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PUNISHMENT AND RIGHTS

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All the predominant theories of criminal penalization justify punishment according to its *efficacy*. The theories variously deem punishment worthwhile if it: restricts the actions of the person deemed guilty; discourages future crime (whether by the particular criminal or the general public); signals social opprobrium for the crime; or is cathartic for the criminal’s victims; or a combination of these aims. The prevailing idea behind punishment is that it should above all make society safer from criminals.

Despite this emphasis on effectiveness, none of the prominent concepts of punishment explains how we can *know* (short of physically rendering a person incapable of doing further crimes) that punishment works. If the goal of a punishment is simply to eliminate the criminal from engagement with society at large, that can be achieved effectively enough; either capital punishment or life-long incarceration will do the trick. However, where punishment is held to have some other purpose than simply extinguishing its subject, the efficacy of punishment becomes much harder to ascertain. Coming up with a rationale for punishment is easy enough, but demonstrating that the reality matches the theory is another matter.

Yet a theory of punishment must do more than define punishment’s purpose and propose a credible way to measure its success. Just as critical is an explanation of how it fits within other cultural, moral, or legal limits. In any society that recognizes individual rights, punishment must be more than effective; it must be consistent with these rights. Ineffective

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1 In speaking of “main theories,” I am referring to: retribution and censure, deterrence, remediation and restitution, and rehabilitation.
2 Recent debates on these themes are summarized well in Lucia Zedner, *Criminal Justice* (Oxford: Oxford University Press, 2004), 84-86.
punishment, or punishment whose efficacy is indeterminate, is unjustifiable within a rights-oriented society because it impinges on a criminal’s rights, all for no purpose. But even punishments that demonstrably accomplish the results intended of them must be compatible with rights.

Indeed, in a legal system that incorporates rights, criminal penalties must either cause no conflict with rights or they must be applied precisely for the sake of those rights. The existence of legal rights complicates the discussion about punishment’s effectiveness because it introduces difficult questions: Do criminals have rights? If so, can punishment override their rights? If it can, is that true for all rights or only some? Under what justification? Is there a limit to how much punishment can prevail over criminals’ rights? If punishment does not negate criminals’ rights, how can it be made compatible with the rights of criminals? Or do rights prevent the state from punishing crimes?

Crimes are often offenses against rights. Although an act may not be legally defined as criminal because it harms a right, it may nevertheless intrude on the rights of the victimized. A broader systemic consequence of crime is that it makes people fearful, leading them to refrain from using their rights to the full.4

In any legal system that recognizes individual rights, criminal punishment is also, inevitably, an impingement on rights. The criminal’s rights do not dissolve upon commission of the criminal act, nor do they disappear once the criminal is caught, tried, and convicted.

Where individual legally defined rights are part of the equation, formulating justifications for

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3“Often” not “always,” because some crimes do not directly intrude on rights. The government may make it a crime of trespassing if an unauthorized person wanders onto a government intelligence-gathering site. Admittedly such a crime is not divorced from the public’s interest—the government will argue that the operation protects the public—but it does not directly intrude on any individual’s interests. Nonetheless, most crimes against individuals or social groups do impinge on personal rights.

criminal punishment becomes difficult because the effectiveness of any punishment, even if it is measurable, is not the sole standard. Penalization must also be compatible with rights.

While some philosophical writings on criminal punishment have wrestled with the issue of whether the state can legitimately punish its own citizens, none of the prevailing theories of punishment delineates precisely how, and to what extent, crimes should be penalized. Although some work has been done on defining “limits” to punishment, the question of how punishment relates to concepts of individual rights remains unresolved. If a society attributes the same rights to every person (allowing for the role of rights-regent in the case of parents or guardians), how can state-imposed punishment be compatible with these rights? Can a legal system that recognizes rights allow for criminal punishment at all? If so, under what conditions is the practice of punishment compatible with individual rights and when not? What is the appropriate extent or duration before an otherwise acceptable punishment becomes excessive?

Although the Eighth Amendment of the United States Constitution precludes cruel and unusual punishment, the full borders defining the realm of allowable punishment remain undetermined. Yet judicial interpretation has not refined the meaning of this standard to a precise compendium of acceptable, and impermissible, kinds of punishment. Nor has it held that it has the duty to define and justify the allowable range of punishment.

My purpose here is not to propound the “correct” measurements for select types of punishment. Toward the end of the past century, American penal doctrine fell under the thrall of a quest to devise an objective, just calculus for determining penal sentences. The proposed

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rules for judges, originally explored by a few states, and eventually made fast in the federal Sentencing Guidelines, became ever more unwieldy as they were made more precise. The desire to formulate an ever more elaborate arithmetic of sentence determination failed to make sentences fairer. The problem was not that sentencing guidelines lacked sufficient nuance; it lay deeper, in the very foundational assumptions of the movement. Prescriptive quantification of punishment obscured the unsettled question lurking in the prevailing theories of punishment: can state-enforced punishment be defensible in a state that also recognizes a notion of individual rights?

In sum, this essay engages with two questions. First, how can state-ordered punishment be reconciled with legal rights, whatever those rights are? Second, if the concept of punishment can be consistent with the concept of individual rights, how can we determine the permissible forms and extent that punishment may take? In pursuit of these inquiries, I spend some time considering what rights are, so as to demonstrate why the relationship between punishment and rights is insuperable, and vexing.

THE MISSING DIMENSION IN THEORIES OF PUNISHMENT

H. L. A. Hart distinguished between “backward-looking” and “forward-looking” justifications for punishment. His differentiation offers a lucid starting point for considering penal theories. Hart characterized retribution, one of the main traditional theories for punishment, as backward-looking. The reason for punishment, according to advocates of a retributive position, is to condemn the criminal act and to reproduce for the criminal some of

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7 Hart characterizes all three rationales for criminal punishment (Retribution, Deterrence, Reform) all together as a “supreme value or objective” or “aim.” Hart views them as distinct purposes for punishment. Hart, Punishment and Responsibility, 2-3.
the pain that he callously caused his victims. There are various reasons why a society may exact retribution from lawbreakers: social disgust, anger, and scorn for the illegal act; a common wish to vent vengeance; or the belief that a criminal’s rebarbative acts warrant corrective moral reactions, what is labeled “just deserts.” Retribution can be done through social censure, such as displaying the criminal in the stocks. It can also condone affliction of severe corporal pain on the criminal, regardless of whether the public witnesses the punishment. Whatever the impulses behind formalized retribution as criminal punishment, its purpose is to reestablish a kind of balance, a “justice” to repair the “injustice” of the crime.

The problem with retribution is that it lacks intrinsic limits. Punishment can be as vicious and relentless as the anger behind it. In addition, it treats the criminal as nothing more than an object of revenge. Retribution can be unforgiving; it recognizes no requirement that criminal penalties try to reintegrate the criminal into society.

Deterrence as a justification for criminal penalization, in contrast to retribution, is a forward-looking theory. It holds that disciplining the guilty serves to protect society. For “general deterrence,” the telos (goal) of punishment is to caution the population at large about the legal penalties that result from breaking the law. Those who might be disinclined to conform to the law will be encouraged to rein in their anti-social desires by the prospect of punishment (or even, for that matter, of detection, arrest, and conviction). “Special deterrence” refers to the dissuasive effect of punishment on the actual convicted criminal. The criminal’s experience of the decreed punitive treatment should discourage him from reprising his crime after the punishment has concluded.8

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Some degree of deterrence may be a byproduct of any kind of punishment, even when it is not intended. Actual deterrence, if not completely speculative, is difficult to prove empirically; the evidence to date has not been terribly conclusive.\(^9\) When deterrence alone is the goal of punishment, then there is no limit to a permissible sentence. Where incarceration or some other form of imposed seclusion might work on some, the fate of an imminent execution is surely more dissuasive still. Even the possibility of a capital sentence is not so impressive if the likelihood of arrest, or, above all, the fairness of the judicial process, is not widely credible.\(^{10}\)

The theory of retributive punishment can overlap with the argument for deterrence. Where retribution is viewed as a means to lead a criminal to remorse, and not strictly as an expression of social fury, it is known as “consequentialism.” A simple version of retribution is satisfied with punishment-as-reciprocity: the convicted person should suffer correspondingly for the pain his crimes caused (and his willingness to scorn society’s laws). Consequentialism, on the other hand, acknowledges that sentences rarely last a lifetime, that the criminal will eventually return to society, and that punishment should therefore try to make of the criminal a more conforming, obliging citizen.\(^{11}\) This more expansive concept of retribution shares with special deterrence a supposed impetus, experienced by the punished subject, toward reflection and a wish to reform. Both concepts assume that the criminal has the capacity for resolution to change.

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\(^{10}\) Kant’s famous proscription in *The Metaphysics of Morals* against using people as means is consistent with the equal distribution of individual rights. A serious risk of arguments for deterrence is that they can justify severe criminal penalties out of a naïve utilitarian concern with a greater social benefit, disregarding the rights of the subject of the penalties.

From Jeremy Bentham onward, deterrence has found an ally in the philosophy of utilitarianism. Bentham repudiated punishment of a criminal as irrational. He held that retribution merely demonstrates society’s resentment against the criminal for what he has done—but to no rational end. By the time a court has found the criminal guilty and proclaimed his sentence, the criminal’s motivations are a matter of history. The criminal act itself is long past. It is, therefore, unreasonable to punish a person in order to influence his past subjective state of mind. The only sensible justification for punishment is if it deflects people from doing crimes in the future. Bentham proposed to correct the wrong-headed retributive defense of punishment with a more rational insight into the purpose of punishment. The suffering of the punished criminal would benefit the greater good by removing him from the opportunity to do further harm, and it would discourage others from acts antithetical to the predominant common interests of society.

**Restitution and Remediation**

Restitution and remediation are other, related, currently popular theories of punishment. Where possible, the state requires the criminal to provide some kind of compensation to his victim. Court-ordered monetary restitution is intended to overcome the limitations of the other common theories of punishment by having the criminal make up for the damage caused by his crime.

Restitution is not always practicable, however. In some instance a convicted criminal may be too impoverished or otherwise incapable, or the damage to the victim is so severe as to render compensation impossible. The theory also has trouble explaining just how

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compensation should be calculated. Set too low (relative to the particular perpetrator), court-mandated payment can be little more than a cost of doing business. Set too high, restitution becomes punitive, and is no longer really restitution. It may be preferable to serving time in prison (in practice it is often combined with prison sentences) but it can result in a lifelong debt for the criminal. At best, restitution covers some of the victim’s financial losses and it indicates the state’s awareness (as does the entire process of prosecution) of the victim’s suffering. Monetary restitution can, however, never adequately compensate the victim of a rape or a crippling battery.

The theory of restitution and remediation is not concerned with the motivations of the criminal, but with the material consequences of his crimes. Of all theories of punishment, it comes closest to civil remedies. Criminals are ordered to make good the harm they did through restitution, whether through monetary recompense or some in-kind counterpart, such as labor.

Rehabilitation

Still another theory of punishment, rehabilitation, calls for resocializing the criminal, to address the psychological problems that led him to his crime, so that he can eventually conform to social norms. For rehabilitation, the purpose of judicial sentences should be to help the criminal understand and overcome the notions that led them to commit their crimes. Crimes, according to this theory, may reflect turmoil in the character and circumstances of the criminal. It is these problems that are the focus of rehabilitative sentences. The particular type of crime a person committed is irrelevant to determining a due punishment; what matters is the probable effectiveness of the rehabilitative regime developed for the subject.
Rehabilitation is forward-looking, for it seeks to reduce the likelihood of recidivism by reforming the individual.

The reliability of the evidence for efficacy from rehabilitative programs continues to be debated, even among those who are sympathetic to its value.\textsuperscript{13} Not every prisoner is susceptible to rehabilitation. And the social situation from which he came, and to which he will go back, may be such as to make any psychological redress essentially impotent. It is also not clear just how the success of rehabilitation should be judged. What qualifies as proof that a criminal is adequately rehabilitated? Is it that he avoids committing further crimes? Or does the measure call for something more, such as a long-term job, purchase of a home, the accumulation of savings? In fact, no measure is reasonable, for rehabilitation can no more predict a former convict’s behavior than any other kind of criminal sentence.

If a supposedly rehabilitated jewel thief steals a necklace from a department store five years after his release, has he lapsed back into his old tendencies, or did new circumstances drive him to resurrect his old skill? Perhaps he left prison with the best of intentions, only to find himself living among his the same deleterious circumstances that helped lead him to his original crime. Does that indicate that rehabilitation must include post-incarceration strictures on a criminal’s life choices? How far would these extend into his life—and the life of his community?

Rehabilitation has also been criticized for being too paternalistic, for perilously cutting close to political reeducation and psychological manipulation.\textsuperscript{14} This charge is less persuasive


\textsuperscript{14} The famous first volley in this debate was loosed by Herbert Morris, “Persons and Punishment,” \textit{The Monist} Vol. 52, (1968), 480ff.
than the others. Yet attacking rehabilitation for being too paternalistic or manipulative is a peculiar accusation. Nowhere is the state more paternalistic than when punishing its citizens, whether through confinement or corporal discipline. Moreover, this opposition to rehabilitation ignores what all forms of punishment have in common: with the exception of executions, life sentences, or other terminal penalties, punishment proposes to change its subject. Punishment either condemns or seeks to reform.

