

## WHAT'S WRONG WITH HARMLESS THEORIES OF PUNISHMENT

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### INTRODUCTION

Scholarship on punishment falls into discrete “camps,” described for students within the first few days, or even the first few minutes, of virtually any course on criminal law. These may be divided and labeled in various ways, but they ultimately fall into two general categories, on which most of the philosophical debates ultimately turn. In the first camp are the *consequentialists*: those who believe punishment can only be justified to the extent that it serves a particular goal—generally of reducing wrongdoing. We may reduce wrongdoing by restraining the wrongdoer (incapacitation), making him an example for others (deterrence), or even by improving either his values or his circumstances to make him less likely to want to offend again (rehabilitation). In the second camp are the *retributivists*. They believe that punishment serves as an end (and a good) in itself, by “answering” wrongdoing and giving a voice to society’s norms and moral edicts.<sup>1</sup>

If you are in either of these camps (and common wisdom insists that you must be), then you are in very good company, both ancient and modern. This Article aims to demonstrate, however, that dividing up the world of punishment theory in this way is not especially useful. By laying out the underlying assumptions of these theories (something infrequently done), we reveal not only several surprising and

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1. Modern punishment philosophers often distinguish between retributivism and expressivism, arguing that since the object of expressivism is to communicate a message, it is technically consequentialist. Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1422 (2000). For our purposes, this distinction splits hairs. But for excellent skeptical accounts of expressivism by leading retributivists, see MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997), and R. A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, in 20 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1 (Michael Tonry ed., 1996).

fundamental similarities, but we also make clear that the most important differences between the two theories rest on particular understandings of what the *harms of crime* actually are, and whether given punishments address them.

Once people specify which harms are in dispute in a particular policy debate, speaking in terms of consequentialist and retributivist theories does not add much, if anything, to the discussion. In fact, it tends to obscure the real issues in contest. Worse still, it makes it more difficult to see which punishment policies will best redress the harms of crime. We argue in this Article that punishment policy debates should bypass the punishment philosophy stage altogether, and focus directly on contested views about harms. Doing so not only improves clarity, so that participants are at least all on the same page, but it also improves the likelihood that the punishment policy finally agreed upon will “work” in the sense of curing the harms of crime. This is because recognizing the particular and diverse harms of various crimes necessitates “matching” them with equally particular and diverse punishments. In short, making arguments about punishment theory when faced with an actual punishment policy proposal simply obscures the issues. Arguing about contested views of the *harms of crime and punishment*, in contrast, is more likely to be creative and on point.

To make these arguments, we proceed in four steps. In Part I, we show that when discussing particular punishment policy proposals, academics usually insist that one cannot be both a consequentialist and a retributivist at the same time; and policies that purport to do both simultaneously are assailed as incoherent. In Part II, we challenge this conclusion, by arguing that *neither* retributivism *nor* consequentialism—in either their pure or hybrid forms—can address the issues at play in a typical punishment policy debate. This is because both are indeterminate when it comes to telling us who and what to punish, and how much.

Part III is the heart of our Article. There, we use findings from philosophical and empirical literature to suggest an alternative approach to understanding the purposes of punishment—one that focuses on a more sophisticated specification of the harms of crime. In this part, we describe the nature of the harms of crime generally, and also offer a specific schedule of potential candidates for the harms of crime. We also describe the nature of disputes about these harms; namely, that various harms either are or are not *empirically* real or

*morally* worthy of recognition. We also offer two examples of how specific punishment policy debates would look different, if they focused on harms instead of on punishment philosophies.

Finally, in Part IV, we offer an illustration of how the recognition of diverse crime harms can be addressed by one especially flexible and creative approach to criminal punishing: restorative justice. In this final part, we argue that a multiplicity of harms can often best be cured with a multiplicity of punishments. We also describe how several scholars are currently criticizing restorative justice for its failure to commit to a (standard) purist punishment philosophy, and we caution that forcing it to do so undermines its genuine potential for improving punishment regimes.

#### I. CONSEQUENTIALISM VERSUS RETRIBUTIVISM: THE STANDARD VIEW, AND THE CONFLICTS IT HAS GENERATED

Consequentialism brings to mind the notion that legitimate punishment concerns itself only with preventing future harm. That is, consequentialism is *forward-looking* and *outcome-oriented*. A consequentialist might say that *consequences are normative for punishment*, in deciding what, how, and how much we should punish. Almost invariably, the “consequence” at issue is the effect on future crime. Retributivism, in contrast to consequentialism, is *backward-looking* and *desert-oriented*. A retributivist might say that *desert is normative for punishment*, in deciding what, how, and how much we should punish.

The acknowledged modern fathers of the consequentialists and retributivists are Jeremy Bentham<sup>2</sup> and Immanuel Kant,<sup>3</sup> respectively. These were perhaps the first thinkers to insist on a purist philosophical approach to punishment (that is, one that excludes other punishment motivations); and they did so roughly contemporaneously, at the turn of the nineteenth-century. Bentham and Kant argued that justice forbids us from considering—at all—reasons for punishing that conflict with their own preferred philosophy. In Bentham’s words, “If

2. See JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J. H. Burns & H. L. A. Hart eds., 1970) (1789). Bentham was very influenced by the work of Cesare Beccaria. See CESARE BECCARIA, OF CRIMES AND PUNISHMENTS (Kenelm Foster & Jane Grigson trans., 1964) (1764).

3. See IMMANUEL KANT, THE PHILOSOPHY OF LAW (W. Hastie trans., 1887) (1797). Hegel, of course, was also an influential early retributivist, who wrote less than half a century after Kant. See HEGEL’S PHILOSOPHY OF RIGHT (T.M. Knox trans., Oxford Univ Press 1978) (1821).

the principle of utility be a right principle to be governed by, and that in all cases, it follows from what has been just observed, that whatever principle differs from it in any case must necessarily be a wrong one.”<sup>4</sup> Compare Kant, arguing, “Juridical Punishment can never be administered merely as a means for promoting another Good either with regard to the Criminal himself or to Civil Society, but must in all cases be imposed only because the individual on whom it is inflicted *has committed a Crime*.”<sup>5</sup>

Bentham precisely sets forth conditions under which one may and may not punish. The touchstone for permissible punishment is the principle of maximizing utility. Bentham explicitly forbids punishment in a number of circumstances where Kant would demand it, such as where punishment would be “*inefficacious*: where it cannot act so as to prevent mischief [; w]here it is *unprofitable*, or too *expensive*: where the mischief it would produce would be greater than what it prevented[; and w]here it is *needless*: where the mischief may be prevented, or cease of itself, without it: that is, at a cheaper rate.”<sup>6</sup> In turn, Kant’s view forbids punishments where Bentham’s seems to demand it, as Kant insists that one may never punish merely to advance the social good.

If Kant and Bentham were the first punishment-philosophy purists, they definitely were not the last. Their writings spawned one of the classic debates in law: Should criminal punishments be retributive or consequentialist? Advocates in this argument have sometimes been blunt, like Sir James Fitzjames Stephen, an early retributivist who argued, “The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it.”<sup>7</sup>

4. BENTHAM, *supra* note 2, at ch.2, para. 1.

5. KANT, *supra* note 3, at 195.

6. BENTHAM, *supra* note 2, ch.8, para. 3.

7. 2 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (1883). See also, for example, Lord Denning:

Punishment is the way in which society expresses its denunciation of wrong doing: and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventative and nothing else.

ROYAL COMMISSION ON CAPITAL PUNISHMENT, *Memorandum Submitted by the Rt. Hon Lord Justice Denning*, in MINUTES OF EVIDENCE TAKEN BEFORE THE ROYAL COMMISSION ON CAPITAL PUNISHMENT, NINTH DAY, THURSDAY, Dec. 1, 1949, at 207 (1950). More modern retributivist works are JEFFRIE G. MURPHY, RETRIBUTION, JUSTICE, AND THERAPY: ESSAYS IN THE PHILOSOPHY OF LAW (1979), and Michael S. Moore, *The Moral Worth of Retribution*, in

Or, as phrased by Michael S. Moore, a modern retributivist, “The distinctive aspect of retributivism is that the moral desert of an offender is a *sufficient* reason to punish him or her. . . . That future crime might also be prevented by punishment is a happy surplus for a retributivist, but no part of the justification for punishing.”<sup>8</sup> A representative quote from utilitarian hard-liners comes from a recent article by Louis Kaplow and Steven Shavell, who argue that “in the evaluation of legal policies, no independent weight should be accorded to conceptions of fairness, such as corrective justice and desert in punishment. . . . [W]hen the choice of legal rules is based even in part on notions of fairness, individuals tend to be made worse off.”<sup>9</sup>

By the middle of this century at the latest, however, punishment scholars had all but abandoned purist theories. Consequentialism and retributivism each have their Achilles heel, with which most readers are more than familiar.<sup>10</sup> Retributivists have challenged consequentialism’s failure to explain why the innocent can’t be punished when it is expedient; nor can it explain why we should punish the guilty at all so long as the public *thinks* we have punished them (the “let’s not and say that we did” scenario). In turn, consequentialists have boxed retributivists into a corner, forcing them to try to explain why we should punish wrongdoers even when doing so seems to cost society far more than it stands to gain. More damningly, consequentialists have pointed out the problems with a theory based on desert, that doesn’t specify what deserving *is*.

As a result, everyone in the academy, it seems, has come to accept more-or-less hybrid theories.<sup>11</sup> The main distinctions are whether a given thinker’s theory leans more toward one view or the other, and by how much it leans. For instance, if retributivism does not have the tools to tell us exactly who to punish, and how much, it can at least serve as a limiting principle on consequentialism, preventing the latter from punishing out of mere expediency.<sup>12</sup> Or, if we can’t rely exclu-

RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179 (Ferdinand Schoeman ed., 1987).

8. Moore, *supra* note 7, at 180.

9. Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 966 (2001).

10. For a short general comparison, see Joel Feinberg, *The Classic Debate*, in PHILOSOPHY OF LAW 613 (Joel Feinberg & Hyman Gross eds., 5th ed. 1995).

