or deterrence ... its only serious justification for the 25-year minimum treats the sentence as a way to incapacitate a given defendant from further crime; the underlying theory is the need to protect the public from a danger demonstrated by the prior record of violent and serious crime. The State, in other words, has not chosen 25 to life because of the inherent moral or social reprehensibility of the triggering offense in isolation; the triggering offense is treated so seriously, rather, because of its confirmation of the defendant's danger to society and the need to counter his threat with incapacitation. As to the length of incapacitation, the State has made a second helpful determination, that the public risk or danger posed by someone with the specified predicate record is generally addressed by incapacitation for 25 years before parole eligibility.... The three-strikes law, in sum, responds to a condition of the defendant shown by his prior felony record, his danger to society, and it reflects a judgment that 25 years of incapacitation prior to parole eligibility is appropriate when a defendant exhibiting such a condition commits another felony.

Whether or not one accepts the State's choice of penalogical policy as constitutionally sound, that policy cannot reasonably justify the imposition of a consecutive 25-year minimum for a second minor felony committed soon after the first triggering offense. Andrade did not somehow become twice as dangerous to society when he stole the second handful of videotapes; his dangerousness may justify treating one minor felony as serious and warranting long incapacitation, but a second such felony does not disclose greater danger warranting substantially longer incapacitation.... no one could seriously argue that the second theft of videotapes provided any basis to think that Andrade would be so dangerous after 25 years, the date on which the consecutive sentence would begin to run, as to require at least 25 years more. I know of no jurisdiction that would add 25 years of imprisonment simply to reflect the fact that the two temporally related thefts took place on two separate occasions, and I am not surprised that California has found no such case, not even under its three-strikes law.... In sum, the argument that repeating a trivial crime justifies doubling a 25-year minimum incapacitation sentence based on a threat to the public does not raise a seriously debatable point on which judgments might reasonably differ. The argument is irrational, and the state court's acceptance of it in response to a facially gross disproportion between triggering offense and penalty was unreasonable within the meaning of §2254(d).

This is the rare sentence of demonstrable gross disproportionality, as the California Legislature may well have recognized when it specifically provided that a prosecutor may move to dismiss or strike a prior felony conviction "in the furtherance of justice." In this case, the statutory safeguard failed, and the state court was left to ensure that the Eighth Amendment prohibition on grossly disproportionate sentences was met. If Andrade's sentence is not grossly disproportionate, the principle has no meaning. The California court's holding was an unreasonable application of clearly established precedent.

The Future of Punishment

DAVID DOLINKO

I want to say a few words ... about ... the future of punishment. For reasons that I hope will become clear, ... this is a crucially important and very timely topic, and yet one that might well give pause to the bravest among us.

For a special brand of courage—or perhaps of dollop of madness—is required to prophesy the future of a social institution as volatile, as controversial, and as prone to unforeseen change as the institution of criminal punishment.... [In the early 1970s] "the future

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of punishment" would have looked dim indeed. For most of the twentieth century, the concepts of punishing criminals and giving them their just deserts had been yielding ground to the notions of reforming or rehabilitating offenders through individualized, therapeutic methods. Almost all of the innovations in American criminal justice since 1900 had borne the stamp of this "rehabilitative ideal": the "juvenile court, the indeterminate sentence, systems of probation and parole, the youth authority, and the promise (if not the reality) of therapeutic programs in prisons, juvenile institutions, and mental hospitals."[1] The Supreme Court had placed its imprimatur on these developments with its 1949 declaration that "retribution is no longer the dominant objective of the criminal law" and that "a strong motivating force for the changes" was "the belief that by careful study of the lives and personalities convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship"—a belief, the Court added, which "to a large extent has been justified."[2] An influential report on penal justice, issued by the American Friends Service Committee in 1971, noted that "the treatment approach receives nearly unanimous support from those working in the field of criminal justice."[3] As recently as 1973, the criminal law scholar Jeffrie Murphy structured an anthology of readings about punishment theory around the issue of whether the criminal process should be completely replaced, as society's response to crime, by therapeutic rehabilitation[4]—as had been advocated, for example, by the noted psychiatrist Karl Menninger in his widely read 1968 book *The Crime of Punishment*.[5] In the same year as Menninger's book there appeared *Punishment and Responsibility*, a collection of essays by the preeminent English legal philosopher H. L. A. Hart. In one of those essays we find Hart describing how the novels of Dostoyevsky "make real to us ... a conception of punishment which, since he wrote, has come to occupy a much diminished place in ... penal policy and practice"—a conception that "makes primary the meting out to a responsible wrongdoer of his just deserts."[6] Hart noted that "many of us here today—perhaps most of us—may hate these ideas as useless obstructions to rational thought," but he added sagely that "we still need to understand the moral and psychological appeal which these ideas have, for they have not disappeared yet."[7]

From our perspective today, we can see that those seemingly antiquated retributive notions of which Hart spoke have not only failed to disappear, but have come roaring back with—one might say—a vengeance. Therapy, reform, and rehabilitation have fallen into discredit and disrepute. "The new retributivists ... gained the ascendency in the punishment debate during the 1970s,"[8] and retributivism "can fairly be regarded today as the leading philosophical justification of the institution of criminal punishment."[9] And that institution itself, far from withering away, flourishes in America today as perhaps never before. Indeed, punishment has become one of our most impressive growth industries.

