# 5

# The Purpose of Criminal Punishment

Does society have the right to punish? Is the infliction of punishment morally justifiable? These complex questions will be addressed in the following discussion of the rationale, justification, and nature of punishment. Rules about punishment, such as how much punishment can be inflicted and for what kinds of behavior, are of course contained in laws and regulations, so in this sense law justifies punishment. However, the moral justification for punishment is a separate issue from the legal justification, because although the law may provide for the infliction of punishment, society's moral justification for punishment still has to be established.

To better understand the nature of punishment, it is first necessary to examine its conceptual basis and then to consider the various theories that have been developed to morally justify society's infliction of punishment. These theories are deterrence, retribution, just deserts, rehabilitation, incapacitation, and, more recently, restorative justice. As well, it is important to appreciate that there are three perspectives about the issue of punishment: the philosophical, the sociological, and the criminological. Each perspective represents a different and distinct way of looking at the issue of punishment, and each will be addressed in this chapter.

## ❖ What Is Punishment?

We use the word *punishment* to describe anything we think is painful; for example, we refer to a "punishing work schedule" or a "punishing exercise program." We also talk of punishment in the context of parents or teachers disciplining children. However, in this discussion we will consider punishment in a particular sense. Flew (in Bean 1981: 5) argues that punishment, in the sense of a sanction imposed for a criminal offense, consists of five elements:

1. It must involve an unpleasantness to the victim.
2. It must be for an offense, actual or supposed.
3. It must be of an offender, actual or supposed.
4. It must be the work of personal agencies; in other words, it must not be the natural consequence of an action.
5. It must be imposed by an authority or an institution against whose rules the offense has been committed. If this is not the case, then the act is not one of punishment but is simply a hostile act. Similarly, direct action by a person who has no special authority is not properly called *punishment* and is more likely to be revenge or an act of hostility.

In addition to these five elements, Benn and Peters (in Bean 1981: 6) add that the unpleasantness should be an essential part of punishment.

The value of this definition of punishment resides in its presentation of punishment in terms of a system of rules and in its differentiation of punishment from other kinds of unpleasantness. Another definition of punishment, proposed by David Garland (1990), is "the legal process whereby violators of criminal law are condemned and sanctioned in accordance with specified legal categories and procedures" (p. 17). This chapter will not be concerned with punishment that takes place in schools, within families, or in other institutions, but instead will discuss forms of punishment that take place as the result of legal processes defined above. It will examine the major arguments relating to punishment, illustrate the ways in which those arguments relate to justice and the justice system, and examine how that system would be affected should one argument prevail over another.

## ❖ Theoretical Approaches to Punishment

Thinking about the issue of punishment gives rise to a number of questions, the most fundamental of which is, why should offenders be punished? This question might produce the following responses:

- They deserve to be punished.
- Punishment will stop them from committing further crimes.
- Punishment tells victims that society disapproves of the harm that they have suffered.
- Punishment discourages others from doing the same thing.
- Punishment protects society from dangerous or dishonest people.
- Punishment allows offenders to make amends for the harm they have caused.
- Punishment ensures that people understand that laws are there to be obeyed.

Some of the possible answers to the question of why offenders should be punished may conflict with each other. This is because some answers are based on reasons having to do with preventing crime, whereas others are concerned with punishment being deserved by an offender (Hudson 1996: 3). When a court imposes a punishment on an offender, it often tries to balance the sorts of reasons for punishment noted earlier, but sometimes certain purposes of punishment dominate other purposes (p. 4). Over time, there have been shifts in penal theory, and therefore in the purpose of punishment, due to a complex set of reasons including politics, public policy, and social movements. Consequently, in a cyclical process, an early focus on deterrence as the rationale for punishment gave way to a focus on reform and rehabilitation. This, in turn, has led to a return to punishment based on the notion of retribution and just deserts

The concept of punishment has been theorized by moral philosophers, social theorists, and criminologists, and these various approaches will be considered in this chapter to provide a better basis for understanding the place of punishment within the criminal justice system and society in general. As Garland (1990) argues, punishment is a complex concept, and an approach to punishment that is limited to a reading of moral philosophy fails to represent the full dimension and complexity of the subject. For moral philosophers, the "ought" of punishment is of great importance and leads to a set of questions, including the following:

- What should be the goals of punishment?
- What should be the values contained in and promoted by the criminal law?
- What is the purpose of punishment?

In contrast to the philosophical view of punishment, the sociological perspective is concerned with the "is" of punishment; that is, what punishment is actually intended for, and the nature of penal systems (see Hudson 1996: 10). Criminologists and policy makers, who focus on penalties for offenses and policy concerns relevant to the punishment of offenders, offer the third perspective on punishment. Some critics, such as Philip Bean (1981: 9), argue that criminology has tended to ignore the moral and sociological implications of punishment in favor of the social and personal characteristics of offenders as well as the nature of penal institutions and methods of social control. In the same vein, Nigel Walker (1991) points out that the practical ends of penal action, particularly with the aims of sentencing and the administration of prisons and probation, are concerns that pay little attention to the philosophy or sociology of punishment. The criminological perspective will be discussed in Chapter 6 in the context of corrections; this chapter will explore the philosophical and sociological perspectives.

## ❖ Why Punish? The Philosophical Approach

In the philosophical debate about punishment, two main types of theories of punishment dominate: utilitarian theory and retributive theory. (Utilitarian theory is discussed more fully in Chapter 11.) These philosophical theories have in turn generated further theoretical discussions about punishment concerned with deterrence, retribution, incapacitation, rehabilitation, and, more recently, restorative justice.

Theories that set the goal of punishment as the prevention of future crime (deterrence) are usually referred to as *utilitarian*, because they are derived from utilitarian philosophy. Past-oriented theories (theories that focus on the past actions of the offender) are referred to as *retributivist*, because they seek retribution from offenders for their crimes. The retributivist conception of punishment includes the notion that the purpose of punishment is to allocate moral blame to offenders for the crimes and that their future conduct is not a proper concern for deciding punishment (Hudson 1996: 3). Theories of deterrence, retribution, just deserts, rehabilitation, and incapacitation as well as the idea of restorative justice will be considered in this chapter. Each of these theories tries to establish a basis for punishment as a response to the question, "Why punish?" The following Closer Look box gives a short history of the concept of punishment in Western cultures, while Case Study 5.1 provides a contemporary example of corporal punishment.

### A Closer Look

### Punishment and History

Before the installation of constitutional governments in most of Western Europe in the 18th and 19th centuries, penalties were arbitrary, dependent on the whims of monarchs or the local nobles to whom they delegated authority to punish. There was very little proportionate graduation of penalties, with capital punishment available for everything from murder and high treason to fairly minor theft (as reflected in the old saying "one might just as well be hanged for a sheep as a lamb") (Hudson 1996: 19).

#### Draconian Punishments

The notion of "draconian punishments" derives from the laws promulgated for Athens in 621 B.C. by Draco (e.g., see Carawan 1998). It appears from later accounts of the Draco code that the punishment of death was prescribed for even the most trivial offenses. Draconian punishments are essentially deterrent in nature, being so severe as to dissuade most people from committing crimes. Draconian-type notions of punishment are often advocated by those in the "get tough on crime" lobby.

## Case Study 5.1 The Nature of the Punishment: Corporal Punishment

On May 4, 1994, Michael Fay, a U.S. teenager who had pleaded guilty to several acts of vandalism in Singapore, was caned by Singapore's authorities (in Nygaard 2000: 1). He was stripped, bent at the hip over a padded trestle, tied down at his ankles and wrists, and his buttocks were lashed by a martial arts specialist four times with a 4-foot long, half-inch wide stick of rattan soaked in antiseptic. Fay, 18, had lived in Singapore since 1992. He was sentenced to 4 months in prison, a fine of $2,230, and the caning after his guilty plea.

The sentence of corporal punishment secured great media attention in the United States, with many people expressing their views. President Clinton, in a personal letter to the Singapore president, urged him to spare the rod and revoke the punishment, which Clinton described as "extreme." Also, 24 U.S. senators appealed to the president of Singapore that clemency would be "an enlightened decision." However, U.S. public opinion expressed support for the punishment, some even writing to the Singapore embassy in Washington expressing their approval. In Dayton, Ohio, where Fay's father lived, citizens supported the punishment by a 2 to 1 margin.

