

WHERE SHOULD THE MOVEMENT MOVE?

A paper by

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Based on his address to the Delegates at the

**Fifth International Conference on Penal Abolition
(ICOPA 5)**

(assembled at **Bloomington, IN, May 1991**)

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Where Should the Movement Move?

Dr. Frank M. Dunbaugh

(Bloomington, IN, May 1991)

Good morning, I am an Abolitionist. Thank you for this opportunity to discuss the abolition movement with all of you distinguished advocates. This week I will facilitate sessions which our program calls "Addressing Legislators Internationally." In planning your time, please note that these are discussion sessions, not panels of people telling you what they know.

In my view, it is time to get down to the nitty-gritty of abolishing the entire penal law system. Until we are able to describe clearly our vision of life without a punitive system, we cannot begin to develop a strategy for getting there. I hope that at this, our fifth conference, we will begin to work out some techniques and strategies.

In establishing our expectations for ICOPA 5, it may be useful to look back at our previous conferences and what we sought to achieve at each of them.

The ICOPA Experience¹

ICOPA 1 at Toronto, 1983. I was honored to be allowed to make one of the keynote addresses at Toronto. At that time, the movement was very frail. I was acutely aware that the crusaders in the US movement for a Moratorium on Prison Construction had not met for about four years, and that nothing was then planned. We had gotten our juices flowing in Kansas City in 1979,² but there had been no follow-up. In Kansas City, we had been unable to agree on supporting the abolition of prisons, but we came close with a statement put out under the name of the National Alliance to Reduce Imprisonment.

The first ICOPA at Toronto had a good turnout and lots of enthusiasm, but it was short on funds for future organization, so I worried that we would never see another ICOPA conference. My only real goal in Toronto was to ensure that there would be a second ICOPA. It is good that so many of the people who were in Toronto are here for our fifth conference at Indiana University today.

ICOPA 2 at Amsterdam, 1985. This was a wonderful conference. Herman Bianchi, Rene van Swaaningen and the Free University were marvelous hosts, and we had excellent facilities. For Amsterdam, I wrote a paper on strategies for abolishing prisons in the United States, but the conference taught me that we should reach further. My paper was premature, because I did not have a good concept of where prison abolition should lead us.

At ICOPA 2, the movement made a great advance -- from prison abolition to penal abolition -- a change in language which was intended to broaden our objective. The Dutch sponsors of ICOPA 2 presented it as a subtle change in the rhetoric of the event, but as the conference developed, it became obvious that abolition of the entire penal law system had to become our goal. A highlight of ICOPA 2 was the representation from many European countries. Another feature was Kay Harris' paper (presented by Andy Hall) on the feminist perspective of crime and justice.³ After Amsterdam, I hoped we would form an international network.

¹ Ruth Morris organized the first ICOPA and is the organizational and spiritual leader of the movement.

² This conference was held in a Catholic seminary on the Kansas side of the Missouri River near Leavenworth.

³ Modified versions of this paper were later published. See Harris (1991) in Bibliographical References, p. 14.

ICOPA 3 at Montreal, 1987. When no framework was developed to maintain and expand the international network of Abolitionists, my goal for Montreal was to create a stable abolitionist organization. Unfortunately, no permanent structure came from the Montreal meetings, a great disappointment. The only scheduled social session was at the opening of the conference. Thereafter, there were few structured opportunities to meet new people. Also, because there were virtually no plenary sessions after the opening, it was difficult to network or to plan for any continuation of the movement, particularly because there were separate sessions in French and English. [ICOPA 1 provided translations.] An important development in Montreal was that Gordon Husk agreed to publish a newsletter. The only effort to plan for the future was at an informal private session not open to everyone.⁴ This appearance of elitism bruised the atmosphere at Montreal.

ICOPA 4 at Warsaw, 1989. This conference was out of reach for me. I had planned to go, but other commitments and expenses barred my attendance. I am very sorry to have missed what everyone has described as a very successful conference. The presence of Bianchi, Christie, Hulsman, Mathiesen and Pepinsky, all at the same conference, was a unique achievement for Monika Platek and the other organizers. Happily, a published report from ICOPA 4 is available here.

ICOPA 5 at Bloomington, 1991. This looks like it will be a great conference. Certainly, the facilities are up to those we had in Amsterdam. The program has been well planned to allow adequate opportunities to meet everyone in social as well as professional settings, and to meet in plenary sessions where we can plan to advance the movement toward the future.

