

# Just Say No to Retribution

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## INTRODUCTION

The Plan for Revision of the Model Penal Code rejects the original Code's choice of rehabilitation as the guiding principle for punishment, and proposes to replace it with the principle of retribution.<sup>1</sup> This would be a serious mistake, both for the Code and for the country.

It would be a mistake for the Code because it would align the Code with the worst features of contemporary American penal practice. There is no need to recite the absurdities of this practice at great length; it is well known that the United States has the highest rate of incarceration in the Western world by a factor of five.<sup>2</sup> What is important to recognize is that this trend has been justified, and sometimes exacerbated, by legislation that abandons the goal of rehabilitation and embraces the principle of retribution. If the Code were to embrace this principle as well, it would inevitably be seen as lending its support to all the irrationalities, immoralities, and inefficiencies of our current addiction to incarceration. Thoughtful American scholars who are urging alternative approaches will reject it. Policymakers and scholars in other democratic nations will regard the revised Code as part of America's morally unacceptable regime of indiscriminate and draconian punishment. When attitudes finally change—and there is a strong likelihood that they will change, not only because

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1. American Law Institute, Model Penal Code: Sentencing, Plan for Revision (January 29, 2002).

2. See U.S. Department of Justice, Bureau of Justice Statistics (2000); Julian Roberts et al., *Penal Populism and Public Opinion: Lessons from Five Countries* 15-17 (2003); James Q. Whitman, *Harsh Justice* 1 (2003). The rate of imprisonment in the U.S. in 2000 was 645 per 100,000, which means nearly 2,000,000 individuals. Among Western nations, New Zealand is next highest after the U.S., with a rate of 145 per 100,000.

they always do, but also because the current approach is financially unsupportable—the revised Code will remain shackled to an approach that will seem primitive and inefficient, the artifact of an abandoned theory.

It might be argued that the kind of retribution that the revised Code would endorse is different from the kind that has caused us to get hooked on incarcerative punishment. Following Norval Morris, the Code might endorse so-called limiting retributivism, which invokes the principle of just deserts to avoid indeterminate sentences that might otherwise extend for the inordinately long time that would be required to actually rehabilitate a particular felon.<sup>3</sup> In terms of practical politics, however, this is a questionable strategy. It is a bit like saying that instead of opposing torture as a means of investigation, the way Beccaria did,<sup>4</sup> one should endorse limited torture, which would now be defined to include acceptable modes of investigation, such as interrogation. However moral one imagines this limited torture to be, using a term, and an underlying concept, that has led to an abuse of human rights is an unreliable way of opposing that abuse.

The substitution of retribution for rehabilitation is not only bad for the Code, but it is also bad for the country. Very few criminologists and criminal law scholars argue that the current addiction to incarceration represents effective public policy. Apart from its moral difficulties, it wastes human and fiscal resources and produces only limited crime control benefits. Elected policymakers, most notably legislators and chief executives at the state and federal level, are generally expected to avoid such counterproductive policies, but in this case they have been intimidated by the level of public anger about crime. Administrators are subject to the same pressures, both directly and through the elected officials who supervise them. Courts can sometimes restrain or reverse policies

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3. American Law Institute, *supra* note 1; see Norval Morris, *The Future of Imprisonment* 73-80 (1974).

4. Cesare Beccaria, *On Crimes and Punishments and Other Writings* (Richard Davies trans., 1995) (1767).

that result from this sort of institutional pathology through Constitutional review, as they did, albeit belatedly, for American apartheid, but this has a limited reach, and does not extend to policy decisions like the choice of incarceration over less expensive, more effective alternatives. Worse still, in the one case where the Constitution can be plausibly invoked, that is, extremely disproportionate punishment, the Court has endorsed the positions taken by executive, legislative, and administrative officials. Reviewing two challenges to California's three-strikes-and-you're-out law,<sup>5</sup> the Court concluded that the cruel and unusual punishment clause did not prohibit two consecutive sentences of twenty-five years to life for a felon who had stolen \$150 worth of videotapes,<sup>6</sup> or a twenty-five year to life sentence for another whose had stolen three golf clubs worth \$399.<sup>7</sup>

As a result of these decisions by elected and appointed officials, the American Law Institute remains one of the few institutions in the nation that can serve as an antidote to current policy, that can speak out against its immoralities and irrationalities. The values articulated in the Model Penal Code, and in its Plan for Revision, suggest that the ALI is willing to shoulder this burden, and it is of course to be commended for the perspicacity and courage of

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5. Cal. Penal Code Ann. § 667(e)(2)(A) (West, 1999); § 1170.12(c)(1) (West Supp. 2002).

6. *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003). Andrade stole the videotapes on two separate occasions. The Court solemnly declared that "[T]hese two incidents were not Andrade's first or only encounters with law enforcement." *Id.* at 1170. His previous offenses involved two convictions for misdemeanor petty theft, two for transportation of marijuana, and one for multiple counts of residential burglary. Under California's three strikes law, residential burglary is a "serious" offense that can serve as the first two strikes, and any felony can serve as the third strike. Thus, Andrade was given a fifty year to life sentence without ever having committed a violent crime.

7. *Ewing v. California*, 123 S. Ct. 1179 (2003). Ewing was a more serious offender than Andrade; in addition to a fairly long list of minor offenses, such as petty theft and unlawful possession of a firearm, he had committed three residential burglaries and one robbery where he threatened the victim with a knife. Having served his time for this robbery, however, he has now been further punished for it by receiving a twenty-five year to life sentence for an offense that would otherwise merit only a few months in prison.

that decision. But the ALI's voice will be attenuated, and possibly nullified, if it adopts the rhetoric of those it is attempting to restrain. Politicians trumpeting still further sentence enhancements—two strikes and you're out, perhaps, or life imprisonment for sex with minors—will be able to assert that the ALI endorses their retributivist goals. Will their opponents be able to convince citizens or policymakers that the ALI meant only Norval Morris's limiting retributivism, that its endorsement of this engine of incarceration was intended to restrict excessive sentences, although they cannot explain, because neither Morris nor the revised Code can explain, precisely why this should be so?

This article will argue that the revised Code should abjure the heated rhetoric of our incarcerative addiction, and base its punishment provisions on the two principles that are morally acceptable and pragmatically effective, namely proportionality and rehabilitation. It begins where the proposed Plan for Revision begins—with the failure of the current Code's rehabilitative model (Part I). But rather than arguing, as the drafters of the Plan do, that the Code's error was to choose a punishment model that was subsequently rejected, the article argues that the drafters of the Code made three more readily avoidable errors: they subscribed to a fashionable theory of punishment without subjecting it to sufficient scrutiny, they ignored the most flagrant correctional abuse that was occurring at the time, and they overlooked the fact that their recommendations would need to be implemented by real-world institutions. The remainder of the article argues that the Plan's adoption of the retributive model of punishment exhibits those very same avoidable mistakes. First, it subscribes to the currently fashionable model of punishment, whereas critical analysis suggests that this model is conceptually incoherent, inconsistent with out basic theory of government, and allied to current political trends that the drafters themselves reject (Part II). Second, the Plan ignores the most flagrant correctional abuse of our time, which is the proliferation of wildly disproportionate

sentences and the uncontrolled expansion of the prison population, by adopting the same retributive approach, by adopting the same retributive approach that has been allied with, if not responsible for, this abuse (Part III). Third and finally, the Plan fails to recognize that this retributive approach will encourage real world prison administrators to violate the rights of prisoners, whereas the rehabilitation model they reject is the best means of safeguarding those rights (Part III).

#### I. WHAT IS REALLY WRONG WITH THE MODEL PENAL CODE?

The Plan for Revision declares that “rehabilitative theory can no longer serve as the general justificatory goal of criminal punishment for most or all offenders, nor should it be a major pillar of the legal structure for sentencing.”<sup>8</sup> The difficulty with the original Code, according to the Plan, is its heavy reliance on what turned out to be an invalid principle. The two principle reasons that are given in the Plan to support its conclusion are first, that research casts doubt on the effectiveness of rehabilitation and second, that public attitudes now reject rehabilitation as a primary principle of punishment. Both the research and the change in attitudes, however, occurred after the Model Penal Code was drafted and promulgated.

This is not a reason to retain the original Code, of course. Subsequent information and events are precisely the grounds on which policy, and policy prescriptions, ought to be revised. It is, however, a reason for questioning whether the Plan for Revision is correct in identifying the nature of the error that the original Code committed. If the mistake is that the Code relied on a substantive principle that turned out to be invalid, precisely how does one avoid such mistakes without possessing that marvelous instrument which physicians describe as a retrospectoscope? Someone who could simply look into the future, and discern forthcoming knowledge and events, would certainly be both

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8. American Law Institute, *supra* note 1.

a political genius and a multi-millionaire, but the task is a bit easier to imagine than it is to accomplish.

Clearly, the mere observation that a decision in the past was wrong in light of subsequent developments is not sufficient. The past always looks old-fashioned and quaint from the perspective of the present, but it did not possess those characteristics from its own perspective. When we look at a movie from the 1940s, for example, with those bulbous automobiles, dial telephones, men dressed in suits, women in dresses, and everybody in hats, it requires real mental effort to recall that these accouterments looked as modern to the people of that time as our sleek cars, cell phones, T-shirts, and jeans look to us, and it demands more mental effort still to concede that our modern fixtures will look equally old-fashioned to people a mere half century from now. In short, it is easy enough to identify mistakes that were made by some previous decision maker, but that is not a particularly useful exercise. The difficult, but much more important task, is to identify mistakes that the decision makers could have known, and should have known, at the time the decision was made. If we can accomplish this task, we have some hope of avoiding or delimiting our own mistakes, instead of merely berating the dead for doing the very same things that we ourselves are doing.

What should the drafters of the Model Penal Code have known at the time they were engaged in their effort? What mistakes could they have identified without knowing that Robert Martinson would write his famous article, rejecting rehabilitation because “nothing works,”<sup>9</sup> and that American decision makers would invoke retribution to explain their newly developed addiction to incarceration?<sup>10</sup>

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9. Robert Martinson, *What Works—Questions and Answers about Prison Reform*, 35 *Pub. Int.* 22 (1974)

10. See Cal. Penal Code § 1170(a)(1) (West 1985) (“the purpose of imprisonment for crime is punishment”); 204 Pa. Code § 303.11 (2001) (“establishes a sentencing system with a primary focus on retribution”); Francis A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* 7-9 (1981); Alfred Blumstein, *American Prisons in a Time of Crisis*, in *The American Prison: Issues in Research and Policy* 13, 13-18 (Lynne Goodstein & Doris L. Mackenzie, eds., 1989).

First, they should have known the obvious point that has just been stated: fashions change in social science as they do in dress, and that it is risky to jump on the bandwagon of the prevailing trend. Of course, reflexive opposition is both logically incoherent and politically unwise, but it is probably advisable to subject fashionable views to scrutiny, and search rejected views for their undiscovered or forgotten virtues. The first way to avoid mistakes, therefore, is to adopt a wary attitude towards the subjects of current enthusiasm. The drafters of the original Code could not have been expected to know the subsequent arguments against rehabilitation, but they could have known that rehabilitation was unlikely to be the panacea that the correctional theory of the time declared.

Their wariness should have been increased by the woeful lack of empirical evidence in support their preferred correctional approach. While they could not have known what Martinson and others would discover in the future, they certainly could have known what they themselves did not know in the present. They could have known that there were relatively few, if any, rehabilitative programs of proven effectiveness. They could also have known that there were few models for such programs, other than the time-worn and much criticized model of the penitentiary itself. They may have felt that continued commitment to the rehabilitative model, perhaps with the added impetus of their own endorsement, would generate such models, but one cannot assume that developments in social science will proceed with the same certainty as developments in technology, and the drafters should have known that as well.

A second mistake that the drafters of the Code committed was to ignore the major abuse in the subject matter that they were addressing. Throughout the time the Code was being drafted, the conditions of confinement in American prisons were frequently horrific, and obviously worse than anything that a civilized nation should have tolerated. Southern prisons were particularly bad, being modeled on the familiar but long-rejected slave plantation. These prisons, like the plantations, were being run for

profit. Prisoners were compelled to work in the fields for twelve or more hours a day, in the same “long lines” that characterized slave labor. They worked under the supervision of an armed prisoner designated by the warden, just as slaves worked under the supervision of an armed slave designated by the master or plantation foreman. The warden often lived on the prison grounds, and used tractable prisoners as house servants, just as the master used tractable slaves. The prisoners, like slaves, received no education, no training beyond what they needed for their labor, and minimal medical care. If they misbehaved or refused to work, they were beaten; if they tried to escape, they were pursued by dogs.<sup>11</sup> Conditions in some of the non-Southern states were much better, but in others only minimally so.

These abuses were hardly unknown at the time; in fact, they were familiar enough to have been the subject of two major Hollywood movies, *I Am a Fugitive From A Chain Gang*,<sup>12</sup> and *Sullivan’s Travels*.<sup>13</sup> Real fugitives from Southern chain gangs, upon recapture in the North, had been bringing suit to prevent their return; several reached the Supreme Court, which had concluded that it could do nothing but return them.<sup>14</sup> The American Correctional Association had promulgated standards, which the courts would ultimately enforce, that clearly forbid the practices

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11. For descriptions of the Southern prisons prior to the judicial reforms, see Bradley Stewart Chilton, *Prisons under the Gavel: The Federal Court Takeover of Georgia Prisons* (1991); Ben M. Crouch & James W. Marquart, *An Appeal to Justice: Litigated Reform of Texas Prisons* (1989); Malcolm Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America’s Prisons 51-95* (1998) (Arkansas and Texas); Steve J. Martin & Sheldon Ekland-Olson, *Texas Prisons: The Walls Came Tumbling Down* (1987); David M. Oshinsky, “Worse Than Slavery”: Parchman Farm and the Ordeal of Jim Crow Justice (1996) (Mississippi); Larry W. Yackle, *Reform and Regret: The Story of Federal Judicial Involvement in the Alabama Prison System* (1989).

12. *I Am a Fugitive from a Chain Gang* (Warner Bros. 1932). This film was nominated for an Academy Award in the Best Picture and Best Actor (Paul Muni) categories.

13. *Sullivan’s Travels* (Paramount Pictures 1941).

14. *Sweeney v. Woodall*, 344 U.S. 86 (1952); *Johnson v. Dye*, 338 U.S. 864 (1949).

in Southern prisons.<sup>15</sup> Yet the drafters of the Code were apparently oblivious to these notorious abuses. The principles that they declare are consistent with the best practices in American prisons, and with the standards of the American Correctional Association, but include no prescriptions for the reform of the plantation model prison. If one recalls the actual conditions in American prisons at the time the Code was drafted, its punishment provisions take on an other-worldly character.

The third mistake that the drafters of the Code could have avoided emerges directly from the first two. In enthusiastically embracing the conventional wisdom of the day, and ignoring actual conditions in the prisons, the drafters somehow forgot that their recommendations would need to be implemented by real institutions. Precisely who was supposed to carry out the humane, intelligent, progressive programs of rehabilitation that the drafters envisioned? Surely not the barely educated, old time Southern wardens, often promoted from the ranks of the prison guards. Surely not the guards themselves, in either Northern or Southern prisons, whose skills and training were rudimentary at best. And with precisely what resources were these sophisticated and humane rehabilitative programs to be carried out? Southern prisons, being modeled on the slave plantation, were supposed to run at a profit, and while this lofty aspiration was often unfulfilled, many of them received minimal allocations from their state. Northern prisons, while appearing as a line in the state budget, were chronically underfunded. If the rehabilitative model was best realized through an individualized treatment plan, as many correctional specialists believed, then the drafters should have known that rehabilitation would not be realized.

