Justice through Punishment

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A Critique of the 'Justice' Model of Corrections

Barbara Hudson

St. Martin's Press New York

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Softcover reprint of the hardcover 1st edition 1987 978-0-333-41431-6

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Scholarly & Reference Division,

St. Martin's Press, Inc., 175 Fifth Avenue, New York, NY 10010

First published in the United States of America in 1987

ISBN 978-0-333-41432-3

ISBN 978-1-349-18914-4 (eBook)

DOI 10.1007/978-1-349-18914-4

Library of Congress Cataloging-in-publication Data

Hudson, Barbara, 1945–

Justice through punishment.

Bibliography: p.

Includes index.

1. Criminal justice, Administration of—Great Britain. 2. Corrections—Great Britain.

3. Rehabilitation of criminals—Great Britain.

I. Title.

HV9960.G7H83

1987

364'.941

87–14668

For Nan, my mother

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Preface

This book has grown out of my close association with social workers and probation officers over the last few years. It is apparent to anyone working in the criminal justice system that a significant qualitative change has been taking place, a change which can be summarised as a shift from an offender to an offence orientation. I have seen my role as a researcher as that of trying to make the system more intelligible to those working within it, and also that of helping students and practitioners defend their own professional values, supporting their efforts to improve their practice without embracing too uncritically the latest penological fads and fancies.

I started to feel uneasy about the justice model while working for the Lancaster University Centre for Youth, Crime and Community, and much of the impetus to write the book stems from discussions with colleagues there and in Essex Social Services Department. I am grateful to them all, in particular David Thorpe, David Downes and Bruce Woodcock.

The book began to take something like its present shape while I was teaching on the Masters course in Social Service Planning at the University of Essex, and I am indebted to the students on that course for challenge and stimulation.

Most recently I have been working with the Middlesex Area Probation Service, and I am grateful to them for the opportunity to investigate the extent to which justice model ideas are being followed in sentencing practice. All my colleagues at Middlesex have played their part in developing ideas, challenging preconceptions, and providing comradely support in getting the book done, but Colin McCulloch and John Walters, in spite of the very heavy demands of their own duties, have been particularly generous in spending time talking with me. Bron Roberts and Dave Rogan are colleagues at Middlesex and also in the Labour Campaign for Criminal Justice, and have contributed more than they realise.

For ideas, references, conversations they probably do not remember, thanks are due to Stan Cohen, Roger Matthews, John Harding, Tamara Flanagan and Julie Warren. Jeanette Shaffer has provided help with typing.

This book would never have been completed without the friendship and encouragement of Angela Williams, Diana Hale and Patricia Maitland, nor of course without Adam and Harry, who have been unfailingly loving, patient and supportive.

Barbara Hudson

Introduction

From the end of the Second World War until the mid-1970s, there was virtual consensus that the progressive approach to offending was to try to eradicate the problems of social and environmental deprivation that engendered crime and delinquency, and to seek the rehabilitation of those who none the less found themselves on the wrong side of the law. Retribution and deterrence were shied away from as unworthy motives for penal sanctions, and the rhetoric of penal systems was a rhetoric of help, cure, providing treatment rather than inflicting punishment. A 'soft machine' of probation officers, social workers, therapists, counsellors and the like developed to provide diagnostic and curative services for offenders. The prison was to become less and less central in penal systems: since offending was generated by problems in the community, then the community must also hold the key to rehabilitation. For those offenders who could not be allowed to remain in the community, the prison was to become more humane, to become a site not only for punishment but for a range of therapeutic services. The prisoner would remain incarcerated not until he had paid the appropriate penalty, but until he could demonstrate that he no longer needed rehabilitative treatment.

By the mid-1970s, however, doubts were being voiced which commanded increasing attention, and which eventually fractured the rehabilitative consensus. Instead of the prison becoming more of a community, perhaps the community was turning into a dispersed prison. Maybe offenders resented the extensiveness of the intrusion into all aspects of their lives that the treatment approach allowed; maybe they resented being held for indefinite periods 'for their own good'. At the same time that the liberal-left belief in rehabilitation wavered, conservatives were demanding sterner punishments, saying that the entry of social workers, psychiatrists and the other rehabilitative personnel had softened criminal justice processes to the degree that they no longer had any deterrent effect on potential crime.

