


JUSTICE THROUGH PUNISHMENT



**A Critique of the 'Justice' Model
of Corrections**

Barbara Hudson



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Preface

This book has grown out of my close association with social workers and probation officers over the last few years. It is apparent to anyone working in the criminal justice system that a significant qualitative change has been taking place, a change which can be summarised as a shift from an offender to an offence orientation. I have seen my role as a researcher as that of trying to make the system more intelligible to those working within it, and also that of helping students and practitioners defend their own professional values, supporting their efforts to improve their practice without embracing too uncritically the latest penological fads and fancies.

I started to feel uneasy about the justice model while working for the Lancaster University Centre for Youth, Crime and Community, and much of the impetus to write the book stems from discussions with colleagues there and in Essex Social Services Department. I am grateful to them all, in particular David Thorpe, David Downes and Bruce Woodcock.

The book began to take something like its present shape while I was teaching on the Masters course in Social Service Planning at the University of Essex, and I am indebted to the students on that course for challenge and stimulation.

Most recently I have been working with the Middlesex Area Probation Service, and I am grateful to them for the opportunity to investigate the extent to which justice model ideas are being followed in sentencing practice. All my colleagues at Middlesex have played their part in developing ideas, challenging preconceptions, and providing comradely support in getting the book done, but Colin McCulloch and John Walters, in spite of the very heavy demands of their own duties, have been particularly generous in spending time talking with me. Bron Roberts and Dave Rogan are colleagues at Middlesex and also in the Labour Campaign for Criminal Justice, and have contributed more than they realise.

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Barbara Hudson

Introduction

From the end of the Second World War until the mid-1970s, there was virtual consensus that the progressive approach to offending was to try to eradicate the problems of social and environmental deprivation that engendered crime and delinquency, and to seek the rehabilitation of those who none the less found themselves on the wrong side of the law. Retribution and deterrence were shied away from as unworthy motives for penal sanctions, and the rhetoric of penal systems was a rhetoric of help, cure, providing treatment rather than inflicting punishment. A 'soft machine' of probation officers, social workers, therapists, counsellors and the like developed to provide diagnostic and curative services for offenders. The prison was to become less and less central in penal systems: since offending was generated by problems in the community, then the community must also hold the key to rehabilitation. For those offenders who could not be allowed to remain in the community, the prison was to become more humane, to become a site not only for punishment but for a range of therapeutic services. The prisoner would remain incarcerated not until he had paid the appropriate penalty, but until he could demonstrate that he no longer needed rehabilitative treatment.

By the mid-1970s, however, doubts were being voiced which commanded increasing attention, and which eventually fractured the rehabilitative consensus. Instead of the prison becoming more of a community, perhaps the community was turning into a dispersed prison. Maybe offenders resented the extensiveness of the intrusion into all aspects of their lives that the treatment approach allowed; maybe they resented being held for indefinite periods 'for their own good'. At the same time that the liberal-left belief in rehabilitation wavered, conservatives were demanding sterner punishments, saying that the entry of social workers, psychiatrists and the other rehabilitative personnel had softened criminal justice processes to the degree that they no longer had any deterrent effect on potential crime.

Out of these separate discontents emerged a reform agenda that became known as the 'justice model' of corrections. Since doing good led to long indeterminate sentences, with coercive recruitment to therapeutic programmes of little proven value, since in the era of doing good the legal system had lost public confidence because of disparities in sentencing, and since all the efforts that had been put into rehabilitation had had no impact on rising crime rates, perhaps such grandiose aims of curing criminals and eradicating crime should be abandoned. The lesser aim of doing justice could perhaps ensure that offenders' legal rights were protected, that they would not suffer greater punishments than their offence merited because of unchallengeable assessments of their problems or needs; that the public were protected by would-be criminals being sure of a punishment appropriate to the crime, and that the judicial system might gain in respect if it could be seen as fairer and more rational.

