

PUNISHMENT IN SOUTH AFRICA:

**An Argument for Rehabilitation
of Offenders**

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ABSTRACT

This research report examines the traditional theories of punishment, that is, retribution, deterrence and rehabilitation, and assesses their practical and empirical relevance in South Africa at the present time. It is argued that the theories of retribution and deterrence are largely inadequate to deal with offenders effectively, and consequently little relief in the crime rate could be anticipated if we were to institute a system of punishment based purely on punitive considerations. By contrast, it is argued that the theory of rehabilitation offers a more holistic approach to deal with offenders, and is really the only system which takes crime control seriously. In sum, it is argued that a system of punishment rooted in retributive or deterrent principles will neither be more just, more effective nor more humane than a system which has rehabilitation of offenders as its goal.

Key Words: Crime, Deterrence, Offenders, Punishment, Rehabilitation, Reintegration, Retribution, South Africa.

DECLARATION

I declare that this research report is my own unaided work.
It is submitted for the degree of Master of Arts in the
University of the Witwatersrand, Johannesburg. It has not
been submitted before for any other degree or examination
in any other university.

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PREFACE

The purpose of this research report is to allude readers to some important pragmatic considerations when formulating and discussing an effective theory of punishment to deal with offenders, and to contribute to current debate on the issue of punishment in South Africa. Indeed this is a controversial issue, and there will be no doubt those who disagree with my findings. Nevertheless, I believe that I raise some important issues which should be taken seriously, and not merely pushed to the back of the long list of social problems to be dealt with later. It is imperative that the plight of convicted offenders in this country is dealt with sooner rather than later if a real reduction in crime in the future is desired, and thereby a reduction in the unacceptably high amount of people falling victim to crime in this country.

It has become all too easy to advocate harsher punishments and longer prison terms to convicted offenders as a means of dealing with the crime problem, and retribution and deterrence have too long been hailed as the panacea to all our ills. An examination of the current pragmatics of theories of punishment in South Africa will reveal the shortcomings of the theories of retribution and deterrence, and will allow us to open the debate to devise a system of punishment which deals with offenders in a more just, humane and effective way. My argument is that rehabilitation is the best way to deal with convicted offenders. It is imperative that we uphold the principles afforded to us in our new Constitution, addressing the injustices of our past, and thereby contribute to a continued culture of democracy. The contribution of the criminal justice system is vital in this regard.

It had been my intention to work with the Department of Correctional Services on this report, and my application for research within the Department was approved in January this year. However, the application was subject to a number of conditions which I felt were unwarranted and I consequently decided not to work with the Department. I believe that greater transparency and freedom of information on the part of the Department is needed. I do not believe that my decision not to work with the Department has impacted on my work in any significant way.

I would like to express my sincere thanks to my supervisor, Professor Tom Lodge, for his helpful suggestions with this report and also for his invaluable support during my two years at Wits. I would also like to thank the Financial Aid and Scholarships Office of the University of the Witwatersrand for Post-Graduate Merit Award received. It is with gratitude that I acknowledge the assistance of Amanda Dissel from the *Centre for the Study of Violence and Reconciliation*, who took the time to read this work, and provided some valuable input and positive feedback. Finally, thanks to my parents and friends who have commented on and supported my endeavours. I am grateful to you all.

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INTRODUCTION

At present in South Africa, the high crime rate has become a matter of practical urgency, and indeed has effected the lives of many South Africans. Today the reality is that many citizens themselves are victims, or at least know of someone who has been unfortunate enough to experience the horrors of crime first hand. It is no longer reserved for lower-class black areas, which have had a long history of crime and violence. The crime phenomenon now knows no racial or social divide, and consequently appears to be a topic of conversation which has the potential to bring people together - if two people otherwise have nothing in common, one can nearly always rest assured that a discussion of the crime rate is sure to spark off what can often result in a heated debate. It a problem which cannot be ignored, as it deeply affects our society. As Coetzee et al. note: "if one listens to, observes, and feels responsible for one's fellow beings, one will realise that there is a disease infesting the deepest roots in our society. This disease is crime, which, like a cancer, can disrupt the normal development of all aspects of our lives."¹

Closely related to the issue of crime is the issue of punishment which has been pushed to the forefront of political discussion at the present time. There are numerous examples of late which have prompted this debate, from the recent cash-in-transit robberies to the upsurge of seemingly senseless violence on the Cape Flats. Commissioner Sitole's suggestion to lock criminals down disused mine shafts won considerable public support and also prompted debate in the political arena. It has now become common place for many citizens to voice their own particular panacea to the crime epidemic, ranging from

¹ W. Coetzee, W. Kruger & J. Loubser, Correctional Services in Focus, Randburg, Hodder & Stroughton, 1995, p. 1.

the reinstatement of the death penalty, to harsher and more severe treatment of criminals in prison.

Subjection to inhumane jail conditions is viewed by some citizens as a necessary component of the punishment, where prisons are seen as mere dumping grounds for society's wayward members. More and more the prison and harsher penalties (including the necklace sentence and public execution by some people) are coming to be seen as the answer to South Africa's crime problem. But would such repressive systems of punishment actually be effective in reducing crime, as it is so often assumed? Do the traditional theories of retribution and deterrence actually hold any empirical relevance to the current situation in South Africa? Or can the theory of rehabilitation offer us a more humane and effective way of dealing with criminals?

The aim of this research report is to assess the traditional theories of punishment, understood broadly (but not exclusively) as retribution, deterrence and rehabilitation, and to evaluate their empirical and material relevance in post-apartheid South Africa. Rather than providing a philosophical account of these theories, that is, if they are internally or logically coherent, it will be argued that the theories of retribution and deterrence (which are often viewed as offering a quick-fix solution to the crime problem) offer us little hope of dealing effectively with offenders, and thereby of reducing the crime rate. Although these systems of punishment *may* work in some possible case scenario (the evidence suggests that this is not likely), it will be argued that a system of rehabilitation which takes the needs of the offender seriously will be a more effective way of dealing with offenders than some of the more punitive practices on offer. Rehabilitation is used loosely to refer to a variety of policies, such as education and skills training, which respond to the needs of the offender and which will contribute to the successful reintegration of offenders into society.

Philosophical accounts of punishment are primarily concerned with punishment by the state. That is, they attempt to explain why the state may justifiably penalise those who are

judged to violate its laws and the conditions under which it is entitled to do so.² Consequently, theories of punishment are based on a variety of premises, aims and objectives, incorporating notions of responsibility, duty, obligation, right and wrong. An enormous scholarly effort has gone into the philosophical bases of punishment, and usually one will find in any standard work three principles which are said to provide alternative moral foundations as well as policy aims of punishment. As aforementioned, these three principles are taken to be retribution, deterrence and rehabilitation. Of these, the two former theories have been included in discussions on penal philosophy down the ages, and the very notion of punishment seems to depend on these principles, as Hudson explains:

Indeed, the very notion of punishment seems to depend upon these principles. It is hard to imagine how anything which did not inflict pain on wrongdoers in consequence of their misdeeds, and by such infliction seek not merely to avenge the wrong but also to discourage others from similar misdeeds, could be considered 'punishment': that punishment involves retribution and deterrence is almost a truth by definition.³

It is for this reason that retribution and deterrence theories are broadly understood as punitive practices of punishment. Supporters of the retributive theory of punishment regard punishment as being justified by an event in the past, i.e. the commission of a crime. By punishing the criminal, the injustice which is said to be brought about by the commission of the crime is said to be righted by the imposition of a similar evil upon the offender. It is an end-in-itself that the guilty should be punished and suffer pain commensurate with the criminal act. Punishment becomes an expression of society's condemnation of a criminal act. Ultimately, the offender 'deserves' to be punished. It is apparent that retributivism is not concerned with the consequences of punishment, and for this reason is said to be backward looking. It focuses solely on the criminal act, where the punishment must fit the crime.⁴ It is also a means of negating the wrong:

² M. Phillips, "The Justification of Punishment and the Justification of Political Authority", *Law and Philosophy*, 5, 1986, p. 393.

³ B. Hudson, *Justice Through Punishment*, London, MacMillan, 1987, p. 1.

...the destruction of guilt, whatever be the consequences, and even if there be no consequences at all, is still good in itself; and this, not because a mere recognition is good, but because the denial of wrong is the assertion of right...and the assertion of right is an end in itself.⁵

By contrast, the utilitarian theory of punishment as deterrence sees the purpose of punishment as preventing the repetition of crimes already committed (individual deterrence) and also to deter potential criminals from engaging in criminal activities (general deterrence) and thereby to protect society. For this reason it is a forward looking theory, as it looks towards future consequences, such as the protection of society. It assumes that individuals rationally decide to commit an offence (or by the same token decide not to commit an offence), and therefore punishments should be severe enough for the pain of the punishment to outweigh the gains resulting from the commission of a criminal act. Deterrence theorists usually advocate the increased use of incapacitation through imprisonment and the death penalty to deter crime.

Consequently, both retribution and deterrence argue that:

- (1) Offenders are responsible human beings who freely choose to engage in crime
- (2) Regardless of the social injustices that may have prompted the criminal into a life of crime, the nature of the crime and not the nature of the circumstances surrounding the crime should regulate the severity of the penalty.

Theresa Fouche has aptly argued that "if we examine the assumptions on which the traditional theories rest it cannot surprise us that punishment applied to these theories has been a grotesque failure."⁶ That is, a failure in practice. An adequate account of punishment must examine the consequences which are likely to be produced by it, the ways in which it may be useful to society, and most importantly must have some notion of controlling or managing crime. For Marx, the crucial question was whether punishment

⁵ F. Fouche, "The Irrelevance of Theories of Punishment: Creating Relevance," South African Journal of Philosophy, 13/2, 1994, p. 50.

⁶ Quoted in C. Bartollas & S. Dinitz, Introduction to Criminology, New York, Harper and Row, p. 109.

⁷ Fouche, op. cit., p. 51.

involves a material respect, that is, whether the theory has application to the actual social world in which we live. Murphy argues that one of Marx's most important contributions to social philosophy is:

his insight that philosophical theories are in peril if they are constructed in disregard of the nature of the empirical world to which they are supposed to apply. A theory may be formally correct (coherent, or true for some possible world) but materially incorrect (i.e. inapplicable to actual world in which we live).⁷

It will be argued that by largely disregarding the circumstances prompting many criminals into a life of crime, the theories of retribution and deterrence are inapplicable in South Africa as they are typically formulated. Primary points to be scrutinised include:

- The classical assumption of retribution and deterrence that violators of the law are rational beings (in the Enlightenment context) and that their actions are the outcome of free will. There is an underlying antagonism to the notion of crime being determined by other factors (such as socio-economic circumstances)
- The firm grounding on the crime and not the criminal. Deterrence and retribution theorists are generally disinterested in the causes or motivating circumstances of crime. Prisons house large numbers of the poor, uneducated, unemployable and the homeless, and as Fouche argues, retributivism cannot be fair if most crime is committed by a certain disadvantaged group of people - black, poor, uneducated and unemployed. Nothing is done to address the needs of the offender to help him or her lead a crime free life upon release. The possibility of rehabilitation is therefore abandoned.
- Related to the above point, there is an implicit assumption that the state not only has no right but also no obligation to do anything about the needs of the offender, thereby legitimating neglect on the part of the state to deal effectively with offenders.
- The assumption that these theories dispense justice, work as a deterrent and that getting tough and sending more people to prison will reduce the crime rate. An examination of the negative effects of incarceration will reveal that this is indeed

questionable, as evidenced by our high rate of recidivism which estimates indicate stands at between 70-93%.

In contrast, it will be argued that a system of rehabilitation and integration of offenders offers an important alternative to these punitive theories. It will be argued that rehabilitation is both forward and backward looking. That is, rehabilitation presupposes a pay-off to society by enabling criminals to become law-abiding citizens and assisting in reintegration so that offenders can become productive members of society. But it also conveys the strong message that this can only be achieved if society is willing to punish its criminals humanely, and to compensate for the apparent social and economic disadvantages which have prompted many criminals into a life of crime. Rehabilitation disputes every facet of retribution and deterrence that the constant escalation of punishment will mitigate the spectre of crime. To argue for an offenders rehabilitation is to reject the conservative notion that individuals exercise (unconstrained) free will in deciding whether to commit a crime. "Since most criminals belong to the class of unemployed, economically deprived, socially disaffected persons, it is self-evident that the incidence of street crime will not be much reduced until socio-economic change has been brought about."⁸ Obviously to prescribe socio-economic upliftment as an instant solution to the crime problem would be facile and unrealistic. My point is that policies that insist on ignoring these realities by assuming a vengeful posture to offenders will contribute little relief to the crime rate, and in fact may do a lot to make matters worse.

Section Two on Retribution and the Justice Model examines the justifications on which this theory rests. It then exposes the shortcomings and the limitations of the vision of the justice model. This includes the abstraction of the criminal act from the criminal meaning that realities such as socio-economic deprivation prompting many criminals into a life of crime are not addressed. It also reveals the mistaken assumption that 'getting tough' will somehow reduce crime. Section Three examines deterrence theory and its

⁷ Quoted in *Ibid.*, p. 52.

⁸ *Ibid.*, p. 53.

inapplicability in South Africa at the present time. Deterrence theory advocates the increased use of imprisonment and harsher penalties as a means of preventing further crime. Yet an examination of the current state of prisons in South Africa will reveal that this simply is not the case, and in fact imprisonment increases recidivism in most instances. Section Four provides a detailed analysis of the system of rehabilitation of offenders as an important alternative to the theories of retribution and deterrence. However, given that rehabilitation practices currently are only reaching a very limited number of prisoners, it is argued that we should embark on a state-obligated approach to rehabilitation.

Perhaps the most important aim of rehabilitation is a commitment to reducing recidivism, which is the only way we can hope to lower the crime rate in the future. Although the Department of Correctional Services (DCS) supports the viewpoint that offenders have the potential to function as law-abiding citizens, and in theory is committed to rehabilitating offenders, in practice funding, facilities, personnel shortages and low morale are some of the problems which hamper successful rehabilitation programmes at the current time. It is important to expose the shortcomings of the current system so that we can work towards a successful programme to deal with offenders successfully. It is also my intention to expose the shortcomings of the theories of retribution and deterrence which are so often thought to offer the answer to our society's crime problem. It is hoped that this will contribute to current debate about penal practices, and in doing so allow us to transcend practices which can only foster hardships and offer little in the way of effective crime control.

2

RETRIBUTION AND THE JUSTICE MODEL

South African policy-makers currently find themselves in a predicament of a balancing act. On the one hand they must uphold a hard won commitment to human rights embodied in the new Constitution (including those of offenders), while on the other they have to address the angry calls for vengeance and retribution by many South Africans who have been victimised by crime and want some experience of justice.¹ For many South Africans, the idea of 'revenge' and 'just deserts' is in itself an intrinsic good, does not require justification and should go without saying that those who have broken the law should suffer proportionately (or even disproportionately) for their crimes. At face value it is a very appealing notion - an ill deserved for an ill done. If nothing else, it will at least provide near instant satisfaction that justice has been served and may help us sleep a little better at night. Proponents of retribution argue that the desire for revenge is deep-rooted in human emotion, and the onus is on the judge to express their 'healthy' desire for vengeance. Fidela Fouche argues that some supporters of retributivism goes so far as to claim that the desire for retribution or revenge somehow belongs to human nature: 'The universal insistence upon retribution for grievous crimes is deeply felt, intractable and

¹ L. Camerer, "Crime, Violence and Punishment: Putting Victims on the Agenda," in *African Security Review*, Vol. 6, No. 3, 1997.

largely independent of utilitarian considerations'.² In South Africa this is indeed understandable with the amount of horrific crimes that are committed on a daily basis. Retribution is admitted to be revenge taking, but because it is not the victims but the state that takes revenge, it is called 'sanitised revenge'.³

Although retribution does not have 'crime control' or 'crime prevention' as a self-professed aim, it is often thought by many that by establishing 'law and order' and repression inherent in the philosophy of retribution, crime will somehow be curbed. This was illustrated in the United States in the 1970s, when there was a conscious shift from rehabilitation to repression or the 'justice model'. Cullen and Wozniak (1982) argue that this was a time of moral panic due to the social turmoil of the 1960s and economic troubles of the 1970s, in which rising crime rates were held up as evidence of a fundamental threat to, and decay of, communal life. Crime came to signify "the ultimate crack in the armour of the existing order", and in seeking immediate results, conservatives were quick to offer a simple remedy: "police 'em, jail 'em, kill 'em"⁴ (we arguably have a similar situation in South Africa today). The appeal of this logic is clear: a (quick) fix solution to the crime problem, while simultaneously ensuring that justice is served through harsh and repressive punishment. Careful analysis will reveal that this is in fact a simplistic response to an intricate problem.

This section will provide a precursory exposition of the major tenets of retribution, a philosophy which is currently so fashionable in South Africa. This will perhaps expose the temptation to embark on this repressive system of punishment which has 'justice' (although limited in its scope) as its ultimate justification. Secondly, I will endeavour to expose the limits of the vision of the justice model. Rather than focusing on the internal coherence of this system of punishment (as this has been done exhaustively), it will be argued that it is largely inapplicable to the 'real world' in which it is supposed to apply.

² F. Fouche, "The Irrelevance of Theories of Punishment: Creating Relevance", *South African Journal of Philosophy*, 13, 2, 1994, pp. 50-51.

³ *Ibid.*, p. 51.

Retribution implicitly embraces a classical (Enlightenment) image of the offender, assuming that criminal acts are the direct manifestation of rational costs and benefits. Through this assumption, the offender is abstracted from the social and economic circumstances which more often than not prompt offenders into a life of crime. It will be argued that by not addressing realities of socio-economic inequalities of many convicted criminals in South Africa, the retributive system of punishment will in fact contribute little relief to the crime problem.

2.1. The Justice Model

2.1.1. Philosophical Underpinnings

In contrast to deterrence, retribution offers the certainty which utilitarianism cannot. The retributive theory of punishment involves two main assumptions:

- (1) that it is an end-in-itself that the guilty should suffer pain
- (2) that the primary justification of punishment is always to be found in the fact that an offence has been committed which 'deserves' punishment.⁵

Retribution means that punishment of the guilty is in itself intrinsic. That is, its justification does not rest on attaining other ends, like deterrence or reformation of the offender. Snyman explains that:

A distinction is made between the absolute theory and the relative theories of punishment.... There is only one absolute theory, namely the retributive theory, while there are a number of relative theories. According to the absolute theory punishment is an end in itself, while according to relative theories, punishment is only a means to a secondary end or purpose.⁶

⁴ F. Cullen & J. Wozniak, "Fighting the Appeal of Repression," Crime and Social Justice, Winter, 1982, p. 25

⁵ A. Ewing, The Morality of Punishment, New Jersey, Patterson Smith, 1970, p. 13.

⁶ Quoted in M. Seleane, The Death Penalty: Let the People Decide, Florida, Vivlia, 1996, p. 5.

Its treatment of punishment as an end in itself is the essential characteristic that distinguishes retribution from its rival opponent, deterrence. Therefore, retribution does not justify punishment by its good social consequences professed by deterrence, i.e.: crime control or a reduction in recidivism, but is rather justified by the commission of a crime, *punitur quia peccatum est*.⁷ The injustice which had been brought about by the commission of a crime is said to be righted by the imposition of an equivalent evil upon the offender. For this reason it is said to be backward looking as opposed to forward looking (consequential). The 're' in retribution points to the past. This is perhaps illustrated by Kant:

punishment can never be administered merely as a means for promoting another good, either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. For one man ought never to be dealt with merely as a means subservient to the purpose of another.... He must first be found guilty and punishable, before there can be any thought of drawing from his punishment any benefit for himself or his fellow-citizens. The penal law is a categorical imperative; and woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or even from the due measure of it...⁸

This extract demonstrates a necessary connection between punishment and guilt which can be interpreted in two ways:

- (1) It can be taken as a logical connection. This is well illustrated by Rawls who claims that punishment is fitting because a person should suffer in proportion to his wrong doing. That a criminal should be punished follows from his guilt, and the appropriate punishment depends on the depravity of his act.⁹
- (2) Kant also sees a moral connection. The link is established by making punishment a question of responsibility.¹⁰

⁷ M. Rabie & S. Strauss, Punishment: Introduction to Principles, Johannesburg, Lex Patria, 1979, p. 4.

⁸ I. Kant, The Philosophy of Law, Edinburgh, T.T. Clark, 1887, p.p. 194-195.

⁹ J. Rawls, "Two Concepts of Rules," The Philosophical Review, 64, 1955.

¹⁰ P. Bean, Punishment, London, Martin Robertson, 1981, p.p. 13-14.

Kant's correlation between guilt and punishment is founded on a theory of political obligation. Kant distinguishes positive law from the 'moral law', the latter representing universal principles arrived at by pure reason. People have an absolute duty to obey it as they can be regarded as having rationally consented to the law, and therefore to their own punishment.¹¹ Obedience to the law is owed as a debt to one's fellow citizens for their self-restraint, and punishment is a payment of that debt in another form. It restores the balance between benefit and obedience, and punishing an offender allows re-entry into the community of citizens.¹² Kant also regarded punishment as morally obligatory to society which has been violated by the commission of a crime. This is explicitly illustrated in Kant's oft quoted dictum of the last murderer:

Even if a civil society resolved to dissolve itself ...the last murderer lying in prison ought to be executed that everyone may realise the desert of his deeds, and that blood guiltiness may not remain upon the people...¹³

The point about community is an important one, and one that is taken up by most retributivists today. On this view, there is a need for retribution as human beings are members of moral communities, and the very existence of moral communities depends on an acceptance of retributive justice. As Lord Denning aptly argued:

The punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory and nothing else.... Punishment...is the emphatic denunciation by the community of a crime.¹⁴

This connotes that society must make the offender suffer a harm commensurate with the harm imposed, and thereby pays his debt to society. Retribution therefore amounts to an

¹¹ D. Clarke, "Justifications for Punishment," in Contemporary Crises, 6, 1982, p. 33.

¹² Idem.

¹³ I. Kant, The Metaphysical Elements of Justice, Edinburgh, MacMillan, 1961, p. 102.

¹⁴ J. Braithwaite & P. Pettit, Not Just Deserts, Oxford, Clarendon Press, 1990, p. 160.

'emphatic denunciation' of the offender and of his crime. Oldenquist argues that this is important because it holds people accountable.¹⁵

Closely related to this point is that of balancing the benefits and burdens in society. In a Kantian sense, when someone infringes another's rights, he gains an unfair advantage over all others in the society. The punishment, by imposing a counterbalancing disadvantage on the offender, restores the equilibrium. After being punished, the offender ceases to be at an advantage over his non-violating fellows.¹⁶ Ashworth talks of punishment as restoring the balance which the offence disturbed. "It is unfair that the offender should be allowed to 'get away' with that advantage, and it is therefore right that he should be subjected to a disadvantage so as to cancel out his ill-gotten gain."¹⁷

Finally, retribution adheres to a Kantian-Hegelian conviction of individual autonomy. Duff's starting point is the Kantian demand that we must always respect others as rational and autonomous moral agents, a demand which must be central "to any tolerable system of punishment". Duff writes that

...to respect another person as a rational and autonomous moral agent is to treat him and respond to him as one who is able, and should be allowed to conduct his own life and determine his conduct in light of his own understanding of values and goals which command allegiance.¹⁸

Retribution is therefore based on a negation of any essential difference between criminals and others, seeing criminal behaviour as a simple rational calculation of costs and benefits - the so called 'reasoning criminal'.

2.1.2. What does this mean in practice?

¹⁵ A. Oldenquist, "An Explanation of Retribution," in *The Journal of Philosophy*, 1988, p. 468.

¹⁶ A. Von Hirsch, *Doing Justice: The Choice of Punishments*, New York, Hill & Wang, 1976, p. 47.

¹⁷ Braithwaite & Pettit, *op. cit.*, p. 158.

¹⁸ J. Birkenbach, "Critical Notice," *Canadian Journal of Philosophy*, Vol. 18, No. 4, 1988, p. 769.

The State

Hudson argues that beyond involving the idea of a state as an expression of the general will, the keeper of the nation's conscience and the protector of the rights of the citizenry, the justice model holds to a view of the role of the state which is minimalist¹⁹ (but this may not be the case in practice). The particular version of social contract theory which underlies the model is a Hobbesian one with the activities of the state being limited only to such involvement in the day-to-day lives of its citizens as is necessary to secure order. Arguably, this is Hobbes as opposed to Rousseau, who saw the state as having a more positive, value promoting function.²⁰ With its emphasis on rights and due process, it echoes the Enlightenment's concern to establish formal legal systems which recognises the legal rights of subjects, grants equality before the law, and curbs abuses of power. Justice theorists today represent the law as dispassionately protecting all citizens from the ravages of street crime, from those acts which "threaten our cities and destroy our sense of community."²¹ Hudson argues that it is return to old ideas, old values and old philosophies, marking disillusionment with rehabilitation, and a loss of faith in the expansionist state as a benevolent provider of caring and curing services: "Return to justice is a retreatist position based on hopelessness and disillusion."²²

Free Will

Just as the justice model returns to a seventeenth and eighteenth century view of the state, so its view of the individual is a return to the free will individual rationality model of human nature of the Enlightenment.²³ We have seen the influence of Kant's theory of individual responsibility which depends on culpability, where each offender's blameworthiness can be assessed along with the gravity of the offence. Hudson explains

¹⁹ B. Hudson, Justice Through Punishment, London, MacMillan, 1987, p. 54.

²⁰ *Idem.*

²¹ R. Paternoster & T. Bynum, "The Justice Model as Ideology," in Contemporary Crises, 6, 1982, p. 15.

²² Hudson, *op. cit.*, p. 55.

²³ *Ibid.*, p. 56.

that as the idea of the state turns from Durkheim and Marx back to Hobbes, so the understanding of the individual reverts from Freud to Kant. Punishment is inflicted because the individual deserves it - it is the offenders right to be punished, the right to expiate his guilt and become morally whole again.²⁴ The idea of 'paying one's debt' and 'wiping the slate clean' is an attractive aspect of this model, thereby restoring the balance between advantage unfairly gained and harm involved in a criminal act.

