

Commentary

ATTICA REVISITED: THE PROSPECT FOR PRISON REFORM

Norval Morris* and Gordon Hawkins**

The Lessons of Attica

In September 1971 *Time* magazine ran a cover story on "The Bitter Lessons of Attica" that was an admirable exercise in vivid news reporting. When it came to the question of "what Attica will mean for the future of prison reform," however, the answer was chastely non-committal. "Attitudes toward Attica," we were informed, "are still so divided that it is uncertain whether this tragedy will help or hinder the cause of prison reform."¹

What were the bitter lessons of Attica? That we have "a penal system that almost everyone agrees is a disgrace."² But also that "to destroy the nation's obsolete prisons and to build new facilities would cost from \$10 billion to \$12 billion." That we should "develop alternatives to prisons." But also that "these programs would consume billions of dollars" and "there is no guarantee that these changes would drastically lower the crime rate or cut down recidivism." That there is a "need for humane reforms." But also that "the U.S. has very special problems that do not afflict other countries—Sweden or Denmark for instance—where prison life seems more civilized."³

Above all, that "the presumed goals of prisons are various, and sometimes they conflict." The aims were described as being "to wreak

* Julius Kreeger Professor of Law and Criminology, University of Chicago.

** Associate Professor of Criminology, University of Sydney.

1. *Time*, Sept. 27, 1971, at 31.

2. *Id.* at 26.

3. *Id.* at 31.

society's vengeance on a criminal, to deter other men from violating the law, [and] to rehabilitate a prisoner so that he is fit to return to the open world." Whether any institution could be conceived or constructed that would simultaneously achieve these discordant purposes was cautiously avoided. "Some experts," we were told, "simply despair of ever resolving the dilemma."⁴ And there the matter was left.

But the matter cannot be left there. The correctional system has too long maintained its broad pattern of inefficiency, brutality, parsimony and neglect; and in the prisons, racial discrimination, idleness, squalor and hopelessness remain pandemic. Two studies published since Attica, *Struggle for Justice*, "A Report on Crime & Punishment in America," prepared for the American Friends Service Committee, and *Attica: The Official Report of the New York State Special Commission on Attica*, prepared by the McKay Commission, should together compel responsible political leadership—a scarce commodity—to reconsider our penal policies.

In this commentary we shall not discuss the para-military aspects of the events at Attica, the taking and treatment of the hostages, the role of the various negotiating groups, the behavior of Commissioner of Corrections Russell Oswald, or the absence of Governor Rockefeller. These matters are considered in detail both in the McKay Report and in Oswald's recently published reply, *Attica—My Story*.⁵ These books have, however, stimulated us to reflect upon some of the underlying contradictions and political cross-currents in the search for a rational prison policy in this country.

The report of the McKay Commission is important in this regard, quite apart from its analysis of the Attica events, because of the colourful suggestion that "Attica is every prison; and every prison is Attica,"⁶ and because, even more courageously, the McKay commissioners unanimously offer a preface declaratory of their view of the principles that should govern prison reform.⁷ These seven principles are a graceful

4. *Id.* at 26.

5. R. OSWALD, *ATTICA—MY STORY* (1972).

6. MCKAY COMMISSION, *ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA* xii (1972).

7. *Id.* at xvi-xix:

1. If prisoners are to learn to bear the responsibilities of citizens, they must have all the rights of other citizens except those that have been specifically taken away by court order. In general, this means that prisoners should retain all rights except that of liberty of person. . . .

2. The confinement associated with the deprivation of liberty of person should be the least that is administratively necessary. If a serious attempt is to be made to prepare prisoners for their return to society, they must not be cut off from all contacts with that society until their time is served. . . .

3. The programs and policies associated with confinement should be directed at elevating and enhancing the dignity, worth, and self-confidence of the inmates, not at debasing and dehumanizing them. . . .

statement of what was offered, in substance, in Cincinnati in 1870 in the Declaration of Principles of the First American National Prison Congress,⁸ by the Wickersham Commission in 1931,⁹ by the President's Crime Commission¹⁰ in 1967, and, if desperate advertisement be tolerated, by us in 1970 in *The Honest Politician's Guide to Crime Control*.¹¹ And, of course, the McKay report stresses their reliance on such often articulated principles:

The tragedy is that we persist in traveling the same wrong roads despite the fact that there has long been agreement among the experts about measures that should be taken—some that are fundamental, and some merely ameliorative of human misery; some that are expensive, and some not costly at all except in efforts of good will and human kindness.¹²

To this they add the warning: "If the state is to take seriously its stated commitment to rehabilitation, and not custody alone, dramatic innovation is inescapably necessary."¹³

In *Struggle for Justice* the Quakers agree in the urgency of the need for dramatic reform; but they disagree sharply and vigorously with the prescription. This is no mere abstract, theoretical and remote divergence of opinion, of interest only to scholars. It is of immediate practical importance since it is clear that unless more effective prison policies are developed and applied, we are likely to have many years of unrest, turbulence, strike, riot and revolt, years of death and injury

4. In order to encourage understanding between inmates and members of the community to which they will eventually return, community groups and outside professionals should be allowed and encouraged to participate regularly in the life of each correctional facility. . . .

5. The central dynamic of prison life is the relationship between inmates and officers. If correction personnel are to be more than mere custodians, they must be trained and paid in accordance with the difficulty and responsibility of their assignments. . . .

