is reduced to the status of a slave for a certain time.” This harkens back to the earliest days of the American prison system where inmates were expected to work to draw in revenue for the prison to be maintained. It is my opinion that the only morally justified way the penal system can support rehabilitation

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51 Eudemonism can best be understood as a system of ethics that evaluates actions based on their ability to produce happiness.
52 Kant 1991, p. 140
53 Pratt 2009, p. 49
54 Rotman 1990, p. 3
55 Kant 1991, p. 142
programs is if the inmates work to financially provide the opportunities for themselves. Rather than a right to rehabilitation, I would like to assert, that inmates should have a right to labor from within the prison walls to secure the privilege of rehabilitation programs.
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