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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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This Issue in Brief

Homicides Related to Drug Trafficking.—Homicides as a result of business disputes in the distribution of illegal drugs appears as a new subtype of homicide in the United States, report authors Heffernan, Martin, and Romano. In this exploratory study of 50 homicides in one police precinct in New York City noted for its high level of drug dealing, 42 percent were found to be "drug-related." When compared with non-drug-related homicides in the same precinct, the "drug-related" more often involved firearms and younger, male victims.

Management Theory Z: Implications for Correctional Survival Management.—Increased workload and decreased budgets are realities facing correctional management during the remainder of the 1980's, asserts Dr. William G. Archambeault of Louisiana State University at Baton Rouge. This means that fewer employees must be motivated to produce more and higher quality services. Faced with a similar dilemma, American business and industry have "discovered" Theory Z management and have demonstrated its pragmatic value. This article analyzes the utility of Theory Z in correctional organizations and outlines the steps necessary to implement this approach.

Making Criminals Pay: A Plan for Restitution by Sentencing Commissions.—Attorney Frederic R. Kellogg writes that the recent controversy over the insanity defense has focused public doubt over the criminal justice system. It highlights the need not for further tinkering but for wholesale reform. This recent proposal would classify offenses according to harm and enforce restitution in every case. It would sweep away the entire uncoordinated panoply of postconviction proceedings and replace them with a well-staffed sentencing commission of experienced trial judges whose assignment would be to assess the harm done by the offender and collect judgment to repay the victim and the state.

Information Processing in a Probation Office: The Southern District of Georgia Experience.—Chief Probation Officer Jerry P. Morgan believes there is a place for word/information processing in the probation office. In establishing a system in the Southern District of Georgia, local sentence comparison became the first project followed by

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Making Criminals Pay

A Plan for Restitution by Sentencing Commissions*

BY FREDERIC R. KELLOGG
Attorney, Washington, D.C.

TWO HIGHLY publicized incidents in the recent past have served to focus public attention on our criminal law. Mark David Chapman did not deny having fired several pistol bullets into John Lennon, causing his death, although his attorney sought for a time to obtain an innocent verdict on the ground of insanity. John Hinckley, whose actions on March 31, 1981, were subject to intensive news coverage, does not deny having fired his pistol at President Ronald Reagan in order to kill him, and yet his lawyers sought—and obtained on June 21, 1982—a not-guilty finding by reason of insanity. Under the insanity defense an accused may plead and prove innocence of a serious crime without denying that the act prohibited was in fact committed, and that the accused committed it. The insanity defense is not a post-trial sentencing device to obtain hospitalization instead of incarceration for one who admits criminal conduct. It is a complete defense to guilt and a denial of the public power of imposing criminal sanctions.

Those who conduct themselves so as to present harm to innocent citizens, but who suffer from a recognized mental abnormality, deserve to have their mental condition taken into consideration in determining appropriate sanctions. But this should not remove serious harmful conduct from the jurisdiction of the criminal courts. It is evident from this practice that the present system of making critical decisions, finding the facts and implementing the necessary response, is in dire need of wholesale reexamination.

The insanity defense is not the only problem with our criminal justice system but rather one of the many signs of our long overdue obligation to reexamine it. Overcrowded state and Federal prisons, backlogged court calendars, crimes by dangerous offenders on release, disparate and inconsistent sentencing practices and inappropriate plea bargains have far more serious impact on the average citizen than the well-publicized cases of notorious and often deadly attacks on public figures by those who later claim innocence by reason of insanity.

All of these reflect in common the failure of the criminal justice system to accomplish its primary task: to protect the public in the greatest degree consistent with individual rights and humanitarian practices. Our system of justice must be able quickly and correctly to identify those whose conduct warrants the severest sanctions, and to remove their ability to inflict harm on the public. It must deny continuing offenders any opportunity to benefit unjustly from the absence of coordination among the multiple separate agencies now involved in the criminal process.

The criminal justice system must also be able to deal with the many offenders who are not violent and recidivist, but whose conduct nonetheless warrants punishment. For these, warehousing in crowded jails and prisons is wasteful, inhumane, and fosters no respect for the law.

The system must, finally, begin to address the plight of the victims of criminal conduct in a coherent and effective manner. It must, to the greatest extent possible, pair punishment with redress for the victim. In placing a greater emphasis on restitution it will bring home to the offender the intolerable social cost of criminal conduct.

