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IMPROVING THE CRIMINAL JUSTICE SYSTEM: THE NEED FOR A COMMITMENT

Donald J Horowitz*

Society asks a great deal of the criminal justice system.¹ It asks for protection, punishment, rehabilitation, and humanity; it simultaneously asks that the system operate accurately, efficiently and fairly. Recently, societal concern has been sharply focused on the criminal justice system and most particularly on its correctional and sentencing aspects.² The rising crime rate³ is blamed on the failure of the system to deal properly with offenders. This assumes too great a potency in the criminal justice system however; many other factors in society

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1. One author has described the system in this manner:

The activities of police, prosecutors, courts, and correctional agencies and the various programs—sometimes repressive and punitive, other times therapeutic and rehabilitative—are commonly accepted as necessary to deal with the immediate problem of criminals and delinquents. These agencies are united in an intricate organizational whole, despite significant areas of federal, state, and local autonomy, and differences in perspective and purpose. This pervasive organization we refer to, for want of a more descriptive term, as the criminal justice system.

F. REMINGTON, CRIMINAL JUSTICE ADMINISTRATION 6 (1969).

At the outset it should be noted that a judge is only one part of the criminal justice system. Criticisms aimed at the judge as a participant in the process therefore cannot be evaluated in isolation from the entire system. In incarcerating the convicted offender or placing him on probation, the judge tries to protect the public in a manner that is consistent with the law and the constitutions. Although a judge should be subject to public evaluation and scrutiny for his or her sentencing performance, such evaluations should not be predicated solely on the number of offenders the judges have sentenced to prison or put on probation. To make an informed judgment, specific information about the individual offender should be considered, along with reports of the offender's behavior in prison or during probation (specifically whether the individual committed further crimes) as well as thereafter. Additionally, if evaluation of judges is desired, specific uniform criteria should be developed. *See* D. STEIN, JUDGING THE JUDGES (1974).

2. The interest in the correctional process was recently highlighted by the Association of Trial Lawyers of America in 12 TRIAL Vol. 3 (March 1976), an issue devoted almost entirely to correctional problems.

3. The Federal Bureau of Investigation's UNIFORM CRIME REPORTS indicated that there had been an 18% increase in crime for 1974 over 1973. Since 1969, the FBI's reports indicate that violent crimes as a group have increased 47% and the property crimes increased 37%. 1974 UNIFORM CRIME REPORTS 10.

have a far greater impact on the incidence of crime and violence.⁴ The criminal justice system, even operating at its best, cannot cure enough of society's ills to solve the problem of crime. It is nevertheless true that parts of the criminal justice system can and should be improved so as to slow the rising crime rate, or perhaps even effect a reduction of the present incidence of crime. To help with this endeavor, this article will propose improvements in the present system and highlight the need for them by examining Washington's failure to accomplish its self-imposed goals in the area of corrections.

I. STRUCTURING THE SYSTEM—MAKING COMMITMENTS

In 1965 the Washington legislature mandated in R.C.W. § 72.08.101⁵ that programs for offenders be provided within a correctional system that is rehabilitative, rather than penal, in character. Instead, public officials of the executive and legislative branches have violated the commands of the statutes and have contributed to the inability of the present system to deal with offenders. Public safety has been the victim of these violations.

The State of Washington has never given the rehabilitative model a chance to work, because it has never made a sufficient commitment to treatment programs for offenders. In 1935, at the instigation of now King County Superior Court Judge Edward E. Henry, a statute was enacted which mandated that the Director of the Department of Institutions set up a state narcotic farm colony.⁶ That law has never been implemented. In 1959 the legislature enacted a statute pertaining in part to drug treatment within and outside of the correctional system, directing state, county, and local health officers and prison officials to

4. See generally Ball, *Why Punishment Fails*, 31 AM. J. CORRECTION 19 (Jan.-Feb. 1969). The FBI has mentioned several of these factors, including relationships and attitudes of law enforcement and the community, density and size of the community population, climate, education, and the effective strength of the police force. 1974 UNIFORM CRIME REPORTS at v.