Having this conference in Indiana has special meaning for me, because on my first trip to Indiana (about twenty years ago), I became a prison abolitionist. At that time, I was a Deputy Assistant Attorney General for Civil Rights in the U.S. Department of Justice. Some of our lawyers were considering instituting a suit against the State of Indiana to enjoin the state corrections officials from inflicting cruel and unusual punishment on the state's prisoners by housing them in overcrowded, inhumane conditions. When I came with them to inspect the prison at Michigan City, it was the first time I had ever seen a large warehouse with a five-story cage inside. My immediate reaction was that no human being should be in such a place for any length of time, no matter what they did.

I now know that there are many such institutions. As we moved on to visit the Pendleton "Reformatory" and the women's "cottages" just outside Indianapolis, I realized that cages can take many forms, but, in whatever form it takes, imprisonment is cruel *per se*.

Goals for ICOPA 5

With respect to this conference, it is my concern that we Abolitionists must progress with our dialogue. There has been a tendency for us to keep saying the same things to one another. Because we reach out to bring new people into the movement, we continually reiterate the justifications for our abolition posture. I, for one, do not need further persuasion to cast off the criminal law system. I am ready for a serious discussion about how that may be accomplished. Hopefully, the sessions assigned to me will become the forum for such discussions. In addition,

⁴ A great irony of this was that the private meeting decided to hold the next ICOPA in Finland. I had chosen not to attend this private meeting and, instead, had dinner with the Finnish delegation. When we heard of the meeting's outcome, the Finns were surprised and non-committal. Thanks to Hal Pepinski, the next ICOPA was in Poland.

we have a substantial need for mechanisms that will enable us to continue the dialogue during the intervals between ICOPAs. It would be a shame for us to recess our discussions for a two-year hiatus when we leave Indiana on Saturday.

Accordingly, my goal for this conference is twofold. The first is to explore alternatives to the penal law system in the context of specific offenses and offense categories in order to begin devising concrete non-punitive means for securing the important communal interests sought to be protected by the criminal law. The second is to create an international network that can continue beyond ICOPA 5 to explore the alternatives to the penal law system and to be a vehicle by which we can help one another in our academic and advocacy pursuits.

My experience in law enforcement convinces me that a community's interest can be promoted without a punitive legal system. I spent twenty years (1958-1978) in the U.S. Department of Justice enforcing the federal civil rights laws. We learned early on that we could not achieve much by trying to prosecute local officials who denied to black citizens their constitutional rights. The burden of proof is too high in criminal cases,⁵ and juries tend to reinforce local customs.⁶ The 1957 Civil Rights Act authorized the Attorney General to initiate civil suits to enforce voting rights. In this way, we could sue voter registrars in non-jury cases seeking court orders to require them to use the same standards for black applicants that they used for white applicants and to place qualified black persons on the official voter registration lists. No effort was made to blame these local officials nor to prosecute them criminally, although it is a federal crime to intentionally deprive a citizen of a constitutionally protected right. The long struggle for civil relief achieved some very limited successes, but the slow progress eventually was used to justify enactment of the 1965 Voting Rights Act that suspended the use of all literacy tests in States which had discriminated in voter registration.

Other civil rights laws authorized the Attorney General to bring civil suits to enjoin discriminatory practices in housing and employment; to desegregate schools, public facilities, and public accommodations; and to remedy unconstitutional conditions in state-run institutions.⁷

Extracting Legitimate Interests From the Penal Codes

In my mind, lawyers and law professors (“Advocates for Justice”, I call them) are needed in the abolition movement, because what we seek is basically a reform of the legal system. That is not to say that the alternatives we decide to pursue will necessarily be incorporated into the legal

⁵ In 1960, my first prosecution, we proved that prisoners had been chained naked to the bars of their cells, while their genitals were assaulted by guards with a high pressure water hose. The case was dismissed after 8 weeks of testimony because the government had not proved that the responsible guards could understand the Constitution well enough to form the required specific intent to deprive the prisoners of their rights.

⁶ Massive racially motivated purges of Black voters from the voter rolls in Louisiana in 1956 did not move a grand jury in Monroe, LA, to return an indictment. Nor was any indictment forthcoming from a grand jury in Mobile, AL, when the sheriff's posse and state troopers tear gassed and assaulted peaceful demonstrators at the Edmund Pettus Bridge in Selma, AL, in March, 1965.

