

The Philosophy and History of Prisons

Poetic Justice

Build prisons
Not day-care
Lock 'em up
What do we care?

Hire cops, not counselors
Staff courts, not clinics
Wage warfare
Not welfare

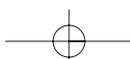
Invest in felons
Ripen 'em like melons
Eat 'em raw, then
Ask for more

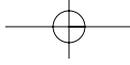
More poverty
More crime

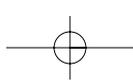
More men in prison
More fear in the street

More ex-cons among us
Poetic justice

Robert Johnson







The Rationale for Imprisonment

1

Joycelyn M. Pollock
Texas State University–San Marcos

Chapter Objectives

- Understand the definition of punishment.
- Be able to articulate the retributive and utilitarian rationales for punishment.
- Understand the social contract and how it supports the right of society to punish.
- Distinguish between incapacitation and punishment.
- Understand the restorative justice philosophy.

Why do we punish? Why do we use prison instead of other types of punishment? In this chapter, we are concerned with the fundamental rationale for the existence of prisons. What do we want them to be? Punishment is a natural response to fear and injury, and prison seems to be our favorite punishment.

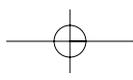
■ Philosophy of Punishment

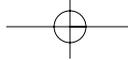
Most people would agree that hurting someone or subjecting them to pain is wrong. However, **punishment**, by definition, involves the infliction of pain. Does this make punishment wrong? Philosophers are divided on this issue. One group believes that inflicting pain as punishment is fundamentally different from inflicting pain on innocents, and therefore is not inherently wrong. Another group believes that punishment is a wrong that can be justified only if it results in a “greater good” (Murphy 1995).

Those who hold the first view do not feel it necessary to justify punishment beyond the fact that the individual deserves it. This would be considered a *retributive* approach. The second view justifies punishment through the secondary



punishment a pain or unpleasant experience inflicted upon an individual in response to a violation of a rule or law by a person or persons who have lawful authority to do so.





rationales of deterrence, incapacitation, or rehabilitation. This will be called the *utilitarian* approach (Durham 1994).

Retributive Rationale

The first philosophical approach (or rationale) is that punishment, strictly defined, is not evil. **Retribution** is a term that means balancing a wrong through punishment. While revenge is personal and not necessarily proportional to the victim's injury, retribution is impersonal and balanced. Newman, although recognizing the difficulty of defining punishment, defines it in this way: "Punishment is a pain or other unpleasant consequence that results from an offense against a rule and that is administered by others, who represent legal authority, to the offender who broke the rule" (Newman 1978, 6–7). The supposition is that by strictly limiting what can be done, to whom and by whom, the evilness of the action is negated. There are two equally important elements to this view: first, that society has a right to punish, and second, that the criminal has the right to be punished.

The right of society to punish is said to lie in the **social contract**. Although this idea dates back to the ancient Greeks, it gained its greatest currency during the Age of Enlightenment in the 17th and 18th centuries and is associated with Thomas Hobbes (*Leviathan* 1651), John Locke (*Two Treatises on Government* 1690), and Jean-Jacques Rousseau (*Du contrat social* 1762). Basically, the concept proposes that all people freely and willingly enter into an agreement to form society by giving up a portion of their individual freedom for the return benefit of protection. If one transgresses against the rights of others, one has broken the social contract, and society has the right to punish (Mickunas 1990).

One problematic element to the social-contract theory of punishment is the fiction that everyone willingly plays a part or had a part in the agreement to abide by society's laws. Many authors have suggested that certain groups in society are, in effect, disenfranchised from the legal system and play no part in its creation. To assume that such groups break a "contract" they had no part in creating (nor benefit from) weakens the legitimacy of this theory. If we believe that our political process and even our justice system is operated for the benefit of only certain groups of citizens, we would also believe that the social contract is a weak rationale for punishment.

The second element of the retributive rationale is that the criminal *deserves* the punishment and, indeed, has a *right* to be punished. Only by forcing the individual to suffer the consequences of his actions does one accord them the rights of an equal citizen. Herbert Morris explains this view:

[F]irst, . . . we have a right to punishment; second . . . this right derives from a fundamental human right to be treated as a person; third . . . this fundamental right is a natural, inalienable, and absolute right; and, fourth, . . . the denial of this right implies the denial of all moral rights and duties (Morris, in Murphy 1995, 75).

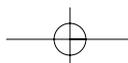
To do anything other than to punish is to treat the person as less than equal, perhaps even less than human. Under this view, correctional treatment is infinitely more intrusive than punishment because it doesn't respect the individ-



retribution the proportional infliction of pain or punishment in response to a wrong.



social contract a heuristic device that illustrates how individuals give up liberties to act with aggression in return for safety.



ual's ability and right to make choices. It regards their behavior as "controlled" by factors that can be influenced by the intervention (Morris, in Murphy 1995, 83).

It is a primitive, almost instinctual, response of humankind to punish wrongdoers, as noted by French sociologist Émile Durkheim and cited in Durham (1994, 22). Punishment is believed to be an essential feature of civilization. The state takes over the act of revenge and elevates it to something noble rather than base, something proportional rather than unlimited. Immanuel Kant (1724–1804) supported a retributive rationale:

Juridical punishment . . . can be inflicted on a criminal, never just as instrumental to the achievement of some other good for the criminal himself or for the civil society, but only because he has committed a crime: for a man may never be used just as a means to the end of another person. . . . Penal law is a categorical imperative. . . . Thus, whatever undeserved evil you inflict on another person, you inflict on yourself (Kant, cited in Borchert and Stewart 1986, 322).

In conclusion, the **retributive rationale** for punishment holds that because of natural law and the social contract, society has the right to punish, and the criminal has the right to be punished. It is not an evil to be justified, but rather, represents the natural order of things. According to Newman (1978, 287), "There is little grace in punishment. Only justice."

