

# CONFRONTATION, CRIMINAL JUSTICE AND CORRECTIONS: A FUTURE HISTORY

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More has been accomplished by riots than by reform: this fact is at the core of human welfare progress during the last decade in North America. The politics of confrontation has emerged as the dominant mode of seeking redress for grievances. The poor, youth, students, blacks, native peoples, prisoners, civil libertarians, teachers, even police, are becoming increasingly militant in pushing towards the attainment of their ends. Schools without teachers, garbage without collectors, planes without pilots, even prisons without guards, have become commonplace occurrences, along with live-ins, slow-downs, back-outs, put-ons, walk-outs, and, occasionally, riots and other forms of violence.

Whether these methods of redress for real or imagined grievances indicate the breakdown of democratic methods or the essence of democracy is a subject of debate. Probably they represent both—a reflection of health as well as disease in a society rocketing into the future. Just as these forms of social confrontation are indicative of the insensitivity of certain institutions to the self-perceived needs of some of their constituents, they represent as well the capacity of our system to tolerate considerable social tension as groups reach out for what they regard as rightfully theirs.

In our opinion, it is this demand that those who are affected have a voice in the decisions which bear upon their future that is the major reason why we will avoid that most frightening of destinies—namely, the drift into a slough of despondency and despair portrayed by Jules Feiffer in his play, "Little Murders". Whatever tensions they create, the politics of confrontation are indicative of persons and groups who see themselves as actors in the human drama being played with increasing rapidity around them rather than as helpless objects being acted upon. Rather than drift, their attitudinal mode is one of engagement.

We have been asked to present some thoughts on the future

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of criminal justice and corrections. It is obvious that one cannot speak of the future of a relatively small sub-system within the larger sub-system of criminal law (which is itself but a part of the macro social system) without taking stock of where the total system is headed. Thus, we propose to start with a description of the macro problems and then narrow our focus by degrees to some issues specific to the future of criminal law and corrections. Our analysis will only skim the surface of the topic in a selective way; this goes without saying because of the space limitations imposed by the editor.

## I

The crucial question which will inevitably shape future history will be whether the philosophy of engagement referred to above can be mobilized for application to world macro problems. Most future historians enunciate as problems of the first magnitude those of ecological imbalance, pollution, resource depletion, overpopulation and weaponry. Others do not discount the importance of these problems, the non-resolution of which will surely spell the demise of civilization, but they point out that the technology for the resolution of these problems exists today. These people, therefore, consider the lack of vehicles of effective international political action to put the knowledge we already possess into effect as the major problem that we face today.

In agreeing with this latter position we propose four problems of pre-eminent importance. Each of these is dependent to a greater or lesser extent on the other; each requires accommodations of momentous proportions to certain basic convictions in order to become operative.

The first macro problem is learning to cope with the full impact of technology, more particularly with the implications of the revolution in cybernetics, human engineering, and weaponry. Advanced nations seem to operate on the implicit assumption that any technology that can be developed should be. Further, they seem to operate without recognizing the need to be mindful of the implications of that technology on those remote from them in time or in space. It appears that technology has its own morality. While these countries forge ahead, less advanced nations continue to struggle just to survive. As we move closer to the notion of the global village the impact of cybernetics will make these discrepancies more obvious and their political implications more serious.

Closely linked to the technological explosion is the discrepancy which exists between the quality of life of so-called "have" and "have not" nations. This gap will inevitably continue to grow at an increasing rate. According to most projections this will happen

despite an overall increase in the standards of living caused in part, paradoxically, by advances in technology.

A third problem of first order magnitude will be the need for citizens in advanced societies to learn to cope with the inevitable increase in the pace of life, and with the increase in diversity, transience and novelty which this will bring. Some of the implications of these momentous changes will be discussed below.

Finally, as mentioned above, another problem of major proportions will be our efforts to solve major ecological and technological problems at an international level—problems of clean air, resource distribution, population, and the construction of models for resolving social tension between nations. The tenacity with which nations cling to their rights as separate entities suggests that modes of international relations which reflect the essential interdependence of all peoples will be inordinately difficult to attain, especially when the pressure of quickening change adds an air of urgency to the matter.

