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Retribution vs. Restoration: Tendencies of the Criminal Justice System

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Abstract

Most modern systems of criminal justice tend to be heavily invested in retribution while placing very little emphasis on restoration. This thesis seeks to understand why this tends to be the case, and argues for the benefits of restorative approaches. The analysis is grounded in two fundamental philosophical perspectives, namely, a neo-Marxist view that attends to the effects of basic economic class divisions, and a Foucauldian view that understands power as an expression of hidden strategies of normalization and control as opposed to explicit forms of oppression. Both views help us to arrive at a more critical understanding of the real economic and cultural interests served by retributive policies that are often obscured by the typically idealist criminal justice discourse. Restorative policies, it is argued, must be crafted in a way that does not simply perpetuate the idealist discourse typically expressed in modern criminal justice policies.

Table of Contents

Introduction

Criminality is a phenomenon present since the very beginning of our existence as human beings. For reasons such as economic inequality, lack of opportunities for the underprivileged, racism, violence, and class separation, crime rates have been increasing like never before. In order to control it, punishments such as imprisonment have been introduced, in the hope that for fear of suffering individuals would think twice before offending. As a consequence, the United States of America currently hold the highest incarceration rates in the world. Current data has led us to believe, however, that prisons are not an effective deterrent, nor an effective rehabilitative method.

Criminal justice systems, in general, have the obvious purpose of helping reduce criminality rates. Two of its main goals are deterrence and rehabilitation, and if these concepts were effective in practice, society would be experiencing a significant change. Since the numbers related to crime in society remain stable, it seems like neither of the two goals are being fulfilled. Most of the individuals who get incarcerated end up going back to prison within five years of their release, a fact that clearly proves rehabilitation methods are not working well and the expectation that prison deters because of the simple fact that it is a harsh punishment is not being satisfied.

To better understand the context in which the criminal system of modern democratic nations is situated, this thesis will present a brief historical overview of European systems of punishment in its first chapter, examining the reasons why each system was created, and the consequences of the application of its sanctions over time. State punishment in contemporary society — mostly through the prison system — will be seen as a social institution that fails to achieve its basic

goals, but at the same time operates establishing class domination and social control, having the exact opposite effect of the restorative character it claims to have.

The second chapter will analyze the retributive character of our current penal system, naming its most important goals and determining which of them are being fulfilled and which ones are not. Aims such as retribution, rehabilitation, and deterrence will be carefully explained and examined side by side with information about current deterrence and criminality rates, facilitating our understanding about the reality behind mass incarceration and the real effects harsh punishments have on individuals.

The third chapter will adopt a Neo-Marxist approach, and the prison will be seen as one of the tools by which the upper classes oppress and keep control of the lower, ruling through the fear of punishment. The flawed criminal system we have today, according to this perspective, is actually not a system that has failed, but a system who has effectively achieved its hidden purposes. Its real goals are not to rehabilitate and provide a better and safer society, but to bring repression and psychologic dominance. The criminal justice system and its laws are adjusted according to the interests of the dominating classes, and the lower classes have no choice but to obey, or else be punished.

The work of scholars who worked on criticizing the modern prison institution will be examined on the fourth chapter, focusing particularly on Michel Foucault (1926-1984), a French philosopher who went beyond and not only studied the development of different forms of punishment — shifting from a time when punishment was a public spectacle for all to see that focused on the affliction of the body, to a form of concealed punishment that has the individual's mind as its target — but also clearly linked the process of surveillance, normalization, and examination present in the modern penal institutions with society's institutions as a whole,

inferring that the criminal system is only one of the ways by which control is exerted over individuals. According to this philosopher, power is operated through hidden strategies of normalization, rather than explicit forms of repression.

The fifth and final chapter will suggest an alternative, bringing restorative methods into the discussion. It will compare retributive and restorative approaches, claiming that restorative systems are much more effective when it comes to reducing criminality rates and helping inmates go back into society through effective rehabilitation. Norway's criminal system will be used as the perfect example of what successful restorative methods can achieve when managed well, presenting extremely low criminality and recidivism rates, and extraordinarily humane prisons.

This thesis will demonstrate how futile retributive state punishment is when it comes to effectively rehabilitating individuals and inserting them back into society, while showing what its true intent is, a system that brings repression, trauma, and exerts control over minorities and the underprivileged classes of society. This research will demonstrate the development of state punishment over time, try to unravel what role it plays in today's society, and what its real character is while suggesting restorative methods as a more appropriate alternative for the current retributive system of punishment.

The Development of Punishment and the Birth of Prison

The methods by which kingdoms and democratic states have chosen to administer penalties and punishments have always been controversial. In order to organize and maintain an ordered society, rulers of different regimes have had, over the past centuries, the tendency to discourage by fear. The techniques employed have always been about dissuasion. Whether for fear of losing something precious (money, health, honor, freedom, or even life), or for fear of no longer being allowed to be part of a certain community (either by being banned from it or stigmatized as unfit), individuals have been deterred from committing crimes. Or at least that's what it was hoped would happen. This strategy, in fact, has never worked efficiently, however it worked well enough to prevent those in ruling positions from bothering changing it.

Ever since the Middle Ages and obviously way before that, punishments of all sorts have been inflicted upon villagers and citizens to try and keep them under control, and humanity has experienced horrifying historical periods to reach the "humane" point (from an ethical perspective) we are today in regards to criminal punishment. The need for an alternative which takes into consideration factors besides deterring and punishing for the sake of punishing has been evident over the last few centuries, but not until recently ideas with the power to revolutionize punitive systems have emerged. In this chapter, a brief historical overview of the development of state punishment will be presented, so that the bigger picture of our current punishment system can become clearer and its issues better understood.

Adopting a social-economic framework to the analysis of punishment, the narrative presented in this chapter will mostly be based on the ideas of the criminologist Georg Rusche (1900-1950) and social scientist Otto Kirchheimer (1905-1965), authors of the book *Punishment and Social Structure* (1939). This book was chosen to support the historical outline of this thesis

because of its Marxist approach, being a reference work on the topic and still today a widely

recognized book in the fields of criminology and social science, frequently quoted in books that

link social and economic relations to state punishment and its origins.

Before digging into an analysis of the current criminal justice system of liberal democratic

societies, it is important to understand more about the development of state punishment in

European countries, ranging from pure physical punishment to the suppression of freedom. The

prison was first seen as a place where people temporarily waited for judgment, and later as an

institution of punishment on itself. (Marsh 18) This historical overview will hopefully set the

ground for a deeper exploration of the system as it is today, its aims, failures, and possibly assist

us on understanding the real purpose of the American criminal system, the consequences of its

operation, and what kind of actions can be taken to improve it.

Back in the early Middle Ages preservation of peace was a "primary preoccupation of

criminal law", (Rusche and Kirchheimer 9) and it was performed by private arbitration when

necessary. Kings and lords adopted all necessary means to keep peace in their kingdoms, since

power is more easily maintained when population is under control. The most common

punishment in the period was the imposition of fines, and the social class of the criminal played

an important role in the establishment of a sum. Once the offender was found, his social class

was taken into consideration and a monetary penalty applied accordingly. Since lower classes did

not have the economic ability to pay fines, corporal punishment was introduced as an alternative

penance.

> Class distinctions were manifested by differences in the extent of penance.
> Penance was careful graded according to the social status of the evildoer and of
> the wronged party. Although this class differentiation affected only the degree of
> penance at first, it was at the same time one of the principal factors in the
> evolution of systems of corporal punishment. (Rusche and Kirchheimer 9)

The social class and status of the offender mattered for the establishment of a penance, but that was not all. The identity of the person offended mattered perhaps more than anything. A crime committed against a simple villager would not generate a commotion and its penance would not be that harsh. On the other hand, if the crime was committed against someone from a higher background, such as a lord or someone from the royalty, the event would cause an extreme social commotion and no matter the degree of the offense, its penance would most of the times be extraordinarily severe.

In the late Middle Ages, all around Europe, corporal punishments had become the most popular penalty, believed by many to be the only effective way of controlling criminals and preventing them from committing more felonies. Interestingly enough, when a crime was committed by someone belonging to the upper classes the law was applied more forgivingly, resulting in milder sentences. When the offender belonged to the lower classes, however, harsh and dehumanized penances were imposed, and strict laws were created to make their situation even more difficult to manage. Benefits like the right of pardon, supposedly created to benefit any individual who fit the requirements, would rarely be applied (if ever) to low class individuals.

> The poorer the masses became, the harsher the punishments in order to deter them from crime. Physical punishment now began to increase considerably all over the country, until finally it became not merely supplementary but the regular form of punishment. Execution, mutilation, and flogging were not introduced at one stroke by any sudden revolutionary change, but gradually became the rule with changing conditions. As time went on, punishment became harsher, not milder. (Rusche and Kirchheimer 18)

Over time, capital punishment, initially used exclusively in extreme cases, became as common as fines in the beginning of the period, and "legislation was openly directed against the lower classes." (18) It was more commonly used than physical punishments, and seen as a way

of "putting allegedly dangerous individuals out of the way," even when the only evidence against someone was not clear enough. Rusche and Kirchheimer add that "the system acted as a kind of artificial earthquake or famine in destroying those whom the upper classes considered unfit for society." (20) Rulers had found an effective way of controlling criminality and maintaining peace: to punish with death any individual who challenges the norm or who does not fit the patterns of normalcy.

