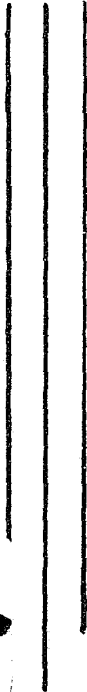


NEW FOUNDATIONS

**OCCASIONAL PAPERS ON
CORRECTIONAL TOPICS FROM THE
CONNECTICUT DEPARTMENT OF CORRECTION**



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.II:

**PURPOSES OF
CRIMINAL SENTENCING**

DEPARTMENT OF CORRECTION



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ACQUISITIONS

NO. II:

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INTRODUCTION

The 1976 California Legislature proclaimed that the "purpose of imprisonment for crime is punishment." ¹ This announcement directly contradicts prior statements: "it is almost assumed that matters of treatment and reform of the offender are the only questions worthy of serious attention in the whole field of criminal justice and corrections."² In the context of this radical examination of sentencing purposes, the federal Congress and many state legislatures are now considering changing their criminal sentencing laws.

When looking at the behavior of "sentencers" and the formal sentencing system, one discovers that the purpose of sentencing is a mixture of several goals set in priority sequence. Criticism leveled at the sentencing system - from legislators, law enforcement authorities, judges, or correctional officials - comes from a disagreement with these priorities. Those considering changing the formal reasons upon which sentences are imposed must determine the priority sequence of several competing purposes rather than select one all-inclusive purpose.

1. DEFINITIONS

A criminal sentence traditionally serves one or more of the following purposes: punishment, rehabilitation, deterrence (both specific and general), or incapacitation.

PUNISHMENT:

The word punishment possesses several connotations. One is denunciation: an offender is punished because society is outraged that he violates its legal/moral/ethical norms. Denunciation not only castigates the offender, but it also upholds the norms he has violated. The second connotation is "desert." In Beccaria's philosophical constructs, an offender deserves to be punished since inflicting pain on him balances the pain he has inflicted on others. In America, punishment is also supposed to be instructive: if an offender violates a second time, he is punished more severely because "he didn't learn his lesson." The extent of both social denunciation and the infliction of pain is determined by the priority sequence of the other purposes of sentencing and the human values that inevitably accompany them.

REHABILITATION:

Those favoring rehabilitation as the preeminent purpose of sentencing argue that the criminal sanction is to reform the offender - and for some advocates to also reform society - so that he will not offend again. Rehabilitation is based first upon the humanistic/religious belief in human

perfectibility and in religious terms, the accompanying notion of the "redemption of the lost." It is simulataneously based, in America, at least, upon this culture's high regard for scientific technology as it extended into behavioral and social sciences.

DETERRENCE (General and Specific):

Deterrence is regarded in two ways. General deterrence means that persons in general society, by seeing what happens to apprehended and convicted offenders, will refrain from criminal activity out of a desire to avoid the observed criminal penalties. Specific deterrence, on the other hand, means that specific apprehended and convicted criminals will avoid future crime because they do not want to undergo criminal penalties again. Deterrence theory is based on the belief that criminals are rational, are able to make free choices, and will change behavior as a result of criminal sanctions. As such, it is a cousin of "economic determinism" as it argues that criminals will abandon their illegal behavior when its perceived costs exceed its perceived gains.

INCAPACITATION:

Persons supporting this purpose argue that certain convicted offenders are so dangerous that, if left at large and not imprisoned, they would harm people. Incapacitation's supporters advocate preventive detention, incarceration, and in some cases, execution. The principle of incapacitation is clearly based upon the assumption that criminal justice of-

ficials can accurately predict individual human behavior.

2. EMPIRICAL OBSERVATIONS

Criminal justice agencies, as other human organizations, seldom consistently relate their operations to a visible or coordinated group of purposes. Consequently, different parts of the same agency perceive the organization's function differently.⁴ Additionally, various agencies within the criminal justice system see their purposes differently: law enforcement and prosecution officials often report their functions as incapacitation and deterrence, parole board members may report their purpose as rehabilitation, and judges often report their goals as punishment mixed with rehabilitation.⁵

PUNISHMENT:

Punishment is not easily susceptible to empirical evaluation of its practical utility or success. First, it is difficult to assess whether society feels it has denounced criminality through the sentencing process. (Recent newspaper articles and legislative proposals might lead one to think that private citizens prefer a louder denunciation.) Inmates certainly feel denounced, however, and any group of writings or paintings from prison attest to the shame and pain arising from punishment.⁶ It is also difficult empirically to define the infliction of pain. Further, no empirical study could possibly determine whether such an infliction balanced a victim's pain; such questions must be answered by human decision-makers.

