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# Contents

# Some Views on the Future of Criminal Justice

*Joe Hudson**

## *Introduction*

T. S. Eliot's notion that times present and past are present perhaps in time future and St. Augustine's view of the past as present memory and the future as present expectation attest to the influence of biography on estimations about the future. In the same way, work in Minnesota Corrections in the 1970's affects my thinking about the future. Three events in particular shaped my present expectations: working on the Minnesota Community Corrections Act, preparing a State Corrections Master Plan, and establishing the Minnesota Restitution Centre. Each had opposite effects to those intended and enhanced my skepticism of large-scale significant criminal justice reform.

The Minnesota Community Corrections Act was a well-known system-wide reform effort and most simply amounted to the state subsidizing counties for the development of local corrections programs. Along with the carrot of the subsidy came the stick of requiring counties to pay prison costs for adult property offenders as well as all juveniles placed in state institutions. In this way, the Act amounted to an elaboration of the push-pull logic built into the earlier California Probation Subsidy scheme. Key assumptions behind the act were that if counties had additional funds from state government to spend on local corrections programs and if they were charged for the use of state institutions, there would be more appropriate use made of state facilities, and the savings generated would cover the cost of the more effective local programs. While major questions were raised about the validity of these assumptions during early stages of policy implementation, they were largely ignored, only to be confirmed several years later by the results of an extensive evaluation study. The evaluation found that few of the program assumptions held up; greater costs were incurred under the Act with more social control being exercised over more offenders with questionable effectiveness.

Planning and implementing the Minnesota Restitution Centre was another experience shaping my views about significant criminal justice reform efforts. The Centre was established in 1972 and amounted to the first systematic attempt at using a restitution sanction within the context of a residential community-based program. The diversion aims were similar to the subsidy act, with assumptions made that property offenders should not be imprisoned and could, more appropriately, be dealt with by using a restitution sanction in a community residential program. The Centre soon became the prototype for the spread of restitution programming at different points in the adult and juvenile justice system so that within a few years literally hundreds of restitution programs had been established, many funded by the federal government as alternatives to prisons and jails. In fact, however, the evaluation evidence available on these programs shows that most served offenders who, in the absence of the restitution program, would not have been imprisoned. Restitution was most commonly added as a requirement of a probation order so that when offenders failed at completing the restitution requirement, they were at risk of being imprisoned. In effect, restitution programs setting out to reduce the use of incarceration likely ended up increasing it.

***The author is professor of social welfare at the Edmonton Division of the University of Calgary. He is the editor of the *Canadian Journal of Progam Evaluation.***

The last experience illustrating the biasing effect of the past on my views of the future was work on a State Corrections Master Plan. This was at a time in the 1970's when the preparation of master planning documents was in vogue and, like many other states, Minnesota set about preparing its own. For that state and our work, the immediate and largely unintended consequence was the construction of an additional prison.

One lesson learned from those experiences is that the best laid plans may only rarely result in actions consistent with design. As ideas get institutionalized, distortions and unintended consequences all too often occur. My present expectations about the future of the justice system are bounded by those events and, while remaining suspicious of large-scale criminal justice reform efforts, I still see the need for carefully monitored, incremental changes.

I would be most generally satisfied if the justice system in 25 years were simply causing less damage to people and providing a little more justice. More specific conjectures come out of some broad historical trends that, I expect, will continue influencing the justice system in the years to come. Two trends in particular will likely continue shaping the justice system. The first is increasing rationalization and the other, the trend toward changing views about the proper role of government. These trends will not likely unravel in simple sequential ways and may, to some considerable extent, work at cross purposes. Their effects in the justice system are likely to take several forms that I see as both highly probable and generally desirable.

The general historical trend toward increased rationalism was pointed out at the turn of the century by Max Weber. Modern bureaucratic forms of organizing with their concentration of the means of administration were used by Weber to illustrate most graphically this rationalizing trend that inevitably leads to control by a minority. Administrators develop interests of their own and inevitably attempt to modify policies they are supposed to carry out so that large service systems end up transforming citizens into clients. From this perspective, the justice system amounts to different groupings of officials organized in bureaucratic settings making decisions about people. Clients are needed to grow, and this means more people with more problems to be decided on. Needs and wants get created, and the organized sets of criminal justice officials have significant influence on the political system, simply because they are focused, organized, and vigorous in pursuing their aims. Along with the enhanced role of special interest groups, Weber saw increased emphasis on rational systematization. Increasingly rejected is decision making based on individual cases, and authority is increasingly exercised according to rules. The result is that decision making discretion continues to become bounded, structured, and confined.

