

## Introduction

### *A Humane Solution to a Barbaric Situation*

This book challenges the nature, justice, and morality of criminal punishment in Western civilization. It questions the received history of criminal punishment; so, of necessity, it focuses on corporal punishment, because the history of criminal punishment is largely a history of corporal punishment (and its extreme form, the death penalty), its transformation into prison, and eventually the transformation of prison into mass incarceration. It uncovers the barbaric effects and practices of mass incarceration, and identifies credible, humane alternatives to the often violent punishments inflicted on today's offenders. The overall aim is to bring back a sense of moderation to criminal punishment, to eliminate punishments of excess (mass incarceration and the extensive penal and societal harm that it inflicts) and replace them with moderate and limited punishments.

Trying to reform criminal punishment is nothing new. For the last hundred years many reformers have advocated alternatives to incarceration: rehabilitation, probation, parole, fines, restorative justice, community service, and on and on. But as these alternatives have been introduced, the more incarceration has increased. So, regardless of their claimed success or beneficial effects, none of these can be taken seriously as having served as an alternative to prison. In fact, they may have even contributed to mass incarceration, since the idea of rehabilitating offenders through prison offers a ready justification for its existence, and more of it.

I offer two alternatives as a way to rid us of mass incarceration: (1) for the majority of offenders moderate corporal punishment (MCP), that is, the precise, limited, temporary, application of pain to the body, carefully controlled and administered according to specific guidelines; and (2) for

the very serious and worst of the worst offenders, open incapacitation (OI), carefully monitored physical incapacitation *without incarceration*.

Now, before you slam this book shut or switch off your Kindle, bear with me. I have come to these alternatives with much trepidation. But I have concluded that the immediate and long-term penal harm of prison (even a tiny bit of prison) is so destructive of individual, family, and community life that we must try something new, even if at first blush it seems distasteful, cruel, or even immoral. I have come to these two punishment alternatives to prison after comparing the outcomes of all alternative punishments according to available scientific data, cutting through the bias against corporal punishment that pervades the research and penal policy.

It might be argued that if a punishment is even a little bit immoral (or if you prefer, evil) it should be rejected and surely that is why we discarded the horrendous corporal and capital punishments of the past. But if that were the case, we could not punish at all, especially with prison, for as I will show, all punishment has an evil side to it, and that includes very well-meaning punishments such as rehabilitation.

The fact is that punishment is a very complicated concept, idea, or practice. All punishment, even the mildest, is a destructive act, always violent or surreptitiously aggressive. At its extreme, it destroys people's lives so that it can restore them. It may create remorse in the punisher as much as, or more than, in the punished. It is irresistible, always searching for ways to spread its evil wings.

### Three Justifications

Punishment is universally resented, but universally applied. Though it takes on different forms in different cultures, there are basically three justifications for its use.

The first is obedience, better known in the criminal justice world as deterrence—a forward looking justification that seeks to ensure that the infraction will not happen again.

Little Johnny, a four-year-old, lives in center city Philadelphia. On his way to day care, he breaks away from his mommy and runs across Lombard Street without looking. A car screeches to a halt, almost running him over. His mom rushes to him and

gives him a sharp slap on the legs. In tears, she cries, "Don't you ever do that again! You could have been killed!" Johnny winces, and cries.

If little Johnny repeats his offense, he will get a harder slap. One must be cruel to be kind, which is why mommies everywhere sometimes cry after they punish their child, though "Tiger moms" are said to develop a steely disposition. This natural response by a parent to her child's infraction, a practice as old as families have existed, gives credence to what is called the utilitarian philosophy, a wide-ranging approach to understanding society and human behavior, popularized and systematized by the English thinkers of the eighteenth century, Jeremy Bentham its greatest proponent. The hope that Johnny will not repeat his disobedience is called in the criminal justice world, individual deterrence. However, not only is it for his own good, it is for ours too. Had his siblings or friends been watching the slap, his punishment would also be called general deterrence, based on the hope that those witnessing the punishment will also be deterred. The moral basis of this philosophy is summed up simply: the end justifies the means.<sup>1</sup> That is, we want a secure, ordered society (family or community), and a punishment for disobedience is a means to get it.

The second is deserts, payback, "it serves you right," or "he asked for it." This view of punishment is commonly referred to in criminal justice as retribution, its more primitive version, revenge or vengeance.

