

NEW TECHNOLOGIES, NEW PUNISHMENTS, AND NEW THOUGHTS ABOUT PUNISHMENT

Vincent Luizzi
Southwest Texas State University

One of the newest correctional devices which recent technology has made available is the electronic surveillance of offenders. In the literature on this device is a lively discussion of its nature, use, and justification. Participants in the debate appeal in a haphazard fashion to a variety of ethical theories and theories of punishment as they struggle to evaluate the new practice. Their adherence to no well thought out theory of punishment mirrors most public debates on most matters about the correction of offenders. I take the opportunity today in Bologna at this 17th IVR World Congress, which is dedicated to "Challenges to Law at the End of the 20th Century," to forge ahead with some new thinking about punishment. This thinking provides not only a framework for evaluating electronic surveillance but also one for thinking about punishment as part of a larger theory about self and society; the theory which I offer ultimately has us think more in terms of offender to do good rather than do bad to the offender.

Let us begin to acquaint ourselves with the world of electronic surveillance by considering first some basic facts about it and its use and then by considering what we primarily find in the discussions of it -- the pros and cons. Electronic monitoring entails the participant's wearing an ankle bracelet or anklet. A monitoring receiver is connected to the participant's home telephone. The anklet sends a radio frequency signal to the receiver which is connected to a monitoring computer of the host. If the participant goes beyond an accepted range (150-200 feet) of the detention base, the signal is broken and a computer sends a report of violation to the participant's probation officer. Further, participants are telephoned and asked to connect a verification device to their anklets to demonstrate their presence at home. Another type of electronic surveillance involves no anklet but does involve the participant's being called on the telephone randomly by computer; participants identify their presence at home by their voices being checked against a voice template which is stored in a computer.

The practice is about a decade old with the first program which endured beginning in 1984 in Palm Beach County Florida. Some people talk about electronic monitoring as a new alternative to the traditional alternatives to incarceration or fines, probation, and suspended sentences. Some people see the use of electronic monitoring as a part of probation in that the use is one of a set of conditions or terms of a probation contract. Other researchers depict it as simply a variation of an established practice of detaining someone at home -- house arrest -- with the use of electronic surveillance amounting to a "technological extension" of house arrest. What is different with this variation, some analysts bring out, is the purpose of the house arrest. Previously it was conceived as a mechanism for rehabilitating offenders and weaving them into the community fabric whereas the focus now seems to be on surveillance and control of the offender in response to such factors as rising prison costs and public intolerance of crime. Some commentators affirm that electronic monitoring allows us reasonably to meet both the goal of protecting the community and of rehabilitating the offender while others have no problem in seeing electronic monitoring's allowing us to promote retributive and rehabilitative ends or allowing us to protect as we rehabilitate.

In 1988 a report of the National Institute of Justice of the U.S. Department of Justice showed 20 states monitoring electronically about 5000 offenders on any given day. One journal article reported that the number of people in the U.S. and Puerto Rico under this form of surveillance was 6490 by February 1989. Another article reported that 21 states were monitoring 826 offenders in 1987 and by 1988 33 states were monitoring 2277. One report identified the people under surveillance as misdemeanants and felons who otherwise would be imprisoned while the another report identified these people as people committing minor property offenses and people offending traffic laws and laws against drunk driving with juveniles and adults participating. Participants pay surveillance fees of \$30-50 per month. According to one commentator, we see fees increasing as the cost of monitoring is decreasing.

Just the titles of some of the articles in the literature on electronic monitoring give us a clue to the range of issues which the practice has given rise to: "High-Tech Monitoring: Are We Losing the Human Element?" "What about House Arrest?" "House Arrest: A Viable Alternative to the Current Prison System" "Electronic Home Detention: New Sentencing Alternative Demands Uniform Standards" "Prisoner in My Own Home: The Politics and Practice of Electronic Monitoring" "Electronic Monitoring: Another Fatal Remedy?" Let us get a deeper sense of these issues and controversies by turning to the advantages and reasons to which people have pointed to justify electronic monitoring. A number of commentators point to the cost-effectiveness of the practice. Significant for one commentator is that the offender works and pays taxes, probation fees, and restitution to the victim. One analyst argues that this effectiveness coupled with statistics on revocation and recidivism points to the viability of electronic surveillance as an alternative to incarceration. We also find in the literature observations about the practice meeting community and offender needs, its low escape rates, its ease of implementation, its flexibility, and its being humane and cheaper and less corrupting than incarceration. One thinker finds that electronic monitoring is not overly intrusive and does not entail the total control of the offender as prison does. Further, it allows the offender to avoid the stigma of prison as it preserves the integrity of the offender's family unit and paves the way for the offender's adjusting to community life.

