

112939
-112948

Federal Probation

- [Systems Therapy: A Multimodality for Addictions Counseling.....112939.....John D. Whalen]
- [Assessment of Drug and Alcohol Problems: A Probation Model.....112948.....Billy D. Haddock
Dan Richard Beto]
- [Drug Offenses and the Probation System: A 17-Year Followup of Probationer Status112941.....Gordon A. Martin, Jr.
David C. Lewis, M.D.]
- [All-or-Nothing Thinking and Alcoholism: A Cognitive Approach.....115942.....Katherine van Wormer]
- [Lower Court Treatment of Jail and Prison Overcrowding Cases: A Second Look112943.....Jack E. Call]
- [Rewarding Convicted Offenders.....112944.....Hans Toch]
- [Current Perspectives on the Prisoner Self-Help Movement112945.....Mark S. Hamm]
- [Consequences of the Habitual Offender Act on the Costs of Operating Alabama's Prisons112946.....Robert Sigler
Concetta Culliver]
- [Evaluating Privatized Correctional Institutions: Obstacles to Effective Assessment112947.....Alexis M. Durham III]
- [Negotiating Justice in the Juvenile System: A Comparison of Adult Plea Bargaining and Juvenile Intake112948.....Joyce Dougherty]

JUNE 1988

U.S. Department of Justice
National Institute of Justice

112939-
112948

This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.

Permission to reproduce this copyrighted material has been granted by

Federal Probation

to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permission of the copyright owner.

Federal Probation

A JOURNAL OF CORRECTIONAL PHILOSOPHY AND PRACTICE

Published by the Administrative Office of the United States Courts

VOLUME LII

JUNE 1988

NCJRS NUMBER 2

AUG 2 1988

This Issue in Brief ACQUISITIONS

Systems Therapy: A Multimodality for Addictions Counseling.—Chemical dependency is a growing problem which has increased at least tenfold over the past decade. Until recent years the phenomenon was not recognized as a disease, but rather a mental health problem, and current therapies still tend to address mental health aspects rather than the disease of chemical dependency. Alcohol, although a drug, is still considered to cause separate and distinct problems from other drugs. Author John D. Whalen maintains, however, that alcoholism and drug abuse can be treated as one common problem with a set of exhibiting symptomologies. This article describes Systems Therapy, a therapeutic approach developed by the author.

Assessment of Drug and Alcohol Problems: A Probation Model.—Authors Billy D. Haddock and Dan Richard Beto highlight the increased emphasis on assessment methods in drug and alcohol treatment programs and describe the assessment model used in a Texas probation department. Major theories of substance abuse and dependence are dis-

cussed as they relate to assessment. The objectives, components, and general functioning of the assessment model are described. A counselor/consultant is used in the assessment process to offer greater diagnostic specificity and make individualized treatment recommendations. According to the authors, the assessment process facilitates a harmonious relationship between probation officers and therapists, thus promoting continuity of care and quality services.

Drug Offenses and the Probations System: A 17-Year Followup of Probationer Status.—Authors Gordon A. Martin, Jr. and David C. Lewis provide the current status of 78 of 84 probationers previously studied in 1970. Of the original group, 14.1 percent are deceased and 18 percent have had constant problems with the law. Sixty eight percent have had varying degrees of success, with one-third essentially free of all criminal involvement. The study indicates that younger probationers who used heroin and barbiturates were the population at greatest long-term risk and merit the longest periods of probation

CONTENTS

Systems Therapy: A Multimodality for Addictions Counseling	John D. Whalen	4	Consequences of the Habitual Offender Act on the Costs of Operating Alabama's Prisons	Robert Sigler Concetta Culliver	57
Assessment of Drug and Alcohol Problems: A Probation Model	Billy D. Haddock Dan Richard Beto	10	Evaluating Privatized Correctional Institutions: Obstacles to Effective Assessment.	Alexis M. Durham III	65
Drug Offenses and the Probation System: A 17-Year Followup of Probationer Status	Gordon A. Martin, Jr. David C. Lewis, M.D.	17	Negotiating Justice in the Juvenile System: A Comparison of Adult Plea Bargaining and Juvenile Intake	Joyce Dougherty	72
All-or-Nothing Thinking and Alcoholism: A Cognitive Approach	Katherine van Wormer	28	Departments		
Overcrowding Cases: A Second Look	Jack E. Call	34	News of the Future		81
Rewarding Convicted Offenders	Hans Toch	42	Looking at the Law		86
Current Perspectives on the Prisoner Self-Help Movement	Mark S. Hamm	49	Reviews of Professional Periodicals		90
			Your Bookshelf on Review		99
			It Has Come to Our Attention		105

and most intense supervision. For them, marijuana did not serve as a "gateway" drug, though alcohol may have. The authors note that the original group of probationers was supervised by a probation officer who was a specialist in drug offenders. While his probation load was sizeable, it was manageable. For probation to fulfill its crucial mandate—the authors conclude—more resources must be made available to it, and caseloads must be manageable.

