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## Future of Corrections

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# Contents

	Page
Preface .....	i
John P. Conrad	
Editorial .....	1
William G. Babcock	
[ The Future of the Local Jail .....	110525 3
Merlyn Bell	
[ Is Ignorance Invincible? .....	110526 11
George Beto	
[ The Future of the Long-Term Offender .....	110527 16
Alonzo M. Cobb, Jr.	
[ Social Policy and the Future of Criminal Justice .....	110528 19
Elliott Currie	
[ Moving into the New Millenium: Toward a Feminist Vision of Justice .....	110529 27
M. Kay Harris	
[ Some Views on the Future of Criminal Justice .....	110530 39
Joe Hudson	
[ Banishing Goodness and Badness: Toward a New Penology .....	110531 49
Naneen Karraker	
[ Corrections in the Nuclear Age .....	110532 54
Oliver J. Keller	
[ Hard Labor Can Save Prison Time .....	110533 67
Kenneth F. Schoen	
[ The Future of Corrections: A View from a State Correctional Administrator .....	110534 71
Richard P. Seiter	
[ Future Penal Philosophy and Practice .....	110535 76
Leslie T. Wilkins	
The Future of Corrections .....	88
Marvin E. Wolfgang	
[ A Hard But Practical Line .....	110536 90
Ernest van den Haag	
Index .....	95

## A Hard but Practical Line

*Ernest van den Haag\**

Crime rates began to decline in the second half of the 19th century; they continued to "drift more or less steadily downward between 1933 and the 1950's," although the economy was depressed between 1933 and 1941 and prosperous from 1941 until 1960 (Wilson and Herrnstein, 1985:423). However, "crime rates rose during the 1960's, a period of unparalleled prosperity, and continued high during the 1970's" (Wilson and Herrnstein, 1985:423). Only a small part of the rise which began in the 1960's can be attributed to nonrecurring factors, such as the greater proportion of juveniles in the population. Most of the rise was age specific: thus, 18-year-olds committed more crimes than before, *per capita*. It seems fair, then, to conclude that we will have more of a problem in the future and not less — unless we somehow find a way of imitating the Japanese, who with increasing prosperity, industrialization, and urbanization, have long experienced decreasing crime rates. This seems unlikely. Thus, the problem will remain at the doorstep of the criminal justice system: How to deal with more crime so as (1) to control (reduce) crime rates while (2) doing no less justice than before to suspects and victims and (3) without increasing costs beyond what is politically tolerable. This is a tall order. I shall address the problem by considering first sentencing and the alternatives to imprisonment and then imprisonment itself.

The main instruments available to control crime rates are criminal sanctions: *ceteris paribus* the crime rate leaps up when sanctions are less used than before, or become less harsh. It has already been mentioned that crime increased in the 1960's. Between 1962-1979, "the probability that a reported index crime would result in an arrest fell from .32 to .18, the probability that such an arrest would lead to imprisonment fell from .32 to .14, and thus the probability that an index crime would result in imprisonment fell fivefold from .10 to .02" (Wilson and Herrnstein, 1985:423-425). It is not astonishing that the crime rate rose steeply during the period. It is astonishing that it did not rise even more steeply.

Punishment rates have increased, beginning in the 1980's, although they still are far below where they were in the 1950's. Crime rates dipped slightly, but in 1987 they began rising again. Meanwhile the number of prisoners in state prisons grew 45 percent between 1979-1984, while prison space increased by 29 percent and the number of correctional officers, unaccountably, rose by 59 percent (Bureau of Justice Statistics, 1986).

Whatever the causes are that lead a person to engage in criminal activity — and they range from genetic factors to the disintegration of the family and the decline of social authority— it is unlikely that much can be done about them in practice. We are left with punishment as our means of crime control.

The purposes of punishment are usually listed (in any order) as rehabilitation, incapacitation, justice, and deterrence.