2.2 Limits to the Vision of the Justice Model

The main argument henceforth is that with the current state of affairs in South Africa, several practical and empirical problems would emerge if we were to heed to calls to implement the justice model, based on the assumption that greater repression will lead to a reduction in crime, and that greater justice will be served. This reasoning is aptly argued by Bazelon (1977):

Most disturbing, all these proposals fail to consider the social injustices that breed crime....I do not understand how these academicians and politicians can have a clear conscience preaching repression as the solution to crime, unless of course they believe that despite the accident of birth everyone... is equally endowed, mentally and physically, and has the same opportunities they have had to get ahead.²⁵

Rather than focusing on whether the principles of retribution discussed thus far are internally coherent or morally sound, it will be argued that retribution is largely inapplicable to the 'real world'. It is apparent that retributivism is not concerned with the consequences of punishment, argues that offenders are responsible human beings who freely choose to engage in crime, that punishment of the offender is deserved, and regardless of the social injustices that may have prompted the criminal to a life of crime, it is the nature of the crime and not the nature of the circumstances surrounding the criminal that should regulate the severity of the punishment.

²⁴ Idem.

Arguably, one of Marx's most important contributions to social philosophy is his insight that philosophical theories are in peril if they are constructed in disregard of the nature of the empirical world in which they are supposed to apply. A theory may be formally correct (coherent or true for some possible world) but materially incorrect (inapplicable to the world in which we live).²⁶ It is this pragmatic reasoning that will be applied to the possibility of instituting a system of punishment in South Africa based on backward-looking, repressive measures. This point is reiterated by Fidela Fouche who has aptly argued, "if we examine the assumptions on which the traditional theories rest it cannot surprise us that punishment applied to these theories has been a grotesque failure".²⁷

Primary points to be scrutinised include:

- (1) The firm grounding of punishment on the crime and not the criminal, that is, abstraction of the act from the agent.
- (2) Realities of socio-economic deprivation are not addressed.
- (3) Just deserts in an unjust society - the inapplicability of social contract theory
- (4) The fact that retribution is divorced from social policy, and that it neglects the needs of offenders, renders it largely inapplicable in the real world
- (5) That getting tough will somehow reduce the crime rate. (1)-(4) will in fact show how unrealistic this premise is.
- (6) it will be countered to advocates of retribution that rehabilitation offers a more realistic option.

2.2.1. The Crime and not the Criminal, the Act and not the Agent

²⁵ D. Bazelon, "Street Crime and Correctional Potholes," Federal Probation, 41, March 1977.

²⁶ J. Murphy, "Marxism and Retribution," In M. Cohen, T. Nagel & T. Scanlon (eds.), Marx, Justice and History, New Jersey, Princeton Univ. Press, 1980, p. 173.

Hudson argues that the irony of the justice model, in focusing on the criminal act and making the punishment fit the crime, is that it in fact encourages "the abstraction of the act from its agent."²⁸ Yet the cornerstone of liberalism is supposedly the championing of the individual human beings against abstractions. Liberalism is supposed to represent the claims of the citizen against ideologies, and yet the justice model abandons any notion of the overall integrity of the individual, encouraging a view which disregards the circumstances of the criminal:

To say that the circumstances of the individual committing an offence are irrelevant to sentencing is to take criminal justice out of the realm of ordinary human interactions, and instead elevate abstract descriptions of events, and abstract decisions about which events are more significant and serious than others, into the realm of universalistic categories not subject to normal negotiating processes. The justice model's privileging of events over people is, therefore, the very antithesis of liberalism.²⁹

In contrast, Hudson argues, a genuinely liberal approach is "an extraordinarily generous willingness to look at each offender as someone trapped by events, someone who is not an event but a person."³⁰ In South Africa, this abstraction would legitimise the police, magistrates, judges and lawyers against addressing the socio-economic plight that many offenders find themselves in. As retributivists place immense faith in the Enlightenment notion of free-will, where unlawful acts occur only if individuals have calculated that they are advantageous, they insulate themselves against the real social and economic roots of crime, calling for repressive measures to control crime. An examination of the realities of socio-economic deprivation will reveal the inadequacy of such an assumption.

2.2.2. Realities of Socio-Economic Deprivation

²⁷ Fouche, *op. cit.*, p. 51.

²⁸ Hudson, *op. cit.*, p. 166.

²⁹ *Ibid.*, p. 167.

³⁰ *Idem.*

I do not intend here to embark on an elaborate discussion of the causes of crime in a capitalist society. Indeed, a rich literature exists in the field, but it is beyond the scope of this dissertation to provide an overview of current perspectives in this department of criminology. I content myself to draw on Willem Bonger and Elliott Currie whose works are particularly pertinent in illustrating the relationship between socio-economic deprivation and crime.

Willem Bonger is regarded by many as a pioneer in the development of modern criminology. For Bonger, criminality has two primary sources:

- (1) need and deprivation on the part of disadvantaged members of society
- (2) motives of greed and selfishness that are generated and reinforced in competitive capitalist societies.³¹

Criminality is therefore economically based: either directly in the case of crimes from need, or indirectly in the case of crimes growing out of motives that are encouraged and developed in capitalistic societies. In Marx's words, such an economic system alienates men from themselves and each other, and alienates men from their fellows by encouraging a kind of competitiveness that forms an obstacle to the development of genuine communities.³² More recently, Elliott Currie has argued that market society is where the pursuit of private gain increasingly becomes the organising principle for all areas of social life, not simply a mechanism which we use to accomplish certain circumscribed economic ends. All other principles of social organisation become subordinated to the over-reaching one of private gain, and as a result individuals, families and communities become more and more dependent on the free market to provide for their human needs.³³ However, a major criticism of market society is that it is not adequately characterised by the notion of the free market, a criticism that is highly relevant to South Africa at the present time. It is

³¹ Murphy, *op. cit.*, p. 175.

³² *Idem.*

³³ E. Currie, "Social Crime Prevention Strategies in a Market Society," in J. Muncie, E. McLaughlin & M. Langan (eds.), *Criminological Perspectives*, London, Sage, 1996, p. 343.

argued that economic and social power, and the expanded life chances and opportunities that go with them, are not free in the classical Adam Smithian sense of being equally accessible to all.

For Bonger, community is central, as moral relations and moral restraint are possible only in genuine communities characterised by bonds of sympathetic identification and mutual aid resting upon a perception of common humanity - reciprocity. In the absence of reciprocity, moral relations will break down and criminality will increase. Crimes grow out of need, greed and indifference to others:

Poverty (taken in the sense of absolute want) kills the social sentiments in man, destroys in fact all relations between men. He who is abandoned by all can no longer have any feeling for those who have left him to his fate.³⁴

Furthermore, as Austin Turk has argued: "Criminal behaviour is almost entirely attributable to the combination of egoism and an environment in which opportunities are not equitably distributed."³⁵ And Brathwaite found in an extensive study that the widening of the income gap between rich and poor is an economic factor which leads to an increase in street crime. In the United States he found that those cities that have the widest income gaps between low and high income earnings consistently have higher street crime rates.³⁶

For many these claims will strike as extreme, unfounded and perhaps even a reversion to the anachronistic days of positivism. But those who are inclined to react in this way might consider these sobering facts:

- (1) South Africa's high rate of unemployment: "In 1995 there were 350 000 new job seekers and only 95 000 jobs were created, mainly for more skilled people. 4,4 million

³⁴ W. Bonger, *Criminality and Economic Conditions*, London, Indiana Univ. Press, 1969.

³⁵ Murphy, *op. cit.*, p. 177.

³⁶ C. Bartollas & S. Dinitz, *Introduction to Criminology*, New York, Harper & Row, p. 234.

people are now without jobs."³⁷ Although various studies differ in estimates of the overall unemployment rate from between 20-40%, it is probable that the overall rate is closer to the 40% mark, and amongst certain sectors (most notably the youth) is even higher. This is illustrated by a recent study conducted by the University of the Witwatersrand which found that 74.2% of youth between the ages of 16-25 are unemployed and actively seeking work. More than half of Sowetans believe that economic factors are the main cause of crime.³⁸

- (2) Poverty: the poverty line was defined in 1995 as an urban household (two adults and three children) with a monthly income of less than R840.00. The Centre for Development and Enterprise (CDE) estimated that over three million households, roughly 39%, were living in poverty, almost one in three people do not have enough to eat, and about two-thirds of all black children were living in poverty. Nearly 95% are black, 5% coloured and less than 1% white.³⁹
- (3) Unemployment is the core cause of poverty in South Africa, and has a clear race dimension. Some studies estimate that unemployment among black South Africans is 38%, among coloureds 21%, Indians 11%, and whites 4%.⁴⁰
- (4) Cock gives the following income distribution statistics: Whites who constitute less than one sixth of the population, earn nearly two-thirds of the income: blacks, who account for nearly two-thirds of the population earn a quarter, and nearly two-thirds of black people live below the minimum living level.⁴¹ Put another way: the poorest 40% of households earn less than 6% of total income while the richest earn more than half.⁴² What we have is a legacy of economic apartheid.

³⁷ Mail and Guardian, July 19-25, 1996.

³⁸ "Understanding Crime," Gauteng News, No. 1, December 1997, p. 15.

³⁹ "Poverty in South Africa," Parliamentary Bulletin, 21 October 1996.

⁴⁰ Idem.

⁴¹ Quoted in Fouche, op. cit., p. 53.

⁴² Mail and Guardian, July 19-25, 1996.

"Massive socio-economic degradation, with poverty, hunger, homelessness and unemployment the order of the day, will render the political changes meaningless if they are not accompanied by a significant improvement in the quality of people's lives. Whilst politically motivated violence is on the decline, there has been an increase in common criminal activities."⁴³ It would be facile to attribute all crime currently plaguing our society to socio-economic deprivation. As Lala Camerer argues, political violence continues to simmer in KwaZulu-Natal, the roots of criminality lie in the apartheid system (although the above statistics are indirectly indicative of this fact), and increases in crime in South Africa are consistent with other countries undergoing similar transitions to democracy - as change proceeds, society and its instruments of social control are reshaped and vacuums of social authority create spaces within which criminals operate (especially organised cartels).⁴⁴

Added to this, numerous other causes of crime can be cited. According to the *International Centre for the Prevention of Crime*, incidents of crime increase for some of the following reasons:

- Inconsistent and violent parenting in early childhood
- Where opportunities for development have been consistently blocked
- Inadequately serviced settlements
- Substance abuse
- Economic recession resulting in high levels of unemployment.⁴⁵

The *National Crime Prevention Strategy* adds the following historical factors explaining high incidences of crime in South Africa:

⁴³ See Internet: www.sun.ac.za/local/library

⁴⁴ Camerer, *op. cit.*

⁴⁵ V. Mhangwana & A. Fourie, "Investing against Crime," *In Focus Forum*, Vol. 4, No. 5, March 1997, p. 13.

- Politically sanctioned violence as a means of attaining political objectives gave rise to a culture of crime
- Vigilantism, revenge and self-defence lead to a spiral of crime
- Easy access to the proliferation of firearms
- The economic and political marginalisation of youth who played a critical role during the period of struggle has made them susceptible to the influence of gangs and criminal activity.⁴⁶

The last point noted is particularly important. Benison Makele explains that during the struggle against apartheid, the youth became used to violent ways of achieving the objectives of the struggle. But left unemployed and without education, many have now turned to using the war skills they learnt during the liberation struggle to the detriment of the very same communities they had striven to emancipate.⁴⁷ This has particularly been evidenced in the recent spate of attacks on cash-in-transit vehicles. Former Umkhonto weSizwe (MK) cadre 'Peter' admitted in March of this year that he had help set up several of the cash-in-transit robberies in which R100-million was stolen and twelve people lost their lives. He also admitted that other former comrades in the MK were part of a number of 'cells' behind the heists. When asked why he had decided to go public, Peter replied his aim was to pressure the ANC into doing something about plight of former fighters:

It is a different form of guerrilla warfare now. We fought for the liberation of South Africa. MK soldiers were made many promises by the ANC. They have not kept any of them. Instead they despise us. By turning to crime, the freedom fighters are making a final stand, a statement, against the ANC.⁴⁸

These varied causes of crime may also be intricately linked with problems of unemployment and poverty, compounding the problem further. One must bear in mind

⁴⁶ Ibid, pp. 13-14.

⁴⁷ B. Makele, "Don't Hang Them - Heal Them!" *City Press*, 22 September, 1996.

⁴⁸ S. Grobbelaar, "I Set up the Heists," *Saturday Star*, March 7, 1998, Section 1, p. 1.

that most criminals belong to the underclasses of society. Cilliers argues that in South Africa there is also a growing and persistent problem of long-term unemployment which is particularly harsh on the less skilled, the youth and those who have any disadvantage in the labour, including ex-offenders. It should come as no surprise then that the majority of criminal offenders, 80% by some estimates, are members of the lowest income levels, or indeed have no income at all. As Judge J. Trengrove argues, "I would say that 75% of the people who appear in our criminal courts are, by reason of population group and socio-economic circumstances, black people."⁴⁹ Unless one wants to embrace the belief that people are poor because they are bad, it might well be realistic to embrace Bonger's suggestion that "many of them are 'bad' because they are poor."⁵⁰

2.2.3. Just Deserts in an Unjust Society

The retributive theory claims to be grounded on justice. But Murphy asks: is it just to punish people who act out of those very motives that society encourages and reinforces? If Bonger is correct, much crime is motivated by greed, selfishness and indifference to one's fellows, but does not the whole society encourage greed and selfishness? Murphy argues that there is something perverse in applying principles which presuppose a sense of community in a society which is structured to destroy genuine community.⁵¹ This point is related to the whole allocation of benefits in contemporary society.

Murphy argues that retribution presupposes what might be called a 'gentlemen's club' picture of the relation between man and society, i.e.: men are viewed as being part of a community of shared values and rules. In the absence of such obedience he deserves punishment in the sense that he owes payment for his benefits. But Murphy argues, "to think that it applies to the typical criminal, from the poorer classes, is to live in a world of

⁴⁹ Quoted in S. Terblanche, "Sentencing: Affordable Approaches," in L. Glanz (ed.), Managing Crime in the New South Africa, Pretoria, HSRC, 1993, p. 246.

⁵⁰ Murphy, op. cit., p. 178.

⁵¹ Murphy, op. cit., p. 180.

social and political fantasy".⁵² Criminals are not typically members of a shared community of values, and they certainly would be hard pressed to name the benefits for which they are supposed to owe obedience. "If justice, as both Kant and Rawls suggest, is based on reciprocity, it is hard to see what these persons are supposed to reciprocate for."⁵³

Hudson argues that the return to the Kantian morality and Hobbesian social contract view of the state inherent in retribution is based on the moral authority of the state itself honouring its obligations to individuals in return for their compliance with the law. That is, having benefited from the Rule of Law, I have in a sense consented to it and its consequences - even my own punishment if I violate the rules. To see how silly this factual presupposition is, Murphy quotes David Hume's famous passage in "Of the Original Contract":

Can we seriously say that a poor peasant and artisan has a free choice to leave his country - when he knows no foreign language or manners, and lives from day-to-day by the small wages which he acquires? We may well assert that man, by remaining in a vessel, freely consents to the dominion of the master, though he was carried on board while asleep, and must leap into the ocean and perish the moment he leaves her.⁵⁴

Similarly, Fouche argues, most criminals in South Africa do not perceive themselves as being members of a community with which they have agreed to enter into a relationship of reciprocity:

Unemployed South African squatters, for example, or victims of forced removals, almost certainly have no sense of benefits they have received from society and no feeling that they owe society any debt. The destitute simply are not voluntary participants in a reciprocal system of benefits.⁵⁵

⁵² *Ibid.*, p. 181.

⁵³ *Idem.*

⁵⁴ *Ibid.*, p. 182.

⁵⁵ Fouche, *op. cit.*, p. 52.

To say that all South African squatters or victims of forced removal do not view themselves as participants in a reciprocal system of benefits may be true with regard to larger society, but this is not to imply that they have no sense of community. Justine Lucas' study Space, Domesticity and 'People's Power' examines civic organisation in Alexandra (a densely populated township which has experienced some of the worst poverty and squalor of apartheid South Africa). Although Alexandra has never been an homogenous community, Alexandra Civic Organisation has endeavoured to build unity among the various divisions through the creation of democratic and inclusive civic structures.⁵⁶ How successful the ACO has been is not relevant to the task at hand (although I suspect with the high crime in Alexandra these civic bonds are not all that strong), but it has merely been my intention to point out that a sense of community may exist in these impoverished areas. Yet I would still concur with Fouche that many destitute people do not feel themselves to be a party to the larger system of benefits operating in society.

Murphy continues that at root retribution fails to recognise that criminality is to a large extent a phenomenon of economic class. "To acknowledge this is to challenge the empirical presupposition of retributive theory - the presumption that all man, including criminals, are voluntary participants in a reciprocal system of benefits and that the justice of this arrangement can be derived from some external and ahistorical concept of rationality."⁵⁷

This point is reiterated by Hudson, who argues, that if rewards are unevenly due, then retributive punishment based on desert has no meaning:

To the extent that benefits are not equally received by all citizens, there is no consent rendered, not obligatory reciprocity and hence no just basis for retributive punishment.⁵⁸

⁵⁶ J. Lucas, "Space, Domesticity and 'People's Power'", African Studies, 54.1.95, p. 90.

⁵⁷ Fouche, p. 52.

⁵⁸ Hudson, op. cit., p. 169.

Bearing in mind that most crime is committed by a certain sector of people (black, uneducated, unemployed and poor), bearing in mind that there is a positive correlation between unemployment and imprisonment rates, and bearing in mind that the unemployed are especially over-represented in the categories of burglary, robbery and drug offences,⁵⁹ retribution is a highly unjust system of punishment in an unjust society. By setting aside the question of social inequalities, justice model theorists are undermining the whole logic of their advocacy of just deserts as a basis for punishment. Consider the following illustrative example provided by Bonger, which is as though written for many South Africans:

A man has been convicted of armed robbery. On investigation, we learn that he is an impoverished black whose whole life has been one of frustrating alienation from the prevailing socio-economic structure - no job, no transportation if he could get a job, substandard education for his children, terrible housing and inadequate health care for his whole family, condescending-tardy-inadequate welfare payments, harassment by the police but no real protection by them against the dangers of the community and near total exclusion from the political process. Learning all this, would we still want to talk - as many do - of his suffering payment under the rubric of 'paying a debt to society?' Surely not. Debt for what? I do not, of course, pretend that all criminals can be so described. But I do think this is a closer picture of the typical criminal that is presupposed by retributive theory - i.e.: the picture of an evil person who, of his own free will, intentionally acts against those just rules of society which he knows, as a rational man, benefit everyone including himself.⁶⁰

In a society in which everyone had an ample opportunity to make a decent living within the law, it is comparably easy to argue that offenders deserve retributive punishment. But difficulties arise when questions of social injustice are taken into account. As Marx remarked, retribution, considering punishment as the result of the criminals own will, is a metaphysical expression for the old *jus talionis*: eye against eye, tooth against tooth. But this account elevates the criminal to the position of a free and self-determined being:

⁵⁹ Fouche, *op. cit.*, p. 53.

⁶⁰ Murphy, *op. cit.*, p. 183.

Is it not a delusion to substitute for the individual with his real motive, with multifarious social circumstances pressing upon him, the abstraction of 'free will'?⁶¹

By setting aside the question of social inequalities, the justice model theorists are therefore undermining the whole logic of their advocacy of deserts as the basis for punishment. As Hudson argues, in an unequal society there can be no equality of obligation before the law; if legal equality is not accompanied by social change to bring about equal distribution of benefits, there can be no legal, as well as no social, justice.⁶²

2.2.4. Penal Policy and Social Policy

The justice model is depicted as presenting itself attempt to tie criminal justice practices to formal legal values. Hudson argues that in reality, it is merely providing a legitimating rhetoric for conservative attempts to pass off dilemmas of unemployment, poverty and inequality as crime problems, and to supposedly control by punishment what they are not prepared to cure by social change.⁶³ Cilliers argues that in South Africa, the last five years have witnessed the emergence of a strong association between levels of unemployment, between long-term dependence on state benefits and the likelihood of being taken into custody because monetary policies (such as state benefits) cannot and are not being paid. He adds that the high levels of unemployment affecting the 16-21 year old age group (a recent United Nations survey reveals that nearly one-third of the male population under 30 have a conviction against them) and a propensity for the involvement in petty crime to lead to more serious crime, is perhaps the saddest and most worrying development of all.⁶⁴ Amanda Dissel from the *Centre for the Study of Violence and*

⁶¹ K. Marx, "Capital Punishment," in L. Feuer (ed.), Marx and Engels: Basic Writings on Politics and Philosophy, Garden City, Anchor Books, 1959.

⁶² Hudson, op. cit., p. 169.

⁶³ Ibid., p. 164.

⁶⁴ C. Cilliers, "Panel Members Reply," in L. Glanz (ed.), Managing Crime in the New South Africa, Pretoria, HSRC, 1993, p. 298.

Reconciliation reiterates this points, acknowledging that the high incidence of crime among the youth of our country is a particular cause for concern.⁶⁵

Hudson argues that the drift to a law and order society is a predictable response to such a crisis: "If society cannot keep order by the carrot, it must revert to the stick", and if it not prepared to pursue justice through the fair allocation of rewards, it must pursue control through the sure administration of punishment.⁶⁶ In times of crisis, the street crimes of the poor are bound to be pinpointed as those which are a threat to the social order. This is particularly evidenced in South Africa at the present time where street crimes are regarded by most people as one of the most serious problems facing this country. Yet the reality is that white collar crime costs the country more money than robberies and heists. It is estimated that in South Africa R326-million was lost to computer crime and fraud in 1997, which is more money lost in robberies or heists.⁶⁷ Yet there is no law against this computer hacking, as it would seem all attention is focused on the street crimes of the poor.

Many South Africans believe that individuals themselves are to be blamed for unemployment and poverty that hampers so many people's lives. This is consistent with Hudson's argument that "if the conditions of urban working class life can be shown to be the product of their own wickedness rather than government neglect, then the government can justify itself in doing nothing to alleviate the problems of decline and decay."⁶⁸ This leads Hudson to conclude that social problems are simply being recast as crime problems, and that the justice model has nothing constructive to offer. By isolating offenders and dealing with them on the basis of individual culpability, all it does is implement a 'get tough' policy on those unfortunate to get caught, while doing nothing to actually eradicate the behaviour:

⁶⁵ A. Dissel, Personal Interview, 17 March 1998, Johannesburg.

⁶⁶ *Ibid.*, p. 165.

⁶⁷ D. Shapshak, "Computers Outsteal the Gunmen," *Mail & Guardian*, February 13-19, 1998.

...its vengeful punishment on the misguided miscreants who are the last link in a chain of crimes of neglect and crimes of exploitation - and the cost of the enormous investment in police, courts and prisons is a diversion away from meeting the real needs of these communities.⁶⁹

Hudson explains that denying the relationship between penal policy and social justice is wrong on at least two accounts:

- (1) Although it is true that no change in criminal justice practices would be sufficient to eliminate the structural inequalities in our society, it is also true that criminal justice practices can do a great deal to make matters worse. Every movement towards stronger repression widens the gulf inequality and current social and economic practices - punishment designed to protect and affirm the existing social order reinforces these inequalities in opportunities to get ahead. "Honouring our commitment to true justice requires that we stop acting as if the goal were to just get tougher, when those who feel the sting most are those who already suffer the most in the absence of broader social justice."⁷⁰ As Matthews and Young argue, all interventions in the control of crime have a social cost which must be weighed against their effectiveness.⁷¹
- (2) It is through its claims to contribute to a just society that punishment derives its legitimacy. Without its necessity for the achievement of justice, there is no basis for penal policy and punishment. So to actually disassociate itself from social justice (as retribution does) is definitionally absurd. "Penal policy cannot ignore the reciprocal effects of its own practices and those of other areas of social policy."⁷²

⁶⁸ It must be admitted that the government is taking steps to address to inequalities inherent in South Africa through the policies required by the RDP and GEAR, but the problem is that this takes time.

⁶⁹ Cilliers, *op. cit.*, p. 113.

⁷⁰ B. Hudson, *Penal Policy and Social Justice*, London, MacMillan, 1993, p. 15.

⁷¹ R. Matthews & J. Young, "Reflections on Realism", in Young & Matthews (eds.), *Rethinking Criminology: The Realist Debate*, London, Sage, 1992, p. 6.

⁷² Hudson, *op. cit.*, pp. 15-16.

Cyril Harris argues that South Africa's 'haves' help uplift its 'have-nots' is more than an economic and social imperative - it is also a moral one. Yet the reluctance to any such reparation and redistribution is course widespread, as witnessed by the reaction to Professor Sampie Terreblanche's recent proposals for a wealth tax, despite the fact that many countries have been imposing it for years in the form of tax on capital gains or profits.⁷³ Harris continues that a series of conundrums bedevils genuine attempts at equalisation, and that the situation in our country demands intervention of some sort. His proposal that individuals and corporations raise their bonds on their properties in order to provide much needed capital sums for development (even with preferential interest rates and income tax relief on their repayments) is perhaps a bit extreme. But his point that major socio-economic causes of crime request help is nevertheless valid. As Harris states: "A young black adult with no house, no money, no education and no prospects can easily be tempted towards crime - unless those with the power to ameliorate his desperate conditions attempt just that."⁷⁴ His point that the recognition that the past inequities of the apartheid era can only be rectified by an acute sense of responsibility towards repairing some of the damage is an important one. Beginning to address the issue of crime involves a holistic approach encompassing strategies that deal with the broader ills of society such as unemployment and poverty, instead of passing of these issues solely as a crime problem.

2.2.5. Getting Tough to Reduce Crime

Retribution manifests disinterest in the question of crime control, instead justifying punishment on the grounds that it presumably provides society with the psychic satisfaction that justice has been accomplished by harming offenders in doses commensurate with the harms their crimes have caused. Yet it is often thought by many that tough and repressive measures will somehow impact upon society by keeping offenders out of circulation. Imprisonment is thought to be the best means of accomplishing this.

⁷³ C. Harris, "Reparation is Crucial if Reconciliation is to Take Place," *Citizen*, 3 December 1997.

