

TOWARDS A MORE PRAGMATIC PENAL SYSTEM

JOHN RAY



INTRODUCTION

Although the mainstream of libertarian thought is now characterised by an Aristotelian Natural Law approach, utilitarianism maintained a strong presence in classical liberalism. Dr Ray's essay belongs to the latter school. Although I for one favour the natural rights approach to jurisprudence — to be found for example in Murray Rothbard's *The Ethics of Liberty* (Humanities Press, Atlantic Highlands, N.J., 1982) — with its emphasis on restitution, we are pleased to publish Dr Ray's vigorous exposition of his utilitarian, deterrence focussed views. This is perhaps a good moment to emphasize the LA's commitment to publishing liberal and libertarian ideas in their diversity, and not merely those variants with which we agree.

Chris R. Tame — 1989

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This paper was originally delivered as an address to the annual convention of the Liberal Party of Australia (New South Wales Division) at the Hilton Hotel, Sydney on 9th September, 1978. Formerly Lecturer in Sociology at the University of New South Wales, Dr. John Ray has published more articles on the psychology and social psychology of authoritarianism than any other scholar. He is author of *Conservatism As Heresy* and, with V. K. Koll, *Authoritarianism Across Cultures*.

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FOR LIFE, LIBERTY AND PROPERTY

What I wish to propose in this essay is a complete re-think of how criminals should be treated in the light of the failure of many so-called "progressive" approaches to the problem. I believe that a new positive approach to the problem of criminality is both long overdue and would be gladly welcomed by the public.¹

THE FAILURE OF THE CURRENT LEGAL SYSTEM

The first thing we must acknowledge in this connection is the very great failure of the present system to protect the public. It is universally acknowledged by all who have any acquaintance with them that our prisons are very much a training ground for crime. A person who has spent some time in prison comes out far more sophisticated in methods of lawbreaking than when he went in. If we had the deliberate aim of running university courses in how to commit crime, we could hardly do better than the present prison system. Because they constantly mix with other criminals, criminal attitudes are constantly encouraged among prisoners. They pass on both anti-social knowledge and anti-social attitudes to one another.

A second problem is the way in which dangerous psychopathic rapists, murderers etc. are released after only short periods and go out to repeat their crimes. Most crime is committed by people who already have criminal records. We have caught them once but have done nothing to protect ourselves from them in the future. How many people have we killed by unleashing criminals on them who should never have been released?

A third problem is the great cost of the prison system. It costs roughly as much to keep a prisoner as it would to keep him at the best first-class hotel in town. Thus we have the state spending enormous sums to keep embezzlers in jail for twenty years, when they would never again get an opportunity to repeat their crimes, while at the same time we let off with a bond rapists who have every opportunity to repeat their crimes. It

sounds like a system of waste roughly comparable to burning bonfires of dollar notes.

The fourth problem is the most basic of all: the failure of our penal methods to keep down the ever rocketing crime rate. While our radicals are pleading for ever more lenient treatment of criminals and while our universities have posters stuck up everywhere inciting us to tear down all jails, people are being murdered, robbed, bashed and raped at an ever increasing rate. What comfort is it to someone who has been raped or bashed to be told that the person who did it had a mother who didn't love him? It is not comfort that is required. It is prevention.

THE REALITY OF DETERRENCE

In this connection, one of the greatest myths that certain radical social scientists have tried to foist on us is the myth that punishment does not deter crime. They draw this conclusion largely from the fact that people who have been punished by imprisonment do not cease to behave criminally. What they overlook is the effect of penalties on the *rest* of the population who don't commit crime. By some strange twist of reasoning they argue that because some people are not deterred by penalties nobody is. A better argument would be to say that because 99% of the population do *not* engage in crime, this is evidence of how deterring the penalties in fact are.

In fact the findings of academic research strongly support this conclusion. Writing in *The Public Interest*, Gordon Tullock in 1974 reviewed research on the question by both sociologists and economists.² He found that sociologists generally started out thinking that punishment would have no effect because it was ideologically repugnant to them while economists started out thinking it would have an effect because it increased the cost of action and everybody knows that increased cost decreases demand. In spite of this difference in preconceptions, however, Tullock found that both categories of researcher still came to the same conclusion: punishment *does* deter crime and the more punishment the more the deterrent effect. It seems a pity that we needed so much research to tell us what every one of us surely knows from his own responses. People *do* fear punishment and it *does* make them seek safer courses of action.³

With this in mind it must come as no surprise that our ever more lenient treatment of criminals should be accompanied by a rising crime rate. As we reduce the cost of crime more of it takes place.

