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Learning by Redoing, Review of A. von Hirsch, Doing Justice: The Choice of Punishments

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BOOK REVIEW

DOING JUSTICE: THE CHOICE OF PUNISHMENTS. By Andrew von Hirsch. New York: Hill & Wang, 1976. Pp. xli, 179. \$8.95.

*Reviewed by Ira P. Robbins**

LEARNING BY REDOING

In the immediate aftermath of the Attica prison riots in 1971,¹ the Committee for the Study of Incarceration—funded by the Field and New World Foundations and consisting of such notable academics as Alan Dershowitz, Joseph Goldstein, Stanton Wheeler and Leslie Wilkins—undertook to “consider afresh the fundamental concepts concerning what is to be done with the offender after conviction.” (P. xv.) Recognizing the growing disenchantment with the American prison system, the Committee sought, in more than twenty working sessions over a four-year period, to integrate the thoughts of philosopher, historian, economist, political scientist, sociologist, psychoanalyst and lawyer into a unitary whole, in order to provide reformers with “a rationale to guide them in their quest for alternatives.” (P. xv.) What emerges from the study is

a conceptual model that differs considerably from the dominant thinking about punishment during this century. The conventional wisdom has been that the sentence should be fashioned so as to rehabilitate the offender and isolate him from society if he is dangerous. To accomplish that, the sentencer was to be given the widest discretion to suit the disposition to the particular criminal. . . . [W]e reject these notions as unworkable and unjust . . . [and] conclude that the severity of the sentence should depend on the seriousness of the defendant’s crime or crimes—on what he *did* rather than on what the sentencer expects he will do if treated in a certain fashion. (Pp. xvi-xvii.) (Emphasis in original.)²

To effectuate its theory, the Committee recommends stringent limitations on incarceration as punishment, with terms of incarceration (retermed “collective residential restraint” (p. 107))³ rarely to exceed three years,

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1. See, e.g., NEW YORK STATE SPECIAL COMMISSION ON ATTICA, ATTICA: THE OFFICIAL REPORT (1972).

2. Essentially this is a statement of act-orientation. See generally Fuller, *Some Unexplored Dimensions of the Law*, in THE PATH OF THE LAW FROM 1967, at 64 (A. Sutherland ed. 1968). Act-oriented controversies “include the who, what, where, when, and how issues before the court; [person-oriented controversies] involve the issues of motive, attitude, and intent.” Robbins, *The Admissibility of Social Science Evidence in Person-Oriented Legal Adjudication*, 50 INDIANA L.J. 493, 499-500 (1975).

3. Compare the change in terms from “guard” to “correction officer” in NEW YORK STATE SPECIAL COMMISSION ON ATTICA, ATTICA: THE OFFICIAL REPORT *passim* (1972). “It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.” Hyde v. United States, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting).

and to be imposed only for serious offenses; alternatives to incarceration for non-serious offenses; sharply scaled-down penalties for first offenders; reduction in sentencing disparity; narrowing in sentencing discretion; and elimination of indeterminacy of sentence.

Bound by what it considers to be "the sense of injustices of the current system, and the need for a workable solution," (p. xxvi) the Committee acknowledges that the Report⁴ is not intended to "solve the crime problem." (P. xviii.) Rather, because the criminal sanction is "a quite limited tool" (p. xviii),⁵ it proposes a means of making fairer the existing process, which is "harsh, arbitrary, and lacking in coherent rationale." (P. xix.)

The Report essentially selects as a guiding principle the theory of commensurate deserts, for it is argued that the experimental therapeutic model of treating the criminal rather than the crime has not succeeded (pp. xxxviii, 11-18).⁶ That model's concept of individualization is replete with ultimately insoluble problems, including virtually unfettered discretion in matters of sentencing and parole,⁷ inherent indeterminacy of sentence in the parole system, freedom of judges to decide similar cases differently, and the bureaucratic vexation of administering the system. What is needed is swift and certain punishment. Thus, the Benthamite utilitarian goal of "the greatest happiness of the greatest number"⁸ is rejected for the Kantian imperative,⁹ which is founded in the concept of fair dealing and societal equilibrium: when one individual infringes upon the rights of another, he acquires an unfair advantage over all other individuals; punishment of the violator counterpoises this disadvantage and restores the balance of benefits and burdens.¹⁰ As a theory of justice, the Committee's view orients one's consideration to the defendant's acts, and depreciates the importance

4. Because an alternative subtitle of the book is REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION, occasional reference is made in this Review to "the Report."

