

PRESENTED BY HOWARD WILLEN 1 OCT 09

## PUNISHMENT AND CRIMINAL JUSTICE

One response to the rise in crime comes from many sectors of America; legislators, judges and many other citizens cry out for these criminals to be punished. Many citizens respond as F. B. I. Director, J. Edgar Hoover, did many years ago when he referred to criminals as "scum from the boiling-pot of the underworld;" "public rats," "vermin in human form."

Hartjen points out that there was no formal machinery in the Western civilization to punish offenders until about the twelfth century. Crime was considered a private matter to be settled either by a bloody feud or by compensation payment. The individual was the avenger. The practice of inflicting pain as the main purpose of punishment became the standard response to crime when crime came to be viewed as an offense against the king or the state.

It was not until the end of the eighteenth century that incarceration for long periods of time was designed to deal with the offender. Rehabilitation was not considered at this time to be a goal. The first two prisons to come into existence in the United States were the Walnut Street Prison in Philadelphia (1776) and the Cherry Hill Prison of 1829, also in Pennsylvania. Solitary confinement was used in both.

Language commonly used to define punishment is often ambiguous. Our nation uses many conflicting ideologies of punishment. Norman Johnson comments:

It seems that legislators, in a vain attempt to avoid the problem of punishment, have devoted themselves to a precise

definition of crimes and left the sanction provisions of the code to the general good will of those who administer it.<sup>11</sup>

While admitting that arrest and trial are factors in punishment, the position of this writer is that incarceration is the dominant form of punishment in America. Regardless of what happens, or fails to happen in prison, one thing is sure; incarceration is punishment because it deprives the offender of liberty. Whatever punishment is mentioned in this paper, it always refers to incarceration.

Society has traditionally used punishment for some desired goal for those who have violated the law. Historically, punishment can only be understood in light of suffering.

Sagarin and MacNamara point out:

Throughout the millennia of human history, the ingenuity of mankind has proved monstrously fruitful in developing an almost infinite complexity of penalties, many of them as barbarously inhumane as they have been demonstrably ineffective.<sup>12</sup>

Punishment involves some sort of deliberate infliction of pain by an authority upon an offender of the law. This act of punishment

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<sup>11</sup>Norman B. Johnson, (ed.), The Sociology of Punishment and Correction, second edition (New York: J. Wiley Company, 1970), p. 350.

<sup>12</sup>Edward Sagarin and Donal MacNamara, (eds.), Correction: Problems of Punishment and Rehabilitation (New York: Mac Nararo Praeger Publishers, 1973), p. 1.

brings distress against the wishes of the offender. One's definition of punishment depends largely on one's approach to the desired aims which are given to justify punishment.

#### HISTORICAL JUSTIFICATIONS OF PUNISHMENT

Many proponents of punishment justify it as a means of retribution for injury, deterrence from crime, and rehabilitation of the offenders.

##### Retribution

Stanley Grupp comments:

The retributivist defends the desirability of a punitive response to the criminal by saying that the punitive reaction is the pain the criminal deserves and that it is highly desirable to provide for an orderly, collective expression of society's natural feeling of revulsion toward and disapproval of criminal acts.<sup>13</sup>

Imprisonment supplies a method of legally carrying out the revenge of a society which is outraged with the rise in crime. "In an earlier period of criminal justice culprits were punished by mob vengeance, and imprisonment is the present substitute for this more primitive technique."<sup>14</sup>

I have not been able to find a contemporary author of note

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<sup>13</sup> Stanley E. Grupp, Theories of Punishment (Bloomington: Indiana University Press, 1971), p. 5.

<sup>14</sup> Harry E. Barnes, The Repression of Crime (Montclair: Patterson-Smith, 1969), p. 299.

who holds the strict retributive theory. During the late 1930's there emerged some proponents of this view. However, the theory is not now held by leading criminologists.