The Singaporean courts and government rejected the various appeals for clemency, except for reducing the number of lashes. A Home Affairs Ministry official stated that Singapore was able to keep its society orderly and crime free because of its tough laws against antisocial crimes and that Singapore did not have a situation like that in New York, where acts of vandalism were commonplace and where even police cars were vandalized.

## Deterrence

People are deterred from actions when they refrain from carrying them out because they experience an aversion to the possible consequences of those actions. Walker (1991: 15) suggests that although penologists believe that penalties do, in fact, deter, it is hard to determine whether the kind of penalty or its severity has any effect on whether a particular penalty is successful. Some question whether deterrence is morally acceptable. They argue that it is unacceptable because it is impossible to achieve, and if deterrent sentences are not successful, inflicting suffering in the name of deterrence is morally wrong (p. 13).

To utilitarian philosophers like Bentham, punishment can be justified only if the harm that it prevents is greater than the harm inflicted on the offender through punishing him or her (Hudson 1996: 18). In this view, therefore, unless punishment deters further crime, it simply adds to the totality of human suffering. In other words, utilitarians justify punishment by referring to its beneficial effects or consequences. In this sense, utilitarian theory is a consequentialist theory that considers only the good and bad consequences produced by an act as morally significant (Ten 1987: 3). Jeremy Bentham is considered the main proponent of punishment as deterrence, and he expressed his early conception of the notion as follows:

> Pain and pleasure are the great springs of human action. When a man perceives or supposes pain to be the consequence of an act he is acted on in such manner as tends with a certain force to withdraw him as it were from the commission of that act. If the apparent magnitude be greater than the magnitude of the pleasure expected he will be absolutely prevented from performing it (in Bean 1981: 30).

Cesare Becarria took a position similar to Bentham's, arguing that "the aim of punishment can only be to prevent the criminal committing new crimes against his countrymen and to keep others from doing likewise" (in Bean 1981: 30). Utilitarians understand punishment only as a

means to an end and not as an end in itself. They perceive punishment in terms of its ability to reduce crime and do not focus on the punishment that "ought" to be imposed on offenders. To utilitarians, a "right" punishment (or one with the greatest utility) is one that is beneficial to the general welfare of all those affected by the criminal act. Critics of utilitarianism argue that because utilitarians see the aim of punishment as promoting public welfare and maximizing the happiness of all, this means that utilitarians are willing to punish the innocent to achieve that objective (p. 4).

Those supporting the theory of punishment as deterrence distinguish between individual deterrence and general deterrence. *Individual deterrence* involves deterring someone who has already offended from reoffending; *general deterrence* involves dissuading potential offenders from offending at all by way of the punishment administered for a particular offense (Hudson 1996). Individual deterrence relies on offenders receiving a taste of the punishment they will receive if they reoffend, and it can be seen operationally in "short, sharp, shock punishments," such as boot camps, which are used as an alternative to imprisonment and are clearly aimed at subjecting offenders to a regime that will shock them out of any further criminal conduct. General deterrence takes the form of legislation imposing penalties for specific offenses in the belief that those penalties will deter or prevent persons from committing those offenses. An example of an attempt at general deterrence would be significantly increasing the penalties for driving under the influence (DUI) in an effort to deter citizens from drunk driving.

### Does Deterrence Work?

Beyleveld (in Hudson 1996: 23), after carrying out a comprehensive review of studies that have considered the deterrent effects of punishment, concluded that

> there exists no scientific basis for expecting that a general deterrence policy, which does not involve an unacceptable interference with human rights, will do anything to control the crime rate. The sort of information needed to base a morally acceptable general policy is lacking. There is some convincing evidence in some areas that some legal sanctions have exerted deterrent effects. These findings are not, however, generalizable beyond the conditions that were investigated. Given the present state of knowledge, implementing an official deterrence policy can be no more than a shot in the dark, or a political decision to pacify "public sentiment."

The empirical evidence suggests that, generally, punishment has no individual deterrent effect (Ten 1987: 9). Walker (1991: 16) argues that evidence from research studies has established that capital punishment has no greater effect than life imprisonment. Daniel Nagin (in Ten 1987: 9) comments on the difficulty in distinguishing between individual deterrence and rehabilitation. In another overview of research on deterrence, Nagin (1998: 345) identifies three sets of studies, which he refers to as interrupted time-series studies, ecological studies, and perceptual studies.

The first set, time-series studies, explores the effect of specific policy initiatives such as police crackdowns on open-air drug markets. Nagin finds that such policy targeting has only a temporary effect and is therefore not a successful deterrent.

Ecological studies look for a negative association between crime rates and punishment levels that can be interpreted as having a deterrent effect. Nagin points out that a number of such studies have been able to isolate a deterrent effect.

In perceptual studies, the data come from surveys. Such surveys have found that self-reported criminality is lower among those who see sanctions, risks, and costs as higher. Nagin therefore concludes that, collectively, the operations of the criminal justice system exert a substantial deterrent effect.

In discussing whether the threat of punishment has a deterrent effect, Johannes Andenaes (1972: 345) explains that two positions are usually debated. Bentham's position is that man is a

rational being who chooses between courses of action having first calculated the risks of pain and pleasure. If, therefore, we regard the risk of punishment as sufficient to outweigh a likely gain, a potential criminal applying a rational approach will choose not to break the law. The alternative position considers this model unrealistic, arguing that people remain law-abiding, not because they fear the criminal law, but as a result of moral inhibitions and norms of conduct. Criminals, they argue, do not make rational choices but act out of emotional instability, through lack of self-control, or as a result of having acquired the values of a criminal subculture (p. 345). Andenaes points out the dangers of generalization; that is, he suggests it is necessary to distinguish between various offenses such as murder and drunk driving. Offenses vary immensely in terms of an offender's motivation, and any realistic discussion of general deterrence ought to take into account the particular norms and circumstances of each particular type of offense.

He also notes that the threat of punishment, although directed to all persons, affects individuals in different ways (Andenaes 1972: 346). For example, in his view, the law-abiding citizen does not need the threat of the law to remain law-abiding. On the other hand, the criminal group may well fear the law but still break it, and the potential criminal might have broken the law if it had not been for the threat of punishment. It follows that the threat of punishment seems relevant only to the potential criminal. In some cases, however, there is evidence that punishment has a deterrent effect on individuals. Andenaes refers to a study of department store shoplifting where amateur shoplifters were treated as thieves by the store management and reacted by changing their attitudes and experiencing great emotional disturbance (p. 343). This contrasts with the professional shoplifter who does not register any shock at getting caught and accepts jail as a normal hazard of the trade.

Gordon Tullock (1974: 109), after surveying the economic and sociological models of deterrence, concludes that multiple regression studies show empirically that increasing the frequency or severity of punishment does reduce the likelihood of a given crime being committed. However, Alfred Blumstein, Jaqueline Cohen, and Daniel Nagin (1978: 66) contend that although the evidence does establish a negative association between crime rates and sanctions, this does not necessarily establish the general deterrent effect of sanctions. This is because, in their view, the negative association can be explained by lower sanctions being the effect, and not the cause, of higher crime rates. Overall, there seems to be little agreement among researchers that punishment has a general deterrent effect.

### How Much Punishment Must Be Imposed to Deter?

For the utilitarian who regards punishment as bad in itself, a particular punishment will be justified only if the suffering it inflicts is less than the harm caused by the criminal act that would have taken place had there been no punishment. If various forms of punishment would achieve the same result, a utilitarian will opt for the most lenient punishment that minimizes the potential suffering. It follows that if a sentence of capital punishment and the lesser punishment of a term of imprisonment are both equally effective in deterring murder, the utilitarian will choose the lesser punishment and regard capital punishment as unjustified. However, utilitarian approaches can result in the infliction of excessive punishment. C. L. Ten (1987: 143) gives the example of petty thefts being widespread in society with hundreds of cases occurring, frequently perpetrated by efficient thieves who are difficult to catch. The harm caused by each individual theft is minor, but the total harm, according to utilitarian approaches, is great and, therefore, may be greater than the harm caused by severely punishing one minor criminal. If a newly enacted law were to impose a punishment of 10 years imprisonment on a petty thief, and no less a penalty would have a deterrent effect, it is arguable that a utilitarian would have to accept what would be considered an excessive sentence for the one petty thief unlucky enough to be arrested and convicted (pp. 143–144).

