Volume 88
Issue 1 *Dickinson Law Review - Volume 88, 1983-1984*

10-1-1983

A Critical Appraisal of Criminal Deterrence Theory

Kevin C. Kennedy

A Critical Appraisal of Criminal Deterrence Theory

Kevin C. Kennedy*

I. Introduction

The search for improved methods of crime control has been unending. There is little question that effective deterrence of criminal behavior has been the *raison d'etre* of this search. The hope of deterrence has fueled this quest in part through its implicit promise, provided that the right combination of law enforcement techniques and tools are employed, of attaining a crime-free society.

What are the assumptions upon which criminal deterrence theory is based? Are these assumptions valid? What are the hidden implications of the criminal deterrence theory? Is it wise to continue to expend society's energies in the battle against crime with deterrence as a guide? After a discussion of criminal deterrence theory's basic principles,[1] this article examines the assumptions and implications supporting the theory,[2] critiques those assumptions and implications[3] and offers an alternative to deterrence theory.[4]

II. General Principles of Criminal Deterrence Theory

A. Background

Criminal deterrence has been divided broadly into two categories, prevention and deterrence; each of these categories have been divided further into two subcategories, special and general.[5] The preventive dimension of criminal deterrence has been defined as follows:

> In the broad usage, a deterrent is anything which exerts a preventive force against crime. Usually, but not necessarily, we are interested in the preventive effects of crime control measures

* A.B. 1973, University of Michigan; J.D. 1977, Wayne State University Law School; LL.M. 1982, Harvard Law School. The author is a law clerk to Senior Judge Herbert N. Maletz of the United States Court of International Trade in New York City.

1. *See infra* notes 5-25 and accompanying text.
2. *See infra* notes 26-51 and accompanying text.
3. *See infra* notes 52-79 and accompanying text.
4. *See infra* note 80 and accompanying text.
5. D. BEYLEVELD, A BIBLIOGRAPHY ON GENERAL DETERRENCE RESEARCH xx (1978).

which are introduced by law enforcement agencies. In this case, an interest in the broad deterrent effectiveness of these measures is an interest in their crime preventive effectiveness by whatever means prevention is achieved.[6]

The deterrent dimension—the second broad category and the major focus of this article—has been defined as the "control or alteration of present and future criminal behavior which is effected by fear of adverse extrinsic consequences resulting from that behavior."[7] This dimension is, in essence, the deliberate threat of harm, communicated to the public generally, to discourage socially proscribed conduct across all society.[8]

Jeremy Bentham and Cesare Beccaria are responsible for some of the earliest formulations of criminal deterrence theory.[9] Bentham was convinced that crime rose from the conscious, rational considerations of the individual.[10] Accordingly, a person contemplating the commission of a crime would undertake a cost-benefit analysis and would execute the criminal plan only if potential benefits sufficiently outweighed expected costs. Under this thesis, the task of law enforcement personnel and lawmakers was clear: the risks, or costs, for a potential criminal had to be so great that he would have far more to lose than to gain from committing a crime.[11] Today, criminal deterrence theorists continue to rely on this model, called the economic model of the rational actor, to explain and predict criminal behavior.[12]

In addition to theorists, courts have adopted the rational actor model as a justification for the imposition of certain penalties, specif-

---

6. *Id.* at xvi.

7. *Id.* Special deterrence focuses on the alteration of the behavior of the individual law violator.

8. *See* Walker, *The Efficacy and Morality of Deterrents*, 1979 CRIM. L. REV. 129 [hereinafter cited as Walker].

9. *See generally* C.BECCARIA, ON CRIMES AND PUNISHMENTS (Bobbs-Merrill ed. 1963) [hereinafter cited as BECCARIA]; J. BENTHAM, PRINCIPLES OF PENAL LAW (1843). The roots of deterrence can be traced as far back as antiquity when warring monarchs exchanged hostages as a peace preservation measure. *See* T. SCHELLING, THE STRATEGY OF CONFLICT 20, 135-37 (1980) [hereinafter cited as SCHELLING].

10. *See* J. ANDENAES, PUNISHMENT AND DETERRENCE 7 (1974).

11. *Id.* at 7, 110.

