

Criminal Justice Policy : Issues, Doubts, and Dilemmas

著者	Albert K. Cohen
journal or publication title	関西大学社会学部紀要
volume	19
number	1
page range	239-248
year	1987-11-30
URL	http://hdl.handle.net/10112/00022696

Criminal Justice Policy: Issues, Doubts, and Dilemmas

Albert K. Cohen

Abstract

Sentencing decisions entail difficult compromises among a set of more or less incompatible goals: rehabilitation, deterrence, incapacitation, just deserts, and moral education. Furthermore, moral questions can be raised about all of these objectives; there is little evidence that any of them are very effective in reducing crime; and there is little reason to expect them to be very effective, since the criminal justice system is only a small part of the social apparatus for social control.

Investment of additional resources in the criminal justice system is not likely to affect crime rates significantly. However, it may (1) enhance people's perception of the quality of justice and (2) help offset the demoralizing effect of the fear of crime on the routine activities of everyday life. The sense that one is doing something and the *belief* that it works is, like magic, an incentive to more vigorous and sustained effort.

Key words: criminal justice, sentencing, rehabilitation, deterrence, incapacitation, moral education, just deserts, magic, crime rates, social control.

抄 録

宣告刑の決定は、リハビリテーション(矯正)、デターランス(抑止)、インキャパシテーション(無害化)、ジャスト・デザーツ(応報)、道徳教育といった、あい矛盾した刑罰の諸目的の妥協の産物にならざるをえない。しかし、これら刑罰目的のすべてについて、道義的疑念が提起されうる。刑事司法制度は社会統制装置のごく一部を占めているにすぎず、これらの目的のいずれも犯罪の軽減に効果的であるとの根拠は乏しいからである。

刑事司法制度に対してさらに追加的に資源を投入することによって犯罪率を著しく減少できるとは考えられない。しかし、それは①司法的正義についての人々の認識を高め、②日常生活における犯罪への恐怖という士気阻喪的影響を中和・相殺する上で役立つであろう。絶えず努力しているのだという意識、それが効果的であるとする信念は、一種の魔術といってもよいが、それこそが、次々と精力的になされるさまざまな試みの動機づけになっているのである。

キーワード：刑事司法、刑の宣告、リハビリテーション、デターランス、インキャパシテーション、道徳教育、ジャスト・デザート、魔術、犯罪率、社会統制

Most of the countries of the developed world, with a few exceptions like Japan and Switzerland, are obsessed with crime. People generally agree that something urgently needs to be done, but cannot agree on *just what* should be done. In particular, they cannot agree on what should be done with the convicted criminal. What should be done depends, of course, on the goal or purpose of the sentencing or disposition process. I would like to talk about some of these goals or purposes that people attribute to the criminal justice system, some of their implications for sentencing, and some of the considerations having to do with facts on the one hand, values on the other, that make it so difficult to settle and agree on what to do with the offender.

For something close to a hundred years, most Americans who wrote or gave speeches on the subject appeared to agree that the main goal of the disposition process was rehabilitation. Rehabilitation is providing the offender with a course of treatment intended to change his personality in such a way that he will no longer be inclined to commit crimes. The roles of the judge and other criminal justice professionals are considered to be analogous to those of doctors and nurses. One determines what is wrong with the offender—his diagnosis—and prescribes treatment appropriate to the offender's needs. Like doctors, those who prescribe and administer treatment must be given a broad range of discretion because each offender, like each patient, is special, perhaps unique; what is to be done must depend on the informed professional judgment of the trained criminal justice practitioner. This discretion includes the discretion to decide when the offender has changed enough to be released from confinement or the jurisdiction of the criminal justice authorities. Rehabilitation is an attractive philosophy because, like the practice of medicine, it sounds very civilized. It claims to be driven not by primitive passions like vengeance and hate, but by concern for the welfare of society and of the offender himself. It wants what is best for both of them.

The antithesis to rehabilitation would appear to be punishment. Punishment means hurting the offender or depriving him of something of value: his money, his dignity, his freedom, perhaps his life. But who should be punished, how they should be punished, for how long they should be punished depends on what one hopes to accomplish by punishment.

