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Punitive Sentences

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PUNITIVE SENTENCES

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Deterrence is the sole purpose of threats of punishment.[1] Therefore, in prescribing sentences, there is no need to consider either desert (retribution) or rehabilitation. Sentences should be determinate and legislatively prescribed, since the deterrent effect is independent of the personality of the offender and of individual circumstances. At present, several contradictory criteria—such as desert, rehabilitation, and deterrence—must be compounded by judges and parole boards. This produces chaotic inconsistencies, many of which can be avoided when deterrence (apart from incapacitation) is recognized as the exclusive purpose of sentencing. Philosophical problems connected with retribution and rehabilitation can be avoided as well.

THE DETERRENT PURPOSE OF LEGAL THREATS

The criminal law tries to influence future conduct by threatening to punish persons who do what it prohibits, so as to deter them from doing it. Deterrence is the sole purpose of threatening punishment.[2] Would-be offenders see the threats of the criminal law as dangers. Most people respond to dangers, be they natural or

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1. Incapacitation will be dealt with separately. *See* text following note 17 *infra*.

2. General deterrence—the attempt to restrain people from unlawful acts by threatening to punish them—is distinguished from "special deterrence"—the expected restraining effect of actual punishment on offenders. General deterrence refers to the effect of potential punishment on potential offenders, the public at large, whereas "special deterrence" refers to the effects of actual punishment (*e.g.*, confinement) on the future conduct of actual offenders. This distinction is useful. However, "special deterrence" is indistinguishable from rehabilitation. When successful, the effect of either is future lawful conduct of the offender; when unsuccessful, recidivism. (The ingredients of rehabilitation and of "special deterrence" differ only slightly. Similar disincentives and incentives are involved, with the latter stressed in rehabilitation.) Since the detectable effects of rehabilitation coincide with those of "special deterrence," one of the two terms is redundant. Hence "special deterrence," so often confused with general deterrence, can be dropped and replaced by "rehabilitation," without loss to anyone but writers who like to make distinctions where there is no difference. In the rest of this Article, nonrecidivism of released offenders is referred to as rehabilitation.

legal, by adapting their behavior to minimize risks. Otherwise, the survival of the human race would be hard to explain. Hence, all systems of punishment rest on the justified belief that, *ceteris paribus*, more severe or frequent punishment—greater danger—deters more. Yet no legal threat, no matter how great the danger it produces, can deter everybody. Responsiveness varies: A few people are altogether unresponsive to danger. Many more are not deterred because the dangers attending legal threats are not great enough to deter them. Such people might respond to more severe threats, or to threats more likely to be carried out. Accordingly, to reduce the crime rate, the severity of threatened punishment can be increased and it can be carried out more frequently. But even an unlimited increase of severity and frequency of punishment cannot eliminate all offenses, since historically no Western[3] system of criminal justice has been able to catch and convict[4] more than a small proportion of all those threatened[5]—although we need not make it as hard to catch and convict them as we do. Judicial interpretations of the Constitution have led to the creation and extension of the exclusionary rule and to some absurd probable cause decisions.[6]

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3. Japan has lower (and declining) crime rates, and far higher apprehension and conviction rates than any Western country. *See* C. CLIFFORD, CRIME CONTROL IN JAPAN (1976). Japan not only has fewer criminals *per capita* than any Western country, it also has far fewer lawyers. *Id.* I cannot say whether there is a causal connection behind this statistical association; or behind the fact that the United States has greatly increased its production of lawyers and of criminals.

4. Police may arrest offenders even when the evidence is insufficient for a lawful arrest (*e.g.*, when probable cause is not demonstrable). And police may make arrests when the admissible evidence is obviously insufficient for conviction. Police officers tend to be credited and promoted according to arrests made, not according to convictions obtained.

