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WE ARE THE IVING PROOF... ”

JUSTICE MODEL FOR CORRECTIONS

Second Edition

by David Fogel

word by LLOYD OHLIN, Harvard Law School

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"...WE ARE THE LIVING PROOF..."

David Fogel

"Fogel well knows the practicalities of prison cages, but his work is also informed by a sense of history and a vigorous attachment to human rights. This is an innovative and important book which will have lasting impact on sentencing and imprisoning."

Norval Morris
Dean,
University of Chicago Law School

"An impressive integration of history, intellectual comment and personal analysis on the American system of punishment and prisons. Fogel's "justice model" for corrections should be a pathfinder and, as he demonstrates, its seeds are already in the wind."

Daniel L. Skoler
Staff Director,
Commission on Correctional
Facilities and Services,
American Bar Association

"Mr. Fogel's thoughtful manuscript presents both an historical perspective against which immediate decisions can be measured, and a mix of conclusions sufficiently precise to suggest to the policy-maker what he ought to try to do right now to make some sense out of the criminal justice system. Mr. Fogel's proposals have been carefully read and broadly discussed at the highest levels of the Federal government, and have been immensely helpful in catalyzing some of the thinking which went into drafting the President's special message on crime."

Richard Tropp
Special Counsel,
Presidential Clemency Board

PHOTO—Attica Rebellion, 1971

State Police herd subdued inmates into A yard before stripping and searching them.

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By

David Fogel

B.A., M.S.W., Dr. of Criminology

Executive Director

Illinois Law Enforcement Commission



**Criminal Justice Studies
Anderson Publishing Co.**

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for carl bingham

"The law must serve everyone, those it protects as well as those it punishes."

**Article VI, *Declaration of the
Rights of Man*, 1789**

NCJRS

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FOREWORD

A rising tide of criticism challenges the prevailing policies and practices of criminal justice agencies throughout the United States. Public disillusionment and professional cynicism is widespread, fueled by the constantly rising crime rates which large, new appropriations of government funds seem unable to curb. These criticisms focus most sharply on the failure of the correctional agencies to reduce recidivism among convicted offenders. The climate of public opinion lends itself most readily to new demands for more repressive measures to increase the punitive and deterrent effect of correctional decisions. Advocates of more punitive sanctions are convinced that only more certain, more visible and more severe sentences of imprisonment for offenders will provide an adequate measure of deterrence and public protection.

Another group of critics espouse an opposing set of premises. They feel that it is not the underuse but the overuse of large maximum security prisons and uncontrolled administrative discretion in sentencing and parole decisions that constitute the failure of correctional policies to deal more effectively with the crime problem. These critics recommend the abolishment of the fortress prison, a moratorium on current prison construction, and the elimination of the indeterminate sentence and parole boards. They locate the failure of current correctional policies in the brutalizing and degrading effects of prison life and the destructive impact on offenders of unreviewable discretion by judicial, prison and parole authorities.

The position expounded in this book does not fit neatly into either of these opposing camps. On the one hand the author seeks to enhance both the certainty and the predictability of the operation of the criminal justice system. On the other he insists that the correctional system must be above all both humane and fair in its operation and conditions of confinement. In this book he is less interested in utopian solutions than in devising short-

term and middle-range solutions to shape a rational and acceptable set of correctional policies.

The issues the author must deal with are made no less difficult by this more limited and practical approach. If we do not place our confidence in the utility of fortress prisons, what types of correctional confinement or alternatives to imprisonment should we substitute instead? If our efforts to rehabilitate offenders and reintegrate them into law-abiding communities are ineffective, what principles and objectives should guide the management of prisoners? If the indeterminate sentence and parole board control over release decisions ought to be abandoned, how are we to maintain order in prison or to motivate offenders to change their lives? If the fortress prison is to be abandoned, how are we to identify and deal with that residual population of intractable, dangerous offenders from whom the public must be protected?

In this book the reader will find provocative, thoughtful and often iconoclastic answers to these and other questions. The author shows compassion and empathy not only for the prisoner but also for the neglected victims of crime and the harassed custodial guard force trying to administer conflicting and irreconcilable objectives in the fortress prison. His proposals constitute an integrated system which deals with central features of the malaise that now afflicts current correctional policies and practices. His solution is built on the idea that "Justice-as-fairness represents the superordinate goal of all agencies of the criminal law," and the propositions which flow from this basic principle.

In considering the application of this overriding principle, Fogel deals with the appropriate role of legislative, judicial, and administrative discretion in the setting of sentences. He considers the relative balance between the use of imprisonment and its alternatives, the role and design of maximum security facilities in the prison system, the problems of maintaining prison discipline and order, the place of rehabilitation and treatment programs for offenders, the participation of prisoners in setting the conditions of confinement, and other problems of infusing the prison system, its conditions, and practices with "justice-as-fair-

ness." In seeking answers for such fundamental questions, the author sketches the broad outlines of a philosophy and a design for a new system of sentencing and corrections. Inevitably, he leaves many details undeveloped while making it clear that the process and the problems of reform in different states will vary considerably. However, he attacks in uncompromising fashion hypocritical attitudes and defensive postures which obscure our capacity to devise realistic and rational alternatives. In short, he outlines a more constructive model of corrections and a new sense of purpose and direction for the future.

The author's proposals for change are fundamental and cut deeply into basic supports of a system long taken for granted. The system he describes is an integrated one which must supplant the present system in its entirety in order to be effective. There is always a measure of risk in proposing such major departures from existing practices. One of the greatest dangers is that parts of the new system will be adopted on a piecemeal basis without essential corrective changes in the existing system. This approach, for example, might result in more frequent use of confinement and for longer periods than is now the current practice. Will the older, outmoded fortress prisons really be closed as new model units are opened? Will the risk of arbitrary and discriminatory parole decisions be supplanted by equally arbitrary and discriminatory sentencing by judges? The proposals advanced here can only be properly tested if they are instituted as a comprehensive alternative to the present system of correctional policies and practices.

There is also a danger that the author's stress on "justice-as-fairness" might be adopted as a guiding principle for the development of a new model of prisoner rehabilitation. The author clearly intends that it should be the basic principle for organizing the correctional system itself in a manner that is both defensible and consistent with the ideology of a democratic society. He also believes that strict adherence to this principle will remove many of the sources of discontent with the present system. Will such a system also teach the individual offender to act more lawfully in his relationships with others? Will he learn