

Penal Harm and Its Justifications

We halted before the door of a cell, and the journeyman on duty rattled his key into the lock. Inside, the client lifted her head, opening dark eyes very wide. Master Palaemon wore the sable-trimmed cloak and velvet mask of his rank; I suppose that these, or the protruding optical device that enabled him to see, must have frightened her. She did not speak, and of course none of us spoke to her.

“Here,” Master Palaemon began in his driest tone, “we have something outside the routine of judicial punishment and well illustrative of the modern technique. The client was put to the question last night—perhaps some of you heard her. Twenty miniums of tincture were given before the excruciation, and ten after. The dose was only partially effective in preventing shock and loss of consciousness, so the proceedings were terminated after flaying the right leg, as you will see.” He gestured to Drotte, who began unwrapping the bandages.

“Half boot?” Roche asked.

“No, full boot. She has been a maidservant, and Master Gurloes has found them strong-skinned. In this instance, he was proved correct. A simple circular incision was made below the knee, and its edge taken with eight clamps. Careful work by Master Gurloes, Odeo, Mennas and Eigil permitted

removal of everything between the knee and the toes without further help from the knife.”

We gathered around Drotte, the younger boys pushing in as they pretended to know the points to look for. The arteries and major veins were all intact, but there was a slow, generalized welling of blood. I helped Drotte apply fresh dressings.

Just as we were about to leave, the woman said, “I don’t know. Only, oh, can’t you believe I would tell you if I did? She’s gone with Vodalus of the Wood, I don’t know where.” Outside, feigning ignorance, I asked Master Paleamon who Vodalus of the Wood was.

“How often have I explained to you that nothing said by a client under questioning is heard by you?”

“Many times, Master.”

“But to no effect. Soon it will be masking day, and Drotte and Roche will be journeymen, and you captain of the apprentices. Is this the example you’ll set for the boys?”

“No, Master.”

—Gene Wolfe, *The Shadow of the Torturer*

The point is so obvious that it is generally ignored: punishment, in the classic sense, involves a government’s organized infliction of harm upon a citizen. Corrections is a bureaucracy established by government to carry out these harming acts.

In the United States, we allocate \$25 billion a year to the penal harm bureaucracy, and we currently apply these harms to 1 in 43 adults. Such a large and expensive social program requires justification, and many writers have sought to offer reasons for penal harming. My purpose in this chapter is to explore those reasons and ask if they provide a sufficient rationale for penal practices that are composed of officially sanctioned harms imposed upon citizens.

There is no simple answer to this question, as the many writers who have preceded my analysis would agree. My argument is that

when other writers have used value-positive terms such as *punishment* or *sanctions* to investigate this topic, it enables them to sidestep the harming intent and harmful content of the actions they seek to justify. In this chapter, I recall the common justifications of penal harms, and discuss them in light of the harm being advocated. When approached from this angle, the common justifications of these harms seem to rest on much more shaky ground. The importance of recognizing the harmful content of penal practice for its advocacy is illustrated by comparing the intuitive reaction to these three assertions: (1) It is good that we censure one another for certain conduct; (2) It is good that we punish one another for certain conduct; (3) It is good that we harm one another for certain conduct. If there is any uneasiness about the latter statement, it comes from our natural doubts about the wisdom of being instrumentally harmful.

In this chapter, I explore the justifiability of penal harm. I begin with a definition of the term, showing that what sets punishment apart from other governmental actions is that it seeks to harm the well-being of the citizen (offender). Such an action begs for justification, and I summarize the traditional retributive and utilitarian justifications of penal harm. After describing contemporary penal practice, I return to these justifications and consider how well they withstand scrutiny, given the nature of today's penal system. My conclusion is that our original doubts about penal harms are well taken.

I will argue that recognizing these doubts—bringing them into the penal harm debate—shifts slightly our understanding of the justifications of penal action, for it calls to our attention the deeply ingrained ambivalence we have about it. Specifically, I will argue that neither of the traditional retributive or utilitarian arguments survive scrutiny about the way they justify penal harms. If this is so, then the intellectual basis for our system of harms is wanting.

The phrase *penal harm* receives a more detailed definition below, but a brief explanation of my adoption and usage of the term in these opening paragraphs will be helpful. It is not meant to refer only to the indirect consequences of penal sanctions for those upon whom they are imposed. Indirect suffering of punished offenders and their families¹ has received wide attention in the literature: men in prison are exposed to severe deprivations (Sykes 1958), experience attacks upon their coping abilities (Toch 1989), are exposed to a range of medical (Hammet 1989) or other environmental threats (Wright 1989); for example, about one in five are victims of sexual attack (Lockwood 1980). Even though recent studies have suggested that the impact of physical and psychological stresses in prison has been exaggerated

(Bukstel and Kilman 1980; Zamble and Porporino 1988), it is undeniable that most prisons are not healthy places.

But even if prisons were healthy places, the penal sanction would be an act of harm; not merely because of the loss of freedom, but because the very content of punishment is harm. If it does not contain harm—if the offender does not suffer—then we do not think the offender has been punished (Hart 1963).

