Reform Movements in Justice

The American criminal justice system is intended to uphold fundamental positive values: community safety, fairness and consistency in the law, accountability for harm, and boundaries of acceptable behavior. Reform movements in justice attempt to remedy perceived abuses against these values. Reformers seek to amend, or in some cases transform, the processes by which we apprehend, prosecute, defend, sentence, punish, and supervise those charged with criminal offenses. But reforms almost always fall short of expectations. Some sociologists theorize that reform movements fail because of the incompatibility of conscience with convenience, that is, the reformers' idealism, or conscience, must confront the pragmatic expediency of the complex penal field. Additionally, reformers typically function outside the criminal justice system and hold ideals and expectations incompatible with the actual workings of judicial and correctional processes. Finally, reform efforts fail because of competing ideologies. Some advocate treatment-oriented incarceration, state benevolence, decriminalization, and decarceration to reform the system. Others promote increased state deterrence through more punitive incarceration, or "swift and certain punishment." Ultimately, reformers must negotiate the fraught dialectic between social control and social reform. This entry traces these patterns of reform, in their social and legal contexts, from the colonial period to the 21st century.

Early Reforms

The colonists, while primarily deriving their penal codes from English law, began the first reform efforts by deemphasizing public displays of corporal and capital punishment, which had been the standard means of punishment in England. They preferred confinement. Up to this point, jails were deplorable facilities, primarily used to hold people for relatively short periods before they were publicly beaten or executed. Instead of individual cells, they featured large, disorderly rooms that simply functioned as temporary holding areas. But early reformers like William Penn, James Wilson, Thomas Jefferson, Benjamin Franklin, William Bradford, and Benjamin Rush advocated abolition of the public death penalty and torture in favor of the prison as a way to reform offenders. Penn lobbied that the purpose of punishment should be "to reclaim, rather than destroy," and Rush argued that "all public punishments tend to make bad men worse, and to increase crimes, by their influence on society."

Their ideas reflected the influences of Enlightenment thought, evangelical Christianity (especially the Quaker commitments), and the earlier reform philosophy by punishment theorists like Cesare Beccaria. Although their efforts to completely abolish the death penalty never succeeded, states drastically reduced capital crimes, and the Pennsylvania legislature even divided murder charges into two "degrees" in 1794, resulting in manslaughter as punishable only by imprisonment, not death. Most states quickly adopted this practice. Additionally, almost all states eliminated the death penalty for property crimes and sodomy. In this shift away from English reliance on public and physical punishment, the early reformers consistently asked: What kind of punishments befit a democracy? How can offenders be rehabilitated?

The prison system seemed to answer these questions. After visiting American prisons, Alexis de Tocqueville observed that our social reformers seemed obsessed with incarceration, excessively concentrating on prisons as the panacea to crime: "They have the monomania of the penitentiary system, which seems to them the remedy applicable to all of ills of society," he wrote to a friend. Indeed, incarceration has remained ubiquitous as America's primary response to crime for the past 250 years.

As the new states formed their penal codes, reformers optimistically experimented with the bourgeoning concepts of the penitentiary, with its implicit religious connotation of penitence, and the correctional institution, which carries the reformers' optimism that incarceration can be a curative experience for offenders. Pennsylvania continued to lead innovative reform efforts with the Eastern State Penitentiary, which featured separate confinement for every inmate. New York also experimented and developed the Auburn system, which housed inmates in their own cells at night but used a congregant system during the workday. Inmates and guards participated in a

Colorado State Penitentiary prisoners circa 1898 walking in "lock-step"—marching men as closely together as possible, in which the leg of each man moves at the same time with the corresponding leg of the person before him.

military-style discipline, including the famous "lockstep," and factory-style industry. Also known as the "big house" prison model, variations of the Auburn system have prevailed in American criminal justice. But the criminal population rapidly outgrew Auburn, and both recidivism and prison violence revealed the current system's failures, so the convicts themselves labored to build another experimental prison, the Elmira Reformatory, in 1876. Under the direction of the venerated penologist Zebulon Brockway, the Elmira system deemphasized punitive and humiliating treatment of prisoners in favor of vocational and religious instruction, "good-time" credits, and post-release supervision. Although Brockway envisioned his prison as a college, transforming the dangerous classes into "Christian gentlemen" who embraced the Protestant work ethic, mismanagement, overcrowding, and the fundamental problems of rehabilitative penology led to Elmira's failure. In the early 19th century, Edward Livingston, by turns a member of the House of Representatives, an attorney, and the mayor of New York, led another significant reform movement. Also opposed to the death penalty and retributive punishment, Livingston was confident in social reform as a way to reduce crime. He committed to a serious emphasis on rehabilitation, which included proactive social programs such as "houses of refuge" and "houses of industry" that provided structured living conditions and work for those who could not find them elsewhere. Livingston spent the last 12 years of his life on his most significant contribution, the Livingston Code (1833), in which he recodified criminal procedure to be more reformatory, humane, and simple. Although states didn't officially adopt the Livingston Code, it significantly influenced subsequent reform efforts, especially in the Progressive Era.

