

CORRECTIONS STRATEGY: HISTORY OF SIGNIFICANT ISSUES IN THE CHANGE FROM THE REHABILITATIVE ERA TO THE PUNITIVE ERA

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ABSTRACT

The late 1970s saw the beginning of a change in penal philosophy in this country from a rehabilitative corrections model to a punitive model. In a law review article for the *Georgetown Journal of Legal Ethics* entitled, “Current development 2006–2007: Penal reform and the necessity for therapeutic jurisprudence”, Parker describes the difference between the two philosophies thus:

[T]he rehabilitative model was based on a perception of the criminal as sick and in need of treatment or rehabilitation. Because the theory looked to offenders’ need for treatment rather than to the character of their crimes, it allowed different sentences for similar offenses.

On the other hand, according to Parker,

the just-deserts [punitive] model is premised on the argument that criminal offenders are blameworthy because they are capable of choosing whether to commit a crime. This argument dates back to the Calvinist principle that punishment was not intended to save the criminal because humans were inherently sinful, and only God could save them.

Two to three decades later, it seems the pendulum is now beginning to swing in the opposite direction once again, raising questions about the impact of the punitive era on the corrections situation in this country. The purpose of this paper is to discuss some of the more significant corrections changes associated with the punitive era in order to begin to understand how they have contributed to a very different corrections landscape from the one they replaced.

INTRODUCTION

Given the complexity of the justice system in the US, with so many variables that one can analyse, it is necessary to simplify the picture in order to undertake a limited discussion of cause and effect over such a broad field. To this end, it is useful to contemplate two big changes that occurred during the punitive era – aggregate prisoner population and corrections costs – and contrast them with two relatively constant figures – recidivism and the percentage of prisoners who will return to society. According to the Bureau of Justice Statistics, the US federal and state prison population rose by around 400% over the past 30 years, from around 300 000 in 1972 to over 1.5 million in 2005. The annual aggregate cost of corrections in this country has risen over 900%, from under \$7 billion in 1980 to over \$65 billion in 2005. Then, as now, over 95% of the prison population will rejoin society sooner or later. Around half of all prisoners released into society after finishing their terms wind up going back to prison within three years. This contrast provides a frame of reference from which to ask questions about the effects of the punitive era in an attempt to evaluate the relative strengths and weaknesses of such a penal approach.

Ultimately, all practical decisions regarding our penal system and the results they engender stem from our penal philosophy. In a general sense, this country’s system works by incarcerating people who, by disregarding the laws, threaten the health or financial security of law-abiding citizens. Incarceration has always intended to accomplish four goals: restraint – keeping prisoners at a safe distance; retribution – punishing people to the degree that they have hurt others; deterrence – serving to warn others of the consequences of disregarding the law; and finally rehabilitation – affording prisoners time to improve themselves so they can avoid breaking the law when their sentences are completed. Most people would agree to prison’s potential to deter and

restrain. Where there is great disagreement, however, is over the question of whether criminal behaviour can be changed – if at all – by punishment or rehabilitation, and as to what mixture of the two works best.

The rehabilitative era, which ended due to a general sense of disillusionment in the late 1970s, was built around the broad view of crime as part of a larger social context. Its central premise is that most people are inherently good, yet capable of bad judgement. Accordingly, although society has an obligation to restrain criminal behaviour, it also must address the root causes of the behaviour underlying imprisonment in an effort to reduce the precursors of crime, and hence crime incidence. As a matter of policy, the rehabilitation strategy lies on the assumption that in order to reduce crime, society needs to construct programmes to address variables such as poverty, alcohol and drug abuse, lack of education, homelessness, and so forth. In this context it is all the more important, according to the rehabilitation model, to make sure that prison time is spent in the most effective way to enhance the likelihood of post-prison success. These efforts resulted in the development of in-prison substance treatment programmes, re-entry strategies such as in-prison job training, mental health services and educational programmes all geared toward reducing recidivism and enhancing the chance that ex-prisoners might overcome the circumstances that led to their incarceration upon their release.

The punitive ideology, on the other hand, takes a narrower view of criminals and their behaviour, reducing crime to a matter of personal choice. Consistent with this view, those who choose to break the law must be kept apart from those who obey – for the purpose of restraint, deterrence of those who might be tempted to act similarly, and punishment of the offenders. Naturally, the punitive ideology does not recognise the role or power of prisons to rehabilitate offenders. As critics of the rehabilitative model, those in favour of a more punitive approach have suggested that it is based on overly idealistic premises, that it encourages the coddling of criminals, and that it wastes valuable tax money on ineffective programmes.