Nor is the term meant to refer primarily to the harms that accompany attempts to control offenders and to protect society from them. Modern methods of behavior control often have undesirable side-effects, especially drug controls and electronic controls (Ball, Huff, and Lilly 1988; Baumer 1990). Nobody should underestimate the discontents that coincide with being under someone else's control.

Yet even if we were to follow the proposals of some to do away with behavior control as a goal of sentencing decisions (Singer 1979; von Hirsch 1976), penal sanctions would be acts of harm. Indeed, according to those advocates, they would then be pure acts of harm against offenders, and this would be a philosophical advance.

It is in this sense that the term *penal harm* is used here—it refers to the essence of the penal sanction—that it harms. It refers as well to its special status as a planned governmental act, whereby a citizen is harmed, and implies that harm is justifiable precisely because it is an offender who is suffering.

The pains of imprisonment and the collateral consequences of control are important considerations to the concept of penal harm, but are incidental to my usage of the term. Terry Baumer (1989) tells a story that illustrates the point. In an exit interview of one woman in his study of electronic monitoring of pretrial offenders, he learned that the anklet had caused a serious rash on her leg. When he asked her why she didn't tell the authorities about the problem, she answered that "she thought it was supposed to be that way."

It is precisely this aspect of the penal sanction that offers the best understanding of penal harm: it is supposed to hurt. When it does—when prisons are painful, when controls are demeaning—we are no more surprised about it than the torturer's apprentice is by the strategic choice of the "full boot."

AMBIVALENCE ABOUT HARM

There is a great deal of ambivalence about making prisons harmful places. (There is less ambivalence about sending citizens to prisons in order to harm them.) Our Constitution places restrictions on how onerous a prison can be, at least with regard to the indirect pains of

being incarcerated. Professionals in the field of corrections are loath to admit that they are bureaucrats whose job it is to implement judicially decreed harms. It is popular to portray the offender as benefitting from the harsh regimes of correctional programs—getting better due to boot camp, or improving from being “scared straight” (Finckenauer 1982).

It is odd that so many people seem to want to downplay the essential harmfulness of the penal method, as though it were some sort of community secret. It is curious also that the simple statement of the nature of punishment and the task of corrections often provokes defensiveness among the officials of government who bear some role in the punitive process—legislators, judges, managers, and workers. Almost nobody wants to acknowledge they are in a business that harms people, and to state the obvious dismays many who work in the corrections field.

They react as though they have been accused of cruelty. They protest in one way or another: “But these are people who have injured others”; “Somehow, criminals have to be stopped”; “Just think what life would be like if the government did nothing about crime”; and so forth. Or they proclaim: “The punishment must fit the crime”; “An eye for an eye, and a tooth for a tooth.” They object to the implication that there might be something wrong with a government-run harm business. In general, two types of objections are voiced. It is said that we must harm offenders because crime must be eradicated, and that we must harm them because to not do so would be morally wrong.

The important point is not whether these protests are right or wrong. They serve to divert attention from the essential nature of punishment—it is organized, intentional harm against a fellow citizen. In recent years, the industry of penal harms has become a carefully calibrated procedural machine. Responding to complaints of arbitrariness and capriciousness in the allocation of penal harms, the makers and managers of the correctional process have produced a host of reforms that establish an overlay of due process and commensurability on the centuries-old Anglo Saxon traditions of law. The aim has been to eliminate irregularities in the production of penal harms and to solidify the justifications of its foundation institutions; in other words, to pursue

the control of pain delivery, rather than the control of pain itself. Regulation of pain becomes so important that the necessity of inflicting pain is more or less taken for granted . . . Sufferings disappear in a fog of regulating mechanisms. Somewhere, far behind, is an activity of dubious repute. But we do not come quite

close to it because we are so intensely preoccupied with building up regulatory mechanisms. (Christie 1981: 49)

The harm is justified because it is right, and it is necessary because it helps both citizens and offenders alike. These are the easy—the commonsense and everyday—justifications we use in our self-defensive reflections about harming law violators. How persuasive are these arguments?

Historically, social philosophers have spent considerable time exploring and explaining the justifications for government-sponsored injury against its citizens. Before turning to these justifications, we need to consider at more length the nature of the official harm invoked through the punitive apparatus.

PUNISHMENT DEFINED AS PENAL HARM

The traditional view of the definition of punishment can be summarized as follows: punishment is an evil or unpleasantness imposed by personal agency of properly constituted authority against an offender because of the offense (Flew 1954). Lest the point be missed, the philosophers of criminal law have gone on to stress that the harm (or pain) is central to the punitive act, not merely its by-product (Benn and Peters, 1959), that punishment “always involves an expressed intention to inflict pain” (Westermarck 1932: 78); that “punishment is an Evil inflicted by a Publique authority” (Hobbes 1937: 164).

