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BOOK REVIEW

“. . . WE ARE THE LIVING PROOF . . .” By David Fogel.¹ Cincinnati, Ohio: The W. H. Anderson Co. 1975. Pp. xxi, 328. \$9.50.

Reviewed by Frederic L. Faust²

As crime rates in the United States continue to climb—despite massive federal, state, and local efforts to curb the trend—it is understandable that citizens, special interest groups, political leaders, and criminal justice professionals alike should become increasingly disenchanted with the prevailing system of criminal correction. The system’s failure to control recidivism among convicted offenders is evident to even the most casual observer. Somewhat less apparent is the growing body of empirical evidence indicating that certain accepted policies and procedures followed by criminal justice agencies may be significant factors in causing recidivism. Central among these factors are the exercise of broad judicial discretion in sentencing, the tolerance of degrading conditions and inhumane practices, and the application of arbitrary criteria to parole decisions. While David Fogel’s study focuses largely upon these particular shortcomings of contemporary corrections, the “justice model” he offers has implications for all aspects of correctional administration. In fact, it is inconceivable that the justice model for corrections, as presented in this book, could be effectively implemented without substantial policy and operational changes in all criminal justice agencies. As the author puts it,

[m]y charge was to develop an elaboration of what I have called the “justice model” of prison administration. It rests on the notion that justice—as fairness—is the pursuit we should be involved with in prison rather than the several treatment models to which we have given lip service in the past. My thesis is that the best way to teach non-law-abiders to be law-abiding is to treat them lawfully. My concern is less with the administration of justice and more . . . with the *justice of administration* (p. xv).

Thus, while taking the prison as the medium of proof for his argument, Fogel designs not a new technique for offender treatment, but rather a model for rehabilitating the existing correctional system (with critical implications for the total system of criminal justice).

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In the opening chapter, Fogel lays the foundation for his thesis with an historical account of how the "fortress prison" reached its present inglorious position in American corrections and shows how the correctional system as a whole has achieved its current state of turmoil. His analysis reflects a fairly balanced synthesis of the "economic-deterministic perspective"³ and the "social order interpretation"⁴ of relevant historical events. That is, he views the precolonial correctional practices of forced labor and transportation in terms of economic needs associated with the growth of mercantilism and the great land discoveries in the western hemisphere. Similarly, the history of American prison labor is presented in relation to economic demands and resulting shifts in marketing systems.

Contrastingly, Fogel attributes the emergence of the fortress prison in the early nineteenth century to social order objectives. As Fogel tells it, the massive influx of poor immigrants with strange cultural patterns and the resulting explosion of vice and corruption in the slums of rapidly growing urban centers were perceived as posing a severe threat to the established American value system and life style. The prison with its strict regimen of productive labor, moral training, and insulation from corruptive influences was designed to serve as the model for other social institutions (colleges, boarding schools, children's homes, and even large families) to follow in the struggle to preserve social stability and protect the values of the Jacksonian era. It was believed that this model's success with society's most aberrant members would clearly demonstrate its merit as the most expedient path to saving the nation.

Discussing the adoption of large maximum-security prisons as the preferred correctional approach (despite the failure of such institutions to realize their social order objectives), the historical account is necessarily brought to focus upon policies and practices of prison administration. Fogel traces the transition in penal policy from the repressive and brutal measures of the mid-1800's, through a period of humanistic reform in the late 1800's and early 1900's, to the era of the "rehabilitative model" that extends to the present. This interpretive review is concise and perceptive. It does not deal in depth with the conflicting philosophical tenets of the classical and positivistic schools of criminology. However, Fogel weaves the correctional concepts of punishment/deterrence and treatment/rehabilitation into his chronicle

3. On the history of corrections from the perspective of economic-determinism, see G. RUSCHE & O. KIRCHHEIMER, *PUNISHMENT AND SOCIAL STRUCTURE* (1939).

4. On the emergence of the prison in America from the social order perspective, see D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* 79-108 (1971).

of events, conditions, and beliefs; moreover, some of the critical issues raised by the interface of these philosophical positions are made apparent in the discussion of the emergence of the rehabilitation model.

