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FOREWORD

CRIME AND CORRECTIONS

ROBERT H. VASOLI*

A society can be examined from as many perspectives as there are observers and substantive areas of study. Historians, economists, sociologists, political scientists, anthropologists, and representatives of many other disciplines as well have all enriched our understanding of the world around us. But with all due respect to the contributions they have made, it would not be amiss to suggest that the study of a society's criminal justice system might well provide as much valid insight into its *Zeitgeist* as more conventional modes of analysis. In that vein, it is of more than passing interest to note that Alexis de Tocqueville's primary mission when he first visited the United States was to examine our penitentiaries. His incomparable *Democracy in America* was preceded by *On the Penitentiary System in the United States*, a work he co-authored with Gustave de Beaumont.

The criminal justice system is a vast socio-legal entity, encompassing the police, prosecutors, courts, correctional institutions, and probation and parole systems. It is a major service industry, employing tens of thousands and processing and ministering to millions. More than a million federal and state offenders are under probation supervision, another half million or so in prisons, and in any given year better than a million citizens pass through the nation's jails. Countless others, while not among the system's official functionaries, are symbiotically related to it as criminal defense attorneys, bail bondsmen, unpaid citizen volunteers, witnesses, and as victims.

No single symposium can hope or pretend to cover—or even touch—all bases of an advanced society's criminal justice system. This symposium is no exception to that general rule of feasibility. Nonetheless, it deals at length with issues that are current, controversial, and of considerable interest: organized crime, the disposition of dangerous offenders, the privatization of corrections, sentencing, and the forfeiture of

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"tainted" attorney's fees. As is the case with most if not all issues in criminal justice, those dealt with herein cannot be resolved in a definitive way. But while the contributions to this symposium do not each and severally constitute the final word, they are scholarly and provocative.

The magnitude and complexity of America's criminal justice system, besides creating problems in its effective operation, make it an inviting and vulnerable target for criticism. The difficulties engendered by size and intricacy are compounded by the fact that, including the military justice system and the District of Columbia, there are fifty-three separate major jurisdictions. As if this were not enough, the system is expected to perform multiple and often conflicting functions. In corrections, for example, the prisons have been variously called upon to punish, deter, incapacitate, and rehabilitate. And they have been expected to perform these competing functions simultaneously, despite chronic budgetary and staffing constraints. Gordon Hawkins, summarizing studies of prison guards, comments that they were "asked to perform impossible tasks without being properly trained to perform even possible ones."¹ The plight of the guard is typical of that of the criminal justice system overall. It, too, is expected to perform wondrous feats without the resources to do that which is altogether pedestrian.

It is not surprising, then, that few kind words are said of our criminal justice system these days. Dissatisfaction with the system is ubiquitous and unrelenting, and it emanates from every ideological quarter. Conservatives rue the system's porosity and permissiveness, its preoccupation with procedure and the rights of the accused, its inability to ensure "just deserts" for the guilty, its apparent diffidence toward the victims of crime. Liberals incline toward pursuit of a legal Holy Grail which entails, among other things, acceptance of the questionable proposition that freeing ninety-nine guilty persons is an acceptable price to pay if it means avoiding the punishment of a single innocent soul. As Macklin Fleming has put it, liberals seek a degree of perfection unattainable this side of paradise. For Fleming, appellate courts are the major loci of the quest for perfection, and they are responsible for most of what goes awry in criminal proceedings.²

1. G. HAWKINS, *THE PRISON: POLICY AND PRACTICE* 106 (1976).

2. M. FLEMING, *THE PRICE OF PERFECT JUSTICE* 3-53 (1974). Fleming was an Associate Justice on the California Court of Appeals from 1964 until 1981.

Liberals, it appears, are disposed toward finding pre-conviction measures procedurally deficient and post-conviction responses to crime excessively punitive. For those of radical persuasion, the entire criminal justice system is an engine of oppression, consciously designed to operate in that mode by a small but powerful elite. The system is topsy-turvy. The real victims are those processed by the system, while the real criminals are those who built the system and now pull its strings. Meanwhile, the important crimes in a capitalistic society, such as racism, sexism, colonialism, imperialism, and militarism, are largely beyond the reach of the law.³ Apart from judgments spawned by ideological leanings, nothing testifies more eloquently to the pervasiveness of disenchantment with the criminal justice system than the fact that even those who staff the system, flouting a first principle of bureaucracy, often find wanting the hand that feeds them.