This definition has generally been used to distinguish the various types of gratuitous harm caused by individuals from official harm that is permissible because it is legitimate punishment. It is merely a definition, and is not meant to excuse the harm of governments—justifications of government harm are more complex and are considered below. Moreover, as a definition, it does not indicate how much pain or hardship is needed before an act is a punishment, but only that the intention of harm, under certain limitations of proper authority and proven citizen misbehavior, can be considered a punishment and therefore permissible.

One of the ironies of penal harm is that it is invoked as a response to the harmfulness of crime. It is a distorted inversion of an old axiom: we are told that “two harms make a good.” In the case of modern punishment, criminal harm begets penal harm. For this reason, it is not surprising that legal philosophers have gone to some lengths to distinguish among the various types of harm, so as to excuse some harms by elevating them to the level of penalty.

That criminal harms require official attention is a well-established idea. John Stuart Mill (1926) provided the classic argument that acts

should not be criminalized unless they produce harm—that harm is a limiting principle to criminalization—since this would guarantee that the behavior is being repudiated simply because it is objectively reprehensible, and not “purely or even primarily because it is thought to be immoral” (Packer 1968: 268). Since one role of government is to protect the rights of its citizens, the negative right to live without injury from others is thought to be the proper province of the law. Indeed, the very existence of interpersonal injury or its threat produces the need for a criminal law in the first place. This relationship is so direct that some legal philosophers have argued that criminal harm “is required of any crime validly on the books of our legal system” (Gross 1979: 114).

To use the existence of a criminal harm as a justification for a penal response is to leave two questions unanswered. First, what constitutes a harm that is rightfully subject to criminalization? Second, why is a *penal* response required, rather than some other response?

In a series of books, Feinberg (1984; 1985; 1986; 1988) has developed an elaborate theory of what constitutes harm, and of the bases on which distinctions may be drawn about criminal and noncriminal harms. A full description of this work is neither possible nor necessary here; rather, it suffices to summarize his main thesis: a harm exists when there is an unjustified setback to legitimate interest to which a person has a claim. For this reason, a citizen may be publicly blamed for action that causes harm. Thus, harm occurs when there are setbacks to a person’s legitimate interests sufficiently blameworthy to call for a public condemnation. The language of public blame and condemnation is the penal action.

Therefore, the discomforts resulting from penal sanctions do not meet Feinberg’s test as true harm. Crimes occur when offenders cause illegitimate setbacks to legitimate interests of the victim. Therefore, the sanction which follows the crime is not harm, for it is an entirely legitimate setback to illegitimate (criminal) interests.² Feinberg lists penal harms as precisely the kind that are excluded from criminalization, because to criminalize them would be patently illogical: the remedy for a criminal harm is a penal sanction; how then, logically, could the use of a penal sanction become the basis for invoking that sanction as a remedy? Not only would it be troublesome to identify the perpetrator, it would be ridiculous to subject the state’s agents of penal harm to a sanction of harm, merely for having carried out their duty. At a minimum, there would be an unending trail of criminal culpability.

Yet simply because a penal harm can never be considered a criminal act does not mean it is not harmful (and, perhaps as a

consequence, regrettable). Nor does it mean that the invocation of penal harms raises no moral problems.

In a persuasive argument about the moral content of the criminal law, Husak (1987) has criticized those who would treat harm as an objective component of conduct that can be properly criminalized. Drawing on Feinberg's earlier work, Husak demonstrates numerous examples of circumstances in which harm occurs to a citizen as a result of intentional action by a fellow citizen, for which the application of the criminal sanction is at least questionable, if not downright inappropriate (234–36).³ Because this is the case, Husak suggests that a “moral and political theory is required to justify whether and under what circumstances the criminal law should recognize a harm” (235).

It follows, of course, that the only distinction between the harms of punishment and the harms of criminality is a moral/political one. The law violator's harms are an attack upon the victim (discussed in detail in Chapter 4) and a breach of the imperatives of government, whereas the government's harms are the realization of those imperatives. In fact, what is abhorred about the lawbreaking cannot be solely the harm that results, because harm is precisely the instrument of punishment. This is why the criminal law must appeal not to some objective dislike of the harms committed by select citizens, but to a vision of a moral/political order by which the government's use of power is justified, indeed by which its very function as arbiter of the uses of harm is certified. When it comes to the issue of imposing harm, the idea of government is that it may harm according to its rules when its citizens harm in their breach—indeed, some influential theorists have argued that on this occasion the government is *compelled* to harm its citizen (Mabbot 1939; Van den Haag 1975).

Why, then, does the government get to do what its citizens cannot? One answer, admittedly inadequate but nonetheless worth saying in passing, is that the government makes the rules and reserves for itself that power. This answer is not only obvious, but also tautological. It suggests a revised version of our second question about penal harms: What interests would justify requiring the government to do what it forbids for its citizens? To answer this question, we must explore the traditional moral/political justifications of the use of coercive power by the state.

