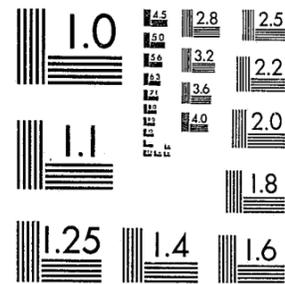


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International Summaries

A Series of Selected Translations in Law Enforcement and Criminal Justice

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NCJ-78582

Decriminalization

Decriminalization has received much attention in the United States. The author describes potentially beneficial decriminalization strategies for Panama and the offenses to which they might be applied.

"Justice mistreats, prison corrupts, and there is no such thing as true rehabilitation of a criminal."

By Leda. Carmen Antony

Introduction

Criminal policy is "the discipline concerned with organizing and channeling, with the greatest possible effectiveness, social reactions against crime."¹

In fighting crime, we have left behind the traditional perception of punishment as being the only valid and effective measure for eliminating and reducing the incidence of crime. Enrico Ferri has already mentioned "substitutes for punishment," or measures of a social nature, to prevent crime, with policies aimed at improving the quality of social, political, and economic life.

Our search must be directed to finding different measures, ones that are neither repressive nor preventive, but are capable of bringing about a restructuring of society itself. Since no country in the world can escape the crisis of penal justice, we must begin by reviewing in depth all aspects of criminal policy. Crime is increasing and totally changing its countenance, a fact which compels us to plan innovative measures which may at first appear daring.

This selection (NCJ 61726) originally appeared as *La Decriminalización*, November 1978. (Instituto de Criminología, Universidad de Panama, Estafeta Universitaria, Panama, Republic of Panama) Translated by Louciana Rose.

¹Ancel, Marc: "La Défense Social Nouvelle." Paris: Cujas, 1971, pp. 128-132.

The essential goal of a criminal policy must be penal social justice, and among the consequences of its implementation must be the real social reintegration of the offender. Reintegration can best be achieved by minimizing penal repression, avoiding excessive criminalizations, and applying them only to the most serious offenses. The current tendency is to reduce penalization by removing the criminal label from certain types of behavior, misdemeanors, or other violations of the penal code and by transferring these acts to jurisdictions other than the penal system.

Professor Lopez Rey warns against governments using criminal policies as tools for promoting their political ideologies and for punishing dissent: by so doing, a series of artificially criminalized acts would be brought into existence with doubtful legal justification. The time has come to reduce penal repression to a minimum and, instead, to encourage the direct participation of the community in the operation of the penal system.²

Certain types of conduct which can be dealt with by administrative measures, arbitration, or compensation should be removed from the penal codes. The French criminologist, Dr. Jean Pinatel, points to two different methods for achieving this end. One would be to remove the criminal label from acts or types of behavior—this would be pure decriminalization. The other would be to replace punishment by educational, therapeutic, or social

²Lopez Rey y Arroyo, Manuel: "La Planificación de la Política Criminal." Mimeographed text. Venezuela, 1975, p. 38.

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measures, while preserving the original label—this would be decriminalization by depenalization, or imperfect decriminalization.³

Decriminalization is one of the most interesting aspects of new criminal policy approaches. Penal inflation, which has caused the very administration of justice to become criminogenic, could be reduced through such a process. Although decriminalization does not lend itself to easy solutions, existing penal laws must be reformed because they are tradition-bound and unfair, and do not reflect new economic, social, and political structures.

We will outline the theoretical scope of decriminalization on the basis of concepts, reasons for its introduction, areas of application, advantages and disadvantages, and how it can be applied to Panama.

THEORETICAL SCOPE

What Constitutes the Decriminalization Process

Decriminalization can be defined as the removal of the criminal label from a type of behavior or from the penal code. Decriminalization can assume different forms, such as:

- abolition of the norm that establishes a type of behavior as criminal;
- legalizing, or explicitly permitting, a type of behavior;
- depenalization, which consists of removing from the penal codes the special laws all norms typifying a form of behavior as criminal; and
- dejudicialization, which involves transferring the following from the courts to other jurisdictions: first, breaches of professional ethics, which should be dealt with by professional associations and academic institutions, and second, cases of drug abuse, to be dealt with by drug rehabilitation centers.