This is not to say that scholars, or even policy analysts, should limit their recommendations to those that will be acceptable to the administrators of the programs they are trying to reform. That would give too much credence to the

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15. Feeley & Rubin, *supra* note 11, at 162-66, 370-72.

status quo. There is a role for imagination and utopianism in political writing, and seemingly implausible ideas often have the greatest impact because, after all, the future is implausible to the present. But the Model Penal Code is at least mid-way between scholarship and legislation, perhaps closer to the latter. It speaks with an authoritative voice, and its impact is direct. The unusual influence that it enjoys imposes a concomitant responsibility to frame recommendations that can be implemented in the present world, and that will produce their anticipated effects. For the Code, it was an identifiable and avoidable mistake to recommend a principle of punishment that could not be realistically implemented by the administrators who were in place at the time.

None of this is intended as a condemnation of the Model Penal Code or the ALI's efforts in criminal law. In fact, the criticism of the rehabilitative standard comes from the ALI's present Plan for Revision, which treats the adoption of that standard as a mistake. The question here is what we can learn from prior mistakes, and how we can avoid similar mistakes at the present time. A recommendation that the drafters should see clearly what we can now see using 20-20 hindsight is no recommendation at all. Rather, what we can learn from the mistakes made in the previous effort is that the Code should not embrace prevailing views without critical scrutiny, that it must be alert to the most serious abuses of its day, and that it should make recommendations that will produce their intended effects when implemented by existing institutions. The Plan for Revision's endorsement of retribution as the guiding principle for criminal punishment can be assessed in accordance with these observations.

## II. RESISTING THE RETRIBUTION CRAZE

Retribution is the rage these days, with scholars, policy analysts, legislators and other politicians eagerly

jumping on the bandwagon,<sup>16</sup> or indeed the juggernaut.<sup>17</sup> Before the drafters of the Code join this parade, however, they might want to subject this very fashionable idea to some critical scrutiny. After all, who knows what Americans will think twenty or thirty years from now? Will the proponents of retribution continue their triumphant progress, or will attitudes reverse direction, grinding retribution and any Code that has been linked to it into the dust? The experience with the prior Code tells us that any idea that the Code enthusiastically embraces had better be one for which people in the future feel similar enthusiasm, but that is not very practical advice. As discussed in the previous section, experience also suggests the much more practical advice is that fashionable ideas should be subjected to scrutiny before they are so enthusiastically embraced.

#### A. *What Does Retribution Mean?*

What does retribution mean, as a principle of criminal punishment? Like so many other terms used in political theory, it possesses a multitude of meanings, but the two primary ones are probably repayment and desert.<sup>18</sup>

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16. For scholarly endorsements of retributivism, see, e.g., Michael Davis, *To Make the Punishment Fit the Crime: Essays in the Theory of Criminal Justice* (1992); Antony Duff, *Trials and Punishments* (1986); Joel Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (1970); George P. Fletcher, *Rethinking Criminal Law* (1978); Hyman Gross, *A Theory of Criminal Justice* (1979); Jean Hampton, *An Expressive Theory of Retribution*, in *Retributivism and Its Critics 1* (Wesley Cragg ed., 1992); John Kleinig, *Punishment and Desert* (1973); J.R. Lucas, *On Justice = Peri Dikaiou* (1980); Michael Moore, *Placing Blame: A General Theory of the Criminal Law* (1997); Herbert Morris, *On Guilt and Innocence: Essays in Legal Philosophy and Moral Psychology* (1976); Morris, *supra* note 3; Jeffrie G. Murphy, *Retribution, Justice, and Therapy: Essays in the Philosophy of Law* (1979); Robert Nozick, *Philosophical Explanations* 363-97 (1981); George Sher, *Desert* (1987); Richard G. Singer, *Just Deserts: Sentencing Based on Equality and Desert* (1979); Wojciech Sadurski, *Giving Desert Its Due: Social Justice and Legal Theory* (1985); Mark Tunick, *Punishment: Theory and Practice* (1992).

17. See Diana R. Gordon, *The Justice Juggernaut: Fighting Street Crime, Controlling Citizens* (1990).

18. John Cottingham, *Varieties of Retribution*, 29 *Phil. Q.* 238 (1979)

Repayment, which is the standard dictionary definition of retribution, is the idea that the criminal should be paid back for the harm he did. This inevitably suggests the famous *lex talionis*, “an eye for an eye and a tooth for a tooth.”<sup>19</sup> Desert is the idea that the criminal should be punished because he did something wrong, that he deserves punishment in the moral sense.<sup>20</sup> Its relies on the more general principle that justice prevails when people get what they deserve, that is, what the moral character of their action merits, whether good or bad.

To begin with the concept of repayment, the difficulty is that this idea is essentially a metaphor,<sup>21</sup> and a rather narrow one. One can imagine a punishment scheme involving literal repayment, like the Anglo-Saxon system of *wergeld*, in which a price was assigned to every wrong that could be inflicted on someone, and the wrongdoer was punished by being deprived of that sum.<sup>22</sup> One can also imagine a metaphorical but fairly specific variant of the repayment principle, which is the *lex talionis* itself: the murderer will be executed, the rapist will be raped, and the thief will be required to pay back his ill-gotten gains. Neither of these systems bears any resemblance to our own, however. In our system, the monetary fines are regarded as too lenient for most major crimes, and physical mistreatment is forbidden. With the exception of the death penalty, which we regard as inappropriate for all but a relatively small number of extremely serious offenses, the only punishment we use for major crimes is imprisonment. But imprisonment bears very little relationship to the concept of repayment. Unless the criminal is a kidnapper,

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19. Nozick, *supra* note 16, at 363-70; Elizabeth Hankins Wolgast, *The Grammar of Justice* 147-190 (1987).

20. Feinberg, *supra* note 16; Kleinig, *supra* note 16; Herbert Morris, *Persons and Punishment*, 52 *Monist* 475 (1968).

21. Cottingham, *supra* note 18, at 245.

22. See Lisi Oliver, *The Beginnings of English Law* (2002); Patrick Wormald, *The Making of English Law: King Alfred to the Twelfth Century: Vol. 1: Legislation and Its Limits* 374-78 (1999). There was a further sense of repayment in this system, since the criminal was not only being paid back for his crime, but was required to pay the fine to the victim or his family.

just how is he being paid back for his crime by being imprisoned? One could say that he is being paid back through the deprivations that imprisonment imposes, but the exact same thing could be said for any other form of punishment. At this level of generality, retribution, in the sense of repayment, ceases to be a theory of punishment and becomes merely a synonym for it.

Thus, retribution, in the sense of repayment, is not only a metaphor for punishment, but an unsatisfactory metaphor. The purpose of a metaphor is to convey information in vivid, condensed, and comprehensible form.<sup>23</sup> To take John Searle's example,<sup>24</sup> the sentence "Richard is a gorilla" conveys essentially the same information as the phrase "Richard is fierce, nasty, prone to violence," but does so more concisely and dramatically.<sup>25</sup> In order for this phrase to serve its informative purpose, however, the term gorilla needs to have meaning for us and we need to understand what is meant by the comparison.<sup>26</sup> In the statements "Sally is a prime number between 17 and 23" or "Bill is a barn door,"<sup>27</sup> the words are all perfectly comprehensible, but the metaphor, being inapt, conveys no real information.

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23. Max Black, *Metaphor*, in *Models and Metaphors: Studies in Language and Philosophy* 25 (1962); Richard Mayer, *The Instructive Metaphor: Metaphoric Aids to Students' Understanding of Science*, in *Metaphor and Thought* 561 (Andrew Ortony ed., 2nd ed. 1993)

24. John Searle, *Metaphor*, in *Metaphor and Thought*, supra note 23, at 83. See id. at 92

25. Linguists have pointed out that all speech has a metaphorical structure. See George Lakoff, *Women, Fire, and Dangerous Things: What Categories Reveal about the Mind* (1987); Michael J. Reddy, *The Conduit Metaphor: A Case of Frame Conflict in Our Language about Language*, in *Metaphor and Thought*, supra note 23, at 164. The discussion in the text is not meant to challenge this view, but simply to refer to the use of explicit metaphors as the basis of a theoretical argument such as the retributivist theory of punishment.

26. As Searle notes, the meaning that we ascribe to the term "gorilla" need not be accurate; gorillas may be shy, inoffensive creatures. This is not important, since the point of the metaphor is to say something about Richard, not gorillas. Searle, supra note 24, at 92. But unless the comparison term has a relatively clear, stable meaning, the point of the metaphor will be lost.

27. Again, Searle's examples. Searle, supra note 24, at 83.

The metaphorical statement that punishment is a form of repayment is similarly uninformative. We do not make criminals pay for the crimes they commit, or do to them what they have done to their victim; rather, we put them in prison. We can, of course, say that imprisonment is a form of repayment, but this conveys neither the justification nor the calibration that the theory is intended to provide. Why should we pay back the criminal by putting him in prison, as opposed to inflicting some other form of punishment? And how do we determine the length of time he should be incarcerated by invoking the idea of repayment? The concept of repayment is simply too narrow, and too tied to a direct quid pro quo, to encompass the kind of punishment system that we in fact employ.

The second common meaning of retribution involves desert, the idea that justice prevails when people get what they deserve. This is certainly an appealing notion—who can object to the prevalence of justice—but its relationship to retribution is unclear. Andrew von Hirsch, whose touchstone is justice, specifically rejects retribution as a description of desert;<sup>28</sup> Norval Morris uses it, but his analysis relies on the term and concept of desert, and he attaches the term retribution to his conclusion without much explanation.<sup>29</sup> Michael Moore asserts a connection between desert and retribution as a matter of deontological necessity—that is, we have an obligation to punish wrongdoers—but his argument is based on moral realism,<sup>30</sup> a position that has been broadly rejected since the Enlightenment. Assuming for the moment that the inclusion of desert within the meaning of retribution is linguistically supportable, the question is whether the

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28. Andrew von Hirsch, *Doing Justice: The Choice of Punishments: Report of the Committee for the Study of Incarceration* 45 (1976) (“We do not find ‘retribution’ a helpful term. It has no regular use except in relation to punishment, so that one is precluded from learning about the concept from the word’s use in other contexts.”).

29. Morris, *supra* note 3, at 73-80

30. Moore, *supra* note 16, at 104-88.

concept of desert itself is a meaningful or useful one for punishment theory.

The problem is that our notions of desert simply do not correspond to our notions of appropriate punishment. The source of this problem is that punishment is not an act of private moral condemnation, but an exercise of governmental power. Concepts that belong to the realm of personal morality, such as desert, may inform government policy at certain points, but they cannot be translated into that policy in the simple and direct manner that desert theorists assert.

To begin with, the concept of desert is much too broad, or over-inclusive.<sup>31</sup> Of course it would be nice if people got what they deserved, both good and bad. Children deserve to be loved by their parents, employees deserve to be treated with respect, no one deserves to get cancer, and everyone deserves to find romance. Conversely, those who withhold love from their children, cheat on a faithful, desperately ill spouse, treat their subordinates like dirt, or drive someone's family business into bankruptcy through aggressive business practices deserve moral condemnation. But most of these deserts occur, or fail to occur, outside the political system, that is, in the economic system, civil society or the natural world. The government would be incapable of providing or preventing them. For it to attempt to implement any significant proportion of these deserts would be a prescription for both inefficiency and totalitarianism.

Second, the concept of desert is too narrow, or under-inclusive. Desert-oriented retributivists regularly focus on the matter of blameworthiness; they argue that our intuitive desire to punish the cynical murderer, the serial rapist, the cutter-off of children's heads and dumper of them in garbage cans serves as the basis for criminal punishment of such actions.<sup>32</sup> As Oliver Wendell Holmes

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31. See John Braithwaite & Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* 157-60 (1990).

32. See, e.g., Moore, *supra* note 16, at 127-52 Moore goes further, and argues that these intuitions serve as a heuristic guide to moral truth.

and others have pointed out, this fails to distinguish between *malum in se* and *malum prohibitum* offenses.<sup>33</sup> We have strong intuitions about the government prohibition against murder, but do we have similar intuitions about the government prohibition against driving a taxicab without filing Form C8705.4?<sup>34</sup> Even if we can find some reason to assert that it is morally wrong not to file the form, is it more wrong than withholding love from one's child or treating one's employees like dirt? Surely not, yet criminal laws against these practices would be ill-advised, and arguably immoral in most people's view. More generally, virtually everyone, including St. Thomas and other proponents of natural law, recognize that the government may act for purely consequentialist reasons.<sup>35</sup> In order to make such consequentialist action effective, the

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33. Oliver Wendell Holmes, *The Common Law* 37-40 (Mark DeWolfe Howe ed., 1963). See Braithwaite & Pettit, *supra* note 31, at 159-60; David Dolinko, *Some Thoughts about Retributivism*, 101 *Ethics* 537 (1991).

34. In response to this critique, as articulated by Dolinko, *supra* note 33, Michael Moore concedes that this objection cannot be answered by invoking a general obligation to obey the law. See Moore, *supra* note 16, at 184. Apart from the inherent problems with this position, it would hardly serve Moore's purpose, since it would sever the connection between intuitive morality and law. Having made this concession, however, Moore has no response; the best he can do is to assert that any particular legal prohibition that we would treat as valid really is morally wrong. This is nothing more than the naïve intuitionism Moore claims that his theory avoids. See Alan W. Norrie, *Punishment, Responsibility, and Justice: A Relational Critique* 97-116 (2000).

Moore's response to a law forbidding morally good or morally neutral actions is equally unsatisfactory. Dolinko gives the example of an ordinance prohibiting the distribution of food to homeless people. Dolinko, *supra* note 33, at 557. Moore responds that "[s]uch offenders should not be punished." Moore, *supra* note 16, at 185. But this position implies some principle for rejecting democratically enacted laws that is many times more aggressive than anything the Supreme Court ever advanced at the height of the substantive due process era. The widely accepted approach to such laws under current constitutional doctrine is to uphold them unless they violate some identifiable right. The Court does so by requiring that the statute demonstrate only minimal rationality (maybe private food distribution creates health hazards, or interferes with the nutritional features of the food stamp program).

35. St. Thomas Aquinas, *Summa Theologica* 997-98 (Fathers of the English Dominican Province trans., 1981); see also *id.* at 1022. The only legal text in the Western tradition asserting that all positive law must reflect moral principles is *The Mirror of the Justices* (William J. Whittaker ed., 1895), traditionally attributed to the archivist Andrew Horn, originally a London fishmonger.

government must have the authority to punish people who resist. There is no reason to assume, moreover, that the consequential reasons cannot counterbalance the moral requirement to punish that retributionists would like to impose upon the government. Suppose, for example, that the passage of a law against driving without a seat belt would cause a social revolution?