One possible aim of punishment is to deter people from crime by instilling fear of the consequences. If the purpose of punishment is to deter the offender from further crimes, one speaks of specific deterrence. If it is to deter people other than the offender—to deter people in general—by making an example of the offender, we speak of general deterrence. What exactly one does to deter may depend on whom one is trying to deter. For example, there may be some crimes that would have to be rather severely punished if they were to deter people in general. For a particular offender, however, the embarrassment of arrest and trial would be enough. For

another offender, the punishment severe enough to deter people in general would still not be severe enough. (Of course, punishment may be more or less *certain*, and this greatly complicates things, because the deterrent value of punishment can be undermined by uncertainty.) The attractive thing about deterrence is its appeal to common sense. Everybody knows, or thinks he knows, that if people expect to get into trouble if they do certain things, they will probably not do them. Nothing seems more obvious.

Another possible aim of punishment is incapacitation. It is clear from research that a relatively small fraction of all offenders produces the majority of all crimes. This small group of offenders tend to repeat their crimes even after they have been punished; many of them are not easily deterred by the threat or the experience of imprisonment. It would seem obvious that we could produce a substantial decrease in crime by rounding up this troublesome minority and putting them in prison for a long time. The purpose of this incarceration would not be the infliction of pain or deprivation: these would very likely be by-products. The purpose would simply be to incapacitate the offender for further crimes. The non-dangerous offender—i. e., the offender not likely to repeat his offense—need not be punished: at any rate, it would not be necessary to waste precious prison space on him.

Another possible goal of punishment is moral education, which at first looks like general deterrence but is really quite different. Deterrence stops people from committing crimes by instilling in them fear of the consequences. Moral education reduces the propensity to commit crimes by teaching people the rules of right conduct and instilling respect for them: they will then refrain from crime because it is wrong, not because of what might happen if they are caught. According to this view, the courthouse is—or should be—a kind of moral classroom. The setting and procedure of the trial are calculated to create the impression that this is a most serious and solemn occasion and that the judge—like a priest—speaks in the name of the larger community of which we are all members. People in the courtroom are quiet and respectful and to the judge they are deferential. The judge sits on an elevated platform, is dressed—again like a priest—in a special costume, and behind him is a flag. What he says carries special authority, as did the words of our parents when we were very small. He tells us how this crime differs from that crime, and how both differ from something else that is not a crime at all, and he tells us just how serious a crime it is in the most eloquent possible way: by the magnitude of the penalty he prescribes. The courtroom is open to all and the results may appear in the papers so that people can learn about the crime and the punishment and discuss them with friends, neighbors, and family. As a result of this discussion, people's consciousness of the moral code of the community is kept alive and vivid, consensus is increased, moral sentiments are clarified and reinforced, and the disposition to conform to custom and law is strengthened.

If the punishment is to succeed as moral education, it must be administered in such a way as to make the moral lesson clear. The law must be enforced vigorously and consistently, punishments must be proportional to the gravity of the crime, offenders who commit the same crime must receive the same punishment. Otherwise, the citizen cannot be certain which crimes are considered “real” and which are considered “trivial,” and cannot be sure just what is expected of him.

This policy too has a certain basis in common sense. If police do not consistently and vigorously enforce certain laws—for example, laws against marihuana in the United States—people do not merely draw the conclusion that one can violate them and get away with it; they draw the conclusion that violating these laws cannot be very serious crimes, that committing these crimes cannot really be very bad.

Notice that, in all the cases I have put before you, punishment is a means to an end—specifically, that it is a way of reducing crime. The justification of punishment in each case is the claim that it produces that effect. And the same is true of rehabilitation; if rehabilitation does not change people so that they are no longer disposed to commit crimes, then it cannot be justified.

Punishment may, however, have another aim, one which has nothing to do with reducing crime. It is sometimes called “retribution,” sometimes “just deserts,” sometimes simply “justice.” It is possible to argue that these are not quite the same, but that is not important for our present purpose. What is important is that they are alike in that they all affirm that it is simply *not right* that behavior that violates the moral expectations of the community should go unpunished. The criminal should “pay for” his crime. Nor is it right that some people should pay the full price and others not, nor that serious crimes should be more lightly punished than lesser crimes. If you believe in just deserts, you are not impressed by the argument that punishment does not reduce crime nor rehabilitate criminals. You will say, “That’s not what punishment is for.” The purpose of punishment is to inflict pain or deprivation on people who have done wrong. To punish the wicked is, so to speak, an end in itself. It is not simply a means—one of several possible competing means—of reducing crime.