The two traditional candidates for the moral/political order to be advanced through the coercive power of the criminal law are retributivism and utilitarianism. Retributivism refers to the idea that people should always and only be treated as ends and never as means, and that the actions of government are legitimate only to the degree to which they are consistent with this model of citizenry. The

utilitarian ideal is more complicated, in that it posits a desirable consequence of government action and advocates government action that promotes the desirable result (Sen 1979). These views of the moral order to be advanced by the criminal law propose different understandings of harm, especially as they reflect the use of penological harm as an instrument of government.

RETRIBUTIVISM

The predominant tradition of retributive thought has been that "the state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not" (Rawls 1971: 4). To this end, Kant has given his famous admonition: "Even if a Civil Society resolved to dissolve itself with the consent of all its members . . . the last Murderer lying in prison ought to be executed before the resolution was carried out" (Kant 1887; cited in Braithwaite and Pettit 1990: 198).

The use of harm as a technique of the retributive government is therefore a commandment. It stems from the main function of law, which is to use the state's harming power to identify the prohibited acts in ways that are perfectly clear to the citizenry.

There is some debate among retributivists as to subsidiary elements of the theory. Some have argued that the main object of retribution is "to restore the balance which the offence disturbed" (Ashworth 1983: 16). From this perspective, all society is poised in a delicate balance of the benefits of social living (commerce, aspirations, and so forth) and the burdens it implies (especially, compliance with the law). But this is a precarious balance, for it relies on each person's respect for the rights of the other. Offenders, in choosing to behave criminally, take advantage of the inherent vulnerability of social living and upset the balance. The imposition of penal harms reestablishes the balance by removing the advantage gained by the unlawful act. The original formulation of the "balances-and-burdens" idea of the criminal law (also referred to as benefits-burdens) was provided by Kant (1887), but there are persuasive modern versions of the idea (von Hirsch 1976; Sadurski 1985; Sher 1987).

This formulation has come under some criticism, even by former advocates (von Hirsch 1985), for a variety of reasons. These problems have been well-chronicled (Braithwaite and Pettit 1990) and seem to revolve around the extreme abstractness of the concepts—what constitutes benefits or burdens when applied to the specific circumstance of criminal acts? Moreover, "in any society with gross inequalities of wealth and power, restoring the balance of benefits and burdens

is a troubling notion" (Braithwaite and Pettit 1990: 159). In capitalist societies, the benefits of citizenship and the burdens of survival can be unequally distributed, and many of those convicted of crimes are already subjected to the severe burdens of poverty and social disadvantage.

A purer version of retributive thinking is that the state inflicts harm in order to confirm the moral order established by the laws of the state. The threat of the full power of the criminal law is central to the educative function of the law, for it persuades citizens to adopt its moral norms (Gorecki 1979; Murphy 1988; Shafer-Landau 1991). That is one reason why Van den Haag (1975) has argued that any threat made by the criminal law must be carried out against those who ignore it and cannot be waived in the interest of mercy. To make a threat and then not impose what it promises is to break trust with the very moral authority of the law itself, to mock its claims as the moral guide it supposes itself to be.

The moral education basis for retribution need not be so harshly drawn. The main idea is that the offender, by the conduct, demonstrates a kind of moral ignorance. The retributive response serves to educate the offender and the punisher alike as to the forbidden nature of the conduct. It confirms the punisher's commitment to those moral norms, and it calls the lawbreaker's attention to the wrongfulness of the conduct. Thus, the criminal law teaches moral behavior. We will return to the instructive nature of penal harm later in this chapter and also in chapter 4, when we ask the question, "What is learned about the moral order by the person subjected to official harms?" Duff (1986) has offered a retributive answer to this question: the offender should learn from the punishment that he or she is ashamed, feels remorse, and repents of the act; in other words, the offender should change from claiming the right to injure other's legitimate interests to claiming no such right. Using similar logic, Adler (1991) has insisted that the preferable form of a punishment occurs when the wrongdoer admits the error and elects some form of personal loss as a public affirmation of commitment to behave otherwise in the future.

There is also a morally-based pure form of retribution known as "just deserts," which is offered as a basis for understanding the very reason of the criminal law. Deserved punishment is housed in the idea that the conduct it forbids is morally reprehensible (von Hirsch 1985). The instrument of criminal reprobation is inherently moral because it is inherently blaming, and is therefore based upon a claim of moral superiority. The imposition of the penal harm makes tangible the moral evaluation of the criminal's conduct, and it symbolizes the communities' outrage at the crime. This is why the relative reprehens-

sibleness of acts determines the amount of official harm they should evoke (von Hirsch 1985).

From the perspective of the state's use of harm, distinctions among the various schools of retributive thought are generally minor. The moral educator is required to design harms that are most capable of educating, but that difference aside, all retributivists believe harm serves a function both symbolic and real. The symbolic function of harm is to provide visible, public certification of social disapproval of conduct which the society, through whatever processes are used to determine its laws, has defined as unacceptable. This means that the criminal act is exposed as a false social claim that cannot be sustained by the offender (Murphy and Hampton 1988). The more practical function is that by injuring a citizen, the state imposes a cost that denies that citizen the satisfactions which may have accrued from the act.