It is likely that these first magnitude problems will continue to exist and will grow even more severe during the next several decades until, either individually or severally, they reach crisis proportions. At that point the urgency of the need for solutions hopefully will force nations to set aside their "inalienable rights" at least long enough to prevent disaster. This form of brinkmanship would appear to be the probable response of nations to the pressures of "change-in-crisis" as we struggle towards new ways of coping with life in a world characterized by complexity unique in human history. Whether vehicles for the solution of these problems can be found before they engulf us will remain *the* question of our era; all others are secondary!

## II

Students of the policy sciences have focussed attention on possible alternative future histories of technologically advanced societies as well as upon global problems. Sophisticated and complex models of future histories are being developed, tested and evaluated in a number of laboratories. A review of the literature brings forward several trends which appear again and again. It seems likely that these trends will shape life during the next several decades. All are observable today and appear to be acquiring increasing significance. If they continue to exert their expected influence they will inevitably affect future social life in the United States and Canada.

There will be a continuation of the trend towards centralization of population in urban areas. Most projections describe an overwhelming percentage of our population as becoming urban

dwellers by the year 2000. This trend will bring problems of crowding, noise, transportation, pollution, loss of privacy and government unheard of before. Serious questions are being raised by ethologists as to whether there is a critical mass of privacy necessary to the maintenance of homeostasis among humans—a mass which if decreased beyond a critical point will bring a violent response. Surely the human problems of urbanization will require new modes of government and increased sensitivity and skills in interpersonal communication. More effective methods will have to be found for dealing with social problems such as crime, which appear to vary directly with centralization of population in urban areas.

The pace of change will continue to increase, bringing opportunities for diversity of employment, life style, goods and services as well as a degree of mobility shared by only a few today. Transience will grow at an ever-increasing rate—transience in occupation, in geographic location, and in social relationships. This development will sorely test and, ultimately, greatly modify some long-held and deeply cherished values related to property and permanence. As an example, a concomitant of frequency of moving will be an increase in the use of rented goods and services. Toffler has referred to this as the “throw-away society”. This trend may well reduce the emphasis on ownership of home and property as one of the basic criteria of social status. When one considers how much of the criminal law is based upon protecting the rights of property owners from the depredations of others, the significance of changes in this direction become apparent. In addition, the impact of mobility and transience on perceptions of the importance of tradition, of history, of privacy and even of family promise to become momentous.

Although most projections indicate a general rise in the overall standard of living within society, the gap between “haves” and “have nots” will increase in North America. At the same time overall levels of education will rise as will the impact of the cybernetic revolution which will make “have nots” more aware of their relatively disadvantaged position in society. These changes may well have the effect of increasing the tenacity of the disadvantaged in attempting to redress this discrepancy.

One impact on education and industry of the increasing complexity of technology and of the rapidity of change will be the speed with which knowledge will become obsolete and careers will require changing. The illiterate man of the future will be the person who has not learned how to learn. Methods of retraining individuals for new careers when old ones become obsolete will assume increasing importance as will the updating of those who are still functioning in one career line. Computerized education

implying an "on-line" intellectual community with a shared data base becomes of crucial importance. Further, the impact of a long illness or, for that matter, of a long period of imprisonment will become much more serious for the individual concerned unless the time one is "plugged out" is compensated for by up-grading.

As levels of education increase those most academically advantaged will become more independent in thought and action and less dependent on bureaucratic systems for their livelihood. Further, they will feel less trapped in bureaucratic structures which they do not find personally satisfying. Their skills will give them not only a better bargaining power but better mobility as well. In this regard, they will run headlong into the increasingly important role to be played by the public sector.