In consideration of what has been argued in points (1) to (3), it should come as no surprise that increased repression in fact does little to reduce crime. Camerer argues that research has shown that retributive justice models do not work.⁷⁵ It is largely agreed by most penal researchers that the United States is tougher on crime than most other countries, as witnessed by their high rate of imprisonment (which is only surpassed by totalitarian states) yet their society is plagued by a high rate of crime. Cullen and Wozniak argue that cracking down on crime does not make people's neighbourhoods safer. A repressive policy ignores the fact that 95% of all inmates or a monthly average of 10 000 prisoners will eventually return to the community, many to offend again and congest the system further. If these offenders have been dehumanised while incarcerated will this make citizens sleep more soundly upon their return? [See section 3.4.1. for the undesirable effects of incarceration].

One of the major hindrances is the prevalence of legal factors such as rights and obligations over social concepts such as help and need which is central to retribution. Retribution, as we have seen, ignores fundamental problems such as socio-economic deprivation which prompt most offenders into crime. Although it may be argued that in the sentencing process these mitigating factors may be taken into account and the offender rendered less culpable, the fact still remains that offenders are not prepared for release, and their plight has not been ameliorated by imprisonment, and in most cases is worsened.

This is evidenced in South Africa with its high rate of imprisonment and high rate of recidivism. Although no evidence is currently available on recidivism rates in South Africa (as I understand no studies have been undertaken) estimates vary from 70% to 90%.⁷⁶ It is probably accepted by most that the recidivism rate is close to the 75% mark. Is a philosophy that gives legitimacy to the neglect to offenders needs going to be effective?

⁷⁴ *Idem.*

⁷⁵ Camerer, *op. cit.*

⁷⁶ C. Henrico, "Ekuseni - A new approach to Youth in Detention," *Nexus*, January 1997, p. 9.

2.3. Reaffirm Rehabilitation

The justice model's call for law and order will only lead us down the path of greater repression and irrationality in the area of crime control. The very real risk is that it will give a 'new legitimacy of neglect'.⁷⁷ Implicit in the philosophy of basing punishment strictly on the crime and not the criminal is the assumption that the state not only has no right but no obligation to do anything about the condition or needs of the offender. The logic of this reasoning is aptly expressed by Karl Menninger:

Crime problems have been dealt with too long only with the aid of common sense. Catch criminals and lock them up; if they hit you, hit them back. This is common sense, but it does not work.⁷⁸

By locating the source of illegality in the wilful calculation of costs and benefits of the crime, the deserts paradigm abandons the humanistic spirit in liberal appreciation of the social injustices that victimise the less advantaged and constrain them to follow a destructive path that ends in imprisonment.⁷⁹ Cullen and Gilbert argue that it is this insensitivity to the ravaging effects of inequality, poverty and unemployment that has allowed liberals to talk of the 'crime of punishment'. Just deserts ultimately obligates the state to do no more than to make criminal pursuits unprofitable, and to provide victims (and offenders) with the solace that they are paying their debt to society.

It was Bonger who argued that "Where crime is the consequence of economic and social conditions, we can combat it by changing those conditions...it is society that prepares the

⁷⁷ F. Cullen & K. Gilbert, *Reaffirming Rehabilitation*, Cincinnati, Anderson, 1982, p. 178.

⁷⁸ Quoted in *Ibid.*, p. 7.

⁷⁹ *Ibid.*, p. 157.

crimes."⁸⁰ This proposition reveals the intimate connection between crime, punishment and society, and perhaps suggests that true criminal justice ultimately awaits true social justice. But it is obviously facile and unrealistic to prescribe socio-economic upliftment as an instant solution to the crime problem. However, rehabilitation at least acknowledges steps in this direction.

Cullen and Gilbert argue that rehabilitation disputes every facet of the conclusion that the constant escalation of punishment will mitigate the spectre of crime. To argue for an offenders rehabilitation is to reject the deserts notion the individuals, regardless of their position in the social order, exercise equal freedom in deciding to commit a crime. Rehabilitation is instead to argue that social and personal circumstances often compel people to violate the law, and unless efforts are made to enable criminals to escape these criminogenic constraints, little relief in the crime rate can be anticipated. "Policies that insist on ignoring these realities by assuming a vengeful posture towards offenders promise to succeed only in fostering hardships that will deepen the resentment that many inmates find difficult to suppress upon their release back into society."⁸¹

The conservative plea for repression is exposed as a crime because it both necessarily dehumanises society's captives, and falsely deceives the public that strict crime control measures will afford citizens greater safety. The concept of rehabilitation reveals that fundamental changes in offenders will not be realised as long as inflicting repression remains the legitimate goal of punishment. As Menninger observed: "the more fiercely, the more ruthlessly, the more inhumanely the offender is treated - however legally - the more certain we are to have more victims"⁸² Rehabilitation prompts us to realise the disadvantages that drive many to crime, and then assists offenders to deal with the conditions and means that have moved them to break the law. In sensitising us to the fact that much crime that plagues society is intimately linked with social inequalities and injustices, rehabilitation insists that a true solution to the crime problem (that is, if one

⁸⁰ W. Bonger, *Criminality and Economic Conditions*, London, Indiana Univ. Press, 1969.

⁸¹ *Ibid.*, p. 255.

⁸² *Ibid.*, p. 256.

were really to exist) rests in the support of educational and reform packages that enables ex-offenders to function within (and not marginal to) the existing social order. This is in notable contrast to the philosophy of just deserts that assumes full individual responsibility, focuses on the culpability of the single perpetrator and therefore "acquits the existing social order of any charge of injustice."⁸³ In the words of Reiman, just deserts ensures that "the rich get richer and the poor get prison."

⁸³ J. Reiman, The Rich get Richer and the Poor get Prison, New York, John Wiley, 1979, p. 144.

3

PUNISHMENT AS DETERRENCE

Perhaps even more challenging than calls for retribution to South African policy makers is the fact that surveys indicate that up to 80% of the population favour for the reinstatement of the death penalty, and harsher and more severe punishments to deter potential offenders from a life of crime. On July 11 1997, over 160 000 postcards were delivered to the presidents Union Building offices in Pretoria in a protest against crime. One sender asked the government to commit a temporary state of emergency to bring the crime situation under control, and bring "about .. system which correctly and quickly punishes the guilty."¹ Another suggested: "I would like people who do crime to get the necklace sentence." Even more alarming is calls for a return of punishment as a public spectacle and humiliation. This was a practice which was abolished practically everywhere at the end of the nineteenth century.² In 1995 Mpumalanga Premier Mathews Phosa stood firm in his belief that criminals should be caged in a zoo so that the public could humiliate them, and "ro and scorn at them."³ But relative to the surfacing in some townships of kangaroo courts, where convicted suspects (particularly of rape) are stoned to death⁴, this is perhaps a moderate sanction.

¹ C. Priddy, "Cards Against Crime Target the President," *Saturday Star*, July 12, 1997.

² M. Foucault, *Discipline and Punish*, London, Penguin, 1979, p. 8.

³ *The Star*, 20 December, 1995.

⁴ *BBC Focus on Africa*, July-September 1997, p. 8.

If one looks at current crime statistics, the above reactions seem fully justifiable. From January to September 1997, 17 709 people were murdered. Even though this figure is down from the previous year, prompting Meyer Kahn to herald a real reduction in serious crime (excluding rape)⁵, this figure is a real cause for concern. 9 869 cases of hijacking were reported to the police, which is more than 22 cars hijacked each day in Gauteng.⁶ In 1996 there were 1 000 bank robberies and hits on security trucks - almost three heists a day, every day of the year.⁷ Little wonder that when the Commissioner of Correctional Services suggested that criminals be locked down disused mine shafts he won considerable public support. And little wonder that calls for draconian measures to deter crime are on most people's minds. However, an examination of the pragmatics of deterrence theory will reveal the shortcomings of this theory which has crime control as its self-professed aim.

3.1. Deterrence Theory

3.1.1. Philosophical Underpinnings

The utilitarian theory of punishment as deterrence sees the purpose of punishment as preventing the repetition of crimes already committed, and also as deterring potential criminals. Subsequently it is a forward looking theory. Protagorus expressed deterrence theory forcefully, and illustrated how it differs from retribution:

1. punishing wrongdoers, no-one concentrates on the fact that a man has done wrong in the past, or punishes him on that account, unless taking revenge like a beast. No, punishment is not inflicted by a rational man for the sake of the crime that has been committed (afterall one cannot

⁵ "Criminals are on the Retreat," *The Star*, 18 February 1998, Section 1, p. 1.

⁶ *The Star*, 17 December, 1997.

⁷ *BBC Focus on Africa*, July-September 1997, p. 7.

undo what it past) but for the sake of the future, to prevent either the same man, or by the spectacle of his punishment, someone else, from doing wrong again.⁸

More recently, the Classical school, represented most prominently by Beccaria and Bentham, was at its core a movement to bring about reform of criminal justice systems in eighteenth century Europe. At this time existed institutions and penalties such as death by burning, amputation and flogging.⁹ Beccaria was especially influenced by social contract theorists of the Enlightenment, particularly Hobbes, arguing that all men are created equal, and are equally possessed of reason and free will.

Beccaria

Beccaria's treatise On Crimes and Punishments was to be the great influence on Bentham's theory of punishment. In Beccaria's theory, law is a result of a social contract between people, "who are weary of living in a continual state of war,"¹⁰ and "in forming a human society, men and women sacrifice a portion of their liberty so as to enjoy peace and security."¹¹ The aim of punishment is to prevent criminals from further injury to society, and to prevent others from doing likewise:

The aim of punishment can only be to prevent the criminal committing new crimes against his countrymen, and to keep others from doing likewise. Punishments, therefore, should be chosen in due proportion to the crime, so as to make the most lasting impression on the minds of men, and the least painful of impressions on the body of the criminal....For a punishment to be efficacious, it is enough that the disadvantage of the punishment should exceed the advantage anticipated from the crime, in which excess should be calculated the certainty of punishment and the loss of the expected benefit.¹²

⁸ Quoted in Fouche, *op. cit.*, p. 54.

⁹ K. Farrington, Hamlyn History of Punishment and Torture: A Journey Through the Dark Side of Justice, London, Hamlyn, 1996.

¹⁰ C. Bartollas & J. Conrad, Introduction to Corrections, New York, Harper Collins, 1992, p. 55.

¹¹ C. Beccaria, On Crimes and Punishments, New York, Oxford Univ. Press, Section 2.

¹² Ibid., Section 15.

The aim of punishment is therefore individual and general deterrence to prevent crimes, and also to maintain the social contract which provides peace and security, and so prevent a reversion to the Hobbesian "war of all against all."¹³ Beccaria believed that human beings are rational creatures who, being free to choose their actions, can be held responsible for their behaviour. The concept of free will is that behaviour is purposive and based on hedonism - individuals choose those actions that will give pleasure and avoid harm. Punishment was justified because of its practical usefulness as a deterrent and in protecting society.¹⁴ He maintained that punishment must be sure and swift: "the more prompt the punishment and the sooner it follows the crime, the more just it will be and more effective."¹⁵ The certainty of punishment was a greater check upon crime than severity.

Bentham

Bentham was the other leading proponent of the classical school. But where Bentham departed from Beccaria was in his rejection that the purpose of law was to protect independently existing, innate natural rights: "The general object which all laws have, or ought to have, is to augment the total happiness of the community..."¹⁶ Bentham's case for punishment relies on the assumption that laws do augment total happiness for the community.

Bentham's most famous concept was the *felicific calculus*, the principle of utility, which assumed that humans are rational creatures who will choose pleasure and avoid pain.¹⁷ With regard to punishment, he believed that "all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil."¹⁸ By this he meant to point

¹³ D. Clarke, "Justifications for Punishment," Contemporary Crises, 6, 1982, p. 30.

¹⁴ Beccaria, *op. cit.*, p. 42.

¹⁵ *Ibid.*, p. 55.

¹⁶ J. Bentham, The Principles of Morals and Legislation, New York, Prometheus Books, 1988, p. 170.

¹⁷ C. Bartollas & S. Dinitz, Introduction to Criminology, New York, Harper & Row, p. 98.

¹⁸ Bentham, *op. cit.*, p. 170.

out that punishment always involves treating people badly, whether by taking away their freedom, their property or their life.¹⁹ The greater evil is further harm to society, so therefore, "general prevention ought to be the chief of punishment as it is its real justification." When punishment is worthwhile, he noted four subordinate objectives:

- (1) To prevent as far as possible, all sorts of offences
- (2) If a man must commit an offence, punishment must induce him to commit a less mischievous one .
- (3) When a person has resolved to commit an offence, the next object is to prevent him from doing any more mischief than is necessary to his purpose
- (4) To prevent the crime at as cheap a cost to society as possible.²⁰

So the basic theoretical constructs of deterrence were developed in the writings of Beccaria and Bentham. Humans were looked upon as rational creatures who are free to decide their actions, and can therefore be held responsible for their actions. Punishment was justified because of its practical usefulness, the aim of punishment was the protection of society, and its dominant theme deterrence. Furthermore, humans were seen to be governed by the principle of utility, which presumed that people will choose pleasure rather than pain.²¹

2.1.2. What does this mean in Practice?

Supporters of deterrence justify punishment on account of its utilitarian function, and the justification of punishment is found in the future, not in the past like retribution. In short,

¹⁹ J. Rachels, The Elements of Moral Philosophy, New York, McGraw-Hill, 1986, p. 117.

²⁰ *Ibid.*, pp. 178-179.

²¹ Bartollas & Dinitz, op. cit., p. 99.

punishment is justified by the value of its consequences, i.e.: the prevention of crime, *punitur ne peccetur*, and crimes are to be prevented in order to protect society. The underlying idea is the offenders *should become* and citizens *should remain* law abiding.²² To prevent crime, punishments should be severe enough for the pain or unhappiness of the punishment to outweigh the crime. This is all that is required for an offender to decide that "crime does not pay", and to be deterred from violating the law. Deterrence is generally categorised as general or individual:

Individual Deterrence

Individual deterrence advocates the threat and use of punishment in order to prevent convicted criminals reoffending, or to prevent recidivism. The pertinent question with which individual deterrence is concerned is well stated by Andenaes:

How does the experience of actual punishment influence the deterrent effect of the threat [of punishment], a deterrent effect which has proved...insufficient to prevent this offence?²³

The underlying idea is that a person who has once been subjected to the pain of punishment will be persuaded in the future to refrain from criminal behaviour. The offender, through punishment, is to be taught a lesson so that he will be deterred from criminal behaviour.²⁴ This theory has been subjected to severe criticism, especially as empirical evidence has indicated that many offenders are recidivists.

General Deterrence

It seems almost a truism that criminals should be punished so that there will be less crime. As Von Hirsh notes, why penalise murderers, thieves and tax evaders if not to deter

²² M. Rabie & S. Strauss, Punishment: Introduction to Principles, Johannesburg, Lex Patria, 1979, p. 9.

²³ Quoted in ibid., p. 11.

²⁴ Idem.

killing, theft and tax fraud?²⁵ The justification for general deterrence lies in its calculation to prevent people in general from committing crimes, i.e.: to keep law abiding people law abiding. The idea is that man, being a rational creature, would refrain from the commission of a crime if he should know that the unpleasant consequences of punishment will follow the commission of certain acts. It is therefore the inhibiting effect of the threat of punishment or the imposition of punishment on others, which will cause a person to think twice before committing a crime. The basic distinction between individual and general deterrence is that some people learn only through experience, while others learn through warnings or through the example provided by others.²⁶ Deterrence advocates the use of incapacitation through imprisonment and the increased use of the death penalty to deter crime.

Incapacitation

The hard-headed person in the street wants would-be predators deterred, and those that are not deterred put away. The most simple way in which an offender can be prevented from repeating his crime is to render him permanently incapable. The imposition of a prison sentence renders the offender incapable of reoffending during imprisonment. For some crimes he would like them to be eliminated - humanely executed. The efficacy of these penalties in protecting the public from harm cannot be denied, and from this point of view the death penalty has no equal,²⁷ as it is a permanent preventative measure. If the prevention of recidivism were the only purpose of punishment, deterrence as a theory would be the most acceptable one, and the death penalty would be the logical punishment for every offender.²⁸

The Death Penalty

²⁵ A. Von Hirsh, *Doing Justice: The Choice of Punishments*, New York, Hill & Wang, 1976, p. 37.

²⁶ Rabie & Strauss, *op. cit.*, pp. 20-22.

²⁷ N. Walker, *Why Punish? Theories of Punishment Reassessed*, Oxford, Oxford Univ. Press, 1991, p. 34.

Until Beccaria made it an issue, jurists, philosophers and theologians did not seriously question the propriety of the death penalty. It is an issue which has been debated ever since. The debate has ended in Western Europe, Canada and Australasia where capital punishment has been abolished, but has not yet begun in Iran or Saudi Arabia where capital punishment is the inevitable consequence for convicted murderers, drug traffickers and adulterers.²⁹ The death penalty was abolished in South Africa in June 1995, but the debate did not end there. It is perhaps one of the most controversial issues facing us at the present time.

Defenders of the death penalty make several arguments supporting their position:

- (1) It is justified because of its deterrent value. They contend that crime is a rational process, and therefore it only stands to reason that the possibility of a death sentence will deter some of those who are contemplating murder. Perhaps the most prolific defender of the death penalty in our time is Ernest van den Haag, whose views are expounded in Punishing Criminals: Concerning a Very Old and Painful Question. His support for the death penalty is both retributivist and utilitarian:

Our experience shows that the greater the threatened penalty, the more it deters....[T]he threat of fifty lashes deters more than the threat of five....[T]en years in prison deter more than one year in prison....[T] threat of life in prison deters more than any other term of imprisonment. The threat of death may deter even more....[D]eath differs significantly, in kind, from any other penalty.³⁰

- (2) Fairness dictates that "cold-blooded killers" pay for their crimes with their own lives.
- (3) Life imprisonment does not protect society as most murderers will be released back into society. They add that it is rare that offenders to remain in prison for 'life'.
- (4) It is too expensive to keep a murderer in prison for life.³¹

²⁸ Rabie & Strauss, *op. cit.*, p. 10.

²⁹ Bartollas & Conrad, *op. cit.*, p. 162.

³⁰ *Ibid.*, p. 169.

³¹ *Idem.*

Abolitionist arguments will be discussed further on.

Basic Tenets of Deterrence

View of humans	:free will, utilitarian, responsibility for actions
Way to stop crime	:make sure that the costs of crime outweigh the benefits
Purpose	:deterrence - if the criminal is shown that the costs of crime outweigh the benefits, the person will not reoffend and set an example to the public. ³²

3.2. Deterrence in South Africa

To define what the basic aim of punishment in South Africa has been is a somewhat problematic task. To some rehabilitation has been one of the aims of penal sanctions, while to others punishment has been meted out for the sake of deterrence. The former Department of Prisons and the Prisons Act has had as its task the "treatment, re-education, reorientation and rehabilitation of the offender, in order that he will not lapse into crime after his release and consequently not be a burden on or danger to the community."³³ Yet in real terms, arguably this has been a secondary aim to that of deterrence (see section 4.4.).

South African courts have not expressly regarded retribution as very important. Terblanche argues that the most important aim of punishment has traditionally been left

³² Cullen & Gilbert, Reaffirming Rehabilitation, p. 35.

open for deterrence, which was (and still is in the absence of rehabilitation) to be "the universally admitted" object of punishment.³⁴ Imprisonment has traditionally been the way to punish people. The first references to the 'purposes' of punishment came in 1945 in the oft cited case of *RV Swanepoel*, and until then very little regard had been given to justify sentencing. In *Swanepoel*, A J A Davis mentioned the importance of the effect of the sentence, not only to the accused, but also to the general public:

The end of punishment, therefore, is no other than to prevent others from committing the like offence. Such punishments, therefore...ought to be chosen as will make the strongest and most lasting impression on the minds of others, with the least torment to the body of the criminal.³⁵

With regard to individual deterrence and recidivism, the reasoning of the courts is usually the following: as a culprit was not deterred by the previous sentence, a heavier sentence is required. For example, in 1987 a 42 year old unemployed man stole biltong worth R2.00 from a shop. He pleaded guilty and received four years imprisonment, which was the going rate for rape, and twice the maximum punishment for drink-driving. This was because he had had a previous conviction which obviously had not deterred him. Perhaps four years in prison now would.³⁶ Terblanche explains that this is not an isolated incidence, but part of the sentencing tradition of South Africa, all at the immense expense to the taxpayer, and filling space that should have been kept available for dangerous criminals. Terblanche also contends that South Africa tends to be behind the rest of the world. For example, in the United States and Europe the justice model has been the dominant paradigm since the 1970s. "Twenty years later it seems that eminent legal minds in South Africa still refuse to take note."³⁷

³³ J. Roux, "The Rehabilitation Role of the South African Prison Service," in J. Midgley, J. Steyn & R. Glaser (eds.), *Crime and Punishment in South Africa*, Johannesburg, McGraw-Hill, 1975, p. 254.

³⁴ S. Terblanche, "Sentencing: Affordable Approaches," in L. Glanz, (ed.), *Managing Crime in the New South Africa*, Pretoria, HSRC, 1993, p. 224.

³⁵ Quoted in *ibid.* p. 225.

³⁶ *Ibid.*, p. 226.

³⁷ *Ibid.*, p. 227.

The official stance of punishment of offenders has obviously changed in recent years. The Department of Correctional Services holds the view that "ideally the criminal justice system should contribute to the maintenance of a just, peaceful and safe society, by utilising appropriate, reasonable sanctions, whilst exercising only the necessary degree of control and by actively encouraging offenders to take advantage of opportunities which will assist them to become law-abiding citizens."³⁸ This is obviously through the rehabilitation of the offender. It is not my purpose here to evaluate the recent changes in policy, as this will be dealt with in the following section. It is useful here to point out though that this change in policy is indeed questionable, and it perhaps useful to regard the purpose of punishment as a continuance of deterrence, rather than one of rehabilitation. In lieu of Commissioner Sitole's suggestion to lock criminals down mineshafts, so that they "never see sunlight again,"³⁹ this argument seems plausible. So arguably, calls for harsher punishments to deter criminals is perhaps merely a continuation of our current system. The examination of prisons and punishment in the next section will demonstrate how ineffective such a system is.

3.3 The Death Penalty in South Africa

Devenish explains that when the Union of South Africa was created in 1910, there was no uniformity in statutes relating to the death penalty. The death penalty for serious offences, other than rape, treason and murder, had been abrogated by disuse during the nineteenth century. Devenish continues that this change was an important reform, and it reflected changing attitudes within the community and a desire for greater humanity in the administration of justice.⁴⁰ Uniformity and clarification came with the Criminal Procedure and Evidence Act of 1917 which expressly stipulated capital crimes - those for murder.

³⁸ White Paper on the Policy of the Department of Correctional Services in the New South Africa, 21 October, 1994.

³⁹ "Prisoners in Obsolete Mines," Debates of the National Assembly (Hansard), Cape Town, Government Printer, 25-27 March 1997, p. 986.

However, between 1923-1934 only 24% of capital sentences were carried out.⁴¹ In 1935 after debate and deliberation, parliament decided to allow the presiding judge to impose a sentence other than death when the court found mitigating circumstances. This 1935 legislation created the framework within which the system of capital punishment operated until abolished.⁴²

Death penalty executions rose from an annual average of 21 between 1910-1947, to an all time high of 164 in 1987. From 1958 a proliferation of capital offences started to take place, "occurring during the apogee of the most primitive stage of the application of apartheid policy in South Africa."⁴³ The extension of the death penalty coincided with the intensification of political oppression. Devenish explains that capital punishment was made applicable to robbery and housebreaking with aggravating circumstances, sabotage, the undergoing of training abroad for the purposes of furthering communism, the furthering overseas of economic and social change in South Africa by means of violence, kidnapping and participation in terrorist activities. Altogether, the Criminal Procedures Act of 1977 provided for eleven capital crimes.⁴⁴ One can note that while South Africa extended the number of capital crimes and intensified the use of executions, many western European countries moved in the opposite direction.

In 1969 Helen Suzman MP, introduced a private motion in Parliament calling for a commission of enquiry into the application of the death penalty in South Africa. The Minister of Justice responded by saying that there was no public demand for abolition, and was backed by the official opposition.⁴⁵ In 1988 Mr D Dalling MP, repeated this request. "He expressed concern that South Africa executed more people than in any other country in the western world and asked for those sentenced to death to have an automatic right to

⁴⁰ G. Devenish, "The Historical and Jurisprudential Evolution and Background to the Application of the Death Penalty in South Africa," *South African Journal of Criminal Justice*, 1, 1992, p. 7.

⁴¹ *Ibid.*, p. 8.

⁴² *Idem.*

⁴³ *Idem.*

⁴⁴ *Ibid.*, pp. 8-9.

⁴⁵ *Ibid.*, p. 10.

appeal." The Minister of Justice replied by saying that nothing warranted the appointment of a commission of enquiry, but conceded that the system could be improved.⁴⁶

In the late 1960s, Professor Barend van Niekerk embarked on contentious research relating to racial biases in the application of the death penalty in South Africa. The Society for the Abolition of the Death Penalty in South Africa was established in 1971 as a result of his efforts and commitment to abolition. As a result, the number of executions reduced dramatically:

1970	81
1971	76
1972	46
1973	43 ⁴⁷

The relaunching of the Society in 1988 had a similar effect in the 1980s:

1987	164
1988	117
1989	53

Devenish argues that public pressure on the authorities on two separate occasions resulted in a decline of executions, but the activities of the Society were short lived. There were certain isolated campaigns to save individuals from the gallows, especially ANC guerrillas, but there was no widespread and sustained opposition to the death penalty. In 1987 164 people were executed on the Pretoria gallows.⁴⁸ Devenish continues that in a country with a host of inequities to remedy, the execution of criminals was not high on the list of priorities at a time of chronic political and economic crisis.

⁴⁶ *Ibid.*, pp. 10-11.

⁴⁷ *Ibid.*, p. 11.

⁴⁸ *Ibid.*, p. 12.

