

**CRIME AND PUNISHMENT:
THE CRIMINAL JUSTICE SYSTEM IN THE 1990's**

**KEYNOTE DIALOGUE OF THE
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I. MARVIN WOLFGANG[†]

I am honored to be here and for being selected by such bright students at the University of Pennsylvania. I always tell my students to read Cesare Beccaria, an economist in Milan who wrote his famous essay *On Crimes and Punishment*.¹ That little book has had a more significant impact on western criminal law than any other work that I can think of.

Beccaria spoke in his essay, on the issue of punishment and crime and is famous for having said, "It is not the severity of punishment, that deters, it is the certainty of punishment."² He was also the first to bring up what now seems very obvious, the idea that we should have a scale of crimes from the most serious to the least serious and of punishments from the most severe to the least severe. He was also opposed to the death penalty. I mention these items because he represented what came to be known as the Classical School of Criminology. He and Jeremy Bentham significantly altered the course of criminal justice all over Europe and in Russia. Thomas Jefferson, in his first inaugural address made references and allusions to Cesare Beccaria's views about proportionality between crime and punishment.

I like to read Beccaria's *On Crimes and Punishment* because for most of the late eighteenth century to the early nineteenth century, the Classical School, also known as the "just desserts" model, was a predominant theory in criminology. If we look at the 1990's, the crime and punishment of the 1990's being the theme of this particular forum, I see instead that our federal and state legislators want to

[†] Professor of Criminology and of Law; Director of the Sellin Center for Studies in Criminology and Criminal Law.

1. See CESARE BECCARIA, *ON CRIMES AND PUNISHMENT* (David Young ed. & trans. 1986) (1764).

2. *Id.*

increase the severity of punishment. However, Beccaria said that it is not the severity but the certainty of the punishment that deters. Ignoring Beccaria, we are increasing the severity of punishment while decreasing the certainty of punishment. Crimes "cleared by arrest," the official term used by the FBI in the Uniform Crime Reports to describe the taking of one or more suspects into custody, has significantly decreased in the past ten or fifteen years.

Homicide clearances rates were once 92%, 90%, and 89%.³ They are now down to 65%.⁴ So the certainty of being apprehended, convicted, and imprisoned is actually lower. So, we are increasing the severity of punishment through federal and state sentencing commissions, which sounds as if they are following the Beccarian notion. However, since the certainty of being apprehended is decreasing, I find, with one or two exceptions, that the state and federal sentencing commissions improperly balance crimes and punishments. They are not proportionate. For example, the passage of the Federal Crime Act permits the death penalty for approximately sixty federal crimes.⁵

A new movement replaced the Classical School in the nineteenth century. In 1870, the first meeting of the American Prison Association was held in Cincinnati. They issued a statement claiming that the major purpose of punishment, of society's reaction to criminal behavior, is reformation. Decades were spent emphasizing the importance of reformation, resocialization, and rehabilitation. Eric Wines, Devlin Brockway, and others in the vanguard of the reformation movement were the architects of parole and the indeterminate sentence. Up until about ten years ago, we were still in

3. See Adam Walinsky, *The Crisis of Public Order*, THE ATLANTIC MONTHLY, July 1995.

4. See Pierce Thomas, *The New Face of Murder In America: Family Killings Decline, Fewer Cases are Solved; Killers are Younger*, THE WASH. POST, Oct. 23, 1995, at A1.

5. The Clinton Administration enacted the Violent Crime Control & Law Enforcement Act of 1994 (the "Crime Act"), which authorized \$1.8 billion over six years to put 100,000 additional police officers onto the nation's streets and to promote community policing to prevent crime in neighborhoods. Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended in scattered sections of 42 U.S.C.).

that period. We now have, in the 1990's, an increasing amount of determined sentences, flat sentences. Elimination of parole seems to be in the minds of many of the legislators.

The Crime Act,⁶ reserved approximately 80% of the funding for punitive measures. The Act features police, prisons, and boot camps; only 20% of the thirty billion dollars is devoted to prevention. Most of the colleagues I am associated with in criminology would have preferred to have those percentages reversed, with 80% allocated to prevention.