Parole, Probation, Indeterminate Sentencing, and the Juvenile Court

The Progressive Era (1890s to 1920s) abounded in reform efforts in many social and political arenas, from immigration policy to women's suffrage to the child labor laws. The Progressive Era reformers contributed substantial changes to criminal justice: the innovative concepts of parole and probation, indeterminate sentencing, and the juvenile court. Both parole and probation represent a shift away from the big house prisons as a way to reform offenders to an understanding that offenders could rehabilitate more substantially by interacting in their communities, under supervision. Between 1900 and 1925, all 48 states initiated probationary sentencing practices. In 1925, under the Federal Probation Act, even federal judges could opt for probation over incarceration, if they deemed that "the ends of justice and the best interest of the public as well as the defendant [would] be served thereby." Similarly, indeterminate sentencing would incite prisoners to seek their own reform, motivated by the understanding that they had "the key to the prison in their own pocket." The juvenile court reflects the Progressive Era's interest in child welfare. Juveniles always held special protections under the law; from the house of refuge movement to the early 19th-century pre-delinquency efforts to reform schools, criminal law sought to distinguish minor offenders from adults. But the newly formed juvenile court, first established in Chicago in 1899, then reproduced in 45 states by 1920, formally codified a less adversarial process for juvenile offenders, treating them less as "criminals" and more as children in need of correction and guidance.

Progressive Era reformers assumed these changes made the criminal justice system more fair and humane; they believed they were creating

individual justice, as opposed to previous generic concepts of a criminal class. They attempted not only to make the punishment fit the crime but to make the punishment fit the criminal. Their optimism rested in their unmitigated belief that humans could be perfected if only the right method were discovered and that state mechanisms could mete out the reforms in fair and just ways. But as historians and sociologists have traced, the Progressive Era reforms usually resulted in increased state control and actually subjected offenders to prolonged incarceration and arbitrary sentencing practices. Their attempts to correct the failures and abuses of the prison system never materialized as they intended.

Attorney General Robert F. Kennedy speaking in June 1963 to a civil rights crowd and reporters in front of the U.S. Justice Department, with a sign for the Washington Congress of Racial Equality prominently displayed.

Model Penal Code

In 1931, 100 years after the Livingston Code, the American Law Institute and the American Bar Association proposed a Model Penal Code, which served as an archetype for states to clarify, streamline, and reconcile the competing theories behind criminal law: progressivism's perfectibility ideal, emphasizing treatment and rehabilitation, and new concerns for the mid-20th-century rising crime rates, deterrence, and culpability. Under the direction of Columbia law professor Herbert Wechsler, the Model Penal Code was completed in 1962 and served as a prototype for state reform of the existing patchwork penal codes: Within 20 years, 34 states enacted new penal codes, and others were substantially revised.

Racial Justice

Generations of civil rights reformers have advanced the criminal justice system from the legal institution of slavery in the 18th century to eventual abolition, the Emancipation Proclamation, the Thirteenth, Fourteenth, and Fifteenth Amendments (banning slavery, granting citizenship and due process, and protecting voting rights), and eventually the Civil Rights Acts outlawing discriminatory legal and social practices. Civil rights reformers advocate equitable legal treatment for racial minorities, primarily through a liberal equality paradigm. Formal institutions like the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP), as well as hundreds of grassroots racial justice organizations, continue to initiate reform of racially biased practices in American criminal justice. Most recently, these reforms have addressed police brutality, racial disparities in arrests and convictions, drug offense policies, and the wide disparities in incarceration rates. But while their broad aims coincide, civil rights reformers differ widely philosophically and politically. Some of these discrepancies have led to a rejection of the principles behind civil rights by critical race activists, who work outside traditional liberalism.

Critical race theory, initiated in the late 1970s by Derrick Bell and others, is an academic and activist movement by legal scholars to address

how racism is a deeply embedded structure in the legal system and the penal field. Although dominated by minorities in the legal profession, critical race theory is in many ways a countermovement to civil rights reforms. Critical race theory critiques the beliefs that racism can be defeated through education and an eventual "colorblind" society. Instead, critical race theorists merge racial issues in law, sociology, economics, literature, and psychology to show how the law constructs and maintains social domination and subjugation. While civil rights (and most reform movements) are affirmative, seeking to restructure the existing systems to be more fair, critical race theory is often criticized for being too negative: Primarily, its contribution involves illustrating the failures of racial justice. But the empirical research behind critical race realism provides a framework for understanding how, almost four decades after the Civil Rights Act, eight black and Hispanic males are incarcerated for every one white male in the United States.

