Very few people today would argue that the American penal system is just. With one third of all young black men passing through the penal system, most of them low-income, it seems almost obvious that class and race biases pervade the penal system (Holzer). In addition to being unjust, the influence of the penal system is prolific. At nearly 1 person per 100 incarcerated at any time, America also has the highest per capita rate of incarcerated individuals of all developed countries (Barclay & Tavares et. al.). The prison system is also largely ineffective at decreasing crime rates and increasing the amount of justice in society as a whole. Indicted individuals, who often spend years or decades in prison, often emerge better able to commit crime but not enabled to make a positive contribution to society.

Sociologists, reformers, theorists, philosophers, criminologists and a whole slew of other experts have dedicated themselves to improving the penal system. Some have sought to improve its efficiency, others its rehabilitative powers. Some would make it harsher, others make it more lenient, and still others would like to eliminate it altogether. All agree, however, that something must be done about the state of the American, and indeed the world, penal system. All agree that whatever is done must make the penal system more just.

There is, however, no one agreed upon idea of what constitutes penal justice or justice in general. In order to decide how to make the penal system just, however, one must first have a clear idea of the meaning of justice and the function of a penal system in a just society. In this essay, I will sort through some of the varying justifications of punishment in order to clarify the
notions of justice that underlie them. I will then compare the consequences of these conceptions of punishment for penal justice and justice for society as a whole, in order to determine when punishment is morally justified and what type of punishment is justified.

According to the analysis that I will defend here, the most justifiable motivation for punishment or any other social policy is to make society fairer. This might seem intuitive. However, American theories of punishment have historically been focused either on vengeance, uniformity, or simply prevention of deviation as the goal of penal justice, under the guises of retribution, rehabilitation, and deterrence, respectively. Of course, most proponents of these positions have defended them on the conviction that they are the most just. In this essay, I will discuss the inadequacy of focusing on only one of these justifications of punishment as traditionally conceived. I will defend a notion of rehabilitative penal justice based on the theorizing of John Rawls in *A Theory of Justice* and “Two Concepts of Rules” and Marilyn Friedman in *What Are Friends For?: Feminist Perspectives on Personal Relationships and Moral Theory*. Using these authors and others, I will also attempt to pinpoint the most just ways to allocate punishment by looking at two theories of punishment, justice as fairness and justice as care. I will defend and adopt a notion of justice as encompassing both universalizing and particularistic considerations.

First, I develop and defend a Rawlsian notion of penal justice. John Rawls discusses justice in most of his published work, but he spends little time discussing punishment and penal justice. As such, I suggest a theory of penal justice based on Rawls work on justice and punishment in *A Theory of Justice* and “Two Concepts of Rules.” Then, I compare my theory with an alternative Rawlsian interpretation of punishment proposed by David A. Hoekema in “The Right to Punish and the Right to be Punished” and argue that my theory as both more
Rawlsian and more just. After clarifying my position on Rawls and justice, I address the challenge that care-based ethics poses to a Rawlsian theory of justice. Then, I will illustrate the ways which a theory of care as justice contributes to a theory of rehabilitation. In light of the provisions that a care-based theory of justice can offer for penal systems, I modify my Rawlsian interpretation of rehabilitationism.

A Theory of Justice

In *A Theory of Justice*, Rawls calls his notion of justice “justice as fairness.” In justice as fairness, fairness is prior to all other goods, including happiness, liberty, and equality. In order to arrive at a theory of justice, Rawls performs a thought experiment, called the original position, through which he attempts to discover “the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association” (11). Rawls argues that such individuals would, above all, want for their society to be fair, in order to allow themselves to achieve their maximum potential and pursue their own good, as they define it. As such, fairness is the fundamental principle of justice. In order for a society to be just, in order for it to allow everyone to pursue her own good, it must be fair.

Allowing everyone to develop and pursue a rational plan towards pursuing his or her own good is the central aspect of Rawls’s theory of justice. A person’s good is the result of carrying out the best overall plan for that person’s life: “a person’s good is determined by what is for him the most rational long-term plan of life given reasonably favorable circumstances” (92-93). This rational plan encompasses goals, values, family, and all other concerns that affect a person during his or her lifetime. As every person is born into unique cultural, social, personal,
political, and familial circumstances, and as such have different goals and abilities to achieve those goals, each person's rational plan will be somewhat different.

In order for a society to be just, it must ensure that all human beings have access to the ability to develop and pursue their rational plans. As such, a society must ensure that all people have access to what Rawls calls "primary goods," regardless of social circumstance or other inevitable variations between one life and the next. The primary goods are "rights and liberties, opportunities and powers, income and wealth and a sense of one's own worth (92). These primary goods allow an individual to develop her innate rational capacities to the point where she can thoughtfully develop her rational plan. They also provide her with the ability, within reasonably favorable circumstances, to follow through on that plan. Thus, Rawls gears his theory of justice towards creating a framework that will allow all people access to the primary goods, regardless of other circumstances.

Rawls argues that only a society with just social structures can reasonably ensure that all members of that society have a chance to develop and pursue their rational plans. As such, social justice is the most important aspect of justice as fairness. Social justice focuses on the regulatory foundations of a society, its institutions. Institutions are the fundamental rules of a society that form its basic structure: "by an institution I shall understand a public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like" (55). While Rawls discusses rules and principles of justice for individuals, he argues that social justice is necessarily prior to these: "the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation" (7). A society without just institutions can never hope to be just. Institutions such as legal protection of
freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family lay the foundation for how a society will function and, as such, shape the ability of persons to act justly and to pursue their own good: “taken together as one scheme, the major institutions define men rights and duties and influence their life-prospects, what they can expect to be and how well they can hope to do. The basic structure is the primary subject of justice because its effects are so profound and present from the start” (7).

