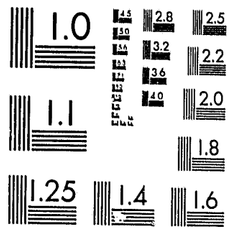




# Federal Probation



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All phases of preventive and correctional activities in delinquency and crime come within the fields of interest of FEDERAL PROBATION. The Quarterly wishes to share with its readers all constructively worthwhile points of view and welcomes the contributions of those engaged in the study of juvenile and adult offenders. Federal, state, and local organizations, institutions, and agencies — both public and private — are invited to submit any significant experience and findings related to the prevention and control of delinquency and crime.

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# Federal Probation

A JOURNAL OF CORRECTIONAL PHILOSOPHY AND PRACTICE

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## This Issue in Brief

***The Evolution of Probation: The Historical Contributions of the Volunteer.***—In the second of a series of four articles on the evolution of probation, Lindner and Savarese trace the volunteer/professional conflict which emerged shortly after the birth of probation. The authors reveal that volunteers provided the courts with probation-like services even before the existence of statutory probation. Volunteers were also primarily responsible for the enactment of early probation laws. With the appointment of salaried officers, however, a movement towards professionalism emerged, signaling the end of volunteerism as a significant force in probation.

***Don't throw the Parole Baby Out With the Justice Bath Water.***—Allen Breed, former director of the National Institute of Corrections, reviews the question of parole abolition in light of the experience with determinate sentencing legislation in California, the current crisis of prison overcrowding, and the improvements that have been made in parole procedures in recent years. He concludes that the parole board—while it may currently not be politically fashionable—serves important "safety net" functions and retention of parole provides the fairest, most humane, and most cost-effective way of managing the convicted offender that is protective of public safety.

***LEAA's Impact on a Nonurban County.***—LEAA provided funds for the purpose of improving the justice system for 15 years. To date, relatively little effort has been made to evaluate the impact of LEAA on the delivery of justice. In this article, Professor Robert Sigler and Police Officer Rick Singleton evaluate the impact of LEAA funds on one nonurban county in Northwestern Alabama. Distribution of funds, retention and impact are assessed. While no attempt has been made to assess the dollar value of the change, the data indicate that the more than one million dollars spent in Lauderdale County did change the system.

***Developments in Shock Probation.***—Focusing on a widely used and frequently researched probation program, this paper by Professor Gennaro Vito examines research findings in an attempt to clearly identify the policy implications surrounding its continued use.

***Family Therapy and the Drug-Using Offender: The Organization of Disability and Treatment in***

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***a Criminal Justice Context.***—The paper describes offenders' behaviors which exacerbate conflict between probation professionals to protect a fragile interpersonal situation within the offender's family. The mirroring of familial conflict by professionals leads to high rates of recidivism whereas the professional's ability to work collaboratively with the offender's family frequently enhances autonomy and more responsible behavior, assert the authors, David T. Mowatt, John M. VanDeusen, and David Wilson. Three modes of interaction characterizing the interface between probation professionals and the offenders' families are described.

***Toward an Alternate Direction in Correctional Counseling.***—While examining some of the problems in correctional counseling, e.g., authority, resistence to change, etc., this article calls for an alternative to traditional therapies. Dr. Ronald Holmes recognizes the need to move toward a model of counseling which reduces the importance of traditional therapeutic values and stresses the need for humane relationships. This model encourages an equal relationship between the counselor and the client, an examination of conscious determinants of behavior, and a belief in the client's ability to change.

***Victim Services on a Shoestring.***—The criminal justice system is currently demonstrating more concern about the victims of crime. Robert M. Smith, probation and parole officer for the State of Vermont, writes that although we in corrections oftentimes do not become involved with offenders until long after some crimes were committed, we still can play a significant role with regard to victims. Furthermore, some of these interventions do not require additional resources; rather, it is a matter of rethinking our own attitudes.

***Medical Services in the Prisons: A Discriminatory Practice.***—This article by Professor James T. Ziegenfuss reviews the provision of medical services in prisons and the growing involvement of the courts. Studies reported in the literature raise serious questions as to the quality and quantity of such care. Traditional approaches would suggest amelioration of the situation by providing more and better care. However, the consideration of alternatives to the present delivery system is examined in this article, as exemplified by the developing drug and alcohol treatment system. Importantly, the resolution of the problem is defined in terms of service system design and redesign. Additional needed research and analytical studies are identified.

***Legal Assistance to Federal Prisoners.***—Legal Aid Attorney Arthur R. Goussy describes the duties of the visiting attorney to the Federal Correctional Institution, Milan, Michigan from February through October 1981. Commencing in April, a total of 136 interviews were conducted with 126 inmates during visits taking a total of 71 hours. Prison authorities felt this service would assist inmates in: (1) pursuing their criminal cases; (2) coping with prison grievances; and (3) resolving private legal matters. This paper addresses, experientally, these problems and the merits of legal consultation.