The main objection to this theory is that it does no more than satisfy the savage desires of our society. Some believe that unpunished deviance will tend to demoralize those who conform to the law. Righteous indignation will flare when society sees crime go unpunished, and some argue that a failure to punish the offender will destroy the desire of good people to keep doing good. Our conclusion is that retribution plays no logical part in criminal justice. It does no more than harden the recipient. Prisons advocating this philosophy furnish society with ex-prisoners who are more committed to crime than they were when they were committed to prison.

#### Deterrence

Advocates of the "deterrence" philosophy hold that punishment serves as a deterrent. This philosophy was developed by criminologists during the eighteenth century and early nineteenth century.

The early advocates of this model argued that to provide greater protection for the individual a definite set of penalties must be established for specific crimes. It was begun out of revulsion against excessive retributive punishment of individual offenders.

A modern advocate of the deterrent philosophy is Professor Paul Tappan. He maintains that "deterrence is a basic if not the



primary function of the state's sanctions."<sup>15</sup> Tappan maintains that the impact of significant deterrent influences in human motivation, is, for the most part, unconscious and emotional. Thus, the deep-seated fears and aspirations play an important part in deterrence.

Tappan also believes that not all persons can be constrained by penal sanctions. For instance, those who commit offenses out of a sense of guilt may seek punishment. As psychologists point out, there are certain types of persons who are challenged by the threat of punishment.

While advocates of the deterrence philosophy hold that penalties should be designed to meet the severity of the crime committed, there seems to be some agreement that the certainty of discovery and punishment is of greater significance in general prevention. The more the law is broken and the offenders go unpunished, the general position held is that crime will rise at a faster rate.

In 1968 the California Assembly Committee on Criminal Procedure published a very thorough report on the deterrent effect of punishment in that state. It cited a 1963 decision of the Supreme Court, *Gideon versus Wainwright*, in which indigent felony defendants were declared to have the right to counsel. In consideration of the action, Jessica Mitford comments:

As a consequence of the decision the State of Florida was obliged to discharge long before the normal release 1,252 indigent prisoners who had been tried and convicted of felonies

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<sup>15</sup>Tappan, op. cit., p. 245.

without counsel. The Florida Department of Corrections conducted a study of these early releases, comparing their recidivism rate with an equal number of full-term releases. Result: twenty-eight months after discharge, twenty-five per-cent of the full-term release group had returned to criminal activity compared with only 13.6 per-cent of the early release group.<sup>16</sup>

John Braithwaite, director of the Canadian Penitentiary Service and president of the American Corrections Association, speaking in Louisville, Kentucky on May 5, 1975, said:

The American public should stop pretending that prisons rehabilitate criminals and deter people from committing crimes . . . I believe that prisons deter people like you and me, those who require little in the way of guidance. The people who enter prisons are those who are not deterred one iota by the thought of a prison sentence.<sup>17</sup>

While it is true that the public is safe from the offender while he is incarcerated, the likelihood of a worse criminal coming back into society from prison is very great. Prisons, as we know them in America, are breeding houses of crime. Imagine what several years of prison life does to a person who has never been incarcerated until a minor offense has been committed. Criminal values are learned in prison and they almost guarantee that the person, when he is released, will commit crime again. Most of our prisons are overcrowded and the staff-prisoner ratio is terribly over balanced. Very few people die in prison. Thus, they come back to our communities more warped than they were when they went to prison.

There is a moral argument against punishing a person for no

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<sup>16</sup> Jessica Mitford, Kind and Usual Punishment (New York: Alfred A. Knopf Company, 1974), p. 281.

<sup>17</sup> The Louisville Courier Journal, May 6, 1975.

other reason than to deter crime. A common sense parole system is one viable answer to long prison terms.

### Rehabilitation

Another philosophy of punishment is rehabilitation. This school of thought maintains that punishment, or more accurately, imprisonment, is justified in the light of the fact that it may help to rehabilitate an offender. It provides an opportunity for us to take steps to reform offenders and so to reduce offenses.