Rawls also contends that, in order for a social structure to be fair, it must balance respect for both liberty and equality. In order for all to be able to pursue their good, the institutions that form the basis of a just society must be to the benefit of all equally. Because of the mandate of fairness, a society is only just insofar as its structure respects the rights of each individual member of that society, without regard for traits, capacities or social standing, which Rawls argues are “arbitrary from a moral point of view” (72). Rawls bases his theory of justice on the premise that all people are inherently valuable and therefore essentially equal, thus deserving of equal rights and duties: “each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override” (3). Thus, through justice as fairness, Rawls attempts to control as much as possible for how arbitrary traits, capacities or social positions affect one’s chances to pursue one’s conception of the good, as long as this control does not stifle liberty.

But, because of its role in ensuring fairness, Rawls privileges liberty over equality. Without liberty, a person can neither develop nor pursue her rational plan. Thus, any restriction on liberty must be carefully thought out. Rawls concludes that liberty should only be restricted if doing so would be necessary in order to strengthen the overall liberty of society or protect
individuals who would not benefit from equal liberty, such as young children: “the principles of justice are to be ranked in lexical order and therefore can be restricted only for the sake of liberty. There are two cases: (a) a less extensive liberty must strengthen the total system of liberty shared by all, and (b) a less than equal liberty must be acceptable to those citizens with the lesser liberty” (250). Because each person is inviolable, no person’s liberty can never been restricted for utilitarian purposes such as increasing the social or economic advantages of some, or even all, members of a society or the overall happiness in a society. For Rawls, liberty is a fundamental human good and the ultimate right, with equality closely following.

In order to regulate the tenuous balance between liberty and equality and set the foundational principles around which to develop the legal and social structure of a society, Rawls proposes what he calls the “two principles of justice.” The first principle, the “principle of equal liberty,” mandates that institutions respect the right of all individuals to liberty: “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others” (60). The second principle, the “difference principle,” addresses when manifestations of inequality are acceptable: “social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all” (60). Rawls prioritizes the first principle to the second, placing them in what he calls a “lexical order.” While both principles are incredibly important, for Rawls, equal liberty is the most essential feature of a just society.

For Rawls, then, liberty is the most essential human good. However, it can, and often must, be restricted, in order to maintain a fair and free society. It is certainly not fair to steal someone’s shoes or take her life, and thus deprive her of property or liberty. If a society is to be fair, it must restrict liberty at least insomuch as to attempt to regulate such fundamentally unfair
actions. In so doing, Rawls argues, a society would actually increase its overall liberty, not decrease it. Rawls holds the Hobbesian opinion that, if allowed, people will violate each other’s liberty in an attempt to ensure that they are able to pursue their rational plans. Thus, individuals with no legal restrictions on liberty would actually live in a very insecure, tenuous state, and as such would have as little true liberty as a person who lives in a society with strict controls on liberty. Because of this, governing social structures must be allowed to restrict liberty somewhat, ideally stopping after reaching the happy medium between absolute license and restrictions on liberty, where the most, true liberty can be achieved for all.

How, then, should this be done? Rawls argues that a coercive penal system follows necessarily from his Hobbesian view of human nature.

The Need for a Penal System in Rawls’s Theory of Justice

For Rawls, taking away someone’s liberty arbitrarily would be the ultimate injustice. The reasons for taking away someone’s liberty, however, are not always arbitrary. One could easily argue—and most people do—that incarcerating criminals, thus drastically curtailing their liberty, is more just than allowing them to have full and equal liberty. Rawls posits the acceptability of incarceration in such instances, with due consideration: “I assume that imprisonment, say, is a drastic curtailment of liberty, and so the severity of the contemplated punishments must be taken into account” (242). This does not appear to conflict with his arguments for justice. One could easily argue that a less extensive liberty for prisoners strengthens the total system of liberty shared by all.

Indeed, the right to deprive someone of liberty draws directly from the nature of rights. Strictly speaking, no right is inalienable. As stated earlier, rights are bestowed by institutions.
As such, rights, such as liberty, can be taken away when necessary and/or appropriate. Liberty, like all rights, implies duties: “liberty, as I have said, is a complex of rights and duties defined by institutions” (239). Failure to obey the law and thus fulfill one’s legal, and thus moral, duty can legitimately result in the curtailment of liberty, if curtailed with due process by the same institutions that grant liberty.

The right to punish also derives from the nature of rights in a similar way. In “The Right to Punish and the Right to be Punished,” David A. Hoekema argues that rights necessarily imply coercive force. We can illustrate this with a thought experiment. Let us assume that Society A respects the institution of private property. If Jane, a citizen of Society A, owns a piece of property, she is said to have an exclusive right to that property. Because she has this right, Jane can legally decide who can enter, what can be displayed, and so forth. As such, if someone tries to vandalize her property, Jane has a right to defend it. Jane has the right, within reason, to coerce those who try to vandalize her property. The justification of coercive force is what distinguishes rights from non-rights. Mark does not, say, have the right to force his colleagues to be nice to him. He does, however, have the right to defend himself if they attempt to physically harm him. People have the right to defend their property and their bodies with physical force.

While individuals are always allowed to defend themselves against immediately present physical threats, in most societies, both defense and punishment are rights that are relegated to the state, which organizes and presides over the society’s fundamental institutions. The just state aims at protecting and ensuring the rights of all of its citizens. In order to ensure these rights, the state punishes those who violate the rights of others and thus fail to do their duty to society and its members. Thus, according to Hoekema, punishment is permissible, even mandated, by the nature of the doctrine of rights.
Rawls agrees that punishment is logically necessary. For a society to be just, its institutions must not only be based on the principles of justice as fairness, but they must also be the basis of the society’s legal system. Having a legal system allows for the rules of justice to be codified, understandable, and readily available to everyone. It also allows for them to be enforceable. Coercive support of the rights, rules, and institutions that define a society is a necessary part of any legal system: “a legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation” (235). Because people are naturally inclined to be self-interested and pursue their rational plans, just legal systems encourage just behavior and discourage unjust behavior. A legal system ensures that a society is founded on the rule of law, not the laws of nature.