⁷ United States Code, Title 42, Sec. 1971a. (voting), Sec. 1997a. (institutions), Sec. 2000a-5. (public accommodations), Sec. 2000b. (public facilities), Sec. 2000c-6 (public education), Sec. 2000e-6 (employment), and Sec. 3613. (housing). Sec.2000c-6 was part of Title IV of the Civil Rights Act of 1964, that also provided two other non-punitive means for desegregating the schools: (1) technical assistance under Title IV to help school boards plan the process, and (2) a mechanism in Title VI for cutting off federal financial aid to racially-segregated school districts.

system, only that they will be designed to supplant a part of the present legal system. Since we are trying to replace the criminal law, we must look at the penal codes with a view to understanding their proper role in society. Few people will agree to the abolition of the penal law system simply because it is immoral, or even because it is ineffective, unless we can identify precisely what legitimate public interests the system is supposed to protect and offer a moral and effective way to implement those communal interests.

It is important to refine our discussions so as to focus on the interests that are to be protected. Are they legitimate community interests? Can they be protected without doing harm? As a preliminary matter, I have analyzed some standard criminal codes and texts. I am hopeful that we will have the opportunity this week to examine these codes and begin to develop a real understanding of what they were designed to do.

Blackstone's Commentaries. Just before the American Revolution, William Blackstone wrote an authoritative treatise on the then current English common law. As it turned out, Blackstone's Commentaries (Gavit 1941) have become the definitive work on what the common law was in America before the States became sovereign and could enact their own laws.⁸ With respect to the criminal law, Blackstone described five major categories of crime, according to whose interests were to be protected.

These categories are:

1. *Crimes against religion or the church*, which include: blasphemy, cursing, witchcraft and sorcery, lewdness, and drunkenness.
2. *Crimes against the law of nations*, which include: passport violations, offenses against ambassadors, and piracy.
3. *Crimes against the crown*, which include: treason, assaults in the court, embezzling public funds, misconduct in office, disobeying an order of the King, and speaking against the King's authority.
4. *Crimes against the state*, which include five subcategories:
 - a. offenses against public justice, such as bribery, perjury, and obstruction of justice,
 - b. offenses against the public peace, such as riotous assemblages, unlawful hunting, and spreading false news,
 - c. offenses against public trade, such as smuggling, usury, and false bankruptcy,
 - d. offenses against public health, such as evading quarantine, and selling unwholesome provisions, and
 - e. offenses against public, police, or economy, such as clandestine marriages, bigamy and polygamy, vagrant soldiers and mariners, idleness, gypsies, nuisances, luxury and extravagance, and gambling.
5. *Crimes against private interests*, which include three subcategories:
 - a. offenses against persons, such as murder, rape, assault, battery, and kidnapping,

⁸ Maryland (where I practice law) adopted the common law as its base (Maryland Declaration of Rights, Art. 5.). Some of the common-law crimes are still not codified. See, *Ireland v State*, 310 MD 328, 529 A. 2d 365 (1987).

- b. offenses against habitations, such as arson and burglary, and
- c. offenses against property, such as larceny, robbery, malicious mischief, and forgery.

Almost everything for which the public now demands law and order falls into the fifth category.⁹ In the eighteenth century, as Blackstone said, offenses against individuals were crimes only because communal interests were affected, leaving some conflicts between individuals for private resolution.¹⁰ This relatively new part of the criminal law was still growing in 1776. The ancient legal systems had no equivalent.¹¹ Roman law provided a forum for *citizens* to initiate suits for injuries caused by private wrongs. In early England, private disputes were settled locally, according to feudal tradition, by the lord of the manor. It was only as the English crown sought to expand its control (and fees), that the jurisdiction of the King's courts was increasingly extended to private disputes by expanding the concept of a breach of the King's peace (Pollack and Maitland, Vol. 2 (1911: 1898:463). In those days, the victim had to hire a prosecutor, so that use of the penal law was usually controlled by wealthy victims, not by the state.

In modern times, however, as Roscoe Pound (1972: 5) observes, 'The state has achieved almost a complete monopoly of force as a regulative instrument.' Herman Bianchi (1988) says our mission is to break the state's monopoly on conflict resolution. The modern expansion of penal law is apparent from examining a recent United States text (Clark and Barnes 1967) on

⁹ Most white-collar crimes such as consumer fraud and environmental crimes are in the fourth category, while official misconduct, such as civil rights violations, were often not criminal, except that embezzlement of public funds constituted a crime against the crown.

¹⁰ At p. 770 (Gavit 1941), Blackstone describes the fifth category as offenses which "derogate from those rights and duties, which are owing to particular individuals, in the preservation of which the community is interested." He later states that:

If these injuries were confined to individuals, they would come under the head of private wrongs, for which a satisfaction would be due only to the party injured; but they are of a much more extended import, because their commission involves a violation of the laws of nature; because they almost always include a breach of the peace; and because by their example and evil tendency they endanger all civil society. Hence, in addition to satisfaction due in many cases to the individual by action for the private wrong, the offender is liable to public punishment for the crime.

