Frequently we make decisions that bring us under the umbrella of institutional authority. Generally speaking, individuals have a right to institutions which respect the choices they have made; and society has the responsibility for making such institutions available. With regard to criminal behavior in particular, the following right and its corresponding responsibility can be identified.

(1) **RIGHT**: Prisoners have a right to facilities that respect the choices they have made to engage in criminal acts.

(2) **RESPONSIBILITY**: As a society, we have an obligation to provide institutions that do not violate the rights of those persons whose choices have led to their incarceration.

I

A person exercises his option to engage in illegal activity. In reaction we, through our judicial system, may choose to commit him to an institution of punishment. Penalties are unambiguously provided in the criminal code. But if he receives penalties that go beyond those explicitly mandated by the law, then the institution to which he is sent fails to respect his criminal choices. An unspoken *judicial surcharge* is added.
But the fact that he has chosen to act illegally does not imply that he deserves to be penalized excessively. Any such action on our part as a society is irresponsible.

The broadest philosophical conception of legal justice presupposes a social contract that includes a set of generally accepted rules designed to facilitate interpersonal transactions. The rules vary from society to society, but in each case it is understood (1) that all citizens share equal rights to the benefits of the contract, (2) that no one can legitimately appropriate an unfair distribution of these benefits, (3) that criminal and non-criminal acts alike are the result of choices freely made, and (4) that criminal acts are subject to punishment.

Many observers perceive crime to be the result of corrupt social and economic institutions as opposed to flaws in the individual. Cultural determinism, rather than voluntary personal choice, is seen as the source of criminal misdeeds. Society at large is blamed, and the individual is exonerated, as if he were some noble savage from the pen of Rousseau. Typically, however, those who share this view do not apply it to non-criminal behavior, and a double standard results. For to assert that a criminal choice is not the fault of the actor, since he is an effect and not a cause, while a non-criminal choice is by contrast the responsibility of the person who makes it, transfers accountability for wrongdoing from the individual to the group, indicting the non-criminal members of society for acts they did not
personally commit. Such reasoning is spurious. The offenses were in every case committed by the offenders, acting of their own free will.

Criminal choices presuppose the use of the will, but it is not only the faculty of volition which the wrongdoer exercises. He also employs his powers of reasoning. The offender is a thinking being. While some criminal choices are impulsive acts committed on the spur of the moment, most are calculated. Criminals rarely strike in the presence of a police officer, or against persons who are obviously prepared to defend themselves. Antisocial decisions are rational selections from a wide range of options. As such, they are not structurally different from other sorts of choices. The criminal thinks in terms of personal advantage, in order to attain a desired objective. When the incentives are right, and the risks are acceptable, he opts for unlawful decisions. He attaches a higher value to his own interests than to those of others, and the choices he makes are free. We agree that his character is flawed, but he is not an innocent savage, culturally corrupted. The potential offender weighs alternatives, estimates his chances for success, and acts accordingly. As with any carefully crafted scheme, well plotted and skillfully executed, the probabilities are on his side. He realizes that the chances are excellent that he will not be arrested, convicted, and sentenced for the particular crime he is contemplating. If he is persistent, however, he will
eventually be apprehended. The odds of getting away with any isolated incident may be weighted in his favor. But like a gambler living for the thrill of the moment, the criminal is temperamentally inclined toward his own peculiar version of Russian roulette. On any given occasion his chances for criminal success are good, but in practice he keeps pulling the trigger, and eventually the game is lost. As in any game, the offender must have been in a position to realize that his behavior incurred a risk. The man has wilfully transgressed against a regulative principle, and punishment is clearly indicated. The wrongdoer has tried to benefit unfairly by violating a rule which all players of the game are expected to honor, and when the game is lost, his choices bring him into contact with an institution specializing in punishment.

II

Prison, our institution of punishment for serious offenses, does violate the criminal choices that he has rationally calculated and freely made. His behavior may be repugnant, and we may feel collectively appalled. But let us punish him in a manner that is openly stated, rather than in another which is hidden. A person sentenced to prison, as opposed to a minimum security facility designed for low risk offenders, is in constant danger of abuse from other inmates. He fears for his safety and even his life. Yet his sentence did not stipulate that he be placed in such danger. An unannounced judicial surcharge has been imposed
upon him by the criminal justice system. It does not follow that he should be released, of course, but justice is tarnished whenever the actual penalty a person is required to pay exceeds the limits explicitly stated in the law. If an inmate is sentenced in order that he might be placed in mortal danger—if this is to become a dimension of his punishment—let the law declare this openly. Whenever a person who is in custody and disarmed is subject to unannounced abuse, the surcharge is in violation of his right to an institution that respects the choices he has made, and it is irresponsible on our part as a society to permit it.