However, because such arrests lead nowhere, prosecutors usually release the suspects before arraignment; if not, they are released upon arraignment. One may refer to the released persons as apprehended but not convicted, or as not apprehended. One must make a similar semantic decision about offenders released, or not even arrested, because the police officer to whom the complaint was made anticipates witnesses and victims to be too fearful or unwilling to testify, or to be likely to lose their resolution after a series of adjournments, or after threats by the suspect's friends.

5. In a well-organized system, the chances of repeat offenders being caught and convicted are comparatively high, since they become known to law enforcement agencies and multiply their risks. But habitual offenders usually are not deterred, and perhaps not deterrable, by available threats. However, actual punishment can prevent additional offenses of recidivists by incapacitating them. Accordingly, incapacitation is suggested. *See* text following note 17 *infra*.

6. *See* Van den Haag, *The Growth of the Imperial Judiciary*, POL'Y REV., Spring 1978, at 62-63 (discussing United States v. Montgomery, 561 F.2d 875 (D.C. Cir. 1977) (suppression of evidence obtained in violation of fourth amendment)).

THREAT SIZE, FREQUENCY OF PUNISHMENT, JUSTICE, AND DETERRENCE

Increases in the severity of threats and in the frequency with which they are carried out usually are limited by considerations of justice, which impose restrictions of two kinds:

(1) Rules instituted to protect nonoffenders and to restrain law enforcers protect many offenders from apprehension and conviction because insufficient evidence becomes available and admissible under these rules.[7] Hence legal threats are not carried out often enough to deter those offenders who might respond if threats of punishment were more frequently carried out.

(2) Although the only purpose of threatening punishment is to deter potential offenders, an attempt is also made to "do justice": to proportion the size of each threatened punishment to the perceived gravity of the offense and to other threats that are so proportioned. However, the threat size required to successfully deter from an offense does not depend on its gravity but on its attractiveness to prospective offenders. Whenever the attractiveness of the offense exceeds its perceived gravity, threats, the sizes of which are proportioned to the gravity of the offense, are unlikely to deter those who might respond only to more severe threats, proportioned to the crime's attractiveness.

"Gravity" roughly equals the malevolently intended harm done. (Permit me to neglect neglect and recklessness here.) Gravity is an uneasy compound of disparate ingredients, since the degree of wrongful intention, or of any culpability, may be independent of the harm done and the two are not commensurable. However, this compound often coincides with the perceived need for deterrence from the offense, although that need depends exclusively on the harm the offense might do. Because both depend heavily on harm done, gravity and the need for deterrence often coincide. Thus, both the gravity of, and the need to deter from, pickpocketing or parking violations are thought to be minor. Hence the size of the threat is small and hardly deterrent since it does not offset the attractiveness of the offense. The threat against murder is severe because the offense is considered grave and the need to deter great enough to maximize the threat size.

When the two criteria which determine the size of legal threats yield different sizes, the severity required by the need for

7. These rules range from the requirement of jury unanimity to the exclusionary rule and the requirement of probable cause.

deterrence from the offense may exceed the severity required by the gravity of it. In Adam Smith's example of the sentry who is executed for falling asleep, the gravity of the offense is perceived as minor, the need to deter from it as major.[8] The need to deter prevails and this leads to a harshness Smith laments as necessary but unjust. Often, however, when deterrence requires harshness and gravity does not, gravity prevails as criterion and we threaten but mild punishment. Our mild threats against drunken drivers who do harm—for that matter against any drunks who do harm—may be just, considering the lack of malevolent intent, but they certainly do not satisfy the need for deterrence. Nor do our threats against juvenile offenders. Justice to potential offenders here—proportioned to their culpability—often involves injustice to potential victims, many of whom might be spared by more deterrent threats.

FROM THREATS TO PUNISHMENT: IS RETRIBUTION IMPLIED?