5. See generally H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

6. But see, e.g., K. MENNINGER, *THE CRIME OF PUNISHMENT* (1968); N. MORRIS, *THE FUTURE OF IMPRISONMENT* 13-31 (1974); MODEL PENAL CODE § 7.01 (Proposed Official Draft 1962) (Criteria for Withholding Sentence of Imprisonment and for Placing Defendant on Probation).

7. The issue of the extent to which the fourteenth amendment's guarantee of procedural due process applies to state parole release proceedings was recently before the United States Supreme Court. See *Scott v. Kentucky Parole Bd.*, unreported decision (6th Cir.), cert. granted, 423 U.S. 1031 (1975), vacated and remanded for determination as to mootness, 97 S.Ct. 342 (1976).

8. See, e.g., *An Introduction to the Principles of Morals and Legislation*, in 1 *THE WORKS OF JEREMY BENTHAM* (J. Bowring ed. 1962). Individual treatment of offenders is an application of utilitarian concepts in the sense that the optimum penalty is that which maximizes the aggregate benefits, including crimes prevented, while minimizing the costs, including the pain inflicted on punished offenders.

9. "The Penal Law is a Categorical Imperative; and woe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment. . . ." I. KANT, *PHILOSOPHY OF LAW* 195-96 (W. Hastie transl. 1887).

10. See, e.g., J. MURPHY, *KANT: THE PHILOSOPHY OF RIGHT* 109-12, 140-44 (1970); MORRIS, *Persons and Punishment*, 52 *MONIST* 475, 478 (1968); Murphy, *Marxism and Retribution*, 2 *PHIL. & PUB. AFF.* 217, 228 (1973).

of his intention and habitude.¹¹ As a foundation for the allocation of penalties, it focuses on the seriousness of the offense committed and the number and seriousness of prior convictions.

To be sure, as with most theories and their applications, this inquiry includes a number of ambiguities and inconsistencies. For example, in order for the just deserts principle properly to function, we need a society that is structured in an equitable manner.¹² Acknowledging that our society and a criminal justice system with discretion and discrimination prior to conviction¹³ may create unfair disadvantages for some of those who necessarily might be placed within the purlieu of the proposal,¹⁴ the Committee rejoins that the sentencing system "may simply not be capable of compensating for the social ills of the wider society" (p. 147), that this study deals with the issue less unfairly than do traditional utilitarian theories (pp. 147-49), that the question "comes down to one's view of our society" (p. 145), and that, in a society of unequal opportunity, "any scheme for punishing must be morally flawed." (P. 149.) What is indeed unfortunate is that the scheme suggested also may be logically and epistemologically flawed.

The Report propounds that "[i]n the most obvious cases, the principle [of commensurate deserts] seems a truism (who would wish to imprison shoplifters for life, or let murderers off with small fines?)." (P. 66.) To this, one might respond that *if* we could determine adequately that the shoplifter is disposed toward a miscreant existence and that the murderer is not likely to commit another crime, then we very well *might* wish to isolate the former for life and only minimally punish—or punish not at all—the latter. At issue is the prediction of harmful conduct,¹⁵ which can obfuscate even the most obvious cases. The Report is unwilling to completely ignore such predictions, and would tolerate predictive restraint in certain circumstances (pp. 124-27). This allowance, however, is clearly incompatible with the proposed theory of justice, and may even contain the seeds of its undoing.

11. See Robbins, *supra* note 2, at 499-504.

12. See generally Murphy, *supra* note 10.

13. See generally K. DAVIS, DISCRETIONARY JUSTICE IN EUROPE AND AMERICA (1976); K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).

14. Committee member Simon Rottenberg, in a separate statement, vehemently disagrees with this conclusion: "I think [these] ideas . . . are, for the most part, abysmally wrong. I am at a loss to understand how they could have been generated by a committee such as this, which was characterized by intelligence and erudition." (Pp. 176-77).