Proportionality

A defect that particularly plagues retribution and deterrence theories is that they offer no systematic, relevant standard of measurement. The one concept that comes close to meeting this need is “proportionality.”15 According to the idea of proportionality, the specific events of a crime, the cruelty with which the crime was carried out and the extent of damage it produced should be considered in judicial determinations of punishment. Looked at closely, proportionality turns out to consist of two complementary parts. First, it holds that crimes can be ranked by their intrinsic offensiveness and disruptiveness. That is why we can have a category for misdemeanors as distinguished from the more serious crimes of felonies; the former involve less damage, in terms both of financial cost and personal harm, than the latter. Premeditated murder for personal monetary gain is widely understood as a more detestable crime than involuntary manslaughter.16 Both are deemed more heinous than theft of an unoccupied automobile.

16 As just one indication of the different weight given to these crimes, the federal sentencing guidelines attach a Base Offense Level of 43 to First Degree Murder, whereas they start Involuntary Manslaughter at, at most, a lower level of 22. These numbers correspond to periods of incarceration. USSC Guidelines Manual, Part A. Offenses Against the Person, 1. Homicide, Sections 2A1.1 and 2A1.4.
The second element of proportionality concerns punishment in relation to crimes. Proportionality posits that punishments exist along a scale, in correspondence to the nature of the apposite crime. The more terrible the crime, the more punishing the sentence. The person who steals a table saw from a Sears store deserves a punishment, but none so severe as that awaiting the murderer.

For the retributionist, proportionality is useful for several reasons. For one, it molds penalties to express different degrees of social displeasure and dismay over different crimes. Proportionality ranks due punishments according to the criminal act (although it also can take into account evidence of the criminal’s contrition). The 25-year-old who goes joy riding in a stolen car is not comparable to the 25-year-old who murders a mother in front of her children. Murder, sexual abuse (particularly rape and abuse of children) are commonly perceived as the most execrable crimes and therefore warrant the weightiest penalties.

Proportionality fits equally well with deterrence theories. Because society abhors some crimes more than others, punitive measures should be adjusted proportionately to be more deterrent for the more nefarious and destructive. Treating every crime as equally condemnable would result in either seemingly mild responses to execrable crimes, or very forbidding punishments for minor crimes. Combining proportionality with deterrence thus introduces an element of leavening. Some crimes may be more socially acceptable than others. Crimes of passion and crimes committed under the influence of drugs or alcohol—where the *mens rea* is less vicious or conscious—may be less susceptible to deterrence. Responding to them with hard criminal sentences would be of little worth—and of disproportionate cost.

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17 The ideas of proportionality and deterrence are not necessarily aligned, however. A society intent on discouraging all forms of crime may apply the harshest of penalties to every crime. Proportionality as a means to rate crimes and to correlate suitable punishments is irrelevant to the most absolute deterrence.
Remediation relies not so much on proportionality as comparability of value. The concern for remediation is determining the material value of the damage the crimes exacted. This value is used to determine the restitution the criminal owes to his victim. As with remedies for tortious acts, calculating a monetary value for a personal harm, as opposed to the loss of property, becomes an uncertain translation. In this sense, comparability is hobbled by the same sort of vagueness that inheres in proportionality.

In contrast to its usefulness for retribution and deterrence, proportionality is irrelevant for rehabilitation theory. Rehabilitative criminal sentences continue as long as necessary to achieve convincing reform in the criminal. Perhaps only when rehabilitation turns out to be ineffective, and the criminal’s sentence is changed to a more customary form of punishment, does proportionality come into play.

Regardless of the theory through which it is applied, proportionality has a fundamental deficiency. The ranking of criminal evils, and the parallel order of proper punishment, is not objectively provable or calculable. At first blush it may appear intuitively sensible, but on deeper examination, the basis for ranking crimes is emotional. Should crimes be ranked by the “amount” of the malevolence that drove them? Or strictly by the devastation and injury they caused? Proportionality cannot indicate what any punishment ought to be in a particular instance; it can only insist that there is some defensible ratio between punitive burden and the nature of a crime. Proportionality cannot tell us whether burglars should be sentenced to five or to 50 years of hard labor. There is no way to know whether murder warrants a capital penalty or a life sentence in prison, any more than is there a single indisputable sentence appropriate for the criminal embezzlement of employees’ pension accounts. We cannot derive a “correct” penalty for first-degree murder from the proportionate differences between it and
other, less devastating crimes. In the end, we come back to the same question: how do we
know what a punishment should be?

The truth is, none of the prevalent theories of punishment offers a pellucid, rational
argument for the duration and form of legal punishment.

The deficiencies in these salient theories can be illustrated with an example. Consider
Willy, a hypothetical criminal defendant found guilty of a felony-degree murder he committed
during an illicit heroin sale. Stan, one of the buyers, tried to extort money from Willy and his
partner. Willy became enraged and began punching Stan. Stan retreated and tripped, hitting
his head on the edge of a metal table. The blow killed him.

Just around this time, the same judge presided over the criminal trial of Lewis. Lewis
is ultimately also convicted of felony-degree murder. He killed someone under quite similar
circumstances to those of Willy. But unlike Willy, Lewis displayed hardly a hint of a
disturbed conscience. At trial, he insisted on testifying in his defense, blaming the victim for
bringing about his own death. He went on to incriminate his partner as the guiltier figure. In
fact, Lewis has a history of criminal assault and battery, has twice had restraining orders
issued against him following complaints by former spouses, and has boasted routinely of the
fear he provoked from others. At no time during his detention and trial did Lewis manifest
regret over the victim’s death or sympathy for the surviving family.

A retributionist could argue that the Willy and Lewis should rightly be given different
sentences because they showed very dissimilar responses to their crimes, and did so even
before their trials. Lewis deserves a tougher punishment than Willy because his hard-hearted
attitude toward the killing makes him more blameworthy.
But it would be just as consistent for a retributionist to concentrate only on the killings at the time they happened, rather than on the subsequent behavior of the two defendants, to conclude that their sentences should be identical. Because the deaths occurred under similar circumstances, and both defendants had similar states of mind when they killed, society should impose like punishments on them. Furthermore, the compound criminal events surrounding the killings, the fact that they occurred during illegal, volatile transactions, give them a proportionately darker significance. Deterrence theory can produce the same variability of emphasis in sentencing, and hence suffers from the same inability to proffer an objective, uniform standard for punishment. One advocate of deterrence could reason that specific deterrence is less important in cases like Willy’s. Willy did not kill his victim with premeditation or malice, and, indeed, has convincingly demonstrated that he had no intent to kill his victim. Another might argue that (as a specific deterrent) Lewis deserves a milder penalty than Willy because deterrence is less fruitful for someone lacking basic human empathy. As regards general deterrence, however, the two positions could converge, advocating especially hard sentences as a strong warning to the public to avoid committing crimes with a high potential for deadly violence.

Utilitarianism similarly cannot lead deterrent theory to the “correct” punishments for particular crimes. The reason for this lies at the core of utilitarianism; it suggests a means of determining the weights of competing values. By itself, though, utilitarianism is unable to assert which values should be maximized. However nuanced the utilitarian argument for punishment, utilitarianism offers no guidance to assessing the value of competing interests or moral propositions as would be required to reach useful conclusions. While we may all agree that society would be better off with less crime, utilitarianism cannot say just how far a
society may go to suppress crime. It cannot even say whether the pleasure the criminal derives from his crime is of greater value than the utility lost by the victim as a result of the crime.

For instance, one might propose that, because they are directly affected by the conditions of any punishment, the wishes of sentenced criminals should be weighed in the calculation of competing utilities. People convicted of murder might overwhelmingly prefer long sentences, even in desolate prisons, to death. The majority of the population in the land might, to the contrary, favor capital punishment for murderers. While the prisoners were comparatively few in number when set against than the rest of the population, their utility in this matter would be multiplied by some coefficient on the grounds that they were directly experiencing the consequences of criminal penalties. Yet even with this adjustment for direct versus indirect exposure to punishment, there is no answer for how punishment ought to be calculated.

The rehabilitationist would urge that Willy’s participation in counseling and other “reconstructive” programs would serve him, and society, far better than an essentially random sentence to incarceration. Willy already appears to be a fertile subject for the lessons of a rehabilitative regime. There is no cause to submit Willy, who is already penitent, to punitive treatment for the mere purpose of inflicting additional harm. Rather, Willy’s sentence should be designed to return him to society, rather than to keep him apart from it. The means of measurement is clinical evaluation, perhaps including a review by a clinically-trained parole board. Under a purely rehabilitationist justice system, punishment would last only as long as required for demonstrated reformation.

All these theories can logically accommodate the idea of mitigating considerations as relevant to sentencing decisions. Willy might deserve some mitigation of the customary
sentence for his crime because, even before the trial, he clearly understood and regretted his acts. Or perhaps there are other facts about Willy’s life that the court considers warrant mitigation of the sentence. In contrast, Lewis, shows no repentance. His parents were benign and supportive throughout his youth, he experienced no traumatic events growing up, the entire drug sale was driven by his cockiness and avarice. Mitigation, all the theories could agree, argues for a lighter sentence for Willy than for Lewis. But how much lighter? And what does mitigation have to do with the efficacy of punishment?

The usual arguments for punishment cannot state precisely what Willy’s and Lewis’s respective sentences should be. Should either, or both, be executed, imprisoned, or allowed to go free with a monitoring device, or forced to pay some sort of compensation to the victim’s survivors, made to undergo therapy? In the end, none of the salient theories of punishment offers justifications for which penalties precisely correspond to which crimes. Neither can any of the theories assert the specific duration of their penalties.

In the end, Willy is sentenced to ten years in prison. At Lewis’s sentencing hearing, the judge orders a twenty-year prison sentence. Ten years of incarceration is surely a harsh penalty for Willy, one that he would find oppressive. Lewis’s sentence is reasonable according to the notion of proportionality because he is the more intransigent, potentially dangerous of the two men. Yet just five years for Willy might have sufficed to express retribution, or deterred him from reprising a comparable crime. Three years might have achieved the same effects. Or two, spent entirely at hard labor. On the other hand, twenty could have been ordered for Willy, fifteen demanded of Lewis. What was the rational, empirically-validated determinant of measurement for the proper punishment for either defendant? None of the theories reviewed above, apart perhaps from rehabilitation (burdened
with its own uncertainties) can answer this question. And we have not even weighed the significance of varying possible conditions of their incarceration. Lewis’s prison may be newly constructed, and outfitted with a library, educational opportunities, an exercise room, while Willy finds himself in a deteriorating facility with no such activities or resources. After all, sentencing by the court is one thing; the conditions under which the sentence is actually lived are another.

**Sentencing Guidelines**

In the United States, judges have historically had wide discretion to determine sentences. Dissatisfaction with the lack of a uniform, “rational” standard for determining prison sentences came to a head in the United States with the debate over sentencing guidelines during the closing decades of the twentieth century. Starting in the 1970s, several states experimented with unilateral adoption of sentencing guidelines. After studying some of these state initiatives, Congress, decided to create the United States Sentencing Commission (USSC). In “The Comprehensive Crime Control Act of 1984,” Congress authorized the establishment of the United State Sentencing Commission (USSC) to draft and issue a comprehensive set of criminal sentencing instructions for federal courts.

The USSC’s sentencing guidelines first came into effect in 1987.\(^\text{18}\) In the Introduction to the *Guidelines Manual*, which is updated and issued annually, the USSC explains that its task was to “review and rationalize” federal criminal sentencing. It was mandated, under the Comprehensive Crime Control Act, to undertake “the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment [sic] and rehabilitation.”\(^\text{19}\)

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\(^{18}\) Tonry, *Sentencing Matters*, 72.

The schema of punishments laid out in the USSC’s Guidelines Manual does not (nor does it claim to) correspond to any standards of proven efficacy. The Guidelines Manual does propound justifications for why any given sentence, and no other, is the right one for the crime. For every criminal sentence, judges have only to calculate in the designated factors, outlined in the guidelines, that match the facts established at the trial, to determine the prescribed punishment. The guidelines never explain just why a particular punishment, taking into account the particular mitigating considerations, is due for a particular crime.²⁰

Neither the Comprehensive Crime Control Act nor the Guidelines Manual tackles such basic questions about the purpose and practice of punishment as: To what end do we punish criminals? Is the goal of this master plan of prison sentences to deter crimes, to take retribution for their commission, or to rehabilitate the perpetrator? Does remediation have a role at all, or is criminal sentencing strictly about separation and detention? Yet without

²⁰ The Introduction to the USSC Guidelines Manual notes:

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 too break down. Some argue that appropriate punishment should be defined primarily on the basis of the principle of ‘just deserts.’ 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 deterring others or incapacitating the defendant. … As a practical matter, however, this choice [between justifying theories] was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.

Guidelines Manual, November 1, 2011, Ch. 1 Pt. A, 4. Because the USSC could not settle on a justifying theory of punishment, it drafted instead a set of “relevant distinctions” to identify apposite punishments for specific crimes. In determining suitable punishments for crimes, the USSC claimed to favor an “empirical approach.” However, it did not support its supposed scientific orientation with hard evidence of penal effectiveness. Empiricism in the applied human sciences demands more than just an initial hypothesis of an identified social problem. Data do not, on their own, indicate how they should be interpreted; they cannot tell us what is a fair, legal punishment. Rather, a complete experimental prospectus should address how a proposed policy intervention will either conform to present societal mores, or explain why those mores themselves need to be reevaluated if the new policy is to be successful. In substituting data in place of a reasoned argument for punishments, the Commission hedged on the challenge of explaining how any given punishment has an effect on crime.
answers to these questions, how can we know that the punishments have achieved any purposes? How are punishments to be evaluated?

