

# Short term sentencing alternative with treatment implications : past, present and future

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## SHORT TERM SENTENCING ALTERNATIVE WITH TREATMENT IMPLICATIONS: PAST, PRESENT AND FUTURE

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The United States, a country that had its origin in revolution, has always viewed itself as revolutionary and innovative. When we were still a new country, we attempted to employ the revolutionary concept of reforming an individual through penitence and hours of Bible readings.

As innovative and ambitious as this concept was in the 18th century, it failed to be sufficient. We have come to the point where we realize that "The problems we face ... cannot be solved by those of us in the criminal justice system alone. We cannot be expected to overcome the effects of broken homes, poor education, and the decline in the influence of the church and family ... certainly not alone and certainly not with the tools presently at hand." (Carlson, Norman A.)

For years, we in the United States have been pursuing the elusive dream of building the prison, implementing the program, or devising the punishment that would persuade individuals that there are more responsible and acceptable means of achieving their goals than by engaging in criminal behavior. American penologists have pursued this elusive dream by swinging, like a pendulum, between an emphasis on deterrence and an emphasis on rehabilitation and, most recently, on retribution.

Let us consider the participants of a crime. First, we have the offender; second, we have the victim; and third, we have law enforcement, the agent of society. Traditionally, when we speak of retribution, we are talking in terms of the offender repaying society. In my mind this retribution excludes one participant, the victim, and is not true retribution for the crime. Retribution must satisfy all offended parties to be genuine.

Consider the following hypothetical question: What retribution, if any, has been gained in this case. A man burglarizes a house and gets away with \$ 6 000.00 worth of property. The burglar spends the money from

what he can fence and destroys the rest of the evidence. The burglar is now arrested and prosecuted. The prosecution is financed by the State. The victim may give of his time, energy, and more money to testify. The insurance company is sure to raise the cost of the victim's and society's insurance because nothing was recovered from the burglar. The burglar is convicted and sent to prison where he spends three or four years being housed, clothed, fed, and possibly treated and/or educated at the expense of the State. In prison, the burglar is in a community which is entirely separate from the world he left on the street. We have learned through study that what is done to, or for, the burglar in prison makes little difference in terms of constructive socialization. Indeed it may reinforce antisocial behavior. When the burglar does get out, he will probably be followed by a parole officer who is again financed by the State. If the burglar gets a job, it will probably be similar to some job he had before the burglary. He will possibly not be paid as well or will have at least lost some or all of the standing he had in that field before he was arrested. In addition, he has the stigma of having been in prison, which further aggravates his loss of earning power. Because of this prison experience, the burglar is probably a broken man and has minimal self confidence, or is more bitter and resolute in his antisocial attitudes. While in prison, if the offender has any dependents, the likelihood is that they too end up receiving some financial support from the state in the form of welfare or some other social service, or worse, themselves become involved in crime.

What retribution does the victim receive from this? He has the satisfaction of knowing that the burglar is in the custody and care of the State for several years, supported by the money he pays in taxes. What retribution does society receive? It has the burglar in its exclusive custody and care; as well as the benefit of knowing that the burglar is not committing crimes on the street for those several years in prison.

What deterrence was there to crime? Very little, perhaps none, as far as this particular criminal is concerned. The probability is 75 % that when the burglar returns to the streets he will find another victim, commit another crime, and be in the custody of the State within two years from release.

What rehabilitation has taken place? Again, very little. We know that the burglar will probably return to some job similar to the one he had before he was arrested, not to one more likely to keep him out of trouble. We know that there is a 25 % chance that he will not return to prison, but we do not know how many of those in that 25 % are merely better at their crime and therefore are not apprehended.

Overall, it cost the victim and society undue time, energy and money to achieve a few years of retribution and individual deterrence and we can only speculate about the amount of rehabilitation of the offender while he was incapacitated. Most likely it was insignificant.

On the whole, it would appear we are operating a rather inefficient system. Both society and the victim pay heavily to exile a criminal for a few measly years. At the same time, what benefit or what change is there for the criminal? In all candor, today's penologists do not know.

Penologists have worked hard over the last two centuries developing better security, better surveillance measures, more humane living arrangements, programs that treat and programs that punish. The programs have been studied. Security has been studied. The inmates have been studied. The victims have been studied. In the end, we still don't know. We just don't know.