So what is—or ought to be—the proper goal of the criminal disposition process? Sometimes the debate is conducted in terms that imply that there is a single paramount goal, that the goal is *either* this *or* this *or* this *or* this. But if, by the question, we mean, “What do people want from the courts?” or “What would they like the sentencing or disposition to accomplish?,” the answer is, “All of the above.” We want to be protected against crime; we want offenders rehabilitated, rendered harmless by being locked up, and to suffer for their crimes. We would also like punishment to educate people about law and morality.

In general, there is nothing wrong with wanting a large and expensive organization like the criminal justice system to perform a variety of services. Most human

artifacts and institutions are used in a number of ways. The post office, for example, can also be used as a savings institution and a sales outlet for government bonds. There may be a problem, however, of the compatibility of the different goals of an institution ; pursuing one may get in the way of pursuing another.

For example, rehabilitation requires that the duration of confinement vary from one offender to another, even if they have committed the same offense, that it depends on the diagnosis and the needs of the offender, and that it cannot be specified precisely in advance. Incapacitation also requires that the duration of confinement for the same offense should vary, but that it depends on a guess as to the dangerousness of the offender, and it could be specified as soon as the offender's dangerousness rating could be determined. Clearly, the two philosophies would likely prescribe quite different ways of dealing with the same offender. Incapacitation and specific deterrence, on the other hand, would appear, as a general rule, to be reasonably compatible. Specific and general deterrence, however, would paradoxically be difficult to implement at the same time. Specific deterrence would call for different sentences for the same offense, because the sentence that might deter one offender from repeating might have very little deterrent effect on another. General deterrence, however, which seeks to deter to people in the community at large, would be most effective if it were certain and predictable ; that would mean that it would not vary from one offender to another. A criminal justice system could not, therefore, systematically pursue both specific and general deterrence.

Just deserts and moral education would appear to be, on the other hand, compatible. Indeed, it could be argued that moral education is the inevitable by-product of the systematic pursuit of just deserts. Both, however, would be incompatible with all systems that treat different people differently for the same offense, and base this difference in treatment on any consideration other than the seriousness of the offense or of the offender's offense history. This would include rehabilitation and all punishment directed to deterrence or incapacitation. This discussion has dealt only cursorily with the question of compatibility, but it has established, I think, that the question of criminal justice policy is one of establishing priorities, of compromise, of working out rules for sentencing that yield the most productive mix in terms of a *set* of goals. We cannot have it all!

The problem of policy is further complicated by the fact that *moral* questions can be raised about each one of these possible goals, and the answers will depend on one's values.

To begin with, just deserts is implicitly a moral criticism of all positions that seek to use treatment or punishment as a means to an end rather than as the sufficient and only justification in itself.

Some people feel that if prisoners *want* to be rehabilitated, and *want* to undergo treatment to that end, that is all right. They feel, however, that no one has a right

to transform somebody else's mind or personality against his will, even if he is anti-social and a criminal. As a responsible person who knew what he was doing, he should be punished; if he repeats, he should be punished again. But nobody has a right to tamper with somebody else's mind against his will: that would be "brainwashing." This argument against rehabilitation expresses the point of view of just deserts, whose proponents claim to occupy the high moral ground. On the other hand, there are those who consider the deliberate infliction of pain or deprivation of life or freedom—that is to say, punishment—in the name of just deserts as only a step away from the talionic law of "an eye for an eye and a tooth for a tooth." This, they say, corresponds to a primitive and barbaric stage of the development of society and human consciousness; it is unacceptable in a civilized society. We may call it justice but it is really the spirit of vengeance.

There are special moral problems associated with incapacitation. For one thing, as I said, the length of the sentence is based on a guess as to the prisoner's dangerousness, the likelihood that he will repeat if set free. The best we can do in the way of prediction, however, is only fair. A lot of the people we predict to be dangerous will not be dangerous at all, will *not* repeat if set free. This means that, when we lock up the people we consider dangerous in order to incapacitate them, we are going to lock up a lot of people who don't need to be incapacitated. Is this fair? Furthermore, that portion of a person's sentence which is justified by the rationale of incapacitation is punishment based on what the person *might do* rather than on what that person *has done*. This is equivalent to what is known as preventive detention, which is widely held to be incompatible with the rule of law.