As for the disadvantages and reasons to which people have pointed to argue against the use of electronic monitoring, we find doubt cast upon the cost-effectiveness of the practice. Some programs proved to be unprofitable and folded; some failed due to onerous startup costs. One researcher reports in a 1992 journal article that the data show the efficacy of monitoring to be controversial although they do clearly show that the monitoring has not yet reduced the overcrowding of prisons. Another researcher denies that monitoring has reduced recidivism. In addition, the cost-effectiveness of monitoring, according to one researcher, should be assessed against the alternative of probation in which case probation prevails as the better alternative, most notably because of the key role which people play in probation. One thinker underscores the usefulness of reducing the prison population of minor offenders by using probation with community service in the light of his concerns with the implications which monitoring has for future social control.

This possibility for increased social control through the use of electronic surveillance is what worries a lot of people, with some of them wondering whether this is a step toward total social discipline, toward constant control by surveillance, and with all wary about overuse and abuse. Some people are concerned that even our current use of monitoring is clashing with constitutional rights. Allegations range from its forcing people to incriminate themselves, to endure cruel and unusual punishment, to be subjected to unreasonable searches, and to its unjustly curtailing basic freedoms of speech and association. Moreover,

charges are made that we are turning the home into a prison and abandoning a longstanding tradition of thinking about home as the last bastion free from governmental intrusion.

Other factors which figure into people's estimation of the downside of electronic monitoring include its limitations for incapacitating an offender and the attendant compromising of public safety, its reducing the severity of punishment and the attendant frustration of our retributive and deterrent objectives, and the discriminatory fashion in which surveillance programs operate; one form of discrimination involves poor people's inability to participate for want of telephones, homes, and money to pay fees; another form involves racial and class biases in the selection of participants.

What I see in this discussion is a wide variety of goals being endorsed for a system of punishment as I see a wide variety of moral considerations being appealed to in thinking about punishment. I find one and the same thinker talking about how some practice furthers retributive, deterrent, and rehabilitative goals with no attempt or concern to keep these approaches separated from one another as we find in the philosophical literature. The approach is experimental and pragmatic and I say pragmatic not in any pejorative sense but to invoke the distinctively American contribution to philosophical thinking, pragmatism. The thesis that our legal system is and should be pragmatic in nature is not a novel one; recently I added to the pool of such thinking by bringing out the pragmatic nature of legal ethics. But I am not satisfied with simply observing and illustrating that aspects of our legal system are pragmatic in nature. However desirable an experimental approach is in and of itself, the approach falls short of providing comprehensive guidance. Even if we adopt Pound's notion of experimenting to achieve social interests, we still have only a theoretical framework for thinking about the larger social order; it leaves out our experiences within contexts smaller than society as it omits talk of our social roles beyond being citizens. Here is the model which I have developed from my observations about the pragmatic features of legal ethics. It is a model which captures the complexity of the moral evaluation together with the pragmatic nature of our legal system's approach to punishment. I first observed that lawyers think of their obligations and rules which guide their experience in terms of how they conceive of themselves and that these conceptions are open to ongoing evaluation and reassessment. Looking more generally into how this process has significance for anyone, I developed a theory of human nature which accounts for and theoretically grounds the lawyer's activities as much as it does someone who is developing a conception of a role and the rules which this conception brings with it for the governance of conduct.