Governmental bureaucracies as well as educational ones will likely increase in size. Some future historians predict an increase in employment in the public service from roughly thirty per cent of the labour force to between forty-five per cent and fifty per cent by the year 2000. Concomitant with this many writers state that bureaucracies will become increasingly ineffective as vehicles for implementing social policy as the demands of a society in the process of evolution become more rapid. As bureaucracies grow larger they tend to become more cumbersome, more self-serving and more resistant to change. Their characteristics of centralization of decision-making, division of labour, and hierarchy of structure make it difficult for them to respond with sufficient speed to more rapid external demands. Future historians point to the increasing use of commissions and task forces—what Toffler so aptly terms "the ad hococracy"—as ways of short-circuiting the basic incapacity of bureaucratic structures to respond to the demands of a super industrial state. It is suggested that as the size of the bureaucracies increases and their ineffectiveness becomes more manifest they will increasingly bear the brunt of social tension.

Some important sources of tension are arising in ideological systems between the old and the new. (Although sometimes couched in terms that imply the dichotomy is between old and young we believe the terminology we have employed to be more accurate.) Several future historians have pointed towards increasing tension between those whose conceptual system is oriented towards achievement, self-control, independence and endurance of stress on the one hand, and those who seek self-actualization, and interdependence and the development of the capacity for joy on the other. Daniel Bell illustrates the point with the following quotation:<sup>1</sup>

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<sup>1</sup> Daniel Bell, *The Trajectory of an Idea* (1967), 96 *Daedalus, Journal of the American Academy of Arts and Sciences* 639.

Society has become more functionally organized, geared to knowledge and the mastery of complex bodies of learning. The culture becomes more hedonistic, permissive, expressive, distrustful of authority and of the purposive delayed gratification of a bourgeois achievement-oriented technological world. The tension between the technocratic and the apocalyptic modes particularly among the intellectuals may be one of the great ruptures in moral temper, especially in the universities.

These projections suggest a period of increasing tension between the various factions in society. Moreover, these factions will increase in number as societies become more complex. Toffler has suggested that social tensions will increase because:<sup>2</sup>

. . . as the number of social components grows and change makes the whole system less stable it becomes less and less possible to ignore the demands of political minorities . . . . As interdependence grows, smaller and smaller groups within society achieve greater and greater power for critical disruption. . . . In short, in politics, in industry, in education, goals set without the participation of those affected will be increasingly hard to execute.

This would appear to be the supreme social challenge of the next quarter century—to find ways of making participatory democracy truly participatory.

### III

As we search for ways to attain this goal, the criminal law and its agencies will inevitably bear the brunt of much social tension.

One of the characteristics of future histories which is described with great frequency in the literature is the inevitability of an increase in the pace of social change. The inference is that those persons and social institutions unable to adapt to the complexity, transience and diversity which will become increasingly dominant characteristics of life will be those most vulnerable to the buffeting of social change. Those who suffer most will be persons and institutions whose points of reference for the development of policy or for the resolution of conflict lie in the past. Among the social institutions which fit this description is criminal justice. As Wilkins<sup>3</sup> points out, some of the difficulties currently being experienced in the field of law and, by association, in corrections stem from its proximity to that of ethics. He points out that although rational decisions about things and events can be and increasingly are referred forward in time, questions of moral and social values are referred backwards. Thus many ideas which permeate the law do not lend themselves easily to adaptation in the light of new demands.

The inherent resistance to modification that is a characteristic

<sup>2</sup> Future Shock (1970), p. 477.

<sup>3</sup> Crimes in the World in 1990, a paper presented at a public lecture at the University of Toronto, December 17th, 1969, under the auspices of the Centre of Criminology (mimeographed).

of the law provides stability and helps to make it one of society's anchors against too rapid and therefore destructive change. At the same time, it increases the likelihood of increasing tension between the agencies of criminal justice which administer the law and the segments of society pushing for more rapid change.