Interestingly, however, punishment is the operational purpose most frequently perceived by inmates, despite administrative statements to the contrary.⁷ Also, with some exception, most inmates with whom this writer has dealt subscribe to denunciation and deserts as the proper purposes of the sentencing system.⁸

REHABILITATION:

Rehabilitation is empirically observed as either a colossal failure or a surprising success. On the one hand, observers claim the system has failed to rehabilitate the vast majority of individuals committed to it.⁹ On the other hand, researchers are finding that recidivism may have declined during the past decade, and that less than one-third of all people now released from correctional facilities return to criminal activity.¹⁰ The only sound statements to guide one's considerations are: (1) no single rehabilitative approach works for everyone; (2) some approaches seem to be effective for some people; (3) the system's desire for rehabilitation seems to be part of the American "human perfectibility ethic"; and (4) more research is needed. It does appear that present knowledge about rehabilitation is too inconclusive to base a system of justice upon.

DETERRENCE:

As the literature on rehabilitation, the literature on deterrence is inconclusive. Some econometric deterrence theorists, using computer models designed for their own assumptions, argue that specific penalties will reduce crime.¹¹ Other econometric theorists dispute these findings.¹²

Some deterrence theorists argue that higher visibility of law enforcement and sentencing actions will reduce crime. However, the Kansas City Preventive Parole Experiment (replicated and corroborated by the Nashville, Tennessee, Metropolitan Police Department) found that visibility of law enforcement personnel has no impact on criminal behavior.¹³ There is, however, other evidence to suggest that increased visibility and enforcement push criminal activity from targeted areas to neighboring ones.¹⁴ High prosecution of drug traffic in New Orleans Parish, for example, is seen as driving the traffic to neighboring parishes, not reducing it absolutely.¹⁵ Other observers, however, see certain felonious activity as relatively immobile.¹⁶

There is relative agreement, however, that the certainty that a crime is (1) reported, (2) results in arrest, and (3) results in conviction is far more important than the severity of any imposed penalty.¹⁷ (1. National reporting trends show that 82% of commercial crimes, 45% of violent personal crimes, and 22% of theft crimes are reported;¹⁸ 2. law enforcement agencies nationally clear 21% of all reported crimes;¹⁹ 3. nationally, 92% of the arrests are charged; and 4. 35% of the charges result in conviction in adult courts, while 46% of the charges are referred to juvenile authorities.²⁰)

INCAPACITATION:

There is little good empirical data about the effectiveness of incapacitation.²¹ Steven Van Dine, however, studied a group of - incarcerated violent felons with prior violent criminal convictions to see how the crime rate would have been affected if, as many legislators recommend, lengthy (5-year net-time served) sentences had been imposed for their prior violent behavior. The reduction in crime would have been no more than 1.5%. That percentage is well within the standard error boundaries of victim and police reporting, as well as within the boundaries of a five-year swing in crime rate. One may argue, therefore, that no appreciable change in crime rate would occur from lengthy, second-felony offender sentences for violent offenders. Van Dine's finding, however, directly contradicts those of prior theorists who calculated that moderate (3 year) or lengthy (5 year) incapacitation would significantly lower crime rates.²²

James Collins, in following a group of Philadelphia residents from early youth through their 30th year, found that 14.8% of them committed 74% of the crimes attributed to the entire group. However, neither Collins nor anyone else has been able to predict in advance who these 14.8% might be, and therefore incapacitate them.²³

Of indirect usefulness to this booklet's review of incapacitation are studies of crimes which persons commit while released from jail on bail. In 1970, because of the widespread feeling that a

large number of defendants free on bail commit crimes while awaiting trial (and that, therefore, they should be incapacitated), then-Attorney General Mitchell, at the direction of then-President Nixon, led the Justice Department upon a program of "preventive detention."²⁴ As part of the effort, the Administration asked the Department of Commerce to study bail practices and recidivism. As a result of that study²⁵ and because of constitutional challenges from Congress, the Administration abandoned its effort.