Putting aside the moral issues, which we have only begun to explore, we must confront also the factual questions: If we were to decide on this or that policy and tried to implement it, would the results actually achieve the goal we have in mind? In point of fact, all those policies that justify punishment as a means to an end have very little scientific evidence that they work! On some of them the evidence is weak or inconclusive because there hasn't been much research on them. There has, however, been a lot of research on the effectiveness of rehabilitative treatment programs, and the conclusion seems to be that these programs accomplish very little or nothing at all. Continuation in crime appears to be pretty much unrelated to having undergone what is called treatment. On the other hand, the evidence from research on deterrence is not much more encouraging. It suggests that there may be a relationship between punishment and deterrence from crime but that, if punishment does make a difference, the difference is small. (There is no research on the effectiveness of just deserts because just deserts is not justified by its effects. It is justified by the intrinsic moral necessity of treating human beings as rational, free, and responsible persons who must be held accountable for their actions.)

The formulation of a sentencing policy is further complicated by considerations

of cost. Let us assume that some of these policies *can* accomplish their purposes and are not morally objectionable. It is questionable that any of them can be implemented so that they would really work, without a much larger expenditure of resources than we are willing to set aside for the criminal justice system. In America, the system is already overwhelmed with far more crime than it can handle. A really serious effort to implement any of the policies I have discussed would add much more to what the taxpayer already feels is a crushing burden.

Suppose now that we decide that we *can* afford to invest in the implementation of some policy enough money to enable it to achieve its potential, whatever that might be. There is good reason why we should not expect a very large return on our investment. More and more it appears that, although the criminal justice system may serve some useful purposes, especially by way of satisfying the popular sense of justice—although in the United States there is much dissatisfaction on this score as well—it doesn't have and cannot have a very large effect on the production of crime. Crime rates do vary greatly from one society to another, but these variations probably do not result to any great extent from differences in their criminal justice systems. I would say that in any society the machinery for the social control of crime is the social system itself in all its aspects. The criminal justice system is part of this machinery, but not a very large part. It happens to be that part that is more or less *specialized* for the control of crime and the administration of justice, but that is not to say that it does most of the job of social control of crime. That depends mostly on how society is organized and run *outside* the criminal justice system, on the routines of everyday life. I would argue that in countries like Switzerland and Japan the crime rate is low, that in the United States it is high, not because of their criminal justice systems, but because of something about how people relate to one another in the family, at work, in school, in the community, and how their activities are arranged and articulated in time and space. These things determine the propensity to crime, the opportunities for crime, the meaning of crime to one's conception of oneself, the consequences of crime to the offender's neighbors, kin, friends, and colleagues, and the rewards and punishments one experiences at *their* hands. Even the effectiveness of the police, the courts, and the other constituents of the criminal justice system as instrumentalities of social control depend less on their internal organization and material resources than they do on their relationships with the people and activities they are supposed to protect and control. Changes in the police, the policies of the courts, or the prisons may have some effect on crime—maybe enough of an effect to warrant these changes—but still, probably not a major effect.

I would, however, distinguish between the effect of changes in the criminal justice system on crime rates and on the popular sense of justice. How the criminal justice system is organized and how it works probably have a more profound effect

on people's feelings about whether justice is being done—about whether offenders are being brought to the bar and being properly punished, corrected, or otherwise disposed of—than on the crime rates. If this is so (although I do not have the evidence to prove it), it would imply that improving the quality of justice is a more feasible goal for criminal justice policy than reducing the amount of crime. Concentrating on improving the quality of justice is not, however, quite the same thing as concentrating on just deserts. It is probable that, for most people, most of the time, justice means just deserts as I have defined it. However, the popular sense of justice may provide for a role, large or small, for rehabilitation as well. For example, most people in most countries feel that it is not right—that is to say, not *just*—that children should be punished according to the gravity of their crimes as they expect adults to be. The personalities of children and their consciences are, they feel, still being formed and it is proper to make some effort to correct the moral defect or deficit that produced it; this would be more just than simply demanding that they pay for their crimes. This is why the juvenile court philosophy was so readily embraced in so many countries and many serious efforts made to implement it, although the rhetoric of rehabilitation always far exceeded the efforts. But, even as applied to adults, most people have been able to accept at least a limited role for rehabilitation without offense to their sense of justice.

