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" . . . We Are the Living Proof . . . "

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BOOK REVIEW

“. . . WE ARE THE LIVING PROOF . . .” Second Edition. By David Fogel.¹ Chicago: Anderson Publishing Co. 1979. Pp. xxi, 338. \$10.95.

*Reviewed by Ray Wilson*²

Few proposals have had such an immediate impact upon state legislatures as has the call for the abandonment of statutory indeterminacy in the sentencing of the criminal offender. Since the publication of the first edition of “. . . *We are the Living Proof* . . .”³ in 1975, state legislatures in Arizona, California, Colorado, Illinois, and Maine have adopted variations of the proposals suggested by the author.⁴ Enactment of similar legislation in Florida during 1978 was thwarted only by gubernatorial veto.⁵ Other states and lesser jurisdictions are addressing themselves to these considerations and the entire issue of determinacy in the criminal justice process. Legislation to bring specificity to parole board decision making has been enacted by Congress as well as in Florida and Oregon.⁶ Sentencing criteria have been established in several states, cities and judicial circuits in an attempt to equalize the variations in criminal sanctions within and across offense classifications.⁷

The disenchantment with indeterminacy, or with like sentencing structures⁸ which permit wide variations between minimum and maximum penalties, stems from several causes. The great expecta-

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3. D. FOGEL, “. . . WE ARE THE LIVING PROOF . . .” (1975).

4. ARIZ. REV. STAT. ANN. §§ 13-701 to -709 (1978); 50 CAL. PENAL CODE §§ 1170-1170.2 (West 1976); COLO. REV. STAT. § 18-1-105 (1978); ILL. REV. STAT. ch. 38, §§ 1005-8-1 to -7 (1977); IND. CODE §§ 35-50-1-1 to -6-6 (1976); ME. REV. STAT. tit. 17A, §§ 1251-1254 (1976).

5. Governor's veto message to Bruce Smathers, Secretary of State (June 22, 1978). (Available from the Joint Legislative Management Committee, Library Services Division, 701 Capitol, Tallahassee, Fla. 32304.)

6. 18 U.S.C. §§ 4201-4218 (1976); FLA. STAT. § 947.165 (Supp. 1978); OR. REV. STAT. §§ 144.110-.275 (1977).

7. See, e.g., 50 CAL. PENAL CODE §§ 1170.3-.6 (West 1976); MINN. STAT. §§ 244.09-.10 (1978); OR. REV. STAT. §§ 144.775-.790 (1977). See also Interim Report of the Sentencing Study Committee to the Florida Supreme Court (1979) (on file with the Florida Supreme Court).

8. The author identifies no less than eight distinct types of sentencing schemes. D. FOGEL, “. . . WE ARE THE LIVING PROOF . . .” 193 (2d ed. 1979).

tions were rooted as much in the desire to convince the captives, if not the captors themselves, of the necessity of a moral and behavioral turnaround as they were in the expiation of the debt owed society. Largely they have remained unfulfilled. The precise moment at which this rehabilitation was to occur was left shrouded in some Gnostic revelation. The inmate was hardly in a position to know the release date as this became tantamount to knowing the Millennium; it was apparently at hand but somehow had escaped precise calculation.

The discovery of this magic moment was made the duty of the clinician, personified in the several capacities of prison warden, parole board member, psychiatrist, and, in contemporary parlance, correctional counselor. The practice of corrections became analogous to the practice of medicine. A curious blend of the scientific and artistic came to characterize this newfound discipline of penology and its allied social science disciplines. For each behavioral disorder there was a therapeutic regimen to be followed, a pattern of conduct to be emulated, and the ever-present threat of immediate sanction to be invoked upon the slightest deviation from the prescribed curriculum. The chronicle of early American penal history presented by Fogel underscores how the jail on the secular level came to reflect the primitive beliefs of the community on the religious level.⁹ Incarceration as punishment became incarceration for punishment, both in its early days of visceral sanctions and its later days of therapeutic justifications.

Much in the vein of Robert Martinson's bibliographic foray into the literature on correctional programs,¹⁰ Fogel has concluded that contemporary efforts at rehabilitation have fallen well below their mark. This ingrained skepticism is reflected in his observation that "[t]o date, no conclusive evidence has been presented in support of the commonly held belief that a rehabilitative institutional program of academic or vocational training is effective in reducing the rate of recidivism among offenders."¹¹ But none of this is new to the second edition, the failure of rehabilitative programs having been the crux of Martinson's earlier review.¹² Nonetheless, little consensus has developed on what does work, under what conditions it is likely to work, and with what degree of reliability it can be expected to affect in a positive manner the behavior of the involuntarily confined.

9. *Id.* at 1-69.

10. Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 *THE PUBLIC INTEREST* 22 (1974).