## Retribution

Retribution is the theory that punishment is justified because it is deserved. Systems of retribution for crime have long existed, with the best known being the *lex talionis* of biblical times, calling for "an eye for an eye, a tooth for a tooth, and a life for a life" (Hudson 1996: 38). Retributionists claim a moral link between punishment and guilt and see punishment as a question of responsibility or accountability (Bean 1981: 14–15). Once society has decided on a set of legal rules, the retributivist sees those rules as representing and reflecting the moral order. Society's acceptance of legal rules means that the retributivist accepts the rules, whatever they may be; accepts that the rule makers are justified in their rule making; and claims that those who make the rules provide the moral climate under which others must live. Accordingly, retributivists cannot question the legitimacy of rules. They argue that retribution operates on a consensus model of society where the community, acting through a legal system of rules, acts "rightly," and the criminal acts "wrongly" (Bean 1981: 17). It follows that the retributivist position makes no allowance for social change or social conditions, looking instead only to crime. Raising the issue of the social causes of crime and questioning the effectiveness of punishment are irrelevant considerations to a retributivist.

Ernest van den Haag (1975) and John Kleinig (1973) have suggested that in historical terms, the *lex talionis* did not operate as a demand for retribution. Instead, it set a limit on the nature of that retribution and therefore prevented the imposition of excessive penalties in the course of acts of vengeance. Capital punishment may be the only form of punishment still supported by appeals to the *lex talionis*. The basic principle of *lex talionis* is that punishment should inflict the same on offenders as offenders have inflicted on their victims. It, therefore, can be seen as a crude formula, because there are many crimes to which it cannot be applied. For instance, what punishment ought to be inflicted on a rapist under *lex talionis*? Should the state arrange for the rape of the offender as his due punishment? In addition, the *lex talionis* can be objected to because its formula to determine the correct punishment considers solely the harm caused by the crime and makes no allowance for the mental state of the offender or for any mitigating or aggravating circumstances associated with the crime. Thus, even though a person's death may have been brought about accidentally or negligently, the *lex talionis*, strictly applied, would still call for the imposition of the death penalty (Ten 1987: 152). A further objection is found in the view that in a civilized society, certain forms of punishment are considered too cruel to be defended as valid and appropriate. For example, a sadistic murderer may horribly torture his or her victim, but society would condemn the imposition of that same form of punishment on the offender. It can also be said that although the death penalty may constitute a just punishment according to the rule of *lex talionis*, it should nevertheless be abolished as part of "the civilizing mission of modern states" (Reiman 1985: 115).

Retributivists believe that wrongdoers deserve to be punished and that the punishment imposed should be in proportion to the wrongdoing the offender committed. In contrast to utilitarians, retributivists focus their line of reasoning on the offender's just desert (a proportionate punishment) and not on the beneficial consequences of punishment. Retributivists ask questions such as "Why do offenders deserve to be punished?" and "How are their just deserts to be calculated and translated into actual sentences?"

A number of explanations have been suggested to justify retribution, including the notion that retribution is a payment of what is owed; that is, offenders who are punished are "paying their debt to society" (Walker 1991: 73). Walker notes that this seems to confuse "the victim" with "society," because we generally do not perceive offenders as liable to pay compensation or make restitution to their victims; furthermore, if society is compensated for anything at all, it is for a breach of its peace.

*Censure* is also an important component in retributivist thinking. For example, Andrew von Hirsch, the leading theorist on just deserts sentencing, writes,

> Desert and punishment can rest on a much simpler idea, used in everyday discourse: the idea of censure. . . . Punishment connotes censure. Penalties should comport with the seriousness of crimes so that the reprobation on the offender through his penalty fairly reflects the blameworthiness of his conduct (in Walker 1991: 78).

For von Hirsch (1994: 120–121), censure is simply holding individuals accountable for their conduct and involves conveying the message to perpetrators that they have willfully injured someone and must face the disapproval of society for that reason. On the part of the offender, an expression of concern or remorse is expected. As well, the censure expressed through criminal law has the role of providing third parties with reasons for not committing acts defined as criminal. In other words, censure can have a deterrent effect. Some theorists of desert argue that notions of censure cannot be adequately expressed verbally or symbolically and that hard treatment is needed to properly express societal disapproval. The notion of the *expressive* or *communicative* character of punishment is closely associated with the idea of "punishment as censure." This conception recognizes punishment as comprising not merely harsh treatment but also elements of condemnation, denunciation, and censure. Thus, for example, punishment in the form of a fine is quite different from the payment of a tax, although both involve payment to the state. In the same vein, imprisonment contrasts with other forms of detention such as quarantine or detention for psychiatric disorders (Duff and Garland 1994: 13–14). Imprisonment, it is argued, carries with it an expressive function of censure, whereas detention for reasons of quarantine or for mental disorder does not. Joel Feinberg (1994: 74) explains the expressive function of punishment in the following terms:

> Punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those "in whose name" the punishment is inflicted. Punishment, in short, has a symbolic significance largely missing from other kinds of penalties.

Feinberg (1994: 76) further argues that punishment expresses more than disapproval; it amounts to a symbolic method of hitting back at the criminal and of expressing "vindictive resentment." In similar fashion, Herbert Morris (1994: 92) contends that punishment serves to teach offenders a moral lesson so that in the process of being punished and being made aware that a crime violated communal values, they will come to see what is good and choose it in the future. According to this account, the aim of punishment is to persuade and not to manipulate or coerce. However, as Morris himself points out, this approach does not account for the punishment of those who are already repentant, nor is it able to cope with those who understand the values of society but are indifferent or opposed to them (p. 106).

Over the last few decades, the notion of punishment as a *communicative practice* has developed (Duff 1999: 48). This notion asserts that punishment communicates to the criminal a response appropriate to the crime committed. Communication requires that the person to whom the communication is directed must be an active participant in the process and must receive and respond to the communication. Additionally, the communication should appeal to the person's rational understanding. The communication must be focused primarily on the offender being punished as a response to him or her and must be justified by his or her offenses (p. 50). The message communicated by punishment must focus on and be justified by the offender's past offense and must be appropriate to that offense. R. A. Duff argues that the message communicated should be the degree of censure or condemnation the crime deserves. In the context of criminal law, censure might be communicated in a formal conviction of guilt or through a system of harsh punishments such as imprisonment, fines, or community service. Duff argues that the aim of hard treatment is ideally to cause offenders to understand and repent crimes committed (p. 51). It should attempt to direct their attention to the crime and give them

an understanding of crime as a "wrong." It should also cause offenders to accept the censure that punishment communicates as deserved. By undergoing hard punishment, offenders can become reconciled with the community and restored back into the community from which the offense caused them to be excluded.

Philosophers such as Duff (in Walker 1991: 79) see the main benefit of punishment as *the effect on the offender*. They argue that punishment has the effect of restoring the offender to the community in the same way that penance restores a penitent to the communion of the church. Robert Nozick sees retributive punishment as a *message* from those whose values are assumed to be correct and normative to someone whose act or omission has displayed incorrect and non-normative values (in Walker 1991: 81). Walker (1991: 81) explains that "man is a rulemaking animal," and that rules and notions of rules are acquired during childhood. *Rules*, in the form of transactions involving promises, establish codes of normative conduct including "penalizing rules" that specify action to be taken against those who infringe the rules (Garfinkel in Walker 1991: 84–85). It follows that failing to penalize an offender for infringing the rules would itself be an infringement of those rules; thus, an unpunished infringement would create two infringements.

