

CRIMINAL SENTENCING REVISITED

PATRICIA EWICK

Stanley Cohen. *Visions of Social Control: Crime, Punishment and Classification*. (Oxford: Polity Press, 1985). x + 325 pp. Notes, index. \$39.95, \$11.95 (paper).

Michael Tonry and Franklin E. Zimring (eds.). *Reform and Punishment: Essays on Criminal Sentencing*. (Chicago: University of Chicago Press, Studies in Crime and Justice, 1983). viii + 210 pp. Notes, references, index. \$25.00.

In *Visions of Social Control*, Stanley Cohen writes about ideas regarding social control, the practices that these ideas inspire, and their consequences. More specifically, he examines the recent movement toward integrative social control—destructuring, decarceration, deinstitutionalization, and deprofessionalization—as well as the stories that sustained the movement, the practitioners who told the stories, and the patterns of punishment that resulted.

According to Cohen, there have been two master shifts in social control systems in the West. The first transformation occurred toward the end of the eighteenth century and the beginning of the nineteenth, and signaled four key changes: (1) the increased involvement of the state in crime control and the accompanying centralization, rationalization, and bureaucratization of control; (2) the increased classification of deviant and dependent groups into separate categories; (3) the increased segregation of deviants into total institutions (such as prisons, mental hospitals, and reformatories); and (4) the decreased use of corporal punishment. The second shift, the destructuring movement that began in the 1960s, was a reaction to the control system that was created by the first transformation. It was allegedly an attempt to dismantle the centralized, formal, segregative apparatus of control and ostensibly offered a system of community-based control that would be less expensive, more effective, and more humane.

Despite its radical rhetoric, Cohen concludes that this second transformation was apocryphal. The destructuring movement did not dismantle the older institutions of control; it supplemented them with new programs. It did not divest professionals of their power to classify and intervene; it invested them with a new, more palatable reason for doing so. It did not empower or defer to the community, the family, the school, or the neighborhood; it colonized them. Rates of incarceration remained the same after

destructuring. The new control apparatus—including halfway houses, shelters, and weekend detention programs—processed deviant and dependent persons who would otherwise have escaped processing altogether. In short, destructuring resulted in the expansion and intensification of state-sponsored social control.

Cohen does not simply point out a gap between visions and reality; he claims that the expansion of the control system was indeed a direct, if unforeseen, result of the rhetoric of destructuring. It flowed from the stories of change: “the inconsistent and varied words used by the workers, managers and ideologues of the system as they explain what they think they are doing and announce what they would like to do” (p. 115). It grew out of the practices, language, and interests of the storytellers (the professionals in the system). According to Cohen (p. 121), “The question is less why the reality of community control has turned out so very unlike the vision but why we could not have expected much else.”

To answer this question, Cohen examines three representative stories of change: the quest for community, the ideal of the minimum state, and the return to behaviorism. For each, he probes its surface message, the popular appeal of the tale, its deeper structures (contradictions, impurities, and hidden agenda), and the ways in which it is being used.

The surface intellectual support for integrative, community-based control included pragmatic and utilitarian considerations (closed institutions did not work), humanitarian justifications (closed institutions were brutal and inhuman), social scientific evidence (closed institutions were criminogenic), and fiscal rationales (closed institutions were expensive). The deeper structures of the ideology derived from the iconography of community itself: the evocation of paradise lost and the vision of a simpler, cleaner, more meaningful world. The impurity in this ideology lies in the role of the state in recapturing paradise. Community-based control is a creature of the state; it is supported, financed, rationalized, staffed, and evaluated by the state. Here, according to Cohen (p. 124), we encounter the central paradox of destructuring for “the rhetoric of destructuring is, in fact, used to justify the creation of new structures.”

Much of the system’s expansion can be traced to characteristics of care and control professionals. Paramount among these is the professional’s cognitive passion to classify. All punishment is premised upon the bifurcation of persons into the good and the bad, the sick and the well, the treatable and the untreatable. (“Yet surely of two souls, one is said to have intelligence and virtue, and to be good, and the other to have folly and vice, and to be an evil soul . . .” [Plato *Phaedo*]). As professionals go about testing, evaluating, diagnosing, and assessing, they create more and more elaborate categories and knit a wider social control net. Against this backdrop of diagnostic fervor, we are reminded of

Foucault's (1980: 41) discussion of power: "the exercise of power itself creates and causes to emerge new objects of knowledge and accumulates new bodies of information." Cohen concludes that much system expansion is a result of filling or creating categories and mopping up the casualties created by classification.