I just returned from a trip to China regarding a delinquency project featuring longitudinal studies. So you will forgive me if I make some allusions to China because of the illuminating contrast to our current approach to criminal justice. Crime in China is increasing rapidly, though it starts from a very low base.⁷ I am certain, however, that we would be happy to have China's crime rate in the United States.

Homicide, for example, in China never reached the 10,000 annual mark until 1985. In 1993, China had approximately 23,000 criminal homicides.⁸ At the same time, the United States had 23,000 criminal homicides. But, the United States has only a population of 250 million while China's population has reached 1.2 billion people. China has a death penalty, though no available statistics state how many people are executed annually. They do have an appeal process but nothing, of course, as elaborate as ours. But, in over 98% of the sentences of death, the defendant receives a two year reprieve. If during that two year period he shows genuine remorse for what he has done and wishes to be reformed, the death penalty is reduced to either life imprisonment or a given number of years.⁹

I want to say a word or two about the fear of crime in China and

6. *Id.*

7. Relevant statistics are on file with the author.

8. *Id.* The more serious an offense is, the more consistently it is reported, and thus the statistics are more valid for serious crimes like homicide. *See also* Michael di Cicco, *Hong Kongers Would Keep Death Penalty After China Takeover*, U.P.I., B.C. Cycle, Nov. 5, 1990; *Nirvana by Numbers*, THE ECONOMIST, Dec. 25 1993, at 39 (citing homicide rate in percentages).

9. Statistics on file with the author.

in the United States. The United States, according to the FBI's crime index, in the seven offenses from homicide to auto theft, indicates a decrease of crime within the last couple of years; a three percent decrease in 1994 and a two percent decrease the prior year. All the homicides have decreased in the major and serious offenses in the United States, but the fear of crime has never been higher and the political, rhetorical statements about crime have never been more abundant. The percentage of the population that appears to favor the death penalty is higher than I have ever experienced in my career. It is up around 80%. This fear is due, I think, to the media and due to the real increase in the amount of juvenile crime and to juvenile homicides increasing as much as 60-65% in the past five years.

In China, it has increased tremendously; there was a 250% increase of drug trafficking in the last two years in China. Despite the increase, the fear of crime has gone down. The surveys illustrate this point,¹⁰ one taken in 1988 and one taken in 1991 with approximately 15,000 people in each sample. In the 1988 survey, 30% of the population said they felt very safe in going out in the street at night and so forth. They feel safe against crime. In the 1991 survey, while crime is rising tremendously, the population that felt safe rose from 30% to 51%. The disjunction of fear of crime and actual crime rates provide an interesting contrast.

In the United States we recently passed the one million mark in our federal and state prisons. China has 1.2 million people in prison. The rate of prisoners per hundred thousand population in the United States, the last time I looked and remember, was 464. The rate of prisoners per hundred thousand population in China was 101. Now, we are a democracy. We are proud of our freedom. We are proud of our civil rights, however tarnished, in comparison with more authoritarian societies where fewer civil rights and greater social control is the norm. The differential rates of incarceration are striking. And I think under the current policies and the future policies of the 1990's, that ratio will increase even more.

Finally, the crime rate in general and particularly crimes of violence are affected significantly by demographic variables. I am sure

10. Statistics on file with the author.

you have heard this before; crimes of violence have been particularly affected by the proportion of the population aged fifteen to twenty-four. The major reason, in whole regression analysis of a multitude of variables, for the great increases in the crimes of violence during the late 60's and throughout the 70's and early 80's was the swelling of the 15-24 population. These were the baby boomers, the result of the post-World War II era where the United States experienced the highest fertility rates in our history. These children grew up and were coming of age during the period resulting in high rates for crimes of violence.

In the early 80's, the baby boomers were aging out of crime. When they reached their late twenties and early thirties and crime rates dipped, particularly for crimes of violence. James Fox, a former student of mine who is a Dean at Northeastern University, and I have predicted that the "echo of the baby boomers," that is the children of the baby boomers, will again swell the fifteen to twenty-four age group. Not as dramatically as the baby boomers themselves, but we will begin to see, now and through the rest of the 1990's, an increase in the amount of crimes and specifically crimes of violence due to that one variable, whether we have one hundred thousand police officers or not.