12. *See, e.g.*, J. SEDGWICK, DETERRING CRIMINALS: POLICY MAKING AND THE AMERICAN POLITICAL TRADITION 16-18 (1980) [hereinafter cited as SEDGWICK]; Geerken & Gove, *Deterrence: Some Theoretical Considerations*, 9 L. & SOC'Y REV. 497 (1975) [hereinafter cited as Geerken & Gove]. This model of human behavior assumes not just intelligent acts, but also "certain kinds of consistency in the behavior of . . . hypothetical participants . . . ." SCHELLING, *supra* note 9, at 4. The economic model offers the advantage of simplicity. *See* SEDGWICK, *supra* note 12, at 17. A researcher can explain the behavior of deviants and nondeviants in the same terms using the same theory. *See also* G.T. ALLISON, ESSENCE OF DECISION 29 (1971), in which the author notes that "rationality refers to an essentially Hobbesian notion of consistent, value-maximizing *reckoning* or adaptation within specified constraints. In economics, to choose rationally is to select the most efficient alternative . . . ."

ically the death penalty for the crime of murder.[13] In *Gregg v. Georgia*,[14] the United States Supreme Court conceded that "there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect."[15] Nevertheless, the Court noted the existence of certain types of calculated murder—like murder for hire and extortion murder of hostages—against which "the death penalty undoubtedly is a significant deterrent."[16] The Court's statement that "there are carefully contemplated murders . . . where the possible penalty of death may well enter into the cold calculus that precedes that decision to act"[17] illustrates its reliance on the rational actor model.

In addition to employing models of rational behavior in their work, modern deterrence theorists consider the moral influence of the law as a preventive factor.[18] At the same time, however, proponents of these theories concede that the effectiveness of deterrence in part may be the result of an "unconscious and emotional [inhibition], drawing upon deep rooted fear and aspirations."[19] Deterrence theory thus has not only a moralizing and educational facet, but an inhibitory and habituating dimension as well.[20]

Under general deterrence theory persons are punished for violating the criminal law to serve as object lessons for the rest of society. Society, according to the theory, thus transmits the following message: It is wrong to behave in certain ways, and if a person behaves in one of those ways and fails to obey the law, society will punish him or her accordingly. The expression of society's disapprobation is punishment. Punishment, as a medium for communicating the deterrence message, creates "conscious and unconscious inhibitions against committing crime,"[21] and results in habitual compliance by society as a whole.

According to several criminal deterrence theorists, the punishment imposed for an offense should be proportional to the severity of the offense. One rationale for the principle of proportionality is that any excess punishment is unjust and represents little more than an

---

13. *See* Gregg v. Georgia, 428 U.S. 153, 185-86 (1976).
14. *Id.* at 153.
15. *Id.* at 185.
16. *Id.*
17. *Id.* at 185-86 (footnote omitted).
18. *See, e.g.*, ANDENAES, *supra* note 10, at 42. These theorists consider the effect of deterrence to be moralizing. A major criticism of the theory, however, is the lack of a moral dimension in the process of developing a deterrence system. *See supra* notes 58-74 and accompanying text.
19. ANDENAES, *supra* note 10, at 42.
20. *See id.* at 8; Hawkins, *Punishment and Deterrence: The Educative, Moralizing and Habituative Effects*, 1969 WIS. L. REV. 550-65.
21. Andenaes, *General Prevention: Illusion or Reality?*, 43 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 176, 179 (1952).

act of societal violence.[22] Perhaps a more important rationale is grounded in the prominent role which law itself must play in a deterrence theory. The principle of proportionality has constitutional underpinnings in the due process[23] and cruel and unusual punishment[24] clauses of the United States Constitution. These provisions, as interpreted by the Supreme Court, prohibit governmental imposition of punishment that either is grossly disproportionate to the offense or makes no measurable contribution to acceptable goals of punishment. Such punishment is nothing more than a senseless infliction of pain and suffering.[25]

B. Requisites for Effective Deterrence

Beccaria and Bentham believed that the rate of commission of a particular offense varies inversely with the celerity, certainty and severity of punishment for that crime.[26] Although these theorists considered the swiftness of punishment in calculating the effectiveness of a deterrent, modern theorists concentrate on the dyad of certainty and severity.[27]

1. Certainty and Severity.—Relying on these two variables, proponents of the criminal deterrence model of utility maximization state that, as the probability of conviction or severity of punishment increases, the amount of crime decreases.[28] The consensus is that certainty of punishment is more important than severity of punishment in deterring crime.[29] As noted by two theorists, "[s]everity only has a deterrent impact when the certainty level is high enough to

---

22. *See* BECCARIA, *supra* note 9, at 121, 131-32.