All-or-Nothing Thinking and Alcoholism: A Cognitive Approach.—Self-destructive all-or-nothing thinking is both a correlate of alcoholic drinking and a likely area for cognitive intervention. Author Katherine van Wormer contends that it is not the alcoholic's personality but the alcoholic's thinking that is the source of the drinking. Specific cognitive strategies are offered—strategies that should be effective both in recovery from alcoholism as well as in its prevention.

Lower Court Treatment of Jail and Prison Overcrowding Cases: A Second Look.—In 1979 and 1981, the United States Supreme Court issued opinions in which it ruled that double-bunking of prison and jail cells designed for single occupancy was not unconstitutional *per se*. It also indicated that lower courts should demonstrate greater restraint in "second guessing" the decisions of correctional administrators. In 1983, *Federal Probation* published an article in which author Jack E. Call concluded that many lower courts were still quite willing to find overcrowded conditions of confinement unconstitutional. In this followup article, Call finds that after 4 more years of lower court decisions in overcrowding cases, this earlier conclusion is still valid.

Rewarding Convicted Offenders.—Offenders can be rewarded by deescalating punishments in response to behavior one wishes to encourage. This practice has distinguished origins, has been subjected to a variety of criticisms, but is regaining ascendancy. In his review of the controversy, author Hans Toch suggests that defensible reward systems for offenders can be instituted and can enhance the rationality, humaneness, and effectiveness of corrections.

Current Perspectives in the Prisoner Self-Help Movement.—Prison rehabilitation programs are usually designed to correct yesterday's problems in order to build a better tomorrow for criminal offenders. Yet the struggle for personal survival in prison often diverts inmates' attention away from these "official" treatment policies and toward more informal organizations as a means of coping with the

immediate "pains of imprisonment." Prisoner self-help groups promise to bridge the gap between immediate personal survival and official mandates for correctional treatment. Drawing on historical and interview data, author Mark S. Hamm offers a typology that endeavors to explain the promise explicit in prisoner self-help organizations.

Consequences of the Habitual Offender Act on the Costs of Operating Alabama's Prisons.—Habitual offender acts have been adopted by 43 states and are under consideration in the legislatures of others. According to authors Robert Sigler and Concetta Culliver, these acts have been adopted with relatively little evaluation of the costs involved in the implementation of this legislation. The data reported here indicate that one area of costs—costs to departments of corrections—will be prohibitive. The authors suggest that the funds needed to implement the habitual offender acts could be better used to develop and test community-based programs designed to divert offenders from a life of crime.

Evaluating Privatized Correctional Institutions: Obstacles to Effective Assessment.—Institutional populations in the American correctional system have increased dramatically during the last decade. This increase has produced serious concern about both overcrowding and the economic costs of imprisonment. One proposed solution to the current dilemma involves the engagement of the private sector in the correctional process. Although it is apparent that there are a number of potential benefits to be obtained from private sector participation in the administration of punishment, a variety of potential hazards have also been identified. In this article, author Alexis M. Durham III considers some of the hazards associated with the evaluation of privately operated correctional institutions. The discussion identifies some of these potential obstacles to effective evaluation and concludes that although evaluation impediments may well be surmountable, the costs of dealing with these problems may offset the economic advantages otherwise gained from private sector involvement.

Negotiating Justice in the Juvenile System: A Comparison of Adult Plea Bargaining and Juvenile Intake.—Plea bargaining and its concomitant problems have been of little concern to those who study the juvenile justice system. We hear little or nothing of "plea bargaining" for juveniles. However, in this article, author Joyce Dougherty argues that the juvenile system itself is based on the very same system of "negotiated justice" that lies at the

heart of adult plea bargaining. By placing society's interest in "caring for its young" (translated into the doctrine of *parens patriae*) over the individual rights of juveniles, the juvenile justice system has created a situation where the determination of a child's "treatability" has become more important than the

determination of his or her guilt or innocence. The author compares adult plea bargaining and juvenile intake in an effort to illustrate how, despite all theoretically good intentions, the "justice" in the juvenile system is no better than the "negotiated justice" that is the end result of adult plea bargaining.

All the articles appearing in this magazine are regarded as appropriate expressions of ideas worthy of thought, but their publication is not to be taken as an endorsement by the editors or the Federal Probation System of the views set forth. The editors may or may not agree with the articles appearing in the magazine, but believe them in any case to be deserving of consideration.