15. See, e.g., L. OHLIN, SELECTION FOR PAROLE (1951); Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions*, 23 J. LEGAL EDUC. 24 (1970); Glueck, *Ten Years of Unraveling Juvenile Delinquency*, 51 J. CRIM. L.C. & P.S. 283 (1960); Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQ. 371 (1972); Meehl & Rosen, *Antecedent Probability and the Efficiency of Psychometric Signs, Patterns and Cutting Scores*, 52 PSYCH. BULL. 194 (1955); Schuessler, *Parole Prediction: Its History and Status*, 45 J. CRIM. L. & C. 425 (1954); Wilkins, *Prediction Methods: A Survey of the Field from the Standpoint of Facts and Figures*, in EUROPEAN COMMITTEE ON CRIME PROBLEMS, THE EFFECTIVENESS OF PUNISHMENTS AND OTHER METHODS OF TREATMENT 60 (1967); von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717 (1972).

The proposal recommends that there be some pliancy in the application of the theory to atypical cases and to first offenders.¹⁶ Yet if this be the case, then the act-oriented antecedent of the thesis lapses, for if punishment is merited by virtue of the commission of a particular act in and of itself, then the status of the offender or the special nature of the case presumably should be irrelevant to the issues of whether and how much to punish. The study further advises that the severity of the punishment should depend not only upon the seriousness of the present conviction but also upon the number and seriousness of prior ones. It is submitted, however, that virtually any consideration of prior offenses impels a person-oriented resolve,¹⁷ thereby greatly weakening the foundation of the Report.

Further difficulties inhere in the treatment of the notion of "seriousness," which is defined to include harm and culpability (p. 79). The Committee concedes that certain questions must, at this point in time, remain unanswered—*viz.*, "harm to what interests?"¹⁸ . . . [h]ow likely must the risk be? . . . should it matter whether or not the injury actually occurs? . . . [how do we deal with an] offender's motives?¹⁹ . . . [and] whose standards should govern?" (pp. 81-82)—and, further, that its discussion is meant only "to suggest that something *can* be said about seriousness—and that this inquiry is worth pursuing." (P. 77.) (Emphasis in original.) What is important, however, is that this toleration for further inquiry was not extended sufficiently to alternative theories as well. It is true that the Report is not so partial that it cannot perceive the justifications for competing ideas and their possible effectuation.²⁰ But the paramount point is that after criticiz-

16. "We . . . suggest that each crime category be assigned a 'presumptive sentence'—that is, a specific penalty based on the crime's characteristic seriousness. This would be the disposition for most offenders convicted of that crime. However, the judge should be authorized—within specified limits—to depart from the presumptive sentence if he finds aggravating or mitigating circumstances." (P. 99.) Compare the parole guidelines used by the United States Parole Commission, 28 C.F.R. § 2.20 (1976). See also UNITED STATES DEPARTMENT OF JUSTICE, YOU AND THE PAROLE BOARD 4-5 (1975):

[Question] 13. Are The Examiners Required To Follow The *Guidelines*?

No, they serve only as a general indicator for use during their deliberation. They may agree on any decision regardless of the *Guidelines*, but when they parole or continue a case for a period not called for in the *Guidelines* they must state in writing what the special reasons are which justify their decision.

In making their decision the Examiners may take into account anything of importance which may affect your chance of succeeding on parole. Since no two persons' situations are alike, factors of importance in one case may not be important in another.

17. At least one member of the Committee shares this critique: "This thinly disguised throwback to individualization and concern for an offender's 'culpability'—*i.e.*, failure to learn from (be reformed by) punishment for his prior offense—undercuts much of the report's most significant point, which is that in determining the seriousness of an offense, and hence the severity of the punishment, focus must be on the crime committed, not on the individual who commits it." (P. 172.) (separate statement of Professor Joseph Goldstein).

18. The Committee further notes that "[h]arm is a debatable matter. . . ." (P. 92.).

19. See also Robbins, *supra* note 2, at 499-516.

20. For example, the Report notes: "It would be an exaggeration to say that no treatment methods work, for some positive results have been reported, which further follow-up may confirm." (P. 18.).

ing the concept of an abuse-prone discriminatory criminal justice system and developing a rationale for its potential correction, the Committee settles upon a flexible and discretionary system with as few clear guidelines as the present one.