This passage is interesting, because if we leave the laws of nature to self enforce, and if we reject punishing for deterrence (*i.e.*, punishing one person for a crime not yet committed by some other unknown person), then we are left with only a breach of the King's peace as the justification for prosecuting offenses against individuals, including murder, rape, robbery, and burglary. Since Blackstone distinguished between the interests of the Crown and those of the state, and since we ejected the King and his interests from our land; that would leave no justification at all for the criminal law in the United States. [Note modified in 2009.]

¹¹ Herman Bianchi (1988:1) writes that:

In antiquity, in Greek, Hebrew, Roman, and Germanic law, state control took place only in case of evidently important political matters. In all other cases of crime the members of the community devised a legal system which allowed them to regulate the conflict themselves.

And Morley (1914: 41) observes that:

[The Romans] drew no clear line between public and private wrongs. Nearly all offenses, as is common in primitive society, were treated as private wrongs. Only to a limited extent had the idea of crime as an offense against the public dawned upon the Roman mind.

criminal law.¹² Like Blackstone, this text also lists five categories of crimes, but at least three are in Blackstone's last category, and the traditional government interests (like treason, bribery, and perjury) seem to have been dropped to last place. The modern categories are:

- 1 Offenses against persons.
- 2 Offenses involving sexual behavior, morality and family relations.
- 3 Offenses against property.
- 4 Offenses against homes.
- 5 Offenses affecting government.

The criminal and penal codes of other nations also categorize offenses according to the interests to be protected. They show some variations that may reflect differing national histories or priorities. The Canadian Criminal Code lists nine rather confused categories of crimes.¹³ The Spanish Penal Code has a slightly different emphasis, reflecting some concern for individual rights, maybe because it was written to replace a dictatorial regime.¹⁴ The Soviet Criminal Code reflects certain communist economic interests not included in the Western codes and also includes military crimes.¹⁵ There is a need to make comparisons of penal codes from various cultures, in order to develop a greater appreciation and comprehension of the range of the protections sought to be achieved by these statutory schemes.

Our focus need not be directed to the prohibited actions defined in the codes as criminal behavior. We should concentrate on the danger perceived by the lawmakers as requiring the defense of the penal law.

For example, the Maryland fraud statutes include such criminal provisions, as making it a crime 1) to advertise unavailable merchandise to induce sales of other merchandise, 2) to use simulated court documents to induce payment of a claim, and 3) to fail or refuse to give the

¹² A treatise is analyzed because in the United States, there is no national penal (or criminal) code that would be equivalent to a European penal code. Each of the 50 states has its own criminal law (only some of which are codified), and the national (federal code) is limited to matters over which the federal government has jurisdiction.

¹³ The categories are: 1) Crimes against public order, 2) Crimes against the administration of law and justice, 3) Sexual offences, public morals, and disorderly conduct, 4) Disorderly houses, gaming and betting, 5) Offences against the person and reputation, 6) Offences against the rights of property, 7) Fraudulent transactions relating to contracts and trade, 8) Wilful and forbidden acts in respect of certain property, and 9) Offences relating to currency.

¹⁴ The categories are: 1) Crimes against the external security of the state, 2) Crimes against the internal security of the state (includes crimes against the exercise of individual rights), 3) Counterfeiting, 4) Crimes against the administration of justice, 5) Crimes of public officials in exercising their duties, 6) Crimes against persons, 7) Crimes against morals, 8) Crimes against honor, 9) Crimes against the status of persons, 10) Crimes against liberty and security, 11) Crimes against property.

¹⁵ There are twelve categories: 1) Crimes against the state, 2) Crimes against socialist ownership, 3) Crimes against life, health, freedom, and the dignity of the person, 4) Crimes against the political and labor rights of the citizen, 5) Crimes against personal ownership of citizens, 6) Economic crimes, 7) Official crimes, 8) Crimes against justice, 9) Crimes against the system of administration, 10) Crimes against public security, public order, and the health of the population, 11) Crimes of continuing the survival of local customs, and 12) Military Crimes. (Berman 1972).

purchaser of purebred livestock a certificate as to breed.¹⁶ Each of these crimes would seem to have been enacted to protect consumers, but since their existence is not well known, it is doubtful that they do so effectively.

What these laws do is to simplify the proof for the prosecutor (if his case fits these special facts), because the statute spells out the offense with greater particularity than a general fraud statute would.¹⁷ It would appear that a much wider and more effective protective net could be cast.