Utilitarian Rationale

The **utilitarian rationale** defines punishment as essentially evil, and seeks to justify it by the greater benefits that result. Under a utilitarian philosophical system, or utilitarianism, what is good is that which benefits "the many." Thus, even if it were painful to the individual, if the majority benefit from a certain act, then **utilitarianism** would define that act as good. In our discussion, if punishment did *deter* or *incapacitate* or facilitate *rehabilitation*, then "the many" (all of society) would benefit, and punishment, by definition, would be good.

This rationale for punishment is ancient. Plato argued that punishment is a benefit to the person because it improves their souls or characters (cited in Murphy 1995, 17). Jeremy Bentham (1748–1832), the classical advocate of utilitarian punishment, believed that punishment could be calibrated to deter crime. His idea of a **hedonistic calculus** involved two concepts: first, that mankind was essentially rational and hedonistic (pleasure-seeking), and would seek to maximize pleasure and reduce pain in all behavior decisions; and second, that a legal system could accurately determine exactly what measure of punishment was necessary to slightly outweigh the potential pleasure or profit from any criminal act. Thus, if done correctly, the potential pain of punishment would be sufficient to outweigh the potential pleasure or profit from crime, and all people would rationally choose to be law-abiding. (See **Box 1-1**.)

Under the utilitarian rationale, punishment is evil, but it is justified when punishment accomplishes more good than the evil it represents. Cesare Beccaria (1738–1794), another utilitarian thinker, suggested that in some instances the benefits of punishment *do not* outweigh the evil, as illustrated by the following quote.

Retributive rationale the justification for punishment that proposes that society has a right to punish, as long as it is done lawfully and proportionally to the wrong committed by the offender.

Utilitarian rationale the justification for punishment that proposes that society has a right to punish, as long as it results in a greater good for the majority of the population.

Utilitarianism the ethical system whereby good is defined as that which results in the greatest good for the greatest number.

Hedonistic calculus Jeremy Bentham's concept that the potential profit or pleasure from a criminal act can be counterbalanced with the risk of slightly more pain or punishment. If this is done then rational people will choose not to commit the act.

Box 1-1

Philosophers of Punishment and Penology

Cesare Beccaria (1738–1794). Beccaria was an Italian writer during the age of the Enlightenment, a historical era marked by great advances in political and social thought. He wrote a treatise on criminal law that was highly critical of the practices of the day, and advocated major reforms that included ideas that were widely adopted, such as the right to defend oneself against one's accusers. The philosophical rationale for these reforms was utilitarianism. He believed that the objective of punishment should be deterrence, and that the effectiveness of punishment was based on certainty, not severity. He was largely responsible for major criminal-law reforms in Europe and America.

Jeremy Bentham (1748–1832). Bentham was an English philosopher, economist, and theoretician. Among his many works was *The Rationale of Punishment* (1830), in which he proposed a utilitarian rationale for punishment. Mankind, according to Bentham, was governed by the pursuit of pleasure and the avoidance of pain. These two masters affected all behavior decisions and could be utilized to deter criminal behavior through a careful application of criminal law. He is also known for his design of the "Panoptican Prison."

Immanuel Kant (1724–1804). Kant was a German philosopher who wrote in the areas of metaphysics, ethics, and knowledge. He is the founder of "Kantianism," a philosophical tradition that explores the limits of human reason and establishes a philosophy of morality based on duty. His views on punishment would be considered purely retributive. He believed that the criminal deserved to be punished, but that to punish for other purposes, such as deterrence, was to violate the "categorical imperative," specifically, that one should not use others for one's own end.

But all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil. . . . It is plain, therefore, that in the following cases punishment ought not to be inflicted.

1. *Where it is groundless: where there is no mischief for it to prevent; the act not being mischievous upon the whole.*
2. *Where it must be inefficacious: where it cannot act so as to prevent the mischief.*
3. *Where it is unprofitable, or too expensive: where the mischief it would produce would be greater than what it prevented.*
4. *Where it is needless: where the mischief may be prevented, or cease of itself, without it: that is, at a cheaper rate (Beccaria, cited in Murphy 1995, 24).*

Situations in which punishment does not deter include **ex post facto laws** (because people cannot be deterred from some action they do not know to be illegal when they decide to do it), and infancy or insanity (because people cannot be de-

ex post facto laws laws that make an act criminal "after the fact," so that individuals would not have received due notice that the behavior would be punished. Our Constitution prohibits these laws.

tered if they cannot control their behavior). This approach views prevention of future harm as the only justifiable purpose of punishment, with retribution having no place because “what is done can never be undone” (Hirsch 1987, 361).

The *social contract* is also the basis for a utilitarian rationale for punishment. In this case, the social contract gives society the right to punish—not because of the offender’s violation, but rather, to protect all members of society against future harms. The right of society to punish comes from the responsibility of society to protect. The utilitarian approach of punishment sees it as a means to an end—the end being deterrence (general or specific), incapacitation, or rehabilitation (reform).

Incapacitation and rehabilitation are not really related to punishment at all. **Incapacitation** prevents an individual from inflicting further harm for at least as long as the individual is under control. Strictly speaking, it is not punishment because it does not necessarily imply pain. To put all criminals under a drug that induced sleep would be to incapacitate them, not necessarily to punish them. If one takes away the ability of the criminal to commit crime, this also would be incapacitation; for instance, chemical castration has been discussed and, in some cases, inflicted on sexual offenders. Note that there is no physical pain involved, only the incapacitating nature of the chemical. This is obviously a punishment, but it could also be termed incapacitation because it takes away the ability to commit the particular crime. House arrest, electronic bracelets, or other means of monitoring the movements of criminals have all been suggested as less expensive alternatives to incapacitating criminals in prisons. Prison, of course, has become synonymous with incapacitation because as long as the person is incarcerated, they cannot commit crimes against the rest of us. Of course, prisoners continue to commit crimes in prison against other inmates, and there is at least some limited ability to continue to commit some crimes, for instance, credit-card abuse over prison phones or computer fraud using computers provided in vocational programs.