***Love Canal Six Years Later: The Legal Legacy.***—It was August 1978 when the New York State Health Commissioner declared a health emergency at the Love Canal site on the outskirts of Niagara Falls, which ultimately led to the evacuation of nearly 1,000 families. For 5 years, Hooker Chemical and Plastics Corporation had used the 15-acre site to dump 21,800 tons of toxic chemicals until it sold the property to the Niagara School Board in 1953. Since 1978 the Justice Department has initiated a $124.5 million lawsuit against Hooker and New York State has filed suits totalling $835 million, charging Hooker with responsibility for the Love Canal disaster and other illegal dumping in the area. Issues remain, however, in the assessment of legal responsibility in this case. In this paper by Professor Jay Albanese questions of causation, prosecution, sentencing, and prevention are examined to illustrate the difficulty in doing justice in cases involving the scientific and legal issues raised by exposure to hazardous waste.





# The Evolution of Probation

*The Historical Contributions of the Volunteer**

BY CHARLES LINDNER AND MARGARET R. SAVARESE**

AS MOST of us already know, probation was brought into existence in this country by a relatively small number of dedicated individuals, most of whom were volunteers. Of course, the very first name that comes to mind is that of John Augustus whose pioneering work in and around Boston during the mid-1800's earned for him the title, "father of probation." But there were other volunteers, both in Massachusetts and other jurisdictions such as New York and Chicago, who followed Augustus and who continued his work, still on a voluntary basis, winning acceptance for probation, in the process and, thus, laying the groundwork for passage of the first official probation laws.

Whereas volunteers had been the undisputed leaders and pioneers during the early stages of the evolution of probation, their role changed radically very shortly after the enactment of probation legislation. Almost inevitably, the advent of publicly paid professional probation officers led to an eventual diminution of both the volunteers' functions and status within the system. In most jurisdictions, a consistent pattern emerged following the creation of a formal, official probation system; as paid probation officers were hired, increased in numbers, and became professionalized, they often concentrated their organizational efforts on the removal of volunteers from the system or, at the very least, on severely limiting the role and functions of volunteers.

In New York State, for example, the trend toward professionalism was evident during the first decade of statutory probation services and, in many instances, publicly paid probation officers were simply substituted for volunteers. Elsewhere, volunteers were subjected to supervision by professional, salaried probation officers, limited in the scope of their duties and responsibilities, and assigned reduced caseloads. Most importantly, a number of attacks on the quality of volunteer work served as a stigma and tarnished the credibility of volunteers as a whole. So strong was the anti-volunteer feeling, as a result, that it would not be until the 1960's that a revival of volunteer services in probation would occur.

Whereas the contributions made by the early volunteers to the development of probation have received considerable attention, the later struggle between volunteers and professionals has been overlooked for the most part. This article is an attempt to explore the various roles played by volunteers at different stages in the evolution of probation culminating in the volunteer/professional conflict and the eventual outcome of that struggle.

## THE ROLE OF VOLUNTEERS PRIOR TO THE PASSAGE OF PROBATION LEGISLATION

The years prior to the passage of the statutes legally authorizing probation and the appointment of probation officers could very well be called the "golden years" of voluntary probation services for it was during this period of time that volunteers played their most prominent, fruitful role in both initiating and then developing probation until it became an accepted, well-established practice. Indeed, in many jurisdictions, long before probation received the official sanction of law, volunteers were active in the courts where they provided, on a strictly informal, unofficial basis, a type of assistance which would, much later, be recognized and accepted as the essential core of professional probation practice. The services provided by these early volunteers included both investigations of defendants and informal supervision, for although the courts lacked the ability, at this time, to place an offender under formal probation supervision, the combination of a suspended sentence plus informal supervision was often used as an alternative and served essentially the same purpose.

### *The Premier Volunteer*

Of course, the first and foremost volunteer was John Augustus and his accomplishments in launching probation in this country overshadow the efforts of all other volunteers who labored during this period prior to the existence of a formal probation system. Appropriately credited with being the "father of probation," Augustus was the "first to invent a system, which he termed probation, of selection and supervi-

*This is the second in a series of four articles on the evolution of probation.

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I am convinced it will continue to provide needed services. Constitutionally, the courts have said that prisoners deserve decent treatment, access to the courts, and recognition of many legal rights not lost by confinement. This program is one answer to this mandate that seems reasonable and appropriate. Accordingly, I would recommend testing it in other Federal districts where Federal prisons exist and in the various state systems. It is a resource that the penal systems could easily acquire and quickly dispense with (by due notice in the contract) if not satisfied. But if successful, as the experience in the Eastern District of Michigan has proven to be, it could be beneficial to the Criminal justice process.



# Love Canal Six Years Later: The Legal Legacy*

BY JAY S. ALBANESE, PH. D.