It is also important to recognize three constraints that a retributive moral theory places on the use of penal harm by government. The first is a set of understandings traditional to Western legal theorists about those acts that the law may forbid: specific behaviors, previously forbidden, which are intentionally chosen when the actor could have behaved otherwise (Hall 1960; Hart 1961; Feinberg 1984). Engaging in such behaviors is a necessary condition of the moral blame of the law. Second, penal harms must be commensurate with (or proportional to) their moral wrongfulness, imposing injury in a way that demonstrates the community's relative disapprobation of the behavior (von Hirsch 1976; Singer 1979). Third, the law must operate within its own procedural and substantive constraints in order to carry the moral authority it claims. Thus the retributivist does not count the official acts of injury against criminal offenders as harm in any meaningful sense. The acts of government may intend (and achieve) pain, loss, and discomfort. Yet the context is the moral high ground of society—the injury is a product of the offender's bankrupt choices and, far from calling the society's morality into question, reflects well upon the seriousness with which the society takes its obligation to publicly defend its legal prohibitions. So long as the pain and suffering of the offender occur within the limits of the law's due process (which can include prohibitions against cruel and unusual inflictions of pain, as does the U.S. Constitution) and is delivered with due regard for proportionality, the existence of well-oiled and effective bureaucracies of penal injury are to be applauded as wise social achievements.

UTILITARIANISM

The discussion of utilitarian moral imperatives in the use of official harm has been made confusing by the common appeal to the types of

utilitarian justifications of punishment: rehabilitation,⁴ deterrence, and incapacitation (or social defense). The all-too-quick reference to these terms of common usage obscures the argument of utilitarianism in two ways. First, it assumes that crime control is the only utility that a penal harm could be used to achieve. Second, it assumes that this classification of utilities is helpful to understanding the general principles of utilitarianism. Neither assumption is appropriate. Crime control is not the only aim of a utilitarian moral order, and these forms of utilities understate the range of values a utilitarian might use to justify penal harm. The formal basis for a utilitarian argument is straightforward: the use of the intentional harm promotes some larger important benefit. This benefit can accrue to the larger social group (as in reductions in crime) or it can exist for individuals who experience enhanced lives.

There are three main traditions of formal utilitarianism. The first, and perhaps earliest, was Jeremy Bentham's classic treatise, first published in 1789, in which he offered that the purpose of any system of government was to maximize the happiness of its citizens (Bentham 1982) by enhancing their well-being—a formulation that many would find attractive. In doing so, the government should observe closely the rule of social equality that each citizen "counts for one, and only for one."

The utilitarian viewpoint is often interpreted as additively mathematical. If a government act benefits some large number of people at the expense of a smaller number, or if it provides a greater benefit to some, then the costs it places on others are justifiable. The utilitarian ideal is the advance of the common good, as measured by the overall, (sometimes even the average) individual benefits of government action.

There have been two main criticisms of the utilitarian ideal. First, many philosophers are unsettled by an argument that the well-being of some can be sacrificed in order to advance the benefits of others, even when the result is greater social good. Second, critics have argued that happiness is a vague term, likely to have different meaning for different people. Strategies to advance happiness therefore require more detailed ideas about what, exactly, happiness means, and how to get it. Since what makes a person happy varies from individual to individual, it may be impossible to advance the well-being of the larger society—a unitary well-being does not exist. Because of these problems, critics of utilitarianism have argued that the role of government is to ensure that the *means* to happiness are made available to all, but not to choose some individual's well-being as being desirable over others' (Rawls 1971).

Still, there remains a continuing desire for a revised version of the happiness formula which seeks to minimize the experience of pain and harm by offenders. Nils Christie (1981) has written an influential though sympathetic critique of retributive punishment, suggesting that the use of harm as an instrument of government is suspect. David Fogel (1988), a longtime advocate of retributive thinking, has recently sought ways to minimize the harm resulting from correctional policy. Edgardo Rotman (1990) has been more assertive in saying that offenders have a legal right to be rehabilitated rather than merely punished. None of these works seems to take much account of the harms caused by offenders, however, and surely these harms are themselves important aspects of overall happiness in society.

Some critics of traditional utilitarian theory have argued that when one person's interests are sacrificed to increase another's gain, the interests of liberty are offended (Dworkin 1979; 1981). Ironically, this critique has led to a second tradition among utilitarians defining liberty as the main utility to be advanced. In this tradition liberty is often expressed as legitimate *autonomy*. An important refinement of this idea, offered by Braithwaite and Pettit (1990), is the interest in maximizing *dominion*, a term they use to refer to the capacity to elect from among "those options which the normal agent is capable of realizing in normal conditions without the special collaboration of colleagues or circumstances" (61). Since any government use of penal power is an incursion into liberty (or domain), these utilitarians argue that there must be a prior demonstration that such a use of power will, in the long run, promote greater liberty among individuals taken as a whole.