In many instances the disenchantment is rooted in experience and empirical reality. In some quarters, however, it derives from a veritable mythology that provides an all too convenient springboard for disparagement of America's criminal justice system. Close to the heart of the mythology is mistaken belief that the system is impervious to change. The historical record shows otherwise. Even cursory examination of the development of criminal justice in the United States reveals an undeniable dynamism. Admittedly, many changes have been superficial, on the order of tinkering, but others have been quite substantial in scope and impact. The material written on new directions in criminal proceedings mandated by the Warren court would fill a small library. Thanks in no small measure to research by the Vera Institute, the bail system in many jurisdictions has been substantially overhauled. Increased reliance on release on recognizance and on personal rather than corporate bond have diminished the role of the bail bondsman and made the eighth amendment's prohibition against excessive bail more reality than abstraction. Along similar lines, several federal district courts no longer use deputy marshals to convoy all convicted offenders to correctional facilities. Many, instead, are given the responsibility of transporting themselves to prison or jail. These examples represent but a smattering of the modifications incorporated into criminal justice procedures. Space considerations preclude even listing manifold changes that have taken place in

3. See, e.g., B. KRISBERG, *CRIME AND PRIVILEGE: TOWARD A NEW CRIMINOLOGY* (1975) and R. QUINNEY, *THE SOCIAL REALITY OF CRIME* (1970).

such areas as probation, parole, and good time.

The work of the reformer-critic of criminal justice is never really done. Yet it is one thing to press for further change, quite another to pretend or insist that nothing has happened, and still another to make one's indictment read like an embodiment of the old Gallic maxim that the more things change, the more they remain the same. Among those unhappy with our correctional system, for example, it is not uncommon to cite specific facilities, specially the older ones, as evidence for the system's chronic inertia. A favorite ploy is to note that many prisons, still in use, date back more than a century. According to one recent count, twenty-five state prisons were built before 1875.⁴ But while some critics concede, almost grudgingly, improvements in older prison plants, others convey the impression that these ancient structures still exist in their original primeval state. Seldom are their prison genealogies accompanied by annotations documenting alterations made over the years. The infamous buckets that once graced the cells of nineteenth century prisons have long since been replaced by indoor plumbing. Parts of older prisons, in some instances entire cell blocks, were rendered fallow by court orders or by initiatives taken by prison officials themselves. Except for strip cells used in many prisons to house incorrigible or potentially suicidal inmates, the typical contemporary cell has electrical outlets as well as modern plumbing. The point here is that even our oldest bastilles have undergone physical changes.

I have dwelt on change in the criminal justice system because change and its maternal twin, reform, appear to be the most salient themes binding together the contributions to this issue. Each contributor takes up one or more criminal justice innovations. Some of the changes have been part of the system for a while, others have barely seen the light of day. Whatever their vintage, they have generated multi-faceted controversy that extends beyond the merely legal and into the realms of politics, morals, economics, and sociology. Thus readers of many disciplinary persuasions will find the contributions both provocative and instructive.

At least since the Roaring Twenties, America has been spellbound by the exploits, real or alleged, of organized crime and the efforts of law enforcement agencies to suppress it. This decades old drama has all the elements of a morality

4. U.S. Department of Justice, Bureau of Justice Statistics, Report to the Nation on Crime and Justice 79 (1983).

play that lacks a final curtain. Perhaps only in comic strips can we find similar confrontation between good and evil. When it comes to organized crime, the list of opposing forces does not end with Mafia (Cosa Nostra) and agents of the law. An almost vitriolic opposition has developed between those who see organized crime as a spectre of the highest rank and those who contend that its power, influence, and wealth are greatly exaggerated.⁵

Historically, attempts to mount a successful frontal attack on organized crime were impeded by the absence of legislation making organized crime as such illegal. Organized crime figures could be prosecuted for specific offenses such as extortion, loan sharking, theft, union racketeering, interstate gambling, trafficking in drugs, and the like, but not for their affiliation with a criminal enterprise. Indeed, in some instances it was necessary to fall back on immigration and tax laws to prosecute individuals allegedly connected with criminal organizations. The latter, despite the creation, in 1954, of an Organized Crime and Racketeering Section within the Department of Justice, remained mostly beyond the law's reach.

A void can be almost as abhorrent to the legal system as it is to nature. The Organized Crime Act of 1970 was an attempt to fill this statutory void by providing, among other things, legal means for prosecuting Racketeer Influenced Corrupt Organizations (RICO). In some eyes, the cure was almost as bad as the disease. Questions have been raised as to RICO's efficacy, its ability to withstand constitutional test, and, in sociological terms, its latent dysfunctions. Judge Abner Mikva and Professor G. Robert Blakey address these and other issues in a vigorous, no-holds-barred debate worthy of the Oxford Union. Their exchange brings to mind the late Herbert Packer's dichotomous models of criminal justice which, despite pulling in opposite directions, simultaneously animate the system's operation in the United States.⁶ The *due process model* emphasizes procedural rights at the expense of efficiency. Packer's metaphor here is an "obstacle course" whereby each phase of a criminal proceeding impedes progression to the next phase. The *crime control model*, in contrast, flows from the premise that the repression of crime is the criminal justice system's primary mission. Metaphorically