*Department of Criminology and Criminal Justice, Niagara University*

IT WAS AUGUST 2, 1978, when the New York State Health Commissioner, acting on studies finding a very high incidence of cancer and other diseases, declared a health emergency at the Love Canal site on the outskirts of the City of Niagara Falls. The Commissioner recommended that children under 2 years of age, as well as pregnant women, be evacuated from homes in the area, and that the 99th Street School remain closed in September.

Five days later, President Carter declared the Love Canal site a Fedeal disaster area, and the State of New York began to buy nearly 240 abandoned homes at a cost of $10 million. Nevertheless, the Federal Disaster Assistance Administration ultimately denied New York State's request for a reimbursement of the $22 million spent in relocating families and in a cleanup effort. Concern about the safety of the area continued, however, for in August 1979 the Niagara School Board voted to close a second area school due to chemical contamination.

It was the element of surprise that made the Love Canal situation so shocking. There was no slowly accumulating body of evidence that the area was unsafe, and no public information was available to confirm or set aside suspicions regarding the cause of the area's growing health problems. Only when the Health Commissioner's declaration was made in 1978 did the panic set in, turning a formerly typical surburban neighborhood into a virtual ghost town.

It did not take long, however, before the legal system was called upon to determine responsibility for (1) the severe health problems experienced in the area, (2) the costs of relocating displaced families, and (3) the costs for a cleanup of the area. The urgency of these legal claims was amplified in late 1979 when a Federal study indicated that the odds that Love Canal residents would contract cancer were as high as 1 in 10. In addition, the U.S. Environmental Protection Agency (EPA) reported that it had found four suspected carcinogens in air samples taken from the area (for a review, see New York State, 1980).

As a result, on December 20, 1979, the U.S. Justice Department initiated a $124.5 million civil suit against Hooker Chemicals and Plastics Corporation charging it with dumping chemical wastes at four different sites in Niagara Falls. On April 28, 1980, the New York State Attorney General also filed a $635 million lawsuit against Occidental Petroleum Corporation and its subsidiary (Hooker Chemical) charging them with responsibility for the problems and cleanup at Love Canal.

The problems at Love Canal continued in 1980 when further tests of area residents by the EPA were said to reveal genetic damage that could result in cancer and birth defects (for a review, see Kolata, 1980; Levine, 1982:153; Shaw, 1980). These findings led President Carter in May 1980 to declare a second Federal emergency, which resulted in the evacuation of an additional 710 families.

In 1982, tests conducted by New York State found dioxin (a chemical that has been linked to cancer, birth defects, and disorders of the nervous system) in abandoned homes in the Love Canal neighborhood to be "among the highest ever found in the human environment" (Dionne, 1982). A few days later, the EPA released its report claiming that only the houses of the "inner rings" closest to the former canal site were still uninhabitable and that families could move back into the other homes. The controversy was rekindled, however, when it was found that only four of the EPA's 11 consultants would say they "absolutely" supported this position. Six said they did not support the conclusion at all (Tyson and Peck, 1982). In late 1982, the 226 homes of the "inner rings" were bulldozed into their foundations and covered over.

Unfortunately, the legal legacy of the Love Canal disaster continues 6 years later. In 1983, the EPA discovered a "significant migration of chemicals" beyond a proposed containment wall and declared a "total review" was needed of their 1982 determination of habitability. The EPA said a new determination of habitability may not be made until 1988 (Perlez, 1983). Furthermore, neither the Federal nor state cases have been settled out of court, and it appears certain that the cases will be resolved only after trial (Tyson, 1982).

*Presented at the Annual Meeting of the Academy of Criminal Justice Sciences in San Antonio, Texas, March 1983.

It is the resolution of these legal issues, however, that lies at the heart of the Love Canal dilemma. That is, without a determination of legal responsibility, a swift cleanup of the area has been prevented, no guidance has been offered for the resolution of similar cases in other parts of the country and, most importantly, the compensation of those who have suffered severe personal and property damages has been delayed. Furthermore, without an accurate understanding of responsibility for the Love Canal disaster, any prosecution, sentencing, or prevention strategy that is developed may be misdirected and, therefore, ineffective. It is interesting, nevertheless, that despite the intensive, nationwide attention given to the Love Canal case, there has been relatively little effort to properly establish its cause.

### *Causation*

It was 1894 when William T. Love began digging a canal which he hoped would join the Niagara River to Lake Ontario by circumventing Niagara Falls. Because direct-current power was the only way to generate electricity at the time, William Love felt that his proposed canal would spark the development of a model city whose cheap hydroelectric power would make it an ideal site for industry.

Before Love's canal was very far along, however, an electrical engineer, Louis Tesla, developed a practical way of producing alternating-current electricity. Because alternating-current could be transmitted over great distances, it was no longer necessary for industry to be located near a water supply in order to generate cheap electricity. This breakthrough caused Love's backers to desert his project, and the Love Canal property was sold at a public auction in 1910.