5. WASH. REV. CODE § 72.08.101 (1974) (emphasis added) states:

The director of institutions *shall provide* for the establishment of programs and procedures for convicted persons at the state penitentiary which are designed to be corrective, rehabilitative and reformatory of the undesirable behavior problems of such persons as distinguished from programs and procedures essentially penal in nature.

6. *Id.* § 72.48.010-.110 (1974).

Improving the Criminal Justice System

set up programs, clinics, and hospitals for drug treatment.⁷ That law was not followed until very recently and then only pursuant to court order.⁸ In 1969 statutes directing the Department of Institutions to establish dangerous drug treatment programs⁹ and providing for juvenile probation subsidies¹⁰ were enacted by the legislature; neither statute, however, is adequately implemented or funded.¹¹

This lack of commitment shows an unwarranted dissatisfaction with the rehabilitative model. There has been considerable discussion in the press and scholarly journals of models of sentencing, including the punishment model, the certainty-of-punishment model, and the rehabilitative model.¹² Punishment and certainty of punishment have achieved some support as goals of the correctional system, but one should question the advisability of abandoning the rehabilitative model without a thorough understanding of the allegations that it has failed.

Major studies of the correctional rehabilitation processes of other

7. *Id.* §§ 69.32.070, .090, .120 (1974). These statutes provided for the isolation and treatment of narcotics addicts in quarantine stations or clinics found in city or county jails, hospitals, or other pertinent public or private institutions.

8. In *Bresolin v. Morris*, 86 Wn. 2d 241, 543 P.2d 325 (1975), the Washington Supreme Court ordered enforcement of WASH. REV. CODE § 69.32.090 (1974) to require that the petitioner be provided with prison facilities for treatment of his drug addiction. The court expressed the view that the legislature should fund remedial programs ordered to be developed by the Department of Social and Health Services. The legislature's response was to repeal the statutory provisions in issue. Ch. 103, § 3 [1975-76] Wash. Laws, 2d Ex. Sess.

9. WASH. REV. CODE §§ 72.49.010-.020 (1974).

10. *Id.* ch. 13.06.

11. The juvenile probation subsidy program has never been fully funded by the legislature to the statutory maximum figures. Similarly, it was not until recently that the dangerous-drug treatment program statute, *id.* ch. 72.49, was implemented. Pressure from King County judges on the Director of the Department of Social Services secured six beds at Western State Hospital, a wholly inadequate number, but an infinite improvement over previous availability. The 1976 legislature repealed this statute. Ch. 103 § 3 [1976] Wash. Laws, 2d Ex. Sess. 273.

12. The punishment and certainty-of-punishment models are relatively similar in basic outlook. The proponents of the punishment model believe that punishment alone is the goal of the penal system. Proponents of certainty of punishment believe that if the offender is aware that criminal behavior will result in certain punishment, he or she will be deterred from committing crimes. The rehabilitative model, on the other hand, looks to the individual characteristics of the offender and attempts to discern the cause of the criminal behavior of that individual. Once the causes are isolated, treatment of those problems by the correctional system presumably can take place. For a discussion of determinate sentencing see Bayley, *Good Intentions Gone Awry: Proposal for Fundamental Change in Criminal Sentencing*, 51 WASH. L. REV. 529 (1976). For those commentators taking a critical view of the rehabilitative model and indeterminate sentencing, see Craven, *Foreword*, 45 MISS. L.J. 601 (1974); J. MITFORD, *KIND & USUAL PUNISHMENT* (1973); M. FRANKEL, *CRIMINAL SENTENCES—LAW WITHOUT ORDER* (1972).

states, such as that of Robert Martinson,¹³ are drawn from a period prior to the development of important rehabilitative concepts, when significant funding from federal and state prison reform programs had not yet been made available.¹⁴ Martinson's study allegedly demonstrated that rehabilitative efforts in large fortress prisons during the period of the study had failed or had been ineffective. It also suggests, however, that some programs can be effective in correcting a percentage of offenders,¹⁵ that better selection of participants for treatment can lead to higher success rates, and that more varied rehabilitative programs can reach a greater proportion of the offender population.