Utilitarian opponents to incapacitation argue that its effects are only short term. Incapacitation, which in our context means imprisoning offenders for extended periods, is effective for keeping specific individuals detained for long periods. It is not effective, they argue, for the whole category "criminals." Incapacitative penalties will increase the "average prison time served" of all targeted criminals. However, once the new "average length of stay" is reached, the targeted criminals will be released at the same rate at which they are currently being released. Thus, the benefit to society accrues only during the time between the current and the new average length of stay.

Utilitarian supporters of incapacitation, however, argue that criminals tend to "mellow out" of illegal behavior either in their later teens (for youths) or later thirties (for adults). Severe incapacitative penalties, therefore, allow criminals to "grow old" while presenting no danger to free society. Further,

utilitarians argue that the number of criminals in society is relatively static. Incapacitating this group, therefore, would decrease the number of people who would potentially commit criminal acts, and hence lower the crime rate itself. (Incapacitation's critics argue, however, that the number of criminals is not static. Further, as some criminals "grow old" in prison, juvenile delinquents and "marginal" criminals graduate into their "jobs.")

Civil libertarians criticize incapacitation's "preventive detention" aspect on both constitutional and pragmatic grounds.

Constitutionally, Americans are considered innocent of any criminal act until a court finding of guilt. Incapacitation argues, however, that certain targeted persons should be imprisoned longer than others because of acts which court or correctional officials predict they will commit in the future. These judgements, civil libertarians argue, are unconstitutional because they deal with future rather than past behavior, with supposition rather than fact, and because they result in substantial incursion of individual rights without factual substantiation.

Pragmatically, preventive detention decisions are attacked because court, probation, correctional, parole, or mental health professionals have not been able to accurately predict individual human behavior. Without this accuracy, criminal justice officials tend to err toward conservatism.²⁶ Thus, using incapacitation as the primary purpose of sentencing would mean

detaining some persons who would not, in fact, commit future crimes. Proponents of incapacitation argue, however, that the issue of collective safety outweighs the issue of individual rights.

3. DIRECTIONS OF CURRENT THOUGHT

Current thought about the purposes of the criminal sanction, whether in books, speeches, journals, or legislation, seems focused in priority sequence upon punishment, deterrence, rehabilitation, and incapacitation.²⁷

The relatively low ranking of incapacitation is due to writers' perception that it is unjust.²⁸ The ranking of deterrence comes from the belief that sentencing alone has little leverage to influence deterrence, and that deterrence is first a police matter. More broadly, some theorists argue that the sentencing structure - indeed the entire criminal justice system - cannot control crime and can be only just or unjust.

Rehabilitation was once the preeminent stated philosophy, even though the disparate individual sentences it required seemed to be a violation of "equal protection" clauses of the United States Constitution. It was argued that the constitutional rights of equity were superceded by the State's "compelling interest" to reform its lawbreakers.²⁹ Additionally, the hopes of social science, which coincided with the nation's histor-

ical view of man (changeable, if not perfectible), promised a goal now seen as unachievable.

Punishment, of course, is the only traditional option remaining after the others have been at least partially discredited as preeminent reasons for the criminal sanction. However, punishment is currently advocated in its own right.

Among the first voices calling for abandoning rehabilitation and adopting punishment as the formal basis for the criminal sanction were, interestingly enough, ex-offenders and civil libertarians. In 1971, *Struggle For Justice* argued that the law should deal only with the narrow aspect of a person's criminal act, not his treatment potential, his function as an example, or his possible criminal future.³⁰

David Fogel, Norval Morris, Marvin Frankel, Alan Dershowitz, the legislatures of California and Minnesota, Leonard Orland, the National Prison Project of the ACLU, the Fortune Society, law enforcement organizations, and other groups gradually began to assert that the function of the criminal sanction is to denounce the offender's action (and thus to reinforce society's ethical/legal/moral boundaries), and to "inflict pain" on the convicted offender (since he inflicted pain on others).³¹ These authors, practitioners, and inmates also argue that justice, for both victims and offenders, can only be brought into the criminal justice system if officials deal fairly and equitably

with the criminal act in itself, and not attempt to treat, make an example of, or predict the future behavior of the individual. The report of the Committee for the Study of Incarceration³² is the academic work which most completely examines different rationales for sentencing and which also most forcefully argues for this punishment orientation.