Michel Foucault (1926-1984), in the book *Discipline and Punish: the Birth of the Prison*, vividly depicts the torture and death of a man accused of being a regicide in France, 1757. This was the most severe punishment ever registered in history. According to the description, the man in question had the flesh of many parts of his body torn with red-hot pincers and then poured melted oil, resin, wax and sulphur, and his body drawn and quartered by horses, finally being set on fire and reduced to ashes. As if the pain weren't punishment enough, it all happened publicly — so as if to also cause great shame to the criminal and his family. (Foucault 3) The severity of the crime and the social status of the victim (in this case the king), were factors strictly linked to the harshness of the punishment inflicted to the accused's body. Having the king as his target had as consequence the cruelest form of punishment, and caused him to suffer the ultimate form of suffering.

A turn of events happened around the end of the sixteenth century, in European society, as the value of human labor increased like never before. The change in the economic needs of the time was also reflected in the way punishment was inflicted. Around the mercantilist period the population had drastically decreased, and with the advent of industry the labor needs increased. New countries were being colonized by the great European nations which meant more raw material available for the rich countries, and at the same time it meant the expansion of the

market that was then reaching more consumers. To keep expanding the market, capitalists needed to hire more.

The scarcity of labor was a big problem, especially of skilled labor, and that was why "the ruling classes left no means unexplored in order to overcome the condition of the labor market. A series of rigorous measures restricting the liberty of the individual was introduced." (Rusche and Kirchheimer 26) Some of these measures were to foster the increase of birth rate so the population could grow and more human labor could become available. Other extreme measures (some even ethically questionable) such as the use of child labor supplied by the state through orphanages had also become more frequent. According to Rusche and Kirchheimer, these were "measures aimed at the serious lack of labor that was threatening the very existence of the social order." (27)

State punishment had also changed, and was then adapted to meet the economic needs of the state, as rulers realized offenders could be useful as available work force. The search for ways of using the labor of prisoners had started. Punishment such as penal servitude at hard labor, galley slavery, and etc., were introduced, and prisoners were now seen as valuable assets capable of contributing to meet the economic needs of the system. According to the authors of *Punishment and Social Structure*, "these changes were not the result of humanitarian considerations, but of certain economic developments which revealed the potential value of a mass human material completely at the disposal of the administration." (24)

The same happened during the eighteenth and nineteenth centuries, a period where, thanks to the Industrial Revolution, labor was much needed. During that period, "punishments which equipped offenders with self-discipline and a desire to work were popularly advocated." (Marsh 18) Government and population realized it was a more profitable deal to use the strength and

power available in each inmate, supporting the state and helping improve economy, then to waste resources to punish simply for the sake of punishing. The mindset was simple: if the labor of offenders can be useful to the state, then why waste it using any other kind of punishment?

Another way of utilizing the man power available to the state was through the houses of correction. They were first seen in Europe, more specifically London, where the first house of correction was established in 1555. This model of punishment became so popular that it was later spread throughout Europe, including powerful nations such as Holland and France. This was the origin of the prison as the institution we know today.

> The essence of the house of correction was that it combined the principles of the poorhouse, workhouse, and penal institution. Its main aim was to make the labor power of unwilling people socially useful. By being forced to work within the institution, the prisoners would form industrious habits and would receive a vocational training at the same time. When released, it was hoped, they would voluntarily swell the labor market. The usual inmates were able-bodied beggars, vagabonds, idlers, prostitutes, and thieves. Only petty offenders were received at first, and later men who had been flogged, branded, and sentenced to long terms. (42)

Houses of correction were at first seen as assistance and guide to the poor and needed, but in the seventeenth and eighteenth centuries their true character had become clear, as they turned into a valuable economic asset, providing workers at an extremely low cost. "The institution of houses of correction in such a society was not the result of brotherly love or of an official sense of obligation to the distressed. It was part of the development of capitalism." (50) It was not the first time (nor the last) that capitalist states used an institution for a purpose different than what it was being announced.

After the Middle Ages, European states experienced changes in the way punishment was being utilized. Houses of correction were introduced, but there were many other ways available for the state to make "practical use of the man power at its disposal". One of them was through

Galley servitude, "the most rational way to procure labor for tasks for which free labor could never be found, even when economic conditions were at their worst" (58), and another was the transportation of criminals to colonized countries that were lacking men for the cultivation of its lands.

This practice became common among European countries like England, France and Spain. "The simplest way to supply the needs of the colonies without prejudice to the interests of the mother country was to send out convicts who would normally be executed." (59) These ideas were left behind with the advent of slavery, something that proved to be a more profitable deal since the deported convicts could only be available for a limited period of time and the slaves were sold for good. None of these punishment options had, however, the intent of reforming convicts, only of meeting the needs of the state at a specific time.

The prison system was developed and its purpose changed over time. At first it was a place made to "keep men", as a place "of detention before trial, where the defendants often spent several months or years until the case came to an end." (62) The amount of time spent in prison would vary according to the wealth of the defendant and the will of the judges. For reasons briefly explained before, the prison then turned into a place of forced labor, where the convicts worked when they had no means available for the payment of fines. Imprisonment (and forced labor) became the most common punishment.

The creation of the prison was a revolutionary event on itself, as it was seen as a more ethical way of handling people, punishment no longer required that the body be affected. The history of penal justice was being changed, and state punishment finally reached a point where it could be considered "humane". (Foucault 231) Through fines and imprisonment, the state slowly

shifted to "nobler" ways of punishing — tendencies that would endure longer than ever expected.

> Sentencing offenders to a period of imprisonment was seen as offering the potential for reform as well as being for punishment; this contrasts with the contemporary view that sees 'reformative' punishments such as community orders and probation as 'alternatives to prison', with the implication that reform and imprisonment do not go hand in hand. (Marsh 18)

Initially, one of the most exciting and innovative aspects of prisons was the possibility of reforming inmates while punishing offenses. To have a place able to keep offenders away from reoffending and also help them be rehabilitated was, in theory, a great accomplishment. While the theory was hopeful, reality, on the other hand, was a totally different story. Prisons did not manage to fulfill its original expectations, and the positive results expected in the beginning of its existence were never achieved. Reformation was a concept never consummated, neither in the past nor in our current state of affairs.

The history of punishment proves that it has always changed according to the needs of the state. In the Middle Ages, the needs were to eliminate undesirable subjects, and over time the system adjusted in a way to meet the state's economic demands, forcing labor where there was a shortage. "Of all the forces which were responsible for the new emphasis upon imprisonment as a punishment, the most important was the profit motive, both in the narrower sense of making the establishment pay and in the wider sense of making the whole penal system a part of the state's mercantilist program." (Rusche and Kirchheimer 68)

During the Enlightenment, questions about nature, organization and the meaning of punishment started being asked. The lower classes were concerned, and "the problem of a more precise definition of substantive law and of improved methods of criminal procedure was brought to the fore by the bourgeoisie who had not yet won their struggle for political power and

who were seeking legal guarantees for their own security." Thinkers such as Beccaria and Hobbes questioned the ways punishment was used and the arbitrary power that the court held to fix penalties according to its own will and not a fixed law. They, like most part of society, wished to avoid an arbitrary administration of criminal justice.

As human and civil rights were gradually being granted to the masses and criminal laws established all over Europe, the way punishment was used changed completely. Corporal punishments were abandoned, and "the body as the major target of penal repression disappeared." (Foucault 8) The focus was shifting from the punishment of the body to the repression of wealth and rights. A whole new criminal system was being shaped, and the prison had become its main tool of control, supervision, deterrence and restoration of criminals. "At the beginning of the nineteenth century, then, the great spectacle of physical punishment disappeared; the tortured body was avoided; the theatrical representation of pain was excluded from punishment. 'The age of sobriety in punishment had begun.'" (14) Or at least that's what was hoped.

Prisons were introduced as a more ethical way of punishing, and as a method also able to rehabilitate individuals. Modern institutions have expanded their goals and not only include retribution and rehabilitation, but also aims such as the deterrence of future offenses. What this thesis seeks to demonstrate is that the prison, in general, is not able to fulfill its goals and does not meet the needs of our current society. The next chapters will more carefully analyze prisons as the main punitive tool of criminal systems, its goals, consequences, and the possible reasons why it is still the number one method of punishment in modern democratic societies.

Retribution, Rehabilitation, and Deterrence

In this chapter we will be discussing the punitive character of criminal justice, focusing on the prison as one of the most prominent methods of state punishment in the United States, and analyzing if it's indeed a reliable way of dealing with individuals and controlling crime in society. We will talk about three of the most important goals of punishment: retribution, rehabilitation, and deterrence, and will discuss whether or not they are effective in reality, offering data to support the chapter's main arguments. In the end, we will come to the conclusion that the prison is effective in repaying harm to offenders, but not in reforming individuals, nor decreasing the rate of crimes in society.

Most western modern democratic capitalist states have similar criminal justice systems — a combination of police forces, courts, lawyers, and punitive institutions such as the prison. Generally, the police are the first to have any contact with the offenders that once located, controlled, and identified, are then sent to face courts, prosecution lawyers, judges, and so on. Courts are the venues where cases are dealt with until their resolution, when the accused individuals are either absolved or declared guilty, then sent to face the punishment determined by the judge.