The unshakable drive of criminal justice bureaucracies to carve out larger domains of influence is likely to be counteracted and restrained by both financial constraints and changing perceptions about the proper role of government and the citizenry, especially citizens as crime victims. A more diverse, less monopolistic justice system is likely to exist in 25 years, largely as a result of changes in the way government is viewed. Instead of taking on roles of deciding and doing, government will increasingly only decide, and not necessarily do. Public policy will set objectives for the justice system, establish standards for program operations to achieve these objectives, and determine the level at which services are financed. Government will less often do what public policy has determined shall be done.

My specific conjectures about piecemeal and incremental changes likely to be carried through over the next 25 years in the justice system follow from these broad historical trends. My views have largely to do with the Canadian criminal justice system, although the changes I foresee are likely to appear sooner and more dramatically in

the United States. Specific changes likely to occur over the next 25 years are increased efforts at bounding decison-making discretion in the justice system, reduced system fragmentation, more use of private agency service provider arrangements, along with an enhanced variety of roles for crime victims in the justice system, and a reduction in the use of incarceration. While all are desirable, the way we are likely to achieve them may not be either terribly rational or pleasant. This is particularly likely to be the case with the dynamics of decarceration.

*Bounding Discretion*

Discretion exercised by criminal justice officials in the next 25 years will be more structured and confined, as well as more visible and open to public scrutiny and accountability. Growing concerns over the last few years about the considerable discretion exercised by police, prosecutors, judges, and parole boards will be translated into schemes for more objectively and systematically disciplining official decisions. In Canada, no formal guidelines currently exist to structure the way criminal justice officials use their discretion. There is, however, increased appreciation of the problems associated with discretionary justice, both in terms of the lack of visibility and the disparities that may result from its use. For judicial decisions, growing pressures recently led the federal government to establish a Federal Sentencing Commission. Like those established elsewhere, the Commission is responsible for examining key matters related to criminal sentencing, including maximum terms and guidelines that should be in place. The Commission is expected to soon issue a report and make recommendations to the government. No doubt, the report will initiate considerable debate and discussion, but most certainly some kind of sentencing guidelines will be in place for Canada within the next 25 years. Other forms of guidelines are likely to come sooner.

The National Parole Board, in particular, seems ripe for reform. The Board, up to this time, has successfully managed to avoid structuring its discretion, even though a large number of federal task forces, legislative committees, and the Auditor General have criticized the lack of clear and meaningful parole criteria. Recommendations have repeatedly been made for the adoption of principles and standards for greater precision in guiding parole decisions. All have failed in changing the practices of the Board. That is not likely to be the case much longer, and it is safe to assume the Board will either have been abolished or will have some kind of decision-making guidelines in place within the next few years.

Attempts at structuring discretion at the level of the judiciary and paroling authorities will increasingly highlight the importance of the discretion exercised by prosecutors and police. Recent reports on the effects of the Minnesota Sentencing Guidelines dramatically illustrate the hydraulic nature of the justice system and the increased importance of the prosecutor's decision to charge. In Canada, police make charging decisions, but prosecutors have largely unbridled discretion to modify or proceed with charges. Prosecutorial discretion will likely become increasingly visible as a result of the sentencing guidelines, and in the next 25 years, there will probably be guidelines in place for pretrial negotiations.

*Jurisdictional Fragmentation*

Another likely effect of increasing rationality will be a reduction in the fragmentation of the Canadian criminal justice system. Corrections in Canada is fragmented both within and between levels of government, so that there is considerable confusion, duplication, and overlap. According to the British North America Act, the federal

government is responsible for running "penitentiaries" and the provincial governments is responsible for running "prisons." These terms are defined so that a "penitentiary" holds persons serving sentences of two years or more and a "prison," persons serving less than two years. The provinces are responsible for providing all probation services, and the federal government supervises federal releases. The three largest provinces also have their own parole boards and provide parole supervision for persons released from provincial prisons. In the remaining provinces and the territories, the federal government carries out parole decisions and supervises releases from provincial and federal institutions, at no charge to the provincial governments concerned.