What we mean when we speak of desert as a governmental policy is that the government should be guided by the principle of desert in those delimited areas where it has been authorized to act. Even in these areas, however, the concept of desert is both over-inclusive and under-inclusive. Does the government, in enacting a minimum wage law, or creating public housing, or enforcing a contract, really give the beneficiaries of these policies what they deserve? To be sure, it makes a determination that they deserve something, that they are in the class of employees, or disadvantaged persons, or contract promisees, but other considerations are generally invoked in order to craft the program in question. Similarly, does the government, in punishing people, really give them what they deserve? Even in our preternaturally punitive era, we decline to punish feckless evil-doers for attempts at the level that we punish their morally equivalent, and only pragmatically superior compatriots for their completed crimes.<sup>36</sup> Thus, desert is too broad a concept to serve as a primary principle for governmental action; rather, it functions as what Robert Nozick calls a side constraint on actions taken for another purpose.<sup>37</sup> In

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36. Many academics, particularly those oriented toward desert, argue that attempts should be punished just as severely. See, e.g., Feinberg, *supra* note 16, at 33; Gross, *supra* note 16, at 423-36; Sanford H. Kadish, Foreword: The Criminal Law and the Luck of the Draw, 84 *J. Crim. L. & Criminology* 679 (1994). See also Stephen J. Schulhofer, Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law, 122 *U. Pa. L. Rev.* 1497 (1974); Lawrence C. Becker, Criminal Attempt and the Theory of the Law of Crimes, 3 *Phil. & Pub. Aff.* 262 (1974).

37. Robert Nozick, *Anarchy, State, and Utopia* 26-35 (1974). Nozick uses the idea of side constraints as a description of rights. Desert is allied to rights because both concepts possess a relatively high moral content.

taking action, government should try to avoid giving people more benefits than they deserve, thereby avoiding “windfalls,” unjust enrichment, or outright corruption. Similarly, and more importantly, the government should strive to avoid subjecting people to more burdens than they deserve, thereby avoiding unnecessary injuries, unjust punishment, or outright oppression. Desert thus places boundaries on governmental action, but it does not provide a comprehensive principle for guiding it.

The use of desert in punishment theory illustrates this difficulty. Most proponents of desert, particularly those who link it to retribution, treat it a means of establishing fixed sentences<sup>38</sup> in place of the indeterminate sentencing that has prevailed since the Progressive Era.<sup>39</sup> In fact, the proliferation of alternative punishments worries some retributivists because it would complicate calculations of the amount of suffering that was imposed on the criminal.<sup>40</sup> But any serious use of desert as a guiding principle could not possibly lead to fixed sentences because so many factors must be considered in determining the offender’s desert. To be sure, the seriousness of the crime is one such factor, but there are many others as well—the background of the criminal, the provocation to which he was subjected, the amount of harm he actually caused, and the particular circumstances of the offense. Most people respond differently to Jean Valjean’s theft of some bread to feed a starving children<sup>41</sup> than they do to a jewelry thief who steals to buy fancy clothes. And most people would regard a parent who kills his child in a rage as different from a man who kills another in a barroom brawl. Whether

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38. See Morris, *supra* note 3; See also von Hirsch, *supra* note 28, at 98-106, who relies on the concept of desert, but avoids retribution.

39. On the evolution and proliferation of indeterminate sentencing, see David J. Rothman, *Conscience and Convenience: The Asylum and Its Alternatives in Progressive America* 43-81 (1980).

40. Andrew von Hirsch et al., *Punishments in the Community and the Principles of Desert*, 20 *Rutgers L.J.* 595 (1989); Martin Wasik & Andrew von Hirsch, *Non-Custodial Penalties and the Principles of Desert*, 1988 *Crim. L. Rev.* 555.

41. Victor Hugo, *Les Miserables* (Norman Denny trans., 1982).

disadvantaged circumstances affect the criminal's desert is more controversial, but while it is difficult to elicit sympathy for the disadvantaged criminal in our rather irate modern culture, it is easier to elicit antipathy for a privileged offender such as Michael Milken.<sup>42</sup>

The need to reflect these differential levels of desert can be partially satisfied by defining crimes more precisely and allowing for a wider variety of excuses, but there are likely to be many residual distinctions that would remain for the sentencing process. Besides, the proliferation of substantive crime categories to avoid indeterminate sentencing is a difficulty of its own, and increases the certainty of the sentencing process in the fact of varying desert by decreasing the clarity, and hence the certainty of the substantive criminal law. Most of the writers who favor desert, such as Morris and von Hirsch, do not really try to use it as a guiding principle for punishment, regardless of what they claim, but rather as a limiting principle, that is, a side constraint. The criminal, they say, should not be imprisoned for any longer period of time than he deserves; he must not be incarcerated past the time he deserves in order to incapacitate him from committing predicted crime, to deter others from committing crime, or to provide an additional opportunity for rehabilitation. That is certainly a valid point, but it involves only a limited use of desert, and bears virtually no relation to the concept of retribution.

Repayment and desert are not the only definitions of retribution to be found in the vast and ever-growing body of retributivist literature. Most of these other definitions, however, suffer from similar defects. Joel Feinberg, for example, proposes the Durkheimian idea that retributive punishment is a symbolic means of expressing disapproval and reprobation.<sup>43</sup> Jean Hampton argues that it responds to the criminal's degradation of the victim,<sup>44</sup> while Herbert Morris, Michael Davis, and others assert that it responds to

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42. See James B. Stewart, *Den of Thieves* 379-443 (1991).

43. Feinberg, *supra* note 16.

44. Hampton, *supra* note 16.

the criminal's willingness to take unfair advantage of another person.<sup>45</sup> But imprisonment is as loosely connected to Feinberg's idea of symbolic disapproval as it is to repayment. Public whipping would be a natural way to satisfy his concept of retribution, or, if one is squeamish, verbal excoriation, compelled apology, and badges of infamy. It seems odd to express symbolic disapproval by locking the criminal away in an isolated institution.<sup>46</sup> The idea that retribution is responding to actions that degrade the victim, or take unfair advantage of him, as Hampton, Morris, and Davis propose, suffers from the same difficulty as desert in being much too generalized. People often degrade or take advantage of others, but many of these actions are not crimes, or even torts. Would we want to put Anna Nicole Smith in prison because she married a sickly old man so that she could inherit his money? Or suppose a foreman fires a person from his job for incompetence, in front of all his colleagues, because the person has come up with an innovation and the foreman wants to take credit for it with the management? This degrades and takes advantage of the other person, but it is not a crime, it is probably not a tort, and it may not even be an unfair labor practice. On the other hand, starting a fight with a person may be an expression of machismo respect, but it is also the crime of assault.

*B. Recidivist Statutes As an Illustration of Retributivism's Incoherence*

The incoherence of retribution, as a theory of punishment, is illustrated by retributivists' efforts to

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45. Davis, *supra* note 16; Morris, *supra* note 16. See also Murphy, *supra* note 16; Sher, *supra* note 16; Sadurski, *supra* note 16.

46. Regarding the gradual removal of torture and punishment from public view during the course of the past millennium, see David Garland, *Punishment and Modern Society: A Study in Social Theory* 216-25 (1990); Petrus Cornelis Spierenburg, *The Spectacle of Suffering: Executions and the Evolution of Repression* (1984). Their work is based on Norbert Elias's the general theory about the progressive refinement of culture. See Norbert Elias, *The Civilizing Process* (Edmund Jephcott, trans. 1994).

justify recidivist statutes under their theory. A recidivist statute is any legal provision that prescribes a heavier penalty, more specifically a longer prison sentence, for a given criminal offense if the offender has previously committed that offense or another criminal offense.<sup>47</sup> These statutes are legion in American criminal law, and any theory that was unable to justify them would thereby undermine its own validity in many people's eyes. Retributivists seem particularly fond of them, perhaps because they are pre-analytically committed to the idea of being tough on crime, and believe they can justify them in terms of their theory.

In fact, if retributivism has any meaning at all, it would prohibit retributivist statutes, as Wojciech Sadurski and Mark Tunick have argued.<sup>48</sup> The whole point of retributivism is to establish a direct correspondence between the criminal's act and the punishment imposed, without allowing offender-based considerations such as dangerousness, potential for rehabilitation, or the possibility of deterrence to intervene. An assault on someone is just as bad if done by a first time offender as it is if done by someone who has previously held up a dozen liquor stores, or even engaged in a dozen previous assaults. The victim is just as badly hurt as he would have been had his assailant had a prior record, and the offender's actions are just as blameworthy. To say that the multiple offender should be punished more severely is to say that the first time offender should be treated more leniently, and that does not sound much like repayment, desert, or any other form of retributivism.

Efforts by retributivists to justify recidivist statutes are remarkably unconvincing. Von Hirsch gives two reasons: first, that only after someone is convicted for a particular action does he really recognize that this action is forbidden,<sup>49</sup> and second, it is only after a person has done

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47. The original offense is called the predicate offense, and the subsequent one that receives the higher penalty is called the triggering offense.

48. Sadurski, *supra* note 16, at 255; Tunick, *supra* note 16, at 154.

49. Von Hirsch, *supra* note 28, at 85. As it may seem difficult to believe that

the action a second time that we can really be certain, given the uncertainties of criminal procedure, that he really intended to do it.<sup>50</sup> This is one of the rare arguments that can be refuted simply by being repeated and, in fact, von Hirsch subsequently withdrew it.<sup>51</sup> Michael Davis, acknowledging the weakness of von Hirsch's position, proposes a justification based on his unsupportable idea that retributive theory can be grounded on the fact that the criminal takes unfair advantage of his victim.<sup>52</sup> Recidivists should be punished more severely, he suggests, because they have had two chances to take advantage of people before others had even one.<sup>53</sup> Even if one can accept

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anyone would actually advance this argument, it needs to be quoted at length:

In assessing a first offender's culpability, it ought to be borne in mind that he was, at the time he committed the crime, only one of a large audience to whom the law impersonally addressed its prohibitions. His first conviction, however, should call dramatically and personally to his attention that the behavior is condemned

Aside from the intrinsic implausibility of the idea that criminal law requires a conviction to communicate its real message, the problem with this rationale is that it only applies to a recidivist statute that punishes the offender more severely for having committed the very same offense again, whereas most such statutes provide that any serious felony serves as a predicate offense.

50. *Id.* at 85-86:

With an instrument as crude as the fact-finding process of the criminal law, the degree of culpability of the defendant is a judgment in which one seldom can have great confidence in any single instance . . . . It is hard to be certain in a single situation, but with each repetition, the ascription of culpability can be made with a little more confidence.

Of course, if the first conviction is intrinsically a matter of such uncertainty, one might wonder how it could be imposed in a system that claims to require proof beyond a reasonable doubt .

51. Von Hirsch et al., *supra* note 40

52. Davis, *supra* note 16, at 46-52. It is unsupportable because only a small number of the cases where one person takes unfair advantage of another could conceivably be regarded as crimes. Conversely, there are many crimes that do not fit Davis's description, such as taking drugs, gambling or failing to file for GR-732.1(c), unless one stretches the idea of unfair advantage past all recognition.

53. *Id.* at 51. Again, quotation at length is required for credibility.

The recidivist deserves punishment, if he deserves punishment, because committing another crime after he has been convicted of others takes an advantage a first offender would not take just by committing the same "underlying" crime. It is perhaps analogous to going back for seconds when not everyone has had a first helping.

For another formulation of this thought, see *id.* at 135.

Davis's underlying conceit that crime is a sort of goody which everyone would avail themselves of unless prevented, it is unclear, on desert grounds, why getting another goody should be punished more severely if one has already been fully punished for getting the first.

The convoluted nature of these arguments strongly suggests that recidivist statutes simply cannot be justified in retributivist terms. In contrast, their justification under utilitarian theories of punishment is apparent. From the rehabilitation perspective, a recidivist requires a longer sentence because he has not been rehabilitated by his initial one. From the incapacitation perspective, he requires a longer sentence because he has demonstrated that he is an habitual criminal who will offend again once he is released. In terms of special deterrence, he requires a longer sentence because he was obviously not deterred by the shorter one to which the general populace was subject. Finally, there is a fairly good, albeit more indirect argument for recidivist statutes under general deterrence theory. If one assumes that a large proportion of crimes are committed by a relatively small number of habitual criminals, a recidivist statute raises the stakes for part of this unusually crime-prone group, namely, those who have already been convicted once.

Precluded from relying on these obvious arguments, recidivists have resorted to convoluted ones such as von Hirsch's surpassingly weird argument that the criminal really does not know that his action is forbidden until he has been given the message by means of an original conviction. The tendency to do so further illustrates the theory's lack of meaning. Retribution, understood as either

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The recidivist is to be thought of as someone who, having bought one or more licenses [to take advantage of others with impunity] on one or more previous days, returns to buy again. The recidivist may be distinguished from the (ordinary) multiple offender. The multiple offender is to be thought of as someone who buys more than one license on a single day.

Remarkably, Davis regards this explanation of recidivist statutes as the crucial argument for demonstrating that his theory of advantage taking is morally superior to *lex talionis*. See *id.* at 51 ("Recidivist statutes provide a clear example of the superiority of the unfair-advantage principle over *lex talionis*.").

repayment, desert, or any of the other formulations offered by its proponents, provides little guidance for the design of a criminal punishment system. Fashionable though it may be, the term does not tell us how to deploy the one sanction that we rely upon to punish virtually all serious crimes, namely incarceration. The Old Testament sound and medieval connotations of retribution may appeal to some people as a return to virtue, but they also signal the inapplicability of the concept to contemporary problems of governance.

*C. What Does Retribution Signify?*

This lack of meaning does not leave retribution without significance, however. It represents a mood, a deeply-felt desire to dispense with utilitarian arguments for punishment and return to punishment per se. In doing so, it effectively captures current anger about crime. The problem is that the mood it expresses is inconsistent with the underlying principles of our governmental system. It sometimes hearkens back to the rack and screw, the stocks and pillory, but always to a conception of government in general that we no longer accept.

A standard criticism of retributivism is that it is merely a form of revenge, an emotive, atavistic response to wrongdoing that has no place in a modern state.<sup>54</sup> In response, Robert Nozick argues that the two are distinct because revenge is personal, whereas retribution is institutional.<sup>55</sup> It is certainly fair to suggest that many modern retributivists, including Michael Davis, Joel

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54. See Susan Jacoby, *Wild Justice: The Evolution of Revenge* 4-6 (1983); Andrew Oldenquist, *The Case for Revenge*, 82 *Pub. Int.* 72 (1986); Robert C. Solomon, *Justice and the Passion for Vengeance*, in *What Is Justice: Classic and Contemporary Readings* 292 (Robert C. Solomon & Mark C. Murphy ed., 1990). Holmes describes retribution as "vengeance in disguise," *supra* note 33, at 39, but is willing to contemplate its inclusion as a partial basis for punishment. For a contemporary version of this argument, see Charles K.B. Barton, *Getting Even: Revenge As a Form of Justice* (1999).

55. Nozick, *supra* note 16, at 367. See also Barton, *supra* note 54, at 52-69; Kleinig, *supra* note 16.

Feinberg, and Jean Hampton, are talking about institutional responses to crime, and are free of the desire to exact revenge on criminals.<sup>56</sup> On the other hand, subtle philosophical distinctions of this sort may not be available to the ALI in drafting a Model Penal Code. While the Code is certainly a work of scholarly significance, its intended and actual audience consists of busy policymakers who are more attuned to public perceptions than to academic refinements. The term retribution smolders with the spirit of revenge and the ALI would be deluding itself to assume that it could be sanitized by philosophic argument.

Suppose, however, one were to give the proponents of a retributivist Code the benefit of a very considerable doubt and allow them to separate retribution from revenge. What would remain is the idea of institutional condemnation, an exercise of moral judgment by the state. Retributivists, whatever their differing views, seem united in their rejection of the treatment model of punishment, and insist that society use the criminal justice system to condemn the criminal for doing wrong. This element of moralism cannot be separated from retributivism, and most retributivists would not want to do so. It represents the essential connotation of the concept, the significance that remains once repayment, desert, and the various other formulations are discarded as unhelpful.