Once theorists and practitioners have settled upon punishment as their primary goal, however, they begin to forcefully advocate deterrence, rehabilitation, and incapacitation as sub-goals. Once punishment is deemed necessary for a specific crime, one must decide what specific punishment is appropriate (i.e., the form of sentence). It is in the discussion of the form of sentence that the ranking of sub-goals becomes crucial. Those favoring deterrence call for prison terms as "examples" to convicted and future criminals that "crime does not pay." Those advocating offender reform, taking an historically new turn, argue that the least drastic alternative which is consistent with the severity and aggravation of the offense should be utilized. Specifically, because of their human costs, prison terms are to be avoided unless clearly needed for the protection of society. Opportunities of which offenders may voluntarily take advantage should be provided by the state at every possible point. Those favoring incapacitation, while generally agreeing with the "least drastic alternative" principle for first-time petty offenders argue that lengthy incarceration

is needed for serious and repeat offenders to protect society from what they would do if sent to non-prison settings.

While the adherents of each sub-goal generally agree on what should be done with first-time petty and savage multiple offenders, they argue bitterly on who comprises and what should be done with the large, middle group. It is upon the priority of sub-goals as embodied in the issues of sentence length, sentence structure, good time allowance, plea bargaining, and offender classification that the unique political coalition of traditionally opposing criminal justice groups breaks apart.

4. CONCLUSION

These pages summarize in brief form the definitions, empirical observations, and current directions of thought concerning the purposes of sentencing. More complete discussions are available in the references cited and should be examined before final decisions are made.

Legislating new sentencing forms and changing penal philosophies are currently in vogue; refining rehabilitative techniques, ameliorating harsh confinement, eliminating corporal punishment, and abolishing trials by snakes, water or fire have been vanguards of the past. Thus, to keep our deliberations in perspective, we must understand that decisions made for this time will be changed in future times.

FOOTNOTES

- ¹ Enacted 1976 California Bill SB42, Ch. 4.5, Article 1, Para. 1170. (a) (1). (Page 83 of the printed Bill).
- ² Francis A. Allen, "Legal Values and the Rehabilitative Ideal," *Journal of Criminal Law, Criminology, and Police Science*, 50, 1959, p. 226.
- ³ Andrew Von Hirsch, *Doing Justice....*, Hill and Wang, 1976, Chapter 6. (Report of the Committee for the Study of Incarceration).
- ⁴ Vincent O'Leary and David Duffee, "Managerial Behavior and Correctional Policy," School of Criminal Justice, State University of New York, Albany, 1970. In a New England correctional institution, the authors found that staff were reform or rehabilitation oriented (in decreasing intensity as top, middle, and line staff were interviewed), while inmates perceived the institution operating from a punishment orientation.
- ⁵ *o.f.*, "Summary Results of Determinate Sentencing Survey," Correctional Service of Minnesota, St. Paul, Minnesota, 1976, p. 11.
- ⁶ John Irwin, *The Felon*, Prentice-Hall, 1970; H. Jack Griswold, *An Eye For An Eye*, Holt-Rinehart-Winston, 1970.
- ⁷ O'Leary and Duffey, *op. cit.*; also *Struggle For Justice*, Hill and Wang, 1971.

- 8 See also George Cole and Charles Logan, "Parole: The Consumer's Perspective," University of Connecticut, Storrs, Connecticut, 1976, p. 8; The authors found that Somers Correctional Institution inmates ranked punishment first among the four purposes in their understanding of the purposes of imprisonment.
- 9 Lipton, Martinson, and Wilks, *The Effectiveness of Correctional Treatment*, Praeger, 1975; David Fogel, *We Are The Living Proof*, W. H. Anderson, 1976; Simon, Cockerham, "State's Prisons Fail to Deter or Help Most Criminals," *The Hartford Courant*, 1974; and generally, *Staff Report*, Commission on Parole Evaluation Techniques and Rehabilitation, State of Connecticut, General Assembly, September, 1975, Chapters II and III.
- 10 Robert Martinson and Judith Wilks, "Knowledge in Criminal Justice Planning," Center for Knowledge in Criminal Justice Planning, New York, October, 1976; Daniel LeClair, "An Analysis of Recidivism Rates Among Residents Released from Massachusetts Correctional Institutions During the Year 1973," Massachusetts Department of Correction, October, 1976; Francis L. Carney, "The Indeterminate Sentence at Patuxent," *Crime and Delinquency*, April, 1974.
- 11 Isaac Ehrlich, "The Deterrent Effect of Capital Punishment," *American Economic Review*, 65:397, June, 1975; Gordon Tullock, "Does Punishment Deter Crime?", *The Public Interest*, 36, Summer, 1974.