Rehabilitation, also called specific deterrence (of the person punished), although advocates insist on discerning a difference, is hardly worth discussing, since it occurs rarely as a result of deliberate programs that could be institutionalized. Rehabilitation,

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collective victims will take on massive proportions, in millions of dollars. In time, these nondangerous, nonviolent offenders will also be controlled by computerized, electronic surveillance, and their offenses will subside.

Corrections will also be modified by more moral value training. Currently, we seem reluctant to teach morals in prison, for we have no dogmatic perspective, as do countries like China. But this situation will change. We are now teaching ethics in business schools like Harvard and Wharton. We are now teaching ethics in law schools. Our society has been unwilling to promote moral, ethical value systems in our MBA, JD, and Ph.D. programs in universities. I believe we will do more moral, ethical value teaching in correctional systems in the future. That is, we will not just give high school diplomas and vocational training, we will seek to inculcate normative, moral values in a much more concerted, positive way than we have ever done in the past. Prisoners and convicted community residents will be required to take training courses in morals and ethics. It will be almost coercive moral training.

But within that framework, there will be self-selected therapy by offenders. They will have the right to choose their own treatment programs. But they must choose something. The right not to be treated will be recognized, but only as a last resort to all the treatment programs available. No one will be coerced to accept treatment, but all will be offered assistance from the healing arts.

The prevailing correctional philosophy will be that only a few convicted offenders require a confined space called a prison. And even prisons should be communities of persons whose dignity is revered. Only the deprivation of liberty should be the punishment. Freedom of movement alone will be presented. All the other amenities of social life should be afforded prisoners: health benefits, nutrition, leisure enjoyments, sexual freedom, educational opportunities, etc. The more freedom of choice that exists in a democratic society, the more severe is the restriction of spatial freedom. Restricted spatial freedom alone should be the meaning of imprisonment.

Maybe the Quakers in the late 18th and early 19th centuries were right: prisoners contaminate one another and should be in separate confinement. The prison of the future might keep prisoners separate from one another. Let them have private meals (as I do in my hotel when I travel); let them have privacy for radio, television, reading, meditation. But let them have as many visits from friends, relatives, and counselors as possible. There should be no restrictions on visits or other communications from outside the prison. Only positive social bonding features would touch them. The more social interaction prisoners have with other prisoners, the more negative social attitudes are encouraged. The Quakers, I think, *were* right: keep prisoners apart. Encourage prison visitors from without the prison to socialize with prisoners. Give prisoners the opportunity to visit their communities, on furloughs, and to develop relationships with leaders who will welcome their return in positive ways, with job opportunities and other forms of stability in the community.

To congregate prisoners is to congregate criminal experience and peer support for continued criminality. Separate criminals from one another. Provide abiding, sustained support from outside the prison, and each prisoner will respond more affirmatively to the social norms of respect, civility, and conformity to the legal norms.

therefore, is unlikely to influence the crime rate. So is incapacitation, if the deterrent effect of imprisonment is separated from the incapacitative effect, which is conceptually possible, although, in practice, the two effects are inseparable.

Before discussing justice and deterrence, let me indicate why rehabilitation, even if, contrary to fact, it were highly successful, is unlikely to reduce crime rates. Neither could incapacitation, however extensive. Both, temporarily or permanently, deactivate convicted individual offenders. But as individual offenders are deactivated, they are replaced, just as deactivated dentists or prostitutes are. The proportion of practitioners of these professions (and of any other) in the population is independent from the number incapacitated. It depends on the expected comparative net advantage of the activities over others available to the prospective offender. The expected net advantage determines how many people find dentistry, or prostitution, or law, or burglary worth their while. If more burglars than before, or car thieves, are incapacitated, or rehabilitated, fewer stolen cars or other goods come on the market. The price rises, and therewith the lucrateness of stealing. This induces more stealing until the profitability of the activity ceases to rise; the previous level of profitability will induce the previous level of activity (van den Haag, 1982). So with the sale of sexual services by prostitutes or of legal services by lawyers.