In an ideal society, the legal system would be the codified embodiment of justice, so no one would feel the need to act unjustly. While people, as rational and fundamentally self-interested actors, will pursue their rational plans ruthlessly if they feel that it is necessary, all individuals have the fundamental desire to respect others and their attempts at pursuing their rational plans to attain their good. As such, people desire to treat each other justly and thus to obey just laws: “the principles of justice manifest in the basic structure of society men’s desire to treat one another not as a means only but as ends in themselves” (179). If the law ensures an individual’s ability to pursue his or her rational plan without resorting to unjust behaviors, then that individual will have no desire to break the law. In fact, if the laws are just and allow for individuals to pursue their own good, people will even love the laws: “we can explain the acceptance of the social system and the principles it satisfied by the psychological law that persons tend to love, cherish, and support whatever affirm their own good. Since everyone’s good is affirmed, all acquire inclinations to uphold the scheme” (177).
Thus, individuals in a perfectly just society will act justly if the institutions that regulate their society are just and thus allow them to develop and pursue their rational plans. However, the best real society possible can only approximate an ideal legal system and thus will not have perfectly just institutions or individuals. If individuals suspect that the legal system allows for injustice, and thus for others to act unjustly, they may worry that they will not be able to pursue their own good if they act justly. Because of this, at least some people will act unjustly, and even violate just laws, in even the best of legal systems.

In order to address unjust actions and minimize the suspicion of injustice, all just legal systems require a penal component. A legal system with a penal component serves to alleviate worries that others will act unjustly: “by enforcing a public system of penalties government removes the grounds for thinking that others are not complying with the rules...the existence of effective penal machinery serves as men’s security to one another” (240). Also, if some people do act unjustly, those who choose justice can rest assured that the unjust will be punished by the state, thus taking away the unfair advantage that a person’s unjust actions gives her. As such, rational individuals will not feel that, as a preventative measure, they must act unjustly in order to be able to continue to pursue their own good successfully. Nor will they feel that acting unjustly is in their own rational interest, as unjust action is punished. People therefore have strong disincentives to act unjustly and to disobey the law.

Thus, Rawls allows for, indeed requires, a penal system, and he allows for a penal system that includes incarceration as a punishment. What might this penal system look like? Before addressing this question, I will discuss just action for individuals and further address the reasons why people commit crimes.


**Acting (Un)justly**

For Rawls, the most the essential mandate of justice for individuals is to act in accordance with just institutions. In an ideally just system, the just individual would always obey the law. In order to make his theory comprehensive, Rawls suggests principles of justice for individuals, which he calls the “principle of fairness” and the “natural duties.” While some of these principles are necessarily extra-legal virtues, such as “beneficence,” “courage,” and “mercy,” most of them are obligations to comply with a society’s laws and institutions, such as the duty to comply with a just, or even an unjust, law, provided the basic structure of a society is just (109; 350). Many of the necessarily extra-legal virtues, such as civil disobedience and conscientious noncompliance, are only just insofar as they facilitate greater societal justice by attempting to amend unjust laws. For Rawls, respect for others is essential to individual justice. However, respect for the law, and thus for legal rights and duties, is prior to all other just action.

As we have already seen, Rawls believes that some people will violate the law in any society. In a reasonably just society, however, the law is written in accordance with the principles of justice, so a violator of the law has probably acted unjustly. Just laws simply serve to uphold basic rights and duties and thus ensure fairness, not to regulate behavior. Those who err against the good when given the opportunity to be just are essentially bad, or at least deeply flawed, people, and thus require punishment:

It is true that in a reasonably well-ordered society those who are punished for violating just laws have normally done something wrong. This is because the purpose of the criminal law is to uphold basic natural duties, those which forbid us to injure other persons in their life and limb, or to deprive them of their liberty and property, and punishments are to serve this end. They are not simply a scheme of taxes and burdens
designed to put a price on certain forms of conduct and in this way to guide men’s conduct for mutual advantage. It would be far better if the acts proscribed by penal statutes were never done. Thus, a propensity to commit such acts is a mark of bad character, and in a just society legal punishments will only fall upon those who display these faults (314-315).

How, then, should a society punish people with such a character? In “The Right to Punish,” Hoekema argues that retribution is the only just reason for punishment that follows from a Rawlsian analysis. I disagree with Hoekema. I argue that, while retribution has its place in a Rawlsian theory of punishment, it is not its central aspect. Rather, although Rawls did not explicitly discuss or support it, rehabilitation is more in line with Rawls’s thought than retribution. Punishment should, as an institution, should be in line with the two principles and aim to encourage social justice. I side here with Rawls, arguing that a Rawlsian analysis necessitates rehabilitationism.