One issue of incapacitation is how long to hold the individual. **Selective incapacitation** is the policy of holding some offenders longer because of their likelihood of recidivism. Unfortunately, there is little confidence in our ability to predict how long someone may be dangerous or who may continue to commit crime. Auerhahn (1999) found that even the best predictions had an error rate of 48–55 percent, meaning that the prediction would be wrong about half the time—in effect, no different from chance. Thus, until our ability to predict future risk improves, it does not seem to be a legitimate argument to use incapacitation to prevent future harm.

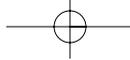
Because incapacitation is forward-looking, it is assumed that the incapacitative period should last as long as the risk exists. This may be inconsistent with principles of justice, even assuming we could predict risk accurately. For instance, forgers have high recidivism rates but are not especially dangerous; should we hold them longer than murderers who have lower recidivism rates? Should the period of incapacitation be tied somehow to the seriousness of the risk (severity of the crime), as well as to the extent of the risk itself (likelihood of recidivism)? Again, this discussion assumes that we can accurately predict risk, an extremely problematic assumption. Although, strictly speaking, incapacitation is not punishment, it usually does involve some deprivation of liberty, and therefore is painful to those who value liberty and autonomy.



incapacitation a state of incapacity or being unable to be fully active or free.



selective incapacitation the concept that we can predict who is going to be highly recidivistic or violent and incarcerate these individuals longer than others.



rehabilitation the process of internal change brought about by external agents.

Rehabilitation is not punishment either, although punishment may be used as a tool of reform. **Rehabilitation** is defined as internal change that results in a cessation of the targeted negative behavior. It may be achieved by inflicting pain as a learning tool (behavior modification) or by other interventions that are not painful at all (for example, self-esteem groups, education, or religion). Under the retributive philosophy described earlier, rehabilitation and treatment are considered more intrusive and less respectful of the individuality of each person than pure punishment because they attack the internal psyche of the individual. They seek to change offenders, perhaps against their will. This is probably more sophistry than reality, as anyone who has worked with offenders can attest. Very few people enjoy the experience of being a drug addict or sex offender, and most prison programs have limited capacity to change individuals against their will anyway. In a later chapter, we will explore the concept of rehabilitation and the various modes of individual change.

To conclude, the utilitarian rationale for punishment must determine that the good coming from punishment outweighs the inherent evil of the punishment itself. The beneficial aspects of punishment include deterrence, incapacitation, and rehabilitation or reform.

Methods of Punishment



corporal punishment pain or punishment inflicted “to the body”; in other words, physical punishment.

Targets of punishment include one’s possessions, one’s body, or one’s psyche. Punishments throughout the ages have attacked the body. **Corporal punishment** (meaning “to the body”) included drawing and quartering, flaying, whipping, beheading, dismembering, and numerous other means of torture or death (Newman 1978). Fines and dispossession of property also have been common throughout history. Conley (1992) writes that fines were more common than physical torture during many time periods. Execution was an economic as well as a corporal punishment because the person’s estate was forfeited to the monarch.



bridewells early English institutions that held the itinerant poor, many of whom probably had committed petty crimes. The name derived from the location of the first such institution.

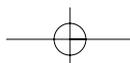
Economic and physical sanctions gradually have given way to imprisonment or lesser deprivations of liberty (probation or parole). We have reached the point today (at least in this country) where punishment is almost synonymous with imprisonment. As early as the end of the 14th century, the purpose of imprisonment changed from custody until physical punishment was inflicted, to custody as punishment itself. An increasing number of laws emerged with precisely defined prison sentences. The church also used imprisonment as a punishment for clerics (Conley 1992). Gradually, imprisonment for crime became almost indistinguishable from the other institutions that developed for vagrants and idlers—the **bridewells**, workhouses, and **gaols** all were responses to the same class of citizens. They held the itinerant poor: individuals who often were forced into petty crime because of their poverty. Chapter 2 explains this history in greater detail.



gaols early English jails.

Philosophy of Imprisonment

Of all the punishments described above, prison is perhaps the most complex. It affects the prisoners’ material possessions because they can earn little or no income while incarcerated, they may lose their job or livelihood, spend their life savings, and have their total lifetime earning capacity affected. It affects the pris-



oner's body because he or she is under the control of others and very little freedom exists. Imprisonment may result in actual physical harm, from attacks by correctional officers or other inmates or from illnesses or injuries left untreated. Prison also attacks the psyche by attempts at reformation and through the mental deterioration that occurs because of the negative environment of the prison. Many describe prison as a "psychological punishment" (Mickunas 1990, 78).

According to some, prison in its most severe form attacks "the soul"; it acts on the "heart, the thoughts, the will, the inclinations of the prisoner" (Howe 1994, 87). Prison critics allege that the most detrimental effects are not physical deterioration, but mental and moral deterioration. "You are nothing!" is a theme that prison inmates live with during the course of their imprisonment, and the mental toll that prison takes on its population is very difficult to measure.

Paradigms and Prison

A **paradigm** is a way of seeing the world or of organizing and making sense of knowledge. We can use the well-worn paradigms of conservatism and liberalism to illustrate the philosophy of imprisonment. The conservative ideology operates under the assumption that human beings have free will, can make rational choices, and deserve the logical outcomes of their choices. The liberal view of human behavior holds that behavior is influenced by upbringing, by affluence or poverty, by education, and by life experiences in general. The radical paradigm calls into question the very existence of the social order; radicals reject private ownership of property and are in favor of restructuring socioeconomic relations (Durham 1994, 17–20).

With these elements in mind, it is clear that the conservative approach to imprisonment is one of deterrence and incapacitation. Prison life should be uncomfortable—even painful—so that rational people, will be deterred from committing crime (**Figure 1-1**). If a short prison term doesn't work, the next sentence should be longer. The liberal approach embraces rehabilitation and reform. The purpose of prison should be to change the individual. Rehabilitative programs and reintegrative assistance, such as job-placement assistance, will help the person avoid future imprisonment by addressing problems of drug addiction, poor self-esteem, and no job skills. The radical approach would abolish prisons because it views them as tools of the powerful to enslave the powerless. The only solution to recidivism and crime, according to a radical perspective, is to reform law and society's resources so that everyone gets a "fair share" (Durham 1994, 28). At least two of these three perspectives can be roughly represented by different eras of prison history, each with a predominant philosophy of penology.