Imprisonment is as old as crime itself, but at the end of the 18th century there occurred a remarkable shift in the concept of punishment. The Walnut Street Gaol in Philadelphia was constructed by the Quakers in 1790, directly facing Independence Hall. This uniquely American invention became the world's first modern prison, which is to say, a penitentiary where in the solitude of his cell a prisoner could cultivate the virtue of penitence. It was a boldly innovative religious experiment, shifting the punitive focus from degradation of the body to redemption of the soul.¹ The body was no longer to be an object of torture. The prisoners labored, righteously it was hoped, from dawn until dark. Religious instruction was required. A change of character could lead to early discharge. Prisoners were classified according to their degree of dangerousness. Transformation of the individual, rather than mere retribution, became the chief
correctional goal, and so the modern prison was born, as a spiritual life retreat, a place to which a man could repair, with the blessings of society, in order to change his fundamental outlook on life.

The American penitentiary became the first practical experiment with the ideal of rehabilitation. But the prisoners did not respond to spiritual incentives and remained as recalcitrant as before. The ideal proved unworkable in practice and died an early natural death, but has subsequently been kept alive by artificial means for two full centuries. However, the failure of the initial design to live up to the aim for which it was intended did not cause corrections officials to abandon the penitentiary concept. Instead, they enlarged upon it, and the early years of the 19th century witnessed a dramatic increase in the number of such facilities, as Pennsylvania and its neighboring states constructed many prisons modelled after the initial example. It had become conventional wisdom that the behavior of prisoners is modifiable, and that such modification is a desirable social goal.

Beaumont and Tocqueville visited the United States in 1831 in order to determine whether the novel penitentiary concept would be suitable for adoption by the French. They rummaged about in Philadelphia, and looked also at the dungeon system at Auburn, New York, a quite different design featuring solitary confinement and severe restriction of prisoners. Auburn and Walnut Street stood sharply in contrast, the former striving to be
sufficiently punitive to permanently discourage recidivists, the latter working to save souls.

At Auburn, unswerving obedience was demanded. Conversation among the inmates was prohibited. It was believed that a mandate of silence, rigorously imposed upon isolated individuals crowded together, yearning but not permitted to communicate with one another, would cause the prisoners to develop a resistance to temptation so that, once returned to society, they would be conditioned not to offend. Those who talked were whipped. By day they labored together mutely. At night each was locked like an individual sardine, canned in a cell barely larger than he. The death rate was high. The jailers intended that their charges develop habits of quietude in their private lives and diligence in their work. Reformation of character was not the goal; it was not desired that the inmate become a sincerely penitent man, only that he don the persona of useful citizen whatever his private thoughts might be. The aim was to create a man with socially accepted habits, if not a socially acceptable mind. The Auburn experiment also ended in failure. The inmates were simply dying in captivity. With only a few exceptions, such as Sing Sing, the Auburn model was not emulated. Walnut Street became the guiding norm for new prison construction.

III

The defining characteristics of punishment are, in no special
order of importance, first of all that it be painful. Second, the offender is forced to relinquish control of his time for a specified period. Third, it must stigmatize. Things are not as they were before, and a repetition of the behavior will not be viewed as lacking precedent. Fourth, the retributive anger of society is expressed in a controlled form. Finally, the recipient must in fact have committed the deed for which he was convicted, and must have acted with mens rea, which is to say, a guilty mind. An innocent inmate is not being punished; he is being wronged.

Punishment, even when it is deserved, leaves us with a sense of unease. One of the essential components is pain, and whenever pain is deliberately inflicted upon a citizen, the discomfort is felt throughout the social body and is shared by the guilty and the innocent alike. When it is demanded that an individual forfeit his time and be placed under the custodial care of corrections officials, it is hurtful not just to that person but collectively as well. Since we are uncomfortable, we turn our gaze away and permit the "correction" to occur behind closed portals, hidden from public view. These portals are the doors of our prisons.

Because punishment contributes to our discomfort, it is easy for us to allow flawed suppositions to remain unexamined. One such dubious belief, which is presently in vogue and seldom challenged, is that punishment should be equivalent to
imprisonment. We have fallen into the viciously circular trap of assuming that prison is the only acceptable mode of punishment. Offenders of all kinds are sentenced alike; only the span of time is varied. Treason, murder, theft, tax evasion, drug possession—all result in prison sentences. As a society we have equated the terms "punishment" and "prison." The justification for punishment has become confused with the justification for imprisonment. We have resigned ourselves to a strategy of general incapacitation for all offenders: prison for everyone. But an important aspect of the Walnut Street penitential ideal remains theoretically in place; there shall be no torture of the body.

