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**From the Selected Works of Melanie M. Reid**

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2015

## Crime and Punishment, A Global Concern: Who Does It Best and Does Isolation Really Work?

Melanie M. Reid, *Lincoln Memorial University - Duncan School of Law*



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# KENTUCKY LAW JOURNAL



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# Crime and Punishment, A Global Concern: Who Does It Best and Does Isolation Really Work?

Melanie Reid<sup>1</sup>

## INTRODUCTION

In 1865, Fyodor Dostoyevsky wrote a letter to Katkov, the editor of the monthly journal *The Russian Messenger* who purchased the serial rights of the novel *Crime and Punishment*, and explained the basis of the novel:

This will be a psychological study of a crime . . . The murderer is suddenly confronted by insoluble problems, and hitherto undreamt feelings begin to torment him. Divine truth and justice and the law are triumphant in the end, and the young man finishes up by giving himself up against his own will. He feels compelled to go back to the society of men in spite of the danger of spending the rest of his life in a prison in Siberia. The feeling of separation and dissociation from humanity which he experiences at once after he has committed the crime, is something he cannot bear. The laws of justice and truth, of human justice, gain the upper hand. The murderer himself decides to accept his punishment in order to expiate his crime. However, I find it difficult to explain my idea. My novel, besides, contains the hint that the punishment laid down by the law frightens the criminal much less than our legislators think, partly because he himself feels the desire to be punished. I have seen it happening myself with uneducated people, but I should like to show it in the case of a highly educated modern young man so as to render my idea in a more vivid and palpable form. Certain recent cases have convinced me that my idea is not at all as eccentric as it may sound. It is particularly true in the case of an educated man and even of one who possesses many admirable qualities. Last year in Moscow I was told an authentic story of a former student of Moscow University who had made up his mind to rob a mailcoach and kill the postman. Our papers are full of stories which show the general feeling of instability which leads young men to commit terrible crimes (there is the case of the theological student who killed a girl he had met in a shed by appointment and who was arrested at breakfast an hour later, and so on). In short, I am quite sure that the subject of my novel is justified, to some extent at any rate, by the events that are happening in life today.<sup>2</sup>

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<sup>1</sup> Associate Professor of Law, Lincoln Memorial University-Duncan School of Law. I want to thank the participants at the Third Annual Conference of the Younger Comparativists Committee of the American Society of Comparative Law. My presentation, [A Comparative Study of Detention: An individual's right to be free versus the government's right to protect and punish](#), is a precursor to this article. I would also like to thank Lauren Mullins, Deanna Breeding, Pat Laflin, and Bob Reid for their invaluable assistance on this article.

<sup>2</sup> FYODOR DOSTOYEVSKY, *CRIME AND PUNISHMENT* 12-13 (David Magarshack trans., Penguin Books 1966) (1866).

Dostoyevsky's lead character in *Crime and Punishment*, Raskolnikov, slowly disassociates himself from the rest of society; he has little regard for the emotions of others; he justifies his actions by arguing he has rid the world of a "louse"; and his self-centeredness and pride push away those in his life who most want to help. He continues to isolate himself from the outside world following the murder. It is not prison, probation, a financial penalty, or the death penalty that impacts the criminal, but it is Raskolnikov's guilt that influences him most. It is only at the moment that he reconnects with society, by developing a loving bond with a woman named Sonia, that he slowly turns the corner from bitter and resentful to contrite and in some ways, reformed.

Along the same lines, Carl Panzram, a serial killer who admittedly killed over twenty-one men during his lifetime, was born in Minnesota in 1891 and was executed by hanging in Kansas in 1930.<sup>3</sup> Panzram first appeared in court at the age eight for drunkenness and later attended reform school as a child, where he was tied naked to a wooden block and beaten regularly.<sup>4</sup> According to his personal account, Panzram claimed he learned about "stealing, lying, hating, burning and killing"<sup>5</sup> in reform school. He left reform school at age thirteen, spent time in a military prison, and in 1915, he burglarized a house in Oregon, and was soon arrested, convicted, and sentenced to seven years in prison.<sup>6</sup> During this first prison stint (not counting a previous military sentence for larceny), he was subjected to numerous disciplinary measures, including beatings and periods of isolation in solitary confinement.<sup>7</sup> Much later, when he was sentenced to death for one of his murders, he stated, "I prefer that I die that way, and if I have a soul and if that soul should burn in hell for a million years, still I prefer that to a lingering, agonizing death in some prison dungeon or a padded cell in a mad house."<sup>8</sup> It is unclear how much of Panzram's experiences in reform school and prison further alienated him from the rest of society and shaped the kind of individual he became.

Bernard Kerik, a former NYPD police commissioner who was once considered to head up the Department of Homeland Security under the Bush administration, served three years in prison after being convicted of tax evasion in February 2010.<sup>9</sup> After his prison stay, Kerik stated the following:

It's not about me being a victim of the system. I think the system is flawed. I think the system is supposed to punish. It's not supposed to annihilate personally, professionally, financially. It's not supposed to destroy families. The punishment

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<sup>3</sup> THOMAS E. GADDIS & JAMES O. LONG, PANZRAM: A JOURNAL OF MURDER 11, 240-41 (Amok Books 2002) (1970).

<sup>4</sup> *Id.* at 12, 56.

<sup>5</sup> *Id.* at 21.

<sup>6</sup> *Id.* at 52-54.

<sup>7</sup> *Id.* at 54-58.

<sup>8</sup> *Id.* at 221.

<sup>9</sup> Barry Paddock et al., *Former NYPD Boss Bernard Kerik Released from Federal Prison, Heads Home to N.J.*, N.Y. DAILY NEWS (May 28, 2013, 7:20 PM), <http://www.nydailynews.com/new-york/nypd-boss-bernard-kerik-prison-article-1.1356234>.

must fit the crime. I was in prison with commercial fisherman that caught too many fish that spent three years in prison. Their licenses were removed. They're not going to be able to work in that industry for the rest of their lives. That's a life sentence.<sup>10</sup>

Kerik was concerned about the detrimental, isolating effect prison has on inmates, mentioning in particular a fellow inmate, a 21-year-old Marine sniper, who spent three years in prison for selling night-vision goggles on eBay.<sup>11</sup>

On July 8, 2013, 30,000 prisoners in California joined a hunger strike organized by gang members kept in Pelican Bay's Security Housing Unit (SHU), arguing that solitary confinement was a violation of the Eighth Amendment and constituted cruel and unusual punishment.<sup>12</sup> The most influential and dangerous gang leaders in California have been placed in individual cells in the SHU at Pelican Bay for twenty-three hours a day, only leaving their cells to exercise in a concrete room alone for one hour.<sup>13</sup> They are housed in the SHU "indefinitely, with a review of [their] status only every six years."<sup>14</sup> One psychologist with access to 100 SHU inmates observed that "[m]ore than three-quarters of the prisoners exhibited symptoms of social withdrawal," which the psychologist characterized as "[a] pervasive asociality, a distancing." Over time, the psychologist found that the "patterns of self-isolation had deepened."<sup>15</sup> One SHU inmate exclaimed that he felt the prison guards' purpose was to "sever all [of a prisoner's] ties to humanity."<sup>16</sup>

What do these scenarios have in common? Separation and isolation from the flock caused greater harm than good. In fact, it caused these human beings to fall deeper into their own negative patterns and caused feelings of alienation from the rest of society.

Since the beginning of time, human beings have lived in a community setting. Not only is it easier to live in a community setting if one family member is in charge of hunting and the other is in charge of preparing food, but human beings are, overall, social creatures. With this sense of community comes a certain order – law and order to be exact. We need to create certain laws to protect the community from a particular individual who has injured or will injure others in the community. Thomas Aquinas explained that humans live according to three different orders: "the universal order, the public or civil order, and the order of a person's nature to

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<sup>10</sup> David K. Li, *Bernard Kerik: Congress Must Reform Prison System*, N.Y. POST (Nov. 4, 2013, 11:14 AM), <http://nypost.com/2013/11/04/bernard-kerik-congress-must-reform-prison-system/>.

<sup>11</sup> *Id.*

<sup>12</sup> Benjamin Wallace-Wells, *The Plot From Solitary*, N.Y. MAG. (Feb. 26, 2014), <http://nymag.com/news/features/solitary-secure-housing-units-2014-2/>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* Unfortunately, there are no easy solutions. Prison officials are often placed in a difficult situation when deciding whether to place an inmate in solitary confinement. On one hand, isolated inmates will suffer significant, detrimental effects from the separation and isolation when placed in solitary confinement, while on the other, officials run the risk that the inmate may kill again if left in the general population with other inmates.

his reason.”<sup>17</sup> As Christian theologians posit, the idea of sin, the disturbance of order, and acting contrary to one’s own reason has existed since Adam and Eve disobeyed God in the Garden of Eden. Knowing we live in a community with other human beings, why would we act against reason and create an imbalance in the order of society in order to harm others (in one form or the other)? One reason might be what befell Raskolnikov or Panzram – the offender isolates himself so much from other human beings that he fails to empathize and fails to see how his actions hurt society.

A person indulges his will to the detriment of another when he commits a crime. Punishment attempts to restore balance in the public or civil order. In this life, the community cannot restore moral order – as Aquinas states, “God is the principal administrator of punishment, for only God has care over the universal order of all things.”<sup>18</sup> The community will never be able to change the “order of a person’s nature to his reason,”<sup>19</sup> as only the criminal can change his own will and determine what is “good” and what is “evil.” But, the community is responsible for the equality of justice and the restoration of the public or civil order. Hence, the creation of laws and the birth of crime and punishment.

The question becomes how should civil authorities assign punishments when an individual breaks the law? Of course “whether a particular crime is more or less detrimental to the civil good”<sup>20</sup> should be taken into consideration. To what extent has the individual injured society, and what sentence, if any, is necessary to punish the defendant for his transgressions? Over the centuries, different societies have utilized a variety of punishments, including: fines, restitution, *diyya* (victim compensation), whipping, amputation, branding, incarceration, public stocks, shaming, dunking tanks, execution, probation, parole, rehabilitation programs, and banishment, to name a few. Not only are there a variety of punishments to choose from, but several objectives of punishment have evolved over time, including: retribution, deterrence (both specific and general), rehabilitation, and incapacitation. Other theories such as the rule of proportionality and restorative justice have also become a part of the discussion regarding crime and punishment.

This Article will evaluate the four identified goals of punishment in relation to their support or hindrance of restoring the civil order. The identified objectives of punishment are retribution, deterrence, incapacitation, and rehabilitation. In Part II, each of these four goals will be examined, and certain forms of punishment will be evaluated as they fall in line with that particular goal. In Part III, one specific form of punishment, incarceration, is evaluated. Its frenetic and ever-increasing use around the world, particularly the United States, has created confusion as to what goal of punishment is truly achieved through its use and whether it adds benefit to

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<sup>17</sup> Joseph L. Falvey, Jr., *Crime and Punishment: A Catholic Perspective*, 43 CATH. LAW. 149, 156 (2004).

<sup>18</sup> *Id.* at 160.

<sup>19</sup> *Id.* at 156.

<sup>20</sup> *Id.* at 161.

the civil order as it currently stands. In Part IV, it is determined that no particular type of punishment nor goal should monopolize the civil order; however, in a survey of thirty countries, it is clear that some countries that favor retribution and rehabilitation tend to suffer from less crime than those countries that heavily incarcerate their offenders and use incapacitation as their main goal. The most popular goals and types of punishment tend to be cyclical. The United States has increasingly used incarceration as a form of punishment with little reflection as to how incarceration fulfills the goals of punishment. The United States can learn from other countries and should explore other options. Lastly, in Part V, the goals and types of punishment are tied back to the basic questions: who, what, when, and why should we punish. I argue that the restriction of freedom should be used less often and that particular punishments that tend to isolate the individual are less effective and, in fact, detrimental, in comparison to other punishments that have a greater possibility of restoring public order and harmony.

## I. GOALS OF PUNISHMENT

Criminal laws are created to prevent harm to society – this harm can be described as any sort of injury to the “health, safety, morals and welfare of the public.”<sup>21</sup> This is accomplished “by punishing those who have done harm, and by threatening with punishment those who would do harm, to others.”<sup>22</sup> Therefore, as a society, we have chosen to focus on punishing bad conduct and allowing the legislatures to determine what the particular punishment for each crime should be.

### A. Retribution

As we delve deeper into *why* we punish, we see that many theories of punishment have arisen over the centuries. Retribution is one of the oldest theories of punishment.<sup>23</sup> Retribution/retaliation/“just deserts”<sup>24</sup> has developed a bad reputation over the years as many liken it to seeking revenge. If you made me suffer, then you shall suffer, as well; and, under this line of thinking, the punishment may be more severe than the actual crime. However, retribution has received significant support from the likes of Immanuel Kant and Thomas Aquinas.<sup>25</sup>

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<sup>21</sup> WAYNE R. LAFAVE, *PRINCIPLES OF CRIMINAL LAW* 11 (2d ed. 2010).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 26.

<sup>24</sup> *See id.* at 26-27 (demonstrating that these words are used synonymously). “Just deserts” is another term for “eye for an eye.” *See id.* (discussing the concept of “just deserts”); *Leviticus* 24:19-20 (King James) (“And if a man cause a blemish in his neighbor; as he hath done, so shall it be done to him; breach for breach, eye for eye, tooth for tooth: as he hath caused a blemish in a man, so shall it be done to him.”).

<sup>25</sup> Peter Koritansky, *Two Theories of Retributive Punishment: Immanuel Kant and Thomas Aquinas*, 22 *HIST. PHIL. Q.* 319, 319 (2005).

Kant explains that everyone has freedom to choose one's actions, or free will, but once your choice encroaches upon another's freedom of choice, punishment must be meted out to re-establish legal justice.<sup>26</sup> To quote Kant, "[a]ny action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law."<sup>27</sup> Kant's view has been considered harsh in the sense that his view focuses on the crime itself but does not take into account the internal motivations of the offender (e.g., whether he was insane, acting in the heat of passion, defending himself, etc.).<sup>28</sup> Legal justice only occurs when the crime is matched with the penalty, yet Kant believes that moral justice is outside any human's authority, as only God can establish and maintain the universal order.<sup>29</sup>

St. Thomas Aquinas's ideas bolster Kant's theory of retributive punishment and explain that all law exists for the common good, so that as a community we may live in peace (meaning "bodily safety and freedom from the unprovoked aggression of others") and virtue (only those moral actions of a "particularly public nature").<sup>30</sup> Most human beings will learn to live peaceful, virtuous lives in the community simply through parental discipline and education, but there will be some who simply need additional "force and fear," as they tend to toe the line:

But since some are found to be depraved, and prone to vice, and not easily amenable to words, it was necessary for such to be restrained from evil by force and fear, in order that, at least, they might desist from evil-doing, and leave others in peace, and that they themselves, by being habituated in this way, might be brought to do willingly what hitherto they did from fear, and thus become virtuous. Now this kind of training, which compels through fear of punishment, is the discipline of laws. Therefore, in order that man might have peace and virtue, it was necessary for laws to be framed . . . .<sup>31</sup>

Whereas Hobbes believed that "fear and force are necessary to restrain human beings by their very nature,"<sup>32</sup> Aquinas believed our nature fundamentally leans toward peace and virtue, and it is only a few that need the requisite punishment "tune-up" to get back to equilibrium.<sup>33</sup> Thus, punishment in retributive fashion is meant to restore balance – a criminal is meant to suffer loss in order to restore legal equality in society. In Aquinas' eyes, retribution is not considered vengeful – we are

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<sup>26</sup> *Id.* at 320.

<sup>27</sup> Frederick Rauscher, *Kant's Social and Political Philosophy*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2012), <http://plato.stanford.edu/entries/kant-social-political/>.

<sup>28</sup> Koritansky, *supra* note 25, at 320 (explaining that Kant's theory focuses exclusively upon the crime committed rather than the personal culpability and psychological motivation of the person committing the crime).

