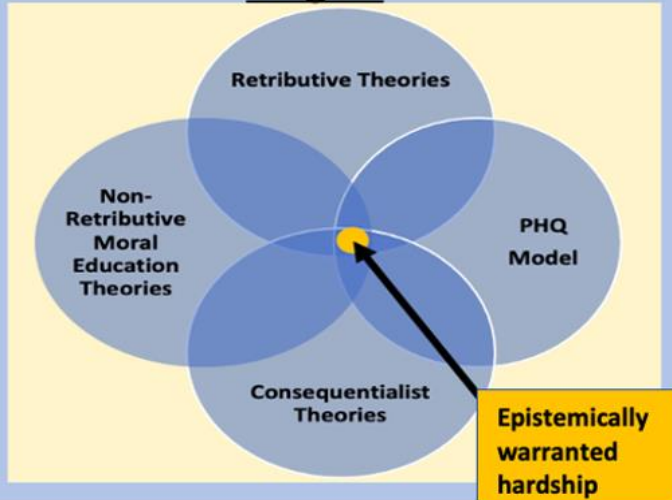


The Convergence Requirement: Research Summary 3

Stage 1



Stage 2



Key Concepts

- **Criminal justice (CJ) theories:** theories about what justifies CJ sanctions, what kind of CJ measures are appropriate, and what limits should be placed on the use of such measures. Examples include:
 - **Consequentialist theories:** CJ sanctions should aim to promote the best overall consequences [1].
 - **Retributivism:** The guilty deserve to suffer, the innocent should not be punished, sanctions should be proportionate to blameworthiness [2].
 - **Moral Communication/Education:** There are retributive [3] and non-retributive [4] versions of the idea that punishment should aim to reform offenders through moral dialogue.
 - **Public Health Quarantine Model:** A non-retributive justification of CJ measures based on upholding *rights*, not just producing good consequences. Society's right to detain dangerous offenders is analogous to the right to self-defence and to quarantine infectious-disease-carriers. State power should also be limited by the need to respect rights of those convicted/accused of crime. [4,5]
- Some theorists defend a "pure" version of one of the above theories. Others combine elements from different theories, but there is still disagreement about which element should be emphasised.
- **Meta-theoretical Approaches to Criminal Justice** provide guidance on whether/how CJ policymakers should take each penal theory into account, given uncertainty about which penal theory provides the best justification for CJ sanctions.
- **Epistemically Warranted Hardship:** When we have strong grounds to be confident that imposing hardship (e.g., CJ sanctions) is justified.
- **The Convergence requirement:** A meta-theoretical approach which states that we should only impose criminal sanctions when reasonable penal theories agree that doing so is justified, and that when a reasonable theory recommends a more lenient sentence than the sentence preferred by competing (reasonable) theories, the sentencing judge should opt for the more lenient sentence.

Why Adopt a Meta-Theoretical Approach?

- If penal theorists step back from their own favoured theories and survey the structure of the debate about punishment, they should realise that there is considerable uncertainty about which theory of punishment is correct, given:
 - the long-standing, intractable division of opinion among respected experts on the topic
 - the complexity of the relevant philosophical arguments, which means that it is easy to make a mistake during at least 1 step in a multi-step argument.

- Given the severe hardships caused by punishment, policymakers should seek an approach that allows society to be highly confident that CJ sanctions are only imposed when it is justified to do so.

Why adopt the Convergence Requirement?

- In the context of much uncertainty about which moral principles are most defensible, our policies should be guided by the principles about which there is most certainty [6].
- There is more consensus (and a higher degree of certainty) about the idea that unjustified punishment is gravely wrong than there is about which specific penal theory is most defensible. The need to avoid unjustified punishment is reflected in the widely-supported “beyond reasonable doubt standard”.
- The convergence requirement rules out imposing CJ sanctions when a reasonable penal theory claims that doing so would be unjustified. This decreases the chance of punishing someone unjustifiably through *reducing grounds for reasonable doubt* about the justifiability of punishing that person.
- Here is another way of explaining how the convergence requirement reduces the risk of unjust punishment. The probability of a disjunction as a whole being true is a function of the probability of the truth each of its disjuncts taken together with the number of those disjuncts. So, for example:
 - Imagine punishing someone only when this is recommended by both disjuncts 1 and 2.
 - Disjunct 1: retributivism recommends punishing a particular person
 - and retributivism has a certain probability of being true
 - Disjunct 2: consequentialism also recommends punishing that person
 - and consequentialism has a certain probability of being true
 - Then the probability that this person ought to be punished is higher than if we relied on one of the two disjuncts alone.

How Could Society Be Adequately Protected if the Convergence Requirement Were Adopted?

- As stated above, in the context of much uncertainty about which moral principles are most defensible, our policies should be guided by the principles about which there is most certainty. There is a high degree of certainty about the need to avoid unjustified punishment. However, there is also a high degree of certainty about the need to avoid social chaos. Policymakers need to strike a balance between these two principles. After working out what the convergence requirement would recommend, policymakers need to move on to a second stage in their deliberations, during which they consider evidence about whether implementing the convergence requirement would cause serious, adverse social consequences. In rare circumstances this could justify departing from the convergence requirement.

References

[1] J Bentham, *An Introduction to the Principles of Morals and Legislation* (MacMillan 1823/1948); [2] M Moore, *Placing Blame* (OUP 1997); [3] R Duff, *Punishment, Communication and Community* (OUP, Oxford University Press 2001); [4] D Pereboom, *Living without Free Will* (CUP, Cambridge 2001), chapter 6; [5] G Caruso, *Rejecting Retributivism: Free Will, Punishment and Criminal Justice* (CUP 2021) [6] B Vilhauer, ‘Free Will and Reasonable Doubt’ (2009) 46 (2) *American Philosophical Quarterly* 131.