This changed dramatically in 1987 when a new category of condemned prisoners appeared in considerable numbers on death row - these were prisoners sentenced to death for murders committed during political unrest between 1984-1987. In 1988, 83 people were on death row as a result of unrest related crimes. A number of campaigners, for example "save the 32 compatriots", calling for the abolition of the death penalty had the following effect in the late 1980s:

1978 164

1988 117

1989 53⁴⁹

Domestic and international pressure against the death penalty in South Africa reached a high in 1989. Lawyers for Human Rights played a seminal role in repeatedly calling for a moratorium on all executions and for the establishment of a commission of enquiry into violent crime and the death penalty.⁵⁰ The last execution in South Africa took place in November 1989.⁵¹ Devenish explains that the vast majority of death row prisoners were black, and that in most cases these so-called 'ordinary prisoners' were the tragic victims of the devastating socio-economic consequences of apartheid:

Today it is generally accepted that crime often has its roots in poverty and social deprivation. Many black South Africans who [found] themselves on death row [had] grown up in overcrowded, unserviced and segregated black townships. They...received pathetic inferior education and...experienced job discrimination. Their lives [had] been fashioned by a culture of poverty and deprivation, characteristic of economically and politically disadvantaged people.⁵²

The death penalty was abolished in June 1995 lifting the threat of hanging from 353 prisoners on death row.⁵³ Interpreting the interim constitution, the Constitutional Court found in 1995 the death penalty to be in violation of various provisions of the constitution.

⁴⁹ *Ibid.*, p. 13.

⁵⁰ *Idem.*

⁵¹ F. Viljoen, "Stick to Core Values," *City Press*, 3 November 1996.

⁵² *Ibid.*, p. 14.

Some judges found it violated the right to life, others regarded it as an infringement of the right to dignity, and the president of the court concentrated on one section which outlaws cruel and inhuman punishment.⁵⁴ The abolition of the death penalty was immediately clouded in controversy, as the retention of it also would have been. The decision of the Constitutional Court brought many issues to the fore, such as the role of the judiciary in interpreting the Constitution, the aims and purposes of punishment, and the relationship between popular will and judicial activism.⁵⁵ Seleane argues that in the context of South Africa and other previously oppressive regimes, the debate about the death penalty tends to be intractable. He continues that when we struggled to undo the racially oppressive regime that was South Africa, we also fought against the death penalty. "With the new order it seems natural that we should continue in our opposition to the death penalty: anything short of that might show us up to be morally and politically inconsistent."⁵⁶ Yet in reality this is not the case.

Spiralling crime has prompted more South Africans, including politicians and judges, to demand the reinstatement of the death penalty, and support has steadily increased. In 1993, surveys indicated that 82% of whites favoured the retention of capital punishment, 12% opposed it and 6% were undecided. Among blacks, 24% supported capital punishment, 57% opposed it and 19% were undecided.⁵⁷ In 1995 black support jumped to 49%, and in April 1997 to 76%, while 94% of whites were said to be in support in April 1997.⁵⁸ So overall in urban areas, surveys indicate that 80% of South Africans believe that the death penalty should be reinstated.⁵⁹

In 1995 after the abolition of capital punishment, "that tenacious and consistent advocate for human rights in South Africa, the National Party, ...managed to keep the matter as a

⁵³ *The Star*, 23 April 1996.

⁵⁴ Viljoen, *op. cit.*

⁵⁵ M. Seleane, *The Death Penalty: Let the People Decide*, Florida, Vivlia, 1996, p. v.

⁵⁶ *Ibid.*, p. 2.

⁵⁷ Gallup Poll: *Attitudes Towards the Death Penalty*, [Fact Sheet], 23 June 1993.

⁵⁸ *The Star*, 23 April 1996.

⁵⁹ *Citizen*, 23 April, 1997.

controversial issue before the Constitutional Assembly."⁶⁰ That opposition parties have come out in support of the reintroduction of the death penalty is no surprise. The National Party, the Freedom Front and the IFP have said that they believed the death penalty was a strong deterrent for criminals.⁶¹ As Mr G C Oosthuizen has stated: "The political decision-makers have removed sufficient deterrent measures for serious offenders and murderers. It was the political masters of Commissioner Sitole who removed the death penalty which, in our opinion, is a deterrent which should be reintroduced."⁶² Opposition parties have even come out in support of Judge Curlewis' comments in the trial of Moses Sitole: "I would have sentenced Mr Sitole to death but the politicians have done away with it. The politicians should have realised that what they were doing was a big mistake."⁶³ Instead Curlewis sentenced Sitole to a 2410 year sentence. It is also believed that Curlewis was expressing the views of up to 80% of the bench. So it is evident that the vast majority of South Africans are seeking the reinstatement of the death penalty. The next section will evaluate how appropriate these calls are, given the fact that no clear evidence exists to suggest that the death penalty is an effective deterrent.

3.4. The Realities and Limitations of Deterrence Theory

Centuries ago any wrong done to an individual was personally avenged - an eye for an eye, a tooth for a tooth. During the Middle Ages, the belief that punishment deters criminals from crime became prominent, and deterrence took over. This was the period of horrific public executions, floggings and the mutilation of criminals, because it was contended that the more horrific the punishment, the more dramatic the deterrent effect would be. Terblanche argues that one still hears this argument today in South Africa -

⁶⁰ D. Davis, "Populist Politics with Strings Attached," *Weekly Mail*, 1 December 1995.

⁶¹ *8pm News*, (Video recording), SABC 3, 8 December 1997.

⁶² "Prisoners in Obsolete Mines," *Debates of the National Assembly (Hansard)*, 25-27 March 1997, p. 986.

people are generally ignorant of history, and so do not learn from its lessons. History teaches us in this regard that those kinds of punishment were a crime in itself, not criminal justice, and that it was a direct cause of much more crime.⁶⁴

A deterrence theorist would insist that the morally acceptable aim of punishment is the social benefits that accrue to society. Therefore, in practice this is justifiable if the social benefits overbalance the social costs incurred.⁶⁵ It is also contended that a panacea is available: the simple solution to the crime problem is to increase the cost, which will protect the community and deter would be offenders. But as Isaac Ehrlich has argued, "the idea that law enforcement...serves partly as a means of deterring future crimes by those apprehended and by others is basic to crime control legislation, ancient and modern, but has seriously been questioned in the criminal literature of the past hundred years or so."⁶⁶ Despite the huge philosophical effort that has gone into justifying punishment on the grounds of deterrence, in practical terms many continue to feel that the project has not proved especially successful. As Fouche argues, the high rate of recidivism and constant growth of criminality in South Africa would indicate that punishment meted out for the sake of deterrence has been grossly ineffectual. The following points will be evaluated:

- (1) Individual deterrence: effects of imprisonment and recidivism
- (2) General deterrence: failure to deter
- (3) Failure to deter: the certainty of detection
- (4) Failure to deter: the death penalty

3.4.1. Individual Deterrence: Effects of imprisonment and recidivism

⁶³ C. Rickard, "Judges Back Curlew on the Death Penalty," Sunday Times, December, 1997.

⁶⁴ Terblanche, op. cit., p. 223.

⁶⁵ Bickenbach, op. cit., p. 765.

⁶⁶ I. Ehrlich, "The Deterrent Effect of Criminal Law Enforcement," Journal of Legal Studies, 1, 1972, p. 259.

We have seen that the most simple way in which an offender can be prevented from repeating his crime is to render him incapable through the imposition of a prison sentence, which should serve as an individual deterrent, as well as serve as an example to others. This subjects convicted offenders to pain, suffering and deprivation of privilege and freedom. The pragmatics of incapacitation are argued as follows:

- (1) Putting more offenders in jail for longer periods should bolster the deterrent effect
- (2) Incapacitation accomplishes at least one goal: it gets criminals off the street and prevents further victimisation.
- (3) It makes sense to imprison violent offenders for longer.⁶⁷

Terblanche argues that most people have forgotten how heavy a penalty prison is, and indeed one hears absurd comments that prison is like a hotel. Dissel and Giffard refer to this as "five-star hotel" syndrome, explaining that some members of the public believe that prison conditions should be made harsh so that imprisonment becomes more of a deterrent.⁶⁸ However, as Terblanche argues, "those who claim that prison is a hotel should try spending a holiday there, and the argument that underprivileged people prefer to be there because they get food and shelter is rubbish - there is no substitute for freedom."⁶⁹ As Foucault remarked, the "self evident character of the prison...is based first of all on the simple form of 'deprivation of liberty'," ⁷⁰ a concept which is recognised criminal justice systems in most parts of the world, and embodied in the United Nations standard of minimum rules. An examination of the current realities of most of our prisons in South Africa should acquaint cynics to the fact that our prisons are anything but the local Holiday Inn.

Foucault's important work Discipline and Punish: The Birth of the Prison alerts readers to the criticisms of the prison system and its methods from its very establishment during the

⁶⁷ Cullen & Wozniak, *op. cit.*, p. 25.

⁶⁸ C. Giffard & A. Dissel, "Transforming Correctional Services: The need for a New Vision," Two Track, Vol. 5, No. 1, March 1996.

⁶⁹ Terblanche, *op. cit.*, p. 230.

years 1820-1845, criticisms which "are today repeated almost unchanged."⁷¹ From the beginning of the establishment of prisons it seems that it was recognised that imprisonment causes:

- (1) Delinquency
- (2) Gangs whose members are loyal to each other and who collaborate in future crimes
- (3) Throws inmates families into destitution
- (4) Recidivism

1. Delinquency

Foucault argued that the prison cannot fail to produce delinquents. This is done by the very existence it imposes on inmates. An investigation into South African prisons will reveal that this is indeed the case. In February 1997, 95 000 sentenced prisoners and an additional 35 000 awaiting-trial prisoners were being held in South African prisons, a total of more than 130 000. These prisons were built to accommodate only 96 325 prisoners. Furthermore, there is a daily average of 317 sentenced and a further 657 awaiting-trial prisoners, or a daily total of 974 persons, who have to be accommodated in already overcrowded prisons, which is more than the number of persons being released daily.⁷² In practice, what this means is that some prisons, like Johannesburg Prison (or Sun City), are 170-200% overcrowded. In Pollsmoor Prison in Cape Town, 46 people are forced into a cell which is meant to accommodate 18.⁷³ At Baviaanspoort outside Pretoria, prisoners live in up to 15 in a cell, and the heat is described as near unbearable in summer.⁷⁴

Mike Green, Section Head at Pollsmoor Prison, states that with this overcrowding and staff shortages, prisoners have to spend 23 hours out of 24 locked up in their cells. They

⁷⁰ Foucault, *op. cit.*, p. 232.

⁷¹ *Ibid.*, p. 265.

⁷² "Prisoners in Obsolete Mines," Debates of the National Assembly (Hansard), 25-27 March 1997, p. 994.

⁷³ Behind Bars, (videorecording), SABC 3, 10 June 1997.

⁷⁴ "Improving SA's Prisons," Enterprise, February, 1997, p. 92.

get opened for one hour exercise, which unfortunately does not happen every day, due to staff shortages and weather conditions, and can consequently spend 24 hours out of 24 locked up in their cells. Jeffrey Lomborg, Supervisor B2 Section Pollsmoor, states that:

Overcrowding is definitely the death-blow. Projects cannot be instituted. Sodomy is also a factor because inmates may be sodomised by an HIV prisoner. There is no place to separate them. It leads to frustration among prisoners, and members (warders) have to work in these critical conditions.⁷⁵

Some of the prisoners views on their life in prison can only be described as tragic, as 'Ricky', an awaiting-trial prisoner at Johannesburg Prison states:

This is a waste of a life. It is overpopulated, the food is horrible, everything is horrible. You get stressed and depressed. They hang themselves here. I've got how many cut marks because I wanted to kill myself already, because my whole life is going for a waste.⁷⁶

Foucault further argues that these violent constraints on prisoners produce delinquency. Prisons are supposed to apply to the law, and teach respect for it, "but in all its functioning operates in the form of abuse of power." As Bigot Preameneu argued: "The feeling of injustice that a prisoner has is one of the causes that may make his character untameable. When he sees himself exposed in this way to suffering, which the law has neither ordered nor envisaged, he becomes habitually angry against everything around him; he sees every agent of authority as an executioner; he no longer thinks that he was guilty; he accuses justice itself."⁷⁷

According to Foucault, another problem is the "corruption, fear and inefficiency of the warders."⁷⁸ This is especially pertinent to South African prisons. The way prisons are designed makes it difficult for warders to effectively monitor the situation inside the

⁷⁵ Behind Bars, (videorecording), SABC 3, 10 June 1997.

⁷⁶ Behind Bars

⁷⁷ Quoted in Foucault, *op. cit.*, p. 266.

prison. However, this is compounded by the fact that the prisoner-warder ratio is 12:1, compared with an international ratio of 4:1 and 1:1 in Hong Kong,⁷⁹ which puts added pressures on warders and decreases accountability in the face of corruption. Neville Myburgh, Head of Management Services at Johannesburg Prison, explains some of consequences: "Prisoners disappear from prison. Computer frauds, prisoners having to pay for certain services, is corruption amongst our members. I think we are not aware at this stage of the actual extent of corruption. We are only aware of what has surfaced until now. When this type of thing happens among members, you do not know which member can be trusted, and unfortunately, money buys anything." This is confirmed by Tobelane, an awaiting trial prisoner, who argues that "if you don't have money you cannot go hospital....You must pay...R5.00 to the warder. That is Sun City, it is corruption."⁸⁰ Is this a way to teach prisoners honesty? Are they not still more demoralised by this abominable exploitation?

2. Gangs

Foucault argues that prison makes possible, and even encourages, the organisation of a milieu of delinquents, loyal to one another, and ready to aid in any future criminal act. It is here "that the education of the first young offender takes place: The first desire that is born within him will be to learn from his cleverer seniors how to escape the rigours of the law; the first lesson will be derived from the strict logic of thieves who regard society as a enemy....Henceforth he has broken with everything that has bound him to society."⁸¹

Amanda Dissel explains that gangsterism is prevalent in South African prisons, where gangs order themselves around specific themes, such as the "number" gangs: the 26's,

⁷⁹ Idem.

⁷⁹ "Improving SA's Prisons," Enterprise, February 1997, p. 92.

⁸⁰ Behind Bars

⁸¹ Foucault, op. cit., p. 267.

27's and 28's.⁸² The number gangs organise themselves around theft and robbery and coerced sexual partners, whereas the Airforce gang organises around escaping from prison. Appropriately, this is what one prisoner at Pollsmoor Prison had to say: "Here you learn crime, it's a warehouse where criminals come together. There are murderers, rapists, house-breakers, thieves. I, who am sentenced to six months for theft, I am put together with these and that's how I learn more about crime." This is reiterated by Cecil Bezuidenhout: "It is possible that you can learn a lot of stuff inside here. In Afrikaans it is called the *misdaad opleidings sentrum* (crime learning centre). I guess its the truth."⁸³

In all prisons there are also various gangs, which is compounded by the fact that prisoners have nothing to do. Commissioner Sitole has stated that "we accept that [crime] may be discussed and planned in prison because of prisoners being idle."⁸⁴ Furthermore, as Foucault notes, these gangs collaborate in future crimes. One prisoner stated: "I am a twenty-six gangster....To be a gangster is not to rehabilitate. You become a gangster and when you leave prison you operate as a gangster outside, and because of that you end up back in prison."⁸⁵

3. Throws Inmates Families into Destitution

Foucault argues that prison indirectly produces delinquents by throwing the inmate's family into destitution: "The same order that sends the head of the family to prison reduces each day the mother to destitution, the children to abandonment, the whole family to vagabondage and begging. It is in this way that crime can take root."⁸⁶

4. Recidivism

⁸² Dissel, *op. cit.*, p. 8.

⁸³ Behind Bars

⁸⁴ K. Sitole, "Corrections Within Correctional Services," SA Now, Vol. 2, Issue 1, February 1997, p. 3.

⁸⁵ Idem.

⁸⁶ Foucault, *op. cit.*, p. 268.

The most pertinent criticism is that "prisons do not diminish the crime rate....The number of crimes is not diminishing...the number of recidivists is increasing, rather than declining." Foucault argues that detention causes recidivism - those leaving prison have more chance than before of going back to it.⁸⁷ In 1991 Adriaan Vlok gave 85% as the figure for recidivism, while more recently the Nedcor Project on Crime, Violence and Investment suggested that 94% of released prisoners return to crime.⁸⁸ (It was explained earlier that detailed studies into recidivism do not exist, and is an area of research which desperately needs to be addressed).

The main problem facing prisoners is lack of reintegration, as ex-convicts find themselves discriminated against in the work place as few employers are willing to employ them as employees. Incarceration usually has not prepared them sufficiently to reintegrate into society, and perhaps leave prison "worse than on the day they were admitted."⁸⁹ But they have been sufficiently prepared for a return to a life of crime. This largely results from prisoners sitting idle in prison, instead of doing something constructive with their time to help them with reintegration. After visiting Leeuwkop Maximum Prison and Modderbee Prison, Amanda Dissel had the following impression:

these prisons ... are large warehouses where people are stored until their sentences have expired. Most prisoners, especially those in maximum sections have nothing to do all day, and this state of inactivity continues for the period they are in prison. They are certainly punished, they are degraded and denuded of every aspect of their responsibility, but there is very little in the way of rehabilitation.⁹⁰

This is reiterated by the following remarks of Abednigo, prisoner at Leeuwkop Maximum Prison: "I don't do anything. We don't have work here, there is no trade. We must learn something here so that when we leave we don't go back to car-jacking. When I get out of

⁸⁷ *Ibid.*, p. 265.

⁸⁸ *The Star*, 24 May 1996.

⁸⁹ *Behind Bars*

⁹⁰ A. Dissel, "South African Prison Conditions: The Inmates Talk," *Imbizo*, No. 2, 1996.

prison I won't be able to do anything. I just sit or walk around all day. I get sick because I don't do anything."⁹¹

The points examined above do not encompass all of the harmful effects of imprisonment. Indeed it is a subject of which a large literature exists, ranging from an examination of the psychological deformation of the offender, to physical abuse in ...on (a reading of autobiographical accounts of life in prison, like Hugh Lewin's Bandiet Seven Years in a South African Prison really brings home these realities). Also illustrative in this regard is Herman Bosman's Cold Stone Jug which recounts his experience in Swartklei Great Prison as a convicted murderer. What is particularly interesting with Bosman's story is his account of everyday life in a South African Prison - "the salient features of prison life as it is lived in terms of regulations."⁹² Yet as Bosman admits, with writing, it is hard to succeed in conveying "the misery of prison existence, the soul-killing monotony, the bleak gloom and brutality".⁹³

Frimpong explains that in many third-world countries, especially on the African continent, prison conditions are generally very harsh.⁹⁴ Prisons are used not only to keep convicts but also political opponents. Mandela's autobiography Long Walk to Freedom tells of the hardships he endured in prison as a political prisoner. For Mandela, life on Robben Island was the worst prison experienced he endured, arguing that Robben Island was "without question the harshest, most iron-fisted outpost in the South African penal system."⁹⁵ Baruch Hirson's Revolutions in My Life is another autobiographical work recounting life in a South African Prison as a convicted political opponent. For Hirson, in relation to freedom deprivation as a consequence of imprisonment, 'time' becomes an important factor through the imposition of 'alien time' (determined by the structure of the prison

⁹¹ Idem.

⁹² H. Bosman, Cold Stone Jug, Johannesburg, A.P.B., 1949, p. 77.

⁹³ Idem., p. 79.

⁹⁴ K. Frimpong, "Searching for Alternatives to Imprisonment: An African Experiment," South African Journal of Criminal Justice, No. 3, 1992, p. 235.

⁹⁵ N. Mandela, Long Walk to Freedom, London, Abacus, 1995, p. 459.

establishment) which is a disruptive factor in the life of a prisoner. An excerpt from his book illustrative in this regard:

From the moment of my arrest at the road block on the Durban-Johannesburg Road, civil time was suspended. For the next nine and a half years the timing of events was determined by the men within whose hands I was held. Like all prisoners of the state I was without a watch or diary, and the calendar only marked off the days and months in which an outside world operated.⁹⁶

Hirson adds that although there are continuities between life in prison and life on the outside, there are obviously many discontinuities. For example, "family life is disrupted, friends and colleagues are barred and the sex urge is diverted or put into limbo. There is also an end to most of the pursuits of civilian life...social and cultural life assumes different meanings.... Above all, the most vital part of life, the taking of personal responsibility for one's actions is closed. The prisoner is officially allowed no part in deciding what should and should not be done."⁹⁷ These consequences of imprisonment can nearly always only result in recidivism, as Hirson argues:

It was quite obvious to us [prisoners] that there was no possibility of rehabilitation under the existing system of imprisonment, that recidivism was not lessened, but institutionalised in this grim fortress [Pretoria Local Prison]. There was nothing that could be done to assist the prisoners because jail was not designed for rehabilitation. The warders were not capable of helping any of the men - they were part of the problem.⁹⁸

In light of the above points this is not surprising. I wish to point out here that it would be a generalisation to argue that *all* prisons are susceptible to the above criticisms, as the experience of Krugersdorp Prison (examined in the following chapter), which is committed to the rehabilitation of offenders, illustrates that these effects can indeed be

⁹⁶ B. Hirson, *Revolutions in My Life*, Johannesburg, Witwatersrand University Press, 1995, p. 328.

⁹⁷ *Ibid.*, p. 160.

minimised or avoided all together.⁹⁹ But it would not be an overstatement to argue that most offenders in South Africa become subjected to above effects of incarceration, as it is the most common form of judicial punishment. Imprisonment has not only been ineffectual world-wide, but also barbarously cruel. Justice James Doyle spoke of the prison system in the following condemnatory terms:

I am persuaded that the institution of prison probably must end. In many respects it is intolerable in the United States (and in any other country) as was the institution of slavery equally brutalising to all involved, equally toxic to the social system, equally subversive of the brotherhood of man, even more costly by some standards and probably less rational.¹⁰⁰

In South Africa punishment meted out for the sake of deterrence has been grossly ineffectual, and calls for more prisoners to serve harsher sentences in already overcrowded prisons is not only illogical, but will also compound the ineffectiveness of this so-called deterrent. And for those who advocate building more prisons, the historical record is clear that building more cells only results in more cells being filled: "where new space has been freely added, on average it is followed two years later by population increases of nearly equal size."¹⁰¹ Deterrence theorists seem to be oblivious to the fact that 95% of all criminals return to society, usually worse than when they entered prison, and many will again be undeterred as they pursue their life of crime. As Harry Elmer Barnes stated: "history shows that severe punishments never reduce criminality to any marked degree."¹⁰²

⁹⁹ *Ibid.*, p. 162.

⁹⁹ It is necessary to point out that the Department of Public Works is participating in a programme to upgrade South Africa's prisons to improve the inhuman conditions under which many prisoners are living. A multi-million-rand upgrade programme, jointly undertaken by the Public Works Department and the Department of Correctional Services, began in early 1997. Those prisons which have been upgraded are called 'new-generation prisons', and are designed in such a way that the prisoners are separated into manageable units. Commissioner Sitole has stated that "once a person is inside prison, you cannot punish him or her any further....keeping prisoners in inhuman conditions is against the law and does nothing towards rehabilitating offenders." (See "Improving SA's Prisons", *Enterprise*, February 1997, p. 92). However, the sad reality is that these changes are only reaching a small portion of prisoners, and for the many of prisoners currently in our system, these changes may simply be too late.

¹⁰⁰ Quoted in Fouche, *op. cit.*, p. 54.

¹⁰¹ Cullen & Wozniak, "Fighting the Appeal of Repression," p. 28.

¹⁰² Cullen & Gilbert, *op. cit.*, p. 182.

Imposing these harsh and worthless penalties has little effect on crime, except maybe to increase it.

3.4.2. General Deterrence: Failure to deter

Typically deterrence involves the assumption of free will, based on utilitarian considerations, where a potential criminal calculates the consequences of being overtaken by the law and suffering the certainty of punishment, and then (presumably) freely and rationally decides to refrain. This reasoning can be stated as follows:

- (1) Is it not true that people, even those who break the law, have free will?
- (2) Doesn't it also make sense that if free, rational people know that they can get away with crime, then they will go ahead and do it?
- (3) If a person's chance of getting caught and sent to jail is minimal (perhaps even as little 1%) doesn't this mean that crime pays?
- (4) If crime pays, shouldn't we expect the high crime rate we have?
- (5) Doesn't it make sense that if we want to reduce crime, we should raise the costs of illegality by sending more criminals to prison?¹⁰³

This reasoning is inadequate on at least two accounts. Firstly, this reasoning disregards many of the obvious causes of crime (see section 2.2.), namely socio-economic deprivation prompting many criminals into a life of crime. Here again we can refer to Marx's argument, "is it not a delusion to substitute for the individual with his real motives, with multifarious circumstances pressing upon him, the abstraction of 'free will'?" Consequently it falls prey to same criticism levelled against retribution that deterrence indeed does nothing to attack crime at its root.

Secondly, deterrence theory rests on the faulty assumption that the most crucial ingredient in the decision to break the law is the 'potential' costs that might be incurred. Cullen and

Gilbert argue that a survey of prison inmates indicated that "individual offence rates are related only to offenders perceptions of the benefits to be derived from crime", and not the risk of being caught and punished.¹⁰⁴ This is reiterated by Terblanche who argues that it is not affordable to punish people to serve as examples to others when we do not know if anyone would really be deterred. "If we ask those who commit crimes about the threat of punishment they will either tell you that they did not expect to get caught, or that the immediate gains were much more enticing than the distant possibility of a conviction."¹⁰⁵

Relatedly, attempts in research to specify that the severity of punishment has a deterrent effect have been inconclusive, as Judge Gerald Kumleben has argued: the belief that harsh sentences would bring down the crime rate was "largely an illusion unsupported by empirical evidence or history." He continued that short of public amputation of the hands of thieves, harsh punishments do not work because criminals committed crimes in the belief that they would not be caught.¹⁰⁶ A Panel on Research on Deterrent and Incapacitative Effects reported that "we cannot yet assert that the evidence proves the existence of deterrent effects."¹⁰⁷ But what is reasonably established is that it is less the penalties for particular offences prescribed by the law than the certainty of detection. This is indeed poses problems in South Africa, as will now be discussed.

3.4.3. Certainty of Detection

It has been stated that the success of general deterrence is more dependent upon the swiftness and degree of certainty that punishment will follow the crime, than upon the severity of the penalty. It is useful here to recall Beccaria's comments: "the more prompt the punishment and the sooner it follows the crime, the more just it will be and more effective." There are two points of importance here: (1) celerity, and (2) certainty.

¹⁰³ Cullen & Wozniak, *op. cit.*, p. 25.

¹⁰⁴ *Idem.*

¹⁰⁵ Terblanche, *op. cit.*, p. 228.

¹⁰⁶ W. Hartley, "Harsh Sentences 'do not lower crime rate'," *City Metro*, 1995.