5. For a recent example, see P. REUTER, *DISORGANIZED CRIME: ILLEGAL MARKETS AND THE MAFIA* (1983).

6. H. PAKER, *THE LIMITS OF THE CRIMINAL SANCTION* 154-173 (1968).

it is an "assembly line" that seldom malfunctions in apprehending, prosecuting, and punishing lawbreakers. Not unexpectedly, the Warren Court is said to exemplify the "due process model," the Burger Court the "crime control model." However that may be, whether the Mikva-Blakey debate has a winner and loser, or whether it ends in a draw, will be decided by the reader and by future experiences with the implementation of RICO.

As difficult as it may be to forecast the future of RICO or any other new development in criminal justice, prediction is commonplace in all human interaction. Our words and actions presuppose an audience that is listening, watching, and understanding. Once interaction is initiated, we anticipate or predict the responses, verbal or behavioral, that our words and deeds should elicit. Such predictions, needless to say, are often inaccurate. But error does not deter us from subsequent predictions because in the final analysis human interaction would be chaotic without them.

Marc Miller and Norval Morris, writing on a narrower plane, rightly note that predictions are routine and necessary occurrences in the operation of the criminal justice system. Police decisions to arrest depend largely on whether such action will be approved by superiors, by the prosecutor, and whether the arrest will stand up in court. Prosecutors shun going to trial unless there is high probability for securing convictions. Defense attorneys anticipate whether it is in a client's interest to go to trial or to negotiate outside of court. With many trial lawyers, it is axiomatic never to put a question to a witness unless the answer is known in advance. Judges weigh their rulings against the likelihood of reversible error. At sentencing, any judge worth his or her salt, unless bound by a statute with mandatory provisions, will try to foresee the consequences of a sentence suspended or imposed. In short, criminal justice predictions are legion.

Morris can be classified as a neo-retributionist or, in the prevailing jargon, an adherent to the doctrine of "modified just deserts." Perhaps it is preferable simply to say that it is retributionism with flexibility and a heart. Punishment is a valid response to crime, but sanctions must be proportionate to the harm done. A neo-retributionist corollary to this principle is that imprisonment should be a punishment of last resort, pretty much restricted to offenders disposed to violence. Accordingly, incarceration of convicted offenders would hinge on predictions of the kind of threat they pose toward their fellow citizens. Predictions of this sort are made daily in

our criminal courts, but Miller and Morris would like to enhance their power of discrimination. This would entail less dependence on the clinical diagnoses of psychiatrists and psychologists, and more reliance on predictions based on actuarial methods and the offender's past behavior.

What Miller and Morris are venturing, it seems to me, is nothing less than a very sophisticated attempt to temper justice and mercy with reason—a challenge fit for the likes of Solomon. As Miller and Morris readily concede, their proposal borders on the utopian. But in terms of logic alone, it represents an improvement over the legal system's current methods for dealing with dangerousness.

While Miller and Morris look at sentencing in relation to dangerousness, Ernest W. Schoellkopff's concern is a fair and rational scheme for sentencing offenders of every stripe. Sentencing, long the bane of criminal court judges, has flirted with total chaos ever since letting the punishment fit the crime was supplanted by letting the punishment fit the criminal. Indeed, it may be argued that disparities in sentencing are direct concomitants of judicial discretion. The latter, in turn, was born of the desire to individualize punishment. The Sentencing Reform Act of 1984, Schoellkopff contends, accomplished little more than a restatement of the conventional objectives of sentencing—retribution, deterrence, incapacitation, and rehabilitation. But the Act does not specify how each objective should be weighed in the sentencing decision. Instead, it provides for the formation of the United States Sentencing Commission that will be responsible for developing sentencing norms based on the nature of the offense and the offender's criminal record. Ultimately, however, application of such norms is left to the sentencing judge's discretion, which would appear to place the effort to ameliorate the sentencing problem right back in square one.