Whatever its additional purposes, punishment carries out legal threats which have failed to deter. Punishment thus seems necessarily retributive since, unlike a threat, punishment refers to past offenses. Courts ascertain who has incurred guilt in the past and punish him accordingly. Even the most ardent rehabilitationists and deterrence theorists usually concede that a just distribution of punishments, a distribution according to guilt, can be explained only by resorting to concepts of retribution and desert.[9]

I have been inclined to this view myself. But I have now concluded that the concept of retribution, which bases punishment on what is deserved by guilt, is not needed to explain or justify the distribution of punishments, or even the size of threats. Specifically, retributionist theories are not needed to tell us (a) why we threaten, (b) why we punish, (c) why we punish only the guilty, and (d) why we threaten or punish them to the degree to which we do. According to Occam's razor—*essentia non sunt multiplicanda*

8. ADAM SMITH'S MORAL AND POLITICAL PHILOSOPHY 129-30 (H. Schneider ed. 1970).

9. This is why rehabilitationists regard punishment according to guilt with misgivings. They would prefer a medical model, which makes guilt and justice irrelevant, substituting social and individual "needs for treatment" and dealing with crime as one deals with hepatitis. For a discussion of the medical and legal models, see E. VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION 117-23, 184-91 (1975).

praeter necessitatem (concepts should not be multiplied beyond need)—retributionist theories are not needed within any legal (as distinguished from moral) discourse. The social need for deterrence alone can be shown to justify and to limit the size of penalties and their distribution exclusively to the guilty.

We threaten to punish only to deter; we do punish only because threats must be carried out. If legal threats are not carried out they will not remain credible and will thus become ineffective as deterrents. The deterrent purpose of legal threats, would be defeated. If not carried out, legal threats also would deceive the lawabiding public which relies on the promise that law breakers will be punished.[10] To the Roman *nulla poena sine lege* (no punishment without a law threatening it), we must add *nulla lex sine poena* (no law without punishment as threatened).

If punishment is not retribution for guilt, why not punish the innocent? The reason is simple: It is not deterrent to threaten or punish those who are not believed to have violated the law. Punishing the innocent may be as deterrent as punishing the guilty, but only if the innocent are believed guilty. However, that belief is hard to produce unless we do our best to single out the guilty for punishment.[11] Thus if we want to deter possible offenders, we must threaten those who might incur guilt, and, as threatened, punish only those who have.

Since the deterrent effect is produced by perceived and not necessarily by actual guilt, it can be argued that it would be deterrent to punish suspects believed to be guilty, as long as only authorities, such as courts, know them to be innocent. Moral (retributionist) objections cause revulsion at this thought: punishment is morally justified only when deserved—when the person punished has committed a blameworthy act. This moral argument, whatever its merits, is not needed. The deterrence criterion also

10. The legal threat is an obligation not to the person threatened, who is merely the object of the threat, but to those who rely on it, *i.e.*, to lawabiding citizens. In view of the threat they omit actions they might have otherwise undertaken: (1) They did not protect themselves from harm caused by the crime, at least not to the degree they would have in the absence of the legal threat of punishment; nor did they directly exact vengeance or compensation from those who caused it; (2) they did refrain from unlawful actions, which they might have undertaken but for the threats of the law. Unless threats are carried out, the lawabiding are placed at an unwarranted disadvantage.

11. "Our best" depends on the state of the art. It may involve witch doctors—if that is the best we can do—or lawyers and courts if that is. But it must be believed to be the best we can do.

requires and permits only the punishment of guilty persons. Anyone who is punished as guilty, while known by the authorities to be innocent, may subsequently become publicly known to have been innocent. In addition, it may become known that the authorities knowingly allowed an innocent person to be punished. Indeed, there is a high risk that this will occur. If it does, it would undermine the deterrent effectiveness of distributing punishment only to the guilty as well as confidence in the authorities distributing the punishment.[12] Hence, from a purely deterrent viewpoint, there is sufficient reason—apart from morality—not to punish anybody who can become known to be innocent. There is no need to resort to retributive arguments. Moreover, the price of the virtues of retributionism—simplicity and intuitive appeal—is high. Since they bear no relation to social needs, criteria of desert tend to be abandoned wherever the punishment deserved and the punishment needed for deterrent purposes clash;[13] further, appearances to the contrary notwithstanding, retributionism cannot tell what penalty size is just.[14] Above all, to say that a penalty is deserved by the gravity of an offense is to express a feeling—more or less widely shared—rather than to give a reason. In contrast, deterrence is, in principle and in fact, a measurable quantity. It prescribes sentences determined by expected and measurable social effects.

