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PUNISHMENT BY IMPRISONMENT: PLACING IDEOLOGY INTO CONCRETE

*David A. Ward**

IMPRISONMENT IN AMERICA: CHOOSING THE FUTURE. By *Michael Sherman* and *Gordon Hawkins*. Chicago: University of Chicago Press. 1981. Pp. xi, 146. \$15.

When Americans think about punishing criminals, they do not think of probation or diversion to community corrections programs. Punishment in America means long-term confinement in state penitentiaries. In *Imprisonment in America: Choosing the Future*, Michael Sherman and Gordon Hawkins argue that "[t]he core of contemporary difficulties" in penal policy "is the weight and power of the traditional American fusion of punishment and incarceration" (p. 122). The authors raise this argument at the right time. Prison populations in many states are approaching or exceeding the rated capacities of many facilities, forcing policy decisions not only for prison administrators and legislators, but also for federal judges. Sherman and Hawkins review the major issues regarding new prison construction, the problems of using statistics to formulate new penal policy, and the monopoly that imprisonment holds among all punitive sanctions. These are important considerations on an important public policy problem. The comments which follow are intended to elaborate the discussion begun by Sherman and Hawkins.

I. THE PRISON CONSTRUCTION DEBATE

Overcrowded prisons seem to provoke two main reactions from informed commentators. Those who argue that incarceration is the appropriate penalty for crime cite crowded prisons as a justification for building more penitentiaries. Others, believing incarceration to be ineffective, overused, and so harsh that inmates come out of prison worse risks than when they entered, argue that a moratorium on prison construction would compel a diminished reliance on imprisonment and more rational decisions about who is to be imprisoned. In surveying the arguments, the authors emphasize the cost, permanence, and increasing populations associated with new prisons as factors weighing against new construction (pp. 12-17). They cite public demands for punishment, the inadequacy, even the unconstitutionality, of living conditions in many prisons, and the need to sentence offenders for reasons of justice rather than the availability of penitentiary space (pp. 17-21). While all of these concerns are relevant, recent developments may have altered their relative importance.

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Since the publication of *Imprisonment in America* in 1981, one of the key considerations in the debate has gained considerable importance: the effect of the current economic recession on capital outlay projects. Legislators in many states find themselves confronted by citizens who demand that something, meaning imprisonment, be done to curb perceived increases in crime at the same time that proposing tax increases is regarded as political folly. The federal government, even under a president dedicated to law and order, has shown little willingness to translate the need to reduce crime into funds for prison construction. President Reagan's Task Force on Violent Crime recommended that the federal government help the states ease their overcrowding problems, but rather than give money to the states, it proposed to make available abandoned military bases "on an interim and emergency basis only."¹

The states have responded to this fiscal pressure in several ways. Some have scrapped their plans to close old prisons; San Quentin, for example, still contains more than three thousand prisoners, despite the efforts of several governors, including Ronald Reagan, to replace it. When the Federal Bureau of Prisons abandoned its costly old medium security prison at McNeil Island, Washington, the State of Washington moved in and claimed it as a needed resource. Where the decision on financing new facilities has gone to the voters, the results have been mixed; Michigan rejected a proposed tax increase to build more prisons while California voters approved a \$495 million bond issue to underwrite the costs of new prison construction. In the interim, California is giving inmates one day off their sentences for each day that they work for eight hours and maintain a clear conduct record. The state also will establish two tent cities of one thousand inmates each on the grounds of San Quentin and Chino Prisons. Several thousand more inmates will be housed in "temporary" metal compounds similar to World War II prisoner of war camps" at Soledad, Vacaville, and Chino.² When conditions such as these prevail, it would seem most unlikely that funds can be found to improve existing facilities rather than to expand the total capacity of the system. In arguing that the limited resources available be allocated to improving current facilities rather than adding new capacity (p. 101), one must now take into account the new economic, as well as political, reality.

Of course, more prisons make sense only if we accomplish something by incarcerating offenders. One of the principal arguments against prison construction, aside from cost and permanence, is simply that this country has accumulated more than 150 years of experience with prisons and almost all of it has been bad. Prisons have failed as agencies of criminal rehabilitation, whether that aim was to be accomplished by solitary contemplation in the early Pennsylvania and Auburn prisons or with the help of social workers and psychologists in more recent history.³ Nor have prisons achieved any degree of specific deterrence; offenders have returned to prisons in

1. ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, U.S. DEPT. OF JUSTICE, FINAL REPORT 10 (Aug. 17, 1981).