In 1940, Hooker Chemical Company bought part of the Love Canal site and used it to dump chemical wastes from 1947-1952. As it turned out, the 15-acre trench that Love left behind was an ideal spot to bury wastes.

> The company considered the old canal bed, 3 meters deep and 18 meters wide, an excellent disposal site because it was dug into a layer of clay, a material through which liquids flow slowly, if at all. In some places, Hooker dug deeper to increase the amount of waste it could deposit there. In all, about 20,000 metric tons of waste in old metal drums were buried and then covered with clay that previously had been removed from the site. The clay created a sealed "vault" that was expected to hold the chemicals securely (Kiefer, 1981:30-1).

Evidence has also been found indicating that the U.S. Army used the site to dump wastes during this period (New York State Assembly, 1980). In 1953, Hooker sold the Love Canal property to the Niagara School Board for one dollar. The deed contained a waiver of responsibility for any injuries that might result from the buried chemicals.

It is at this point where most investigations of causation have ended. Given the circumstantial evidence that Hooker "unloaded" a worthless piece of property (a former chemical dump), an immediate assumption was made by nearly everyone that Hooker was responsible for the Love Canal disaster. Indeed, both popular accounts of the episode, as well as the government lawsuits, claim Hooker to be responsible and, therefore, liable for damages and compensation (Brown, 1981; Gibbs, 1982). A closer examination of the circumstances surrounding Hooker's sale of the property to the Niagara School Board reveals some enlightening, but overlooked, evidence.

The fact that the deed included a disclaimer of Hooker's responsibility for any injury was certainly a factor in the widespread perception that Hooker had tricked the Niagara School Board. A look at the entire final paragraph of the deed, however, leads to a somewhat different conclusion.

> Prior to the delivery of this instrument of conveyance, the grantee herein has been advised by the grantor that the premises above described have been filled, in whole or in part, to the present grade level thereof with waste products resulting from the manufacturing of chemicals by the grantor at its plant in the City of Niagara Falls, New York, and the grantee assumes all risk and liability incident to the use thereof. It is therefore understood and agreed that, as a part of the consideration for this conveyance and as a condition thereof, no claim, suit, action or demand of any nature whatsoever shall ever be made of the grantee, its successors or assigns, for injury to a person or persons, including death resulting therefrom, or loss of or damage to property caused by, in connection with or by reason of the presence of said industrial wastes. It is further agreed as a condition hereof that each subsequent conveyance of the aforesaid lands shall be made subject to the foregoing provisions and conditions.

As this portion of the deed indicates, Hooker appeared to be honest in its description of the property. Contrary to popular opinion, Hooker acknowledged the fact that chemical "waste products" were buried there that could cause "injury" or "death." This accurate description of the property is preceded by their disclaimer, which is common in property sales. At the end of the paragraph, however, Hooker adds that "each subsequent conveyance" of the property must include the warning that potentially dangerous chemicals are buried there. Therefore, Hooker was apparently concerned that if the School Board, or subsequent owners, later re-sold the land, innocent third parties might be unaware of the potential hazard.

Furthermore, as investigative journalist, Eric Zuesse, was to find out later, Hooker also made sure that School Board representatives actually inspected the site before buying it.

> Hooker had escorted them to the Canal site and in their presence made eight test borings--into the protective clay cover that the company had laid over the Canal, and into the surrounding area. At two spots, directly over Hooker's wastes, chemicals were encountered four feet below the surface. At the other spots, to the sides of the Canal proper, no chemicals showed up.
>
> So whether or not the School Board was of a mind to inspect the Canal, Hooker had gone out of its way to make sure that they *did* inspect it and that they did see that *chemicals* lay buried in that Canal (1981:19).



It is also interesting to note that Hooker's sale of the canal property was not entirely voluntary. Niagara School Board records indicate that plans for building the 99th Street School on the Love Canal site were developed 2 years before it was purchased. In addition, the School Board had threatened to condemn the property and seize it under eminent domain, if Hooker refused to sell it (Wilcox, 1957). Placed in this position, Hooker attempted, unsuccessfully, to sell it only if the canal site was used as a park.

> Hooker wanted to require that the donated premises "be used for park purposes only, in conjunction with a school building to be constructed upon premises in proximity to" them. And it wanted the Board to agree that, should the property ever cease serving as a park, title to it would revert to Hooker. Instead of these restrictions, which the Board rejected, the company had to settle for the liability provisions and warnings in the last paragraph of the deed hammered out in meetings between Hooker and Board representatives (Zuesse, 1981:22).

The attorney for the School Board also wrote a letter to the Board, warning them that the deed places liability upon the School Board for any damages that arise from the canal property. In spite of this warning, however, the School Board unanimously accepted the deed to Love Canal in May 1953 and built the 99th Street School on the site.