Provincial agencies are responsible for prosecuting most criminal charges, with the exception of specific federal crimes —largely having to do with income tax, food, drugs, narcotics, customs, and immigration. Approximately half of all federal prosecutions are handled on a contract basis by private attorneys. The selection of these attorneys is based largely on political considerations.

Police work is also split between federal, provincial, and local jurisdictions. The two largest provinces of Ontario and Quebec maintain provincial police forces as well as local police departments. With the exception of the larger cities in the remaining eight provinces, contractual arrangements exist with the federal government for the provision of Royal Canadian Mounted Police services.

The two-year demarcation for federal and provincial correctional institutions is arbitrary and creates practical difficulties for the efficient delivery of services. Both levels of government operate programs of imprisonment and community supervision so that both must bear all attendant administrative and overhead costs associated with these different services. Problems of planning and coordination are created by two levels of government placing demands upon related social services. The incentive is for provincial governments to sentence for longer terms and, in this way, avoid the cost of housing inmates in their own provincial institutions.

In response to these problems, the next 25 years will see a shift toward centralizing correctional services. Provincial governments will increasingly assume responsibility for corrections, including probation, imprisonment, and parole decision making and supervision. Some movement in this direction has been evidenced in the last few years in the form of Exchange of Service Agreements between the federal government and certain provincial governments. These agreements aim at allowing the use of certain correctional resources by both levels of government. For example, provinces with empty prison beds are entering into agreements with the federal government for the use of these beds. Those provinces facing the possibility of new prison construction are seeking capital contributions from the federal government, in exchange for a reserved number of beds for the use of federal inmates. This trend toward centralizing correctional services at the provincial government level will likely accelerate over the next 25 years, with some provinces assuming full responsibility for all correctional services within their borders. Other provinces, especially those least populated, will continue to operate on the basis of the traditional split jurisdiction with the federal government. This shift to local operations will be based on the assumption that greater coordination and efficiency can be achieved by relocating responsibilities from the federal to provincial governments. However, this shift will also mean that provincial governments will be more financially liable for the use of imprisonment. Having to underwrite the cost of locking people up, provincial governments are likely to give greater scrutiny to the use of such a costly sanction.

Similar developments are likely with prosecution work. The larger provinces, particularly Quebec, Ontario, and British Columbia, will assume total responsibility

for all criminal prosecutions. This is essentially the case at the current time in the province of Quebec. This trend toward provincial governments assuming responsibility for all prosecutions is likely to be accelerated by increased provincial pressures on the federal government for financial reimbursement for the costs of using provincial court facilities and staff for trying federal cases. Provincial governments will be less willing in the future to assume the cost of all court operations when some substantial proportion of the cases dealt with come within the federal jurisdiction.

*Increased Privatization of Criminal Justice Programs*

On the basis of changing perceptions about the proper role of government and the drive toward the increased reationalization of the world, the next 25 years are likely to have more criminal justice programs and services delivered by a variety of private, profit, and nonprofit organizations. At the present time in Canada, private agencies are involved largely in providing post-release supervision to federal and provincial inmates. In addition, approximately half the medical and dental staff in the federal prisons work on personal service contracts, and most educational instruction is provided on the basis of contracts with local school boards. A substantial proportion of the halfway house bed space across the country is provided on a contract basis by private agencies. As distinct from the American experience, so far no private agencies are involved in managing Canadian prisons on a contract basis.

The next 25 years in Canada will likely see major efforts placed on privatizing specific functions and services within and outside of prisons and only slow movement toward private sector prison management. Prison food services will be delivered totally on the basis of private contracts, as will all institutional educational and vocational training. Formal contracts will be established with community clinics to provide the entire health care services of prisons.

Two areas likely to show the greatest changeover to private operations will be prison industries and community-based services. At the present time in Canada, only about 6 percent of the federal prison population work for outside industries operated by private enterprise. This proportion has remained quite stable over the last several years, despite periodic drives to attract more outside employers to prison industries. Increased emphasis will continue to be placed on the establishment of prison industries operated by private firms, and meaningful work will become the primary focus of prison programs.