It is our nature to be active role constructors of roles ranging from our work and family and social roles to our most general condition of being human. Moreover, recognizing that our conceptions of our environments can be seen in terms of how we see ourselves in our environments, we may see them too as open to our construction and as carrying advice for how we act. Thus, we are concerned with a comprehensive picture of how we construct conceptions of ourselves as humans, as parents, as citizens, as law enforcement officials, teachers, as lawyers, and as judges within the environments which we construct of family, classroom, an adversary system, a system of punishment, a community, and of society. We want a consistent profile of ourselves and of our environments and we want one which we are willing for others to imitate for we recognize that our social reality is one in which role modeling is a reality. Here the moral limit and scope of our constructive endeavors emerges. This standard in effect is a restatement of the Golden Rule or of Kant's first formulation of his categorical imperative but is derived from what we know about our functioning in a social reality.

We should look at such new correctional methods as electronic monitoring as invitations for us to rethink our commitments to how we think of ourselves in our contexts; of particular concern here is how we think about ourselves and the context or institution of punishment. And if we think not differently of ourselves in the end, we still are afforded an opportunity to reaffirm in a contemporary setting a value or view which we still wish to endorse. We have an opportunity and a special reason for speaking out on where our best thinking for the moment takes us regarding the application of our constructed conceptions to a matter of pressing current concern. And in so speaking out we create the possibility for our conceptions obtaining.

With this pragmatic, developmental approach we can turn to our legacy of ideas about punishment as grist for our constructions. Let us put the basic moves on the table. Utilitarians justify punishment because it promotes social utility by deterring crime. Retributivists see punishment as society's necessary response to wrongdoing and as giving the offender what the offender deserves. Kant, the classic retributivist, abhorred the utilitarians' willingness to use people for deterrent purposes, since this use conflicted with the categorical command to treat people with dignity. Barnett offers a theory of pure restitution which depicts the offender as having no debt to society but only to the victim.

Some theorists look for alternatives to punishment like treatment and rehabilitation. Menninger, for example, urges that we repudiate our vengeful ways, recognize crime as a disease, and replace punishment with therapy. Other alternatives come from a Christian perspective. Tolstoy brings out that Christian teachings, like loving one's enemy, forgiving, considering no one worthless, not seeking an eye for an eye, and turning one's cheek, show the madness of anyone who sees punishment as necessary. Clarence Darrow invokes the wisdom from *Matthew* in the title of his book, *Resist not Evil*, which also issues a call to stop punishing people and to treat them with Christian love and kindness.

My own sense of these theories of punishment is that they turn on some very few and simple alternatives; and we can conceptualize these alternatives with the traditional scales of justice whose balance has been upset by some evil which an offender has brought into the world. People like Darrow and Tolstoy are at an extreme with a non-theory or a rejection of the institution; the scales of justice serve no purpose for them. While they acknowledge that the scales have tipped in one direction, we should not be concerned with offsetting the imbalance. The other theories do invoke the scales with the starting point that the perpetrator has done some evil which has caused them to tip in one direction. They all seem to proceed to balance the scales by directing evil at the malfasant; the variations come in where additional reasons for punishing, or in effect, for bringing more evil into the world are offered and where decisions are made as to how much evil to create for the offender. Retributivists create it because the criminal deserved it; utilitarians, for the good of society. As to how much, we know they debate over whether the evil should be equal to or proportional with the moral gravity of the act and to what extent should such considerations like mercy and interests to rehabilitate lessen the evil created for the offender.

Even theories like Menninger's and Barnett's seem to employ this model of balancing the scales in the traditional fashion. In evaluating a humanitarian theory of punishment like Menninger's, C.S. Lewis brings out that, in effect, we still punish offenders even when we treat them, since we take them away from their homes and deprive them of their freedom. And Barnett, with pure restitution, claims only to be shifting the locus of the debt of the offender -- from society to the victim -- in distinguishing his view from traditional theories of punishment; we still create an evil, the debt to the victim, to offset the offender's evil. If we insist on using variations of this model of the scales of justice where the offender's evil

has created an imbalance, we should at least consider fully what further basic alternatives it offers, especially in the spirit of constructing an adequate conception of the institution of punishment.

One alternative is to think in terms of offsetting the evil which the offender produced with good which the offender is required to produce. We tacitly invoke a model of this sort when we require someone to perform community service, but I think that these sorts of sentences are thought of as sometime substitutes for our usual notion of sentencing to punish and have not served to guide our thinking to broader applications. Again, in this view, we still try people to determine their guilt; we still hold the guilty responsible for their acts; we still give them what they deserve as justice dictates; but we do not send evil their way, instead we have them produce good.