23. U.S. CONST.amend. V provides in part that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S.CONST. amend. XIV, § 1 provides in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

24. U.S. CONST. amend VIII provides as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

25. *See, e.g.*, Helm v. South Dakota, 51 U.S.L.W. 5019 (June 28, 1983) (sentence of life imprisonment without possibility of parole significantly disproportionate for nonviolent crimes); Coker v. Georgia, 433 U.S. 584, 592 (1978) (capital punishment for rape excessive and disproportionate); Robinson v. California, 370 U.S. 660 (1962) (sentence of 90 days for drug addiction violation of cruel and unusual punishment clause). *Compare* Rummel v. Estelle, 445 U.S. 263 (1980); Gregg v. Georgia, 428 U.S. 153 (1976).

26. *See* J.P. GIBBS, CRIME, PUNISHMENT AND DETERRENCE 5 (1975); BECCARIA, *supra* note 9.

27. The celerity or speed with which punishment is imposed following the commission of a crime was considered important to ensure that the educative and moralizing aspects of punishment would not be lost on the criminal. The sooner punishment was imposed, therefore, the better reformed the criminal would be.

28. SEDGWICK, *supra* note 12, at 17.

29. *See, e.g.*, ANDENAES, *supra* note 10, at 185; F. ZIMRING & G. HAWKINS, DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 161 (1973); Antunes & Hunt, *The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy*, 51 J. URBAN L. 145, 161 (1973).

make severity salient."[30] The relationship between certainty and severity as indicated in a number of criminal justice studies,[31] shows a statistically significant inverse relation between index crime rates[32] and the certainty of punishment.[33] The theorists do not agree, however, that severity of punishment and the index crime rates are negatively related.[34]

Statistics support the conclusion that certainty of punishment deters crime more than severity of punishment. The question remains, however, whether *objective* certainty is critical to deterrence, or whether *subjective* certainty suffices. Researchers agree that the effectiveness of deterrence depends more on the perception of certainty than on the objective reality of certainty.[35] Some, however, contend that no punishment can deter unless the punishment is perceived as being severe.[36] But again, the perception of risk more than the actual risk seems to be important,[37] and the subjective probability of punishment is a greater deterrent than its subjective unpleasantness.[38]

2. *Credibility and Communication.*—Certainty and severity of punishment undoubtedly are necessary to make deterrence effective, but alone they are insufficient. For a threat of punishment to be effective as a deterrent, the threat must be credible and communicated.[39] For credibility to be achieved, the threatened target group must believe that the system is capable of apprehending and punishing some offenders.[40] Personal experience and police presence apparently have the greatest impact on perceptions of credibility.[41] An increase in the number of law enforcement personnel raises the objective probability of apprehension and, more importantly, increases the perceived credibility of threats in those who personally

30. Antunes & Hunt, *supra* note 29, at 151.

31. G. NEWMAN, THE PUNISHMENT RESPONSE 242 (1978) [hereinafter cited as NEWMAN]. *See generally* Note, *Creative Punishment: A Study of Effective Sentencing Alternatives*, 14 WASHBURN L.J. 57 (1975).

32. The FBI annually publishes rates of commission of seven index crimes including nonnegligent homicide, rape, assault, robbery, burglary, larceny in excess of $50 and auto theft.

33. SEDGWICK, *supra* note 12, at 22-25.

34. *Id.* at 25.

35. *See, e.g.*, GIBBS, *supra* note 26, at 115; J. Andenaes, *General Prevention Revisited: Research and Policy Implications*, 66 J. CRIM. L. & CRIMINOLOGY 338, 362 (1975).

36. *See* GIBBS, *supra* note 26, at 119.

37. *See* Geerken & Gove, *supra* note 12, at 498, 501.

38. Walker, *supra* note 8, at 133.

39. F. ZIMRING, PERSPECTIVES ON DETERRENCE 65-66 (1971).

40. *Id.* at 76.