Conservatism: Deterrence and Incapacitation

The conservative approach characterized by views of **deterrence** and incapacitation was strong throughout pre-Jacksonian America and Europe. The philos-



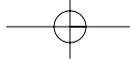
paradigm a way of seeing the world or organizing and making sense of knowledge.



Figure 1-1 A penitentiary cell with modest appointments. Reproduced with permission of the American Correctional Association, Lanham, Maryland.



deterrence the capacity to prevent or discourage an individual or individuals from committing an act.



ophy of punishment in general, and of prison specifically, was to deter and punish.

[C]learly the colonists relied on societal retribution as the basis for punishment and viewed the execution of punishment as a right of the society to protect itself and to wage war against individual sin. Deviance was the fault of the offender, not the breakdown of society or the community. . . . (Conley 1992, 42).

The use of prison was seen as a more humane form of punishment than earlier corporal punishments, but it was not necessarily viewed as reformative. The individual was seen as evil or weak, someone that society needed to protect itself against. Prison became a type of banishment. Earlier societies had banished wrongdoers to the wilderness; prisons (which were isolated far away from urban areas) became the “new wilderness.” If individuals were not deterred by the thought of that punishment (**general deterrence**), then they might be after experiencing incarceration (**specific deterrence**). At the least, society was protected as long as the offender was away (incapacitation).

Liberalism: Reformation and Rehabilitation

At some point during the 19th century, the philosophy behind imprisonment changed. Prison became viewed as more than an alternative to brutal corporal punishments. It was seen as redemptive and capable of changing the individuals within to become better people (Conley 1992).

David Rothman (1971), one of the definitive authorities on the reformative origins of the prison, proposes that the idea of reforming the individual criminal was at odds with the Calvinist doctrine of original sin. Before the 1800s, punishment remained retributive and was associated with **expiation** (a religious term meaning personal redemption through suffering). People were viewed as not capable of reform. Once the possibility of individual change was born, the idea of prison developed as the site of the “reform” (Hirsch 1987).

Although the penitentiary might have been an idea born in Europe, its development was purely American. Hirsch (1987) and others (McKelvey 1987) describe a shift in penal philosophy as the concept developed in the United States and Europeans began to look to American models of penal institutions.

The deluge of European delegations [to American prisons] in the 1830s masked a subtle shift in the intellectual center of penal reform. Before 1800, European theorists dominated the field of criminology, supplying the basic concepts and programs on which American facilities were built (Hirsch 1987, 429).

Separation, obedience, and labor became the trinity around which officials managed the penitentiary (Crosley 1986). Convicts were “men of idle habits, vicious propensities, and depraved passions,” who had to be taught obedience as part of their reformation (Rothman 1971, 579). By teaching convicts these virtues, prison officials reinforced their value for all of society. The penitentiary would reawaken the public to these “virtues,” and “promote a new respect for order and authority” (Rothman, 585).



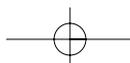
general deterrence what is done to prevent or discourage an individual or individuals from committing an act.



specific deterrence what is done to a specific person to prevent or discourage that individual from committing an act.



expiation the process of making amends or atoning for bad acts.



The early reformatory ideals, although corrupted by greed and co-opted by practicality, evolved into the rehabilitative era of the 1960s and early 1970s. Reformation was the dominant theme of the 1870 Prison Congress, which laid out the “Principles of Corrections,” and these were endorsed again, almost without change, in the 1970 Prison Congress. The 1870 and 1970 Prison Congresses endorsed such philosophical principles as:

... “corrections must demonstrate integrity, respect, dignity, fairness . . . ,”
 . . . “sanctions imposed by the court shall be commensurate with the seriousness of the offense,” and
 . . . “offenders . . . shall be afforded the opportunity to engage in productive work, participate in programs . . . and other activities that will enhance self worth, community integration, and economic status” (American Correctional Association Statement of Principles, 1970/2002).

Ed/?:
 Lower-
 case p as
 wanted?

The **Progressive Era** (early 1900s) was the time period during which educated professionals entered penology believing that science would solve individual prisoners’ problems. Indeterminate sentences and individualized treatment were the tools to accomplish this task. Scientific objectivity and professionalism replaced the missionary zeal of earlier penologists. The prison was no longer viewed as a utopia for society to emulate. It was viewed instead as a laboratory in which social work and psychiatry would work to help change people’s behavior.

Liberalism, however, is more clearly represented by the “rehabilitative era” of the 1970s. For a brief period of time, the general philosophy and mission of prisons changed to one of reformation and rehabilitation. Even the name of the prison changed to “correctional institution” and correctional programs proliferated. However, the rehabilitative era was over by the 1980s as prison systems struggled to house rising numbers of prisoners. Penal institutions once again settled back into a less ambitious mission of providing punishment and incapacitation.

Radicalism: Prison and Economics

Rothman (1971) accepted the rhetoric of penal philosophy at face value. That is, the writings of the time indicated that the motivation and purpose of prison was to reform offenders, and this goal was accepted as fact. Others see the rhetoric of early prison reformers as masking a more subtle and insidious philosophy of imprisonment, one based on economy rather than reformation, and on power rather than benevolence. Rusche and Kirchheimer (1939) suggested that imprisonment emerged as the dominant method of punishment because of a desire to exploit and train captive labor. A scarcity of labor served as the impetus for the modern prison because of its role in training and exploiting labor reserves.

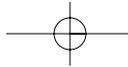
The so-called **severity hypothesis** of Rusche and Kirchheimer proposes that punishment becomes more severe when there is a surplus of labor, and more lenient when labor is scarce and convicts are more valuable in the labor force. Some authors have supported this theory by using case histories of prison systems and comparing the treatment of prisoners to economic conditions. Other authors have not found any support for the theory, at least not measurable by standard methods (Gardner 1987). For instance, in his study of New York prison history, Gardner



progressive Era refers to the early 1900s when there was an explosive growth of the “sciences” and the optimism that humans could, through science, understand and control the world.



severity hypothesis
 Rusche and Kirchheimer’s proposition that punishment becomes more severe when there is a surplus of labor.



found that harsher punishment often resulted from attempts to maintain and increase the production of essential commodities in overcrowded, tumultuous prisons.