Hooker provided additional evidence of their concern over the use of the Love Canal property in 1957. In that year, the Niagara School Board, which was in financial difficulty, considered selling some of the unused canal property to developers in order to build homes. Once again, Hooker strongly resisted using the land in this manner. A letter from Hooker's vice president and general counsel to the School Board president in November 1957 expresses this concern.

> It is our feeling that even though great care might be taken at this time in the construction of buildings on the property that as time passes the possible hazards might be overlooked with the result that injury to either persons or property might result. It is our primary purpose in calling these facts to your attention to avoid the possibility of any damage to any one or to any one's property at any time in the future and we feel that the only way that this can be assured is by using only the surface of the land. We still feel very strongly that the subsoil conditions make it very undesirable and possibly hazardous if excavations are to be made therein and urge most strongly that arrangements be made to use the property for the purposes intended, since we also feel that additional park or recreational facilities in this area are very desirable (Wilcox, 1957).

Hooker's plea was successful this time, and the School Board's tie vote defeated the resolution to sell the property to developers.

The victory was a hollow one, however, because late in 1957, and again in 1960, the City of Niagara Falls installed sanitary and storm sewers 10 feet below the surface of a new street that was to be paved across the middle of the canal site. Placed on gravel beds, these sewers probably violated the waste storage area and allowed for the escape of chemicals.

In 1960, the School Board donated the canal property North of the School to the City of Niagara Falls and, in 1961, auctioned the southern portion for $1,200 to a private citizen. In 1972, the City ordered the owner to do something about the "strong chemical odors permeating from ground surface," and after spending $13,000 on the property, he sold it to a friend for $100 (Zuesse, 1981:26). After several seasons of above average precipitation, the serious health problems began to appear, followed by the health emergency in 1978.

Given these facts, it does not appear that Hooker acted irresponsibly in its handling of the Love Canal property. If responsibility is to be properly assessed, it appears the School Board and the City of Niagara Falls failed to act cautiously, or to follow warnings, regarding the use of the former canal site. Interestingly, both the Federal and State suits are against Hooker, rather than the City or the School Board. (The City and Board are named in the suits, but only to insure their cooperation with any remedial measures that mey be ordered on their property.)

Perhaps the most important reason for the continuing legal entanglement surrounding Love Canal, therefore, is the fact that Hooker is not the proper target of the lawsuits (see Albanese, 1982). As a result, strategies for prosecution, sentencing, and prevention have been misdirected.

### *Prosecution*

The avenues for prosecution in cases like Love Canal are surprisingly limited. It was not until 1976 when Congress passed the Resource Conservation and Recovery Act (RCRA) which made legislation available to effectively protect land, food, and drinking water from environmental pollution. Subtitle C of RCRA regulates the identification, transporation, generation, disposal, and inspection of hazardous wastes. Violators of the provisions are liable (when violations are not corrected within a specified period) for civil penalties of up to $25,000 per day of noncompliance, as well as revocation of their waste permit. Persons who knowingly transport, dispose, or falsely represent any document relating to hazardous waste are subject to criminal fines of up to $25,000 per day of violation, as well as imprisonment for up to 1 year. A second conviction subjects the offender

to penalties of up to $50,000 per day and 2 years imprisonment.

Although the RCRA was passed in October 1976 and the EPA was required to administer regulations to implement subtitle C within 18 months, the EPA did not do so for 4 years. Following a suit against the EPA by two environmental groups, a Federal judge set new dates for implementation in 1979. It was November 1980, however, before the EPA implemented the first of its regulations under RCRA, much to the dismay of the U.S. Senate which found the EPA's justifications for the delay as "lacking in merit" (U.S. Senate, 1980). The EPA regulations now require handlers of hazardous wastes to register with the EPA and to comply with a reporting system which tracks the movement of wastes from their generation to their disposal.

Numerous problems exist, however, that preclude effective prosecution of hazardous waste violators. First, and most significant, is the lack of knowledge of the true risk and long-term effects of exposure to various types of hazardous chemicals. As the General Accounting Office has recently pointed out,

> The scientific data base is deficient in dealing with hazardous waste problems. Current sampling and analytical methods are not standardized or validated...EPA's ability to assess the risks posed by hazardous waste dump sites is also deficient. Little is known concerning how far and how fast wastes may move from dump sites to affect the populace and how long wastes may persist in hazardous forms...Without fairly quick, inexpensive methods to identify hazards and assess risks, it will become increasingly difficult for EPA to manage the problem. Setting priorites for site investigations, undertaking enforcement actions, and determining appropriate cleanup measures depend upon knowledge that the scientific community cannot sufficiently provide at this time (1981:33).

A second problem is that the EPA does not know what resources are required to investigate suspected violations, nor is it sure of the number of sites that must be investigated. The incredibly high rate of discovery of new hazardous waste sites has compounded the problem.