I suggest that we first assume a logical posture toward our priorities. In each crime, we have said there are three participants, each one deserving of equal attention: the offender, the victim, and society. Any program that gives more attention to one participant over the other is out of balance, and will only serve injustice and perpetuate the damage of the original crime. Thus, we will surely end up with three victims instead of one. The only programs to date that approach that balance are "diversion" programs or alternatives to incarceration. Most of the many diversion programs being tried throughout the United States manage to actively involve all three participants. With the alternative to incarceration, both society and the offender get away from the fallacious concept of "rehabilitation, and get down to working with the realistic goal of habilitating the offender. We do not want to rehabilitate; we want to habilitate. We do not want to return him to the state he was in; we want to bring

him to a state he has not been in. Through alternatives to incarceration, we have the opportunity to put the offender to work not only for himself, but to directly restore to the victim, as well as to society, their due. Through alternatives to incarceration, society, through its government, functions in its proper role as arbiter and facilitator, not as keeper.

Alternatives to incarceration will not work for all offenders. Some offenders prove unable or unwilling to be habilitated. For these people who cannot adjust to society, we must retain places in which to isolate them. However, this number can certainly be minimized through efforts which I am about to discuss.

On the one hand, society has always demanded control of a perceived offender, and control, of necessity, is interfering and, therefore, punishing. On the other hand, American sensitivities are offended by the concept of punishing an individual before he has been proven guilty of a crime. This does not appear to be such a grave paradox on the surface. However, it is a conflict that has plagued us and is still plaguing us to date. Throughout the history of Anglo-American Jurisprudence, we have searched for suitable means to control the presumed offender without violating his human rights. This is almost impossible. To exert control over an individual, as in pre-trial detention, is to remove rights to which he is entitled if he is innocent. We claim to assume that an individual is innocent until proven guilty. The question then remains, how can we imprison someone, the very essence of punishment in our society, if we have not yet given him a trial and proven his guilt?

Since the very beginnings of Anglo-American Law, many alternative solutions to this problem have been explored. In early England, it was the practice to "issue a summons" instead of a warrant for arrest following the commission of any offense, even a felony, if the judge was satisfied that the person summoned would appear. This particular method is still being utilized. We have sought to have individuals released to the streets on the guarantee of bonding agencies that the accused would not leave the community. Later, we refined the summons concept for those who had been arrested to include "personal recognizance". This has been employed to varying degrees and with varying effects over the past fifteen years. More recently, because of overcrowding of jails and court facilities,

because of cost and because of an ever-constant attempt to effect change in offenders early in the criminal justice process, we have turned to pre-trial diversion programs.

There are many programs for pre-trial diversion that have problem-solving themes. Many of these address only the ubiquitous and obnoxious problems of alcoholism and drug abuse. Most programs, however, rely on some form of pre-trial release without attempt at rehabilitation. An individual is set free in the community with no responsibility required of him except to appear in court on the required date. Again, we are demonstrating our concern with procedural goals and the safeguarding of rights over the pragmatic goal of requiring the presumed offender to behave in society in a responsible manner. Agencies and community groups such as the VERA Institute of New York, the Indianapolis Pre-Trial Service Agency, the Washington, D.C. Bail Agency and the El Paso Regional Probation Department have all, with some success, used pre-trial release to minimize the negative effects that criminal procedures may have on society and the offender. In these types of programs, an alleged offender does not receive direct attention to his problems, but has the opportunity to shore up his community support. He has the opportunity to maintain his job without interruption. He has the opportunity to prepare for trial and possible incarceration. He has the opportunity to exercise what responsibility he may have and to retain some dignity, as well as involvement, with the community. All three of these, exercising responsibility, preserving dignity, and maintaining involvement with the community, must be preserved if we are to change people, and if we are to make the task of implementation and change easier and less costly to society, the victim and the offender.

The majority of pre-trial diversion programs deal mainly with problems of alcoholism and drug abuse; (for example, the ones operated by the Federal Bureau of Prisons in conjunction with the Federal Courts in New York, Chicago, and Philadelphia, The Night Prosecutor Program in Columbus, Ohio, Treatment Alternatives to Street Crime: TASK, and Project Intercept in San Jose, Ca.) Programs such as the one in the Citizens' Probation Authority in Flint, Michigan, select "situational lawbreakers" and require them to "accept moral responsibility" for their offense from the outset. Thus, they are much closer to the ideal

proposed here.

In as much as these programs have been able to operate with some measure of success, they suggest two things to us. First, they suggest that we do not have to use jail as a holding area for all offenders awaiting their day in court. Second, they suggest that we can persuade individuals who have demonstrated some ability to act responsibly to continue to assume responsibilities as they go through our criminal justice system in order to be useful citizens.