<sup>29</sup> *Id.* at 321.

<sup>30</sup> *Id.* at 326.

<sup>31</sup> ST. THOMAS AQUINAS, *SUMMA THEOLOGICA I-II* q. 95, a. 1 (Fathers of the English Dominican Province trans., 3d ed. 1942).

<sup>32</sup> Koritansky, *supra* note 25, at 326.

<sup>33</sup> *Id.*

only permitted to punish “according to the order of reason” not “beyond his deserts” or else the “desire of anger will be corrupt.”<sup>34</sup>

Pope Pius XII described retribution as “the most important function of punishment”<sup>35</sup>:

Part of the concept of the criminal act is the fact that the perpetrator of the act becomes deserving of punishment. . . . Punishment is the reaction demanded by law and justice against crime; they are like blow and counter-blow. The order of justice that is disrupted by the crime demands to be reestablished and restored to its original equilibrium.<sup>36</sup>

Retribution has been described as “backward looking” in the sense that those determining what type of fear, force, or medicine is warranted in a particular case must examine what the offender did in the past that would merit such punishment.<sup>37</sup> The punishment must “fit the crime.”<sup>38</sup> The proportionality principle is heavily cited in many criminal codes throughout the world. For example, the Canadian Criminal Code provides that a sentence “must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”<sup>39</sup> According to Canadian law experts, “[t]he retributive principle of proportionality attempts to link the amount of punishment with the seriousness of the offence and the offender’s degree of culpability.”<sup>40</sup> Therefore, according to the Canadian Criminal Code, the law of proportionality both authorizes and limits punishment.<sup>41</sup>

In the past, communities have exhibited a rather strange sense of what constitutes proportionality. In the Middle Ages, Germanic tribes in northern Europe executed offenders who cut down trees by burying them in the ground from the shoulders down and chopping off their heads (just as the tree had been topped).<sup>42</sup>

A type of punishment much closer to the common understanding of proportionality would be the use of financial penalties which predates the Code of Hammurabi.<sup>43</sup> This Code, for example, personifies the rule of proportionality stating that “[i]f any one open his ditches to water his crop, but is careless, and the

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<sup>34</sup> *Id.* at 328.

<sup>35</sup> Falvey, *supra* note 17, at 158.

<sup>36</sup> *Id.* at 158-59 (citing Pope Pius XII, *International Penal Law*, in I MAJOR ADDRESSES OF POPE PIUS XII 244, 313 (Vincent A. Yzermans ed., 1961) (1939)).

<sup>37</sup> JOHN M. BURKOFF & RUSSELL L. WEAVER, *INSIDE CRIMINAL LAW: WHAT MATTERS AND WHY* 6 (2008).

<sup>38</sup> ARNOLD H. LOEWY, *CRIMINAL LAW IN A NUTSHELL* 6 (5th ed. 2009).

<sup>39</sup> Kent Roach, *Canada*, in *THE HANDBOOK OF COMPARATIVE CRIMINAL LAW* 102 (Kevin Jon Heller & Markus D. Dubber eds., 2011).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> PHILIP L. REICHEL, *COMPARATIVE CRIMINAL JUSTICE SYSTEMS: A TOPICAL APPROACH* 294 (5th ed. 2008).

<sup>43</sup> *Id.* at 297.

water flood the field of his neighbor, then he shall pay his neighbor corn for his loss.”<sup>44</sup> The code also states, “[i]f a man let in the water, and the water overflow the plantation of his neighbor, he shall pay ten gur of corn for every ten gan of land.”<sup>45</sup>

According to one study in 1997, financial penalties were “the most frequently used noncustodial sanction in the world, ranging from 95% of noncustodial sanctions in Japan through more than 70% in Western European countries to much lower percentages in the developing world.”<sup>46</sup> For example, in Japan, retribution is achieved through disgrace. A long-term imprisonment is unnecessary because any type of sanction creates a form of alienation from the community, and the Japanese prefer to use financial penalties to get the point across and achieve retribution.<sup>47</sup> The Japanese value maintaining close ties within a group, and the offender has a greater chance of success within the community working to pay the fine than being placed in an institutional setting for a period of time.<sup>48</sup>

Another example of a financial penalty used to create legal equality is the European day fine. The fine is “based on the idea that monetary punishment should be proportionate to the seriousness of the crime,” with the amount tailored to an individual’s financial circumstances.<sup>49</sup> In Germany, for instance, very few offenders end up in prison.<sup>50</sup> In fact, only about eight percent of convicted defendants actually serve prison sentences.<sup>51</sup> Rather, the day fine system is used as a punishment for severe crimes, replacing short-term imprisonment and instead reflecting the offender’s daily wages.<sup>52</sup> The number of days used for the fine is proportional to the offender’s culpability.<sup>53</sup> Additionally, the day fine system limits the secondary effects of imprisonment on family members. While the offender will feel the effects of losing income, the offender’s family will be spared the physical loss of a breadwinner and family member.

Restitution or victim compensation can also, arguably, fall under retribution. According to Thomas Aquinas:

[R]estitution restores an equality to the relationship between two private individuals by returning some good to the person from whom that good (or some other good of equal value) was taken. . . . [I]t presupposes that what rightfully

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<sup>44</sup> EAWC ANTHOLOGY: HAMMURABI’S CODE OF LAWS no. 55 (L.W. King trans.), available at <http://eawc.evansville.edu/anthology/hammurabi.htm>, (last visited Mar. 7, 2014).

<sup>45</sup> *Id.* no. 56.

<sup>46</sup> REICHEL, *supra* note 42, at 297.

<sup>47</sup> RICHARD J. TERRILL, WORLD CRIMINAL JUSTICE SYSTEMS: A COMPARATIVE SURVEY 252-53 (8th ed. 2013).

<sup>48</sup> *Id.*

<sup>49</sup> REICHEL, *supra* note 42, at 298.

<sup>50</sup> See, e.g., Thomas Weigend, *Germany*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 39, at 275.

<sup>51</sup> *Id.*

<sup>52</sup> See *id.*; see also REICHEL, *supra* note 42, at 299 (indicating that day fines are valued at the offender’s net take home pay).

<sup>53</sup> Thomas Weigend, *Germany*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 39, at 275.

belongs to one person is in the possession of another bound by justice to restore it.<sup>54</sup>

In Saudi Arabia, retribution can take the form of compensation in that the victim or victim's family is compensated directly in the form of *diyya* (blood money).<sup>55</sup> *Diyya* is "considered a way to rid society, including the victims and their families, of any grudges toward the offender," and the amount of compensation depends upon the nationality of the victim and whether the victim was Muslim or male.<sup>56</sup>

Germany also utilizes a form of victim compensation in the form of the donation sanction.<sup>57</sup> The offender may pay the victim or a charitable organization a sum of money or perform another action/work assignment that will benefit the public.<sup>58</sup> Once the offender completes the task, the prosecutor dismisses the case and the offender's criminal record is wiped clean.<sup>59</sup>

Using restitution as a form of retribution is a relatively recent concept many countries are relying upon called "restorative justice." Restorative justice looks to the social relationship between victim and offender and focuses on the breach of that social relationship when the offender commits the crime.<sup>60</sup> Restorative justice requires an agreement, in essence a plea and sentencing deal, among the offender, the victim, and the prosecutor, and it considers victim compensation and community service the most effective type of punishment.<sup>61</sup> Advocates argue that the restorative justice theory reduces crime rates and recidivism, while critics argue that it allows for disparate treatment of otherwise identical offenders.<sup>62</sup> Australia bases its criminal code on the principles of restorative justice which "provide a broader range of diversionary options and prospects for offender and victim restoration. . . . Its objects are to[:]

- Enhance the rights of victims of offences by providing restorative justice as a way of empowering victims to make decisions about how to repair the harm done by offences;
- Set up a system of restorative justice that brings together victims, offenders, and their personal supporters in a carefully managed, safe environment;
- Ensure that the interests of victims of offences are given high priority in the administration of restorative justice under this Act;

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<sup>54</sup> Koritansky, *supra* note 25, at 330.

<sup>55</sup> REICHEL, *supra* note 42, at 301.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 301-02.

<sup>59</sup> *Id.* at 302.

<sup>60</sup> LAFAVE, *supra* note 21, at 27.

<sup>61</sup> *Id.* at 28.

<sup>62</sup> *Id.*

- Enable access to restorative justice at every stage of the criminal justice process without substituting for the criminal justice system or changing the normal process of criminal justice;
- And enable agencies that have a role in the criminal justice system to refer offences for restorative justice.”<sup>63</sup>

In summary, retribution is retrospective in nature and is deserved when the wrongdoer freely chooses to violate society’s rules. The degree of punishment should be calibrated with the moral wrongdoing encompassed by the crime.<sup>64</sup> In step with the principles of retribution, a judge might consider crafting a punishment meant to restore balance between the offender and society, and the offender and the victim, while utilizing the principle of proportionality to make the punishment fit the crime (e.g., a European day fine tailored to the defendant’s financial circumstances).

### B. Deterrence

In addition to retribution, many countries also list deterrence as an important goal of punishment. The Rome Statute of the International Criminal Court went into force on July 1, 2002 and was adopted by 120 countries.<sup>65</sup> The Rome Statute created the International Criminal Court (ICC), which is permitted to investigate and prosecute four core international crimes: genocide, crimes against humanity, war crimes, and crimes of aggression in which a state uses armed force against another state and the case is referred to the ICC.<sup>66</sup> “The Preamble to the Rome Statute affirms that ‘the most serious crimes of concern to the community must not go unpunished’” and argues that countries must “put an end to impunity for the perpetrators of these crimes and thus . . . contribute to the prevention of such crimes.”<sup>67</sup> The ICC focuses on both retribution and deterrence. Retribution “is not to be understood as fulfilling a desire for revenge, but as duly expressing the outrage of the international community caused by these crimes.”<sup>68</sup> While fulfilling the need for retribution, the ICC suggests that deterrence will be a by-product of the punishment. “[T]he deterrent effect of punishment ‘must not be accorded undue prominence’ . . . because punishment is supposed to deter by ‘bringing about the development of a culture of respect for the rule of law and not simply the fear of

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<sup>63</sup> Simon Bronitt, *Australia*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 38, at 56.

<sup>64</sup> 2 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 15.01[2], at 346 (4th ed. 2006).

<sup>65</sup> Rome Statute of the International Criminal Court, July, 17 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; Kevin Jon Heller, *The Rome Statute of the International Criminal Court*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 39, at 593.

<sup>66</sup> Rome Statute, *supra* note 65, at 92, 100.

<sup>67</sup> Kevin Jon Heller, *The Rome Statute of the International Criminal Court*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 39, at 601 (citation omitted).

<sup>68</sup> *Id.* (citation omitted) (internal quotation marks omitted).

the consequences of breaking the law.”<sup>69</sup> Therefore, “[p]romoting deterrence through retributively disproportionate sentences is thus unacceptable.”<sup>70</sup>

The ICC’s first sentenced Thomas Lubanga, a Congolese militia leader who was known to have abducted children under the age of fifteen to be a part of his rebel army in 2002 and 2003.<sup>71</sup> In July 2010, Lubanga was sentenced to fourteen years in prison, falling far short of the prosecution’s requested thirty-year sentence.<sup>72</sup> Apparently, the judge found that fourteen years was proportionate to the seriousness of the crimes and that the amount of time would sufficiently deter others. Unfortunately, other militia leaders such as Joseph Kony, the leader of the Lord’s Resistance Army, who continually abducts children to turn them into soldiers, are not deterred.<sup>73</sup>

In contrast to retribution, deterrence is more “forward looking” in the sense that those deciding punishment must determine what society will gain in the future from punishing the offender at this particular moment in time.<sup>74</sup> Deterrence has also been labeled “utilitarian” in that the pain inflicted by the particular punishment is justifiable only if it is expected to result in a reduction in the pain of crime that would otherwise occur.<sup>75</sup> “Utilitarian justifications for punishment are those that weigh the costs of imposing punishment against the social benefits to be obtained in crime prevention.”<sup>76</sup> Therefore, a particular punishment would only be utilitarian if the consequences of the punishment are useful to a great number of people (victim, defendant, society, etc.), and the punishment strikes a proper balance between curbing any future wrongdoing by the defendant and allowing the victim some sort of peace and sense that justice was done.

Deterrence is broken down into two categories: general and specific.<sup>77</sup> General deterrence focuses on how the punishment of the individual offender translates into deterring others from committing future crimes.<sup>78</sup> Whether punishing a particular individual substantially impacts others who are considering committing similar acts is unclear. “[I]ndividuals undoubtedly react differently to the threat of punishment, depending upon such factors as their social class, age, intelligence, and moral training. The magnitude of the threatened punishment is clearly a factor, but perhaps not as important a consideration as the probability of discovery and punishment.”<sup>79</sup> Specific deterrence focuses on how the offender’s punishment will

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<sup>69</sup> *Id.* (citation omitted).

<sup>70</sup> *Id.* (citation omitted).

<sup>71</sup> Marlise Simons, *International Criminal Court Issues First Sentence*, N.Y. TIMES, July 11, 2012, <http://www.nytimes.com/2012/07/11/world/europe/international-criminal-court-issues-first-sentence.html>.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> BURKOFF & WEAVER, *supra* note 37.

<sup>75</sup> DRESSLER & MICHAELS, *supra* note 64, at 347-48.

<sup>76</sup> BURKOFF & WEAVER, *supra* note 37, at 14.

<sup>77</sup> DRESSLER & MICHAELS, *supra* note 64, at 348.

<sup>78</sup> *Id.*

<sup>79</sup> LAFAVE, *supra* note 21, at 26.

deter the individual offender in the future from committing similar acts against society.<sup>80</sup> Whether a punishment will serve as a wake-up call and prevent the individual from committing another crime remains to be seen and may depend upon why the individual committed the crime in the first place.

Clearly, a community's sense that law and order exists, complete with police, prosecutors, and judges, will have a deterrent effect. However, it is hard to determine whether this theory is true since we are unwilling to perform such an experiment and live in a complete state of anarchy to prove the point. In one such experiment during World War II, the Germans arrested the entire police force in Denmark and substituted it for a virtually non-existent policing system.<sup>81</sup> The impact? The rate of crime increased tenfold.<sup>82</sup> Some have said that "[c]ertainty of detection and punishment is of greater consequence in deterring people from committing crimes than is the *severity* of the penalty."<sup>83</sup> "[I]t seems fair to say that the prospect of punishment does deter crime, at least to some degree. . . . [But] because of our unwillingness to create a meaningful control group, we cannot precisely calibrate the extent of this deterrent effect."<sup>84</sup>

Are criminals aware of the sentences the court imposes or do they calculate the possible loss as well as the potential gain? Are criminal laws enforced with sufficient certainty and severity to serve as effective deterrents? Would a man who killed his wife in the heat of passion be deterred to kill again by a significant prison sentence or would his sentence generally deter others from committing murder?

Established criminal justice systems have a deterrent effect on crime (we are just uncertain as to how much). However, there are other methods of deterring crime. As Aquinas mentioned, parental guidance, education, and subtle community pressure have a tendency to keep individuals in line.<sup>85</sup>

There was nothing subtle about the way the villages in American colonial times placed pressure on its members to live an orderly and virtuous life. In the seventeenth and eighteenth centuries, leaders in the community deeply believed in a God-given, natural order and chain of command, which, in turn, created a powerful, religious, self-conscious ethos.<sup>86</sup> "The laws and legal customs . . . were a mirror of what elites, magistrates, and leaders thought about the good, the true, and the right, about justice and order."<sup>87</sup> Punishment was public, and the leaders of the villages made use of shaming in order to teach a lesson "so that the sinful sheep would want to get back to the flock."<sup>88</sup> Offenders were forced to sit in the stocks,

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<sup>80</sup> DRESSLER & MICHAELS, *supra* note 64, at 348.

<sup>81</sup> LOEWY, *supra* note 38, at 8.

<sup>82</sup> Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 962 (1966).