Public protection, not punishment or rehabilitation, is the ultimate objective of the correctional system. Punishment is simply one tool to be used by judges and correctional authorities to aid in the process of correcting the behavior of an individual in order to protect the public. Correction is essentially an individual procedure to which individual consideration must be given. The punishment models fail in this respect because they look only to the type of crime committed, thus ignoring the totality of the individual, including mental incapacity or pathological problems such as drug or alcohol addiction.

Proponents of the certainty-of-punishment or punishment models fail to observe that where punishment is made the motivating theory of the correctional system, a sizeable commitment of resources for the building of new prisons to house the additional persons convicted must be made. Additionally, these models fail to deal adequately with the problem created by those types of offenders whose criminal behavior will not be deterred by the threat of certain punishment. The afflictions of criminals with backgrounds of mental retardation, drug

13. Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22 (1974). For a study that was published prior to Martinson's, see Bailey, *Correctional Outcome: An Evaluation of 100 Reports*, 57 J. CRIM. L.C. & P.S. 153 (1966). Bailey found success in about one-half of his sample but questioned the reliability of those success findings. For a more recent California study, see Ward, *Evaluation Research for Corrections*, in PRISONERS IN AMERICA 184 (L. Ohlin ed. 1973). See also Serrill, *Is Rehabilitation Dead?*, 1 CORRECTIONS 3 (May/June 1975).

14. Martinson's analysis stopped with the year 1967, at which time major federal aid to prisons and prison reform movements had not yet begun. The Law Enforcement Association Administration, which has funded treatment and other criminal justice programs, was not in existence until 1968. See Omnibus Crime Control Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified in scattered sections of 5, 18, 28, 42, 47 U.S.C. (1970)).

15. The implications of Bailey's and Martinson's studies of the 1940's through 60's are discussed in Reid, *A Rebuttal to the Attack on the Indeterminate Sentence*, 51 WASH. L. REV. 565 (1976).

addiction, and alcoholism will not be cured, nor will such individuals stop committing crimes because of a threatened temporary loss of freedom.¹⁶

Another paradox seldom confronted by the admirers of the certainty of punishment model is the juvenile system.¹⁷ If certainty of punishment is the concept to be used in adult corrections, arguably, that principle should also be applied to the youthful offender. It seems anomalous to apply punishment theory to adults while clinging to a rehabilitative concept, which allegedly does not work, for juveniles; yet some advocates of certainty of punishment have been reluctant to extend the concept to juveniles.¹⁸

II. IMPROVEMENT OF THE WASHINGTON CORRECTIONAL SYSTEM

Solution of the problems facing the criminal justice system and the correctional system may be approached in a number of ways. Although the following proposals will not solve all the problems, they can be a start toward solving many of them. First, sentencing laws in Washington should be changed to do away with mandatory sentences wherever possible.¹⁹ Experience in other states demonstrates that mandatory sentences are not only not helpful, but are counterproduc-

16. One author has noted: "Punishment occurs in the future, and the fear of that punishment is not strong enough to counteract the passion of the present, especially for people who are oriented toward immediate, not delayed, gratification." S. REID, *CRIME AND CRIMINOLOGY* 501 (1976). This reasoning seems even more compelling for those individuals who cannot rationally weigh the advantages and disadvantages of committing a crime.

17. WASH. REV. CODE § 13.04.095 (Supp. 1976) provides that the court may commit the dependent or delinquent child to any one of a number of different persons or agencies, except that if the child's dependency arises from incorrigibility, he may be committed to a diagnostic and treatment facility for not more than 30 days. *Id.* § 13.04.095(5). The statute also provides that the child may be released or the commitment order may be rescinded when the reformation of the child "shall be deemed complete."

18. Christopher Bayley, King County Prosecutor, formerly indicated that a distinction between the sentencing of adults and juveniles could be made. Recently, however, Mr. Bayley has indicated the necessity of adopting some aspects of the determinate system in juvenile corrections. Interview with Janet Bridgeman, Special Projects Director, King County Prosecutor's Office, in Seattle, Wash., May 6, 1976.