- ¹² Morris Silver, "Punishment, Deterrence, and Police Effectiveness," City College of the City University of New York, February, 1974; Peter Passell, "The Deterrent Effect of the Death Penalty: A Statistical Test," Columbia University, June, 1975.
- ¹³ George Kelling, *et al*, *The Kansas City Preventive Patrol Experiment, A Technical Report*, Police Foundation, 1974; "Patrol Evaluation Research: A Multiple-Baseline Analysis of Saturation Police Patrolling During Night and Day Hours," Nashville Metropolitan Police Department, Nashville, Tennessee, 1977.
- ¹⁴ It is reported that when New York City police actively sought out subway robbers, the felons shifted their activities to city buses.
- ¹⁵ Personal communication from William Wessel, First Assistant State's Attorney, New Orleans Parish, Louisiana, December, 1976.
- ¹⁶ Thomas A. Repetto, "Crime Prevention and the Displacement Phenomenon," *Crime and Delinquency*, 22:2, April, 1976.
- ¹⁷

See also William Nagel, "A Statement on Behalf of a Moratorium on Prison Construction," American Foundation, Inc., Philadelphia, Pennsylvania, 1976, where the author finds no correlation between crime rates and severe prison sentences. See also the "Staff Report" of the Parole Commission (*op. cit.*), pp. II/16ff. for a discussion of how most theorists argue that *certainty* rather than *severity* of penalty has deterrent impact.

- 18 "Criminal Victimization in the United States: A Comparison of 1973 and 1974 Rates," United States Department of Justice, Law Enforcement Assistance Administration, May, 1976.
- 19 *Crime in the United States, 1975 (Uniform Crime Reports)*, United States Department of Justice, FBI, August, 1976, p. 37.
- 20 *Ibid.*, p. 176.
- 21 Some important local data will be forthcoming from Howard Sacks, Professor, University of Connecticut Law School, in Summer, 1977.
- 22 Steven Van Dine, *Journal of Research in Crime and Delinquency*, January, 1977. In contradiction, Shlomo and Shinnar, *Law and Society Review* (a), 1975.
- 23 James J. Collins, Center for Studies in Criminology and Criminal Law, Philadelphia, PA, 1976.
- 24 See Mitchell's presentation to Congress in Ronald L. Goldfarb's "A Brief for Preventive Detention," *New York Times Magazine*, March 1, 1970.
- 25 "Compilation and Use of Criminal Court Data in Relation to Pre-Trial Release of Defendants: A Pilot Study," United States Department of Congress, National Bureau of Standards, NBS Technical Note #535, August, 1970.

- 26 "State and County Probation: Systems in Crisis," General Accounting Office, Office of the United States Comptroller General, 1976.
- 27 While most writers reject rehabilitation strongly, their concern for alternatives to incarceration, short determinate sentences, voluntary offender service programs, and speedy trials with little plea bargaining display a high interest in the reformation of offenders, within the boundaries of the severity and aggravation of the crime.
- 28 For example, Norval Morris, *The Future Of Imprisonment*, University of Chicago Press, 1974.
- 29 Toni Kellar, "The Emergence of Individualized Sentencing," *Temple Law Review*, 45, 1972, pp. 351-369.
- 30 *Struggle For Justice*, *op. cit.*, p. 145.
- 31 David Fogel, *We Are The Living Proof*, W. H. Anderson, 1976; Norval Morris, *op. cit.*; Marvin Frankel, *Criminal Sentences*, Hill and Wang, 1973; Alan Dershowitz, (Background Paper), *Fair and Certain Punishment*, McGraw-Hill, 1976; California 1976 S.B. 42 (see law enforcement support for the bill); Minnesota 1976 bill S.F. 634 (passed by General Assembly, but vetoed by Governor); Leonard Orland, *Prisons: Houses of Darkness*, Free Press, 1975; Alvin Bronstein, ACLU, in testimony before the

Illinois State Legislature, May, 1976.

³² Von Hirsch, *op. cit.*

*This brochure has been prepared by the
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