Why not have the state sponsor a broad consumer education program and have the state employ readily available attorneys with special knowledge (real estate, antiques, livestock, grains, wholesale foods, etc.) to oversee any major sales, at the request of either the seller or the purchaser? This might eliminate some criminal cases and, perhaps, many civil cases as well.

The crimes of murder, mayhem, and battery all involve the infliction of bodily injury. What is the true purpose of the criminal statutes with respect to them? Obviously, no *ex post facto* prosecution provides the victim of the crime with any protection, and only the civil law is available to award damages for the injury. So, it must be said that these crimes were designed for another purpose -- perhaps to reform the offender or to intimidate other potential offenders, as a means to protect other potential victims of similar crimes which have not yet occurred. If so, the most important alternatives to criminal prosecutions of this type may have nothing to do with the alleged offenders.

To illustrate, if many assaults occur in the vicinity of a row of abandoned houses, the city should consider a program designed to ensure occupancy of the houses. If assaults occur in a particular dark, blind alley, installing lights and a closed circuit monitor might be much more effective, and less costly, than threats of prosecution. Devising effective means of reducing fearful incidents of bodily injury, may be the best alternative to the use of penal sanctions in cases of violence.

To the extent, however, that the danger generally perceived by the community is that the perpetrator of a violent attack on another person is likely to attack again, it is time that we, as a community, deal with those fears directly. One problem with the penal law is that it does not face the issue of preventive detention honestly. It purports to punish an offender for a discrete and amply probed past act, but the sentence, which is imposed as a punishment, often includes elements of deterrence (based on what someone else might do in the future) and incapacitation (based on what the offender might do in the future).¹⁸ Yet no evidence is required nor are any findings made as to the likelihood of future unlawful behavior by the offender.¹⁹

¹⁶ Annotated Code of Maryland, Article 27, Sec. 195 (d) (bait and switch), Sec. 199 (a) (false court documents), and Sec. 211 (livestock certificates).

¹⁷ One cannot help wondering whether such statutes were proposed to the Legislature after an unsuccessful prosecution in a case of the type described in the law.

¹⁸ The concepts of incapacitation and deterrence, as appropriate objectives of the criminal law, are widely accepted among experts who are not abolitionists.

¹⁹ The deterrent effect seems to be assumed, perhaps based on the theory that the Legislature made a presumptive finding. We know, however, that the Legislatures have not held hearings or made any serious findings about deterrence, either generally, or with respect to particular offenses.

Since the fact of an offender's future dangerousness is never litigated, it can not be appealed. Although many of us may feel it is immoral to authorize incapacitative detention,²⁰ a statutory mechanism for this purpose would at least require an evidentiary record, findings in the trial court, and an appeal on the basis of whether the proved material and relevant facts support a finding of future dangerousness. This might be better than the present system which allows long-term carceral sentences to be upheld simply as appropriate and within the limits of the Legislature's punitive guidelines.²¹ Both the moral and strategic aspects should be debated by Abolitionists.

Public Safety and Restorative Justice

The advocates of restorative justice have no problem imagining a civil law remedy, or even an informal negotiated remedy, in most cases of theft or minor assaults. Yet, there may be a pattern of behavior developing on the part of an offender which, in the judgment of the guardians of community safety (the police or the prosecutor)²² ought not to be ignored. Even if we give priority to the claims of the victim and insure that the victim is able to be restored before the community attempts to take action against the offender, the community may still have a legitimate interest in initiating some defensive action. One might argue that such actions should not be punitive, but that injunctive restraints might be appropriate.

For example, if a person's offensive behavior indicates that he or she suffers from an addiction or chemical imbalance, the community may perceive a need to impose treatment.²³ This suggestion raises the sensitive issue of whether a person has the right to refuse medical treatment. But suppose the community decided to impose skills training to make an offender self sufficient, so as to reduce his or her need to steal? Is this fundamentally different from medication or counseling therapy? Should a public agency be able to determine the need for training or treatment, to evaluate proposed treatment plans, and to order implementation? Should a civil court make such decisions or review the agency process? The right to refuse treatment in such contexts is another issue for Abolitionists to debate.

²⁰ If the purpose was to protect potential future victims from the current offender, we would confine and punish: persons who the government asserts may (we can not be sure) someday (we know not when) commit an act (we know not what) which somehow (we know not how) will endanger another person (we know not whom). Yet the fact finding process by which people are selected for such preventive confinement does not even purport to examine the when, what, how, and whom of the feared future offense ... [T]o subject persons to imprisonment for what we guess they might do in the future constitutes a gross denial of human rights. [Passage quoted from Harris and Dunbaugh (1979: 445)]

What do we think about locking up a convicted offender for what we guess *someone else* might do in the future?