Why Decriminalization?

The qualitative and quantitative increase in crime points to a deep crisis in modern criminology. Penal law obviously has failed to rehabilitate offenders, and many countries are eliminating incarceration because prisons are criminogenic factors in themselves. Mentally defective delinquents, alcoholics, and drug addicts should not even fall under the realm of penal law, but should be subjected to rehabilitative treatment. Traditional penal policies (prevention, control, treatment, and rehabilitation) are failing. For example, insistence on the rehabilitation of an offender only serves to accentuate his sense of marginality to society. Recidivism is on the increase, and new forms of criminality are proliferating, such as human rights violations, terrorism, and white-collar crime.

³Pinatel, Jean: "La Criminología frente a los procesos de decriminalización." XXV International Criminology Seminar, Guayaquil, Ecuador, 1975.

We are by no means against criminology: we only seek new solutions to the problem of crime. Professor Rico sums up the many aspects of the crisis in the administration of penal justice as follows:

- Legislative inflation (penal codes filled with traditional *status quo* provisions and metaphysical abstractions)
- Fragmented and uncoordinated judicial bodies
- Poorly selected and trained police personnel
- Court case overloads
- Judges' lack of preparation (limited to juridical information)
- Lack of effectiveness of traditional penalties, such as imprisonment and fines
- Nonexistent or ineffective treatment forms, and
- Justice establishment resistance to criminological policy innovations.⁴

We think that the slow pace of the administration of justice is one of the main obstacles to rehabilitation, resulting in, for example, unjust pretrial detention.

Another aspect of crime, which alone would justify decriminalization, is the high financial and social cost of crime. The former includes the expenditures involved in the administration of justice (salaries of justice officials, policemen, trial personnel), while the latter refers to the value of stolen goods, the price of forgeries and usury, and the removal of prison inmates from productive employment.

The hidden costs of crime also include loss of lives, moral deterioration, and harmful effects on family units. Mexican sociologists estimate the costs of crime in Mexico at one-fifth of the gross national product. The costs of a homicide case to public administration are 2.5 times higher than the costs of rehabilitation, and 3 times higher than the costs of prevention and repression.

From the above figures it would appear logical to resort to the depenalization of some crimes; e.g., for minor injuries and petty larceny, substitute penalties should be imposed instead of short prison terms. Other crimes require treatment and help from specialists rather than imprisonment. These include drug abuse, prostitution, alcoholism, and homosexuality. Advocates for the decriminalization of these offenses point to the fact that there are no victims in these so-called crimes, only the wasted lives of the offenders, who need reeducation and reintegration into society above all.

From a juridical viewpoint, decriminalization can be legal or de facto; the latter usually precedes the former and reflects the sociocultural realities of a community and should, therefore, bring about legal decriminalization as a matter of course.

⁴Rico, José: "La Decriminalización: El Ejemplo Canadiense." Cuadernos Panamenos de Criminología 5, 1976, p. 61.

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Field of Application of Decriminalization

No hard and fast rules can be stated with regard to which types of behavior are susceptible to being decriminalized, because ethnic and cultural factors, the climate of public opinion, and political, economic, and social realities vary from country to country. Of course, as has already been mentioned, some types of criminal behavior lend themselves best to decriminalization: homosexuality, prostitution, pornography, adultery, lewdness, unnatural sex, abortion, antisocial behavior (vagrancy, begging, drug abuse, and alcoholism), misdemeanors (petty larceny or swindling), unauthorized use and theft of vehicles, gambling, and traffic violations. Some penal codes already consider such acts as matters for arbitration and compensation rather than for penal sanctions. To these must also be added participation in marches, demonstrations, conscientious objection to military service, littering, insults, criticism of state power, indecent exposure, and fortune telling.