The third tradition of utilitarianism is preventist, in that it seeks to minimize the amount of crime. This approach can be thought of as advancing a kind of negative liberty, or placing a value on government practices that most prevent the criminal behavior which restricts liberty. Here, the traditional forms of utilitarian thinking are considered: general deterrence, rehabilitation (and specific deterrence) and incapacitation. Numerous explanations and defenses of these approaches have been written (see Honderich 1984), which is probably one of the reasons that this tradition of crime prevention has come to be equated (falsely) with the general ideal of utilitarianism.

Recently, a group of Christian reformers has advanced the concept of *restoration* as a utilitarian value (Van Ness 1989). This view is a reformulation of the benefits-burdens model of retribution that incorporates a strong theme of rehabilitation ideas. The utility to be maximized is the reestablishment of harmony between the community (including the victim) and the law violator through a combination

of acts of contrition by the offender and behavioral change programs by the state.

Unlike the various forms of retributive models, the choice of a utility to be maximized has substantial implications for the use of harm by the state in service of the utility. The preventionist utilitarian values set the stage for potentially enormous injuries to citizens in pursuit of reductions in crime, for they express no formal limit on the use of official harm to achieve the aims of negative liberty (Braithwaite and Pettit 1990; von Hirsch 1990). This is undoubtedly one reason why populations under all forms of formal government control skyrocketed in the United States during the last 15 years (Austin and Killman 1988; Mauer 1990; see also Chapter 2), because the only apparent policy that has driven the use of official injury during this period has been a kind of frenzied desire to get tough on crime at any cost.

By contrast, other utilitarian models attempt to build in limits to the use of harm. This is true, for example, for harm reduction models that include the experience of harm by the law violator in the overall calculation. They seek to minimize the amount of harm in a society, and they include penal harm to offenders as a part of the equation. Egregious harm to offenders in pursuit of crime reduction would be impermissible under a harm reduction scenario. Equally so, happiness and liberty models are forced to confront the losses incurred in these utilities when offenders are harmed.

Utilitarian models are presented by their advocates as having an advantage over retributive thinking in that they define a target to be achieved rather than a constraint to be obeyed, as is the case for retribution. Under the conditions of uncertainty, which dominate social policy, it is argued that targets provide a rational and empirical basis for choice among policy alternatives, taking into account the inevitable risks of any option. Reliance upon constraints such as desert can only appeal to the original values in choosing policies (Braithwaite and Pettit 1990).

This suggests an important potential limit that may be placed on any utilitarian theory of official harm. Before the harm can be imposed, it must be demonstrated that its invocation will, in fact, tend to advance the valued utility. Otherwise, the harm constitutes gratuitous and indefensible incursion into lives, as well as a misuse of precious governmental resources available in behalf of the utility (Clear and O'Leary 1983).

PUNISHMENT, HARM AND OFFICIAL HARM

A definition of punishment helps identify the circumstances under which harmful acts by government against its citizens might be

justified. This is important because of the strong tradition in Western thought that democratic societies are governments of the people, and exist to serve the interests of the people, not to injure those interests. Surely any situation in which a government acts with the full intention of harming one of its members is inherently suspect, and requires explanation and strict limitation.

The need to draw boundaries around the meaning of punishment derives as much from the history of government abuse of power against citizens as it does from philosophical niceties. The standards of punishment in the eighteenth and nineteenth centuries were by any measure extreme. For instance, even in the prerevolutionary Quaker society of Pennsylvania, all felonies except larceny were punishable by death (Barnes and Teeters 1959). In the United States' early development, it was not unusual for penalties to involve hard labor, corporal punishment, and extreme public humiliation. The period of transportation—exile of criminals—had only recently ended. In fact, when the government chose to impose harm on a citizen for an act, the painful result was as obvious as it was injurious.

Drawing restrictions on this power was a concern of the new political order, whose philosophers advanced the idea of representative government (Ford, 1988). They had lived through the experience of brutal despots and indifferent monarchs, and they wanted to create intellectual structures for the use of power by the representatives of the people. They sought a state capable of action in behalf of the interests of the governed, not the government.

Yet they certainly recognized the positive uses of acts of harm. Revolutions against autocratic rulers always required the will to violence. The mechanisms of freedom, then, seemed to demand the aggressive use of injury and its potential to guard liberty, just as the techniques of suppression incorporated pain as a main instrument. Philosophers of freedom thus developed elaborate ideals about how and when to harm citizens officially.

A moment's reflection will reinforce the fact that many kinds of authorities use intentional harm to achieve some desirable aim. Parents spank their children or purposefully withdraw privileges in order to teach them rules. Universities impose fees upon students who fail to register for courses on time or are late in paying their bills. Bosses suspend or even terminate their subordinates when their work performance is inadequate. Intentional, calculated harm as an instrument of the powerful is widespread in modern society.

It would be naive, however, to think of harm as purely an instrument of authorities and power-holders. Unions withhold labor as a means of crippling business owners and equalizing strength of

claims over the benefits of commerce. The pains that children impose upon their parents in order to achieve their freedom are legion.