Another theory that attempts to justify punishment as a retributive act is that an offender should be viewed as a person who has taken an *unfair advantage* of others in society by committing a crime and that imposing punishment restores fairness (Ten 1987: 5). Philosophers such as Herbert Morris, John Finnis, and Jeffrie Murphy subscribe to the *unfair advantage* theory. For example, Morris argues that the effect of criminal law is to confer benefits on society, because others are not permitted to interfere with areas of an individual's life, given that certain acts are proscribed and prohibited. To gain the benefits of noninterference, individuals must exercise self-restraint and not engage in acts that infringe the protected areas of the lives of others (in Ten 1987: 53). It follows that when people violate the law but continue to enjoy its benefits, they take an unfair advantage of others who follow the law. Punishment, it is argued, is therefore justified, because it removes this unfair advantage and restores the balance of benefits and burdens disturbed by the criminal activity.

The unfair advantage argument has been challenged by those who argue that it distorts the nature of crime itself. For example, the wrongfulness of rape does not merely consist of taking an unfair advantage of those who obey the law. Also, it is difficult to show that offenders have in any real sense "willed" their own punishment (Murphy 1994: 44). Additionally, although unfair advantage might constitute an ideal theory for the justification of punishment, the question arises about whether it can be applied to an actual society. In other words, do those who commit criminal acts actually take an unfair advantage for themselves?

Finally, some retributivists argue that punishment is morally justified, because it gives *satisfaction*. James Fitzjames Stephen, an English Victorian judge, is often cited as an advocate of this theory. He expressed his view of punishment as follows:

> I think it highly desirable that criminals should be hated, and that punishments inflicted upon them should be so contrived as to give expression to that hatred, and to justify it so far as the public provisions of means for expressing and gratifying a healthy, natural sentiment can justify and encourage it (in Bean 1981: 21).

In 1972 and 1976, the U.S. Supreme Court stated that it considers retribution "a legitimate justification for capital punishment" (*Furman v. Georgia* 1972; *Gregg v. Georgia* 1976).

### Is Retribution in Fact Revenge?

Retributive theories of punishment argue that punishment should be imposed for past crimes and that it should be appropriate to the nature of the crime committed; that is, the severity of the punishment should be commensurate with the seriousness of the crime. Sometimes, retributive punishment is confused with notions of revenge. Critics of retributionist theories of punishment argue that retribution is basically nothing more than vengeance. However, Nozick (1981) argues

that there is a clear distinction between the two, because "retribution is done for a wrong, while revenge may be done for an injury or harm or slight and need not be a wrong" (p. 366). He also points out that whereas retribution sets a limit for the amount of punishment according to the seriousness of the wrong, no limit need be set for revenge. In this sense, therefore, revenge is personal, whereas the person dispensing retributive punishment may well have no personal tie to the victim. As Nozick points out, "Revenge involves a particular emotional tone, pleasure in the suffering of another" (p. 367). A further distinction between the two is that retribution in the form of punishment is inflicted only on the offender, but revenge may be carried out on an innocent person, perhaps a relative of the perpetrator.

## Just Deserts

Up until about 1970, criminologists generally thought of retribution as vengeance. During the 1970s, criminologists reconsidered the idea of retribution and advanced new formulations. By the 1980s, the new retributionist theory of just deserts had become influential (Hudson 1996: 39). Importantly, the new thinking indicated that although there should continue to be treatment programs, a defendant would not ordinarily be incarcerated to receive treatment (N. Morris 1974). Influential writings such as *Struggle for Justice* (American Friends Service Committee 1971) and *Doing Justice* (von Hirsch and Committee for the Study of Incarceration 1976), the latter written in the aftermath of the riot at Attica Prison in 1971, elaborated on the new retributivism in philosophical and civil libertarian terms.

This theory gained support as a reaction against the perceived unfairness of systems that favored treatment, which had developed over the first half of the 20th century, especially the use of the indeterminate sentence. This form of sentence vested the power of determining the date of release to a parole board and signifies the practice of individualized sentencing. The intent was to sentence according to the treatment needs of the offender rather than the seriousness of the offense (Duff and Garland 1994: 12). One of the criticisms of indeterminate sentencing was the fact that the sentencing courts had a wide discretion in choosing a sentence, and although they tended to adopt tariffs for classes of crime, individual judges could depart from them without providing reasons. Along with the just deserts movement, many states and federal sentencing authorities repealed indeterminate sentencing laws with the aim of reducing judicial discretion in sentencing and promoting consistency and certainty as well as a set of standards that would help in the process of deciding the sentence.

Among the retributivists, Immanuel Kant argued that the aim of penalties must be to inflict desert and that this was a "categorical imperative." (Kant's categorical imperative is discussed as an aspect of deontology in Chapter 10.) By this he meant that inflicting what was deserved rendered all other considerations irrelevant (Walker 1991: 53). Just deserts proponents emphasize the notion that punishment should be proportionate; that is, there should be a scale of punishments with the most serious being reserved for the most serious offenses, and penalties should be assessed according to the seriousness of the offense (Hudson 1996: 40). This is often called *tariff sentencing*. In this method of punishing, the offender's potential to commit future offenses does not come into consideration, but his or her previous convictions are taken into account, because most proponents of just deserts support reductions in sentences for first offenders. Desert theorists contend that punishment should convey blame for wrongdoing and that blame is attached to offenders because they have done wrong. Consequently, the blameworthiness of the offender is reflected in the punishment imposed.

Thus, advocates of desert focus on two dimensions only—the harm involved in the offense and the offender's culpability. Von Hirsch (1998: 669) enlarges on these two main elements, stating that, in looking at the degree of harm, a broad notion of the quality of life is useful, because "invasions of different interests can be compared according to the extent to which they typically affect a person's standard of living" (p. 670). As to culpability, he suggests that the substantive criminal law, which already distinguishes intentional from reckless or negligent conduct, would be useful in sentencing law.

Von Hirsch (1998: 667) argues that a focus on the censuring aspect of punishment has coincided with a change in criminological thinking. Criminologists had previously regarded the blaming aspects of punishment as a stigmatizing label that might create obstacles to the reintegration of the offender into the community and might also cause offenders to reinforce their own deviance, making them more likely to continue offending. Desert theorists now emphasize that responding to criminal acts with a process of blaming encourages the individual to recognize the wrongfulness of the action, to feel remorse, and to make efforts to refrain from such conduct in the future. In contrast, a deterrent punishment requires the individual to simply comply or face the consequences. The difference between the two approaches is that a moral judgment is required from the offender under just deserts that is not required under a purely deterrent punishment. During the 1980s, many states, as well as the Federal Sentencing Commission, introduced desert-based sentencing schemes (Hudson 1996: 43).

In considering questions of proportionality and seriousness, the issue arises as to how offenses are to be ranked in terms of their seriousness. Who is to determine the degrees of seriousness? In some jurisdictions, the judge's views determine the issue; other approaches include the use of sentencing commissions and legislating sentencing schedules. In California, the Determinant Sentencing Laws allow politicians and others to raise the tariffs for offenses in response to public or media pressure to give effect to "get tough on crime" policies (Zimring 1976, 1994).

Some critics argue that just deserts theory leads to harsher penalties, but von Hirsch (1998: 672) contends that the theory itself does not call for harsher penalties and that sentencing schemes relying specifically on just deserts theory tend not to be severe. He draws attention to sentencing guidelines in Minnesota and Oregon that provide for modest penalties by U.S. standards. The Minnesota Sentencing Guidelines provide a grid with a horizontal axis showing previous convictions and a vertical axis showing offense type (Hudson 1996: 44). The sentencing judge is required to locate the appropriate cell on the grid for the offender being sentenced, where the severity of the offense and the number of previous convictions intersect. Each cell stipulates a presumptive prison term that represents the normal period of incarceration for a standard case of that offense. In addition to the presumptive sentence, there is a band indicating the range that should apply in the actual case. For example, in the case of an aggravated burglary, where the offender has three previous convictions, there is a presumptive term of 49 months and a range of 45 to 53 months. The actual sentence depends on aggravating and mitigating factors. According to Barbara Hudson (1996: 45), sentencing guidelines have had the effect of reinforcing relatively lenient punishments in states with that tradition, although states with a history of imposing severe punishments, such as New Mexico and Indiana, have produced severe schedules and guidelines.