Through the rest of the 1990's, we will most likely see an alteration in mandatory sentencing with drug violations. I think the pressure will be so great that some type of change must occur. These are some of my observations about crimes and punishment in this decade.

II. ALVIN BRONSTEIN^{††}

A. *Introduction: The Criminal Justice System in Crisis*

I had the privilege of knowing Ed Sparer; I worked with him in the early 60's when he was at Columbia University and was part of a group of people who were developing the whole concept of public

†† Executive Director of the National Prison Project of the ACLU Foundation.

interest law. Indeed, to show you how old I really am, I can recall a luncheon date with Beccaria¹¹ in Rome.

I need about three hours today to run my data past Marvin Wolfgang. I need another three hours to tell you about some of the interesting developments in Eastern Europe and Sub-Saharan Africa and some of the Western European areas as well. I need another four hours to talk about current issues in the United States. Yet, they have given me a total of twenty minutes to talk to you about crime and punishment in the 90's.

Now, let me for a moment leave that subject and raise something which requires a presentation all its own, something that I hope you will keep in mind for the rest of your program. I don't believe we have a system of justice or criminal justice in the United States. I believe this for one simple reason: justice implies equality of treatment. Indeed justice *requires* equality in the treatment of all. You will recall seeing the blindfolded Goddess of Justice with the equally-balanced scales over every courtroom in the United States, including the Supreme Court. Near there is the slogan, "Equal justice under the law." That is not what we have in the United States. We have a system of criminal punishment.

Our current system of dealing with crime is unfair and inequitable in that it treats people differently based upon impermissible criteria: race, wealth, class, access to power, access to people with power. We have entirely different systems of justice for different groups of people and, therefore, no *system* of justice at all. Two examples will get me to the subject of what I will be talking about. In Los Angeles County today there are 7,000 people in the Los Angeles County jail. Of them, 6,999 are poor, mostly Black and Hispanic. Then there is O.J. Simpson. O.J. Simpson has wealth, access to power, and he has obtained a speedy trial and all kinds of hot-shot lawyers.¹² The other people sit in jail for an average of two-and-a-half to three years before they can get a trial, where they are represented by underpaid, overworked public defenders. Most plea bargain because they would

11. See BECCARIA, *supra* note 1.

12. On October 3, 1995, the jury found Simpson not guilty of the murders of Nicole Brown Simpson and Ronald Lyle Goldman. See 1995 WL 704831 *2 (Cal. Super. Trans.). On the date of this speech, Mr. Simpson was still awaiting trial.

spending more time in pre-trial detention than if they were sentenced.

So there are two kinds of justice. Keep in mind that, although there is a correlation between race and poverty, it is class, even more than race, that dominates the two different justice systems in this country. Thus, Michael Milken,¹³ the Wall Street entrepreneur who defrauded the public of billions of dollars, spent two years in a minimum security prison, then returned to his fifty million dollar fortune.¹⁴ Meanwhile, the poor, Blacks and Hispanics in Harlem or the Philadelphia ghetto who steal \$300.00 from a liquor store to support drug habits might spend four or five years in prison, come out labeled ex-offenders, and be unable to get jobs.

B. Current Movements in the Criminal Justice Area

None of what I say should be taken as a denial that crime is a very serious problem in this country. There is a great deal of punishment in this country. We are in the process of providing more and more punishment. All of this punishment is being sold to the American public in the name of fighting crime. However, it has very little to do with crime; rather, it has everything to do with political policy.

I will discuss four different movements that are dominating the crime policy discussion in this country. One is the movement that has caused harsher sentencing, particularly in the form of mandatory, minimum sentences and the so-called "three strikes" or recidivist statutes. There now have states with two strikes,¹⁵ and a couple of states are even looking at one strike. The second movement is popularly known as "no-frills" legislation. It is designed to eliminate all of those luxurious country club prisons that we have in America. The third movement is legislation that purports to deal with frivolous

13. See *United States v. Milken*, Cause #S 89CR 41(KBW) (S.D. N.Y. 1989).

14. Milken, originally sentenced to ten years in prison, had his sentence reduced to two years. See *Reduced Sentence Means Milken Eligible for Release in 7 Months*, LOUISVILLE COURIER-JOURNAL, Aug. 6, 1992, at B8; *Swindler Milken to Serve Rest of His Term at Home*, CHI. TRIB., Feb. 5, 1993.