<sup>83</sup> *Id.* at 964 (emphasis added).

<sup>84</sup> LOEWY, *supra* note 38, at 8.

<sup>85</sup> AQUINAS, *supra* note 31.

<sup>86</sup> LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 12 (1993).

<sup>87</sup> *Id.* at 23.

<sup>88</sup> *Id.* at 37.

whipped, branded, or placed on the ducking stool.<sup>89</sup> “[A] Massachusetts law of 1672 denounced the ‘evil practice’ of ‘Exorbitancy of the Tongue, in Railing and Scolding’<sup>90</sup> and offenders, mostly women, were to be “[g]agged, or set in a Ducking-stool, and dipt over Head and Ears three times in some convenient place of fresh or saltwater.”<sup>91</sup> Deviants were humiliated in order to see the error of their ways.

Several methods of deterrence were used. Burglars had their ears detached as a way to forever be labeled as thieves.<sup>92</sup> Workhouses were set up for “people classified as vagrants, idlers, paupers;”<sup>93</sup> Thomas Jefferson even proposed castration for sex offenders.<sup>94</sup> Shaming techniques were effective in deterring crime not only because they tended to be severe but also because in smaller communities, individuals desperately wanted to be accepted as part of the flock. The ultimate punishment was banishment,<sup>95</sup> which more likely than not, led to death outside the comforting arms of neighbors and family members.

In many countries such as Saudi Arabia, Sudan, Yemen, Mali, and Iran, amputation is used as a form of punishment and serves as an extremely powerful deterrent.<sup>96</sup> In 2011, Amnesty International reported at least six cross-amputations (right hand and left foot) for highway robbery in Saudi Arabia,<sup>97</sup> and, in 2012, it reported seven amputations in Mali for theft and robbery.<sup>98</sup> Islamic law justifies amputation in cases of repeated theft or robbery, and Iran utilizes an electric guillotine that severs a hand in a tenth of a second.<sup>99</sup>

In the Seventh United Nations crime trends survey, Qatar, Singapore, Swaziland, Zambia, and Zimbabwe were reported as using corporal punishment, mainly flogging, as a punishment sanction.<sup>100</sup> According to one scholar’s research:

More than 30 different crimes have mandatory caning sentences in Singapore, rape may be punished by whipping with a cat-o’-nine-tails in the Bahamas, and

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<sup>89</sup> *Id.* at 38, 40.

<sup>90</sup> *Id.* at 38.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 40.

<sup>93</sup> *Id.* at 49.

<sup>94</sup> *Id.* at 73.

<sup>95</sup> *Id.* at 40.

<sup>96</sup> *The 13 Most Brutal and Inhumane Judicial Punishments Still Used Today*, BRAINZ.ORG, <http://brainz.org/13-most-brutal-and-inhumane-judicial-punishments-still-used-today/> (last visited Oct. 14, 2014). Kenya also uses amputation though it appears as if Kenya’s use is not judicial but rather a practice used by its dictator to punish enemies and instill terror. See *Kenya’s ICC Trials*, AMNESTY INT’L (Sept. 16, 2013), <http://www.amnesty.org/en/news/kenya-s-icc-trials-2013-09-16>.

<sup>97</sup> *Saudi Arabia: King Urged to Commute ‘Cross Amputation’ Sentences*, AMNESTY INT’L (Dec. 16, 2011), <http://www.amnestyusa.org/news/news-item/saudi-arabia-king-urged-to-commute-cross-amputation-sentences>.

<sup>98</sup> *Mali: End Horrific Abuses Targeting Civilians Amid Conflict*, AMNESTY INT’L (Sept. 20, 2012), <http://www.amnestyusa.org/news/news-item/mali-end-horrific-abuses-targeting-civilians-amid-conflict>.

<sup>99</sup> REICHEL, *supra* note 42, at 305.

<sup>100</sup> *Id.* at 304.

flogging is a punishment for alcohol-related crime in Iran and for sexual offenses in Saudi Arabia. . . . Amnesty International reports flogging sentences from 80 to 120 [lashes] in the United Arab Emirates and of 240 – in installments of 40 every 7 days – in Saudi Arabia.<sup>101</sup>

In Saudi Arabia, flogging is a principal or additional punishment, and in 2012, Amnesty International reported that at least five defendants were sentenced to 1,000 to 2,500 lashes.<sup>102</sup> In these instances, the punishment is meted out, and the offender then returns to society where hopefully, she/he is deterred from committing future crimes. Some argue that punishment for deterrent purposes “will fill the prisoner with feelings of hatred and desire for revenge against society and thus influence future criminal conduct.”<sup>103</sup> Or, it can produce the opposite effect and these punishments may serve as a reminder, as strong as the letter “A” on Hester Prynne’s dress, to prohibit others from following similar “criminal” ideas.

In its new criminal code adopted in June 1996, Russia moved away from an emphasis on retribution towards deterrence and rehabilitation as its primary goals of punishment. According to Article 43 of the Criminal Code, which is devoted to the concept and purposes of punishment, punishment is imposed to “‘restore social justice’ and to ‘correct the convicted person and prevent the commission of new crimes.’”<sup>104</sup> The Criminal Code further states that:

Punishment is the measure of State coercion assigned by judgment of a court. Punishment shall be applied to a person deemed to be guilty of the commission of a crime and shall consist of the deprivation or limitation of rights and freedoms of this person provided for by the present Code. Punishment shall be applied for the purpose of restoring social justness, and also for the purpose of reforming the convicted person and preventing the commission of new crimes.<sup>105</sup>

This was Russia’s attempt to transform the old correctional system of the Soviet Union to a more humane approach under the Russian Federation. By focusing on deterrence and reform, Russia sought to look less vengeful and less harsh as it meted out punishment.<sup>106</sup>

Punishment must be just in the sense that it is proportional to the character and level of social dangerousness of the crime, the circumstances of its commission, and the personal characteristics of the guilty person.<sup>107</sup> “[T]here is now a presumption

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<sup>101</sup> *Id.* at 305.

<sup>102</sup> AMNESTY INT’L, AMNESTY INTERNATIONAL REPORT 2013: THE STATE OF THE WORLD’S HUMAN RIGHTS 226 (2013), available at [http://files.amnesty.org/air13/AmnestyInternational\\_AnnualReport2013\\_complete\\_en.pdf](http://files.amnesty.org/air13/AmnestyInternational_AnnualReport2013_complete_en.pdf).

<sup>103</sup> LAFAVE, *supra* note 21, at 25.

<sup>104</sup> Stephen C. Thaman, *Russia*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 39, at 419 (citation omitted).

<sup>105</sup> TERRILL, *supra* note 47, at 414.

<sup>106</sup> *See id.* at 415.

<sup>107</sup> *Id.* at 414.

that the least restrictive punishment must be imposed unless the goals of punishment cannot be achieved without meting out a more severe punishment.”<sup>108</sup>

“[T]he majority of Russian citizens display[] a good deal of respect for the power and authority . . . [of] their leaders” (whether it is the present state of affairs or the remembrance of the iron fist under the tsars or the leadership of the Communist Party).<sup>109</sup> Regardless, this respect for law and order has created a conformist attitude towards the state by the citizenry, ultimately having a deterrent effect.<sup>110</sup>

As previously mentioned, Japan achieves deterrence through detection and exposure. Lenient sentences first induce shame by exposing the offender’s crime to the community; these light sentences are then meant to encourage the rehabilitation process and impress upon the offender the court’s generosity.<sup>111</sup> It is then the obligation of the community to assist the offender in rehabilitation and keep him or her from re-offending. Exposure and societal pressure serve as the deterrents.<sup>112</sup> Parole is common, thus, the Japanese system has produced a lower amount of repeat offenders by restoring community relationships and reintegrating offenders into society.<sup>113</sup>

In step with the principles of deterrence, a judge might consider whether the offender has strong friendships or family ties and whether the offender has any economic or financial ties or roots to the community. Public shaming or community service may be more effective punishments similar to the Japanese model than a long-term prison sentence for those who have strong ties to the community. Japanese courts also consider whether this is the individual’s first crime or whether he or she has a significant criminal history. Stiff penalties may be appropriate for repeat offenders who may be deterred by a strong sense of law and order where judges “carry a big stick.”<sup>114</sup>

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<sup>108</sup> Stephen C. Thaman, *Russia*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 39, at 419 (citation omitted).

<sup>109</sup> TERRILL, *supra* note 47, at 412-13.

<sup>110</sup> *See id.* The Communist ideology that influenced Russia’s correctional systems has also induced the conformist attitudes of Russians. *Id.* at 413. For example, *Pussy Riot*, a punk rock protest group based in Russia, opposes the policies of Vladimir Putin via stage performances and music videos that they share with the public. *See, e.g.*, Laura Smith-Spark, *Russian Court Imprisons Pussy Riot Band Members on Hooliganism Charges*, CNN (Aug. 18, 2012, 11:24 AM), <http://www.cnn.com/2012/08/17/world/europe/russia-pussy-riot-trial/>. In a March 2012 protest, three members were arrested, convicted and imprisoned for their actions, drawing criticism from Western societies of Russian human rights; however, public opinion in Russia was unsympathetic towards the women’s punishment. *See id.* According to a series of Levada Center polls published in the annual report *Russian Public Opinion* for 2012-2013, eighty-six percent of Russian citizens following the case favored some sort of punishment. *See* LEVADA ANALYTICAL CTR., RUSSIAN PUBLIC OPINION: 2012-2013, at 121-23 (2013).

<sup>111</sup> TERRILL, *supra* note 47, at 252.

<sup>112</sup> John O. Haley, *Japan*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 39, at 399.

<sup>113</sup> *See id.*

<sup>114</sup> 1 THEODORE ROOSEVELT, Speech at Washington, D.C. (Nov. 13, 1902), in PRESIDENTIAL ADDRESSES AND STATE PAPERS OF THEODORE ROOSEVELT 266 (1905).

*C. Incapacitation*

The goal of incapacitation focuses on isolating the offender from others once society has deemed the offender as dangerous and unable to live amongst the community.<sup>115</sup> Under this theory, criminals should be isolated or otherwise confined in order to prevent them from doing further harm.<sup>116</sup> Obviously, if the offender is executed or imprisoned for life, he or she cannot commit future crimes against other individuals in society.<sup>117</sup>

China leads the world in the number of executions taking place per year, with Iran, Saudi Arabia, and the United States following suit.<sup>118</sup> However, only twenty-one countries<sup>119</sup> carried out executions in 2012, and more than two-thirds of countries worldwide have either banned the death penalty or its practice by the end of 2012.<sup>120</sup> The European Union, South America, and Central America have all abolished the death penalty, except for Guyana.<sup>121</sup> In North America, Canada and Mexico have abolished the death penalty.<sup>122</sup> Countries in the Middle East and North Africa have, on the whole, retained the death penalty.<sup>123</sup> Iran is one of the top five countries in the world in terms of the numbers of executions, and its drug laws are deemed to be one of the strictest, with the ultimate penalty being death.<sup>124</sup> Israel has the death penalty on the books for a small number of crimes, but the only person to have been executed in Israel since 1962 was Nazi Adolf Eichmann, who was head of the Department for Jewish Affairs in the Gestapo and chief of operations in the deportation of three million Jews to extermination camps.<sup>125</sup>

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<sup>115</sup> LAFAVE, *supra* note 21, at 25.

<sup>116</sup> BURKOFF & WEAVER, *supra* note 37, at 5.

<sup>117</sup> LAFAVE, *supra* note 21, at 25.

<sup>118</sup> REICHEL, *supra* note 42, at 306.

<sup>119</sup> *See generally* AMNESTY INT'L, *supra* note 102. According to Amnesty International's 2013 Report, *The State of the World's Human Rights*, the following countries had death penalty laws on the books: Afghanistan, Algeria, Bahamas (no known executions in 2012), Bahrain, Bangladesh, Belarus, Benin (no known executions in 2012), Cameroon (no known executions in 2012), China, Democratic Republic of the Congo (no known executions in 2012), Egypt, Gambia, Guatemala (no known executions in 2012), India, Guinea, Guyana, Iran, Iraq, Jamaica (no known executions in 2012), Japan, Jordan, Kenya (no known executions in 2012), South Korea (no known executions in 2012), North Korea (executions not verified), Kuwait (no known executions in 2012), Lebanon (no known executions in 2012), Liberia (no known executions in 2012), Libya (no known executions in 2012), Malaysia, Maldives (no known executions in 2012), Mali, Mauritania, Morocco (no known executions in 2012), Myanmar (no known executions in 2012), Pakistan, Palestinian Authority, Qatar, Saudi Arabia, Singapore, Somalia, South Sudan, Sudan, Swaziland, Syria, Tanzania (no known executions in 2012), Thailand, Trinidad and Tobago (no known executions in 2012), Tunisia, Uganda (no known executions in 2012), United Arab Emirates, United States, Vietnam, and Yemen. *Id.*

<sup>120</sup> *See id.*

<sup>121</sup> REICHEL, *supra* note 42, at 307.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Silvia Tellenbach, *Iran*, in *THE HANDBOOK OF COMPARATIVE CRIMINAL LAW*, *supra* note 39, at 339.

<sup>125</sup> Itzhak Kugler, *Israel*, in *THE HANDBOOK OF COMPARATIVE CRIMINAL LAW*, *supra* note 39, at 380.

Much of the Asia-Pacific region has kept the death penalty, including China, India, Japan, Singapore, Thailand, and Vietnam.<sup>126</sup>

India, for example, has retained the death penalty for crimes such as “murder, robbery accompanied by murder, attempted murder by a person serving a life sentence if hurt is caused, waging war against the government of India, abetting mutiny actually committed, and giving false evidence upon which an innocent person suffers death.”<sup>127</sup> Hanging by the neck has been deemed acceptable,<sup>128</sup> however, imprisonment, forfeitures, and fines are much more common.<sup>129</sup> In 2012, India carried out its first execution in eight years by hanging a Pakistani national for his involvement in the 2008 Mumbai terror attacks.<sup>130</sup>

China currently executes people for drug offenses and violent crimes as well as for nonviolent crimes such as tax fraud and embezzlement.<sup>131</sup> One study found that China began using the death penalty more frequently when they found the crime rate was on the rise in the late 1970s.<sup>132</sup> Between 1983 and 1986, 7,000 to 14,000 executions were carried out, and Chinese officials alleged there was a substantial drop in the number of crimes in the first half of 1986.<sup>133</sup> Historically, Chinese custom allowed for five degrees of punishment: five degrees of beating with a light stick ranging from ten to fifty blows, and increasing in severity of up to two degrees of death, the first being strangulation and the second being decapitation.<sup>134</sup> Decapitation, described as the most severe punishment, was seen as being disrespectful to one’s parents based upon Chinese social and religious views of the body.<sup>135</sup> After widespread reports that the Chinese government was executing too many innocent people, the Chinese government established three branch courts of the Supreme People’s Court to review death sentences in 2006.<sup>136</sup> Officials anticipated the reform would lead to a thirty percent reduction in executions.<sup>137</sup>

The greatest criticism of the theory of incapacitation lies in the fact that it is difficult to predict which offenders will be ongoing dangers to society, and therefore, which should become “incapacitated,” whether that takes the form of life

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<sup>126</sup> REICHEL, *supra* note 42, at 307.

<sup>127</sup> Stanley Yeo, *India*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 39, at 307.

<sup>128</sup> *Id.*

<sup>129</sup> *See id.*

<sup>130</sup> AMNESTY INT’L, *supra* note 102, at 120.

<sup>131</sup> REICHEL, *supra* note 42, at 312.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 313.

<sup>134</sup> *Id.* at 314.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 313.