This model has us treat the offender not as some passive recipient of pain or evil which we have caused for the offender. Our agency instead triggers events which cause the offender to assume an active status and to become a producer. This model in effect says as much about the nature of punishment as it does about how we think about ourselves, offenders, and society. We ourselves are not producers of evil; we are not beings who are gratified when primitive impulses of vengeance are acted upon. Presumably, when we committed ourselves to justice, we ruled vengeance out, since vengeance has no limits. This model still commits us to justice but simply offers different materials for thinking about how we give people what they deserve. We do not have the evil of punishment dwell in the present and future which is the case when we focus on past acts of evil. We concern ourselves instead with the future production of good. We focus not on causing people to endure evil but on positioning them to produce good. We emphasize not the worthlessness of one's past or present status or acts but the worth of future contributions for society and for the individual's estimation of self.

It is a model which comports with our some of our intuitions about our own wrongdoing and how we maintain our own conceptions of selfworth in the face of this wrongdoing. If we bring harm to another in whatever form -- we insult, we accuse, we stand someone up, we neglect someone, surely our initial response is not to inquire into how we shall punish ourselves, into what the right amount of evil is that we should send our way, into whether we should detain ourselves at home for the next five evenings, whether we should deprive ourselves of dessert, whether we should restrict our socializing, whether we should take some stack of dollar bills which we have been saving and tear them up and throw them away. We think in terms of what we can do to make up for the what we have done, and that something is not a report of how we plan to punish ourselves. We feel better when we are able to do that something, that good, and dislike receiving a cold shoulder instead of an acceptance of our attempt to right the wrong. We dislike the cold shoulder (as a type of evil being sent our way) because it highlights and perpetuates the wrong and diminishes our sense of worth. So when we think it so natural to send evil the way of wrongdoers, we certainly are drawing on no model of what seems to be the natural response when we are the wrongdoers, a response of doing good to compensate for the evil which we have caused. When our response is one of wanting to deliver evil to the offender, we objectify the offender and classify the offender purely as wrongdoer; in the absence of any personal interaction with offenders which might remind us of offenders' having instincts similar to ours, we hurl the evil at the offenders, virtually the last group in human society which we can legitimately objectify, stereotype and toward whom we can legitimately direct our hatred and sanctions.

Our exploration of this model should begin with an intuitively plausible starting point, e.g., sentencing a first-time juvenile shoplifter to 20 hours of community service, and as we

proceed to more serious offenses, asking what would be the do-good equivalent to the usual punishment. Western civilization has deliberated over two thousand years about how much evil to bring to the offender; our American society, for over two hundred years. So I do not propose to have all of the answers to the question of what an offender's do-good deserts are in all cases, having devoted little over two hundred minutes to thinking about, discussing, and writing this paragraph. But what about an offense more serious than the juvenile shoplifting? What about someone who steals a car? Would we increase the service? What would the terms of probation be? If we restrict people with these terms, can we reasonably associate these restrictions with productivity? If so, can electronic surveillance facilitate this process? Let us return to this question in a moment, but let us persist with the issue of offender to do good counterparts to the usual do bad to offender punishments.

I think that this model allows us to think in terms of positioning the offender to do good as much as the doing of good itself, in terms of educating offenders and giving them contact with positive role models as much as in terms of having them serve. Since this model has us think about those whom we feel we must detain for purposes of public safety as producers during this detention, it has us think about personnel in these facilities more in terms of social workers than distributors of the evils of prison life. It may have us think about offenders being able to earmark their payment of fines as going toward certain community projects and programs.

Some people may object to this model on the ground that society and especially victims and families of victims will never be satisfied with this approach. I am uncertain what to make of this complaint. Is social satisfaction the measure? Many people are dissatisfied with their income levels but we are not about to distribute income supplements until we think they have reached the right level of satisfaction. Other critics might object that people might take matters into their own hands and personally do harm to the offender. This seems to amount to saying that some people are so concerned that some true justice be done that they are willing to do what they so abhor in others — break the law. This sort of person sounds like one motivated by vengeance which, presumably, has been set aside once we are committed to dealing with offenders justly. Could not people of this sort learn something from a society's example of how it wishes not to inflict evil on offenders?