15. CAL. PENAL CODE § 667 (West 1988 & Supp. 1996); GA. CODE ANN. § 17-10-7 (1990 & Supp. 1995).

law suits filed by prisoners. The fourth, in a sense the most mischievous of all, is legislation popularly called "STOP" or "Stop Turning Out Prisoners," which attempts to dramatically alter the role of the courts in dealing with prison conditions.

Everything that we are doing is wrong. We need to address issues, like drug use, which plague this country. We must reach the increasing number of young violent people who are committing homicides with guns. However, these are not being addressed because they are tough problems, and politicians do not want to deal with the tough issues. They want to deal with the things that are popular, that sound tough and that seem to be *punishing* people when what the public really wants is for them to do something about *crime*.

1. *Harsh, Disproportionate Harsh Sentences*

In terms of sentencing, we are already the most punitive country in the world. Our rate of incarceration per capita is second only to Russia's. If we computed it the same way as the Council of Europe does, our incarceration rate is 516 per 100,000 people.¹⁶ Previously, the detention rate in the United States was higher than those in South Africa and the Soviet Union. Due to its huge crime wave, the new Russia, whose rate is about 546-547 prisoners per 100,000 people, is now the leader. Also, our sentences *last longer* than any place in the world. Therefore, it is not only how many people we incarcerate, but how long the incarceration lasts.

With the exception of the United Kingdom, no other industrial democracy uses incarceration as a crime control mechanism. But that is how our politicians choose to respond; they sell the public on the idea that the way to fight crime is to lock up more and more people. Almost every criminal justice official in the country will agree that mandatory minimum sentencing laws have had an enormous impact on prison crowding and prison population yet almost no impact on crime. The best example of this is the Rockefeller Drug Laws enacted by

16. The detention rate is computed by adding the sentenced population to the pre-trial population.

New York.¹⁷ The first mandatory minimum drug sentencing law enacted in the country has had virtually no impact on the serious drug problems in New York State, but it has tremendously overcrowded the New York State prison systems at great economic cost. Today, the conservative Governor Pataki is beginning to recognize the futility in the law and the great economic and human costs resulting from it.

Forms of the so-called "three strikes and you are out" legislation has been around for a long time. In fact, a case went to the Supreme Court fifteen years ago that involved a Texas recidivist statute in which the three felonies involved were three forged checks totalling \$265.00. The Supreme Court upheld the life sentence despite an argument that it constituted a cruel and unusual punishment.¹⁸

Another good example is a recent story about a California man who received a sentence of twenty-five years to life for stealing a single slice of pepperoni pizza.¹⁹ He had three prior convictions: robbery, car theft, attempted robbery. The fourth felony was the slice of pizza. He clearly was not the most dangerous criminal; yet that incarceration will cost the State of California approximately \$625,000. This story appeared in the *New York Times*, and some typesetter obviously had some fun, because on the other side of the page is a story title "Budget Crunch Aids Inmates."²⁰ It reported that Los Angeles County planned to release 3,000 prisoners because it did not have the money to keep them in prison. On the other side of the page, a headline reads "25 Years for a Slice of Pizza," a sentence which would cost over half million dollars to taxpayers.²¹

This is representative of crime policy in the United States. As Marvin Wolfgang pointed out, since Beccaria, we have not been able to establish any evidence that the threat of harsh punishment deters crime. Most people commit crimes because they do not think they

17. Act approved May 8, 1973, ch. 276 §§ 6(1), 9(2)(a), 19, 1973 N.Y. Laws 1040, 1043, 1044-45, 1053-54 (amended 1979) (codified as amended in scattered sections of N.Y. Penal Code Article 7).

18. See *Rummel v. Estelle*, 445 U.S. 263 (1980).

19. See, e.g. *Around the Nation*, CHICAGO DAILY L. BULL., Mar. 3, 1995, at 3 (describing the conviction of Jerry Dewane Williams).

20. *Budget Crunch Aids Inmates*, N.Y. TIMES, Mar. 5, 1995, at 21.

