

Reasons for Advocating the Abolition of the Punitive Law

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Attached is an unfinished paper I wrote in March 2008, headed "Proposed Lecture on Penal Abolition." It gives 12 reasons for abolition, but it does not recite my No. 1. reason.

1. ***The punitive law system***,¹ not only fails to prevent crime, it ***prevents crime prevention***. As long as the people (voters) are persuaded that enforcement of the criminal laws deters crime, the bureaucracies and the government officials and policy makers will continue to invest more and more of our public resources in this endeavor. This causes the so-called crime control apparatus to grow and grow with an ever increasing thirst for more public money. The problem is that enforcement of the criminal laws ***does not prevent crime***.² But by convincing the public that it ***does*** prevent crime, we allow ourselves to rely on it entirely. ***Thus, we have no real crime prevention strategies; strategies that would, in fact, prevent crime and violence, and no one with any real influence is advocating for a different approach.***

In my view, we can only motivate good behavior by ***inspiring our youth with HOPE***. Our current policy of trying to motivate good behavior by ***intimidating our youth with FEAR*** is misguided and ineffective. We must let all of our young people know that we ***expect*** each of them to become financially independent (economically free) in honest ways, and we must invest in the resources (such as, education, health care, vocational training and venture capital) necessary for them to achieve this success. That portion of the crime culture which is an alternative economic system for those who are excluded from our legitimate economic system will begin to wither away.

In addition, we must include mental health care, especially preventive care, in our health care plans. The insurance industry is in the business of gambling. Mental health presents unpredictable and unprofitable risks, so they avoid having to make bets in this field. But from a crime prevention standpoint, especially with respect to violent behavior, we need more and better mental health programs, including addictions therapy on demand and anger management. One should not have to commit a crime to be eligible, and the government should not have exclusive control over access to such programs. Friends and family should be able to initiate access to mental health treatment. ***The main problem here is whether or not we should condone compulsive involuntary treatment or preventive confinement for treatment. These are worthy issues for a conference on abolition.***

¹ It is not a system; it is a collection of independent bureaucracies that create expenses that are passed on to another agency's budget. From police to prosecutors to courts to corrections.

² In part, this is because in order to justify increases in their budgets, the police and prosecutors run up their arrest and conviction statistics by emphasizing the easy cases, which have the least crime prevention impact. For example, the police arrest those drug dealers who market their wares in the open on the urban street corners. In the suburbs, drug deals occur in-doors where the police cannot sit in their car and watch them go down. This strategy also ignores all but the retail market, so wholesalers and financiers are rarely targeted successfully. The street vendors are usually replaced immediately. There are many people waiting in line for those jobs, so arresting the street dealers has little effect on the trafficking of illegal drugs. It just boosts police statistics.

We could devote a week or two to analyzing various common crimes and trying to figure out how to prevent them. Crime prevention is a huge area that has not been explored adequately. But it is the most important alternative to our punitive crime control policies.³

Following the lead of Michelle Alexander, who argues that the rise in imprisonment and especially the rise in the imprisonment of black men in the United States is due largely to the War on Drugs, we should consider whether decriminalization of drug possession and drug use would be a good crime prevention strategy.

My primary concern in this area is that the marketing of illegal drugs is a major industry in urban America, and it supports a large number of people many of whom are not trafficking in drugs. If the drugs were not illegal, clearly the pharmaceutical industry would move in quickly and take over the manufacture and distribution, putting all of the urban street vendors and their suppliers out of business. *This raises the questions of whether we should and how we could replace this economic loss to the urban neighbor-hoods.* The racial overtones are immense.

2. ***The punitive law does not provide an effective remedy for the victims of crime.*** The criminal law was not designed to restore justice to the victims.⁴ All crimes are offenses against the state (or government). The victims of crimes do not have any standing to participate in criminal proceedings. A victim has no say as to what charges should be brought against the offender. A victim has no control over the plea bargaining process.⁵ A victim has no control over the investigation or over the production of evidence. A victim has no say over the sentence to be imposed, and has no right to appeal the result of a criminal trial. A victim is only a witness to the facts of the offense, with a limited right in some states to inform the court at sentencing how the crime has impacted the victim's life.