> Since 1979 EPA has increased its efforts and resources to investigate and evaluate hazardous waste sites. These efforts, however, have not enabled EPA to perform work at thousands of sites that must be investigated and evaluated. Over 3,400 sites existing at December 31, 1980 had not had preliminary assessments performed or final strategy determination made.
>
> EPA's fiscal year 1981 budget projected that funding would be sufficient to perform initial investigations on 500 sites and full investigations at 70 sites. At the end of 1980, EPA was identifying new potential hazardous waste sites at a rate of over 400 per month (U.S. Comptroller General, 1981).

Finally, litigation is time-consuming, expensive, and the possibility of harm often difficult to prove, thereby limiting prosecutions.

In December 1980, however, after being overwhelmingly approved by Congress, President Carter signed into law the Comprehensive Environmental Response, Compensation and Liability Act of 1980 which established a $1.6 billion "superfund" to be administered by the EPA to clean up sites such as Love Canal. Nearly 90 percent of this money is to be raised from 1981-1985 through an excise tax on chemical companies. In addition, this legislation allows the government to sue to recover money spent from the fund, and it makes those illegally disposing hazardous substances liable to pay for the cleanup. The existence of this fund now allows the EPA to clean up waste sites first, and then to recover the costs from those responsible later. The superfund also allows the government to clean up sites where the violator is unknown, no longer exists, is unable to pay for the cleanup, or declares bankruptcy. Further, it provides funds for a program of investigation and enforcement actions against environmental law violators.

Although the superfund has provided some immediate relief in providing for cleanups prior to court settlements, several serious prosecution problems remain.

> Although EPA's enforcement activities are attempting to force companies to clean up hazardous waste sites, this is only a partial solution. By showing "potential" harm, EPA decreases time and money for litigation, though substantial evidence is still required to sustain risk or harm arguments, and may obtain some timely relief by settling out of court. However, with current resource levels, EPA estimated that only 40 to 50 enforcement actions a year could be filed, while the number of sites with enforcement potential is ever increasing.
>
> The superfund legislation will aid EPA in taking more timely and effective cleanup action at more sites than is now possible. Although the legislation provides $1.6 billion over the next 5 years, it is difficult to say how many sites can be acted upon because of varying factors, such as costs of cleanup at individual sites and how often payments from the fund will be reimbused from responsible parties. If EPA is forced to go to court for this reimbursement, past experience has shown that court cases have been limited by both the resources needed to pursue cases and the time it takes to ultimately resolve them (U.S. Comptroller General, 1981:42-3).

As a result, an alternative must be found to the slow and resource-consuming problems of hazardous waste litigation.

### *Sentencing*

Historically, law violators have been handled according to one of four philosophies of sentencing: retribution, incapacitation, deterrence, or reformation. In cases of organizational misbehavior involving hazardous waste, none of these strategies has yet been proven to be workable, although there are some reasons for optimism.

Retribution seeks to punish offenders in proportion to the seriousness of the offense. Although this justification for punishment may have some relevance for individual offenders, it does not appear to be useful in cases of illegal hazardous waste disposal. Clearly,



an "eye for an eye" is a strained analogy in cases of organizational crime. Its only possible relevance would be in the widely shared view that intentional or reckless polluters should be dealt with more severely than cases of negligence or accidental behavior.

Incapacitation aims to prevent crimes by physically restraining offenders. In the United States, this is most often accomplished through incarceration. In cases of organizational crime, the equivalent occurs when a company's license or permit is suspended for a certain period. Most states also have provisions to permanently revoke a company's license, thereby permanently putting it out of business, but such a strategy is very rarely employed due to its deleterious effects on employees and the local economy.

Deterrence as a sentencing rationale sees crime prevention as the result of the threat of legal penalties. Therefore, if offenders are penalized, they will be reluctant to commit the offense again, as will potential violators who see what happens to those who are caught. Unfortunately, deterrence is effective only when the penalty is swift and certain—two features uncharacteristic of hazardous waste cases (Beccaria, 1764; Andenaes, 1974). As indicated earlier, the prosecution of organizational crime is characterized by neither swiftness or certainty and, therefore, criminal penalties are unlikely to deter environmental law violators.

Reformation of offenders to correct social or psychological shortcomings was, for a long period, a widely shared correctional philosophy for the treatment of individual law violators. Corporate offenders rarely commit crimes as a result of these influences, but on a different scale, "organizational defects" can occur where corporate decisionmaking, supervision, or recordkeeping policies are inadequate to insure their legality. These can be corrected through better regulation or as conditions of settlements with enforcement agencies. Andrew Hopkins, in a study of violations of consumer-protection laws in Australia, found 15 of 19 cases of corporate violations to be due to correctable "organizational defects" (Hopkins, 1980). Therefore, reformation may indeed be a useful strategy for sentencing policy where organizations are involved.