2. Bancroft, *A Plan to Ease Prison Crowding*, S.F. Chronicle, Feb. 3, 1983, at 7, col. 1.

3. See, e.g., Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22 (1974).

which sanitation, food, heat, ventilation, medical services, and treatment by guards have been so inadequate or abhorrent that prison conditions themselves have constituted reform issues throughout American penal history.

Even in today's prisons with basic human needs and services provided and guard brutality an infrequent occurrence, the punitive aspects of doing time can be measured by the number of inmates who require or demand confinement in protective custody, by the frequency of assaults, and by the body counts associated with "disturbances" such as those at Attica, the New Mexico State Prison, and the maximum security prisons of many other states. For many American inmates, life in prison is characterized by the daily prospect of exploitation by or armed combat with members of the Mexican Mafia, the Nuestra Familia, the Black Guerilla Family, the Aryan Brotherhood, and groups representing American Indians, Cubans, Hells Angels and other local gangs, interest groups, and collectivities.

Inmates in all prisons are divided along lines of race and ethnicity and by the competition among cliques, groups, and organizations seeking to control drug traffic. When the rate of violence is such that any inmate can become a victim simply because of his race, ethnicity, or physical appearance, and not because of any action he has taken against another inmate, when inmates realize that the prison staff cannot protect them from — to use the word currently in vogue with prison administrators — the "predators" — long-term confinement in protective custody becomes a preferred alternative to remaining in the general population, and few complaints are heard when entire prisons are placed in lock-down status. If penal confinement is intended to deter crime because it is a harsh and punitive experience, few inmates in today's maximum security prisons should be recidivists.

But if prisons do little to deter and rehabilitate, they do serve other plausible penal objectives. For retributionists who contend that the consequences of criminal activity should be unpleasant,⁴ American prisons have done the job. Similarly, those who support the proposition that prisons effectively incapacitate their inhabitants are on firm ground. Very few men escape from prisons, leaving only the question of whether theft, robbery, rape, and assault against inmates and staff count as real crimes.

Sherman and Hawkins urge policymakers to consider the conflict over these justifications for punishment, not only because they believe we are at a critical juncture in the prison construction debate, but also because we know enough about the costs and benefits of imprisonment to plot a new course in penal policy. The authors caution, however, that decisionmakers should guard against the inclination of our technologically-oriented society to rely on counts and statistical correlations to identify the best policies. They add the further caveat that, since Americans are hard pressed to think of anything but the death penalty and prisons when they think of punishment, moving public opinion and public policy from this mental set will require creativity and political courage. These are important considera-

4. Liberal commentators searching for a replacement for the rehabilitation rationale widely approved of the retribution model early in the past decade. See, e.g., A. VON HIRSCH, *DOING JUSTICE* (1976).

tions, and the following comments are intended to elaborate the discussion begun by Sherman and Hawkins.

II. STATISTICS AS THE BASIS OF PENAL POLICY

In a chapter entitled "The Numbers Game" (pp. 25-47), Sherman and Hawkins refer to such measures as the number of prisoners, prison capacity, square feet per prisoner, time served, and rate of jail and prison confinement per 100,000 population. These numbers are used to identify problems such as overcrowding, which in turn may be related to "riot potential." The authors note that one should be cautious in drawing conclusions about the effects of density and crowding since these are subjective problems. The prison environments in other democratic countries make this abundantly clear. For example, at Fuchu Prison outside of Tokyo, Japan's most secure prison, groups of twelve to fourteen inmates live together in rooms little larger than one would find in a good hotel; the rooms are bare except for a low table around which inmates sit cross-legged on the floor. At night tatami mats for sleeping are spread next to each other on the floor. For Japanese inmates, these accommodations do not provoke complaints of overcrowding or demands for single cells. Indeed, punishment in Japanese prisons may consist of taking an inmate away from his group and putting him in a single cell.