In 1970, when the future of punishment seemed so tenuous, there were less than 200,000 inmates in state and federal prisons. As of June 30, 1998, that figure had swollen to 1,277,866. This increase is all the more remarkable given that the violent crime rate has declined every year since 1991, the property crime rate has dropped steadily since 1975, and the levels of both of these types of crime fell last year to their lowest point since 1973.

Of course, a good part of the explanation for this seeming anomaly lies in the unrelenting "War on Drugs." Sixty percent of federal prison inmates, and 23% of state prisoners, are serving time for drug violations. More people are behind bars for drug offenses in the U.S. than are in prison for all crimes in England, France, Germany, and Japan combined. The FBI reported for 1995 a total of 1,476,100 arrests for drug-law violations, a 65% increase since 1986. More than a third of those arrests—some 503,000—were for marijuana possession: more than the combined total of arrests for murder, manslaughter, robbery, rape, arson, and all sex offenses including prostitution.

This zealous drug war helps explain why nearly one of every 150 persons in this country is in jail or prison, why state prisons are operating at between 15% and 24% above capacity and the federal prison system at 19% above capacity, and why an American born this year stands a one in twenty chance of spending some part of life in a correctional facility—a one in four chance if that American is black. But the drug war is only part of the explanation. One must also take into account the general increase in harshness, punitiveness, and "tough on crime" policies that has been rampant since the decline of therapeutic rehabilitation.

Consider, for example, the spread of "three-strikes" laws designed to impose greatly increased prison terms on recidivists. Since Washington state pioneered the concept in 1993, twenty-two other states have passed some form of three-strikes law.

California's is the most draconian, requiring a twenty-five-year-to-life sentence for any third felony as long as the two priors were "violent" or "serious." As of July 1998 nearly a quarter of California's prisoners were serving terms for second or third strikes. Despite a $5 billion investment in a massive prison-building program over the last fifteen years, the California system is more overcrowded now than it was before.

Consider, too, the spread of mandatory minimum sentencing laws. Every state has now enacted some law of this type. Federal law includes about sixty such statutes, several of which have real bite. Most notorious, perhaps, is the law that imposes a mandatory ten-year minimum prison sentence for trafficking in 5000 grams of powder cocaine or 50 grams of crack, and a mandatory five-year term for 500 grams of powder or 5 grams of crack. There is little evidence in the legislative history that this 100-to-1 disparity was adopted on rational grounds. Furthermore, there is little scientific support for the disparity, and the U.S. Sentencing Commission has called for its abolition. Yet the disparity survives, and because over 90% of federal crack defendants are black while almost half the powder cocaine defendants are white, this anomaly helps explain why there were, at the end of 1996, 1571 sentenced black inmates per 100,000 blacks in the U.S. compared to 193 white inmates per 100,000 whites.

There are other ways in which American punishment practices have grown harsher over the last three decades. Twenty states have eliminated parole release, and many states, responding to federal incentives, now require prisoners to serve at least 85% of their sentences. Thirty-five states have made it easier to transfer juveniles to adult courts, either by adding specific offenses that can result in such a transfer or by lowering the upper age limit of juvenile court jurisdiction. The federal government's decade-old sentencing guidelines authorize increasing a defendant's sentence on the basis of crimes with which he was never charged, and even crimes of which he was acquitted, as long as the sentencing judge—not a jury—finds by a preponderance of the evidence—not beyond a reasonable doubt—that the defendant committed these crimes.

The most dramatic sign of America's turn toward harsher punishment, however, has to be the contemporary revival of the death penalty. From 1968 through 1976, not a single execution took place in this country. as capital punishment underwent a series of legal challenges that it ultimately withstood. Executions had been declining during the fifties and sixties, and a public-opinion poll in July 1966 had found only 42% of respondents favoring death for convicted murderers, with 47% opposed. Similar polls nowadays routinely report 70% to 80% of Americans favoring capital punishment, and since George Pataki defeated Mario Cuomo for the New York governorship in 1994 on a pro-death-penalty platform, it is rare to find an American politician opposing capital punishment. From the time executions resumed in January 1977 through the end of last year, an even 500 persons had been put to death in the U.S.. Most astoundingly, as of April 1, 1999, there were 3565 inmates under sentence of death in American prisons—a number more than twice as great as the total number of persons executed in this country in the fifty years of my life to date!