It is sometimes argued that the deterrence argument could permit altogether different objects of punishment: for example, we could threaten to punish the children or wives of the guilty. But there is no deterrent advantage in such injustice. Guilt would still have to be ascertained, and a direct threat against the guilty would be more deterrent.

Desert, Gravity, and Threat Size

Together with the need for deterrence, the gravity of the offense determines the size of threats and of actual punishments. The gravity of an offense depends on the moral or material harm it does and on the culpability of the offender.[15] The harm, it is thought,

12. The gospels present a remarkable case in point: Jesus, found guilty by a court, later was thought innocent by his followers. A modern example is the Dreyfus case which shook the French Republic when it emerged that a French Army officer, convicted of espionage, was not only innocent, but had been deliberately used as a scapegoat.

13. *See* text following note 8 *supra*.

14. *See* E. van den Haag, *supra* note 9, at 191-95.

15. Harm often is morally evaluated. The relative gravity of rape and burglary is rated morally. This moral evaluation determines the felt need for deterrence which determines the threat size independently of desert.

gives rise to the need for deterrence, while malevolent intent, culpability of any type, usually is thought to codetermine the size of the punishment deserved. Thus, threats proportioned to the gravity of offenses are thought to be proportioned according to desert. However, it is quite possible to allow culpability to codetermine the size of threats and punishments because of its importance in their deterrent function, and to dispense with notions of desert and of retributive justice here too.

Culpability is a measure of guilt. The more offenders wrongfully intend to do harm the more guilty they are. *Ceteris paribus*, threats are more deterrent the more specifically they are directed to, and carried out against, those guilty of breaking the law. Thus, if the harm produced by the offense is held constant, it will be most deterrent to threaten and punish most severely the offenders whose culpability is greatest, since only those culpably intending to commit offenses can be deterred by the threats that punishment makes effective. Therefore, a deterrent threat must take account not just of the harmfulness of the offense, but also of the degree of culpability of the offender. Justice must be done for the sake of being deterrent as much as for the sake of being just.

Unfortunately, whether one wishes to maximize deterrence or justice according to desert, the difficulties of compounding culpability and harmfulness remain. The deterrence criterion, based on harm and culpability, still may lead to ineffective threat sizes whenever the attractiveness of the offense is great and the harm it does is not. In such cases the wrongful intent does not weigh heavily because of the comparative harmlessness of the offense. On the other hand, threat sizes above those justified by culpability are likely whenever the need for deterrence is thought overwhelmingly great because of the harm done. In such cases the fact that there is little or no wrongful intent is disregarded because of the harmfulness of the offense. This may offend our sense of justice; indeed, strict liability does. It is acceptable, nevertheless, because the deterrent threat can be effective in some types of offenses, even without a showing of individual culpability—although, almost by definition, the punishment inflicted is undeserved.

Intuition and the Role of Desert

Intuitively, it seems inappropriate to deny a role to retribution and desert in the theory of punishment. These concepts are indeed essential to moral theories which help explain why the community prohibits or should prohibit certain actions as wrong. Moral

theories also help explain the amount of harm done by prohibited actions and, therefore, the intensity of the need to deter them. Further, moral theories influence the rules of evidence and procedure, which protect individual rights (*e.g.*, privacy) and limit punishment threats (*e.g.*, by prohibiting punitive torture). But the belief that moral concepts such as desert and retribution must play a role in the theory of punishment itself is mistaken. It rests on an insufficient distinction between moral theories and theories of punishment.[16] Indeed, if one takes as *datum* that whatever the law prohibits is harmful, concepts such as desert are not needed in the theories of punishment which explain who is threatened and punished, why, and how much. The need to deter entirely explains the size and distribution of threats and punishment.