Just how American prisoners really feel about such aspects of confinement as crowding, privacy, and noise has not been the subject of much research. Answers to the question of what specific elements compose the punitive aspect of penal confinement are provided by white, middle-class, college-educated legislators, prison administrators, lawyers, and others of the professional class. Recently, however, researchers have begun to assess empirically the quality of life in American prisons. Hans Toch attempted to measure stress in the prison environment through a "prison preference inventory" which took into account the following factors: privacy (absence of environmental irritants such as noise and crowding), personal safety and structure (clear-cut rules, orderly and predictable events), support (reliable, tangible assistance from significant others), emotional feedback (appreciation and concern from others), social stimulation (opportunities for social interaction, companionship), activity (opportunities to fill time and be distracted from everyday concerns), and freedom (the need for opportunities for individual autonomy and decisionmaking).⁵ Lawrence Greenfeld of the National Institute of Justice surveyed every state and federal prison in America in 1978 using an "Index of Confinement Conditions" to provide data to compare prisons and to make comparisons among states. Greenfeld developed measures of prison environments including density (the proportion of inmates living in less than sixty square feet per person), deviance within the facility (the proportion of the population specially housed in disciplinary or protective custody units), freedom of movement (the average of hours per day for an inmate confined to a housing unit and the proportion of inmates classified as maximum security), access to services (the proportion of staff classified as service providers and its ratio to the inmate popula-

5. H. TOCH, *LIVING IN PRISONS: THE ECOLOGY OF SURVIVAL* 16-17 (1977).

tion), and expenditures per inmate.⁶ A major survey of American jails and prisons which included attention to that condition of confinement called "overcrowding" was undertaken by Mullen, Carlson, and Smith.⁷ This study reviewed such issues as cell versus dormitory living space, cell size, and number of occupants and cited the standards proposed by federal courts, by the American Bar Association, by the American Correctional Association, by the National Clearinghouse for Criminal Justice Planning and Architecture, and by the Justice Department's *Federal Standards for Corrections*.⁸ Value judgments are, of course, evident in the selection of areas for investigation, the criteria by which stress and other prison conditions are measured, and the standards by which prisons are judged. Toch's scales, Greenfeld's indices, and the standards cited in the report by Mullen and her associates represent concepts of mental and physical well-being that may or may not be the same indicators that inmates might select if they were asked to identify the features of imprisonment they find the most annoying, most difficult, and most dangerous. The irony of life in many American penitentiaries today is that so many inmates, particularly young, white inmates, are in the same position as the weaker and more vulnerable segments of the urban citizenry at large. Like children, the elderly, and females, these inmates confront on a daily basis the threat of loss of their personal property and the prospects of physical violence and sexual assault. And as citizens try to find safety in their locked apartments and houses, a growing number of prisoners seek the same security in protective custody and accept, often with relief, the lock-downs of entire prisons.

How inmates and prison staff assess the quality of life in maximum security prisons in four different regions of the United States is the subject of a study by the author and two colleagues, Herman Milligan and Constance Osterbaan-Milligan. In the first phase of this study, lengthy interviews were held with randomly selected samples of inmates and staff members in which the respondents were asked to identify the most serious problems in their prisons and to discuss in considerable detail relationships between inmates of all racial and ethnic groups. Inmates were asked, for example, about aspects of daily living such as their preference in friends, clothing styles, food, music, and personal appearance, as well as their assessment of the degree to which individuals or groups were able to monopolize telephones, recreational equipment, and preferred locations in visiting rooms, cell-blocks, the dining room, and the yard. Using this interview data as a base, surveys were constructed and then administered to the inmate and staff populations at large, including all inmates who were confined in protective custody and punitive confinement units. Respondents were asked to fill out

6. L. Greenfeld, *Assessing Prison Environments: A Comparative Approach* 3-4 (N.I.J. June, 1980). Greenfeld's paper also includes references to the crowding literature which relate the effects of prison density/crowding to problems such as complaints of illness and rules violations.

7. J. MULLEN, K. CARLSON & B. SMITH, *AMERICAN PRISONS AND JAILS: SUMMARY FINDINGS AND POLICY IMPLICATIONS OF A NATIONAL SURVEY* (1980).