The punishments used by the state have changed drastically over the last few centuries in search of efficiency and efficacy (as seen in the previous chapter), shifting in focus from almost exclusively corporal punishment to the restriction of freedom through arrest and confinement —, with the prison slowly becoming the main punitive agent of modern states. Its application in a sentence could be accompanied by milder punishments (such as fines, community services, probation, or even house arrest) or completely substituted by them when involving minor crimes

or violations, but the prison has been for a long while the criminal justice system's major tool, believed by many to be the most effective.

> The transition from the public execution, with its spectacular rituals, its art mingled with the ceremony of pain, to the penalties of prisons buried in architectural masses and guarded by the secrecy of administrations, is not a transition to an undifferentiated, abstract, confused penality; it is the transition from one art of punishing to another, no less skillful one. (Foucault 257)

State punishment has changed over time, but what we'll soon figure out is that it essentially remains the same. The transition from one kind of punishment to another, unfortunately, has not proved to be more efficient or humane, and has not yet proved to make society any better, even though governments and leaders try to convince us of the contrary. The prison, in this work, will not be seen as an advancement in human rights regarding punishment, or as a place able to reduce criminality in society. Rather, it will be seen as a "morally acceptable" institution that still maintains the same purposes as old punishments and continues perpetrating social inequality and separation, increasing criminality in society. Current methods may be different, but we are still far from reaching an exemplar way of doing justice.

It is very important to this discussion to analyze how effective the prison is when it comes to achieving its own declared goals —, understanding which effects it is claimed to have and which effects it actually does have. As the number one method of punishment reserved to offenders, it would be expected that, at least, it's successful in meeting its goals and in offering people a better and more civilized society. In the United States, more than anywhere else in the world, prison is the main tool of the criminal system and the per-capita rate of incarceration is among the highest in the world, "surpassing all European countries, South Africa, Russia, and China." (Chambliss 234) Unfortunately, what happens in theory is not reflected in reality, and

the main aims of modern punishments such as prison have not been effective in fulfilling most of its objectives.

In a general way, the aims of punishment can be divided into two groups: "aims concerned with preventing future crimes and those concerned with punishing crimes already committed." (Marsh 7) The aims concerned with preventing future crimes see punishment as a way of deterring future offenses, as individuals would, in theory, not commit crimes for fear of punishment. It also has another future-oriented aim, concerned with reforming individuals so that in the future they would not re-offend. These aims "focused on future prevention could be seen as utilitarian, as having a certain degree of 'usefulness' for the wider society." (7)

While future-oriented aims are about reducing crime, past-oriented aims are all about retribution. In a straightforward way, some of the aims of punishment are really about paying back the harm caused by the offenders and their actions, so that they understand what it feels like to be mistreated. Past-oriented aims are extremely efficient, as punishment on itself is what they are set to achieve. No after effects are expected, as there is no concern with the future behavior of criminals. Nevertheless, the aims of the criminal justice system in general — and more specifically the prison — go beyond pure retribution, and expect much more from the application of its sanctions.

> It is viewed not just as being about "doing justice" through law enforcement and punishing offenders, but also as having a wider remit to reduce crime through reforming offenders and deterring others from offending. And, as the expectations of reducing crime have not been met, so issues about the aims and success of punishment become a focus for public concern. (Marsh 6)

In criminal justice theory, punishments are called corrections, what might sound like a hint to the reason why they exist in the first place: to correct criminal behavior. Even though that is not the only reason why punishment is inflicted, it can be said it's the most important reason, as

it's the only one, side by side with deterrence, capable of discouraging bad behavior and effectively controlling crime rates — in theory. The most important question to be raised at this point is: do punishments actually correct and deter? Do they really fulfill their future-oriented goals? Most importantly, does the prison have the ability to reduce criminality?

By detailed analysis of the aims of punishment we are able to better understand whether or not the criminal system is failing to achieve its goals and, most of all, to reduce crime. Currently, according to the academic fields of criminal science theory or penology, there are six recognized aims of punishment, but three of the most important are deterrence, rehabilitation and retribution. As already mentioned before, retribution is the only aim out of the three that can be fulfilled in itself — as punishing the convicts automatically repays what they have done to society. The other two, on the other hand, are future-oriented aims that cannot be seen immediately, but only expected after a period of time, and only attested after careful research.

Deterrence is the aim that believes it is possible to prevent crimes as it deters convicts from reoffending, and also discourages others from offending in the first place. (Marsh 8) According to the theory, offenders or possible offenders would be discouraged from committing any offenses, simply because they would feel afraid of getting caught and facing punishment. In general, deterrence "works by showing others who may consider a criminal act that they will suffer painful consequences if they commit the offense." (8) In consonance with the deterrent goal, the harsher and longer the punishments are, the more dissuaded to commit crimes individuals would be, argument used by those in favor of more severe penalties.

> Removal from society inflicts punishment on the wrongdoer by limiting civil liberties and by restricting the individual's ability to make independent decisions. Incarceration also provides a symbol to others in the community that such behaviors warrant punitive action, which is considered general deterrence. Incarceration has a demonstrative effect on individuals, as detention provides state control over their total being. (Chambliss 234)

One of the main arguments against the idea that punishment is effectively deterrent is the simple fact that in real life most criminals strongly believe they are able to get away with crimes. Besides that, a great parcel of the crimes committed were actually driven by emotions, not rational and calculated plans. Extensive research on the topic has been made, and it is evident that many criminals don't think much before acting, and most crimes are impulsive. "Impulsive offenses are clearly a problem for a penal strategy of deterrence, and it could well be argued that many, if not most, crimes are not rationally premeditated." (Marsh 11) That being said, "there is little evidence that the type or severity of punishment has much influence as a general deterrence." (11) On the contrary, detention is seen as a major cause of recidivism, as "those leaving prison have more chance than before of going back to it; convicts are, in a very high proportion, former inmates." (Foucault 265)

The second and most discussed future-oriented aim of punishment is rehabilitation, "based on the belief that people can change, that they are never beyond reform." (17) Knowledge about rehabilitation greatly increased in the late nineteenth century with the advent of criminology as a field of the human sciences. The study of offenders, the reasons why individuals commit crimes, created knowledge that was useful and could also be applied for the reformation of those offenders. (Marsh 20) Ever since then, methods have been created in order to help convicts to either reform themselves or be rehabilitated with the help of professionals. However, based on statistics and extensive research on recidivism in the United States, it is safe to say that the prison has not been successful in its attempt to rehabilitate.

> As early as 1988, reconviction rates for adult males, released from prison within two years, stood at 55% and at 75% for teenagers. (…) By 2003, the reconviction rate for young male offenders released from prison had not changed and remained at 75%; similarly for adult males at 52%. The reconviction rate for females had been 57% and now stood at 45% respectively. (Smartt 121)

Imprisonment rates have been growing exponentially in the last few decades (Lynch 2007), and for that reason, more prisons have been built — private, federal, and also state prisons. The number of convicts has increased like never before, and currently, the United States incarcerates more than 2.3 million people, holding "the highest incarceration rate in the world." (Austin and Irwin 1) Even though the criminal justice system in the United States has been using prison as its main punitive weapon, and has been persistently trying to control criminals and decrease crime rates, reconviction rates remain stable, proving that severe criminal systems and long prison sentences fail to rehabilitate and deter.

It's obvious that the prison system has not been the most effective method of crime control, simply because "if punishment was all that a society needed to reduce or eliminate crime, we would expect that the nation with the world's biggest prison system would have very little crime." (Lynch 34) According to Foucault, "if the law is supposed to define offenses, if the function of the penal apparatus is to reduce them and if the prison is the instrument of this repression, then failure has to be admitted." (Foucault 271) It's important, then, to be able to define some of the reasons why the prison fails to deter and rehabilitate.

Since the very beginning of a criminal prosecution, individuals are labeled and stigmatized, status that will follow most people for the rest of their lives, even if they are at some point considered innocent. Going through the criminal system, whichever instance it may be, leaves a strong mark and automatically establishes a barrier between the defendants and society, making the expected "reinsertion" into society even more difficult (one of the main goals of punishment). According to the philosopher Michel Foucault, "being on the loose, being unable to find work, leading the life of a vagabond are the most frequent factors in recidivism." (Foucault 267)

> Whilst prison is serving its purpose as the ultimate form of punishment in most western European countries prison can also be an isolating and brutal experience for the offender. Research has found that first-time imprisonment can be particularly traumatic for vulnerable people i.e. those with mental health problems, drug addicts or the young. (Smartt 112)

Besides the fact that many inmates have no access to education, meaningful work, or any kind of activity that might help them develop useful skills, having a prison history makes it extremely hard for individuals to find any significant job once they are back into society — they are simply not considered honest or reliable enough to get a decent position anywhere. Reoffending becomes one of the only alternatives available to those who are, once again, rejected by society. Instead of rehabilitating and facilitating ex-offenders' reinsertion into society, the prison system, most of the times, separates them even more.

Life in prison can be tough and traumatic, especially when drugs are involved, which is the case in most prisons. "In terms of day-to-day prison life, fear is a prominent and pervasive feature. For instance, there are more and more drugs of all kinds in prisons, and the consequent violence and intimidation that stem from them exacerbate this fear." (Marsh 198) The consequences of living in fear can be quite devastating for the inmates, as the rates of suicide, killings, sexual assaults, spread of diseases, etc., in prison are able to confirm.