The use of harm and its threat is so fundamental to human interaction that it is important to be clear about the harms specific to punishment if there is to be any sense made of the problem. While there may be a general interest in keeping harm to a minimum in all social transactions, governmental harms against citizens in response to rule-breaking are a special case.

In order to further our understanding of the meaning of penal harm as opposed to other types, we need to consider the several forms that harm may take. As a working definition of harm, let us adopt the following broad statement: harm is the violation of a person's well-being. It should be noted that this definition closely associates the idea of harm with the precepts of utilitarianism. It should be noted as well that the idea of "well-being" is by no means a simple one. But the choice of the definition makes it clear that the injury resulting from an act of harm need not be merely physical; for example, an act of harm may be emotional or economic. The definition also makes it clear that the mere experience of pain may not constitute harm. Medically necessary injections both cause a person pain and, when used correctly, promote that person's well-being.

Well-being, as a concept, is central to the philosophical world of the utilitarian, who assigns to government the responsibility to maximize the well-being of its citizens (Bentham 1982; Mill 1926; 1951). But the problem with the idea of well-being is that, at least initially, it seems so subjective. What makes one person happy makes another bored; what one person desires another disdains, and so forth. With such widely divergent experiences, how can government responsibly take on the duty to maximize well-being without favoring one point of view over another—and thus violating the maxim that "each counts for one and only one?" With all these differences among people, how do we go about making each person count?

In an excellent discussion of this and related problems, Griffin (1986) has proposed that the elements of well-being can be properly conceived as occupying a hierarchical structure that includes needs, informed desires, and "prudential" values (those related to one's self-interest as a social animal), which together connote a "moral notion of well-being" (55). Thus, a person's well-being comprises not simply a person's wants, but includes also the objects of a person's interest, given that the person has an "appreciation of the nature of the objects of his desire." This is an argument for the existence of a higher order of utilities that includes not simply happiness, but also prudential

values, which "take a global form: this way of living, all in all, is better than that [way of living]" (323).

Von Hirsch and Jareborg (1991) have suggested a hierarchical model of well-being that can be used to evaluate the degree of harm caused by a criminal act. In effect, they propose using a two-dimensional scale of domains of interest that ranges from temporary physical loss to permanent loss of ability to pursue liberty and happiness. The concept of well-being, according to this scale, infers a pattern of self-interest.

With this kind of understanding of the idea of well-being, it is easier to integrate the views of the traditional legal theorists, who have given such prominence to the idea of autonomy as the appropriate guarantee of the criminal law, with the views of other theorists who see the law as having a more affirmative need to advance specific utilities. People who believe the role of the law is to promote autonomy usually approach their definitions from the standpoint of negative rights; that is, they argue that the law should operate only when there are violations of autonomy. Others, such as Braithwaite and Pettit (1990), argue that the task of the law is to promote "dominion," which is something like the state of equal access to maximum possible liberty (64-5)—a positive version of what they refer to as "autonomy."

These conceptualizations share a common theme: well-being includes the condition of being able to act in one's true self-interest. This is true for the retributivists and the utilitarians alike. While there are numerous subtle and not-so-subtle variations on this theme, they are not important for the purpose of understanding the role of penological harm. Penal harm is that situation when law violators are restricted, hampered or prevented from acting in their own legitimate (or as Griffin would put it, "prudent") self-interest.

Indeed, it is the very existence of the capacity to pursue important and legitimate ends with some reasonable expectation of their achievement that constitutes well-being (Griffin, 1986, 32). As an attack on well-being, then, the correctional sanction takes aim at the self of the law violator, in particular that part of the self that contains aspirations, informed desire, and the pursuit of personal ends.

Because we are discussing the well-being of law violators, it is important to emphasize an aspect of well-being that ordinarily would not be very troublesome. What about the law violator's claim that well-being is dependent upon the capacity to continue to violate the law?

This is not an accurate view of well-being, for it treats any of a person's approaches toward satisfying a desire as equal, no matter

how imprudent the approach may be. With the exception of unusual cases (such as civil disobedience), the object of law-violating behavior is seldom simply to violate the law. Rather, the lawbreaking is an instrument toward a larger desire or set of desires that perhaps most people would feel: excitement, the command of material goods, among others (see, for example, Katz 1988). To interfere with crime as the means of meeting those desires is not really an attack on the person's well-being, for it leaves open a variety of other, more prudent, ways to meet the desire. To attack well-being would require interfering with all means of satisfying the desires, regardless of their prudence.

By way of example, a certain person, Tom, may feel a desire for power and may exercise this desire through predatory acts of rape. Neither philosophers nor psychologists would say that Tom's well-being is linked to the ability to rape freely. Rather, they would agree that Tom's personal desire for power had taken an imprudent (to say the least!) manner of expression, and that his true well-being was dependent either upon overcoming his attachment to power or finding other ways of expressing it. They would certainly not feel that in being unable to rape, Tom's well-being would suffer. Nor would they say there is something inherently forbidden about Tom's desire to feel powerful.