11. D. FOGEL, *supra* note 8, at 114.

12. Martinson, *supra* note 10.

Fogel's remedy for the above nonapplications and misapplications of rehabilitation is the development of a justice model for corrections which will shift the focus from the processor/administrator to that of the consumer/offender.¹³ Fairness and justice in the administration of penal sanctions are to replace the statutory caprice of current practice. The model is to take the form of legislatively prescribed sanctions of fixed duration, or flat time sentences, reducible only through allowances for good behavior. Latitude in the imposition of widely varying sentences is eliminated as courts will henceforth be limited to selecting a sentence within a much narrower range. Parole boards are reduced to insignificance if not abolished.

What may prove troublesome to legislatures in accepting such a justice model are the substantial philosophical and fiscal compromises required. Philosophically, legislatures may be less willing to champion such an innovative sentencing scheme which reduces the duration of the maximum penalty available for particular offenses in favor of certainty of confinement and fairness in release. However, certainty of confinement is more a product of the arrest and prosecution of the offender than the logical consequence of a pronouncement of the legislature. The decision of whether to prosecute and upon what charge is sufficiently detached from the legislative halls that a justice model, while intellectually appealing, is of little practical significance, as plea negotiations easily undermine the uniformity of its application. The discretionary application of justice is still vested with the prosecutor, even with this model. Discretion has not been eliminated, it merely resides in a different setting.

Convincing legislatures that the appeal of the justice model is worth the financial price poses another dilemma. The estimated costs associated with similar proposals for Florida and California have been placed in the hundreds of millions of dollars.¹⁴ Fogel downplays such estimates noting that "[m]an-years and costs under flat time sentencing can be significantly adjusted according to the flat time sentencing scheme employed."¹⁵

The tremendous cost of flat time sentencing places the concept at the mercy of economic cycles if not itself determining the economic policy of the state. Nevertheless, mandatory minimum sentences for certain crimes have become increasingly popular with

13. D. FOGEL, *supra* note 8, at 190.

14. Florida: Fla. S., Committee on Corrections, Probation and Parole, Staff Analysis and economic statement on CS for HB 150 (Oct. 17, 1978) (on file with committee); California: D. HOWARD, DETERMINATE SENTENCING IN CALIFORNIA 26 (1978).

15. D. FOGEL, *supra* note 8, at 320.

state legislatures.¹⁶ In light of the projected costs, the author should be content with the modest victory of moving at least part of the discretion of sentencing from the courtroom to the committee room.

Legislatures are occasionally ahistorical creatures and the variations on the theme proposed in 1975 by Fogel are noteworthy, as each of the enacting states has modified Fogel's original proposal.¹⁷ The Maine and Illinois statutes still allow substantial judicial discretion in the imposition of varying flat terms whereas California retains a decidedly rigid character in its imposition of sentences for crime. Other state enactments share attributes of both.

To understand what determinate sentencing does represent, it is important to realize what it does not represent. While it stands as a vehicle for making the distribution of justice less variable, it is not in the nature of institutions to surrender their prerogatives easily. Enactments of the variety sought by Fogel may turn out to be more tinged with rationality than infused with it as the purity of the concept becomes so pruned with restrictive clauses and limiting conditions that the constructive dialogue he wishes to undertake may be frustrated from the very beginning. Moreover, his call for correctional administration to "begin the development of an agenda for dramatic change"¹⁸ asks a great deal from those very professions where the gulf between the theoretical and the applied is wide, the opinions divergent, the affection for the conventional endearing.

Having the legislature establish a uniform sentencing policy is the substantial contribution made by Fogel and is one that is persuasively argued. But whether legislatures *can* function as the guardian of the guardians remains an unanswered question since it presumes that legislatures have established themselves as policy developers rather than policy reactors. Fogel's catalogue of judicial decisions clarifying the legal rights of the confined indicates that the legislative impetus for change may be considerably more reactive than prospective. The evolving constitutional standards of minimal acceptability for prison systems are more a product of the judicial than the legislative branch of government.

The quantum leap desired for qualitative improvement to obtain a fair, just, and humane prison environment will have to confront

16. Florida has three mandatory minimum penalties: FLA. STAT. § 775.087 (1977) prescribes a three year minimum term of imprisonment for the use of a firearm in the commission of a felony; § 775.082(1) (1977) prescribes a mandatory 25-year minimum sentence upon conviction of a capital felony where life imprisonment is imposed; and recently enacted ch. 79.1, Fla. Sess. Law Serv. 9-11 (West 1979) (to be codified as FLA. STAT. § 893.135) establishes a minimum penalty scale from 3 to 25 years for possession of large quantities of controlled substances.

17. D. FOGEL, *supra* note 8, at 264.

18. *Id.* at 281.

and to successfully accommodate these competing quantitative pressures which oftentimes require solutions to be tailored in more traditional garb. And that is the challenge for the development of the justice model for corrections: how to undertake meaningful change in measured increments without being overcome by the pressure to maintain therapy as the objective or being intimidated by the potential fiscal and policy dilemmas which a radical departure from the existing system can cause.