Thus, punishment should make society fairer. This necessitates, of course, addressing the ways in which criminals put others in society at a disadvantage. It also necessitates looking at why this happens. Let us look at the situation of Joe, a CEO of company XYZ. Joe has access to all of the primary goods and has had access to them for, at the very least, a large portion of his life. If Joe knows that his company is failing and instead of making this public decides to withdraw his stocks and tell his friends to do the same without regard for how this will affect others, Joe certainly deserves to be punished, as he does if he commits fraud or a similar crime. He must, at the very least, have his privileged advantage taken away from him, in the form of large fines or other modes of punishment.
However, penal justice must also consider the ways in which institutions have disadvantaged criminals and attempt to ameliorate this situation. While people with the necessary advantages to pursue their rational plans commit both financial and violent crimes far too often, crime is often either a direct or an indirect result of poverty or other forms of deprivation. This is not, of course, because poor people are inherently immoral and cannot take responsibility for their actions. Sometimes, people with full conviction that, say, stealing is wrong, both morally and legally, steal because they see it as the lesser of two evils. We can illustrate this by imagining the situation of a single mother of four, Donna, who needs to choose between stealing and feeding her children. Donna does not condone stealing; in fact, she is determined to teach her children to be law-abiding citizens, and she generally follows the law herself. However, one day—or perhaps even often—Donna, who is poor and has little financial support, cannot afford food. Should she steal or let her family go hungry? This is a real moral dilemma, but surely most parents would rather break the law than let their children go without food.

In this case, of course, the disadvantage is straightforward and the negative consequences are low. In many cases, the consequences are much more injurious and the disadvantage more obscure. Elijah Anderson documents many such situations in his book *Code of the Street: Decency, Violence, and the Moral Life of the Inner City*. Anderson ties crime in low-income Philadelphia to a set of moral standards based on the concept of respect, which he calls the code of the street, and argues that this subculture has been allowed to develop and exist because of a direct result of poverty and social isolation. Even in relatively just societies like our own, there are large pockets of concentrated injustice. The individuals who live within these pockets are largely unable to pursue their own good within the system, or they may have been raised without
incentive to. In all likelihood, many are in both categories. While any unjust actions that they commit are no less unjust for the actor’s poverty, it is necessary to consider that, in non-ideal societies, crime is correlated with more than poor character; or at the very least that poor character is not innate, but often caused by social and environmental factors. Individual accountability is not static, but variable.

Regardless of the injury sustained or why the crime was committed, Rawls would insist on respecting the personhood of the criminal. If I kill my husband, as heinous as my act was, I am still a person. In fact, it is likely that I am a person who has suffered emotional trauma or is otherwise not fully equipped to exist socially with other human beings. This does not make me any less culpable or my crime any less horrendous. However, treating me inhumanely would simply make the situation worse, not better. Retributivism cannot account for unconditional personhood, but rehabilitationism can. As such, a Rawlsian theory of justice must be rehabilitative, not retributive.

After clarifying the terms of discussion, I will analyze Rawls texts and an interpretation by Hoekema in order to elucidate my position on punishment. I argue that my Rawls’s position on punishment supports rehabilitationism and is, as such, just.

**Theories of Punishment**

Traditionally, theorists discuss punishment in terms of deterrence, rehabilitation, or retribution. In “The Right to Punish,” Hoekema explains these terms, which he pinpoints as the three justifications for punishment. According to Hoekema, the deterrent theory maintains that its effect in preventing future crime is the most important aspect of punishment: “The deterrent theory of punishment holds that punishment is justified by its effect in discouraging the person
punished and others from committing future offenses similar to that for which the punishment is inflicted according to the deterrent theory, of which I take incapacitation as a particular application, punishment is justified by the socially useful effects of deterrence and incapacitation of known criminals and potential criminals” (247-248). Thus, the goal of a deterrence theorist is to figure out which method of punishment best deters individuals from committing crimes and to implement that punishment. As such, a deterrence theorist might support either retribution or rehabilitation if she believes that they best prevent crime.

The rehabilitative theory focuses more on the relationship of the individual to the society. According to rehabilitative theory, the individual acts criminally because of maladjustment, and thus the best way to restore justice is to help individual criminals assimilate or re-assimilate into society: “The rehabilitative or reformative view of punishment sees the purpose of punishment above all in its beneficial effects on the individual. Criminal acts are taken to be symptoms of malfunction or maladjustment of the person who commits them; the treatment of criminals, on this view, should aim at restoring them to psychological health and making their behavior conform to socially accepted standards” (Hoekema 248). Rehabilitative theorists focus on evaluating what they see as psychological or pathological behavior in criminals and eliminating the tendency of criminals towards such behavior.

Hoekema distinguishes the retributive view from these former views, which he labels as “forward-looking.” The retributive view, on the other hand, is “backward-looking: it judges the appropriateness of punishment by the offence that a person has committed, not by the expected effects of his punishment on himself or on society” (248). The retributive view focuses on individual accountability, holding that “the justification of punishment lies in its exacting a retribution for the offence committed. Retributivism holds that the person who has committed a
crime deserves to be punished accordingly” (248). According to Hoekema, individual accountability and self-determination are central to the rehabilitative justification of punishment.

**Rawls on Punishment**

As mentioned various times in the essay, Rawls supports a deterrent theory of the need for a penal system. Penal systems, and thus punishment, must be in place in order to deter individuals from breaking the law and acting unjustly. Rawls does not, however, support deterrence simply to ensure that individuals obey the law. In the perfectly just society that Rawls theorizes, obeying the law is equivalent to acting justly. As such, ensuring that people obey the law is equivalent to encouraging justice. Rawls’s main goal is supporting a deterrence theory of punishment, however, is to discourage injustice, not ensure that people obey the law, whatever it may be. As evidenced by the obligation of civil disobedience in profoundly unjust societies, Rawls’s main goal is to ensure that justice as fairness prevails, not that laws are obeyed.

As I discusses above, however, this does not mean that Rawls’s theory does not or could not also support rehabilitation, retribution or some other end as the best way to achieve deterrence. Each is a strategy of discouraging injustice, in addition to having its own unique properties. We can distinguish here two questions: first, why do we punish? Second, how should we punish? To the first, Rawls answers in order to make society more just, his definition of deterrence. To the second, however, Rawls does not provide a clear answer. As such, Rawls leaves open the question of the structure of the actual punishments and penal system that follows.