The history of correctional philosophy reveals a number of noble experiments, which have brought much humanitarian improvement since the age of corporal punishment, but which have, on the whole, proved failures. We have tried to bring religion, rehabilitation, and research to bear on the problem of crime, but we have neglected the most obvious way of making the individual offender, and the entire society, aware of the stakes involved. By ignoring the cost, we have lost our ability to exact repayment. In every domain of our lives we learn to consider the consequences to others; the answer to crime is to apply this lesson to the criminal.

*This article is based on a criminal justice position paper prepared for the Ripon Society. The author's earlier piece, "Organizing the Criminal Justice System: A Look at 'Operative' Objectives," appeared in the June 1976 issue of FEDERAL PROBATION.

Crime is common because it is cheap, and it is cheap because we make it so. The essence of crime lies in injury to the innocent. Our civil law has for centuries made the knowing perpetration of such injury very expensive to those responsible, through the development of civil remedies for money damages. It is time that we made this lesson a fundamental part of the entire legal order.

The criminal process performs two major functions, those of trial and sentencing, finding the facts and determining the appropriate and effective response. In its excessive concern with legalisms, it has lost sight of the single major criterion which should guide all of its operations: the prevention of harm to innocent citizens. The system fails because it does not carry out the immediate and continuing inquiry which criminal conduct warrants and impose sanctions accordingly. It is a system which suffers from a woeful lack of organization and understanding of the individuals who by their conduct are brought into contact with it. Its procedures are dominated by traditions which, although they have been reviewed piecemeal in countless individual court cases and special legislative tinkering, have never been reevaluated in their entirety since their derivation from ancient forms of action in England and Europe.

The essence of our criminal procedure, dating from the Middle Ages, is the adversarial trial. A particular charge is drawn by a prosecutor and reviewed by a grand jury in felony cases. Trial of the case is conducted under restricted rules of evidence, and sentencing is done by the judge according to a set punishment prescribed according to the given offense. Definition of offenses has always been accomplished through technical and largely historical classifications, which may encompass a widely divergent set of circumstances. A great diversity of acts, causing varying degrees of harm and demonstrating varying degrees of intent, may fall under a single class of offenses. The first requirement of a realistic criminal justice system is that criminal acts be evaluated according to real, and not traditional, criteria of gravity. The real criteria consist of intent, circumstance, and harm. The severest sanctions should be reserved for those who knowingly do great harm to innocent citizens, without provocation.[1]

Traditional practice has also determined that sentencing be imposed by the trial judge. Judges are already overworked and underpaid, and are hard pressed to handle an increasing civil and criminal caseload. They are not experts on penology and cannot be aware of the diverse available sentencing alternatives. They cannot oversee the administration of their sentence to be sure that it attains its purpose, nor can they amend their decision, except in rare circumstances, when further information comes to light regarding the offense or the offender. In the great majority of cases judges are not even well informed concerning the background and record of the offender, and when no trial takes place they may know relatively little concerning the entire nature of the offense. The second requirement of an effective criminal justice system is that sentencing be performed by an independent body with experience in corrections, comprehensive information as to sentences given for comparable offenses and available sentencing alternatives, access to all relevant information concerning the offender, and the capability of following up its decisions in order to see that they are implemented.

Under the present system, enormous discretion is accorded to the prosecutorial branch of government. Due to the broad and general definition of crimes, it is possible and legally permissible to charge the same offender with different or multiple counts and degrees of offenses. Final decisions concerning offenses, offenders and sanctions are therefore often made by prosecutors and negotiated by plea bargains, are not subject to review and foreclose any further inquiry. No sentencing system can be fair, effective and consistent unless the evaluative function of the prosecutorial branch is coordinated with the decisions at other stages in the process and consistent with sanctions imposed on other offenders.

Considerable controversy has taken place concerning the function of parole boards, which hold the chief responsibility over postsentencing decisions affecting the term of imprisonment. Parole boards as presently constituted are entirely independent of prosecutive, trial and sentencing, and correctional agencies. Because parole deci-

[1]There have been several attempts in recent years to meet the problem of disparate sentencing practices, spurred by Judge Marvin Frankel's articulate call for reform in *Criminal Sentences: Law Without Order* (1972). Two major studies during the last decade have recommended "flat-time" or determinate sentences, but in so doing proposed systematic consideration of "aggravating and mitigating" circumstances. *Fair and Certain Punishment*, Report of the Twentieth Century Fund Task Force on Criminal Sentencing (1976); von Hirsch, *Doing Justice: The Choice of Punishments*, Report of the Committee for the Study of Incarceration (1976). Examination of the aggravating and mitigating factors reveals a shift away from traditional sentencing by class of offense and toward placing greater weight on intent, circumstance and harm. See Kellogg, "From Retribution To 'Desert': The Evolution of Criminal Punishment" 16 *Criminology* 179 (August 1977).