The federal sentencing guidelines briefly discuss proportionality, without, however, indicating why proportionality should matter, or what role it should play in determining prison sentences. In the sole passage on the matter, the Guidelines Manual merely takes note of the potential clash between proportionate sentences and uniform sentences:

Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity ... Simple uniformity -- sentencing every offender to five years -- destroys proportionality. Having only a few simple categories of crimes would make the guidelines uniform and easy to administer, but might lump together offenses that are different in important respects. For example, a single category for robbery that included armed and unarmed robberies, robberies with and without injuries, robberies of a few dollars and robberies of millions, would be far too broad. 21

The sentencing guidelines’ extensive “categorizations” and “subcategorizations” not only make them unwieldy (despite the declared goal of simplification); they also exist in a vacuum of philosophical explanation. According to the Guidelines Manual, the basis for determining an appropriate sentence for a given crime is the likelihood of a specific type of harm resulting from the crime, the severity of that harm, and the number of instances of harm. 22 The USSC never penetrates further into the meaning or value of proportionality in relation to defining varying periods of incarceration.

21 Ibid. 2-3.
22 The Commission wrote, “The list of potentially relevant features of criminal behavior is long; the fact that they can occur in multiple combinations means that the list of possible permutations of factors is virtually endless. The appropriate relationships among these different factors are exceedingly difficult to establish, for they are often context specific. Sentencing courts do not treat the occurrence of a simple bruise identically in all cases, irrespective of whether that bruise occurred in the context of a bank robbery or in the context of a breach of peace. This is so, in part, because the risk that such a harm will occur differs depending on the underlying offense with which it is connected; and also because, in part, the relationship between punishment and multiple harms is not simply additive. The relation varies depending on how much other harm has occurred. Thus, it would not be proper to assign points for each kind of harm and simply add them up, irrespective of context and total amounts.” Ibid., 3.
In the *Booker* decision of 2005, the United States Supreme Court overturned federal mandatory sentencing. The Supreme Court ruled in *Booker* against making the application of the federal sentencing guidelines (although statutory maximum periods of incarceration still obtain) mandatory on federal judges. The Court ruled instead in favor of a return to the traditional freedom of judges to use their discretion in sentencing, albeit in conjunction with the formulae codified in the sentencing guidelines.\(^23\)

### A DEFINITION OF RIGHTS

#### A. What Rights Are

To understand why rights pose particularly important limitations on punishment, and why they make the vagueness in theories of punishment regarding the nature and duration of punishment such a pressing defect, we must start with a clear concept of rights.

Rights are legal protections and supports, guaranteed by the state, for individual interests and pursuits, both actual and potential. Parsing out this statement, we see that inherent in this definition are the following elements:

1) Rights are *legal creations* established by societies;

2) The purpose of rights is to shield and promote certain recognized individual and group interests and activities, both current and conjectured; and

3) The institution endowed with the function of enforcing and preserving rights is the prevailing legal power of the society, referred to here as the “state.”

Rights may be limited within a society to a defined group, such as “citizens” as opposed to alien residents. However, such restrictions run the risk of internal contradiction, as

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\(^23\) The Supreme Court upheld its ruling in *Booker* recently in *Pepper v. United States*, No. 09-6822, Mar. 2, 2011.
we shall see; if rights are based on human abilities, interests and potentialities, then reducing them to a sub-set of a society’s population is inconsistent with the definitional nature of rights.

Different societies recognize diverse rights. Indeed, the same ostensible right will often be understood variously in different societies. While the current German constitution, the *Grundgesetz*, safeguards freedom of expression, it shields personal honor (*Ehrverletzung*) to a greater degree than does U.S. law.²⁴ Germany’s legal prohibitions against organized gatherings sympathetic to Nazism, or the display or utterance of pro-Nazi symbols and statements, may also strike Americans as a stark infringement of free expression.²⁵

This does not mean that all human abilities, interests, and needs are *automatically* rights. All rights are historical, social creations. They function, by definition (as we will examine in more detail), as fundamental legal principles that grant a special status to designated human abilities, interests and possibilities, controlling the corpus of a society’s laws. But while these originative characteristics of rights are inherent in their definition, rights in practice are historical, not ideal, doctrines. Societies that adopt rights do so at particular moments, and in their idiosyncratic, selective ways. The existence of rights presupposes the framework of a society, with a government and legal system that recognizes and enforces rights. Thus, while rights have at base by definition a common source in the plenum of human abilities, potentialities, and particular interests, their realization as legal tenets is historically contingent.

²⁴Art. 5, Abs. 2 of the *Grundgesetz*
²⁵Restrictions on public assembly and on forms of public expression reflecting Nazi-oriented political views are written into the German criminal code. The *Bundesverfassungsgericht* reaffirmed this legal exception to the constitutional protections of free expression and the freedom to assemble in 2009. (BVerfG, 1 BvR 2150/08 (Erster Senat, Nov. 4, 2009). See the analysis of the high court’s opinion in Christoph Goerisch, “Das Grundrecht der Meinungsfreiheit im Lichte des ‘Historikerstreits,’” *KritV*, Heft 2, 2011.
Social Context as an Essential Aspect of Individual Rights

There is no substantial distinction between rights as individual freedoms and social rights. Rights are legal commitments of the state both to protect and to abet specific abilities and interests. So-called social rights bind the state to provide certain goods, such as food, health care, decent shelter or education. Yet these positive duties of the state are of a piece with the general function of rights, which is the promotion of individual capacities and needs, and the interests of cultures or groups within the state. Just which interests are captured by rights and to what extent a state will promote social rights varies according to the demands of the residents of the particular society and the state’s resources.

Although I have use the word “abilities,” the most elemental human abilities, such as basic physical movements, do not in themselves necessarily require the protection of rights (although they conceivably could). For example, the ability for someone to move his or her arms is usually going to be too granular, too socially trivial, to warrant an explicit legal protection. In itself, it (usually) has no social significance. Likewise, thinking is too private for any practicable legal protection. Still, such simple abilities can, as we know, take on in the form of particular acts a social significance that may well be a basis for a right. And while thoughts may be hidden, people can certainly pressure or influence one another to such a degree that they become subjectively forbidden and suppressed.

While merely moving one’s hands may not call for recognition within a legal right, intentional movements that have a social meaning, or that attract attention (even if their intended meaning is not decipherable by others) such writing, painting, gestures, speaking or performing more likely will. And while many activities can be done in solitude (one need not publish what one writes, after all), the fact that an activity can be undertaken in public, or
somehow cross over into public attention, may be reason enough to secure it through legal acknowledgment as a right. The dissident sitting alone in her study writing criticisms of the state does not require a right to protect her activity. Rights are meaningless in a solipsistic universe. Only because the state could intrude into her home, or because she may want to communicate her criticism to others, is that right to freedom of expression called for. Where an action can be suppressed or hindered by others, including the state, the existence or absence of a relevant right is important to its free performance.

The import of rights is all the more evident in the case of activities that, by their nature, dispose themselves to public exposure. A right to free travel, to walk abroad beyond the confines of one’s home (or whatever private environment the state permits, if any) is a plausible subject for a legal right. Rights, whether individual or group, are essentially social phenomena. They are fundamental legal rules that protect and promote people’s interests within a society. In the absence of a social environment, the concept of rights is meaningless.

The emphasis here so far on intentional actions should not be understood to mean that rights are restricted to intentional actions, for the definition of rights admits as well of the plausibility of protections for spontaneous or unconscious activities. A right to sleep and to rest is consistent with the idea of rights as protections for human activities. It applies to a real human capacity and interest. After all, such activities still carry social import. Thus, while there may be a right to sleep, there is no right to sleep while driving because such an act would endanger others (as well as the sleeping driver).

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26 The definition of rights set out here is different from the Capabilities Approach developed by Amartya Sen and Martha Nussbaum. Although much about their views is persuasive, they assume a normative definition, despite the generous list of the ten threshold Central Capabilities they have identified that is far too restrictive to satisfy a definition of rights. See Martha C. Nussbaum, Creating Capabilities: The Human Development Approach (Cambridge: Harvard University Press, 2011), 32-35.
Another reason that rights, by definition, are not limited by the capacity for intentionality is that they logically extend to people who are have minimal capacity for intending, planning or concertedly pursuing many acts. Children and the mentally retarded or mentally ill benefit from rights because they have interests, however much they require the help of others to meet those interests. Too, they also have physical abilities, and do activities, that, however circumscribed, come within the definitional span of rights.

Potentialities

Of the words used here to describe the basis of rights, the most unexpected may be “potentialities.” I mean the term, however, in neither some metaphysical sense of what we are destined to become, nor as an aspirational ideal for what we “should” be. “Potentialities” refers simply to those abilities that people may develop in the future, whether through personal development or through larger social changes, such as advances in technology. The word applies no less to the individual capacities a person can acquire within his or her lifetime than it does to capabilities humans develop over the centuries.

What might therefore appear to be a speculative category of human capabilities is, in fact, a necessary element in the definitional composition of rights, because human abilities and interests change. Including potentialities among the human qualities that serve as the source of rights is not to argue that an actual legal body of rights must anticipate all potentialities. As social inventions, rights will always be partial representations of what people do, what they want, and the capabilities and interests they might possibly develop in
the future. Rights will never recognize every human ability or interest precisely because there is no definitive list, or definition, or what these are.27

This is all the more reason, then, that the very mutability and expansiveness of human abilities and interests must be accounted for in the concept of rights. The definition of rights needs to allow for humans’ intrinsic flexibility to change their interests and to add to their possible activities.28

There are many reasons why any single activity or interest becomes noticed in the legal consciousness of a society. For example, in a society with a history of religious factionalism and discrimination, the urge to protect religious practices will be paramount. A secular society, or a society with a single religion, however, may not recognize a right to religious freedom because there is no perceived need for it.

Furthermore, rights are not fixed and unchanging. Just as the activities people do (if not their physical abilities) can fall out of custom, while other new skills and pursuits appear, so, too, are the rights that draw on these abilities are mutable. Indeed, a right can become obsolete if the activity it safeguards falls out of use. Moreover, because abilities mature and potentialities can change, rights must be flexible. People can gain new abilities through education, experience, and changing technologies.29 With a person’s realization of new abilities, the basis for people’s rights expands. Therefore, while a society may not have formal

27 Jack N. Rakove lays out the difficulties of “enumerating” and “textualizing” rights comprehensively in “The Dilemma of Declaring Rights,” in Barry Alan Shain, ed., The Nature of Rights at the American Founding and Beyond (Charlottesville, VA: University of Virginia Press, 2007).
29 What of abilities that are not commonly shared? The skilled pole-vaulter has a right to indulge in her rare ability. It is very likely that only a few people in a given society will be able pole vaulters—indeed, it is unlikely that the majority of the society will aspire to such—but it make little sense to formulate a right just for those who do this one sport. The class of people who pole vault is changeable. People can move in or out of this group. Moreover, the specificity of a pole-vaulting right is too trivial. It belongs to a class of broader rights protecting, say, physical training or exercise and the enhancement of physical abilities.
legal rights for these new abilities, and for the new activities these abilities make possible, the soil from which rights are cultivated thereby becomes more fertile.

Those abilities, potentialities, and interests that do not find their way into a society’s set of recognized rights at a given time are potential sources of additional rights that may, at some time, be incorporated into a society’s extant corpus of rights, whether through express accretion or expanded interpretation of existent rights. While I would argue that, by definition, legal rights logically represent the broadest conceivable range of socially non-iniquitous human activities, possibilities, and interests, no society has, in practice, adopted a “complete” all-inclusive set of rights. In fact, no society could recognize every human ability and interest in its official set of rights, because potentialities are inherently unforeseeable and human interests are so finely varied. An ideal “complete” group of rights is inherently unrealizable.