The preceding exegesis is not intended to dispraise the good faith or competence of the members of the Committee. Without question, they realize that there is nothing original in criticizing the American system of criminal justice. They further recognize that their investigation was not a novel one, for "as long as we have relied upon prisons and mental hospitals to treat and correct the deviant, so long have committees met to analyze the inadequacies of the institutions and to recommend improvements." (P. xxi.)²¹ Finally, they acknowledge that other principles than commensurate deserts must play some part in any system of justice. Thus the Report's imperfections perhaps derive in part from the fact that although the final position is one of compromise, it is advanced without the tensions and recriminations that the term implies. But one wonders whether any individual position ultimately could have been any less flawed.

The problem of crime has been approached from many perspectives, including that of the offender,²² the victim,²³ the norms being violated,²⁴ the supporting subcultural norms,²⁵ the availability of resources and opportunity,²⁶ and the system of social control.²⁷ But the simplification of the

21. Significantly omitted from the Report is a discussion of the conditions of confinement.

22. See, e.g., E. DURKHEIM, RULES OF SOCIOLOGICAL METHOD (S. Solvay & J. Mueller transl., G. Catlin ed. 1950); S. GLUECK & E. GLUECK, UNRAVELING JUVENILE DELINQUENCY (1950); G. SUTHERLAND, THE PROFESSIONAL THIEF (1937); Blum & Braunstein, *Mind-Altering Drugs and Dangerous Behavior: Narcotics*, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: NARCOTICS AND DRUG ABUSE 40 (1967); Cason & Pescor, *A Statistical Study of 500 Psychopathic Prisoners*, 61 PUB. HEALTH 557 (1946); Gibbons & Garrity, *Definitions and Analysis of Certain Criminal Types*, 53 J. CRIM. L.C. & P.S. 28 (1962); Montagu, *The Biologist Looks at Crime*, 217 ANNALS 46 (1951); Tappan, *Some Myths About the Sex Offender*, FED. PROB., June, 1955, at 7.

23. See, e.g., L. SCHULTZ, RAPE VICTIMOLOGY (1975); S. SCHAFER, THE VICTIM AND HIS CRIMINAL: A STUDY IN FUNCTIONAL RESPONSIBILITY (1968); Wolfgang, *Victim-Precipitated Criminal Society*, 48 J. CRIM. L.C. & P.S. 1 (1957).

24. See, e.g., I. CHEIN, D. GERARD, R. LEE & E. ROSENBERG, THE ROAD TO H (1964); E. LEMERT, HUMAN DEVIANCE, SOCIAL PROBLEMS, & SOCIAL CONTROL (1967); E. SCHUR, CRIMES WITHOUT VICTIMS (1965); C. SHAW, THE JACK ROLLER (1930); L. WILKINS, SOCIAL DEVIANCE (1964); Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 158 (1967); Schwartz, *Moral Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669 (1963).

25. See, e.g., F. ALEXANDER & W. HEALY, ROOTS OF CRIME (1935); R. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE (1953); C. SHAW & H. MCKAY, JUVENILE DELINQUENCY AND URBAN AREAS (1969); A. COHEN, *The Content of the Delinquent Subculture*, in DELINQUENT BOYS 24 (1955); R. Merton, *Social Structure and Anomie*, 3 AM. SOC. REV. 672 (1938); Miller, *Lower Class Culture as a Generating Milieu of Gang Delinquency*, 14 J. SOC. ISSUES 5 (1958); O'Donnell, *The Rise and Decline of a Subculture*, 15 SOC. PROB. 73 (1967); Sellin, *Culture Conflict and Crime*, in SOC. SCI. RES. COUN. BULL. 41 (1938); Yablonsky, *The Delinquent Gang as a Near Group*, 7 SOC. PROB. 108 (1959).

26. See, e.g., R. CLOWARD & L. OHLIN, DELINQUENCY AND OPPORTUNITY (1960); Glaser & Rice, *Crime, Age, and Employment*, 24 AM. SOC. REV. 680 (1959).