¹⁰⁷ *Idem.*

1. Celerity

Many theorists question, in practical terms, whether it is possible to achieve celeritous punishment. Joan Jacoby contends that even though celerity is desirable, it is rarely achieved as there are many reasons for delay beyond the control of prosecutors. The police are handicapped in swift pursuit of offenders through the manner in which they detect and apprehend suspects, and that the courts are hindered by delays in the court process by the safeguarding of defendant's rights and by excessive case loads.¹⁰⁸ In South Africa some awaiting trial prisoners have been waiting for two years to go to court, due to excessive case loads and incompetence of the prison system where some offenders actually miss their trial in court.¹⁰⁹ Prosecution, courts and prisons are swamped and ill equipped to perform their present routine tasks.

2. Certainty

It is reasonable to assert that the bulk of the deterrent effect lies in the certainty of detection and punishment, which Lea argues, has both a technical and social component. The social component concerns the general willingness of individuals to give information and report crime to the police.¹¹⁰ The technical component lies with law enforcement:

Neither fear of punishment nor respect for the law is likely to hold back potential offenders effectively if [law enforcement] is known to be inadequate.¹¹¹

Deterrence theory, and its belief in harsh sentencing and punishment, has little to do with the largest source of uncertainty in the criminal justice system: policing that is largely reactive in nature and unable to attain high clearance rates for nearly all offence categories.

¹⁰⁸ Bartollas & Dinitz, *op. cit.*, p. 116.

¹⁰⁹ Behind Bars.

¹¹⁰ J. Lea, "The Analysis of Crime," in J. Young & R. Matthews (eds.), Rethinking Criminology: The Realist Debate, London, Sage, 1992, p. 79.

On average, in South Africa, every 1000 crimes result in 77 convictions and 36 prison sentences with only eight criminals being imprisoned for two years or more.¹¹² And Glanz estimates that only 45% of every 1000 offences are reported to the police. Perhaps the biggest obstacle to an effective system of deterrence in South Africa lies in the small percentage of clearance rates. But this problem is compounded by corruption in the lower ranks of both the justice system and police, and the high rate of prison escapees who may (or may not) be assisted in many instances by representatives of law enforcement. In South Africa in 1997 there were more than one thousand prison escapes, where only 226 offenders have been re-arrested.¹¹³

This is due to the fact that law enforcement is riddled with problems countrywide, with policing hampered by low salaries, poor morale, deficient management practices, poor procedures, virtually non-existent information systems and staff shortages.¹¹⁴ As Community Policing Forum chairman Bryan Pringrove argues, "Our police have inadequate resources, especially human resources, lack of training and battle with a steady bleeding away of manpower."¹¹⁵ There has been a freeze on the hiring of policemen for the past three years, despite the fact that 2 600 experienced police personnel have recently left the force.¹¹⁶ And furthermore, a recent survey found that police officers spend 70% of their time in administration, and only 30% fighting crime.¹¹⁷ As a result, law enforcement under these conditions cannot possibly be relied upon to provide the certainty of detection and apprehension which is a vital component in the deterrence equation. Studies have found that to be an effective deterrent, a perceived certainty factor must attain a specific level, ideally at around the 50% mark. It is contended that unless the certainty of identification, apprehension and punishment regarded to be in the 50% range, general

¹¹¹ Kabie & Strauss, *op. cit.*, p. 23.

¹¹² *Two Way* (videorecording), SABC 3, 26 June 1997.

¹¹³ *8pm News*, SABC 3, 11 January 1998.

¹¹⁴ See internet, www.bullion.org.za/policy/saf.htm.

¹¹⁵ *Sandton Chronicle*, 28 May 1997.

¹¹⁶ *BBC Focus on Africa*, July-September 1997.

¹¹⁷ *Idem*.

deterrence is of little value.¹¹⁸ In South Africa we should be so lucky if the perceived certainty factor were 10%.

3.4.4. The Death Penalty

Those arguing for the reintroduction of capital punishment must show that the death sentence is a more effective deterrent than other forms of punishment. That is, they must show that it accomplishes other aims apart from that of retribution, otherwise it is an insufficient deterrent and reinstatement serves no purpose except an ideological panacea to the crime problem. They must convince us that the real problems of insufficient policing and law enforcement, as well as a prison system which is highly conducive to recidivism, will be rectified by have the death penalty reinstated. They must also convince us that reintroducing the death sentence is of greater importance than the underlying socio-economic causes of crime. As Frans Viljoen of the *Centre for Human Rights*, University of Pretoria, argues, the death penalty is a slogan to score political points by political parties. It is "a dishonest attempt to deflect attention from the real causes underlying the rise in crime."¹¹⁹

There are cogent arguments, both moral and pragmatic, against the institution and application of a system of capital punishment. On the moral side, the sanctity of life is of paramount consideration in regard to arguments against capital punishment. Moralists who reject the death penalty as a response to crime hold that it is state-administered homicide. As Beccaria argued:

...laws designed to temper human conduct should not embrace savage example which is all the more baneful when the legally sanctioned death is inflicted deliberately and ceremoniously. To me it is an absurdity that the law...detests and punishes homicide should itself commit one.¹²⁰

¹¹⁸ Bartollas & Dinitz, *op. cit.*, p. 117.

¹¹⁹ F. Viljoen, "Stick to Core Values," *City Press*, 3 November 1996.

In killing the criminal, it is argued, the state engages in premeditated murder which the solemn proceedings of prosecution and conviction cannot disguise as anything else. Abolitionists believe the lesson that killing people is wrong cannot be taught in the gallows.¹²¹ But leaving aside the questions of whether capital punishment is morally right or morally wrong, I move to the pragmatic issues which are more relevant to the discussion at hand.

1. Irreversible Consequences

One of the most pertinent points raised by abolitionists is that it is a sentence with irreversible consequences imposed by fallible men, and that there is a real and horrifying possibility of judicial error. As H.L.A. Hart once commented:

[a]lthough the danger is small, the death penalty cannot be expunged if it is discovered that an innocent man has been executed. The possibility is an intolerable risk.¹²²

Devenish explains that in the United States, two eminent jurists have established that 343 people were wrongly convicted of capital punishment since 1900, and that 25 of these people were actually executed as a result of judicial errors. He continues that in South Africa, although there is no recorded case of an innocent person being hanged, the possibility of judicial error has been compounded by two issues:

- (a) the pro deo system which permits persons accused of the most serious crimes to be defended usually by young and inexperienced lawyers, who do not have the assistance of attorneys who are essential to proper preparation of capital offences, and who have a minimum amount of time for consultation with offenders.

¹²⁰ Quoted in W. Bowers & G. Pierce, "Deterrence or Brutalisation: What is the effect of Executions?" *Crime and Delinquency*, Vol. 26, October 1980, p. 154.

¹²¹ Bartollas & Conrad, *op. cit.*, p. 170.

¹²² Quoted in Devenish, *op. cit.*, p. 17.

- (b) the extensive use of interpreters used most notably with blacks accused of capital crimes. As interpreters have been widely used in South Africa, judges received second hand information, which could conceivably lead to irreversible miscarriages of justice.¹²³

These are two issues which could potentially continue to obstruct justice should the death penalty be reinstated in South Africa.

2. The Death Penalty is a Violation of the Constitution and Human Rights

It has been stated that up to 80% of South Africans favour the reinstatement of the death sentence. In his book The Death Penalty: Let the People Decide, Seleane locates the question of capital punishment in relation to society and the social order, arguing that public opinion is a factor to be considered. But those calling for a referendum to decide on the question of capital punishment should consider the following remarks by Chaskalson:

...The question before us...is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the constitution allows the sentence. Public opinion may have some relevance to the enquiry, but in itself it is no substitute for the duty vested in the courts to interpret the constitution and to uphold its provisions without fervour....[T]he issue of capital punishment cannot be referred to in a referendum, in which the majority view should prevail over the wishes of a minority. The very reason for establishing the new legal order...was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society...¹²⁴

An example which is often used to illustrate the problem of populism is *Brown v. the Board of Education*, which is analogous to referring the issue of capital punishment to a referendum. The argument is that principle issues like the death penalty should never be

¹²³ *Ibid.*, p. 18.

¹²⁴ Seleane, *op. cit.*, pp. 35-36.

subject to popular consent, for there is always the possibility that populism might gain the better of the principle. It is argued that if the desegregation of schools in the United States had been referred to a referendum in the 1950s, the majority of Americans would almost certainly have voted against desegregation. In order for American society to move beyond desegregation, it was necessary for the Supreme Court to desegregate schools without regard to popular feeling on the matter.¹²⁵ As Piotr Nowosa, National Secretary of Amnesty International South Africa, has argued, because of the emotive nature of the debate, it is not easy to inquire into the issue involved on a consistently rational basis. "Emotional appeals and not reasoned analysis are the stuff of referenda."¹²⁶

But the real issue at hand is the rights of each individual embodied in the Constitution: "The Republic of South Africa is founded on human dignity, the achievement of equality and advancement of human rights and freedoms....Everyone has the right to life...Everyone has the right to be free from all forms of violence from both public and private sources, not to be tortured in any way." These rights apply to everyone, without exception. The execution of a prisoner would destroy the above rights enshrined in our Constitution. The Constitutional Court has found that capital punishment is a cruel punishment, it denies the humanity of the executed person, and "strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state."¹²⁷ The application of the death penalty cannot be separated from the issue of human rights. The death penalty cannot be reinstated without changes to the Constitution. But the danger of this is obvious, as Piotr Nowosad argues, "by changing the Constitution so soon, we would be opening the door to regular constitutional changes after every election or during every public debate. A referendum on nationalisation of all land? A two-thirds majority supporting the flogging of a former president?"¹²⁸ Public opinion cannot limit the rights upheld in the constitution - it does not make exceptions.

¹²⁵ *Ibid.*, pp. 71-72.

¹²⁶ *The Star*, 23 January, 1996.

¹²⁷ *Ibid.*, p. 33.

3. Racial Bias

"Calls for the restoration of the death penalty are, in real terms, calls to hang those who are black and poor....Those who make this demand [for the death penalty] seek to deny that it is the dehumanising poverty imposed on the people by the apartheid system which generates this crime."¹²⁹ This statement highlights a major problem of selective application of the death penalty in South Africa. As Professor John Dugard observed:

[I]t is impossible to divorce the racial factor from the death penalty in South Africa. Of the 2 740 persons executed between 1910 and 1975 less than 100 were white. No white has yet hanged for the rape of a black and only about six whites have hanged for the murder of blacks. Furthermore blacks convicted of murder or rape of whites are usually executed.¹³⁰

Wherever the death penalty is employed, it is "used disproportionately against the poor, the powerless, the marginalised or those whom repressive governments deem expedient to eliminate."¹³¹ As Piotr Nowosa argues, that in the new South Africa there is no discrimination is largely utopian, and its implementation is largely selective in application. It is inflicted on the most vulnerable members of society - the poor, the unemployed, the mentally disturbed. "The argument that because South Africa is a non-racial democracy we will have unbiased application of the death penalty is not borne out in the rest of the world."¹³²

4. The Death Penalty as Deterrence

The death penalty could possibly have a measure of justification if indeed it was effective as a deterrent. But a multitude of research studies indicate convincingly that there is "no compelling evidence that the death penalty deterred crime. During the 1980s, South

¹²⁸ P. Nowosad, "Between a Rock and a Hard Place when it Comes to Capital Punishment," Saturday Star, 14 September, 1996.

¹²⁹ The Star, 19 December 1997.

¹³⁰ Quoted in Devenish, op. cit., p. 23.

¹³¹ Ibid., p. 25.

Africa executed more prisoners than in any other country which has a comparable judicial system, but crime rates still increased exponentially."¹³³ Minister of Justice Dullah Omar has stood firm in his belief that nowhere in the world had it been proved that the death penalty was an effective deterrent to crime, and that "the death penalty" was a legal form of punishment in South Africa and yet crime continued to increase."¹³⁴ In South Africa the exponential increase in the number of executions was not accompanied by a manifest reduction in the numbers murders committed annually.

Dolinko in the Journal of Criminal Law and Criminology analysed a large body of empirical studies and concluded that there is virtually no scientific evidence that the application of the death penalty reduces the incidence of murder. This was also the view of the British Royal Commission of Capital Punishment in 1949 that preceded the abolition of the death penalty in the United Kingdom.¹³⁵ In 1988 the United Nations conducted a survey of research findings on the relation between the death penalty and homicide rates, and concluded that:

[t]his research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment. Such proof is unlikely to be forthcoming. The evidence as a whole still gives no positive support to the deterrent hypotheses.¹³⁶

Piotr Nowosa from Amnesty International also concedes that study after study world wide, despite different countries, times and methodologies of analysis, show no correlation between the use of the death penalty and the rate of crime. This is reiterated by Professor John Dugard from the University of the Witwatersrand:

Many studies have been carried out. But to my knowledge there is no clear evidence that the death penalty is a deterrent. And in the absence of such clear evidence it would be unfortunate if we were to reintroduce the death penalty.¹³⁷

¹³² The Star, 23 January, 1996.

¹³³ D. Davis, "Populist Politics with Strings Attached," Weekly Mail, 1 December 1995.

¹³⁴ R. Rohan, "Government Firm on Death Penalty," Sowetan, 23 May 1997.

¹³⁵ Devenist, op. cit., p. 16.

¹³⁶ Idem.

It is useful to recall the point made earlier that criminals are possibly deterred by the possibility of being caught - which is unlikely in South Africa - rather than by the severity of the penalty. The constitutional court has found "the greatest deterrent to crime is the likelihood offenders will be apprehended, convicted and punished. It is that which is lacking in our criminal justice system."¹³⁷ I would indeed concur with Professor John Dugard that it would be unfortunate to reinstate the death penalty in South Africa in the absence of empirical evidence to support the hypothesis that capital punishment does deter crime. This in itself would be criminal as, "the practice of the death penalty reveals that no criminal justice system is, or conceivably could be, capable of deciding fairly, consistently and infallibly who should live and who should die."¹³⁹

3.5. Reaffirm Rehabilitation

If the human race is to claim to be more civilised than any other species, it is time our civilisations were based not on how sophisticatedly we kill our neighbours, but rather on how efficiently we are able to ennoble human and other life around us...the death sentence is abominable, as abominable as the crime itself. Our state must be based on love, not hatred and victimisation. Our penal code must be based on rehabilitation rather than annihilation.

Chenjerai Hove - a prominent Zimbabwean Poet¹⁴⁰

Glanz argues that the court's adherence to deterrence in sentencing in South African courts has been one of the most unaffordable aspects of the sentencing system, and continues that to expect every sentence to have a deterrent effect and contribute to reduction in the crime rate has over and over been proved to be futile. Naïve beliefs in the effectiveness of a policy of deterrence have been replaced by the realisation that some people may be deterred in some situations, but that we do not know enough to be specific

¹³⁷ 8pm News, (videorecording), SABC3, 8 December 1997.

¹³⁸ Davis, *op. cit.*

¹³⁹ Devenish, *op. cit.*, p. 29.

about under what circumstances. "It is therefore not affordable to punish people to serve as an example to other criminals when we do not know if anybody would really be deterred from crime."¹⁴¹

Considering the realities of poverty, unemployment and inadequate policing and prosecuting in South Africa, it would be far more profitable to concur that we are only deluding ourselves if we were to believe that harsh sentences and perhaps the execution of a few offenders will serve as effective examples to deter others from a life of crime. A system of deterrence creates an erroneous impression that effective measures are being employed to counteract crime, while the fundamentals of socio-economic deprivation are not addressed and remedied. As forensic criminologist Dr Irma Labuschagne has argued:

[The death penalty] is a little straw we all cling to in the desperate hope that if we put the death penalty in place tomorrow morning, by tomorrow afternoon we are going to have less crime in this country. It is not as simple as all that. The death penalty is not really the deterrent we are praying for. What we need to address very urgently are issues such as unemployment, poverty, the total lack of norms....¹⁴²

It was Plato who formulated the reformatory theory of punishment, pointing out that punishment was not meant to harm but to ameliorate the conditions of the offender. The retributive and deterrent theories of punishment relegate the rehabilitative elements to the background in favour of archaic principles thereby disregarding important social and economic causes of crime and do nothing to remedy the needs of the offender. In the treatment of an unemployed offender, for example, deterrence theory would have us impose free will based on utilitarian calculations to justify punishment which in most cases will not improve his condition but prepare him for a return to a life of crime. This largely ignores realities of socio-economic deprivation, and its claims to reduce crime through deterrence is ironic.

¹⁴⁰ *Ibid.* p. 1.

¹⁴¹ Glanz, "Executive Summary," in *Managing Crime in the New South Africa*, pp. xviii-xix.

¹⁴² *Spm News*, (videorecording), SABC3, 8 December 1997.

Rehabilitation disputes every facet of deterrence theory that the constant escalation of punishment will reduce the spectre of crime. Instead it is aware that realities of socio-economic deprivation often prompt people into a life of crime, and efforts are made through education, skills training and reintegration to enable offenders to escape their criminogenic constraints. Moreover, by sensitising people to the fact that the majority of illegality that plagues society is linked with existing social inequalities and injustice, rehabilitation makes clear that a reduction in the crime rate will only result from sustained and interrelated efforts to normalise these injustices.

4

REHABILITATION OF OFFENDERS

It has been argued thus far that offenders can conceivably 'pay' their debt to society by suffering punishments variously (but not exclusively) through retribution and deterrence. Sentencers try to juggle with the contradictory demands of complex penal philosophies to achieve - exactly what? Just deserts for criminals? Protection of society through deterrence? Or perhaps most importantly, a real reduction of crime in the future?

Crime control is not a self-professed aim of the justice model but many proponents assume that 'getting tough' and establishing 'law and order' will somehow curb crime as evidenced in the United States. But by assuming a classical Enlightenment view of the offender, where criminal acts result from rational and wilful calculations, the offender is abstracted from the social and economic circumstances which prompt many criminals into a life of crime. Not only is this system unjust in an 'unjust' society, it merely passes off dilemmas of unemployment, poverty and inequality as crime problems and does not aim in any way to rectify the underlying causes of crime. As 'justice' is its justification, there is no attempt by deserts theorists to ameliorate the conditions of the offender in any way, giving credence to Menninger's assertion that "crime problems have been dealt with too long only with the aid of common sense. Catch criminals and lock them up....This is common sense but it does not work." Just deserts ultimately obligates the state to do no

more than to make criminal pursuits unprofitable, and to provide society with the solace that they are paying their debt.

With regards to deterrence, Menninger has argued that "it is no secret that our official prison threat theory of crime control is an utter failure."¹ It has been argued that deterrence theory as a measure of crime control and prevention, has largely been unsuccessful. To assert that harsher punishments and increased use of the death penalty will somehow deter crime is largely fallacious as history tells us:

When pick-pocketing was punishable by hanging in England, the crowds that gathered about the gallows to enjoy the spectacle of an execution were particularly likely to have their pockets picked by skilful operators who, to say the least, were not deterred by the exhibition of 'justice'.²

It has also been argued that perpetrators of most offences are never detected; of those detected there is a low clearance rate, and still fewer actually serve a prison sentence. And what do we do with offenders? Menninger rather cynically argues: "after a solemn public ceremony we pronounce them enemies of the state, and consign them for arbitrary periods to institutional confinement. Here they languish until they have ground out so many years and months". Of those who do serve a prison sentence, many 'become firmly committed to a life of crime as a result of their incarceration as evidenced by the high rate of recidivism. On average, 95% of all criminals are released back into society, to do exactly what? Menninger argues that "with a planelessness and stupidity only surpassed by that of their original incarceration they are dumped back upon society, regardless of whether any change has taken place in them for the better with every assurance that changes have taken place within them for the worse." Proscribed for employment by most concerns, finding themselves ostracised from society and blacklisted in the labor market, they are expected to invent new ways to make a living and survive without any further help from society. It

¹ K. Menninger, "Therapy, Not Punishment," in J. Murphy, Punishment and Rehabilitation, California, Wadsworth, 1973, p. 133.

² Idem.

is in this way that society skilfully converts individuals of border-line self control into loyal members of the underground fraternity.³

Having argued that both deterrence and retribution are largely inapplicable in South Africa, the next question is what do we do with these offenders? Consider the following prudent words, again by Menninger:

My answer is that we, the designated representatives of the society which has failed to integrate this man, which has failed him in some way, should take over....Our move must be a constructive one, an intelligent one, a purposeful one - not a primitive, retaliatory, offensive move....We are not driven, as he is, to wild impulsive actions. With knowledge comes power and with power there is no need for frightened vengeance of the old penology. In its place should go a quiet, dignified, therapeutic programme for the rehabilitation of the disorganised one, the protection of society during his treatment period, and his guided return to useful citizenship.⁴

Although his use of 'therapeutic programme' is perhaps a reference to the reformatory days of rehabilitation, I largely concur with Menninger's answer. It is my aim to demonstrate that there are intelligible alternatives to some of the more unthinkingly punitive practices of current sentencing. Until there is a greater recognition of the relationships between crime, criminal justice and social justice, it is unlikely that punishment will be fashioned to bring about reductions in crime rates. Rehabilitationists generally claim that theirs is the only approach to penology which offers any hope of reducing crime. While overall crime rates may only be significantly reduced by radical social change, rehabilitation does attempt very positively to prevent individual recidivism: that is the whole *raison d'être*. It would be unrealistic to argue that rehabilitation holds the formula to turn all criminals into model citizens, and to dramatically reduce the crime rate, but rehabilitation puts forward a modest optimum:

³ *Idem.*

⁴ *Ibid.*, p. 141.

No one seriously believes we can 'eliminate' crime or 'remake' offenders, but there is nothing unrealistic about reducing crime or offering offenders a less damaging alternative to traditional prison.⁵

4.1. Historical Analysis

Rehabilitation today should be differentiated from the past days of the therapeutic and treatment model. A review of the history of rehabilitation will enable us to discern the various misleading directions taken in the name of rehabilitation, all of which led ultimately to disenchantment. Despite its failures and distortions, the idea of rehabilitating the offender is related to the faith of human capacities for change. As Rotman argues, it is no accident that the idea of rehabilitation has come to the fore in periods when the search for excellence dominated the mainstream of human thought, under circumstances marked by inspiration and confidence in the improvement of the human condition.⁶ Although the various expressions of rehabilitation were shaped by the particular anthropological conceptions prevailing at the time, they all proclaimed the common goal of transforming a purely vindictive penal reaction into a constructive venture.⁷

Antiquity and Christianity

The idea of the moral transformation of the offender has its roots in antiquity. As early as 1050 BC a Chinese book contained a penal policy based on the idea of amendment. But the earliest rehabilitationist is usually regarded as Plato, who saw wrongdoers as morally sick, where the court's task was to act as physician of souls. This argument involves three propositions:

⁵ B. Hudson, *Justice Through Punishment*, p. 175.

⁶ E. Rotman, *Beyond Punishment: A New View on the Rehabilitation of Criminal Offenders*, New York, Greenwood Press, 1990, p. 21.

⁷ *Idem*.

- (1) Wickedness as a mental disease, disintegrating and ultimately fatal.
- (2) The punishment of wicked acts is to be regarded as a moral medicine, unpalatable but wholesome.
- (3) The state should stand to the criminal *in loco parentis*.⁸

The Greek ideas on reformatory punishment evolved into the Christian notion of monastic penance. The Christian contribution to the development of a rehabilitative spirit in the application of criminal sanctions was rooted in various texts of the New Testament, particularly the admonition to love one's enemy. St Thomas Aquinas spoke of *poena medicinalis*: "we can also look at punishment as medicinal and then not simply as a cure for past sins but as a preventative of future sins or even as an inducement to some good."⁹ In these formulations rehabilitation is spoken of as a manifestation of social disease. Both these arguments use a medical orthodoxy, and the aim must have been to cure the disease by treatment. It was assumed that reform was possible. The most influential embodiment of the Christian rehabilitative conception was the disciplinary punishment practised within monastic orders. Through solitary confinement and meditation in the cell, the order attempted to combine the pain of imprisonment with the spiritual growth of the transgressor. It was the combined use of imprisonment and amendment which became the formula for nineteenth century correctional experiments.¹⁰

The Penitentiary

The construction of the penitentiary annex to the Walnut Street Jail in Philadelphia, inaugurated in 1797, is generally considered to be the beginning of modern imprisonment. It was the result of the Quaker's struggle against the death penalty and gruesome corporal punishment.¹¹ The Quaker's advocated the principle of solitary confinement along the lines of Plato and the model of the monastic order as part of their reformatory scheme.

⁸ P. Bean, Punishment, Oxford, Martin Robertson & Co., 1981, p. 54.

⁹ Idem.

¹⁰ Rotman, op. cit., p. 29.

¹¹ Ibid., p. 37.

However this scheme of reformation was short-lived and gradually lost momentum. It was only after the 1820s that the reformatory ideal actually played a role in the penitentiary. Crime was explained as the result of the corrupting influence of society of a society in which the old moral codes were cracking up and family and Church had lost their grip.

Before rehabilitation was accepted as a primary goal of legal punishment, reform was incorporated as a major goal alongside retribution and deterrence. The words reform and rehabilitation are often used synonymously, but in fact they are two distinct concepts. Bean, in discussing Hegel's theory of punishment, argues that reform is to be effected *through* punishment, whereas rehabilitation entails that rehabilitation *accompanies* punishment. He goes on to explain:

The object of punishment, according to Hegel, is to make the criminal repent his crime, and by doing so to realise his moral character, which has been temporarily obscured by his wrong action, but which Hegel asserts is his deepest and truest nature.¹²

Crucial to the idea of reformism was a belief in the self-determination of humans - capitalism reconstituted the citizen as *homo economicus*, making free choices based on calculations of profit and loss. It was believed that the criminal can repent and can become a good citizen, only if he *will*. Rehabilitation by contrast seemingly implies determinism.¹³

The reformist agenda was thought to be immensely successful in most Western countries and were taken up as the official orthodoxy of penal systems. Prisons, reform schools and mental hospitals proliferated during the last half of the nineteenth century - the heyday of reformism. Hudson explains that even more remarkably, the punishment apparatuses developed during the previous eras were dismantled, such as the instruments of torture.¹⁴

¹² Bean, *op. cit.*, p. 47.

¹³ Hudson, *op. cit.*, p. 3.

¹⁴ *Ibid.*, p. 5.