Many of the problems related to prisons can be linked to overcrowding —, what happens when the number of prisoners is much higher than the capacity the institution has to accommodate inmates. When this is the case, prisoners have to live in "exacerbating adverse prison conditions" and many other problems emerge, such as "overburdening such basic resources as toilets, showers, and food services, … making it difficult or impossible to provide critical mental health or medical care, or adequate protection from physical and sexual violence." (Chambliss 210)

Human rights are constantly violated and daily life becomes something very difficult to bear. The life conditions prison systems offer will hardly ever be able to rehabilitate, on the contrary, will much more easily create delinquents and teach criminality, (Foucault 266) — why, then, has the system survived for so long and it's still in existence?

> (…) a better prison system is one that has a crime suppression effect, or one that reduces the level of crime in society. After all, isn't this why societies build and employ prison systems: to reduce crime? To be sure, crime reduction, whether through rehabilitation, deterrence, or incapacitation, has always provided the philosophical underpinnings for imprisonment (except if one adopts a pure retributive perspective). (Lynch 20)

The criminal justice system of the United States costs about $270 billion dollars annually, (Lippke 54) but prisons do not seem to be making our society a better place, or anyone's lives any better, as "prisons do not diminish the crime rate: they can be extended, multiplied or transformed, the quantity of crime and criminals remains stable or, worse, increases." (Foucault 265) However, most part of the population still seem to be satisfied with the services provided by the criminal system, and many strongly believe we are better with than without it. If the system is not able to eliminate or even decrease criminality, however, it does seem like there's much to be done in this respect.

A Marxist Approach to the Issue of Incarceration

In this chapter we will try to understand why the criminal system remains unchanged even though it has been proved to be so ineffective. We will be taking a Marxist approach to the critique of state punishment, understanding why class division plays an important role in the decisions made by the system, including which laws should be created and which individuals should be punished. In a system of economic inequalities and social division, lower classes and minorities will be seen as victims of the system for lack of opportunities and means, and at the same time the most punished by it. We will then present a few thinkers that are able to support the main arguments of this chapter, analyzing how their work on criminology contributes to this discussion.

Karl Marx (1818-1883), a German philosopher, sociologist, economist, and political theorist, deeply believed that "The history of all hitherto existing society is the history of class struggles." (Marx and Engels 1) According to his ideas, most of the issues faced by humanity today derive from the fact that there is a constant fight between classes, the bourgeoisie and the proletariat. In simpler words, the social and economic issues of today are mostly caused by the disparity between those who have economic power, and those who don't.

To him, classes with economic power are constantly seeking to dominate and control the ones in disadvantage, and that happens through several different strategies of oppression. "The modern bourgeois society that has sprouted from the ruins of feudal society has not done away with class antagonisms. It has but established new classes, new conditions of oppression, new forms of struggle in place of the old ones." (1) Through a Marxist lens of analysis, we will try to understand how the criminal justice system of modern nations is contributing to this class

struggle, and why is it a major tool of oppression that, in most cases, affects directly and indirectly the lower classes of society.

The prison has failed in many instances, but most importantly it has proved to be an unsuccessful reformative method of punishment and consequently an ineffective crime reducing tool. It is important then, to unveil the possible reasons why it is still the first response to crime in liberal democratic capitalist societies. As mentioned in the previous chapter, the prison has failed the task of decreasing crime rates, which is what society expects from the criminal system as a whole, proving to be an extremely flawed and inefficient method of dealing with offenders and crime. The question that needs to be answered is why, at such a low success rate, is the prison still the most popular tool of criminal justice systems all around the world.

This question has been raised a while ago and has been puzzling philosophers, sociologists, political theorists, and thinkers of all fields. If the prison cannot fulfill the reason why it exists in the first place, then why aren't governments thinking about strategies to create a better system, or to improve what is already in existence? Why is it that people are being incarcerated more than ever before, but the feeling of insecurity is greater and greater? Why it is that even at such high criminality rates, not much is being said about prisons, their effectiveness, and alternative methods of reducing crime in society?

Sociologists like Erich Fromm (1900-1980) would argue that there is a specific reason why the criminal system is still functioning the way it is — something he would call its hidden function. Having devoted part of his studies to understand the criminal justice system and the ways by which it is used as a weapon of capitalist systems and other political regimes throughout history, he offers significant ideas about the criminal system capitalist societies usually present.

His ideas were deeply inspired by Freudian and Marxist insights and had a strong anti-

authoritarian orientation when criticizing state power.

> The means by which the ruling class imposes itself on the masses as a father figure are quite varied. One of them, and not the most unimportant, is criminal justice. It demonstrates one of the most essential attributes of the father, his power to punish, and it generates the fear that makes an attitude of loving reverence preferable to rebellion. [. . .] Therefore the state, as the representative of the ruling class, must attribute to itself this power to punish. (Fromm 1931: 145–146)

Fromm perceived the criminal justice system as an authoritarian institution (compared to

the figure of a father) that represents the interests of the ruling classes of society, and has the

purpose of controlling and suppressing the lower — this being the reason why it is not of the

state's interest that it be reformed or that it ceases to exist. The official aims of the system are

merely distractions, as in reality the purpose of criminal systems is not to re-educate offenders

(since obviously it has no effect in changing behavior and rehabilitating), but to educate society.

The lower classes, then, live in constant fear of a punishment imposed by a state that acts

like a father disciplining and threatening its children. The state shows interest in restricting

behaviors and punishing acts, but not in understanding what caused individuals to act in a certain

way or on trying to prevent those behaviors from happening in the first place. According to this

perspective, it does not seem to be important for the state to find a way of reforming offenders and

reintegrating them into society, prisons exist for a different purpose.

> "The result of these considerations is that all insight into the ineffectiveness of the contemporary criminal justice system with regard to the criminal will hardly lead to basic changes in the system, as long as the peculiar structure of the present society prevails. Society needs the criminal justice system for purposes that have nothing to do with effective approaches toward the criminal. The criminal justice system is an instrument for 'educating' the masses in the sense of fixating them artificially to the situation where a person is 'educated'. It is the situation of the child who reveres the father." (Fromm 1930b: 126–127)

From this point of view, the criminal justice system is one of the ways by which the upper classes keep control of the lower without having to use force. It is an entirely psychologic method of domination that works through fear of punishment, and is only able to maintain itself because of the current structure of society, where classes are divided according to their economic power. The criminal justice system is "an indispensable psychological requirement for a class society." (Fromm 1931: 147). And according to Fromm, that is the reason why the system is not being abandoned even though "it is manifestly incapable of fulfilling its officially stated purposes". (147)

Rusche and Kirrchheimer also linked the criminal system with the changing nature of economic relationships, and most importantly, stated that these were the limits that stopped a penal reform from happening — the system wouldn't change simply because it is not advantageous for the classes up on the pyramid. The criminal system is also seen as part of a whole, sharing the aspirations and defects of the social system, and should not be seen as an isolated phenomenon. One of its aims is to keep the lower classes isolated and in many cases, locked up, having no access to quality education and no prospects of a better life. Once this happens, individuals have higher chances of going into criminality (their easy way out of a difficult life), and are then seen as dangerous enemies, making it easier for the upper classes to keep their privileged position, even though, in reality, there's no major threat.

As problems such as class division and economic inequality have complex and difficult solutions (if solutions are even considered at all), the simplest answer seems to be repression, an easy way of maintaining things as they are, and of keeping the underprivileged under careful surveillance and indirectly dominated. As Rusche and Kirrchheimer would say, "the futility of severe punishment and cruel treatment may be proven a thousand times, but so long as society is

unable to solve its social problems, repression, the easy way out, will always be accepted."

(Rusche and Kirrchheimer)

Michael J. Lynch, a criminology professor and contemporary thinker contributes to this discussion with his concern about "troubling trends in American society". For him, the system chooses its targets on a very specific level, leaving the criminal system and its punishments mainly for the poor, the black, and minorities in general. He sees an increasingly "limited democracy that accepts the curtailment of freedom and the enhancement of governmental power and control as the price for safety." (Lynch 2007)

> This movement, however, has been underway for decades in the way America responds to crime, especially street crimes, or those offenses most likely to be engaged in by the lower classes and Americans of color. It is no accident that these crimes, more so than the more harmful behaviors of corporate and government officials, are the prime subject of crime control, and that the prime suspects are those unlike "us"—they represent economic decay and difference.

He finds ironic the fact that the American criminal system has been incarcerating more than ever before, but the focus of its attention continues to be on the poor and minorities, not on the ones who are the greatest threat to our society and our ecosystem. The big corporations, politicians, and executives are the ones with the economic and political power to create and modify laws, pollute the environment, change the course of politics according to their own interests by helping increase economic inequality, manipulating consumers, and so on. They are the ones who should be considered the real enemies of society, the ones who should be carefully watched. (Lynch 2007)

For reasons that couldn't be explained in a couple of pages, these criminals are not the ones targeted by the system. Instead, the whole penal apparatus is mobilized to discipline petty offenders, as if they were society's real threat. Problems that could be solved with better education, information, less inequality, and more opportunities, are dealt with involving a system

that is only able to recreate the evil caused, not dissipate it. Lynch's contribution adds to the

theory that nothing that happens within the penal system is by chance, but it is fruit of a

meticulous plan.