²¹ If deterrence and incapacitation were separated out from punitive sentences (by authorizing civil commitments), could we persuade the public that punishment by long imprisonment is cruel? Could we require a different standard of treatment for civilly committed detainees who are not being punished? The Court is likely to follow its rationale in *Bell v. Wolfish*, 441 U.S. 520 (1979) to hold that persons lawfully confined are not entitled to any better treatment than convicts, except that they may not be punished.

²² A serious problem is the definition of community and the level of self determination involved in the selection of those who are authorized to act on behalf of the community.

²³ I do not mean to suggest that the alternative to criminal law is mental health law. This has been the criticism leveled at Dr. Karl Menninger.

Three problems with the ideal of informal dispute resolution and reconciliation come to mind and should be studied and discussed within the abolitionist circle. They are: 1) that the parties may not always be able to negotiate from positions of equality, 2) that resources are needed to investigate and organize the facts to facilitate the decision-making process, and 3) that the offender may not always have the resources to make adequate restitution. Means must be devised to give weaker participants greater leverage.²⁴ Part of the solution may be to provide adequate free investigative resources so that the facts are not exclusively available to those who can afford to hire their own lawyers, accountants, and investigators.²⁵ Restitution plans also are likely to need considerable financial help.²⁶

The Roots of the Abolitionist Movement

We are not here to start a revolutionary movement. The idea of abolition is quite old. It is hard to believe that it has been a dozen years since Kay Harris and I (Harris and Dunbaugh 1979) wrote a law review article on the abolition of prisons. At that time, we relied heavily on Fay Honey Knopp's *Instead of Prisons* (1976) and Gilbert Cantor's *An End to Crime and Punishment* (1976). Honey Knopp (1976) cites many historical references for abolishing prisons, including quotes from Jesus²⁷ and Clarence Darrow (1902). Cantor postulates that the entire criminal law system could be abolished, and it seems to me that his article might well serve as a starting point for our discussions here in sessions on "Addressing Legislators."

In turn, Cantor's article referred to a 1973 symposium in the *Wayne Law Review* on "Dismantling the Criminal Law System," which was based on a 1972 conference at the University of Kentucky in Lexington -- only about two hours drive from here. In the lead article, Professor Michael Bayles cites Karl Menninger (1968). So, one can see that the movement's roots are old and deep.

Since I was already in Indiana last week for the annual Delegate Assembly of Offender Aid and Restoration, I arrived here in Bloomington a few days early for this conference. This gave me an opportunity to surrender to my addiction for used book stores. In a shop in downtown Bloomington, I found a real gem which had come from the library of Edwin H. Sutherland.²⁸

My prize book (Margaret Wilson 1931), published just a year after my birth, is a brilliant advocacy for abolition of the penal system. Noting that: "***We must remember that crime, as distinguished from wrong doing, is a fact manufactured entirely by law.***" (ibid.: 39, emphasis added), Ms. Wilson advanced all of the present-day arguments and rationales. She anticipated by

²⁴ Community dispute resolution is not likely to replace the class action suit against corporate giants for protection against consumer fraud, product defects, and toxic assaults.

²⁵ We might consider some form of periodic mandatory community service from all citizens as a mechanism for finding the necessary resources to provide a level playing field. If we allowed voluntary service as a set-off against taxes, the citizenry might be able to effect significant changes in budgetary priorities.

²⁶ There may be ways to assist an offender to create a voluntary support base made up of family members, friends, and supportive organizations. A program of government guaranteed loans to such support groups would be helpful. By putting innocent volunteer supporters in financial jeopardy, there is an added incentive to keep the offender out of prison and in the work force.

²⁷ In Luke 4, 16-30, Jesus says that the Lord sent him 'to proclaim release for prisoners.'

²⁸ Sutherland, who distinguished himself with prolific contributions to the field of criminology, was Professor of Sociology at Indiana University here in Bloomington.

over 50 years much of Kay Harris' (1991) feminist perspective,²⁹ and relied on the religious roots of abolition, much the same as does Honey Knopp (1976).³⁰ Wilson's book, bearing the same title later used by Menninger (1968), is *The Crime of Punishment*. Considering how long ago it was written, it is extremely well documented and filled with marvelous quotable material.³¹

Wilson described herself as a housewife with no interest in crime and punishment until her husband became the governor of an English prison. Then, applying common sense and refusing to accept that there was anything that she could not understand, she studied criminology and became convinced that there was no acceptable rationale for the punitive system.