21. *25 Years for a Slice of Pizza*, N.Y. TIMES, Mar. 5, 1995, at 21.

will be caught, and in most cases they are right. They also do not believe that they will be punished even if they do get caught. They just do not stop to think about it. Regarding Michael Milken and other white collar criminals, legislatures still seem to feel that they can achieve deterrence with the threat of hard punishment even though it does not work for street crimes. It just doesn't work. And yet, this is what we are talking about with our sentencing policy.

This is our sentencing policy. Compare the vast increases in incarceration rates over the past 20 years. Including those who have gone from 200,000 to 1.5 million prisoners in America. Crime rates have been fairly stable over those years, but violent crime committed by young people is increasing. In short, the crime that we are trying to address in no way is impacted by this harsh punishment.

2. *Anti-Prisoner Legislation*

Now, let me talk about the anti-prisoner legislation, what I call the LRPTB legislation, as in "Let's Really Punish Those Bastards," as a way to solve our crime problem. Three kinds of legislation are whipping through the United States Congress. We have all kinds of legislation surfacing through many of our state legislatures as well. The practice of most politicians is to mix all three together and sell them to the public as a crime prevention mechanism. But what they are really out to do is put meanness in politics.

The first is the "No-Frills Legislation"²² that is typified by a House bill introduced by Congressman Zimmer,²³ who admits that the Act is based on a November 1994 *Reader's Digest* article called "Must Our Prisons Be Resorts?"²⁴ Congressman Zimmer took

22. "The No-Frills Act" passed the House on February 11, 1995, and is currently before the Senate Judiciary Committee. House Bill, 1995 U.S. H.B. 695; Senate Bill, 1995 U.S. S.B. 1275.

23. In 1995, Representative Richard Zimmer of New Jersey won a seat on the House Ways & Means Committee working on welfare reform and tax reduction. See David Bauman, *Zimmer Realizes Cherished Goal With Seat on Ways & Means*, GANNETT NEWS SERVICE, Jan. 5, 1996.

24. See Naftali BenDavid, *No-Frills Movement Takes Aim at Prison Comforts*, LEGAL TIMES, Mar. 13, 1995, at 1 (noting that "angry at such anecdotes, many culled from an article in the November issue of *Reader's Digest*, Zimmer has introduced a bill . . .").

everything in this article as gospel, enhanced it a bit and then put forth this bill. We checked some of the stories and they turned out to be either untrue or to be gross distortions. As an example, the whole thrust of the *Reader's Digest* article and this legislation is that the public is paying for frills in luxurious county club prisons. First, the article talks about a maximum security prison in Pennsylvania, the Mercer Correctional Institution.²⁵ The prisoners there are supposedly provided with very fancy exercise equipment, huge numbers of psychologists and luxurious accommodations all at taxpayers' costs. However, according to the Attorney General's Office in Pennsylvania, Mercer is a *minimum* security prison. It is a facility where prisoners are on their way out, an exit facility. There is, in fact, exercise equipment in the facility, but it was secured through a private foundation established by the Pennsylvania Prison Society, and the fund is by profits from the prison inmates' telephone system. The prisoners are paying for this equipment, not the taxpayers. The article neglects to mention that the so-called luxurious but small cells are each occupied by two inmates. Finally, the number of counselors and psychologists at the prison is only one-fifth of the number stated by the article.

The second assertion made by the article is that the prisoners in the Missouri State Penitentiary in Jefferson City have around-the-clock, closed circuit television where they can watch sex, horror and violent movies at the taxpayers' expense.²⁶ We checked with the Missouri Department of Corrections and were told they have been trying to reach the author of this article for months. He has not returned the calls. In fact, I have a written document from them that there is cable television in the facility, but that it was paid for by a contribution from a fundamentalist Christian ministry called Praise The Lord. The satellite dish, cable and all the equipment were purchased without any taxpayer funds at all. The cable system is used by the staff to communicate messages to prisoners and for educational programming. The Missouri Correction Department said, "No X-

For the article in question, see Robert J. Bidinotto, *Must Our Prisons Be Resorts?*, *READER'S DIGEST*, Nov. 1994, at 65.

25. See Bidinotto, *supra* note 24, at 65-66.

26. *Id.* at 67.

rated movies are shown at any time on any channel."

