

# Rethinking the deterrence theory criminology essay



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With much popular appeal, the concept of deterrence has been widely accepted and understood, by judges and parliamentarians alike, to be a central tenet in the principles of sentencing and the wider penal system in England and Wales. Significantly, section 142(1) of the Criminal Justice Act 2003 expressly enjoins sentencers to take account of deterrence as one of the purposes of sentencing when determining what and how severe the appropriate punishment in a given case should be. In practice, as deterrence is widely perceived by judges, not only in the English and Welsh jurisdiction, but also elsewhere in the common law world, as a primary means through which to afford public protection, in many cases involving adult offenders, precedence has tended to be given to deterrence over other considerations in the interest of the community.[3] Nevertheless, tensions are palpable between deterrence and other sentencing aims.[4] The question of, for instance, whether punishment should be an end in and of itself, or whether it ought to be understood as a facilitator of the ideal of offender rehabilitation, remains in the front line of critical discourses into sentencing in the contemporary era.[5] Thus, it has become increasingly necessary to deliberate upon the worthiness and value of deterrence not only in the context of sentencing but also to the purpose of the entire penal system.

Within this context, the following essay will proceed by first providing an overview of the paradigm of deterrence within the broader framework of the contemporary penal system. It will then attempt to identify and question the moral and empirical underpinnings thereof. Further, it argues that from a criminological or sociological perspective, efforts to achieve deterrent effect, in particular where the individual offender is concerned, are in large part

counterproductive. Finally, this essay observes, whilst arguing that deterrence as a penological theory is morally and empirically unsound, that it would be impractical to assume that deterrence will be abandoned altogether in English sentencing law in the near future. Rather, the more prudent and reasonable way to approach the matter would be to continue to observe the constantly evolving concept in an era of significant social, cultural, political and economic change. In conjunction with other penal theories, elements of deterrence will appear to remain a highly influential sentencing tool.

#### Exposition of the deterrence theory

'Deterrence' is one of the oldest paradigmss in the history of criminological and jurisprudential inquiry. As early as in the early eighteen century, the primary purpose of state imposed punishments was said to be the reduction of crime, by means of 'terrifying [potential offenders] into obeying the law'. [6]The punishment of prison and the deterrence it brings about, by the relinquishment of the fundamental freedoms, were onceived of as the best means of reducing offending in modern society[7].

Johnson defines the verb 'deter' as 'to discourage by terror, to fright from anything'. [8]Deterrence can also be defined as including two separate aspects, depending on the class of people being directed at, namely individual (specific) deterrence and general deterrence. [9]Translated into judicial language in the specific context of sentencing, a Hong Kong judge, HHJ Ching Y Wong SC, drew the distinction thus:

A deterrent sentence may be in personam [that is, individual] or in rem [that is, general]. Normally if the circumstances that pertain to an offender are such that the court is of the opinion that it must be brought home to him that he is not to commit such offences again, for example, a repeat offender, a deterrent sentence in personam is proper. When an offence is, inter alia, so prevalent or is so serious within its class, and the court is of the opinion that those of like minds are to be strongly discouraged from committing the same or similar offences, then a deterrent sentence in rem is called for.[10]

In simpler terms, specific deterrence is directed at the offender in question and is expected to prevent her from reoffending by the imposition of punishment; general deterrence, on the other hand, focuses on the public at large, and prevents potential offenders from engaging in criminal conduct in the first place.[11]

With its roots in the classical and utilitarian thinking of crime,[12]the deterrence theory is often compared to a cost-benefit analysis performed in the economic field.[13]Underlying the theory is the assumption that all offenders, and potential offenders, are by nature rational, the hallmark of their actions being the pursuit of maximum pleasure and minimum pain. It follows that, as offenders choose, rationally and voluntarily, to commit crime, they respond readily to the perceived costs and benefits of their actions. [14]As Lundman explains,

If their calculations suggest that perceived benefits will exceed possible costs, then rational [offenders] commit [crimes] in anticipation of enjoying rewards. However, if these calculations lead [criminals] to conclude that

costs will exceed rewards, then the rational course of action is to seek gratification in ways other than [criminality].[15]

In other words, if the calculation of the consequences of offending leads to the conclusion that there is more to be lost than there is to be gained from committing crime, the potential offenders should be naturally deterred.