### *Prevention*

Although recent work has suggested that organizational misbehavior is deterrable due to the fact that it is usually rational, goal-directed behavior (as opposed to spontaneous, impulsive behavior), and that the avoidance of negative publicity is an objective of most organizations (Braithwaite and Geis, 1982), the important elements of certainty and swiftness are still lacking for most types of organizational misbehavior. Nevertheless, a recent investigation of large increases in the resources devoted to the enforcement of coal mine safety regulations found a significant reduction in fatality rates (Lewis-Beck and Alford, 1980). This finding suggests that by increasing the probability of apprehension, a significant deterrent effect may be realized. Only through similar studies in other areas, however, can the usefulness of deterrence as a prevention strategy be better established.

According to the EPA, nearly 57 million tons of hazardous wastes are produced each year by industries across the county. Further, these corrosive, flammable, or toxic wastes do not include radioactive waste products which are monitored by the Nuclear Regulatory Commission (which has not yet come up with a permanent disposal method for radioactive waste). Clearly, an effective prevention strategy designed to stop the illegal generation, transportation, or disposal of these wastes will not be modest.

It will be necessary, perhaps, to abandon prevailing strategies for prevention of future Love Canals. The inability of government agencies to successfully prosecute, deter, incapacitate, or reform organizational misbehavior with any consistency has forced many private citizens to fend for themselves on the legal battlefield. Such a decision does not lead down an easy path, however.

The "superfund" legislation does not allow individuals to sue the fund for damages caused by exposure to toxic wastes. Victims can, individually, sue a company for damages but, as one commentator has noted, "such lawsuits are usually very expensive and can go on for years" (Shabecoff, 1980:1). This is because individuals must generally pursue compensation under the provisions of common law.

Under common law, an individual can initiate a civil suit in hazardous waste cases using several different strategies, including negligence (where the responsible party should have been aware of a substantial and unjustifiable risk), strict liability (where the nature of the activity, i.e., toxic dumping, has a great possibility for harm and those engaged in it are criminally liable for legal violations whether or not they had intent), nuisance (knowingly or recklessly creating or maintaining a condition that endangers the health or safety of others), or trespass. To successfully invoke any of these claims, however, it is necessary for the damaged party to: (1) locate the source of the hazard, (2) quantify its presence, (3) establish its migration from the source to the damaged property or person, (4) demonstrate the defendant's responsibility for it, and (5) provide evidence of a link between the hazard and the damage suffered. This is an incredibly difficult burden of proof for any individual which is expensive, time-consuming and in some cases, impossible.

Faced with this tremendous burden of proof, individuals may be discouraged from pursuing legal relief for health damages from hazardous waste. The likelihood of adequate relief is dim because such litigation may take years; providing the scientific/technical evidence is expensive; civil procedures cannot provide immediate relief; delays may lead to inadequate out-of-court settlements; total damages may be greater than the polluter's ability to pay; workmen's compensation laws cannot apply since there is no clearcut cause/effect link; some injuries may take decades to manifest themselves; and State laws may apply a statute of limitation which would put a time limit on liability (U.S. Comptroller General, 1981:47).

This is an especially significant problem because in cases, such as Love Canal, where the responsibility appears to lie with a governmental body (such as a City or School Board), who can citizens sue to recover damages? Governments obtain their money through taxes, so a successful claim will likely be recovered through tax increases. Therefore, when governmental bodies become defendants, citizens can only sue "themselves" inasmuch as they are the source of the government's assets. This situation makes the inability of citizens to sue the superfund for damages an especially serious problem.

Due to the difficulties encountered by citizens in recovering damages, governments may be better off as public advocates, rather than criminal prosecutors, in hazardous waste cases. Until the probability of apprehension is more certain and the scientific link between exposure and illness better established, criminal cases will be difficult to win and perhaps not worth winning. Criminal intent is very difficult to establish in cases of organizational crime, criminal fines often meaningless to large corporations, and sentences of imprisonment are extremely rare when convictions are obtained. Furthermore, criminal cases do nothing to help those damaged by the violations.

As a result, governments may be better advised to pursue a policy of *compensation* for those who are the victims of hazardous wastes until they are better able to prevent it through deterrence or reformation. Such a goal cannot be realized, of course, until the recovery of individual damages is guaranteed when governmental bodies are defendants. Furthermore, it is impossible to accurately aim prosecution, sentencing, and prevention strategies unless the initial investigation has properly assessed responsibility for the harm caused. At Love Canal, this does not appear to have taken place.

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# News of the Future

## RESEARCH AND DEVELOPMENT IN CORRECTIONS


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### Terminating The Executioner
### How The Empiricist Can Help

AS MY TITLE for this column implies, I have a bias I must declare. I view the return of the executioner to the administration of justice in America as a grave regression. I want to terminate his repellent services as needless in a resourceful and civilized society, and destructive of the sense of community in a necessarily plural society.

