Past OR Future Crimes

Deservedness and Dangerousness in the Sentencing of Criminals

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To Kaethe and Ruth Bachert
Donald von Hirsch

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Preface

This book grew more or less of its own accord. My first sketch of a theory of criminal sentencing was published in 1976—*Doing Justice,* the report of the Committee for the Study of Incarceration. Having spent more than four years on that project, I thought I had exhausted what I might have to say.

My intention was to focus next on the implementation of sentencing reform. I obtained a grant to study parole, which evolved into Kathleen Hanrahan's and my 1979 book, *The Question of Parole.* I then became involved in a study of determinate sentencing as it had been carried out in several jurisdictions.

During these projects, however, questions of sentencing theory kept intruding. The desert model for sentencing advocated in *Doing Justice* was generating more interest than I had anticipated—and I found myself confronted with questions about various aspects of the model. Studying determinate sentencing also raised theoretical questions about the role of previous convictions, about gauging the seriousness of crimes, and about finding the anchoring points for a penalty scale. The resurgence of interest in predictive sentencing in the early 1980s forced me to take a second look at prediction, and its empirical and ethical problems. I wrote articles on these various topics, as they claimed my attention.

Recently, I had some leisure to look those efforts over and found they had become a patchwork of writings in separate journals, with some overlap and with major gaps. The time had come to do a more systematic work on desert and prediction in sentencing—one that would incorporate the usable parts of those articles and address the issues I had not dealt with previously. The result is this book.

I have tried to make my ideas specific enough to provide guidance to rulemakers. Having served as consultant to several sentencing commissions, I have seen how seriously the members and staff were willing to take ideas, provided they are made relevant to the writing of guidelines. I learned to share commission members' impatience with broad theories whose application is left unspecified.

Punishment has always been a nasty business. No theory can improve it, without the necessary political will and an understanding of the actual workings of the penal system. A coherent theory, however, is needed so we can comprehend better what our aims should be. One can reform sentencing only by knowing what reform means.

Acknowledgments

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I owe my gratitude to several colleagues who devoted their valuable time to reviewing the first draft of the book and whose comments have helped me improve it: Jacqueline Cohen, Don Gottfredson, David Greenberg, Sten Heckscher, Peter Hoffman, Nils Jareborg, John Kleinig, Sheldon Messinger, John Monahan, Don Scheid, Kip Schlegel, and Richard Singer.

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I also much appreciate the enthusiasm and support of Rutgers University Press, and of its editor-in-chief, Marlie Wasserman.

Finally, I should acknowledge my debt to Norval Morris. I continue our running theoretical debate in this book, but he has in his writings compelled me to rethink my ideas. He also deserves much of the credit for stimulating and maintaining our profession's interest in the conceptual underpinnings of sentencing policy.

In a number of chapters, I have used (with considerable alterations and additions) portions of articles of mine that have been published elsewhere. I am grateful to the following publishers, who have kindly allowed me to utilize those articles.

In chapter 1: "Recent Trends in American Criminal Sentencing Theory," *Maryland Law Review* 42 (1983): 6–36. Originally published in German as "Gegenwärtige Tendenzen in der Amerikanischen Strafzumessungslehre," *Zeitschrift für die Gesamte Strafrechtswissenschaft* 94 (1982): 1047–1079. Also, a book review of *The Decline of the Rehabilitative Ideal,* by Francis Allen, and *Imprisonment in America,* by Michael Sherman and Gordon Hawkins, *University of Pennsylvania Law Review* 131 (1983): 819–834.

In chapters 3 and 5: "'Neoclassicism,' Proportionality and the Rationale for Punishment: Thoughts on the Scandinavian Debate," *Crime and Delinquency* 29 (1983): 52–70, originally published in Swedish as "Nyklassicism, proportionalitet och straffets grunder." *Nordisk Tidsskrift for Kriminalvidenskab* 69 (1982): 97–117.

In chapter 4: "Equality, 'Anisonomy' and Justice: A Review of *Madness and the Criminal Law,*" *Michigan Law Review* 82 (1984): 1093–1112.

In chapter 7: "Desert and Previous Convictions in Sentencing," *Minnesota Law Review* 65 (1981): 591–634.

In chapters 6 and 8: "Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale," *Journal of Criminal Law and Criminology* 74 (1983): 209–248.

In chapters 9 and 10: "Selective Incapacitation: Some Queries about Research Design and Equity," *New York University Review of Law and Social Change* 12 (1983–1984): 11–51 (with Don M. Gottfredson).

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PART I

The Issues in Perspective

PAST CRIMES OR FUTURE? When a convicted criminal faces sentence, should the blameworthiness of his criminal acts decide his punishment? Or should the sentence be based on how dangerous he is?

This question of past or future crimes prompts much of today's criminal sentencing debate. One influential school of thought emphasizes the past crime—the conduct for which the defendant stands convicted. It holds that punishment is a condemnatory institution, and its severity should comport with the degree of blameworthiness of the offender's criminal acts. Another school emphasizes risk of future criminality. Once the defendant has been convicted, his sentence should be determined chiefly by how likely he is to commit further offenses. The first theory, concerned with desert and proportionality, was not taken seriously in earlier decades, but during the last ten years it has acquired—and retains—a great deal of influence. The second, concerned with prediction, was historically influential, waned for some years, and has had a recent renaissance.

The debate is no abstract one, for it vitally affects the substance of sentencing policy. According to the first theory, punishments should be scaled to reflect the comparative gravity of offenses, and crimes of similar gravity should receive similar punishments. According to the second, offenders convicted of similar crimes should receive unequal sentences, when their probabilities of returning to crime are unequal. Sentencing guidelines will have different emphasis and content, depending on which of the two theories is the guide. This book examines the merits of the two conceptions, and the conflict between them.