Schoellkopff's sentencing wish list calls for purpose, priorities, fairness, and the reduction of needless disparity. On the latter point especially his hope is shared by countless prison inmates who have experienced firsthand the sting of disparity. For most inmates a "bum rap" refers not to a claim of innocence but to a sentence that requires them to do more time than fellow inmates, including accomplices, who committed the same offense. Disparate sentences are a leading cause of prisoner discontent, and in many cases a formidable barrier to rehabilitation. No amount of rhetoric on the need for individualizing punishment can persuade one armed robber that justice is served by keeping him in prison longer

than another armed robber housed in the same cell block. No doubt the Sentencing Commission, to carry out the assignment given to it by Congress, will scour the literature, solicit expert opinion from the bench, bar, and academia, and perhaps underwrite some field research on sentencing patterns in selected jurisdictions. But before the Commission formulates any recommendations and guidelines, it would be well advised to test them against the views of those subjected to sentencing practices—the inmates of our prisons and offenders in various community-based correctional programs. Although such measures will make for a better informed Commission, excessive sentencing disparity will likely persist until the courts and sentencing agencies are shorn of some of their power of discretion.

To privatize or not to privatize may not be *the* leading question among correctional pundits but surely it relates to a prominent and increasingly popular thrust for correctional reform. The inspiration for privatization does not come from the works of Adam Smith or from the rediscovery of the glorious powers of free enterprise. Rather, it is prompted by the desire to change a system that seems to produce only misery for those under its heel and despair among those who wish to make it better. Three of the symposium's contributors are staunch advocates of privatization. Warren I. Cikins lays out a case for the privatization of prisons. Jerome G. Miller, while much in favor of extensive privatization of corrections, directs our attention to a privatized community correctional program for offenders who would otherwise be candidates for incarceration. His "Client-Specific Planning" model which involves, among other things, close monitoring of subjects and restricting them as little as possible, is already in use throughout the United States. The article by Diane M. Haller is a brief for extending the role of the private sector in prison industries and labor. Of special interest is her attempt to bolster her position with theological views on work.

The historical antecedents for privatization are manifold. Ordinary citizens once had much the same power to arrest now reserved to police in the state's hire. Although the gods more so than human perversity might have dictated the tragedy that occurred at the Ford Theater on April 14, 1865, Pinkertons rather than Secret Service agents were responsible for guarding President Lincoln. Even today, when the pursuit of trivia has become a national pastime, few Americans realize that private police far outnumber their federal, state, and local counterparts. During the nineteenth century

a substantial portion of prison industry existed in the form of contract labor or the piece-price system. Both involved leasing inmate labor to private contractors who supplied their captive workers with the necessary raw materials, tools, and machinery. Under the piece-price system the prison received a fixed amount of money for each item produced, but it is most improbable that much if any of the "profit" went toward improving the lot of the inmate workers. Both plans required the prison staff to maintain custodial control over the inmates. Under another arrangement, called the lease system, custodial as well as entrepreneurial services were provided by private contractors. These early ventures into privatization probably fattened the purses of the private contractors and lightened the burdens of prison administrators, but accounts of nineteenth century prison conditions generally hold that the prisoners were ill-served by them. Perhaps our standards of decency and ability to draw legal safeguards have evolved to a point where privatization during the latter years of the twentieth century will avoid the failings and exploitation associated with privatization a century or more ago.

Flexibility, efficiency, reduced costs, and greater potential for rehabilitation are among the major justifications for privatizing corrections. But in all likelihood the great unstated justification is that privatized correctional systems and programs cannot possibly be worse than those run by the state. It is much too early to deem one approach superior to the other. Before any verdict is reached there must be a sizable body of rigorous evaluative research that can enable us to make intelligent choices. Such research, besides hewing to proper methodological and statistical techniques, should always be conducted by researchers with no ties to the program or policy under study. And the chips should be allowed to fall where they may. The research might show that privatization yields better results, that it is simply on par with public sector corrections, that certain programs and types of offenders are more amenable to privatization than others, or even that in some circumstances privatization does more harm than good.

Although the issues surrounding attorney's fees is not within my field of professional competence, Lincoln Stone's article on the forfeiture of fees deals with an altogether fascinating subject. Obviously, meddling with attorney's fees is a touchy subject, as evidenced by the bar's reactions to recent efforts to cap liability awards. Equally obvious, perhaps, the Comprehensive Forfeiture Act of 1984 was drafted by a lawyer, or team of lawyers, whose remuneration was salary

rather than fee generated. And why shouldn't lawyers become exercised when confronted with the prospect of seeing their fees limited or, worse, forfeited? Stone may be correct in arguing that the Forfeiture Act is unconstitutional, but unless the law is allowed to become dormant, its use by prosecutors will create a legal and ethical morass that will never go away. A single conundrum might hint at where such a law can lead: If an attorney must forfeit tainted money received from a client for legal services, why not require a grocer or car dealer patronized by that client to give the state any money that the lawyer's client pays for their wares? In terms of Herbert Packer's models of the criminal justice system, the Forfeiture Act represents a triumph of crime control over due process. But in terms of criminal justice realities, it remains to be seen whether the law will have significant bearing on the prosecution of organized crime.