What about people who are concerned with deterrence and their worry about the ability of this model to provide for it? These people would point to current offenders as evidence of the inadequacy and uncertainty of the evil which the current system inflicts. As they get tougher on crime, they move closer to inflexible, inhumane, or unrealistic sentences like the recently proposed "three strikes and you're out" legislation of President Clinton. Are we so convinced that tough, certain sentences will deter that we are willing to support active young recidivists as they spend their autumn and winter years in prison? Furthermore, if we believe that punishments of the traditional nature really do deter, we credit wouldbe offenders with envisioning what life would be like were they to incur the punishment. If we think we are dealing with would-be offenders of this ilk, surely we would think them as capable of envisioning what it would be like say, to lead a life of doing good for the society as they are of envisioning what a life in jail would be like. If so, we are looking at a group of people who wish to do what they will with their lives and who are perceptive enough to realize how the criminal path can put a red light up along their life's way. So if we believe that we do deter with our current system of punishment, it seems that we can continue to do so with the proposed model, given that any sort of deterrence seems predicated on people's not wanting their lives interfered with.

Still others may object that we are imposing our conceptions of good on the offender and that the traditional model simply gives the offender a dose of the offender's own medicine. On either model we are imposing our conception of good on the offender as we assert that we have a claim on the offender's activity. Our good has been interfered with and in the name of that good we will require something of the offender, something to balance out that evil which the offender brought about and which interfered with our good. Whether we balance the scales by sending evil the way of the offender or by requiring the offender to do good, we are still imposing our conception of good.

How might this model guide us in the evaluation of electronic monitoring? On one line of thinking, if our goal is merely to detain, and that detention represents the evil which the offender deserves, then we quite obviously have not been guided by the model, and we could, by reference to the model criticize the use of electronic monitoring. Further, many of the objections to the use of electronic surveillance which we considered above can be made with additional force as they are cast in terms of frustrating a primary objective, that of requiring service of the offender. Thus, when we arrest and monitor in the home, one might object not only on the ground that we are invading the sanctity and privacy of the home but also for a purpose which we find objectionable, that of inflicting evil on the offender.

We might, however, think of the model as providing an ideal toward which we must incrementally strive. On this line of reasoning, we do not think it feasible to expect society to convert with any rapidity to a model of offender to do good. Rather we must seize opportunities to ameliorate current practices of balancing evil with evil, and where possible, introduce the proposed model. Here, the employment of monitoring could be seen as a meliorating of the evil of a prison term and as an acceptable practice. Further, we might find situations where we can sensibly assert that the surveillance is assisting in positioning the offender to do good. The surveillance may contribute to inclining the participant to develop new habits as the participant stays in at night. Or conceivably, the offender could be performing some service at home or participating in an educational activity.

Further, the nature of confinement as a means of inflicting evil, which is largely invisible to us when it occurs in prisons, becomes more evident as this detention occurs in the home with electronic monitoring. There are more realistic opportunities for people to observe and assess what we are accomplishing when we turn to detention as the evil with which we offset evil. If this visibility, which electronic monitoring can provide, leads people to seeing that the offender's doing something productive for the community is better than the offender's merely receiving the sanction of having his or her freedom restricted, then, again, this monitoring moves us incrementally toward the goal of the model and is desirable.

The point is that devices like electronic monitoring which high technology makes available come with no simple moral descriptors, right or wrong. How we evaluate them should be a function, I have proposed, of how we think about how best to conceive of not just a system of punishment but of ourselves as humans and as occupiers of various social roles and environments. The model which we developed quite evidently has called upon us to revise our thinking about punishment and how we think about ourselves in relation to our fellow citizens as offenders. Our thinking about these matters allowed us to move beyond some of the unstructured thinking on the pros and cons of electronic monitoring and make some observations about the ethics of the particular practice from a newly constructed network of ideas, prominent among them being the notion of offender to do good rather than do bad to the offender.