[16]Thus, within the utilitarian framework criminals are invariably errant, though still rational, individuals whose perversity or anti-social self interests serve to offer some perceived benefits of offending.[17]It is in this light that Bentham passionately argues for the usefulness of deterrence, on the ground that the threat of punishment is ' the force employed to restrain [possible offenders]' from commission of crime, from which the pain of punishment might result.[18]

Underlain by these ideas of rationality and self-interest, for deterrence theorists there are certain qualities necessary to an effective deterrent punishment. As Newburn elaborates on these qualities first enunciated by Beccaria[19], punishment must come with certainty and be enforced consistently, and that it does should be acknowledged by the offender; there must be celerity in the law, with punishment coming as promptly as possible, in order that both the public and the offender himself could see the relationship between the punishment and the offence as inevitably causal; and finally, it must be properly proportionate to the crime, namely one that is relatively mild and moderate and inflicts pain just exceeding ' the advantage derivable from the crime'.[20]

Moral problems with the deterrence theory

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An emphasis on deterrence often leads to a harsher sentence than the offender would otherwise be deemed to deserve.[21]The Court of Appeal has held, relying on the Strasbourg jurisprudence, that the legitimate object of deterrence can, in appropriate cases, amply justify such sentences.[22]It seems apparent that in such cases the sentencing aim of deterrence can be paramount. Whilst weight would, in theory, have been accorded to the interests of the offender, where the alleged crimes are considered as threatening the wider community, the utilitarian theory of deterrence demands that individual rights and proportionality, in its narrow sense, subsume under the societal interests.[23]

Young is critical of this judicial use of deterrence as a 'sentence enhancing factor'.[24]He argues, not unconvincingly, that the theory is arguably 'inconsistent with fundamental notions of justice'.[25]Indeed, why a person's liberty need be sacrificed for the educational impact it will have on others is a legitimate question to pose. This concern has been shared by del Vecchio, who emphatically stated that 'the human person always bears in himself something sacred, and it is therefore not permissible to treat him merely as a means towards an end outside of himself.'[26]

A more fundamental moral weakness of the notion of deterrence pertains to the coherency of its ideological premise - rationality. As in the analysis in Part I, deterrence has traditionally built upon the premise that individuals will desist from reoffending because of the fear inherent in the discipline and punishment meted out by the state. In a moral sense, then, a semblance of 'common reasoning' is central to the application of the utilitarian

understanding of deterrence. Yet, as the famous philosopher John Rawls  
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persuasively argues, ' there is no reason to assume that our sense of justice can be adequately characterised by familiar common sense precepts or derived from the more obvious learning principles.'[27]

It seems indeed somewhat simplistic to assume offenders as rational beings before or in the course of committing a crime. As the Home Office rightly conceded in 1990, offenders very seldom weigh up the possibilities prior to their conduct and typically do not act only after on rational premeditation. [28]In many instances criminals need to take their decisions hastily. Two young males fighting in a public street, for example, are unlikely to have ever thought about the consequences of their actions in the heat of the moment.[29]Moreover, as Cornish and Clarke argue, the decision-making process of offenders is remarkably limited in their understanding of possibilities, potentials and consequences.[30]For instance, most petty criminals are often badly informed about the criminal liability, let alone the penalties, associated with the crimes they commit.[31]As a result, even accepting that offenders are rational, it would be difficult, if not impossible, for offenders to have accurately balanced the costs and benefits of the commission of the criminal act.[32]