The third claim, which received a lot of notoriety, was the famous prime rib dinner. According to *Reader's Digest*, prisoners with life sentences in a Massachusetts prison regularly have catered prime rib dinners for themselves and their guests.²⁷ The truth of the matter is there is an organization called "The Lifers" which has a dinner each year shortly before Christmas. They are allowed to invite guests and the costs of the food is paid for by the prisoners or their families with no taxpayer money at all. This kind of story is just made up to inflame the public.

Nevertheless, there are various forms of "No-Frills" legislation all over the country. Now, by law, prisoners in the state prison system in Mississippi all wear striped uniforms, with the word "Convict" on the back in three-inch letters. Mississippi prisoners have no access to televisions, radios, or record, tape or CD players.²⁸ Alabama reinstated the chain gang.²⁹ Prisoners are kept in chains while working on the roads, and are watched by armed guards. Prisoners are also going to be required to break rocks.

Congressman Zimmer, whom I debated on CNN,³⁰ talked about proposed federal legislation that would require prisoners to break rocks nine hours a day and then use those wages to pay for room and board at the prison and for restitution. I asked him, "I've been to a lot of prisons in this country and I don't recall any of them having rocks. Where will you get the rocks?" He said, "We will bring in trucks of rocks." Who is going to pay for trucking the rocks in? Prisoners' pay averages \$2.00 a day in this country.³¹ If states must pay to transport the rocks, where will they get enough money to pay

27. *Id.*

28. Miss. Code Ann. § 47-5-124 (Supp. 1995). The law, passed in 1994, took effect on January 1, 1995.

29. The Alabama Legislature has considered bills which permit sentencing of convicted criminals for hard labor. See, e.g. 1996 A.L.S. 292 (permitting hard labor for second and third time drunk driving convictions).

30. For more information on debates between Mr. Bronstein and Congressman Zimmer, see Naftali BenDavid, *No-Frills Prison Movement Picks Up Speed*, THE RECORDER, Mar. 15, 1995, at 1.

31. See Steve Kukolla, *Prisoners Make Good Making Goods for Sale*, INDIANAPOLIS BUS. J., Nov. 14, 1994, at § A (stating that inmates earn \$.80 to \$2.28 a day).

the prisoners enough for them to pay room and board for their prison housing, let alone restitution? But those facts are not important. What is important is that he is telling the public that we are going to make these people break rocks. Never mind the facts; we are going to punish those S.O.B.'s. That's what sells as crime policy in this country.

3. *Frivolous Lawsuits and STOP Legislation*

The next two pieces of legislation are unfortunately, and I think often deliberately, mixed together as STOP legislation. Both titles start with the word "stop" or "stopping" and they get mixed together.³²

Title II, entitled Stopping Abusive Prison Lawsuits, deals with so-called "frivolous lawsuits," such as a case in which a prisoner supposedly filed a lawsuit because he was served chunky peanut butter and he wanted it to be creamy. I have never been able to find this mythical case. This is not to say that frivolous lawsuits ought not to be dealt with. The courts, attorney generals, correctional officials, and prison reform activists like myself have tried to work out methods of preventing frivolous lawsuits without denying access to the courts. Nevertheless, such suits are banned in the new crime bill.

Title III is called "STOP" (Stop Turning Out Prisoners) and deals with prisons, jails and juveniles. Under the bills, no court, state or federal, will have the power to enforce any consent decree based on federal law entered into in order to settle prison condition litigation of any kind. All prison condition lawsuits will require a full blown trial. For example, the mid-trial agreement that we just negotiated and entered into in the middle of the trial with the Attorney General's Office in Pennsylvania would be barred under this legislation. All existing consent decrees based on the parties' agreements will be terminated. None of them have a concession of liability, which is why the states want to settle the cases. They do not want to concede

32. Both are contained in the same bill. *See* H.R. 667, 104th Cong., 1st Sess. (1995) (the "Violent Criminal Incarceration Act of 1995"). The bill, which passed the House on February 10, 1995, is currently in the Senate Judiciary Committee.

liability and they want to save money.³³

The discretion of a court to shape a remedy in any case will be severely restricted. Any remedial decree based on federal law and entered following the trial will self-destruct in two years, which means the case must be retried at that time.³⁴ No state or federal court would have the power to enter any preliminary relief. In Pennsylvania, two years ago during the course of our discovery, our doctors found there was a serious tuberculosis problem in a number of Pennsylvania prisons. We were able to get a preliminary injunction thereby preventing the spread of the disease. Because tuberculosis is an airborne disease, it is a threat to the staff, the prisoners and the community. Nevertheless, we could not get that relief under this new law.