In “The Right to Punish,” Hoekema undertakes a broadly Rawlsian analysis and comes to the conclusion that retribution is the only method of punishment that is able to respect individual rights. As a backward-looking punishment, retribution is able to respect the “the rights of
individuals to freedom and self-determination” of an individual being punished (263). Hoekema argues that any forward-looking punishment, such as those based on deterrence and rehabilitation, “will violate the rights of individuals” by attempting to control and change them as people, not simply to punish them for their actions: “A rehabilitative account of punishment... divorces the treatment of individuals radically from their choices, since liability to punishment or treatment is not dependent on one’s past acts...Under a rehabilitative system I cannot control my future condition by my acts or even predict my future condition...Furthermore, such a system imposes on individuals standards of health or normality which may be in sharp conflict with their own conceptions” (247, 262). The fact that the system attempts to shape my future for me infringes on my rights as a rational being, as well as discouraging individual accountability.

Rehabilitation is, certainly, a dangerous political tool in unjust societies. We can imagine how unjust a system would be that attempted to “rehabilitate” political criminals and civil dissidents. This has happened various times throughout twentieth century history—in the USSR, in China, etc.—to the point of being a part of the common consciousness of various generations. For decades, if not centuries, psychiatrists have subjected mental patients and criminals of all sorts to various coerced “treatments,” such as shock therapy (ECT), insulin shock treatment, and lobotomies (Szasz). In order for rehabilitation to occur, society must first develop a norm. If this norm does not place a strong emphasis on individual self-determination for all people, regardless of criminal status, mental condition, age, race, class, etc., then rehabilitation is likely to be a coercive practice that disregards individual autonomy and self-determination.

Yet, Hoekema seems here to neglect the fact that whether or not a punishment disrespects individual autonomy and self-determination is independent of its justification as allegedly
retributivist or rehabilitationist. A lobotomy performed in order to take revenge is no more dignified than a lobotomy performed with the goal of rehabilitation. The same is true for the death penalty, imprisonment, and the various other types of torture and punishment. Pure retribution, vengeance without consequences for a person's future life, is impossible.

It is easy, however, to see how someone working within the framework of rights would make this mistake. Thought within the framework of rights, the freedom to live my daily life as I see fit is conceived of as the right to liberty. This right to freely choose my daily activities, which both Rawls and Hoekema would argue is inscribed by institutions, can therefore be taken away. If I misuse my right to liberty, I get it, and only it, taken away. Imprisonment, therefore, need be nothing but the deprivation of the right to liberty.

However, much more is taken away than a right, and much more is imposed. It is impossible to deprive someone of liberty without also strictly regulating that person. If I were imprisoned, my daily routine would be forced upon me: when I showered, when I ate, when I worked, when I had free time, when I could see my friends and family would all be decided for me, as would where I could go and what I could do during the free time that I had. This is not merely the deprivation of liberty. It is, rather, also a form of rigid social control. In fact, in Discipline and Punish, Michel Foucault's a history of modern penal practices, Foucault presents imprisonment as the ultimate form of social control. This social control occurs both inside of the prison and after release: "prison, and no doubt punishment in general, is not intended to eliminate offences, but rather to distinguish them, to distribute them, to use them; that it is not so much that they render docile those who are liable to transgress the law, but that they tend to assimilate the transgression of the laws in general tactics of subjection" (272). One does not
even leave prison with a clean legal slate, but rather with a criminal record and all of the social control and stigma it entails.

Thus, retributivism seems to have the same pitfalls as rehabilitationism, without any of its potential advantages. Both retribution and rehabilitation are potentially dangerous punishments. However, rehabilitationism at least accepts that it has an effect on the criminal and attempts to moderate that effect. While retributivism is mere vengeance, rehabilitationism, at its best, is a theory geared towards increasing the overall well-being of those who are rehabilitated and helping them to achieve their rational plans. This, of course, is not easy, and it cannot be done without respecting the desires and individual self-determination of those who are rehabilitated.

Prisoners are, of course, a vulnerable population. Perhaps it would help to think of a moral way to address people in another vulnerable position: children. No one argues that children should be allowed complete autonomy or self-determination. Rather, children need resources, support, and guidance. Because they are dependent upon their guardians, the guardians must constantly have the children’s best interest in mind. This is generally difficult and requires flexibility and constant renegotiation of the idea of what is in a child’s best interest, as the child grows, changes, and asserts herself. There is no one standard for dealing with all children. Rather, parenthood is often referred to as the most difficult profession because it requires so many compromises and such close attention to how one’s vision of the good correlates and conflict with and also influences that of someone else.

If we address penal rehabilitation on this paternalistic model, then we would need to fundamentally change the way that we look at prisoners. Rawls, for example, examines prisoners as a group or a class, not as individuals. While he encourages attention to every individual, he does not provide guidelines for the interaction between vulnerable individuals and
those to whom they are vulnerable. Rawls’s theory supports rehabilitationism, but it does not provide guidelines for how to conduct rehabilitation. After discussing Rawls’s support of rehabilitationism, I will address as different ethic of justice, justice as care, which speaks to the question of interpersonal relationships in a way that justice as fairness does not.

**Rawls on Rehabilitation**

Rawls’s theory lends itself more strongly to supporting rehabilitation than retribution. In fact, Rawls explicitly argues against retributivism in his essay “Two Concepts of Rules.” In “Two Concepts,” Rawls discusses two justifications of punishments, retribution and utilitarianism, or maintaining the social order, and argues that utilitarianism is prior to retribution terms of developing a theory of punishment. Rawls defines retribution as the view that crime justifies punishment: “punishment is justified on the grounds that wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing” (21-22). The utilitarian view, on the other hand, holds that punishment is valuable only in relation to its potential consequences: “The utilitarian view holds that on the principle the bygones are bygones and that only future consequences are material to present decisions, punishment is justifiable only by reference to the probable consequences of maintaining it as one of the devices of the social order...If punishment can be shown to promote effectively the consequences of society it is justifiable, otherwise it is not” (22).