Rehabilitation

By the 1890s however, new ways of thinking were becoming established and the old ways of reforming criminals was questioned. The failure of penal policy to reduce crime became allied to public alarm over poverty, and to disillusion engendered by the failure of Victorian capitalism to sustain economic growth that had characterised the earlier parts of the century.¹⁵ Garland argues that a new philosophy of punishment developed during the last decades of the nineteenth century in the United States and the United Kingdom, from a discourse of reformism to rehabilitationism. This involved the idea of determinism, individualism and pathology, and the idea of a powerful and benevolent state empowered to intervene in the lives of inadequate citizens and thereby rescue them from delinquency, depravity and deprivation.¹⁶

The development of rehabilitation early this century in the United States and England saw the elaboration of a powerful alliance between the state and the newly developing sciences of psychiatry, physiology and sociology. These disciplines, using the cause and effect modes of thinking of positivist science fed into the criminological programme, providing for a new agenda of penal innovation. Positivism proposed that social and psychological phenomenon obeyed the same kinds of causal rules which were believed to apply to the natural world, and this idea was assimilated into penal practice to do something about crime. If human behaviour obeyed causal laws, then in practice, the causes of crime could be discovered and eradicated.¹⁷ A new set of penal aims emerged designed to organise programmes which would bring about desired changes in criminals. They diagnosed the criminal, offered treatment and released them when they were deemed to be cured. Therefore, "treatment" became the *modus operandi* of rehabilitation as a way of dealing with the incorrigible.¹⁸

¹⁵ *Ibid.*, p. 6.

¹⁶ *Ibid.*, p. 7.

¹⁷ *Idem.*

¹⁸ *Ibid.*, pp. 9-10.

By 1967 the principle that punishments should be tailored to the needs of the individual offender rather than calculated totally on the basis of the crime committed was well established. Carlen argues that unlike the classical theory of justice put forward by Beccaria, the general rehabilitative model was less committed to making the punishment fit the crime and more concerned with fitting the punishment to the offender, i.e.: an individualised sentencing aimed at ameliorating the conditions presumed to have been part cause of criminal behaviour.¹⁵ Treatment programmes such as group therapy, individual counselling as well as vocational training were usually available to offenders, and the principles of diagnosis, classification and treatment were the accepted way of approaching the sanctioning of offenders. The idea the offenders should be dealt with on an individual basis rather than as a class of perpetrators was the 'progressive' approach to crime and delinquency.

Models of Rehabilitation

Consequently we can draw on the work of Rotman who distinguishes four different models of rehabilitation which have succeeded each other during the historical development of rehabilitation. It is useful here to refer to the first three models, the penitentiary, the therapeutic, the social learning models. His latest model, the rights based model, will be discussed further on as it not relevant to the discussion presently at hand. All these models belong to the same family. That is, they are composed of similar elements and respond to similar needs of a social system. Where they differ is in the means used to achieve social goals and in the roles and powers of the members of the rehabilitative relationship.

1. The Penitentiary Model

The basic elements here are work, discipline and moral education. Different concepts of psychological transformation led to two variations of the model:

- (a) one approximating the monastic ideal of penance
- (b) the other associated with the individualistic nineteenth century ideal of progress through industry and personal effort.²⁰

The walls of the prison not only isolated the offender from the contaminating influence of society, but supported the reformatory action of religious discipline and indoctrination. But reform through submission can be shown to not necessarily lead to penitence but perhaps to bitterness or insanity, or that the regime is not necessarily reformatory.²¹

2. The Therapeutic Model

This model assumed that offenders were sick and attempted to cure them of their criminality. Rotman argues that most of the modern debate about rehabilitation revolves around the medical model. He continues that "thanks to the medical analogy, the term treatment began to be used in a medical sense." In principle, the therapeutic model can mitigate the harshness of the penitentiary model with an element of care. But its potential for coercion tends to overshadow its positive aspects and has lent itself to violations of rights. Eventually an evolved therapeutic model paved the way for the social learning model.²²

3. The Social Learning Model

¹⁹ P. Carlen, "Crime, Inequality and Sentencing," pp. 13-14.

²⁰ Rotman, *op. cit.*, p. 5.

²¹ Hudson, *Penal Policy and Social Justice*, p. 165.

²² Rotman, *op. cit.*, p. 5.

This model views crime as the result of learned behaviour and rehabilitation as a compensation for early socialisation flaws resulting from, for example, family break-up. It assumes that the capacity for law abidance can be learned through a process of human interaction which includes participation, sharing information and preparation for the post confinement world.²³

4.2. Attacking Rehabilitation

Early criticism of rehabilitationism usually took a philosophical or quasi-religious tone, centring on the determinism of the 'medical approach' to deal with offenders, and asserted the individual's right to retain his personality unchanged. But by the beginning of the 1970s there was a discernible breach in the consensus that treatment for sickness and help with problems was the approach to take for dealing with offenders.²⁴ On both sides of the Atlantic, criticism focused mainly on two areas:

- (1) Conservatives claimed it was soft on crime.
- (2) Rehabilitation does not work

4.2.1. Soft on Crime

Advocates of a tougher reaction to crime contributed to the crisis in rehabilitative policies across the world, arguing that rehabilitative policies weakened the punitive mechanisms of the state. There was a manifest need to find a more immediate and direct solution to lawlessness, and a 'war on crime' was needed to re-establish 'law and order'. The main problem was seen by many as the criminal justice system which was more concerned with benefiting the criminal than with preventing the victimisation of innocent criminals. This

²³ *Idem.*

²⁴ Hudson, *op. cit.*, pp. 18-20

was apparent in the long list of rights that been accorded to offenders.²⁵ Conservatives were confident that (and remain so today) that a criminal justice system that abandoned the futile goal of the rehabilitation of the offender and set about the task of rationally punishing law-breakers could achieve substantial reductions in the crime rate. As we have seen this theory of punishment assumes that most criminals exercise free will in deciding to commit a criminal act.

Rotman explains that conservatives unfairly blamed rehabilitation policies for the overall crisis in crime control, disregarding many social, demographic and economic factors that helped increase crime. As Rotman argues:

Phenomena such as technological advance, industrialisation, urban-rural migration and urban concentration, population explosion, unemployment, housing shortages, economic instability, ethnic and class conflicts and changes in the family structure have transformed modern societies, and reduced the effectiveness of social control. The consequent increase in violent crime, the emergence of new forms of criminality and the severe leaks in the criminal justice system have made obvious the need to re-examine the postulates of current crime policy.²⁶

He continues that although prevalent in legislative proposals and penal theory since the end of World War 2, rehabilitation had not been consistently applied and could hardly be held responsible for the increase in crime. The worn out just deserts model offered a deceptive illusion of order and security, while the humanistic rehabilitative model had not yet been given a fair chance to prove its worth. Rotman also argues that the crisis in rehabilitation was compounded by the excessive use of imprisonment. After conducting research, he found that rehabilitation was being scapegoated for the failure of the prison system. The overcrowded and violence ridden prisons bore no necessary relation to rehabilitative policies, yet rehabilitation was persistently blamed for the problems arising from other sources.²⁷

²⁵ Cullen and Gilbert, *op. cit.*, p. 95.

²⁶ Rotman, *op. cit.*, pp. 109-110.

²⁷ *Ibid.*, p. x.

4.2.2. Rehabilitation Does Not Work

Although various studies had cast doubts on the effectiveness of correctional treatment, sentencing policies were not substantially affected until the publication of Robert Martinson's "What Works" article in 1974, which reported the results of an extensive research project that had investigated the effectiveness of rehabilitation. After analysing 231 treatment studies conducted from 1945 to 1967, Martinson could offer reformers little to be optimistic about.²⁸ Rotman argues that only the negative aspects were emphasised, and in the public discussion that followed, the content of the article was too often summed up as "nothing works." He continues that "this distorted conclusion quickly spread among scholars and penal theorists and was frequently cited in academic and legislative debates on sentencing and correctional reform. It soon became an easy argument to reinforce others that were being raised against rehabilitation."²⁹

It was unfortunate that Martinson's dictum that "nothing works" became a dictum that *rehabilitation* cannot work. Martinson's own interpretation of his findings after revealing the negligible impact of treatment on recidivism rates was to admit that the dearth of effects had arisen probably because "our programmes aren't yet good enough" and hence that "what our correctional system needs is simply a more full-hearted commitment to the strategy of treatment."³⁰ But what he did find was:

...evidence that vocationally oriented training for youthful offenders (over 16) both in institutions and in the community are associated with lower rates of recidivism than standard institutional care or standard parole. These programmes appear to be most successful when they provide the offender with a readily marketable skill.³¹

He also found evidence that community counselling, particularly if designed to meet the immediate needs of the offender, appears to reduce recidivism and increase community

²⁸ Cullen and Gilbert, *op. cit.*, p. 111.

²⁹ Rotman, *op. cit.*, p. 126.

³⁰ Quoted in Cullen and Gilbert, *op. cit.*, p. 112.

and vocational adjustment. Many hints on successful rehabilitative possibilities were presented as incentives for further investigation of each particular method.

Rotman argues that rehabilitation received new support in the late 1970s and 1980s as new evidence refuted the claim that "nothing works." The new studies demonstrated that the quality of both rehabilitation and research greatly improved since the heated debate based primarily on *treatment-evaluation* studies before 1967. With proof that programmes do work, Ross and Gendreau concluded that "some treatment programmes, when applied with integrity by competent practitioners to appropriate target populations, can be effective in preventing crime or reducing recidivism."³² In 1987 Ross et. al. made a comprehensive review of the abundant literature on rehabilitation since 1980, and testified to the revival of rehabilitation in both theoretical and empirical research.³³ Rotman argues that the assertion that no rehabilitation can be effective is inconsistent with the basic uncertainty inherent in the social sciences, and to exclude offenders from the benefit of rehabilitative efforts on the basis of dubious conclusions can hardly be regarded as scientific³⁴. But he continues that one important result was considerable improvement in the quality of new rehabilitative programmes.

It has been my intention here to point out the criticisms that were levelled against the 'earlier' models of rehabilitation as they emerged in the United States, and less significantly in England to locate the rehabilitation debate in the international context. Having assessed some of these earlier criticisms, I move now to an examination of 'new rehabilitationism'. One must however acknowledge that deep feelings of fear, uncertainty and distrust are pressing us toward repressive formulas. As Rotman argues, "the search for security in a world of mounting problems explains but certainly does not justify the regression to anachronistic responses to crime."³⁵ He continues:

³¹ Quoted in Rotman, *op. cit.*, p. 129.

³² *Ibid.*, p. 133.

³³ *Ibid.*, p. 134.

³⁴ *Idem.*

true, certain costs and calculated risks are involved in giving a second chance to criminal offenders. But our short-sighted unwillingness to face that reality is making our society more dangerous. Many offenders are daily discharged back into society with minimal or no preparation to face the momentous social problems and handicaps reserved for ex-convicts. A criminal justice system that creates and then ignores imperative individual needs for assistance and reeducation is bound to generate more crime. A new concept of rehabilitation...is needed to break this vicious circle and make law abidance a real possibility for ex-offenders.³⁵

The problems of rehabilitation of the past makes it important to re-examine their conceptual basis. The formulation of a revised rehabilitative concept which includes the important programme of reintegration, free from the errors of the past, can improve existing rehabilitative programmes and inspire future ones. One of the most important points is to realise that rehabilitation can not be held responsible for the short-comings of imprisonment that have been discussed earlier. Rehabilitation today includes measures to counteract the noxious effects of incarceration (Krugersdorp Prison, which is discussed further on, is a case in point), as well as alternatives to avoid it altogether.

4.3. Defining Rehabilitation

4.3.1. Ideology

Cullen and Gilbert argue that rehabilitation is the only justification of punishment that obligates the state to care for an offenders needs or welfare:

Admittedly, rehabilitation promises a payoff to society in the form of offenders transformed into law-abiding, productive citizens. But this ideology also conveys the strong message that this outcome can only be achieved if society is willing to punish its captives humanely and to

³⁵ *Ibid.*, p. x.

³⁶ *Idem.*

compensate offenders for the social disadvantages that have constrained them to undertake a life of crime.³⁷

In contrast, the two competing justifications of punishment, deterrence and retribution, contain not even the pretence that the state has an obligation to do good for its charges. The only responsibility of the state is to inflict that pains that accompany the deprivation of liberty, and whatever utility such practices engender flows only to society and not to its captives. Therefore, deterrence aims to protect the social order by making offenders suffer sufficiently to dissuade them, as well as onlookers entertaining similar notion, from venturing outside the law.³⁸ Retribution manifests disinterest in questions of crime control as its gaze is transfixed on ensuring that justice has somehow been served by harming offenders in commensurate doses with the crime. Gaylin and Rothman (proponents of the justice model) question whether it is strategically wise to forsake the only correctional ideology which displays any degree of benevolence towards offenders:

In giving up the rehabilitative model, we abandon not just our innocence but perhaps more. The concept of deserts is intellectual and moralistic; in its devotion to principle it turns back on such compromising considerations as generosity and charity, compassion and love.³⁹

Rehabilitation also provides an important rationale for opposing the assumption of retribution and deterrence that increased repression will reduce crime. We have seen how those embracing "law and order" place immense faith in the premise that tough rather than humane justice is the answer to society's crime problem. It is assumed that unlawful acts occur only if individuals have calculated they are advantageous, and society's victimisation will only subside if criminal choices are made more costly. This can best be achieved by sending more offenders to prisons for longer and more uncomfortable stays. It has been argued throughout that repressive tactics do not touch upon the real social roots of most crime, and therefore will hardly succeed in even marginally reducing crime. As Cullen and Gilbert argue:

³⁷ Cullen & Gilbert, *op. cit.*, p. 247.

³⁸ *Ibid.*, p. 248.

³⁹ *Ibid.*, p. 249.

Campaigns to heighten the harshness of existing criminal penalties - already notable for their severity - will only serve to fuel the problem of burgeoning prison populations and result in further deterioration of penal living standards. The strategy of "getting tough" therefore promises to have substantial costs, both in terms of money wasted on the excessive use of incarceration and in terms of the humanity it shamefully introduces.⁴⁰

By contrast, rehabilitation disputes the argument that increased punishment will mitigate the spectre of crime. To argue for an offenders rehabilitation is to respond to the fact that most (but obviously not all) offenders in South Africa are unemployed, impoverished, uneducated and perhaps recidivists, and by virtue of these social and economic circumstances often find themselves driven to a life of crime. Unless efforts are made to enable offenders to escape these criminogenic constraints, little relief in the crime rate can be anticipated, as we are experiencing in South Africa. It was argued in Part 2 that a real problem with the just deserts theory is that it is a system of punishment which is largely divorced from other domains of public policy. Hudson argues that contemporary penalty promotes:

- (1) The abstraction of acts from agents, individuals from their collectivities
- (2) The abstraction of punishment from other penal purposes
- (3) The separation of criminal justice from other areas of public policy.⁴¹

Rehabilitation and reintegration by contrast involve an attempt to reunite the criminal with society at large, and reunite punishment with other criminal justice purposes. A rehabilitative ideology prompts us first to realise the disadvantages that have driven many to crime, and secondly allows us to respond to them in practical ways that will allow offenders the opportunity to reintegrate back into society. "The ideology of rehabilitation is therefore fully oppositional to the conservatives agenda for the repression of crime and

⁴⁰ *Ibid.*, p. 254.

⁴¹ Hudson, *op. cit.*, pp. 149-150.

provides a coherent framework with which to argue that benevolence and not brutality should inform the institution of punishment and thereby crime control."⁴²

This point is again reiterated by Rotman who argues that rehabilitation challenges the fantasy that the so-called 'dark side' of society can simply be packed off to the prison. Rehabilitation oriented policies seek more effective channels of social re-entry than those offered by retribution and deterrence. Whereas traditional punitive reaction enforces conformity to the law on the basis of fear or rational calculation, rehabilitation creates in the offender the capacity for social participation and responsibility. It aims to offer opportunities that will make crime free life a practical option.⁴³ Rotman continues that rehabilitation is not incompatible with fair punishment, but rests on an assumption that it is self-defeating to try to prevent crime by the very means one is trying to eradicate. Instead of violence and coercion, rehabilitation proceeds through purposeful constructive action and opposes a purely retributive justice system. By counteracting the excesses of retributivism, rehabilitation makes punishment more fair, equitable and effective.

Rehabilitation is also the only system of punishment which is both backward and forward looking. It demands an examination of the offenders life, including his or her future. This multi-dimensional concept of justice therefore transcends the limited vision and symmetrical reaction of the traditional theories. Furthermore, due consideration is given to the individual offender and aims to aid the offender with reintegration into society, rather than merely fulfilling social goals. As Rotman argues, "in a purely retributive or deterrent system, the individual is only an abstract means to fulfil overriding social goals."⁴⁴

Rehabilitation demands that the scope of the legal system be enlarged so that the future life of the offender in the community is considered in sentencing and during the correctional phase. It should be clear that a modern rehabilitative concept not only serves

⁴² Cullen & Gilbert, p. 256.

⁴³ Rotman, *op. cit.*, p. 1.

⁴⁴ *Ibid.*, p. 2.

the social interest by preventing recidivism, but also the personal life of the offender who benefits from the opportunities of a crime free life. Rehabilitation introduces broader social issues into the criminal justice system, creating an area of convergence with the social welfare, public health and educational systems.⁴⁵ Some writers explicitly specify amelioration or at least the non-aggravation of socio-economic inequalities as a primary goal, whilst others take it as self-evident.

It has been argued that rehabilitation needs to be defined in a way that avoids the conceptual errors of the past. Rotman argues that an evolved rehabilitative concept includes the perspective of the offender and the state. Today this is typically seen to take various forms, but for my purposes I will concentrate on two forms. Firstly, state-obligated rehabilitation, and secondly an extension of state-obligated rehabilitation, the rights based model (alluded to earlier, and typically formulated by Rotman).

The name state-obligated rehabilitation is taken from Cullen and Gilbert's proposals in Reaffirming Rehabilitation (1982). Cullen and Gilbert were amongst the first in the United States to warn that a renaissance of the justice model might not be the best way to reduce crime and the prison population. Arguing that where rehabilitationism had previously failed, it had done so because of the state's lack of commitment to it. Their argument reinforced the poverty of state-enforced rehabilitation, and instead advocated state-obligated rehabilitation that takes seriously the betterment of inmates but legitimates neither coercion in the name of treatment, nor neglect in the name of justice.⁴⁶ A fundamental assumption of state-obligated rehabilitation would posit that as both the offender and the state might be more or less responsible for the breakdown in social relations which had resulted in crime, both have an obligation to take action to reduce the likelihood of a similar rupture in the future. Such a conception of reciprocal obligation might also replace the punishment - treatment dichotomy, as suggested by Pashuhans:

⁴⁵ Idem.

⁴⁶ Cullen & Gilbert, op. cit., p. 246.

Imagine for a moment that the court was really concerned only with considering the ways in which the living conditions of the accused would be so changed that either he was improved or society was protected from him - and the whole meaning of the term punishment evaporates at once.⁴⁷

In this formulation, the state's duty to intervene in the life of its citizens is based upon an obligation to justice, not only to the victim and society, but also to the offender. It is not a limited system of punishment with a limited vision of justice (inherent in the retributive theory), but also incorporates wider social goals. As Lacey argues:

Given the limited extent to which present society is committed to the equal pursuit of the welfare and autonomy of all its citizens, the best option may nonetheless be to support at least some practices of punishment, in the absence of any realistic prospect of getting anything better in the near future.⁴⁸

And it has been argued that a system of punishment which aims to ameliorate the conditions of the offender is obviously more desirable than a system which merely fosters hardships in the short and long term. State obligated rehabilitation ensures that the offender is not damaged beyond the intentionality of the penalty. A sentence of imprisonment is a sentence for the restriction of liberty, not a sentence to lose contact with families, to become deskilled, progressively less employable or to become brutalised. Therefore, the state would be obligated to provide rehabilitative provisions to counteract these well documented effects of incarceration, and to counteract the manufacture of handicaps concomitant with imprisonment.⁴⁹

The logical extension and stronger version of state-obligated rehabilitation is a rights based model which is typically formulated by Rotman. He argues that in modern pluralistic democracies, public policies are limited by individual rights, resulting from a long process that began with the natural law theorists of the seventeenth and eighteenth

⁴⁷ Quoted in Carlen, *op. cit.*, p. 18.

⁴⁸ *Idem.*

⁴⁹ Hudson, *op. cit.*, p. 165.

century philosophers of the Enlightenment, developed through nineteenth and twentieth century constitutions and culminated in conceptions of human rights, widely recognised in most countries and incorporated into international law. The right to rehabilitation presupposes a series of prisoner's rights as its indispensable basis. These rights (which would result from legislation and prison rules) would create the basis for a broader right to rehabilitation, encompassing the protection of the prisoner in areas of health, education, training and work. The purpose of the rights based model is to offer each offender an opportunity to reintegrate into society as a useful human being. The rights based model creates the legal duty on the state to counteract the effects of disabling criminal punishment. These rights demand from any state an affirmative care and a positive contribution to inmates as ways to counteract the harms of imprisonment.⁵⁰ But in South Africa, given the fact that rehabilitation is far from guaranteed in most instances, and given the fact that the facilities for successful rehabilitation are few and far between, opting for a rights based model would be counter-productive and logically inconsistent as a viable option. For this reason, a state obligated approach to rehabilitation would be a more realistic option to embark on.

Advocates of prison rehabilitation schemes are quick to distinguish their proposals from the so-called rehabilitative regimes of the 1970s. As Cullen & Gilbert point out, although there is some defence of the old-style rehabilitation as being the impetus behind the only humanitarian gains that have been achieved in prisons, the main problem was that rehabilitative facilities were only patchily and sporadically available. There has been no obligation on the part of the state to offer rehabilitation as a realistic alternative to traditional imprisonment. An examination of the current situation will reveal that this criticism is especially pertinent to the current state of affairs in South Africa. To attain any system of punishment that is better in the future we must call into question the practices of the present.

⁵⁰ See Rotman, *op. cit.*, pp. 70-78.

4.3.2. Alternative Sanctions

At this stage it is necessary to expose the fact that not all prisoners can be rehabilitated. The argument thus far has focused on those offenders which conceivably have the potential to be rehabilitated and which seemingly will pose little threat upon release back into society. The Department of Correctional Services classifies prisoners according to minimum, medium and maximum custody, where medium and maximum constitute 84.8% of all prisoners, and 2.9% as maximum prisoners.⁵¹ It would be realistic to acknowledge that perhaps different penal tariffs are necessary for different categories of prisoners.

Commissioner Sitole's proposals for sending prisoners down disused mine shafts and housing them onboard ships was a reference to those prisoners who are habitual offenders, or by the nature of their crimes do not warrant a rehabilitative element in their sentence, or are prison escapees. Indeed, in most instances rehabilitation would be superfluous, as Commissioner Sitole has stated that some inmates do not want to co-operate in rehabilitation programmes.⁵² If we accept that the defining characteristic of punishment must be the prevention of further crime and protection of society, then in certain instances rehabilitation would be menial. Depending on the nature of the crime and the character of the criminal, the future crime prevention strategy will best be served by deterrence and incapacitation in those instances where rehabilitation would not be in the best interests of society at large and the individual offender. I would concur with Hudson that specific penalties then need to be designed to serve specific purposes:

For normal run-of-the-mill crimes where the offending has not arisen from any obvious medical or psychiatric conditions requiring treatment, or any personal-social circumstances which would indicate the need for help rather than punishment (such as speeding), simple deterrent penalties aimed first and foremost at the offending individual but would also deter the general population of potential offenders would suffice.⁵³

⁵¹ Department of Correctional Services Annual Report, 1996, p. 19.

⁵² Debates of the National Assembly (Hansard), 25-27 March 1997, p. 986.

⁵³ Hudson, 1993, p. 160.

In these instances fines and community service would suffice, with prison reserved for the most serious offenders. However, where a deterrent or incapacitative penalty is imposed, such as the recent case where Magistrate Joe Ikaneng sentenced a 19 year man to 18 years imprisonment for rape to "knock some sense into you and also to rehabilitate you,"⁵⁴ rehabilitation in the weak sense of preventing deterioration should be an obligation of the state and right of the offender.

But for most offenders, given the socio-economic circumstances which surround many crimes, rehabilitation would be the best system of punishment to enable offenders to escape criminogenic constraints and aid with successful reintegration back into society. Programmes designed to lesson reoffending should be instituted as an obligation on the state so as to contribute to the reduction of the crime rate. As Hudson argues: "If the state takes to itself the right to punish, it must acknowledge the duty to use punishment for its proper purposes - limits on the state's right to punish and obligation to rehabilitate should be indicated by proportionality, feasibility and reasonable prospect for success."

There is however, a point of disagreement among new rehabilitationists on the question of the offenders right to refuse rehabilitation. This is an important point as state-obligated rehabilitation may be criticised on the grounds that it is coercive. It is important for new rehabilitationists to transcend the critique of earlier rehabilitation systems which were often thought to be coercive. If rehabilitation is synonymous with the earlier treatment models (therapeutic and social learning models) then without a right to refuse rehabilitation is coercive rather than enabling. For Rotman, the prisons "Ringe" in Denmark and "Butner" in North Carolina are examples of prison conditions under which rehabilitation can succeed (a more detailed analysis of how these prisons succeed in rehabilitation is provided further on). Life inside the prison is characterised as being near normal to life on the outside, and part of the normality is autonomy. Rotman argues that offenders should have self-determination in nearly everything except that they are confined. Whether they

⁵⁴ S. Beharie, "Mr Tough has had Enough," Sunday Times Metro, February 22 1998, p. 1.

work, take education classes or counselling sessions should be personal decisions: "for other people to make such decisions is to prescribe activities as treatment rather than provide the environment that enhances self-determination."⁵⁵ This point is reiterated by Hudson. She argues a rehabilitative element should be included in all sentences unless "the offender and the court are agreed that a rehabilitative element would be redundant in a particular case."⁵⁶ At present in South Africa, inmates exercise a choice in taking part in rehabilitation programmes offered in various prisons, and are not forced to do so. If a prisoner feels that he does not want to be rehabilitated, the Department of Correctional Services cannot force him to do so. Commissioner Sitole has commented that as a result of financial constraints, there are not adequate facilities to accommodate all prisoners should they be coerced into a process of rehabilitation.⁵⁷ However, it is imperative that those demanding rehabilitation should be entitled to services that will enable the criminal to reintegrate back into society. But further analysis (see 4.4.2.) will sadly reveal that this is not the case in South Africa.