The most prominent use of a system of standardized factors of aggravation and mitigation to adjust sanctions is found in the set of guidelines adopted in the 1970's by the United States Parole Commission and published in the Code of Federal Regulations. 22 CFR 2.20. Although parole boards alone cannot assure equal sentencing since their decision comes at the end of the process and must make do with more fundamental decisions already made, experience with the guidelines may be useful to states interested in standardizing sanctions according to additional criteria beyond the class of offense.

sions shorten prison sentences on an independently selective basis they have often been inconsistent with the original sentencing decision. Parole board appointments are not subject to the same degree of scrutiny as judicial appointments, and are often less insulated from political considerations.

There is a strong body of opinion that parole boards should be abolished in order to promote sentencing determinacy. Abolishing parole decisions, and putting nothing in their place, would remove the only postsentencing stage of inquiry into the appropriateness of sanctions. The system must be able to correct error and make use of newly available information. It must also have the power to adapt sanctions to the postsentencing conduct of the offender. Abolishing any form of inquiry and discretion subsequent to the initial sentence would be a step backward. The problem lies in integrating the parole decision into the overall evaluative process.

Therefore, the Ripon Society makes the following proposals. The first proposal is for the creation of independent correctional commissions which will be responsible for assuring accurate assessment and consistent sentencing of criminal offenders at each stage of the process, operating under public scrutiny and a clear set of standards. Such commissions should operate under the judicial branch of government, as their major functions will be those traditionally given to the judiciary. They should be chosen with the same order of selectivity as is used for judges and be given all of the power and independence of the judicial branch, and their actions should be subject to review in the appellate courts under the standards currently employed in administrative law. They will be responsible for all major decisions concerning offenders, from sentencing onward.

We do not recommend that the commissions be given prosecutorial powers or that the prosecutive branch sacrifice its traditional responsibility, but only that the commissions be assured two powers which are consistent with our judicial tradition and the separation of powers: to approve or disapprove all prosecutive plea bargains reducing or enhancing charges once an offender has been indicted by a grand jury, and in special and clearly defined circumstances to submit matters before a sitting grand jury, to prevent cases of clear and grave violation going unprosecuted. The commissions should also be given the responsibility over all postsentencing decisions, including probation, parole, probation and parole revocation, transfer to halfway houses or special employment, and all other major changes to the initial sentencing decision.[2]

The use of such commissions, staffed by trained investigators and personnel currently operating under the separate probation and parole agencies, will for the first time assure that serious and continuing offenders are denied any opportunity to "judgeshop" or exploit the absence of coordination among the multiple separate agencies now involved in the criminal process. The central objective of the process will then be to identify at the earliest possible stage the continuing and violent offender, using knowing infliction of harm upon innocent citizens as the primary criterion. This will assure that danger to the public is removed. The commission will be empowered to oversee the implementation of confinement, employing drug treatment, job training or other rehabilitative measures as it sees fit, and it will be in a position to insure that all sanctions are consistent and humane.

The correctional commissions will end the need for the insanity defense. Through the use of independent commissions, operating under clear and consistent standards, fair, appropriate and humane correctional practice may be employed with regard to offenders who suffer from mental disturbances. There will be no need to divert those who claim insanity from the criminal justice system, as their needs will be addressed at that stage of the process where they belong: the administration of the appropriate response. The Ripon Society does not oppose different treatment of the insane offender, nor does it deny that the insanity defense may have been conceived with the best intentions. Rather, it contends that correctional commissions will be able to assure proper treatment of the mentally disturbed or deranged, as well as all other types of criminal offender.

The second major proposal for improvement of the criminal justice system in the United States will substantially reduce our dependence upon already overcrowded jails and prisons and will enhance our ability to deal effectively with new or nonviolent offenders who are nevertheless responsible for harm to innocent citizens. It will also

[2]Forty-five years ago criminologist Sheldon Glueck contended that sentencing is too important and difficult to be left to judges alone. Over 20 years ago "sentencing councils" were established informally by Federal trial judges in the Eastern District of Michigan and the practice developed a small following in other juriadictions. However, the scope of decision was necessarily limited and the demands on judges' time burdensome. The correctional commission would have full scope of decision over sentences and would be undistracted by other duties.

enable the system to convey to the offender the cost of his conduct in suffering to others. This proposal consists of requiring an assessment of the degree of harm to others in every criminal proceeding, and a judgment against the offender for the harm in money damages. The offender will then be required to make full restitution either to the victim or to a fund for future victims of crime, and this judgment will remain until paid.