<sup>137</sup> *See id.* The Dui Hua Foundation has actively promoted China’s death penalty reform since 2005. While the actual numbers remain a state secret, Dui Hua regularly publishes estimates of China’s executions. Dui Hua estimates that executions have reduced by half since 2007. They credit this reduction primarily to the Supreme People’s Court regaining the power to review all death sentences in 2007. *See Criminal Justice*, DUI HUA, [http://duihua.org/wp/?page\\_id=136](http://duihua.org/wp/?page_id=136) (last visited Oct. 15, 2014).

imprisonment or execution.<sup>138</sup> Rather than ease up on incapacitation, many countries, the United States in particular, seem to be leaning more heavily on this theory.<sup>139</sup> There has been a recent worldwide trend expanding long-term detention, not only for reasons of punishment post-trial, but also to protect society from anticipated future conduct pre-trial. In 2012, prisoners of conscience that remained in prison without charges were detained in fifty-seven countries.<sup>140</sup>

As a result of a higher violent crime rate in the 1970's, the United States' Bail Reform Act of 1984 was designed to permit detention based upon a finding by clear and convincing evidence that the defendant is a danger to the community.<sup>141</sup> A judge must determine after evaluating the circumstances of the offense, the type of crime, and the personal information of the offender obtained by the Pre-Trial Services officer, whether the offender should be incarcerated prior to trial or, in some instances, despite no trial at all.

The tendency towards detention for reasons other than punishment include recent trends to civilly commit those who pose a threat to society, such as sexually violent predators and those with mental illness. In the United States, more and more sex offenders are retained in prison after their prison sentences have been served because psychologists deem them to be "sexually dangerous" to the community.<sup>142</sup> In order to extend the sentence as such, the government must prove to the judge that: (1) the offender molested a child or committed a violent sex crime; (2) that the offender has a mental disorder; and (3) that the offender's illness will force him or her to have "serious difficulty" refraining from new sex crimes if freed.<sup>143</sup> A *USA Today Investigation* revealed in March of 2012 that since 2006, 136 men had been found to be "sexually dangerous" and remained detained after they had finished their criminal sentences.<sup>144</sup> The article points out that:

In the 1980s, a devastating series of studies suggested that psychologists' predictions about who was dangerous were no more reliable than a coin toss. So in the years that followed, researchers analyzed records on thousands of sex offenders, looking for the telltale markers that could identify groups of people most likely to re-offend. What they came up with is a lot like the system insurers use to figure out which types of people are most likely to have an accident. . . . The last step [proving that the individual will have serious difficulty not re-

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<sup>138</sup> LAFAVE, *supra* note 21, at 25.

<sup>139</sup> See generally NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 29, 50, 52 (2014) (demonstrating the rapid growth in the federal prison system).

<sup>140</sup> AMNESTY INT'L, HUMAN RIGHTS: FACTS AND FIGURES 2013 (2013), available at [http://files.amnesty.org/air13/fnf\\_air\\_2013\\_en.pdf](http://files.amnesty.org/air13/fnf_air_2013_en.pdf).

<sup>141</sup> 18 U.S.C. § 3142(e)(1) (2013).

<sup>142</sup> See Brad Heath, *Sexual Predators Rarely Committed under Justice Program*, USA TODAY (Mar. 19, 2012, 11:34 AM), <http://usatoday30.usatoday.com/news/nation/story/2012-03-13/dangerous-sexual-predators-detained/53621210/1>.

<sup>143</sup> *Id.*

<sup>144</sup> See *id.*

offending] is the hardest, in part because studies have repeatedly found that most sex offenders are never convicted of another sex crime.<sup>145</sup>

There has also been an increase in the detention of deportable aliens, material witnesses, and enemy combatants. Other nations are also demonstrating an interest in detention for reasons other than punishment meted out post-trial. Suspected terrorists are being held in Guantanamo Bay based upon the likelihood that they are a threat to the United States and that, if released, they may commit terrorist acts against United States' citizens or attack United States' cities. A recent report by the Director of National Intelligence reveals that as of July 15, 2013, out of 603 detainees formerly held at Guantanamo Bay that have been transferred and released to other countries, 100 (16.6%) have been "confirmed"<sup>146</sup> to have re-engaged in terrorist activities, and seventy-four detainees (12.3%) have been "suspected"<sup>147</sup> of re-engaging.<sup>148</sup>

Similar to the United States' response to 9/11 with the enactment of legislation permitting detention without a trial, Spain, in response to the bombings at the Madrid train station in 2004, enabled authorities to hold an individual in incommunicado detention for up to thirteen days without charges being issued.<sup>149</sup> Many other countries consistently maintain a high number of pre-trial detainees who have been, and still are, waiting months, and sometimes years, to have their cases heard.

What is striking about these examples lies in the fact that no actual crime has been committed or in many instances, the detainee has yet to have been convicted of a crime. The idea behind incapacitation lies in society's fear that the offender *may* re-offend. As we broaden our reasons for detention, there may be a greater tendency to detain people on the basis of fear, our concerns that the detainee, if released, will do us harm. But who can truly judge the hearts of men and reliably predict future behavior with crystal ball clarity, 100 percent certainty? Can our expectations of the possible<sup>150</sup> and probable<sup>151</sup> future behavior of certain individuals

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<sup>145</sup> *Id.*

<sup>146</sup> OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, SUMMARY OF THE REENGAGEMENT OF DETAINEES FORMERLY HELD AT GUANTANAMO BAY, CUBA (2013), available at [http://www.dni.gov/files/documents/September\\_2013\\_GTMO\\_Reengagement\\_UNCLASS\\_Release\\_FINAL.pdf](http://www.dni.gov/files/documents/September_2013_GTMO_Reengagement_UNCLASS_Release_FINAL.pdf) (defining "confirmed" as "[a] preponderance of information which identifies a specific former GTMO detainee as directly involved in terrorist or insurgent activities. For the purposes of this definition, engagement in anti-US statements or propaganda does not qualify as terrorist or insurgent activity.").

<sup>147</sup> *Id.* (defining "suspected" as "[p]lausible but unverified or single-source reporting indicating a specific former GTMO detainee is directly involved in terrorist or insurgent activity").

<sup>148</sup> *Id.*

<sup>149</sup> HUMAN RIGHTS WATCH, SETTING AN EXAMPLE? COUNTER-TERRORISM MEASURES IN SPAIN 1 (2005), available at <http://www.hrw.org/reports/2005/spain0105/spain0105.pdf>.

<sup>150</sup> See WEBSTER'S NEW WORLD DICTIONARY 503 (4th ed. 2003) (stating that "possibly" means something might happen, exist, or be true but is not certain).

or groups justify lengthy detention of those individuals solely based on our fears and questionable judgment?

Incapacitation is an extreme goal of punishment and should be used sparingly. Incapacitation makes the statement that the offender is beyond hope – so “sick” that he or she is unable to behave and live amongst society. In the words of Clarence Darrow while defending Leopold and Loeb and arguing for life imprisonment rather than the death penalty,

Why did they kill little Bobby Franks? Not for money, not for spite; not for hate. . . . They killed him because they were made that way. Because somewhere in the infinite processes that go to the making up of the boy or the man something slipped, and those unfortunate lads sit here hated, despised, outcasts, with the community shouting for their blood.<sup>152</sup>

Therefore, in step with the principles of incapacitation, a judge might consider using incapacitation only in those limited cases where the public, the court, parents, and friends “know perfectly well that they should not be released, and that they should be permanently isolated from society.”<sup>153</sup>

#### *D. Rehabilitation*

Rehabilitation should be our most important and favored goal of punishment. Rehabilitation focuses on the hope that offenders can be “reformed” or “changed for the better” while being punished so that the offender may re-integrate with the rest of society with the hopes that he or she does not re-offend. “The rehabilitation theory rests upon the belief that human behavior is the product of antecedent causes, that these causes can be identified, and that on this basis therapeutic measures can be employed to effect changes in the behavior of the person treated.”<sup>154</sup> Under this theory, various programs are offered to the offender, such as drug, alcohol, or sex offender treatment or educational programs such as job training and career counseling to help the offender transition into a productive life, again, with the hope that the offender no longer poses a threat to others and that they will be able to shed their anti-social and criminal tendencies.<sup>155</sup>

Both probation and parole are utilized as a part of rehabilitative aims. Both are tools that are used to attempt to reintegrate the offender back into society. Probation is granted to offenders instead of a term in prison or is added on after a prison sentence has been completed, whereas parole is offered to offenders as early

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<sup>151</sup> *Id.* at 513 (defining “probably” as “likely to occur”). It is very likely even with a series of established statutory factors to consider, judges will have a difficult time determining when a defendant might reoffend.

<sup>152</sup> MICHAEL S. LIEF ET AL., *LADIES AND GENTLEMEN OF THE JURY: GREATEST CLOSING ARGUMENTS IN MODERN LAW* 173 (1998) (quoting the closing argument of Clarence Darrow in *Illinois v. Nathan Leopold & Richard Loeb*).

<sup>153</sup> *See id.* at 166.

<sup>154</sup> LAFAVE, *supra* note 21, at 25.

<sup>155</sup> *See* BURKOFF & WEAVER, *supra* note 37, at 7.

release at the end of a prison term. Both probationers and parolees typically report to a supervising officer, who monitors their behavior in the community and determines whether an offender violates their conditions of release.<sup>156</sup> If an offender violates the conditions of their release, a judge can remand the individual into custody for the duration of the sentence. In most jurisdictions, probation/parole officers are responsible for “providing information to other criminal justice agencies (e.g., presentence reports that assist the judge in determining an appropriate sentence), case supervision (e.g., assisting the reintegration process and monitoring offender compliance), [and] enforcement (e.g., initiating revocation proceedings when the offender violates conditions of probation).”<sup>157</sup>

Probation can trace its roots back to Boston shoemaker John Augustus who pushed for the first law in the United States that provided for paid probation officers in 1878.<sup>158</sup> Similarly, in 1841 in England, Matthew Hill, a court recorder in Birmingham, pushed for probation after an offender served one day in prison and suggested that not only parents or employers should be allowed supervisory authority, but that relatives, magistrates, police officers, and volunteers be permitted to supervise as well.<sup>159</sup> But it was “[n]ot until 1907 [that] the English Parliament pass[ed] a bill providing for appointment of paid probation officers to supervise those offenders placed on probation.”<sup>160</sup> It took another forty years before continental Europe caught on to the idea of probation.<sup>161</sup> Latin American countries soon followed suit. Mexico (1921), Costa Rica (1924), and Colombia (1936) passed similar laws but established a type of probation that provided for police surveillance rather than supervision by a probation officer.<sup>162</sup>

Probation in other countries varied. For example, Egypt allowed probation, but only for those offenders who had never previously received probation and had never been imprisoned more than one week.<sup>163</sup> In Japan and China, as long as an offender had never been sent to prison, a person could receive probation multiple times.<sup>164</sup> “The Chinese law of 1912 allowed for supervision by the police, charitable organizations, government officials, members of the public, or even the offender’s relatives.”<sup>165</sup>

Critics of rehabilitation believe that criminals represent the worst in society, and, therefore, “it is unjust to take tax dollars from those they consider more worthy to finance the rehabilitation of those they deem less worthy.”<sup>166</sup> Unfortunately, fulfilling the goal of rehabilitation entails significant programs,

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<sup>156</sup> See REICHEL, *supra* note 42, at 319.

<sup>157</sup> *Id.*

<sup>158</sup> See *id.* at 316.

<sup>159</sup> *Id.* at 317.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 318.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> LOEWY, *supra* note 38, at 2.

facilities, employees, and equipment, all of which can be quite costly.<sup>167</sup> Criminal justice systems must be whole-heartedly committed to the goal in order to create and effectively implement a truly rehabilitative correctional regime.

Others believe that “people who behave badly should simply be treated as sick people to be cured . . . .”<sup>168</sup> However, “[d]o we have the right, moral or legal, to paternalistically force someone to improve his lot in life? Should we force a convicted criminal to receive such [rehabilitative] training or should we simply facilitate its availability?”<sup>169</sup> And, “[d]oes training of this sort actually work?”<sup>170</sup> My question, in response, is “what do we have to lose?”

Many countries list rehabilitation as one of their top aims of punishment. Whether they actually make it a top priority is another story. In Argentina, “[r]ehabilitation or resocialization is the main, legally stated goal of imprisonment sanctions.”<sup>171</sup> As its justification, Argentina makes reference to the International Covenant on Civil and Political Rights, which states that “[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation,”<sup>172</sup> and the American Convention on Human Rights, which states that “[p]unishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.”<sup>173</sup>

Germany focuses on rehabilitation in its desire “to neutralize the offender’s continuing dangerousness” and its types of sentences include “commitment to a psychiatric hospital, commitment to an institution for alcohol or drug rehabilitation, security detention, and revocation of a driver’s license.”<sup>174</sup>

When asked whether rehabilitation exists and, if so, whether it works in the United States, one prisoner stated:

The consequences of . . . harsh sentencing guidelines and laws was more people being imprisoned in . . . already overcrowded prisons, teeming with prisoners from the War on Drugs in the 80’s, which became even more overcrowded in the 90’s . . . . Prisons are so overcrowded only bare bones educational and vocational programs are available. Due to the prevailing public and political climate, emphasizing punishment over rehabilitation, it is no longer a question of does rehabilitation work; it is a question of does rehabilitation have a prominent role in American prisons. Rehabilitation works, it is just expensive and time-consuming, two factors which work against it in a society dominated by politicians who want

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<sup>167</sup> BURKOFF & WEAVER, *supra* note 37, at 9.

<sup>168</sup> Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 406 (1958).

<sup>169</sup> BURKOFF & WEAVER, *supra* note 37, at 8.

<sup>170</sup> *Id.*

<sup>171</sup> Marcelo Ferrante, *Argentina*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 39, at 19.

<sup>172</sup> International Covenant on Civil and Political Rights art. 10(3), Dec. 19, 1966, 999 U.N.T.S. 171.

<sup>173</sup> American Convention on Human Rights: “Pact of San Jose, Costa Rica” art. 5(6), Nov. 22, 1969, 1144 U.N.T.S. 123.

<sup>174</sup> Thomas Weigend, *Germany*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 39, at 275.

immediate results to gloat over and a public that is accustomed to 15 minute solutions.<sup>175</sup>

Prisoner Carl Panzram, on the other side of the spectrum, apparently did not believe in rehabilitation, stating, “I believe the only way to reform people is to kill [th]em.”<sup>176</sup>

The United Nations Standard Minimum Rules for Noncustodial Measures, also known as the Tokyo Rules (where the rules were adopted), provide for acceptable, internationally accepted, non-custodial sanctions with an aim towards rehabilitation.<sup>177</sup> Some of the non-custodial sanctions listed in the Tokyo Rules include “furloughs, halfway houses, work or education release, parole, remission (reprieve), and pardon. The guiding principle is to provide a wide range of alternatives to prison and to encourage the early release and reintegration into society of those who were sent to prison.”<sup>178</sup>

One popular Tokyo Rule sanction in Poland, the Czech Republic, Australia, and France is the community service order, which is an alternative to a prison sentence.<sup>179</sup> In Poland, the offender must remain at a specified residence and must perform unpaid work at a charitable or nonprofit organization for between twenty and forty hours per month.<sup>180</sup> In the Czech Republic, the community service sentence can include fifty to 400 hours of compulsory, unpaid work “in the local community or for the general interests of society” to be performed during the offender’s free time.<sup>181</sup> In South Australia, community service can be imposed for up to 320 hours over a maximum period of eighteen months and can include cleaning waterways, building boat ramps, restoring historical sites, and cleaning litter from highways and roads.<sup>182</sup> In France, “community service is imposed as the main sentence (e.g., 200 hours to be performed within 6 months) or in combination with a suspended sentence (e.g., 3 months’ suspended sentence with the requirement to perform 200 hours of community service within 6 months),” and if the offender fails to fulfill his community service obligations, a prison sentence or fine may be imposed.<sup>183</sup>

Rehabilitation is clearly on the minds of legislators worldwide; however, whether significant funds are put aside to create a lasting rehabilitative impact is unclear. The hope is that offenders will obey the law in the future as a result of the

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<sup>175</sup> BURKOFF & WEAVER, *supra* note 37, at 8 (citation omitted) (quoting a prisoner’s online correspondence).

