History and Philosophy of Punishment

- Punishment has been a part of the history of mankind to the beginning of recorded history
- Punishments included:
  - Corporal punishment
  - Shunning
  - Banishment
  - Execution
  Communities would respond to other communities with a formal apology, compensation or blood feuds

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- Compensation to other communities included:
  - Cattle
  - Slaves
  - Offering a person for execution – did not have to be the perpetrator

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- As societies developed so did systems of justice
- Most famous: The Code of Hammurabi (1700 BC) which is one of the first known written law containing 282 laws
- Lex talionis – "eye for an eye, tooth for a tooth"

- Nearly all societies used some form of capital punishment

Breaking wheel

Other punishments

- Boiling to death
- Flaying
- Disembowelment
- Crucifixion
- Impalement
- Crushing (including by elephant)
- Stoning
- Burning
- Dismemberment

Hanging and gibbeting
Spence Broughton – mail robbery

- 18th century Britain there were 222 crimes punishable by death – including cutting down a tree or stealing an animal.
- Public hanging of pickpockets created the opportunity for more pickpocketing

Philosophical basis for sentencing

- Philosophical views – as early as the Greeks and Romans
- Begin in the 1700's
- First question – why am I taking your time to examine the state of affairs so many years ago?

Imposing a sentence is one of the most difficult tasks performed by trial judges.

In Canada we are governed by the principles in the *Criminal Code*, of which much more will be said

Many of us have not considered the origins of these principles and without knowing the foundation for the principles of sentence can we truly impose a just sentence?

- I have shown you in too much detail the history of torture.
- The person who is credited with the banishment of torture is Cesare Beccaria and his treatise *On Crimes and Punishment*
- In 1764 Beccaria asked,
- "Is the death-penalty really *useful* and *necessary* for the security and good order of society? Are torture and torments *just*, and do they attain the *end* for which laws are instituted? What is the best way to prevent crimes? Are the same punishments equally effective for all times? What influence have they on customary behaviour?"

- ‣ Retributive theory
- ‣ Utilitarian theory
- ‣ Rehabilitative theory
- ‣ Punishment for the sake of punishment

Roman Law

- ‣ Nulla poena sine leges and
- ‣ Nulla poena sine
- ‣ No punishment outside the law and no punishment except for a crime
- ‣ Today – the state cannot impose punishment except for those convicted of a crime after a fair trial

Immanuel Kant

- ‣ Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead in all cases be imposed on him only on the ground that he has committed a crime.
- ‣ I am very thankful I am a judge in a country which holds this basic principle

Retributive theory

- ‣ Some incorrectly equate retribution with revenge
- ‣ Retribution is proportional punishment
- ‣ "Let the punishment fit the crime" (Mikado 1885)
- ‣ The retributive theory is backwards looking and punishes crime based on the moral blameworthiness of the offender and the harm done to the victim.
- ‣ Enshrined in s. 718.1 of the *Criminal Code*

Utilitarian Theory

- ‣ Jeremy Bentham and John Stuart Mill
- ‣ Rightness or wrongness of an action is determined by the balance of good (happiness) over evil (unhappiness) it produces
- ‣ Crime produces unhappiness, therefore the goal of punishment is crime prevention
- ‣ Punishment is also evil, but if it prevents crime, a greater evil, then it is justified

Utilitarian Theory

- ‣ Root of the principles of:
  - ◦ Specific deterrence
  - ◦ General deterrence
  - ◦ Rehabilitation (which came along much later)
  - ◦ All codified principles in the *Criminal Code*

  Most members of society do not commit serious crimes – deterred by a variety of factors
  Many members of society commit some crimes or quasi-crimes: traffic offences
  Of those convicted – recidivism rates tell us that deterrence from punishment is overrated
  Certainty of being caught has a much higher deterrent effect (Christmas roadblocks)

Utilitarian Theory

- In theory, could justify sentences much longer than "fits the crime" in order to achieve deterrence and rehabilitation

Rehabilitation Theory

- On off-shoot of the utilitarian theory
- Became quite popular in the last century
- Not terribly successful within the prison
- Herbert Packer – "The problem with rehabilitation is that we don't know how to rehabilitate offenders".

- Retributive theory of proportionality balances the utilitarian theory of the greater good
- The two theories form the foundation for modern sentencing –
- With or without justification?
- What is the justification for the practice of punishment?