Shifts toward more responsibility by the provincial government for the delivery of criminal justice programs and services, coupled with greater private agency involvement in the system, will have major implications for the role of provincial and federal governments. These governments will need to free themselves up for their central task of creating a system that will make the decisions. On the side of the executive branch, there must be a strengthening of those institutions that develop proposals for politicians to present. Legislation must acquire expert staff to make competent critiques and to react to proposed programs. Oversight of not only the state's own agencies but also the larger number of private agencies through which much of the public program will be carried out must be principled and continuous. Along with this will come the need for government to come up with imaginative and effective ways of measuring and monitoring both the problems of the community and the progress of programs undertaken to deal with them. This will become a key element of efforts aimed at providing better oversight of the way the justice system is working. More and more, emphasis will be placed on the use of the evaluation research and audit procedures, particularly in the

form of sampling and survey research. While these methods have traditionally been thought of in terms of measuring opinions, they will be used as a way of testing facts, particularly facts about the amount, type, and quality of services provided. In all of these ways, emphasis will be placed on accountability in the sense of public officials being required to give an accounting for the way responsibilities have been carried out. Enhanced accountability of criminal justice officials to crime victims will be a further example of this trend in the years to come.

*Victim Roles and Services*

In the last fifteen years, attention has been given to the place of crime victims. A variety of victim programs have been created and opportunities afforded for victim participation at different points in the justice system. The discipline of victimology has been recognized as a specialized field of study and practice, several international symposia on crime victims have been held, an *International Journal of Victimology* published, and the National Organization of Victim Assistance established. This emerging interest in the crime victim has a number of implications for the future administration of justice, including the development of alternative ways for dealing with disputes to expanded victim roles in the justice system and use of reparative sanctions.

Wrongs committed have historically been defined as crimes because of state interest in regulating the behavior of its citizens and, largely as a result, victims have been excluded from playing a meaningful role in the dispute settlement process. The next 25 years will see the establishment of more settlement mechanisms to deal with a wider variety of disputes between persons or organizations, as alternatives to the criminal justice system. Dispute settlement schemes will be used with intrafamily crime, private criminal complaints, and property crimes. Systematic efforts will be made to use these kinds of dispute mechanisms in the increasing civilization of the criminal justice system so as to reduce the criminal workload and target on the violent offender.

The traditional victim roles of initiator of the criminal justice process and as witness will be expanded in the next 25 years with more attention to victim roles, both as the recipient of information and active participant in the system. Criminal justice officials will become more accountable to crime victims who will be seen as having a legitimate right to receive information about actions taken or not taken by officials in the system. Victims will routinely be given information about charging decisions, plea-bargaining decisions, and sentencing and institutional release decisions. With this additional information will likely come an increase in the use of litigation by crime victims to sue criminal justice officials seen as negligent in carrying out their duties.

In addition to the victim's role as receiver of information, more opportunities will be provided for full participation at different points in the justice system. This will take various forms at different points in system processing. Prosecutors will be required to obtain victim views before entering into a plea-bargain, and victims will be given an opportunity to participate in plea discussions. Victim impact statements containing victim views about the offense and offender will become a routine requirement of presentence reports and considered by the court at sentencing. Victims will be notified of disposition hearings and be given the opportunity to present information at these hearings for consideration by the court. Following determination of guilt, victims will be afforded opportunities to participate actively with the offender to carry out the sentencing recommendation. Involving victims with their offenders will inevitably lead to a focus on reparative sanctions, particularly financial restitution and community service work orders. In these reparative schemes, victims will be given opportunities for face-

to-face meetings with the offender to negotiate the amount and type of reparations to be made. Probation officers will take on responsibility for arranging these meetings, mediating them, and reporting the agreement to the sentencing court for approval. In this way, the role of the probation officer will focus on facilitating the process of victims and offenders arriving at an agreed upon restorative plan and monitoring its ongoing implementation. Mediating the conflict resolution process between victims and offenders will give specific form and direction to probation work so that it will less often be seen as a miscellaneous pot pourri of roles covering the gamut of therapist to cop.