THE CRIME RATE

It is in fact amazing how generally this simple relationship is ignored. We hear every possible explanation for the rising crime rate except the obvious one. It is fashionable now to blame the increased size of our cities for the increase in crime. Yet since the war the

population of London has declined from 8 million to 6.5 million. Does this mean that the London crime rate has declined? Needless to say, it has gone up the same as everybody else's.⁴

A perhaps even more fashionable explanation is to blame increased crime on increased unemployment. Yet in Australia's twenty years of full employment under Menzies and his immediate successors did Australia's crime rate stagnate? Far from it. It went up then at roughly the same percentage rates as it does now. We must conclude, then, that many of our young women who have been raped and brutally murdered might be alive today if the perpetrators had still had the gallows to fear.

What then am I advocating? Is my solution to all the problems I have outlined to bring back hanging? Far from it. Although the public opinion polls both in Australia and the United Kingdom repeatedly attest that the majority of the population want the death penalty for serious crime, there are so many vocal sections of the population who oppose it that I think it must now be regarded as a "dead" issue.⁵

A NEW SYSTEM

What I am advocating is in fact something more fundamental. I advocate that whatever else our system of criminal justice may do, the thing that must have first priority is the protection of the public.⁶ I am advocating that whenever a criminal is caught, he never be released unless there is good reason to believe that he will in future abstain from crime.

Does this mean I am advocating more and bigger jails and more money being spent on supporting them? Far from it. Under the pragmatic system I am proposing white collar criminals like Peter Huxley, a noted Australian embezzler, could be released immediately. For him the loss of his good name and position in the community is already severe punishment. The chances of him ever having the opportunity to repeat such crime are almost nil. Who again would ever trust him with a chequebook? For a less notorious white collar criminal some system of requiring that he ever afterwards had to check in at a police station once a month and advise them of his place of employment would be sufficient check. The police could then make sure that any employer knew of the person's criminal background. This might mean that white collar criminals would be for ever confined to menial work but it would be better that they be paying for their own support than for us to be keeping them. If this amounts to lifelong punishment then all the better for its deterrent effect on others.

Another implication of the pragmatic system I am proposing is that one thing we would *never* do is allow prisoners to mix with one another. The only people we would ever allow them to come into contact with would be normal, non-criminal people who would not

encourage them in their criminal ways. Aside from visitors (who should be allowed frequently), social workers and prison staff, then, all prisoners would effectively be in solitary confinement with not even a passing word allowed to fellow criminals. Because this is a very severe punishment which some think can lead to mental breakdown,⁷ ameliorative measures such as allowing radio, TV and newspapers in the prisoner's cell — perhaps even a telephone — would also have to be taken. Perhaps even a certain amount of what are called “conjugal rights” would have to be allowed if this was thought to be in the interest of the prisoner's rehabilitation. If it is protection of the interests of the community that we are putting first, rehabilitation must obviously come before punishment. Until prisons can be redesigned, exercise might also have to be taken in the prisoner's cell — with the aid of gym equipment, exercise bicycles, etc. Visits to libraries, workshops, etc. could still however be allowed as long as strict silence was enforced. Again the severity of this system is not the primary objective but it would nonetheless act as a strong deterrent to the would-be criminal.

As now, many criminals could be let out on day-release schemes etc. so that they could contribute to their own upkeep. The only difference would be that surveillance of their lives would probably have to continue for many years before it could be felt that they had abandoned criminal ways. Our present parole system already has inbuilt “report-in” procedures but these cease once the prisoner's sentence is up. Under the pragmatic system I am proposing, these would never cease as long as there was any possibility they might be required.

I do envisage that those who commit crimes of violence would normally have to be under fairly close custodial control for very many years. The young bash-artist would have to stay inside until aging deprived him of enthusiasm for the activity. These do however amount to only a minority of criminals and it must be remembered that under the present system they would be in and out of jail for most of their lives anyway. At least the new system would encourage them to reform rather than confirm them in their ways.