> Most people being sent to prison today are very different from the image of Willie Horton that fuels the public's fear of crime. Most crimes are much pettier than the popular images promoted by those who sensationalize the crime issue. More than half of the people sent to prison committed crimes that lacked any of the features the public believes compose a serious crime. (Austin and Irwin 46)

Most criminologists of the 21st century agree that the majority of inmates living in

American prisons today aren't there for having followed a criminal career, or for wanting to

build one. Most of them are non-white men who did not finish high school, knew that had really

low chances of getting into college, and do not have "marketable job skills" — the reason why

many of them were unemployed by the time of the arrest. (Lynch 2007) They are mainly petty

offenders caught up in a system that offers very little opportunities of a better life, having to live

knowing that economic and social equality are concepts from a distant reality and that society

still looks at them as if they were dangerous, inferior, and not worthy of respect.

Crime becomes the easy way out. A simpler, non-licit way of achieving what would have

been almost impossible through traditional means, but so easy for privileged, well educated

people. The arguments mentioned above are not meant to excuse bad behavior, but to try and

help society understand the reasons why our prisons are filled mostly with poor, uneducated,

black, young people. A way of trying to break stigmas and preconceived notions of who these

people actually are, and what their incarceration represents. Also, to understand which

individuals are the ones who should be helped, and which should be condemned. It's an attempt

to shift the focus from punishing to assisting, and most importantly, preventing crimes instead of

spreading injustice.

Foucault: The Prison & Power

This chapter will draw upon Michel Foucault's work *Discipline and Punish,* one of the most influential texts of the twentieth century on the subject of prison and his "most famous and elaborate exposition of disciplinary power." (Hoffman 27) The focus will be on discerning Foucault's conception of punishment, power, and most importantly, his perspective on why liberal, democratic states see prison as an effective strategy of crime control. In a general way, we will examine how the prison is actually one of the many tools used by the state in order to observe and control — one of the many ways by which power is manifested in society.

Some of the most commonly found conceptions of power in political science discussions are the liberal and radical approaches. The liberal conception see power in action when someone is forced to do something that would not otherwise have done, or stopped from doing something that is of his interest. The radical conception is broader and encompasses cases where individuals are manipulated to do something that is not of their interest, believing it is because of the action, words, or rules of someone else. In other words, "the focus of research widens from a concern with the action and inaction of agents to the formation of desires that violate objective interests." (Digeser 979).

To Foucault, the conceptions of power mentioned above are limited and do not represent all the power relations that exist in reality. He reveals, then, a whole new conception of power, where power is seen as a hidden force found in most institutions and in social relations of all forms. According to him, power is not always evident, but manifested in subtle, discreet, or even hidden ways, and his preoccupation is in demonstrating that control is being exerted even when society thinks it is most free.

Power is everywhere, but at the same time is not in anyone's hands. It can't be controlled, owned, or manipulated; we are all subjects of a greater power. Power is not a possessed capacity according to Foucault, but it can still be exercised by individuals, groups or states. "power underlies all social relations from the institutional to the intersubjective and is a fundamentally enabling force." (MacNay 3) We could all be venues through which power is manifested, but we are also subjects that have been forged according to all the power relations that surround us and involve us. "Subjects and social practices are effects of a power that one cannot escape." (Digeser 981)

> Between every point of a social body, between a man and a woman, between the members of a family, between a master and his pupil, between every one who knows and every one who does not, there exist relations of power which are not purely and simply a projection of the sovereign's great power over the individual, they are rather the concrete, changing soil in which the sovereign's power is grounded, the conditions which make it possible for it to function. (Foucault 1980d, 187)

According to Foucault, power is always present, but "for the most part is exercised without intentionality, objective interests, or a repressive character," (Digeser 984) which means most of the conducts through which power travels are not even aware of the fact that there, through those specific actions or inactions, power is being manifested. To fully understand his conception of power, then, it is important to analyze a concept called "microphysics of power". Power ought to be analyzed in detail, in everyday relations and practices, not on its most centralized and evident forms such as the power which is manifested through the ruling classes. (MacNay 3)

Since power is found everywhere, all we know and have ever known is a creation of power. Our rituals, practices, laws, socially acceptable behaviors, everything has been molded according to power relations that dictate what is right or wrong. Power has the ability of subtlety influencing, creating, and changing habits, "it traverses and produces things, it induces pleasure,

forms knowledge, produces discourse." (Foucault 1980f, 119) Power, in a Foucauldian approach, is disciplinary.

When talking about power, Foucault's main interest was in analyzing "how power relations of inequality and oppression are created and maintained in more subtle and diffuse ways through ostensibly humane and freely adopted social practices." (MacNay 2) In other words, he sought to understand more deeply the ways in which non-obvious instances of power are manifested and how this helps to perpetuate inequality and oppression.

> Foucault questions the rationality of post-Enlightenment society by focusing on the ways in which many of the enlightened practices of modernity progressively delimit rather than increase the freedom of individuals and, thereby, perpetuate social relations of inequality and oppression. (2)

An interesting feature of the power Foucault believed to underlie every relation in society is its tendency to "normalize". According to him, we are taught to believe that there are certain immutable behavioral norms that must be followed. There are socially acceptable ways of getting dressed, of speaking, of interacting with other subjects — the list goes on and on. We are led to believe that these norms are the right thing to do, the correct way of behaving, but Foucault had a different point of view. Through these norms, he would say, individuals more easily fit into one category, more easily adapt to society, and more easily can be observed and administered. To him, these are ways through which power is manifested and society controlled.

What differentiates Foucault's concept of power from others is that we, as individuals, are also considered an important tool of "normalization", since we supervise each other on a daily basis and also ourselves. We're constantly judging, analyzing, and mistreating those who are considered different and, in the same way, we are constantly observed by others. Everyone, according to Foucault, is a normalizing agent — but not fully aware of that fact. Not only are we

watched by others, but we are also deeply analyzed by ourselves, in an attempt to make sure we have what it takes to be part of society.

> Control in modern societies is achieved, therefore, not through direct repression but through more invisible strategies of normalization. Individuals regulate themselves through a constant introspective search for their hidden 'truth', held to lie in their innermost identity. (MacNay 97)

Once individuals know the standards they have to follow in order to be considered "normal", they instinctively adopt these ideas in order to fit in. They are taught to be 'normal', to follow directions, to think and do what is right, but the standards that dictate these rules are not natural rules, but a stronger power that leads society in a certain path according to its interests. "Even when individuals think that they are most free, they are in fact in the grip of an insidious power which operates not through direct forms of repression but through less visible strategies of 'normalization'." (MacNay 5)

Power, however, is accompanied by resistance, a term that implies that "we are neither infinitely pliable nor naturally suited to be one kind of person rather than another," (Digeser 985) which means there isn't necessarily an ideal identity or form that individuals of a same society should share, nor natural rules that should be unconsciously followed. Resistance, then, would be manifested in the notion that we are not predesigned to be anything or anyone in particular. The most common forms of resistance according to Foucault are "the mad, the sick, the criminal, and the abnormal" (985) — individuals that refused to follow specific patterns of behavior imposed by others.

> Upon those who fall outside the range of acceptability, there is immense social pressure to conform, standardize, and normalize. The forms that this pressure takes have their origin in medicine, criminal punishment, education, industry, and the military."(993)

If individuals don't conform with society's standards of acceptability (patterns of behavior, norms imposed by the legislators, and so on), institutions are then triggered to perform the task of reformation, resocialization, and rehabilitation — making use of all the tools available to correct abnormal behavior and transform individuals in a way that they are able to fit the mold of acceptability. The direct targets of these systems of control are the ones who deviate from the norm, but in reality the whole society is a target, but an indirect one, since "what happens when deviation occurs (when one deviates from the norm) is a lesson for us, and we discipline ourselves accordingly," (994) fearing that the system might, one day, shift its attention to us. Most people don't want to be the ones at fault, so they try really hard to adjust and to not give reasons for the system (or for other individuals) to believe they are unfit.

This is the point where Foucault's concept of power becomes relevant to this work: the criminal justice system — through its most used tool, the prison — is seen as one of the ways by which society is controlled and "normalized". He strongly believed prisons are oppressive institutions that hold a hidden purpose, as one of the many "disciplinary strategies of neutralization," (Digeser 993) disciplining individuals into becoming what is considered appropriate and "normal".

In consonance with much of what has been said before, the prison as an institution of reform and rehabilitation has failed awfully, achieving in most cases the exact opposite of what it claims to seek, and is still considered "the great failure of penal justice." (Foucault 264) It is difficult to understand how it can still exist even though it performs the exact same tasks as centuries ago, and produces the exact same negative results — the reason why many scholars dedicated part of their life trying to figure out if there is, in fact, another reason why the prison still exists and why it incarcerates more than ever before.

> If the prison-institution has survived for so long, with such immobility, if the principle of penal detention has never seriously been questioned, it is no doubt because this carceral system was deeply rooted and carried out certain very precise functions. (271)

The answer to all these questions was very clear to Foucault: the criminal system did have another aim, a hidden but very precise goal to achieve. The failure of the prison, "the maintenance of delinquency, the encouragement of recidivism, the transformation of the occasional offender into a habitual delinquent, the organization of a closed milieu of delinquency" (272), were (and still are) consequences of a meticulously executed plan. What is the purpose of it, though, and who does it benefit?

