

Why Punishing Criminals Can Be More Merciful Than ‘Rehabilitation’

Our efforts to diagnose and 'rehabilitate' prisoners do not bring about greater justice and reform. In practice, they achieve the opposite.

The United States prison system constitutes a serious problem. While we **make up 5 percent** of the world's population, we lay claim to 25 percent of the world's prison population—that's 2.4 million incarcerated people. This constitutes a 500 percent increase over the past 30 years, a problem that such diverse figures as Ta-Nehisi Coates and the Koch brothers want to address.

As with many social problems, progressives point to Europe as the righteous elder brother to the younger, prodigal United States. The problem with our prison system, say progressives, is our retributive mentality. Our system metes out revenge instead of rehabilitating. A **video comparing** Norwegian and American prisons made the rounds a few months ago and illustrated this perspective precisely.

“Do you want people who are angry?” a Norwegian prison official asks. “Or do you want people who are rehabilitated?”

Besides the false dichotomy between anger and rehabilitation, along with the video's extremely selective view of a single prison, and the irrelevance for the U.S. of policy made in the small, homogenous, oil-rich Norway, the video also plays into progressive American self-flagellating for problems that do not exist. Do we have a problem with our prisons? Yes. But the problem is not too much retribution.

In Choosing Effectiveness, We Abandon Justice

No matter how heartwarming it is to watch footage of convicted Norwegian criminals smiling and playing electric guitar, progressives' story about the American obsession with retribution is bogus. Much of our problem actually stems from having forgotten about retribution. The American criminal justice system is not intended to punish criminals, and in fact, the notion of rehabilitation is part of the problem with our prisons. If we had heeded C.S. Lewis' warning on the subject, we wouldn't be in our current mess.

In his 1949 essay “The Humanitarian Theory of Punishment” (published in *20th Century: An Australian Quarterly Review* because no one in England would publish it—the Australians had no qualms with a defense of retribution, apparently) Lewis warned that the doctrine of rehabilitation-as-punishment, “merciful though it appears, really means that each one of us, from the moment he breaks the law, is deprived of the rights of a human being.” Rehabilitation deprives prisoners of their rights.

How could that be true? As Lewis explains, by endorsing rehabilitation, we abandon “the concept of Desert,” the principle that justice exists only when people get what they deserve. We can ask whether a punishment is likely to deter others or to cure the offender, but these questions have nothing to do with justice—they are questions about effectiveness. A doctor does not ask about a “just cure” or a “fair cure,” but only about an “effective cure.” In choosing effectiveness, we abandon justice.

The State Is Not A Doctor, And Prisons Aren’t Hospitals

After all, justice is quite simply getting what you deserve. For example, justice requires allowing Muslims to practice their faith, because they deserve religious freedom. In a similar way, justice requires punishing the criminal, because he deserves punishment. The punishment, however, must be strictly in proportion to his crime. We can, and ought, to argue about what constitutes a just punishment.

Clearly, a six-month sentence for rape with only three months served, as in Brock Turner’s case, is unjust because it falls far short of what Turner deserves. And a sentence of 25-to-life for stealing three golf clubs, as in Gary Ewing’s case, is unjust because it goes far beyond what Ewing deserves. So long as we are having this argument, we are on the right track, because we are arguing about justice. Too often, however, we argue not about what is just, but about what is effective.

When we argue about what is effective, instead of what is right, we grant the State the authority to prevent and to cure, and in so doing, we grant it a more expansive role than it previously had. The State becomes a doctor who diagnoses, treats, and pronounces a cure, but in a prison, unlike in a hospital, the patient has no right to refuse or discontinue the treatment. Before the rise of rehabilitation, we permitted the State to punish strictly in proportion to the crime committed. Once the punishment was paid, the State had no further right over the prisoner, unlike now.

Consider the “box” on educational and employment applications. Or the publicly accessible databases that contain the names, faces, and addresses of sex offenders. Or how we take the vote away from those convicted of felonies. The punishment follows the offender forever, wherever he goes and whatever he does, because the price for his crime is never actually paid. Because the State has committed to curing criminals, it must monitor them for relapse, and continue to do so indefinitely. “Mercy, detached from Justice, grows unmerciful,” Lewis writes. Even if we “reform” our prisons to include electric guitars, they will still be warehouses where the State is doctor, disciplinarian, and priest—master of the body and of the soul.