However, even critics of the Rusche-Kirchheimer view mention economic elements in their explanations of motivations for the development of prison. Gardner (1987) proposes the idea that prisons would have developed much earlier in England and Europe if the Board of Trade in England had not been so vigorously opposed to their creation and the competition that would develop from prison labor. He also points out that in American prison history, the promises of prison officials that prisons could be self-supporting were subverted by the low fees contractors were allowed to pay for leased labor, not to mention the economic boon of the prison itself to a local economy. In fact, he goes so far as to point to the economic benefits of the prison to certain interest groups as the reason for “the persistence and expansion of an otherwise politically and economically anachronistic form of punishment” (Gardner, 106).

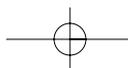
The earliest origins of the prison are tied to economics because prisons targeted the “idle poor” and were first cousins to the *bridewells* and *workhouses*, institutions that absorbed the vagrant classes of Europe and early American cities. Authors disagree, however, as to the meaning of labor within the prison. Some see labor as a reformatory element, helping the inmate take on the industriousness and good habits of a perfect citizen. Others describe prison labor as more purely punishment where legislators instructed prison administrators to institute labor “of the hardest and most servile kind, in which the work is least liable to be spoiled by ignorance, neglect or obstinacy” (cited in Rothman 1971, 570). There was no question that prison labor in southern prison systems was purely exploitive: “[P]enal slaves were herded about the camps by armed guards, and at night they were shackled in ‘cribs.’ The lease-holders were interested in making as large a return as possible for the least outlay of money” (Crosley 1986, 21).

In the North, economics favored the “**factory prison**” model. Inmates were housed and worked together and were better utilized in factorylike labor conditions (Melossi and Pavarini 1981). Chapter 5 explores current issues of prison labor.

The radical view sees economics as the central issue in all social relations. Those who have economic power also have legal and social power. The legal system, including the sanction of imprisonment, is viewed as a tool of those in power. The purpose is variously described as to capture and exploit the labor pool, to hold a portion of the labor class inactive to keep down labor costs, or to serve as a dumping ground for those who are expendable in a capitalist system. Theorists who advocate this philosophy of imprisonment point to the continued existence of an institution that seems to have failed miserably in its original goal of reformation. For instance, Reiman (1995, 4) says, “On the whole, most of the system’s practices make more sense if we look at them as ingredients in an attempt to maintain rather than to reduce crime,” and “[the criminal justice system] projects a distorted image that crime is primarily the work of the poor.” It keeps the public fearful and unsympathetic toward the disenfranchised, and keeps attention away from economic power holders who are the real perpetrators of most of the injury and loss in society.



“factory prison” model
derived from the Auburn
Prison and was more
common in the northeast.
These prisons utilized
prison labor in factory
settings.



Whether the system focuses on individual responsibility for crime (and therefore punishment) or on individual deviance (and therefore treatment), the result is the same: the existing social order is excused from any charge of injustice. The radical theorists point out that this is the true reason why prisons fail to cure or deter. Even theorists who are not necessarily radical point out that imprisonment is futile without addressing social problems, such as unemployment, homelessness, poverty, discrimination, inadequate health care, and unequal education (Selke 1993).

Foucault (1973) presented a slightly different view of prison—one based less on economics, but still premised on the need of those in power to discipline and control the populace. In his history of the emergence of the prison, he sees the prison as one part of the institutionalization of society—the prison housed the poor and criminal, the mental institutions housed those who couldn't take care of themselves, and poorhouses housed those without economic means. All controlled and contained the class of people who were considered expendable. All normalized the idea of containment and deprivation of liberty as a natural right of society.

Although the radical view has had some support for many decades, it has never been the dominant viewpoint. There is continuing evidence, however, of the potency of the idea that the underlying philosophy of imprisonment has always been economic. Today, we see that private prisons have emerged as a profit-generating industry (see Pollock 2004b). In Chapters 3 and 10, we will discuss their growth and the profits that are generated in both state and federal systems. Powerful companies such as CCA (doing business now as Prison Realty Trust) and Wackenhut are public companies, and their stock is traded on the New York Stock Exchange. Further, the biggest growth in private-prison construction has been in small towns that have seen manufacturing jobs disappear. It is not an exaggeration to say that the towns' very economic livelihoods depend on a continuing stream of prisoners to fill the prisons to provide the jobs for the townspeople. The radical view would hold that the continued existence and, perhaps, growth of prisons is assured when they generate profit for someone.

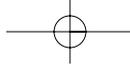
The New Conservatism: Justice and “Just Desserts”

Since the late 1970s and early 1980s, there has been disillusionment and dissatisfaction with the idea of prison as a reformative tool. Some believe that the only purpose of prison should be punishment. The first and most vocal critics of the rehabilitation ethic were Von Hirsch (1976) and Fogel and Hudson (1981). Although different in tone, both critique the idea that prison should be anything more than a measure of punishment. Their approach blends a curious mixture of utilitarianism and retributivism to form a **new retributivism**. This philosophy is actually quite old, and more similar to pre-Jacksonian deterrence and incapacitation than anything seen for the past 100 years. Von Hirsch justifies and limits the role of punishment by retributive proportionality:

1. The liberty of each individual is to be protected so long as it is consistent with the liberty of others.
2. The state is obligated to observe strict parsimony in intervening in criminals' lives.



new retributivism a term used to describe those in the late 1970s and early 1980s who proposed abandoning the “rehabilitative ideal” and returning to a system based on retribution.



just-desserts model views retribution as the sole rationale for punishment. What is done to the individual criminal should be based solely on the wrong that was committed and measured accordingly.

3. The state must justify each intrusion.
4. The requirements of justice ought to constrain the pursuit of crime prevention (that is, deterrence and rehabilitation) (Von Hirsch 1976, 5).