27. See, e.g., M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973); W. GAYLIN, PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING (1974); JUSTICE IN SENTENCING (L. Orland & H. Tyler eds. 1974); J. ROBERTSON, ROUGH JUSTICE: PERSPECTIVES ON LOWER CRIMINAL COURTS (1974); J. SKOLNICK, JUSTICE WITHOUT TRIAL (1966); J. WILSON, VARIETIES OF POLICE BEHAVIOR (1968); Foote, *The Bail System and Equal Justice*, FED.

problem to any singular aspect of the situational paradigm has been less than fruitful, in terms of either the strategies for controlling crime or the ideological justifications advanced to support them. Intensifying the lack of success are the system's multiple objectives of restraint, general deterrence, individual deterrence, rehabilitation, and desert, which, though necessarily intertwined, have been impossible to reconcile—the Report of the Committee for the Study of Incarceration being no exception. Thus we are faced with the proverbial vicious circle: in order to approach the problem of crime in our society, we must establish a theoretical justification to support a proposed system of criminal justice; but in order adequately to fulfill the theory, we must consider and balance concepts which are inconsistent therewith.

At its base, the question then becomes whether, in our sullen state of less-than-perfect knowledge,²⁸ we should abandon any attempt to ameliorate the contemporary arrangement, or persist with our existing expedient measures which will have to be altered with experience.²⁹ A reciprocal query is whether the public will acquiesce in any proposal inviting stagnation, while the emotions and realities of the criminal justice system are confronted on a daily basis. The Committee's reply is that its theory presents a workable starting point, and one which merits consideration if we are to avoid a sense of hopelessness: "What we offer are partial solutions, while awaiting more insights, greater knowledge, and more complete answers in some hoped-for future." (P. xxxix.)

When commencing its deliberations, the Committee well realized that it might "reinvent the wheel." (P. xxxiv.)³⁰ But that step was a vital one to undergo, for only if our ideas are more intelligently conceived and executed can we progress from what seems now to be labyrinthine perplexity to clear a more direct route toward truth and understanding, as well as toward the doing of justice. In our gradual transformation from the Kantian "trow-

PROB., September, 1955, at 43; Mott, *Judicial Personnel*, 167 ANNALS 143 (1933); Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. CRIM. L.C. & P.S. 3 (1962); Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L.C. & P.S. 780 (1956).

28. "Our solution is one of despair, not hope." (P. xxxix.)

29. Compare the evolution of a standard for determining whether in the prison context a particular set of circumstances constitutes "cruel and unusual punishment" under the eighth amendment. See *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."). See also *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) (en banc), cert. denied, 404 U.S. 1049 and 405 U.S. 978 (1972) (conditions of solitary confinement as constituting cruel and unusual punishment); *Kish v. County of Milwaukee*, 441 F.2d 901 (7th Cir. 1971) (failure to protect prisoners from assault); *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) (nature of physical abuse); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976) (conditions of the institution); *Holt v. Sarver*, 309 F. Supp. 318 (E.D. Ark. 1970), aff'd, 442 F.2d 304 (8th Cir. 1971); Robbins, Book Review, 62 VA. L. REV. 462, 467-68 (1976).

30. Professor Leslie Wilkins expressed this thought differently: "It seems that we have rediscovered 'sin,' in the absence of a better alternative!" (P. 178.).

ing” to “knowing”³¹ we should not despair, because “[f]or [some of] the things we have to learn before we can do them, we learn by doing them.”³²

31. The holding anything to be true, or the subjective validity of a judgment admits, with reference to the conviction which is at the same time valid objectively, of the three following degrees, *trouing*, *believing*, and *knowing*. *Trouing* is to hold true, with the consciousness that it is insufficient *both* subjectively and objectively. If the holding true is sufficient subjectively, but is held to be insufficient objectively, it is called *believing*; while, if it is sufficient both subjectively and objectively, it is called *knowing*.

I. KANT, CRITIQUE OF PURE REASON 524 (F. Muller transl. 1966) (original emphasis).

32. ARISTOTLE, NICOMACHEAN ETHICS, bk. II, ch. I.