But moralism, in this sense, is inconsistent with the underlying conception of our government, the conception that the Framers of the Constitution embodied in that document and in the structure of our government.<sup>57</sup> One

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56. None are quite as free of this, however, as von Hirsch, who joins these writers in favoring desert but abjures the term retributivism. Von Hirsch, *supra* note 28, at 45.

57. This is not intended as an originalist argument. The conception of our government has changed, and constitutional courts should not strike down emergent governmental mechanisms that respond to those changes on the grounds that they do not correspond to eighteenth-century practice. Besides, eighteenth-century practice is not easy to discern, and the lawyer's tendency to seize on a particular document, without recognizing its context, can lead to real error. See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996). An egregious example related to the subject under discussion is provided by Justice Thomas's dissent in *Helling v. McKinney*, 509

component of this basic conception was the rejection of the idea that the government should be a moral instructor of its subjects, that it should educate and improve the populace, or that it should possess an autonomous moral agenda. The Framers were children of the Enlightenment,<sup>58</sup> and nothing was more antithetical to Enlightenment thought than the idea of a moralistic state. As Peter Gay writes, “the philosophes saw society no longer as a family of God’s children dependent on paternal direction and approval.”<sup>59</sup> “[T]heir conception of the state,” he continues, “was utilitarian: governing authorities and institutions justify themselves not by an appeal to religious or historical sanctions but by the effectiveness with which they perform their assigned task, which is to minimize pain and maximize pleasure.”<sup>60</sup> On the specific subject at issue, Beccaria, in the most influential book on criminal law and punishment of the eighteenth century, insisted that the sole purpose of punishment is to prevent crime, and not to exact revenge.<sup>61</sup> Thus, according to the Enlightenment mentality that inspired the American revolutionaries, deterrence, incapacitation and rehabilitation are all acceptable motivations for punishment, as they are utilitarian

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U.S. 25, 37-40 (1993). Thomas asserts that if the Eighth Amendment had been meant to apply to conditions of confinement in prison, the Framers could have said so, since some of the state constitutions of the time referred to conditions of confinement in jail. What he overlooks, of course, is that jail is different from prison, and that the Framers could not very well have referred to prison because there were no prisons at the time.

The emphasis here is on the Framers’ basic conception, and the point is that this conception is worth attending to, although it should not be taken as definitive for our present situation.

58. Bernard Bailyn, *The Ideological Origins of the American Revolution* 26-30 (enl. ed. 1992); Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 3-10, 97-107 (1969) [hereinafter Wood, *Creation*]; Gordon S. Wood, *The Radicalism of the American Revolution* 189-212 (1991) [hereinafter Wood, *Radicalism*]; Rakove, *supra* note 57, at 18-19; Thomas J. Schlereth, *The Cosmopolitan Ideal in Enlightenment Thought, Its Form and Function in the Ideas of Franklin, Hume and Voltaire, 1694-1790* (1977); Garry Wills, *Cincinnatus: George Washington and the Enlightenment* (1984).

59. 2 Peter Gay, *The Enlightenment: An Interpretation* 398 (1969).

60. *Id.* at 401.

61. Beccaria, *supra* note 4.

principles geared toward preventing future crimes, but retribution represents the sort of governmental moralism that is to be avoided, and indeed condemned.

This Enlightenment approach to government was embodied in the Framers' idea that sovereignty resided with the people, not the government.<sup>62</sup> Government was only legitimate to the extent that it reflected the people's desires and served their purposes; it was the people who are supposed to instruct the government, not the government that is supposed to instruct the people. For this reason, all government officials, and not merely those who were directly elected, were conceived as the people's representatives;<sup>63</sup> they were in office to serve the will of the sovereign people, not to use their own wisdom or to communicate God's wisdom to their subjects.<sup>64</sup> Thus, government was to be designed as an instrumentality, a complex mechanism whose imbricated components would divide power among themselves and counteract each other.<sup>65</sup> As Madison said in *Federalist* LI, liberty is to be secured "by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."<sup>66</sup> The overriding idea was that the government was an unruly servant, to be controlled by various stratagems to ensure that it served its master in the intended manner. There is nothing in this conception to suggest that government should be a source of morality, that it is authorized to protect its dignity, instruct its

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62. Bailyn, *supra* note 58, at 198-229; Wood, *Creation*, *supra* note 58, at 344-89.

63. Rakove, *supra* note 57, at 203-43; Wood, *Creation*, *supra* note 58, at 596-600

64. This is not to suggest that God was irrelevant to most of the Framers, but rather that they maintained the Protestant position that individuals, not institutions, possessed access to God, and that the purpose of institutions, here as elsewhere, was to serve the purposes of individuals.

65. See Michael G. Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (1986).

66. *The Federalist* No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961).

subjects, or impose the retribution that eighteenth-century people would have regarded as reserved to the Almighty.

Retributivists tend to cite Kant in support of their position,<sup>67</sup> but Kant espoused a strictly contractarian theory of the state,<sup>68</sup> and thus, like Madison, regarded the state as an instrumentality, not a source of moral judgment. As Mark Tunick observes, he distinguished between private morality and governmental action, and saw the primary purpose of governmental punishment as deterrence.<sup>69</sup> Modern retributivism owes its real intellectual origins to Hegel.<sup>70</sup> It was Hegel who argued that crime is an act of will by the criminal, an act which takes advantage of the victim, and that this act must be negated by punishment.<sup>71</sup> As he explains, “[t]he annulment of the crime is retribution in so far as (a) retribution in *conception* is an ‘injury of the injury,’ and (b) since as existent a crime is something determinate in its scope both qualitatively and quantitatively, its negation as *existent* is similarly determinate.”<sup>72</sup> Hegel was a contemporary of Madison, but his conception of the state could not have been more divergent. For Hegel, the state is the source of all true human freedom; it is not a delimited contract among free individuals but the expression of Right and the embodiment of higher authority.<sup>73</sup> Retribution fits well

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67. See, e.g., Barton, *supra* note 54, at 96; Antony Duff, *Intention, Agency, and Criminal Liability: Philosophy of Action and the Criminal Law* (1990); Feinberg, *supra* note 16; Hampton, *supra* note 16; Morris, *supra* note 20; Jeffrie Murphy, *Marxism and Retribution*, in *Punishment 3* (A. John Simmons et al. eds., 1995); Sadurski, *supra* note 16, at 225; von Hirsch, *supra* note 28, at 47-49.

68. Immanuel Kant, *The Metaphysics of Morals* §§ 43-52 (Mary Gregor trans., 1996).

69. Tunick, *supra* note 16, at 94-102.

70. Barton, *supra* note 54, at 96; Hampton, *supra* note 16, at 15. Most modern philosophers would prefer to cite Kant, of course, at least in matters that involve political life. For a particularly striking example, see Murphy, *supra* note 67. Murphy begins from Marx's position on punishment, and then justifies that position with a discussion of Kant's philosophy. But Marx would have had Hegel in mind, not Kant.

71. Georg Wilhelm Friedrich Hegel, *Philosophy of Right* §§ 90-104 (T.M. Knox trans., 1967).

72. *Id.* § 101.

73. *Id.* §§ 257-271. See Frederick Neuhouser, *Foundations of Hegel's Social*

within this statist theory because a state that possesses such authority can clearly engage in moralistic treatment of its citizens. As Hegel says, in rejecting Beccaria's approach to punishment, "the state is not a contract at all . . . nor is its fundamental essence the unconditional protection and guarantee of the life and property of members of the public as individuals. On the contrary, it is that higher entity which even lays claim to this very life and property and demands its sacrifice."<sup>74</sup> This conception of government has exercised an undeniable appeal, but it is entirely antithetical to our own.

None of this is meant to suggest that morality is irrelevant to modern government. Weber was worried that this would be the case, that the bureaucratic state would lock itself in an iron cage of purposeless instrumentalism.<sup>75</sup> But as Habermas points out, an instrumentalist state is one that abjures generating its own morality, not one that is necessarily foreclosed from following moral precepts generated by another source.<sup>76</sup> In fact, the government's instrumentalism, the principle that its only purpose is to serve the public's interests, empowers citizens to provide moral direction to the government by placing the government at their service.<sup>77</sup> Such external direction,

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Theory: Actualizing Freedom 114-44 (2000); Charles Taylor, Hegel 428-61 (1975); Kenneth Westphal, The Basic Context and Structure of Hegel's Philosophy of Right, in *The Cambridge Companion to Hegel* 234 (Frederick C. Beiser ed., 1993).

74. Hegel, *supra* note 71, § 100.

75. Max Weber, Parliament and Government in a Reconstructed Germany, in Max Weber, *Economy and Society: An Outline of Interpretive Sociology* 1381 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff trans., 1978). See also Max Weber, *The Protestant Ethic and the Spirit of Capitalism* 176-83 (Talcott Parsons trans., 1958)

76. 1 Jürgen Habermas, *The Theory of Communicative Action* 216-71 (Thomas McCarthy trans., 1984)

77. Habermas writes:

The positivization, legalization, and formalization of law mean that the validity of law can no longer feed off the taken-for-granted authority of moral traditions but requires an autonomous foundation . . . . It is here that there first emerges the idea that legal norms are in principle open to criticism and in need of justification . . . . The model for justifying legal norms is an uncoerced agreement, arrived at by those affected, in the role of contractual partners who are in principle free and equal.

which we generally associate with the formation of public policy, is very different from the judgmental, moralistic government that retributivist theories necessarily imply.

It might be argued that retributive punishment could still find a place in the American conception of government because government is supposed to express the moral sentiments of the people. Once one relies on the sentiments of the people, however, the fragile partition between retribution and revenge collapses. Retribution is supposedly distinguishable from revenge because it is institutional, not personal, because it reflects a considered philosophical position, not the passions of the populace. But if the institution's justification for action is that it is reflecting the popular morality, then it is simply acting as a transmission belt for the anger of the multitudes, and will possess all the philosophical detachment of an angry bumble bee.

One could, of course, embrace revenge as a principle of punishment, or argue that people's vengeful instincts are somehow transformed into non-vengeful retribution when they act en masse. Neither of these arguments makes retribution any more consistent with the underlying conception of our polity. If there was one thing the Framers feared as much as a government that was oblivious to the people's desires, it was one that was too responsive to their passions.<sup>78</sup> A well-constructed government, Madison argued, was one that could control faction, which he defined as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."<sup>79</sup> When such a faction consists of a minority of citizens, he continued, its oppressive tendencies will be controlled by the majority. "When a

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Id. at 260-61 (italics omitted). For a more extended discussion of this view, see Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg trans., 1996).

78. Rakove, *supra* note 57, at 49-51; Wood, *Creation*, *supra* 58, 499-506

79. *The Federalist* No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.”<sup>80</sup> On this basis, Madison and the other Framers rejected direct democracy and opted for a complex representative system, with state legislatures, an electoral college, a judiciary, and a variety of other mechanisms interposed between the people and the government that was designed to serve them.

It would be difficult to think of a more dramatic example of faction, in Madison’s sense, than the majority of law-abiding citizens, who are united by their common rage at criminals, and willing to sacrifice the rights of those whom they detest. Is there any doubt, given our nation’s current mood, that many of the procedural protections with which those accused of crime are now provided would fall without constitutional protection? Only these protections guarantee that suspected criminals will not be coerced to confess, forced to testify against themselves, and convicted without juries or proof beyond a reasonable doubt.<sup>81</sup> The most notable gap in this system of protection is that the Bill of Rights, as interpreted by the courts, does not place any real limits on the length of sentences,<sup>82</sup> and here, as

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80. *Id.* at 80.

81. In theory at least. In practice, most criminal cases are resolved by plea bargains, where these protections are nowhere in sight.

82. See *Ewing v. California*, 123 S. Ct. 1179 (2003) (upholding 25 year to life sentence for recidivist convicted of stealing three golf clubs); *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003) (upholding twenty-five year to life sentence for non-violent recidivist convicted of stealing \$150 of videotapes); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding life imprisonment without the possibility of parole for possession of a little more than one pound of cocaine); *Hutto v. Davis*, 454 U.S. 370 (1982) (*per curiam*) (upholding forty year sentence for possession and distribution of small quantities of marijuana); *Rummel v. Estelle*, 445 U.S. 263 (1980) (upholding life sentence for non-violent recidivist convicted of passing a forged check for \$120). The one principal exception is *Solem v. Helm*, 463 U.S. 277 (1983), which struck down a sentence of life imprisonment without the possibility of parole for a non-violent recidivist who passed a \$100 bad check. The rationale for this decision is that the Eighth Amendment contains a “principle of proportionality.” *Id.* at 286. This principle, however, seems to have become attenuated to the point of disappearance by the subsequent decisions.

Madison predicted, the passions of the majority have reigned unchecked.

Some day, perhaps, the courts will see things differently; for now, we must rely on arguments of policy. From that perspective, it is surely inconsistent with the underlying concept of the Framers to authorize the government to express the anger of the populace through a policy of retributive punishment. Government is supposed to interpose itself between popular passion and public policy in our system. Instead of expressing the anger of the people, it is supposed to respond to that anger by rational, effective policies designed to remove its cause. In the context of criminal punishment, it is supposed to develop a utilitarian strategy to minimize crime, or, more precisely, minimize the harm that crime inflicts,<sup>83</sup> by deterring, incapacitating and rehabilitating the criminal, not by squandering valuable tax dollars on draconian sentences that respond to public anger.

Whether the Framers relied on separation of powers or federalism to achieve the internal controls on government that they desired has been a matter of some controversy. If they did, however, there can be little question that the advent of a national, administrative state has put enormous pressure on these mechanisms.<sup>84</sup> But the administrative state strongly amplifies underlying idea that the state is itself a utilitarian mechanism, that it is in its entirety an instrumentality to serve the needs and desires of the people. Given the vast authority and impact

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83. See *Minimizing Harm: A New Crime Policy for Modern America* (Edward L. Rubin ed., 1999).

84. See, e.g., Samuel Hutchison Beer, *To Make a Nation: The Rediscovery of American Federalism* (1993); Erwin Chemerinsky, *A Paradox Without a Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 *S. Cal. L. Rev.* 1083 (1987); E. Donald Elliot, *Why Our Separation of Powers Jurisprudence is So Abysmal*, 57 *Geo. Wash. L. Rev.* 506 (1989); Feeley & Rubin, *supra* note 11, at 171-203, 311-35; Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *Harv. L. Rev.* 1231 (1994); Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (1982); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *Colum. L. Rev.* 573 (1984).

of the modern state, granting it the authority to engage in moral reprimands seems like a highly dangerous strategy, an invitation, at least in theory, to totalitarianism. The USSR, after all, undertook precisely the task of moral education of its citizenry, expressing its moral condemnation of religion and private enterprise in its effort to produce Socialist Man.<sup>85</sup> One might object that retributivism reserves its moral condemnation for criminals but, then again, the Soviet Union declared religion and private enterprise to be serious crimes.<sup>86</sup> Without reference to outmoded and ultimately incoherent notions of natural law, it would be impossible to construct some theory that would distinguish the crimes that American retributivists want to condemn from those condemned by the USSR's equally moralistic and retributivist approach. Far better to remove the weapon of moral condemnation from the modern state, and insist that its actions, particularly its most severe actions, be justified by some demonstrable benefit for its citizenry.