There remain then only two purposes of punishment that need to be discussed: justice and deterrence.

Justice, also known as retribution, or, more recently, as "just deserts," tells us to punish only the guilty, regardless of whether it is advantageous to punish others, and to punish all the guilty as deserved. The criminal justice system would lose much of the popular support it needs if it were not perceived to do justice. However, justice tells us to punish the guilty according to what they deserve, without telling us how to determine desert. It depends on the seriousness of the crime committed and the culpability of the criminal; but we have no principle determining the weight to be given to either. Nor can we measure (except ordinally in some cases) the seriousness of crimes or what that seriousness deserves. In effect, then, justice means punishing the guilty according to what is popularly perceived as deserved. What is so perceived largely depends on tradition. Still, punishments must be perceived as just, if the criminal justice system is to have the support it needs.

Although much maligned, deterrence is the only purpose of the punishment threats of the criminal law. Actual punishment —whatever other purposes it has— is needed to make these threats credible. Threats that are not carried out are bluffs, and become ineffective.

If we intend to deter by credible threats of punishment, the size and probability of punishment must be determined by the degree of deterrence for which we are ready to pay the material and moral price. The greater the risk of punishment and the harsher the punishment risked, the greater the cost of crime to the criminal and, therefore, *ceteris paribus*, the less the net gain from crime he can expect. The less the net gain, the lower the attractiveness of the crime. The attractiveness of crimes differs from their gravity. Thus, we may regard as disproportionate (unjust) the punishments that would deter attractive crimes regarded as not serious (grave) enough to deserve the punishment needed to deter them. At some point, we decide that we prefer burglaries, avoidable by harsher or more probable punishments, rather than to pay the material and moral price of imposing them. Punishment sizes that reflect this decision are appropriate. They will be regarded as just as well.

What sanctions do we have available for the offenders who have not been deterred by the threats of the criminal laws?

Restitution is basically a civil liability —although it may well be decided on as part of a criminal proceeding. Even if full restitution is made to a victim, the criminal liability of an offender is not discharged. That liability for the harm done to society, not to the victim, requires punishment.

Probation is widely used. It ought to be available only for first offenders convicted of a minor offense when no pattern of criminality is apparent. Anyone who has not learned from his first conviction (or who committed a major offense) should be punitively confined.<sup>1</sup> Probation should be denied to adult offenders who continue as adults a juvenile pattern of crime.

The purpose of imprisonment must be punitive —to give the offender his just deserts— and deterrent —to help control crime by making the deterrent threats of the law credible.

There is no evidence to indicate that rehabilitation programs have any effect that would not occur without them. Therefore, rehabilitation must be considered as an occasional incidental effect. Incapacitation is unlikely to make a dent in the crime rate for the reasons already discussed. We are left with retribution (justice) and deterrence as the purposes of imprisonment. These purposes inherently require that the convict be removed from his usual environment and that his activities be limited and controlled, so as to exclude anything inconsistent with the retributive and deterrent purpose of punishment.

Nothing requires that prisons be near metropolitan centers. They may well be built more cheaply in remote areas. Nothing requires that prisoners be idle or prevented from earning wages commensurate with their skills and efforts. There are six reasons for giving prisoners opportunities to work at prevailing wages.

- (1) They may help support their families.
- (2) They may pay taxes.
- (3) They may make restitution, if so ordered, to their victims.
- (4) They may pay for their room and board in prison.
- (5) They may purchase amenities including better equipped cells, special foods, or movies, or books (this will be part of the incentive to work).
- (6) They may become accustomed to doing regular work. This may help in rehabilitation, if anything can.

Prisons should be organized around industrial work opportunities. (Few prisoners are likely to work in agriculture upon release. Hence, most work should be industrial.) Work opportunities could be made available through luring private investors into prison industries by means of tax concessions. The businesses within the prison compound should pay prevailing wages for the skills utilized and less than minimum wages only in exceptional cases, for housekeeping tasks. Despite the obligations mentioned, inmates should not retain less than 25 percent of their wages to be used as they see fit; the wage structure also should be as much of an incentive as possible, with piece work preferred.