Out of these separate discontents emerged a reform agenda that became known as the 'justice model' of corrections. Since doing good led to long indeterminate sentences, with coercive recruitment to therapeutic programmes of little proven value, since in the era of doing good the legal system had lost public confidence because of disparities in sentencing, and since all the efforts that had been put into rehabilitation had had no impact on rising crime rates, perhaps such grandiose aims of curing criminals and eradicating crime should be abandoned. The lesser aim of doing justice could perhaps ensure that offenders' legal rights were protected, that they would not suffer greater punishments than their offence merited because of unchallengable assessments of their problems or needs; that the public were protected by would-be criminals being sure of a punishment appropriate to the crime, and that the judicial system might gain in respect if it could be seen as fairer and more rational.

Although no model is ever applied in a pure form in the real world, the justice model has been remarkably influential. It has a simplicity and coherence that appeals to legislators, the judiciary and other professionals, who are given an easy-to-follow schedule of sentences instead of a vast array of competing penological ideas which all, always, present themselves as 'reforms'. In a short space of time, justice model ideas have been incorporated into legislation, judicial guidelines, the policies of social work managers and practitioners, and the vocabulary of deserts, due process and determinacy has become the dominant penological discourse.

The justice model may have been something of a welcome corrective to complacency when rehabilitation was the orthodoxy, and when welfare agencies were expanding and recruiting more and more of the population into their nets as clients. It was all too easy to justify interference in the lives of those who did not conform to narrow social stereotypes on the basis that such people were vulnerable to crime. Today, however, the problem is the withdrawal of welfare services rather than their over-supply, and the justice model too readily provides a legitimating rhetoric for the reduction of social-work presence in courts, the exclusion of offenders from caseloads, the curtailing of intermediate treatment programmes, and the cutting of counselling, training and other rehabilitative services in prisons. The minimalism of the justice model has justified a neglect of offenders and their problems that is

far from benign; the state has washed its hands of responsibility for anything other than punishing deviants, it has absolved itself of any responsibility for the situation in which they find themselves and therefore disclaims any compunction to offer them the means to improve their lives.

This book looks first of all at the critiques of the rehabilitative approach which facilitated the emergence of the justice model, and then examines the model itself, looking in detail at the most sophisticated version of it, that expounded in von Hirsch's (1976) *Doing Justice*. The implementation of the model is then demonstrated, with attention focused on determinate sentencing legislation and sentencing commission guidelines in the United States, and the delineation of an authoritative series of guideline judgments by the Court of Appeal in England and Wales.

Subsequent chapters take up the challenge of the justice model at its most persuasive, in relation to the exclusion of 'non-legal factors' such as race, gender and employment status from sentencing decisions. A separate chapter looks at justice model arguments as they apply to juveniles. It is argued in these chapters that making non-legal factors irrelevant to sentencing would do nothing to reduce discrimination, and would produce more rather than less imprisonment.

The concluding chapter summarises the criticisms of the justice model which have appeared recently, and looks at two alternative approaches to criminal justice, the new rehabilitationism, and the emergent radical agenda. While both of these, and especially the latter, are preferable to justice model ideas, they need to be supplemented by a direct, abolitionist policy towards prisons to have any impact on present excessive rates of incarceration.

At the start of working on this book, the justice model seemed to have won all the major arguments, and the demise of rehabilitation seemed certain. Those who tried to resist were accused of hanging on to professional vested interests. All the critical thinking about criminal justice seemed to be written within at least a broadly justice model perspective, even when it did not fully espouse the idea of deserts-based retributionism, or was not self-consciously aware of its justice model assumptions. By now there has appeared some disillusionment among the original advocates of the model, as well as some hostility among academic commentators, but in general this has yet to reach legislators and practitioners. The disillusionment evident in the United States has not

yet spread to the United Kingdom: in 1986 the Home Office published a White Paper on criminal justice, and a new edition of its sentencing handbook for magistrates, both of which show evidence of almost unadulterated justice model thinking. It is the intention of this book to provide a clear statement of the justice model agenda and the philosophical principles on which it is based, to look at evidence of its effects in practice, and to raise issues of principle which should point to the abandonment of any belief that the model has any potential for facilitating a shift to a more humane, less oppressive response to crime.