The fundamental difficulty with deserts theory is that it lacks any principle that determines a properly commensurate sentence (Hudson 1996: 46). Deserts are determined by a scale of punishment that fixes the most severe penalty. This might be imprisonment or death. It then determines ordinally proportionate penalties for lesser offenses. It follows that if imprisonment is the most severe penalty, then proportionality will provide shorter terms of imprisonment and noncustodial penalties for lesser offenses. If the term of imprisonment for severe offenses is moderate, then short sentences and penalties such as probation will soon be reached when considering proportionate sentencing options on the scale of seriousness. If the penalty for the most serious offenses is death, it follows that long terms of imprisonment will be considered proportionate penalties for less serious offenses. This is the situation that prevails in many states.

Many argue that retribution based on just deserts fails to account for the problem of just deserts in an unjust world. Just deserts theory ignores social factors like poverty, disadvantage, and discrimination and presumes equal opportunity for all. Michael Tonry (1994: 153) notes that most sentencing commissions in the United States will not allow judges to bring personal circumstances into account in their sentencing decisions, despite the fact that the average offender has a background that is likely to be either deeply disadvantaged or deprived. Franklin Zimring (1994: 165) suggests that desert sentencing fails to take account of the fact that there are multiple discretions involved in the sentencing power. He points to the legislature that sets the range of sentences, the prosecutor who has the legal authority to select a charge, the judge

as the sentencing authority, and the correctional authority, which is able to modify sentences after incarceration, as constituting a multiplicity of decisions and discretions that make the task of achieving just and proportionate sentences extremely problematic. Since prosecutors and legislators act under political influence and attempt to implement policies that reflect public opinion, the sentencing process is not the monopoly of the trial judge but is all too often an expression of varying perspectives based on periodic concerns about whether current philosophies reflect notions of being "tough on crime."

## Reconciling Utilitarian and Retributive Theories

Is it possible to reconcile utilitarian and retributive theories of punishment? For utilitarians, desert is not seen as necessary to justify punishment or as a reason for punishment, because desert does not look to the consequences of punishment—it simply punishes. For the utilitarian, the only good reasons for punishment relate to the consequences of that punishment. The contrast between the two theories lies in the fact that for utilitarians, the aim of punishment is to control future action, whereas the retributivists see the aim in terms of desert (Bean 1981: 32). The strength of the utilitarian argument is that rules can be changed according to changes in society but that no such change is built into theories of retribution.

Can a retributivist ever be forgiving or merciful? During the sentencing process, offenders often say they are remorseful for their actions, and in this sense, remorse represents regret and self-blame. Those charged with the task of determining the sentence are urged to accept statements of remorse as mitigating factors. The issue, therefore, is whether genuine remorse should lead a sentencer toward leniency. If the sentencer is a utilitarian, he or she will be concerned only about whether a remorseful offender will be less likely to reoffend. However, for the retributivist, the question is whether remorse should mitigate culpability (Walker 1991: 112). According to Walker, forgiveness has no degrees but may take the form of "interested" or "disinterested" forgiveness, with the victim being interested and the sentencing authority disinterested. He suggests that the sentencing authority, whether working from a utilitarian or retributivist viewpoint, must choose the sentence that is most appropriate and that a retributivist may take extenuating circumstances into account. He considers, however, that forgiveness, being an act of absolution, should not be considered an extenuating circumstance (p. 113). Thus, according to Bean, (1981), "Forgiveness is a moral sentiment where ill-will is no longer retained. It may occur before or after punishment but does not affect it" (p. 99).

Mercy must be distinguished from forgiveness, because granting mercy is an act, but forgiveness is an attitude of mind (Walker 1991: 115). Mercy may be prompted by expressions of remorse or by a statement that the victim has forgiven the offender. Walker argues that mercy is not equivalent to "reasoned leniency" and that mercy, in effect, suggests other considerations such as proportionality, any suffering experienced by the offender, and mitigation generally (p. 116). Fundamentally, therefore, mercy is a synonym for various kinds of leniency and has no force or effect of its own.

## Rehabilitation

Retribution and deterrence involve a process of thinking that proceeds from the crime to the punishment. However, rehabilitation is a more complex notion involving an examination of the offense and the criminal and a concern for the criminal's social background and punishment. Further, those in favor of rehabilitation theories acknowledge the possibility of additional problems developing during the offender's sentence or treatment that may be unconnected with the offense and that may require an offender to spend additional periods in treatment or confinement (Bean 1981: 54).

Utilitarian theory argues that punishment should have reformative or rehabilitative effects on the offender (Ten 1987: 7–8). The offender is considered reformed, because the result of

punishment is a change in the offender's values so that he or she will refrain from committing further offenses, now believing such conduct to be wrong. This change can be distinguished from simply abstaining from criminal acts due to the fear of being caught and punished again; this amounts to deterrence, not reformation or rehabilitation by punishment. Proponents of rehabilitation in punishment argue that punishment should be tailored to fit the offender and his or her needs, rather than fitting the offense. Underpinning this notion is the view that offenders ought to be rehabilitated or reformed so they will not reoffend and that society ought to provide treatment to an offender. Rehabilitationist theory regards crime as the symptom of a social disease and sees the aim of rehabilitation as curing that disease through treatment (Bean 1981: 54). In essence, the rehabilitative philosophy denies any connection between guilt and punishment (p. 58).

Bean (1981: 64) outlines the strengths of the rehabilitation position as being its emphasis on the personal lives of offenders, its treatment of people as individuals, and its capacity to produce new thinking in an otherwise rigid penal system. He suggests its weaknesses include an unwarranted assumption that crime is related to disease and that social experts can diagnose that condition; that treatment programs are open-ended and do not relate to the offense or to other defined criteria; and the fact that the offender, not being seen as fully responsible for his or her actions, is capable of manipulating the treatment to serve his or her own interests. In addition, rehabilitation theory tends to see crime as predetermined by social circumstances rather than as a matter of choice by the offender. This, it is said, denies the agency of the offender and arguably treats an offender in a patronizing, infantilizing way (Hudson 1996: 29).

Indeterminate sentences gave effect to the rehabilitative perspective because terms of imprisonment were not fixed at trial, but rather the release decision was given to institutions and persons operating within the criminal justice system, including parole boards, probation officers, and social workers. The notion of rehabilitation enjoyed considerable political and public support in the first half of the 20th century, but modern rehabilitationists now argue that fixed rather than determinant sentences should be the context for rehabilitation (Hudson 1996: 64). They argue that with indeterminate sentences, offenders become preoccupied with their likely release date, and this leads to their pretending to have made more progress in treatment than is really the case.

The demise of rehabilitation as a theory of punishment began in the 1970s and was the result of a complex set of factors, one of which was a much quoted article by Robert Martinson (1974), who was perceived to have argued that "nothing works," that is, that no treatment program works very successfully in preventing reoffending and that no program works better than any other. Martinson later attempted to rectify this pessimistic view of rehabilitation and treatment by acknowledging that some programs work, sometimes, for some types of offenders.[1] Nevertheless, from that point on, policy makers and legislators abandoned rehabilitation as an objective of punishment. On the issue of indeterminate sentencing, the publication of *Criminal Sentences: Law Without Order* by Marvin Frankel (1972), then a federal judge, which argued that judges exercised "almost wholly unchecked and sweeping authority" in sentencing (p. 5), provided substantial support to the proponents of determinate sentencing. By the 1980s, the retributionist theory of just deserts had become the most influential theory of punishment.