Criminologists played a significant part in bringing about the recently ended moratorium on capital punishment. The work of such eminent figures as Thorsten Sellin, Negley Teeters, Marvin Wolfgang, and Leonard Savitz, among many others, contributed an empirical authority to an argument that was unlikely to win on its philosophical merits alone.

It is not surprising that in recent years we have turned our attention to other matters. After all, how can one study the deterrent effects of the death penalty when nobody is being executed? We have had a long interval during which we could look into other problems, but that respite has come to an end. The retentionists have won victories in the Federal courts that assure that fresh data in adequate quantitites will soon be available for our study. It is time for criminologists to return to the topics to which their predecessors gave such fruitful study. In this contribution I want to suggest some studies that seem urgent to me as abolitionists prepare for a new battle with those who believe that somehow killing people is the way to teach citizens that killing people is wrong. My wish list is addressed first to my fellow criminologists, but I hope that its contents will be of interest to abolitionists who are looking for more ammunition for the difficult campaign ahead.

I write from some experience. Last year saw the publication of *The Death Penalty: A Debate.*[1] This was a confrontation between Ernest van den Haag, an ardent supporter of capital punishment, and myself, at least as ardent an opponent. I concluded my side of the controversy with the same view with which I began: this is an issue which will not be resolved by reason and facts. One believes that some kinds of criminals should be killed, or one does not. I was reminded of this state of affairs in a recent conversation with a dear friend of mine who, after telling me how much he liked the book and my arguments, went on to say, "But John, why should there be a debate? You said it all when you said that killing people is wrong. Why say anything else?"

Why indeed? The answer, I think, lies in the empirical quality of our culture. More than any of our ancestors, we believe that arguments should be settled by facts rather than by ethical or moral considerations. Right and wrong are no longer decided by doctrine when data can be collected, coded, tabulated, analyzed, and interpreted to settle the greatest good of the greatest number. Whether we like it or not—and I don't—we are all utilitarians, unwitting disciples of Jeremy Bentham.

Debates are to be conducted with deference and reference to the facts, and the adversaries are not to scream at each other. So, with all the civility we could muster, Professor van den Haag and I tried to argue our cases as rationally as we could, scooping up the facts where we could and ordering them in as logical an array as possible. The difficulty for both of us was that the facts were surprisingly difficult to find and verify. In this contribution I want to suggest further research that ought to be done to make my side of the debate easier to fight. I will leave it to Professor van den Haag to present his demands on another occasion, probably in another forum. My redoubtable opponent needs no help from me.

[1] Ernest van den Haag and John P. Conrad. *The Death Penalty: A Debate.* (New York: Plenum, 1983).

### A Typology Of Homicide

We need a system for classifying the persons convicted of first degree murder. Murderers kill for many different reasons and under widely differing circumstances. Most citizens will agree that the crime of passion is somehow less reprehensible than a killing by a gangster's hitman. If we are going to study homicide seriously, we must not assume that all homicides are alike as we collect our data. We must learn to differentiate and discover what differences should be significant for an understanding of the tragedies that statisticians transform into data. Classification is the beginning of research. As to homicide, we have a long way to go.

At present, the Bureau of Justice Statistics (BJS) maintains an annual tabulation of all persons sentenced to death by the usual demographics: age, race, sex, marital status, and—as one criminological item—prior felony history. I admire the systematic way in which these data are maintained for special reasons of my own. Many years ago, when I was chief of research at the Federal Bureau of Prisons, one of my responsibilities was the publication of the precursor of the Bureau of Justice Statistics' annual compilation, *Capital Punishment.* The difficulty of finding in each state that carried on executions someone who could and would provide us with timely data was much more than I anticipated when I took on the job. I can give the BJS credit where it is due, but I am insatiable. Much more must be done.

What we need, so long as we have the death penalty in effect in this country, are the data on *all* the homicide convictions in the country. We ought to know how many men and women are sentenced to death, and how many receive a technically lesser penalty, life imprisonment—or that fearful consignment to a state of hopelessness, Life Without Possibility of Parole—as well as the lesser degrees of homicide: second degree murder, and the various kinds of manslaughter that have been provided for in the nation's penal codes.

Once these data become available, we need further attention to classification. We ought to know as much as we can codify about the nature of the murders for which these people were convicted. How many of these homicides were crimes of passion? How many were committed in the course of a robbery or burglary? How many were committed after a rape or other sexual felony? How many were committed by hit men on contract? How many victims were police officers or prison guards?

Other classifications of homicide will occur to meticulous statisticians, but my point should be evident. We need to compare the disposition of homicides using the independent variables which constitute a typology of homicide. Is it true that the men and women who are sentenced to death are specially heinous or that the nature of their crimes is different from those who are sentenced to life in prison? What kinds of circumstances mitigate the punishment for murder? I did not know the answers to these questions as I argued my side of the debate, and I would have been grateful for current information on the differences—even if that information would have

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