

Encyclopedia of Criminal Justice

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Punishment

Definition: Intentional infliction of harm on an individual for an offense against law by those vested with political authority to do so.

Significance: Because punishment involves harming offenders in ways that would be clearly immoral in other circumstances, competing theories attempt to justify or abolish this institution.

@FP=Punishment in the contemporary United States is a massive and costly enterprise. As of 2001, approximately 5.6 million living adult residents of the United States had served time in a federal or state prison. In that same year, federal, state, and local governments in the United States spent \$57 billion punishing these individuals, which does not include \$72 billion to provide police protections and \$38 billion to maintain the court system. An American resident is more than eight times more likely to be incarcerated than a German resident and nearly nineteen times more likely than a Japanese resident. Despite the fact that our incarceration rates are so disproportionately high when compared to rates of other wealthy democracies, we suffer far more violent crime per capita than similar nations. In 2001, the reported offense rate per 100,000 for homicide in the United States was 5.6 while in Germany the rate was 3.23. For rape, the numbers are more disproportionate, with 31.8 in the U.S. compared with 10.45 in Germany. The comparison with Japan is still more dramatic, with Japanese homicide rates at 1.10 and rape rates at 1.85 per 100,000. The United States invests more in punishment than any other nation—both in terms of financial expenditure and the loss of freedom for millions of convicts—yet this price does not appear to result in a safer society. Given this, we must ask fundamental questions regarding punishment: What justifies punishment? What are the objectives of punishment? How should we accomplish those objectives? How important are those objectives when compared with other objectives, such as personal liberty? Imagine, for example, that we retained all of our current laws but one punishment applied for violating any of them: regardless of whether you were convicted of murder or exceeding the speed limit, you would be executed. Surely we could all be more confident that such a threat would reduce criminal activity, but with this security would come the anxiety that you or a loved one would be killed for committing a minor offense. This leads us to ask whether we can practically pursue the goals of punishment without compromising other things we value. Punishment suspends the freedom of millions of people every year and intentionally subjects them to pain and suffering. How could such an enormous, resource-consuming, and apparently sadistic institution have a place in modern life?

Until the 18th century, punishment for criminal offenses typically consisted of sporadic public displays of spectacular corporal violence. This could include examples of what we would now consider torture, such as “drawing and quartering” where the convict would

have ropes tied to her four limbs and would be dismembered by horses pulling on the opposite ends of ropes. Such punishments served several objectives, including demonstrating the authority of the rulers, exacting revenge on the convict, and issuing a warning to anyone considering committing similar offenses. Punishment did not become a subject of serious systematic study, however, until Cesare Beccaria's 1764 *On Crimes and Punishments*. Beccaria argued that deterring offenders could be the only legitimate function of punishment and that this was best accomplished by standardizing penalties, publicizing them so that everyone understood and had notice of the harm they could suffer, and enforcing sanctions regularly and fairly. Beccaria further claimed that excessive punishments were inhumane and unnecessary to deter. English philosopher and reformer Jeremy Bentham developed Beccaria's insights into comprehensive theory of law governed by the central premise of what has come to be known as utilitarianism: legislation should promote the greatest good (utility) and the least suffering for the greatest number of people. According to utilitarianism, punishment is forward-looking in that its only legitimate concern is preventing crime in the future. From this perspective, three possible justifications for punishment arise: deterrence, incapacitation, and rehabilitation.

