

# Crime and Punishment: Is “Justice” Good Public Policy?

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Dysfunctional features of American penology are mitigated somewhat by the application (though uneven) of modern science. Unfortunately, these advances do not address major flaws in the ideas on which the system is erected. These include retribution, proportional punishment, and all-or-none notions of criminal responsibility. We propose abandoning retribution for its own sake; making punishment proportional to its effectiveness for behavior change rather than to the indignation evoked by the offense; and incorporating punishment into sentences based on the clinical and behavioral characteristics of the offender, including containment as necessary for public safety. Every offender would be held responsible, but the meaning and consequences thereof would change. The proposed changes could only occur incrementally. New systems of oversight and accountability would be required. Legislative bodies could provide guidelines, and courts could oversee, but neither could micromanage. Few are better qualified to work toward these goals than readers of this journal.

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The law is reason, free from passion.—Aristotle

... the means ought to be proportional to the end.—  
Alexander Hamilton

Distrust those in whom the wish to punish is strong.—  
Johann Wolfgang von Goethe

The quotations sum up what the American response to crime is not. Passion (revenge) and the wish to punish trump reason; the means employed are proportional to past behavior rather than desired future ends. Improvements in penal practices occur unevenly, but clash with traditional priorities and archaic notions about human nature and behavior. Few are better prepared than readers of this journal to understand these problems and to work for their solutions.

Dysfunctional notions and attitudes hide behind the revered concept of justice. Few would dispute that justice is good. This creates a presumption that anything called “justice” is also good. Among the notions subsumed under the heading of justice that lead to bad policy are retribution, proportional punishment, and doctrines about criminal responsibility. Let us examine each.

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## Retribution

Retribution, the core of criminal justice policies, is a code for revenge. Revenge is powerful, and, within limits, functional. It tends to deter offending by punishing it. The problem is that too often it fails to deter. There are many reasons for this. One is failure to understand that one person’s punishment is another’s reward. Another is the offenders’ belief that they will never be caught. In the face of failure, instead of investigating the cause, the knee-jerk response is to ramp up the supposed severity of the punishment. Thus, legislators rely on emotion and popularity polls, not scientific analysis or even trial and error in prescribing sentencing guidelines. Consequently, many offenders are treated like toxic waste: imprisoned and released no better, and often worse, off than when they entered. The effect, intentional or not, is a higher value on revenge than on public safety.

Revenge without reason, in its purest form, is the death penalty. This is usually debated as a conflict between “justice” and humaneness. The more salient arguments are practical. It virtually assures wrongful and irreversible executions, and the appeals process makes it more expensive than alternatives. All this is in return for no demonstrable gain in deterrence.

Passion without reason also leads to the overuse of jails and prisons rather than to alternative sentences

that may be equally or more effective. Ill-advised “three strikes” laws further aggravate the already out of control overcrowding of jails and prisons.

### Proportionality

At least since the Code of Hammurabi (circa 1750 BC), proportional punishment (an eye for an eye, let the punishment fit the crime, for example) has been the main restraint on excesses. Proportionality would make better sense if applied to future ends rather than to indignation over past events. Public safety would be better served by scientifically sound sentences unpleasant enough to deter and including rehabilitation for behavioral change when possible and containment when not. Study of outcomes could begin to yield predictions of what sentences are likely to be effective.

### Responsibility

Criminal responsibility is assumed to appear full blown at various levels of mental or neurological health or illness, age, or IQ. Multiple definitions of thresholds bear little or no relationship to clinical or scientific reality or to threat level. In the occasional high-profile case, they become a cause for legal and mental health professionals to think poorly of each other and of the public to think poorly of both. The insanity defense, probably the most frequent basis for claiming nonresponsibility, is fortunately still invoked so rarely and succeeds so rarely that the practical effect is small. However, it exposes the archaic assumptions about human behavior that underlie crime policy.

These assumptions are based first on introspection and common sense but gain intellectual currency through the speculations of Descartes and the ancient Greeks. According to these notions, the mind is ethereal, nonmaterial, and identical with consciousness. The ethereal domain is ruled by reason, free will, choice, and calculated self-interest. Some laws of nature obviously operate there, but the assumed extent is murky.

Though Freud is now remembered mainly for his mistakes, he was right in his core contention that consciousness is merely the tip of the mental iceberg. Joseph LeDoux summarized the state of modern neurobehavioral science on this point as follows: “. . . unconscious processing is the rule rather than the exception throughout evolution” (Ref. 1, p 71).