8. Recent books dealing with stress in prison include N. PARISI, *COPING WITH IMPRISONMENT* (1982); THE PAINS OF IMPRISONMENT (R. Johnson & H. Toch eds. 1982); L. BOWKER, *PRISON VICTIMIZATION* (1980). See also d'Atri, *Measuring Stress in Prison*, in *CONFINEMENT IN MAXIMUM CUSTODY* 27 (D. Ward & K. Schoen eds. 1981).

a victim survey, to answer questions about the reasons for inmate violence and sexual assault and to indicate the degree to which they felt staff had control over the inmates. They were also asked to select from a list of eighteen items those actions that inmates of each racial and ethnic group in the prison might take that annoyed them most and to answer questions about gangs, cliques, organizations, and cultural groups that had been identified in each prison. Finally, they responded to a series of items that were intended to measure racism, alienation, and inmate loyalty and solidarity. Interviews and surveys of staff members focused not only upon their perceptions of inmate relations and problems of daily living but also on the degree to which the employees felt safe in their daily work.⁹

This study and others cited or underway should help to bridge the gap between the speculations and imaginings of penal policy-makers who are inexperienced in living in prisons about those features of penal confinement that are most unpleasant for the people who must do the time. Policymakers will have to consider the possibility that imprisonment might be for some inmates an experience more damaging than they can imagine, but for other inmates it may simply be the continuation of an existence and even a lifestyle that began in other coercive settings and in the neighborhoods from which they came. Which inmates are affected, and in what specific ways, by long and short terms of confinement in American jails and prisons is still an open empirical question 150 years after the Auburn and Pennsylvania prison experiments were begun. What is clear is that penal confinement cannot be expected to have the same effect on all offenders whether that effect is intended to be corrective or simply punitive.

III. THE AMERICAN PREOCCUPATION WITH IMPRISONMENT AS THE PENAL SANCTION OF CHOICE

Sherman and Hawkins contend that "except for their ambivalent and intermittent support of capital punishment, Americans have *always* given imprisonment a monopoly over other forms of serious punishment. It has always been the currency of American criminal justice" (p. 186) (emphasis in original).¹⁰ The authors review the rather gloomy historical basis for what they label "the 'monomania' of the penitentiary," but conclude that recent developments suggest some hope for change. The signs of change include the debate about the purposes of imprisonment, that has been forced by the demise of the rehabilitative ideal; the increase in the number of offenders being sent to prison; and the economic realities that have forced policymakers to reconsider, if not necessarily change, their proclivity to punish every offender by imprisonment. These circumstances suggest that alternatives to incarceration will be considered because they will have to be considered. The problem for Sherman and Hawkins, and for all

9. The first phase of this study is reported in D. Ward, H. Milligan, C. Osterbaan-Milligan & A. Calabrese, *The Stillwater Transition Study* (National Institute of Corrections, June, 1980). The current study is funded by the National Institute of Justice grant number U.S.D.J. 81-IJ-CX-0065.

10. For background on the history of imprisonment in America, see generally D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* (1971); Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1155 (1982).

others who propose that we do something different, is to identify alternatives than can be accepted given our long history of defining imprisonment as the only punishment that counts.

What, exactly, *are* those punishments in the middle range, those alternatives to incarceration that should be applied to those offenders who should not go to prison? Here the experience of other nations more developed in terms of penal policy may be helpful.¹¹ The Swedish experiment in "intensive supervision," essentially an effort to provide a high degree of police and parole officer surveillance of the daily activities of offenders in the community, may be a politically viable alternative in America, since it combines assistance in the forms of employment and treatment for chemical dependency where needed with genuine police surveillance. This surveillance, in turn, with all of its invasions of privacy and restrictions of activity,

11. It should be noted that the structure of European penal systems varies greatly from that of the United States. America has a federal prison system, fifty state prison systems, thousands of county-operated jails and work-houses, and a judicially supervised system of probation and parole. From a Western European perspective, the absence in this country of any overall penal policy to provide guidelines for all major issues from prison construction to the types of programs to be offered in the prisons, the number of penal systems organized and acting according to their own local mandates, and the absence of centralized authority over jails, prisons, and probation and parole departments constitute part of a lesson on how *not* to operate a penal system.