41. *Id.* at 71. Nevertheless, would-be law violators may have a realistically high incentive to commit crimes. A potential law violator, evaluating the risks of apprehension, knows that law enforcement personnel cannot be in all places simultaneously. Each criminal knows that he or she literally may be able to get away with murder.

have experienced arrest.[42]

The communication of threats of punishment has a key role in the deterrence of criminal behavior, but only to the extent that the punisher communicates a rational basis for the punishment. Communication of the rationale improves the effectiveness of deterrence[43] by compensating for the effectiveness lost as a result of low intensity punishment.[44]

C. *Obstacles to Effective Deterrence*

Several obstacles must be overcome to achieve effective deterrence. First, deterrence might fail if any societal condition exists that undermines the successful transmission or reception of the deterrence message.[45] Some suggest that, if a threat creates uncertainty about the sanctions to be imposed, the threat might be a more effective deterrent than a threat purporting to communicate a complete description of the sanctions.[46] Thus, Geerken and Gove have posited as follows: "The more members of a social system have detailed knowledge about crime[,] the more specific the deterrence message and the less efficient the deterrence system."[47] Frank Zimring, who supports this view, suggests that the effects of personal experience are powerful enough to erode the effects of publicity,[48] if that publicity is contrary to one's personal experience.

Although it might be desirable, therefore, to inject some ambiguity into the deterrence message, principles of constitutional law clearly prohibit vagueness in proscribing certain conduct and in prescribing sanctions for that conduct. Criminal laws must define explicitly proscribed conduct and the maximum punishment for a violation of the law. Those applying the law in this nation must adhere to the legal maxim, *nullum crimen sine lege, nulla poena sine lege.*[49] The due process clause bars enforcement of any unduly vague or

---

42. *Id.* Even if a violator is apprehended, he or she may perceive that the system is unwilling or unable to impose the punishment threatened. This perception would serve as a further incentive for committing a crime, or at least would minimize the effect of the threat of punishment as a disincentive. This result is even more probable if short or otherwise lenient sentences frequently are imposed on offenders and if actual time served is short.

43. NEWMAN, *supra* note 31, at 238-39.

44. *Id.* at 242-43. Because perceptions and the communication of a rationale are fundamental to deterrence effectiveness, the penal system should become a mechanism for information transfer, rather than simply remain a sanctioning system. *Id.*

45. Geerken & Gove, *supra* note 12, at 500.

46. *See, e.g.*, ZIMRING, *supra* note 39, at 57; Geerken & Gove, *supra* note 12, at 507.

47. Geerken & Gove, *supra* note 12, at 507.

48. *See* ZIMRING, *supra* note 39, at 72. Persons who are exposed to publicity campaigns, and who subsequently are persuaded by other information that the risks of detection are not as represented, might discount any future announcements on crime prevention and detection techniques. Publicity without substance may decrease the general credibility of law enforcement threats. *Id.*

49. "No crime or punishment without a law."

overbroad criminal statute.[50] A law must be sufficiently clear so that a person of ordinary intelligence should know in advance the nature of unlawful conduct.[51]

Deterrence is based on the psychological assumption that the subjective certainty and unpleasantness of punishment discourages the community from engaging in criminal behavior. The social stigma attached to a conviction is part of the punishment and, in some instances, may have a greater deterrent effect than the term of imprisonment itself.

III. A Critique of the Criminal Deterrence Theory

Critics of criminal deterrence theory attack the theory on several grounds. First, they claim that the rational actor economic model does not reflect reality and thereby presents a distorted picture of the object of deterrence. Reliance on the rational actor model of criminal behavior has been criticized for its major premise that individuals are, in the words of Veblen, "lightening calculators of pains and pleasures."[52] The assumption that persons *always* carefully weigh the consequences of their criminal conduct beforehand easily can be refuted by the observation that some crimes are spontaneous acts, highly emotional in character.[53] Indeed, some commentators categorize crimes as either instrumental or expressive. The former is for material gain and includes rational planning; the latter is motivated by passion.[54] A person possessing a strong emotional commitment to the perpetration of a particular offense is not likely to be deterred from committing it, regardless of the sanctions imposed.[55]

A second criticism of deterrence theory is that, even though it is impossible to prove the deterrent effect of punishment, society continues to invoke "deterrence" to justify the imposition of punishment on individuals. Empirically, the burgeoning docket of criminal cases illustrates that deterrence has not been effective to any substantial degree. The effectiveness of deterrence cannot be demonstrated conclusively because researchers employ a scientific method of inquiry which attempts to disprove hypotheses rather than prove them.[56]

---

50. *See, e.g.*, United States v. Bohonus, 628 F.2d 1167 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980).

51. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Grayned v. City of Rockford, 408 U.S. 104 (1970).

52. *See* BEYLEVELD, *supra* note 5, at xxxvi; Hawkins, *supra* note 20.

53. *See* N.WALKER, SENTENCING IN A RATIONAL SOCIETY 97 (1972); McGee, *A New Look at Sentencing*, 38 FED. PROBATION 3, 5 (1974).

54. *See, e.g.*, Gregg v. Georgia, 428 U.S. at 185-86. ZIMRING, *supra* note 39, at 54.

55. *See* JOHNSON, CRIME, CORRECTIONS AND SOCIETY 639 (1974) [hereinafter cited as JOHNSON].

56. *See* Gregg v. Georgia, 428 U.S. at 185; N. WALKER, PUNISHMENT, DANGER AND STIGMA: THE MORALITY OF CRIMINAL JUSTICE 79 (1980) [hereinafter cited as WALKER].

Successful falsification results in the hypothesis being modified, retested and further modified if necessary.[57] Meanwhile the untested hypotheses, which remain to be disproved, are used to rationalize the logic of inflicting punishment, despite the lack of proof that any social good is achieved through punishment.

Third, deterrence theory lacks a sound moral foundation, which ultimately undermines the punishment's effectiveness in deterring crime. Deterrence in its simplest form requires a regime of compulsion and coercion; the regime's effectiveness depends on positive responses to threats. For a deterrence theory to be a complete theory, however, a moral element should be added to the twin pillars of certainty and severity of punishment. This moral element is social legitimacy of the criminal justice system.[58] Without respect for the criminal justice system grounded in morality, the system and its code of proscriptions, in the long run, will experience a breakdown in the form of disobedience. "[R]espect for authority depends on recognition of its legitimacy."[59]

The absence of a moral dimension in deterrence theory is best understood by examining the methodology of deterrence theorists. Various extralegal conditions must be considered before theorists can declare with confidence that a particular punishment is an effective deterrent. For example, social condemnation, unemployment and low income can have inhibitory or generative effects on the crime rate[60] and therefore should be considered by deterrence theorists. The theorists, however, do not implement control measures in their studies for these extralegal conditions[61] because these conditions defy incorporation into deterrence theory.[62] Similarly, deterrence theorists are unable to incorporate a moral dimension.

Because deterrence theory lacks a moral dimension, two more specific criticisms continually are leveled at the theory. First, the theory can easily be associated with inhumane forms of punishment, particularly capital punishment, and excessive types of punishment, like mandatory life sentences for a succession of relatively minor offenses and statutorily imposed minimum sentences. Second, deterrence theory is based on the deliberate threat of harm; if the system

---

Karl Popper rejected induction, insisting that conclusions must be drawn by deductive reasoning. *See generally* K. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (1959). Popper's greatest legacy was the innovative view that the results of tests can only falsify, but never verify, a theory.

57. *See* WALKER, *supra* note 56, at 79.

58. *See* Andenaes, *General Prevention Revisited: Research and Policy Implications*, 66 J. CRIM. L. & CRIMINOLOGY 338, 362 (1975).

59. Hawkins, *supra* note 20, at 569.

60. *See* GIBBS, *supra* note 26, at 19. Similarly, Nigel Walker posits that conformity resulting from moral scruples is not deterrence. *See* Walker, *supra* note 8, at 131.

61. *Id.*

62. *See* GIBBS, *supra* note 26, at 149.

is to be effective in deterring criminal behavior, the threatened punishment must be imposed.[63] In a nonsadistic society the justification for the deliberate infliction of pain on a human being must be very strong if that society hopes to avoid severe condemnation from its members and from other societies.

Deterrence theory thus is confronted with a dilemma regarding punishment: to secure the public good of obedience to the law, the public evil of punishment must be accepted.[64] This virtual paradox not only draws deterrence theory *qua* theory into question, but also represents the ultimate pitfall of the theory as a viable social tool.