Deterrence functions as a disincentive to committing a crime. It may be in my interest to steal books from the library because I prefer having them exclusively to myself and do not want to bother returning them. If no penalty exists for stealing books, I have little reason not to steal them other than my moral convictions. Utilitarians believe it would be foolish to rely on people's moral beliefs to prevent them from doing things that would benefit themselves but decrease overall happiness for others. The threat of punishment, for utilitarians, shifts the balance of incentives. If I risk burdensome fines or jail time, I am much less likely to steal a book to avoid the minor inconvenience of having to return it. Criminal sanctions therefore alter incentive structures so that it becomes in each individual's best interests to obey the law. Breaking the law thus becomes unworthy of the risk. In order to maintain this risk/reward deterrent ratio, the public must understand the laws and their sanctions, believe there is an adequate degree of likelihood that they will be apprehended and subjected to the punishment, and agree that the punishment is not so extreme that levying it would produce such suffering it would outweigh the happiness or utility it was intended to promote. For this latter reason, punishments intending to deter cannot be too harsh (or, in constitutional language, "cruel and unusual"), cannot violate rights of offenders by denying them "due process" or "equal protection under the law," must be proportionate to the crime in that more serious crimes trigger more severe punishment, and must only be as severe as required to accomplish the penological objective and therefore not excessive. This argument presumes that a substantial portion of potential offenders engage in rational cost-benefit analyses to determine whether criminal activity is worth the risk of punishment, and some critics doubt whether potential criminals engage in such deliberations.

Utilitarianism also finds incapacitation to be a legitimate strategy for reducing crime. Incapacitation renders the convict incapable of committing further crime against the general public by either incarcerating her or physically debilitating her. This can include execution and chemical or surgical castration for sex offenders. The belief that

individuals who commit crimes will continue to commit crimes unless incapacitated underlies this theory which informs recidivist statutes, such as “three strikes” laws, that impose more severe punishments for repeat offenders. The value of incapacitation would be undermined if serving time actually increased a convict’s likelihood to commit crimes upon release, for example if they become further acculturated to criminal life while living among other convicts during their sentence or if they find their opportunities for success in non-criminal life worse upon their release from prison than when they entered the criminal justice system. While warehousing convicts in prisons will, to some degree, prevent them from committing offenses against civilians, it is widely acknowledged that crimes occur within prisons at rates higher than in the general public. A consistent utilitarian cannot discount the pain caused by these offenses, yet most advocates for incapacitating criminals pay little attention to this consequence of segregating our most troubled populations into such brutal arrangements. Considering that African-American men are approximately ten times more likely to be incarcerated than white men, this concentration of violence is particularly troublesome.

Rehabilitation is also a legitimate means of preventing crime for utilitarians. Rehabilitation seeks to reform the offender into a person who no longer commits crimes, and under this theory a sentence can seem more like treatment than punishment. This can take many forms, including religious conversion, moral transformation, substance abuse therapy, vocational training, and education. Instead of conceiving of prison as a depository for offenders, rehabilitative theory seeks to use sentences as occasions to remove offenders who had strayed from law-abiding life from whatever social forces had corrupted them. Early prisons practicing the rehabilitative model—such as those at Auburn, Ossining, and Pittsburgh during the 1820s—therefore isolated inmates from each other to prevent them from tempting each other to deviate from their path toward the straight and narrow. Left to hard work, their conscience, and a Bible, reformers believed that the inmates’ good natures would return. Rehabilitative ideals committed to a belief that humans are good, equal, and redeemable and deserve the opportunity to correct their lives and restore their full citizenship. According to this position, governments are responsible for helping their citizens along this path.

In addition to rehabilitating individual offenders, utilitarianism also attempts to prevent crime by addressing the social causes of crime and “rehabilitate” the broader culture as well as individuals. If drug abuse, poverty, or racial discrimination cause crime, utilitarians would seek to uproot criminal behavior by eliminating the cultural forces that generate millions of criminals rather than simply incarcerating all of these criminals once they commit offenses. In this sense, utilitarian rehabilitation attempts to diagnose and cure the social diseases that cause crime rather than simply treating individuals once they have symptoms of criminal behavior. Critics of the rehabilitative model question its effectiveness, doubting whether even the most thorough therapeutic treatment can reform incorrigible criminals. Others find rehabilitative objectives vague and difficult to measure, leaving too much of sentencing indeterminate and subjective. Further, some fear that rehabilitation blurs the line between treatment and punishment and thus results in extended criminal detention of those needing only therapy. The mentally ill, for example, will have difficulty ever leaving the criminal justice system.