Although no model is ever applied in a pure form in the real world, the justice model has been remarkably influential. It has a simplicity and coherence that appeals to legislators, the judiciary and other professionals, who are given an easy-to-follow schedule of sentences instead of a vast array of competing penological ideas which all, always, present themselves as 'reforms'. In a short space of time, justice model ideas have been incorporated into legislation, judicial guidelines, the policies of social work managers and practitioners, and the vocabulary of deserts, due process and determinacy has become the dominant penological discourse.

The justice model may have been something of a welcome corrective to complacency when rehabilitation was the orthodoxy, and when welfare agencies were expanding and recruiting more and more of the population into their nets as clients. It was all too easy to justify interference in the lives of those who did not conform to narrow social stereotypes on the basis that such people were vulnerable to crime. Today, however, the problem is the withdrawal of welfare services rather than their over-supply, and the justice model too readily provides a legitimating rhetoric for the reduction of social-work presence in courts, the exclusion of offenders from caseloads, the curtailing of intermediate treatment programmes, and the cutting of counselling, training and other rehabilitative services in prisons. The minimalism of the justice model has justified a neglect of offenders and their problems that is

far from benign; the state has washed its hands of responsibility for anything other than punishing deviants, it has absolved itself of any responsibility for the situation in which they find themselves and therefore disclaims any compunction to offer them the means to improve their lives.

This book looks first of all at the critiques of the rehabilitative approach which facilitated the emergence of the justice model, and then examines the model itself, looking in detail at the most sophisticated version of it, that expounded in von Hirsch's (1976) *Doing Justice*. The implementation of the model is then demonstrated, with attention focused on determinate sentencing legislation and sentencing commission guidelines in the United States, and the delineation of an authoritative series of guideline judgments by the Court of Appeal in England and Wales.

Subsequent chapters take up the challenge of the justice model at its most persuasive, in relation to the exclusion of 'non-legal factors' such as race, gender and employment status from sentencing decisions. A separate chapter looks at justice model arguments as they apply to juveniles. It is argued in these chapters that making non-legal factors irrelevant to sentencing would do nothing to reduce discrimination, and would produce more rather than less imprisonment.

The concluding chapter summarises the criticisms of the justice model which have appeared recently, and looks at two alternative approaches to criminal justice, the new rehabilitationism, and the emergent radical agenda. While both of these, and especially the latter, are preferable to justice model ideas, they need to be supplemented by a direct, abolitionist policy towards prisons to have any impact on present excessive rates of incarceration.

At the start of working on this book, the justice model seemed to have won all the major arguments, and the demise of rehabilitation seemed certain. Those who tried to resist were accused of hanging on to professional vested interests. All the critical thinking about criminal justice seemed to be written within at least a broadly justice model perspective, even when it did not fully espouse the idea of deserts-based retributionism, or was not self-consciously aware of its justice model assumptions. By now there has appeared some disillusionment among the original advocates of the model, as well as some hostility among academic commentators, but in general this has yet to reach legislators and practitioners. The disillusionment evident in the United States has not

yet spread to the United Kingdom: in 1986 the Home Office published a White Paper on criminal justice, and a new edition of its sentencing handbook for magistrates, both of which show evidence of almost unadulterated justice model thinking. It is the intention of this book to provide a clear statement of the justice model agenda and the philosophical principles on which it is based, to look at evidence of its effects in practice, and to raise issues of principle which should point to the abandonment of any belief that the model has any potential for facilitating a shift to a more humane, less oppressive response to crime.