112944

Rewarding Convicted Offenders

BY HANS TOCH*

Distinguished Professor of Criminal Justice, State University of New York at Albany

ONE OF the most neglected subjects in criminal justice is that of the rationale and/or the criteria for distributing rewards to offenders. This oversight is understandable, since the system is presumably in the business of dispensing punishments, which at first glance appears inconsistent with the opposing business of allocating rewards. This appearance, as it happens, is deceptive, because (among other things) punishments are subject to modification, which means that they can be deescalated, suspended, and discontinued in response to sterling—or, at least, improved—behavior.

Consider the following sample scenarios:

The parole board explains to Inmate Jones why it has decided to release him. "At our last meeting with you," notes the Chairman, "we advised you to show concern about your drinking problem. We see you now coordinate the prison AA program, and we hope you will follow through in the community."

The probation office has reduced Smith's schedule for office visits. "You are married and have a steady job," explains the probation officer, "we can see you less frequently."

The good time review committee has restored the time allowance Inmate Sylvester has lost through prison disciplinary violations. "We recommend restoring good time," explains the board, "because this inmate's behavior has been exemplary for two years."

Resident Endicott is transferred to the Honors Cottage. She comes highly recommended by work supervisors, and has moved from illiteracy to a high school equivalence diploma.

Junctures such as these have two attributes in common: (1) they deescalate the onerousness of the offender's treatment, and they (2) respond to behavior deemed meritorious by corrections staff. The com-

bination fits the dictionary definition of a reward as "something . . . that is offered or given for some service or attainment."

Other developments in an offender's life may also have a rewarding effect, without it being planned for by staff. Such junctures meet the first element of the definition but they lack the second, because there is no desire to reward the offender when his conditions of punishment are mitigated. Examples include the following:

The inmate is given a work assignment in the officers' mess. "Good deal!" he exclaims, "an unlimited supply of snacks!"

A detainee is recommended for commitment, but a psychiatrist demurs: "This man is a malingerer;" he argues, "he prizes the hospital as a respite from confinement."

An offender is segregated for a disciplinary violation. "I've made it into the Big Leagues," he tells friends, "and my creditors cannot get to me in the hole."

A Graduated Reward System in Corrections

A conception of offender careers that is of distinguished vintage envisages progress in the system as a sequence of graduated rewards or deescalated punishments. The inception of this idea rests with Captain Alexander Maconochie, who became warden of the Norfolk Island colony in 1840 and promulgated a roster of prison regulations which is still breathtaking. This document proposes that an inmate's sentence be translated from time-to-be-served to a commensurate obligation to make positive contributions, which Maconochie called "tasks." Productivity and good conduct were to be rewarded, using a fixed scale of "marks of commendation," which were to be allocated on a daily basis. The minimum inmate wage was to be 10 marks a day with provisions for overtime. For 5 marks the inmate could treat himself to the Australian version of three-star meals (regular food cost 3 marks; bread and water were free). Accumulated marks could buy time reduction at the rate of 10 marks for each day of good time.

All inmates in the system were to earn their prog-

*The author wishes to thank Scott Christianson, John Conrad, and Tim Flanagan for constructive comments and suggestions.

ress from tightly supervised prison experiences through seven-man team membership to a community-based reentry stage in which inmates lived in cottages and owned sheep.¹

From 1854 to 1862, a student of Maconochie's, Sir Walter Crofton, ran a derivative regime in Ireland, which has been called the "intermediate system." The regime derives its appellation from a middle (intermediate) stage in a sequence of graduated freedom. This intermediate stage involved residence in a halfway house on work release.

Crofton influenced the New York Prison Association and inspired the wardens and reformers who shaped the Declaration of Principles of the 1870 American Prison Congress. This declaration recommends a "system of rewards" for inmates, "a gradual withdrawal of state restraints" and "constantly increased privileges . . . earned by good conduct." The fifth of the declaration's principles emphasizes that "the prisoner's destiny, during his incarceration, should be placed, measurably, in his own hands."²

The advocates of systematically graduated rewards for inmates argued for this reform in 1840 and can still argue for it, on the following grounds:

(1) *Rewards for good conduct provide hope:* The availability of graduated improvements in the offender's conditions of punishment gives him something to look forward to. He can face his situation with greater equanimity, knowing that his fate can become less onerous in the foreseeable future.

(2) *Rewards provide incentive:* The offender in a graduated system knows that there is something he can do to improve his own condition. This gives him a reason to participate in constructive endeavors or, at least, to "keep his nose clean." Once a person has some reason for self-improvement, he may evolve other reasons, such as love of learning or pride in products of work.