Any interested government official, a prosecutor, or a legislator could intervene in any of these cases. No state or federal court would have the power to appoint a special master to help the courts. Instead the court could only use federal magistrates, who are not corrections experts.³⁵ Special masters are usually correction experts. And finally, it will severely restrict the ability of lawyers to collect attorneys' fees, singling out lawyers in prisoners' rights cases from all other civil rights cases, which permit attorneys to petition the court for their fees.³⁶

III. JOSEPH MCGETTIGAN^{†††}

Like Mr. Bronstein, I have found that the criminal justice system

33. *Id.* § 301(a). This amends § 3626 of Title 18 to limit prospective relief in civil suits over prison conditions.

34. *Id.* The amendment of § 3626(B)(1) in the Act states that prospective relief automatically terminates two years after either the date the court found that a violation of a federal right existed or after the date of the enactment of the STOP legislation (whichever is later). The amended § 3626(G)(2) states that "relief" includes consent decrees and settlement agreements.

35. *Id.* § 301(a) (amending § 3626(E)).

36. *Id.* § 301(a) (amending § 3626(F)).

^{†††} At the time of the Sparer Conference, Mr. McGettigan served as the Chief Deputy Attorney General of Pennsylvania, Criminal Investigation and Prosecution Section.

has many difficulties that reflect societal problems.

My understanding, from my early years as a prosecutor and from my years studying English literature, was that the idea of "justice," and criminal justice in particular, had the tripartite underpinning of rehabilitation, protection of society, and punishment, also known as just desserts. One reason why our criminal justice system is under scrutiny today is because it became fashionable in the sixties and the seventies to ignore a significant element of punishment -- just desserts. We fashioned a model of criminal justice in the sixties and seventies that was quite rehabilitation oriented. During that period, criminal sentences were fashioned to improve the character of the offender, who would then be characterized as a victim. Not only did this model not work, but it became the subject of vast disapproval by society. The individuals in society were victimized because of the removal of a significant moral aspect of inflicting an intentional wrong on another person.

What happens then? I don't have any answers. But it is something to think about. What is the idea of penalty? What is punishment? What is the purpose of punishment? Is the purpose merely to protect the individual or society from a person who committed a violent act? Or, is it to rehabilitate him, or some combination of the two? If the goal is rehabilitation, should there be any element of punishment at all when a person commits a wrong -- even if that person takes a life?

Members of society want to be assured that the criminal offender will not again take a life or commit a crime. Society insists that the offender is rehabilitated to the extent that he will not murder again. Why do anything to that person? Why do anything with him at all, beyond saying we are sorry this unfortunate incident occurred? That is the model of criminal justice that started to develop in the sixties and seventies and is thriving now. Soon, we will be confronted with a significant problem. One of the clearest statistical correlation is that between violent crime and age. The facts are indisputable. But now we have another significant element, because now we have these echoes, these baby boomers' children.³⁷

37. See *supra*, part I., introducing the "echoes."

We are going to be releasing these offenders into society very shortly. In fact, Pennsylvania is a classic example of this phenomenon. Many individuals committed violent murders when they were young and received significant penalties, including long-term incarceration. They are getting out now and their entire socialization process was learned in a system which was very critical of them and did little to rehabilitate them. Many of the offenders sent from Philadelphia will likely return when released in the near future. They have had no socialization process, save what they learned in an institutional setting. We have to deal with them and with their children. Many of them had children at the age of eighteen before they were incarcerated. What is to be expected of children whose fathers are incarcerated for murder?

Society must grapple with these issues. What degree should punishment play in how we deal with people who commit violent crimes? Should there be any? Because if you remove that moral imperative of punishment from society and from the justice system, you leave the task to individuals.