When I remarked earlier that punishment has become an impressive growth industry, I had in mind more than the stirring output statistics with which I have been bombarding you, however. There is, for example, the growth of privately owned prisons. Some 120 prisons and jails, including some under construction, are now privately run, and the number of inmates in these facilities rose from 3000 in 1987 to more than 85,000 in 1996. The stock price of the nation's largest private jailer, the Corrections Corporation of America, has increased tenfold since 1994. On the other hand, there is the increasing clout of unions representing prison guards—the fastest-growing public employee associations in many states, which generally oppose private prisons because they employ nonunion labor. In California, the California Correctional Peace Officers Association sustained some unpleasant publicity from its efforts to derail a state investigation into alleged abuses at Pelican Bay, the state's highest-security prison. But the association doubled its membership in the past decade and, according to one recent report, "made deft use of a staggering $4.5 million in bipartisan political contributions" to win support in last year's state elections.

I imagine I have said more than enough to drive home the point that criminal punishment in this country today is a thriving activity with a powerful impact on the shape and spirit of our national life. What adds to the timeliness of the present [discussion], even as it complicates any effort at prognostication, is the changing nature of our punishment practices. Let me just mention two aspects of these changes: the blurring of the borderline between criminal punishment and noncriminal methods of responding to offenders, and the

rise in popularity of nontraditional, unusual modes of punishment, often with a strong component of public shaming.

In theory, punishment is imposed through the distinctive mechanism of the criminal law, with its array of special procedural protections for those who find themselves exposed to this most coercive exercise of official power. But in practice the strength of the criminal-civil distinction appears to be eroding. One striking illustration of this trend is the phenomenal expansion, over the last three decades, of the use of civil property forfeiture as a tool against drug criminals. From a 1970 federal statute authorizing the seizure and forfeiture of drugs, drug-manufacturing and storage equipment, and conveyances used to transport drugs, anti-drug forfeiture provisions have grown to include proceeds traceable to drug transactions as well as real property "used, or intended to be used" in drug felonies. Because forfeiture proceedings are classified as "civil," they offer a way to impose what for all intents and purposes is a punishment, often a severe one, on suspected drug offenders even where the evidence is insufficient to allow a criminal conviction—indeed, even in cases where the property owner has been tried and acquitted. There is no presumption of innocence, no right to appointed counsel, no proof beyond a reasonable doubt: once the government establishes probable cause that the property is subject to forfeiture, the burden is on the property owner to prove by a preponderance of the evidence that the property has not been used for criminal purposes.

Another example of the erosion of the criminal-civil distinction can be found in the spread of "sexually violent predator" laws, enacted in sixteen states in recent years. These statutes allow states to confine "sexually violent predators" after they have served their sentences. In *Kansas v. Hendricks*,[10] the Supreme Court upheld the application of such a statute to a repeat child molester who was nearing the end of his criminal sentence when the state secured his indefinite confinement in the psychiatric wing of the prison hospital. The Court held this commitment not to be "punishment"—and hence neither an ex post facto measure nor a double jeopardy violation—even though the preamble to the Kansas statute itself explained that it applied to persons who did not have the kind of mental disorder that would qualify them for traditional civil commitment, and whose personality disorders "are unamenable to existing treatment modalities." The Court stated that confining such a person would be nonpunitive even on the assumption that there was in fact no treatment at all for his condition.

As for nontraditional, "creative" punishments, a recent Op-Ed piece in the New York Times offered a number of provocative examples of "shaming" penalties imposed as conditions of probation. A California judge required a burglar to wear a T-shirt proclaiming "I am a felon on probation for theft"; an Illinois farmer convicted of assault had to erect a sign warning "A Violent Felon Lives Here"; Arkansas and Wisconsin judges have had shoplifters stand in front of stores with signs admitting their crimes; a Florida woman was ordered to take out an advertisement in her local paper confessing that she had bought drugs in front of her children; and a Long Island drunk driver was made to display a license plate branding him a convicted felon. And let us not forget the revival of the chain gang in recent years in Florida, Alabama, and Lewis County, Washington—nor the California statute conditioning parole for repeat child molesters on "chemical castration."

To sum it up: criminal punishment is an institution that is large, growing, and quite possibly mutating into new and surprising forms....

Endnotes

[1]Francis A. Allen, *The Decline of the Rehabilitative Ideal: penal Policy and Social Purpose* 6 (1981).

[2]*Williams v. New York*, 337 U.S. 241, 248, 249 (1949).

[3]American Friends Service Committee, *Struggle for Justice* 83 (1971).

[4]See Jeffrie G. Murphy, *Introduction to Punishment and Rehabilitation* 10 n.6 (Jeffrie G. Murphy ed., 1973).

[5]Karl Menninger, *The Crime of Punishment* (1968).

[6]H. L. A. Hart, *Punishment and Responsibility: essays in the Philosophy of Law* 158 (1968).

[7]*Id.* at 159.

[8]John Braithwaite and Philip Pettit, *Not Just Deserts: a Republican Theory of Criminal Justice* 4 (1990).

[9]David Dolinko, "Three Mistakes of Retributivism," 39 *UCLA L. Rev.* 1623 (1992).

[10]521 U.S. 346 (1997).