I kept on inquiring diligently, without ceasing, into the real reasons for shutting men inside prisons. And the shattering discovery was that there is no acceptable reason for shutting four-fifths of the present prisoners in prison -- and none for letting the other fifth

²⁹ For example, Wilson (1931: 287) writes that

The first step in women's quest of an alternative to punishment is to repent, deeply and thoroughly, of respect for the law. Women can perform one invaluable service to the nation by meeting, in their organizations, to consider the absurdities, the hypocrisies, the unfairness, the indecencies, the cruelties, the inadequateness of the laws of their state -- all the time obeying to the letter these laws for which they are responsible until they can manage to change them. They ought conscientiously and continually to attend their local courts and discuss and criticize all the processes of the law... They could read Wines, Lawes, Gillan, Sutherland, Osborne, Havelock Ellis, Parry, Cairns -- for every reading and digestion of these books is a service to the States cursed by ignorant voters. Women's clubs might get lawyers to come and defend the law to them ... [to] explain to them what justice really is, the implications of its Roman and Pagan origin.

And later (ibid.: 290):

One knows what the legal profession will answer any such reckless women. They will say that a little knowledge is not a dangerous thing to lawyers, and that women can't understand these matters; in fact that no one but a lawyer with years of training can appreciate the magnificence of the scheme of justice. Yet they will not agree, that as a wit says, the laws of England, or of the United States of America, tend to become an official secret. The question rises, if determined women by a thorough course of reading cannot understand these things, how are the men of the street, without any such conscientious endeavor, to obey laws which they have not a chance of understanding.

³⁰ For example, Wilson (1931: 287-288) asks whether "a crucifix, an innocent man on a cross, would not be a better symbol of the workings of Roman justice than a blindfolded goddess with scales. Or would Pilate washing his hands in an attempt to shift responsibility be a still more fit emblem?"

She suggests that women should discuss criminal law with their clergymen:

Ask them if our faith or our courts are right. Ask them if they believe in the infliction of pain and death for the crimes of pain and death, because the ancient Jewish law permitted the taking of an eye for an eye, and a hand for a hand, and a life for a life... Ask them if Jesus believed in an eye for an eye, a life for a life... Let the women ask their spiritual advisors their opinion of the retributory theory of punishment -- but let them not accept it without thought. [Wilson, 1931:290-291]

Ask them why the word Justice is not mentioned in the teachings of Jesus, nor, indeed, in the New Testament. Ask them if the whole Roman and Jewish conception of the human infliction of pain for wrongdoing is not exactly what Jesus strove by his teachings to overthrow. Ask them if he ever approved of punishment inflicted by anyone but an infinitely loving God. [ibid.: 291]

³¹ Wilson quotes J.A.R. Cairns as saying:

Like most things purchased by the poor, even Justice is coarser in fiber and cheaper in quality... It is fantastic nonsense to say that the Law takes no cognizance of the status of its citizens; it is worse than nonsense, it is hypocrisy... The poor ought not to be subjected to a state of affairs which would be intolerable to the wealthy. (ibid.: 289)

out. Not only is there no reason for doing it, but there is no excuse for doing it. I had supposed in my thoughtlessness that prisons exist because there are criminals. I began to see that there are criminals largely because there are prisons. I discovered, with acute pain, that I had discovered none of these facts. For a hundred years, in many unread volumes, men who knew what they were talking about have been trying to say to the world what I began to realize -- that crime is largely the result of the presence of bad laws and the lack of good ones. (Wilson 1931: 15-16)

[A]s I watched the proceedings of local courts, I began to see very clearly that while one must obey all law -- as long as it exists -- one can respect very little law indeed. I saw that laws are not holy things to be worshipped, but efforts of the human mind to be judged and weighed... Integrity of the mind implies a refusal to admire or respect unworthy things, whatever priesthood exacts our admiration ... We obey the law, but we need respect very little of it. We must not worship any of it. It is not God. It has no sanctity... Let the law repent its blasphemous claims to sanctity, let it throwaway its pretentious crown, and get into overalls like any other servant and do its job for the community, and then we will honor it endlessly. (ibid.: 16-17)

Margaret Wilson understood that some people must be confined for public safety, but that imprisonment is cruel *per se*, and prison *reform* is not the goal. She states (ibid.: 313):

In our generation it is not only futile, it is fatuous for any State to mention its humanity while it sends men to prison for a day longer than they need for the public safety to be there. What men think about prisons is not what sort of a cage they are in, but that they are in a cage. It would be no more humane to imprison men for a long term in the White House than it is to imprison them for a long time in prison. Neither would it be any more humane. It betrays a low sort of intelligence to boast at any time of anything, but what shall we say of a state which boasts of the money she spends on prisons, of modern plumbing she puts in, of the wireless, the food and the recreation, the libraries, or any other luxury she provides for her prisoners, while she keeps them locked up for thirty years for crimes which other states punish with two years? A murderer might as well plead that he shot his victim with a silver bullet, or that he administered poison out of a Venetian glass goblet. It is fundamentally cruelty and torture needlessly to cage a man. The only decency to a man inhumanely imprisoned is *to let him out*.