This is to say that while the intent of a punishment is to harm well-being, for most law violators, well-being is not tied up in being criminal, *per se*, but in meeting more or less normal desires which, in fact, the person has chosen to address (abnormally) through crime.⁵ It follows that stopping the person from committing a crime is not, in and of itself, a punishment. For instance, we would not say to an offender, "Your punishment is that you are no longer able commit crimes." We would not think that being unable to commit a crime would be a harm—we would not see it as a penal harm or an attack against the person's well-being. Instead, we would expect that as a minimal condition of any reasonable social intervention, the person's ability to harm others would be constrained. The penal intervention that prevented criminality would not be considered "harmful" unless it also injured well-being by attacking the ability to exercise free choice of prudent self-interest to meet desires.

We feel this way because it is never an aspect of legitimate autonomy or dominion to violate the well-being of others. To be specific, no matter how strongly a rapist might believe it so, his prudential well-being is never dependent upon continued raping, for a wholly acceptable level of well-being is conceivable (indeed, perhaps only possible) without raping. To take actions that interfere with his

capacity to rape is not to punish; the latter requires a direct reduction of the rapist's well-being. To control his raping may be a socially wise policy, but it is not a punishment.

This discussion suggests three important aspects of penal harm. First, penal harm interferes with a person's pursuit of individual ends that are otherwise legitimate ends. Thus, the claim of the advocates of retributive punishment, that it treats people always as ends and never as means, is a bit overstated—for retributive punishment has repudiated the very ends that give the person well-being. Further, an attack on a person's well-being, in order to promote some negative right (such as autonomy), is only a variant of the circumstance in which human beings are used coercively to promote the interests of others. It would be one thing merely to repudiate illegitimate ends of the law violator, but that is not solely the character of punishment (though that is one of its valuable results). The repudiation is accomplished by damaging the person's own deeply held ends—can it really be said that this is the higher moral position because it is, somehow, respectful of autonomy?

Second, it should be clear that no appeal can be made to objectivity, either in the idea that the criminal law is an instrument, or in the substantial social benefits the law seeks to promote through the use of coercive power. These subjects are patently moral and political. Admittedly, there may be widespread social consensus about much of what the criminal law now protects and how it does so, but social consensus is not the same as sociological objectivity. The central importance of subjective judgments about penal policy, which range from the determining of specific manifestations of negative rights protected by the law (Feinberg 1984; Husak 1987), to deciding which utilities are prudential for citizens (Griffin 1986), is undeniable. Defining harm—either its prevention or its use as a technique—requires making choices about moral and political priorities.

The existence of a proven criminal act, then, does not objectively require a punitive response any more than a heroic act would require a reward. Responding to crime via policies of penal harm is a moral/political act that advances some interests over others. The implications of the policy cannot be relegated to externalized costs of justice. To the contrary, the decision to repay crime with harm produces consequences that must be included in calculations about the wisdom of the decision in the first place. Both retributivists and utilitarians are forced to consider the implications of their moral frameworks when they design penal instruments.

For instance, when retributivists say that the criminal law must be invoked when a citizen harms another because the original harm

requires it, they ignore the wide varieties of harm that are not protected by the criminal sanction. They act as though there is some natural hierarchy of harms that is not a product of a given society and a given culture, when a more accurate view is that the construction of law is always an act of political and moral symbolism (Garland 1990). Presenting themselves as the protectors of a legal order, retributivists inevitably find themselves protecting a particular manifestation of social arrangements, one that almost inevitably benefits some groups or individuals more than others (Quinney 1977; Rusche and Kirchheimer 1939, among others).

When utilitarians say that the techniques of penal harm are justified by the greater good of the larger society, they ignore the intimate connection between the well-being of any individual citizen in a society and that of all citizens. In order to carry out a penal harm that promotes some utility, utilitarians must engage in acts that damage, at least for the law violator, the very well-being they seek to promote. Holding high the banner of a better world, the utilitarian chooses actions that specifically damage the quality of experience for one member of that world, and this choice is taken even though other actions are possible.

A final point is needed here. The general case of harms that occur to a person's well-being must be differentiated from the specific case of penal harms. All sorts of circumstances, tragic (such as accidents) and intentional (such as gossip), produce deficits in well-being. Often, in fact, the infliction of pain is used as a method of pedagogy—as a technique that teaches the recipient about the social meaning of certain behaviors. What sets penal harms apart is that they are the intentional act of a government, and that they rest upon an appeal to moral rightness. In any case, the intentional choice to use harm as a method of correction sits upon a delicate precipice: it is potentially destructive to the moral order it seeks to promote. In the case of penal sanctions, the paradox of moral authority is complicated by a dilemma of political power.

MODERN FORMS OF PENOLOGICAL HARM

The kinds of harms that government visits upon people convicted of breaking the law have changed. This change contributes to misunderstandings of harm and its meaning in the correctional context.

In one of the most important works ever written on the nature of penology, Foucault (1977) made the point that with the advent of modern government, the nature of the punitive target changed. From recorded history until roughly two centuries ago, punishment was