Beneath the tip of the iceberg are nondeclarative memories, expectations, information processing, emotions, and temperamental predispositions that push conscious thought and actions into deeply worn channels. They regulate what one notices or ignores, forgets or remembers, and believes to have been seen or heard. Out-of-awareness processes are not always irrational, but they are usually less accurate, and they trump conscious rational ones far more often than is commonly appreciated. Whether anything will be left over for “free will” after all this is understood is anyone’s guess. Debates about psychic determinism echo old ones about predestination.

### Risk and Causation

Crime, poverty, child abuse and neglect, mental and personality disorders, and substance use disorders form an interlocking network of risk factors. These are realms in which nonconscious processes trump conscious rational ones with especial frequency. Risk factors are not necessarily causes, but if they are not causes themselves, they indicate that there are causes at work.

Some conflate understanding the causes of behavior with excusing it. Cause and effect are facts of nature and not subject to human preference. Whether and when to excuse is a policy decision, entirely subject to human preference.

What might replace the dysfunctional elements of traditional criminal justice? Wexler and Winnick<sup>2</sup> go part way with their proposals for therapeutic jurisprudence, holding that law can be either therapeutic or anti-therapeutic and should seek to enhance the welfare of society by achieving practical results, but only when other things (apparently justice, liberty, and autonomy) are equal. Their proposals leave traditional foundational assumptions intact. They consider practical results desirable, but not the top priority.

Despite underlying traditional assumptions, scattered and uneven positive changes do take place. They include drug and mental health courts, community correction programs, drug and mental health treatment in jails and prisons, support programs for integrating released inmates into the community, educational and vocational training, anger management training, victim reconciliation programs, and more. However, these are all grafted onto and often clash with tradition and with the firewall between punishment and treatment.

## Therapeutic Justice

Therapeutic justice, as proposed by Nygaard<sup>3,4</sup> and as advocated in this article, goes the rest of the way. It proposes, after determining whether the accused in fact did the act, to hold the individual responsible for his or her behavior, but to change the meaning of responsibility. Instead of imposing formulaic proportional punishment, it would develop an estimate of the reasons for the offense, using the best that science and common sense can offer. This estimate would be used to formulate a sentence that would not be an end, but a journey. It would include punishment designed for its deterrent effect. It would address the deficiencies of offenders, require that they do something about them, make the tools to do so available, and provide assistance in utilizing them. Education and training are already part of rehabilitation. Customary distinctions between education, training, and psychotherapy become increasingly blurred, since all are forms of learning. Psychotherapeutic learning is most relevant to maladaptive, nondeclarative processes and is rapidly expanding its applicability, mainly through increasingly fine-grained dissection of emotion, thought, and behavior. Growing understanding of the neurobiology of learning and memory holds out the prospect of enhancing this learning with biological interventions. Indeed some early successful clinical trials of this approach have already been published.<sup>5</sup>

Like any treatment plan, a sentence would require periodic review and adjustment. It would include systematic, active postcrime roles in the lives of offenders. Prison and jail sentences would be used only for offenders who are dangerous or who fail to comply with alternative sentences.

Death penalties and life sentences without possibility of parole would be replaced by life sentences with difficulty and/or improbability of parole. This would apply to any major violent offense, as being presumptive evidence of lifelong dangerousness without effective intervention. Parole would be considered only if there were strong evidence of positive change and an end of dangerousness. Such estimates are of course always uncertain. Release, if any, would be partial, progressive, and accompanied by close supervision and surveillance, to be relaxed only slowly contingent on continuing successful adjustment.

Expense is an obvious problem with these proposals. Costs would be partially offset by redirecting re-

sources currently massively misallocated to jails and prisons. As treatment policies become more cost-effective, further savings would come through the reduced cost of crime to society. The net effect of all this is hard to estimate.

Oversight and accountability to prevent corruption, incompetence, and sadism are significant problems that are far from absent in the present system. Courts would probably maintain overall supervision with redesigned legislative guidelines, but could not micromanage sentences and treatments. Postsentencing management is an area in which lawyers could make a substantial contribution, rather than clinging to their traditional roles.

Fundamentalist libertarians will raise objections based on fears of paternalism, a therapeutic state, and deprivation of autonomy. This reflects a lack of awareness of the extent to which mental, personality, and drug use disorders undermine autonomy. It is especially curious in view of the near total deprivation of autonomy in jails and prisons. It should be remembered that no one would be subject to any of this unless convicted of a crime.

Another obstacle is jealousy of professional turf. In principle, this is not a valid objection, although there are practical questions about how to allocate authority and responsibility to the various professions. No individual can master all the science, skills, and administrative ability needed. These should be approached as problems to solve rather than reasons to cling to the past.

Therapeutic justice embodies radical proposals. Its implementation will obviously be incremental rather than cataclysmic. We believe that something like it will be implemented, and that readers of this journal can help to bring that about.

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