The attention Fogel directs on the historical transition in offender status in American corrections is of particular significance. He approaches his analysis of correctional policies and practices in much the same manner that Dinitz, Dynes, and Clarke approached their study of deviance—through the development of a status typology.⁵ Fogel points out that correctional policy and the role of prison personnel in carrying out that policy can be interpreted as a function of the prevailing definition of offender status:

When the offender was a *pariah*, the then embryonic correctional apparatus operated as *banisher*, *mutilator*, or *executioner*—its least complicated roles. After the Revolution, the offender was deemed to be a *penitent* (and thus in need of a place for penitence—a penitentiary); the keeper became a *moral guider*. With the Industrial Revolution came the collapse of the solitude system of care, prayer, and work; the offender now simply became a *prisoner* and the keeper a *punisher*. From about the end of the Civil War, but at an accelerated pace after the turn of this century (in response to the influx of clinicians), rehabilitators in their need for work products (caseloads) recast the prisoner as a *patient*, and the keeper became *treater*. Following the erosion (but not yet the demise) of the medical model, the prisoner turned to the courts for status revision. . . .

. . . The prisoner deemed it more useful to become a *plaintiff*. . . .
When the prisoner turned from *patient* to *plaintiff*, the officials necessarily turned *defendant* (pp. 62–64).

The next two chapters of the book are devoted to a detailed examination of how this transition along the pariah-penitent-prisoner-patient-plaintiff continuum has affected both the “keepers” and the “kept.” This discussion leads the reader to conclude that the correctional system’s failure to effectively impact upon the crime problem

5. In laying the foundation for their study of deviance, these authors noted that, every society defines behaviors that are to be labeled as deviant and proscribed as undesirable. . . . [S]ome explanations or theories must be offered for the existence and persistence of such deviant behavior in the face of negative social sanctions. . . . [T]here would be little reason to define, sanction, and explain deviance without also doing something to, for, or with the deviant in order to correct, deter, prevent, and/or punish him.

S. DINITZ, R. DYNES & A. CLARKE, *DEVIANCE* 3 (1969). In this light, what is done to, for, or with a deviant (e.g., banishment, punishment, treatment) may be viewed as a function of the deviant’s ascribed status (e.g., freak, sinful, criminal, sick, or alienated). *Id.* at 12–21.

is the consequence of aimlessness and chaos arising from several circumstances. In the main these are: (1) inconsistent definitions of the purpose of criminal law; (2) the lack of understanding of human behavior and the consequent use of inadequate and frequently competing theories and methodologies; and (3) the absence of any specific correctional purpose or objectives as a result of (1) and (2) above. The present situation is particularly aggravated by the insecurity and hostility (of both the keepers and the kept) attending the early uncertain stages of the offender's transition from patient to plaintiff and the prison official's transition from rehabilitator to defendant. Thus the current state of the correctional system is not only chaotic but also highly explosive.

Given this picture of where we have been and where we are now, Fogel's next step is to consider where we should be going and how best to get there. His aim is to establish a set of principles that are general enough to provide the correctional system with a clearly delineated purpose and specific enough to serve as guidelines for policy decisions and operational practices that will resolve rather than simply alleviate the current crisis. The central theme is "justice-as-fairness," and the approach is designed to be practical as opposed to philosophical. As Fogel puts it, "In order to develop an operational model of justice in corrections we must move from the philosopher's chair to the cellblock" (p. 185). This does not, however, imply a lack of concern for philosophical considerations, since he carefully specifies the main assumptions of his position and refers to them frequently as he elaborates their operational implications. The statement implies that once he has specified these premises, Fogel does not feel the need to argue or defend them at length.

Fogel asks the reader to take it as given that the classical (or neo-classical) free-will/punishment/deterrence philosophy, with its ideal implications for due process in the administration of criminal justice, forms the only meaningful foundation for penal sanctions.⁶ No claim is made that imprisonment is an effective deterrent either generally or

6. The rehabilitative correctional purposes of treatment and resocialization are not dismissed without argument but with brief reference to the conclusions of Tappan and Packer that the multitude of rehabilitative theories and techniques have been inadequate and conflicting, and that there is no demonstrable relationship between these therapeutic or training approaches and criminal behavior. Concurring with these observations, Fogel posits: "When corrections becomes mired in the dismal swamp of preaching, exhorting, and treating ('resocialization') it becomes dysfunctional as an agency of justice. Correctional agencies should engage prisoners as the law otherwise dictates—as responsible, volitional and aspiring human beings" (p. 184). See also P. TAPPAN, *CONTEMPORARY CORRECTION* 4-5 (1951); PACKER, *LIMITS OF THE CRIMINAL SANCTION* 189 (1968).