The demise of the rehabilitative era, which began in the late 1970s, was accelerated by the spread of crack cocaine and a frightening rise in gang violence. Two legal changes marked the onset of the punitive era in the early 1980s. The first of these developments was the “war on drugs”, a reaction to the explosion of drug dealing, murder and social blight associated with the crack epidemic, which led to significantly higher incarceration rates and longer mandatory sentences for crack cocaine possession and distribution. The other major change characterising the punitive shift was actually a series of sentencing-law modifications that marked the gradual end of sentencing discretion by judges and parole boards. According to information released by BJS in a report entitled “Truth in sentencing in state prisons”, the following is a description of some of these modifications. Previously, parole boards acting under a system of indeterminate sentencing had used their authority to reward positive behaviour by reducing sentence lengths in order to induce prisoners to make positive changes. While sometimes effective, indeterminate sentencing was challenged on the grounds that prisoners would often serve less than half of their original sentences. This system was replaced by a form of determinate sentencing which required minimum-term lengths.

In addition to complaints that parole boards had too much power, there was a general outcry against the fact that judges had too much discretion in sentence length, creating unfair disparity among sentences of prisoners with similar offences. In reaction, the enactment of sentencing guidelines made sentencing less arbitrary. Finally, beginning in 1984, the Truth in Sentencing laws came into effect, eliminating sentence reduction for good behaviour and early release, thereby ensuring that all prisoners would serve out their sentences.

While it is difficult to gauge the degree to which these changes acted as a deterrent, some studies suggest that the inception of the sentencing reforms of the punitive era has in fact significantly reduced crime. Leipold (2006: 542), in an article entitled “Recidivism, incapacita-

tion, and criminal sentencing policy” published in the *University of St Thomas Law Journal*, cites the study of Steven Leavitt, a University of Chicago Economics professor, “which shows that among the reasons for the declining crime rate of the 1990s, increased imprisonment was by far the most important one studied, accounting for 12% of the drop in violent crime and 8% of the decline in property crime”. Leavitt’s opinion, however, has been contradicted by numerous studies. In one article challenging such assumptions, entitled “Unlocking America”, Austin et al. (2007: 8) remark: “Most scientific evidence suggests that there is little if any relationship between fluctuations in crime rates and incarceration rates.” To defend the proposition, Austin et al. add:

A study of crime from 1980 to 1991 in all fifty states and the District of Columbia shows that incarceration rates exploded during that period. The states that increased incarceration rates the least were just as likely to experience decreases in crime as those that increased them the most.

Leipold (2006: 537) also points out some of the darker consequences of the higher imprisonment rate accompanying the punitive era. Noting the disproportionate number African Americans and Hispanics in the prison system relative to the general population, he suggests that “if incarceration rates remain unchanged, nearly 1 in 3 African American boys born in 2001 will go to prison at some point in his life, compared to 1 of every 17 white boys”. It can hardly be ignored that such a trend would have a strong impact on African American communities in this country outside of prison.

Beyond racial issues, in exploring reasons behind the large increase in prison population, Leipold (2006: 540) mentions a theory by Bernard Harcourt from a working research study which suggests that “the increase in imprisonment is offset by a decrease in the population of psychiatric hospitals”, an idea touching on the question of whether prison is the proper venue for the mentally ill. Adding to the discussion of mental illness in prison, Fellner (2006), in a paper published in the *Harvard Civil Rights-Civil Liberties Law Review* entitled “A corrections quandary: Mental illness and prison rules”, notes that “there are more than 200,000 – perhaps as many as 300,000 – men and women in U.S. jails and prisons suffering from mental disorders, including such serious illnesses as schizophrenia, bipolar disorder, and major depression”. Fellner’s paper highlights the degree to which prisons, housing such a large number of the mentally ill are practically replacing psychiatric institutions, yet without offering them the benefit of professional treatment. Under such conditions, Fellner argues, prison officials often misinterpret mentally ill behaviour as rebellious or disrespectful, and thus react with punishment, potentially exacerbating the illness. She further suggests that use of prisons in such capacity without providing appropriate medical treatment should be seen as violating the 8th Amendment’s “cruel and unusual punishment” clause.

Apart from the aforementioned issues associated with the punitive era’s increased incarceration rate, there are major problems arising specifically due to prison overcrowding. Haney (2006), in a study entitled “The wages of prison overcrowding: Harmful psychological consequences and dysfunctional correctional reactions” published by the *Washington University Journal of Law and Policy*, details a litany of negative effects related to the overcrowding of prisons caused by the incarceration explosion. Haney sees these effects as an outgrowth of

a correctional philosophy that saw deprivation as a goal rather than a problem. No longer judged by their ability to rehabilitate but rather, by their potential to punish, prison administrators felt little pressure to provide meaningful programming or activities for prisoners.

Haney’s study blames the era’s prison overcrowding with reducing or eliminating educational, vocational and psychological programmes that might later reduce recidivism in many prisoners, and replacing them with idle time. In addition to the lack of enhancement programmes, Haney remarks on the negative social effects of prison overcrowding, that “when prison environments become unduly painful they also become harmful, and prisoners carry the effects or consequences of that harm back into the ‘freeworld’ once they have been released”.