<sup>176</sup> GADDIS & LONG, *supra* note 3, at 221.

<sup>177</sup> United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), G.A. Res. 45/110, U.N. Doc. A/RES/45/110 (Dec. 14, 1990).

<sup>178</sup> REICHEL, *supra* note 42, at 315.

<sup>179</sup> *Id.* at 315-16.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 316.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

elimination of their motivations for offending. With that in mind, judges should always consider the goal of rehabilitation while determining an offender's sentence.

## II. THE MULTIPLE GOALS OF PUNISHMENT AND ITS ASSOCIATION WITH IMPRISONMENT

Imprisonment demands a separate section of its own as it is, arguably, a type of punishment that serves the goals of all of the above-described theories: retribution, deterrence, incapacitation, and rehabilitation.

As seen in the chart below, the United States relies heavily on incarceration as the dominant form of punishment. According to the International Centre for Prison Studies' World Prison Brief of 2013, 707 individuals per 100,000 are incarcerated in the United States' national population. Russia comes in second place with 474 individuals per 100,000 incarcerated. Japan and India are the countries with the lowest rate of incarceration with fifty-one individuals and thirty individuals per 100,000 respectively.

Country	Prison Population Rate per 100,000 of the national population <sup>184</sup>	Pre-trial Detainees (% of Prison Population)	Occupancy Level (Based on Official Capacity)	National Crime Rate in per 100,000 <sup>185</sup>
United States	707	21.60%	99.00%	3764.78
Russia	469	17.00%	83.60%	2940.00 <sup>186</sup>
South Africa	294	27.80%	127.70%	5918.73 <sup>187</sup>
Iran	283	25.00%	192.00%	Not Available
Brazil	275	38.00%	171.90%	Not Available

<sup>184</sup> *World Prison Brief*, INT'L CENTRE FOR PRISON STUD., <http://www.prisonstudies.org/world-prison-brief> (last visited Aug. 23, 2014) (displaying statistics in the "Overview" tab when an individual country is selected).

<sup>185</sup> *The Tenth United Nations Survey of Crime Trends and Operations of Criminal Justice Systems (Tenth CTS, 2005-2006)*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/unodc/en/data-and-analysis/Tenth-CTS-full.html> (last visited Oct. 26, 2014) (representing the grand total of recorded crimes).

<sup>186</sup> *Russian Population Dwindles Since 2002 – Statistics*, RIA NOVOSTI (Mar. 28, 2011, 6:40 AM), <http://en.ria.ru/russia/20110328/163240193.html> (representing population figures).

<sup>187</sup> *The Eighth United Nations Survey on Crime Trends and the Operations of Criminal Justice Systems (2001 - 2002)*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/unodc/en/data-and-analysis/Eighth-United-Nations-Survey-on-Crime-Trends-and-the-Operations-of-Criminal-Justice-Systems.html> (last visited Oct. 11, 2014) (displaying statistics if one selects "sorted by country" in the first table under the screen optimized column).

Israel	249	35.80%	90.30%	Not available
Colombia	238	35.40%	152.70%	Not available
Singapore	233	24.60%	79.20%	900.64
Saudi Arabia	162	58.70%	Not available	386.54 <sup>188</sup>
Argentina	161	50.30%	101.60%	3128.44
U. Kingdom	149	14.30%	111.40%	10399.21
Spain	143	13.00%	85.70%	2397.39
Paraguay	136	72.50%	130.90%	259.45
China	124	May be about 250,000	Not available	Not available
Canada	118	35.00%	96.40%	8317.24
France	102	26.00%	118.30%	377.00 <sup>189</sup>
Italy	90	32.60%	110.10%	4715.12
Germany	81	17.10%	86.30%	7628.46
Egypt	76	9.90%	Not available	2.32
Sweden	57	24.50%	84.20%	13493.44
Japan	51	10.70%	74.00%	1602.81
India	30	66.20%	112.20%	443.08

Not only is the world using incarceration as a punishment after conviction, but countries are also imprisoning individuals between the time of arrest and trial. A staggering seventy-two percent of all individuals in prison in Paraguay are pre-trial detainees; the second closest is India at sixty-six percent (with India incidentally also being the country with the lowest rate of incarceration in the chart). With so many individuals detained without undergoing a full trial and receiving due process, the question must be asked, what goal of punishment is being served here?

<sup>188</sup> *Id.*

<sup>189</sup> *France – Population – Historical Data Graphs Per Year*, INDEX MUNDI, <http://www.indexmundi.com/g/g.aspx?c=fr&cv=21> (last visited Oct. 15, 2014) (representing population figures).

A crime *may* have been committed; however, without a full and fair trial, the individual has not, as of yet, been convicted beyond a reasonable doubt.

According to World Prison Brief numbers,<sup>190</sup> 21.6% of all individuals in United States prisons are pre-trial detainees. Under 18 U.S.C. § 3142, magistrate judges must decide whether the alleged offender poses a flight risk or poses a danger to “any other person and the community.”<sup>191</sup> The bail statute favors unconditional release “unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.”<sup>192</sup> If that is the case, then the judicial officer’s option would be to release on one or more conditions,<sup>193</sup> with the least favored option being pre-trial detention.<sup>194</sup> However, the bail reform statute continues by pointing out that a rebuttable presumption applies if the defendant is both a flight risk and dangerous to the community when the court has probable cause to believe that the defendant has committed a crime; this crime could take the form of a narcotics offense punishable by more than ten years in prison or a crime in violation of 18 U.S.C. § 924(c), which provides for an enhanced punishment for the use of a firearm during the commission of a drug offense or crimes of violence.<sup>195</sup>

Critics argue that pre-trial confinement “runs contrary to both the presumption of innocence and the principle of limited government authority,” that it is wrong to jail persons for what society fears they will do in the future, and that a person has a right to liberty until it is proven beyond a reasonable doubt that he or she has chosen to abuse it.<sup>196</sup> My greatest concern is that pre-trial detention only serves the goal of incapacitation without the benefit of a full trial. Individuals are determined to be dangerous based upon prior bad acts and rather than evaluating whether other goals of punishment and other types of punishment might be better served, imprisonment is utilized above all else. In fact, the World Prison Brief demonstrates that most countries are at full capacity, and many times, beyond capacity.<sup>197</sup> The United States is at 99% capacity, and countries, such as Brazil at 171% and Iran at 192%, at almost double their official capacity.<sup>198</sup>

Other goals and types of punishment have been forgotten in the rush to make imprisonment the cure-all for crime. The use of imprisonment in the United States

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<sup>190</sup> *World Prison Brief*, *supra* note 183 (displaying statistic in “Overview” tab when individual country is selected).

<sup>191</sup> 18 U.S.C. § 3142(e)(1) (2013).

<sup>192</sup> *Id.* § 3142(b).

<sup>193</sup> *Id.* § 3142(c).

<sup>194</sup> *See id.* § 3142(e)(1).

<sup>195</sup> *Id.* § 3142(e)(3)(A)-(E). A rebuttable presumption of dangerousness is also imposed in cases involving crimes enumerated in § 3142(f), provided that the defendant has previously been convicted of such a crime within the last five years, and that the offense was committed while the defendant was on release pending trial for an offense. *Id.* § 3142(e)(2)(A)-(C).

<sup>196</sup> DRESSLER & MICHAELS, *supra* note 64, at 106.

<sup>197</sup> *See World Prison Brief*, *supra* note 183 (showing statistics in “Overview” tab when each individual country is selected).

<sup>198</sup> *Id.*

originally took root in the nineteenth century when communities transitioned from small villages to much more mobile, transient societies, and those responsible for law and order needed to identify new methods to maintain control and teach self-discipline and moderation.<sup>199</sup> The “penitentiary” was actually meant to be a place of penitence and reformation.<sup>200</sup> Imprisonment was designed to “remove the deviant from his (weak and defective) family, his evil community, and to put him in ‘an artificially created and therefore corruption-free environment.’”<sup>201</sup> The prisoners were supposed to be committed to silence, isolation, discipline, and regimentation.<sup>202</sup> Therefore, imprisonment was originally used to support the goal of rehabilitation – to initially isolate, and then to have the offender re-integrate into society as a changed individual.

Unfortunately, money soon became an issue, and adequate funding to support the concept of prisons as centers of rehabilitation fell by the wayside as individuals were being imprisoned at a rate that prison officials could not keep up with.<sup>203</sup> An indeterminate sentencing scheme along with a parole system was put into place, which was meant to ease the growing imprisonment problem; however, by the 1970s, “[a] wave of conservatism swept the country” as the crime rate drastically increased and members of society began to fear their fellow neighbors.<sup>204</sup> The criminal justice system reverted back to a determinate sentencing scheme, where judges were given less discretion when sentencing defendants and were required to follow a fixed set of sentencing guidelines set forth by state legislatures, Congress, and the U.S. Sentencing Commission.<sup>205</sup> The parole system was abolished and statutory mandatory minimums for several types of offenses were passed in both federal and state legislatures.<sup>206</sup> Jails became overpopulated, and by the end of the 20<sup>th</sup> Century, the prison population had seen significant growth, increasing eight-fold in California while tripling overall.<sup>207</sup> In 1995, thirty-nine jurisdictions and the District of Columbia, Puerto Rico, and the Virgin Islands, were under court order to reduce prison overcrowding or improve the conditions of confinement.<sup>208</sup> As one representative stated, “[e]very 19-year-old first-time offender who sleeps in a prison bed in a prison that’s full denies me an opportunity to put an armed robber in a bed.”<sup>209</sup> According to a recent study conducted by the National Research Council,

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<sup>199</sup> See FRIEDMAN, *supra* note 86, at 13.

<sup>200</sup> *Id.* at 80.

<sup>201</sup> *Id.* at 77 (citation omitted).

<sup>202</sup> *Id.* at 79-80.

<sup>203</sup> See *id.* at 156.

<sup>204</sup> *Id.* at 305.

<sup>205</sup> See DRESSLER & MICHAELS, *supra* note 64, at 351-52.

<sup>206</sup> See *id.*

<sup>207</sup> FRIEDMAN, *supra* note 86, at 316.

<sup>208</sup> LINDSAY M. HAYES, U.S. DEP’T OF JUSTICE, PRISON SUICIDE: AN OVERVIEW AND GUIDE TO PREVENTION 8 (1995), available at <http://static.nicic.gov/Library/012475.pdf>.

<sup>209</sup> ROBIN CAMPBELL, DOLLARS & SENTENCES: LEGISLATORS’ VIEWS ON PRISONS, PUNISHMENT, AND THE BUDGET CRISIS 8 (2003) (quoting Texas Representative Ray Allen), available at [http://www.prisonpolicy.org/scans/vera/vera\\_jul03.pdf](http://www.prisonpolicy.org/scans/vera/vera_jul03.pdf).

imprisonment rates have quadrupled in the United States since the 1970s.<sup>210</sup> In fact, with a penal population of 2.2 million adults, almost one-quarter of the world's prisoners are held in American prisons.<sup>211</sup> The study goes on to further explain that the U.S. prison population is drawn from individuals in the lowest socioeconomic status of the nation: mostly men under age forty, disproportionately minority, poorly educated, frequently carrying drug and alcohol addictions, plagued by mental and physical illnesses, and lacking work preparation or experience.<sup>212</sup>

Clearly, imprisonment has not satisfied the goal of rehabilitation – prisons are simply too overcrowded and treatment programs available within prisons are too underfunded to successfully rehabilitate offenders. Has the increase in the use of imprisonment successfully satisfied the goals of deterrence and incapacitation?

According to Professor Friedman:

Clearly, there must be *some* impact, some deterrent effect, some influence on morality and behavior. How much, is completely unknown. It is pretty certain that it is less than most people think; the constant clamor for more prisons, more executions, more police, assumes a potency that is almost surely a delusion.<sup>213</sup>

It is unclear whether the building of more prisons, stiffer sentencing penalties, more felony arrests, and the dramatic rise in prison population have had any effect on crime rates. However, it is also unclear whether education, training, and social reform programs would have any effect on crime rates either.

However, what is clear is that repeated isolation is not beneficial to any individual. If the goal is to eventually have the offender reintegrate and become a productive member of society, the longer the offender is separated from the rest of the community, the more difficult it will be to make a smooth transition to join the rest of society. The 2014 study conducted by the National Research Council emphasizes that the United States has gone far past the point where the numbers of people in prison can be justified by social benefits and has reached a level where these high rates of incarceration constitute a source of injustice and social harm.<sup>214</sup> As legal scholar Lawrence Friedman notes:

It isn't fear of jail that keeps most of us from robbing, pillaging, raping, murdering, and thieving. Powerful restraints, levers, and controls run the machinery of our selves; governors inside our brains and bodies, reinforced by

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<sup>210</sup> Corey Adwar, *Here's Evidence That Insanely Long Prison Terms Are a Bad Way to Deter Crime*, BUSINESS INSIDER (May 28, 2014 6:34 PM), <http://www.businessinsider.com/report-says-long-sentences-dont-deter-crime-2014-5>.

<sup>211</sup> NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 33, 36 (Jeremy Travis et al. eds., 2014), available at [http://www.nap.edu/openbook.php?record\\_id=18613](http://www.nap.edu/openbook.php?record_id=18613).

<sup>212</sup> *Id.* at 7.

<sup>213</sup> FRIEDMAN, *supra* note 86, at 14.

<sup>214</sup> NAT'L RESEARCH COUNCIL, *supra* note 211, at 9.

messages from families, institutions, schools, churches, and communities. . . .  
Strong informal controls keep most people in line.<sup>215</sup>

If we leave individuals locked away for years at a time with nothing to do but sit alone with their thoughts or socialize with other offenders and learn of other criminal behaviors, it will be difficult for them to improve since positive behavior is taught, not self-learned or reinforced. And these informal controls that are experienced by living in a community setting are lost on isolated prisoners. One can hardly expect differently of individuals who have been separated from society with little or no tools to help assist them in the reintegration process.

“[I]f prisons do nothing more than warehouse criminals (as sometimes occurs), we run the risk of ignoring the underlying causes of crime and thus losing an opportunity to address those causes”<sup>216</sup>; drug addicts without treatment, thieves without job counseling and job training – incarcerated criminals can “become embittered and hostile and more (not less) likely to commit crimes when they are released.”<sup>217</sup> However, if children are isolated from society at an early age due to their abusive or dysfunctional families, then rehabilitation may not be effective or may be difficult to accomplish (requiring even more resources).

Again, which of the four goals of punishment are achieved through imprisonment? There is no clear effect on deterrence, there are alternative ways to ensure retribution, and rehabilitation is minimal in the existing environment. Are we satisfied with incapacitation as prison’s only aim (and incapacitation with little hope for positive reintegration into society)?

### III. A VARIETY OF PUNISHMENTS AND PUNISHMENT GOALS

Most countries, according to their stated criminal codes, identify multiple goals of punishment as reasons behind the types of punishment they use. These goals also vary and rank differently in importance depending upon the particular trend at the time. For example, the United States focused on rehabilitation during the 20’s through the 60’s until it turned back to retribution and incapacitation during the mid-70’s and beyond.<sup>218</sup> All countries in some form or another take into account the nature of the crime, the individual’s criminal history, background, potential recidivism, and the society’s own judgment of the particular crime when determining an individual’s sentence.<sup>219</sup>

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<sup>215</sup> FRIEDMAN, *supra* note 86, at 8-9.

<sup>216</sup> BURKOFF & WEAVER, *supra* note 37, at 5.

<sup>217</sup> *Id.* at 6.

<sup>218</sup> DRESSLER & MICHAELS, *supra* note 64, at 346, 351-52.

<sup>219</sup> “If the penal code announces that the punishment for burglary is five years in prison, that is not merely a statement about the (expected) *price* of burglary. It also pronounces the judgment of society (or some part of society) on burglary: and the punishment, when we compare it to other punishments for other crimes, tells us roughly *how* evil burglary is—again, as compared to other criminal acts.”