*D. Proportionality: The Alternative to Retribution*

The Plan for Revision's rationale for jumping on the bandwagon of retributivism seems entirely creditable. It seeks to use the retributivist principle to limit the excessively long sentences that supposedly resulted from offender-based theories of punishment such as rehabilitation and deterrence. Of course, the drafters of the Plan might have derived some sense of caution from the fact that sentences have increased dramatically in length since rehabilitation and deterrence were replaced by retribution. In any event, the considerations in the three foregoing sections suggest that retribution is an incoherent, normatively invalid, and extremely dangerous theory to rely upon in order to develop a rational and equitable

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85. See Sheila Fitzpatrick, *Everyday Stalinism: Ordinary Life in Extraordinary Times: Soviet Russia in the 1930s*, at 75-79 (1999).

86. *Id.* at 40-66; János Kornai, *The Socialist System: The Political Economy of Communism* 62-90 (1992).

sentencing policy. All the results that the Plan attempts to achieve with retribution, and all the necessary constraints on offender-based approaches such as rehabilitation and deterrence, can be achieved through the principle of proportionality.

Proportionality, of course, is not a comprehensive theory of punishment. Unlike retribution, deterrence, incapacitation and rehabilitation, it does not tell us why we should punish offenders, or what the moral justification is for doing so. But it does serve as a limiting principle for punishments that are justified by these comprehensive theories. In particular, it serves to limit the punishments prescribed by utilitarian or instrumental theories of punishment, such as deterrence, incapacitation, and rehabilitation. It is what Nozick called a side-constraint on governmental action.<sup>87</sup> The point, in other words, is that we do not need to move to a different theory of punishment to avoid the oppressive implications of our previously accepted theories. Proportionality, as a subsidiary principle of punishment, provides all the limitation that we need.

The reason that proportionality works, and indeed works extremely well, is the result of a distinctive feature of our punishment system. This feature is that the only severe penalty we find acceptable, aside from the very small number of criminals eligible for the death penalty, is imprisonment. We are no longer willing, as a society, to use corporal punishment, mutilation, enslavement, transportation, banishment, or outlawry as a punishment for serious crimes. Either we imprison the criminal or we impose a fine, which is generally recognized as a lesser penalty. The contemporary search for alternatives to incarceration has led to the use of treatment programs, boot camps, house arrest, and other innovations. Most of these, however, are voluntary, and thus need not be addressed in this discussion. If the criminal, faced with a justly measured term of imprisonment, can choose an

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87. Nozick, *supra* note 37, 26-35.

alternative sanction, he can decide for himself whether the alternative is proportionate.

Because we rely almost exclusively on imprisonment for serious offenses, the proportionality principle can be used easily and effectively. All we need to do is to grade offenses according to their seriousness. This can be done on whatever basis the criminal justice system deems appropriate: the intrinsic depravity of the act, what the act indicates about the depravity of the criminal, or the amount of harm inflicted. Having graded offenses in this way, we can match them with punishments, since terms of imprisonment are readily graded by the univalent criterion of temporal length. The longest possible prison sentence is life imprisonment and the shortest is one night. Thus, the most serious non-capital offense should be punished with a term of life imprisonment, and the least serious offense for which prison is appropriate should receive the one night sentence. All other offenses can then be ranged along this continuum.

While this principle of proportionality cannot be used with mathematical precision, it does provide a considerable amount of guidance in sentence determination, certainly more than inaccurate analogies to repayment or vague invocations of desert. For example, if we regard violent offenses as more serious than offenses against property, it tells us violent crimes should carry longer sentences. It tells us that grand larceny should be punished with a longer sentence than petty larceny, that assault with a deadly weapon should be punished with a longer sentence than simple assault, and that intentional homicide should receive a longer sentence than negligent homicide.

Proportionality is a relativist principle of course; it will not give us the proper sentence for a single offense. It does, however, provide the means for constructing a catalogue of punishments, which is precisely what we need for a state criminal code, and thus for the Model Penal Code. Repayment and desert do not give us the proper sentence for a single offense either. Precisely what is the criminal supposed to pay for an armed robbery? And precisely what

does the criminal deserve? The problem is that these constituents of retribution and the concept of retribution itself not only fail to specify the punishment for particular offenses, but they also fail to provide us with a relative scale. They are absolute in nature; that is, they claim to establish a one-to-one correspondence between an offense and a punishment. As a result, they provide no more guidance in constructing a catalogue of punishments than they do in assigning individual ones, unless we cheat and add interject the principle of proportionality.<sup>88</sup>

This is exactly what von Hirsch does in his influential Report of the Committee for the Study of Incarceration. He begins with the Sellin-Wolfgang study,<sup>89</sup> which asked a group of judges, police officers, and college students to rank the seriousness of offenses on an eleven-point scale.<sup>90</sup> He then proposes to match this scale against length of incarceration. Michael Davis, a self-declared retributivist, follows the same approach; he suggests the construction of a ranked list of penalties and a ranked list of crimes, and then states that “we should [c]onnect the greatest penalty with the greatest crime, the least penalty with the least crime, and the rest accordingly.”<sup>91</sup> In these procedures, the concepts of repayment, desert, and retribution do no work whatsoever, despite the declared intentions of the authors. At no point do they establish a one-to-one correspondence between any crime and any punishment on the basis of how much the criminal should repay, or how much he deserves, or how much he should be retributed against.<sup>92</sup> The only operative principle is proportionality.<sup>93</sup>

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88. See Braithwaite & Pettit, *supra* note 31, at 174-80.

89. Johan Thorsten Sellin & Marvin E. Wolfgang, *The Measurement of Delinquency* (1964). A follow-up study conducted as an adjunct to the National Crime Survey asked some 60,000 people to rank twenty-five crimes on a scale that was anchored by an arbitrary value of ten for bicycle theft. Marvin E. Wolfgang et al., *The National Survey of Crime Severity* (1985).

90. Von Hirsch also relies on a follow-up study by Peter Rossi. Peter H. Rossi et al., *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 *Am. Soc. Rev.* 224 (1974).

91. Davis, *supra* note 16, at 78. Davis does not refer to any of the survey data.

92. Rossi and Berk carried out a study for the U.S. Sentencing Commission where they did establish such one-to-one correspondences. Peter Henry Rossi &

Given the fact that these authors are really relying on proportionality, it seems much better to use that principle on its own, rather than bringing with it all the normative problems of retribution. This point is well illustrated by recidivist statutes. As noted above, utilitarian theories provide obvious rationales for recidivist statutes; the problem is that they do not suggest any inherent limit on the length of the sentence that can be imposed on a recidivist, just as they fail to provide an inherent limit on the length of the initial sentence. To obtain such limits, one must invoke the principle of proportionality. This would suggest that the length of the enhanced sentence must bear some relationship to the seriousness of the triggering offense, and that draconian punishments for recidivism itself, as an act abstracted from any particular crime, are disproportionate.

To take the example offered by the recent case of *Lockyer v. Andrade*,<sup>94</sup> the penalty for stealing a videotape should fall somewhere below the penalty for violent crimes such as rape, attempted murder, and assault with a deadly weapon. It should also fall below bank robbery and grand larceny. Permitting a sentence of twenty-five years to life for stealing a videotape offends the principle of proportionality; it is genuinely cruel and unusual to destroy a person's entire life for commission of a petty crime. But suppose the person continues stealing videotapes, suppose he cannot be rehabilitated, incapacitated or deterred by the proportionate sanction for this minor crime? One solution, consistent with the principle of proportionality, is that his sentence could be increased by some multiplier, such as 50

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Richard A. Berk, *Just Punishments: Federal Guidelines and Public Views Compared* (1997). These correspondences were created by means of an empirical survey, however, rather than a theory; 1500 people were given 42 vignettes describing a federal crime, and asked to set a punishment.

93. Morris does not propose two coordinated scales, and his discussion remains at an abstract level. Morris, *supra* note 3, at 73-77. But he also relies on the concept of proportionality. He states: "The link between established crime and deserved suffering . . . is a central precept of everyone's sense of justice or, to be more precise, everyone's sense of injustice." *Id.* at 75.

94. *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003).

or even 100 percent, to deter him or others from such repeated actions. Another is that he could receive the same sentence that he would have received for stealing several videotapes, on the theory that he has given evidence that he will continue committing this or similar offenses.<sup>95</sup> But these enhanced sentences should still bear some relationship to the actual harm inflicted; to treat recidivism itself as the most serious possible offense, regardless of the actual crimes that the repeat offender has committed, is monstrous.

Thus, the principle of proportionality operates in conjunction with utilitarian theories of punishment to produce a just result. There is no need to resort to retributivism. Retributivism, or at least the just deserts aspect of retributivism, might seem to provide similar limits on recidivist statutes. In fact, as described above, it provides no limits at all, since recidivist statutes cannot be justified in retributivist terms. The only way to incorporate recidivist statutes into a retributive theory is to rely on the essential incoherence of retributivism, and construct fantastic arguments such as the ones described above. But assuming one ignores this inconvenient difficulty, the problem with using retributivism as a source of limitation is that it imports all the vengeful or moralistic baggage of retributivism into the punitive calculus. The predictable result is morally offensive statutes like the California three-strikes-and-you're-out law.

Reliance on retributivism, with its unfortunate implications, is entirely unnecessary. The principle of proportionality provides a simple, readily justified means of limiting the reach of the recidivist statutes that are

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95. Suppose, for example, that Andrade is deemed to be an incorrigible video tape thief, that the law presumes that he will immediately steal videotapes upon his release from prison. If he were given a proportionate sentence for each individual act, say, one year in prison, he would thus be stealing videotapes every year, which, at the level of his triggering offense, means \$150 worth. His twenty-five year sentence thus protects society from a potential \$6,000 loss. Would it be proportional to imprison a person for twenty-five years for stealing property worth \$6,000, particularly when those convicted of rape, assault, or manslaughter for the first time receive shorter sentences?

justified by utilitarian theories of punishment. With respect to these statutes, as with punishment in general, it serves as a side-constraint on governmental action. Perhaps there may seem to be some aesthetic problem with invoking the independent principle of proportionality to temper the effects of utilitarian theories of punishment. But that is generally the structure of human rights considerations. Freedom of speech is not an inherent feature of a government's economic and social policy; rather, it acts as a constraint of the way such policies are carried out.

Retributivism attempts to dispense with this structure of rights by articulating a theory of punishment which is inherently constrained. But it is merely taking advantage of its own incoherence to suggest that the constraints are inherent in the theory. In fact, these constraints come from the principle of proportionality, an independent principle that must be invoked to temper and control other theories of punishment. For utilitarian theories of punishment such as deterrence, incapacitation, and rehabilitation, the independence of proportionality is apparent, because these are coherent theories that include certain arguments and exclude most others. Retributivists can smuggle the principle of proportionality into their theory because their theory, being incoherent, has no natural boundaries. But ultimately, it is this principle that is doing the work, and it is the only one we need to place constraints on the length of prison sentences. There is no need for the Model Penal Code to join the retributivist parade.

### III. ACKNOWLEDGING THE PRESENT CRISIS

The second avoidable error that the Model Penal Code committed in its punishment provisions was to ignore the most flagrant correctional abuse of its day. That abuse was the conditions of confinement in American prisons, and specifically in Southern prisons that were modeled on the slave plantation. Well-meaning declarations that every prison should strive to rehabilitate its inmates ring hollow

in light of the barbaric conditions that prevailed in the South's plantation-model prisons, and of many prisons in the North as well. Had the Code taken cognizance of this well known situation, identified a more realistic theory of incarceration, and prescribed minimum conditions of confinement, it might have had a beneficial impact. Instead, the Code was absent, as a moral template, in the judicially-orchestrated reform movement that followed, and courts turned instead to the standards promulgated by the American Correctional Association.<sup>96</sup>

To move to a retributivist theory of punishment in a revised Code would commit precisely this same mistake as the original Code, and one that is just as readily avoidable. The present and equally well known abuse is the scale of imprisonment. Incarceration rates in the United States are now the highest in the world. Driven by policies such as minimum sentencing, truth in sentencing, three strikes and you're out, two strikes and you're out, and a variety of substantive provisions, the prison and jail population has risen until it now approaches two million persons. The rate of incarceration in the U.S. is about five times that of Canada and the United Kingdom, and seven times that of Germany or France.<sup>97</sup> Driven by the felt need by political leaders to compete with each other's sentence enhancement proposals, prison terms have lengthened to the point that we will soon have institutions filled with elderly men who committed minor or moderate offenses several decades earlier. The spiraling cost of these policies has placed enormous stress on the budgets of states and counties, draining dollars from functions such as education, police, fire, sanitation, public assistance, and road repair that typically compete with the correctional budget.

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96. Feeley & Rubin, *supra* note 11, at 103-05, 162-66, 320-322.

97. Roberts et al., *supra* note 2, at 16. The rates per 100,000 are Canada: 125, U.K., 125, France, 90, Germany, 90. Among Western nations, New Zealand is next highest after the U.S., with a rate of 145 per 100,000. Germany, with more than one-fourth as many people as the U.S., has about 72,000 prisoners; France, with about one-fifth our population, has about 54,000.

Two particular features of our present addiction to incarceration are worth noting. The first is its impact on the African-American community. Twenty-five percent of black males between twenty and forty years of age are currently under the supervision of our criminal justice system. A black male in the United States has a one-in-four chance of spending time in prison at some point during his life.<sup>98</sup> Part of the reason for these disproportionately high prison rates, even relative to the disproportionately punitive American system, is racial discrimination; blacks regularly receive harsher sentences than whites for the same offense.<sup>99</sup> But even the portion of these disproportionately high rates that results from non-discriminatory treatment is troublesome. African Americans, after all, are a group that was brought to America as slaves, and, once freed, subjected to systematic discrimination and mistreatment for at least a century. To respond to their resulting social pathologies in such a punitive manner raises serious human rights concerns, and bodes ill for our chances of ultimately resolving a social problem that has been with us since the inception of our nation.

A second notable feature of our incarcerative frenzy is the large number of non-violent criminals in our prison population. An increasing proportion of the prison population consists of property offenders.<sup>100</sup> Even more notable is the proportion of incarcerated persons who are serving time for drug offenses, and often for simple possession.<sup>101</sup> Ever since Nancy Reagan told American to

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98. Thomas P. Bonczar & Allen J. Beck, *Lifetime Likelihood of Going to State or Federal Prison* (1997); Jerome G. Miller, *Search and Destroy: African-American Males in the Criminal Justice System* (1996); C. Spohn & D. Holleran, *The Imprisonment Penalty Paid by Young, Unemployed Black and Hispanic Male Offenders*, 38 *Criminology* 281 (2000); Michael H. Tonry, *Malign Neglect—Race, Crime, and Punishment in America* (1995).

99. C.A. Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991-1992*, 31 *Law & Soc. Rev.* 789 (1997); Spohn & Holleran, *supra* note 98.

100. Tonry, *supra* note 98, at 25; Franklin E. Zimring & Gordon Hawkins, *Prison Population and Criminal Justice Policy in California* (1992).