11. See Kaplow & Shavell, *supra* note 9, at 1231–32, and especially 1246 n.697 (listing many such hybrid views).

12. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 62–70 (1968); Lawrence Crocker, *The Upper Limit of Just Punishment*, 41 EMORY L.J. 1059, 1104 (1992).

sively on consequentialism in a civilized and thoughtful penal regime, its insights and cost formulas can at least help us to avoid the worst waste and pitfalls from structuring a system on just deserts alone.<sup>13</sup> Or, we might structure a system where consequentialism rules in one domain (say, in assessing crimes and punishments at the legislative level<sup>14</sup> or in justifying why we have a penal regime at all),<sup>15</sup> and retributivism in another (such as evaluating individual wrongdoers).<sup>16</sup> In other words, as H.L.A. Hart put it, “[M]ost contemporary forms of retributive theory recognize that any theory of punishment purporting to be relevant to a modern system of criminal law must allot an important place to the Utilitarian conception that the institution of criminal punishment is to be justified as a method of preventing harmful crime.”<sup>17</sup>

But a funny thing happened on the way to the legislature. Though purist punishment philosophies are routinely dismissed as analytically unworkable in the literature, *actual penal regimes* are routinely assailed by academics for not conforming to them more rigidly.

In 1987, for example, the United States Sentencing Commission completed the Federal Sentencing Guidelines.<sup>18</sup> It explicitly refused to box itself in to any one punishment philosophy. The final draft argued that since “[m]ost observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime,” and since “in most sentencing decisions the application of either philosophy will produce the same or similar results,”<sup>19</sup> the Commission did not need to choose one philosophy over another. Critics have repeatedly assailed this position.<sup>20</sup> Most famously, one of

13. Sidney Gendin, *A Plausible Theory of Retribution*, 5 J. VALUE INQUIRY 1, 8 (1971); Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 354–55 (1983).

14. H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 9 (1968).

15. John Rawls, *Punishment*, in PHILOSOPHY OF LAW, *supra* note 10, at 654, 655–56.

16. *Id.*; HART, *supra* note 14, at 9.

17. H.L.A. HART, *Postscript: Responsibility and Retribution*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW, *supra* note 14, at 210, 235–36.

18. Sentencing Guidelines for the United States Courts, 18 U.S.C. app. (2003). Since then, every state in the United States has passed at least some version of determinate sentences for non-federal offences. Marguerite A. Driessen & W. Cole Durham, Jr., *Sentencing Dissonances in the United States: The Shrinking Distance Between Punishment Proposed and Sanction Served*, 50 AM. J. COMP. L. 623, 634 (2002).

19. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL 3–4 (1998).

20. See, e.g., Paul H. Robinson, *Dissent from the United States Sentencing Commission's Proposed Guidelines*, 77 J. CRIM. L. & CRIMINOLOGY 1112, 1112–24 (1986); Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 NW. U. L. REV. 1336 (1997); Aaron J. Rappaport,

the original members of the Sentencing Commission, Professor Paul Robinson, quit in protest exactly because the Commission refused to clearly express its sentencing philosophy. The resulting outcome, he argued, was “guidelines that are haphazard and internally inconsistent.”<sup>21</sup>

Similar objections have been leveled against the Halliday Report in England and Wales,<sup>22</sup> which proposed certain changes to the explicitly desert-oriented approach required by the governing Criminal Justice Act of 1991.<sup>23</sup> Specifically, the Halliday Report recommended that sentences should rely more on an offender’s criminal record. The noted punishment theorist Andrew Von Hirsch wrote an article attacking the Report for what he identified as its central flaw: its failure to articulate a punishment theory to explain its proposed changes.<sup>24</sup> The result, he complains, is recommendations that cannot be justified under any standard principle of punishment.

Julian V. Roberts, another prominent punishment theorist, leveled the charge more directly. “[T]he heart of the reform package contains an attempt to achieve the impossible: to reconcile within the same guiding statute (and sentencing guideline scheme) the conflicting sentencing philosophies of desert and utilitarianism.”<sup>25</sup> Though his tone is more direct, his ultimate objection is the same as Von Hirsch’s; namely, that accounting for previous offenses in sentencing—a deterrence perspective in that it serves as a very rough proxy for whether the offender is likely to commit more crimes in the future—will undermine desert-based sentencing.

We don’t mean to dismiss the criticisms of scholars like Robinson, Von Hirsch, and Roberts; they each identify real and important problems with the applied punishment schemes they discuss. Instead, we want to express skepticism about how they’ve characterized the

*Unprincipled Punishment: The U.S. Sentencing Commission’s Troubling Silence About the Purposes of Punishment*, 6 BUFF. CRIM. L. REV. 1043 (2003).

21. Robinson, *supra* note 20, at 1113. Robinson has since softened some of his initial criticisms of the Guidelines, but continues to adhere to the belief that the problems that do exist stem from the Guidelines’ lack of philosophical integrity. See Paul H. Robinson, *The Federal Sentencing Guidelines: Ten Years Later*, 91 NW. U. L. REV. 1231 (1997).

22. HOME OFFICE, MAKING PUNISHMENTS WORK: REPORT OF A REVIEW OF THE SENTENCING FRAMEWORK FOR ENGLAND AND WALES (2001).

23. Criminal Justice Act, 1991, c. 53 (Eng. & Wales).

24. Andrew Von Hirsch, *Record-Enhanced Sentencing in England and Wales: Reflections on the Halliday Report’s Proposed Treatment of Prior Convictions*, 4 PUNISHMENT & SOC’Y 443, 453 (2002).

25. Julian V. Roberts, *Alchemy in Sentencing: An Analysis of Sentencing Reform Proposals in England and Wales*, 4 PUNISHMENT & SOC’Y 425, 426 (2002).

nature of the problem; namely, as failures to be true to an underlying purist punishment philosophy. Robinson, for instance, points out the absurdity of a regime that can allow a greater punishment for submitting a false record about protected wildlife, than for aggravated sexual contact with a child.<sup>26</sup> He lists several such bizarre examples, arguing that each results from the Commission's having never comprehensively ranked the severity of various offenses.<sup>27</sup> But would sincerely invoking and hewing to a unitary punishment philosophy solve his (or Von Hirsch's, or Roberts's) very real complaint? The next part argues that it would not.

## II. CONSEQUENTIALISM VERSUS RETRIBUTIVISM: SIMILAR PROBLEMS, SIMILAR ASSUMPTIONS

We have already offered a definition of consequentialism as the idea that *consequences of punishment are normative for punishment*. Similarly, retributivism simply means that *desert is normative for punishment*. That is, a consequentialist must assess what will happen as a result of different punishments, and weigh these outcomes against one another. A retributivist must assess what a wrongdoer deserves. But these definitions, simple enough, beg the following questions. For consequentialists, which outcomes are relevant, and how, exactly, are they to be weighed against each other? For retributivists, what behaviors, and which actors, deserve punishment?

Attempts to answer these questions require us to step outside each model. Nothing within the model itself can provide the answers. This is most obvious in the case of retributivism. As Anthony R. Duff has phrased it, "The central objection to all retributivist theories is that they fail . . . to explain this notion of penal desert, falling back on unexplained intuition or metaphysical mystery-mongering, or offer[ing] covertly consequentialist explanations."<sup>28</sup> When one asks a retributivist, "*Who* deserves punishment?" they might respond by offering, "Those who are morally responsible for a criminal offense," or perhaps, "Those whose behavior is wrongful." If one asks them *how much* one should punish the deserving offender, the answer will be that the punishment must be "proportional" to the crime—which

26. Robinson, *supra* note 20, at 1113–14.

27. *Id.* at 1114.

28. Anthony R. Duff, *Crime and Punishment*, in ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY (E. Craig ed., 1998), available at <http://www.rep.routledge.com/article/T002SECT2>.

of course one can assess only after assessing how “bad” or “responsible” the wrongdoer is, but also only after one has determined how “bad” or “wrongful” the crime in question is. The point is that while the model relies fundamentally on notions of desert, it fails to specify, *within the model*, what “desert” is.

Though the point isn't as obvious<sup>29</sup> as it is with retributivism, consequentialism suffers from the same indeterminacy. Dan Kahan explains,

Unless we know whether and how much we disvalue a particular species of conduct, we can't determine whether the cost of deterring any particular amount of it is worth paying. Nor can we make a rational judgment about how to allocate punishment resources between crimes that impose different levels of harm.<sup>30</sup>

If you ask a consequentialist, “*Which* behaviors should we punish?” he might answer, “Those that affect the sum total of happiness in society.” If we ask, “*How much* should we punish?” he might answer, “Exactly as much as is necessary to offset the bad effects of the crime.” But again, we must look outside the model to determine which behaviors will affect (or more aptly, which we are willing to recognize as affecting) happiness. Similarly, the model won't tell us *how* bad the bad effects of crime are—it can only tell us how to weigh them off one another after we have plugged those values in ourselves.

We can put this in the context of the particular criticisms leveled at the Sentencing Guidelines and the Halliday Report. Powerfully, Robinson points out several pairs of seemingly absurd results possible under the Guidelines: aggravated fish smuggling can be punished more harshly than aggravated bank robbery, failure to surrender a Green Card more than certain antitrust violations, impersonating a government employee more than involuntary manslaughter, altering a car's VIN more than inciting a riot, as well as the already mentioned pair, aggravated sexual assault of a child more than filing a false report for protected wildlife.<sup>31</sup> Imagine instead that the Commission had

29. Just why it isn't as obvious is probably more a function of the fact that consequentialism is more accepted as a punishment philosophy in current public debates. As an analytic matter, the shortcoming is the same for both retributivism and consequentialism.

30. Dan M. Kahan, *The Theory of Value Dilemma: A Critique of the Economic Analysis of Criminal Law*, 1 OHIO ST. J. CRIM. L. (forthcoming 2004). Kahan argues that consequentialist punishment justifications are incomplete because they do not specify how much we should value the goods and bads produced by crime and its punishment. His answer is to turn to “intrinsic value retributivism.” However, for the reasons noted above, retributivism suffers the same deficiency.

31. Robinson, *supra* note 20, at 1113–14.

settled definitely on a particular sentencing philosophy. How might they have assigned potential penalties for these offenses differently?

A retributivist Commission could have said, “*If* bank robbery is worse than fish smuggling, antitrust violations worse than Green Card shenanigans, involuntary manslaughter worse than impersonation, riots worse than automobile fraud, and sexual assault of children worse than failing to protect wildlife, *then* we must punish the former more than the latter in each case.” But a consequentialist Commission could have said the exact same thing. The question is, how do we know which is worse than which? The answers may seem obvious as a matter of intuition, but the point is that our *punishment philosophy* does not provide them.