specifically. Rather, Fogel recognizes that a prison sentence realistically represents a deprivation of liberty for a given period of time and, as such, must be carried out in the context of lawful administration. According to Fogel, it is this lawful administration—justice-as-fairness—that is *the* fundamental purpose of all agencies of the criminal law. On this point he notes that “[j]ustice-as-fairness is not a *program*; it is a *process* that insists the prisons (and all agencies of the criminal law) perform their assigned tasks with non-law-abiders lawfully. No more should be expected, no less should be tolerated by correctional administrators” (p. 184).

Critical to the concept of justice-as-fairness is the recognition that the prisoner is nothing more than a member of society who is being lawfully subjected to a temporary loss of liberty. As a continuing member of society,⁷ he retains all of the rights of a free citizen except those that permit freedom of movement and freedom from the essential constraints of mass living. The prisoner retains a right to voluntarily choose programs and services for his own benefit and to be free from coercion into those he does not seek. It is incumbent upon correctional officials and staff to recognize this volition on the part of convicted offenders and to design and conduct correctional programs and activities with the full degree of “fairness” that such recognition requires.

The policy implications of this perspective are presented in terms of short-range and middle-range goals—*i.e.*, those not requiring enabling legislation or new appropriations, and those requiring either or both. The short-range goal is the adoption of the concept of justice-as-fairness in correctional policy and practice. The middle-range goals are:

- (1) a return to flat time sentences with procedural rules in law governing sentence selection;
- (2) the elimination of both parole boards and parole agencies as we have known them;
- (3) the transformation of the fortress prison into institutions for no more than 300 persons, further divisible into sub-units of 30 [containing offenders sentenced to similar terms, with release being determined by] a narrow and reviewable system of vested good-time rules (p. 204).

Fogel emphasizes that long-range goals are not specified, quite intentionally, in order to avoid detracting from the urgency of immediate change. Nonetheless, the complete demise of the fortress prison is recognized as a long-term process, even though it is suggested

7. On the concept of the prisoner as a continuing member of society, see CANADIAN COMMITTEE ON CORRECTION, *THE BASIC PRINCIPLES AND PURPOSES OF CRIMINAL JUSTICE* (1969).

as an immediate policy provision to be implemented as a middle-range goal.

In order to realize these objectives, Fogel offers a number of specific proposals which he elaborates in terms of "micro-world" (within prison) and "macro-world" (outside of prison) categories. For the micro-world he advocates the following:

- (1) a system of inmate-staff governance;
- (2) a formal grievance procedure for conflict resolution;
- (3) the provision of legal advice to prisoners in dealing with conditions of confinement and civil matters (*e.g.*, divorce, protection of property), as well as post-conviction appeals;
- (4) a tight set of procedural rules to limit (though not eliminate) discretion and insure "fairness" in administrative decision making; and
- (5) the appointment of ombudsmen to monitor prison practices and conditions and maintain open lines of communication between prisoners and administrators.

Proposals with regard to the macro-world call for:

- (1) a system of victim compensation that would have the effect of keeping more offenders out of prison by keeping them employed in the community in order to repay victims;
- (2) a substantial restriction of sentencing discretion through statutorily required sentencing criteria and procedures for sentence review;
- (3) more extensive use of alternatives to imprisonment and the requirement of a finding that the offender presents a clear and present danger to society as a prerequisite for incarceration;
- (4) the establishment of a "flat time" sentencing structure (allowing a very narrow range of flexibility for mitigating or aggravating circumstances) with provision for "good time" credit; and
- (5) the abolition of parole.

The combination of short- and long-term and micro- and macro-world proposals is intended to form an integrated system which the author argues must be taken as a whole. In his view, "the parts of the justice model must operate together if the result is to be a process of justice-as-fairness. Anything less runs the risk of being an obstruction of this process" (pp. 274-75). The dangers of piecemeal implementation are several. The adoption of selected procedures (*e.g.*, inmate-staff governance and formal grievance procedures), taken out of the context of the total model, could simply serve to conceal existing

oppressive practices by giving them an aura of legitimacy. Similarly, there is the probability that flat time sentencing policies and the abolition of parole, taken separately, would result in longer and more frequent prison sentences than are currently being imposed. The adoption of the micro-world proposals in the absence of the macro-world changes could well facilitate a prostitution of the model's fundamental purposes and result in its becoming simply another technique for the "treatment" of prisoners.