In Singapore Anuar, a nine-year-old, uses an f-bomb at the dinner table. His father takes him firmly by the hand to the bathroom. "Give me your toothbrush," he demands. Anuar does as he is told. Dad wets it, rubs it on a bar of soap and says, "You used a very dirty word. Wash your mouth out with soap and water!" Anuar does as he is told. He has done this before. "I'm sorry! I'm sorry! I didn't mean it, I couldn't help it!" he cries.

This is a backward looking justification, necessarily brought on the offender by his own action. It rests on a "categorical imperative" (that is, a blunt moral assertion) that every wrong deed must be punished because it was wrong, and most importantly with a punishment that fits the crime. Often the punishment reflects the offense in some way, hence the punishment of Anuar is washing out his mouth, from whence came the dirty word.

The third is redemption and its many close and distant relatives (restoration, rehabilitation, enlightenment, reform, penitence, community service, and so on).

In a quiet suburb of San Francisco, three-year-old Billy throws a tantrum because his mommy refuses to give him a second ice cream. "That's it! Time out!" cries mommy. "Go to your corner and face the wall. You can come back when you're ready to say you're sorry!" Billy stands in his corner, sobbing. He turns around. "Face the wall!" calls mommy. But soon she relents, and goes to him. "Are you ready to say you're sorry?" she asks tearfully. "Yes mommy, I'm sorry." Mommy gives him a hug.

This approach, which may also include within it elements of the first two justifications, rests on the assumption that it is through pain and suffering of punishment that the offender learns his lesson and demonstrates to us that he truly understands the error of his ways, the horrible effects of his crime. On the positive side, this justification may have deep religious overtones, the enlightening functions of suffering that are recognized and practiced by most of the major religions of the world, whether through self-flagellation, austere restrictions on bodily movement (the lotus position, for example), or strict diet. The problem, though, is to suffer in such a visible way that one's confession of wrongdoing and expression of remorse are sufficiently convincing. The way we punish can help the punished to overcome a past wrongful act.

When toddlers misbehave, mothers everywhere in the West say, "Time out!" The child is ushered into a selected corner of a room, usually out of our sight, or, if he has been especially naughty, required to turn and face the wall, as described above. The type of punishment here is social ostracism, and its severity gauged by the length of time he is required to remain in the "time out" zone. Mothers of the twentieth century used the most familiar punishment of "go to your room," but in the twenty-first century this punishment doesn't work well because it is not demonstrably painful enough. If the offender is a teenager, it may be very much what she wants, to get away from all adults; and for any age child there is plenty to do in one's room, where most often one finds all the trinkets of the twenty-first century: iPads, tablets, computers, electronic games, Lego, TV, and even books. Like prison for white-collar criminals, it just isn't painful enough. Parents these days are stuck without the good old alternative expressed in

the adage “spare the rod and spoil the child,” the punishment philosophy expressed to his mother by Hamlet, who was very, very naughty, capable of the cruelest deeds:

I must be cruel only to be kind.  
Thus bad begins and worse remains behind.<sup>2</sup>

Until the twentieth century, punishment had a simple solution. You whacked the offender, then felt sorry for him and yourself. If only the offender had not misbehaved, you would not have had to punish. You do not want to punish, but for the good of all you *must*. Translated into eighteenth-century Enlightenment policy, each act of punishment is applied in the name of civil society. It is the righteousness of religious practice that relieves the guilt of cruelty, because it is done in the service of good government. It begins at home, where each child is turned into a good family member and eventually a good citizen. It is for the good of all.

It was during the Enlightenment, as we will see, that the very entrails of punishment, bodily pain intentionally inflicted, were torn from criminal punishment. The direct punishment of the body was abolished in a matter of several decades, and it was replaced, at the societal level, with the confinement of prison, and, within the family and schools, with “time out” and confinements of various kinds.

Except, that is not quite what happened. The violence of punishment of the body continued to be applied haphazardly within prisons, as I will recount often throughout this book. Nor did it go away in families or in schools, or, at least, it persists. Surveys show that the majority of college students report having been slapped or hit by parents when they were children. In the face of active campaigning, corporal punishment in schools still persists in some states of the United States and throughout many countries of the world, especially those less developed.<sup>3</sup>

## Two Ways to Punish

There are basically two ways to punish: punish the body directly or confine the offender’s body in some location or setting. Johnny and Anuar received bodily punishment. Billy was confined to a place. We should note, though, that Billy went to his place when told. There will be many occasions in which he must be taken by the hand or shepherded to that location. In

other words, even confinement in a place requires for the most part direct contact with the body of the offender.