If we were, however, to demand an answer to the question of which is worse, what would we need to know? The list would be large. Just to begin, let’s look at the riots/VIN fraud pair. In order to determine how bad riots are, we need to know how much we value—at the most obvious first cut—communities that aren’t in a state of riot. Or, to put it in the reverse, how much do we disvalue riots? That is, how much damage do riots cause to the economy, to the community, and to individuals? How much do we value the speech acts that might be chilled if we punish incitation to riot? This merely begins the list, but the idea should be clear. We have to know all the harms that riots (and the punishment of riots) cause, and then we can know how bad they are. But we aren’t done, because we also need to know how much we disvalue VIN fraud. Again, how much damage does it cause to consumers, and to sellers? How much do we disvalue the inconvenience caused by the increased bureaucracy that detection of VIN fraud would entail (that is, how many more forms can we bear to fill out at the DMV)? Again, this merely begins the list, and only in the most general way.

If we really want to answer the question rigorously of which is worse, riots or VIN fraud, we’d need to answer *all* these questions of value, which translate into questions of harms. Only once we have done this can we tell how much punishment a riot inciter and a VIN fraud artist *deserves*. In exactly the same way, only after we have done this can we tell how much punishment each of these offenses requires in order to offset the *costs* of the crime. Neither retributivist nor consequentialist theories will help us here; *both identically require an underlying and independent assessment of the harms of crimes and their punishment.*

We should point out that Robinson does not directly argue that a purist retributivist would have come up with different pair-orderings than would a purist consequentialist. While he states that his beef with the Commission was its failure to settle on a unifying punishment philosophy,<sup>32</sup> as his article actually plays out he seems mostly aggravated by the Guideline's mechanical reliance on mathematical averaging of past actual sentences to come up with the Guideline's own sentences. The result is not so much Guidelines that fail to comport with strictly retributivist or consequentialist principles, but rather ones that simply weren't given much actual thought at all. While this itself *is* a problem, we have to go elsewhere to learn its nature. In work conducted with one of the authors of this Article, Robinson has argued that penal regimes that fail to comport with citizens' intuitions about just punishments will inevitably lose *legitimacy*, and ultimately compliance with law will decline.<sup>33</sup> The communities the authors investigate prefer a criminal law that reflects the kinds of concerns with which retributivists are usually associated, whereas the American legal system tends to embody the kinds of concerns with which consequentialists are usually associated. The resulting disconnect threatens system legitimacy. We can phrase these differing concerns in terms of competing views about what the harms of crime and punishment are; in Part III, we explain this notion further.

In short, in punishment policy debates, punishment philosophies serve as proxies for (contested) views about *what the harms of crime are*. What is really at stake in the cases we have described is whether or not certain kinds of losses are real, and whether or not they should *count* in the moral calculus of criminal punishment. Unfortunately, punishment philosophies turn out to be very inexact proxies, and certainly opaque ones.

We argue for a change not in the positions of the debate, but in its terms. Instead of framing the issue as one of retributivism versus consequentialism, we characterize it as one, far more directly, about the harms of crime. Framing things this way will allow policy debates about actual penal systems to truly make some progress, rather than getting bogged down in competing punishment philosophies that, in

32. *Id.* at 1112–13; Robinson, *The Federal Sentencing Guidelines: Ten Years Later*, *supra* note 21, at 1242.

33. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW U. L. REV. 453 (1997); PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 6–7, 201–08 (1995).

fact, do no real work at telling us which policy we should adopt. In short, we argue that discussions of whether particular policies are or should be retributivist or consequentialist are monumentally unhelpful. We need to get past these kinds of debates and get directly to what really matters.

Interestingly, the concept of “harm” has already fully colonized debates about the criminal laws themselves; that is, about what behaviors are or ought to be recognized as crimes. Bernard Harcourt has persuasively demonstrated that academic literature no longer uses moral theory to defend competing views of what should be crimes, though that used to be the primary currency for discourse in the area.<sup>34</sup> Instead, debates are framed in terms of John Stuart Mill’s harm principle, first introduced in his famous essay *On Liberty*.<sup>35</sup> In the past, one might have argued for bans on certain sexual behaviors or disorderly conduct because they offend a given community’s shared sense of morality. Or, one might have argued against such bans because regulating them is inconsistent with norms of liberal tolerance. Today, one is more likely instead to argue that these activities cause a definite *harm* that ought to be controlled (or that, to the contrary, these harms are ephemeral).<sup>36</sup> Another way of looking at our Article is as an argument that this same transformation should take place in the debate about punishment policies.

As with consequentialism and retributivism, Harcourt points out that the harm principle itself does not provide answers to the normative question of how (or even whether) we should punish.<sup>37</sup> However, unlike consequentialism and retributivism, framing things in terms of harm does reflect more accurately what motivates disagreement about actual punishment policies. As we argue below, the real issue at the heart of punishment policy disagreements is whether or not certain harms of crime actually exist, and if they exist, whether or not we should recognize them as a moral matter. Framing things in terms of

34. See Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999); BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 185–216* (2001) (hereinafter HARCOURT, *ILLUSION OF ORDER*).

35. JOHN STUART MILL, *ON LIBERTY* (David Spitz ed., W.W. Norton Co. 1975) (1859).

36. Harcourt, *The Collapse of the Harm Principle*, *supra* note 34, at 109, 134–38.

37. *Id.* at 182–83.

harms, then, provides much-needed transparency about the normative judgments that really drive policy decisions.<sup>38</sup>

### III. AN ALTERNATIVE PUNISHMENT “PHILOSOPHY”: THE HARMS OF CRIME ARE WHAT MATTER

#### A. *The Meaning of Harm*

##### 1. Crime Harms are Diverse and Sometimes Remote

If we were to put it in economic terms, we would say that the “harms” of crime are anything that results in “an allocation of resources other than that which would exist in the absence of crime.”<sup>39</sup> But phrasing things in economic terms is not the best way, we think, to capture the diversity of harms that different crimes wreak. In addition to “resources” like material goods, physical injuries, and economic losses, we also mean to include things like psychic well-being, status, community order, etc. In short, if people attach a positive value to something, then its loss could be a harm. If the loss occurs by what we consider to be a criminal action, then the loss is a harm of crime.

In addition to painting with a broad brush the *types* of losses that count as harms, we are also expansive in our understanding of *who* might suffer these harms, and how far down the causal chain from the crime a harm might occur and still count. We are expansive here because citizens themselves take this expansive stance when thinking about crimes. For example, direct victims suffer, but so do the people, businesses, and communities with which and in which victims interact.

##### 2. Crimes and Punishments are Best Described as Having Multiple Dimensions

Perhaps the most important reason we are reluctant to use an economic definition is that doing so implies that crime harms can be arrayed easily along a unitary metric of severity. Robinson demonstrated that our intuitions enable us to spontaneously differentiate

38. Cf. Tracey L. Meares & Bernard E. Harcourt, *Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 735 (2000).

39. Charles M. Gray, *Editor's Introduction*, in *THE COSTS OF CRIME* 7, 7 (Charles M. Gray ed., 1979).

and rank crimes as diverse as child molestation, wildlife smuggling, inciting riots, and immigration fraud. Further, a system that relies as heavily as ours does on imprisonment as the sole penalty for crime, and uses the duration of the sentence to mark the perceived severity of the crime, clearly makes this unitary metric assumption. Without rejecting the obvious conclusion that different crimes *can* be so ordered, and that our current penal regime implicitly does so via its almost complete reliance on prison for punishment, we argue that this is an oversimplification. If we paid more attention to the cognitive processes by which citizens of a culture manage this unification process, it would illuminate the diversity of harms that are being amalgamated.

To illustrate, imagine two home robberies. In the first, the robber steals a television set, and a set of antique silver-framed photographs housing irreplaceable pictures of the owner's deceased parents. In the second, the robber uses a baseball bat to smash the owner's television set, and his silver-framed photographs. Both of these crimes cause identical material harms, because in both cases the owner can no longer enjoy watching his favorite program while his parents smile down at him from the mantelpiece. But most victims would consider the second crime to have inflicted singular emotional harms as well. The second crime adds literal insult to injury. One could clumsily argue that these two crimes differ along the dimension of severity. But a better characterization is that they starkly differ in the *meaning* of the acts. It's not so much that one crime is more severe than the other (though it is), it's that the harm inflicted is experienced differently in the two cases.

This scenario helps explain why a rape is not only worse than, but truly different from, a mugging. The current prison-centric criminal justice system in this country elides this fact by simply adjusting the duration of the prison sentence for the two crimes. But we want to make two suggestions. The first is the least controversial: By investigating the intuitions that enable a judge to merge all of the varied harms of a crime into this one summary punishment (prison), we can learn a good deal generally about what people in a culture think the harms of crime actually are. Second, and more controversially, if we can disaggregate and identify the multiple harms into their component parts, we create the possibility of assigning variegated punishments that are better capable of appropriately dealing with different types of criminal harm (say, the insult and degradation of a rape),

than can a system that relies on a unitary punishment metric. When we fail to recognize the diversity of harms different crimes cause, we easily overlook how much better a diversity of *punishments* might perform, relative to using a single type of punishment that varies only in how severely we apply it. Being able to draw from a larger punishment set should generate a system that more efficiently achieves a culture's punishment purposes, than one that relies solely on prison.

By focusing on the specific harms of specific crimes, we can more easily identify what it is an offender needs to do to "make good," that is, what needs to be done to directly *answer* the crime. Because the harms we identify will likely be plural, the actions we will require of an offender as punishment will also more likely be plural—that is, we won't want to rely as much on imprisonment alone. It is our suggestion, one that requires empirical testing, that a "menu of punishments" approach will have two advantages: First, both victims and onlookers will see such punishments as more adequately addressing the diverse harms of crime. Second, by enabling us to shorten or sometimes even eliminate prison sentences, we will save money, and better still, minimize the harmful collateral effects of imprisonment, such as lost (or perverted) human and social capital.

### 3. The Criminal Justice System Strives to Balance the Harms of Crime with the Counter-Harms of Punishment

Crime inflicts harms on victims. Punishments are designed to "answer" crimes by inflicting counter-harms on the offender. The criminal justice system matches the harms of crime with the counter-harms of punishment, with the goal of righting or restoring the state of the world to what it would have been had there been no crime. A deterrence theorist would characterize this as making sure that the punishment provides proper incentives (neither punishment so weak that it fails to deter inefficient behaviors nor so strong that it chills beneficial ones). A retributivist would call this making sure that punishment is properly deserved (because either too harsh or too mild a punishment would be unjust). But both of these can be reduced to the notion of balancing crime with punishment. Simply put, the punishment should fit the crime.