(3) *Such a system empowers the client:* If performance leads to rewards, the person in fact controls his future, in that he can generate improvements through his own efforts. Conversely, he can decide not to buy into the reward system, assuming he is willing to accept the consequences of nonparticipation.

(4) *The sequence is ultimately reintegrative:* As punishments are mitigated, environmental conditions get to approximate life in the community, where the offender must operate free of restrictions. The sequence provides an opportunity for the rehearsal of prosocial behavior under regimes involving decreasing surveillance. Reward systems also are reintegrative because they resemble career ladders in the free world, in which advancement hinges on performance. Lastly, there is value in learning that decent behavior is occasionally profitable.

Critics' Objections to a Reward System in Corrections

Though one might suppose that objections (if any) to reward sequences built into corrections would originate with conservative critics, the loudest protests in fact derive from strongly felt concerns of liberal or radical students of the system. These observers argue that reward systems in corrections are inhumane and undesirable, on the following grounds:

(1) *Reward systems are self-serving:* The goal of corrections officials is envisaged as one of institutional behavior-control, meaning that the objective is to induce inmates to conform to rules that benefit the system rather than the inmate. The historian David Rothman describes parole, for example, as "a disciplinary mechanism far more potent than the lash." He also tells us that prison privileges exist because they can be withheld "to the ends of discipline."³ In other words, rewards become a gambit, a way to achieve prisoner obedience, and a means to discourage manifestations of autonomy by offenders.

(2) *Rewards induce hypocrisy:* If offenders come to participate in programs because program participation is rewarded, they can be presumed not to be interested in program content. The process is sometimes described as one of blackmail which inspires undignified pretense and reduces the effectiveness of programming.

The authors of *Struggle for Justice* thus contend that inmates are made cynical about prison programs, that "programs are regarded as phony and that the motivation for participation is to manipulate the parole process." With regard to rewards, the authors of this report note,

In rehabilitative prisons the person's release may be affected by the quantity and quality of his participation in "treatment programs." Since he knows that this is true, he is greatly influenced to enter these programs not simply to help himself,

¹J.V. Barry, "Pioneers in Criminology: Alexander Maconochie (1787-1860)," *Journal of Criminal Law, Criminology and Police Science*, 1956, 47, 145-161; J.V. Barry, *Alexander Maconochie of Norfolk Island*, London: Oxford, 1958. During the 4 years of Maconochie's tenure and in its aftermath, 1,450 Tasmanian convicts were released; the recidivism rate of this group was less than 3 percent, despite the fact that two-thirds of the group (950 men) had been classified as unreformable.

²*Transactions of the National Congress on Prison and Reformatory Discipline*, Albany, NY: Weed and Parsons, 1871. Reprinted, Washington, DC: American Correctional Association, 1970, pp. 1-8.

³D.L. Rothman, *Conscience and Convenience*, Boston: Little Brown, 1980, pp. 74 and 161.

but in order to manipulate the release system. In doing so he usually corrupts the treatment value of the programs (emphasis added)⁴

David Fogel goes so far as to suggest that prison programs are often (at best) unnecessary and would decay if they could not drum up business by relying on rewards. Fogel asks, for example,

We wonder, in an atmosphere of real choice (in the sense of "free enterprise"), how may prison clinical programs would survive if survival turned merely on attendance and inmates were assured immunity for absence.⁵

(3) *The administration of reward systems is inevitably capricious:* The right to make decisions about who gets rewarded confers wide discretion upon those who make such decisions. This fact places a great deal of power into the hands of officials, who can punish offenders against whom they are prejudiced by withholding rewards.

In relation to parole, for example, Fogel writes that

It is in this process that prison staff decision-making fades into unbridled, low visibility discretion. If at first blush discretion looks like power, in prison it also produces an arena in which indecisiveness, favoritism, racism, suppression and lawlessness are acted out daily.⁶

(4) *Rewards can be unjust:* Tampering with a fairly arrived-at sanction can devalue a system which has the obligation to stick to its guns. If one must not add penalties in midstream, the same consideration applies to the dilution of penalties. Von Hirsch comments that

The reverse situation—releasing an offender early on rehabilitative grounds—presents much the same questions as releasing him early on the basis of a prediction that he is not dangerous . . . Releasing him as soon as he completes his cure—like releasing him immediately if he is predicted not to offend again—remains objectionable as disproportionately lenient in relation to the gravity of the crime for which he was convicted.⁷

⁴ *Struggle for Justice: A Report on Crime and Punishment in America. Prepared for the American Friends Service Committee.* New York: Hill and Wang, 1971, pp. 88 and 98.

⁵ D. Fogel, "We Are the Living Proof": *The Justice Model for Corrections*, Cincinnati, Ohio: Anderson Publishing, 1979, p. 263.