Other dichotomies are emerging which are likely to have increasingly widespread implications for society and its legal agencies. As society becomes more complex the variety of choices will probably increase. There will be not only greater diversity of vocational and educational opportunities, but also a larger variety of life styles. In response to this development it is very likely that the core of commonly shared social values will continue to shrink. It is true that certain core values crucial to the continued maintenance of good order will remain relatively unchanged, the source of a high degree of consensus, but many forms of behaviour now on the outer fringes of proscribed behaviour will become more and more subject to discussion. Increasingly, human behaviour will come to be perceived as infinitely complex. Social institutions such as the law which tend to perceive both human behaviour and social values in simplistic, reductionistic terms will come under increasing attack. An example of this reductionism is the concept of the "cognitive man" which underlies the whole approach of the law to assigning responsibility for criminal behaviour.

There are many indications that, for a large group of people, certain portions of the criminal law are simply irrelevant. Increasingly, those whose private morality does not proscribe such behaviour are flouting the criminal law by ignoring it. In addition, the law is becoming more and more inconsequential because the probability of apprehension for continued illegal behaviour is negligible. This applies to the use of certain "soft" drugs as well as certain forms of sexual expression, gaming and gambling, abortion and other behaviour defined as "corrupting" by the law in an age strongly influenced by Victorian morality. During the last decade, Mr. Justice E. P. Hartt of the Ontario Supreme Court stated that a whole generation of youth experimented with L.S.D., learned from their experience, and largely abandoned it "while we attempted to control their experimentation with laws that were designed for an entirely different purpose . . .".<sup>4</sup>

We are likely to see a shift in the types of behaviour that are defined as criminal. At present, offences against the person are generally perceived as the most serious although the bulk of crimes in the Criminal Code are offences against property. Non-violent morals offences are few in number but maintain a strong position

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<sup>4</sup>The Vital Task of Transitional Men, a paper delivered before the Empire Club of Toronto, December 7th, 1972, as quoted in the *Globe and Mail*, December 8th, 1972.

because of the high correlation between law and morality which still pervades our law.

During the next quarter century offences against the person will likely remain relatively unchanged because they reflect core values upon which there is a high degree of consensus. Non-violent morals offences, including the "crimes without victims", will probably continue to be removed from the law and left to social custom and personal preference for control. The future of property offences is open to conjecture for reasons enunciated above. Patterns of theft may well shift from theft of property to theft of information in response to the importance of changes attendant upon the cybernetic revolution. In contemporary society property is equated with power; in the global village information will be equated with power and the theft or manipulation of information may well change the face of this aspect of our criminal law. Another shift which is now being felt is the impact on criminal behaviour of the greatly increased use of credit cards, a development which has led to more sophisticated modes of consumer frauds and thefts.

It is likely that the overwhelming urbanization of future society may elevate to new heights the importance of pollution and noise as behaviour for which criminal sanctions will be required. Theft today represents one kind of invasion of privacy. Is not the pollution of air or water simply another form of invasion of private spaces as well? This raises interesting questions of possible shifts in the form of penal sanctions to be employed. If patterns of crime shift from offences perpetrated by individuals to those committed by corporations we may see a concomitant increase in the use of fines and other sanctions which do not involve imprisonment. This trend in turn may reflect back on the way that individuals convicted of crimes will be handled.

Another shift which will be long overdue is a lessening of the singular stress placed upon the use of penal sanctions as the dominant way of deterring crime. We have had some success in limiting the incidence of breaches of anti-trust or food and drug laws by regulation, accommodation, the restructuring of markets and by the use of economic sanctions. Schelling,<sup>5</sup> for instance, has pointed out, that economic analyses of the criminal underworld could lead to the identification of incentives and dis-incentives to organized crime, in evaluating costs and losses due to criminal enterprise, and in restructuring laws and programmes to minimize costs, waste and injustices that crime entails. Thus economic sanctions may come to be employed more frequently,

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<sup>5</sup> Economics and Criminal Enterprise in Wolfgang, Marvin E.; Savitz, Leonard; and Johnston, Norman (eds), *The Sociology of Crime and Delinquency* (2nd ed., 1970), pp. 613-625.



lessening the singular stress on criminal sanctions as the way to "control crime".

