2015

Substituting Effective Community Supervision for Incarceration

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Transcribed Speech

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The United States has much more punishment than the countries to which we would like to compare ourselves, and also much more crime. We are back to about 1965 crime levels, which is a considerable accomplishment. It means we are at about half the crime rate we were in 1994. But we still have four times as many homicides as any civilized country, and in the same neighborhoods where a large fraction of the young men wind up in prison or on probation, the leading cause of death for young men is being murdered. It is important not to lose sight of the crime side of the crime-and-punishment problem. They are both rather nightmarish.

Most of the harm done by crime is not the direct result of victimization, but of all the efforts that people make to avoid being victimized, starting with moving to the suburbs. I have not seen any discussion of crime as a contributor to global warming, but if suburban and exurban sprawl is a major source of green house gas emissions, crime and the consequent mobility patterns make a big contribution to sprawl.

So: we have crime and we have punishment. Punishment is supposed to control crime through deterrence, incapacitation, and rehabilitation, as well as providing retribution (which I regard as a proper objective).

The default punishment in the current American system is incarceration. We talk about other punishments as "alternatives to incarceration." Empirically, that is not correct; most people who get convicted of something are not sent to prison or jail, but instead are placed under community supervision.

I would add pretrial release to the list of community supervision statuses we need to pay attention to. Pretrial release has

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a very large number of people on it at any one time, and an even larger number of people going through it over time. Ten percent of new felonies are people currently on release awaiting trial for something else. Managing pretrial release is a problem we have not even started to wrestle with.

Locking people up is a pretty good way to incapacitate them, as long as you ignore the crimes they commit against one another and the crimes committed against them by officials while they are in prison, which we should, but do not, count. Incarceration does provide the maximum retribution—particularly the way we run some of our prisons in this country. On the other hand, if incarceration makes a contribution to rehabilitation, nobody has ever found it.

Consider ways of treating offenders other than by locking them up. What are the desiderata of such a system—of any punishment system?

Punishment ought to be frontloaded because offenders, even more than the rest of us, tend to be somewhat present-oriented. So the closer the punishment is to the crime, the more effect it is going to have on future behavior. That implies that our current system of back-loaded punishments, where the offender still feels the effects of having committed a crime at eighteen when he is thirty-five, is completely crazy. The ideal punishment hits right away and dissipates quickly.

Punishment should be arranged so that, once it ends, the offender finds that choosing a law-abiding life from there on out is more advantageous than continuing to commit crimes. That suggests that fines are a really terrible idea for people who are committing crimes to get money, and that any kind of disability in the labor market is another really terrible idea, insofar as it pushes the people we would like to make into *ex*-offenders back toward criminal activity.

The obvious alternative to incarceration is community release under supervision. But, as Marty Horn has pointed out, there is another alternative sentence of considerable antiquity: "Go, and sin no more."[1] There is no particular reason to think that every conviction ought to lead to a substantial punishment; insofar as probation is merely being used as a placeholder because we do not want to do anything else, maybe we ought to think about cutting back on it. For a very large fraction of the people who are nominally under probation supervision but are considered "low-risk," that supervision is in fact only nomi-

1. *John* 8:11.

nal. They are on banked caseloads where all that is being managed is the paperwork, and basically nothing happens unless they commit another crime. For that group, "probation" is a legal status rather than a program. It simply means that a new offense can be handled through probation revocation, which is faster than bringing a new case.

However, on paper even those merely-nominal probationers are subject to a long list of conditions of release. It is merely that we do not bother to monitor whether those conditions are being observed. If you think, as I do, that bluffing is a bad habit and that the criminal justice system does way too much of it, then you ought to favor making the distinction between nominal and real probation explicit, and not pretend to impose conditions we are not willing to enforce.

As Ron Corbett has pointed out,[2] even for those on "real" probation, there is a practical limit to the number of conditions that can be usefully imposed, simply based on the mental "bandwidth" of probationers. We routinely exceed that limit. Probation conditions compete for scarce cognitive capacity not only with each other but also with other things we want probationers thinking about, such as finding a job. To misquote Thoreau, "Let your conditions be as two or three, not as a hundred or a thousand."[3] Less is more.