The weakness becomes even more obvious in the case of such rarer but usually more horrendous crimes as those involving violence, the offenders of which are characteristically not reasoning. Hudson plausibly argues that crimes of such kind are usually committed without a prior careful calculation of risk.[33]Most killings, for instance, are not rationally planned, but are impulsive and driven by strong emotion.[34]In other instances, such are

crimes that involve intentionality where offenders commit crime regardless of the risk.[35]

Interestingly, probably comprehending the moral difficulties existing therein, English courts have rarely invoked deterrence as a standalone ground for an otherwise disproportionate sentence. It is often relied on in conjunction with other penal theories. Deterrence has, according to the jurisprudence of the European Court of Human Rights, customarily been recognised as the twin of punishment.[36] Thus some commentators have gone further in contending that, in fact, punitiveness resides in the epicentre of the contemporary penal policies supposedly informed by the utilitarian principles of deterrence.

[37] For them, the current political discourse and policy initiatives '[blame] the offenders, [silence] excuses ... and [see] the punishment of the wrongdoer as the proper response.' [38] Deterrence, then, has not been upheld on any principled basis, but has rather been reduced to a "morality that has to be upheld whatever the functional benefits." [39] As a result, from a philosophical perspective, classical utilitarianism upon which the theory of deterrence is based would seem quite unable to 'do justice to the mode in which many of our actual ends matter to us.' [40]

The empirical (in)validity of the deterrence theory

It seems fair, to say that the empirical literature examining deterrence has not yielded enormous success - different studies often tend to contradict each other, on occasions directly and completely.[41] Some evidence suggests that swift punishments do not abate the incidence of subsequent crimes any more than delayed punishments, owing to the cognitive capacity



of humans to imagine.[42]More research efforts have been put into the consideration of the other two aspects of deterrence. By and large, there is some evidence, albeit anecdotal in one way or another, showing that certainty of punishment has a greater deterrent effect than does severity of punishment.[43]

However, even this is more than what Radzinowicz and King have been prepared to accept. They quite sensibly argue that, more precisely, it is the certainty of detection or intervention, not of punishment, that is the more crucial element in deterrence.[44]Lending support to this view, commenting on figures in the United States, Cornish and Clarke suggests that offenders are more likely to be put off by the immediate fear of exposure and being caught, as opposed to the threat of some penalty relatively remote in time. [45]Thus it may not be any surprise when Gough concludes that deterrence should only be a minor consideration, if occupying a role to play at all, for the purposes of sentencing.[46]What is needed, in Gough's opinion, is tougher enforcement and targeted strategies that increase detection certainty, rather than any ' toughening' of sanctions.

On the other hand, there is a more critical view that the reduction of crime in these studies cannot be ascribed to deterrence. What have been influential might well have been the incapacitating effect of the punishment or other myriad variables quite apart from the risks of punishment, including ' the motive for the crime, the strength of the temptation, the strength of inhibitions or moral revulsion against it.'[47]

In any case, all these studies, deriving as they do from crime statistics, must be interpreted with caution, whether they be supportive or dismissive of the deterrence principles. After all, there are no such things as 'empirical truths' as such.[48]In determining whether or not deterrence should be regarded as being beset by empirical difficulties, the entire discussion would prove moot if one does not appreciate the problem of interpreting crime statistics in the first place.

Notoriously, any organised way of understanding about crime, criminals and crime control framed in definitional and empirical terms is intricately problematic.[49]Ultimately, criminality is a natural by-product of such industrial, capitalist experience as economic growth, the easier availability of social opportunities, and the increased recognition of individual liberties. [50]It is essentially a social construct, varying as it does across time, place and people.[51]Viewed from such a perspective, deterrence is but part of a means devised by the state to statistically 'manage' the social problem of crime.[52]Put in this wider social and political perspective, the extent to which deterrence is, just as punishment, thought to be a fundamentally important social theory inescapably reflects the broader political economy of the urban society in which one lives.[53]