The new set of priorities would also provide a more effective encouragement to really intensive and realistic attempts at rehabilitation. Such attempts at the moment amount to little more than trade training. Instead psychological conditioning methods such as were vividly portrayed in the film *Clockwork Orange* could be offered to prisoners on a voluntary basis. Behaviour modification is now a very extensive discipline within Psychology Departments of our Universities and there is no reason why it cannot be made available to criminals who genuinely want to cure themselves of criminal proclivities. Like anything else, such facilities might be abused but even a modest success rate would be better than the zero success-rate we appear to have at the moment.⁸

There are, of course, some crimes of violence that would not have to be treated by imprisonment. Judges sometimes already take exceedingly lenient views of so-called “crimes of passion” — crimes arising out of conflicting or disturbed family situations. In the late 1970s the family of a current Miss Australia were let off free for murdering her apparently tyrannical father. While the man in the street is entitled to ask whether this verdict does not encourage murder in preference to the more reasonable alternative of moving house, it is also quite clear that imprisonment was in fact not necessary to protect the community on this occasion. Thus while I regard the judge's decision not to proceed with imprisonment as one in line with the system I am proposing, I might also add that there were other punishment alternatives that might have been considered. Ten years of charitable weekend work with homeless men might, perhaps, have been considered. Deterring crime is as much a part of protecting the community as is rehabilitation. The law must surely provide strong reasons to deal with unpleasant family members by methods other than murder.

The system I am proposing — that protection of the community be the sole criterion of what is done with any convicted criminal — would represent a sweeping change from current practice. There would be no element of retribution and no suggestion that a criminal could “pay off his debt to society”. Minor criminals might require lifelong supervision in some cases while in others people who had committed very serious crimes might require very little subsequent supervision.⁹ Sweeping though these changes may be, however, I believe that they are needed precisely because our previous systems have failed. If justice as we have had it in the past has failed to protect the community, it is justice that has to be modified — not the community who should have to suffer. Let the guilty suffer and the innocent be protected. Surely that is justice of a very fundamental sort.

How could the new pragmatic system be introduced? Firstly, it should be clear that the new system is one that could very easily be worked up to piecemeal. Protection of the community is already one of the criteria we use at the moment for deciding how to treat criminals. I would advocate that the importance of this criterion be steadily upgraded until it is on all occasions pre-eminent.¹⁰ One example of how some movement could be made towards it now, without even any new legislation, would be to make strong evidence of rehabilitation the one criterion for allowing parole. Another would be to use the Governors prerogative to release many white-collar criminals. These two measures alone, taken in combination, would surely mean that the more dangerous criminals would stay in prison longer and the undangerous ones would not. It is surely amazing that we have not always insisted on such a situation.

THE QUESTION OF CLASS

Again on a matter of practical politics, some will surely charge that the proposed system would show class bias. Am I not advocating that the characteristically middle class type of crime be not dealt with in general by imprisonment while at the same time advocating that the characteristically “working” class type of crime (crimes of violence) be subject to long imprisonment?

Let it be said that at the moment exactly the opposite system prevails. My information is that white collar crime, or crime against property,¹¹ at present attracts roughly twice the average sentence that crimes of violence do. So the present system already contains a class bias. Furthermore, “working class” people have two further advantages. They get free legal aid and they can abscond more readily. In our system it is only the very rich and the very poor who can afford justice.¹² Because they are also more visible in the community and tend to hold highly valued jobs which form an integral part of their lives, middle class people are also much easier to catch. Most reported crime is never solved and one reason for this is that those sought in connection with it simply disappear. Landlords who have had tenants “do a flit”, leaving great sums of rent unpaid and the property in a shambles, will know what I mean. This is something that most middle class tenants could never do. To disappear would be to sacrifice too much.

At any event, crimes against property are not in fact characteristically middle class — although some particular types may be. Burglary and defrauding of finance companies by absconding with goods not paid off are both crimes against property which are generally working class. Clearly defrauding of finance companies should not generally require a custodial sentence. Blacklisting of various sorts could be used to ensure that restitution was made. I think it could be guaranteed, therefore, that the judicial system as a whole would not, under my pragmatic criteria, show bias against the working class. Indeed, if their natural advantage of being able to evade the workings of the system entirely on many occasions were taken into account, I doubt that they *could* be so discriminated against.

In general however, I think that the thing to stress is that crimes against property can generally be made good — by insurance if not by restitution. This is not at all true of the damage done by crimes of violence. How can the victim of a bashing be given his health back? How can a raped woman be given her faith and confidence back? If what I am advocating has a class bias, then, it is precisely the opposite of what the more conservative side of politics is generally accused of. The so-called political “Right” is often accused of valuing property more than people. What I am advocating has the effect of treating crimes against people with more severity than crimes against property.