All children grow into more rights as their abilities, interests, and comprehension develop. Until people are sufficiently mature—the law marks this change with formal thresholds—their rights are invested by proxy in their parents or guardians. Children themselves have fewer rights, but the rights and legal obligations of care borne by their parents compensate for their inferior condition. Moreover, they hold the “promissory note” of future legal rights when they get older. People can gain access to existent legal rights by qualifying for them (which can mean maturing into them) according to legal criteria. These criteria must be, in turn, logically consistent with the basis of the right. That is to say, if a society recognizes a right, it cannot reasonably withhold it on irrelevant grounds from anyone capable of using it. The child who grows into an adult, capable of traveling, cannot reasonably be denied the recognized right to travel on the grounds that she has dark skin.
Before the invention of powered flight, there was no reason to push for a right to fly. That technological change to human possibilities produced a new basis for a right. However, the concept of what rights are, of their grounding in human characteristics, must allow for technological advances. This is not to say that everyone now has a right to board the nearest plane, let alone to fly it. The right to engage in the activity of flying, to take advantage of this technological ability, is a mediated right. Air travel is still expensive and it is also extensively regulated. The right to travel by air comprises several discrete rights: the right to travel freely, the right to engage in the economic activity of purchasing a ticket or the right to own and operate a private aircraft. In other words, in some cases, general rights are accessibly only through the fulfillment of more specific rights. 30

Personal development, cultural changes, and technology are not the only sources of abilities that could possibly be protected through rights. Social practices, political developments, and laws themselves can also determine people’s capabilities and interests. Indeed, because these are legally admitted practices, they necessarily produce rights, unlike other abilities and interests that may or may not find their legal instantiation as rights. Petitioning the courts for legal redress or voting in elections are rights because these are abilities, even though they do not exist outside the particular societies that have established them. Citizens vote to express their interests and preferences and to help mold the laws by which they are governed. (People can elect a dictatorial regime that restricts suffrage and

30 No one had a right to drive an automobile before automobiles were invented and produced. Driving on public ways is typically subject to state licensure; the state restricts the exercise of the ability to drive to protect public safety. The restrictions are based on criteria of ability which must be proven to monitoring officials. People have the right to evidence their eligibility by taking the pertinent tests. A minimum age requirement for driving is also rationally tied to ability, on the presupposition that driving requires a certain maturity of judgment and physical dexterity that people presumably lack until they have reached (arguably) their late teenage years. The point, in sum, is that the state can limit some abilities that it nonetheless recognizes as legal in order to protect people, but may do so only according to reasonable measures and must provide everyone access to showing their qualifications. Otherwise the state would be withholding permission for a recognized right arbitrarily.
quashes other rights. In short, nothing prevents people from using their abilities against their own interests.

**Universal Availability**

Rights are “available” to individuals who are not physically or mentally capable of exercising them. That is to say, rights are open to all. Rights, once identified in the law, are universal. Anyone who pursues a rights-protected activity may do so without displaying threshold proficiency. Those lacking the capacity, or desire, to exercise an available right do not lack the right; they merely do not draw on it. A person who is physically paralyzed does not lose the legal right to freedom of personal movement. The right simply has no relevance to the person. Should this individual gain the ability to move more, the right to do so stands open to her. She need not prove her eligibility to some reviewing authority. Were that so, the right to movement would not be a right but (strangely) a privilege.

*That* the state should strive to universalize legally-recognized rights is the logical consequence of rights. *How* any given state responds to rights is determined by its policies and resources, as well as the pressures of its constituents. So, for example, where people have a right to move freely throughout their country, there is no one way in which the state must enable that right. What the state must do is, as best it can, prevent hindrances to the exercise of that right. It is not bound, say, to provide everyone with a personal automobile or even with public transportation. This is neither the most feasible, nor the fairest, manner by which a government can secure this individual right most widely. It does make sense, in contrast, for the state to pass laws mandating that publicly-supported ways and buildings be made accessible to people with physical handicaps.
In sum, rights are the legal “enabling” of human capacities (those that are recognized by a particular society’s code of rights). Rights stipulate that people may legally do activities that they can (potentially) do. Binding rights to proof of eligibility ignores the “potentialities,” one of the definitional elements on which rights draw. “Potentialities” refers, after all, not just to historical advances in human capacities, but also to individual potentialities.

In contrast, imagine a society where rights are not universally attributed, but are, rather, available only upon a person’s proof of applicable capability. Only when one demonstrates the ability to use a right may one take advantage of it. Such a parsimonious interpretation of rights would have a chilling effect on the use of rights. People would be unsure about which rights they could legally rely on. They would have to overcome the daunting legal presumption that they were ineligible for specific rights by proving that they can take advantage of them. In a legal dispute involving the infringement of a right, the complainant would first have to convince the court of his or her capacity to use it. Only after overcoming this first test could the complainant proceed to introduce evidence that the defendant had abridged it.

A concomitant danger in contouring rights to individual capacities is that it makes enforcement of rights dependent on proof of proficiency. The judicial system would, in addition to its function as legal interpreter of the law, and possible fact finder in relation to a legal dispute, be encumbered with the role of arbiter over who qualifies for which rights.

**Interpretation**

Just as rights can be added to a society’s laws through popular referenda, legislative agreement, or some other means, so, too, can they be expanded or contracted through legal (possibly starting out as popular) interpretation. Interpretative development of rights typically
happens either when groups advocate for a broader reading of existing rights or when the
government must reconcile conflicting rights.

What cannot befall established rights, without violating the logic of how rights are
formed, is that the state eliminates them unilaterally. Because rights are derived from human
abilities, activities, and interests, these would have to be purposely and thoroughly ignored,
prohibited, or somehow made impossible. Disregarded or proscribed activities continue to
exist as potential abilities and interests. They persist as the seeds for future rights.

B. What Rights Are Not

a. Rights are not distinct from duties

Inherent in the definition of rights are obligations of the state to its residents, and of
people to one another. There is no difference between duties and rights because duties are
inherent in rights; rights are duties. As legal protections for individual abilities and interests,
rights require an active regard. Rights set prescriptions that are incumbent on the government
or the population in the treatment of each person. A society would not establish a right had it
not accepted that the government and the population must abide by it.31

As Joseph Raz observes, the concept of duty is, in itself, an inexact tool for defining a
right. Many duties have no connection to rights.32 Duties may be the consequence of promises
or mutually expectations. An autocratic state can demand many duties of its citizens that are
onerous and of no value to the commonweal. It would be perverse to assert that people sent to
war by a rapacious dictator are fulfilling their duty to their ruler’s right to wage war. Even
were that society to have adopted precisely such a political right, it derives less from the

31 A wonderfully clear account of the customary arguments about the relation between rights and duties can be
relation of duties can be found in Leif Wenar and Stephen Macedo, “The Diversity of Rights in Contemporary
Ethical and Political Thought,” in Shain, ed., The Nature of Rights at the American Founding and Beyond, 296-
298. The essay is to be recommended for its clear, thorough summary of theories of rights.
leader’s human abilities than from his power to enforce compliance on his people. The duty to
fight lies not in a right, but in a ruler’s political control. Indeed, the capacity to cause harm to
others, to endanger people, is the sort of interest that, lying as it does beyond the bounds of
universal human abilities and desires, does make sense as a recognized right.

The correlative term to a duty “owed” by one person to another is that the first person
has a “claim” on the other for the performance of the duty. People can make all sorts of claims
on each other without having the rights to do so. Claims have no legally enforceable status
unless there is a corresponding presupposed right. People do not need to activate their rights,
to make a claim on them, for them to come to be. As we noted, rights entail a duty. The claim,
like the duty to fulfill it, is inherent in the right. The role of the state is to oversee the integrity
and realization of its population’s rights, whether through its direct intervention or by
providing a workable forum where people can protest that their rights have not been met: civil
courts and rules of civil process for litigation; resort to ombudsmen; the means to appeal to
legislators; communal elections.

b. Rights are not privileges

Rights should not be confused with privileges. A privilege can be unilaterally revoked
by the party that extended it. The beneficiary of a privilege, the person who holds it, has no
right to the privilege. Rights, in contrast, are by law affixed to a person. They belong to the
rights holder and may not usually be denied or discouraged. In some situations, rights may be
justifiably overridden, but that is so only where rights are in conflict, and only under an
exigent justification, or after the provision of due compensation. If a large landowner grants
local farmers the privilege of planting in his gardens, they have no claim of ownership to the
privilege. The farmers cannot insist that the landowner has a duty to let them to plant in his
field, because they lack a right to use it. If, though, the farmers have a legal right to work a parcel of land, then no landowner may legally prevent them from cultivating it. At most, the state could seize such land by exercising eminent domain, but for that step the state would have both to provide a sufficient justification of service to the public welfare along with the compensatory provision of a comparable field or payment equal to its agricultural value.

c. Rights are not “Natural” or “Moral”

The definition of rights put forth here might be thought to imply that rights are “natural.” After all, I argue that rights have a natural basis in that they draw from human physical capacities, interests and needs. Rights have a long history of being tied to select fundamental human concerns or capacities. Among the most prominent of such notions of natural rights are individual utility, autonomy, the freedom for self-fulfillment, the inherent worth of the individual, religious values, or rationality. These ideas all attribute to rights an essential ineluctability and inviolability.

But there are no natural rights. In striving to justify legal restraints on the power of the state, philosophies of rights often concentrate on a subset of human concerns. Limiting rights

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32 Many of these arguments, following in the tradition of natural rights, have continued to hold sway even as their theological assumptions have faded in importance. Consider Locke’s familiar doctrine that “no one may harm another in his life, health, liberty or possessions.” Locke did not represent these human concerns as being self-evident. Rather, he explained, “for men being all the workmanship of one omnipotent and infinitely wise Maker; all the servants of one sovereign Master,…are His property, they are made to last during His, not one another’s pleasure.” John Locke, “An Essay Concerning the True Original Extent and End of Civil Government,” in Two Treatises of Civil Government (London: Everyman’s Library, J.M. Dent, 1960).

33 J.S. Mill grounded his notions of both moral rights and legal rights in utility, or the individual’s state of happiness and deserts: “To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of. If the objector goes on to ask why it ought, I can give him no other reason than general utility. If that expression does not seem to convey a sufficient feeling of the strength of the obligation, nor to account for the peculiar energy of the feeling, it is because there goes to the composition of the sentiment, not a rational only, but also an animal element—the thirst for retaliation; and this thirst derives its intensity, as well as its moral justification, from the extraordinarily important and impressive kind of utility which is concerned. The interest involved is that of security; to every one’s feelings, the most vital of all interest.” John Stuart Mill, Utilitarianism, Chapter V, 1863 (New York: The Modern Library, 1961) 385.

34 Examples of these positions are offered in Carl Wellman, Real Rights (Oxford: Oxford University Press, 1995). Also see Tom Campbell, Rights: A Critical Introduction (New York: Routledge, 2006),
to purportedly fundamental needs is premature and arbitrary. These views misconceive the origin and composition of rights. Rights do not reveal themselves, whether through reason or common moral sentiment, as undeniable truths. The idea of natural rights implies that rights somehow preexist, awaiting our enlightened acknowledgement.

Arguments for natural rights confuse human needs or strong interests with rights. Needs are compelling subjective interests, urgent physiological requirements. Rights are social-historical legal doctrines. They must be conceived of and argued for in order to be adopted within a legal system. Nothing compels society to satisfy personal needs, outside of its formalized promises to do so. Those promises, incorporated into the law, are rights (although rights, as we have seen, are more than legal commitments to subjective needs).

Rights do not precede legal systems; the natural human capacities and desires that are the bases for them do. And these abilities and interests can in turn change, come into being, or fall into obsolescence. These human attributes do not naturally engender legal rights, however. The route from ability to legal recognition as a right is a historically contingent one, formed through societies’ self-perceptions of human capacities (in some cases popularly held, in others held close by social elites forming a new government). The formation of rights is also driven by reasoned debate mixed with moral values. While there is a natural basis to the content of rights—they originate in abilities and interests—any particular right comes to exist only because a society chooses that it should.

Morality intersects with the definition of rights, for there is a normative aspect to the creation of rights.³⁶ A society’s decision to codify rights is compelled no less by moral beliefs than by practical, political considerations Moral values lie at the heart of a specific legal

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order’s set of rights. When a society adopts rights in its legal order with the purpose of safeguarding the freedom to take certain actions, or to protect the pursuit of particular human interests and human needs, it is acting out of moral beliefs.37

This is not to say that rights are themselves equivalent to morals. What is moral is the move to incorporate moral tenets under the mandated protection of rights. The same is true for a society’s decision to expand the number or applicability of the rights it currently recognizes. Like all moral judgments, the decision behind devising or modifying rights results from the complexities of a society’s culture and history.38

It thus makes no sense to speak of “moral rights” as values opposed to “legal rights” because moral rights do not exist. Rights are inseparable from the law. They rely on the promise of state enforcement. The difference between moral codes and rights is that rights exist within a political and legal framework that actively defends and nurtures them. Morals do not enjoy this same direct appeal to the power of state support, however much they may influence the state’s recognition of particular legal rights.

Rights, for their part, give rise to moral expectations. A respect for rights can sometimes mean tolerating the likelihood that other people will violate one’s own moral values. People accept that others have the right to say or do things they find offensive out of respect for the legal embodiment of these activities, that is, for their rights. The recognition of rights produces its own moral principles—above all, the idea that we should honor one another’s rights.

37 Douglas Husak approaches the relationship of morality to rights theme from a different, but important and innovative angle. Douglas Husak, Philosophy of Criminal Law (Totowa: Rowman & Littlefield, 1987), 231-244. 38 Raymond Geuss (arguing that political philosophy should not assume subjective rights as a “starting point”) observes that rights are a historical and cultural phenomenon. He goes on, though, to stress that the acknowledging the historical origin of rights does not “in any way ‘refute’ the concept. Raymond Guess, Philosophy and Real Politics (Princeton: Princeton University Press, 2008), 67.
Another way in which morality and rights are intertwined is that moral concepts inform how a society resolves conflicts among rights. Confrontations between people who are legitimately acting on their rights are unavoidable and constant. The right of one person to sing in public may collide with the rights of others to enjoy silence—or, at least, the absence of that person’s singing. The social right to shelter means that the state will use resources to house people at the expense of spending money on other rights-supporting projects. Moral views heavily, if not exclusively, influence the arguments and solutions governing these conflicts.