Both methods of punishment may also be adjusted according to severity. Punishments of the body may be swift and temporary (a smack, a flogging, an electric shock) or drawn out, even permanent (the scarlet letter, whether branded on the body or worn on clothing, the cutting off of the hand or testicles, the death penalty).

Confinement may be for long or short terms—in criminal justice, from days to years or life in prison—and may be adjusted according to intensity, such as solitary confinement, hard labor, diet, and so on.

There are also techniques to enhance or aggravate each way of punishing. Direct bodily punishment may be applied in sessions spanning several months and, in practice, is usually combined with imprisonment—the setting most usual for torture, as we will later see. Bodily punishment is directly or indirectly always part of the punishment of imprisonment. It is more difficult to invent a confining punishment of prison that is short, sharp, and temporary, compared to corporal punishment that does not require prison. Shock incarceration, which we will review later, is one such invention. Both types of punishment may also be enhanced by the use of humiliation, again expressed and administered in many different ways, but usually in some kind of public spectacle, or, if in prison, the coercive, physical domination of inmates by guards or their designated surrogates.

### The Moral Problem of Punishment

As we saw with Johnny's mom, those who punish are invariably ambivalent about it, the punisher regretting the necessity to do it. This moral ambivalence is reflected in many societies, if not all. The moral problem with punishment is that it requires the intentional infliction of pain or suffering on an individual. As such, it has to be "legitimized," and so we have criminal laws to do just that. Western civilization has also developed a complex, chimerical, self-serving way to punish criminals that allows it to pretend that we do not intentionally inflict pain and suffering on an offender, or, if we do, it is accidental, so not our fault, even justifiable.<sup>4</sup> The isolated and largely secret conditions of prison life provide this moral smokescreen. In other societies that inflict violent punishment in public, such as most Islamic societies, the moral justification comes directly from Allah, via the

Qur'an, interpreted and applied by clerics or mullahs. They therefore do not need prisons as a moral cover, and, generally, their incarceration rates are much lower than those in the West.

Criminal punishment serves the morality of cultures in many ways, as the famed French sociologist Emile Durkheim so well demonstrated one hundred years ago.<sup>5</sup> What he did not quite manage to say, however, was that the enforcement of morality brings with it an inevitable hypocrisy, so well expressed in Judeo-Christian literature: "There but for the grace of God go I." Durkheim argued that punishing criminals reinforced the feeling of community and cohesiveness of society. It brought people together in combined moral condemnation of the criminal. It also established the premise for later scholars such as the great French playwright (and criminal) Jean Genet, who argued that, because criminals bore the brunt of society's morality play, they were sacrificial lambs to the greater morality of society; saints, not sinners. This view of criminal punishment stereotypes criminals as scapegoats and those who punish them as motivated by violence in the name of doing good for society. It is a recipe for excess. It is also why the language of punishment is replete with nonsense and fabrication,<sup>6</sup> such as, for example, the common claim in most textbooks of "corrections," that we send criminals to prison "*as* punishment, not *for* punishment"—that prisoners are being rehabilitated, not punished.

We point to the violent punishments of days gone by to provide the fodder for our moral assumptions today, to justify and dismiss the destructive conditions of prison life. We are fascinated by those ancient punishments because we cannot imagine applying them today, proof that what we do must therefore be more enlightened, civilized. After all, we have replaced them with nonviolent punishments of which we are proud: prison, probation, parole, community service, counseling, rehabilitation, restorative justice, work release.

In sum, we need those sins of our fathers to justify what we do today. We have lost sight of the essential ingredient of punishment, which is pain, without which punishment cannot be just. Given the confusion of our experts about criminal punishment, revealed, as we will see, by sentencing chaos and the fake ambivalence between punishment and treatment, maybe it is time for a civilized society to reconsider the painful possibilities of criminal punishment—all the possibilities, including various ways of inflicting pain that (1) preserve the dignity of both the offender and the punisher, (2) can be kept under control more reliably compared to prison, (3) are fiscally

responsible, (4) are more compatible with the retributive and redemptive justification of punishment, and, for the worst offenders who deserve it, (5) can, for our protection, incapacitate the worst offenders who deserve it, without using prison.