Later in his book Cohen assumes a broader perspective on social control. He locates social control ideology within the wider context of utopian and dysutopian visions in order to show how our visions of social control are embedded in these more general predictions, fantasies, and expectations. Just as the city became the collective symbol of dysutopia and lost community, it has also become the principal object of twentieth-century crime control. Designing and reconstructing the city to meet the needs of control (for example, by creating defensible space, reducing illicit opportunities, and increasing surveillance) harkens the real master shift about to take place: "the control of whole groups, populations and environments—not community control but the control of communities" (p. 127).

After spending six chapters masterfully exposing the social control mess we are in and the social fictions that obscure the mess, Cohen cautions us against adversarial nihilism, pessimism, and analytic despair. In their stead he offers "moral pragmatism." The "moral" part of this attitude means that we affirm "doing good" and "doing justice" as values in themselves, not to be compromised by utilitarian ends such as crime reduction. As for "pragmatism," he insists that each solution be assessed in terms of these preferred values and not disqualified for reasons of political or cognitive impurity. Although hardly a blueprint for change or a solution, Cohen's discussion of "What Is to Be Done?" (p. 236) is reasoned, compassionate, and fair.

Visions of Control is a rich, provocative, and at times brilliant analysis of social control, punishment, and classification. Cohen's use of historical, theoretical, and empirical descriptions, his unique vision and objective argumentation, and his compassion and involvement with the issues make this an essential text for anyone interested in social control. By ignoring traditional conceptual and theoretical boundaries, Cohen has permanently broadened and illuminated the discourse in this field.

Reform and Punishment, edited by Michael Tonry and Franklin E. Zimring, is a detailed examination of issues surrounding criminal sentencing. Because of the radical reforms proposed and implemented during the past decade (many of which are a reaction against the informalism of the destructuring movement), there is an urgent need for such a systematic look at our system of sentencing.

The first two papers in the book provide a comparative perspective to American criminal sentencing. In the first, Johannes Andanaes examines the Scandinavian sentencing systems, and in

the second, Thomas Weingend describes West German systems. What makes these systems proper objects of study is that, compared to the American system, they seem to work: Disparity and indeterminacy are less of a problem, and the practice of sentencing is perceived to be more legitimate, fair, and just than in the United States. (The degree to which this is true is evidenced by the relative absence of "reform" that has characterized these systems.) In fact, these European systems of sentencing already embody many of the characteristics of recent reform proposals in the United States: comparatively shorter sentences (in West Germany only 1% of prison sentences are longer than 3 years), presumptive parole, no plea bargaining, no formal or informal guilty plea discounts, and appellate review of sentences (by either defendant or prosecutor). Finally, in each of the European systems, the principal goal is retribution. Within the range of appropriate sentences fixed by deserts, secondary goals such as rehabilitation, general deterrence, and incapacitation are used to determine the specific sentence.

The principal difference between the European systems and recent reform proposals in the United States is the means by which this uniformity and determinacy of sentencing is achieved. In Scandinavia and West Germany, these goals are met through the exercise of judicial discretion and the development of a common law of individualized sentences. As the rest of the essays in this book make clear, the thrust of reform in the United States has been toward the formalization and rationalization of sentencing through the creation of sentencing commissions and statutory guidelines and toward an administrative and bureaucratic solution to the problem of indeterminacy and disparity. It remains to be seen, therefore, what the difference in direction will make in emulating European successes. Although the lessons from abroad are clear, differences in size, volume of crime, cultural heterogeneity, and legal tradition between Europe and the United States raise serious questions as to their applicability to this country.

The second section of the book focuses on recent American sentencing reform. In "Options in Constructing a Sentencing System," Louis B. Schwartz compares four landmark penal reform projects: the American Law Institute's Model Penal Code (1962), the Proposed New Federal Criminal Code recommended by the National Commission on Reform of Federal Criminal Laws (1970), and the criminal code revision bills sponsored by Senator Edward Kennedy (S. 1722, 96th Cong., 1st Sess. 125 CONG. REC. S1224 (1979)) and Congressman Robert Drinan (H.R. 6915, 96th Cong., 2nd Sess. 126 CONG. REC. H2190 (1980)) in the Ninety-Sixth Congress. Although the proposals differ in the extent to which they would constrain judicial decision making, they all illustrate the general trend toward the bureaucratization and legislative control of sentencing. The specific differences among the proposals are of

less interest than Schwartz's discussion of the dimensions along which any proposal might be assessed: statutory sentencing minima and maxima; the distribution of sentencing discretion among the prosecutor, parole board, and sentencing commission; the nature of constraints on judicial discretion; and the relationship between the judicial sentence and the authority of parole and correction.

That the movement toward retribution and determinacy is gaining momentum becomes clear when we compare the Kennedy and Drinan bills with the earlier proposals. The two bills place greater restrictions on judicial discretion and contain stronger provisions for legislative control and direction: presumptive sentencing, the specification of appropriate mitigating and aggravating factors, appellate review of sentences falling outside of the guidelines, the abolition of parole (Kennedy), and an explicit statement that retribution and desert are the primary goals of punishment.