19. The new Washington criminal code enacted in 1975 attempted to relate the maximum term to the gravity of the offense, but mandatory terms are still present for certain types of offenses. Class A felonies (WASH. REV. CODE § 9A.20.020(1)(a) (Supp. 1975)) require imprisonment for not less than 20 years, *e.g.*, murder in the first degree requires life imprisonment (*id.* § 9A.32.040), rape in the first degree (*id.* § 9.79.170) and statutory rape in the first degree (*id.* § 9.79.200) require imprisonment

tive.²⁰ The length of the maximum sentence should relate to the dangerousness of the individual and his pattern of conduct. A five year maximum is probably sufficient for most offenders, but if the person is a particularly dangerous offender, provision for a longer maximum term should be made.²¹ Additionally, so-called shock sentencing is a useful tool for a sentencing judge. Shock sentencing permits a judge to sentence an offender to prison for a short duration, followed by probation and strict monitoring of the individual's progress. This device has been used in other states with some success²² and permits the sentencing judge, rather than the parole board, to maintain some control over the individual sentenced.

of the offender for not less than twenty years, conviction for aggravated murder in the first degree carries a mandatory death penalty (*id.* § 9A.32.046, added by Initiative Measure No. 316). *But see* *Gregg v. Georgia*, 44 U.S.L.W. 5230 (U.S. July 2, 1976), in which the Court indicated that mandatory death penalties are subject to constitutional challenge.

20. "Any objective assessment of the mandatory prison sentencing strategy . . . ought to take into account New York State's unsuccessful two year experience with its Second Felony Offender Law." 6 CRIM. JUSTICE NEWSLETTER 1 (Sept. 1, 1975). This law stipulates that all but the most serious second felony offenders must be sentenced to a minimum prison sentence of one-half the maximum term set by statute, provided that the last previous felony occurred within the preceding ten years. Counterproductive effects of the law during its first 19 months of study were reported to include: an increase in the number of inmates at state institutions by 3,556; an 8.7% increase in the backlog of court cases in the first year of the new law; increases in the rate of cases going to trial; number of guilty pleas decreased from 74.8% of convictions in 1973 to 65.6% in 1974; convictions down from 83.4% of felony trials in the first quarter of 1974 to 77.2% in the final quarter; and the proportion of sentences of five years or more increased from 31% of the felony total in 1972 to 40% of the total in 1973. "[T]he study team recommended repeal of the Second Felony Offender Law and less use of incarceration in New York." *Id.* at 2.

In California a House Resolution requested that the Assembly Committee on Criminal Procedure submit a progress report on the deterrent effects of criminal sanctions in California and make appropriate legislative recommendations. The Committee reported with respect to severe mandatory sentencing that:

Mandatory . . . sentences rarely accomplish the ends they seek. The certainty of punishment which is sought by such provisions is illusory. There are numerous discretionary devices—ranging from acquittal of the guilty to reduction of the charge—by which the judge, if that is his purpose, can frustrate the effect of a mandatory sentence.

CALIFORNIA STATE ASSEMBLY COMM. ON CRIMINAL PROCEDURE, DETERRENT EFFECTS OF CRIMINAL SANCTIONS pt. II—Crime and Penalties in California (May 1968). The Committee report went on to state that mandatory sentences prevented courts from basing their sentences on the relative importance the particular factors of each case and that adherence to the statutory requirement could produce results that seemed unjust. The Committee also found persuasive evidence of nonenforcement of mandatory sentencing provisions by courts and prosecutors because prosecutors would frequently reduce the charge to a lesser offense if the defendant would plead guilty. *Id.*

21. A ten-year maximum has been recommended in MODEL PENAL CODE §§ 6.06-.07 (sentences for felonies) and 7.03 (extended sentences for particular offenders) (Proposed Official Draft 1962).

22. See OHIO REV. CODE ANN. § 2967.13 (Page 1975) (shock parole); IND. CODE § 35-7-1-1 (Burns 1975) (court discretion to suspend a prison sentence any time within

Improving the Criminal Justice System

Second, judges should be provided with information from other participants in the criminal justice system such as the police. At present, information from the prosecutor and the Department of Social and Health Services is made available to the judge.²³ The concerns of the arresting and investigating officer and the victim of the crime are also relevant, however, and should be explored in the courtroom setting.