Rawls argues that retributive and utilitarian justifications of punishment respond to different questions, both of which are fundamental to penal justice. Rawls illustrates this by imagining the different in the answers that a father might give to his son for two different but related questions addressing why people are put in jail. In the first instance, the son asks why a
certain man, J, was put into jail yesterday. The father responds that he robbed bank B, was tried, and found guilty. In the second instance, the son asks why anyone is ever put into jail. In this case, Rawls imagines that father responding that people are jailed to protect good people from bad people or to prevent people from acting unfairly. These two questions illustrate two different reasons why people punish: "One question emphasizes the proper name: It asks why J was punished rather than someone else, or it asks what he was punished for. The other question asks why we have the institution of punishment: Why do people punish one another rather than, say, always forgiving one another?" (22). Rawls contends that retributivism responds to the first question while utilitarian addresses the second.

Rawls argues that, because of this, the best justification of punishment is both retributive and utilitarian. Judges must always sentence indicted criminals, thus retributively subjecting criminals to whatever punishment the law demands for the offence. However, as utilitarians would argue and retributivists would surely accept, the law must be based on principles geared towards the betterment of society, not mere vengeance, which is not an adequate reason to punish or an adequate punishment. The law itself must not be constructed on retributivist principles, but it must be enforced with all of the seriousness that retributionism demands. Utilitarian principles must establish the law, but retributive principles must determine its enforcement. Utilitarianism belongs in the state house, retribution in the court house. While both retribution and utilitarianism are necessary to a theory of punishment, utilitarianism is prior to retribution, as utilitarianism deals with punishment on the institutional level. Utilitarian concerns must determine the actual structure of the penal system and the types of punishment that a judge can retributively enforce.
Rawls also rejects retributivism as the basis for an ethical theory in *A Theory of Justice*. Rawls’s legal systems are coercive, but this coercion is not retributive; rather, it is only justified when in the service to liberty: “the principle of responsibility is not founded on the idea that punishment is primarily retributive or denunciatory. Instead it is acknowledged for the sake of liberty itself...The conclusion once again is that arguments for restricting liberty proceed from the principle of liberty itself” (241-242). Additionally, Rawls positions the two principles as an improvement upon utilitarianism. Thus, we can reasonably assume that, as the two principles are preferable to utilitarianism as a foundation for an ethical theory, and utilitarianism is preferable to retribution for the same purpose, Rawls did not intend for *A Theory of Justice* to support a retributive theory of punishment. Indeed, the utilitarian theory makes more sense in terms of justice as fairness. Punishment is not in the interests of the person being punished, and it is often, as in the case of imprisonment, torture, or the death penalty, not amenable to individual liberty. If it cannot be shown to be “acceptable to those citizens with the lesser liberty” or “strengthen the total system of liberty shared by all,” then it is certainly unjust to deprive someone of his or her equal liberty, because no overall liberty is gained by the punishment (250).

Rawls does not, however, explicitly reject penal rehabilitation. In certain circumstances, rehabilitation is an adequate and even necessary mode of punishment. Rawls allows for and necessitates rehabilitation for indicted criminals, provided they are incapable of pursuing their own good and the person overseeing rehabilitation has the criminals self-proclaimed best interest in mind: “paternalistic intervention must be justified by the evident failure or absence of reason and will; and it must be guided by the principles of justice and what is known about the subject’s more permanent aims and preferences, or by the account of primary goods” (250).
Thus, rehabilitation seems to be only justified in limited circumstances. Yet, the amount of people unable to pursue their own good is larger than one might initially guess, and the potential characteristics of rehabilitation are broader. Let us imagine a prisoner named Bob. Bob was incarcerated for various counts of petty larceny. Bob has a sixth grade education, no job skills, and two kids. What is the best way to ensure that Bob does not commit further crimes? In order to even consider the possibility of not committing future crimes, Bob would need education and Bob needs job training so that he could be employed and support himself and his family after leaving prison. Bob would need the ability to pursue his rational plan, or at the very least not starve, without breaking the law.

So, a just penal system must employ a type of rehabilitationism. But what would this rehabilitation look like? Rehabilitation with a narrow emphasis on assimilating individuals into society is not sufficient to encouraging social justice.

**Justice as Care**

While Rawls acknowledges the importance of interpersonal relationships in our lives, these play little or no role in determining his standards of justice. Acting justly is adhering to the rest of rules that justice as fairness provides. In seeming moral dilemmas, then, I need to consider the rules of justice, represented by the penal code, when making my decision. Thus, if I were to find out that my brother had murdered someone, my first obligation would be to uphold the law, not to support my brother. If I needed to either steal or let my family go hungry, my family would have to do without food. Ideally, no such thing would happen; but when worse comes to worst, one must still adhere to the rules. Each individual is only one of many who depend upon the maintenance of the system of justice.
Starting with Carol Gilligan, feminists and ethicists began to challenge the priority of this type of moral reasoning, termed “rule-based” or “justice reasoning,” by opposing it to a type of moral reasoning that prioritizes the role of interpersonal relationships in our lives, which they called “care reasoning.” The rule-based approach to justice makes assumptions about the nature of justice that the care-based approach challenges. When discussing the value that we attach to interpersonal relationships, Rawls states that “to attain and to preserve these values, we are often tempted to act unjustly” (425). In the care-based approach, prioritizing friends and family over abstract laws and rules would never be unjust. For care, justice is, essentially, attending to our interpersonal relationships. If anything, abstract rules and rights are what tempt us to act unjustly. (WRIGHT NOTES: “This is different from poverty and other social conditions.”)