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1 Reform, Rehabilitation, Welfare and Treatment: Concepts, Confusion and Critique

The opposite of custody is not treatment, but liberty. (American Friends Service Committee, 1972)

In any standard work on the bases of legal punishment (e.g. Benn and Peters, 1959; Bean, 1981), one will find described three principles which are said to provide alternative moral foundations as well as policy aims of punishment. These three principles are retribution, deterrence and rehabilitation. Of these, the first two have been included in discussions of penal philosophy down the ages and have always, to varying relative degrees, been incorporated in actual penal systems. Indeed, the very notion of punishment seems to depend upon these principles. It is hard to imagine how anything which did not inflict pain on wrongdoers in consequence of their misdeeds, and by such infliction seek not merely to avenge the wrong but also to discourage others from similar misdeeds, could be considered 'punishment': that punishment involves retribution and deterrence is almost a 'truth by definition'. But rehabilitation? Apart from being something of a parvenu concept in penological discourse, rehabilitation seems not so essential to the idea of punishment; rather, it seems a tangential aim of the application of penal sanctions, an outcome which though it may be desirable in itself, may be unachievable within penal systems, and may be better brought about if separated out from penal policy and practice. If current trends continue, the central place of 'rehabilitation' in discussions of penal philosophy and the development of penal policy may well be short-lived.

The accepted definitions of punishment would seem to imply elements of retribution and deterrence, but not of rehabilitation, so that the presence of the latter in penal discourse must be urged in terms of its desirability rather than of its being an essential, inevitable quality of punishment. For example, Grotius defines punishment as 'the infliction of an ill suffered for an ill done', whereas a more modern penal philosopher defines punishment in terms of five essential criteria (Flew, 1954):

1. it must involve an evil, an unpleasantness to the victim;
2. it must be for an offence, actual or supposed;
3. it must be of an offender, actual or supposed;
4. it must be the work of personal agencies;
5. it must be imposed by authority conferred through or by the institutions against the rules of which the offence has been committed.

A sixth criteria, suggested by Benn and Peters (1959) is also generally accepted now as making, with those suggested by Flew, an adequate working definition of punishment. This sixth criteria is that the pain or unpleasantness should be an essential part of what is intended and not merely a coincidental or accidental outcome. Taken together, these criteria define punishment by differentiating it from arbitrary exercise of power, or unauthorised aggression, private 'vendetta' vengeance, or hidden dangers following ill-considered actions. From such definitions, principles and outcomes of retribution and deterrence are easy to derive; rehabilitation does not seem to be similarly implied.

There have, in every era, been advocates of rehabilitative penal measures. Even where those advocates have been among the most influential of figures, though, they have been isolated voices whose ideas were not incorporated into the general penal policies of their times. Thus, however powerful and persuasive an intellect Plato may seem to us now, his urging of the idea that criminals were sick souls in search of treatment rather than wicked souls in need of punishment was not successful in his own age. Aristotle's more pragmatic, retributive views as expressed in the *Nichomachean Ethics* were more generally favoured not only in the great days of Athens, but right down to recent times.

More modern campaigners, such as Benjamin Rush in Philadel-

phia and John Howard in England, were advocating rehabilitation as the primary goal of penal systems in the last quarter of the eighteenth century. It took another hundred years, however, for the idea of rehabilitation to infiltrate not just the thinking of individual and rather idiosyncratic critics of existing penal practice, but to become the dominant ideology of almost the entire establishment of theoreticians, legislators, policy makers and practitioners.

The reformist phase

Before rehabilitation was accepted as a primary aim of legal punishment, reform was incorporated as a major goal alongside retribution and deterrence. The words 'reform' and 'rehabilitation' are often used as though they were synonymous. In fact they are not, and some of the problems of contemporary penal systems can be ascribed to the conflation and confusion of what should be seen as two quite distinct concepts.

Bean, in discussing Hegel's theory of punishment, says that reform (and he categorises Hegel as a reformist) is to be effected *through* punishment, whereas rehabilitation entails that reform *accompanies* punishment. He goes on to explain that

The object of punishment, according to Hegel, is to make the criminal repent his crime, and by doing so to realize his moral character, which has been temporarily obscured by his wrong action, but which Hegel asserts is his deepest and truest nature. (Bean, 1981, p. 47)

This illustrates the crucial basis of reformist theories, namely that they depend upon belief in the free will of the individual. The criminal *can* repent, *can* become a good citizen, if only he *will*. Rehabilitation theory, in contrast, is a theory which implies determinism, and this is one of the causes of difficulty in associating the idea of rehabilitation with the idea of punishment.