Third, the judiciary should adopt written standards and guidelines to limit wide disparities in the sentencing of offenders. Currently it is very difficult to identify the reasons supporting the sentence imposed. A careful and thorough set of written standards for judges to use in the exercise of their discretion in sentencing would be beneficial. Unlimited standardless discretion in a decisionmaking body, as the United States Supreme Court has indicated in an analogous situation,²⁴ is neither desirable nor constitutional. Crime-specific uniformity in judicial sentencing is not necessarily a proper goal, given the individual characteristics of offenders and variations in what will be effective in protecting the public from further undesirable behavior, but some consistency is desirable to reduce great disparities and promote a sense of fairness in the disposition. Both society and the offender should feel that equity has been done so that the process of correction can begin with a sense of fair treatment.

Fourth, a parole reorganization bill²⁵ should be enacted by the leg-

six months of disposition and to place offender on parole); KY. REV. STAT. ANN. § 439.265 (Baldwin Supp. 1975) (court may suspend further execution of the sentence upon motion of the defendant made not earlier than 30 days nor later than 60 days after delivery of the defendant to institution, and place defendant on probation). Shock sentencing has evidently been successful in Ohio. See Ammer, *Shock Probation in Ohio—A New Concept in Corrections after Seven Years in the Courts*, 3 CAPITAL U.L. REV. 33 (1974), wherein the statistics for the period 1965–1971 indicated that a 90.6% success rate was achieved statewide, with only 9.4% failing to successfully complete their probation. *Id.* at 49. Former common pleas court judge David Porter of Miami County, Ohio, reported a lower percentage of repeat offenders among those individuals he sent to prison for 60–90 days and then released on probation, than among either those placed directly on probation or those sentenced to longer terms of confinement. Telephone interview with Bruce Johnson, Chairman of the Board of Prison Terms and Paroles, in Seattle, Wash., May 3, 1976.

23. See, e.g., WASHINGTON SUPER. CT. (CRIM.) R. 7.1 (sentencing) and 7.2 (pre-sentence investigation). See also WASH. REV. CODE § 9.95.030 (1974) (facts made available to the Board of Prison Terms and Paroles in its sentence determination).

24. See *Furman v. Georgia*, 408 U.S. 238 (1972). In *Furman* the United States Supreme Court held that death penalty determinations entrusted to the discretion of the jury were unconstitutional, given the unequal application of that penalty to the same class of offenders. The discretion of the jury was not inhibited by mandatory guidelines or rules.

25. See, e.g., S.H.B. 487, 44th Legis., 2d Ex. Sess. (1976).

islature. The Board of Prison Terms and Paroles is currently seriously overworked in that it must conduct more than 4,200 interviews per year to fix minimum terms for offenders, reconsider existing terms, and consider residents for parole.²⁶ At the same time the Board is responsible for policy development and keeping abreast of the field of corrections. As a result, the Board cannot devote more than a few minutes annually to each offender. If the structure and responsibilities of the Board were reorganized, and the parole decisionmaking process changed,²⁷ the Board would have more time to commit to its essential functions,²⁸ and would be able to arrive at decisions based on more relevant data.

Fifth, a violence reduction center should be created to provide full diagnostic capabilities and study the causes and effects of violence. Such a center would be of great assistance to correctional authorities and judges by helping determine whether an offender was dangerous. The center would provide for more than the offender's present limited contact with a court-appointed psychiatrist by offering multidisciplinary tests and observation over a period of many weeks. As an additional benefit of such a center, valid general observations on violent individuals in our society could be obtained for purposes of more accurate prediction. The experience of the violence reduction center, and the expertise gained by its staff, could be used to evaluate existing treatment programs.

Sixth, the state should undertake to submit a criminal justice bond issue of approximately \$50 to \$75 million to the people for their ap-

26. In 1974 the Board of Prison Terms and Paroles conducted 4,263 meetings with adult correctional institution residents. The Board also conducted 382 on-site parole revocation hearings in the community. BOARD OF PRISON TERMS AND PAROLES, 1974 ANN. REP. 57 (on file with the *Washington Law Review*). During fiscal year 1975, the Board conducted 4,628 in-person meetings. BOARD OF PRISON TERMS AND PAROLES, 1975 DRAFT ANN. REP. 5 (on file with the *Washington Law Review*).