The criminal justice system at every level focuses on balancing the harms of crime and punishment, yet this is far from straightforward in practice. Officially declaring a behavior a "crime" amounts to recognition that the behavior causes harm. The penalties attached to

a crime, by design, inflict answering harms on offenders—the point of inflicting the harms is either to modify the behavior of offenders, or to somehow (probably psychically) compensate victims. Criminal penalties, however, inflict collateral harms, too: sometimes on the offender himself, sometimes on related third parties, occasionally on victims, and always on the state who must police, adjudicate, and carry out sentences. Ideally, the upside of reducing or answering crime will compensate for the necessary downside of punishing it. On one side of the equation are the harms of the crime itself and collateral harms of punishing; on the other side are the intended “benefits” of declaring behaviors illegal and punishing them. The criminal justice system must evaluate all penal policies according to whether it balances or instead upsets this equation.

In order to do this, it must know which harms of crime a given punishment proposal aims to address, and which harms the punishment policy might inadvertently introduce while addressing them. Once all of these harms are specified, only then can the criminal justice system decide whether a given punishment proposal cures the ill, and if so, whether it is worth its costs.

#### 4. Harms May Be Evaluated as Empirically or Morally Valid

To the parties of a punishment policy debate, the harms of crime may seem so obvious that they do not need specifying or defending. On the contrary, these harms are highly contestable. In fact, we argue that when punishment policy debates arise, they can almost always be reduced to disputes about whether particular criminal losses are real, or if real, whether they ought to count.

The problem has two dimensions. One is empirical. That is, *does crime (or its punishment) cause a particular harm, in reality?* Asked like this, the question is one criminologists and psychologists have spent a good deal of time trying to answer. These questions sound familiar: Does crime cause disorder in neighborhoods?<sup>40</sup> How much trauma do rape victims experience?<sup>41</sup> How much money does the

40. Compare WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* (1990), with HARCOURT, *ILLUSION OF ORDER*, *supra* note 34.

41. See, e.g., Martin D. Schwartz & Molly S. Leggett, *Bad Dates or Emotional Trauma?: The Aftermath of Campus Sexual Assault*, 5 *VIOLENCE AGAINST WOMEN* 251 (1999); R. Karl Hanson, *The Psychological Impact of Sexual Assault on Women and Children: A Review*, 3 *ANNALS SEX RES.* 187 (1990).

economy lose for every instance of child molestation?<sup>42</sup> Some of these types of questions are less common, but still of the same species, that is, empirical: Do people lose social status as a result of criminal victimization?<sup>43</sup> Does the disproportionate use of capital punishment convey disrespect for Blacks?<sup>44</sup> Does the use of shaming penalties morally degrade society and the penal system?<sup>45</sup> In sum, one way to challenge a criminal policy is to argue that the harm it aims to address doesn't exist at all, is either smaller or larger than we think, or introduces real (usually collateral) harms that we hadn't considered.

The other dimension is moral. That is, *should we respect this kind of suffering as a harm?* This is a complex question that we do not deal with at any length in this Article; but it may be as important as the empirical question in criminal policy debates. This dimension is more than the realization that a criminal action may set in motion a chain reaction causing harms so causally remote that we would not regard the offender as having intentionally brought them about. It also captures the notion that we may not always be willing to write even direct or obvious harms onto our balance sheet. As just one small example, prosecuting a crime takes up many state resources (like judges' time) that we don't ordinarily include in our tally of the harms of a crime. We usually set this issue aside, not because it isn't real, but because adjudication seems like the kind of thing governments are simply obligated to do, and so its costs ought not to be charged against offenders. However, this dismissal is open to debate. Maybe a crime that costs more to adjudicate *should* be considered more harmful than one that may be adjudicated cheaply. This decision is not an empirical question, but a distinctly normative one.

As social scientists, we feel best equipped in this Article to highlight the empirical question of what the harms of any given punishment policy might be. But here we merely highlight; we do not quantify any harms beyond the assertion that if they are on our list, they are at least arguably greater than zero. (Our footnotes, however, often point to empiricists who have tried to measure the harms in question, and elsewhere, we also engage in this enterprise ourselves.)<sup>46</sup> Nor in this Article do we say which empirically *real* harms

42. TED R. MILLER ET AL., VICTIM COSTS AND CONSEQUENCES: A NEW LOOK (1996).

43. Kenworthy Bilz, unpublished data, on file with authors.

44. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 341 (1997).

45. James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1074-79, 1087-92 (1998).

46. Bilz, unpublished data, *supra* note 43.

are due respect in a criminal justice system, nor how they should be weighed. Instead, our ambition is to completely change the terms of the policy debate about punishment. Namely, we want people to stop talking about punishment *theories*, and instead start talking about *harms*. Specifically, when a punishment policy comes on the table, we urge disputants to specify their underlying assumptions, first about which specific harm of crime they are contesting or advocating, and second, about whether the dispute rests on empirical (the harm does or doesn't exist in fact) or moral (given that the harm exists, we insist on/refuse its recognition) grounds.<sup>47</sup>

We advocate this because disagreements about these assumptions (recognition, quantification, and relative weight) are *exactly where the real debates actually center*, whether or not people are talking that way explicitly. Unfortunately, especially in academic debates, punishment policy disagreements often get bogged down in theoretical arguments about the purposes of punishment.

Traditional punishment philosophy debates serve as very rough proxies for disagreements about the harms of crimes and punishments. *Retributivists* tend to emphasize the harms of crime itself to victims and to the social order; *rehabilitationists* emphasize the harms of criminal punishment to offenders; *incapacitation theorists* emphasize the harms of crime to general social control; and *deterrence theorists* emphasize whichever harms of crime are readily apparent and easily measurable (often economic or material losses). So, for example, when a retributivist argues with a rehabilitationist, we can usually assume that a good deal of their disagreement stems from the retributivist's perception that the rehabilitationist has not adequately accounted for the dignitary harms suffered by crime victims, and the rehabilitationist's perception that the retributivist has not appreciated the harms a criminal offender (and those who may rely on him emotionally or financially) will suffer from various punishments. Yet this fundamental disagreement generally remains unstated, even though it is at the core of the debate. Were the debaters to shift from abstract punishment theory to their concrete, genuine concerns, they might

47. One can imagine cases where we might refuse to acknowledge a harm, even though we admit that it is both real and morally worthy of consideration, simply because it is too hard to measure. One such example might be the economic costs to other drivers of a major interstate traffic jam, resulting from a collision caused by a criminally negligent driver. This is a classic example of an attenuated harm unrecognizable in tort; the argument is much the same for the criminal law. Cf. Victor E. Schwartz, *The Remoteness Doctrine: A Rational Limit on Tort Law*, 8 CORNELL J.L. & PUB. POL'Y 421, 423 (1999).

not change each other's position—but at least they'd be arguing about the same thing.

The next section aims to ease this shift in punishment policy discourse by explicitly laying out the various candidates for harms of crime, as identified in both philosophical and (especially) empirical literature about crime. Our object is to stimulate thought about the diversity of harms in play in any criminal justice regime.

### B. *A Schedule of the Harms of Crime and Punishment*

The harms can be ordered by sufferer, by degree of obviousness, or in any number of other ways. We have chosen to list them by type; namely, the harms of victimization, punishment, and prevention.

#### 1. Victimization Harms: Direct Victims

Many victimization costs are direct and easily calculable. For instance, a victim of robbery or burglary loses whatever is stolen.<sup>48</sup> A victim of a physical attack may suffer injuries,<sup>49</sup> or even lose his life. Though such material losses are the most obvious, they may not always—or even often—be the most important. For instance, robbery victims report that the sense of having been violated weighs more heavily than material losses.<sup>50</sup> Even less obviously, victims may suffer

48. On one view, there is no “loss” when a victim loses material goods that a wrongdoer merely steals (as opposed to destroys, as in vandalism). See Gray, *supra* note 39, at 28. That is, there has been a *transfer*, but no actual loss. One answer to this objection is actuarial: goods dramatically lose value when they are stolen. Even goods that stay in the hands of the thief are also probably worth less to the thief than they were to the lawful owner, for sentimental reasons and the like. Although there are certainly cases where the thief attaches a higher value to the good than the owner and is merely unable (but not unwilling!) to purchase it legally (contrast the “efficient theft” theory, Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 5–6 (1989)), most stolen goods are fenced at a fraction of their cost. See NEW YORK TEMPORARY COMMISSION OF INVESTIGATION, A REPORT ON FENCING: THE SALE AND DISTRIBUTION OF STOLEN PROPERTY (1978). We include losses from theft here, however, not so much because stolen goods suffer actuarial loss, but because even if the new “owners” value the goods *even more than their legal owners*, their loss is still a “harm” if one refuses, for moral reasons, to include in the calculus any benefits an offender gets from his crime. This is no different than refusing to balance the suffering of a rape victim against the psychic benefits the rapist gets from the act. For discussion, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 217–223 (4th ed. 1992). And again, in this taxonomy, we list harms plainly, and reserve their actual measurement, weight, and even recognition to the policy debaters themselves.

49. See Chester L. Britt, *Health Consequences of Criminal Victimization*, 8 INT'L REV. VICTIMOLOGY 63 (2001). Britt also reports the health consequences even to victims of property crime.

50. Studies routinely find that the “invasion of privacy,” for instance is the worst or one of the worst things about burglary. See the studies cited in Tony Keaton & Rebecca Leach, *Invasion of the “Body Snatchers”: Burglary Reconsidered*, 4 THEORETICAL CRIMINOLOGY 451, 455 (2000). The importance of such psychological concerns is cross cultural. See R. I. Mawby et al.,

psychic losses that have nothing to do with fear, such as shame and self-doubt.<sup>51</sup> A sense of lost self-worth may not just be in the victims' own head, but may be shared by third parties—that is, victims don't just lose self-esteem, but social esteem as well.<sup>52</sup> (Obviously, the magnitude of the losses suffered will vary with the type of crime.<sup>53</sup>) Victims even may suffer “secondary victimization”<sup>54</sup> when the criminal justice system or sources of social support (both formal and informal) fail to address their problems properly. Indeed, this secondary victimization in many cases will be the most significant harm victims experience.

Not just individuals, but commercial enterprises may suffer from victimization. They may suffer when their individual workers are victimized, in the form of lowered productivity,<sup>55</sup> expenditures on physical or mental health care,<sup>56</sup> or correcting other obstacles workers might experience as a result of crime (for example, arranging for transportation to and from work when a victim's car is stolen, or she is rendered unable to drive). And businesses themselves may be direct victims of crimes. They may suffer the costs of vandalism, theft, (sometime armed) robbery, and white collar crime.<sup>57</sup> As with individual victims, not only are the direct losses themselves costly, but the expenditures businesses make in their wake (such as lost productivity while investigating or correcting the crimes) also add up. When crimes against individuals (either workers or visitors) occur on the

*Victims' Needs and the Availability of Services: A Comparison of Burglary Victims in Poland, Hungary, and England*, 9 INT'L CRIM. JUST. REV. 18, 25–27 (1999).