Once a crime has been committed, the threat of punishment to prevent that particular crime no longer has a purpose that is justifiable within deterrence theory. The threat of punishment has failed to deter the commission of the offense. Clearly the courts cannot undo the crime by punishing the offender. Consequently, judges may be inclined to impose less punishment that the legislatively authorized maximum[65] because the benefit to society, which justified the punishment in the first place, appears to have diminished. Deterrence as a theoretical model begins to feed on itself and, in the process, devours the deterrent effect of threatened punishment. Deterrence alone is, therefore, an insufficient justification for punishing crime.[66]

Moreover, judges and legislators might be tempted to avoid this undesirable result by invoking deterrence in support of harsher sentences. Harsh sentences, however, tend to arouse the public's sympathy for the offender, and a criminal justice system that produces emotional support in the citizenry for those who violate the law is inefficient and is unlikely to maintain the public's respect.[67]

An additional criticism is that deterrence theory sanctions the conviction and sentencing of an individual solely to provide an effective threat to the entire society.[68] Deterrence theory condones human sacrifice, and, thus, victimization acquires a degree of social utility.[69]

---

63. *See* WALKER, *supra* note 56, at 65. *See also* ANDENAES, *supra* note 10, at 129-48, for a discussion of the morality of deterrence theory.

64. SEDGWICK, *supra* note 12, at 40.

65. *Id.*

66. *Id.* at 42. Sedgwick argues that retribution is needed to strengthen deterrence. He defines retribution as righteous indignation based on the intrinsic rightness or wrongness of a criminal act. *Id.* at 43. In the *Gregg* decision, the Supreme Court stated that retribution, as "an expression of society's moral outrage at particularly offensive conduct," is an acceptable justification for punishment. 428 U.S. at 183.

67. *See* JOHNSON, *supra* note 55, at 177. *Compare* Gregg v. Georgia, 428 U.S. at 183-84.

68. *See* T. HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 52 (1969).

69. *See* Walker, *supra* note 8, at 139; G.W.F. HEGEL, PHILOSOPHY OF RIGHT (Oxford ed. 1942) [hereinafter cited as HEGEL]. Some prosecutors have stated that it does not matter if an innocent person is punished for a crime; it is important for society only that someone is punished. *See* J. FRANK, NOT GUILTY 37 (1957). This extreme reliance on deterrence would be effective, of course, only if the public never discovers what has been done.

Hegel condemned such punishment when it is imposed for the exclusive purpose of promoting the general good of society.[70] This utilitarian justification for punishment is *no* justification in a society in which every individual is free and equal under the law. Hegel declared as follows:

> To base a justification of punishment on threat is to liken it to the act of a man who lifts his stick to a dog. It is to treat a man like a dog instead of with the freedom and respect due to him as a man. But a threat, which after all may rouse a man to demonstrate his freedom in spite of it, discards justice altogether.[71]

The utilitarian roots of deterrence theory have been attacked as sadistic. One commentator has stated the following:

> The utilitarian . . . who supposedly sees punishment as inherently evil and must therefore demonstrate that the good it brings outweighs the bad (i.e., that punishment actually "deters" or "prevents" crime), finds himself in the position that he is administering an evil even though there is no hard evidence that it is doing any good.
>
> In the face of such uncertainty and doubt about its efficacy, why do we persist in its use? . . . Perhaps the . . . reason is that we are simply all sadists.[72]

Deterrence theory is immoral because it treats individuals as means rather than as ends. Additionally, the theory relies on mass obedience. This reliance is contrary to the historical flow of civilization and democracy, which has been moving away from strong central governments, coercive force and tyranny.[73] Deterrence theory's reliance on mass obedience, therefore, is a serious political threat to the citizenry of any free nation in which deterrence theorists influence the decision making process.[74]

Finally, the ambiguity that often pervades the punishment message can diminish the deterrent effect. Certainly ambiguity might cause a potential criminal to overestimate the severity of punishment or governmental willingness to punish the proscribed conduct at all.

---

70. HEGEL, *supra* note 69, at 246.

71. *Id.* The Supreme Court has recognized that "[a] penalty also must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' " Gregg v. Georgia, 428 U.S. at 173 (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)).