The development of reformism in the penal systems of the United States and Western European countries has been well chronicled in the recent social histories of the prison. Rothman's (1971) *Discovery of the Asylum* describes the growth of the

penitentiary in Jacksonian America, while Foucault's (1977) *Discipline and Punish*, Ignatieff's (1978) *A Just Measure of Pain* and Melossi and Pavarini's (1981) *The Prison and the Factory* describe the development of a complex prison system as the major element in sophisticated and expanding social control systems at the time of the industrial revolution and urbanisation in Britain and in continental Europe. To varying degrees, these authors attribute the growth of the reformist prison to a combination of economic and ideological forces, but for all of them the essential ingredients for the rise of reformism are the development of a capitalist production system which demanded an increasing and geographically stable labour force; doctrines such as Calvinism and utilitarianism which articulated and legitimised these imperatives of capitalism; some genuine benevolence which sought to improve the conditions of those held under the state's power to punish (Ignatieff); and the rise of new criteria for 'science', which specified separation and classification as the ways of approaching phenomena to be apprehended and dealt with rationally (Foucault).

Whatever the precise mix of ingredients which went into the growth of reformism in penal systems during the industrial revolution, it is agreed by all these commentators that the need for labour meant that punishments which made criminals permanently unavailable for work were dysfunctional for burgeoning capitalism. The harshest of purely retributive punishments – death and transportation – made felons entirely lost to the labour force, of course, and punishments such as torture and other physical inflictions of pain often rendered their victims unable to work, or able to work only minimally, by maiming those upon whom they were enacted. Even the less barbaric punishments, while they might not make criminals less unfitted for work than before the application of the sanction, did nothing to increase their preparedness for work, and did not do anything to redress the antipathy or unsuitability for regulated labour which had made them choose crime rather than factory work in the first place. Retributive punishments, in other words, at best did nothing to increase the labour force and at worst reduced it. Therefore, whatever the stated motives – and whether these were real or rhetorical – for reformist punishments, the reformers were certainly proposing a system of sanctions which accorded with the needs of industrial capitalism, even if it was not solely motivated by those needs.

Penal policy in the industrial revolution period, therefore, moved from the application of incapacitating sanctions against the body, to a system of reformist sanctions against the mind and soul. The social historians cited above have given accounts of the growth of prisons which together form a rich picture of the development of reformism, and this history does not need repetition here. What does need reiterating here, however, is that the prisons were not to be mere places of confinement, but to be places where the criminal would be changed into not only a law-abiding, but a productive citizen. There developed several versions of the reformist prison, but they all shared this common aim. Whether reform was to be accomplished through consciousness of constant surveillance, as in Bentham's panopticon prison; whether through solitary reflection as in the American penitentiary; whether through the exercise of prayer or through the learning of skills and work discipline, the goal of the prison was to produce the right-thinking citizen, ready for work. Melossi and Pavarini talk of the 'constructive prison', in which there is an emphasis on work and training, which regime develops in times of shortage of labour, and which is in marked contrast to the 'destructive prison', which leans towards permanent removal of the felon from the workplace, and becomes an equivalent (for the labour market) to death and transportation (Melossi and Pavarini, 1981). We are seeing the re-emergence of the destructive prison today, when we are over-supplied with labour and need to justify the permanent exclusion of vast numbers of people from the labour force, but more of that later.

The reformist agenda was immensely successful. Not only were reformist ideas taken up as the official orthodoxy of penal systems in most Western countries, but the institutions needed to meet reformist goals were built in great numbers. Prisons, reform schools, training schools and mental hospitals proliferated during the last half of the nineteenth century, the heyday of reformism. Even more remarkably, and in contrast with what was to happen when rehabilitation became the officially favoured penal ideology, the punishment apparatuses developed during previous eras were dismantled. Stocks disappeared from village greens; instruments of torture were removed to museums; prison ships were left to decay or were converted into carriers for the equally inhumane emigration traffic; criminal codes were redrafted to reduce the

numbers of offences punishable by death, or by other physical sanctions such as amputation.