As such, although crime data and criminal statistics are ostensibly transparent and open manifestations of offending patterns, to divorce the quantifiable empirical data from the broader politicisation of crime would be an unrealistic exercise provided the complex settings in the modern liberal democracy such as this country, in which crime, sociology and political economy are inextricably intertwined.[54]Doubts have therefore historically

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been cast onto the verity of the official figures with the most pessimistic criminological interpretations suggesting that crime statistics are universally doctored, and thus of limited worth to the understanding of the relationship between crime, the state and punishment.[55] In the final analysis, imagining crime figures as being free from bias would be to ignore the ' tension between broad generalization and the specification of empirical particulars', [56] and the interpretation thereof will inevitably entails an overly objective view of an inherently subjective phenomenon.[57]

The ' anti-deterrent' effects of punishment: a criminological perspective

Some criminologists do not merely dismiss deterrence as unconvincing, but have gone further in arguing that, quite far from producing the intended result, fear of punishment might sometimes lead directly to the commission of crime. It is possible that a criminal who has already offended, but not yet apprehended, feels that they have little to lose from further offending, because they have to be punished ' anyway'. As Taylor cites as a striking example, at some point in the last century, a substantial minority of unmarried women in Scotland have been driven to commit infanticide exactly because of the fear of being publicly humiliated as a punishment for adultery.[58]

For those who have been apprehended and punished, further offending behaviour is still not impossible under the ' labelling theory', under which criminality is to be thought of as a quality created inevitably when punitive sanctions are applied to behaviour considered to be " offending".[59] The offender takes on a criminal identity when he is labelled as such by a range

of social reactions, including and following the imposition of an official sanction, which has the effect of isolating her from society.[60]Her opportunity to live by legitimate means whilst being labelled criminal would quite conceivably be reduced considerably, and resort might then have to be had to illegitimate ways of life. In this way the label is dramatised to the extent that it becomes entrenched and internalised.[61]In this light, the labelled, stigmatised and socially isolated, have to accept their status as criminals and rebuild their lives accordingly, leading to a greater degree of deviance.[62]

In this sense, punishment within the context of deterrence may in truth be counterproductive in reducing incidence of recidivism.[63]With all the negative social interactions that punishment entails, a sentence which speaks to the deterrence of the individual offender appears to reinforce the self-prophecy of criminality, render reintegration into the conventional world difficult, and a criminal career almost inevitable.[64]Thus punishment with a deterrent element may ironically result in the promotion of the kind of activities that it is designed to prevent.

Conclusion: Abandoning deterrence...or not?

Deterrence has for the most part been discounted as an effective and justifiable approach to sentencing by academics, in particular criminologists, who are often more willing to consider the causes in addition to the consequences of criminal activity.[65]However, the popular appeal of the notion as a 'commonsense' approach to sentencing appears to persist to this day.

Given the important case of Attuh-Benson,[66]it seems unlikely that attempts, however able and sincere, to bring the criticisms levelled against the usefulness of deterrence before the courts would be of any avail. There the Court of Appeal forcefully pronounced that '[i]f a different approach is to be adopted it should be in response to guidance from the Sentencing Guidelines Council who may wish to consider this matter.'[67]After all, it is important to bear in mind that the way in which the state responds to criminality has always constituted an inexorably divisive conundrum with hardly any consensus as to what ought to represent a ' just' punishment. [68]And sentencers, even those of the eminence and seniority of the Lord Justices of Appeal, will understandably consider and defer to the legislative objectives set forth in the Criminal Justice Act 2003, one of those being deterrence. Indeed, according to established principles of the common law, this is not an area in which the court should, in the words of Borins DCJ, sitting in the Canadian Supreme Court, ' pass on the wisdom of Parliament.'[69]As such, discourses of deterrence are likely to remain a distinguishing feature of the English sentencing policy, as in elsewhere in the world.

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