According to Gilligan, care and justice are distinct moral perspectives. As such, “Considerations of care and relationships may sometimes override considerations of justice and rights in overall moral reasoning” (Friedman 94). Many philosophers who theorize Gilligan’s work, like Marilyn Friedman, disagree with the claim that justice and care are distinct moral perspectives, arguing that they are mutually compatible and possibly co-dependent. Nevertheless, even Friedman holds that people do, indeed, prioritize either concerns about abstract rights or rules or concerns about interpersonal relationships. Thus, the need emerges to theorize the relationship between care and rules and why one might prioritize one type of concern over the other.

In *Care, Autonomy, and Justice*, Grace Clement discusses the differences between what she calls the ethic of justice, or the rule-based approach, and the ethic of care, the care-based approach. According to Clement, the ethic of justice and the ethic of care are distinct ways of approaching morality that make irreconcilable assumptions about the nature of human beings,
human obligations and human relationships. Clement argues that these two ethics are fundamentally distinguished in three ways: "(1) the ethic of justice takes an abstract approach, while the ethic of care takes a contextual approach; (2) the ethic of justice begins with an assumption of human separateness, while the ethic of care begins with an assumption of human connectedness; and (3) the ethic of justice has some form of equality as a priority, while the ethic of care has the maintenance of relationships as a priority" (11).

The first distinction addresses the basis of moral reasoning. Quoting Seyla Benhabib, Clement argues that the ethic of justice requires us to view others abstractly and thus think about the human in terms of commonalities: "moral dignity is based on what we have in common, not what differentiates us" (12). As such, we are obligated to treat others according to an abstract set of rules that represents this moral dignity. The ethic of care, on the other hand, emphasizes the differences and unique qualities of persons and situations: "care has as its primary focus the unique and particular features of a situation...rather than abstracting from a person's individuating features, using the ethic of care, we make moral decisions on the basis of these features" (12). Care prioritizes each person's individuality when making moral decisions. One might object that a rule-based theory of justice like Rawls's places individual autonomy at the center of all considerations of justice. However, individual autonomy and individuality are two very different concepts. I can respect someone's autonomy without knowing anything about her or even having met her. I can even provide for her basic needs, such as food and shelter. I cannot, however, appreciate or care for her as an individual unless I know her personally.

The second distinction addresses obligations to others and "conceptions of the self" (13). Justice conceives of the self as an isolated, atomized individual who enters into relationships
through choice: “The ethic of justice begins with an assumption of human separateness, so that in order to be obligated to others, we must in some sense consent to those obligations. Thus the ethic of justice emphasizes notions of choice and will in understanding our moral obligations” (13). This thinking of humans beings as atomized individuals allows for a contract theorist like Rawls to posit human beings as fundamentally separate and self-interested to the point of almost resembling those born into a Hobbesian state of nature. As such, he is extremely sensitive to the necessity of creating just rules and allowing people to pursue their rational plans, so that they will choose to be just. Care, in contrast, conceives of human relationships as largely unchosen. Thus, we must deal with them like we would any fundamental principle of justice: “the ethic of care begins with an assumption of human connectedness, the result of which is that to a large extent we recognize rather than choose our obligations to others. In other words, the ethic of justice takes freedom as its starting point, while the ethic of care takes obligation as its starting point” (13). Humans beings always already have the obligation to act justly.

The third distinction addresses the relative priorities of care and justice. The priority of justice is preserving and promoting human equality: “the ethic of justice takes some form of equality as a priority” (14). We can easily see this in Rawls, who emphasizes fairness as the basis for his reasoning and the justification for creating and obeying systems of rules that regulate society. Care, on the other hand, prioritizes the interpersonal relationships that it conceives of as obligatory and necessarily commanding one’s attention: “The ethic of care has two interrelated priorities: maintaining one’s relationships and meeting the needs of those to whom one is connected” (14). As such, one is morally obligated not to treat all people equally, but rather to treat those close to oneself attentively and appreciate them in their particularity: “the
care orientation takes relationships as fundamental and develops moral injunctions to protect those relationships” (15).

Clement claims that most theorists argue that these three distinction make two more necessary. First, care and justice take opposing views on the value of thinking in terms of autonomy: “while the ethic of justice is understood to take the concept of autonomy as central, the ethic of care is understood to be opposed to the concept of autonomy on the grounds that it is excessively individualistic” (15). Because care de-emphasizes the importance of the non-relational individual, care has little use for the concept of autonomy: “the ethic of care’s focus on relationships between individuals leads its advocates to be skeptical of the desirability and even the possibility of autonomy” (15). People are so interdependent that thinking of them as atomized individuals fails to grasp the fundamental sociality of human beings as the nature of human interaction. It also overlooks the moral obligations that care claims we have to nurture our relationships.

Second, care and justice are typically thought to represent the private and the public spheres, respectively. Theorists seem to implicitly assume that “the ethic of justice applies to the public sphere of politics and civil society, while the ethic of care applies to the private sphere of family and friends” (15). Indeed, theorists seem to support a “division of labor between the two ethics along public/private lines” (16). It would be impossible to “care” about starving people in Africa, because one does not know them or understand the details of their lives, thus barring one from caring action. However, this does not imply that one should not exhibit some type of concern about those one does not know. One might, perhaps, encourage those around them to care for needy people. However, such a situation seems to call for a conception of rule-based
justice to justify some sort of intervention to provide people with basic necessities, without which they cannot care for each other. Sometimes, it is simply unhelpful to ignore that humans beings are, to a large extent, similar, and we have similar needs: “The individuating details of these people’s lives are both unavailable and irrelevant when we make this judgment: The point is, they are starving and should be fed” (17). An ethic of care cannot deal with situations that require generalizing the human condition, so such situations are left to the territory of justice.