Currently, a survey<sup>220</sup> of fifteen countries and the International Criminal Court indicate the following preferences in the goals of punishment:

Countries:	Deterrence	Incapacitation	Rehabilitation	Restorative Justice	Retribution
Argentina		✓	✓		
Australia			✓	✓	✓
Canada	✓	✓	✓	✓	
China	✓	✓	✓		
Egypt	✓	✓			✓
Germany		✓	✓		
India	✓		✓		✓
Iran	✓		✓		✓
Israel	✓	✓	✓		✓
Japan			✓		✓
Russia	✓		✓		
South Africa	✓		✓	✓	✓
Spain	✓		✓		✓
United Kingdom		✓	✓		
United States <sup>221</sup>	✓	✓			✓
International Criminal Court	✓				✓

While incarceration is on the table for all the countries examined, each country offers several alternatives to prison.

The U.S. Sentencing Commission was charged with creating objective sentencing guidelines in 1984 in order to reduce disproportionate sentences depending on which particular judge the defendant was assigned.<sup>222</sup> The

FRIEDMAN, *supra* note 86, at 10.

<sup>220</sup> This survey is based upon each country's criminal codes and information on their criminal justice systems. TERRILL, *supra* note 47.

<sup>221</sup> As derived from the U.S. Sentencing Commission's own comments on the goals of punishment. See U.S. SENTENCING GUIDELINES MANUAL Ch. 1 Pt. A at 1 (2012), available at [http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manual-pdf/Chapter\\_1.pdf](http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manual-pdf/Chapter_1.pdf).

<sup>222</sup> *Id.* at 2.

Commission explained that they took into account several different goals of punishment when proposing sentencing guidelines:

A philosophical problem arose when the Commission attempted to reconcile the differing perceptions of the purposes of criminal punishment. Most observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime. Beyond this point, however, the consensus seems to break down. Some argue that appropriate punishment should be defined primarily on the basis of the [moral] principle of “*just deserts*.” Under this principle, punishment should be scaled to the offender’s culpability and the resulting harms. [Thus, if a defendant is less culpable, the defendant deserves less punishment.] Others argue that punishment should be imposed primarily on the basis of practical “crime control” considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by *detering* others or *incapacitating* the defendant.

Adherents of each of these points of view urged the Commission to choose between them and accord one primacy over the other. . . . The Commission’s empirical approach also helped resolve its philosophical dilemma. Those who adhere to a just deserts philosophy may concede that the lack of consensus might make it difficult to say exactly what punishment is deserved for a particular crime. Likewise, those who subscribe to a philosophy of crime control may acknowledge that the lack of sufficient data might make it difficult to determine exactly the punishment that will best prevent that crime. Both groups might therefore recognize the wisdom of looking to those distinctions that judges and legislators have, in fact, made over the course of time. These established distinctions are ones that the community believes, or has found over time, to be important from either a just deserts or crime control perspective.<sup>223</sup>

Currently, federal district courts take into account the following relevant factors under Title 18, § 3553(a), of the United States Code: the nature of the offense, the need for the sentence, the kinds of sentences available, the applicable sentencing guidelines, any pertinent policy statement, the need to avoid unwarranted sentencing disparity, and the need for restitution to any victims.<sup>224</sup> Prior to the sentencing hearing, a probation officer completes a presentence investigation and report detailing the defendant’s criminal record and circumstances of the crime, the defendant’s work and education history, family life, substance abuse history, and personal data. Post *United States v. Booker*<sup>225</sup>, a judge may consider sentencing guidelines and the § 3553(a) factors, and he or she must articulate reasons for sentencing the defendant outside the Guideline range. At the appellate level, a sentence within the Guidelines range is thought to be presumptively reasonable.<sup>226</sup> A year after *Booker*, federal sentences conformed to the Guidelines in eighty-six percent of cases, and the average sentence length has actually increased.<sup>227</sup>

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<sup>223</sup> *Id.* at 4 (emphasis added).

<sup>224</sup> 18 U.S.C. § 3553(a) (2013).

<sup>225</sup> 543 U.S. 220, 245 (2005).

<sup>226</sup> See U.S. SENTENCING GUIDELINES MANUAL, *supra* note 221, at 2.

<sup>227</sup> DRESSLER & MICHAELS, *supra* note 64, at 361.

In Argentina, in a comparison with other nation states, the criminal code demonstrates that:

[T]here are only four types of punishment—two forms of incarceration (reclusion and prison), fines, and the deprivation of rights related to the activity through which the crime was committed (e.g., withdrawal of driving or professional licenses, or incapacitation to hold public official positions). The two forms of incarceration, reclusion and prison, were intended to express a difference in seriousness that manifested itself in the kinds of treatments inmates received under either one. Reclusion, purportedly the harsher of the two, involved somewhat longer incarceration terms and in distant facilities, whereas prison involved incarceration in a local facility. Reclusion was also meant to have a shaming dimension that prison would not have. As a matter of fact, however, reclusion and prison sentences have long been indistinguishable—incarceration at an available correctional facility and under a unified punitive treatment.<sup>228</sup>

In Australia, a judge considers “whether the sentence is ‘just’ and would serve the goals of rehabilitation, deterrence, denunciation, and community protection.”<sup>229</sup> Furthermore:

Federal offences typically provide for only two types of sentencing options: fines and imprisonment. A much wider range of options is available at state and territory levels, including community-service orders, periodic detention, and home detention. . . . The nature and purpose of sentencing depend on the offender and the offence. Under the common law, general deterrence is accorded less weight when sentencing an offender with a mental illness or intellectual disability, and rehabilitation should be accorded more weight when sentencing a young offender.<sup>230</sup>

Meanwhile, in Canada, the Criminal Code

recognizes a broad range of sentencing purposes, including denunciation of crime, the specific deterrence of the offender, the general deterrence of others, the separation of offenders from society where necessary [incapacitation], the rehabilitation of offenders, the acknowledgement of the harm done to victims and the community, and reparation for victims and the community [restitution]. . . . [P]robation orders and conditional sentences of imprisonment . . . are served in the community often under conditions of partial house arrest.<sup>231</sup>

Canada has put in place a series of mandatory minimums, and the death penalty has been abolished.<sup>232</sup>

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<sup>228</sup> Marcelo Ferrante, *Argentina*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 39, at 18.

<sup>229</sup> Simon Bronitt, *Australia*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 39, at 56.

<sup>230</sup> *Id.* at 76.

<sup>231</sup> Kent Roach, *Canada*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 39, at 102.

<sup>232</sup> *See id.* at 122.

“According to the Chinese Criminal Code, criminal punishments are divided into principal punishments and supplementary punishments.”<sup>233</sup> Principal punishments range from criminal detention for relatively minor offenses for a period between fifteen days and six months, which would consist of being confined in a detention house and receiving a salary for any work the offender completes while in detention and may be given permission to go home for one or two days each month.<sup>234</sup> For more major crimes, a fixed-term imprisonment lasting six months to fifteen years is used, or life imprisonment for major crimes through placement in prison or labor camps, where the offender must be rehabilitated through labor if their health permits, or the death penalty.<sup>235</sup> Other principal punishments include public surveillance (for minor offenses) by the local public security bureau contained within the local police department, a loss of the rights of free speech, publication, assembly, and demonstration (unless the offender obtains special permission), and a requirement that the offender report his activities regularly to the state and ask for permission to meet visitors or change his domicile. This form of “probation” may last between three months to two years.<sup>236</sup> “Supplementary punishments include fines, deprivation of political rights, confiscation of property, and deportation (applied to foreigners only).”<sup>237</sup> One type of principal punishment may be imposed on an individual offender while two or more types of supplementary punishment may be imposed.<sup>238</sup> Fines are also used “for nonviolent crimes, such as organizing prostitution, abducting and trading women and children, and trading fake and shoddy goods.”<sup>239</sup>

China has developed discretionary circumstances that may also be taken into account:

1. *Criminal motivation*. . . [The] punishment should be severer for a criminal who steals in order to live a life of luxury than for a criminal who steals in order to survive.
2. *Criminal methods*. . . [The act of] mutilating a body after a murder[] should be punished more severely.
3. *Context of the crime*. . . [Crimes committed] during a state of emergency, such as robbery in an earthquake-recovery area, should receive severer punishment.
4. *Object of the crime*. . . [E]mbezzling or stealing money or materials from an emergency relief fund should be punished more severely than stealing “ordinary” money or materials.

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<sup>233</sup> Wei Luo, *China*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 39, at 158.

<sup>234</sup> *Id.* at 159.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 158-59.

<sup>237</sup> *Id.* at 158.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 159.

5. *The criminal's previous behavior.* . . . [A] professional thief should be punished more severely.

6. *Attitude after committing a crime.* . . . “[C]onfession for leniency and stricter punishment for resistance.” . . . [A] criminal who confesses the crime he or she committed and admits guilt should receive a more lenient punishment than a criminal who refuses to confess and denies his or her guilt.<sup>240</sup>

The Chinese “courts also consider, when determining sentences, whether criminals are recidivists, surrender to the authorities voluntarily, or identify other criminals.”<sup>241</sup> China also “has a very strong tradition of using the death penalty to ensure social order.”<sup>242</sup>

In Egypt, the “[p]rimary punishments are fines, detention, . . . imprisonment . . . and death.”<sup>243</sup> Additionally, there are four types of ancillary punishment: “(1) deprivation of certain rights and privileges; (2) removal from government employment; (3) probationary supervision by the police; and (4) seizure and confiscation of contraband and fruits or instrumentalities of the crime.”<sup>244</sup> Sentences of one year or more include mandatory imprisonment, while sentences of less than one year may or may not include penal servitude.<sup>245</sup>

In Germany, judges, when determining the sentence, take into consideration the offender’s blameworthiness, the impact of the sentence on the offender’s future life in society, “the offender’s motivation for committing the crime, the way in which the offense was committed and its consequences, and the prior life and the present living conditions of the offender, as well as the offender’s conduct subsequent to the offense, in particular, any effort to compensate the victim.”<sup>246</sup> However, the court “remains free to decide how much weight it gives to each factor.”<sup>247</sup>

In India, the sentencing decision is usually left entirely “to the discretion of the judge” who will consider “the nature and magnitude of the offence, as well as the need for the penalty to be proportionate to the offence.”<sup>248</sup> However, “[a] court which imposes a sentence of imprisonment is required to state its reasons for not extending the benefit of probation to the offender.”<sup>249</sup> The Indian Supreme Court has stated that “the ‘sentence should bring home to the guilty party the

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<sup>240</sup> *Id.* at 160-61.

<sup>241</sup> *Id.* at 161.

<sup>242</sup> *Id.*

<sup>243</sup> Sandiq Reza, *Egypt*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 39, at 193.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 194.

<sup>246</sup> Thomas Weigend, *Germany*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 39, at 276.

<sup>247</sup> *Id.*

<sup>248</sup> Stanley Yeo, *India*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 39, at 306.

<sup>249</sup> *Id.*

consciousness that the offence committed by him was against his own interest and also against the interest of the society of which he happens to be a member.”<sup>250</sup> The criminal code distinguishes between rigorous imprisonment, during which the offender “is required to perform hard labor, such as digging earth and grinding corn,” and simple imprisonment, during which the offender is not obligated to work.<sup>251</sup>

In Russia, the sentencing scheme is on an ascending “staircase” beginning with the least intrusive punishment, a fine, to professional prohibition, deprivation of military duty and awards, to “limitation of freedom, short-term detention, incarceration in a disciplinary military barracks, [to] deprivation of liberty for a determinate period, [to] life imprisonment, and finally [to] the death penalty.”<sup>252</sup> “The choice of punishment and its magnitude depend on an assessment of mitigating and aggravating circumstances.”<sup>253</sup>

Further, Judges have the discretion:

[T]o impose less than the statutory minimum prison sentence or to impose a less serious form of punishment “in the presence of exceptional circumstances connected with the goals and motives of the crime, the role of the guilty person, his conduct during and after commission of the crime, and other circumstances which substantially mitigate the level of social dangerousness of the crime, or by active contribution of a member of a group to solve a group crime.”<sup>254</sup>

Probation ranges “from a minimum of six months to a maximum of three years for crimes punishable by less than one year’s deprivation of liberty,” and the judge can ask the offender “to undergo treatment for alcoholism, drug addiction, or venereal diseases, and to support one’s family.”<sup>255</sup>

With the signing of the European Convention on Human Rights, there have been no executions in Russia “since August 1996, although Amnesty International has reported that the separatist Chechen Republic carried out executions from 1996 through 1999.”<sup>256</sup>

In South Africa, legislation in 1998 prescribed minimum sentences for certain offenses, and judges “could impose a lesser sentence only if they were satisfied that ‘substantial and compelling circumstances’ existed to justify this lesser sentence.”<sup>257</sup> “The most prominent South African rationale tends to emphasize retribution often with isolation.”<sup>258</sup> And

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<sup>250</sup> *Id.* at 292 (citation omitted).

<sup>251</sup> *Id.* at 306.

<sup>252</sup> Stephen C. Thaman, *Russia*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 39, at 430-31 (citation omitted).

<sup>253</sup> *Id.* at 432.

<sup>254</sup> *Id.* at 433 (citation omitted).

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 434.

<sup>257</sup> Jonathan Burchell, *South Africa*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 39, at 472-73.

<sup>258</sup> TERRILL, *supra* note 47, at 326.

[t]he aim is usually to isolate the offender from the general public because of the harm and suffering caused by his or her criminal actions. Such a sanction may also include a fine and a period of correctional supervision. In light of the Constitution of the Republic of South Africa, capital and corporal punishments, which were common under the apartheid regime, are no longer permitted.<sup>259</sup>

In Spain, “the Supreme Court and the Constitutional Court have ruled that the punishment imposed may not be disproportionate to the punishment deserved by the offender under a retributive theory of punishment.”<sup>260</sup> So “[p]unishment may be imposed only on those who have committed an offense without justification or excuse.”<sup>261</sup> Security measures may be enforced against dangerous individuals who have engaged in wrongful but excusable conduct in order to prevent possible future harmful conduct instead of exacting retribution for past acts.<sup>262</sup> The judge has the discretion to make adjustments in punishment as long as the judge selects a sentence that remains within the statutorily prescribed range.<sup>263</sup> A punishment, however, “may never exceed forty years of imprisonment.”<sup>264</sup>

[I]mprisonment sanctions of two years or less may be suspended. . . . In order to determine whether a sentence should be suspended or substituted with fines or community service, courts take into account both the dangerousness of the convict and the existence of other criminal proceedings pending against him or her.<sup>265</sup>

Home detention is available as a form of punishment for the commission of petty offenses.<sup>266</sup>

In the United Kingdom, section 142 of the Criminal Justice Act of 2003 provides that a court should consider “five purposes of sentencing: punishment, crime reduction (including deterrence), rehabilitation, public protection, and reparation.”<sup>267</sup> And “[e]ach offence has a statutory maximum sentence, except for a small number of common law offences for which there is no fixed maximum.”<sup>268</sup> Additionally, “[i]n the hierarchy of sanctions, suspended sentences of imprisonment come beneath imprisonment; then come community sentences (including . . . performance of unpaid work, drug treatment, or undertaking specified activities);” fines (most frequently used); compensation orders; reparation

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<sup>259</sup> *Id.*

<sup>260</sup> Carlos Gómez-Jara Díez & Luis E. Chiesa, *Spain*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 39, at 497.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 516.

<sup>264</sup> *Id.* at 517.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 516.

<sup>267</sup> Andrew J. Ashworth, *United Kingdom*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW, *supra* note 39, at 535.

<sup>268</sup> *Id.* at 545.

orders; or conditional discharges.<sup>269</sup> There are very few mandatory minimum sentences; judges tend “to exercise their judgment in deciding on the appropriate sentence within the lawful limits.”<sup>270</sup> The United Kingdom has a fixed set of sentencing guidelines; however, there are no sentencing grids, the guidelines are narrative, and they are not as strongly presumptive as the United States’ guidelines.<sup>271</sup> “England and Wales have one of the highest proportionate imprisonment rates in Europe . . . but at around 150 per 100,000 the rate remains less than one-quarter of the U.S. imprisonment rate.”<sup>272</sup>

In summary, most modern correctional systems assert that they consider several punishment goals and in turn, they face a crisis of purpose and direction.