51. Ronnie Janoff-Bulman & Irene Hanson Frieze, *A Theoretical Perspective for Understanding Reactions to Victimization*, 39 J. SOC. ISSUES 1 (1983).

52. Experiments on the “Just World” hypothesis show that when prevented from being able to help victims, onlookers tend to view victims as deserving their fate. See generally RESPONSES TO VICTIMIZATIONS AND BELIEF IN A JUST WORLD (Leo Montada & Melvin J. Lerner eds., 1998); see also Bilz, unpublished data, *supra* note 43.

53. See Arthur J. Lurigio, *Are All Victims Alike? The Adverse, Generalized, and Differential Impact of Crime*, 33 CRIME & DELINQUENCY 452, 454–55 (1987).

54. Isabel Correia et al., *The Effects of Belief in a Just World and Victim's Innocence on Secondary Victimization, Judgments of Justice and Deservingness*, 14 SOC. JUST. RES. 327 (2002); Carl H. D. Steinmetz, *Coping with a Serious Crime: Self-Help and Outside Help*, 9 VICTIMOLOGY 324 (1984).

55. E.g., Kathryn Andersen Clark et al., *A Cost-Benefit Analysis of the Violence Against Women Act of 1994*, 8 VIOLENCE AGAINST WOMEN 417 (2002).

56. E.g., NANCY E. ISAAC, CORPORATE SECTOR RESPONSE TO DOMESTIC VIOLENCE (1997).

57. E.g., Donald F. Kuratko et al., *Crime and Small Business: An Exploratory Study of Cost and Prevention Issues in U.S. Firms*, 38 J. SMALL BUS. MGMT. 1 (2000); AMERICAN MANAGEMENT ASSOCIATIONS, AMERICAN MANAGEMENT ASSOCIATIONS' CRIMES AGAINST BUSINESS PROJECT: BACKGROUND, FINDINGS AND RECOMMENDATIONS (1977).

business premises or in the course of the business's operations, all of these costs compound.<sup>58</sup>

## 2. Victimization Harms: Third Parties

Third parties may suffer harms from others' criminal victimization, and these costs are frequently profound. Virtually all individual victims are situated within a network of family and friends. Some of these may rely financially on victims, and some may rely emotionally. (This, of course, is the basis for the "loss of consortium" tort.) Thus, when victims are incapacitated physically or suffer economic losses, those who depend on them for support will bear losses as well. In addition, to the extent they empathize with the victim, they will suffer when "their" victims suffer.

Loved ones are not the only third parties who can suffer from crimes to others, however. Those who have never met the victim may suffer. Generalized fear is an obvious cost of crime (though it isn't perfectly correlated with risk of victimization).<sup>59</sup> Increased taxes to police high crime neighborhoods will reduce property values in a neighborhood, and even induce flight to lower-crime neighborhoods, inflicting obvious harm on residents both fleeing and remaining.<sup>60</sup> Even people who just share a social identity with a victim, such as religion, race, sexual orientation, or gender, may experience psychic harms. Indeed, studies of hate crime reveal that people genuinely feel victimized when they hear about incidents purposely directed against members of their own group.<sup>61</sup>

We have already discussed the effects on businesses when workers endure crimes, but all of these business costs, both direct and indirect, have the potential to affect still others.<sup>62</sup> If businesses must lower wages or even lay people off to pay for the costs of crime, the financial well-being of workers will be harmed. Increasing costs of insuring against crime affects consumer prices. If stock values drop, the well-being of shareholders is impinged.

58. See generally VIOLENCE AT WORK: CAUSES, PATTERNS AND PREVENTION (Martin Gill et al. eds., 2002).

59. See C. Hale, *Fear of Crime: A Review of the Literature*, 4 INT'L REV. VICTIMOLOGY 79 (1996).

60. Andrew J. Buck et al., *Endogenous Crime Victimization, Taxes, and Property Values*, 74 SOC. SCI. Q. 334 (1993).

61. See Paul Iganski, *Hate Crimes Hurt More*, 45 AM. BEHAV. SCIENTIST 626 (2001).

62. See *Action to Tackle Rising Cost of Crime to Firms*, W. MORNING NEWS (Plymouth, England), Aug. 14, 2003, at 1; Adrienne Gleeson, *Rising Cost of Crime Falls on Smallest Firms*, TIMES (London), Aug. 30, 1994, at 35.

Finally, third parties may simply suffer abstract losses as a result of crime. Their moral sensibilities may be offended.<sup>63</sup> Or, crime may unsettle their deep sense that others share their understandings about norms of right and wrong behavior.<sup>64</sup>

### 3. Victimization Harms: Communities/Institutions

Crime breeds crime: evidence of crime itself can make criminals infer that the community is a soft target, inducing them to engage in even more lawbreaking. This is the so-called “broken windows” effect.<sup>65</sup> But just the *fear* of crime and resulting avoidant behavior by individuals can have profound effects on entire communities. For one thing, crime may cause flight from high-crime communities to low-crime ones.<sup>66</sup> These defectors take their resources and their tax bases with them.<sup>67</sup>

Even those who stay may engage in neighborhood-transforming behaviors. An early open-ended survey on reactions to crime asked respondents if they did “anything to protect against the dangers of crime,” and found that two of the four most commonly cited responses involved strategies that should inevitably produce a lack of “neighborliness” in a community: staying off the streets after dark, and not talking to strangers.<sup>68</sup> Another early study found that from one-third to one-half of adults “limited or changed activities” in efforts to avoid crime victimization.<sup>69</sup> These behaviors can perceptibly change the character of neighborhoods: “Shops close early, community and religious organizations flounder for lack of participation, and people refuse to invest in or move into such areas because they are

63. See Neil Vidmar & Dale T. Miller, *Socialpsychological Processes Underlying Attitudes Toward Legal Punishment*, 14 LAW & SOC'Y REV. 565, 571 (1980).

64. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 34–41 (W. D. Halls trans., Free Press 1984) (1893).

65. James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29. The effect is controversial. See HARCOURT, *ILLUSION OF ORDER*, *supra* note 34. But remember, the point here is to list *potential* harms of crime, not to assess their empirical validity.

66. One study found that for Chicago-area relocators, “crime and safety” was cited as their most important reason for selecting a particular neighborhood, with 64 percent describing crime and safety as “very important” in their decision to leave their previous neighborhood. Wesley G. Skogan, *On Attitudes and Behaviors*, in REACTIONS TO CRIME 19, 34 (Dan A. Lewis ed., 1981).

67. *Id.* at 35.

68. *Id.* at 29.

69. *Id.*

not desirable places to live.”<sup>70</sup> Ironically, these crime-avoidant behaviors may actually foster *more* crime, “leav[ing] potential offenders at large, with no reason not to turn their attentions to others.”<sup>71</sup> Visible “target hardening” efforts in individual households (such as window bars) may have the same effect, making a community look less safe, which in turns breeds the kinds of avoidant activity that actually *make* it less safe (and simply less pleasant to live there).<sup>72</sup>

At least in theory, the opposite could occur. Neighbors asking neighbors to look after each other’s homes fosters trust. Crime-racked communities could organize and engage in collective surveillance and activism,<sup>73</sup> building social capital. Programs designed to give teenagers opportunities other than petty crime and gang membership (like Boys’/Girls’ Clubs) can appreciably increase these youths’ prospects, and consequently, improve the communities in which they live.<sup>74</sup> On the downside, ironically, these same interventions may inflate members’ perceptions of the incidence and risk of crime in their neighborhoods, leading to perverse effects.<sup>75</sup> In addition, neighborhood watch groups can also take on vigilante, and sometimes even racist, overtones—the creation of which must also be considered a harm of crime.

Finally, criminal victimization in general may have profound costs for institutions. We have already discussed direct material expenditures governments make while preventing and prosecuting crime. To the extent it cannot solve the problems associated with crime, however, institutions will also suffer losses of legitimacy. Victims frequently complain of their dissatisfaction with the machinery of criminal justice.<sup>76</sup> As we mentioned before, we sometimes even

70. *Id.* at 31; *see also* WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* (1990); Robert J. Sampson & W. Byron Groves, *Community Structure and Crime: Testing Social-Disorganization Theory*, 94 AM. J. SOC. 774 (1989); ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

71. Skogan, *supra* note 66, at 31.

72. *Id.*

73. *Id.* at 32.

74. Carl E. Pope & Rick Lovell, *Gang Prevention and Intervention Strategies of the Boys and Girls Clubs of America*, 28 FREE INQUIRY IN CREATIVE SOC. 91 (2000).

75. *Cf.* Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 342 (2001).

76. Ugljesa Zvekic, *Policing and Attitudes Towards Police in Countries in Transition: Preliminary Results of the International Crime (Victim) Survey*, 8 POLICING & SOC’Y 205 (1998); Ewa Bienkowska & Edna Erez, *Victims in the Polish Criminal Justice System: Law and Reality*, 15 INT’L J. COMP. & APPLIED CRIM. JUST. 217 (1991); Lois G. Forer, *The Law: Excessive Promise and Inadequate Fulfillment*, 24 CRIME & DELINQ. 197 (1978).

describe their treatment within the system as a “secondary victimization.” Indeed, the perceived ill-treatment of victims has spawned an entire “victims’ rights” movement to advocate for changes such as restitution,<sup>77</sup> victim impact statements,<sup>78</sup> better victim social services,<sup>79</sup> and the like. And to the extent the system is continually unable to respond to victims’ needs, the system will lose legitimacy, which in turn can have effects on victims’ own compliance with law.<sup>80</sup>

#### 4. Punishment Harms: Offenders

This is undoubtedly the most controversial class of sufferers. Offenders may experience economic losses as a result of the stigma of conviction (or even just arrest).<sup>81</sup> And of course, to the extent criminals “worsen” from their prison experiences, or simply from their being branded outlaws, we must consider a possible increase in their future lawbreaking.<sup>82</sup>

The harms an offender suffers may even be a result of the crime itself, if, for whatever reason, committing the crime causes him distress.<sup>83</sup> Wrongdoers may feel deeply conflicted about the crimes they commit.<sup>84</sup> Though we may not regard the anguish a pickpocket feels about his behavior as worthy of much consideration, other “unwilling

77. Robert Elias, *Alienating the Victim: Compensation and Victim Attitudes*, 40 J. SOC. ISSUES 103 (1984).

78. See *Payne v. Tennessee*, 501 U.S. 808 (1991). For an empirical evaluation of the effect of victim impact statements on victim satisfaction, see Edna Erez et al., *Victim Harm, Impact Statements and Victim Satisfaction with Justice: An Australian Experience*, 5 INT’L REV. VICTIMOLOGY 37 (1997).