One of the virtues of the European system is that the authorities enjoy a wide range of options for the punishment of each offender. Sweden, for example, has prisons for short term property offenders, prisons for offenders with chemical dependency problems, prisons from which inmates leave each day to attend a local university, several factory prisons in which inmates earn close to market wages, prisons from which inmates go out each workday to jobs in the local community, prisons for long-term offenders with mental health problems, and several small capacity, high security prisons for persons who have committed serious crimes or who are regarded as posing serious management problems. In short, Swedish prison officials have a range of physical plant and program options at their disposal that American state officials would have if county jails, farms, and workhouses were under state authority — as they are in a few states with relatively small prison populations, such as Alaska, Delaware, and Vermont. These states are important as examples showing that county and state correctional facilities can be integrated advantageously and without a revolution. In a large state — say, California — a combined state and county penal system would allow for facilities which would house only drug-dependent offenders, facilities which would house only inmates who are now seeking refuge in protective custody, facilities only for "predators," facilities for long-term offenders who quietly do their time, facilities for short-term offenders who are "management problems," facilities located close to every inmate's home town which could facilitate family and community contacts, and possibly, if inmates elected to choose this option themselves, separate facilities for inmates who prefer to live only with members of their own racial or ethnic group.

The advantage of the diverse American system is that it is more open to reform than the integrated bureaucracies characteristic of European penal systems. Indeed, European reformers complain that substantial changes rarely develop from within these highly bureaucratized systems. Reform in American prisons, beyond the usual well-intentioned tinkering, has usually resulted from a combination of factors — a scandal of some sort, a reform-minded governor, and the recommendation of a blue-ribbon commission to seek new leadership from outside the state bureaucracy. These circumstances created the opportunity for Jerome Miller to close the youth prisons in Massachusetts, for Tom Merton to bring to the attention of the public and the federal courts the corruption and brutality of the Arkansas prison system, and for David Fogel to start the process of making the Minnesota Department of Corrections the American penal system which closest approximates the hallowed Swedish model.

Whether this sort of flexibility is enough to justify fifty separate penal systems going their fifty separate ways is an open question. But the benefits of less hierarchical organization, as well as the costs, should be kept in mind in the formulation of policy.

constitutes a punitive sanction that can also be seen as a crime prevention measure. Other concepts that may prove useful in the development of middle range punishments include community service orders, restitution, and short-term confinement, such as weekends, in relatively open barracks-like facilities such as those used in the Scandinavian countries for drunken drivers and minor property offenders.

If politically viable alternatives to incarceration could be provided, there would be much less disagreement with Sherman's and Hawkins' call for punishments "in the middle range," so that prison sentences could be reserved for persons convicted of homicide, robbery with firearms, aggravated assault, and those burglars and drug law violators who have prior convictions for these offenses. Persons committed to prison as Sherman and Hawkins propose for the purpose of incapacitation would serve no more than five-year terms except for especially notorious cases (*e.g.*, Charles Manson) and cases where "a diagnosis of psychosis or other mental disorder creating real and continuing physical danger has been made and repeatedly reaffirmed" (p. 111).

For many liberals and conservatives these days, the bottom line on the purpose of imprisonment is incapacitation (pp. 101-14). Indeed, the incapacitation argument has been made much more specific by the *Rand Corporation Study and Recommendations in Selective Incapacitation*.¹² With this study, the arguments related to incapacitation based upon incarceration on predictions about future behavior, and the demonstrable effects on the incidence of crime resulting from imprisoning certain classes of offenders have gone far beyond the rather general discussion of this rationale presented in *Imprisonment in America*.

Punishment by imprisonment, and imprisonment for purposes of incapacitation are both politically viable propositions. It is the proposals for alternatives to incarceration that require something lacking in American government, *i.e.*, the courage to lead rather than follow public opinion. Given the style of running for elective office in this country, change in this area seems less likely than in any other. There are now some more restrictive financial constraints on legislators' desires to be tougher on criminals than their opponents in the next election, but the disinclination of policymakers at all levels of government to try to educate the citizens about crime control and crime prevention suggests that prison overcrowding is the most likely present and future course in American penal policy. *Imprisonment in America* is a thoughtful, lucid explication of some of the elements that underlie American penal policy. What is now needed are specific proposals for those punishments in the middle range, coupled with strategies for coping with those social, economic and political obstacles that make the United States, in terms of penal practice, an underdeveloped country.

12. P. GREENWOOD & A. ABRAHAMSE, *SELECTIVE INCAPACITATION* (1982).