I recently received a call. I prosecuted a double homicide which took place in a small town. The offender had been arrested three times before my office became involved. The murderer was the son of one of the scions of the county. He had been discharged three times; once before a preliminary hearing, twice after preliminary hearings. No one in this county was looking for justice; they needed to be persuaded to do the right thing. The offender was convicted and sentenced. After the trial, the mother of one of the victims thanked me for "giving us back our lives." That kind of praise is very nice to hear, but it is also an enormous burden. I said, "I did the best I could and I'm glad." She said, "No, you don't understand. We are nice people, country people, hardworking people. You don't understand that if this hadn't happened, if he had not been convicted, something real bad was gonna happen." Someone would have taken the law into his or her own hands.

If we ignore punishment as part of the penalty that is imposed upon offenders, then we are asking individuals to impose it themselves. We all have an obligation as individuals, as citizens, to address that issue. Rehabilitation is a good goal, but so is protecting society. Should you punish wrongdoing? Either address that moral

issue and bring it into a system, or don't. But make the goals and policies clear. In the current American system of justice, one of the biggest efforts offenders make to lessen their penalties is to claim victim status. People aren't in prison, for the most part, because they have done good for society.

America has gone the wrong direction in some of its elements of incarceration. I feel very strongly about that, and have even prosecuted a person who committed murder in prison. America's prisons should not be dungeons. No American should support the idea of tormenting or torturing persons. Even prisoners should be protected from violence -- even from their fellow inmates. They should not be busting rocks or in chain gangs. I am not a big believer that prisons should have luxury items, but I have yet to be in a prison that was a luxurious accommodation.

As a prosecutor, I deal with the micro level, with the specific offenders. I see their victims, their victims' families, and I see them. I sit across the room from people who have taken human lives. As a trial prosecutor, I have a personal obligation to consider the effects of my actions. I consider that, but it is important to remember that *all* punishment is fundamentally arbitrary. Except, for example, if I take a dollar from this gentleman and I am forced to return it later; we call that justice because he gets his dollar back. But any period of incarceration or any other penalty is arbitrarily selected because of social values. What makes the crime of burglary worth five years in jail or two years in jail, or probation, or anything else? Only a social set of values.

Incarceration is only effective when it comes from a communal understanding that penalties should contain the following three elements -- rehabilitation, protection of society and punishment. If we neglect or overemphasize any of those elements, we err against human nature and some social values. I've sat in courtrooms with good people who have caused no harm to anyone, who are sitting there watching the person who murdered their loved one. They want something to happen. They don't want that person just to say, "Well I won't kill anybody else in your family." Or, "I'll be a good person, and when I come out, I'll get a job." They want something more; the offender committed a wrong, and society should say they are wrong. That process develops values in all of us.

When I walk into a courtroom seeking a penalty, I feel that I have an obligation, ultimately, to myself and to a person who is no longer there. Based upon what I have learned in the criminal justice system and what I have learned in my interaction with human beings, I believe that every person has a similar responsibility.

Professor Wolfgang probably agrees with the old expression, "it is better for a thousand guilty men to go free than for one to be wrongfully convicted." In my experience, that is about the ratio we see now. The previous speakers claim crime is down. Crime *itself* is not down. Crime *reporting* is down. The fact that crime reporting is down does not mean that our quality of life has improved. One of the reasons for the decrease in the crime statistics is because many of us have adopted certain self-protective tactics. Criminals still walk down the street at night looking to break into cars, but "The Club" prevents that. Many of the activities that we engage in decrease our quality of life. They may also lower the crime rate, but is that the way we want our society to develop? Think of the changes that all people, and especially women, have taken just to feel more secure and safe in the past several years. You can tell me that you feel safer and that you believe crime is down, but people do not report crimes because of their fear and dismay. They think, "Nothing will happen. I'll be victimized again. This guy will be out on the street and he'll know where I live."

The final issue delves a bit into the philosophical. I think that a cause of some of the unusual disparity in the rate of incarceration in the United States as opposed to other countries comes from the fact that America is a multicultural, diverse society which has opened its shores to many different people. We have what I call "cultural rub." Also, we have people running the system [politicians] whose way of figuring out how to deal with the problems is to wet a finger and hold it to the wind. That is an easy thing to do and will make some people happy. Luckily, it is not universal.