Like morals, rights order social behavior. Societies establish rights to reduce both social uncertainty and the risk of oppression. Rights provide people with an ordered, pacific legal recourse against an overbearing state and the excessive interference of one person with another. If rights do not reduce conflict, they at least keep it within moral and justiciable bounds by defining the terms and setting limits for adjudication of disputes. Resolutions of rights conflicts are often traceable to shared moral intuitions, enabling opposing parties to accept the merit and sincerity of each other’s views.\(^\text{39}\) Where the rights of different parties collide, one party may even refrain from exercising its rights for the benefit of the other. This is a moral choice, not one based on different rights.

\textit{d. Rights are not distinguishable by value.}

Rights differ from the moral views that drive their creation in that rights are not ranked according to a value hierarchy. Strictly speaking, there are no fundamental versus derivative or second-level rights. We all perceive certain rights, and the activities and interests they reflect, as more crucial than others to people’s well-being. A right to having access to food or

\(^{39}\text{Although he does not analyze the import of “moral intuitions” in this particular context, John Rawls emphasizes the inevitable role they play in any system of justice and fair distribution of social goods. John Rawls, \textit{A Theory of Justice} (Cambridge: Harvard University Press, 1971), 34-41.}\)
to free association is more critical and immediate than the right to vote. However, the inclination to value rights variously according to a scale of relative worth derives from moral perceptions; the differentiation of values is not an element of rights themselves.\textsuperscript{40} The moral value that accrues to rights in general—our belief that we should honor rights—can on occasion clash with moral values. An individual who killed another in self-defense is understood to have exercised her “right” to protect herself. Various societies may permit people a right of self-defense, however differently they define this right. The right to self-defense may allow for the use of deadly force, meaning that one “rights holder” may legally destroy another to ensure his own survival. We may not think of such encounters in terms of competing rights because we deem the attacker to be so fully in the wrong. Still, we would swallow hard before describing such a killing as “moral.”

Even though we might come to conclusion that the person was morally correct in using deadly force to protect himself, the moral answer is not so unambiguous as the legal one. Our discomfort with some acts that are protected by rights, even those we might argue were morally justifiable, stems from our moral ambivalence about them. Moral values and rights inform one another but they do not run in concert.

\textit{d. Rights are not a Social Contract}

The putative “social contract” is as much an illusion as the ideas of natural or moral rights. Societies, including democratic ones, do not arise, or persist, because of the constant conscious consent of their constituents.\textsuperscript{41} People are born and grow up in societies by fact, not

\begin{footnotesize}
\begin{enumerate}
\item Rules, too, can be ordinal, in that one rule can trump another under established circumstances. The relative ranking of rules to one another is itself one of the controlling rules. Rules that are overridden by prevailing rules otherwise remain valid in appropriate situations.
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by legal decision. Their mere existence in their home societies is not a de facto legal agreement, “signed by every individual, to some encompassing social contract, nor are there any express terms under which such a contract can be voided through a resident’s non-performance. There is no overarching contract law that defines the terms of consideration exchanged between the individual and society, or how the contract is to be entered into, or how modifications to the social contract are properly made, or, finally, what qualifies as a breach and acceptable remedy.

The conceit of the social contract has lead to some spurious conclusions about relation between crime and rights. The common argument that violations of the criminal law amount to a breach of the social contract is specious (and not just because it confuses a civil legal instrument with criminal consequences). It assumes a legal agreement that never occurred. Moreover, it runs into unresolved quandaries. For one, there is no definite demarcation between those actions that are contractually “non-conforming” but tolerable and those that rise to the level of a contractual breach. Do misdemeanors suffice to void a contract, or only felonies? If the latter, are all felonious acts breaches, or only treason? Can the state also commit a breach of the social contract, perhaps, say, by instigating a war through false information?

Moreover, at that point when the criminal perpetrates his misdeed, and breaks his tie to the social contract, the legal system loses its authority to punish him. With the rupturing of the contract, the breaching party would be outside the legal jurisdiction of the society. The only grounds on which he could be tried and sentenced would be if some higher law in the society prevailed over the social contract. Yet the social contract is presumably the
fundamental law binding citizens to one another and to their government. Asserting that another law predominates above the social contract leads right into a self-contradiction.

And because social contract theory endows the social contract with a legal primacy, it makes rights a derivative legal arrangement that only arise with the contract. Yet if rights are contingent on the social contract (and one must wonder just where people acquire the legal right and standing to enter into a binding social contract), then they are not really rights at all, but merely negotiable terms, exchangeable and dispensable like any other contractual conditions.

The persistent popularity of the social contract idea, then, must lie in its usefulness. It offers a welcome story for democratic polities. It situates political legitimacy in a presumed “original” popular consent. Yet, while popular rebellions can surely bring down governments and transform social values and structures, the ongoing existence of societies does not hang on the assent of its collective membership. In actuality, societies come to be for all sorts of historical reasons: geographical characteristics like water and climate, or their greater or lesser exposure to migration of different social groups; the proximity of families and communities; people’s religious beliefs and other shared cultural traditions.

The story of how rights are realized in different societies is not traceable to the origin myth of a social contract. The meaningfulness of rights does not rise or fall depending on the social contract. Rights may be established by elites at the formation of a new political regime, or they may be adopted into the extant legal order because of pressure from groups within a society. What is fundamental is that rights share definitional attributes across societies.
RIGHTS BEFORE RULES

A. Rules in General

The thematic question at this stage is where do rights exist, what role do they have within the legal system? By reconstructing how rights are situated in relation to other laws, we will be able better to analyze the place of punishment in a realm of rights.

Rights serve as axioms around which a society’s legal system operates. Rights are a special kind of rule that anchors and qualifies the society’s body of laws. They provide foundational rules for the rest of the body of law. In so doing, rights become crucial “social facts.” They are the principles that guide the creation and enforcement of the superstructure of other laws. As social facts, rights are conditions, truths on which people base propositions about the legality of anyone’s actions and their legal obligations to one another.

The characterization of law as a set of rules is articulated extensively and cogently in H.L.A. Hart’s The Concept of Law. While I do not follow Hart’s taxonomy of rules here, his general analysis of law as a structure of rules is a helpful guide.

Types of rules

Rules can be divided into three main types. First, there are “constitutive rules.” Constitutive rules define the elements of the system that are subject to the other two types, procedural and consequential rules. Constitutive rules determine whether a person is eligible or ineligible to do certain things. In a game, for example, constitutive rules can include the number of players, their qualifications, the duration of the game, the arena and setting for play, and the tools to be used, such as dice, cards, an hourglass, a pencil, a score card.

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“Procedural rules” dictate the function of elements in the system. A board game, for instance, has rules designating what actions may be done when, with which pieces, and by which participant.

The third type of rules is “consequential rules.” A consequential rule dictates what will occur as a result of compliance with, or violation of, another rule. The outcome of the procedural rules result in certain set consequences. Consequential rules, while they determine what follows from procedural rules, are independent from them. Landing on a particular space in a board game may mean that the player gets an award or pays a fee, advances a number of spaces or moves backward. The procedural rules prescribe the steps, but the consequences of carrying out these steps are dictated independently, by the consequential rules.

Still, consequential rules have a consistent relationship with procedural rules. Consequences in a game do not happen haphazardly (unless the consequential rules of the game allow for some randomness). In the context of law, if a person pays her taxes correctly and on time, as the law requires, she should not be subjected to a penalty for dilatory payment.

With any set of rules, the terms composing the rules must be defined. They must, for instance, help people comprehend the identity and role of the rules. If players have no idea of what a board game is—how the board and its markings function, what dice are for, or what procedures of play are (what it means to take turns, to toss dice—indeed, just to obey a mandated procedure)—then the game cannot get underway. The same is true for the elemental terms of procedural and consequential rules: what it means for a particular game piece to have certain constant operational attributes, or what happens when one player’s piece overtakes another’s.
Rules vs. norms

Beneath these three species of rules lies a fourth, rather different, type of “rule.” This fundament consists of the social norms that guide social behavior that makes rule-following possible. The norms are indispensable to the cooperation and meeting of minds on which any rule-based activity rests. Were these norms not to obtain, the other types of rules would have no enduring force. I use the term “rules” for this fourth category provisionally; the rubric does not quite capture the special relationship of normative principles to the other kinds of rules, as they make those rules possible.

Games are founded on norms such as that the participants commit to follow the same rules (constituent and procedural), and to do so throughout the game. One axiomatic rule in an integral arrangement of rules is the principle that participants in the rule-governed environment either abide by the rules (both constitutive and procedural) or, if they want to alter them, they seek changes only in a manner that accords with the rules (axiomatic and procedural) for expressing dissent and for undertaking rule-modification. Consider a game in which some players suddenly propose to change the rules. The game may already include a process for this. Perhaps it directs that they write their proposals on specially printed papers, which they then must present for discussion and vote by the other players.

If the game does not have a pre-established process for revisions, the players can resort to a norm, such as that they may talk with one another, civilly, to negotiate aspects of the game. Those who want changes may persuade the other players, or they may go a more formal route, getting everyone first to agree to procedural rules that then allow the introduction of new rules (or the abandonment of existing rules). What is not allowed is for some players to threaten, attack, or bribe others to get them to agree to new rules. Violent or
deceitful acts are spurs to chaos. They lie outside the norms of the game because they are
destructive of its system of rules.

The process of rule modification described above corresponds to the course by which
legislation is introduced and voted on or constitutions are amended. However, the realms of
rules by which statutes are made are multiple and intertwined. If pictured all together as a
spiral, the outermost ring connotes public discussion and the efforts of some citizens to
institute changes in policies and laws. The next, narrower ring of rules encompasses the ways
in which people may (legally) communicate their wishes to their legislators. The tightest ring
is the set of rules controlling the legislature and the drafting, consideration, and the passage of
legislation.

The rules become progressively formalized, but this is not to say that the initial
activity was not rule-bound. People rely on their political rights to meet and debate with one
another about their aspirations to change their laws. They abide by the principle of mutual
recognition of the rights of other members of the society to disagree with their
recommendations. Without the principle of reciprocal endorsement of the legitimacy of rights,
the entire legal edifice comes to a halt. This principle is not just a moral tenet; it is an
indispensable axiom for the realization of rights in a society. As we observed in the previous
section, though, this principle can be fraught for some with moral unease.

Rules of enforcement

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43 In some instances, the push for legal changes may take the form of civil disobedience. Civil disobedience
defies procedural rules, but complies with axiomatic principles. People rely on their rights, in other words, to
defy existing laws in an effort to change the law.
44 Another normative axiom underlying any system of rules is that words (or gestures) have distinct, if
sometimes multiple, meanings. A correlative to this rule derives from the logical law of the excluded middle. It
says that any given word cannot simultaneously have one meaning, and the opposite or incompatible meaning.
Even in the case of “contronyms,” words with the same spelling that have opposite meanings (such as the word
“sanction”) can have only one definition when used in a particular context.
The only compulsion behind rules is further rules which are the “rules of enforcement.” Rules of enforcement are a type of consequential rule. Enforcement of rules must itself follow rules. People participate in a system of rules because they believe they should, or that in doing so they will benefit from some consequential advantage. Or they may obey the rules because they fear undesirable consequences if they do not conform. Some people may follow rules merely because they feel no impetus to defy them.

Thus in the context of law, the consequential rules of criminal enforcement must accord with other laws, above all with the axiomatic principles of the legal system. Where a legal system is based on rights, it would be logically inconsistent for the consequences of criminal violations, from criminal procedures to punishments, to contradict the system’s foundational principles of rights.

B. Where Rights Meet Rules

In legal systems that are based on rights, rights function as normative, axiomatic rules. They are the principles on which all other, non-axiomatic laws are grounded. Rights are the presumptive principles around which the other “rules,” or laws, of a legal system are structured.

That is not to say that rights are part of every political or legal system, but, rather, that where they do exist, they make up a large part of the foundation of the society’s laws. Democracies by definition recognize rights because democratic governance requires the right of political participation.

Under a legal system based on rights, all four categories of rules (that is, the society’s laws) create capabilities and interests in its members. Laws are not only grounded in rights,

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45 Any body of laws needs basic rules or axioms. That is not to say that these axioms must originate from moral beliefs.
but they engender rights, so that people have the right to have laws/rules that protect their rights. People have primary rights to the laws that govern them, and these laws in turn found new rights by establishing new, legal capabilities.

Rights-based legal systems differ from other legal systems—and from other kinds of rule-based systems—in that those who have rights have rights to all the categories of rules. Thus, anyone who fits under a society’s constituent rules (remember constituent rules pertain to players just as they do to the other elements of a game) have a right to the laws defining constituency. However the society determines eligibility for membership (birth, criteria of “citizenship,” the sheer condition of being human), its members have a right to its constituent elements, such as passports, birth certificates, and, for that matter, rights. Just so has the population a right to the procedural rules (for instance, due process under the law).

A society’s procedural laws invest members with legal abilities, and an interest in exercising these abilities. Voting is a legal ability, and, because it is a major procedure in a democratic society, it gives people not just an ability but an interest in exercising this ability, too. Finally, the members of a rights-based society have a right to their society’s consequential rules: those goods or experiences that are established legal consequences of legal procedures inhere in every eligible member. They have a right to the same access to rewards (engagement in commerce, standing to prove eligibility for licenses), obligations (taxes, military service), and punishments.