The most trenchant criticism of rehabilitation is leveled by those who disagree with the entire utilitarian view of punishment and find that coddling prisoners in this way suffers from a fundamental confusion: criminals simply deserve to suffer punishment. It is morally imperative to punish murderers, for example, regardless of whether doing so would reduce crime rates. Retribution, from the Latin “to pay back,” traces its Western origins to the Biblical *lex talionis* or “eye for an eye.” Unlike the forward-looking orientation of utilitarianism, retributivism seeks to address the wrongs of the past by forcing the offender to pay her debt to the victim and society. In other words, the retributivist believes punishment should balance the scales of justice by causing the offender to suffer pain commensurate with that of her victim. In this sense, retribution exacts revenge in proportion to the moral desert of the offender.

Immanuel Kant’s late eighteenth century ethical writings provide the philosophical underpinnings for modern retributivism. The human ability to reason, Kant claims, enables each of us to freely think and understand universal moral truths. By determining what is right from our own reasoning rather than from the authority of another, employing our will to rise above the corrupting influences of culture and desire, and performing the good, we become self-governing and free. This understanding of humanity, wherein we use our reason to realize and live by objective ethical truth, provides the foundation for the Enlightenment’s secular conception of human dignity. Because humans have dignity, Kant argues, they must always be treated as ends-in-themselves rather than as mere means. He names this requirement that we not use others exclusively as tools the “practical imperative.” Utilitarian justifications of punishment violate the practical imperative because they use offenders merely to reduce crime rates. To preserve an offender’s dignity, the justice system must hold her responsible for her crime and treat her as if she is capable of freely making moral choices. While this may seem odd, from a Kantian perspective offenders have a right to be punished. Otherwise she is but a child or animal. In all forms utilitarian forms of punishment, offenders are denied dignity in this respect: rehabilitation seeks to cure them of their disease, deterrence treats them like rats that need shocks to keep them from eating the cheese, and incapacitation simply denies them any ability to make moral choices. Anthony Burgess’ novel *A Clockwork Orange*, which was converted into a controversial film by Stanley Kubrick, dramatically demonstrated these tensions between freedom and crime prevention.

Retributivists also claim that because preventing crime is the sole objective of utilitarian punishment, utilitarians would permit grievous injustices such as framing innocent people if such sacrifices furthered this goal. Although commentators repeat this criticism in most discussions of the justifications of punishment, it does not appear to raise serious problems. Utilitarianism originated as a legal theory that demanded several institutional conditions for the public pursuit of utility, including security of person and property, legality, legislative supremacy, democratic accountability, publicity and transparency. These utilitarian political procedures would preclude framing an innocent person.

Critics of retributivism find that its refusal to consider the objective of reducing future crime contradicts our most basic practical justification for punishment. We punish children, for example, to foster their development into moral citizens rather than to balance metaphysical scales of justice. Surely we would find it reprehensible if a parent physically assaulted a child and explained that she administered this corporal punishment as a vendetta because the child “deserved to suffer.” Retributivism thus appears to offend the intuitive maxim that “two wrongs do not make a right.” To many, the retributive demand for “just deserts” provides a thinly veiled excuse for a lust for vengeance similar to the righteous indignation accompanying violence committed in the name of religion. As Gandhi warned in his pacifist philosophy, “an eye for an eye makes the whole world blind.” In addition, retributive theories claim that punishment must be proportionate with the offense, yet they offer no convincing explanation for how to go about matching offenses with crimes other than the bare assertion of *lex talionis*. In addition, sentencing decisions also raise problems of incommensurability. In what sense, for example, is a prison term proportionate with a drug conviction? Even if we execute a murderer, this death is not in any meaningful way equivalent to the death of a particular victim. Death, suffering, and loss endure regardless of the pain we inflict on the offender.