101. See Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons*,

“Just Say No” to drugs, legislatures have just said “Yes” to longer sentences for drug offenders. The result is that increasing numbers of non-violent persons are being held for extended periods of time in expensive, high security institutions. This disproportionate severity toward drug offenders amplifies the disproportionate severity toward African Americans in the notorious case of crack cocaine. During much of the period when incarceration rates were soaring, penalties for possession of crack cocaine, the drug of choice in black communities, were one hundred times higher than penalties for possession of equivalent amounts of powder cocaine, the drug of choice in Hollywood. In 1999, Congress lowered the penalty for crack cocaine, so that they are now a mere ten times higher.<sup>102</sup>

The dramatic increase in the severity of sentences, and the consequent ballooning of the prison population, occurred largely in the 1980s and 1990s, and followed almost immediately upon the shift from rehabilitation to retributive rationales for punishment in the state legislatures, which began during the 1970s. More generally, these increases are contemporaneous with a general mood, in both academic writing and the popular press, that favored retribution. There is nothing surprising about this temporal correspondence. In theory, retribution, repayment, and just deserts may limit as well as extend criminal punishments; in fact, it is difficult to see how any of these rationales could recommend anything more than minimal punishment, such as a fine, for simple drug use. In practice, however, rehabilitation is associated with a more lenient or sympathetic attitude toward criminals, and retribution is associated with severity. When people think about a punishment policy that gives the criminal his just deserts, they are generally envisioning a situation where that criminal will now serve a full and longer sentence, instead of being given a reduced sentence or paroled before he serves his sentence because of good time credits and the like.

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1980-1996, in 26 *Crime and Just.* 17 (Michael Tonry and Joan Petersilia eds., 1999).

102. Roberts et al., *supra* note 2, at 152-53.

An academic, writing in a scholarly journal, may recommend a form of retributivism that limits rather than lengthens sentences, and may even derive some advantage by juxtaposing her own use of the term to that term's common connotation. But a declaration of public policy, by an authoritative organization such as the American Law Institute, does not have this option. Acting as what Alan Schwartz and Robert Scott have called a private legislature,<sup>103</sup> it must be attuned to the popular reception of its declarations. If the ALI declares, at this point in history, that it is abandoning rehabilitation and favoring a retributive policy, it would be seen as endorsing the current move toward severity in sentencing and massive incarceration. No matter how many qualifications it attaches, no matter how many pious expressions of concern it issues, the basic message will be that the trend begun by retributivist electoral rhetoric and retributivist penal statutes should continue or accelerate.<sup>104</sup>

This message from the ALI would come at a time when there are few other institutions that can exercise restraint. Ever since the first George Bush struck a devastating political blow to his opponent with the Willie Horton case, elected politicians have been terrified to recommend anything less than increased severity for criminals. Prison wardens, although they often feel that their institution is filled with people who do not belong there, have been notably silent. The courts, which played such a crucial role in reforming prison conditions and abolishing the plantation model,<sup>105</sup> have not been able to fashion a doctrine that would strike down disproportionate sentences. The Supreme Court's decision's this term,

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103. Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. Pa. L. Rev. 595 (1995).

104. The report of the Committee for the Study of Incarceration, a high profile, foundation-funded effort by some of America's most progressive criminological experts, see von Hirsch, *supra* note 40, is filled with moderate recommendations and condemnations of excessive severity. Because it recommends a shift from rehabilitation to just deserts, however, it was perceived as part of the general chorus of opinion for harsher sentences.

105. Feeley & Rubin, *supra* note 11.

endorsing sentences of twenty-five years to life under California's three strikes law for a man who stole three videotapes at different times, announces, with absolute clarity, that no restraint will be forthcoming from the federal judiciary.<sup>106</sup> Thus, the ALI is one of the few influential institutions that could possibly introduce a note of moderation into this overheated subject. By adopting retributive language, it would lose this opportunity. In essence, it would be committing the same avoidable mistake that the original Code committed—drafting punishment provisions that simply ignore the most serious human rights abuse in the contemporary correctional system.

The skyrocketing prison rates in the United States are sometimes justified by reference to democratic theory; the claim is that they result from the response of elected politicians to the genuine desires of the populace. Democracy is a puissant but often gaseous term, however, that must be used cautiously in analytic writing.<sup>107</sup> To return once more to the plan of the Framers, it is clear that the federal government, democracy though it may be, is not designed to translate popular views directly in governmental policy. Rather, it is a constitutional republic, where the populace elects officials who are expected to exercise judgment as well as be responsive to their constituents, and where legally established rules, enforced by unelected judges, constrain the actions of these representatives. All the state governments have this structure as well, even those that allow for popular referenda, such as California. Under our system, the people's desires should certainly determine the principal direction of public policy. That does not mean, however, that the particular manner in which policy is implemented should be determined by appeal to popular opinion. Government officials are required to determine whether the apparent desires of the populace regarding specific programs are truly the optimal way to implement the

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106. *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003).

107. See Edward L. Rubin, *Getting Past Democracy*, 149 U. Pa. L. Rev. 711 (2001).

populace's larger goals. They are also required to determine whether the programs they devise are consistent with the constraints embodied in the Constitution.

These principles are directly relevant to crime policy decisions. There is no question that the public is deeply concerned about crime, and that this concern should not be ignored. But the current levels of incarceration seem to be a product of what Julian Roberts, Loretta Stalans, David Indermaur and Mike Hough call "penal populism," which they define as a willingness, by elected officials, to "allow the electoral advantage of a policy to take precedence over its penal effectiveness."<sup>108</sup> In other words, elected officials have responded to public concern about crime with an easily explained, superficially appealing strategy that does not provide an effective response to that concern.

Evidence for the ineffectiveness of our incarceration frenzy is extensive. As Franklin Zimring and Gordon Hawkins have noted, for example, public concern focuses largely upon violent crime, but the sentence enhancement proposals that politicians often feel obligated to propose during election campaigns have tended to catch large numbers of property and drug offenders in their indiscriminate nets.<sup>109</sup> California's three strikes and you're out law, at issue in the *Ewing* and *Andrade* cases, is indicative, albeit extreme. The law, and an accompanying referendum measure, was enacted as a response to the horrific abduction and murder of a twelve-year-old girl, Polly Klaas, but includes non-violent felonies among its predicate offenses, and allows any felony to serve as the triggering offense.<sup>110</sup> The result is the imprisonment of people for twenty-five years to life for stealing a slice of pizza, three golf clubs, or some videotapes.

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108. Roberts et al., *supra* note 2, at 4-5.

109. Franklin E. Zimring & Gordon Hawkins, *Crime is Not the Problem: Lethal Violence in America* (1997); Franklin E. Zimring & Gordon Hawkins, *Public Attitudes Toward Crime*, in *Minimizing Harm*, *supra* note 83, at 35.

110. Franklin E. Zimring et al., *Punishment and Democracy: Three Strikes and You're Out in California* (2001); Edward L. Rubin, *Introduction*, in *Minimizing Harm*, *supra* note 83, at 16-17.

It is quite unclear, moreover, whether the populace truly appreciates the fiscal implications of the particular response to crime that it has supposedly endorsed. Do people truly realize how steeply recidivism rates fall off after the offender is forty years old, and how expensive it is to incarcerate a person for twenty or thirty years, particularly an older person with increasing medical needs? Do they truly understand the trade-offs that state governments must make between incarceration and other governmental programs? Even if they respond to a survey by stating that they favor long sentences for particular groups of offenders, would they take the same position if they were told that the additional ten years of incarceration for that group meant that class size had to be increased in elementary schools, or police patrols had to be reduced, or public health facilities had to be closed? In concluding that the attitudes of the general populace about the proper length of prison sentences are generally consistent with the federal sentencing guidelines, Rossi and Berk did not ask people to make these sorts of trade-offs, although public officials are compelled to do so.<sup>111</sup> Even so, Rossi and Berk found that lack of education is strongly correlated with support for lengthy prison terms,<sup>112</sup> which suggests that people who were more likely to understand this issue were affected by it.

Beyond these policy concerns lie the moral issues embodied in the Eighth Amendment. At one time, the Eighth Amendment was considered non-justiciable.<sup>113</sup> Then, confronted with the horrific conditions in American

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111. Rossi & Berk, *supra* note 92, at 211-26 (instructions to VIG WRITE computer program for construction of vignettes used in the study).

112. *Id.* at 182-84 ("The regular pattern is that those who did not graduate high school give much longer than median sentences [in a survey that presented them with vignettes about criminal activity] whereas those who received college degrees give shorter sentences.").

113. *E.g.*, *United States ex rel. Atterbury v. Ragen*, 237 F.2d 953 (7th Cir. 1956), cert. denied, 353 U.S. 964 (1957); *Siegal v. Ragen*, 180 F.2d 785 (7th Cir. 1950), cert. denied, 339 U.S. 990 (1950); *Snow v. Roche* 143 F.2d 718 (9th Cir. 1944), cert. denied 323 U.S. 788 (1944). See Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 *Yale L.J.* 506 (1963).

prisons, particularly Southern prisons, federal judges invoked it to fashion an extensive jurisprudence of proper prison conditions, ultimately placing entire state systems under court order and prescribing such details as the quality of medical care, the caloric content of the meals, and the educational training of the guards.<sup>114</sup> Surely, a life sentence to stealing three gold clubs or some videotapes should elicit a similar response. It is certainly unusual by international standards to impose sentences such as this. It is also cruel, by almost any definition, to take the entirety of someone's life away because they engaged in repeated drug use or petty theft during their twenties and thirties.

Perhaps it is somewhat utopian to expect that elected politicians will forgo an immediate political advantage for the sake of long-term social policy or moral considerations. Perhaps this is an unfortunate but inevitable side effect of a political system that possesses the virtue of intense, unrestrained competition for electoral office. That is precisely where policy analysts and advisory groups can play a salutary role. They are positioned to take the public's genuine concerns into account while ignoring transitory, superficial solutions that attract public support without achieving public purposes. They are positioned to hold up before public officials a more rational, deliberative way of achieving a commonly-shared goal. Remonstrations of this sort are one of the few things that can bring the runaway emotionalism of our current crime policy under control. The revised Model Penal Code would be repeating the mistake of its predecessor if it were to ignore this possibility.

Paul Robinson has advanced an argument to counter the idea that crime policy is a product of penal populism.<sup>115</sup> According to Robinson, conforming punishment to the inclinations of the populace does not conflict with the optimal social policy but rather implements it. The reason

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114. Feeley & Rubin, *supra* note 11, at 30-143.

115. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 *Nw. L. Rev.* 453 (1997).

is that the criminal law, like all law, relies on voluntary compliance for its effectiveness, and people will not comply unless the law reflects their sense of justice, that is, their sense of just deserts. This utilitarian justification of just deserts, with its Durkheimian overtones, is more convincing than reliance on just deserts or retribution as a theory of punishment, because it makes no claims about the coherence of the concept, but only about its appeal within civil society. In addition, it does not rest upon pre-modern notions of vengeance or moralism, but rather relies on the utilitarian or instrumental premises that serve as the basis for our political system, and for the modern administrative state.

Robinson's theory would appear to apply most directly to the boundaries of the criminal law.<sup>116</sup> It strongly counsels against criminalization of widely-used consumption goods such as narcotics, gambling and prostitution, and possibly against taxes on tips or salaries of domestic workers. Activities that it would favor criminalizing are less obvious, given the extensive reliance on criminal law in the United States, but might include certain forms of corporate activity. It is not entirely clear, however, that this theory applies as well to details of crime policy such as the length of prison sentences. Extreme cases of murderers or rapists serving relatively short sentences might be regarded as so unjust that they would undermine public compliance, but such cases are rather rare in our system. There is a general belief that sentences are too lenient, but since the proportion of the population who maintain this belief has remained stable from 1971 to 1998,<sup>117</sup> despite massive lengthening of sentences, this would appear to be a general sense of dissatisfaction, rather than a response to specific sentencing policies. Moreover, the findings of Zimring and Hawkins suggest that the public demand for harsher sentences focuses primarily on violent crime, and that compliance with the

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116. *Id.* at 477-88.

117. Roberts et al., *supra* note 2, at 27-28; Tonry, *supra* note 98.

criminal law would not be affected by reduced sentences for property or drug offenses.

Even if one assumes that the public demand for harsher sentences is sufficiently informed so that decreases in sentences would produce an effect, the consequences for public decision makers and policy analysts are hardly self-evident. The theory of penal populism is not that people have the wrong basic values, but that they have settled on ineffective means to implement those values. The role of a responsible public official, in these circumstances, is to offer more effective alternatives and attempt to educate the public about these possibilities. Attitudes do change over time, after all, and legal regulation can be an important factor in such change. A mere half-century ago, apartheid was standard practice in the United States; at present, it is unacceptable, and legal enactments such as the *Brown* decision and the Civil Rights Act, which were quite controversial when implemented, have played an important role in its ultimate rejection. Passing laws that run directly counter to public attitudes seems dictatorial, but assuming that every law must conform to the particular attitudes of the day suffers from a fatalism that is equally unattractive.

There are absolute limits to what people will accept of course. First degree murderers must be harshly punished, even if there were social science evidence to indicate that they would be law-abiding if they were paroled. All that is needed to conform to these limits, however, is the principle of proportionality. Within the limit set by this principle, there is no obvious reason why the public could not be convinced that imprisoning non-violent criminals or sickly old men who were violent twenty years ago is a waste of resources and human lives.

Just as it would be a mistake for the Model Penal Code to ignore America's gargantuan incarceration rates, it would be a mistake to acknowledge those rates and treat them as unalterable. At some time in the future, attitudes will change. If the revised Code shackles itself to present attitudes and policies by adopting the retributivist rhetoric

of the present day, it will condemn itself to early obsolescence. It will end up sounding as old-fashioned and naive as the present Code seems today. People will look back on it, from the vantage point of a different future, and wonder how the drafters could run on about limiting retributivism without taking cognizance of the dramatic abuses and irrationalities that surrounded them.

#### IV. SPEAKING TO THE CORRECTIONAL ESTABLISHMENT

The third avoidable error of the original Model Penal Code was to ignore the fact that its recommendations would need to be implemented by real institutions. This led to an ill-placed faith in rehabilitation, a belief in the ability of prisons to operate effective institutions that could actually transform the criminal into a law-abiding citizen. Whatever institutions that the drafters had in mind, they were certainly not the under-funded, overcrowded, understaffed, and often barbaric prisons that actually existed at the time. Because the Model Penal Code is supposed to provide the template for actual legislation, rather than being a utopian scheme for conceptual or moral edification, this failure to confront the institutional realities of American prisons was a serious error, and one that should have been perceived and avoided at the time.

If the revised Code adopts the rhetoric of retribution it will be committing a similar error, albeit for a very different reason. Retribution is explicitly presented as an alternative to rehabilitation, and as a shift in penal philosophy from an offender-based approach to a desert-based approach.<sup>118</sup> In accordance with Hegel's strictures, it treats the criminal as a rational being, not a patient. The problem is that the rehabilitative model is the most

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118. American Law Institute, *supra* note 1. Virtually all proponents of retributivism make this argument; indeed the academic literature on retributivism seems largely driven by a feeling of revulsion toward the medical model of corrections. See, e.g., Allen, *supra* note 10, at 33-34; Moore, *supra* note 16, at 85-87; Morris, *supra* note 20; von Hirsch, *supra* note 40, at 9-32; Murphy, *supra* note 16.

effective control on prison officials at the present time. It is the effort to rehabilitate the prisoners that brings a modicum of decency and humanity into the prisons.<sup>119</sup> By encouraging them to abandon this model and become retributivists, the Code will be implicitly endorsing a return to the brutal mistreatment of a prior era.