PUNISHMENT AND THE FUTURE

If an act for which a reward was promised has been done, the promised reward must be given, regardless of how the person to whom the promise was made is likely to behave in the future. Future conduct is relevant only to future promises and rewards. Analogously, a threatened punishment must be carried out independently of the future conduct of the person against whom it was threatened. Future conduct is relevant only to future threats and punishments. Punishment, then, *need not* rest on anything but past threats; and it *cannot* rest on the desire for rehabilitation or incapacitation both of which refer only to future conduct. Both may coincide with punishment; but they also may be separately produced; and punishment need not produce either. Thus, however useful punishment is in rehabilitating or incapacitating, neither is logically related to punishment's essential function: to *deter* from crime.

Since punitive sentences carry out legal threats made beforehand, they must be determined by the threat made against the offenses committed and not by conjectures about the future behavior of the offender. However, past offenses (and additional objective factors) may predict the likelihood of future offenses. If that likelihood is great enough, threats and sentences may include provisions for nonpunitive incapacitation for the sake of social defense.

16. Moral theories are theories of right and wrong, good and bad, etc. Theories of punishment deal with *social devices* to control what moral theory tells us to control. Punishment and the threat of punishment are more or less effective *means* of social control, means used to accomplish the (moral) ends incorporated in the law.

REHABILITATION

Although rehabilitation is incidental to punishment, punishment usually is essential to rehabilitation. Without punishment rehabilitation is unlikely to take place, for it is the experience of punishment, and the threat of future punishments, that suggests to offenders that their criminal conduct is self-defeating; punishment gives them the main motive for rehabilitation. In the absence of such a motive, rehabilitation cannot be helped by any program of treatment.[17] Punishment and the threat of punishment may not be sufficient but are necessary ingredients for rehabilitation. On the other hand, that an offender has been rehabilitated is neither a necessary nor sufficient justification to stop a punishment inflicted to carry out a threat against an offense committed in the past.

INCAPACITATION

Confinement is not essential to punishment, since punishment may consist of a fine. Nor is punishment essential to confinement, which may be imposed for nonpunitive reasons on the insane, on those suffering from infectious diseases, or on those held for trial. Punishment is thus not a necessary reason for incapacitation, although it is a sufficient one. Incapacitation is felt to be punitive, because it is involuntary. Still, incapacitation need not be punitive in function.

Whereas punishment is threatened to deter, and imposed because threatened, incapacitation may be imposed for reasons that have nothing to do with deterrence. If we knew, by revelation, that a man would throw a bomb to harm the community, we certainly would incapacitate him for as long as we knew him to be willing and capable of throwing the bomb, regardless of whether his intent is criminal or his mind deranged. By incapacitating him we do not intend to punish him: he has done nothing, as yet, to justify punishment. We cannot punish anyone for what he has not yet done.[18] We can incapacitate him, however, to prevent harm. Incapacitation, then, is a measure of preemptive social defense, quite independent of punishment.

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17. No program of treatment has been shown to regularly and significantly increase the rate of rehabilitation (defined as nonrecidivism) of treated over nontreated control groups. *See* D. LIPTON, R. MARTINSON & J. WILKES, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT (1975).

18. Here, the deterrent and retributive conclusions coincide, although the arguments for each differ. However, incapacitation is independent of either argument.

Now, in practice, certainty about what anyone will do is hard to come by. However, we have statistical probabilities which may vary from offender to offender and can be calculated. They indicate that those convicted of a second offense, particularly if young, are much more likely to commit other offenses than those who are not, and those convicted of a third offense are still more likely to continue criminal conduct. It is also statistically likely that those convicted of second and third offenses have already committed many more offenses of which they were not convicted.[19]