Rehabilitation

Crucial to the idea of reformism was a belief in the self-determination of the human individual: capitalism reconstituted the citizen as *homo economicus*, making free choices based on calculation of profit and loss. For penal policy, this meant that adjudication rested first of all on culpability based on 'freely-willed responsibility' (Garland, 1985), and on proportionality of punishment based on calculations of pains to be exacted relative to the potential gains to be made from the offence. Thus the utilitarian notion of man as driven by the wish to maximise pleasure and/or profit and minimise pain underpinned reformist punishment, with the further utilitarian idea that total pain should always be minimised, acting as the calculus of proportion: in the same way that the profit from the crime should never exceed the pain of the penalty, so also the amount of pain existing in society should not be increased by punishment. In other words the degree of pain inflicted by the sanction should not exceed the amount of social pain thereby expiated.

By the 1890s, however, new ways of thinking were becoming established, as well as old ways of reforming criminals being increasingly found wanting. In describing the development of what he calls 'modern penality', Garland (1985) explains that by the 1890s the prison was more and more coming to be questioned in principle, rather than the failure of the reformist prison to solve the crime problem being taken to be a technical or administrative shortcoming which could be put right by new and better ways of running prisons. The failure of penal policy to reduce crime became allied to public alarm over increasing poverty, and to disillusion engendered by the failure of Victorian capitalism to sustain the economic growth that had characterised the earlier parts of the century. Garland is undoubtedly right in claiming that a new philosophy of punishment developed during the last decade of the nineteenth century and the earliest decades of the twentieth, unlike commentators such as Foucault (1977) and Cohen (1983) who see the years from the latter part of the eighteenth century

right down to the present as the development of a continuous penal era characterised by a mode of technically sophisticated, disciplinary control, or other writers such as Bean (1976), who, more conventionally, trace the origins of the 'rehabilitationist' era to as recently as the Second World War. Rothman (1980) and Garland (1985) together show that in both the United States and in England and Wales, the turn of the century saw a shift in the official discourse of penology from reformism to rehabilitationism.

The essential propositions of this new discourse, both Rothman and Garland agree, were the ideas of determinism, individualism and pathology, and the image of the powerful and benevolent state, not only empowered but obligated to intervene in the lives of inadequate citizens and thereby rescue them from delinquency, depravity and deprivation.

The development of rehabilitationism during the 'progressive era' of 1900–20 in the United States, and the period from 1885 to 1914 in England – the period during which Sir Evelyn Ruggles-Brise was Chairman of the Prison Commission for England and Wales – saw the elaboration of a powerful alliance between the state and the newly developing sciences of psychiatry, physiology and sociology. These new disciplines, using the cause-and-effect modes of thinking of positivist science, fed into the criminological programme (Garland, 1985) which provided the new agenda for penal innovation.

Positivism, conceived in its most grandiose form by Auguste Comte to provide a basis for understanding all forms of human life and behaviour, proposed that social and psychological phenomena obeyed the same kinds of causal rules which were believed to apply to the natural world, and this idea was eagerly assimilated by theorists, politicians and penal administrators under pressure to 'do something' about increasing crime rates. If human behaviour obeyed causal laws, then, in principle, the causes of crime could be discovered and eradicated. For a brief period, positivist criminology sought single causes of crime, the most celebrated of which was Lombroso's 'atavism'. Lombroso thought that the criminally disposed were less evolved than other people, and that this lower evolution manifested itself physically in cranial irregularities. From examination of convicted offenders, then, it would be possible to see which of them were criminal types – literally the 'born criminal' – who could never be corrected and should therefore be