It may seem contradictory to assert that endorsing rehabilitation and rejecting rehabilitation are both errors, and avoidable errors at that. But the two uses of rehabilitation are quite different. The original Code treated rehabilitation as a comprehensive theory of punishment, a rationale for incarceration, and a means of determining its duration. That places far too much weight on an approach that displays admittedly modest results. In particular, it implies that every prisoner can be rehabilitated, and that the possibilities of rehabilitation are so promising that offenders can be given indeterminate sentences in the expectation that their rehabilitation is only a matter of time. This is only an implication of course; the reality is that indeterminate sentences were not used to give prison authorities a chance to rehabilitate the prisoner, but rather to give the prisoner an incentive to behave himself in prison. Nonetheless, the implication is present in the original Code, and the Code must be judged on that basis.

The role of rehabilitation in modern American prisons is quite different. Rather than serving as a universal expectation about outcomes, it functions as an organizing principle for the day-to-day operation of the institution. Prison wardens know that they cannot rehabilitate all the inmates, or even a large proportion of them; what they always say is that they can only rehabilitate any prisoner who genuinely desires that result. But their efforts to do so are responsible for the vocational and educational programs that provide an alternative to oppression or

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119. See Edward L. Rubin, *The Inevitability of Rehabilitation*, 19 *J.L. & Inequality* 343 (2001).

neglect. To abandon rehabilitation, as a mode of prison operation, is to descend back into barbarity.

This role of rehabilitation as an organizing principle was imposed by the courts. Between about 1970 and 1990, courts, principally federal courts, engaged in a massive effort to reform American prisons, abolishing the plantation model prison of the South and compelling prisons in all parts of the country to conform to enlightened incarcerative practices.<sup>120</sup> Apart from forbidding outright barbarities, such as physical torture and deprivation of medical care, the courts used two principles to guide their reform efforts, two images of the institution that organized all their particular and often highly detailed reforms. The first was that the prison was supposed to be organized bureaucratically, that prisoners could not be subjected to the patriarchal, pre-modern regime of the plantation, nor neglected as a result of disorganized administrative practices.<sup>121</sup> The second was that the prison must attempt to rehabilitate the prisoner, or, more precisely, that it must become the sort of institution that attempts to rehabilitate the prisoner. Prisoners should generally work, but their work should be a means of learning vocational skills, not a means of supporting the institution. Educational programs should be provided. Living conditions should be sufficiently decent so that prisoners can focus their energies on such tasks, rather than being engaged in a daily struggle to survive.<sup>122</sup>

If the Code embraces retribution and specifically rejects rehabilitation as a goal, it is not only abandoning rehabilitation as a philosophy of punishment, but also abandoning it as an organizing principle for incarceration.

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120. See, e.g., American Civil Liberties Union National Prison Project (1995), reprinted in *Prisoners and the Law*, App. B at 109 (Ira Robbins ed., 1996); Chilton, *supra* note 11; Crouch & Marquart, *supra* note 11; Feeley & Rubin, *supra* note 11; James B. Jacobs, *The Prisoners' Rights Movement and Its Impact*, in *New Perspectives on Prisons and Imprisonment* 33 (James B. Jacobs ed., 1983); Martin & Ekland-Olson, *supra* note 11; Yackle, *supra* note 11.

121. See Feeley & Rubin, *supra* note 11, at 271-90; James B. Jacobs, *Stateville: The Penitentiary in Mass Society* 105-37 (1977).

122. Feeley & Rubin, *supra* note 11, at 252-71.

It is signaling to beleaguered correctional administrators, overwhelmed by an ever-increasing number of prisoners, and constrained by budgets that, at the very best, do not increase nearly so fast, that they may abandon their rehabilitative efforts. Similarly, it is signaling to state legislatures that they can continue adding to the prison population without subjecting themselves to the political pain of allocating adequate funds for rehabilitative programs. It is telling these real world institutions that retribution is an acceptable goal for punishment, that the retributive prison, rather than the rehabilitative prison, is the new model that the ALI endorses.

*A. The Retributive Prison*

As previously stated, there is no inherent connection between retributivism and incarceration as a mode of punishment. Unlike utilitarian notions of incapacitation, which at least suggest incarceration, or rehabilitation, which virtually requires it, retribution could be achieved by virtually any means of inflicting pain or suffering on the offender, and most obviously, by physical torture. This gap in retributive theory can be concealed by the somewhat lame assertion that incarceration is our culturally determined mode of pain infliction, but the very same gap appears when we ask what retribution means as an organizing principle for incarcerative institutions. Once again, the first thing that retribution brings to mind is that the offender should be tortured while in prison. Many prisoners, and certainly the violent ones who, by common agreement, constitute the most important targets of incarceration, are being punished because they inflicted physical suffering of some sort on another person. By torturing the prisoner, society would be “paying him back” for the wrongs he committed, and would be giving him his just deserts. Retributivists might object to this characterization, reiterating the argument that retribution is not equivalent to revenge. It should be noted, however, that while revenge is personal and often emotional, torture

can be inflicted by an institution, and in a perfectly dispassionate manner. In pre-modern Europe, the torturer was a functionary, a government employee who rarely knew the prisoner whom he was mutilating or dismembering.<sup>123</sup> The image of the stern but just government, giving the offender what he deserves in the name of society in general, is precisely the image of the pre-modern European torturer.

Modern retributivists, of course, reject torture as a model of punishment, and since nothing in their theory of punishment leads to this prohibition, they invoke it as an independent moral principle, a side-constraint in Nozick's terms. Having rejected rehabilitation as well, there remains the question about what to do with the prisoner, or, to be more precise, the two million prisoners in American institutions. To put the matter in concrete terms, consider the position of a prison warden who is charged with developing a strategy to deal with the prisoners who come into his institution. The law tells him that the purpose of imprisonment is retribution. To this end, it tells him how long he is to keep the prisoner, as imprisonment statutes generally do, and it tells him not to allow the prisoner to escape. Beyond that, it tells him nothing. It provides no guidance whatsoever about the way the prisoner should be treated in the institution.

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123. See Richard van Dülmen, *Theatre of Horror: Crime and Punishment in Early Modern Germany* (Elisabeth Neu trans., 1990); Michel Foucault, *Discipline and Punish* 32-69 (Alan Sheridan trans., 1979); George Riley Scott, *A History of Torture Throughout the Ages* (1959). As Dülmen describes, after a person's hand was cut off for manslaughter or perjury, his wound would be cauterized to stop the bleeding, hardly the sort of thing that the torturer would do in the heat of anger. *Id.* at 47.

Torture was used as a mode of investigation, as well as a mode of punishment. James Heath, *Torture and English Law: An Administrative and Legal History from the Plantagenets to the Stuarts* (1982); John H. Langbein, *Torture and the Law of Proof* (1977); Lisa Silverman, *Tortured Subjects: Pain, Truth, and the Body in Early Modern France* (2001). Here, of course, the use of torture was even further removed from anger or revenge. In fact, as Silverman describes, judicial torture in France was governed by published manuals, and one needed a license, which could be obtained only by receiving years of training and passing an exam, in order to become a torturer. *Id.* at 51-68.

Many retributivists would probably assert that prisons must be orderly; in their moralistic desire to be stern and unsympathetic, they would presumably insist that the prisoners be subject to a fairly strict disciplinary regime. This connection, however, is emotive rather than logical, because demands that prisons should be orderly cannot be derived in any direct way from the concept of retribution. Indeed, prisoners might be better paid back, or better given their just deserts, if they were subjected to a chaotic, dangerous environment. Beyond this, the idea of order is closely associated with the work of John DiIulio.<sup>124</sup> Malcolm Feeley and I have previously characterized DiIulio's emphasis on this issue as fetishistic,<sup>125</sup> and the retribution versus rehabilitation issue indicates the reason. What exactly is the purpose of maintaining an orderly prison? Order is generally regarded as an instrumentality, a means to an end, not an end in itself. One could argue that it helps prevent escapes or decreases violence in the prison. These are certainly commendable goals, but they are results every prison tries to achieve, and thus provides no particular content to the idea of retribution. A more common argument is that order contributes to the goal of rehabilitation, either because it is intrinsically rehabilitative, as the Auburn and Pennsylvania plans asserted, or because it allows more specific rehabilitative efforts, such as education and vocational training, to proceed without disruption. This assumes that the prison has a rehabilitative goal, of course. To champion order as a deontological value, without treating it as an instrumentality for achieving some other purpose, one must derive pleasure from the image of prisoners with clean uniforms, marching in lockstep through neatly-maintained hallways. But this is something only a few people with unusual sensibilities would enjoy.

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124. John J. DiIulio, *Governing Prisons: A Comparative Study of Correctional Management* (1987).

125. Malcolm M. Feeley & Edward Rubin, *Prison Litigation and Bureaucratic Development*, 17 *Law & Soc. Inquiry* 125, 137-43 (1992).

It is sometimes said that prison is supposed to function simply as a warehouse for the prisoner.<sup>126</sup> This may seem to reflect commendable sincerity, but it does very little else. To describe a prison as a warehouse is another metaphor, and like the metaphor of repayment, it is uninformative. The purpose of a warehouse is to store goods of some sort—automotive parts or library books, for example—so that they do not encumber high-use settings such as repair shops or open stocks but are available when someone needs them. Prisoners are indeed being kept away from the high-use area of general society, but they are not being held so that they are available when needed. Moreover, a warehouse is supposed to receive items that are in good condition and to hold those items without changing them. The automotive parts and library books are supposed to come out of the warehouse looking just the way they looked when they went in; the warehouse's job is to avoid deterioration of useful parts or books.

But this cannot be what we envision for a prison. Prisons do not receive good items, but bad ones. If these people come out the way they went in they will presumably be going back to prison again, which is not what any one wants. The reason these people are bad, moreover—not the murderers and sexual predators, but the vast majority who are thieves, drug dealers, and addicts—is often because they lack the kinds of skills that can often be provided by rehabilitative programs. To go further, people are not inert objects that can be kept in an unchanged condition. Unlike automotive parts or library books that will remain in the same condition if deteriorating influences such as mice or mold or moisture are eliminated, people are dynamic entities. If not provided with mental stimulation and human interaction, they tend to deteriorate; if not given an opportunity to practice acquired skills, those skills that they possess become impaired, thereby reducing the

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126. Michael Welch, *Punishment in America* 51 (1999); Franklin E. Zimring & Gordon Hawkins, *Incapacitation: Penal Confinement and the Restraint of Crime* 10-12 (1995); Seymour Halleck & Anne Witte, *Is Rehabilitation Dead?*, 23 *Crime & Delinq.* 372, 379 (1977).

person's economic value to himself and to society. Thus, even a good warehouse would provide prisoners with many of the programmatic features we identify as rehabilitative, and a good prison would certainly include those features.

*B. The Rehabilitative Prison*

Despite the condemnations of theorists, and the declarations of state legislatures, the goal of rehabilitation remains an essential means of organizing and structuring a modern prison. Since the judicially instituted reforms, virtually all large prisons offer vocational and academic training of some sort.<sup>127</sup> Innovations such as day treatment programs, work release, halfway houses and boot camps are only comprehensible as part of a rehabilitative model; they clearly offer no advantage from the perspective of incapacitation. Studies of prison programs demonstrate this point, and independently illustrate the continuing commitment to rehabilitation. To quote Zimring and Hawkins, "patterns of academic attention to issues in criminology [show] both the unchallenged salience of rehabilitation as the principal topic over time."<sup>128</sup>

Why then has rehabilitation been so roundly condemned, and why have those condemnations seemed so persuasive? Perhaps the reason is purely political—a punitive turn in the American sensibility, or the availability of punishment as coded racism once explicitly racist attitudes became socially unacceptable. Perhaps, however, the academic arguments that have been directed toward the rehabilitative ideal have produced an effect on public policymakers. Three such arguments are most commonly voiced. The first is the social science finding that "nothing works," that rehabilitative programs have

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127. Ann Chih Lin, *Reform in the Making: The Implementation of Social Policy in Prison* at 6, 18-19 (2000).

128. Zimring & Hawkins, *supra* note 126, at 12. Examining the titles of articles and books listed in the Social Science Research system during the 1980s, they found that 4,199 referred to rehabilitation and recidivism, while only forty-five referred to incapacitation, that is, the warehousing theory of incarceration.

had no success in achieving their intended goal.<sup>129</sup> Second, that rehabilitation authorizes an assault on the prisoner's personality, the use of intrusive methods such as brainwashing, behavior modification, drug therapy and shock treatment<sup>130</sup> and that it implies that prisoners should be kept in prison until the authorities consider them cured, even if this greatly exceeds the punishment they merit on grounds of just desert. Finally, that the entire concept of rehabilitation is inconsistent with the premises of our political system.<sup>131</sup> These arguments can be considered in turn.

The short answer to the argument that rehabilitation is a failure is that this conclusion is empirically false. Once the impact of the initial findings had abated, social scientists began to devote more detailed attention to rehabilitative programs and produced more refined, modulated results. Martinson himself withdrew his famous 1974 declaration that "nothing works" as early as 1979.<sup>132</sup> Meta-analyses and individual program evaluations in the 1980s and '90s advanced the unsurprising, but previously unrecognized idea that the effectiveness of rehabilitation programs varies depending on the nature of the intervention and the cooperation of the target group.<sup>133</sup>

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129. Allen, *supra* note 10; Philip J. Cook, *Punishment and Crime: A Critique of Current Findings Concerning Preventive Effects of Punishment*, 41 *Law & Contemp. Probs.* 164 (1977); Martinson, *supra* note 9; von Hirsch, *supra* note 28, at 11-18.

130. See Allen, *supra* note 10, at 41-57; American Friends Service Committee, *Struggle for Justice* 39-40, 146 (1971); Ira Glasser, *Prisoners of Benevolence: Power versus Liberty in the Welfare State*, in Willard Gaylin et al., *Doing Good: The Limits of Benevolence* 117 (1978); C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 *Res Judicatae* 224 (1953); Moore, *supra* note 16, at 86-87; Morris, *supra* note 3, at 26-27; Stephen J. Sansweet, *The Punishment Cure* (1975); von Hirsch, *supra* note 40, at 27-32.

131. Allen, *supra* note 10, at 33-34.

132. Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 *Hofstra L. Rev.* 243 (1979). Martinson was part of a research group whose principal investigator was not ready to publish his results. Martinson published his original article on his own, without permission. A few months after publishing his retraction, he committed suicide. See Joseph T. Hallinan, *Going up the River* 33-36 (2003).

133. Robert R. Ross & Paul Gendreau, *Effective Correctional Treatment* (1980);

A recent study by Ann Chih Lin observes that the mode of implementation is a crucial factor. When the rehabilitation program meets the need and obtains the loyalty of the corrections staff, it will be implemented well, and promises to be effective; when it does not, it will be implemented poorly and will inevitably fail.<sup>134</sup>

Even without these empirical results, however, the declaration that rehabilitation fails to achieve its declared objective is highly suspect. Such a conclusion necessarily depends upon a theory for evaluating social programs, some metric that is applicable to institutional efforts of this nature. Relatively little thought has been devoted to this topic however. Studies of the success or failure of rehabilitation generally focus on the recidivism rate, that is, the extent to which the offender reduces, maintains or increases his level of criminal activity upon his return to society. The obvious difficulty with this criterion is that it fails to specify a baseline. If the baseline is that any criminal activity constitutes a failure—the way any loss of telephone service to subscribers' homes constitutes a failure—then rehabilitation will inevitably be judged a failure. Surely, however, the level of favorable results that constitutes success or failure needs to be adjusted in accordance with the complexity of the task. Rehabilitation, like education, is an effort to change human beings, to make them different from, and better than, they were before. A social goal of this nature cannot be measured by the same standards as simple tasks such as keeping prisoners confined, or providing telephone service.