Nowadays, rehabilitationists contend that their rationale for punishment is the only one that combines crime reduction with respect for an offender's rights. According to this view, although capital punishment and long terms of imprisonment may deter and will certainly incapacitate, rehabilitation can be accomplished only if criminals reenter society; consequently extreme

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[1]One meta-analysis found that adult correctional treatment is effective in reducing recidivism; that behavioral cognitive treatments are more effective than others; and that intensive in-prison drug treatment is effective, especially when it operates in conjunction with community aftercare (Gaes, Flanagan, Motiuk, and Stewart 1999: 361). In assessing the effectiveness of interventions, Duff and Garland (1994: 24) point out that we need to ask not just "what works" but also "what should be counted as working?"

punishments should be ruled out. Edgardo Rotman (1994), for example, argues in favor of a "rights oriented rehabilitation," which accepts the offender's liability to receive punishment but claims a corresponding right on his or her part to "return to society with a better chance of being a useful citizen and staying out of prison" (p. 286). This perspective is often termed *state-obligated rehabilitation* and contends that if the state assumes the right to punish, it should ensure that no more harm is inflicted than was intended when the sentence was pronounced. That is, the intent of the prison sentence is deprivation of liberty and not loss of family ties or employability (Gallo and Ruggiero 1991). Rotman, for one, argues that a failure to provide rehabilitation amounts to cruel and unusual punishment. Pat Carlen (1994) and Roger Matthews (1989) argue that states are entitled to punish offenders because offenders act out of choice. However, they suggest that the offenders' choices are often limited because of circumstances and social conditions like poverty and inequality, which might lead people into crime. Therefore, Hudson (1996: 66) claims, the state should recognize that it plays a part in causing crime and should recognize its role in crime prevention by providing rehabilitation to assist offenders in not committing further crime. Offenders, on their part, have a corresponding obligation to take part in rehabilitation programs offered by the state. Nevertheless, even for those offenders who are unwilling to enter rehabilitation programs, rehabilitation may be coerced or pressured in the sense that their decision about whether or not to undertake the program will be influenced by the existence of adverse consequences for nonparticipation, for example, the denial of parole if the program is not completed (Day, Tucker, and Howells 2004: 259). In this view, rehabilitation may be seen as an alternative to punishment rather than as something to be achieved through the means of punishment. As Carlen (p. 329) contends, a purely punitive approach to sentencing does little to decrease crime and serves only to increase the prison population.

## Incapacitation

Penal practice has always tried to estimate the risk that individual offenders might commit crimes in the future and has tried to shape penal controls to prevent such crimes from happening. Through the incapacitative approach, offenders are placed in custody, usually for long periods of time, to protect the public from the chance of future offending (H. Morris 1994: 238). In utilitarian theory, incapacitation is seen as a good consequence of punishment, because when serving their sentences, offenders are removed from society and are therefore unable to commit further offenses. This applies regardless of whether offenders are deterred, reformed, or rehabilitated through the punishment they are given. Incapacity may also be present in other forms of punishment such as parole, in the sense that although offenders are free from incarceration, they are placed under supervision, which may restrict their opportunity to commit crime (Ten 1987: 8).

Some criminologists claim that certain offenders commit crimes at very high rates and that applying a policy of selective incapacitation aimed at these "career criminals" will assist with the aims of crime prevention. There are two basic objections to following a policy of incapacitation based on selecting offenders for this kind of punishment. The first is that predicting criminal dangerousness is problematic and will inevitably mean that a number of persons will suffer incapacitation who would not have committed further crimes if left free, because, given the inaccuracies of prediction, it is necessary to lock up or incapacitate large numbers of nondangerous offenders so we can ensure we incapacitate dangerous offenders. Second, there is the moral objection that it is wrong in principle to punish offenders based on a prediction of their future conduct; that is, they ought to be punished for what they have done and not for what they *might* do in the future. H. Morris (1994: 241) argues that sentences intended to incapacitate an offender ought to be permitted only where there exists reliable information showing a high probability of future offending. Morris suggests that taking account of dangerousness in the future should be considered as statements about an offender's present condition and not as a prediction of future conduct.

Some of the problems inherent in incapacitative sentencing include that it works only if

- we lock up those who would have committed further offenses if they had been left free;
- those we lock up are not immediately replaced by new recruits; or
- the crimes committed after release are not so frequent or serious so as to negate the effects of the crimes prevented through incapacitative sentencing.

Ethical questions that arise from the sentencing rationale of incapacitation include the following (also see Travis 2002):

- Is it ethical to punish persons for crimes not yet committed?
- Is it ethical to base punishment on inaccurate predictions?
- Is it ethical to punish repeat offenders for past crimes they committed and have already been punished for?

The notion of incapacitation is reflected in such punishment policies as three-strikes legislation, mandatory minimum sentences, and truth in sentencing. These polices will be discussed as penal policies in Chapter 7.

## ❖ Restorative Justice

John Braithwaite (1998) argues that restorative justice has been "the dominant model of criminal justice throughout most of human history for all the world's peoples" (p. 323), and that it is grounded in traditions from ancient Greek, Arab, and Roman civilizations and in Hindu, Buddhist, and Confucian traditions. Braithwaite emphasizes that restorative justice means restoring victims as well as offenders and the community. In addition to restoring lost property or personal injury, restoration means bringing back a sense of security. He points to the shame and disempowerment suffered by victims of crime. He observes that Western legal systems generally fail to incorporate victims' voices because the justice system often excludes their participation. Restoring harmony based on an acceptance that justice has been done is, in his view, inadequate. Essentially, restorative justice proponents emphasize the need to support both victims and offenders and see social relationships as a rehabilitative vehicle aimed at providing formal and informal social support and control for offenders (Bazemore and Schiff 2001: 117). Rather than separating out the offender as a subject for rehabilitation, restorative justice sees social support and social control of offenders as the means to rehabilitation.

The origins of restorative justice in the United States lie in part in court orders for reparation taking the form of restitution and community service. Since the 1970s, restitution and community service have been employed as sentencing tools in criminal and juvenile courts, and during the 1980s an expansion occurred in victim–offender mediation programs resulting partly from interest in restitution and community service programs (Bazemore and Schiff 2001: 25). Along with the increased interest in these alternative sanctions, attention to the interests of victims increased during the 1990s, focusing on repair and healing influenced by the "faith community" and feminists (p. 26). Today, numerous programs can be brought under the rubric of restorative justice, but they often remain small-scale experiments and tend to be associated with community approaches to crime control.

In considering the nature of a restorative justice approach to offenders, it is useful to note the three core principles suggested by Dan Van Ness and Karen Heetderks Strong (1997: 8–9):

1. Justice requires the healing of victims, offenders, and communities injured by crime.
2. Victims, offenders, and communities should be permitted to actively involve themselves in the justice process in a timely and substantial manner.
3. Roles and responsibilities of the government should be rethought, and in its promotion of justice, government should be responsible for preserving a just order, and the community should be responsible for establishing peace.

Restorative justice may be considered unique in its emphasis on not just one component of the criminal justice system such as punishment, but as incorporating victims, offenders, and the community in its strategies and designs. It is considered important that all three parties actively participate in the restorative justice process so that relations among them can be restored. Programs that do not include all three parties are not considered true restorative justice programs, because at least one important component of the triangle is absent. Thus, mediation programs that focus on achieving a resolution only between the offender and victim and leave out the community are normally not considered true restorative processes. Probation is a sentence of the formal system and, although a sentence carried out in the community, involves the official system through the supervision of the offender by the probation officer, but does not involve the community in resolving the harm caused by the offense. It leaves out victims in terms of their participation in the process. Even though some probation sentences include an order to pay the victim restitution or compensation for the offense committed, the participation of victims is passive in that their role is only to receive that payment.

In relation to offenders, Gordon Bazemore and M. Dooley (2001: 108) state that there is a normative focus on harm and repair. Repair, in the context of restorative justice, implies a particular form of rehabilitation. However, Bazemore and Dooley concede that there is an absence of theory to explain how the operation of restorative justice is supposed to bring about a change in the offender. Some restorative justice proponents argue that repair in relation to offenders involves a focus on *restoring, strengthening, and building relationships between offenders, victims, and communities* (p. 111), and therefore intervention intended to prevent future crime must focus not only on the offender's obligation to repair harm done to victims and the community but also on the need to repair broken relationships between the offender and the community, the victim and the community, and the victim and the offender.

Critics of restorative justice point to its too ready assumption that it will be possible to secure agreement between offenders, victims, and communities. Garland (in Hudson 1996: 150) notes that one of the functions of punishment is to relieve the feelings of victims and communities where crimes are committed and that restorative justice avoids the ceremonies and rituals of criminal law that recognize these emotions. In addition, it can be argued that a greater reliance on restorative justice and a consequent restriction on the operation and expression of criminal law might lead to a situation in which those victims processed through restorative justice might come to believe or feel that the harm they have suffered is of less importance than "real crime." Feminists, who have argued for severe sentencing for domestic violence as well as for sexual offenses, have adopted this argument (Daly and Stubbs 2007). Criminalization and punishment show the limits of tolerance, and depenalizing through restorative justice processes tends to suggest that society has a different attitude toward certain kinds of behavior (pp. 158–159; Hudson 1996: 151). Von Hirsch (1998: 674–675), in his investigation into the basis for restorative justice, contends that no clear principles have been formulated for restoring the harm done by offenders to community standards, and unlike victim restitution, which involves a task of mediation between the victim and the offender, there are no disputed claims involved in crime because, for example, a robber appropriates something that is clearly the property of the victim. Maria R. Volpe (1991) has warned of the propensity of restorative justice to widen the net of social control.