There is no reason why the punishment threatened for committing a second offense should not exceed that threatened for the first. The community may wish to deter not only from specific offenses, but also from continued offending. And, quite apart from punishment, the community may rely on offenses committed, combined with other relevant factors, to statistically predict the likelihood of further offenses. Where such likelihood is found to be considerable and to significantly exceed the average likelihood of future offenses by nonconvicts, the convict likely to commit further offenses of sufficient harmfulness should be incapacitated for as long as that likelihood remains high. This may lead to post-punishment incapacitation of some young recidivists up to the age of forty. Some older recidivists may be incapacitated up to the age of fifty, if our data relating age and likelihood of criminality are correct.[20]

There are two major arguments against imposing postpunitive incapacitation on the basis of categorical (statistical) prediction.[21]

(1) By imposing such incapacitation we punish for what will or might be done, not for what has been done. This argument either fails to distinguish between incapacitation and punishment, despite the conceptual difference, or, more often, relies on the fact that, from the viewpoint of the person incapacitated, the difference felt between punitive incapacitation and preventive incapacitation may be so small as to be indiscernible. He will feel punished because he is deprived of liberty by the decision of a social authority. This point must be granted even if the preventively confined person is

19. *See* Wolfgang, *Crime in a Birth Cohort*, 117 PROC. AM. PHIL. SOC'Y 404 (1973).

20. G. NETTLER, EXPLAINING CRIME 99-101 (1974).

21. I deliberately exclude clinical psychiatric prediction, which has been shown to be unreliable and capricious.

allowed to live in more pleasant conditions than the punitively confined.

To the legal threat of punishment we may add, for second or third offenders, a legal threat of incapacitation beyond the punishment. Our purpose may well be preventive. Yet as far as the offender is concerned, the added nonpunitive incapacitation is part of what was threatened, part, if he so conceives it, of the punishment threatened. He thus is incapacitated for what he has done, for committing a second or third offense. Unlike the insane, he is as able to avoid the threatened incapacitation as he is to avoid the threatened punishment which precedes it, by avoiding the second offense. He volunteers for the risk of both punishment and postpunitive incapacitation, and cannot complain if that which he risked occurs.[22]

(2) The more cogent argument against postpunishment incapacitation rests on our limited ability to predict. We can statistically predict that some offenders are more likely to offend again than others, depending on the category into which they fall. But our probabilities are no more than that. If not incapacitated, perhaps a majority of those statistically likely to commit additional offenses may never actually do so; at least they may never be convicted of other crimes. Statistical predictions can be improved, but it is unlikely that they will ever approach certainty. Thus, a considerable number of persons might be incapacitated who, if free, would have done no harm. Yet, they volunteered for that risk by committing the offenses for which they were convicted.

However, there is a social and moral cost when persons are incapacitated, who need not be, after they have served the punishment required by their offenses. Against this social cost must be weighed the social gain produced by incapacitating the offenders most likely to commit further crimes. The outcome of the calculation is hardly in doubt even if all third offenders had to be permanently incapacitated.[23]

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22. The length of postpunishment confinement depends on other factors besides the offense, such as age. This poses no difficulty. Either the threat is varied according to the age of the offender, or it is so formulated as to make the length of postpunishment confinement dependent generally on the statistical likelihood of recidivism.

23. However, this would go far beyond what is suggested by the available data which indicates that the likelihood crimes will be committed declines rapidly after the age of 40. *See* G. NETTLER, *supra* note 20, at 99-101.

In war we shoot at enemy soldiers who individually may not be guilty of anything, not even of being hostile to our country or cause. Yet we can defend our country and prevent harm to it only by shooting enemy soldiers who otherwise may shoot us. Social defense against internal enemies admittedly is different from social defense against external enemies. For one thing, less is at stake for the country as a whole. But there are similarities as well. In both cases we must defend the community against harm by incapacitating both actual and potential enemies. Those who have enlisted in the criminal army are personally more guilty than those who serve in the enemy army. Criminals are volunteers; they usually serve no cause but their own advancement, whereas enemy soldiers usually are draftees, who do not serve to advance their personal fortunes. But both criminals and enemy soldiers must be incapacitated as long as we have reason to believe that they will harm us if free to do so. Postpunishment incapacitation is among the risks second offenders volunteer for. It is less of a risk and more easily avoidable than the risk the draftee runs. I can see no reason why repeated offenders should not be threatened with that risk. Some further consequences of the deterrence approach to sentencing will now be considered.