Besides the greater focus given to probation work, another benefit likely to follow from greater victim participation in the justice system will be a general mitigation of punishments. The likely mitigating effect of victim participation follows from the growing body of evidence that supports the notion that crime victims are much less punitive than system officials. Some of this evidence should be briefly noted because it deserves to be much better known than currently is the case. The expectation is that being better known, it will no longer be so easy for courts to continue sending large numbers of people to prison under the justification that the public requires it. Indeed, the evidence is accumulating that the reality is otherwise, and that while people want an adequate response to lawbreakers, they are not as punitive as officials think.

Some examples of research on public attitudes are worth noting. A field experiment conducted on victim participation in plea-bargaining in Florida found that victims did not demand the maximum authorized punishment, and the effect on sentencing was toward a reduction in sentence severity, especially the use of incarceration (Heinz and Kerstetter, 1979). This was also the case in the experience of the Minnesota Restitution Centre where victims willingly participated in face-to-face meetings with their offenders to negotiate restitution agreements, even though they knew that the outcome of the process would be a much shorter period of prison time for the offenders (Galaway, 1985). Results from the first and second British Crime Surveys were "at odds with the impression which opinion polls tend to give of a thoroughly punitive public" and "conflict with the widespread belief that the public is impatient with the leniency of the legal system" (Hough and Mayhew, 1983; 1985:28-50). Similar findings were reported in Canada where researchers concluded that "the public may not be as punitive as some writers have suggested" (Roberts and Doob, n.d.). Survey work done in Illinois found that "the public may be far less vengeful than it is frequently protrayed to be" (Thomson and Ragona, 1984). A study of burglary victims in England found that victims were not the "punitive, hang them, flog them, lock them up for ever," people that popular myth suggests (Maguire, 1979). Galaway's research in New Zealand found that the public, including both victims and nonvictims, was willing to accept reduction in the use of imprisonment for property offenders if there was an increase in the use of restitution (Galaway, 1984). Victims were much more interested in receiving redress for the offenses committed against them than in harshly punishing the offender.

The evidence is consistent and clear. Citizens are much less punitive than commonly thought and the practices of criminal justice officials might suggest. Officials may very well be imputing views to the public that reinforce their self-interest. Having more control over more people serves the interests of administrators and officials so that public problems get converted into private needs. Likely counteracting this trend will be grudgingly given opportunities for victim participation and reduced enthusiasm for imprisonment.

The importance given to full victim participation in the justice system should have effects on the development of a wide variety of victim services. Enhanced by evolving technology, continued efforts will be made toward reducing the vulnerability of

citizens to victimization, especially the growing numbers of elderly citizens. These efforts will be largely based on current schemes. For example, there will be continued emphasis on using a neighborhood organization approach in which neighbors group together to take responsibility for their immediate community. Block Watch programs will be organized so that neighbors can assist each other by watching homes in the absence of the occupants, and an increased number of safe homes will be established for children, women, and the elderly needing refuge from troubles in the home. Efforts will be made at target hardening and at making homes and other buildings more secure. Property identification numbers will be universally used, and emphasis will be placed on providing education to the growing number of elderly to assist them in reducing their sense of vulnerability and fear. Crime prevention efforts through environmental design will be emphasized and environments designed to facilitate communication and socialization among persons belonging in particular areas, while creating barriers to people who do not.

The growing number of specialized programs and services for crime victims will conflict with the limited amount of public money available. Federal and provincial/state governments will have limited funds available for victim programs and services to cover startup costs, and additional funds will be needed to get started and keep going. Coupled with this problem of having a stable funding source for victim programs and services will be the growing potential for service fragmentation, overlap, and duplication. Each special interest group of victim service providers will likely view the particular problems they handle as paramount and most deserving of funding. Communities will be placed in the position of trying to support a variety of specialized programs —programs for sexual assault victims and battered women, elderly and child victims, restitution programs for victims of property crimes, and compensation programs for violent crime victims.

In response to these growing problems of limited resources and fragmented victim services, more attention will be given to implementing various types of offender "surtax" schemes. While these will probably differ in certain respects from one jurisdiction to another, they are all likely to have in common the idea of imposing on the offender a financial penalty in addition to any other penalties imposed. Monies recouped from these schemes will be used to plan and operate better organized and securely funded victim programs.