This is in part due to the fact that the [criminal justice] system frequently has established multiple goals for itself. When faced with this dilemma, conflict over which goal should take precedence is often inevitable. To compound the problem further, more than one component of the justice system has an impact on determining which direction the correctional system will take.<sup>273</sup>

With the United States leading the charge with the highest imprisonment rates in the world, they can learn from other countries’ alternatives to imprisonment, which types of people are rehabilitated, what programs are offered to help with rehabilitation, what exists outside of imprisonment, and what measures result in the reduction and deterrence of committing crimes. The question the United States should ask itself is: what can be learned from those countries with lower imprisonment rates, and do the alternatives work?

#### IV. SOLUTIONS

In conclusion, each country professes to take into account several goals of punishment when determining an offender’s punishment. The rule of proportionality is alive and well – most countries profess to attempt to make the punishment fit the crime. Most countries strive to take into account many factors of the crime itself: the seriousness and circumstances surrounding the crime, the offender’s criminal history, family and work history, and attempt to predict whether it is likely that they will re-offend. Choosing an appropriate punishment is not an easy task.

However, the consideration and weight given to one or multiple goals of punishment in this process has created confusion and a frenetic environment for judges when they mete out particular punishments. How can judges consider all four goals that potentially contradict each other? Have the four goals been lost and

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<sup>269</sup> *Id.* at 545-46.

<sup>270</sup> *Id.* at 546.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> TERRILL, *supra* note 47, at 105.

have statutory lists of what must be considered risen to the forefront? Are judges, and in some instances juries, relying too much on their instincts or thoughts of the day when determining sentences?

What combination of incapacitation, rehabilitation, retribution and deterrence is most effective, the most judicious? The goals of punishment are clear, but how to achieve all goals at once is unclear. Those determining punishment should consider the goals of punishment as providing a blueprint that encompasses the “big picture” before tackling the factors in § 3553 or whatever multi-prong approach its countries’ legislatures or criminal code sets forth. The defendant has separated from his or her community by committing a crime, and the defendant has injured society – now, what is best for the defendant and for society? Punishment is meant to repair the damage caused by the defendant and bring harmony back into the lives of both the injured and the accused.

Unfortunately, we live in a complicated world. There are no easy answers. What someone chooses to do with his own free will may infringe upon another’s free will, and a violation of the criminal laws may take place. In some instances, the existing criminal laws may be outdated, unduly harsh, or no longer protect society from further injury. Values, policies, attitudes, and ideals change, and criminal laws change along with them. Rather than being preoccupied with the particular crime or particular circumstances surrounding the event, perhaps we should focus on what it means to restore balance and make whole both victim and society, as well as the offender.

The ideas of repairing the damage within for both the offender and the victim and restoring balance within the community parallel many of the thoughts recently put forth by those in the self-help, spiritual industry who provide instruction on how to best achieve peace and harmony within. Not only have people begun to discuss how to achieve harmony within one’s inner being, but this sense of peace and harmony has been described as coming from our soul-level, a piece of ourselves that is eternal<sup>274</sup> (this assumes that one believes that each of us has a soul.) If we were able to connect to other human beings at this soul-level, then we would never choose to harm another as our soul is eternally connected to everyone else’s soul in the universe. This concept of a soul-level allows us to explore the state that exists beyond this life, beyond the physical world, where souls are said to exist in harmony and in a state of oneness with other souls. After all, isn’t that what we are all striving for? Peace on earth? No crime, and therefore, no punishment? The restoration of balance within the community? Perhaps in this state, the community of souls, as a whole, may have a better grip on crime and punishment than we do on earth where so many physical distractions exist. Many individuals who have had near death experiences have begun to write about what they experience after their bodies began to die – what exists at the soul-level. On a certain level, we all want to know what happens when the physical body dies and the essence of us (the soul) moves on into another dimension. Is St. Peter at the pearly gates citing the § 3553

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<sup>274</sup> *See generally* ANITA MOORJANI, DYING TO BE ME (2012).

factors as he decides whether to send you to heaven or hell? Is it like the movie *Defending Your Life*, where one must prove they should be permitted to enter heaven by arguing in God's court that they demonstrated courage in their previous life?

One near-death experience struck me as fascinating and uplifting, and I hope that, in fact, this is the state in which we will live when our physical bodies expire. In 2006, Anita Moorjani had end-stage cancer, Hodgkin's lymphoma, and was in a coma when she felt as if she "crossed over" to another dimension and experienced life "on the other side."<sup>275</sup> In her book, *Dying to be Me*, she describes the relationship between the criminal and the victim and how crime and punishment is perceived in this soul-level state:

There's absolutely no condemnation in that realm, because there's nothing to condemn—we're all pure consciousness.

A lot of people don't like to hear that there's no judgment after we die. It's comforting to think that people will be held accountable for their wrongdoings. But punishment, rewards, judgment, condemnation, and the like are a "here" thing, not a "there" thing. That's why we have laws, rules, and systems.

On the other side, there's total clarity about why we are the way we are and why we did anything we did, no matter how unethical it felt in life. I believe that those who hurt others only do so out of their own pain and their feelings of limitation and separation. Perpetrators of acts such as rape and murder are far removed from even having an inkling of their own magnificence. I imagine they have to be extremely unhappy within themselves to cause so much pain to others, so in fact, they need the most compassion—not judgment and further suffering in the afterlife.

I actually don't believe that criminals and murderers *are* "being who they are." I think that we turn to destruction only when we've lost our way and drifted far from knowing the truth of who we really are. Criminals have lost their center, and what they're doing to others is actually a reflection of how they feel inside about themselves. We like to think of perpetrators and victims as "them" and "us," but there is no "them." It's *all* us!

A serial killer is diseased, similar to a person with cancer. And if we have more murderers in the world today, it means we have a sick society. Locking them away may have short-term benefits, just like treating the symptoms of cancer. However, if we don't transform and transcend the core issues within any society, the problem will only grow, requiring us to build more prisons and straining the judicial systems. Perpetrators are more than just victims of their own circumstances. They're the physical symptoms of underlying issues with *us as a whole*.

I'm not condoning their acts. I'm just trying to say that the knowledge of my own magnificence changed me. I think that if everyone were able to get in touch with their own truth and know their greatness, they wouldn't choose to be harmful. A

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<sup>275</sup> Anita Moorjani's *Near Death Experience*, ANITA MOORJANI, <http://anitamoorejani.com/about-anita/near-death-experience-description> (last visited Oct. 16, 2014).

happy and loved person who feels inseparable from Oneness knows that to injure another is the same as injuring the self. . . .

It felt as though those whom we label “perpetrators” are also victims of their own limitations, pain, and fear. When we realize this, we feel only connection with everyone and everything. I understood that in the other realm, we’re all One. We’re all the same.

If everyone knew this, we wouldn’t need laws and prisons. But here, we don’t understand, so we think in terms of “us” and “them,” causing us to operate out of fear. This is why we have judgment, laws, prisons, and punishment. In this realm, at this time, we need them for our own protection. But on the other side, there’s no such thing as punishment, because once we’re there, we become aware that we’re all connected.<sup>276</sup>

It would be ideal to create a “heaven on earth” scenario where everyone felt connected to everyone else, we found peace within, and neither crimes or injuries existed. As much as we would like to, we cannot convince every human being that they are loved and valued just by virtue of being a unique individual with his or her own special talents and gifts. That is why in this physical dimension, we should continue to consider all four goals of punishment, but do so taking into account Moorjani’s insights.

Moorjani would have us focus on rehabilitation so that perpetrators would have a greater chance of feeling as if they are a part of society rather than feeling separated and isolated. Moorjani seems to believe incarceration and incapacitation are short term solutions. Moreover, an emphasis on retribution is unnecessary if the divide between victim and perpetrator is blurred and creating more separation between the two would cause the perpetrator to feel more isolated and lost. Moorjani seems to accept that the goal of deterrence is needed. We, as members of society, are not sufficiently self-aware and cannot see the injury we cause each other. It is important to live in a state with judgment, laws, prisons, and punishment in order to protect ourselves from others. Therefore, from Moorjani’s perspective, rehabilitation and deterrence should be emphasized more than incapacitation or retribution.

How can we design our sentencing/punishment scheme to take into account the fact that our main goal should be to assist offenders in becoming aware of their own greatness so that they no longer feel it necessary to hurt others?

1. *Retribution* must be considered in an attempt to restore balance between the offender and the victim. Would some sort of victim compensation, a day fine taking into account the offender’s financial means, or some sort of community service assist in restoring balance and create a feeling of “oneness”? Retribution teaches us that the amount of punishment should be calibrated with the moral wrongdoing encompassed by the crime.

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<sup>276</sup> MOORJANI, *supra* note 274, at 169-70.

2. *Deterrence* must be considered based on the circumstances in each particular case. The pain inflicted by the punishment is only justifiable if it is expected to result in a reduction of the pain of crime that would otherwise occur. Many studies have demonstrated that lengthy prison sentences and even the death penalty have only a minor deterrent effect on whether the offender will commit future crimes. Japan has an extremely low incarceration rate along with an extremely low rate of recidivism.

3. *Incapacitation* must be considered in those instances where the offender simply is unable to change and grasp the idea that he or she is valued and can in fact, live as a productive, respected member of society. There are instances of individuals with mental illness that will never be able to comprehend this idea or psychopaths, such as the Ted Bundy or Carl Panzram's of the world, who will never be able to reintegrate with the rest of the society. These individuals need to be isolated and separated from others to prevent them from committing additional crimes against society.

4. Lastly, *rehabilitation* and the different programs including drug treatment, psychiatric treatment, vocational training, half-way houses, electronic monitoring, and split confinement sentences associated with ongoing rehabilitation should be considered. We should make it a priority to reintegrate all offenders back into society. As Moorjani states, these "perpetrators' are also victims of their own limitations, pain, and fear."<sup>277</sup>

By considering all four goals of punishment, we are neither idealistic nor naïve since we recognize that incapacitation alone may be the only answer for those criminals who are incapable, for one reason or another, of reintegrating back into society. However, by reflecting upon each goal of punishment each and every time we sentence another for their offenses, we also acknowledge that a full range of options does exist up to and including incapacitation. Incarceration should not become a knee-jerk reaction to every crime committed. The worldwide community has devised several types of punishment outside the need to follow the one-size-fits-all standard incarceration routine. While cutting off one's hand for repeated thievery sounds cruel and outside our comfort zone, this type of punishment allows the offender to reintegrate into society much faster (albeit with one less hand and a permanent stigma that hopefully deters him from committing a similar crime) than if the offender was sent to prison for fifteen years, isolated from friends, family, and the rest of society, and living without the benefit of positive reinforcement from the outside world.

In the movie *Shawshank Redemption*, Brooks, an old-timer who had been in prison for more than fifty years, was eventually released back into society with a few dollars in his pocket, a boarding house to live in, and a lead on a job as a bagger at the local grocery store.<sup>278</sup> The pressure of integrating was too hard on Brooks who was accustomed to the strict rules of prison life. Life outside was simply too free,

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<sup>277</sup> *Id.* at 170.

<sup>278</sup> See Scott Myers, *Great Characters: Brooks Hatlen ("The Shawshank Redemption")*, GO INTO THE STORY (July 1, 2011), <http://gointothestory.blcklst.com/2011/07/great-characters-brooks-hatlen.html>.

too unknown.<sup>279</sup> He eventually hung himself inside his bedroom.<sup>280</sup> All too often, recently released prisoners re-offend because they know of no other way to live – they were in prison for too long and did not receive any training or education that would cause them to change their old behavior patterns. They had been isolated from society for so long, there was nothing left for them to do but go back to the familiar, i.e., their criminal ways.

There are no easy solutions. Reforming the prison system is not an easy or quick task, but simple incarceration is not the answer. Giving prisoners an opportunity to develop a sense of purpose or self-worth, a desire to reintegrate with the rest of society, is a start. Working on a project, learning a trade, following a rehabilitation program, or taking a class are far better options than forced isolation, which only heightens destabilization and alienation towards society. If incarceration is a necessary evil and an essential element within the four goals of punishment, then providing hope and purpose to those made to suffer confinement is essential.

Bastoy Prison Island is known as the first “human ecological prison” in the world and contains some of the most serious offenders in Norway.<sup>281</sup> Prisoners live in houses in what has been described as a “self-sustaining village.”<sup>282</sup> The Governor of the prison island, Arne Kvernvik Nilsen, stated:

I run this prison like a small society. . . . I give respect to the prisoners who come here and they respond by respecting themselves, each other and this community. . . . It is not just because Bastoy is a nice place, a pretty island to serve prison time, that people change . . . . The staff here are very important. They are like social workers as well as prison guards. They believe in their work and know the difference they are making. . . . Many people here have done something stupid—they will not do it again. But prisons are also full of people who have all sorts of problems. Should I be in charge of adding more problems to the prisoner on behalf of the state, making you an even worse threat to larger society because I have treated you badly while you are in my care? We know that prison harms people. I look at this place as a place of healing, not just of your social wounds but of the wounds inflicted on you by the state in your four or five years in eight square metres of high security.<sup>283</sup>

Bastoy Prison has a low reoffending rate of sixteen percent compared to around seventy percent for the rest of Europe and the United States.<sup>284</sup> Prisoners are permitted to transfer to Bastoy Prison for the final part of their sentence “if they

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<sup>279</sup> As Red, played by Morgan Freeman, describes it: “Terrible thing, to live in fear. Brooks Hatlen knew it. Knew it all too well. All I want is to be back where things make sense. Where I won’t have to be afraid all the time.” *Id.*

<sup>280</sup> *See id.*

<sup>281</sup> Erwin James, *Bastoy: The Norwegian Prison that Works*, THE GUARDIAN (Sept. 3, 2013), <http://www.theguardian.com/society/2013/sep/04/bastoy-norwegian-prison-works>.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

show a commitment to live a crime-free life on release.<sup>285</sup> Therefore, only those who wish to integrate back into society find their way to Bastoy.

Governor Nilsen and Bastoy Prison are perfect examples of what should be the focal point of every sentencing decision: what is most effective in reducing reoffending, and how can we reduce the criminal's feelings of separation that cause him or her to commit a crime in the first place. As Nilsen explains:

Losing liberty is sufficient punishment – once in custody we should focus on reducing the risk that offenders pose to society after they leave prison. For victims, there will never be a prison that is tough, or hard, enough. But they need another type of help – support to deal with the experience, rather than the government simply punishing the offender in a way that the victim rarely understands and that does very little to help heal their wounds.<sup>286</sup>

Judicial discretion also appears to be a key to success. Like a medical surgeon in his or her particular field, a criminal court judge sentences offenders every day. Just as a magistrate judge develops a certain amount of intuition as to who will flee pre-trial, a district court judge develops a certain intuitive sense as to what sentence works for that particular offender. The judge is paid to be the voice of the community; we must place our trust and confidence in his or her expertise.

Congress removed a significant amount of judicial discretion when creating statutory mandatory minimums and three strikes laws. The hands of federal judges were irreparably tied when these U.S. sentencing guidelines were created. The United States became a world leader of incarceration rates as narcotic offenses were tied to significant prison sentences.<sup>287</sup> Not only did drug offenses carry high sentences, but also sentencing enhancement provisions for drug offenses, such as 21 U.S.C. §§ 841(b) and 960(b), raised the statutory minimums.<sup>288</sup> Title 21 of the United States Code § 841(b)(1)(A) and (B) double the mandatory minimum from five years to ten years or from ten to twenty years if the defendant has one prior drug felony.<sup>289</sup> If the defendant has two or more prior drug felonies, the defendant may receive life imprisonment if the drug amount is one kilogram of heroin, five kilograms of cocaine, 1,000 kilograms of marijuana, or fifty grams of actual methamphetamine.<sup>290</sup> The government must file a 21 U.S.C. § 851(a) notice to raise the statutory minimum, and this mandatory minimum trumps the sentencing guidelines.<sup>291</sup> Any motions filed for a downward departure will not take the sentence below the mandatory minimum if a § 851 notice is filed.<sup>292</sup>

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<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> See, e.g., Steven J. Boretos, *The Role of Discrimination and Drug Policy in Excessive Incarceration in the United States*, 6 UDC/DCSL L. REV. 73, 73-74 (2001).