We shall now analyze which categories of offenses could be candidates for decriminalization.

Juvenile delinquency. Court proceedings in cases of juvenile delinquency have proven ineffectual and costly. We do not advocate decriminalization of offenses committed by juveniles: we would only remove from the criminal codes those offenses which, if they were perpetrated by adults, would not be considered crimes, together with some forms of deviant behavior by juveniles (as distinguished from serious crimes, such as violent rape, homicide, assault), including traffic violations, disturbing the peace, typically adolescent misbehavior, and nonviolent crimes against property. In this regard, the Canadian project for treating juvenile delinquents through social institutions, without recourse of court trials, is of interest.⁵

Such new solutions to the problem of juvenile delinquency are critically needed because juvenile delinquency is increasing in all countries, along with the percentage of young people below the age of 25 (in 1980, 65 percent of the world population).

Sexual offenses. The new climate of social permissiveness has brought about two schools of thought with regard to sexual offenses: the first calls for decriminalization of all sexual offenses, the second distinguishes between acts involving adults and minors. Clearly, sexual abuse and corruption of minors are not suitable for decriminalization, whereas acts that represent only the moral aspect of the problem (homosexuality, pornography, prostitution) are susceptible to decriminalization. In some countries adultery and bigamy are considered sexual offenses; in others, they are regarded as offenses against honesty and morals. We feel they should be decriminalized, because the social climate in which they were considered crimes has changed completely.

Crimes against life and bodily integrity. Some forms of killing have been decriminalized during different

historical periods (infanticide, homicide by euthanasia). Currently, artificial prolongation of life by extraordinary means and the termination of life by cutting off life-support systems, abortion, and suicide attempts, are all subjects of lively disagreement in terms of decriminalization. While suicide attempts are clearly a matter for psychiatric treatment, and should doubtless be decriminalized, political or pseudorevolutionary assassinations do not call for decriminalization but for some other solution which cannot be discussed within the limited scope of this work.

Crimes against property. Various types of theft or robbery have already been decriminalized de facto (theft prompted by hunger, among others). This is not an area to which uniform criteria for decriminalization can easily be applied. Generally speaking, petty larceny (such as shoplifting in supermarkets), domestic thefts, thefts by workers at their place of work, and kleptomania, should be decriminalized. Criteria for decriminalization include the absence of violence, economic hardship as an extenuating circumstance, or the possibility of restitution by the criminal through work. Some authors go so far as to advocate decriminalization of bank robbery and auto theft, which they regard as a mere transfer of social costs.⁶

Deviant behavior. This is the area in which decriminalization should be applied without reservation. Traditional types of deviant behavior, such as alcoholism, drug addiction, prostitution, begging, and vagrancy call for new, enlightened social remedies. Drug addiction in particular, with the exception of drug trafficking, should be treated with psychological and psychiatric help. Drug dealing has so many ramifications and so many people are involved in drug transactions, including corrupt police and government officials, that the problem appears complex and difficult to resolve. Undoubtedly, distinctions must be made between the degree of culpability of drug distributors and their clients.

Traffic offenses. The constant increase in traffic fatalities alarms both the authorities and the public at large. Statistics indicate that the courts are overloaded with traffic cases. The time is ripe for decriminalization of traffic offenses, and such was the consensus at the Amsterdam Symposium of 1975 on Penal and Penitentiary Law on Traffic Offenses.

ANALYSIS OF THE SITUATION IN PANAMA

"Prison punishes and confines, but does not reform; it teaches the sad truth that there is no turning back from crime."—Mariano Ruiz Funes on the prison crisis.

Panama is ready for the decriminalization of such acts as abortion, adultery, and cohabitation, as well as of lewd and obscene behavior. It is also time for criminalizing such hitherto overlooked types of behavior as tax evasion, swindles, fraud, and corruption by revising

traditional concepts of what constitutes crime. The criteria for criminalization and decriminalization must vary from country to country and must mirror the actual political situation in each one of them. The penal system in Panama is basically colonial, just as in other Latin American countries. Panama's correctional institutions and philosophies are obsolete and essentially based on retribution, which leads to penal inflation. Fortunately, a reform of the Panamanian Penal Code is under review by a commission and the time is favorable for introducing the decriminalization of certain types of behavior and categories of offenders.