### *The Use of Incarceration*

As with many Western nations, imprisonment has taken on the proportions of a large and growing business in Canada. Over a 37-year period to 1982, the number of persons in federal penitentiaries more than tripled, and provincial prison populations increased almost the same amount. From 1981 to 1986, the average number of people imprisoned in Canada grew from slightly over 24,000 to almost 28,000. Current penitentiary projections call for continued growth over the next ten years, from 12,760 to 15,176. While comparing incarceration rates between countries poses severe problems of comparability, even crude comparisons show that Canada has the second highest rate of incarceration in the western world. With one-tenth the population and one-fifth the violent crime rate of the United States, people in Canada are imprisoned at approximately half the rate of the United States. Combined federal and provincial expenditures for the construction and maintenance of prisons and penitentiaries in Canada in 1985/1986 exceeded a billion dollars, the current average daily cost of housing federal inmates is over a hundred dollars, and over eighty dollars for housing provincial inmates. These trends are not likely to continue in the next 25 years. Limited financial resources, the

mitigating effect of victim involvement, along with the new "gaol fever" of our age will dictate more sparing use of prison. This new "gaol fever," in particular, is likely to have drastic implications for our propensity toward locking people up.

Andrew Rutherford begins his very fine book, *Prisons and the Process of Justice*, with Lord Bacon's account of the effects of "gaol fever" or typhus on 18th century jails:

> The most pernicious infection, next to the plague, is the stress of the jail, when prisoners have been long and close and nastily kept; whereof we have had in our time experienced twice or thrice when both the judges that sat upon the jail, and numbers of those that attended the business or were present, sickened upon it and died.

Rutherford suggests that the "new gaol fever" of our age is the overuse of imprisonment. He is, in part at least, wrong. More literally, it is AIDS. Prison inmates amount to highly vulnerable populations to this disease, and its spread will be both quick and pervasive.

In just a few years, the disease has spread widely thoughout North America. Center For Disease Control estimates released in late February 1987 report that as a national average, one in 80 men in the United States have been exposed to the virus and one in 1,000 women. Current figures indicate that 36 percent of viral carriers go on to develop the syndrome within seven years of infection. In the high risk states of New York, New Jersey, Florida, California, and the District of Columbia, the Center estimates that 1 in 30 men between the ages of 20 and 29 carry the virus and one in nine between the ages of 30 and 39. AIDS is now the leading cause of death among homosexuals, intravenous drug users, and hemophiliacs in the United States and Canada. The U.S. government is projecting 180,000 death from AIDS in five years. As a group, prison inmates will not likely avoid its spread. They are young, "long and close and nastily kept," composed of substantial numbers with histories of intravenous drug use and who, while in prison at least, engage in homosexual practices. At least partially fueling its spread will be the refusal of prison administrators to make condoms available.

The implications of the spread of AIDS in prisons is staggering. How likely are judges to sentence to prison when the disease is known to be rampant? And even for those judges so inclined, might they not be seen as violating the cruel and unusual punishment/treatment provisions of the U.S Constitution and the Canadian Charter of Rights and Freedoms? Who would work in such places with all of the attendant fears about getting the disease through casual contact? Prison will be a place where fear runs wild. Basic matters of personal hygiene will become major concerns of staff and inmates.

A cure for the disease is not soon likely, and it will probably spread quickly. Implications for the future of imprisonment are substantial. Prison will be increasingly reserved for offenders committing violent and repetitive offenses. Those offenders sentenced to prison will be required to undertake AIDS testing at admission and throughout their term. Condoms will be available. Special prison disease control units will be established, along with special prisons for persons testing positive. Prison administrators will have serious problems recruiting and maintaining staff. Controlling inmate populations will become a nightmare as a result of staff and inmate fears, intimidation practices of inmates, along with a fatalistic, nothing-to-lose philosophy adopted by those inmates carrying the virus.

### *Summary*

These, then, are my present expectations about some likely developments in the justice system over the next 25 years. Elements of the system will be less fragmented

within and between jurisdictions and official discretion will continue to be bounded and confined. In addition, there will be more providers, more roles for victims and services for victims, and reduced reliance on prisons. Evidence on each of these trends is available now, adding to the likelihood of their extension into the future. But plausibility is far from certainty, especially when offering conjectures about the future. We are, after all, embedded in a huge on-goingness, moving from a dimly understood past to an unknown and largely unknowable future.

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