The impact of cybernetics on our procedures of apprehension, trial and sentencing have yet to be felt. In Canada we have not as yet developed simulated models of the criminal justice system with which we can begin to employ game theory and other techniques to assess ways of maximizing benefits and minimizing costs of different legal procedures and sentences. The technology for this is currently available but we lack the conviction which is a prerequisite of financial commitment. Rapid implementation of these procedures could bring optimum use of current knowledge about criminal justice.

A great number of other issues arise as one contemplates the future of criminal law and its administration. The control of electronic eavesdropping is one issue which is rapidly rising to a position of prominence. It will probably hold that position for some time as we search for ways of achieving a trade-off between personal privilege and social good. Another emerging problem is the rapid increase in the use of private security forces in the protection of apartment houses and other urban dwellings. The impact which this will have on police standards and practices and on the control of freedom is just beginning to be felt, as is the implication for the police role in a society whose incidence of crime is increasing faster than is the increase in law enforcement personnel, judicial personnel and the provision of court facilities. It is obvious that at some time in the not-too-distant future major amendments to our criminal procedures are going to have to be implemented in order to narrow this growing discrepancy between needs and services. One suggestion has been to redefine the role of law enforcement officers, to restructure their training to give them quasi-judicial roles in the handling of minor offences. In this way inferior courts of criminal jurisdiction would become, in effect, the first level of appeal from judicial decisions dispensed "on the curb" by police. Further, so far as we know, serious consideration has not been given to the possibility of employing current cybernetic knowledge to reduce the case loads of courts. There would appear to be no technological reason why persons willing to plead guilty to certain offences could not have the data related to the offence fed into computers. The penalty would then be awarded without the necessity of court intervention. In the case of minor offences where fines were assigned on a tariff system, the ticket and the credit card of the defendant could be fed into an on-line terminal in the court building and the penalty cleared without the accused appearing in court at all.

## IV

It is only during the last century and a quarter that prisons have become the fulcrum of the penal system. Spawned during the Enlightenment, when what are now perceived as reductionistic notions of the determinants of human behaviour were extant, prisons reflect a notion of behaviour based on the pleasure-pain principle. The theory is that the criminal behaviour is the subject of clear choice by persons capable of having full knowledge of all the implications of their actions. Thus, penal discipline according to this notion should respond to criminal behaviour by punishment which is sufficiently painful to deter future crimes by both the offender and those who might be tempted to follow his example.

During the last century many modifications have developed in prisons as perceptions of the determinants of criminal behaviour have developed in the direction of greater complexity. Education, trades-training, religious instruction, behavioural science "treatment" have been added to the lexicon of penal programmes. Nevertheless, no matter how the intent of these programmes has changed, the reality has not. With very few exceptions, inmates have passed through our penal institutions decade after decade emerging relatively untouched by the rehabilitative components grafted onto the basically punitive autocratic prison regime. Any rehabilitation which has been effected has been a welfare by-product of the penal system. During the early 1950's the combination of the demand for more prisons arising from an increase in crime and in population, and the outcries of penal reformers, resulted in the development of probation and parole. Although these two measures did much to provide alternatives to an increasing number of offenders, they did little to modify the structure and programme of those who were incarcerated. The essentially autocratic nature of prison programmes remained. Almost without exception these programmes seek to change the offender by imposing solutions on him. In so doing they miss a crucial determinant of human behaviour: namely, that one can impose solutions if the object is to punish or to contain behaviour but not if the object is to change it. Thus, with all the modifications which have taken place in prisons, the root problem remains—the non-reciprocal nature of most prison programmes and the almost inevitable resistance of most individuals to organized efforts, however well intentioned, on their behalf. C. S. Lewis commented appropriately:<sup>6</sup>

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<sup>6</sup> *The Humanitarian Theory of Punishment* (1953), 6 Res Judicatae 244.

Of all the tyrannies, a tyranny sincerely exercised for the good of its victims may be the most oppressive.