⁶ *Ibid.*, pp. 200-201. One of the authors of *Struggle for Justice* (David Greenberg) takes an even stronger stance. He ruminates,

What if the prison staff and officials, as well as the government of which they are a part, are not merely stern and corrupt but murderous? These disturbing questions have been shown to be more than academic by the events in the last 15 years. Revelations of the killing of prisoners by guards, of lobotomies of prisoners, druggings, solitary confinement, beatings and enforced transfers of militant prisoners have left us with a more sinister view of penal administrators (D.F. Greenberg, "Introduction," in D.F. Greenberg (ed.), *Corrections and Punishment*, Beverly Hills: Sage Publications, 1977, p. 11).

The report itself takes a more tempered position. It concludes that "today the evils of discretion far outweigh conceivable benefits, but this might not always be true" (*Struggle*, Note 4, supra, p. 143).

⁷ A. Von Hirsch, *Doing Justice: The Choice of Punishments. Report of the Committee for the Study of Incarceration.* New York: Hill and Wang, 1976, p. 129.

A related argument is that a prison sentence should be punishment, prison activities should be rehabilitative, and the twain should not meet as parole decisions. Morris thus deplors "the corrupting link between time and treatment, which creates a further corrupting link between coercion and cure."⁸ Morris does not object to other rewards, however, such as the provision of enriched milieus to inmates willing to consider self-improvement.

(5) *Rewards endanger civil rights:* As some see it, reward systems turn offender rights into privileges and convert offenders into recipients of amenities to which they should be entitled. This means that the offender has reduced bargaining power with staff members, who can retaliate more easily if they feel challenged. Moreover, enterprises such as counseling and education can be contaminated when staff who are supposed to work with offenders can also determine their fate. I have myself suggested, for example, that "as long as prison therapists feed data and recommendations to decision makers, there is little point in maintaining that they can do therapy."⁹

A Sequence of Nondiscretionary Benefits

Close reading shows that most critics do not object to improving the offender's fate but profoundly mistrust the judgment of officials who would decide that improvement is warranted. This means that most critics would have no problem with routinized increments of privileges which automatically accrue to the offender at predetermined junctures, with the burden placed on officials to justify denials of benefit, subject to challenges and appeals.

The irony is that under a system thus envisaged, one can punish an offender by withholding a benefit, but one cannot reward him by conferring it. This view also generates expectations that invite rancor and bitterness: for example, it makes parole boards ratifiers of a sentence the inmate *should* serve; the board must therefore release any given inmate unless it decides to deliberately injure him by denying him parole, which is added punishment. Good time credit gets similarly taken for granted. The fact that good time is often routinely awarded in practice may assist such expectations, but the view has nothing

⁸ N. Morris, *The Future of Imprisonment.* Chicago: University of Chicago, 1974, p. 14.

⁹ H. Toch, "Psychological Treatment of Imprisoned Offenders," in J.R. Hays, T.K. Roberts, and K.S. Solway (eds.), *Violence and the Violent Individual*, New York: Spectrum, 1981, p. 338. One other concern relates to the potential of corruption, as in some prison systems that have been declared unconstitutional, in which inmates were formally or informally rewarded for keeping fellow-inmates "in line" by brutalizing them.

to do with probabilities of award. If parole is a presumed right, a parole board which turns down most inmates at first appearance would evoke expectations no different from one that releases them, though the bitterness such a board invites would increase. This is so because of the view that the board retains people whom it could release, rather than releasing people whom it could retain.

The perspective may strike us as presumptuous, but it approximates a good deal of "real" (outside of criminal justice) life. It particularly resembles seniority-based career systems, such as civil service. In such systems there may be talk of merited progression, but actual benefits (the analogues of good time and parole) become available as a function of time served, barring exceptional, and usually embarrassing, circumstances.

Defensible Strategies of Reform

No one—including radical critics—would regard a "time serving" paradigm outside a prison as a model we should aspire to or emulate. Such a system implies passivity rather than citizenship, provides no incentive or recognition, has little integrity, and fosters bureaucratic survival. In return, of course, the system is admittedly reliable, and protects nicely against arbitrarily exercised power in allocating the rewards of life.

The problem is that given the obsession with capricious exercises of power by officials, it is hard to envisage systems other than time-doing that mistrustful observers would find acceptable.