The so-called **just-desserts model** also views punishment as being justified solely by retributive ends rather than utilitarian ones. This view utilizes the “social contract” again to justify punishment for those who break the law. It promotes the idea that the only goal of the justice system should be justice, not reform of the individual (Fogel and Hudson 1981). This view advocates using determinate forms of sentencing rather than indeterminate, separating treatment options from release decisions, and circumscribing the goals of custody to retribution rather than reformation. It has found popular and political favor probably because it sounds punitive, although advocates of this philosophy were most likely reacting to the abuses of power engendered by a utilitarian treatment ethic that allowed a great deal more control over the individual offender’s body and mind “for their own good.” There is a distinct difference between a penal philosophy that holds that we should do no more to the individual than she deserves (that is, not keep an offender imprisoned longer for treatment), and a penal philosophy that holds that the only thing an offender deserves is punishment. Despite their differences, both of these approaches have contributed to penal policies today.

■ The Effect of Retributivism and a New Era

We are currently in an era where neither liberalism nor rehabilitation is the dominant correctional philosophy, despite the continuing theme of the popular press and politicians who propose “getting tougher” as the answer to the crime problem. There are two fallacies to this rhetoric. The first is that we are not “tough” enough. To the contrary, some perceive the United States as a “gulag nation,” and the U.S. incarceration rate exceeds that of any other Western nation. The other fallacy is that we have a crime problem. Crime is at its lowest point in 30 years, yet today the dominant penal philosophy, which developed in the late 1970s and early 1980s, continues to be conservative and punitive.

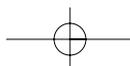
Clear (1994) refers to this era as the “**penal-harm movement**.” The phrase encapsulates the idea that, far from rehabilitation, the objective and goal of reformers in the late 1970s was to make prisons painful and increase the measure of punishment inflicted. This approach has been with us for at least 20 years, and has its roots in traditional retributivism. This philosophy has been pervasive in the politics and rhetoric surrounding corrections, and no doubt has contributed to the phenomenal growth of the incarceration rate and the proliferation of prisons. There is some small evidence, however, that the ever-increasing use of prison as punishment may be slowing down, and that other responses to crime might be gaining favor. It is possible that the “new retributivism” or “penal-harm movement” might be on the wane.

Restorative Justice: An Alternative Philosophy?

A relatively new philosophy, restorative justice, has emerged in criminal justice that is quite contrary to the penal-harm movement. The roots of such a philosophy might



penal-harm movement a term coined to describe the punitive approach that has characterized the justice system and corrections since the 1980s when rehabilitation and reform were, to a great extent, abandoned.



be found in the Ethics of Care (Pollock 2004a) and, to some extent, in utilitarianism. Adherents also find support in religion, arguing that in the Bible, the “eye for an eye” reference is to reparation, not restitution (Schweigert 2002, 29).

Much of the concept has been borrowed from aboriginal peoples, including the Inuit, Maori, and Navajo (Perry 2002, 5). Basically, the idea of restorative justice is that the objective is not to inflict punishment on the offender, but rather, to restore all parties to a prior state of “wholeness.” This philosophy can also be called reparative justice or peacemaking justice.

One basic tenet of restorative justice is the involvement of victims in a search for a resolution that meets the needs of all parties (Van Ness and Strong 1997). The offender must meet the victim (either literally or figuratively) and take responsibility for his or her actions by in some way repairing the damage done to the victim. For instance, in one restorative-justice case, a DWI offender who had killed his best friend in a traffic accident offered to pay child support to the victim’s wife and young child until the child reached college (Perry 2002, 10). This is a much different outcome from the typical system response to a DWI fatality. In this case, some attempt has been made to meet the needs of the victims; in a typical prison sentence, needs are ignored in favor of vengeance.

The idea of restorative justice is that victims must be made whole; however, part of the solution might be meeting the needs of the offender as well. An important component of this philosophy is that the offender is not to be condemned, but rather, is helped to see how he or she can repair the damage. The idea that the offender continues to be a part of the community is very important. Far from being banished or stigmatized by the experience, the offender should feel more fully integrated into his or her community (Braithwaite 1989).

Mediations and conferences between the victim and offender are often a part of restorative-justice efforts (Braithwaite 1989; Bazemore and Maloney 1994). Restitution is also consistent with the ideals of restorative justice, but only if it is tied with the specific needs of a victim and is meaningful to both (Schweigert 2002, 21). Adherents of this approach see it as a return to older forms of justice rather than as a new philosophy of justice. They note that the oldest forms of justice were concerned with restoring loss and repairing injury rather than with punishment. Further, justice was administered by and kept within the community, not abdicated to a higher state authority (Schweigert 2002, 25).

So how do prisons fit with restorative justice? Actually, they don’t. In the majority of cases where prison is used as the response to an offense, a restorative-justice rationale would argue that community service, restitution, or some type of mediation would be a better alternative. Only in cases of serious violent crime would mediation and restitution not be appropriate. Prison is banishment. Individuals who are banished and feel pain via imprisonment are not likely to feel close to the community that banished them; thus, the “circle” of society has been broken. Prison not only injures the individual, but also injures the community because of the loss of the individual from his or her community. Thus, prison is basically inconsistent with a restorative-justice philosophy; however, some argue that prison might become restorative if it were to fundamentally shift its emphasis and objective to reparations to specific victims and to safeguarding the dignity and humanity of the offenders (Perry 2002, 14).



reintegration a term referring to the re-entry of prisoners into society.

Utilitarian Caring: The Reintegrative Movement

Recently we have seen a renewed attention to the needs of prisoners reentering society (Mauer, Chesney-Lind, and Clear 2002). Interestingly, in the 1980s this problem was addressed and the term **reintegration** was coined. The federal government has recently budgeted some monies toward studying what can be done to aid the offender in reentry efforts (Murphy 2002b). While some might think this trend is part of the restorative-justice movement, a more likely philosophy underpinning the effort is utilitarianism. It cannot go unnoticed that more than 600,000 prisoners are reentering our society every year (King and Mauer 2002, 3). Further, at least one study indicates that the recidivism rate is worse today than 20 years ago (Murphy 2002a). Most citizens would prefer that released offenders have some means to support themselves, and it benefits us all if offenders have access to programs that may help them withstand the temptations of alcohol, drugs, and/or committing future crimes. This has translated into more funds for parole, job-placement services, and other assistance to newly released inmates (Ward 2004).