Ms. Wilson not only preferred a restorative system to a punitive one, but she wrote that we must change laws so as to prevent crimes. She observed that counterfeiting was reduced by making money extremely difficult to copy, and that the record keeping laws helped prevent bigamy in France. She said (ibid.: 298):

In England there is nowadays a good deal of bigamy, because the laws of divorce are so devastating to the poor. In France, it is practically impossible to commit bigamy. A man can't be married without a birth certificate, upon which every marriage and every divorce is endorsed. 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. But there is no hope of the brain of any nation being brought to this problem, until the nation realizes how terrible is the alternative of punishment.

My 1985 paper for ICOPA 2 also suggested that, “The immediate task for abolitionists and reformers is to educate the public to the need for a pro-active program of crime prevention, so that political pressure will begin to stimulate the thinking of professionals and academics.” (Dunbaugh 1986).

Ms. Wilson concludes her wonderful book (1931:330) with the following indictment of the punitive model:

How can a community hurt a criminal it has created, which it has borne as truly as a mother bears a child? Considering the history of our cruelty, it seems that what we need more than anything else is to cleanse our minds from the idea of judicially exacting suffering for wrongdoing, to realize that our habit of punishment is as great an evil as any crime.

Obviously, we are not the first to advocate for the abolition of the criminal law. Anthropological studies indicate that there was no punitive system within primitive cultures, because they needed one another for communal benefits, mainly for food acquisition and defense. There was no punishment for members of the tribe, even if they failed to perform up to the community's expectations. It was understood that everyone knew what was expected, and peer pressure usually brought conformity. Failures were not looked upon as offenses against the group.³² If a member truly could not get along with the tribe, that person left the group or was banished. I suspect that, in practice, exiles often moved in with other related tribes.

In a 1915 treatise on the *Origin of Punishment*, Ellsworth Faris wisely noted:

Our institutions are so complex and our tendency to idealize the existent is so inveterate that we are driven from one theory of punishment to another in the effort to justify what may, perhaps, have no real justification. (Kocourek and Wigmore 1915: 151)

Faris observed that to punish is to declare an enemy. War with an enemy is not like punishment. There is no effort to measure pain, to make it proportional to the offense. Rivals tend to fight a deadly struggle. As Margaret Wilson said (1931: 22), group defense permits no measured response, so that each member must say to outsiders, “The things which belong to anyone man of us are more valuable to me than your life, and if you steal from any of my group, I shall take your life, or part of it.”³³ Based on his studies of primitive people, Faris (1915) observed:

There is an abundant reason for questioning whether anyone inside the primitive group was ever punished, at least by those within his own tribe. In an instinctive way the members of the group are bound together and in the most homogeneous groups they do not punish each other. Present-day people of some uncivilized tribes do not punish their children.

³² Does this suggest that we have expanded our 'community' too far? In smaller families, tribes, or communities, it is possible to foster a loving and non-judgmental relationship among the members. But unlike early England when the jurors were expected to know the people and the facts in advance of trial, we now insist on putting the fate of our youth in the hands of people selected *because they are strangers with no knowledge of the circumstances surrounding the event they are to judge*. It may be fair, but is it wise?

³³ When policy makers declare a war on drugs, or tax evasion, or whatever, it connotes exile from the protection of the community and a fight to the death. In this milieu, there can be no effective invitation to treatment, and offers to reconcile are often predicated on ultimatums to surrender.

Someone suggested that penal abolition could mean retaining the criminal law and abolishing the penalties. Perhaps it will always be appropriate to announce and demonstrate community standards, and a formal court proceeding for placing guilt may be an appropriate vehicle. My mind is not closed to examining any approach, but I tend to suspect measures that leave a prosecutor looking for someone to condemn.

We will hear a great deal more about restorative justice, both here at ICOPA 5 and elsewhere. It is the new catch phrase. It is a promising concept which we should nurture, but we do not yet know what it will become. Let us be on our guard. If we allow the government to retain its monopoly on dispute resolution, but in a new, more attractive, dress, it may become more difficult to wrest control from the politically powerful.

Thank you for your attention and welcome to Bloomington. I look forward to our discussions this week.

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