This point becomes quickly obvious when we consider some suggested—and occasionally essayed—approaches:

(1) *Circumscribing decisions with rules*: A popular approach is to use guidelines or point systems to make decisions more reliable. Hypothetically, the link between performance and rewards can be similarly prespecified; the result can thus become more predictable, though one can never get around the fact that the offender's performance is in the first place assessed by someone whose judgments become data which are fed into the actuarial system. Judgments, of course, can be idiosyncratic, but less so if they are pooled or reviewed, which reduces arbitrariness. John Barry notes that Maconochie was aware of the need for reliability checks. Maconochie

contemplated that marks should be affixed daily by various goal officials, acting separately, for various aspects of a prisoner's conduct and labour. In this way he considered that the dangers of abuse of discretion would be lessened.¹⁰

Another desideratum is to have publicized criteria and rules about how behavior is to be rated. Again, according to Barry,

Maconochie's emphasis was always upon the desirability of a prisoner's knowing where he stood, and what he had to do to gain his liberty. I do not think he would have cared for a system where the time of release depends, not upon a prisoner's own efforts, but on a tribunal's estimate of the significance of those efforts, and of various other considerations which may not be known or disclosed to him.¹¹

(2) *Demonstrating inmate-centered concerns*: Some critics envisage a zero sum model which has it that behavior that benefits the prison by definition cannot assist the inmate, and vice versa. If we take this grotesque formula seriously we cannot encourage inmate achievements, no matter how laudible and profitable for the inmate, unless these achievements increase the inmate's nuisance value to staff. The bottom line is that no incentive systems could ever be instituted because any improvement of conduct can make an inmate more congenial or easier to manage, which can be adjudged "convenient" to staff if one wants to impugn their motives.

An incentive system of integrity can be best created by ignoring prison benefits and advancing prescriptions that envisage results beneficial to offenders. A prescription might read, for example, "demonstrably illiterate persons entering the system will receive encouragement and credit if they partake of remedial education programs until they achieve reading and writing proficiency," or "certifiably addicted persons will be rewarded if they participate in substance abuse programs" (presuming such are available). If educated or rehabilitated inmates achieve custodial improvements, this fact would be welcome but irrelevant.

(3) *Engendering inmate participation*: One pet presupposition of critics is that rewards are constraining, meaning that if anyone is rewarded for doing something this compromises the free exercise of his or her volition. Speaking for a blue ribbon committee, for example, von Hirsch proclaims that "we stress that offenders should be free to decide whether or not to participate: if a person is subject to penalties if he refuses to join (or promised more lenient treatment if he does), the program is no longer voluntary."¹²

Such reasoning about the constraining effects of rewards is never applied to higher wage scales in prison industry, which most critics favor. Nor is it applied outside of prison, such as to the well-re-

¹⁰Barry (1956), Note 1. *supra*, p. 159.

¹¹*Ibid.*, p. 160.

¹²Von Hirsch, Note 7 *supra*, p. 116.

warded careers of legal scholars who make such arguments. The fact is that "constraint" and "voluntariness" are mostly in the eyes of the beholder, but this does not mean that we need not be concerned about the relationship, and it is obviously important that program involvement be as spontaneous and enthusiastic as possible.

One established way of promoting inmate participation is to offer to negotiate contracts in which persons agree to behavior goals whose attainment will be rewarded. It is true that one can point to power imbalances in such contracts between staff and clients who sign them. Limited choice, however, is better than no choice, and volition that is exercised in the absence of constraints or incentives is rarely encountered anywhere.

Finally, offenders could volunteer to participate in a reward system and might be permitted to do so, with nonvolunteers undergoing routine, fair, and standardized processing. This, however, creates a two-tier arrangement which invites being seen as a way of punishing the noncompliant under the guise of rewarding those seeking to achieve.

Rediscovering Incentives

It should be obvious at this point that almost any solution one can think of invites objections from persons who feel that the power to reward is a license to punish. In a system that accommodates such objections, only routine benefits could be provided; some intrinsic rewards (including the joy of winning suits against officials) would also be available. The idea would be that motivated offenders could achieve goals of their choosing and unmotivated offenders could contentedly desist. The system could obviously continue to punish destructive behavior, given due process, but it could not encourage what it deems desirable behavior, using rewards.

This "hands off" position is not currently in the ascendance. It is not favored by officials who want to expedite the program participation of inmates in crowded prisons so as to enhance their readiness for release.¹³ It is also not favored by reformers outside the system with parallel concerns, who are legislating innovations such as performance-based presumptive parole.¹⁴ The view, however, contaminates much of our thinking about both parole and institutional practices to a surprising extent and partly helps explain the timidity with which we customarily approach the realm of prisoner achievements. For example,

(1) Information in most offender files prolifically highlights lapses of behavior and litigations, but provides few details about personal effort, activities,

and achievements that deserve encouragement and support.

(2) Classification systems only secondarily specify programming needs, such as areas in which developmental possibilities and offender interests converge. Unincluded, moreover, are inventories of conditions (such as types of assignments) the offender would find rewarding and would be willing to work toward.