Before proceeding with the analysis, however, it may be useful to put the question of past or future crimes in perspective. In chapter 1, I sketch the development of today's debate: the origins of the competing views, and the earlier conceptions they have replaced. In chapter 2, I describe the sentencing grid and explain how this device can be used to illustrate the issues.■

CHAPTER 1

Evolution of the Debate

Before about 1970, there was for several decades a recognizable consensus among penologists about the aims of sentencing. That consensus no longer exists today.

The Positivist Penal Ethic and Its Decline

The old consensus has often been described as one preoccupied with rehabilitation.[1] The belief supposedly once was, but no longer is, that sanctions should be chosen to serve the treatment needs of offenders.

A decline in the penal treatment ethic would scarcely be surprising, for it lived on watered intellectual capital. Despite years of rhetoric about rehabilitation, the ends of treatment were never carefully specified. Was it to protect the community by reducing recidivism? Or was it to enhance offenders' own lives, by offering them needed skills, guidance, and opportunities? Treatment advocates claimed it was both, without admitting the potential conflict between these aims.[2] Or worse, they oscillated between crime-prevention and social service conceptions in unprincipled fashion. Treatment programs were presented as a way of protecting the community against crime. When their effectiveness was questioned, it was said (on slender evidence) that they *probably* prevented crime, but that even if not, they enabled offenders to live more fulfilled lives. When offenders resisted the profferred help, it

was then said that their consent was not needed, because the treatment helped reduce recidivism, and so on.

Equally vague was the specification of the means for treatment. Virtually any intervention, even the daily routine of the prison itself ("milieu therapy"), was said to be rehabilitative—with little serious inquiry into how (or why) that intervention could be expected to work.[3] It was only a matter of time before the inadequacies of rehabilitative techniques became a matter of public knowledge. After decades of talk of treatment, American criminologists began in the 1950s and 1960s to test penal treatment programs in systematic fashion. The results of such studies were slow in coming, but by the early 1970s, several surveys of treatment studies had been published.[4] The results were disappointing, indeed. Although many offenders seemed to show improvement (that is, did not return to crime), this tended to occur as much among untreated as among treated individuals*—the treatment as such had little perceptible influence.[5]

Beyond these program failures, Francis Allen suggests, has come a loss of belief in human malleability.[6] Penal rehabilitationism requires the assumption that even the most recalcitrant seeming individuals can be made to change their characters, values, and habits through state-sponsored treatment efforts. This faith in human receptiveness to change has waned. Although crime and other forms of social deviance were plentiful in the past, their persistence in the face of elaborate and costly social and educational efforts has shaken our confidence. Perhaps people are not so easily remade—at least not those who lack the necessary mo-

*These pessimistic conclusions were confirmed by a 1979 report by the National Academy of Science's Panel on Research on Rehabilitative Techniques.

The panel report is set forth in Lee B. Sechrest, Susan O. White, and Elizabeth D. Brown, eds., *The Rehabilitation of Criminal Offenders: Problems and Prospects*, 3–118.

Recently, there have been occasional reported successes with particular treatment methods dealing with particular offender types. See Ted Palmer, "Treatment and the Role of Classification: A Review of the Basics." But no serious researcher has been willing to reassert the rehabilitationists' traditional claim that treatment can routinely be made to work for the bulk of criminal offenders.

In the face of discouraging evidence, a few writers have bravely maintained their optimism about the prospects of rehabilitative sentencing. See, for example, Francis T. Cullen and Karen Gilbert, *Reaffirming Rehabilitation*. But such sanguine attitudes have not been widespread among penologists.

Aside from questions of effectiveness, the fairness of rehabilitative sentencing has also been questioned. Andrew von Hirsch, *Doing Justice: The Choice of Punishments*, 127–128.

tivation. Certainly the state no longer appears so efficacious a remaker.

Was the traditional penal ethic, however, so exclusively *rehabilitative*? Certainly, treatment was an important element. But there was also a second component: predictive restraint. Sentencing and correctional officials were supposed to gauge not only individual offenders' treatment needs but also their likelihood of returning to crime. Redeemable offenders were to be treated (in the community, if possible), but those judged bad risks were to be confined.

In virtually every text extolling rehabilitation, this other element of predictive restraint was discernible.[7] The National Council on Crime and Delinquency's proposed Model Sentencing Act, notwithstanding its emphasis on community treatment, provided for prison terms up to *thirty years* for dangerous and untreatable felons.[8] A more representative document, the American Law Institute's Model Penal Code, authorized judges to commit offenders to prison whenever they found "[an] undue risk that . . . the defendent will commit another crime."[9] The prevailing American ideology was less purely rehabilitative than positivist—in the sense used by writers of the Italian positivist school such as Enrico Ferri and Raffaele Garofalo.[10] Its aim was to prevent further crimes by convicted offenders. When those crimes might be forestalled through rehabilitative efforts, treatment programs should be tried. But to the extent that the success of such programs was uncertain, the offenders who were bad risks could always be restrained.

The positivist ideology had such appeal, I believe, precisely because it offered both therapy and restraint. One did not have to assume all criminals were redeemable but could merely hope that some might be. Therapy could be tried on apparently amenable defendants, but always with a fail-safe: the offender who seemed unsuitable for or unresponsive to treatment could be separated from the community. The system's institutions were organized on this bet-hedging premise. Judges could place promising offenders on probation but imprison the poor risks. Parole boards could release good prisoners early, while denying release to potential troublemakers. Probation and parole agents could service their cooperative clients, while recommending revocation and imprisonment for clients who seemed headed back to crime. The ideology was suited perfectly to Americans' desire to have it both ways: to be optimistic about criminals' potential for improvement while