JUVENILES

Juveniles who have committed acts defined as crimes when committed by adults, should be tried and sentenced by the same courts adults are tried by, and under the same laws. If counsel for the defense wishes to plead diminished capacity for *mens rea*, or any other legal excuse or mitigating circumstance, he can do so. But the law and the court should not assume a priori that the age of juveniles is a mitigating circumstance, let alone a legal excuse.[24] There is no evidence to indicate that juveniles, owing to their age, are unaware of the gravity of their offenses or unlikely to be deterred by threats.

Juveniles cannot be deterred, or for that matter rehabilitated, by promising them immunity from serious punishment, as we have done hitherto. And they are not less, and often more, socially dangerous than older offenders.[25]

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24. Prisons for various age groups may be separated.

25. Children below the age of 10 should be dealt with by parents and legal guardians, regardless of offense. The likelihood of full understanding of the wrong-

DETERMINATE SENTENCES, PAROLE, AND PROBATION

There never was a justification for having sentences second-guessed by nonjudicial personnel. Parole boards know nothing the sentencing judge could not know, except for some superficial information about the offender's conduct in prison. Such conduct is not relevant to the punishment to which he has been sentenced in view of the offense; and conduct in prison does not predict future conduct outside prison (which also is irrelevant to punishment). Hence parole should be abolished. It rests on considerations that, apart from being materially wrong, are irrelevant under the deterrence criterion. Some credit for good conduct in prison, given at the discretion of prison authorities, may help prison discipline and may be useful as long as it does not significantly modify sentences. It should be available, under an established point system, to all prisoners who have not violated prison rules; but the maximum credit given should not exceed 10% of the sentence—otherwise indeterminacy would be reintroduced. Deterrence would not be served by sentences that could be greatly reduced by arbitrary and nebulous criteria.

If parole is abolished, long sentences presently threatened and given in view of the likelihood of parole should be modified by lessening legal threats. Threats and sentences should be altogether determinate, leaving judges little discretion. To be deterrent, sentences must be predictable, and the relevant prediction refers to the time that actually must be served. "Little discretion" may mean reducing or increasing the legally threatened sentence by 10%. If a judge wishes to go beyond this discretionary variation because of circumstances deemed exceptional, the prescribed sentence may be increased or decreased by up to 30%, but the sentence must be automatically reviewed by an appeals court empowered to let it stand or to reimpose the sentence threatened for

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fulness of their offenses is small. Hence there is little point in legal proceedings. (Parents and guardians should be civilly liable for harm done by their children.) If parents or legal guardians abdicate responsibility, whether because of their own disabilities, or because of offenses or misbehavior by the children in their care, the children should be dealt with exclusively by social agencies other than courts. (This might also be done for juveniles between 10 and 17 if they are not convicted of offenses but merely rejected at home.) Preferably, they should be adopted or have foster parents, or, as a last resort, be kept in nonpunitive boarding schools or institutions. Institutionalized children should be released as soon as that can be done without harm to them or others.

the offense.[26] When neither seems satisfactory, the appeals court may ask the lower court to reconsider the sentence. However, unless the discretionary limits are exceeded, sentences should not be appealable. Giving judges discretion does not adapt the sentence to the personality of the criminal, as was hoped, but to that of the judge. Neither adaptation serves the purposes of criminal justice, and both lead to sentences being perceived as arbitrary and capricious. Hence, discretion should be narrowly limited.

Probation and suspended sentences should be available only to first offenders for comparatively minor offenses. If judges grant probation in other circumstances the sentence should be automatically reviewed by a higher court empowered to reject probation.