We’ve Embraced the Panopticon

In “Discipline and Punish,” Michel Foucault describes the Panopticon, Jeremy Bentham’s prison design with a central guard tower and darkened windows intended to make prisoners feel that they are under constant observation. Foucault recognizes that this system of imprisonment has nothing to do with retributive punishment, but rather with creating what Foucault calls “docile bodies.” The all-seeing Panopticon reminds us that though we’ve been using the metaphor of “cure,” the State is not actually interested in health, but something more like total submission. We ought not to trust Lidless Eyes.

The unmerciful plant of rehabilitation and its bad fruit grow abundantly in the state of California. In 2011, the Supreme Court ruled that prison overcrowding in the state had grown so unreasonable that the prisons themselves constituted a violation of the Eighth Amendment. And the prisons got to that point because officials stopped asking whether a punishment was just, but concerned themselves with effectiveness.

For much of the twentieth century, California’s criminal justice system **operated by the humanitarian theory** that Lewis condemned. Judges handed out absurdly broad sentences, like five years to life, and let parole boards evaluate prisoners’ progress in rehabilitation efforts. But (justified) progressive concerns about racial bias on parole boards and conservative concerns about rising crime pushed then (and now) Gov. Jerry Brown, a Democrat, to sign a 1976 determine sentencing law that curtailed the immense discretion of parole boards. The rest of the country got in on the tough-on-crime act too, which reached its climax in President Bill Clinton’s Violent Crime Control and Law Enforcement Act.

‘Humanitarian’ Punishment Isn’t Really Humane

While being tough-on-crime seems like a return to the retributive mentality, it is actually an extension of the humanitarian theory. Once the proponents of the humanitarian theory had gutted justice from our theory of sentencing, we were left only with deterrence and rehabilitation—both approaches predicated on effectiveness, not justice.

Take the bevy of Three Strikes and You're Out Laws that were passed in states all over the country. These laws are responsible for much of the overcrowding afflicting American prisons, and directly responsible for Gary Ewing's draconian sentence of 25-years-to-life for stealing three golf clubs from a pro shop.

The Three Strikes Law is supposed to serve as a deterrent (its actual effectiveness is doubtful). But it also reveals the tyrannical "mercy" at the heart of the humanitarian theory. Under no circumstances does petty theft merit the same—or harsher—penalty as rape or murder. But that is precisely how the State treats a thief under the Three Strikes Law.

We may protest that the State is not acting justly, because the sentence violates the law of proportionality, "the concept of Desert," a requisite of justice. But the State does not care. In this case, the State is not even looking at the rubric of justice at all. Rather, the sentence is ultimately an expression of resignation. "We cannot cure this man," the State says about the repeat petty offender. "He is incurable, so we must lock him up forever."

Proponents of the humanitarian theory of punishment call their approach "merciful," and thus many Christians associate rehabilitation with Christianity. But mercy requires acknowledgment of a crime committed, just as forgiveness requires confession.

Humanitarians, on the other hand, call crime a "disease," or even more frightening, a "social pathology."

But a sick man cannot be pardoned, only cured. And if the cure doesn't take, well then, the social physicians conclude, the problem must be the patient. The Three Strikes Law is the inevitable pessimism that inhabits the dark side of utopian social engineering. It is what Lewis called "a man-eating weed." So it should surprise no one that such an enlightened progressive as Hillary Clinton invented the "superpredator," the maniacally violent black youth of the inner city, immune to the remedies of the State.

An 'Eye For An Eye' Restrains Violence

“An eye for an eye leaves the whole world blind.” This is one of the numerous supposed quotes from Gandhi. Many cite it to denigrate the retributive justice found in Mosaic Law, the *lex talionis* that mandates a penalty equivalent to whatever harm was committed. It is considered bloodthirsty, but consider what you would do if someone tore out your eyeball. I doubt many would content themselves—after staunching the blood issuing from their eye socket—with taking a single eye from their assailant. A response much more violent would feel in order. Rather than promoting violence, “eye for an eye” restrains it.

At the heart of the *lex talionis* is a timeless and universal moral truth. Justice requires punishment, punishment must be deserved, and just desert requires a punishment in proportion to the crime committed—neither too much, nor too little. This is far preferable to the senselessly draconian sentences and the perpetual monitoring and post-imprisonment sanctions subject to the whims of a grimly humanitarian state. Even if it has electric guitars—although forcing prisoners to listen to their cellmates learn how to play might be its own form of punishment.

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