Thus, the two ethics seem diametrically opposed. The ethic of care focuses on individuals in their particularity and sees individuals as interconnected, thus leading care to emphasize moral obligations to those to whom one is close and eschew the concept of autonomy. An ethic of care thus seems most relevant to private sphere and even irrelevant to the public sphere. The ethic of justice, in contrast, focuses on rights and other abstract measures of justice and individual as essentially separate, thus leading justice to prioritize equality, fairness, and autonomy. As such, many see the ethic of justice as useful for regulating the public sphere, in ways that the ethic of care is not.

Yet, this way of looking at the ethics of care and justice makes them seem, respectively, narrow and callous. Is care really so limited and justice so unable to respect individual differences? In What are Friends For?: Feminist Perspectives on Personal Relationships and Moral Theory, Marilyn Friedman breaks down the distinctions between the ethics of care and justice in a move that she calls “integrationism.” According to Friedman, care and justice are not separate approaches to morality; rather they are “conceptually compatible” and, indeed, “mingled in the moral reasoning of real men and women” (126). Treating someone justly involves caring for that person in wanting for that person’s needs to be to be taken care of and
respected: “Justice, as the most general level, is a matter of giving people their due, of treating them appropriately” (127). In this sense, treating someone with respect or ensuring that she has food, even if you do not know her, is caring for that person. Caring is not only affective, confined to expressive modes of taking care of a person, despite the arguments of some theorists of care. Justice as fairness and justice as care are compatible moral frameworks.

Friedman challenges us to question a narrow notion of caring and ask what caring for someone effectively actually entails. A narrow, affective type of care is not enough to adequately take care of someone. We can easily illustrate this by thinking about the needs of a child. Let us assume that Mary has a daughter, Susan, who has to, and indeed wants to, care for. While Mary must provide Susan with love and affection, these are not enough. In order to care for Susan, Mary must feed her, clothe her, nurse her when she is sick, and so forth. Mary must ensure that all of Susan’s basic needs are met and, ideally, that she has access to all of the primary goods. Being just does not require mutual disinterestedness. Indeed, without considerations of justice, we cannot deal with our mutually interested relationships in a morally adequate way: “Justice is relevant to personal relationships and to care precisely to the extent that considerations of justice determine appropriate ways to treat friends or intimates” (127). Therefore, theories of justice need to account for the intricacies of mutually interested relationships.

Friedman also challenges us to contest a narrow notion of justice. We can try to illustrate this as well with another example. Let us imagine Julie, a victim of rape. Treating Julie justly implies seeking out, indicting, and punishing her rapist. But, truly being just to Julie implies more than this. Indictment and punishment help to ensure fairness and law, but they do not help
Julie to overcome her suffering or ensure that, after a potentially traumatic experience, she is restored in her abilities to pursue her own good or have satisfying relationships. Truly being just to Julie would imply ensure that she is taken care of in her particularity and her individual needs are met.

These considerations of care as an integral part of justice carry over into the penal system. Any penal system must address individuals in their particularity. What types of punishment, then, are compatible with care? Rehabilitationism is the only theory of punishment that is able to account for considerations of care. Rehabilitationism is able to make individuals more caring and responsible. A human being’s basic needs extend beyond food and shelter. They include, as Rawls would argue, right and liberties, wealth and opportunities, and a sense of one’s own worth. They also include having other care for them in their particularity.

**Constructing a Theory of Penal Justice**

Any theory of penal justice needs to account for the consideration of both rules-based and care-based theories of justice. Being just is not simply respecting someone’s rights, nor is limited to addressing someone on an emotional level. A theory of penal justice needs to address the complexities of justice that an integrationist theory poses.

Like any other institution, a penal system needs to be governed by just rules. These rules need to be in line with the two principles: limiting liberty only when absolutely necessary and acceptable to the society as a whole, and, preferably, even to the deviating individual, at least in the long-run. Thus, the penal system needs to respect every individual’s right as far as possible while accomplishing the goals of punishment. It must respect individual autonomy and the individual criminal’s rational plan as far as possible.
The penal system needs to attempt to ameliorate the social condition of those who enter into it by providing them with the opportunity to acquire some of the primary goods. Because of social injustice, many individuals who enter into the penal system have a very limited educational background. These individuals need to be given the opportunity to be educated in all sorts of subjects, including job training, as many criminals are unskilled. Wealth is one of the primary goods also, and skill training increases one’s ability to gain wealth legally. Criminals also need help with job placement. Criminals, like all other individuals, have the right to wealth. Thus, society needs to ensure that criminals, who are especially at risk for recidivism because their criminal record lessens their ability to find a legal job and thus be able to provide for themselves and their families legally.

Punishment, as rehabilitation, must also address the particular concerns that affect each individual criminal as an individual. True justice implies ensuring that a person is taken care of. Caring for someone requires more than simply providing for basic needs. It also necessitates addressing those cared for in their particularity.

A Rawlsian theory of punishment, somewhat modified, is able to account for integrationist concerns. While Hoekema’s analysis of Rawls is interesting, it is incorrect. It also encourages injustice. The goal of the penal system should be to make society more just, not less. An integrationism theory of justice that supports a rehabilitationist theory of punishment allows for the penal system to provide a positive social contribution.

\[1\] I recognize that Rawls does not claim to argue that people exist in a state of nature and then enter into a contract in order to come into a state of civilization. My use of the state of nature argument is more metaphorical than absolute.