A substantial portion, and likely the majority, of crimes would not be committed if there existed a real possibility that they would have to be paid for in full by the offender. With few exceptions, existing civil laws provide remedies for victims against those who inflict wrongful harm. However, these remedies are rarely used due to the expense of hiring lawyers, the burden of maintaining a private lawsuit, and the unlikelihood that collection may be effected against the defendant.

These obstacles can be removed by making assessment of the harm and damage from criminal conduct part of the criminal proceeding, and making collection part of the criminal sanctioning process.[3] Offenders will be placed on notice that the consequences of their acts will be speedily evaluated after judgment of guilt, while the evidence is still fresh. They will be required to make full restitution as part of the sentence, under supervision of the correctional commission. Judgments from criminal violation will not be subject to removal in personal bankruptcy. All property owned by the offender at or after the time of the offense will be liable to attachment for satisfaction of such judgments to the same extent as for other civil judgments. When confinement is deemed necessary by the commission, offenders will be required to work in prison industries to pay their victims. Such judgments will assist in establishing funds for crime victim relief in order to provide immediate assistance to the victims of crime.

[3]The most efficient and equitable assessment of money damages would be through the commission, but in states where a constitutional right to jury assessment exists a waiver would be required to submit the case to the commission. It is likely, however, that jurors would tend to render higher awards than the commissioners, and waivers would be common.

[4]Great Britain: see Tarling, R. and P. Softley, "Compensation Orders in the Crown Court," *Criminal Law Review* 422-428 (July 1976); Australia: see Potas, "Alternatives to Imprisonment," *Crime and Justice in Australia* 102 (1977); Canada: *Community Participation in Sentencing*, Law Reform Commission of Canada (1976); for a survey of programs in the United States, see Chesney, S., J. Hudson and J. McLagen, "New Look at Restitution: Recent Legislation, Programs and Research," 61 *Judicature* 348-357 (March 1978).

[5]Federal Prison Industries showed a profit of $6 million in 1976 and Texas prison industries showed profits of $5 million in 1978, according to *Criminal Justice Monitor* and Balkin, S., "Prisoners by day: a proposal to sentence non-violent offenders to non-residential work facilities," 64 *Judicature* 154 (October 1980).

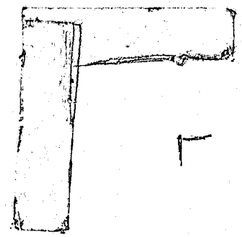
[6]See Balkin, *supra* n. 4, 154, 156.

[7]*Id.* at 159.

The idea of introducing restitution into the criminal sentencing process is not new. Other countries, and several states in this country, have sought to escape the predominant and increasingly costly reliance on imprisonment through court-ordered restitution to the victim.[4] Most restitution programs to date, however, have placed the main burden of setting the penalty on the sentencing judge, and have not established a systematic evaluation of all offenses. Nor have they created an agency like the correctional commission which would be in a position to insure both uniformity of sanctions and the effectiveness of their administration.

Another important factor for successful restitution is the existence of adequate work facilities for convicted offenders who are unemployed. Most states, as well as the Federal Government, have long experience with prison industries, and some industries have proven both effective and profitable.[5] But prison should be reserved for the serious and violent offender. A recent proposal would help to meet this problem by allowing nonviolent offenders to live where they choose and work at conventional jobs in state-run or supervised industries. The leading proponent of such nonresidential work facilities has observed that the most costly and inhumane part of prison is the residential component, and that if such facilities were readily available for nonviolent offenders about half of all inmates in our prisons today would not be incarcerated.[6] Rich and poor offenders could be treated equitably by assessing penalties in terms of work time.[7]

The Ripon Society urges that implementation of these proposals be initiated at the state level. Questions regarding implementation, including the manner of assessment of particular offenses, need not be answered here but should be debated first by state legislatures. The primary jurisdiction over crime in this country lies with the states, and individual state legislative action provides an excellent proving ground for national policy. We believe that these proposals may succeed where other experiments have failed, and that if tried in one or more states they could dramatically reduce the level of criminal offenses, relieve the plight of the innocent victim, and substantially reduce the cost of crime and the administration of criminal justice.



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