The philosopher's theory is based on the idea that the penal system is not meant to eliminate criminality in the first place — it isn't meant to make society a better place or to create a peaceful environment for all to live in harmony. Punishment, on the contrary, has the main purpose of stigmatizing and separating specific individuals (such as minorities and the lower classes) from the bigger group. It is meant to shift the focus of attention to determined offenses, usually committed by particular groups of society; to create division and to serve the interests of a specific class, as "law and justice do not hesitate to proclaim their necessary class dissymmetry." (276). The criminal justice system, more specifically the prison, works as a hidden strategy of domination.

> Penalty would then appear to be a way of handling illegalities, of laying down the limits of tolerance, of giving free reign to some, of putting pressure on others, of excluding a particular section, of making another useful, of neutralizing certain individuals and of profiting from others. (272)

The criminal justice system, that at the turn of the nineteenth century (due to economic and political reasons) went through substantial changes regarding who were the people being incarcerated, increasingly focused its attention and resources in criminalizing behaviors and

arresting people that, mostly, came from the social base. In other words, "criminals, who were once to be met with in every social class, now emerged almost all from the bottom rank of the social order." (276) This new tendency increased over the decades, reaching a point where the great majority of those arrested came from the lower classes of society.

A common argument in favor of separating criminals from society is that crime has alienated them, and for that reason they don't know how to live in society and don't belong anymore. However, Foucault would say that crime happens in the first place because most individuals, even before their crime, were already seen as aliens. Society is manipulated in a way that it believes the law is there to be equally applied to all, when in fact it is aimed specifically at the least enlightened classes, the ones that, in many cases, don't have enough knowledge of what the law is about and how it works, of how to achieve anything without crime, of how to thrive in a society that is constantly looking at them as if they were a threat. (276)

> Naive to believe that the law was made for all in the name of all; that it would be more prudent to recognize that it was made for the few and that it was brought to bear upon others; that in principle it applies to all citizens, but that it is addressed principally to the most numerous and least enlightened classes; that, unlike political and civil laws, their application does not concern everybody equally; that in the courts society as a whole does not judge one of its members, but that a social category with an interest in order judges another that is dedicated to disorder. (276)

Foucault's final point and most important argument regarding the prison system is that, in reality, it never failed to achieve its aims, on the contrary, it successfully achieved the purpose of shifting the focus of attention to the infractions of the lower classes, of creating the illusion that they are enemies of society, and of generating "a specific type, a politically or economically less dangerous — and, on occasion, usable — form of illegality." The greatest achievement of penal law and its varied forms of punishment, according to Foucault, is to "specify a 'delinquency'." (277)

The usefulness of these aims is more easily understood when analyzed through the lenses of those occupying privileged positions. When the idea of a universal evil is created, society's attention is focused on scapegoats, automatically blaming them for any problems encountered on the way — a practice that blinds people from the fact that dominant groups also commit illegalities but of a different kind, for different reasons, and through different means.

> If this is the case, the prison, apparently 'failing', does not miss its target; on the contrary, it reaches it, in so far as it gives rise to one particular form of illegality in the midst of others, which it is able to isolate, to place in full light and to organize as a relatively enclosed, but penetrable, milieu. (276)

The law, according to Foucault, serves the interests of the upper classes. State punishment (most importantly the prison), in its turn, helps control the lower, being one of the most effective tools of domination thanks to its 'normalizing' character. The higher classes have then the power to create and administer illegalities and at the same time the freedom to break the law in their own way, since most of the time, society is busy supervising the behaviors of others.

Marxist and Foucaudian approaches recognize that the criminal justice system has failed the mission of rehabilitating individuals and controlling criminality, and both agree that it only exists because it needs to perform its hidden purposes. For both perspectives prisons are useful to the system because they control the lower classes and isolate minorities considered unfit. From a Marxist point of view, as long as there's class division and economic inequality, there will always be struggle. Prisons are seen as tools that help the upper classes maintain power, keep the masses controlled, get rid of undesirable subjects, and rule the lower classes through the fear of punishment.

To Foucault, on the other hand, the real purpose of prisons and incarceration rates that never stop increasing is to manage minorities and shift everyone's attention to the petty crimes of the underprivileged, creating in them the image of "enemies of society", specifying delinquency,

and leaving a clear path for those with economic power to perform whatever actions they think necessary to achieve their goals without fear of the law, surveillance, or punishment. Foucault also adds that power works in a subtle way through the criminal system, seeking to shape individuals in a certain way through rehabilitation. To him, the fact that people are forced to adjust to a system that does not allow differences is one more evidence that oppression is being manifested.

For both perspectives the criminal justice system is effective, but not in the ways it should actually be. Its effectiveness is found in promoting class division and undermining the credibility of the lower classes in order to allow for the upper to stay in control. For systems like this it is imperative that the current status quo be maintained, and changes that would deeply affect society are not that easily encouraged. That being said, it is vital to raise awareness on the issue of the criminal justice system and how its practices have been profoundly affecting certain parts of the population.

Restorative Alternatives

In this last chapter we will be talking about the most discussed alternative to the current tendencies of retributive justice systems — a positive conflict-solving approach that does not focus on retribution, but on effectively decreasing the rates of recidivism by facilitating the contact between offenders, victims, and society. This chapter will expose the main characteristics of restorative systems, helping unveil the reasons why these methods have been achieving superior results and are considered extremely effective methods of dealing with criminality. The arguments in favor of restorative approaches will be supported by data from Norway — a country that has for long adopted a restorative approach to the way punishments are inflicted and have successfully kept recidivism rates at about less than half of what is currently achieved in the United States of America.

The criminal justice system of modern democratic societies has been studied and questioned for many years and is today one of the most criticized institutions in Western nations. However, it is still a challenging task to try and solve its problems or to find a replacement that will effectively change the way punishments are being handled. Restorative justice comes to the picture as a "radical alternative to the traditional way of understanding crime and justice, and dealing with criminal behavior." (Zernova 2) Developed over the last forty years, restorative methods have proved to hold the power to revolutionize the criminal system, having had extremely positive results and having changed the way modern thinkers see the criminal justice system, finally bringing some optimism to this discussion.

To better understand what restorative approaches are about, it is helpful to start by comparing the major characteristics of a restorative system with current retributive systems. A clear distinction between both is that retributive systems focus mainly on punishing offenders,

not considering the victims' interests as a relevant factor — not much is done for them besides

revenging the harm that had been caused by the offender, what might result in a feeling of

satisfaction with the thought that justice has been done, but leaves no long term positive effects

for the victims. Restorative systems, on the other hand, will focus on healing processes that help

restore the victims as much as the offenders. Victims' feelings and interests are taken very

seriously and a lot of effort is put on trying to repair the harm caused by the crime, mostly

through healing victims from the trauma they have been through (or at least minimizing the

effects of the crime).

It is true that restorative approaches have the victim's interests as a priority, but that is not

the only factor to be examined when thinking about reasons why restorative methods are a better

choice. The way offenders are handled is another significant aspect to be considered, as that's

what effectively makes a difference when it comes to decreasing rates of recidivism and

criminality. Only when both parties in a conflict are able to express their thoughts and feelings

without restrictions, knowing they are being heard, is when justice can effectively rehabilitate

and restore what's been damaged.

> Restorative justice is most closely associated with the principle of reparation –
> based on the notion that crime affects communities and victims, who should
> therefore have a part to play in administering justice. This approach usually
> involves the offender being brought face to face with someone they have harmed
> and thereby confronting what they have done. (Marsh 23)

Restorative methods seek to provide a safe environment where the parties involved in the

conflict can communicate, express their feelings, and "participate in an inclusive procedure that

enables them to come to an agreement about how to 'repair the harm' caused by the conflict."

(Levad 8-9). It empowers victims to actively participate in the solution of their own conflicts,

and also offenders, who then have a chance to understand the victims, talk about their motivations, and work on reaching an agreement side by side with the offended.

By actively participating in the solution of conflicts offenders are able to better understand the impact of their actions and have the opportunity to make amends, repairing — even if only partially — the damage that was done. Empowerment is a major restorative tool not only to the victims, but also to the offenders. To give both parties power to solve the conflict themselves is a clever tool of restorative approaches, as then both parties feel their opinions are valuable and learn to see themselves as productive citizens who have the ability to solve their own conflicts and help make society a better place.

> For victims, disempowerment is a core element of the violation. Empowerment is crucial to recovery and justice. For offenders, irresponsibility and a sense of disempowerment may have been some of the bricks on the road to the offense. Only by participating in the "solution" can they move toward responsibility and closure. (Zehr 204)

The differences between systems might also be analyzed in the way crime is understood by each approach. For retributive justice systems crime is seen as an attack on the state, in the way that it violates its rules and disturbs the social order. The state then goes on to determine who is the one to blame and to administer pain according to the harm offenders have caused and the laws they have violated. In this perspective, justice is done when a sentence is applied and the offender is punished. For restorative systems crime is seen differently. It is not a violation of the state, but of people and relationships. Justice can only be done, then, when those relationships are restored, the harm repaired, and the offender rehabilitated. (181)

Restorative justice and its methods are able to give "(…) the victim and offender an opportunity to close the gap between them through communication, allowing as much of the harm to be repaired as possible and relationships to be restored," (Wallis and Tudor 14)

achievement that wouldn't be possible through traditional means offered by most criminal justice systems of liberal, capitalist, democratic nations, which mostly enlarge the barrier between victims and offenders.