If the rationale of restorative justice is to repair relations between victim, offender, and the community, the question arises, should restorative justice be seen as "alternative punishment" or "alternatives to punishment"? R. A. Duff (1992) argues that restorative justice should be perceived as an alternative punishment and advocates developing alternative modes of punishment. In practice, restorative justice responses to crime incorporate forms of punishment; for example, the process of acknowledging the harm done to the victim and performing measures of reparation is intended to cause pain and be a burden to the offender. Thus, it can be argued that retribution is an element of the restorative justice process (Lokanan 2009: 299). However, restorative justice proponents generally reject

the punishment paradigm, arguing that retribution is oppressive and divisive. Public acceptance of restorative justice processes may well depend on a perception that it contains retributive elements, and some commentators have suggested this be made more explicit by incorporating a custodial regime called *restorative detention* (p. 302). They envisage that an offender would undergo therapy, counseling, or training during the time in custody in a restorative prison, which provides a therapeutic regime that permits all stakeholders to be involved in the punishment process.

## ❖ Why Punish? The Sociological Approach

In sociological terms, punishment raises questions such as why particular punishments were used and why they are no longer used, why a punishment like capital punishment has been abandoned to a great extent in the West, and why imprisonment has become the major form of punishment for criminal activity.

In social terms, research has concluded that punishments depend less on philosophical arguments and more on the currents and movements in social thinking and in climates of tolerance and intolerance. A focus on history and changes in social conditions has illuminated the relationship between punishment and society, which in turn has broadened the investigation of the notion of punishment into questions concerned with how order and authority are maintained in society. Garland summarizes social theory about punishment as "that body of thought which explores the relations between punishment and society, its purpose being to understand punishment as a social phenomenon and thus trace its role in social life" (1990: 10).

Garland (1990) has argued that punishment is the product of social structure and cultural values. Thus, whom we choose to punish, how we punish, and when we punish are determined by the role we give to punishment in society. If we construe criminal punishment as a wrong for a wrong, then we must conclude that society is, in a sense, wronging the offender. We must therefore ask, "Can the infliction of pain or a wrong upon an offender be justified ethically?" To answer this question, one must first look at the purpose of criminal punishment and question the various rationales put forward for punishment, such as deterrence, incapacitation, rehabilitation, just deserts, retribution, and restorative justice.

Sociological perspectives on punishment include the thinking of Émile Durkheim, Max Weber, the Marxist tradition, and post-Marxist sociologies of punishment, particularly that propounded by Michel Foucault. Sociologists expand the notion of punishment to penality, which they explore in various societies at various times. Hudson (1996) defines *penality* as

> the complex of ideas (about proper punishment, about effective punishment), institutions (laws, policies and practices, agencies and buildings) and relationships (who has the power to say who is punished, whose ideas count, what is the relationship of those who punish and are punished to the rest of society) involved in the punishment of offenders (p. 6).

Only a broad outline of the various perspectives on penality will be provided here.

According to Durkheim, society has an objective reality apart from the individuals who compose it, and he argues that people behave according to social rules that, together with customs and traditions, form a culture for a particular society (in Hudson 1996: 81–86). Durkheim took a functionalist approach; that is, he examined aspects of social life in terms of the functions they performed in society. He applied this approach to punishment by looking at the functions that punishment fulfills in maintaining social order. Durkheim identified beliefs

and sentiments held by members of society, which he called the "conscience collective," and argued that crimes are those acts that violate that conscience collective and produce a punitive reaction (in Garland 1990: 29).

He developed two laws of penal evolution. The first is that punishment is more intense the less developed a society is and the more the central power within that society is of an absolute nature. Thus, in industrial societies, collective sentiments are embodied in law rather than in religion, so crimes are seen as wrongs against individuals. He tried to demonstrate that penalties changed from ancient societies to his time, from aggravated penalties such as death with torture and mutilation to reduced forms of punishment. In his second law, he developed the notion of punishments having lesser intensity, arguing that imprisonment will become the main punishment replacing death and torture.

Overall, Durkheim saw the function of punishment as promoting social solidarity through the affirmation of values, and he argued that punishment's importance lies in its expression of outrage on the commission of an offense. He believed punishment to be a "passionate reaction" to crime, and this expressive view of punishment can be seen in modern-day notions of censure in retributivism. His focus was not, therefore, on whether punishment was effective in controlling crime but in its function as a means of maintaining social solidarity through expressions of outrage and through the affirmation of societal values. Among critics of Durkheim, Garland (1990) suggests that Durkheim's analysis of punishment is focused too strongly on punishment's expressive function, causing all other explanations to be discarded. Nevertheless, Garland points out that Durkheim's insight into the role of punishment—as one of expressing community outrage against criminal acts—does single out one aspect of punishment that seems to resonate in the context of today's debates about "getting tough on crime" (p. 252). In similar fashion, George Herbert Mead, in *The Psychology of Punitive Justice*, contends that the indignation that members of society feel toward the criminal amounts to a cultural sublimation of the instincts and hostilities that the individual has tamed in the interest of social cooperation with others (in Garland 1990: 64).

Weber's ideas on punishment are implied rather than made explicit in his notions about authority and power in modern society. Having identified three types of authority, the traditional, the charismatic, and the legal, Weber promoted legal authority—the process of making rules by those given the right to rule—as being the most appropriate form of rule for modern societies. For Weber, legal authority carries with it a duty to obey laws. He argued that systems of laws might be rational or irrational; in a rational system of criminal law, crimes would be defined and rules put forward for adjudicating those crimes. He favored formal rationality, which he termed *bureaucratic rationality*, and saw this as an essential feature of a modern state. His notion of bureaucratic rationality appears in certain features of modern society, such as our processes for making judgments according to rules and the way in which officeholders exercise authority. Developments such as a professional police force and a judiciary as well as due process can be traced to the bureaucratization of society.

Marxist perspectives on punishment evolve out of Marx's concern for the place of capitalism and the relations between production and society. In his view, institutions like law are shaped to parallel the relations of production and the maintenance of the capitalist system. Marxist penologists have argued that punishment regulates the supply of labor; this view was put forward in 1939 by Georg Rusche and Otto Kirchheimer in *Punishment and Social Structure* (in Howe 1994: 12). In discussing the history of punishment in Europe from the 13th century until the development of capitalism, the authors perceive the severity of punishment as being tied directly to the value of labor. Thus, the severity of punishment, they argue, is relatively lenient when labor is scarce and its value high, whereas when labor is abundant, punishments become more intense.

Another key aspect of their view is the principle of *less eligibility* (Howe 1994: 12). The argument is that the conditions offenders will experience in prison must be worse

than anything they are likely to endure outside the prison to restrain the "reserve army of labor" from crime, that is, to serve as a deterrent to the lowest social classes. The idea of less eligibility encompasses matters like discipline, diet, accommodation, and general living conditions in prisons. Rusche argued that this principle limited penal reform, because punishments and prison conditions could not be improved beyond a point that would bring the offender into line with the standard of life of the least advantaged nonoffender (in Howe 1994: 20). This analysis has been criticized for its economic reductionism. (It offers only an economic argument to explain changes in punishment.) Nevertheless, it has led to a series of studies that have tested the basic framework and found some correlation between punishment and the labor market in the United States over time. The important point is that the authors, together with other Marxists, have provided the insight that all punishment cannot be understood simply as a response to crime. In other words, when changes in the use of imprisonment and other punishments are examined in historical contexts, other factors appear to have influenced their development.