In this age of confrontation, therefore, it is not surprising that one of the points of greatest tension in prison today are those related to the decision-making power of correctional authorities. During the last decade we have seen the gradual emergence of a relatively new body of law whose primary concern is the clarification of the rights of those incarcerated. Referred to as correctional law, it is attaining a position of increasing importance in this era of confrontation. More and more frequently inmates and those acting on their behalf are demanding a say in the decisions made by courts and penal authorities which affect them. They are demanding at the very least to know the criteria upon which decisions are made and the specific reasons which apply in their case. Many of these decisions are made by administrative tribunals whose authority is non-reviewable. The focus of greatest concern is on parole boards in relation to their authority to grant, refuse, and revoke parole. In some jurisdictions decisions are made with a minimum of input by the offender and regulations do not require that the reasons for these decisions be communicated to the applicant. On the other hand, some boards are beginning to bridge this communication gap by holding personal hearings in institutions where reasons for the decisions are expressed more or less explicitly. Nevertheless, the need for clearer enunciation of criteria and for some form of review of the decisions of these bodies will continue to be an issue of increasing importance.

Literature on the subject usually enunciates four levels of bridging this communication gap, including: the making explicit of criteria upon which decisions are made; the provision for review by an ombudsman; the provision for review by a judicial body; and finally, the provision of full procedural safeguards during the hearings themselves as well as review on appeal. Each of these levels involves a greater amount of intensity of participation by the inmate or his counsel. It remains to be seen which will be found to be the satisfactory resolution of the problem.

Coupled with decisions related to the release and reaprehension of inmates, the issue of the right of inmates to refuse treatment is causing concern. Both inside and outside prisons many people are becoming increasingly concerned with the possible implications of new technology and the effect that it may have in modifying human behaviour. We have now moved beyond the concern created by one-way glass, projective tests and the use of drugs and have entered an era where technology can allow very delicate neurosurgery, prosthetic devices, nutritional experimentation, the modification of genetic codes and the

use of hormonal implants to ensure the modification of behaviour. These developments raise issues of great concern relating to the potential tyranny of treatment. They are issues which are becoming more and more the subject of controversy. What limits we will place upon the rights of men to modify the behaviour of others remains a major problem.

Although in terms of the numbers of persons incarcerated, prisons have lost their position of prime importance in penal discipline, the sentence of incarceration still remains the form of disposition against which all others are compared. There is every likelihood that it will remain so, especially for that small but significant group of offenders whose behaviour demonstrates a continuing propensity for conduct that is violent or predatory or both and who must be incarcerated for the protection of others. However, the trend towards reduced use of imprisonment which has been felt during the last several decades will likely continue although at a reduced rate. Forms of community-based alternatives to imprisonment which have emerged with such speed during the last five years will continue to provide residential facilities for probationers and parolees and in particular pre-releasees who require "maisons de transition" at the end of their prison sentences. Experiments will continue in the use of minimum security prison facilities with a maximum of fifty inmates, designed to allow temporary absences and other opportunities for low-risk categories of inmates in the community. Although relatively low risk, these programmes still imply a higher risk than keeping inmates behind high walls. Thus one can anticipate an increase in tension between those segments of society which support and those which oppose such trends.

Groups of ex-offenders will play an increasingly important role in the programmes of corrections in the future, especially in post-release programmes. Thus, life experience will take its place beside professional training as another pre-requisite of working in the field. New careers of "crisis counsellors" will likely emerge—careers in which the personal involvement of the counsellor will be given recognition as an asset rather than a liability. In addition, ex-offender groups will take a more active part in pushing for penal reform.

Yet it is likely that the biggest crisis in the correctional system during the next quarter century will be spawned within the bureaucracy itself. It will arise from the conflict between those strongly committed to helping and who demand a structure which allows them freedom to do this, and the demands of the bureaucratic system which require the rigid enforcement of regulations. It is likely that the source of greatest rigidity within the bureaucratic system will be those in middle range positions who are most bound

to former traditions, most threatened by the unknown future and most anxious that changes not be effected too rapidly.

Thus we find that we finish where we began. The social tensions created by the politics of confrontation will inevitably increase within our penal system. Here, as everywhere else, it will be necessary to develop new forms of communication between those who represent the establishment and those who represent change. The kind of solutions found will determine whether riots or reform will be the mode by which change will come about.

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