It makes sense for the public to be in favor of community alternatives to prison because such alternatives are less costly. If prison costs \$45 a day compared to \$2 for probation (Ward 2004), and if there is no substantial risk in choosing the cheaper alternative, it would seem that even a punitive utilitarian should prefer that the offender be placed in the cheaper correctional alternative—it is best for the offender, but more importantly, it is best for us all.

■ Conclusions

In this chapter, we have surveyed some historical and current philosophies of punishment and prison. An implicit assumption of this chapter is that what we do has some relationship to what we believe. Is it important to review the motivations and purposes behind the prison? One benefit of this exercise is that we become more clear about what we expect from prison. For instance, many people, including many inmates, believe that the prison's main function is to rehabilitate. In reality, this has not been a major element in the "mission" of prisons for more than two decades. Although we will discuss education and vocational training in Chapter 6, and other rehabilitation programs in Chapter 5, much of the philosophical rationale for these interventions has been discarded by penologists and the politicians who fund the prison enterprise.

Another issue to consider is whether there is any evidence in support of the rationales for punishment discussed in this chapter. If one believes in a penal philosophy based on utilitarian deterrence, is it not important to have evidence that prison deters? How does one know whether prison has deterred someone from committing crime? Some argue that the declining crime rates point to prison's effectiveness in deterrence. However, as we shall see in Chapter 3, others point out that crime rates and prison rates (both of which vary among the states) bear no relationship to each other, thus undercutting the assumption that it is imprisonment that has led to the decline of crime.

In Chapter 6, correctional treatment programs are discussed, along with the mixed findings of the evaluations that have been conducted on correctional pro-

grams. While some indicate that there is little or no evidence that treatment programs reduce crime, others argue that there are positive effects. The same mixed findings are found in evaluations of education and vocational training.

The penal enterprise has always had more than one philosophy or rationale. It is a slippery fish: if we criticize it for not rehabilitating, we are told it deters; if we ask for evidence of deterrence, we are told it is retributive. If the public is at all squeamish about locking their brethren up in cages, we are taken on tours of educational buildings and carpentry-apprentice programs to show that it is “for their own good.” If the public rails against prison as the “Holiday Inn for criminals,” one can show them prison chain gangs. One prevailing aspect of penal philosophy may be its amorphous content. Prisons can be all things to all people. The radical theorists may be right that the prison has been successful in diverting public attention away from the transgressions of the economically powerful by defining and reviling a “criminal” class, but they are less successful in any attempt to envision a society without prison.

KEY TERMS

bridewells—early English institutions that held the itinerant poor, many of whom probably had committed petty crimes. The name derived from the location of the first such institution.

corporal punishment—pain or punishment inflicted “to the body”; in other words, physical punishment.

deterrence—the capacity to prevent or discourage an individual or individuals from committing an act.

expiation—the process of making amends or atoning for bad acts.

ex post facto laws—laws that make an act criminal “after the fact,” so that individuals would not have received due notice that the behavior would be punished. Our Constitution prohibits these laws.

“factory prison” model—derived from the Auburn Prison and was more common in the northeast. These prisons utilized prison labor in factory settings.

gaols—early English jails.

general deterrence—what is done to prevent or discourage an individual or individuals from committing an act.

hedonistic calculus—Jeremy Bentham’s concept that the potential profit or pleasure from a criminal act can be counterbalanced with the risk of slightly more pain or punishment. If this is done then rational people will choose not to commit the act.

incapacitation—a state of incapacity or being unable to be fully active or free.

just-deserts model—views retribution as the sole rationale for punishment. What is done to the individual criminal should be based solely on the wrong that was committed and measured accordingly.

new retributivism—a term used to describe those in the late 1970s and early 1980s who proposed abandoning the “rehabilitative ideal” and returning to a system based on retribution.

paradigm—a way of seeing the world or organizing and making sense of knowledge.

penal-harm movement—a term coined to describe the punitive approach that has characterized the justice system and corrections since the 1980s when rehabilitation and reform were, to a great extent, abandoned.

progressive Era—refers to the early 1900s when there was an explosive growth of the “sciences” and the optimism that humans could, through science, understand and control the world.

punishment—a pain or unpleasant experience inflicted upon an individual in response to a violation of a rule or law by a person or persons who have lawful authority to do so.

rehabilitation—the process of internal change brought about by external agents.

reintegration—a term referring to the re-entry of prisoners into society.

retribution—the proportional infliction of pain or punishment in response to a wrong.

retributive rationale—the justification for punishment that proposes that society has a right to punish, as long as it is done lawfully and proportionally to the wrong committed by the offender.

selective incapacitation—the concept that we can predict who is going to be highly recidivistic or violent and incarcerate these individuals longer than others.

severity hypothesis—Rusche and Kirchheimer's proposition that punishment becomes more severe when there is a surplus of labor.

social contract—a heuristic device that illustrates how individuals give up individual liberties to act with aggression in return for safety.

specific deterrence—what is done to a specific person to prevent or discourage that individual from committing an act.

utilitarianism—the ethical system whereby good is defined as that which results in the greatest good for the greatest number.

utilitarian rationale—the justification for punishment that proposes that society has a right to punish, as long as it results in a greater good for the majority of the population.

REVIEW QUESTIONS

1. Explain the difference between the retributive rationale for punishment and the utilitarian rationale.
2. What is the social contract?
3. Discuss the three benefits of prison under the utilitarian rationale of punishment.
4. Discuss the differences between the conservative, liberal, and radical approaches to penal philosophy. What time period in history is associated with the conservative approach? The liberal approach?
5. What is the importance of “separation, obedience, and order”?
6. Explain the severity hypothesis and the economic theories of penal philosophy.
7. Discuss the elements of the new retributivism. What is the “just-desserts” model?
8. Discuss “restorative justice” and how this approach is or is not consistent with imprisonment.
9. Discuss the philosophical rationale for reintegration efforts.
10. To sum up, describe the two most common rationales for prison.