It is presupposed that the offender is in need of redirection and a rechanneling of his drives. The task of penology is to prepare offenders to be responsible members of the community when they are released from prison. Professor Daniel, lecturing at the Arden House Conference, June, 1964 commented:

Interest in punishment for its own sake is rapidly being replaced by concern with promoting change in offenders. Custodial tasks are becoming less sharply separated from treatment services, for all personnel have treatment functions.<sup>18</sup>

The twentieth century has brought a new emphasis on rehabilitation of the offender. According to Tappan, the Italian school of criminology, with its emphasis on individual rehabilitation, has influenced modern law and correctional administration in the United States. The school was represented primarily by Lombroso, Ferri and Garofalo. Lombroso is best known for his doctrine of biological

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<sup>18</sup> Charles S. Prigmore (ed.), Manpower and Training for Corrections (New York: Council on Social Work Education, 1966), p. 27.

atavism as a cause of crime. According to this theory the recurrence in an organism, or in any of its parts of a form typical of ancestors more remote than the parent, is usually due to recombination of ancestral genes. His greatest contribution was to the individual criminal and empirical research. His two contemporaries emphasized the significance of social and economic factors in creating the conditions which seem to produce crime.

This was a departure from the traditional justifications of punishment. Tappan says that little emphasis was placed on the sinfulness of the offender, and much emphasis came to be placed on environmental factors and conditions within the offender, over which he has no control. He says:

From its attention to the individual and to differentially effective group influences, the Italian school concluded that offenders and their backgrounds should be studied with a view of differing treatment according to the personality and social needs of the individual. From these sources the followers of positivistic criminology have come to hold, either explicitly or implicitly, that man is not responsible for his behavior and therefore does not deserve punitive treatment.<sup>19</sup>

Perhaps the greatest weakness of this theory is the strong emphasis on determinism. While I agree that one's mental adjustment is determined largely by one's environment, it seems unrealistic to hold that one's emotional stability is determined only by environmental pressure. Many proponents of this philosophy give almost no attention to the free will of the offender.

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<sup>19</sup>Tappan, op. cit., p. 259.



Some criminologists have tried to correct this fallacy by putting social conditions in their proper perspective while paying proper respect to the free will of the offender. Professor Anthony Flew of the University of Calgary, Canada, puts to rest the assumption by some that we are "sick." He holds that criminal conduct is defined by what the particular systems happens to prescribe. He illustrates this by using discrimination as being illegal in the United States, while in South Africa it is encouraged.

Therefore, one cannot maintain that mental derangement alone is the cause of deviant behavior. We don't even agree as to the meaning of deviant behavior, or mental derangement.

It is held by most criminologists that if an offender is to be reformed he must be coerced into receiving some kind of treatment. Some need treatment of the mind, while others need to be removed from a society which, to a large degree, has been responsible for the deviant behavior. Still others need a planned program of counseling and job training.

Certain research projects have indicated that intensive counseling and a permissive social climate within prison do not always produce the same level of reform in all offenders. At a naval disciplinary barracks, a California institution for older youth, and a Massachusetts prison, controlled experiments proved this to be so. Glaser says:

Prisoners with little prior involvement in crime who expressed a desire for counseling and were in these therapeutically oriented programs had lower recidivism than similar persons in traditional



prison programs. Conversely, those prisoners with more prior criminal experience and strong ties to other criminals who were in these therapeutic programs had markedly higher recidivism rates than similar offenders in traditional firm, but fair prison regimes.<sup>20</sup>

The most successful programs of rehabilitation are placing emphasis on re-entry as it relates to job training and work release.

The May 28, 1973 issue of Newsweek reports one such program.