To speak of having a right to a rule may seem to open the door to an infinite regression of rules to uphold rules. In fact, it is actually a quite important aspect of rights. Whereas in a game a single player has no recourse other than to object or leave when other players violate the rules, in a rights-based civil society, an aggrieved person can appeal to the
judicial authority of the state. As someone covered under the society’s constitutive laws, he or she shares in the society’s full collection of rights.

Rights protect the interests people have in their laws, in the capacities to act in accordance with laws. Some rights are adopted at the genesis of a legal system. Others come into being with the changes in people’s interests and abilities. Legal procedures can (usually) be modified without offending a right because the right does not lie in the particular procedure, but rather in access to and influence over the political workings through which procedures are established. What the state may not abolish, without thereby destroying a right, are the elemental procedural rules to due process, to political participation, and to the transparency of, or at least access to, the legislative process.

**KNOWLEDGE OF RIGHTS AND THE EPISTEMIC CHALLENGE TO DETERMINING PUNISHMENT**

Laws, whether statutes passed by a legislature or the rulings of a court, are “facts” insofar as they are logically consistent, both internally and with other laws. The body of rights that a given society adopts becomes a foundation for knowledge claims about rights.46 People can point to their rights as fixed legal truths or facts. They can advance arguments about their rights as they see them, or to increase the coverage of rights, or to introduce new rights, because people can claim to know what their rights are. This is not to say that their assertions are not subject to disputation; but then that is the case for all truth claims.47

46 Put another way, the normative principles of rights, developed through value-driven interpretations of general human abilities and interests, become the bases of a legal knowledge: the “ought” of rights, extrapolated from the “is” of favored human abilities and interests, becomes in turn the “is” of a legal “fact.”

47 Inasmuch as one can know established rules—procedural, constitutive, or consequential—a fortiori must one be able to claim a knowledge of the principles underlying the application of those rules.
What courts are doing when they rule on disagreements involving the rights of opposing parties is interpreting the applicability of the rights. Judicial holdings do not have the apodictic heft of proven mathematical equations. Judges’ opinions may be colored by emotions, unreasonable biases, or unexamined beliefs. Yet judicial decisions, like codified constitutions, statutes, and regulations, become precedents and thereby social facts, conditions of a society’s reality. Judicial rulings function as statements of knowledge.

Therein lies a paradox at the core of legal systems: laws, including judicial decisions, serve as propositions of truth. This is so even as they are subject to superseding legislation or subsequent judicial rulings. The authority of laws does not depend solely on the state’s power to enforce them. Statutes and judicial rulings must also be accepted by their subject populations as valid and reliable—as, in a sense, true. When two parties turn to the courts to resolve a contract dispute, they trust that the court will reach its decision based on a rational, impartial, semantically plausible reading of the law.

Notwithstanding the functional potency of statutes and judicial holdings, they can conflict with people’s experiences. The reality propounded by the law and that encountered in the lives of the governed can diverge, sometimes at the cost of intense social division. People will become all the more prone to disregard laws that they see as inconsistent with their real needs or abilities. The laws may say as they once did that teachers must instruct that the sun revolves around the Earth, or that slaves are not fully human. Whether the law ever adapts to contrary physical reality is a question of political pressure and persuasion, of forceful and persistent civil outspokenness.

In specific relation to criminal punishment, judges cannot know just what punishment is proper for a particular crime except to the extent the law tells them. The reality of a

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punishment’s putative effectiveness or lack thereof, according to its stated goals, can conflict with what the criminal statutes prescribe. Neither the legislature nor judges can claim to know what “appropriate” punishment is beyond the statutory instructions, because they cannot say just what punishment actually does, or why one period of incarceration is more “effective” than another.

The gap between the “reality” of statutorily-determined sentences, or judicial precedent, and the efficacy of punishment is but one epistemological quandary. Another is the relationship between punishment and rights. The legal “truths” of a mandated criminal sentence and a criminal’s rights are all too often irreconcilable. In the context of rights, it is not enough to know what penalties the law allows; one must also know whether a punishment is consistent with its subject’s rights. However this epistemic challenge is resolved, whether it is addressed by the legislature or by a judicial body, punishment must be consistent with the axioms of rights because they compose the basis for legal knowledge.

The *Booker* decision held that Congress lacks the constitutional authority to determine specific sentences for the judiciary. But the issue is deeper than the confrontation between the legislature’s versus the judiciary’s powers as allocated in the United States Constitution. In any legal order grounded in rights, the legislature, no less than the judiciary, is bound to abide by the axiomatic laws of rights. Neither entity can claim knowledge of (or power over) the law that is contrary to these principles.

**RECONCILING PUNISHMENT AND RIGHTS**

A. The Case for Punishment
Criminal punishment is afflicted with two inherent defects. First, punishment occurs only after the crime it addresses has occurred. The damage of the crime has already been done. What does punishing the culprit achieve? Punishment cannot retroactively divert the culprit’s intentions nor can it obviate the crime, no more than it can fully negate the infringement on rights that the victim has suffered.  

Second, the supporting proof for the deterrent effect of punishment is necessarily elusive. Deterrence projects a cause-effect relationship in the future. A criminal penalty may well dissuade people, whether the criminal himself or others, from doing crimes. Assembling empirical evidence showing that deterrence has worked is very difficult. The best that can be done to test any law enforcement method is to do retrospective statistical studies. The results of such studies, though, are only shadow evidence. It is impossible to demonstrate that punishment will deter future crimes. Applied social research, such as interviews, can try to discover whether people consider punishment when contemplating a crime—whether because of their own experiences or by the prospect of suffering. The results are by no means reliable (we cannot know that someone would have done a crime he did not commit, even when he insists that he planned to) and they become more tenuous when generalized to longer spans of time. Punishing preemptively, whether to prevent or to deter crimes, on the chance of that they may occur, is a severe abbreviation of a person’s rights.

Given this combination of insoluble limitations—ineffectiveness against the actual crimes, questionable effectiveness on possible future crimes, and all with certain friction with individual rights—is there a case for punishment?

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49 This troubling irony, the disjunction between a harm and its supposed remedy, is not the bane just of criminal justice. It haunts the usual legal remedies for torts as well.

50 There are some exceptions, such as sexual predation or serial killing, where the perpetrator can be diagnosed as behaving from a compulsion combined with an absence of inhibitions.
There are several substantial reasons for pursuing criminal punishment, albeit in particular forms. For one, punishment can be a means toward partially repairing a criminal injury, even if it cannot nullify the crime. Criminals can be ordered to compensate their victims through money, goods, or labor. Community service is a popular example of this kind of punishment. The courts can, in addition, direct that criminals have an opportunity to express remorse to their victims. While an apology brings no material or monetary restitution, it can still be extremely significant for those who were harmed.

Additional reasons for punishment derive from the experience of the victims. The damage from a crime, particularly a serious one, does not disappear quickly. Experience of a criminal attack holds stubborn traction in a victim’s memory. Criminal events have a lingering existential weight, as well, for people who are close to the victims. If the crime was notorious, it leaves a brand on the memory of a larger portion of society. Crime produces a legacy of fear, distrust, a sense of vulnerability to dangerous and unforeseeable acts.

Some kinds of sentences can contribute to healing for the victims of crime. They accomplish this not by satisfying a victim’s wish for revenge but by making the criminal more conscious of the wrong he committed and the mark it left on his target. Finally, memory is key to deterrence. General and specific deterrence work because people recall (presumably with aversion) the punishment, as well as the reason it was inflicted.

Other lingering emotions a criminal violation can evoke in a victim are guilt, shame, rage, and, in particular, a sense of having been subjected to an “injustice.” “Injustice” crops up regularly when we talk about crimes, whether they were against a single person or a large population. Punishment is supposedly the means through which the injustice of a crime can be rectified.
Just vs. Justice; Unjust vs. Injustice

To understand the meaning of injustice in relation to crime, we need first to look carefully at the terms “justice” and “injustice.” These words can be used in two quite distinct contexts, with divergent meanings. A condition of justice is an ideal situation of equitable relations between people. As used in a Rawlsian sense, “justice” is a principle of rationally fair distribution of goods and opportunities among the residents of a society. Specifically in terms of rights, a condition of justice characterizes to a society in which rights are properly attributed to all members, and in which they are respected equally throughout the population. Note, though, that a just government is not the same as a just society. Injustices will occur among individuals despite the presence of a scrupulously fair and generous state.

An instance of justice, on the other hand, happens when a wrong is corrected. We could refer to such outcomes as occasions of “justice applied,” in distinction from the existential state of “justice maintained.” When a person looks to the criminal justice system for justice in the wake of a crime, what he or she is seeking is redress for a harm undergone, for restoration of his or her situation preceding the crime. In the context of criminal law, an injustice names an antagonistic non-consensual act by one or more people against the inoffensive interests of another without real compensation.

Establishing justice, reaching a just result, in the adjudication of a crime does not mean realizing a just life for the victim. The task for the criminal justice process is not to raise (or reduce) the life of the victim to some universal level of equity, but to rectify the injury caused by an identifiable crime. That is, setting an injustice right is not the same as reaching a condition of justice. A victim of a crime could well have been impoverished and struggling in
socially inequitable circumstances. In relation to “justice maintained,” Robin Hood is a hero; under “justice applied,” he is a crook.

Justice can involve emotional circumstances in addition to material ones. When people say that they want “justice” for the crimes they suffered, they are not appealing solely, if at all, for a financial reparation. What they are seeking is several things compacted under the one overarching term. For one, they hold the crime to have been unjust because it intruded on their continuing pursuit of their interests and chosen activities. The crime deprived them of their unhindered exercise of their rights. Yet there is more to the wound wrought by a crime than interference. Cruelty, whether criminal or not, strikes us as unjust. Our perception that a person has acted out of malevolence or callous, unapologetic disregard also contributes to our sense of injustice. We perceive an imbalance between the predatory satisfaction of the perpetrator and the needless hurt he caused.

In cases where rectification is impossible, “seeing justice done” might at first seem meaningless. The victim of a murder is simply gone. The killer may have received no material gain from the deed that could be distributed to survivors. What would it mean to speak of the imbalance, the injustice, of the offense? The injustice of such terrible crimes is that the perpetrator irreparably deprived the survivors, intimates and friends of the victim, of the person. Even here, though, the right judicial sentence can try to lead the criminal toward eventual contrition. If the injustice of the murder cannot be undone, punishment still has a worthwhile purpose in striving to reform the criminal, perhaps even encourage reconciliation.

Failure by the legal system to pursue and prosecute a crime conjures up another kind of injustice. The state’s inability or disinclination to hunt down and condemn a crime is an institutional injustice that compounds the injustice of the initial crime. To insist on getting
justice for a crime is to demand not just evidence of the criminal’s repentance, but also an acknowledgement from the state, as the locus of legal enforcement, that the rights of the victim were violated.

B. Rights as a Justification for Punishment

The most important reason for punishment lies in its relation to rights, for punishment is crucial for preserving rights.\(^{51}\) While the prospect of punishment alone does not ensure people’s mutual regard for one another’s rights—rights function only in societies where people respect them—punishment is but one piece of the state’s armamentarium for promoting its people’s rights. Social programs also serve the social maximization of rights. The state can provide people with ameliorative or sustaining care when they fall on hard times or are incapacitated. Just so can the state erect institutions such as schools, training centers, recreational programs and arts centers that by sustaining the general social welfare can help people better to act on their rights.

Rights are neither absolute nor conditional. They are \textit{conditioned}. Were rights absolute, they would present an unworkable ideal in a world where people continually bump up against others’ rights while engaging in their own. A society creates the rights on which it then relies as guiding legal axioms; it does not have the legal power to subtract them. As fundamental legal characteristics attributed to every societal member, rights undergird the society’s laws. The only legitimate limitations on rights are the restraints necessitated by social friction. The state’s job is to arbitrate among conflicting rights while constraining each person as minimally and fairly as possible.

\(^{51}\) A good amount of literature discusses the importance of the threat of punishment, as distinct from the actual punishment. See, e.g., Warren Quinn, “The Right to Threaten and the Right to Punish,” \textit{Philosophy and Public Affairs}, Vol. 14, No. 4 (Autumn 1985).
However, societies adopt rights to protect and promote certain human abilities and interests, not all. As we have observed, rights do not exist—indeed, cannot—for every human ability. This is true not only because rights cannot feasibly account for every human ability or interest, but also because some activities and desires are inimical to the wellbeing of others. That a serial killer enjoys his attacks does not entail a right for such an activity. A society need not recognize killing people as a right, except perhaps in finely defined circumstances.

Of course crimes can occur through activities that are protected by general rights. The details of a specific act are what remove it from the aegis of rights: the degree of cruelty, or greed, or disregard for the rights of others -- in short, the way in which it was undertaken. That is so even in the absence of an explicit criminal proscription. The criminal law designates acts that are inimical to rights. Criminal punishment is the tool that gives force to those proscriptions. Without legal enforcement, ranging from detection and arrest to punishment, the criminal law would be but a body of nomenclature. And without criminal laws, the state, formed to preserve rights, would have no means to protect them. When the state penalizes criminals it is without question reducing their rights. The only justification to do this that is consistent with rights is that it is done to preserve rights, and, then only to the extent necessary to educate those who harmed others about the nature of rights and the reprehensibility of their deeds.