Prison Space and Prison Treatment

It is often argued that the sentencing criteria suggested would increase intolerably the shortage of prison space. Undoubtedly the increasing severity of sentences which is already occurring requires more prison space than is presently available. Enactment of the reforms proposed here may require still more. How much additional prison space will be required permanently is hard to predict. If more severe and frequent prison sentences are given, a higher proportion of offenders will be in prison. But if these sentences deter, fewer offenses will be committed.[27] Thus the total number of offenders will decrease and the actual prison population ultimately may not increase much.

Yet, at least temporarily, more prisons will have to be built. It has been argued that this will be too costly. However, it is cheaper to build prisons than to tolerate a higher crime rate, even though taxpayers rather than crime victims may have to bear the cost. At any rate, the cost of imprisonment is far higher than it need be for three reasons apart from waste and corruption.

(1) Fairly costly attempts are made to provide prisoners with rehabilitative services and various amenities which have never been shown to contribute to any of the purposes of punishment, including rehabilitation. Television is not required as part of

26. Thus, if the law prescribes a sentence of 10 years, the court, within its discretion, may impose a sentence of anywhere between nine and 11 years without review of the sentence. If the court, explaining the exceptional circumstances that lead to its decision, increases the sentence to 13 years or decreases it to seven years, an automatic review follows.

27. The lengthier and more frequent incapacitation of habitual offenders will add to that effect.

humane treatment or rehabilitation; nor is tennis, or conjugal sex.[28] A prisoner is intentionally severed from his normal environment and from amenities. There is no reason to provide either at government expense. If his normal environment were helpful in producing lawful behavior, he probably would not be in prison. There is no evidence showing that television, sex, or tennis help rehabilitation either.

(2) Prisoners are not given productive work and they are not allowed to earn enough to pay for their keep. Most legal experts are in favor, as I am, of normal wages and work opportunities for prisoners, and of incentive pay. Even nonmonetary work incentives, such as shortening of sentences according to work performed are not altogether inconsistent with deterrent punishment, if kept within narrow limits.[29] I will not dwell on this matter. Obstacles come from labor unions and business; the problem is political. But it must be noted that prisons are costly only because we insist on making them costly. They could be self-supporting and, if prisoners become taxpayers, they could increase government revenue. Lawful work at normal wages within prisons may even be rehabilitative. It is one "treatment" that has never been tried.

(3) The most costly part of imprisonment consists of the measures taken to prevent escape. These measures also raise prison building costs. However, many inmates are neither violent nor prone to escape. They may have surrendered voluntarily and may prefer to serve their time rather than to add to their crimes by escaping and living as fugitives. Accordingly, we should create small prisons with minimal supervision: no more security is needed than is provided in a factory. Roll calls will be needed—but no actual measures to prevent flight. In doubtful cases prisoners working in these prisons may provide bonds, forfeited if they escape. In other cases this may be unnecessary. If only actual security risks—violent or escape-prone prisoners (a category which may include all young offenders sentenced to long terms)—are kept in high security prisons, imprisonment will become much cheaper than it is now.

Those who most lament prison crowding and wax eloquently about the inhumane conditions it creates are often the very persons

28. The absence of sexual gratification, although unpopular, has never been shown to be harmful, romantic psychologists to the contrary notwithstanding.

29. Appropriate deductions from pay for room and board and for court ordered compensation of parties harmed will have to be made.

who did their best, for ideological reasons, to prevent the building of additional prisons. They have helped create the conditions which they now use to insist that offenders should not be confined as often or as long as is needed to protect the community. Most of them persist in opposing the building of prisons and I have found it impossible to rehabilitate them.

CONCLUSION

Deterrence is the only criterion needed to justify threats and the infliction of punishment. Deterrence also justifies and determines the length of sentences and their distribution. Both deterrence and retribution require the distribution of punishment to the guilty, although for different reasons; neither rehabilitation nor retribution is needed as justification or as sentencing criterion. Furthermore, in specific cases, postpunitive incapacitation is justifiable as a measure of (nonpunitive) social defense.