In addition to "not too many," I would propose two other guiding principles about conditions of community corrections.

Every condition should be linked to not committing new crimes, and any condition worth imposing is worth monitoring and enforcing with consequences—otherwise, it is just a helpful hint. There is no point giving orders if you cannot tell whether they are being obeyed or if you are not prepared to sanction disobedience.

Now we get into this Symposium's topic. There is a right way and a wrong way to do those sanctions. The wrong way is the way we do it now in almost all jurisdictions in this country. Monitoring is lax, partly because probation officers are overwhelmed. A typical caseload in a high-crime jurisdiction will run between 150 and 200 cases: the arithmetic about how much time that leaves to supervise each case is grim. So monitoring is lax, and the probability that any given violation is detected is

2. Ronald P. Corbett, Jr., *The Burdens of Leniency: The Changing Face of Probation*, 99 MINN. L. REV. 1697, 1710, 1723–24 1729 (2015); *see also* SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH (2013).

3. *See* HENRY DAVID THOREAU, WALDEN (1854).

approaching epsilon.

When a violation *is* detected, the overworked probation officer (PO) is likely to say, "Don't do that again." That is probably the sanctions for more than ninety percent of detected probation violations. The second time he detects a violation, the PO is likely to say, "Don't *do* that again." The third time, "If you keep doing that, you're going to get in trouble." The fourth time, "You know, you do that one more time, we're going to see the judge." The fifth time, "This is your last chance."

Now, think about this as a system for shaping somebody's behavior. The offender always knows that the next violation *might* draw an actual sanction, but never knows that the next violation *will* draw an actual sanction—how is he to guess which "last chance" is actually his *last* chance? When the PO finally loses his temper and takes the probationer in front of the judge, the judge has two options. The judge either says, "Don't *do* that again. Really!," in which case the probation officer's credibility is shot, or sends the offender to (or back to) prison for a period of months or occasionally even years. So we have a system that never gives the probationer knowledge about the consequence of his behavior. It is a behavioral trap, setting up a revolving door.

That has to be the wrong way to do the job.

As for the right way, Cesare Beccaria wrote down the principles in 1764.[4] Punishments, to be effective, need to be swift and certain. They need not be severe. And as James Q. Wilson argued, severity is not merely an inadequate substitute for swiftness and certainty—it is the enemy of swiftness and certainty.[5] And the more severe a sanction is, the more infrequently it can be applied because you run into capacity constraints and the more slowly it will be applied because you run into a higher standard of due process.

So the right way involves swiftness, certainty, and (I would stress, as I failed to stress in the past) fairness. The best clinical approach to changing somebody's behavior minimizes, rather than maximizes, discretion in the probation officer and the judge. What is really therapeutic is the subject's belief that his outcomes are tightly coupled to his behavior.

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4. CESARE BECCARIA, DEI DELITTI E DELLE PENE [ON CRIMES AND PUNISHMENTS] (1764).

5. JAMES Q. WILSON, THINKING ABOUT CRIME (1975); *see also* Mark A.R. Kleiman, *Thinking About Punishment: James Q. Wilson and Mass Incarceration* (Marion Inst., Working Paper No. 11, 2014), *available at* http://marroninstitute.nyu.edu/uploads/content/Thinking_About_Punishment.pdf.

Insofar as punishment is discretionary, then the probationer is always given the choice of hoping to get away with it, and a lot of people who end up on probation have been hoping to get away with it for a long time. Moreover, if punishment is sporadic, as it generally is, then any actual punishment is really the decision of the probation officer or the judge. If punishment is, instead, consistent and predictable, that makes the punishment implicit in the decision of the offender to break the rule. And that is the message you want the offender to get.

So you want to put as many people as possible under community supervision rather than locking them up, you want to have no actual conditions of supervision for some offenders and a minimal number for the rest, and you want to enforce those conditions with swift, certain, and fair sanctions. That is the idea that went into Project HOPE and many, many other instances, both before and after, of doing community supervision according to common sense principles known to every Psych 101 professor and every parent. There is really nothing very obscure about this. This is just applying to the problem of community supervision everything we know about human behavior and how it changes.