Other Marxist theorists like Dario Melossi and Evgeny Pashukanis have asked why imprisonment persists as opposed to other forms of punishment. One answer from Pashukanis is that there is a correspondence between the development of wage labor, which puts a price on time, and paying for crime by "doing time." In this sense, Marxist theory concerning the relations of production is found mirrored in the punishment of imprisonment, and Marxists therefore argue that a crucial principle in society is the exchange of equivalence. Punishment, therefore, becomes an exchange transaction in which the offender pays his debt, an expression commonly used today both in that form and in the notion of "paying a debt to society" (Garland 1990: 113). Feminists have heavily criticized Marxist analysis of society generally for ignoring gender and for outmoded interpretative frameworks (Howe 1994: 41).

In 1977, Foucault published *Discipline and Punish: The Birth of the Prison*, revolutionizing the study of penality and punishment by presenting the notion of penality and highlighting *discipline* as the key element in modern forms of punishment. In his complex exploration of penality, Foucault follows an approach that examines the issue from the ground up through a detailed examination of penal practices. His central focus is the *exercise of power* in modern society and its linkages with knowledge to exercise power of and over the body. Describing first the effect and content of the public execution, Foucault shows how the infliction of pain on the body gave way to an exercise of power through the new practice of disciplining the individual through institutions such as the factory and the modern prison and how this led to the development of a class of "delinquents." Foucault claims that disciplinary regulation is the fundamental principle of social control in modern society and is most fully realized in the form of the prison.

Foucault (1977) emphasizes the role of punishment in producing the "right-thinking citizen," that is, the trained and disciplined individual (Hudson 1996: 7). He draws on both Weber (in his emphasis on bureaucratization) and Durkheim (in his description of punishment as an expressive force) in his account of penality. However, he adopts a much broader analytic framework that links punishment and penality and connects them directly to changes in society and to the exercise of power over the individual. Foucault's ideas have inspired many followers, including Garland who, in *Punishment and Modern Society* (1990), argues that a full understanding of punishment and penality should incorporate the theoretical insights of all the writers discussed in this section, together with those of Norbert Elias and his notion that the West has undergone a "civilizing process" that has sensitized society against harsh punishment. Importantly, Garland has drawn attention to the need to consider punishment not simply as the consequence of a criminal act but as a "complex social institution" requiring us to think beyond simply crime control. Punishment, he argues, should be viewed as a social institution, and its social role and significance can be properly understood only through developing the insights of social theorists.

## Summary

The morality of punishment rests on theories of deterrence, retribution, just deserts, rehabilitation, incapacitation, and most recently, restorative justice. These theories attempt to justify society's imposition of punishment on offenders and try to provide an adequate ethical rationale for inflicting harm. Deterrence maintains that people are deterred from crime because they are concerned about the possible consequences of their actions. Utilitarian philosophers first put forward this justification for punishment. A number of studies have considered the effectiveness of deterrence as a theory, but there is no clear conclusion about whether deterrence works.

Retribution theorists argue that punishment is justified because it is deserved, and punishment therefore becomes a question of responsibility and accountability for acts that harm society. In retribution theory, the punishment imposed should be proportionate to the wrongdoing. Retribution is justified in a number of ways, including the notion that offenders are paying their debt to society, that they are being censured by society, and that punishment has an expressive character that ought to be communicated to an offender.

The emergence of just deserts theory in the 1980s put an end to indeterminate sentencing and introduced sentencing guidelines and sentencing commissions as attempts were made to fix proportionate sentences. Just deserts theory lacks any principle that determines how to constitute a properly commensurate sentence, and it ignores social factors as well as the multiple decisions and discretions that go into the sentencing decision.

Rehabilitation shows a concern for an offender's social background and regards crime as the outcome of a social disease that should be cured through treatment. In the past, indeterminate sentences supported rehabilitation programs, because the release decision was given over to boards and not determined by the court. The idea that "nothing works" brought about the demise of rehabilitation, which had been the dominant rationale for punishment until the 1970s. It has now been displaced by just deserts and incapacitation.

According to incapacitation theorists, placing offenders in custody for lengthy periods of time protects the public from the chance of future offending, but this means that offenders are being punished based on a prediction of what they might do in the future. It raises the question of whether it is ethical to punish persons for crimes they have yet to commit.

Restorative justice is a newcomer to the field of penal theory, and some suggest that it lacks theoretical support. However, its emphasis on community involvement in solutions to crime and on the victim have attracted a body of support, at least at the local level, where it has been employed to deal with delinquency and relatively minor offenses.

The philosophical approach to punishment is concerned with the "ought" of punishment, whereas the sociological approach raises questions about the use and severity of particular punishments and the relationship among punishment, society, and social change. The criminological approach focuses on the fact of imprisonment and on penal policy making and crime control. Some suggest that no single approach adequately provides justification and rationale for punishment and that a full explanation can be gained only by combining these various perspectives.

## Discussion Questions

1. Offenders are punished because we hold them accountable and responsible for their actions. Explain by reference to the various theories of punishment.

2. Does deterrence work? Explain with examples.

3. How can just deserts theory be criticized, and why has just deserts become the predominant view in penal policy?
4. Contrast rehabilitation and incapacitation as theories of punishment, explaining their justification, their operation, and the criticisms that have been made of them.
5. What advantage would society gain if restorative justice were the only method of punishment? In your answer consider all the advantages and disadvantages offered by a restorative justice approach to punishment.
6. Contrast the philosophical and sociological perspectives on punishment.
7. What is the *lex talionis*, and what are its drawbacks as a form of punishment?

# 6 Ethics in Corrections

The preceding chapter explored philosophies of punishment and the rationales for punishment generally and set the context for the discussion in this chapter concerning ethics in corrections. Here, we are concerned with the prison system, inmates, and guards and with ethical dilemmas that may arise within the prison system. A further concern is the treatment afforded to those who are incarcerated. For example, is it ethically correct to impose severe restrictions on amenities and comforts for prisoners? Is an offender sent to prison for punishment or as punishment for an offense? Should offenders, in effect, be warehoused in prison and left to languish under strict supervision, or should they be provided with treatment programs, psychological services, and educational opportunities? First, however, it is necessary to set the context by looking at the state of the prison system in this country.

## ❖ The Prison Explosion

The number of state and federal prison inmates increased from 400,000 in 1982 to almost 1.3 million in 1999; as of December 31, 2002, the number of male prisoners in state and federal prisons had reached 1,440,655, and the number of female prisoners had reached 97,491 (Harrison and Beck 2003). During the period from 1982 to 1999, over 600 state and at least 51 federal correctional facilities were opened. In the same period, the number of jail inmates tripled from approximately 200,000 in 1982 to 600,000 in 1999, and the number of adults on probation increased from more than 1.3 million to almost 3.8 million persons (Gifford 2002). Moreover, the number of correctional staff more than doubled from nearly 300,000 to over 700,000 in same period. According to Pew Center on the States (2010a: 1) the number of inmates under the jurisdiction of state correctional institutions was 1,404,053 (representing a 0.3% decrease), and the number of federal inmates was 208,118 (representing a 3.4% increase) for a total of 1,612,171. In total, corrections supervised 7,225,800 persons by year-end 2009, representing 3.1% of adults in the U.S. population (Glaze 2010: 1). The number of jail and county inmates was 748,728 between midyear 2009 and midyear 2010, a 2.4% decrease from the previous report for 2008–2009 (Minton 2010: 1).

The cost of corrections has also increased by a staggering amount. For example, in 1982, federal expenditure on corrections was $541 million; by 1999, this had increased to $4 billion, an increase of 650%. In the states during this same period, there was a 476% increase in corrections expenditure (Gifford 2002). In fiscal year 2001, correctional authorities spent $38.2 billion to maintain correctional systems, and day-to-day operating expenses amounted to 28.4 billion (Stephan 2004: 1), and by 2007 it had risen to $44.06 billion (Pew Center on the States 2008: 12). State spending on corrections for the period 1986 through 2001 increased from $65 per resident to $134, and between 1982 and 2003, corrections expenditure increase 423% from $40 to $209 per U.S. resident (Hughes 2006: 1). The federal government increased its expenditure on corrections between 1982 and 2003 by 925% (p. 2). The costs of imprisonment are illustrated by Pew Center on the States (2010b):