The Washington State Penitentiary has established a program called 'The Bridge.' This corporation is run by inmates who travel around the state buying, selling and delivering furniture. About one-half of the prisoners live outside the prison wall in an unlocked building. Three-fourths of those involved are serving time for crimes of violence. No one has escaped and they have reported to have had only two fist fights.<sup>21</sup>

Another rehabilitative approach is the involvement of prisoners in community service projects. One such program has been initiated at the Vienna Correctional Center, Vienna, Illinois. Vernon G. Housewright, the warden, recently explained the program at a United Methodist seminar, Louisville, Kentucky. The prisoners are allowed to leave prison on Sunday morning to attend worship in local churches. The prison has a music group that travels over the state. Other prisoners work with local emergency units as ambulance drivers and assistants.

Most states are now allowing early release for those prisoners who have proven themselves to be ready for life outside the prison.

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<sup>20</sup> Daniel Glaser, Adult Crime and Social Policy (Englewood Cliffs: Prentice-Hall, 1972), p. 105.

<sup>21</sup> Newsweek, May 28, 1973.

Prigmore comments:

From the earliest times to the beginning of the twentieth century a criminal's fate was almost always decided as soon as he was sentenced. If the court imposed imprisonment, it not only specified the exact duration for the penalty, but it even designated the institution to be used and the program to be followed there, such as 'solitary confinement' or 'hard labor.'<sup>22</sup>

During the twentieth century the classification of offenders has begun to take place in prisons across the United States and has taken from the courts their long-standing role in determining the place and condition of the offenders' incarceration. Thus, the prison and the parole board have more freedom in determining who will receive an early release and how they will be treated while incarcerated.

The majority of prisoners are released from prison before the completion of their sentence. Complete confinement is replaced by minimum custody conditions. The parole officer works with the offender according to the terms of his parole requirements. Most penologists of note favor early release. Most correctional budgets are tight and early release is cheaper than keeping the offender in custody until his time has been served. While most prisoners favor a flat discharge from custody, they seem to prefer parole to a long prison confinement.

Some ex-offenders live in half-way houses following parole. Some spend weekends with their families while the re-entry effort proceeds. However, if an offender has been involved in a successful

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<sup>22</sup>Prigmore, op. cit., p. 15.

work-release program, he either has a job waiting for him or it usually isn't long until he finds one. One must remember that a parolee is not a free person. Casework and counseling are substituted for surveillance and control.

The parole process is begun in prison, as Kassenbaum, Ward and Wilmer points out:

Parole begins in prison. That is, the first steps associated with parole are taken inside prison walls. Initially, the Adult Authority grants a parole and sets a date for release. Then comes pre-parole classes and the arrangements for job and residence. These pre-release factors are presumed to ease the transition from prison to community life and to pre-dispose releases toward patterns of living that are considered appropriate by the Department of Corrections.<sup>23</sup>

### Conclusions

Several conclusions of this writer follow from the foregoing discussion. First is the conviction that rehabilitation should be stressed even against the weight of evidence which shows that not all offenders can be rehabilitated. Research done by Irwin and Cressey in 1965 revealed a very strong subculture in prisons which attempts to block all rehabilitative efforts. Many inmates do not want treatment and will resist any effort toward rehabilitation. Most reliable criminologists agree that not all offenders can be rehabilitated.

Secondly, a casual glance at our prisons indicates that they

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<sup>23</sup> Gene Kassennaum, David Ward and Daniel Wilmer, Prison Treatment and Parole Survival: an Empirical Assessment (New York: John Wiley and Sons, 1971), p. 223.

are not staffed with rehabilitative purposes in mind. Emphasis is placed on custodial responsibility of the prison manpower for there are few trained psychologists and sociologists on the staffs of our prisons.

Finally, we have concluded that incarceration is severe punishment because an offender's liberty is taken away. The conditions inside our prisons virtually make rehabilitation impossible. The conditions add to the punishment of the prisoners. Rehabilitation is taking place in some prisons. Recidivism is much lower when parolees have a job and the parole officer is capable of counseling and is available for regular assistance.