<sup>288</sup> 21 U.S.C. §§ 841(b), 960(b) (2013).

<sup>289</sup> *Id.* § 841(b)(1)(A)-(B).

<sup>290</sup> *Id.* § 841(b)(1)(A).

<sup>291</sup> *Id.* § 851(a).

<sup>292</sup> *Id.*

A drug swallower caught at an international airport attempting to smuggle 100 grams of heroin into the United States will receive a minimum of five years.<sup>293</sup> The chances of receiving a reduction in his or her sentence, via the prosecutor filing a motion for downward departure under U.S. Sentencing Guidelines § 5K1.1 or a Rule 35 motion,<sup>294</sup> are slim because the offender has no information to provide to authorities – they are only told to call a certain phone number upon arrival, and they receive three hundred dollars for their service. Our prisons are filled with such cases.

Of course, more discretion will not necessarily solve the problem. There are no easy answers. Unfettered judicial discretion, the disparities in sentencing, and the seemingly severe sentences, which were often sharply reduced by the parole system between the 1930s and again in the 1960s to mid 1970s, led to the passage of the Sentencing Reform Act of 1984, the creation of the United States Sentencing Commission,<sup>295</sup> and the subsequent promulgation of the Sentencing Guidelines. Congress sought to “provide certainty and fairness in meeting the purposes of sentencing.”<sup>296</sup> The guidelines, statutory mandatory minimums, and career criminal enhancements produced higher sentences and more conformity.<sup>297</sup>

Even within this framework, U.S. Attorney Generals have had different opinions on how to operate within the existing federal sentencing structure. In September of 2003, Attorney General John Ashcroft required federal prosecutors to:

[C]harge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case . . . . The most serious offense or offenses are those that generate the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence.<sup>298</sup>

Prosecutors were given no discretion in charging decisions or filing 21 U.S.C. § 851 notices requesting that the statutory minimum be raised based upon previous drug convictions.

On the other side of the spectrum, Attorney General Eric Holder encouraged discretion in all charging and sentencing decisions. In his memo to U.S. Attorney Offices dated August 12, 2013, he stated:

Current policy requires prosecutors to conduct an individualized assessment of the extent to which charges fit the specific circumstances of the case, are consistent with the purpose of the federal criminal code, and maximize the impact

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<sup>293</sup> *Id.* § 841(b)(1)(B)(i).

<sup>294</sup> *See* FED. R. CRIM. P. 35.

<sup>295</sup> *See* 28 U.S.C. § 991(a) (2013).

<sup>296</sup> *Id.* § 991(b)(1)(B).

<sup>297</sup> *Id.* § 991(b).

<sup>298</sup> Memorandum from John Ashcroft, Attorney Gen., U.S. Dep't of Justice, to All Federal Prosecutors (Sept. 22, 2003), available at [http://www.justice.gov/archive/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.justice.gov/archive/opa/pr/2003/September/03_ag_516.htm).

of federal resources on crime. When making these individualized assessments, prosecutors must take into account numerous factors, such as the defendant's conduct and criminal history and the circumstances relating to the commission of the offense, the needs of the communities we serve, and federal resources and priorities. . . . We must ensure that our most severe mandatory minimum penalties are reserved for serious, high-level, or violent drug traffickers. In some cases, mandatory minimum and recidivist enhancement statutes have resulted in unduly harsh sentences and perceived or actual disparities that do not reflect our Principles of Federal Prosecution.<sup>299</sup>

Whether or not discretion is encouraged, we still see, and presumably will always see, charging and sentencing disparity within the ninety-four federal districts and among the states. According to U.S. Sentencing Commission analysis for the fiscal year 2012, federal circuits such as the District of Columbia and the Ninth Circuit followed the Sentencing Guideline Range only 34% and 37.8% respectively and were the lowest of all the circuits.<sup>300</sup> The Fifth Circuit and the First Circuit were the highest in following the Sentencing Guideline range at 69.6% and 62.2% respectively.<sup>301</sup> The deviations from the Sentencing Guideline range may be upward or downward departures. Despite making the Guidelines merely advisory after *United States v. Booker*,<sup>302</sup> we still see a significant amount of sentences are still being determined by the Sentencing Guideline ranges.

There will always be disparity in sentencing among districts and states.<sup>303</sup> Perhaps there should be, as communities are different, and some communities are more tolerant of particular crimes than others. The key is that discretion leads to more thought being placed into the sentencing decision itself and to increasing the possibility that the multi-goals of punishment are fully considered and integrated.

Discretion and more lenient sentences for those who can be rehabilitated would also lead to greater judicial discretion as to which offenders need to be sentenced to

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<sup>299</sup> Memorandum from Eric Holder, Attorney Gen., U.S. Dep't of Justice, to the U.S. Attorneys & Assistant Attorney Gen. for the Criminal Div. (Aug. 12, 2013), available at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf>.

<sup>300</sup> U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2012, FIRST CIRCUIT 12-17, available at <http://www.ussc.gov/sites/default/files/pdf/data-and-statistics/federal-sentencing-statistics/state-district-circuit/2012/1c12.pdf>.

<sup>301</sup> *Id.*

<sup>302</sup> 543 U.S. 220, 222, 245 (2005).

<sup>303</sup> See Scott Shackford, *Federal Judge Knocks Arbitrary Drug Sentencing Enhancements*, REASON.COM HIT & RUN BLOG (Aug. 28, 2013, 5:30 PM), <http://reason.com/blog/2013/08/28/federal-judge-knocks-arbitrary-drug-sent>.

A repeat offender [in the Northern District of Iowa] was 2,532 times more likely to face a doubled sentence than one arrested a mile away across the Nebraska border . . . Those prosecuted in the eastern district of Tennessee were nearly 4,000 times more likely to receive an enhancement than those caught in the state's western district.

*Id.* (citing Ryan J. Foley, *US Judge Blasts DOJ Over Drug Sentence Disparities*, AP THE BIG STORY (Aug. 28, 2013, 2:12 PM), <http://bigstory.ap.org/article/us-judge-blasts-doj-over-drug-sentence-disparities>).

accomplish the aims of incapacitation. Neurocriminology may soon be able to assist judges in their assessment of the likelihood of recidivism. Neurocriminology is a relatively new field that uses neuroscience to understand why repeat offenders continue to commit crime.<sup>304</sup> Over 100 studies of twins and adopted children revealed “that about half of the variance in aggressive and antisocial behavior can be attributed to genetics.”<sup>305</sup> Further, “other research has begun to pinpoint which specific genes promote such behavior.”<sup>306</sup> Not only have physical deformations been identified that predispose some individuals to violence, but “[a] poor environment can change the early brain and make for antisocial behavior later in life.”<sup>307</sup> Neurocriminology still needs to be fully scientifically proven, but it is certainly better than a hunch and a crystal ball. Minimum mandatory sentences, three strikes laws, and sentencing enhancements should be reserved only for those who must be incapacitated and who stand no chance of being rehabilitated.

“Nationwide, state spending on corrections has risen faster in the 20 years from 1988 to 2008 than spending on nearly any other state budget item—increasing from about \$12 billion to \$52 billion a year.”<sup>308</sup> Yet, on a positive note, seventeen states<sup>309</sup>, including Kentucky, are experimenting with a justice reinvestment model that supports “cost-effective, evidence-based” policies projected to generate meaningful savings for states, while maintaining a focus on public safety.<sup>310</sup> Each state involved in the program is identifying the specific factors behind prison growth and corrections in their state. They have found that by identifying areas where incarceration is too rigid a punishment (e.g., technical violations of probation, excessively long sentences, insufficient community supervision and support, parole processing delays, etc.) and by increasing good time and earned time credits, intermediate and graduated sanctions in lieu of long term imprisonment, and increasing community-based treatment programs, these states

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<sup>304</sup> Adrian Raine, *The Criminal Mind*, WALL ST. J., Apr. 27, 2013, at C1.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *Justice Reinvestment Facts & Trends*, JUSTICE CENTER, <http://csgjusticecenter.org/justice-reinvestment-facts-and-trends/> (last visited Oct. 14, 2014) (citations omitted).

<sup>309</sup> These states include: Arkansas, Delaware, Georgia, Hawaii, Kansas, Kentucky, Louisiana, Missouri, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, and West Virginia. *See infra* note 310.

<sup>310</sup> *See* Denise E. O'Donnell, *Foreword* to NANCY LAVIGNE ET AL., THE URBAN INST., JUSTICE REINVESTMENT INITIATIVE STATE ASSESSMENT REPORT (2014). For example,

[a]s a result of JRI reforms, Kentucky has realized a total savings of \$34.3 million: \$25 million in averted jail costs and \$9.3 million from its mandatory reentry supervision program. Kentucky has invested \$13.9 million in evidence-based programs, including educational program, substance abuse treatment, and sex offender treatment programs. Although Kentucky's prison population increased 2.6 percent the year after JRI legislation was passed, the prison population declined 7.5 percent between January and September 2013.

*Id.* at 77.

have experienced reductions in their prison populations.<sup>311</sup> These states under the Justice Reinvestment Initiative are the leaders in “punishment” reform by focusing on what types of intervention will help offenders change. A risk-assessment model is created where corrections professionals take into account the individual’s characteristics, such as his or her peers, housing, personality, antisocial tendencies, etc., to predict his or her risk of reoffending and whether detention, incarceration, release, supervision, or treatment is necessary.<sup>312</sup> After much research, states have learned that “interventions, treatment programs, and supervision should identify and focus on those individuals at greatest risk for committing crimes.”<sup>313</sup> Whereas incarceration was thought to be lengthy and rehabilitation fairly short, the opposite has been found to be true today. This solution is causing states to divert more and more funds to treatment programs and community supervision.<sup>314</sup> These seventeen states are leading the charge.

Lastly, it is important to note that the United States may never beat Japan in low incarceration rates. One of the major reasons for high crime statistics in the United States, i.e., the West, and lower statistics in the East are the vastly different cultural values. This would not explain the disparities among Western countries, e.g., the difference between the United States and Germany, but it would explain the differences between the United States and say Japan or China. In the West, the “expression of self” is “I” oriented versus “we” oriented in the East.<sup>315</sup> In the West, the individual is “autonomy and individual achievement” versus “group duty, preservation of harmony” in the East.<sup>316</sup> In the West, conflict resolution is “trial or confrontation, use of lawyers/courts” versus “more mediation through trusted third parties.”<sup>317</sup> The cultural values and tight family units in the East, with their obsession with education and perception of self as an obligation to family and community, may explain why American society is much more violent and prone to higher crime rates. Slight cultural differences between certain Western countries may also affect crime statistics, especially in those countries where family values and strong religious influences are present. There is also something to be said about European-style socialism versus conservative secularism and capitalism in the United States. The United States’ competition-driven society that does not sympathize with the “losers” and ignores the inequality will tend to be more violent or prone to crime in order to satiate the self due to out of self-loathing from societal alienation.<sup>318</sup>

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<sup>311</sup> *Id.* at 2.

<sup>312</sup> See *id.*; Interview with Kerri Wagner, South Dakota Senior Parole Agent and Consultant/Trainer, Wagner Consulting Group, in Knoxville, Tenn. (Apr. 4, 2014).

<sup>313</sup> JUSTICE CENTER, *supra* note 308.

<sup>314</sup> See LAVIGNE ET AL., *supra* note 310, at 22.

<sup>315</sup> See generally Rainer Falle, *East Meets West: An Infographic Portrait by Yang Liu*, BSIX12, <http://bsix12.com/east-meets-west/> (last visited Oct. 14, 2014) (being represented by the picture “Lifestyle: Independent vs. Dependent”).

<sup>316</sup> See generally *id.* (being represented by the picture “Lifestyle: Independent vs. dependent”).

<sup>317</sup> See generally *id.* (being displayed in the picture labeled “Problem-solving approach”).

<sup>318</sup> See Atul Gawande, *Hellhole*, THE NEW YORKER, Mar. 30, 2009, at 41.

Unfortunately, as the use of technology and social media increases, a sense of local community decreases, especially in urban populations throughout the world.<sup>319</sup> Some offenders may have a tendency to feel alienated in their own towns and commit crimes against others. In Dostoyevsky's *Crime and Punishment*, it was only when Sonia embraced Raskolnikov and exclaimed, "Oh, I don't think there is anyone in the world more unhappy than you are!" that "a feeling [Raskolnikov] had not known for a long time overwhelmed him entirely, and at once softened his heart."<sup>320</sup> His response? "So you won't leave me, Sonia, will you?" he said, looking at her almost with hope.<sup>321</sup> The one-on-one connection with Sonia broke the cycle and gave Raskolnikov a reason to live in society again. It is unclear whether we can acquire the same feeling of connection and understanding via video chat, Facebook, Twitter, or instant messaging.

Perhaps we should use the new social media outlets to our advantage and publicize our mandatory minimums, three strikes laws, and sentence enhancements for career offenders. Selected websites and apps, Facebook, and Twitter might publicize the severe penalties for free – spreading the word that crime does not pay and for repeat offenders, even less so. Perhaps that might deter the next drug dealer debating whether to bring a gun to his next drug transaction for fear of receiving an 18 U.S.C. § 924(c) enhancement<sup>322</sup> tacked on to his already stiff drug sentence.

#### CONCLUSION

Choosing the "right" punishment will never be an exact science. However, keeping in mind the idea of community and the impact separation has on an individual when we choose the merits of punishment is always a good idea. Punishment has oftentimes been described as "medicine." Aquinas stated that punishment should have the "character of medicine, conducing either to the amendment of the sinner, or to the good of the commonwealth."<sup>323</sup> Medicine,

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<sup>319</sup> See generally *id.* Gawande explains that isolation of individuals is a negative and that all people crave companionship in life, but solitary confinement leaves people even more unfit for social interaction.

<sup>320</sup> DOSTOYEVSKY, *supra* note 2, at 425.

<sup>321</sup> *Id.*

<sup>322</sup> 18 U.S.C. § 924(c) (2013) applies if, during and in relation to a crime of violence or a drug trafficking crime, the offender uses or carries a firearm. If the offender possessed the gun during the drug transaction, he will receive an additional five-year mandatory minimum sentence. If a gun was brandished, meaning it was displayed or there was conduct otherwise suggesting the presence of a firearm being used to intimidate, the offender will receive an additional seven-year mandatory minimum. If the gun was discharged (fired), the offender will receive an additional ten-year mandatory minimum sentence.

<sup>323</sup> Falvey, *supra* note 17, at 162 (quoting St. Thomas Aquinas).

[P]unishments that are inflicted in the present life either by God or by man do not always correspond to the gravity of fault, for sometimes a lesser fault is punished with a graver punishment temporarily in order that a great danger be avoided; for punishments in the present life are used a medicines.

however, has a tendency to mask the symptoms of illness rather than get to the heart of why the illness occurred in the first place. If punishment is meant to be medicine, we need to explore ways to get to the core of why the crime was committed in the first place so that it will not be committed again, and the medicine will no longer be needed. Without a full review of why we punish and what will be the end result of such actions on victims, offenders and society, then distributing punishment in pursuit of “justice” will remain a palliative medicine at best. Unfortunately, we may soon enter a post-antibiotic era where traditional medicines will no longer work and returning to the drawing board and evaluating the basic goals of punishment will be critical.

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Koritansky, *supra* note 25, at 334 (quoting St. Thomas Aquinas).