The debates between utilitarian and retributive theories of punishment have led some to adopt hybrid theories, with the most common calling for a consequentialism constrained by deontological boundaries. These attempts to synthesize the best of both theories, however, fail to resolve their incompatible foundations. The “restorative justice” movement has recently been offered as a progressive alternative to retribution, as it emphasizes repairing the damaged relationships between offenders and victims through reconciliation programs rather than punishment. Still others advance the increasingly popular “restitution” theory of punishment, which argues, following the principles advanced by the law and economics movement, that offenders should pay their debts to society and their victims financially rather than through conventional penalties such as prison sentences. Some take the radical position that attempts to justify punishment will fail because such state-sanctioned violence is ultimately unjustifiable. The fact that punishment may make human affairs more orderly does not necessarily entail that it has ethical foundations, and if not it should be abolished. In its place, abolitionists would understand crime as conflicts requiring resolution rather than the infliction of more pain. Abolitionists share many ideological commitments with pacifists and are subjected to similar criticisms, including the charge that it fails to adequately protect victims from aggressors.

Social scientists have become increasingly skeptical of the ability to deter or rehabilitate with punishment. This has led to a rebirth in the popularity of retributive arguments, which were thought to be barbaric only a few generations ago. This rise of retributivism, coupled with the brute efficacy of incarceration, has created a culture where offenders are thought to deserve long sentences. The Federal Sentencing Guidelines formalized these trends, requiring longer sentences and removing much of the discretion previously granted to judges to tailor individual sentences. Add to this situation lengthy mandatory sentences for drug offenders—who comprise twenty-five percent of prison populations—and our staggering incarceration rates continue to balloon.

Further Reading:

Beccaria, Cesare. *On Crimes and Punishments*. Indianapolis: Bobbs Merrill, 1963. 18th century Italian reformer's attempt to justify and regulate punishment by appeal to its social utility.

Bentham, Jeremy. *Introduction to the Principles of Morals and Legislation*. New York: Hafner Publishing Company, 1961. The original systematic and detailed theory of hedonistic utilitarian punishment. Responsible for many philosophical and practical elements of modern democratic and criminal procedure.

Bianchi, J. and Pettit, P. eds. *Abolitionism: Towards a Non-Repressive Approach to Crime*. Amsterdam: Free University Press, 1986. Collection of essays arguing for the abolition for punishment and in favor of understanding crime as conflicts needing resolution.

Binder, Guyora and Smith, Nick. "Framed: Utilitarianism and Punishment of the Innocent." *Rutgers Law Journal*. Volume 32, 2000. Defends utilitarianism against the clam that it permits punishing the innocent.

Duff, R.A. *Trials and Punishments*. Cambridge: Cambridge University Press, 1986. Argues that both deterrence and retribution are flawed justifications for punishments. Supports communicative theory of punishment, wherein the offender repents for her wrongdoing.

Duff, R.A. and Garland, David eds. *A Reader on Punishment*. Oxford: Oxford University Press, 1994. Collection of landmark articles, including papers on Marxism and retribution, expressive and paternalistic theories of punishment, sentencing, and abolitionism.

Foucault, Michel. *Discipline and Punish: The Birth of the Prison*. Sheridan, Alan trans. New York: Vintage Press, 1995. Traces the migration of punishment from brutal public events to subtle exertions of power over individuals in everyday life. While this trend away from corporal punishment appears to be motivated by humanism, Foucault explains how social control becomes much more efficient when it can control our minds and private behaviors rather than merely restrain or inflict pain on our bodies.

Honderich, T. *Punishment: The Supposed Justifications*. Harmondsworth: Penguin, 1984. Useful critical introduction to theories of punishment.

Kant, Immanuel. *Foundations of the Metaphysics of Morals*. White Beck, Lewis trans. Indianapolis: Bobbs Merrill, 1959. The foundations of secular retributivism.

Kaplan, John, Weisberg, Robert, and Binder, Guyora eds. *Criminal Law: Cases and Materials*. 5th ed. New York: Aspen Publishers, 2004. The leading criminal law casebook used in law schools. Provides statistics (including those cited above) and well-chosen excerpts from historical and contemporary punishment theory.

Primoratz, Igor. *Justify Legal Punishment*. Atlantic Highlands, NJ: Humanities Press, 1989. Accessible introductory exegesis and analysis of competing theories of punishment. Argues for retributivism.

See also:

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