79. U.S. OFFICE FOR VICTIMS OF CRIME, U.S. DEPARTMENT OF JUSTICE, *NEW DIRECTIONS FROM THE FIELD: VICTIMS’ RIGHTS AND SERVICES FOR THE 21ST CENTURY* (1998).

80. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

81. John R. Lott, Jr., *Do We Punish High Income Criminals Too Heavily?*, 30 ECON. INQUIRY 583 (1992); John R. Lott, Jr., *An Attempt at Measuring the Total Monetary Penalty from Drug Convictions: The Importance of an Individual’s Reputation*, 21 J. LEG. STUD. 159 (1992); John R. Lott, Jr., *The Effect of Conviction on the Legitimate Income of Criminals*, 34 ECON. LETTERS 381 (1990).

82. Evidence for this is understandably hard to gather (since there is no obvious way to construct a control group of those who have committed crimes but not been arrested or convicted), but for one example of an attempt to understand the effect of imprisonment on recidivism, see Julye Myner et al., *Variables Related to Recidivism Among Juvenile Offenders*, 46 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 30 (2002).

83. One study linked the closeness of the relationship of those who commit homicide to their victims, with the likelihood that the killer will commit suicide, theorizing that greater levels of guilt explained the positive finding. Steven Stack, *Homicide Followed by Suicide: An Analysis of Chicago Data*, 35 CRIMINOLOGY 435 (1997).

84. Consider Matza’s finding of ambivalence toward criminal wrongdoing in his famous study of juvenile delinquents. DAVID MATZA, *DELINQUENCY AND DRIFT* 41 (1964).

criminals” might evoke more sympathy and lead us to reconsider the wisdom of declaring their behavior criminal, or at least second-guess the magnitude of their punishment. Think, for example, of the guilt-wracked mercy-killer, or the addicted drug buyer. Further, offenders may choose not to engage in otherwise innocuous or beneficial behaviors, for fear of wrongful criminal punishment.<sup>85</sup>

Finally, of course, the *pleasure* an offender gets from committing his crimes could, in theory, count against the tally of losses of the crime. *Remember, whether such suffering should “count” is contestable*—but it exists.<sup>86</sup> The opposite accounting could occur, too—we might consider his pleasure to actually be an additional (psychic) harm to the victim, or to the social order. What we decide to do with data about possible offender pleasure is a part of the moral calculus, not the empirical one.

### 5. Punishment Harms: Third Parties

Just like victims, offenders are a part of extended networks of family and friends.<sup>87</sup> Criminal punishment hurts not only offenders, but those who rely on them financially and emotionally. Spouses, children, and employers lose when offenders go to jail, or even just when offenders experience diminishment of their human capital as a result of the stigma of criminal offending and punishment.<sup>88</sup> And just as victims’ loved ones empathize with victims’ misfortune and spend resources seeking punishment, so wrongdoers’ loved ones will often expend resources to avoid that punishment.<sup>89</sup>

Punishment can have even more pernicious effects on whole communities, if those communities bear a disproportionate burden of the costs of punishment. An example of this happens with typical drug law enforcement, which usually targets sellers (who are usually Black and largely reside in the inner city) at the expense of buyers (who overwhelmingly are white and dwell outside the inner cities and in the suburbs).<sup>90</sup> Prosecuting drug dealers instead of drug buyers

85. POSNER, *supra* note 48, at 224–25.

86. *See id.* at 217–23.

87. Professor Meares calls this phenomenon “linked fate.” *See generally* Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998).

88. DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* (2004).

89. So, of course, will offenders themselves. John R. Lott, Jr., *Should the Wealthy Be Able to “Buy Justice”?*, 95 J. POL. ECON. 1307 (1987).

90. Meares, *supra* note 87, at 192–93, 221.

means that Black inner city residents are more likely to be tossed in jail than their white suburban counterparts. The predictable result is a segment of the population suspicious and resentful of what they see as discriminatory law enforcement policies.<sup>91</sup>

## 6. Prevention Harms

Obviously, nobody wants to be a victim of crime. Governments at every level spend millions to avoid it, on policing, prosecuting, and punishing,<sup>92</sup> but also on crime prevention programs generally such as school interventions,<sup>93</sup> specialized urban planning to reduce the incidence of crime in particular places, etc.<sup>94</sup> Though public expenditures like police forces come most readily to mind when considering prevention costs, the bulk of such costs are directly borne by private individuals and businesses. Given that private security officers outnumber public police by about three to two,<sup>95</sup> it's fair to say that even policing duties are largely privatized. Businesses also spend a great deal of money screening customers and employees for criminal activity.<sup>96</sup> The purchase price of locks,<sup>97</sup> alarm systems, pepper sprays, and handguns,<sup>98</sup> self-defense courses, and the like are crime expenses. But less obviously, each *use* of these items, as well as the trouble of

91. *Id.* at 213. Note that this suspicion of law *enforcement* is present even though inner city residents are not more tolerant of law *breaking*. Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 L. & SOC'Y REV. 777 (1998).

92. BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1995, at 3 (Kathleen Maguire & Ann L. Pastore eds., 1996).

93. For instance, the 2001 annual budget for the National Crime Prevention Council, who spearhead the McGruff the Crime Dog public service campaign, was about \$12 million, and it used about \$100 million worth of donated media advertising. NATIONAL CRIME PREVENTION COUNCIL, 2001 ANNUAL REPORT: CREATING VITAL, CRIME-FREE COMMUNITIES, at <http://www.ncpc.org/ncpc/ncpc/?pg=5878-2348> (last visited Apr. 5, 2004).

94. For a general examination of the costs and benefits of prevention efforts, see Brandon C. Welsh & David P. Farrington, *Monetary Costs and Benefits of Crime Prevention Programs*, in 27 CRIME AND JUSTICE: A REVIEW OF RESEARCH 305 (Michael Tonry ed., 2000).

95. David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1174–77 (1999).

96. For an entertaining example, see David Sedaris's description of Macy's Department Store's employee screening. DAVID SEDARIS, *SantaLand Diaries*, in HOLIDAYS ON ICE 1, 9–10 (1998).

97. David A. Anderson, *The Aggregate Burden of Crime*, 42 J.L. & ECON. 611, 634 (1999).

98. Eduard A. Ziegenhagen & Dolores Brosnan, *Citizen Recourse to Self Protection: Structural, Attitudinal and Experiential Factors*, 4 CRIM. JUST. POL'Y REV. 91, 92 (1990) (finding that one-quarter of New York City subway riders in a 1986 survey carried such a device). Prof. Anderson also suggests annual expenditures on these sorts of items. Anderson, *supra* note 97, at 632–34.

purchasing them in the first place, also counts in the total.<sup>99</sup> Less obvious still are the harms of having to make less-desired lifestyle choices out of fear or crime avoidance, as we discussed before. Each decision to stay at home instead of walking in the streets at night, accept a job in a safer neighborhood, or move to a suburb where the crime rate is lower—along with the degree to which your quality of life is lower because of making this less-preferred option—is a prevention harm of crime. The effects of these decisions on communities may be among the costliest of all, affecting the character or viability of entire industries, neighborhoods, or even whole cities.

### C. Examples

Although in any given punishment policy debate, all of the above harms are *potentially* in dispute, usually only one or two actually are. And such debates can be crystallized down to a disagreement about whether the loss is real (an empirical question), or ought to be recognized (a moral question). To make this more concrete, we offer two brief examples of punishment policy debates, outlining how they are usually argued in academic literature, and how the debates would look if they focused instead on harms.

#### 1. Hate Crimes

In recent years, legislatures have increasingly passed sentence-enhancements for crimes motivated by hatred toward a particular group, such as gays, Jews, or African-Americans.<sup>100</sup> One debate focuses on how well such enhancements advance the cause of deterrence. For instance, one frequent argument is that hate-motivated criminals are more motivated than the garden-variety criminal, so in order to deter hate crime (which is also, because of its motivation, usually more violent) we must punish it more. But another deterrence argument goes in the opposite direction: the depth of bigotry underlying hate crimes make them undeterrable.<sup>101</sup> Other times, the hate crime debate is framed as one about retribution: either hate crimes

99. For example, in addition to estimating the average expenditures on locks in the United States yearly, Prof. Anderson also calculates, from survey data, the dollar value of the average time spent locking things and hunting for keys (4 minutes per day per person, or \$89.6 billion per year). Anderson, *supra* note 97, at 623–24.

100. *Wisconsin v. Mitchell*, 508 U.S. 476, 483 n.4 (1993) (listing such statutes).

101. *E.g.*, Craig L. Urich, *Hate Crime Legislation: A Policy Analysis*, 36 HOUS. L. REV. 1467, 1497 (1999); Shirley S. Abrahamson et al., *Words and Sentences: Penalty Enhancement for Hate Crimes*, 16 U. ARK. LITTLE ROCK L. REV. 515, 524–25 n.35 (1994).

are more deserving of punishment because they make an ordinary crime “worse,” or, they are no “worse” than ordinary crimes since the motivation does not change the nature of the act itself.<sup>102</sup> Thus, hate crime laws may be either assailed or lauded as being consistent with a particular punishment philosophy.

However, by framing the issue in deterrence or desert terms, we fail to engage directly with policy advocates. This is only partly because purist punishment philosophies are, as the arguments above suggest, indeterminate. More importantly, policy advocates have real and competing opinions about what the harms of hate crimes are.<sup>103</sup> When we speculate about the role of hate crime legislation in “detering” these crimes, we are really of course talking about deterring the *harms* that stem from hate crimes. When we talk about hate crimes as “deserving” more punishment, this is just an indirect way of saying that they cause more harm than their opportunistically-motivated cousins. But we can be much more direct in our debates. Rather than asking how often hate crimes occur (the answer to which will not move someone who is not convinced hate crimes are more harmful), we can ask: What exactly is the increased harm caused by hate-motivated crimes, that it requires a penalty premium to address? This is the point that advocates (and even opponents) seem to be making when they call hate crimes “symbolically” important.<sup>104</sup>

Research has revealed that hate crimes do seem to cause greater psychological and emotional distress.<sup>105</sup> Our own continuing empirical research into crime victimization suggests that victims’ greater distress is warranted: when crimes are un- or under-punished, victims actually do lose status in the eyes of fellow community members.<sup>106</sup> Moreover, hate crimes even seem to traumatize members of the

102. *E.g.*, Brian S. MacNamara, *New York’s Hate Crimes Act of 2000: Problematic and Redundant Legislation Aimed at Subjective Motivation*, 66 ALB. L. REV. 519, 529 (2003).

103. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 463 (1999).

104. *See, e.g.*, Edward L. Kenney, *Hate-Crime Law Debated in Courses*, NEWS-JOURNAL (Wilmington, DE), Jan. 19, 2004, at B1; Melanie Phillips, *Big Brother Really IS Watching You: As the Police Urge Us To Inform on “Incorrect” Opinions*, DAILY MAIL (London), Nov. 25, 2002, at 10.

105. Linda Garnets et al., *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences*, in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 207 (Gregory M. Herek & Kevin T. Berrill eds., 1992); FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW (1999); Satnam Virdee, *Racial Harassment*, in ETHNIC MINORITIES IN BRITAIN: DIVERSITY AND DISADVANTAGE 259, 284-89 (Tariq Modood et al. eds., 1997). Some research disputes these harms. *See, e.g.*, JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS (1998).

106. Bilz, unpublished data, *supra* note 43.

targeted group who were not directly involved in the actual crime event itself.<sup>107</sup>

So hate crimes do seem to inflict more harm. Yet even where the increased harm of hate crimes is acknowledged, we still may debate whether we ought to recognize them in the law. This would be a moral assessment about the respect due to certain kinds of harms; here, status or insult harms. Opponents could say that while harms to status may be genuine, the criminal law should not be in the business of unsettling status hierarchies. Another approach opponents take is to counter with another empirical claim about the harms of punishing hate crimes. This is what opponents implicitly do when they complain that such laws punish beliefs, not behaviors. Namely, punishing hate crimes chills the free flow of ideas, which harms democratic ideals, and even democracies themselves—this too is a harm that must be considering when deciding on hate crime policy.

The point is that these issues—whether hate crimes (and hate crime laws) do in fact cause harms, and whether the criminal justice system should be in the business of answering them—are what advocates actually care about. Although paring the issue down to a debate about the increased harms caused by hate crimes does not tell us whether or not to have enhanced penalties, talking this way at least puts us all on the same page. Talking about punishment philosophy does not.

## 2. Crack Cocaine

Interestingly, the debate about whether crack cocaine should be penalized more severely than powder cocaine actually did begin as one about a particular kind of harm, and has since shifted to another. Initially, the focus was on the harm that stems directly from the crack cocaine industry itself. That is, early proponents of a crack cocaine punishment premium urged that because crack forms of the drug had a much more devastating impact on inner city communities than powder, the punishment for crack should be proportionately larger.<sup>108</sup>

107. Monique Noelle, *The Ripple Effect of the Matthew Shepard Murder: Impact on the Assumptive Worlds of Members of the Targeted Group*, 46 AM. BEHAV. SCIENTIST 27 (2002); Iganski, *supra* note 61, at 628–32.

108. See, e.g., Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1278 (1994). In 1986, residents of an inner city neighborhood in New York, ravaged by crack cocaine, held a rally demanding an “additional 250 patrolmen and 50 undercover police officers to combat the drug problem in their neighbor-

However, once the premium went into effect, another harm, unforeseen, reared its ugly head. Although inner city residents disproportionately suffer from the effects of the crack cocaine trade,<sup>109</sup> they also suffer disproportionately from anti-crack law enforcement.<sup>110</sup> Longer prison terms for crack cocaine sellers has resulted in a significant proportion of young Black inner city men, in the prime of their earning years and frequently the fathers of small children, being locked away for very long prison terms.<sup>111</sup> This trend has further decimated the already threatened stores of social capital within inner city communities. To make matters even worse, as the penalties for sales rose, crack cocaine itself became costlier (because dealers had to be “paid” more to compensate them for increased imprisonment risks). As a matter of simple economics, this increased the price of crack cocaine. And as crack cocaine prices rose, particular markets (like street corners) became more valuable—and more worth killing for. Thus another cost of increased enforcement was, ironically, greater levels of street violence in inner city communities.<sup>112</sup>

Many critics now argue that crack cocaine premiums are unjust. But the argument is usually framed as a retributive concern; namely, that sellers of crack cocaine do not “deserve” stiffer penalties than sellers of powder cocaine, and that the disparity is racist since Blacks disproportionately sell crack.<sup>113</sup> But what really drives the objection to crack punishment premiums is a sense that particular communities—overwhelmingly black and poor—are suffering in a way we didn’t fully anticipate when the premiums were initially advocated. The very communities that policy makers were trying to protect with the premiums, have instead suffered. Focusing on retributive justice issues misses this essential point. Abstract issues of desert are not really what critics care about, nor are such arguments particularly persuasive—they box in politicians, who cannot feasibly vote in way that suggests they do not think crack cocaine “deserves” harsh penalties. But by shifting focus back to the specific harms that the crack cocaine

hoods.” John T. McQuiston, *At Rally in Bronx, Hundreds Clamor for Aid in Drug Fight*, N.Y. TIMES, June 8, 1986, at 42.

109. Meares, *supra* note 87, at 199–203.

110. *Id.* at 205–11.

111. *Id.* at 206–07.

112. *Id.* at 221–22.

113. One article critical of the disparity quotes a researcher saying, “Cocaine is cocaine. Regardless of whether you shoot it up or smoke it or snort it, it has the same stimulant effect.” *The Cocaine Color Line*, LEDGER (Lakeland, Florida), Dec. 2, 1996, at A10.

*trade* as well as its disproportionate *enforcement* inflict on inner city communities, it would become easier for both sides to simply say, “These policies have not worked to reduce the harm as we intended.” Further, recognizing these harms explicitly also makes it easier for policy makers to see truly creative punishment options. In the case of crack cocaine, merely shifting from strategies that target sellers to ones that target buyers may cure a great deal of the problem. But this strategy only becomes clear (even somewhat obvious) when one focuses on harms, not philosophies.<sup>114</sup> So by shifting the debate to a cooler, empirical question about whether the policy solves the harms it was intended to solve, or instead replaces them with new and worse ones, politicians can more easily reverse the premiums as having been merely dysfunctional, rather than undeserving.

In neither of the above cases does shifting to a discussion of harms make the policy solution obvious, with no additional work either empirical or moral. But what it *does* make obvious are the true concerns underlying the debate, enabling them to be disputed sensibly and directly. Better still, when we debate the different harms of crime, by necessity we also must recognize their diversity. When we obscure the harms by forcing them into a unitary metric of “desert” or “disutility,” it only allows us to compare different crimes along the dimension of severity. If instead we abandon this monism and focus on the pluralism of criminal harms, we can still compare their severity reasonably well, but we can also see the richness of meanings of different types of criminal harms. The advantage here is not aesthetic, but emphatically practical. Diverse harms may demand (or at least be better cured by) diverse punishments. By abandoning punishment philosophy approaches, we may thus also improve the creativity of punishment policy proposals. This in turn might enable us to punish with less reliance on prison sentences of long duration, with their well-known financial and social costs.

Our final part is devoted to an example of just such creativity stemming from a punishment policy approach that explicitly focuses on the idea that crime causes diverse harms. This is the great promise of restorative justice. We argue that certain other aspects of the restorative movement that its proponents have chosen to embrace in-

114. Prof. Meares discusses the effect of these “reverse stings” at length. Meares, *supra* note 87, at 220–23. In short, she argues that they help engender inner city residents’ confidence in the police, and by causing a decrease in the price of drugs (by restricting demand rather than supply), they help to reduce the local violence associated with competition in the drug trade. *Id.*

stead, tend to undermine this promise and limit or destroy its utility as a general solution to criminal punishment.

#### IV. RESTORATIVE JUSTICE: RECOGNIZING THE MULTIPLE HARMS OF CRIME

“Restorative justice” is a relatively recent phenomenon that has been growing in popularity with policy makers and academics alike. As with many innovative policies, the concept of restorative justice is still in the process of being defined. Restorative justice contains elements pleasing to both liberals and conservatives,<sup>115</sup> making for interesting and strange bedfellows. Conservatives like it because it pays attention to victims (indeed, the concept was born out of the right-wing victims’ rights movement<sup>116</sup>) and liberals like it because it doesn’t seem as punitive as jail.<sup>117</sup> Probably because of its broad-based appeal, the growth of restorative justice programs (manifested as Victim Offender Reconciliation Programs (“VORPs”) or, more commonly, Victim Offender Mediation (“VOMs”)) has been rapid since their inception in the mid-1970s.<sup>118</sup> At last count, there were more than 1,000 of them throughout North America and Europe, and the numbers continue to expand at a fast pace.<sup>119</sup>

The architectures of various VOMs differ importantly in their details, but the foundation is always the same. Essentially, VOMs are meetings between victims, offenders, and mediators (although in some versions others might also be present, such as family members, friends, community members, and the like). The outcomes of the meetings also vary, but the usual stated goals are to provide a forum for “clearing the air” and asking questions, agreeing on a restitution contract for the offender, and also giving the offender the opportunity

115. Robert B. Coates, *Victim-Offender Reconciliation Programs in North America: An Assessment*, in CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION 125, 125–26 (Burt Galaway & Joe Hudson eds., 1990).

116. Heather Strang, *The Crime Victim Movement as a Force in Civil Society*, in RESTORATIVE JUSTICE AND CIVIL SOCIETY 69, 73–75 (Heather Strang & John Braithwaite eds., 2001); James Dignan & Michael Cavadino, *Towards a Framework for Conceptualizing and Evaluating Models of Criminal Justice from a Victim’s Perspective*, 4 INT’L REV. VICTIMOLOGY 153 (1996).

117. Gordon Bazemore, *Restorative Justice and Earned Redemption: Communities, Victims, and Offender Reintegration*, 41 AM. BEHAV. SCIENTIST 768 (1998).

118. Mark S. Umbreit, *Restorative Justice Through Mediation: The Impact of Programs in Four Canadian Provinces*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES (Burt Galaway & Joe Hudson eds., 1996).

119. Mark S. Umbreit & Jean Greenwood, *National Survey of Victim-Offender Mediation Programs in the United States*, 16 MEDIATION Q. 235 (1999).

to apologize to his victim. The meetings are optional for both parties, and may either be diversionary (meaning they replace prosecution) or an adjunct to sentencing/probation.<sup>120</sup> Flexibility is the key—all of the parties present are involved in deciding how to respond to the crime.