### Overview of the Book

The book first revisits the received history of criminal punishment, showing how punishment to excess, the essence of human folly, led us to deny the scandal of mass incarceration. It then argues that returning to physically based punishments—moderate corporal punishment (MCP) and open incapacitation (OI), incapacitation without prison—will break open the intellectual wall that shields prison from its many failed critics. The moral superiority of MCP and OI over prison is well demonstrated. Finally, modern technology can be harnessed to control, administer, and—maybe—normalize it by reining in the human excesses of criminal punishment by making it an everyday affair, no longer the spectacular, disruptive, and violent event it has been in the past.

Chapters 1 through 3 deconstruct the language of civilized punishment and examine why corporal punishment's disappearance in Western civilization coincided with the introduction and growth of prison. They compare the assumed barbarity of corporal punishment in the history of penology to that of the civilized punishment that replaced it: prison. They define what corporal punishment is and is not and distinguish it from torture. The overall question is, if corporal punishment were replaced by prison, is there any chance that its reintroduction would replace prison?

In answering this question, I uncover the basic (and necessary) hypocrisy upon which all punishment rests and deconstruct the modern language of punishment, identifying its many distortions and abuses. I show that aggression is the universal element of all punishment, which drives it towards excess, clearly revealed in the history of criminal punishment. Finally, I identify the bureaucratic facilitators of modern criminal punishment: the corrections establishment and the academy that feeds it.

Chapters 4 and 5 examine in more detail the moral justifications of punishment in the context of criminal justice. They dissect the strengths and weaknesses of retribution and deterrence and uncover the bias against corporal punishment that has caused researchers and policymakers to reject



corporal punishment in favor of prison. These biases and practices have contributed to a chaotic criminal punishment system that reeks of injustice and inequity, exacerbating the already terrible effects of mass incarceration. Then, in chapter 6, I address the third moral justification for punishment, redemption in the context of incapacitation (the major justification for the incarceration of the very serious offenders and the worst of the worst), and show how they may be incapacitated without prison.

Chapter 7 systematically assesses the range of criminal punishments available today, including moderate corporal and digital punishments, according to a set of criteria that assesses the outcomes of all punishment types. Moderate corporal punishment easily comes out the winner, but then the question is, to what crimes should MCP be applied? Along the way we also see that prison, by comparison, suffers from severe moral and practical defects compared to moderate corporal punishment.

In chapter 8, we look at the tremendous possibilities for refining the application of moderate corporal punishment that the technologies of the twenty-first century offer: in effect, the use of robotics to control and apply both moderate corporal punishment and incapacitation outside of, and instead of, prison. The great advantage of robotic delivery of punishment is that it can be applied equitably much more than other punishments and avoids human error.

Chapter 9 returns to the question of civilized punishment, comparing the punishments of Western civilization with those of Islamic civilizations that use corporal punishments. It asks why is it that the United States has the highest incarceration rate in the world and Islamic countries generally have very low incarceration rates? Perhaps prison is not as civilized a punishment as popularly assumed? I pursue answers to these questions by examining how the two approaches to punishment bear up according to the standards of international human rights and the US Constitution.

In Chapter 10, now freed from the blinders of twentieth-century thinking about punishment, we look at the possibilities, given the rapid changes in technology, of what might be the way forward to the end of punishment as we know it. Wouldn't it be wonderful if we could abolish punishment completely? Of course, that is a human impossibility. But there may be ways to make it more flexible, less severe, and less voracious, especially by first of all getting rid of mass incarceration. In this chapter, I offer a twelve-step guide to reaching that goal, but I also suggest ways to blunt the current destructive effects of criminal punishment:

- “Normalize”—that is, remove the spectacle of—all criminal punishment.
- Remove human error from the administration and control of criminal punishment by conducting trials, sentencing decisions, and administration of punishment robotically.
- Create the facility for individuals to punish themselves, instead of having the state do it, thus eliminating the most invidious role of punisher against punished.

In 1985, in my book *Just and Painful*, I laid out a powerful argument for the limited corporal punishment of some criminals. This book goes well beyond that thesis, shedding light on why that argument was, and still is, viewed with such shock and even outrage, when the logic and evidence in its favor far surpass that for prison, least of all mass incarceration. In the present book, I revisit some of the original arguments, with many additions demanded by the rapid technological changes of the past two decades, but, more importantly, I place them in the historical and philosophical context of the complicated, verging on tragic, role of punishment in Western civilization, of which the United States is the shining beacon.

And for those of you who just can't wait to debunk any of what I have asserted so far, or what you think I may say in the rest of the book, I have included an appendix that recounts the common (misguided) criticisms and my replies that you can refer to at any time.