FURTHER READING

- Braithwaite, J. 1989. *Crime, Shame, and Reintegration*. Cambridge: Cambridge University Press.
- Foucault, M. 1973. *Discipline and Punish: The Birth of the Prison*. New York: Vintage.
- Murphy, J. 1995. *Punishment and Rehabilitation*, 3d ed. Belmont, CA: Wadsworth.
- Rothman, D. 1971. *The Discovery of the Asylum: Social Order and Disorder in the New Republic*. Boston: Little, Brown.
- Rusche, G., and O. Kirchheimer. 1939. *Punishment and Social Structure*. New York: Russell and Russell.

REFERENCES

- American Correctional Association. 1970/2002. Retrieved January 2, 2004, from www.aca.org/pastpresentfuture/principles.asp.
- Auerhahn, K. 1999. "Selective Incapacitation and the Problem of Prediction." *Criminology* 37, 4: 705–734.
- Bazemore, G., and D. Maloney. 1994. "Rehabilitating Community Service Toward Restorative Service Sanctions in a Balanced Justice System." *Federal Probation* 58, 1: 24–35.
- Borchert, D., and D. Stewart. 1986. *Exploring Ethics*. New York: Macmillan.
- Braithwaite, J. 1989. *Crime, Shame, and Reintegration*. Cambridge: Cambridge University Press.
- Clear, T. 1994. *Harm in American Penology: Offenders, Victims, and Their Communities*. Albany, NY: S.U.N.Y.–Albany Press.
- Conley, J. 1992. "The Historical Relationship Among Punishment, Incarceration, and Corrections." In S. Stojkovic and R. Lovell (Eds), *Corrections: An Introduction*, pp. 33–65. Cincinnati, OH: Anderson.
- Crosley, C. 1986. *Unfolding Misconceptions: The Arkansas State Penitentiary, 1836–1986*. Arlington, TX: Liberal Arts Press.
- Durham, A. 1994. *Crisis and Reform: Current Issues in American Punishment*. Boston: Little, Brown.
- Fogel, D., and J. Hudson. 1981. *Justice as Fairness*. Cincinnati, OH: Anderson.
- Foucault, M. 1973. *Discipline and Punish: The Birth of the Prison*. New York: Vintage.
- Gardner, G. 1987. "The Emergence of the New York State Prison System: A Critique of the Rusche-Kirchheimer Model." *Crime and Social Justice* 29: 88–109.
- Hirsch, A. 1987. "From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts." In K. Hall (Ed.), *Police, Prison, and Punishment: Major Historical Interpretations*, pp. 344–434. New York: Garland.
- Howe, A. 1994. *Punish and Critique: Towards a Feminist Analysis of Penalty*. London: Routledge.
- King, R., and M. Mauer. 2002. *State Sentencing and Corrections Policy in an Era of Fiscal Restraint*. Washington, DC: Sentencing Project. Retrieved August 12, 2002, from www.SentencingProject.org.
- Mauer, M., M. Chesney-Lind, and T. Clear. 2002. *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*. New York: Free Press.

- McKelvey, B. 1987. "Penology in the Westward Movement." In K. Hall (Ed.), *Police, Prison, and Punishment: Major Historical Interpretations*, pp. 457–479. New York: Garland.
- Melossi, D., and M. Pavarini. 1981. *The Prison and the Factory: Origins of the Penitentiary System*. London: Macmillan.
- Mickunas, A. 1990. "Philosophical Issues Related to Prison Reform." In J. Murphy and J. Dison (Eds.), *Are Prisons Any Better? Twenty Years of Correctional Reform*, pp. 77–93. Newbury Park, CA: Sage Publications.
- Murphy, J. 1995. *Punishment and Rehabilitation*, 3d ed. Belmont, CA: Wadsworth.
- Murphy, K. 2002a. "State Prisoners Often Return, Report Shows." Stateline.org. Retrieved June 10, 2002, from www.stateline.org/story.do?storyID=240988.
- Murphy, K. 2002b. "States Get Grants to Help Ex-Offenders" Stateline.org. Retrieved July 17, 2002, from www.stateline.org/story.do?storyID=248888.
- Newman, G. 1978. *The Punishment Response*. New York: Lippincott.
- Perry, J. 2002. "Challenging the Assumptions." In J. Perry (Ed.), *Restorative Justice: Repairing Communities Through Restorative Justice*, pp. 1–18. Lanham, MD: American Correctional Association.
- Pollock, J. 2004a. *Dilemmas and Decisions: Ethics in Crime and Justice*. Belmont, CA: Wadsworth.
- Pollock, J. 2004b. *Prisons and Prison Life: Costs and Consequences*. Los Angeles: Roxbury.
- Reiman, J. 1995. *The Rich Get Richer and the Poor Get Prison*. Boston: Allyn and Bacon.
- Rothman, D. 1971. *The Discovery of the Asylum: Social Order and Disorder in the New Republic*. Boston: Little, Brown.
- Rusche, G., and O. Kirchheimer. 1939. *Punishment and Social Structure*. New York: Russell and Russell.
- Schweigert, F. 2002. "Moral and Philosophical Foundations of Restorative Justice." In J. Perry (Ed.), *Restorative Justice: Repairing Communities Through Restorative Justice*, pp. 19–39. Lanham, MD: American Correctional Association.
- Selke, W. 1993. *Prisons in Crisis*. Bloomington: Indiana University Press.
- Van Ness, D., and K. Heetderks Strong. 1997. *Restoring Justice*. Cincinnati, OH: Anderson.
- Von Hirsch, A. 1976. *Doing Justice*. New York: Hill and Wang.
- Ward, M. 2004. "Rehab Trend for Convicts Gaining Favor." *Austin American Statesman* (December 7): A1, A12.