The second paper in this section, "Sentencing Reform in the States: Lessons from the 1970s" by Zimring, reviews the sources of the movement toward determinate sentencing. Zimring observes that three groups (prisoners, professors, and politicians), each with different motives and goals, led the crusade. In its own way, each group was disturbed by the uncertainty and disparity of sentences and the ineffectiveness of rehabilitation. After examining determinate sentencing reforms adopted by states such as California, Indiana, and Illinois, Zimring concludes that despite such reforms, discretion and disparity in sentencing remain high. In offering several lessons for future reform, he discusses, among others, "the danger of negative coalitions" (p. 114). Zimring (p. 115) makes an obvious but important and often overlooked point: "When prisoners and police chiefs unite in proposing the abolition of parole, it should be clear that each group has a different vision of life without parole." Beware the politically weaker group.

The essays in the third part of the book address specific issues and difficulties in sentencing. Norval Morris, in "Sentencing the Mentally Ill," attempts to reconcile the paradox that mental illness can both mitigate and aggravate the gravity of an offense. When mental illness is seen as reducing an offender's responsibility, the desert model requires that a less severe sanction be imposed. When mental illness is seen as increasing the dangerousness of an offender, incapacitation goals require a more severe sentence. According to Morris, the contradiction can be resolved by holding the offender to conventional legal standards of liability and by identifying a range of deserved punishments for any given offense. Diminished responsibility due to mental illness should fix the proper sentence toward the lower end of the range. Evidence of enhanced recidivism due to mental impairment (i.e., a recidivism rate over and above that expected for similar offenders not suffering from a given type of mental illness) would justify setting

the sentence toward the upper limits of the deserved range. Thus, according to Morris, mental illness should function either to mitigate or to aggravate sentences only within punishment categories defined by just deserts.

In "Hard Choices: Critical Trade-offs in the Implementation of Sentencing Reform through Guidelines," John C. Coffee, Jr., and Tonry examine the problem of compliance with presumptive sentencing. In particular, they assess the organizational resistance to reforms that is likely to be mounted by prosecutors, defense attorneys, and judges. These professional participants have a common interest in the expeditious handling of cases and have developed tacitly agreed upon methods for achieving that end. In the face of reform, they are likely to attempt to preserve those informal practices to maintain control. Defense counsel may simply see guidelines as new "going rates" from which they will want a discount, and prosecutors will still have an incentive to grant such discounts. Fact manipulation may replace charge manipulation: Prosecutors and judges may thwart sentence guidelines by manipulating facts (regarding culpability or harm) to justify an extremely lenient or harsh sentence falling outside of the statutory guidelines. Guilty plea discounts or charge reduction guidelines might increase pressure on defendants to plead guilty (particularly if the discount straddles the in-out threshold).

Coffee and Tonry then consider methods of structuring sentencing guidelines to anticipate and counter adaptive responses: real offense sentencing, guilty plea concessions, and various external mechanisms for monitoring compliance with presumptive guidelines. The efficacy of these methods is, at best, likely to be mixed. They conclude that successful implementation of any reform program depends on its not being entrusted to courthouse regulars who labor under a conflict of interest between the system and the expeditious resolution of cases.

It is perhaps unfair to criticize a book for ignoring issues that it does not purport to cover. Reviewed alongside Cohen's book, however, the omissions of *Reform and Punishment* are obvious. For the most part, the essays in this volume consider only the substance of reform—the policy options and the anticipated and real problems of implementation. With the exception of Zimring's essay, they fail to examine the rhetoric or discourse of reform or the broad cultural and institutional context of reform. Yet as Cohen makes abundantly clear, the deeper structures of "control talk" often reveal impurities, contradictions, and hidden agenda.

Nonetheless, taken on its own terms, *Reform and Punishment* is an informative volume. The essays are thorough, well written, and intelligent, and the authors are familiar with the details of reform and the organizational contexts in which they will be implemented. The editors offer the book as "a basic reference for stu-

dents of issues in criminal sentencing" (p. vii). It will serve these students well.

PATRICIA EWICK is an Assistant Professor of Sociology at Smith College, Northampton, Massachusetts. She received her Ph.D. in 1985 from Yale University, New Haven. Her principal interest is the social control of organizations. Her recent publications include "Redundant Regulation: Sanctioning Broker-Dealers," 7 *Law and Policy* 421; and "Confronting Organizations as Legal Actors: The Organization as Offender, Victim and Claimant," *American Bar Foundation Research Journal* (in press).

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STATUTES CITED

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