The utility of the restorative process is its ability to acknowledge the broad sweep of harm inflicted by crime and punishment, both in type and in who suffers. The “[c]ore restorative justice ideals imply that government should surrender its monopoly over responses to crime to those who are directly affected—the victim, the offender, and the community.”<sup>121</sup> During a typical VOM, a victim gets to describe how much she lost materially as a consequence of crime. But she also gets to specify the emotional and psychological harms she suffered; often, these are status harms, or the sense of having been humiliated or violated. Representative community members, if present, also get to specify the losses they suffered (such as diminished social activity because of fears, or an assault on community values). Offenders’ own participation gives them the opportunity, at least, to ameliorate the harm they caused, with less damage to themselves, their families, and their communities than traditional jail sentences typically inflict. Because it recognizes an array of criminal harms, restorative justice also enables and demands an equally diverse assortment of responses and actions designed to address them. It allows for creative, precisely tailored, and therefore more deeply satisfying resolutions to criminal offending. In short, restorative justice is harm-oriented. It is about seeking redress for the multiple harms inflicted by crime, while being cognizant of the myriad harms inflicted by punishment as well.

Notably, discussions of restorative justice do not require one to take a philosophical stand on retribution, rehabilitation, or deterrence. In fact, what makes restorative justice so appealing is that because of its harm-focus, people with any of these philosophical bents can all agree that restorative justice (in the abstract) advances their

120. Mark S. Umbreit, Robert B. Coates, & Ann Warner Roberts, *The Impact of Victim-Offender Mediation: A Cross-National Perspective*, 17 *MEDIATION Q.* 215, 216–17 (2000).

121. Leena Kurki, *Restorative and Community Justice in the United States*, in 27 *CRIME AND JUSTICE: A REVIEW OF RESEARCH*, *supra* note 94, at 235, 236. Depending on exactly what she means by “surrender[ing]” its “monopoly,” Kurki may be imposing an impossible condition on restorative procedures. The presence of some control imposed by the government to insure equitable balancing of crimes with punishments, as opposed to leaving the determination of penalties solely in the hands of those immediately involved in the specific case at hand, seems an obvious requirement of a procedure that will be allowed to deal with more than the most minor offenses.

cause. Retributionists, we argued earlier, care more than others about harms suffered by victims of crime. Restitutionists care more about the harms of punishment to offenders. And deterrence theorists care about relatively easily measured material harms of both crime and punishment. Happily, restorative justice considers all of these explicitly, allowing philosophers of all stripes to approve of it. By refusing to endorse one or the other view, and focusing instead on the harms of particular crimes and punishments, it is free to produce genuine, creative, and meaningful solutions.

So long as restorative justice can avoid the philosophy trap, it offers stunning potential to the criminal justice system. Unfortunately, many punishment philosophers are striving to make restorative justice their own. Take, for instance, John Braithwaite, one of the earliest, most eloquent, and most energetic academic advocates for restorative justice. He, along with coauthor Heather Strang, recently offered perhaps the most revealing summary of the concept:

On [the procedural] view, restorative justice is a process that brings together all stakeholders affected by some harm that has been done. . . . These stakeholders meet in a circle to discuss how they have been affected by the harm and come to some agreement as to what should be done to right any wrongs suffered. On the other view, it is values that distinguish restorative justice from traditional punitive state justice. Restorative justice is about healing (restoration) rather than hurting.<sup>122</sup>

The description starts out well. The first two sentences comport with the spirit of restorative justice as a harm-focused policy approach. But the last sentence poses the problem. If “it is values that distinguish restorative justice from traditional punitive state justice” and “[r]estorative justice is about healing (restoration) rather than hurting,” then “restorative justice” is almost never about doing full justice at all. Namely, a restorative justice procedure that refuses to “hurt” offenders cannot give full consideration to all of the harms suffered by victims and against communities. As has been demonstrated in numerous research studies, citizens feel that assigning a punitive treatment to the offender, presumably what Braithwaite and Strang dismiss as “hurting,” is morally required for criminal offenses,

122. John Braithwaite & Heather Strang, *Introduction: Restorative Justice and Civil Society*, in *RESTORATIVE JUSTICE AND CIVIL SOCIETY*, *supra* note 116, at 1.

in order to adequately respond to the crime (and by extension, to victims' suffering).<sup>123</sup>

Braithwaite and Strang are indirectly staking a philosophical claim in restorative justice in a way that others have done more directly. Other scholars have explicitly warned of the dangers of restorative justice becoming too "retributive,"<sup>124</sup> or argued that restorative justice must be "rehabilitative." But what Braithwaite, Strang, and the others really care about are particular harms. Namely, they want to make sure restorative justice procedures make room for the harms suffered by offenders from harsh punishments. They want to make sure that harms suffered by victims, particularly hard—to measure ones like dignitary harms, do not dominate the proceedings. But by broadly identifying the enemy as the presence of "retributive" sentiments or as a lack of rehabilitative concerns, they throw out the baby with the bathwater. "Retribution" throws out a whole class of harms; "rehabilitation" lets in another with equal lack of discrimination. Making restorative justice consistent with a particular purist punishment philosophy is bound to make those who ally with a different philosophy reject it altogether. It also erodes the greatest asset of restorative justice—its ability to appeal across political dividing lines.

Research we have conducted hints that this may already be happening. Citizens seem unwilling to route serious cases (such as those involving physical harm) into restorative justice programs.<sup>125</sup> This is probably because the public regards these programs as lacking in punitive punch. They believe that justice necessitates inflicting harm on offenders in a way that fits the crimes they have committed. Since restorative justice programs are perceived (often rightly) as diversions from the more severe sanctions offered by the criminal justice system, citizens balk at using them for offenses that require the heavy guns of prison to fully condemn. Why are they willing to use restorative jus-

123. Cf. Kevin M. Carlsmith, John M. Darley & Paul H. Robinson, *Why Do We Punish?: Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCH. 284 (2002); John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, *Incapacitation and Just Deserts as Motives for Punishment*, 24 L & HUM. BEHAV. 659 (2000).

124. E.g., Charles Tracy, *The Promises and Perils of Restorative Justice*, 42 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 275 (1998); Michael L. Radelet & Marian J. Borg, *Comment on Umbreit and Vos: Retributive Versus Restorative Justice*, 4 HOMICIDE STUD. 88 (2000).

125. Kenworthy Bilz, *Restorative Justice and Victim Offender Mediation: A New Area for Social Psychological Inquiry?* (Unpublished Master's Thesis, Princeton Univ., 2001) (on file with authors).

tice procedures at all, even for more minor offenses? It isn't because restorative justice procedures are not retributive at all. In fact, they are: victims get to "face down" their offenders, inflicting a measure of humiliation on them that responds to the humiliation they themselves felt as victims.<sup>126</sup> But while being faced down by your victim may be humiliating, it still isn't very severe. Restorative justice as popularly conceived is capable of inflicting adequate harm (in the form of condemnation) on minor offenders; but it just isn't strong enough for more serious ones. Take away *all* retributive elements of restorative justice, however, and citizens will be unwilling to use it for *any* crimes, even the minor ones. Demanding that restorative justice reject retribution, and more generously embrace rehabilitation, will certainly destroy restorative justice altogether.

By being expansive and explicit in its understanding of the harms of crime and punishment, restorative justice's approach also easily accommodates punishments that vary along more than just one dimension. Imprisonment and fines, the favored sanctions today, require translating a specific offense, in all its diverse harms, into a unitary (or at most, dual) metric. Shorter prison sentences (or lower fines) are less severe, and longer sentences (or higher fines) are more severe. While we are capable of making such translations, and automatically, doing so can leave us with a lingering sense of incompleteness, because we have failed to engage in careful consideration of the variety of harms motivating our final conclusion. Further, while there is nothing about retributivist or consequentialist philosophy that inherently prevents assigning creative punishments that go beyond merely fine-tuning imprisonment and fine guidelines, their opaque amalgamation of harms makes this less likely. By instead focusing on

126. Victims have a direct hand in deciding how the harms they suffered will be addressed; a position that gives them power over the offender. But interestingly, to the extent that the harms she suffered were psychic, emotional, or losses in status, the very ability to meet the offender face-to-face may go some way toward healing her wounds. Here, dialogue and redress merge into one.

126. This "face-down" is such an important feature of VOM that it sometimes can overshadow any other benefits a victim gets from the meeting. Family members of murder victims who participated in VOMs described the satisfaction of such power-transfers from the offender by noting, "One thing that I did get accomplished was I did see him face-to-face, I did have him look me straight in the face and tell me he killed my sister." A granddaughter of a murder victim reported, "Even if I had only gotten in the room and sat and done that for 5 minutes, I would have been happy." One man who had been shot point-blank during a motel robbery wanted to face his offender because he had "'thought the offender was a monster,' a being whom he had fantasized as horribly powerful." After his assailant apologized for what he had done, the man responded, "I'm glad that you're sorry." Carl D. Schneider, *What it Means to Be Sorry: The Power of Apology in Mediation*, 17 *MEDIATION Q.* 265, 272 (2000).

the diverse harms of crime, we may more clearly see a multi-dimensional array of things the offender could do to the victim and the community to ameliorate the harms he caused. Thus pushing restorative justice to adopt a purist punishment philosophy also risks cramping its facility for plural punishments.

In sum, the greatest strength of restorative justice (at least as originally conceived) is its refusal to settle on a purist punishment philosophy. By embracing a harm-approach to crime and its resolution, it is flexible, transparent, and creative in its approach to criminal justice. If, however, advocates insist on turning its distinct harm-focus into a philosophical one, it will lose not only its benefits as a genuine alternative to more traditional criminal justice procedures, but it will lose its political palatability as well. Sadly, this may have already happened to some degree.

#### CONCLUSION

Framing criminal policy debates in terms of competing punishment philosophies is not the most useful way to frame the issues. First, without going outside of their own models, retributivism and consequentialism are indeterminate about what should be punished, and how much. Thus, they cannot on their own help us to decide whether we should adopt a particular criminal justice policy. Second, once we do go outside the models to examine their underlying assumptions, we see that both philosophies require some independent conception about the harms of crime. It is these different conceptions about the harms of crime that lead to different conclusions about what policies the criminal justice system should adopt. But once we specify the harms of crime we are willing to acknowledge (both on the basis of their being empirically “real” and morally worthy of recognition), the punishment philosophies themselves do no additional work in resolving policy debates.

Furthermore, because punishment philosophies are opaque about the diverse harms of crime, they tend to amalgamate them into single dimensions such as how “severe” different crimes are. As a result, debates framed as competitions between punishment philosophies tend to lead to less creative suggestions for punishment policies than would debates framed directly as competitions between differing conceptions of the harms of crime. In particular, punishment philosophy-dominated debates tend to lead to mere refinements of prevailing imprisonment and fining schedules, rather than to complex punish-

ment proposals that would directly address the multiple types of harm that different crimes inflict.