The hard part is the operations. I am convinced, based on what is now ample data (which Angela Hawken has done much of the work to collect and analyze), that wherever you put swift, certain, and fair sanctions into practice, you will get the same fairly sharp decay curve for violation rates—a big majority either never violates or does so only once, and fewer than twenty percent violate as many as four times.

There is an old saying about an incorrigible thief: "He'd steal a hot stove." The principle of a project like HOPE—of swift, certain, fair sanctioning—is that most people will *not* steal a hot stove, that if you can make the stove reliably hot and make sure the person *knows* the stove is hot, most people will let it alone.

What we found in Hawaii in a set of persistently noncompliant probationers—most of them with methamphetamine problems and an average of fourteen prior arrests, picked precisely because they had *not* been complying with probation conditions—is that once Judge Alm warned them that every detected violation would lead to a couple days in jail and put them on random drug testing so there was no day they could safely use, half of those people never earned an actual sanction. So half the people you thought you were going to have to do something complicated to, you could pretty much ignore, once you

had given them a clear warning and made sure they knew you meant it.

Hawken points to another feature of the swift-certain-fair approach, a result she calls "behavioral triage." It causes probationers to divide themselves into a small group that needs active supervision (demonstrated by persistent noncompliance) and a larger group that needs a good leaving-alone. And the system arranges for the good being left alone. Unlike a drug court judge, Steve Alm never sees a HOPE probationer after the warning hearing, unless that person violates, until it is time for the motion for early termination of probation. Therefore, according to Hawken's analysis, he spends an average of twenty courtroom minutes a year per HOPE probationer, which means he can handle his current load of 1900 probationers in a single courtroom, with only a usual judge's staff.

Compare that ratio—1900 probationers to one judge—to a drug court judge, who maxes out at fifty or seventy-five. So this is a program and an approach to probation management that can go to scale.

The difficulties are operational, rooted in the complexity of the criminal justice system rather than the supposedly intractable nature of addiction. You have to get probation officers to think about a different way of doing their job, and you have to think about making that new job feasible. If a violation report is a revocation motion that takes four hours to write up, and a probation officer has a caseload of 180 with a violation rate of about thirty percent a month for either no-shows or positive drug tests, which is typical, then the task of reporting every violation simply is not feasible. There are not that many hours in the work month.

But if the report is simply, "The guy didn't show up for his drug test yesterday," that should not take four hours to fill out. So you simplify the paperwork. You have the report submitted by fax. You do not require the PO to show up for the hearing, which is, after all, a pretty perfunctory process. The guy did not show up for his drug test yesterday. What is he going to say about that? So you can simplify the workload.

But even once you have done that, just as you need to watch the probationers closely, you need to watch the probation officers closely. They have personal relationships with their probationers. Confronted with a positive drug test, a PO is tempted to say, "This guy has been doing a good job for six months. All right, he screwed up once. Why shouldn't I give him a break? He's a good guy. He won't do it again."

That act of random mercy is toxic. Once that word gets around, everybody who actually gets punished will say, "Hey, why me? You didn't punish *him*." And when that guy is punished the next time, he will say, "Oh, you know, the PO must have been in a bad mood today. He is punishing me now for something I have done before and gotten away with, and that I know other people get away with. *It's not fair*."

It is a paradox, but the mechanical aspect of swift, certain, fair sanctioning is one way the fairness gets built in.

But you cannot get that sort of consistency in a bureaucratic setting unless you enforce it. Probation supervisors need to know which violations were detected and which were promptly and correctly acted on. And, again, you can develop a system to do that.

The reason this is feasible is, again, that most people will not steal a hot stove. So of those first thirty-five really-bad-actor HOPE probationers, seventeen never drew a sanction. And of the eighteen who drew a first sanction, nine never drew a second sanction. And by the time you get to a third sanction, you are down to fifteen percent of the population. If you are only dealing with fifteen percent of the population, you can really do some serious supervision and offer some intensive, high-quality treatment and other services. Statistical prediction—"risk-needs assessment"—is better than nothing, but it is not as good as the actual observation of behavior in deciding who really needs services and who really needs supervision.