4.4. South Africa

4.4.1. Correctional Services

The Department of Correctional Services was formerly known as the Prisons Department. Prior to the changes implemented in the early 1990s, the department had two basic functions: (1) to ensure that every prisoner lawfully detained in any prison be kept in safe custody until lawfully discharged or dismissed, and (2) "as far as practicable, to apply such treatment to convicted prisoners as may lead to their reformation and rehabilitation and to train them in the habits of industry and labour."⁵⁸ So the primary function of the prison

⁵⁵ Rotman, *op. cit.*, p. 168.

⁵⁶ *Ibid.*, p. 163.

⁵⁷ Sitole, *op. cit.*, p. 3.

⁵⁸ Roux, *op. cit.*, p. 254.

system was firstly the safe custody of offenders, and secondly, the re-education and rehabilitation of the offender.

With regards to the rehabilitation of the offender, it was argued that the provision of sufficient food, decent clothing and medical services was of basic importance for the rehabilitation of the offender. Yet it was realised that this alone was not sufficient for rehabilitation, and that it was necessary to apply 'treatment'. 'Treatment' examined the individual with his personality, temperamental make-up, emotional level, intellectual functioning, value system and general outlook on life. It was therefore "directed at each individual as a human being" and determined "the particular treatment required by a person for his eventual recovery and reformation."⁵⁹ For this purpose a therapeutic team consisting of clinical psychologists, social workers, educationalists and spiritual workers was employed. Secondary to this was the inclusion of sufficient possibilities for scholastic and vocational training. An important part of this process was the 'observation' of the offender, complete with a 'psycho-diagnostic' analysis.⁶⁰ It was believed that prisoners could be cured of their anti-social conduct. (This model seems fitting with Rotman's therapeutic and social learning models examined above).

But as a result of the large numbers of prisoners who were in custody daily, Roux argues that it was impossible to reach each individual case and to give intensive individual attention to each offender. There was also a shortage of vocational and specialised personnel, and an unsympathetic community often hampered the rehabilitation (and certainly did not assist in the reintegration) of the offender. It was these realities that give credence to Terblanche's argument that the primary purpose of punishment in South Africa has been deterrence.

The 1994 White Paper on the policy of the Department of Correctional Services (DCS) redefined the traditional stance and objectives of the DCS. It stated that ideally the

⁵⁹ *Ibid.*, p. 255.

⁶⁰ For more information see Roux, pp. 251-261.

criminal justice system should contribute to the maintenance of a just, peaceful and safe society by utilising appropriate, reasonable sanctions, whilst exercising only the necessary degree of control and "by actively encouraging offenders to take advantage of opportunities which will assist them to become law-abiding citizens." The Paper continues that the DCS believes that offenders have the potential to become law-abiding citizens, and that their goal is to provide opportunities, facilities, services and incarceration conditions conducive to rehabilitation and development.

The main objectives of the DCS are:

- (1) safe custody of prisoners
- (2) supervision and control over probationers and parolees in the community
- (3) humane detention and treatment of prisoners
- (4) *provision of developmental services*
- (5) *Reintegration into the community*
- (6) effective resource management and utilisation.⁶¹

The most important consideration for the discussion at hand is to examine the Department's commitment to providing developmental programmes and rehabilitation services to prisoners. It is envisioned that the Department offer both formal and non-formal classroom and vocational skills training. The objective is provide prisoners with the opportunities to improve their scholastic qualifications and to facilitate reintegration into the community. It also aims to provide prisoners with the academic and technically oriented vocational skills as well as the establishment of a learning culture and the promotion of the work ethic. Specific attention is paid to providing basic needs in respect of literacy and career directed skills training. The training programme comprises vocational and career directed skills training and entrepreneurial skills. It targets all sentenced prisoners who do not have the necessary level of training to be accommodated

⁶¹ Department of Correctional Services Annual Report, 1996, p. 5.

in the labour market after their release.⁶² However, in reality there are obvious practical constraints to actually implementing these aims of the DCS.

4.4.2. Practical Considerations

We have seen that "new rehabilitationists" propose a state obligated approach to rehabilitation. It claims a much more central place for rehabilitation than that of being one among several penal aims. Hudson argues the essential argument is although much has been made of the rehabilitative character of twentieth century penal systems, states have never acknowledged any obligation to provide rehabilitative facilities to those whom they have brought within the orbit of punishment facilities.⁶³ This has particularly been evidenced in South Africa, where rehabilitative programmes have only been available at the whim of the state. Traditionally the purpose of punishment in South Africa has been deterrence, although rehabilitation has sporadically been available to those willing to participate and services have been available. There has been no continuity, uniformity or obligation on the part of the South African state to provide rehabilitative programmes to assist offenders with reintegration into the community. We have seen above that only recently has the Department of Correctional Services supported the view that "offenders have the potential to make positive behavioural changes and to live as law-abiding citizens." For this reason their goal is "to provide the opportunities, facilities, services and incarceration conditions conducive to rehabilitation and development."⁶⁴ This includes providing services such as education and training, social work services, psychological services and religious care.⁶⁵

⁶² *Ibid.*, pp. 20-24.

⁶³ Hudson, *Penal Policy and Social Justice*, p. 162.

⁶⁴ *White Paper on the Policy of the Department of Correctional Services in the New South Africa*, 21 October 1994, p. 3.

⁶⁵ *Department of Correctional Services Annual Report*, 1996, p. 19.

However, realities that were being revealed in American prisons in the 1970s are now being echoed in South African prisons. It is now not uncommon to hear inmates stating: "this is a correctional institution, but they don't do any correcting." This remark sensitises us to two realities:

- (1) That insufficient pressure is being exerted on the state to supply inmates with meaningful opportunities to become rehabilitated
- (2) That the inmate was clear in his call for more (or at least some) rehabilitative services that would facilitate his self-improvement and enable him to achieve a reasonable stake in reintegrating back into society.⁶⁶

1. No Obligation

One of the main obstacles to rehabilitation of offenders in South Africa is a lack of obligation on the part of the state to provide rehabilitation. For most offenders rehabilitation is not a reality. Mike Green, section head at Pollsmoor Prison, explains that in his prison, which accommodates 3 500 prisoners, there are two social workers, one psychologist, no workshops, no classrooms and no recreational programmes.⁶⁷ It is not surprising that no rehabilitation takes place here, as one prisoner comments: "For us prisoners, who get sent to prison to rehabilitate, you can't rehabilitate." He continues that in prison you do learn a trade, but unfortunately that is crime: "here you learn crime, it's a warehouse where criminals come together...and that's how I learn more about crime." Another prisoner informs us that:

We are 23 in a cell that is supposed to sleep 10. You can see how small this room is. Look how crowded we sleep, there isn't room to move around. I could *never* rehabilitate here because we have a bunch of gangsters in this cell.⁶⁸

⁶⁶ Cullen & Gilbert, *op. cit.*, p. 263.

⁶⁷ Behind Bars (videorecording).

⁶⁸ Idem.

These problems are not reserved to Pollsmoor Prison. Mamoshabe Tloubatla, a Clinical Psychologist at Johannesburg Prison, acknowledges that the role of the prison should be correct the behaviour of the offender, and to rehabilitate the individual from what he has been to someone who could positively contribute to the community. Yet she argues that "realistically, the majority of them cannot be rehabilitated. [There is a] shortage of social workers and medical staff. We are only two social workers with a prison population of 7000 at Johannesburg Prison. So we focus on really needy prisoners - those who are depressed or suicidal."⁶⁹ The sad fact that there is little rehabilitation taking place is evidenced in the fact that there are 2000 recidivists (out of a population of 3000 sentenced prisoners) in the prison. "The state is spending money on the custody of the offender, and not much on the rehabilitation of the offender."⁷⁰ One must remember that 95% of all sentenced return to society where they are expected to be law-abiding citizens. "With inadequate programmes of training and counselling, the prognosis is often predictable and ex-offenders frequently re-enter the Criminal Justice System soon after release, congesting the system even further."⁷¹

The points raised above provide a point of departure for an assessment of why rehabilitative practices are so often flawed. This is a system which in theory advocates the rehabilitation of the offender, yet in practice furnishes few practices to secure this end. Phillip Carlisle, special projects manager involved with education at Leeukop Prison, argues that "Correctional Services seems to be more intent on finding space to incarcerate prisoners than it is on rehabilitating them and keeping them out of the prison." He continues that "there are few rehabilitation programmes and the problem with the educational courses offered is that they do not bear in mind job prospects on release or identifiable career paths."⁷² We need to expose the state's failure to meet its responsibilities with regard to rehabilitation of offenders. What is needed is a system of

⁶⁹ Idem.

⁷⁰ Idem.

⁷¹ White Paper on the Policy of the Department of Correctional Services, 21 October 1994, p. 1.

rehabilitation which obligates correctional services to supply inmates with the educational, occupational and psychological services, as well as community programmes it has so long promised to deliver. As Cullen and Gilbert argue, state-obligated rehabilitation obligates the state to rehabilitate, as opposed to a system that undermines the provision of treatment services to offenders.⁷³

The denial of rehabilitation and lack of concern for the future life of the offender amounts to passive and indifferent acceptance of the inevitable deterioration brought about by life in prison. State-obligated rehabilitation should be the main objective of all sentencing, with the aim to bring about a reduction in the crime rate without a further increase in inequality. Generally, there should be no imposition of a prison sentence which, given the offenders income or social circumstances, would certainly increase social inequalities still further. A large amount of prisoners are socially and economically handicapped and need basic support in education, job training and social learning. As their situation is worsened by the stigma of a criminal record, the state should be obligated to make efforts to support successful reintegration back into society. As Rotman argues:

Rehabilitation in this sense means that a state effort to prevent and neutralise the unwanted and harmful side effects of its own punitive intervention, and to respond to the human challenge posed by the socially (and economically) deprived offender.⁷⁴

2. Demand for rehabilitation

There is also evidence that inmates recognise that rehabilitation programmes are one of the few features of prison life that hold any potential to mitigate the boredom and harshness of idleness, create possibilities for self-improvement and foster hope and not despair. Cullen and Gilbert explain that a sample of prisoners in a United States prison

⁷² L. Taitz, "Education a Way out of Life," *City Metro*, 3 November 1997.

⁷³ Cullen & Gilbert, *op. cit.*, p. 266.

⁷⁴ Rotman, *op. cit.*, p. 70.

showed strong support for rehabilitation - 4% rejected the conclusion that "rehabilitation of adults just does not work", and three-quarters concurred that rehabilitation is "the only effective and humane cure to the crime problem." 80% favoured expanding rehabilitation programmes that were being undertaken in that prison.⁷⁵ These conclusions were also reflected in research reported by Hans Toch. Toch discovered that the most important need identified by inmates during imprisonment was "support - a concern about reliable tangible assistance from persons and settings, and about services that facilitate self-advancement and self-improvement."⁷⁶

Similar sentiments are echoed in South African prisons, as witnessed by prisoners' remarks in the previous section. Amanda Dissel explains that many prisoners are frustrated that they receive no training in prison which will help them stay away from crime upon release back into society. Thembi, a prisoner at Leeuwkop Prison, explained:

I don't want to come out [of prison] and find there is no job for me. I don't want to commit crime. But there is no-one to help me. There is no-one to lead us.⁷⁷

One educationalist at Johannesburg Prison states the offenders are "very interesting as far as education is concerned. Because most of them can't write their names or construct a sentence we have to start afresh from the basics."⁷⁸ He continues that almost everyone who is sentenced is willing to come to classes on a daily basis so that "when they go outside then they have learned a lot from the prison." Demands for increased rehabilitative opportunities are also evidenced in the following remarks by Mohammed Fadiel, a 19 year old, convicted of murder and robbery, who was a compulsive drug addict:

I feel that they haven't given us enough opportunities as prisoners, especially as a youngster. I have got potential, I'm not lazy, I do want to work. I want the opportunity to develop my skills

⁷⁵ Cullen & Gilbert, *op. cit.*, p. 179.

⁷⁶ *Idem.*

⁷⁷ Dissel, *op. cit.*, p. 8.

⁷⁸ Behind Bars (videorecording).

in a specific trade, plumbing, but up until this far I haven't been given this opportunity. They don't even want to send me away so I can go to Krugersdorp or Leeukop where there are those facilities for me to upgrade my skill so that when I go outside I know I have something to fall back on....I haven't been given that opportunity [and] I have been here now for five years. It's a wasted five years and I'm scared of going outside as it is difficult. When I was sentenced, the court stated that I will be getting my rehabilitation....I haven't received it yet.⁷⁹

Dissel adds that in her research most prisoners were adamant that they did not want to return to prison and had visions of working once they had been released. Many prisoners expressed concern that they had no trade and feared the implications of looking for employment with a criminal record and no skills.⁸⁰

4.4.3. Rehabilitation and Imprisonment

Prisons were originally designed as multi-functional devices serving various preventative and retributive goals sought by penal sanctions. Rotman argues that in practice these aspirations have largely failed, and the effectiveness of the prison has been challenged at every level. Moreover, imprisonment has been largely denounced for its harmful and counter-productive effects.⁸¹ It is therefore important to ensure that rehabilitation counteracts the harmful effects of imprisonment, obliging the state to provide appropriate human services and the opportunity for social reintegration after release into society. Rehabilitative efforts to prepare the inmate for release are crucial.

State-obligated rehabilitation would mean that new prisons must meet stringent qualitative standards incompatible with a purely incapacitation oriented approach to construction.⁸² Adherence to state-obligated rehabilitation would decrease the excessive reliance on imprisonment as a form of punishment. Rehabilitation in prison comprises educational opportunities, vocational training, medical and psychological treatment, maintenance of

⁷⁹ *Idem.*

⁸⁰ Dissel, *op. cit.*

⁸¹ Rotman, *op. cit.*, p. 143.

⁸² Rotman, *op. cit.*, p. 78.

family and community links, a safe and healthy prison environment, and post-release support. As this list suggests, a broad concept of rehabilitation is not limited to specific programmes but includes the prison environment.⁸³ Rehabilitation may also be done in the community, as discussed further on.

It is ironic that most prisons do not rehabilitate, yet rehabilitation is the overriding aim of the correctional system. From the point of view of both society and offenders, there is an overriding interest to avoid prisoner deterioration associated with imprisonment, and to make it possible for offenders to lead a crime free life. It is therefore vital that the creation of rehabilitative atmosphere be created.⁸⁴ A minimally decent environment, security, medical assistance and fair treatment are not only pre-requisites for whatever programmes are being offered, but are part of the rehabilitative offering itself. Therefore, the rehabilitative potential of a prison is indissolubly linked with the maintenance of certain standards in the prison system. As Rotman argues:

The chance of a successful return into the free society requires not only specific programmes, but also an environment that can counteract the deteriorating effects of freedom of deprivation.⁸⁵

To many this may seem like a problematic task. An examination of Krugersdorp Prison will reveal that a little change can go a long way in creating an environment conducive to rehabilitation. The difficulties of the task also do not diminish the urgency of rehabilitation, or justify a reversion to merely repressive social control.

Krugersdorp Prison

Krugersdorp Prison is a good example of where prisoners can be rehabilitated within a prison environment in South Africa. Two years ago it was typically characterised by the prisons legacy inherited from the past regime, comparable to Pollsmoor or Johannesburg

⁸³ Rotman, *op. cit.*, p. 3.

⁸⁴ *Ibid.*, p. 145.

⁸⁵ *Idem.*

Prisons today. Rex Gibson, author of the autobiography of Greg Blank (a prominent and rich stock-broker convicted of 48 charges of fraud and who became actively involved in the transformation of the prison) describes Krugersdorp Prison before its transformation as "one of the most violent prisons in the country with a sombre record of assaults and deaths in the cells."⁸⁶ Blank's lawyers reported to the DCS the "the term "Correctional Services" ...is a misnomer - where was the correctional or rehabilitative element? All [Blank] witnessed was violence, aggression and unhappiness. He had never seen violence of this nature before - people beaten and stabbed almost every night right before his eyes."⁸⁷ At one time there had been an average of two murders a month in the cells.⁸⁸

Nico Lotter, Deputy Director, reiterates that there was a lot of violence, problems between warders and prisoners and prisoners doing nothing daily, and it was decided that something should be done about it:

The Recommendation Committee suggested that we should invite the community to get involved in this prison. We arranged a champagne breakfast and took them into the prison, and showed them that we needed to give more facilities for the prisoners. They donated a computer, a fully equipped gym, a fun room with snooker tables and paint. While we were busy bringing all the changes in, we also noticed that there were less assaults on prisoners...and we also noted that the prisoners self-esteem changed a lot because they were proud of what they were doing.⁸⁹

He explains that warders generally did not understand the changes because this was not done in the past. "We concentrated more on keeping the person locked up. We did not change the person inside, and he went outside [worse] than when he came in." Lotter's opinion is that there is a responsibility to give offenders facilities and training to learn certain skills, to try to motivate him to change his self-esteem so that he can reintegrate when released back into society. "I've noticed over the two years here, the changes that have happened in this prison. Prisoners [who] were aggressive, swore at members, have

⁸⁶ R. Gibson, *Prisoner of Power: The Greg Blank Story*, Johannesburg, Zebra, 1997, p. 128.

⁸⁷ *Ibid.*, p. 134.

⁸⁸ For more information on the horrors of Krugersdorp Prison, and its subsequent transformation see Gibson, pp. 127-187.

⁸⁹ *Behind Bars* (videorecording).

changed their lives. I also noticed how the family got involved trying to help the prisoners. And the gangs are no longer active. So I think we are on the right track. We are going to send back a better person than [the one] we received, and I believe they will live a better life outside."⁹⁰ But it should be remembered that there are no long term studies to show the long term effectiveness of these changes.⁹¹

Rotman explains that the creation of a rehabilitative prison atmosphere serves the interests of both the state and the offender. The state is interested in maintaining discipline and order, and avoiding prison riots, and these perils considerably diminish when the institution is oriented toward the rehabilitation of the offender. At the same time, the offender benefits not only from the programmes themselves, but also the prison standards that make them possible.⁹² For example, a skills enhancing programme can hardly be offered in a climate of overcrowding and continuous violence. These facts reiterate Matthews conclusion that given the political will, we could still turn the "rehabilitative ideal into a reality."⁹³

Another important development to aid in the successful rehabilitation and integration of offenders is the introduction of the work ethic. The DCS recognises that it is important that a healthy work ethic is cultivated among prisoners in order to facilitate their reintegration into the community. In order to achieve this goal, the Department recognises that it is essential that sentenced prisoners perform productive labour, and endeavours to offer them the opportunity to extend their skills and knowledge, which will make it easier to obtain work after release.⁹⁴ For example, at Victor Verster Prison in the Cape, goods from cushions to milk containers are made in the workshops. The workshop facilities include joinery, wood-machining, cabinet making, upholstery, welding, motor-

⁹⁰ *Idem.*

⁹¹ It is necessary to point out that while Krugersdorp Prison may have introduced some impressive programmes, Amanda Dissel explains that the prison still experiences problems indicative of the prison system in general, such as overcrowding and lack of resources. Consequently, not all prisoners benefit from rehabilitation programmes, but she acknowledges that the prison's commitment to rehabilitation is nevertheless extremely important.

⁹² Rotman, *op. cit.*, p. 146.

⁹³ P. Carlen, "Introduction", in Carlen & Cook, *op. cit.*, p. 7.

mechanics and spray-painting. The main function of these workshops is in fact rehabilitation and preparing the offender for a job in the private sector upon release. The secondary functions are the manufacture of various items required by government departments all over South Africa, and running maintenance of the prison.⁹⁵

The rhetoric of inmate labour may provide a new ideological vehicle for doing good in prisons.⁹⁶ But this reasoning may be taken a step further where inmates actually receive compensation for labour performed or crafts produced (such as inmates skilled in producing stained-glass goods). The following benefits may result from such practices:

- (1) Inmates would be able to pay for their keep and ease the financial burden on the state
- (2) Offenders may pay compensation to their victim
- (3) It would be a good way to rehabilitate offenders

Cressey adds the following:

- (4) The daily existence of inmates penal living standards would improve if the state had a genuine interest in transforming the prison into a productive industry
- (5) A flourishing system of inmate labour could have several valuable side effects: it would provide inmates with a new found economic power and hence material basis for inmate solidarity, it would foster links to the community and enhance the ability of inmates to recognise their identity of interests.⁹⁷

What is needed system which in practice moves beyond the limited scope of current employment opportunities in prison. For example, one prisoner at Leeuwkop Prison working in the hospital section complained that "the harder you work in this place, the less you get for it. I get paid R7.00 a month for my work. The good you do doesn't give you

⁹⁴ Department of Correctional Services Annual Report, 1996, p. 24.

⁹⁵ R. Hart, "From Cushions to Milk Containers are made at Victor Verster," *Nexus*, August 1995, p. 16.

⁹⁶ Cullen & Wozniak, *op. cit.*, p. 30.

⁹⁷ *Idem.*

any feedback."⁹⁸ It is important to provide incentives for prisoner employment, as seemingly many benefits could result. Perhaps the most important benefit would be directly profitable to the offender who would be given a chance to do something constructive with his or her time in prison. Instead of left feeling as though he has nothing to contribute to society, his contribution could begin within the prison system. Upon release back into society, reintegration would be easier with a skill mastered, and the offender could make a positive contribution to society. It is of utmost importance to develop some kind of positive action to help inmates lead a crime free life in the community.

Rotman explains that the prison work is highly valuable, and that in modern correctional policies, work has a predominantly rehabilitative component. Inmate labour is an "indispensable element in restructuring the prison so as to minimise its evils and bolster rehabilitative undertakings." Furthermore, "work relates the closed universe of the prison to the demands and economic realities of the society outside."⁹⁹ It is therefore an important instrument in bringing prison life closer to the open environment, and in improving the economic prospects of inmates after their release. "Educational and formative in nature, rehabilitative prison work is a way to learn how to work."¹⁰⁰

What is particularly interesting to note is recent advances in the area of imprisonment and rehabilitation. Following is a precursory examination of some of the most recent developments internationally.

Recent Advances in Prison Rehabilitation

By now it should be clear that the prison environment is instrumental in the successful implementation of rehabilitation programmes. We have seen that in general most prisons

⁹⁸ Dissel, "South Africa's Prison Conditions," p. 6.

⁹⁹ *Ibid.*, p. 150.

¹⁰⁰ *Idem.*

do not rehabilitate, due to the negative effects of incarceration and lack of commitment to providing rehabilitation facilities. Rotman argues that rehabilitation is the overriding aim of progressive correctional systems¹⁰¹. It is therefore necessary to provide a progressive approach to the prison system in general. One such approach is the liberty centred approach to rehabilitation, which tends to relax the strictures of prison through leaves of absence, anticipated release and forms of trusting the inmates and making them self-responsible. The open prison is regarded as the epitome of liberty centred forms of institutionalised rehabilitation,¹⁰² and Rotman argues is the cornerstone of recent penal reform internationally. The effort ranges from the encouragement of visitation to the prison, in which all elements are oriented toward freedom. The offender should also be supported in the educational and work levels.

Denmark

Rotman explains that Ringe prison in Denmark is the foremost current experiment in prison rehabilitation, and is a good example of opening the prison inwardly. Inside the prison, inmates have a high degree of locomotive freedom, and the underlying principle is that the open prison should approximate the conditions of the outer world as far as possible. Each week inmates are given cash, including wages earned in the workshops and a basic allowance for subsistence, from which inmates must purchase their own food and prepare their own budgets. If they run out of money, they must depend on the solidarity of fellow inmates as no advance loans are made. These strategies and others are intended to develop a sense of responsibility in inmates and to encourage self-reliance.¹⁰³ Rotman argues that Ringe prison is the most tangible expression of the recent transformation of the rehabilitative concept.¹⁰⁴

North Carolina, USA

¹⁰¹ Rotman, p. 144.

¹⁰² *Ibid.*, pp. 144-145.

¹⁰³ *Ibid.*, p. 152.

¹⁰⁴ For further information on this prison see Rotman, pp. 150-153.

The Federal Correctional Institution at Butner, North Carolina, is an excellent example of a non-coercive concept of rehabilitation, which has made voluntary rehabilitation possible. Butner offers a wide range of educational, recreational and training programmes, where the uniqueness of the prison is regarded to revolve "around the institutional atmosphere rather than any single programme."¹⁰⁵ The prison maintains a rehabilitative atmosphere that reduces coercion, grants responsibility to the offenders and offers realistic opportunities to inmates. Most importantly, the institution seeks to "create a safe and humane environment which was conducive to change and finding new and more effective ways of providing correctional programmes for offenders."¹⁰⁶ Imprisonment proceeds through three phases: orientation; a continuation phase (in which inmates choose their work or self-improvement activities) and a graduated release programme with increase levels of independent functioning. As with Ringe, the emphasis is on the inmates taking responsibility for themselves. It has been demonstrated that this environment contributes to less aggression and disciplinary problems by offenders than similar inmates in other institutions.¹⁰⁷

4.5. Alternatives to Imprisonment: Correctional Supervision

4.5.1. Philosophical Underpinnings

Not surprisingly, there is a prevailing misconception in South Africa that we should send more, and not less, offenders to jail. Depending where one stands on the punishment spectrum, some argue that more offenders should be sent to jail either to serve as an example to others (deterrence), because they deserve it (just deserts) or less often, to be

¹⁰⁵ Ibid., p. 153.

¹⁰⁶ Idem.