The civil law is the law that provides for and was designed for victim restitution. In a civil case, the victim sues the offender for damages or for other remedies. The state is not a party. Here the victim has standing and controls the litigation. The problem here is that civil litigation can be expensive. There is a need to have investigators and accountants to develop the facts as to liability and the extent of damages. There also may be a need for expert witnesses. Civil cases are usually developed fully by pretrial discovery, which means that documents may need to be copied and analyzed and the identity of witnesses may need to be determine and their testimony taken, recorded and transcribed before trial. *An issue here is whether the police and crime lab investigators can be used at public expense to provide the evidence for a private civil trial.*

In addition, a major impediment to using civil remedies instead of criminal prosecutions is that the offender often does not have the resources to pay any significant judgment that may be found (by the

³ As Margaret Wilson pointed out long ago, "We must remember that crime, as distinguished from wrong doing, is a fact manufactured entirely by law." Wilson: *The Crime of Punishment*, Harcourt Brace, New York (1931). As to prevention, Mrs. Wilson noted (p. 298) that the crime of bigamy could be virtually eliminated in England, as it had in France, simply by having all marriages and divorces recorded in the birth records. Also, Bank notes were often counterfeited, even under a death penalty, until the notes were made in ways that required more technology and skill than an average person could employ. She said, "One wonders how much forgery, stealing and burglary might be made impossible if the brain of a nation was turned towards devising ways of prevention."

⁴ The myth perpetrated on the public is that the victim gets "justice" when the offender is punished. Hog wash!

⁵ A victim cannot even negotiate a civil settlement with the offender that would be binding on the prosecutor.

judge or jury) as the value of the loss suffered by the victim. This suggests the question of: *Whether the government should buy the judgment from the victim*, so that the victim can be paid promptly. Then, the government and the offender could enter into a contract which would allow the offender to pay off the judgment (over an extended time period) by providing community service -- volunteer work to replace or supplement work that would otherwise be undertaken by a state employee or by a contractor, who would have been paid by the government for this work.

3. ***The punitive law system is not just.*** As noted by nearly everyone who considers abolition, it is unjust in that (1) it sometimes results in convicting the wrong person (allowing the actual offender to go free), and (2) it is regularly administered in a manner that is unfair, in that persons who are poor or who are of a disfavored status (by race, or by foreign ancestry, for example) are more frequently arrested and prosecuted, or are less vigorously defended, or are convicted on less adequate evidence, or are sentenced more severely. Fairness and justice are important values to us, and we nearly always agree that these unfair outcomes should not occur. But, they do occur, and no one has devised an adequate remedy to eliminate them. Considering No. 4, it makes sense to abandon the blame and punishment route and to seek another way to meet our goals. It is worth considering: *What do we want our legal system to accomplish? How can we attain these goals?*
4. ***The punitive law system does not contribute any benefit worth its costs.*** We expend an enormous portion of our tax revenues to maintain our system of blame and punishment. As already noted, this money does not provide either crime prevention or victim remedies, which are the purported reasons for having a criminal law system. The only benefit we get from this is that it creates jobs, but we could create more jobs, and useful ones, for a lot less money. We pay for judges, prosecuting lawyers, defense lawyers (public defenders), court personnel, a huge corrections bureaucracy, probation officers and staff, and many more, including construction workers to build more prisons, when we need better schools and hospitals and bridges and roads and group homes for those who need a more structured way of living. Instead of providing high risk, low skill jobs as corrections officers, we need to use our tax dollars to offer more, better paying, jobs as nurses and as teachers and recreation workers and other mentors to children.

Very little else is worth discussing. I could list another six reasons, but it should not be necessary. The main points are in these four. (1) No crime prevention. (2) No victim reparations. (3) No justice. (4) No value received.

Respectfully submitted, this 23rd day of May, 2012, from Annapolis, Maryland, U.S.
Please forgive me for my tardy response.