This was not always so. We are reminded of an earlier era in which public humiliation of the body was an accepted option, even to a heinous degree. As recently as the latter part of the 18th century, punishment often took the form of physical abuse in the presence of an excitable and erotic audience. Casanova, lamenting in his Memoirs the martyrdom of Damien, described the scene from a room overlooking the Place de Grève. As the dismemberment was taking place, shrieks piercing the air as the man was drawn and quartered, the passions of some persons in the party became enflamed. One member of the entourage, a woman leaning out of the window in order to ensure a better view, later feigned displeasure at having been sodomized while thrilling to the scene. But the villain who initiated her pleasure produced a
timely apology and became her newest lover. By the beginning of the 19th century, however, bodily punishment as a public spectacle had largely vanished, along with the circus atmosphere which attracted large and enthusiastic crowds.

Punishment does not have to be an horrific public spectacle to amuse and arouse Casanova's friends. Today the vicarious enjoyment of the prisoner's physical pain is officially disallowed. As Michel Foucault has seen, the modern concept of punishment has shifted from the body, and the pain which torture confers, to the soul. The goal is no longer to produce physical pain, but discomfort of another kind, spiritual pain. Hence the appearance, in the modern prison, of chaplains, psychologists, and educators. Even the responsibility of the judge has shifted, from judgment of the body of the defendant to judgment of his soul. The somber black vestments worn by the contemporary judge, in the exercise of a quasi-priestly function, acquire a holy yet sinister significance, fusing the sacred and the profane into one.

IV

Each of us has the option to use our time as we see fit. It is not an injustice to demand of a prisoner that he be deprived of the free use of his time, and that this deprivation cause him pain. Ironically the time he is actually required to serve usually turns out to be substantially less than that mandated by the sentence, while the actual pain inflicted is often far in
excess of the measure apportioned by the court.

One of the chief hazards of prison life is that many of the persons who are sent there are by nature violent men. It is a safe assumption that persons who are violent before going to prison can be expected to be violent after arriving there. The newly sentenced prisoner is not being ushered into a monastery. The violence will, predictably, be transferred to the prison facility, thus compounding the task of corrections officials. But it is altogether irresponsible on our part to sentence a man to this environment without ensuring proper safeguards.

Pain is essential to punishment, but where is it openly stated that, as part of his penalty, he be sentenced to live in a warren in continual fear for his safety? The overcrowding and violence that have become characteristics of American prison life are punishments not of the soul but of the body. These are corporeal penalties, so in point of fact we do torture the body now, while claiming only to punish the soul.

It is an act of collective savagery, unauthorized by any known and public law, that we should choose to adopt a policy of wholesale sentencing and, at the same time, refuse to provide a prison environment in which an inmate can be reasonably safe. Our policy of general incapacitation is irresponsible, since we do not furnish an institution which respects the illegal choices an offender has made.
The extra-legal penalties are visible to the keepers and to the kept, but not to the public, which chooses to look the other way. There should be no clandestine addition, such as personal danger, to the punishment the sentence itself imposes. If legislators wish to deny to prisoners such amenities as personal safety, let them propose a statutory redefinition, to specify explicitly the additional deprivations that are desired. Let it be written that a man is incarcerated in order that he might be stabbed, raped, or slain. The prisoner has violated the contract, leading to a confinement. A demand on his time, a spiritual penalty, is imposed. But he is then not sent to a type of institution for which his choices have qualified him, and to which he has a right. If a spiritual demand is to be made upon a person's time, and that alone, let it end there.

The hypocrisy should come to an end. If we really do desire a torture model as our punishment strategy, let us codify one. Let us admit to ourselves, and announce to the defendant, that he is being sent to prison not only as a pre-emption of his time, but also that his body can be tortured under the supervised care of correctional officials, and that the torture will be administered by his fellow inmates.

Legally and morally we have the responsibility for guaranteeing the safety of our prisoners. More than any other group, they are completely dependent upon the state to ensure their protection.
visible, and most vulnerable subset. They cannot protect themselves in the same manner as the average person. But they are citizens, not outlaws, and like all citizens they have a right to institutions that do not impose penalties exceeding those proclaimed in open court.

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**FOOTNOTES**


3. Foucault, p. 11.