¹⁰⁷ Idem.

rehabilitated. But the question arises as to whether prison is or ever can be the most suitable place for the rehabilitation of offenders. For those offenders who may pose a potential threat to society (through the nature of the crime committed) rehabilitation within the prison system is in the best interests of society. And for those who are deemed unfit for rehabilitation, deterrence and incarceration are perhaps the most suitable form of punishment. Not even the staunchest critics of imprisonment deny that it is necessary for at least dangerous offenders. As Judge Cohn, advocate for alternatives to imprisonment, stated:

I submit that the only situation in which no alternative sanction is available or effective, and imprisonment therefore legitimate, is where the public must by all means be protected from probably recurring acts of violence. Where the convicted prisoner is potentially dangerous, it does not matter whether he is in need of treatment (say for pathological impulses) or what his motives are: the society's right to be protected from him has priority¹⁰⁸

However, one must keep in mind the harmful effects of incarceration. These have been examined in section 3.4.1., and it is not my intention to repeat the criticisms here, save to say that if offenders are removed from the responsibilities, problems and temptations of every day life, they are less likely to acquire the self discipline which will prevent reoffending in the future. Overcrowded prisons are not schools of good citizenship, and cannot provide the mechanisms necessary for most offenders to lead crime free lives. It is necessary therefore to neutralise the harmful effects of incarceration and provide an environment conducive to the rehabilitation of the offender. A positive development to note is that the new prisons being constructed in South Africa have been designed to be conducive to rehabilitation. Dr Sipo Mzimela has explained that the new generation of prisons are not what has been seen in South Africa to date, and will provide for the education, skills training and counselling needed for modern rehabilitation programmes.¹⁰⁹ One such example is Malmesbury Prison in the Cape which is a new generation prison which puts more emphasis on the rehabilitation of prisoners. It includes classrooms to enhance

¹⁰⁸ Frimpong, *op. cit.*, p. 236.

¹⁰⁹ Two Way (videorecording), SABC3, 26 June 1997.

educational opportunities, a library, skills enhancing workshops to aid in rehabilitation and a recreational centre.¹¹⁰ Alternatively, in line with recent international trends, we should look for alternatives to imprisonment altogether. It would be senseless to implement a system based on imprisonment which would require rehabilitating the inmate from its own desocialising influence. As Rotman argues, "the new language and socialising action must counteract the jungle law criteria that now influences an important segment of the population of correctional institutions." An important step in this regard has been the implementation of community corrections.

The basic condition of community correction is the placement of responsibility for correction within a political sub-division other than the state, for example, the community. Community corrections may frequently involve some degree of incarceration, like restrictions on movement such as house arrests. Alternative dispositions which avoid or supplement traditional incarceration can occur at any point in the criminal process, that is, from the time of arrest through conviction, sentencing and sentence duration.¹¹¹ Community correction has been asserted to be more cost effective, more humane and a more successful approach to correction than traditional incarceration. The view of the international community is best formulated by the United Nations. The sixth annual Conference on the Prevention of Crime and Treatment of Offenders (1980) adopted a resolution on alternatives to imprisonment. It noted that while "imprisonment remains an appropriate sanction for certain limited offences and offenders" there are "social benefits that accrue to society from dealing with its deviant members to the extent possible in the community."

4.5.2. South Africa

No one who has seen or been held in South African prisons can seriously maintain that prisons are the best places to reform and rehabilitate prisoners. Fouche rather wryly adds

¹¹⁰ D. Mooloo, "A 'New Generation' Prison in Malmesbury," *Nexus*, July 1997, p. 17.

that members of the leadership, who have collectively spent several hundred years in prison, must be aware both of the evils of prison life, and generally of its failure to rehabilitate. The appalling conditions in most prisons, such as severe overcrowding and lack of opportunities for rehabilitation, means that most prisoners are unable to improve their prospects once they have been released. We have seen that criminals stand a better chance of improving their criminal skills than they do of contributing to society. If it is recognised that our prisons cannot rehabilitate under present conditions, we must look for ways of ensuring that only those offenders who are a danger to society or committed serious offences are sent to prison.¹¹² This type of non-custodial sentence aims at punishing the offender through the restriction of his or her liberty, but it also allows for the development of the offender in the community through the participation in programmes aimed at the rehabilitation and reintegration of the offender.

The White Paper (WPD-91) in 1991 of the then Department of Prisons showed a recognition that crime occurs within the community, and directly involves the community to solve the problem of crime. One of the missions of the department was: "to promote community order and security by exercising control over, detention of and dealing with prisoners and persons under correctional supervision in the most cost-effective and least restrictive manner."¹¹³ This strategy was an attempt to bring South Africa in line with international trends by generating community involvement in correctional matters and introducing alternative sentencing options to curb the ever increasing influx of offenders into already overcrowded prisons. The question of alternatives to prison and the success it proved to be in Africa, Europe, the United States and New Zealand prompted the department to study different systems. Work done by an inter-departmental working group chaired by Mr W F Krugel was of immense value. From this, and attendance of the

¹¹² J. McSparron, "Community Correction and Diversion," *Crime and Delinquency*, Vol. 26, 1980, p. 227.

¹¹² A. Dissel, "Prison Reform Needed," *Sowetan*, 7 July 1995.

¹¹³ H. Bruyn, "An Overview of the Treatment of Offenders in prison and Correctional Supervision," L. Glanz (ed.), *Managing Crime in the New South Africa*, Pretoria, HSRC, 1993, p. 275.

Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders in 1990, the concept of correctional supervision was enacted in South Africa in 1991.¹¹⁴

At present there exists two alternatives to imprisonment: correctional supervision and parole, which are collectively called community corrections. The conditions of correctional supervision are primarily aimed at exercising control over the offender and protecting the community, while being conducive to the upliftment and rehabilitation of the offender.¹¹⁵ Correctional supervision provides for *inter-alia*, monitoring, community service, house arrest, placement in employment, reparation and rehabilitation. Parole involves monitoring of offenders and exercising control over violation of conditions of parole. The DCS supports the view that many offenders can be dealt with safely and effectively in the community, and that the interests of society are best served by the successful reintegration of offenders as early as possible.¹¹⁶ In contrast to imprisonment, correctional supervision has, *inter alia*, the following advantages:

- The probationer can benefit maximally from the normalising influences of the community
- The probationer is not exposed to the influences of hardened criminals and the prison subculture
- The rehabilitation process takes place within the community where optimum results can be obtained
- It is a more cost-effective sentence
- It relieves prison overcrowding.¹¹⁷

Correctional supervision was implemented in South Africa by means of a pilot study in August 1991 in Pretoria. The implementation was facilitated by a representative body of persons from the legal profession, government departments and the National Institute for

¹¹⁴ *Ibid.*, pp. 279-280.

¹¹⁵ B. Ndebele, "The Practical Application of Correctional Supervision in South Africa," *Nexus*, December 1995, p. 18.

¹¹⁶ White Paper on the Policy of the Department of Correctional Services, 21 October 1994, p. 17.

Crime and the Rehabilitation of the Offender (NICRO). Based on the success of the Pretoria Project, adjacent magisterial districts were added, and by June 1992 a further 90 districts were implemented.¹¹⁸ In 1996 there were 15 475 probationers and 36 941 parolees.

While the theory upon which community corrections are based in South Africa is laudable, the implementation of supervision leaves a lot to be desired. The DCS launched an investigation into the effectiveness of community corrections in 1996, and found that many problems hamper the execution of community supervision, including a lack of knowledge and co-ordination, a shortage of monitoring personnel and non-involvement of the community.¹¹⁹ NICRO argues that the most important problem lies with the fact that the judiciary has not been keen to impose correctional supervision, and few guidelines have been laid down for the courts with regard to this form of sentence. NICRO continues that in South Africa community corrections are based on considerations which largely ignore the socio-economic context within which numerous offenders commit offences. "As a result, it is not easily available to offenders from the deprived communities of South African society. This has thus given credence to the argument that it is an elitist option and of course the majority's view that our legal system is the law of the rich and the affluent."¹²⁰ But even more alarming is Justice Minister Dullah Omar's criticism of the DCS that it is releasing prisoners to probation after only having served a portion of their sentence, including those sentenced to life imprisonment.¹²¹

Here we find yet another example of successful attempts in other countries to bring about a real reduction in the prison population, and consequently the crime rate, gone wrong in South Africa. It is imperative that the DCS takes this option seriously, as many benefits can result from community corrections. For example, the benefits of incarcerating low

¹¹⁷ Ndebele, *op. cit.*, p. 19.

¹¹⁸ Bruyn, *op. cit.*, p. 285.

¹¹⁹ Department of Correctional Services Annual Report, 1996, p. 9.

¹²⁰ Alternatives to Imprisonment, NICRO.

¹²¹ Dissel, *op. cit.*

risk offenders are small, but yet the costs are high at around R75 per day.¹²² We currently have a backlog of around 24 000 prisoners awaiting appropriate accommodation in prison, but the cost of building a new prison is approximately R75 000 per one space.¹²³ The money needed to finance this backlog is unaffordable, and community corrections cost as little as R11 per day per offender. Yet other benefits are imminent. The offender can gain maximally from the normalising influences of the community, the prisoner is not exposed to the noxious effects of incarceration, the rehabilitation process is arguably more effective, and problems such as socio-economic deprivation prompting criminogenic action is dealt with in the community in which it manifested. The rehabilitation and reintegration of the offender is best served within the community.

4.6. Reintegration

New rehabilitationism is much dependent on greater reintegration of offenders. One cannot forget about what happens to offenders on post-release. Prison rehabilitation must involve liaison with agencies to maintain community links, provide employment and release opportunities. One such agency in South Africa is NICRO, whose reintegration project offers a number of services that assist ex-offenders to become constructive members of society. It aims to prepare pre-release prisoners for the release into the community, by providing skills to empower them to find employment. NICRO also liaises and networks with other relevant organisations in order to advocate for improved policy and legislation affecting prisoners and their families.

The ideology of the exclusion of ex-offenders must be replaced by one of reintegration. Criminals must be acknowledged as part of society whether undergoing punishment or not - crime and punishment must be seen as community problems and responsibilities.¹²⁴

¹²² Amanda Dissel, Personal Interview, 17 March 1998, Johannesburg

¹²³ Bruyn, *op. cit.*, p. 279.

¹²⁴ Hudson, *op. cit.*, pp. 170-172.

Reintegration into the community is needed not just to provide services for offenders, but to help reduce crime. Without leaping into positivistic theorising about the causes of crime, we can surely accept that societies with high levels of racism, marginalisation and socio-economic inequality tend to be high crime societies. We also know that societies with loose social bonds and little social capital (Fukuyama 1995) are high crime societies. Improved social provision, more family support, action to reduce unemployment, homelessness and poverty and successful reintegration are vital in any strategic support for crime prevention. An integrated approach therefore needs to reintegrate criminals with their communities, and to reintegrate punishment with other social policy. As Hudson argues, rational and humane punishment can only develop if crime is accepted as a social phenomenon and as a communal duty. Penal policy needs to consider people as well as acts, to acknowledge purposes other than simple retribution or deterrence, and to become more integrated with other aspects of social justice.¹²⁵ Rehabilitation is the only theory of punishment promoting reintegration. The promotion of community is not taken to be the aim of retribution or deterrence.¹²⁶

4.7. What Works?

It has been argued throughout that one of the major aims of punishment should be a reduction in crime in the future, and it has been argued that retribution and deterrence offer us little hope of achieving this through the punitive measures imposed. It has been countered that rehabilitation is the best means through which a reduction in crime in the future can be achieved, and it is important that we take seriously a system of punishment based on rehabilitative goals. A renewed concept of rehabilitation is a counteractive force to the negative aspects of imprisonment, creating obligations on the part of the state to provide appropriate human services and the opportunity for reintegration after release

¹²⁵ Hudson, p. 175.

¹²⁶ E. Reitan, "Punishment and Community: The Reintegrative Theory of Punishment," Canadian Journal of Philosophy, Vol 26, No. 1, 1996, p. 65.

from prison, thereby protecting society and offenders from prison-related recidivism. Efforts to prepare the offenders for release is regarded as crucial.¹²⁷ We have seen that in the 1970s and 1980s there was wide spread disillusionment with the effectiveness of treatment programmes in the United States (although prisons in various states still implement rehabilitation programmes) as a means to reduce recidivism. Similarly today in South Africa there are critics of the DCS's underlying commitment to rehabilitation as the major aim of corrections and punishment.

It is therefore necessary to demonstrate that rehabilitation programmes can be effective in reducing recidivism. It is important to remember that with respect to offender rehabilitation, earlier views failed to distinguish between programmes that could be expected to be effective and those programmes which were inconsistent with theory and evidence. Bonta explains that the failure to distinguish among rehabilitation programmes undoubtedly contributed to the pessimistic conclusions about the effectiveness of rehabilitation.¹²⁸ It is therefore evident that not all programmes are considered to be effective in reducing recidivism, and is very important to therefore which systems have been or hold the potential to be most effective.

Bonta explains that internationally there have been considerable advances in knowledge about the characteristics of effective rehabilitation programmes. He explains that two important principles which have emerged are the Risk Principle and the Need Principle. The Risk Principle states that the level of treatment should match the risk level of the offender (where for example low risk offenders require little help), and the Need Principle refers to the criminogenic (or non-criminogenic) needs of the offender. Effective offender rehabilitation programmes target the criminogenic needs of the offender.¹²⁹ It is important to note, as Bonta points out, that when rehabilitation programmes are compared to purely punitive sanctions, "the findings show treatment more likely to reduce recidivism....If we

¹²⁷ Rotman, *op. cit.*, p. 144.

¹²⁸ J. Bonta, *Offender Rehabilitation: From Research to Practice*, Ottawa, Department of the Solicitor General of Canada, 1997.

¹²⁹ *Idem.*

are to enhance community safety, offender rehabilitation programmes that follow the principles of effective treatment are most likely to meet with success."¹³⁰

The Need Principle is of particular import in considering effective rehabilitation programmes. Targeting criminogenic needs of the offender is directly related to changes in recidivism. As has been argued throughout, the theories of retribution and deterrence fail to address the underlying causes of crime prompting criminals into a life of crime and consequently offer us little hope of reducing the crime rate. Rehabilitation by contrast, by taking seriously the needs of the offender, targets the criminogenic causes of crime. For example, unemployment and illiteracy are criminogenic needs, and consequently must serve as rehabilitation goals, which if successfully addressed, will reduce recidivism. In the United States, a 1994 report by Miles Harer from the Federal Bureau of Prisons concluded that recidivism rates were inversely related to educational programme participation while in prison. In Ohio, it has been found that those offenders graduating from university programmes (in contrast to those who do not participate in education at all) reduces recidivism by roughly 72%.¹³¹ This study and various others indicate the value of targeting criminogenic needs, such as the education of offenders in prison.

It has not been my intention to embark on a detailed discussion of all the various rehabilitation programmes on offer around the world and their subsequent success rates. Indeed, this would be a project in itself beyond the means of the project at hand. Rather, my purpose is to alert readers to the fact that rehabilitation programmes can be successful when implemented properly. In the United States, Rudy Cypser of *Citizens United for the Rehabilitation of Errants* (CURE)¹³² explains that the right kinds of rehabilitation programmes can be effective in reducing recidivism. He explains that recidivism is readily reducible by 16-62%, particularly through substance abuse treatment, educational

¹³⁰ *Idem*.

¹³¹ "Offender Education and Training" see Internet: <http://www.mnv.net/~curenv/educatn.htm>

¹³² A national organisation committed to reducing recidivism, and thereby reducing crime, by providing rehabilitative and reintegrative programmes to offenders.

facilities, work opportunities and alternatives to incarceration.¹³³ While these may seem like modest results to some, it is important to note that these programmes are actually reducing recidivism, rather than increasing it which so often results from purely punitive practices. This is evidenced by the increasing crime rate in South Africa (which is reported to be about 10%, although certain categories such as murder are supposedly decreasing). Even a modest reduction of 10% in recidivism through rehabilitative efforts would contribute significantly to stabilising the crime situation. 'Smart' rehabilitation programmes have been proven to be many times more effective in reducing crime than standard 'get tough' criminal justice programmes alone. But it must be borne in mind that any successful rehabilitation programme must be accompanied by a system of reintegration of offenders upon release.

South Africa

With regards to rehabilitation programmes implemented in South Africa, there is no clear evidence as yet to determine if they have been successful in reducing recidivism. Lukas Muntingh of NICRO has argued: "I understand that very little research has been undertaken in South Africa determining the success rate of rehabilitation programmes. To my knowledge, the actual recidivism rate for the entire population has not been calculated."¹³⁴ The DCS acknowledges that it is a well documented fact that an in depth study into reintegration and recidivism rates needs to be undertaken. Until such a study has been conducted, it is obviously extremely difficult to measure the success rates of various programmes implemented by the DCS.

It is imperative that this task is undertaken soon. We have seen above that not *all* programmes are potentially beneficial to offenders, and what needs to be determined are the programmes which will be most beneficial to offenders. As Amanda Dissel argues: "with regard to rehabilitation in South Africa, it is important to carefully analyse the

¹³³ R. Cypher, *What Works*, CURE-New York, 21 October 1997.

¹³⁴ L. Muntingh, Telephone Interview, 13 March 1998, Cape Town.

various programmes on offer. It is important for the Department of Correctional Services to determine exactly which programmes will be effective when implemented. There also needs to be more emphasis on structured programmes of reintegration of offenders after release from prison."¹³⁵

Despite lack of statistical evidence, Commissioner Sitole has offered the following success rate: "Although we do not have a conclusive study on the table to confirm this, *all the indications are there that about 70% of those prisoners who choose to take part [in rehabilitation] become successful.*"¹³⁶ What is meant by 'successful' is not stipulated, nor is the various programmes that offenders referred to have taken part in. But a 70% success rate is indeed positive, even if rehabilitation programmes are only reaching a small percentage of offenders in prison. Successful prison rehabilitation programmes, together with successful reintegration of offenders (Lukas Muntingh from NICRO believes that services offered to assist offenders with reintegration back into society have been largely successful¹³⁷) are the only way that we can hope to reduce the crime rate in this country.

However, it should be remembered that it is also the prison environment and not merely the programmes that are part of the rehabilitative package. The rehabilitative potential of the prison is therefore "indissolubly linked to the maintenance of certain standards in the rest of the prison system. The chance of a successful future return into the free society requires not only specific programmes, but also an environment that can counteract the deteriorating effects of freedom deprivation."¹³⁸ It is the pursuit of a rehabilitative prison environment, together with 'appropriate' programmes of rehabilitation which the DCS must now commit itself to. Not only does rehabilitation offer a constructive way to improve the criminal justice system,¹³⁹ it offers a constructive way for offenders to reintegrate to become productive members of society. Modern rehabilitative policies offer us an important alternative to purely punitive practices of punishment, such as those

¹³⁵ A. Dissel, Personal Interview, 17 March 1998, Johannesburg.

¹³⁶ Sitole, *op. cit.*, p. 3.

¹³⁷ Muntingh, *op. cit.*

¹³⁸ Rotman, *op. cit.*, p. 146.

advocated by retribution and deterrence, which merely advocate sending more offenders to prison, often resulting in more crime. As Rotman argues: "without rehabilitative efforts before and after their discharge, offenders' grave social and individual problems will usually lead to further crime."¹⁴⁰ By addressing the criminogenic needs of the offender, rehabilitation offers us an important alternative to deal with offenders, rather than the punitive practices of retribution and deterrence, which has been demonstrated, adds little in the way of effective crime control.

¹³⁹ Ibid., p. 183

¹⁴⁰ Idem.

5

CONCLUSION

I

The purpose of this research report has been to examine the traditional theories of punishment, that is, retribution, deterrence and rehabilitation, and to assess their applicability to the current situation in South Africa. Many people are coming to regard the use of harsher and more repressive penalties as the only solution to the crime epidemic. Consequently, retributive and deterrence theories seem like the obvious sanctions that should be implemented to deal with offenders. It has been my intention to expose the limitations of the justice model and deterrence theories, and to demonstrate that embarking on a system of punishment based purely on punitive considerations will be neither more just, more humane, nor more effective in dealing with offenders. Consequently, as Menninger observed, "the more fiercely, the more ruthlessly, the more inhumanely the offender is treated - however legally - the more certain we are to have more victims."¹ It is argued that we should embark on a programme of state-obligated rehabilitation which takes seriously the needs of the offender, and legitimates neither coercion nor neglect in the name of justice. A reduction in crime can only be achieved if society is willing to punish its offenders humanely, and to compensate for the apparent social and economic disadvantages that have compelled many to undertake a life of crime.²

II

¹ Menninger, quoted in Cullen & Gilbert, *op. cit.*, p. 256.

Those embracing the call for 'law and order' inherent in the just deserts paradigm place immense faith in the premise that tough justice is the answer to the nation's crime problem. Indeed, a drift to law and order society seems an entirely predictable response to the crime problem. It is a system of punishment that is based on 'just deserts' - criminals deserved to be punished in order to pay their debt owed to society. Retribution embraces a classical Enlightenment view of the individual, assuming acts result from a direct calculation of costs and benefits. Unlawful acts therefore occur when individuals have calculated they are advantageous, and consequently crime will only subside if choices are made more costly by imposing harsh and repressive punishments. Retribution manifests a disinterest in the causes of crime, asserting that it is the nature of the crime and not the nature of the circumstances surrounding the crime that should regulate the severity of the punishment.³

An examination of the limits to the vision of the justice model exposed the shortcomings of this theory which is so often thought to control crime. The abstraction of the criminal act from the agent implies that the circumstances of the offender are largely irrelevant to determining the punishment imposed. In South Africa, this would legitimate the police, judges and lawyers in ignoring many of the socio-economic inequalities that prompt many criminals into a life of crime. Consequently, the needs of the offender are not addressed. How can a system of punishment which legitimates the neglect of the offender be effective in crime control, when at least 95% of offenders return to society, and will find themselves in a worse predicament than before committing their crime? It is imperative that the needs of the offender are addressed and not simply ignored if we hope to mitigate the spectre of crime. A programme of rehabilitation, in contrast to retributive punishment, acknowledges that social and personal circumstances often prompt criminals into a life of crime, and unless efforts are made to enable criminals to escape these criminogenic constraints, little relief in the crime rate can be anticipated.

² *Ibid.*, pp. 247-248.

³ *Ibid.*, p. 254.

III

Deterrence theory sees the purpose of punishment as preventing the repetition of crimes already committed, and also in deterring potential criminals. It is a forward looking, in that punishment is justified by future gains and consequences, such as the protection of society and reduction in crime. Severe penalties are imposed on criminals as a means of repressing crime - the assumption is that such penalties will reduce crime rates by deterring the offender from engaging in future crime, and also by terrorising bystanding citizens so that they will not violate the law. Again this theory is based on the assumption of free will on the part of the offender. Criminal acts supposedly result from the rational calculation of costs and benefits. Through the spectre of increased punishment (usually imprisonment) and the use of the death penalty, it is assumed that crime is deterred.

However, the reality is that deterrence actually offers us little in the way of crime control. This is evidenced in South Africa with the high crime and recidivism rates, as Fouche argues: "...punishment meted out for the sake of deterrence has been grossly ineffectual."⁴ An analysis of the prison system in South Africa exposed that prisons organised around purely punitive considerations are simply not effective in reducing crime, but can contribute significantly to increasing it. As Foucault has argued, prisons cannot help but cause delinquency and gangs, which contribute significantly to recidivism when the offender is eventually released back into society. Rather than deterring criminals, those leaving prison have more chance of returning to it due to the negative effects of incarceration, and a lack of commitment to the reintegration of offenders upon release. With regard to general deterrence it was found that the certainty of detection is a bigger check on deterring criminals than the threat of punishment. This poses a problem in South Africa with the low clearance rate of most crimes, and also corruption within the ranks of the police force. With regard to the death penalty, it was shown that there is no compelling evidence to suggest that it works as an effective deterrent.

⁴ Fouche, *op. cit.*,

Taking into account the realities of poverty, unemployment and inadequate policing and prosecuting in South Africa, it would be beneficial for us to abandon the notion that harsh sentences and perhaps the execution of a few offenders will contribute significantly to a reduction in crime. Both retribution and deterrence manifest a disinterest in the causes of crime, and consequently offer us little hope of reducing it. We should rather take seriously a programme of rehabilitation of offenders, where efforts are made through education, skills training and reintegration to enable offenders to escape criminogenic constraints. By sensitising people to the fact that the majority of illegality that plagues our society is linked to prevailing social and economic inequalities, rehabilitation makes clear that a reduction in crime will only result from efforts to normalise these injustices.

IV

Setting aside the primacy of retributive and deterrent tariffs for offenders necessitates the acknowledgement of other purposes of punishment. It has been argued that shamefully harsh and repressive practices of punishments must give way to a more a constructive way of dealing with offenders, so that a real reduction of crime in the future can be achieved. To argue for an offenders rehabilitation is to respond to the fact that most offenders in South Africa are poor, unemployed and uneducated, and by virtue of these social and economic circumstances are often driven to a life of crime. It is therefore imperative that rehabilitative opportunities are provided to offenders to enable them to escape these criminogenic constraints, and offer them hope of reintegrating back into society and thereby contribute positively to the community. Real opportunities for education and training must be provided.

Although the Department of Correctional Services is committed in theory to providing rehabilitation programmes for prisoners, the reality is that there are very little rehabilitation practices currently being undertaken in prisons. For this is reason it is proposed that the state embark on a system of state-obligated rehabilitation, as proposed by the new rehabilitationists, to ensure that those offenders wanting to participate in rehabilitative programmes have the opportunity to do so. It is also imperative that a rehabilitative

environment is established in prisons, which we have seen is as important as the programmes themselves. Furthermore, a detailed study determining the effectiveness of various programmes on offer has to be undertaken, together with a study on recidivism rates, in order to determine the best way to deal with offenders, and reintegrate them effectively back into society. It is only through a serious commitment to rehabilitation can we have any hope of reducing the crime currently plaguing our society.

"Our present penal system intensifies the alienation of prisoners from society; incarceration confirms their status as social outcasts. At the same time it fosters an irresponsibility and a false sense of security in the law abiding public, confident that they are being protected by the police and courts, and that somehow, justice is being done."⁵ Perhaps the biggest challenge to the successful implementation of rehabilitation and reintegration programmes is the ignorance of the larger community. As we have seen, it is so often assumed that harsh, punitive punishments will somehow teach criminals that crime does not pay. If we are to implement successful programmes to deal with offenders, perhaps an important step would be a massive education project. As Rehana Rossouw argues, "people need to know that retribution doesn't work. In the United States they have 3 500 people on death row, but they have the highest murder rate in the world. New Zealand has doubled the penalties for rape, but it has not stopped it."⁶ There is a need for the community to be educated about the purposes of imprisonment, and about what is happening inside prisons. The community must be alerted to the negative consequences of punitive practices, and at the same time made aware of the many benefits of a successful system of rehabilitation. It is hoped that this research report will contribute in some way to achieving this aim.

⁵ *Ibid.*, p. 55.

⁶ R. Rossouw, "Once were Criminals," *Weekly Mail*, 30 June 1995.

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