Inmates should not be allowed to spend within the prison any money not earned within the prison. No alcohol, tobacco, or interpersonal sex should be permitted within the prison. Inmates who refuse to work should be maintained on a welfare standard, without the amenities purchasable by those who do work.

Currently, prisons are largely run by the most bullying inmates, supervised rather feebly by correctional personnel. Acts of tyranny, intimidation, and violence by inmates against one another are frequent, and are punished, if at all, rather mildly. Such acts —e.g., assaults— should be punished more harshly than they are punished outside prison. The authority of correctional personnel should be strengthened.

As I am writing, some prison administrators distribute condoms to inmates, to protect them against AIDS (rampant among addict and homosexual prisoners). These administrators feel that they can or will not organize and strengthen supervision sufficiently so as to prevent interpersonal sexual activity. An administration that cannot do so also cannot prevent interpersonal violence, and, in effect, cannot run a prison beyond keeping the prisoners inside.

All complaints against inmates and correctional officers should be handled by an outside judicial body, independent of the prison administration and authorized to cancel all, or part, of time off for good behavior. Where necessary, this judicial body should be able to prolong imprisonment by up to three months, or in cases where greater punishment is sought, remand cases to the regular judiciary.

Parole has been linked with the prospect for rehabilitation. Once rehabilitation is dropped as a major purpose of punishment, in favor of retribution and deterrence, the size of punishment may just as well be determined by the judiciary, according to law. Thus, punishments should be determinate, flat, and, as much as possible, mandatory. Both justice and deterrence are served by predictability, and neither is served by judicial discretion, which contrary to intent is more likely to adapt sentences to the personality and outlook of the judge than to that of the prisoner.

There is little point to medium security prisons. Prisons which house long-term prisoners, or prisoners known to be unruly and escape prone, should have high security.

Prisoners confined for less than three years, or otherwise known to be unlikely to try to escape, and, not least, prisoners who can provide adequate security to the authorities (such as is now furnished as bail for unconvicted suspects) ought to be kept in nonsecurity prisons. Although fenced, the prison compounds, organized around the industrial plants that offer work opportunities to inmates (who should not be permitted to leave the prison) should need few other security precautions. Prisoners are likely to recognize that it is more in their interest to serve their time than to live as fugitives. Consequently, security can be reduced to little more than frequent headcounts. Correctional personnel can be reduced accordingly. Recreational, rehabilitative, educational, and exercise programs should be made available to the extent the prisoners demand them and are willing to pay for them from their wages. The punitive purpose of imprisonment would be preserved by the deprivation of liberty and by the nonavailability of many amenities which are available to persons outside prison: travel, a wide range of entertainment, association with family and friends, sex,<sup>2</sup> and the ability to use one's time as one sees fit. Yet the punitive and deterrent purpose of prisons is not fostered by idleness, or the nonpayment of prevailing wages.

High security prisons have a far greater problem with respect to work than non-security prisons do. The work opportunities are likely to be less varied because of the need for intensive supervision. Nonetheless, every effort should be made to make work opportunities available. Prevailing wages should be paid with the deductions listed above.

Ideally, what is produced in prison should be sold on the open market. However, if resistance to this cannot be overcome, government agencies are an alternative market. They need almost anything prison industries could produce.

There is little doubt that more people will be imprisoned in the future than are currently confined. Hence, it is important that imprisonment, instead of enforced idleness or busy work, be made productive for all concerned, and less costly to taxpayers than it is now.

#### *Footnotes*

<sup>1</sup>Income day fines may be an alternative in some cases (see Ernest van den Haag, *Punishing Criminals*. New York: Basic Books, 1975, p. 232). Current law does not explicitly provide for income day fines, therefore I do not here discuss them.

<sup>2</sup>There is not evidence showing that sexual activity is required for physical or mental health.

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