(3) Reward options in the system remain uninventoried, except in general terms. We have ballpark norms about penalties assigned to types of infractions, but no equivalent norms about graduated rewards (such as increments of time reduction) commensurate with magnitudes of accomplishment. Our awareness of rewarding milieu attributes of different prisons in a system, such as the level of freedom they offer, is similarly vague, so that conditions cannot be systematically improved.

(4) Amenities are serendipitously distributed, as where a prison job happens to bring improvements of living conditions. This supports the presumption that institutional needs always take precedence; it also permits amenity-seekers to gravitate to assignments for inappropriate reasons, particularly where squeaky wheels (persons who file requests) get attended to.

(5) Eligibility requirements governing access to

¹³One such official is Governor Baliles of Virginia, who instituted and supported a Literacy Incentive Program for offenders unable to read or write at sixth grade level. Inmates invited to participate in this program are informed that "the program is geared toward increasing your reading level so that you will have the ability to complete job applications, to read the newspaper, and to do other things that require the use of basic reading skills" (Commonwealth of Virginia, Department of Correctional Education: *Literacy Incentive Program, Phase I, Procedures for Implementation, Seventh Draft*, August 28, 1986, p. 41). Inmates are also informed that the progress they make in achieving literacy goals will be used by staff who are charged with "making decisions regarding GCA/ECT (good time allowance) awards, transfers, job assignments, and special program assignments, including work release, furloughs, community activities, etc." They are additionally assured that "the Parole Board will use your treatment plan and progress report to determine your efforts toward improving your level of literacy," and that "positive and continuous efforts toward raising your level of literacy, as documented by your six-month progress reports, may be used favorably by the Parole Board." While inmates are warned that program participation does not guarantee parole, they are told that "progress toward your educational goals will now also become a major focus of the Parole Board review. Your participation and progress in school programs will be evidence of your willingness to improve your skills toward a better adjustment in the community upon your release" (*Ibid.*, p. 47). Programs such as that implemented in Virginia have been introduced in other countries. A Canadian news item, for example, reads: "The Solicitor General has announced that the National Parole Board will consider participation in a literacy program when deciding on parole. 'Perhaps this more than anything else will help inmates to understand the importance of literacy skills in functioning successfully on the outside,' Mr. Kelleher noted." (*Liaison*, March 1987).

¹⁴One variant on presumptive parole is a New York program incorporated in the legislature's recent (1987) Omnibus Prison Bill. Inmates who participate in this program receive (at the discretion of the Commissioner) a Certificate of Earned Eligibility, upon completion of individually designed treatment and work assignments which pre-empt "successful transitions" to law abiding careers. The certificate offers each inmate the probability of release at the expiration of his minimum sentence *unless* the parole authorities find a "reasonable probability that if (the inmate) is released he would not live and remain at liberty without violating the law, and that his release is not compatible with the welfare of society." (See Part 2100, Earned Eligibility Program, Title 7, N.Y. Official Compilation of Codes, Rules and Regulations)

opportunities in the system frequently emphasize time-related and offense-centered considerations, rather than personal achievements. An offender who is close to release date, or one who has committed a nonviolent offense, may get precedence for a rewarding transfer (such as one closer to home) over an offender with a commendable record of institutional accomplishments.

(6) Reward systems are least available under conditions such as punitive or administrative segregation where hope is at a premium, living conditions deplorable, and motivation low. (Progress could be built into all prison settings, including those most likely to invite resentment and bitterness.)

(7) Long-term planning for clients rarely takes place; most programming and referrals specify short-term objectives, such as placement in a prison course or a job. Sequences of experiences that could involve progressions or promotions are not considered, though the proportion of long-term confinees in the system is steadily growing.

(8) There is little concern about elementary learning theory principles, such as those that point up the value of arranging short-term rewards at the inception of learning or the need for consistency if rewards are to be effective.

The above picture holds despite the fact that most corrections systems offer types and degrees of amenity that can be inventoried and used and others that can be instituted through variations of the regime, provided one does not feel that standardization of treatment is a self-evident desideratum.