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Donald Andrews et al., *Does Correctional Treatment Work? A Clinically-Relevant and Psychologically-Informed Meta-Analysis*, 28 *Criminology* 369 (1990); Francis Cullen & Paul Gendreau, *The Effectiveness of Correctional Rehabilitation: Reconsidering the 'Nothing Works' Debate*, in *The American Prison: Issues in Research and Policy*, supra note 10, at 23; Paul Gendreau & Robert Ross, *Revivification of Rehabilitation: Evidence from the 1980s*, 4 *Justice Q.* 349 (1987); Paul Gendreau, *The Principles of Effective Intervention with Offenders*, in *Choosing Correctional Options that Work* 117 (Alan Harland, ed., 1996); Ted Palmer, *The Effectiveness of Intervention: Recent Trends and Current Issues*, 37 *Crime & Delinq.* 330 (1991); Ted Palmer, *Programmatic and Nonprogrammatic Aspects of Successful Intervention*, in Harland, supra, at 131.

134. Lin, supra note 127.

This is not to suggest that rehabilitative programs are beyond criticism, or that we should relinquish our aspiration to turn every criminal into a productive, law-abiding citizen. The real question is how we evaluate rehabilitative programs, and what conclusions we derive from those evaluations. Rehabilitative programs should not be evaluated against some fantasy-based standard that we can rehabilitate every criminal, but against other approaches to morally acceptable punishment. Is a warehouse prison, with no programs, more likely to prevent recidivism than a rehabilitative one? Is a retributive prison, whatever that may be, more likely to do so? This seems difficult to believe. What will perform better than a rehabilitative prison, in the view that many rehabilitationists, are intermediate or alternative sanctions of various kinds that share a rehabilitative philosophy.<sup>135</sup> But a retributive approach to punishment is likely to foreclose these possibilities. In fairness, retributivists are not necessarily opposed to alternative sanctions.<sup>136</sup> But the public mood that is associated with retributivism, and that the Model Penal Code's endorsement of retributivism would encourage, is unalterably opposed.

Rehabilitation is in fact the approach adopted by prison wardens and other correctional officials. Although far from being a collection of bleeding heart liberals, they are uniformly committed to rehabilitation as a goal for prisons. They recognize, however, that this goal will often be frustrated, that many prisoners will turn back to crime following their release. Their job is to make rehabilitative opportunities available, to do their best to alter the institutional variables to favor rehabilitation. As Norman Carlson, director of the Federal Bureau of Prisons stated:

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135. See James M. Byrne et al., *Smart Sentencing: The Emergence of Intermediate Sanctions* (1989); Michael Tonry, *Proportionality, Parsimony, and the Interchangeability of Punishments*, in *A Reader on Punishment* 136 (R.A. Duff & David Garland eds., 1994).

136. See Robert Harlow et al., *The Severity of Intermediate Penal Sanctions: A Psychological Scaling Approach for Obtaining Community Perceptions*, 11 *J. Quantitative Criminology* 71 (1995); Robinson, *supra* note 115, at 491; von Hirsch, *supra* note 40, at 118-23.

“We cannot force anyone to change. All we can do is provide opportunities for anyone who wants to change on his own.”<sup>137</sup> But this does not deter them from continuing the effort, nor does it motivate them to search for different organizing principles for their institutions. Rehabilitation remains an essential organizing principle that is subscribed to by every conscientious prisoner administrator in the United States today. The Model Penal Code should not undermine their efforts.

The second argument against rehabilitation, and one that figures prominently in the rhetoric of retribution, is that it authorizes an assault on the prisoner’s personality. Critics charge that the rehabilitative model is linked, at least in concept, to morally unacceptable reformative techniques such as brainwashing, severe behavior modification, drug therapy, and shock treatment, and that it authorizes open-ended sentences that keep offenders incarcerated until prison authorities have judged them to be rehabilitated.<sup>138</sup> Francis Allen, in a 1981 book titled *The Decline of the Rehabilitative Ideal*, goes so far as to suggest that the most complete embodiment of the rehabilitative ideal is to be found in the correctional system of Communist China.<sup>139</sup>

Once again, the problem with this criticism is that it fails to state a theory for analysis, or to establish an explicit metric. The implied metric seems to be that a social program should be condemned if any sort of government, no matter how different from our own, could use it as a rationale for practices that we find unacceptable. No program could withstand such a test, however. Communist China used public education to indoctrinate its children,<sup>140</sup> the Soviet Union used mental health to

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137. Quoted in Pete Early, *The Hot House* 58 (1992). See Lin, *supra* note 127, at 134; George Playfair, *The Punitive Obsession* 212 (1971) (English prisons).

138. See *supra* note 130 (citing sources).

139. Allen, *supra* note 10, at 16-18.

140. Richard Baum & Frederic C. Teiwes, *Ssu-Ch'ing: The Socialist Education Movement of 1962-1966* (1968); Fox Butterfield, *China: Alive in the Bitter Sea* 194-201 (1982); Jonathan D. Spence, *The Search for Modern China* 564-65 (1990).

suppress dissent,<sup>141</sup> and Nazi Germany used recreational programs to foment aggressive attitudes.<sup>142</sup> These lugubrious examples may be useful as a warning against potential abuses, but they cannot, by themselves, be taken as a criticism of an otherwise acceptable program. In one of his more considered moments, Allen states that “the rehabilitative ideal has revealed itself in practice to be peculiarly vulnerable to debasement and the serving of unintended and unexpressed social ends.”<sup>143</sup> While this is more plausible than his comparison with Communist China, he has just as little basis for asserting it. What does it mean to say that a program is “particularly vulnerable to debasement?” Without stating some standard for vulnerability of this sort, the statement stands for nothing more than Allen’s a priori decision to hold rehabilitation accountable for every abuse committed by someone who asserted a commitment to that principle. He has no evidence that the principle caused the abuse, or made it in any way more likely to occur.

The concern that a rehabilitative theory of punishment would authorize extreme techniques of thought reform and bio-chemical manipulation, for unlimited periods of time, is essentially a political fantasy, at least within the context of our current political system. This idea is widely asserted by punishment theorists at present,<sup>144</sup> but its earliest articulation, so far as I can tell, is in a science fiction novel by C.S. Lewis.<sup>145</sup> In fact, the criticism of rehabilitation as

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141. Zhores A. Medvedev & Roy Aleksandrovich Medvedev, *A Question of Madness* (Ellen de Kadt trans., 1971).

142. William Shirer, *The Rise and Fall of the Third Reich* 252-55 (1959) (the Hitler Youth program).

143. Allen, *supra* note 10, at 34.

144. See *supra* note 130 (citing sources).

145. Lewis has Miss Fairy Hardcastle, the head security officers of the satanic (literally) National Institute of Co-ordinated Experiments (N.I.C.E.) declare:

[W]hat had hampered every English police force up to date was precisely the idea of deserved punishment. For desert was always finite: you could do so much to the criminal and no more. Remedial treatment, on the other hand, need have no fixed limit; it could go on till it had effected a cure, and those who were carrying it out would decide when *that* was. And if the cure were humane and desirable, how much more prevention? Soon

an inducement to abusive practices is almost certainly false when considered in the context of American corrections. It has always been the doctrine espoused by the most progressive elements in the correctional establishment. The rigors of the Auburn and Pennsylvania system may seem excessive, but they were humane when compared to torture, or to the death penalty. The rehabilitative approaches that followed were generally more humane, and expressed a sincere concern for the felon as an individual. Pavlovian thought reform, although theoretically consistent with the concept of rehabilitation, was never instituted to any significant extent in American prisons, even when Pavlov's ideas were very much in vogue.<sup>146</sup> If

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anyone who had ever been in the hands of the police at all would come under the control of N.I.C.E.; in the end, every citizen.

C.S. Lewis, *That Hideous Strength* 81-82 (1946).

Lewis' Christianity seems to be as defective as his political science. While Satan himself may have attempted an injustice, by rebelling against God, orthodox Christian belief places him securely under God's control, and thus bound by principles of justice. He is authorized to tempt people, but may only punish those who succumb, according to a strict principle of desert. What tempers this principle of desert, in Christian doctrine, is God's mercy, and the human attitude that renders a wrongdoer most worthy of God's mercy is contrition. Moreover, because of the Fall (and this is where Satan becomes relevant), we are all wrongdoers, all guilty, and all in need of God's mercy. If human punishment were designed along these lines, it might be based on the principle of desert, but only God can know people's true desert, and we sinners might hesitate before trying to imitate God's judgment. But we would certainly be encouraged to imitate His mercy by granting forgiveness, on the basis of the criminal's contrition, from whatever judgments we impose. This approach would favor restorative justice, see John Braithwaite, *Restorative Justice and Responsive Regulation* (2002); Lawrence W. Sherman, *Reason for Emotion: Reinventing Justice with Theories, Innovations and Research* (The American Society of Criminology 2002 Presidential Address), and would probably favor rehabilitative programs as well.

146. Feeley & Rubin, *supra* note 40, at 268-70. American prisons did experiment with some forms of behavioral conditioning. See, e.g., John J. DiIulio, *No Escape: The Future of American Corrections*, 126-47 (1991); Richard Hawkins & Geoffrey P. Alpert, *American Prison Systems*, 413-16 (1989); Willard Gaylin & Helen Blatte, *Behavior-Modification in Prisons*, 13 *Am. Crim. L. Rev.* 11 (1975). But these efforts were relatively mild, and stopped far short of kinds of abuses that the critics of rehabilitation envision. A typical example of behavioral conditioning in American prisons was the token economy, where the prisoners received tokens that they could exchange for privileges when they exhibited the desired behaviors. See Norman Carlson, *Behavior Modification in the Federal Bureau of Prisons*, 1 *New Eng. J. Prison L.* 155 (1974); Michael A. Milan & John

one wanted to catalogue the worst abuses in American corrections, one would certainly choose the convict leasing system, the plantation model prisons, and the current Scylla and Charybdis of under-funding and over-crowding, not those prisons that were organized along rehabilitative lines.

The claim that rehabilitation would authorize indeterminately long sentences is equally a product of abstract academic alarmism. Indeterminate sentencing, although sometimes justified on rehabilitative grounds, was widely used, and misused, in situations where no effort to rehabilitate the prisoner was being made. Nor were the lengthy sentences that sometimes resulted based on any definitive test for rehabilitation that the prisoner had failed to satisfy. Rather, the combination of indeterminate sentencing and discretionary parole was primarily employed to give prisoners an incentive to behave themselves when they were in the institution, and to enable prisons to delay the release of individuals who were deemed a continued danger to society. The theoretical possibility that someone who committed a relatively minor offense would be retained for several decades because he was resistant to a rehabilitative program is more fanciful than real. It is during the retributivist era that such abuses have occurred, generally as a result of recidivist statutes. In any case, it must be conceded that rehabilitation, like any other theory of punishment, including retribution, cannot be justly translated into prescribed prison terms without relying on the independent principle of proportionality.

Finally, critics of rehabilitation have argued that the entire concept is inconsistent with our democratic principles because it subjects people to social engineering, rather than treating them as autonomous moral beings. A democratic regime, it is said, depends upon the view that each person is equally valuable, capable of decision

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M. McKee, *The Cellblock Token Economy: Token Reinforcement Procedures in a Maximum Security Correctional Institution for Adult Male Felons*, 9 *J. Applied Behav. Analysis* 253 (1976).

making, and responsible for her actions. When such people commit crimes, they should not become subjects for manipulation by experts with supposedly superior knowledge; they should be punished as moral actors who have chosen to offend against society. Rehabilitation is ultimately based on a therapeutic or psychological view of human beings, rather than a moral and political view that is consistent with democratic principles.

The difficulty with this criticism is that the social reliance on prisons as a mode of punishment, and the social commitment to rehabilitation, is essentially concurrent with the development of English and American democracy. Historical evidence thus suggests that rehabilitation and democracy are not as inconsistent as the criticism claims. In fact, the view of individuals as autonomous moral actors is common to all social contract theories, including those positing that individuals must trade away all their liberties to establish an effective government. Democracy has nothing to do with this; it is a social practice that chooses public officials by election, and is based on the idea that the government's purpose is to serve the people. Rehabilitation fits perfectly well into this democratic ethos. Its central principle is that every human life is valuable, and that government has an affirmative obligation to help offenders return to society and live a normal and productive life.

To summarize, the criticisms directed at the concept of rehabilitation are based on abstract academic arguments that have little contact with the institutional realities of American corrections. In the real world of American prisons, the rehabilitative ideal, together with the insistence on regularized, bureaucratic governance, remains the principle source of decent and humane correctional practices. As prison populations grow, placing increasing stress on state budgets at the same time that these budgets are being battered by economic conditions, there is a correspondingly powerful incentive to abandon such practices, and subject prisoners to a regime of deprivation and neglect. The Model Penal Code's rejection of rehabilitation, and its endorsement of a retributive

theory which emphasizes the imposition of suffering on prisoners, could only be received as a green light to proceed with this regime. This would be an error, and it is a readily avoidable one. Whether retributivism remains popular, or whether a chastened academy ultimately recoils from it, the immediate impact of its endorsement on real American institutions can be readily predicted at the present time, and it is something the ALI should studiously avoid.

#### CONCLUSION

The United States, like any addict, would shiver, shake, and sniffle for a while if it were to end its addiction to incarceration. A certain sense of dread and resentment would arise within our angry, frontier souls if we resisted the desire to send tens of thousands of drunk drivers, addicts, small-time drug dealers, hot check writers, burglars, shoplifters, and videotape and golf club thieves to high security institutions for extended periods of time. Even more dread and resentment might result if we released, to society or to less restrictive forms of punishment, the hundreds of thousands of such offenders who presently inhabit these institutions, together with the elderly men who committed fairly serious crimes during the 1970s and before. That dread would certainly be amplified, in souls one hesitates to characterize, by the return of hundreds of thousands of African-American men to their communities. It is difficult to say whether we will kick the habit within any foreseeable length of time, whether we will recognize how enormously expensive our addiction to incarceration is in terms of dollars spent, lives ruined, and communities disrupted.

What seems clear, however, is that the ALI's endorsement of retribution can only serve to prolong this addiction. However many academic qualifications are attached to the concept, the fact remains that it rests upon the moralism, if not the sense of rage, that has generated this addiction, and that is inconsistent with both the principles of our founding and the ethos of our modern

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administrative state. It would be a mistake for the ALI to jump upon this ill-directed bandwagon. It would be a mistake for it to ignore the worst human rights abuse in the correctional system. And it would be a mistake for the ALI to frame recommendations that do not recognize the institutional realities of contemporary correctional institutions. If we kick our incarceration habit, these mistakes will destroy the moral credibility of the Model Penal Code. If we remain addicted, they will not have this effect, although they are unlikely to bring much credit to the Code. We cannot know what will occur in the future, but we should be able to recognize and avoid these mistakes in their present time.

Proportionality, not retribution, is the means by which we can constrain the length of prison sentences. Rehabilitation, not retribution, is the means by which we can constrain the behavior of prison officials. The Code should endorse these principles, and avoid the fashionable but incoherent idea of retribution that has contributed to a correctional policy that is the shame of our nation.