Juvenile Delinquency

As a developing country, Panama is not immune to the worldwide increase in juvenile delinquency and is also experiencing an increase in the percentage of young people below the age of 25. Many adolescents admit having committed one or two illicit acts. However, sentencing them to reform schools and other correctional institutions, which are schools for crime, is not the proper solution to the problem. Alternatives should be explored, and an examining agency could help determine which juveniles should go through the courts and which should be diverted.

Traffic Violations

Rather than decriminalization, the depenalization of some traffic-connected offenses appears advisable. However, traffic fatalities in Panama have increased so dramatically in the last 10 years that any measures aimed at preventing such tragedies, even decriminalization, should be considered.

Sexual Offenses and Crimes Against Honor

In the existing penal code these crimes are grouped under Title XI, where they are generally defined as crimes against morals and the institution of the family. The commission entrusted with the revision of the penal code has decided to depenalize, or reduce the penalties, for some of them. For example, adultery and cohabitation were depenalized. Bigamy is now simply defined as illegal marriage. Lewd and obscene acts have kept their criminal character only when minors are involved. Abortion and drug use are being reexamined, but drug dealing is still subject to highly repressive measures, especially with regard to international trafficking. The financial costs of crime in Panama are high and steadily increasing. Preventive detention, the slow pace of the administration of justice, and the imprisonment of criminals in correctional institutions are expensive. In particular, if incarceration were replaced by measures suggested by the High Level Commission for Penitentiary Reform in Panama, costs would be greatly reduced.

GENERAL CONCLUSIONS

Investigations aimed at evaluating the effectiveness of penalties and forms of treatment have proved conclusively that many offenders now confined to prisons could be treated within the community without increasing the risk of recidivism. It is not possible to abolish imprisonment entirely as a penalty or as treatment for the offender, because prevention of recidivism is not the only goal of sentencing. Prisons must be maintained for offenders less likely to be rehabilitated and for those who have committed serious crimes, but correctional institutions should be very different from the existing prison facilities.

Decriminalization and criminalization are not universal panaceas for the elimination of crime. Both should be part of a criminal policy. The process of decriminalization is only one way to reform the administration of justice. Nonetheless, types of behavior which have acquired greater importance under current technology and sociopolitical conditions, such as financial crimes, corruption, and political crimes, should be criminalized.

Substitute penalties for imprisonment must be studied, such as partial freedom, weekend arrest, and compulsory work outside prison, as should therapeutic treatment of offenders by anthropologists, physicians, psychiatrists, and psychologists. Some of the traditional penalties—e.g., parole, probation, and suspended sentences—should be retained. All these measures can be applied only after in-depth studies of each country's characteristics and of public opinion; above all, gradual implementation is important.

SPECIAL CONCLUSIONS FOR PANAMA

Although the proposed reform of the penal code in Panama is still conservative in approach and based on retribution, it does contain proposals for decriminalizing some offenses and criminalizing others. There is a need for replacing judicial intervention with other types of local jurisdiction agencies, such as treatment centers for alcoholism and drug addiction, medical and psychiatric clinics, counseling agencies for juveniles, and aid to families.

Imprisonment cannot be entirely eliminated as a penalty, but it should be only one among several other weapons in the fight against crime. This does not mean that we should be satisfied with a criminal policy only slightly modified by the above measures. The decrepit penal system now in existence must undergo a drastic transformation accompanied by the substantial reform of sociopolitical structures in order to achieve a new system in which the freedom and dignity of man are respected.

⁵Op. cit., Rico, p. 72.

⁶Hulsman, I.H.C.: "La Decriminalización," quoted by Rico, op. cit., p. 63, Coloquio de Bellagio, Italy, 1973.

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