72. NEWMAN, *supra* note 31, at 282.

73. *Id.*

74. *But cf.* Gregg v. Georgia, 428 U.S. at 175, in which Justice Stewart announced as follows:

> [I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

Thus, a would-be perpetrator might not violate the law because an ambiguity in the punishment scheme led him to believe incorrectly that the government would impose an intolerable penalty, which the government, in fact, would not have imposed.

Conversely, however, ambiguity might raise heightened expectations of punishment among potential criminals. When the government imposes punishment that is less severe than expected, the punishment could have a diminished deterrent effect. Thus, a government should work to prevent any ambiguity in the perception of its will to fight crime and punish criminals. Ambiguity will weaken the legitimacy of the system and eventually will undermine the government's ability to exercise its police power.

Deterrence theory thus is fraught with weaknesses. The rational actor model, fundamental to deterrence theory, may misrepresent the workings of the criminal mind.[75] Little proof, if any, can be mustered to support the proposition that punishment has ever deterred potential criminals from committing crimes.[76] Moreover, deterrence theory oversimplifies the life process by not considering the effects of adverse or positive social conditions on criminals.[77] Similarly, deterrence theory has no moral foundation. Critics easily and with credibility can assert that a criminal justice system, which seeks to achieve deterrence across the spectrum of society by punishing an individual, is inhumane and sadistic.[78] Finally, if a system seeks to avoid this apparently inhumane result by punishing the perpetrator in a less severe manner than was threatened, the deterrent effect of the threats crumbles.[79]

IV. An Alternative Approach—Toward Social Order

The theoretical shortcomings of deterrence theory combine with practical difficulties to render the theory unpersuasive in explaining why criminals violate the law. In modern society, the populace simply does not believe that law enforcement officials are effective in apprehending criminals. Even with unlimited resources, the criminal justice system could not solve every crime. With many police departments and law enforcement agencies understaffed and undersupplied, the public's perception probably is that much crime is unsolved and that many criminals go unpunished. This perception probably is strongest among deterrent theory's target group, prospective criminals, who become convinced that the system simply is not

75. *See supra* notes 52-55 and accompanying text.
76. *See supra* notes 56-57 and accompanying text.
77. *See supra* notes 60-62 and accompanying text.
78. *See supra* notes 58-59, 63, 67-74 and accompanying text.
79. *See supra* notes 64-66 and accompanying text.

very effective.

Clearly deterrence theory alone does not explain why people generally are law abiding. At one end of the social continuum, a fringe group of criminals and deviants exists for whom deterrence clearly has failed and will continue to fail. One may hypothesize that at the other end of the spectrum a group exists that obeys the law out of a sense of moral rectitude and for related noncoercive reasons. For this group, threatened punishment plays at most a marginal role in their decision to obey the law. What then of the vast middle? Why do they obey the law?

One answer may lie in the perceived legitimacy, or justness, of the social order. Obviously if every American taxpayer stopped paying taxes, the Internal Revenue Service could do very little to compel compliance. Nevertheless, Americans dutifully pay their taxes every April 15. Why? Perhaps Americans recognize, first, that a government has a legitimate interest in collecting taxes and, second, that chaos otherwise would be visited upon society. One commentator has stated that

> [t]he ultimate explanation of the binding force of law is that man, whether he is a single individual or whether he is associated with other men in a state, is constrained, insofar as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live.[80]

Crimes punished throughout history are committed every day. In the United States, where individuals generally are free to speak their minds, bear arms, assemble in public and come and go as they please, the vast majority of Americans obey the law. Theorists thus should focus more on the individual's respect for or lack of respect for societal order and should work to develop programs to strengthen respect for order in those who, otherwise, might be criminally motivated.

V. Conclusion

For too long criminal deterrence theory has been a small tail wagging a very large dog. A more appropriate focus is on the perceived legitimacy of the social order and how this perception can be engendered and strengthened. Maintenance of societal order cannot be attributed to the efficacy of threats of punishment alone.

One useful lesson may be drawn from the habituating effects of the criminal law: experience suggests that perhaps most members of society are law abiding because they recognize the benefits of social

---

80. J. BRIERLY, THE LAW OF NATIONS 56 (1963).

order and not because they fear apprehension and punishment for violations of the criminal law. Legitimacy of the social order and its impact on crime therefore deserve more extensive research, examination and emphasis.