After an offender has been convicted, the conventional punishment has been to exile him to a correctional facility for some period of time. Here he is kept by the state and furnished with food, clothing and shelter. In this exile, his time and associations are controlled. In many ways he is kept like a child, with little or no opportunity to exercise initiative or assume adult responsibilities, yet we know that the longer a child is cared for excessively, infantilized, and prevented from assuming a responsible and contributing role in family affairs the less likely that the parents will be able to realize their parental hopes. Incarceration, like the excessive sheltering of a child, fosters irresponsibility, insecurity, indignity, and contempt for authority. This I believe we can all agree upon and this appears in agreement also with our empirical evidence.

It is for these reasons that I lean toward alternatives to incarceration. To the present, we have felt relatively comfortable with incarceration in handling those who have violated our codes of conduct. This is a method of behavior control that may be efficient in achieving incapacitation. However, efficient as it may be in physically containing individuals for a time, it is hardly sufficient to achieve retribution, deterrence and habilitation. Incarceration not only fosters irresponsibility in the offender, but in the community as well. By allowing the criminal justice system to lock up an offender to remove him from the community, the public relinquishes its responsibility to itself and the offender, practically responding in a criminal fashion. We have experimented with more mature and honest problem-solving solutions to criminal behavior through the use of diversion programs for convicted offenders.

Among alternative programs that have been tried in the United States are

the programs that were set up in Iowa in 1974 for probation or deferred sentencing with the condition of restitution. In 1976, Colorado followed with a similar program. In 1972, Minnesota Department of Corrections set up a program for property offenders. After serving four months of their sentence in prison, the offender lives in a center, works in the community and makes an agreed-upon restitution. In 1975, the Georgia Department of Corrections/Offenders Rehabilitation initiated a two-year, LEAA-funded, resident restitution program designed to divert offenders from incarceration. This program essentially required offenders to repay victims for whatever losses they may have suffered. This program was so popular that the state legislature voted to fund the program themselves in an austere budget year.

In New York City, the Wildcat project was originated and sponsored by the VERA Institute of Justice. This is a program for young adult drug-abusing offenders with multiple convictions. It is now in its fifth year of providing employment, six months to two years, to prepare the offenders for nonsubsidized jobs in industry and government, hopefully, to help them avoid further criminal entanglements. During training, they might work on such jobs as restoring an old-age home and thus provide a measure of reparation to the community.

Project Intercept, based in San Jose, California, was mentioned in the discussion of pre-trial alternatives. It includes also a post-trial diversion program used for a select group of probationers, providing assistance for alcohol, drug, psychological and vocational difficulties.

A program that I find of considerable interest is Ellsworth House, a joint project between the probation department and the rehabilitation service of San Mateo County, California. This was a three-year experimental program. The offenders were selected by the use of the Table of Random Numbers. The population from which they were drawn had already been sentenced to a minimum jail term of four months. The offenders excluded from the program were those with a severe escape history, those with a heavy drug sales and distribution backgrounds, and those with explosive personalities.

The program was rather loosely structured initially and too permissive,

but developed into a highly structured program with a therapeutic milieu. Attendance at group therapy programs or encounter groups was mandatory, great emphasis was placed on personal development, work and financial responsibility. The results of the program indicated that in terms of recidivism, Ellsworth House did only as well as the excluded control groups. But one variable, employment, indicated considerable success for the Ellsworth House group.

Throughout the reports describing these diversion programs recurs the same, discouraging theme: Evidence is very limited and the writers do not really know how well, or to what extent, these programs really work.

What do we need? What will do the job considering the three participants in crime:

the offender, the victim and society.

As we said before, to date we have had only one true answer for that question, "We do not know." Should we not now resolve that we commit ourselves to finding a definite answer? We are long overdue for such a commitment.

We propose that a Research Institute be established; one comprehensive enough to include pre- and post-trial diversion programs, and comprehensive enough to deal with as many human problems as may arise. The purpose of the Institute, very simply, would be to identify programs that work. This purpose will require controlled program evaluation. In order to handle the breadth of programs involved, the Institute should be able to operate programs located in two or more cities the size and sophistication of Los Angeles, Chicago, New York, London or Munich. It would be organized under a board of three to five men. These persons would be appointed by the President in conjunction with the Governor of the state in which they are to operate, and they would be isolated from political pressure. They would select programs for evaluation and would be in charge of the administration of the Institute. They would be guided by a highly competent staff of advisors in the human and behavioral sciences, and they would minimize overanxious interference by law enforcement and correctional agencies.