These are indeed legitimate concerns, since any sudden and total commitment to such a drastically different approach in American corrections is most unlikely to occur. Therefore, the author realistically backs away from an all-or-nothing requisite for the implementation of his model and interprets these operational risks as dangers to be recognized and avoided in the process of change. The fact that such critical risks in implementation are immediately apparent and clearly elaborated is at once a strength of the author's practical approach and a weakness of the model—a weakness that is common to social reform approaches that call for fundamental and sweeping changes in established social institutions. However, the signal attention that Fogel directs to these problems helps to place them more in the realm of major hazards than insurmountable obstacles.

Overall, Fogel has set for himself the task of delineating a clear purpose for the correctional system and a set of guidelines for achieving that purpose by creating "a vision about what we are now and what we wish to become, coupled with a strategy to help get us there" (p. 282). Unquestionably he accomplishes this task. His analysis of the current correctional system is perceptive and candid. In addition, his specification of "justice-as-fairness" as the fundamental purpose of all agencies of the criminal law is clear and certain, and his proposed strategy for realizing this objective is sufficiently elaborated to serve as an unambiguous guide for practical implementation. Granted, he does not lay out detailed directions for implementing the model, but this is by design rather than default since it would not be possible within the scope of his study to accurately account for the conditions and resources of all the individual states. Nonetheless, the principles essential for developing detailed plans and carrying out specific activities are provided.

It seems unlikely that the author's central theme of "justice-as-fairness" will meet with any significant degree of informed opposition. At the same time, his condemnation of offender treatment approaches and his denial of offender rehabilitation as a correctional goal of equal standing with justice may result in the model's being rejected out-of-

hand by a number of persons in the so-called "helping professions." This would indeed be unfortunate. Acceptance of the justice model does not require cessation of the quest for deterministic explanations of human behavior, nor does it preclude the use of knowledge derived from this quest in attempts to help convicted offenders resolve their individual problems in socially acceptable ways.⁸ What is required is the preservation of human dignity and the elimination of coercive "treatment" that relies upon the prisoners' hopes and fears with respect to the consequences of their behavior. Scientific knowledge of human behavior in general, and criminal behavior in particular, is not presently sufficient to bring about the effective rehabilitation of offenders. While this may not always be so, the argument for the priority of "fairness" in contemporary correctional policy and practice is a cogent one. Further, justice-as-fairness could well turn out to be the first essential step in the process of individual offender rehabilitation.⁹

Fogel's work is not presented as a panacea for all the ills of the existing correctional system, nor should it be heralded as such. It is, however, an important contribution and may be expected to have a significant impact on the future development of correctional policy and practice in the United States.

8. While the proposed system is built upon a classical view of man as a rational and volitional being, its practical construction does not necessitate the denial of deterministic influences on behavior. From a practical perspective it is reasonable to conceive of determinism and free will as positions on a continuum ranging from scientific knowledge to ignorance of the causes of human behavior. In this sense, the deterministic extreme is characterized by scientifically verified knowledge, while the free will extreme is a reflection of scientific ignorance, with an area of experimentation separating the two extremes. Correctional policy and practice, then, may be described in terms of movement back and forth along the continuum from knowledge, through experimentation, to ignorance. Thus, when scientific ignorance abounds, but the necessity for coping with aberrant behavior remains, the tendency to fall back upon free will, punishment, and deterrence is not only understandable but necessary. Under all conditions the principles of humaneness and fairness must be recognized as the foundation for the administration of justice. See Faust, *A Perspective on the Dilemma of Free Will and Determinism in Juvenile Justice*, 25 JUVENILE JUSTICE, May 1974, at 54.

9. On the development of this notion, pertaining to the field of juvenile justice, see Justice Douglas's quote from a Rhode Island Family Court decision, *In re McCloud*, quoted in *McKeiver v. Pennsylvania*, 403 U.S. 528, 562 (1971) (Douglas, J., dissenting).