The pitfall for legal enforcement, above all for punishment, in a rights-based legal system is that it is carried out on the entire person who committed the crime, and therefore limits a multitude of the person’s rights. This is one of the inescapable paradoxes immanent to

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52 Even those who speculate about abandoning punishment admittedly find their proposals more palatable for material crimes, such as theft or bribery, as opposed to more impulsive and violent crimes. See David Boonin, *The Problem of Punishment* (New York: Cambridge University Press, 2008), 237ff; Stephen P. Garvey, “Alternatives to Punishment,” in John Deigh and David Dolinko, eds., *The Oxford Handbook of Philosophy of Criminal Law* (New York: Oxford University Press, 2011).
rights: to sustain people’s rights against the reality of crime, the state must suspend or suppress the rights of those who commit crimes. There is no denying that criminal punishment rests on a trade-off of one person’s rights in return for the protection to others’ rights. That trade-off violates the logic of absolute universal individual rights. At the same time, it is necessary to preserving rights in a world of imperfect, sometimes perfidious humans.

C. Punishment as Rules

Within the realm of criminal law, criminal sentencing and the practices of punishment are the consequential rules of enforcement, corresponding to the constitutive rules of criminal statutes (and common law crimes) and the procedural rules of the criminal process. In a board game, consequential rules do not need to have a logical relationship to procedural rules (they could even be arbitrary, if the rules so allow). Players may receive a bonus every time they land on a certain block on the board, or acquire points after surviving a number of tests, for no reason other than that the game’s consequential rules so stipulate. Chance alone determines consequences. That cannot be so for rules of enforcement in a legal system, for the predominance of chance would lead to inequitable treatment.

Every system of rules is tied to some kind of territory, even if, as in a computer game, it is a “virtual” area. If a rule limits the number of players in a game, or allows potential players to determine who may play, then a person who shows up too late can properly be excluded, however qualified she may otherwise be to play. The same is true if, under the game’s rules, the current players have the power to decide who may join in. There must likewise be rules governing participants’ departure from the game. Otherwise, a player’s abrupt exit would be disruptive, just as the presence of an obstreperous player would have to
be tolerated. Changes in any system of rules, that is, must be accounted for by the existent constitutive and procedural rules. Where those rules do not adequately provide for such events, there must be rules controlling the adoption of new rules to address them.

So it is with legal systems. A legal system requires laws that define the extent of its jurisdiction (in terms of geography, or function, as in the case of diplomats abroad) and that, more particularly, determine whom they cover and whom they do not. However people qualify under the jurisdiction of a legal system, they may not be disqualified as members of that system in a manner that contradicts the constitutive rules. If the law says that anyone living within a defined region falls within the authority of its laws, then no one living in that region can be completely deprived of or removed from the law’s jurisdiction. To do so would be contradictory because it would rely on the very legal validity it was denying.

D. Who Gets Punished and Why

The rationale for punishment draws on the same notions of human sovereignty that underlie criminal law and legal rights. In societies governed by a just and rational rule of law, people are convicted for the illegal deeds they did, not for who they are. The law recognizes that people are not identical with any single act they do. The state punishes in order to make it clear that each criminal act is wrong.

The law cannot tolerate a convicted defendant employing a surrogate or offering up a scapegoat to suffer his due punishment. That would abandon the normative principle that people are responsible for their acts. The identity principle is firm in criminal liability: the person found to have perpetrated the crime must be the one who experiences the penalty. The

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justification of punishment as a defense of rights depends on making the criminal understand his responsibility for his deeds.

The legal logic binding the actor with his or her act is consistent with both the tenets of criminal law and the concept of rights. Most crimes in the United States, for instance, require both *mens rea* and *actus reus*: there must be evidence that the criminal not only did the act, but intended to do so. Crimes involving recklessness or extreme negligence depend no less on proof of the perpetrator’s mental state.

The consciousness requisite for a *criminal* act makes the criminal culpable not only for the harm he caused his victim, but also for the injury he made to their rights. As a rights-holder himself, the criminal is—or is reasonably imputed to be (unless found to have been insane or otherwise possessed of a defective *mens rea*)—aware of the existence of rights of others.

The link between punishment and the culpable actor is crucial in a realm of rights. Consider where the divorce of deserts and punishment otherwise leads. It gives a free hand to an oppressive state. The government can try to discourage future crimes by arbitrarily seizing anyone, accusing her of the crime, and punishing her as it sees fit. Indeed, governments could combat crime by charging a randomly chosen group of people with conspiracy in the same crime and then shutting them all in prison. The more people sentenced, the more infamous the incident becomes, and thus the more pervasive would be the public’s timidity. Indeed, history shows us that this kind of general deterrence works even in the absence of criminals.\(^{54}\)

In a rights-based legal system, an important justification for punishing criminals is that they chose to disregard how the rights of others necessarily constrain their own rights. Their

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\(^{54}\)Specific deterrence, in contrast, is never completely separate from general deterrence because every punished person is, supposedly, culpable of the crime. The punishment carried out on the individual criminal should, in theory, deter both that person, in particular and, through his example, the society at large from similar crimes.
intentions were too narrow, or their desires too outsized, to allow for the interests of other people. The skewed *mens rea* and the deleterious *actus reus* that, together, comprised their criminal acts betrayed their disregard or inadequate understanding of rights. Punishment serves to isolate those who have proven themselves to be dangerous to the well-being and to the rights of others. No less essential, however, is that punishment educate those who are punished about rights—theirs and those of others.

**FORFEITURE OF RIGHTS**

There is one other theory of punishment that we have not yet examined, one that addresses the rights of criminals. This is the proposition that criminals “forfeit” their rights through their illegal acts. At root, the rationale behind rights forfeiture is that because the criminal has intentionally scorned the very legal system that watches over his rights, he has thereby lost his claim on some of his own rights (or all of them, depending on the crime). His defiant actions have cost him moral standing to make claims against the legal code of rights.\(^{55}\)

Rights forfeiture leans heavily on the idea of proportionality. Starting with the familiar argument that punishment should weigh the rights of the criminal against the nature of his crime to determine a punishment proportionate to the offense, it takes a further step, to conclude that criminals forfeit rights in proportion to their crime. Hence a murderer would lose far more rights than a petty shoplifter: the murderer must give up his life, or at least the

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future enjoyment of it, because he took the life of his victim (The shoplifter’s penalty would presumably be somewhat milder).\(^5\)

The problem with rights forfeiture is that it misunderstands what rights are. Rights are the tenets to which a legal system commits itself. They cannot be unilaterally annulled or withdrawn by the state.\(^5\) Nor are rights the possessions of individuals; people cannot wholly surrender their rights through their actions. Were that the case, they would not then be the legal principles on which other laws stand, but merely laws comparable to all others.

Norval Morris has observed that a person whose rights are violated by a crime does not thereby lose those rights. The offense of the crime does not destroy the victim’s rights; it only, as he puts it, infringes on them.\(^5\) A corollary of this argument is that the criminal’s rights are not abolished by his actions. Without question the two parties, perpetrator and victim, are very different: one has been harmed against his will, the other has purposely (or recklessly) acted so as to cause the harm. The reason they are, for all that, alike in relation to the permanence of their rights is that the existence of rights does not hinge on criminal actions. Incorporated in a legal system as fundamental legal principles, rights exist separately from the people who live under them, buried in the prevailing legal order.

The advocate of rights forfeiture might yet ask: if societies determine the rights that they recognize under the law, what prevents them from modifying these rights, or taking them away? May not the state decree that criminals deserve a reduced legal status? Isn’t this exactly

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\(^5\) While Judith Jarvis Thomson does not reject the rights forfeiture position, she correctly warns that a government’s penal code must be consistent with the society’s formal rights (she also distinguishes between legal and moral rights; the differentiation misunderstands the function of rights as principles of a legal system that, in turn, enforces them.). Judith Jarvis Thomson, *The Realm of Rights* (Cambridge: Harvard University Press, 1990), 366.

what happens when the state punishes criminals, inevitably restricting their rights in the process?

In fact, nothing stops a society from taking away any rights, whether entirely or selectively, from individuals. In so doing, however, the society moves away from a coherent legal adherence to rights. Rights cease to be the stable norms, the pilings, on which the legal system is built. They are instead put on the same plane with all other laws, replaceable at the will of the government.

Because in a rights-based legal system, rights function as axiomatic principles, no acknowledged right can, logically, be permanently revoked. Once established, rights remain in existence. The one exception to this prohibition, as remarked above, is if the natural bases on which the rights draw fall out of practice or themselves disappear. Societies certainly can and often do eliminate rights; it is just that, in so doing, they are rupturing the logic behind rights as legal principles, derived from recognized human abilities and interests, that are universally attributed across the population as protections for the relevant manifestations of those abilities and interests.

The irreversible aspect of rights applies to individuals no less than to the society as a whole. If a particular right itself cannot be abolished from the corpus of rights, neither can it be denied to individual members of the society. Each legal member of the society has the identical rights. Rights are not valid in the society as some abstract totality. They are not allotted to people according to their virtue or performance or other deserts. Nor may a society, or more precisely, its government, impute to a person his or her subjective willingness to surrender participation in rights. Although some rights are waivable (actively, by the subject’s choice); many are not. Rights exist uniformly for all members as part of the society’s laws.
Rights continue to pertain to a person until he or she decides to leave the region of legal jurisdiction.

At the core of rights forfeiture lurks an insidious perception of the criminal as someone who has, by his acts, made himself inferior to law-abiding citizens. It sees the criminal act as shifting the criminal into a different ontological category, as a being who lacks the abilities, interests, or capacity for intentions of humans. Its very differentiation of the criminal from the rest of society drives rights forfeiture into a contradiction. If the criminal is not like other people, in terms of rights, then we can no longer speak of criminal culpability. The law might well regard this lesser sort of human being, given his proven depravity, as mentally incompetent. It is unclear just what punishment can be expected for the criminally insane. The humane response would be not to assume the criminal has forfeited his rights, but rather that the state must step in as his guardian.

CONCLUSION

A. Some Alternatives and Their Flaws

Justifying the principle of punishment is but one step. A residual dilemma lingers: which rights may be limited in punishment? Those the criminal would enjoy using and whose removal he would therefore miss? Those his victim lost or saw trespassed on by the criminal act, so he would see “what it is like” to experience his crime? Those that would enable him to do further crimes, were he so inclined?

The last suggestion is the legitimate solution, for it retains some punitive punch, while ensuring that the criminal does not continue to prey on more victims. It does not bind
punishment just to the subjective interests of the criminal. That would create an adverse experience for him, to be sure, but it would not necessarily impress on him the harm he had caused to his victim. On the other hand, punishment that reflects the damage to the victim’s rights alone might prove confusing, immoral, or even impossible. Subjecting the rapist to rape only repeats a cruelty; it does not elucidate for him the impact of his wrong. In the end, the criminal must learn about the wrongness of his deeds, while being restrained, if temporarily, from repeating them.

The history of sentencing guidelines in the United States, from the creation of the USSC through the decision in *Booker*, reveals the hazards of determining criminal punishments in the absence of definite concepts about the justifiable forms and quantity and duration of punishment. Without defensible standards of punishment, we cannot say at what point punishment can “go wrong” or be excessive. Compounding the problem of defining a rational basis for punishment, and its limitations, is that the theory so often does not match the reality of life in a society’s penal system.

Incarceration is one of the most widely accepted forms of criminal punishment because it purportedly does what punishment is meant to do (inculcating remorse in the criminal, exerting some social retribution for his condemnable deeds, and warning others not to find themselves in the same place) while remaining humane. Incarceration holds a criminal apart from society, depriving him of opportunities to commit further crimes. At the same time, it shields the criminal from the unchecked ire of an offended society.

The ideal aspiration for incarceration, however, has deteriorated over generations of practice. This is not surprising. The incarcerated prisoner is out of the public’s sight. Unsympathetic in his own right, supported by a weak constituency, and ultimately hidden, the
criminal detainee is all too prone to finding himself in barren, underfunded quarters. Incarcerating a person in conditions that are dangerous, isolating, and demeaning is neither conducive to re-socialization nor is it consistent with a maximum reasonable retention of rights. For that matter, it works against the very intent of rights-oriented punishment by embittering and alienating criminals still further. At some point, punishment can be so oppressive that it works against itself. The harsher and more antagonistic a criminal penalty is, the more cynical and irremediable will likely be the attitude of the person punished.

When judges sentence people to prison, they rely primarily on intuition and custom to decide on a period of incarceration. What judges hand down as sentences does not encapsulate the conditions of what prisoners actually experience. Incarceration all too often is the setting for many of the very crimes, including murder and rape, that society most earnestly punishes.⁵⁹ Judges have little control over the living conditions of the individual prisons within their jurisdiction. The judicially-expounded sentence is but an idealized sketch of what actually happens in prisons. Judges, correctional officials, elected politicians and the public all know that these crimes occur in prison.⁶⁰

Where the experience of criminal punishment does not correspond with the officially pronounced sentence, there is a worrisome disjunction between the justifications for punishment and its actuality. Hence, the retributionist must be prepared to agree that if the true conditions of prison represent the wonted retributive penalty, then those conditions should be an express part of the formal sentence. Just so, if the proponent of deterrence finds

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that the dangers and psychological deterioration of prison life are proper, then he or she must allow that a true accounting of these conditions should be incorporated into every criminal sentence, and readily publicized for the population at large.