> The offender learns about the consequences of their behavior and has an opportunity to take responsibility and to make amends. The person hurt may learn why it happened, be reassured that it won't happen again, and gain answers to questions that only the offender can supply. The process itself can feel uncomfortable and there may be strong emotions on both sides. The more serious the offense, the more courage is required for the different parties to come face-to-face. Indeed, many victims state that a restorative meeting is the toughest thing the offender can be asked to do, and frequently it is all that the victim feels is required to put right the harm. (Walls and Tudor 14)

The main principles of restorative approaches are victim support and healing, help offenders take responsibility for their actions, promote facilitated dialogue between victim and offender, attempts to fix mistakes, help offenders try to avoid future offending, and community reintegration of victims and offenders. (Liebmann, 27) The ways by which these goals can be achieved are diverse, but all restorative programs share the same central components and goals, (Roberts, 146-147) contrasting greatly with the aims of retributive systems, which, in reality, focus mainly on retributing the damage done to society, creating a journey through the criminal system that "(…) can generate more and more damage as their case progresses." (Walls and Tudor 15)

Some of the ways by which these restorative approaches occur are through practices such as victim-offender mediation, conferencing, victim-offender groups, victim awareness work, reparation, and so on. (Liebmann 27) Each method has its own peculiarities, but they all focus on the same objectives and share the same prerequisites. In a general way, it is required in all approaches that the offender take responsibility for his actions, preferably understanding that positive actions such as an apology can be a decisive factor in the victim's healing process. It is

also required that the victims actively participate in the process, being able to express their feelings, concerns, and desires. "Finally, the outcomes often include reparation to the victim and/or to the community so that the offender may be re-integrated into the community as a productive citizen." (Roberts 146-147)

Another prerequisite for most restorative methods is the presence of a third person who facilitates the dialogue between victim and offender while maintaining a respectful atmosphere and making sure everyone has got the chance to talk. Voluntariness is another important requirement, as positive dialogue can only be achieved if both parties are willing to talk to each other and have the desire to fix what is broken. Dialogue between victims and offenders may sound like a hard thing to be achieved, but in fact, it has proved to be one of the things victim's want the most. To be heard and be able to understand the reasons why the offender committed a certain crime had proved to be more valuable to victims than simply getting the offenders locked up and never having the chance to talk about the issue face-to-face.

According to restorative justice practitioners, people are, in general, "willing to contemplate meeting their offender, and (…) many offenders are keen to make amends." Also, those who are involved with any type of restorative method, as mediators or conciliators, say that "restorative meeting shines out as the most meaningful and remarkable encounter in their careers." (Walls and Tudor 14)

> Extraordinary things can occur in the safe space created by restorative meetings, as people let down the barriers between them and seek a resolution together. Labels disappear and judgement dissolves. As each person's story is told and the participants start to own the process, there is a genuine potential for transformation and healing. (14)

Some of the proponents of restorative justice argue that, unfortunately, some of the approaches mentioned earlier cannot be applied to every case. According to them, it does not

seem possible to restore relationships that never existed, which means restorative methods wouldn't be effective in cases where offender and victim never had any connection before the crime. Victim-offender mediation, for example, in their perspective, could only be successful if applied to conflicts where the parties involved had a previous relationship of any kind (friends, neighbors, family, etc.). Scholars such as Howard Zehr (1944–), though, argued that even if there is no existing relationship between offender and victim, crime itself creates one — and a very hostile one. A relationship that can — and should — be restored. (Zehr 181) Even if restricted to specific cases, though, restorative methods could undoubtedly help decrease recidivism rates and improve the lives of people who, otherwise, would be stuck in a system that can only reproduce pain and suffering to those who are involved.

Several countries around the world have been slowly adopting restorative methods, but in some countries restorative justice is the only response against crime. Interestingly enough, these countries are usually the ones with lowest incarceration and recidivism rates in the world. One of the most outstanding cases is Norway, where recidivism rates are about 20%, contrasting greatly with American rates that have increased every year and which, according to a report made by U.S. Department of Justice, have already reached 80%. The report, made to analyze the recidivism rates of the American prison population of 2005, states that "five in 6 (83%) state prisoners released in 2005 across 30 states were arrested at least once during the 9 years following their release." (Alper 1)

The triumph achieved in the criminal justice system of Norway (also being reproduced in countries such as Finland and Sweden) is astonishing, and the most relevant question now is what can be learned from the most successful criminal systems in the world. The theoretical framework supporting the Norwegian system is the work of Nils Christie (1928-2015), a

criminologist scholar who believed conflicts are being stolen from their rightful owners when administered by the state. According to his ideas, the power to solve conflicts has to be given back to the people truly involved in them (and interested in their resolution). (Albrecht, 4)

Centered in Nils' idea, Norway uses multiple restorative approaches, but its main method of conflict solving is victim-offender mediation. Through mediation, as already mentioned before, victim and offender are able to talk, share concern and motives, and think of a way of solving their conflict, often times through economic compensation. Besides mediation practices, restorative principles have influenced the law and the way judges come to a verdict. An example of this is the fact that punishments such as death penalty or life imprisonment no longer exist, and the maximum amount of time an individual can be incarcerated is 21 years (except when war crimes or genocide are committed). Norwegian prisons have also changed drastically under the influence of a restorative mindset, and are today considered the most humane prisons in the world, and "models of successful incarceration practices." (Deady 3)

> The thinking is that justice for society is best served by releasing prisoners who are less likely to reoffend. The Norwegian penal philosophy is that traditional, repressive prisons do not work, and that treating prisoners humanely improves their chances of reintegrating in society. This is achieved by a "guiding principle of normality," meaning that with the exception of freedom of movement, prisoners retain all other rights and life in the prison should resemble life on the outside to the greatest extent possible. (3)

One example of this is the case of Halden, a maximum-security prison in Norway where inmates have access to innumerable classes and workshops, full-equipped kitchen, shared living rooms with television and video games, and sports courts. Their rooms have the view of a great grass field through big windows with no bars, so that people can stay connected to nature and have the benefits of sunlight. The point of creating such environment is to make sure people who are going back to society after their time ends, go back rehabilitated, reintegrated, and happy —

things that will most likely prevent them from going back into criminality. The government also supports ex-inmates by guaranteeing that "it will do everything possible to ensure that released prisoners have housing, employment, education, as well as health care and addiction treatment, if needed." (Deady 3) This is only one of the many reasons why recidivism rates are so low in places where restorative justice is the rule.

It is important to mention that the rates of criminality in Norway do not even come close to the rates attained in the United States of America, and there are many theories able to explain why. It is not my purpose to go further into this topic, but as already briefly discussed in the previous chapters, it's helpful to keep unveiling reasons why the criminal justice system of the United States incarcerates to such a great extent. Since criminality is clearly a consequence of economic inequality, countries like Norway would never suffer from it as much as countries where the gap between higher and lower classes is so great.

> Provocatively, data suggests that countries in which wealth is more evenly distributed also have lower rates of incarceration and recidivism. Sweden, Denmark, Norway, and Finland are among the ten countries with the smallest gap between rich and poor. In these countries, citizens pay higher taxes and receive more social services. John Pratt, a professor of criminology and expert on Scandinavian prisons, believes that strong welfare systems reduce poverty and inequality — key drivers of criminality. (Deady 3-4)

Even though some places are considered safer than others, crime still permeates every community in one way or another, and how the criminal system of each nation responds to it is what will define whether or not rates of recidivism and criminality in general will decrease or keep increasing. The Norwegian criminal system might not seem like a trustworthy method of dealing with offenders to many of those who support a retributive approach, but there's plenty of data out there to confirm that the results of a system which focuses on restoring instead of punishing are undoubtedly less harmful to the people involved and much more effective. The

ambitious aspirations of restorative systems can revolutionize the way crime is handled and help minimize the negative effects it has on society in general, and in the lives of those directly affected by it.

As seen in the previous chapters, modern democratic societies have been using criminal justice systems as tools with the power to oppress and control minorities and, mostly, the lower classes of society. Having the prison as a major method of punishment is a choice that has been causing division and perpetrating injustice, a perspective shared by both Neo-Marxist and Foucauldian approaches. Restorative justice comes into play with the purpose of eliminating barriers, decreasing injustice, and any kind of intolerance based on the color of the skin or the social-economic situation of individuals. Only when the hidden purpose of criminal systems is clearly understood is when society will be able to face it and, hopefully, seriously think of alternatives that can lead us in the right direction, with the hope of creating a much more equitable and effective criminal justice system.

Conclusion

The criminal justice system of the United States of America is filled with flawed and ineffective institutions. No matter how many prisons are built, or how many individuals are incarcerated, the system has never managed to fulfill its first and most important purpose: to decrease criminality rates. The number of inmates in American prisons is the highest in the world, and even though so many offenders are imprisoned, the feeling of insecurity never ceases to increase. The reason why prisons exist in the first place doesn't seem to matter anymore, since the two most important goals of the criminal justice system, deterrence and rehabilitation, have had no effects in reality.