At any rate, people certainly want more than just justice. They also want security. It is a matter of some interest that, notwithstanding the weakness of the evidence that security is enhanced by giving the police, the courts and the prisons more money or other material support, they are in fact prepared to spend quite impressive sums of money on all three. I think it is a thesis worth exploring that this expenditure of money is, to a large extent, a form of magic. Magic is associated with situations in which people are faced with calamitous events whose incidence is uncertain and unpredictable and which are beyond their control by ordinary rational efforts. Such, for example, are illness and the effects of weather upon crops. When people are very vulnerable to these disasters, and realize that they can undo and render worthless the honest toil and sustained discipline that are necessary to the accomplishment of most human productive activities, the motivation and morale necessary to sustain them in this toil and discipline may collapse. Magic may be thought of as actions that are not supported by the rational examination of evidence and experience but which people *believe* are efficacious. Because they believe that, in doing these things, they are in fact making themselves more secure against disaster, their motivation and morale are enhanced, their toil and discipline are strengthened, and the likelihood that their purposes will be accomplished are increased. To illness and weather, we may add, in societies like the United States, crime. The fear of crime and the feeling that one is helpless to prevent it can undermine the motivation to carry out many of the routine activities of everyday life. People may be afraid to

leave the house to visit kin or go shopping. They may be afraid to take the subway to work, or take a nighttime job. Life and work and high levels of productivity are still possible in societies that have high rates of crime, provided that the debilitating effects of the fear of crime upon morale can be overcome. The expenditure of large sums of money on a social apparatus specialized for the war against crime and the belief in the efficacy of this apparatus may provide the extra boost to morale necessary to maintain a high level of toil and discipline. There may be a kind of self-fulfilling prophecy at work here. The very belief that what we are doing will help to assure that our work will bear fruit encourages the effort that is necessary to make it bear fruit. In a curious way, it may be sound social policy to invest in crime control activities that do not, as far as we know, really have any large impact on crime. The positive effect on the labor of ordinary people in their callings may fully justify the investment. This is a very tentative thesis, crudely stated and advanced with some hesitation. It does, however, have a more or less rational basis, it is capable of scientific evaluation, and is, I think, deserving of further study.

Let me now enter a couple of qualifications to this thesis. First, it is an overstatement, an effort to present a novel idea in a forceful way and in a brief space. I am not arguing that police, courts, and prisons make no difference to the production of crime. Perhaps the thesis is better stated—although still too simply—in this way: beyond a certain point, increased expenditures on police, courts, and prisons, and the elaboration of new technologies and methodologies produce little actual effect on the production of crime but may produce a substantial effect on the motivation to carry on with socially useful activities in the face of crime.

The other qualification is that I am not saying that there is nothing people can do to reduce crime. People are doing *something* in Japan and Switzerland that produces dramatically lower levels of crime than in the United States. However, what, precisely, it is about Japan and Switzerland that produces those lower levels is not at all clear. It is probable that, whatever it is, it is deeply imbedded in the culture and social organization of the respective societies. And, finally, if we Americans knew exactly what it was, it is rather unlikely that we would *want* to or would *know how* to transform our society to make ourselves more like Japan or Switzerland in the necessary respects. One of the attractive things about magic is that it does not require radical, disruptive, distasteful transformations of the world we know and are used to.

It strikes me, as I look back on this paper, that it may impress the reader as somewhat bleak and discouraging. Partly that may be because it is meant to be a paper mainly on the problems and difficulties in the formulation of criminal justice policy. Partly also, it may be because I am not myself involved in the formulation of such policy, or giving advice to those who are. Therefore, I can better afford to dwell on those problems and difficulties, even to savor them, than those who have to

make policy decisions and get on with the job. Finally, a detached analysis of this kind, whether it is valid or not, may not have much to do with how policy decisions are actually made. There are men and women of intelligence and conscience out there fighting the battles of policy, weighing and balancing, compromising and manipulating interests and allies, statistics and slogans, symbols and budgets, parties and factions, and yes, scholarship and theories, and even essays like this. How the decisions are actually made is a subject for a very different, and possibly a more cheerful, essay. Possibly...and possibly not.