Banishment or exile, as a punishment, is flawed because it is self-contradictory. In denying the citizenship of the criminal, it not only conflicts with the society’s constituent rules, but it excludes the very people over whom it proposes to have legal authority. What a state may do is propose exile as an option that the convicted person may choose at sentencing. People can, after all, opt to leave a jurisdiction, thus giving up the rights they enjoyed there. Of course, the state is not compelled to offer this way out. The person who committed a crime while in the state’s jurisdiction acted within the realm of the state’s laws.

Another way to skirt the difficulties that arise with punishment is to concentrate on preventing the occurrence of crimes. After all, if people have few opportunities to commit crimes, they will not be punished for them. The cost of this “solution” is that it puts the punishment before the crime; the incidence of crime is dampened at the expense of the formation of a heavily interventionist police state. In attempting to bar crime, the state would substitute a type of preemptive punishment for consequential punishment. The result is contrary to individual rights: the state decides what interests, abilities and activities may be carried out when and where and with whom, and when they must end.

Everyone becomes a “potential criminal” in this case, for the state oppresses all alike. In the place of equal rights exists an equally presupposed proclivity to criminal culpability. The more effective a governmental policy is in discouraging crime, the more likely it is to violate people’s rights. This is as true at the front end, such as with a police force endowed with broad powers of arrest, as it is at the back end, through the use of drastic, oppressive
punishments. Because the state’s power to criminalize nearly any action is enormous, it must take care that its techniques of enforcement do not overly hamper the very rights it is committed to defend.

An emphasis on controlling crime leads not merely to a diminishment of rights but to their extensive violation. The reason is that a society armed with an extensive body of criminal laws, but few explicit rights, necessarily gives rise to a multiplicity of tacit rights. Crimes imply rights: wherever there are justiciable crimes, rights exist consequently in the form of the legal interests being protected by the criminal law.⁶¹

Societies that have a paucity of both rights and criminal laws dodge the difficulty of reconciling punishment and rights, at the risk of being either hostile places to live or precarious utopias. At best, a society without express criminal laws can endure if it is a consensual community united by a strong deontological worldview. The members of this kind of society regard their laws as the promulgations bestowed on them by a revered source. Short of such a unified view of the law, enforcement must be of a piece with criminal proscriptions.

Lastly, a state could conceivably punish criminals while still fully sustaining their rights. This would only work, however, where the punitive conditions imposed were designed so as not to impinge on any specified rights and the society’s recognized rights were few in number and specific. For example, a society that did not recognize a legal right to freedom of travel and social association could incarcerate criminals without thereby limiting a right to these activities. Admittedly, personal movement and socializing are two prevalent human activities, and it is just such human concerns that are the basis of legal rights. It is difficult to imagine how a criminal sentence could not impinge on the convict’s rights; this first solution

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⁶¹The provocative question, whether the institution of the “rule of law” always brings with some rights, if only the right to due legal process, is too broad to go into here. This hypothesis depends in good part on the operative definition of “rule of law.”
is unrealistic, and that is just as well: any society that could punish without stepping on rights would be a society with too few rights.

B. A Proposal for Reconciling Punishment with Rights

A workable, rights-consistent approach to punishment starts by acknowledging that punishment will inevitably infringe on convicts’ rights. And this is the way it should be. The rationale for punishment is to inculcate in its subject a better awareness of rights. The purpose of criminal punishment should be to bring the criminal to a sympathetic understanding of the limitation on his rights in regard to those of others. Because the criminal overstepped his rights impermissibly and denied the rights of his victims, some sort of engineered epiphany is called for.

But teaching criminals about rights does not by itself justify punishment. Neither is punishment justified that is not oriented around getting criminals to understand right. The reason that punishment may limit the criminal’s rights not that it is retributive—because he harmed the rights of another he must lose some of his own. Rights may be reduced through punishment for two reasons only: public safety and in order to make the criminal more conscious of what rights are—his and others’—and how they coexist in a social environment.

Clearly punishment must be something more than a good-natured civics lesson. People commit crimes out of self-interest, defiance, and deliberate unconcern with the fate of their victims. The criminal justice system is routinely confronted with angry, thoughtless, and toughened adolescents or adults. Many may not come to doubt their crimes, or to feel regret for them, without some adverse encounter. They will need to understand that their behavior was incongruent with rights as recognized in their society.
When the state punishes in a manner that is rights-limiting, it is holding the subject apart from his rights in a kind of promissory suspension. The criminal does not lose or surrender his rights to the state. Rather, the state is saying, “You have not understood what your rights are, and how your exercise of them must not be inimical to the rights of others. Just as the respect and preservation of people’s rights is a duty of the state, so is it incumbent on the people toward one another.”

As part of the lesson, some rights must be placed in abeyance so as to prevent their continued abuse. This *educative punishment* must be limited to those measures necessary to protect others *and* to bring the punished person to a clear perception of rights. The convicted criminal needs the incentive that he will recoup his own complete rights. If penalization is too oppressive, it engenders resentment, not empathic understanding.

Educative punishment would be based on a curriculum model. The period mandated in judicial sentences would be structured around the time necessary for “schooling” convicts in rights and living in a rights-based society. Penal instruction demands innovative techniques; after all, it addresses people whose wayward drift may oftentimes have been already evident during their school years. Seminars, counseling and practica are superior to the uniformity of conventional education. They will need to be modified to reach each prisoner.

The duration of every criminal sentence must be framed within a lower and an upper bound. The minimum period will correspond to the amount of time required for the standard curriculum. The actual term of each person’s sentence will vary, depending on results. Just as evidence is necessary for prosecuting a crime, so is demonstrable proof critical to determine the efficacy of rights-oriented rehabilitation. The maximum ceiling for a prison sentence is not a matter of pedagogy, but rather of fairness. Open-ended sentences would be susceptible
to abuse. Prison officials could continually refuse to release a prisoner they want to make suffer by insisting that he fails to show adequate advancement. Thus the stipulated upper limit to a sentence would be based on empirical evidence of how well rehabilitation “takes.” But this ceiling could be reducible in each instance depending on the inmate’s progress.

Sentences should continue for as long as the convicted criminal needs to understand how to behave in society, to realize what the borders of his rights are, and what the presence of others’ rights demands from him. The duration and method of punishment are driven by the genuine (as far as this is determinable) metamorphosis of each convict’s consciousness. Whereas current criminal sentencing, influenced by a mix of custom, guidelines, and the individual judge’s sense of just deserts, emphasizes the outside time to be served, educative punishment looks to the progress of the inmates’ comprehension and social adjustment. It is more consistent with universal individual rights, because the sentence endures only as long as necessary for the convict truly to become aware of rights.

Still, in the end, punishment cannot but be punitive, if only because it limits a person’s full rights. Whether punishment needs to be unpleasant beyond that is another matter. In proving that the criminal had the requisite mens rea for the crime, a successful criminal prosecution establishes that the criminal understood that he was harming others. Behavioral instruction commonly combines explanation with discipline. Teaching about “correct” behavior must sometimes be reinforced by a showing of the cost to “incorrect” acts together with lesson in why they were wrong.

An especially vexing quandary is defining the proper punishment for recalcitrant, unrepentant criminals. Convicted criminals with a penchant for cruelty and calculation, who show no sincere regret for their malefic acts, will have to satisfy the high proof standards for
education and rehabilitation before their release. Evidence of the perpetrator’s true remorse is a fundamental aspect of this education and testing. Especially malevolent or compulsive criminals are not likely to be easily susceptible to a quick course of rehabilitation. On the other hand, if or when they do sincerely change, there is no justification to continue keeping them apart from their full rights. They have been punished; being sentenced to the detention and training called for by a pedagogical penalization is no token expression of social displeasure. It is not a happy experience, one that people would choose. Indeed, if only as a by-product, this form of punishment produces some deterrent and retributive effects.

Two legal norms could help keep punishment from excessively constricting a convict’s rights. For the first, Bentham’s principle of “parsimonious” punishment might provide a possible solution. The rule would be that any punishment must preserve the rights of the person sentenced for a crime at their maximum reasonable level, while still demonstrating the state’s censure for the criminal act. We could call this a principle of maximum reasonable retention of rights, a sort of “principle of restrained proportionality.” It is not too dissimilar to the idea of proportionate punishment, albeit with the maximization of rights as the limiting principle.

The advantage of this principle is that it guides judges to choose sentences that emphasize a convict’s rights, rather than merely avoiding “cruel and unusual” penalties. By itself, it is still insufficient because it suffers from the bane borne by all utilitarian solutions: utilitarianism does not incorporate moral values, so it cannot guide a balancing of rights against one another. Rules for apportioning individual utilities within a society do not

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63 This suits the goal of both retributionists as well as proponents of deterrence. See footnote 13 *Supra*. 
translate into a rational method of rights-balancing.\textsuperscript{64} The difficulty with a Benthamite sliding scale of punishment is that it cannot provide a defensible \textit{actual} measure. It is unable to define in detail what makes for a suitable, i.e., a “reasonable” punishment.\textsuperscript{65}

At best, then, the idea of maximum reasonable preservation of rights is a limiting principle; it is not a tool for determining proper measurement. Under the doctrine of maximum reasonable retention of rights, punishment does not just trade off the rights of the criminal against the rights of others (victims, society at large). It also leads to a juggling among the criminal’s own various rights. For instance, a state could order a convicted sexual predator to be castrated (whether chemically or surgically) as a precondition for his rejoining society. In the alternative, the punishment could be that he is left physically untouched, but is instead incarcerated for a very long time. How does the justice system decide which is the “greater” individual right: the criminal’s right to reengage with society, albeit after a fundamental anatomical loss, or his right to remain physically intact yet held apart from society for years? We may find one of the penalties more repellent than the other, and that is not insignificant. Utilitarianism cannot say whether the criminal should have any say over his

\textsuperscript{64} Rex Martin discusses the relationship between punishment and rights extensively in his \textit{A System of Rights} (Oxford: Clarendon Press, 1993), 225-239. Martin argues first that rights have different ranks, or weights, according to a society’s norm. Punishment is justified when it limits rights (of the criminal) that are equal to or of less weight than the rights the criminal harmed. In addition, he says that punishment serves to uphold the accepted ordering of rights by instituting adverse experiences for those who would favor their (lesser) rights at the expense of others’ greater rights. Martin distinguishes between “infringement” of rights and “violations”. Violations occur when an act “is unjustifiably contrary to the norms internal to that right, when the questionable action infringed the right in an unacceptable way or did so for an unacceptable reason.” 225. Martin’s distinction departs from rights and depends, instead, on a notion of internal norms. In so doing, it evades the original question, what happens when rights conflict, because it introduces some higher, imagined essence behind rights that nevertheless has an overt role in a legal system. But what if the society’s norm is precisely that a legal system should protect rights equally, rather than relying on uncodified norms? Moreover, Martin’s argument does not preclude punishments from violating rights, despite the defense that the penalties thereby shore up a greater good of other rights.

punishment; the decision to look to his preferences is a moral one. Therefore, rights must be preserved, not only to their maximum, but also in accordance with another principle.

The second general principle delineating the limits of punishment is *pertinence*, where it means a finding a similarity, as opposed to a proportionality, between a crime and its punishment. In practice, criminal penalties could take one of three thematic forms. They could reduce the criminal’s rights to those he engaged in when committing his crime; they could hinder the same rights as those he violated in his victim; or they could limit just those rights that it must control in order to bring clarity to the convict about his misdeed, regardless of whether they played a part in the crime itself.

Under the first version of punishment, the criminal would be taught the limits of what he lawfully may do. Under the second, he would be encouraged to realize the harm he caused to another by seeing its effect on himself. The third version is the most open-ended, its goal the broadest: to bring the criminal to understand rights, and the norm of respect for rights.

Under this norm, certain rights would be entirely set outside the circle of allowable punishment. Not only would the norm disallow punishments that were needlessly cruel, it would also restrain tendencies toward excessive punishments. The death penalty, which destroys the subject’s rights completely, would be barred for one. So, too, would be any torturous punishments – those that are destructive, degrading, or gratuitous. Other punishments that would not qualify under this rule would include extensive periods in solitary confinement, or living conditions so exiguous as to be more bestial than human.

Precluded punishments need not be limited just to those that are most extreme, however. For example, unless communications from the prisoner are conceivably dangerous, or undermine the effectiveness of the punishment, freedom of expression should be retained
to some degree. There is no sound argument to deprive criminals (or ex-convicts) of the right to vote.\textsuperscript{66} The pertinence principle entails that serious restrictions on a criminal’s rights, such as restrictions on free movement (which would also impinge on freedoms of association and, to some degree, communication) are warranted only where the person was demonstrably dangerous or prone to recidivism.

Again, the principle of pertinence is not alone enough to make punishment consistent with rights. In conjunction with the other norms here defined, the pertinence principle corrals punishment within rational relationship with the pedagogical purpose of punishment. The design of punishments, under the pertinence restriction, should aim at making the criminal conscious of the harm he caused including the harm to the rights of his victims.

So to the original question: is there a place for punishment in a rights-based legal system? The answer is yes. Punishment is a one means of sustaining rights. Without the tool of criminal punishment, rights are in perpetual danger by people who do not comprehend how their interests, and rights, exist within a social world of rights. Punishment, however, can also be incompatible with rights. The enduring question is how, and when, punishment is done.

\textsuperscript{66} For arguments against disenfranchisement as a general punishment, see are Richard L. Lippke, “The Disenfranchisement of Felons,” \textit{Law and Philosophy}, Vol. 20, No. 6 (Nov. 2001).