The journey through the criminal justice system should, in theory, result in a positive outcome. Once offenders are punished for their crimes, a process of rehabilitation should start, and eventually prisoners should be ready to go back into society, reformed, and if not, at least discouraged from committing more crimes thanks to the painful experience that the prison had offered them. It is safe to say that if theory reflected reality, most of the individuals who go to prison would not be coming back. Society would be experiencing a great decrease in criminality, since it has been incarcerating more than ever before.

Unfortunately, numbers serve as a clear evidence that about 70% of young male offenders end up going back to prison within a period of five years after release in the United States. Prisons have not been deterring, nor rehabilitating. On the contrary, most of the people who face incarceration at least once in their lifetime will never be able to have a normal life. Stigma and prejudice will follow them everywhere, and very few would ever be able to get normal jobs, and be accepted back into society without judgements. These facts will consequentially lead to the

increase of criminality and violence, simply because there's basically no other option for those who are seen as criminals, treated as criminals, and given no chance of repentance.

Besides the stigma that follows inmates after their release, the prison experience is also a major contributing factor to the dissemination of criminality. Life in prison is harsh, and individuals have to deal with pain and trauma on a daily basis. Human rights are violated, crimes are constantly being repeated inside the institutions, and there's a lack of protection of one against the other due to the fact that prisons are overcrowded and it becomes extremely hard to keep track of every action or transaction going on in rooms, hallways, and common areas. To maintain sanity in an environment filled with violence and terror is a very hard task to achieve. To go back into society rehabilitated is even harder.

It seems like instead of dissipating crime, prisons end up propagating them. Given the current circumstances, a reflection about the issue of the criminal justice system is extremely important. Scholars who focused their studies on criminology, sociology, or politics, often question why are nations and governments still allowing this horror show to go on. Some of the most common answers to this question have been based on the idea that criminal systems have another purpose, a hidden motive we are not fully aware of.

The hidden purposes mentioned in this thesis draw upon Marxist and Foucauldian approaches. For Marxist approaches, the criminal justice system in general is nothing but one more weapon used in the fight of class against class. Prisons are seen as tools which help the upper classes keep control of the lower (since prisons are mostly filled with people coming from poor families), not because they intend to change them, but because they seek to manage and oppress them. It's not of their interest that the lower classes get rehabilitated through better education or better life conditions. On the other hand, it is more convenient if they remain

uneducated, isolated, and repressed, so that they have no intellectual nor economic power to ever fight the status quo or even question it.

Foucauldian approaches have a similar base, but vary a little bit in its details. The penal system is seen as a complex set of institutions not meant to eliminate criminality, but to specify who the criminals are and who should society be confronting. In this perspective, the system is also a strategy of domination, but mainly because it tells society who should be punished in order to shift attention away from the crimes of the upper classes. Environment and political crimes, for example, are not nearly as focused and as despised as petty crimes such as theft.

The prison's normalizing character is a concept worth mentioning, since that's one of Foucault's major critiques on prisons (and many other institutions). Through normalization systems, individuals are led to believe they need to adjust and conform to the norms established by those in power. The prison would be just one more institution that seeks to normalize individuals by making them fit into the standards of acceptability. Any person who deviates from the norm is considered abnormal and has to face society's judgment in many different instances.

According to these scholars, prisons are effectively performing the task of neutralizing subjects, isolating the undesired, and creating a stigma that will last forever in the lives of many. Its techniques do not help eliminate criminality, but instead have been perpetrating injustice, creating class separation, and forging enemies that do not exist. The issue of massive imprisonment in the United States needs to be addressed. More than that, the culture of having the prison as number one response to crime needs to be changed. Retributive justice fails society in the way that it does not control criminality nor rehabilitate offenders, only paying back the harm caused by them and maintaining a vicious cycle of offenses.

Restorative methods have emerged as excellent alternatives to all the damage done by retributive systems. In countries such as Sweden and Norway, recidivism rates are some of the lowest in the world, contrasting greatly with the rates in the United States, place where, unfortunately, the majority of former inmates end up going back into criminality. In countries that have adopted restorative methods, the focus is put on restoring what's been damaged by the offense, putting victim and offenders side by side (when the situation allows it), instigating them to solve the conflict by themselves. The positive effects that procedures like this have are underestimated, but numbers are there to prove that restorative methods have the power to change individuals and reduce crime in society.

It's time to start rethinking the tendencies of our current criminal system and carefully analyze what can be done to revert the daunting numbers our reality presents. By drawing inspiration from the example of countries with successful criminal systems, we are better prepared to know which actions should be given up on, and which ones should be encouraged. Redirecting resources to education, workshops, and to the creation of job opportunities for those in need instead of spending millions in prisons would already be a great start. There will not be immediate results, but working on making the system better instead of accepting it for what it is the only way of one day getting to the place we expect to be.

We have what it takes to allow change to happen, if we're only brave enough to question our current state of affairs. Change is a difficult thing, but once achieved, it will gift society with lower criminality rates, less class disparity, less stigma, and less suffering.

Works Cited

Albrecht, Berit. "Multicultural Challenges for Restorative Justice: Mediators Experiences from Norway and Finland." *Journal of Scandinavian Studies in Criminology and Crime Prevention*, vol. 11, no. 1, 2010, pp. 3–24., doi:10.1080/14043851003616204.

Alper, Mariel, et al. 2018 *Update on Prisoner Recidivism: A 9-Year Follow-up Period* (2005-2014). 0AD, www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf.

Austin, James B., and John Irwin. *It's about Time: Americas Imprisonment Binge*. Wadsworth, 2012.

Chambliss, William J. *Corrections*. Sage Publications, Inc, 2011.

Deady, Carolyn W. *Incarceration and Recidivism: Lessons from Abroad*. Salve Regina University, 2014, pp. 1–5, *Incarceration and Recidivism: Lessons from Abroad*, salve.edu/sites/default/files/filesfield/documents/Incarceration_and_Recidivism.pdf.

Digeser, Peter. "The Fourth Face of Power." *The Journal of Politics*, vol. 54, no. 4, 1992, pp. 977–1007. *JSTOR*, www.jstor.org/stable/2132105.

Foucault, Michel, and Alan Sheridan. *Discipline and Punish: the Birth of the Prison*. Penguin Books, 1977.

Fromm, Erich. *(1930a) "*The State as Educator: On the Psychology of Criminal Justice*" (Der Staat als Erziehher: Zur Psychologie der Strafjustiz), Zeithschrift fur psychoanalythisce Padagogik, 4: 1.*

Fromm, Erich. (1930b) 'The State as Educator: On the Psychology of Criminal Justice', in K. Anderson and R. Quinney (eds) *Erich Fromm and Critical Criminology: Beyond the Punitive Society.* Urbana: University of Illinois Press.

Gideon, Lior, and Hung-En Sung. *Rethinking Corrections : Rehabilitation, Reentry, and Reintegration*. SAGE Publications, Inc, 2011.

Hoffman, Marcelo. "Disciplinary Power." *Michel Foucault: Key Concepts*, by Dianna Taylor. Routledge, 2014.

Levad, Amy. *Restorative Justice : Theories and Practices of Moral Imagination*. LFB Scholarly Publishing LLC, 2012.

Liebmann, Marian. *Restorative Justice : How It Works*. Jessica Kingsley Publishers, 2007.

Lippke, Richard L. T*he Nature of Retributive Justice and Its Demands on the State*. 4 October 2018. JOURNAL. Law and Philosophy (2019) 38: 53-77. (See more info on how to make journal/article citations).

Lynch, Michael J. *Big Prisons, Big Dreams : Crime and the Failure of America's Penal System*. Rutgers University Press, 2007.

MacNay, Lois. *Foucault: a Critical Introduction.* Continuum, 1994.

Marsh, Ian, et al. *Criminal Justice: an Introduction to Philosophies, Theories and Practice.* Routledge, 2004.

Marx, Karl, and Friedrich Engels. *The Communist Manifesto. Minneapolis :* Lerner Publishing Group, 2018.

"Punishment That Works—Less Crime—A Safe Society." *Federal Sentencing Reporter,* vol. 31, no. 1, 2018, pp. 52–57., doi:10.1525/fsr.2018.31.1.52.

Roberts, J. V., & Hough, J. M. *Understanding Public Attitudes to Criminal Justice*. Maidenhead, Berkshire: McGraw-Hill Education, 2005.

Rusche, George and Kirchheimer, Otto. *Punishment and Social Structure*. New Brunswick, New

    Jersey: Transaction Publishers, 2003.

Simon, Dan, and Larry M. Bartels. *In Doubt: The Psychology of the Criminal Justice Process*.

    Harvard University Press, 2012.

Smartt, Ursula. *Criminal Justice*. Sage Publications Ltd, 2006.

Wallis, Pete, and Barbara Tudor. *The Pocket Guide to Restorative Justice*. Jessica Kingsley

    Publishers, 2008.

Zernova, Margarita. *Restorative Justice : Ideals and Realities*. Routledge, 2007.

Zehr, Howard. Changing Lenses : A New Focus for Crime and Justice. Herald Press, 1990.