This Institute would select programs such as Ellsworth House in San Francisco or the Georgia Restitution Program. It would evaluate and analyze such programs and execute the necessary steps to determine if the successful programs can be replicated elsewhere. Once the Institute has knowledge about truly successful programs, its responsibility would be to package such programs and make them available to communities across the country as programs known to work. It would be the Institute's responsibility to establish a system for continuous evaluation of these programs to make certain that they continue to work. It is evident that the work of such an Institute would be long and tedious, but the rewards for this work would be known programs with known costs and known positive results. Intelligent decisions would be possible.

Such an Institute would maintain close liaison with major universities, as well as law enforcement agencies and public interest groups. Universities, with their Human and Behavioral Science Departments and their Medical and Law Schools, Ph. D. Programs, Libraries, Computer Centers and large pools of faculty and graduate and undergraduate students, would serve as an untapped resource.

Close contact with law enforcement agencies would assure realistic orientation of programs. Contact with public interest groups would assure consideration of basic human and societal values. Ultimately, we could realistically hope for programs that are both humane and effective. Rather than operating programs that are based on popular preference or good intentions without good knowledge or based on mere political expedience, we could operate sound programs based on a sound body of theory, data and experience. The end result is that a real advance in crime control would be possible.

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\* There is a five volume set of paperback books entitled "Instead of Jail: Pre- and Post-trial Alternatives to Jail Incarceration" which was funded by the U. S. Government. This set can be purchased from the Superintendent of Documents, U. S. Government Printing Office, Washington, D. C. 20402. This set surveys the current work in this area and served as the basic resource.

## Summary

This article covers three major points. First, the concept of retribution as one of the goals of sentencing is reviewed. If society is interested in justice for its citizens, then society must give serious consideration to the victim's emotional involvement in the retribution process of the sentencing procedure. Second, there are alternatives to prison which can support an equilization of the retribution process by societies judicial system. Some of these alternatives are briefly discussed. Thirdly, while in the past society has been generous in encouraging programs for the rehabilitation of offenders, it has not considered the advantages of programs for the habilitation of offenders. Data suggest that society should be more interested in habilitation than rehabilitation. Further, society should demand that those responsible for dispersion of funds for programs require program directors to provide methods for program evaluation and program replication. Ideas on how this change in correctional philosophy may be implemented are discussed.

## Résumé

**La courte peine privative de liberté et ses alternatives avec des conclusions de traitement: passé, présent et futur**

L'exposé comporte trois parties. Le lère montre un nouvel aspect de la question, en ce qui concerne la vengeance (talion) qui est un des aspects de la peine. Si le côté justice nous intéresse, nous devons alors nous intéresser sérieusement à la réaction de la victime. La 2ème partie montre que notre recours aux alternatives à la privation de liberté souffre d'un manque de casuistique, les solutions pratiques ne manquent pas. Nous en donnons des exemples. La 3ème partie suggère une casuistique et un plan de recherches. Nous ne devrions pas dire: Je ne sais pas. Nous devons rechercher des solutions. Nous montrons ce qu'on peut faire.

## Zusammenfassung

### **Die kurze Freiheitsstrafe und die Alternative der Behandlung: Vergangenheit, Gegenwart und Zukunft**

Im Referat werden drei Hauptpunkte behandelt. Der erste zeigt einen neuen Aspekt im Hinblick auf die Vergeltung als eines der Ziele des Strafens. Wenn wir am Recht interessiert sind, müssen wir uns ernsthaft um die gefühlsmässige Bezogenheit des Opfers beim Vergeltungsaspekt der Strafe interessieren. Der zweite Punkt zeigt, dass, obwohl unser Gebrauch von Alternativen zum Freiheitsentzug noch einer soliden Programmbeurteilung ermangelt, es doch eine Anzahl Möglichkeiten gibt, die bereits angepackt worden sind oder angepackt werden sollten. Im Referat werden Beispiele für solche Programme für Alternativen genannt. Der letzte Punkt möchte anregen, zukünftige Programm-Beurteilungen und Forschungen ins Auge zu fassen. Wir sollten nicht mehr sagen: Ich weiss es nicht, sondern wir sollten etwas tun, um herauszufinden, ob neue Möglichkeiten besser sind. Anregungen werden gegeben, wie dies zu tun wäre.