27. The Board members have agreed to provide specific guidelines for the development of a specific policy for fixing minimum terms. The Board is also evaluating the effectiveness of using statistical aids in its decisionmaking and is compiling data to assist in developing a decisionmaking matrix. BOARD OF PRISON TERMS AND PAROLES, 1975 DRAFT ANN. REP. 12 (on file with the *Washington Law Review*).

28. S.H.B. 487, 44th Legis., 2d Ex. Sess. (1976), provides that the work of the present Board would be delegated to hearing officers and a parole committee composed of those institutional staff members with closest, most frequent, and most continuous contact with the inmate; *viz.*, his or her correctional officer (guard), counselor, work supervisor, or teacher. The Board itself would be limited to five members who would hear appeals of hearing officer decisions made in the prisons, take applications for gubernatorial pardons, and establish rules to govern the following subjects: parole, parole conditions, adjustment and redetermination of minimum terms, revocation of parole, conditional discharge from parole, and final discharge from parole.

proval.²⁹ The funds secured by this bond issue could be used to create smaller, more effective correctional facilities, including facilities for alcohol and drug treatment. Such facilities would be places in which serious crime-producing personal and physical problems could be dealt with, yet also be sufficiently secure to assuage the fears of the public, and to keep the residents off the streets and available for needed treatment. Additionally, adequate funding for the juvenile system could be provided with the bond monies to subsidize juvenile treatment programs and to fund child-abuse prevention and treatment programs.³⁰ These funds would prevent today's delinquent from becoming tomorrow's criminal. Funding for programs of foster care, adoption, and social services to youth should also be increased. The central purpose of this bond issue would be to make the financial commitment to rehabilitation that has been lacking in the past. It would help to provide the treatment facilities necessary to make a rehabilitative concept function; it would provide for improvements in, and expansion of, the probation and parole staff so that actual supervision of offenders after their release from state institutions to prevent further criminal activity would occur; and it would be an expression of this state's determination to take action on carefully considered correctional policies.

Finally, a more thorough consideration by the legislature of the substantive criminal law is in order. The legislature recently enacted a new criminal code for this state³¹ but it failed to deal with such major problems as drug-related crimes.³² Instead of pursuing policies based on misguided morality in this field, the state should consider heroin maintenance programs.³³ It is necessary that problems of crime be dealt with realistically.

29. WASH. REV. CODE ch. 43.83D (1974), adopted in 1972, permits the state, prior to January 1, 1980, to issue general obligation bonds in the sum of \$25 million or as much as may be required for planning, acquisition, construction, and improvements of health and social facilities including adult and juvenile corrections and drug abuse and alcoholism treatment programs. *Id.* §§ 43.83D.020-.050.

30. See THE BATTERED CHILD (R. Helfer & C. Kempe eds. 1968). See also Washington Child Abuse Reporting and Procedure Act, WASH. REV. CODE ch. 26.44 (Supp. 1975).

31. WASH. REV. CODE tit. 9A (Supp. 1975).

32. Tightening of drug control law enforcement creates peaks in the incidence of crime. Because dealers are forced to curtail their activities at such times, drug prices increase and so do robberies and drugstore crimes. Interview with City Police Chief Robert Hanson, in Seattle, Wash., March, 1975.

33. The British have used a heroin maintenance program in which heroin was made available to addicts by prescription. See E. BRECHER, LICIT AND ILLICIT DRUGS 120-29 (1972). Treatment of addicts in the clinical setting is also a possibility.

IV. CONCLUSION

The crisis of confidence in the criminal justice system involves not only public doubt about the ability of judges and correctional authorities to deal with crime, but also public doubt that these problems can be impacted at all. Nevertheless, if participants in the present debate on the criminal justice system continue to express their views without fear of recrimination, Washington's citizens can make solid and careful judgments on correctional policies and financing that will bring about actual solutions to some of the problems of crime and demonstrate to the public that, through its effort, such solutions can occur.