More evidence tying prison overcrowding and budgetary strains to post-prison failures is cited by Heller (2006), in a note published by the *Georgetown Journal on Poverty Law and Policy* entitled “Poverty: The most challenging condition of prisoner release”. Heller’s article decries the decline of positive post-release programmes, noting that one successful programme was ended due to the fact that the “Board of Prisons did not believe that the staff time needed to monitor the project could be spared due to the current level of overcrowding”. More importantly, Heller raises the issue of poverty in its role in recidivism. Recognising the difficulty facing ex-prisoners in their quest to re-enter society, Heller details how their economic hardship is exacerbated by a nearly insurmountable collection of release rules and regulations, the violation of which leads to re-incarceration. Noting that over half of recidivism can be attributed to release violations, Heller argues that such rules result “in giving many offenders lifetime sentences of ‘invisible punishment’ even after individuals serve their time in prison”. Far from suggesting that ex-prisoners should be coddled, Heller points out that making release terms more manageable is good for the public since it reduces the cost of corrections by reducing recidivism, decreasing prison population and, hence, expense.

The overall picture painted by the studies cited above is bleak. The only positive aspect that comes to mind in consideration of the effects of the punitive era is that by warehousing so many people, the public is that much safer from the potential crimes the prisoners might commit while they are temporarily behind bars. Yet even that proposition is unlikely, given that the majority of prisoners in the US have either committed non-violent or other relatively low-impact crimes, or have violated the terms of their release (Austin et al. 2007: 25). On the other hand, the negative aspects speak for themselves. Thus it is fair to say that a penal system in which the main focus is retribution mainly produces retribution. It also carries very high economic and social costs. On the other hand, according to Austin 2007: (22–24), improvements in rehabilitation and re-entry programmes, while useful, would not substantially reduce the number of prisoners since the root cause of the explosion in prison population was that “laws were passed that increased the number of people sent to prison and their length of stay”. Austin’s paper proposes a four-point plan to reduce prisoner expansion, which includes reducing sentence lengths to make them more proportionate to the crimes they represent; ending re-incarceration due to release or probation violations; shortening the length of post-release supervision; and the “decriminalisation” of so called “victimless” crimes. Although it seems unlikely that these proposals will be implemented in the near future, they constitute a well-considered approach to the question of how to undo the damage caused by the punitive era.

Recommendations regarding this issue range from the practical to the idealistic. I am generally in agreement with those who believe that removing criminals from the public can sometimes serve the useful purpose of keeping us safe from them. But I have never understood the value of punishment, other than as a tool to train children. As idealistic as this may sound, I think punishment serves no purpose other than making some people feel revenge. As such, a system based on the virtue of punishment is misguided, not to say bloodthirsty. The negative consequences of the penal system as we currently know it are too many to list and too great to quantify. Consequently, I think that prison as we know it is a failed institution which needs to be rebuilt from the ground up.

I don’t think that anyone who has entered a prison such as North Carolina’s central prison could come away with the notion of anything positive being accomplished behind its walls. Anyone who spends more than a few hours there – including staff members – would be lucky not to feel depressed. In my idealistic world, we always have to remember that prisoners are people, worthy of respect for no other reason than that. In this context, if we are to decide that someone cannot have the privilege of living among us for a while, we should go to great lengths to help find a way to understand and help that person deal with the issues that led to the commission of crime. Such

people should not be left idle, alone or in fear for their health or safety while in prison. It is fair to say that no one knows definitively why people commit crime, or what to do to stop them from doing it. One thing we do know is that the circumstances behind one person's crime are different from the next. This means that it takes a certain amount of careful consideration to evaluate the so-called offender in order to accurately assess how to best serve the needs of the community. In my mind, inflicting more pain, as I would characterise the effect of the current method of corrections, serves neither the criminal nor the community. It generally makes things worse.

Given the fact that most people currently in prison come from backgrounds marked by social problems, it is fair to assume that many are used to being treated meanly. While I haven't researched this issue specifically, I have read that many of the most violent offenders in our society come from backgrounds in which they were abused by members of their own family, likewise in the case of sexual abuse. Our current system of corrections subjects such prisoners to conditions that they are familiar with. Will being subjected to more of the same really make them remorseful? Can making them spend more time under these conditions lead to anything positive?

I think that if we as a society honestly want to reduce crime, we need to address the root causes of crime: substance abuse, mental illness, poverty, lack of education and so forth. We know that a large percentage of those currently behind bars come from backgrounds where one or more of these issues were a contributing factor. Making a long-term commitment to really investing in improvements to the social climate underlying crime would likely have a positive effect on crime.

Ultimately, criminal behaviour is a sign of desperation and alienation. People who break the law knowing they might wind up behind bars likely do so because they have lost faith in their ability to flourish. People who follow the laws do so not because they are afraid of what will happen to them if they break them, but because living within the law contributes to the continued success of their life plans. The goal of corrections should be to create and implement strategies that contribute to helping criminals catch on to the true value of living legally, rather than attempt to beat them into submission and hope they eventually see the light. Imprisonment as currently run cannot restore or teach prisoners what it takes to have faith in their ability to build positive futures. Without solving that problem, I think it is highly unlikely that prison will ever be more than a tool of restraint and revenge.

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