And the outcomes? Nothing short of spectacular: roughly fifty percent reductions in reoffending and in days behind bars over the next five years. The effects seem to persist beyond the supervision term, which is impressive.

There is no reason we cannot do this on parole—Washington State is doing it now for thousands of parolees. There is no reason we cannot do this on pretrial release, which was the first application of swift-certain-fair in Washington, D.C., in the 1970s.

And there is no reason we cannot do it to a large number of people who are now in prison. I think we could make community supervision a much more effective alternative to incarceration and make incarceration the last gasp where there is no other alternative. And I have to respectfully disagree with the notion that emptying most of the prisons by doing better community supervision would not be much progress over the *status quo*. I think it would be enormous progress. And I think we can do it while keeping crime rates moving in the right direction.

We are back to 1965 crime rates. Good for us! Incarceration peaked about two years ago and new commitments peaked about six years ago. Good for us! But, that leaves us with five times the incarceration rate we have ever had historically. In the eighty years up until 1979, the incarceration rate in this country varied between 120 and 140 prisoners, prison plus jail, per 100,000 residents. That number is now 752. We must not regard that sharp increase as normal or acceptable.

To get back to our historical rate, we have to reduce the prison-plus-jail head count by eighty percent. That would merely leave our incarceration rate fifty percent higher than the average level of the advanced democracies. Most Western European countries run about 100. The only one that is even close to our historical rate is England and Wales, which runs about 140. The Netherlands and Norway run about seventy. Now, there are lots of other things about those countries that are going to give them naturally lower crime rates, so we cannot necessarily expect to get to their incarceration rate. But to get back to our own historical level, we have to figure out what to do with eighty percent of our current prisoners.

To some extent, we can fix that on the back end. Swift-certain-fair is one way to break the revolving door between community supervision and incarceration. We can do it some on the front end if we make probation and parole a more potent punishment. We may be able to persuade prosecutors, judges, and legislators to use incarceration less and community supervision more. But at some point we have to start letting people out of prison, and I think it is possible using the principles of swift-certain-fair management to control a very large fraction of our current prison and jail population, without holding them in cages and paying their room and board bill.

So that is my current project: inventing a virtual prison where people would have a prisoner status but physically be in the community. (Think of it as furlough on steroids, or a halfway house without the house but with a ton of information technology.) But that is a topic for another day. Our topic for today is whether we can get rid of a community-corrections system that makes absolutely no sense because of too many conditions, too loose monitoring, and sporadic but draconian punishment—that is the incumbent we are running against—and replace it with a system that any parent would figure out in two minutes—a limited number of rules, capacity to monitor every rule so there is no undetected violation, and a sanctioning

system so that there is no violation without a swift and modest punishment.

I think it is now fair to say that we know that. But there is much we do not yet know.

When HOPE started, Judge Alm was doing one week as the first sanction. My one contribution to this process was to say, "Try two days." It turned out two days had exactly the same behavioral consequences as a week, or as the six weeks another judge was using. So we know that two days is enough in a system where there is escalating punishment with repeated violations. And when Judge Alm stopped escalating, he kept getting the same results. So we know that two days is enough even without escalation.

We do not know whether two days is more than enough. The Sobriety 24/7 drunk driving program in South Dakota uses a night in a jail cell and gets spectacular results. And in one county, they ran out of jail cells and substituted one hour in a police holding cell as the first sanction and got the very same results.

We are looking for the minimum effective dose of punishment, and all that can be said for sure right now is we have not gone that low yet. The optimal first punishment might not be confinement in an institution at all. It might be a week on a curfew. It might be a weekend of home confinement. In Washington State, it is a "stipulated agreement"—basically a confession of the violation and a performance contract specifying sanctions for future violations. And that generates the same violation curve as HOPE gets—lots of zeroes, lots of ones, not many threes or fours.

Swift-certain-fair, applied throughout the system, can massively reduce the number of people under lock and key while still reminding them not to do what they did before and still guiding them on a path that will not put them through the revolving door of crime and prison and crime and prison: "Doing life on the installment plan." That is a pattern we need to break. I think we can.