NOTES

1. Although new in detail, the present approach does fall into the general category of a “utilitarian” approach.
2. G. Tullock, “Does Punishment Deter Crime?”, *The Public Interest*, 1974, 36, 103-111. See also J. P. Gibbs, *Crime, Punishment and Deterrence*, Elsevier, New York, 1975.
3. The availability of alternative satisfiers has been stressed by learning theorists such as A. M. Clarke and I. C. McKenzie in their paper “Punishment and its behavioural outcomes: Application of research evidence to the modification of behaviour”, *Australian Journal of Education*, 1970, 14, 30-48. If no alternative course of action is available to the potential criminal, the prospect of punishment will *not* deter crime. Such a contingency is however extraordinarily unlikely in most cases. Learning theory considerations would, however, lead one to advocate greater tolerance of (say) prostitution if we wish to deter (say) rape.
4. It might be objected here that the rise in London’s crime rate is probably due to the increased proportion of West Indians in the city. West Indian suburbs such as Brixton are of course tremendous *foci* for crime of all sorts. To argue this way does however concede the point being made in this paper - that it is not city size that gives rise to crime but rather the attitudes of the inhabitants.
5. In a poll carried out in the U.K. in 1967, 60% of Londoners wanted the death penalty with 35% opposed and 5% not sure. In Glasgow the equivalent proportions were 76%, 19% and 5%.
6. This approach is very similar to that advocated by N. Morris in his book *The Future of Imprisonment*, Chicago University Press, 1974, but differs in that Morris also considers the principle of desert as a proper guiding principle for sentencing. While the present approach would in most cases achieve some measure of desert, the sole *guiding* principle would be protection of the community.
7. P. Suedfeld, in his article “Solitary confinement as a rehabilitative technique: Reply to Lucas”, *Australian and New Zealand Journal of Criminology*, 1978, 11, 106-111, has shown that the deleterious effects of “solitary” have been much overstated and challenges the view that it can of itself lead to psychotic episodes.
8. See D. C. Gibbons, “Comments on the efficacy of criminal treatment” *Canadian Journal of Corrections*, 1960, 2, 165-173.
9. A very cogently stated objection to this sort of proposal is quoted by S. W. Johnston in his article “The utilitarian does something useful”, *Australian and New Zealand Journal of Criminology*, 1976, 9, 169-180. Attributed to G. Armstrong, it reads: “If we penalize the criminal according to what he has done, we at least treat him like a man, like a responsible moral agent ... If, on the other hand, our aim in fixing penalties is the reform of the criminal - his *cure*, some might say - then the logical pattern of penalties will be for each criminal to be given reformatory treatment until his is sufficiently changed for the experts to certify him as reformed. On this theory, every sentence ought to be indeterminate - ‘To be detained at the psychologist’s pleasure’, perhaps - for there is no longer any basis for the principle of a definite limit to punishment ... From the moment he is found guilty the criminal loses his rights as a human being quite as definitely as if he had been declared insane.” This attempt at a *reductio ad absurdum* is in fact *precisely* what is being advocated here. As Johnston goes on to argue in reply to Armstrong, “Armstrong, seeing only the *length* of imprisonment as the standard of sentencing, seeks to curb abuse of power by arguing against an indeterminate *period* of imprisonment. I seek to curb abuse of power by arguing the non-utility and injustice of Armstrong’s indeterminate or destructive *quality* of imprisonment. It ill behoves a retributivist to suspect a utilitarian of possible mistakes in the operation of his benevolent purposes when the whole or characteristic purpose of the retributivist is malevolent.”
10. We may thus achieve what Plato - the first utilitarian - saw as intrinsically obvious. In the words of Protagoras to Socrates: “No one punishes the evil-doer under the notion, or for the reason, that he has done wrong - only the unreasonable fury of a beast acts in that manner. But he who desires to inflict rational punishment does not retaliate for a past wrong which cannot be undone; he has regard for the future, and is desirous that the man who is punished, and he who sees him punished, may be deterred from doing wrong again. He punishes for the sake of prevention, thereby clearly implying that virtue can be taught.”
11. I am not here of course equating white collar crime with crime against property. I merely point out that white collar crime is a category of crime against property and all such crimes differ from crimes of violence in that more or less exact restitution is at least possible. As such they must pragmatically be viewed as less serious.
12. A comment by none other than the much-decried Mr. Peter Clyne is peculiarly apt here. He says in *The National Times* (Australia) of September 3rd, 1978 p. 23: “If you are a small businessman in financial trouble, you can’t get legal aid. Go around committing rapes and murdering little girls and you get all the aid you need.” Class bias indeed.