From the Correctional Institution to Mass Incarceration

The 19th-century "big house" prisons led to the rise once again of the correctional institution movement, also known as rehabilitative penology (1950s to 1980s). This reform movement initiated treatment-oriented prisons, with more professional staffing, psychotherapy, addiction counseling, and a heavy emphasis on education. Even the most punitive level of incarceration, solitary confinement, was labeled the "adjustment center," illustrating how reformers attempted to ameliorate every aspect of incarceration. This was a period when convicts like Malcolm X, George Jackson, and John Irwin went to prison uneducated and emerged as important political and social theorists. This era of prison reform correlated the prison to a hospital: Inmates were treated almost as patients in need of care. But rising crime rates, empirical failures of reform, and increasing politicization of crime legislation led to the failure of the correctional institution and the rise of the warehouse prison.

As a result of disillusionment with rehabilitation programs that did not seem to work, in the mid-1980s, a new era began, one of "sending a message" to criminals. Subsequently, the war on crime and the war on drugs (with resulting "three strikes and you're out" sentencing procedures) quadrupled the prison population between 1980 and 2010. In the 21st century, the United States incarcerates a higher per capita rate of its population than any other country, with about 3 percent of the population in prison, on parole, or under probationary supervision. Former emphases on rehabilitation and treatment shifted to punitive, control-oriented prison systems and longer sentences that function almost solely to "warehouse" offenders, or to remove them and store them away from communities. One example is the 1994 retraction of Pell Grant funding for inmates, which illustrated legislators' "tough on crime" stand to the public but effectively ended the only program that statistically lowered recidivism rates.

Reformers decry mass incarceration as exorbitantly expensive, socially deteriorating, racially unjust, and insufficient to deter crime or to fully satisfy victims. They claim it diametrically opposes what the original reformers sought as "befitting a democracy." But after 200 years of reform efforts, sociologists observe that the United States has failed to create a system capable of sufficiently deterring crime, making communities safer, fully satisfying victims, eliminating racial bias from the justice system, or empirically reforming offenders. Many reformers are turning to a paradigm shift, restorative justice, with promising social, legal, and moral dimensions to correct abuses in the criminal justice system.

Restorative Justice

Reformers in the 21st century believe that restorative justice functions as a viable corrective to the failed paradigms of criminal justice reform. It gained extraordinary momentum in Europe, South Africa, New Zealand, and Australia, particularly after Desmond Tutu's Truth and Reconciliation Commission (which he explicitly understood as restorative justice). First a grassroots and academic movement, restorative justice has steadily achieved workable credibility: The National Institute of Corrections researched, then piloted a restorative justice program, and the U.S. Department of Justice has integrated restorative justice principles into the Office of Juvenile Justice and Delinquency Prevention and into drug courts. Most states use some form of

restorative justice mediation for juveniles and are increasingly incorporating it into their state correctional institutes. In addition to government adoption, restorative justice has attracted media attention, sparked the development of nongovernmental organizations, and been the focus of extensive academic scholarship in the fields of law, sociology, and criminal justice.

Restorative justice shifts the criminal justice process away from punishment and control, and toward meeting the goals of all stakeholders in the offense: victims, defendants, those impacted in the community, mediators, and community safety advocates. It focuses on the harm caused by criminal behavior rather than on guilt against the state; in this way, restorative justice seems to meet the divergent ends of both retributive justice and welfare justice models.

The practices of restorative justice involve identifying the harm caused by criminal behavior, determining the steps to repair that harm, then facilitating a process through which the harm can be remedied. This can include group conferences, victim/offender mediation, restitution options, victim assistance, community service, and ex-offender assistance. The key values are "encounter," which creates opportunities for victims, offenders, and community members to meet and discuss the harm of the offense; "amends," which facilitates the offender's repair of the harm; "reintegration," which seeks to restore the offender as a productive member of the community; and "inclusion," which provides all people with a stake in the crime to participate in the resolution.

Conclusion

While history illustrates persistent oscillation between competing theories of reform, generally understood as retribution and rehabilitation, restorative justice offers a new lens through which to consider crime and punishment. Instead of focusing on the criminal act as a violation of a specific penal statute, with a punishment to be exacted, restorative justice focuses on who has been hurt and what society's role should be to repair that harm. In a shift away from conceiving of crime as a felony against the state, and toward handling the offense in a more socially egalitarian way, restorative justice responds to the original reformers' question: What kind of punishment befits a democracy?

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See Also: Prisoner's Rights; Rehabilitation; Retributivism; Suspect's Rights; Vice Reformers; Victim Rights and Restitution.

Further Readings

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Rehabilitation

Rehabilitation is one of four philosophies governing systems of punishment (along with deterrence, incapacitation, and retribution) and is often used to justify penal programs such as in-prison drug addiction programs, in-prison employment programs, and community corrections such as parole and probation. The use of rehabilitation as the main philosophy of punishment, however, has changed over time. Rehabilitation has moved from dominating the criminal justice system for