The Behavior Modification Specter

Does any self-conscious use of rewards verge on behavior modification? The answer is not clear at first glance. Behavior modification as a procedure systematically applies behavioral learning principles. Maconochie only missed being a behavior modificationist by accident of birth, because his prescription is a model of what learning theorists prescribe. By the same token, self-styled psychological interventions in prison—such as the infamous Project Start—violated fundamental tenets of applied learning theory, starting with its definition of goals, which, in the words of an authoritative source, must “facilitate improved self-control by expanding individuals’ skills, abilities and independence.”¹⁵

Project Start was a behavior modification program for disruptive inmates which relied on involuntary recruitment and contingent restraints

consisting of indefinite segregation. At least one psychologist associated with the program defended this practice as necessary because “a voluntary program could be expected to be used by those prisoners who find themselves distressed by their situation, not by those who are causing extreme distress to others but are little inconvenienced themselves.”¹⁶ The psychologist’s rejection of the criterion “distressed by their situation” is particularly troublesome, because the understanding in behavior modification is that the interventionist supplies the technology (such as a reward schedule) but the client supplies the goals. In fact, over 3 years before the inception of Project Start, the leading authority on behavior modification, Albert Bandura, underlined and emphasized this principle. He wrote that “though the change agent determines the means by which specified outcomes can be achieved, the client should play a major role in determining the directions in which his behavior is to be modified”; Bandura also pointed out that to the extent to which this distinction is observed “the frequently voiced concerns about human manipulation become essentially pseudo issues.”¹⁷

Not to consider the reduction of inmate suffering as a goal of intervention feeds the objection of critics to other goals, such as improved deportment and rehabilitation, which can appear to disregard the needs of inmates. This connotation of inhumaneness has also given the concept of behavior modification unsavory connotations, particularly in prisons. As a result, prison administrators are probably well advised not to invoke the concept in designing rewards and incentives for inmate self-improvement.

Amenities and Necessities

In thinking about implementing reward systems, it becomes essential to distinguish between commodities that any civilized regime should furnish to its clients, conditions that must be furnished because a client needs them, and those that can be deployed as rewards because they transcend civilized entitlements or personal requirements.

Failure to draw such distinctions not only invites well-deserved lawsuits (such as those that nowadays shape permissible behavior modification experiments)¹⁸ but confuses reward systems with systems

¹⁵A.F. Scheckenbach, “Behavior Modification and Adult Offenders” (1974), in I. Jacks and C.S. Coxs (eds.), *Psychological Approaches to Crime and its Correction*. Chicago: Nelson-Hall, 1984, p. 468.

¹⁷A. Bandura, *Principles of Behavior Modification*. New York: Holt, Rinehart and Winston, 1969, pp. 101, 112.

¹⁸Court decisions relating to law suits have held that amenities to which all institutionalized clients are entitled cannot be used as rewards, to be purchased with tokens. See, D.B. Wexler, “Token and Taboo: Behavior Modification, Token Economics, and the Law,” *California Law Review*, 1973, 61, 81-109. Also, D.B. Wexler, *Mental Health Law: Major Issues*, New York: Plenum, 1981.

¹⁵B.S. Brown, L.A. Wienckowski, and S.B. Stolz, *Behavior Modification: Perspective on a Current Issue*. Washington, DC: National Institute of Mental Health, 1975, p.1.

that punish or injure under the guise of rewarding. This issue is relatively straightforward when one thinks about amenities which must be made universally available, because not to make them available creates substandard conditions. It is more complex with respect to milieus that must be created in response to special needs, setting aside any reward levels that might be built into such assignments.

To be defensible, the principle governing allocations must be that personal needs must take precedence over inventories of amenities. Given two inmates who are in line for a porter's job, for instance, the person whose mental health or social adjustment can be improved through solitude *must* get preference over the person who wants (but does not need) the job, though this person has assiduously "earned" the assignment. By the same token, it is inappropriate, and inexcusably cynical, to highlight improvements of living conditions that are attendant upon needed conditions, such as a hospital assignment. If a person is both vulnerable and manipulative, the former fact must be considered relevant and the latter irrelevant, even where it is obvious that an assignment (e.g., a hospital ward) is the person's idea of nirvana.

These and similar considerations place reward systems for offenders in appropriate and defensible contexts. They make it obvious that for a reward system to thrive and withstand criticism it must never

supplant a civilized regime, but must supplement it. The criteria for allocating resources must place entitlements in the foreground and expand the residual so as to multiply incentives available for rewarding achievement.

In formulating the priorities in this way, I do not imply that currently prevailing practices are wildly divergent from my formulation. The point is not to create a different system for allocating benefits (such as introducing token economy programs), but to find ways of enhancing use of existing performance-based criteria of allocation. My contention is not that we must change course, but that we can do more than we are doing to demonstrate to offenders in our charge that we welcome any efforts they make at self-improvement, and are prepared to buttress such efforts.

The move seems timely, on two important counts: First, it has become axiomatic that we must unclog prisons, and performance-based criteria are a much more flexible way of selecting candidates for release than an offender's past history, which none of us—including the offender—can change. Second, the reward strategy furthers rehabilitation if we reward an offender's resocializing moves, but it also accommodates the prevalent philosophy of just desert since the logic that dictates that we must punish transgressions allows for its corollary, which is that we reward contributions that benefit the society that offenders have harmed.