6. Vocational training and other educational programs should be conducted in accordance with the preceding principles. Among other things, work assignments should not be part of the punishment-reward system except to the extent that compensation is provided for work done. Inmates should be adequately paid for their work. . . .

7. Parole is the principal method by which most inmates leave prison. But, as presently operated, parole procedures are unfair, and appear to inmates to be even more inequitable and irrational than they are. For a correctional system to satisfy the principles here enunciated, the grant or denial of parole must be measured by clear and comprehensible standards, disseminated to inmates in advance. . . .

8. *Report of National Congress on Penitentiary & Reformatory Discipline, quoted in BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 524-25 (1951).*

9. Wickersham Report, U.S. Nat'l Comm. on Law Observance and Enforcement (15 vols.) (1931).

10. *See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE (1967).*

11. N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* (1970).

12. MCKAY COMMISSION, *supra* note 6, at xvi.

13. *Id.*

for staff and prisoners alike. But what kind of action is required? In order to answer that question some political realities of the contemporary prison community must be noted.

Reform and Revolt

The year 1971 was one of both more penal reform and of more penal revolt. And there were other apparent paradoxes. The Uniform Crime Reports reveal that there was more crime in 1971—on a decreasing rate of increase, according to a President determined to fulfill his promises—but that there were also fewer prisoners; about 190,000 being in federal and state prisons (not jails), 20,000 less than the peak prison population of the midsixties. These fewer were clearly more difficult to handle.

Prisoners run prisons. Immediate physical power is with them. The walls are armed but arms cannot—other than in a concentration camp—come into the yards or cells. Prisoners are largely anonymous in the mega-prisons of this country. A bitter complaint of the guard force as it came off duty from a riot in Pontiac Prison, Illinois, was that the wicked prisoners were removing their shirts! How would they be recognized? The ingenuous belief was that they were wearing the right shirts to begin with. Knives and other lethal weaponry proliferate in every big prison. Race relations are unambiguously hostile and ferocious. Violence is endemic and in the past has been contained, insofar as it has been contained, only by a complicated series of implicit contractual relationships between the leaders amongst the prisoners and the administration and staff of the prison. But the old order changeth; leadership is deposed; violence increases.

The intra-prisoner mortality and morbidity rate is barely noticed. Nor do we pay very much more attention to death and injury inflicted on prisoners by prison staff as a method of maintaining tenuous control. Such violence in the Tombs in New York, in Cummins in Arkansas, in San Quentin receives a few days' publicity. But many incidents seem to pass almost unnoticed. To give only one example: the shooting of 48 black inmates at the Indiana State Reformatory in Pendleton in September 1969. All 48 were lying on their stomachs, helpless and exposed at the time of the shooting; 46 were wounded, two were killed. Without a hint of embarrassment the Governor of Indiana and a county grand jury passed the matter off without an indictment being issued, all staff exonerated.¹⁴

14. See AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE—A REPORT ON CRIME AND PUNISHMENT IN AMERICA 6 (1971) [hereinafter cited as STRUGGLE FOR JUSTICE].

As the end result, we are experiencing a radicalization of the prison. In the racially skewed large prisons and jails of this country, a new and more politically conscious inmate leadership is emerging. There is no need for us to distinguish between a political criminal and a common criminal in this process. Many youths from the ghetto, coming in as common criminals, develop their political and social perceptions under the pressure of reflection and persuasion until we have, possibly for the first time in the world, the emergence of the "political prisoner" who is not a "political criminal." We take common criminals like Malcolm X, Eldridge Cleaver and George Jackson and, in the pressure cooker of the racially skewed and politically changing prison, turn them from common criminals to political activists. And their influence perseverates.

It is not only the prisoners, particularly the black and minority prisoners, who are finding new leaders and new political activism. In recent years new, more innovative wardens and senior correctional administrators have emerged. The entrenched prisoner leaders and the entrenched prison administrators are both being challenged. The old-guard warden is being disturbed. Social institutions, like ecological systems, tend to find a relatively peaceful balance. The warden who always knew what could not be done helped to preserve the ecological balance of the past. Today his steadfast resistance to change produces staff uncertainty, unrest and opposition to reform. And the staff in turn feed the fires of unrest.

The staff too are prisoners. When they leave the walls they live predominantly in village appendages to the prison, our large prisons being sited, for political and economic reasons, in remote areas with declining employment opportunities. Their contact with members of minority groups is confined largely to media headlines and to their Black, Mexican-American and Puerto Rican prisoners. They are traditionally hostile to the whole civil rights movement in this country. They have great difficulty in communicating across profoundly different linguistic and life styles. They are at the other pole of the political spectrum. Even those on the staff who are willing to renegotiate the contractual basis of a peaceful prison find communication itself with minority prison activists next to impossible.

In such a setting it is illusory to hope for rapid penal reform, even were we agreed on its appropriate direction. At the same time there has been a lamentable tendency for politicians and senior correctional administrators to oversell their product. They have promised so much and delivered so little. They have allowed themselves

to be seduced by the public's clamor for a quick and cheap cure to a complex and intractable problem.

The unreality of their promises of a swift reform of the correctional system tends to be quickly recognized by staff and prisoners alike. This makes their efforts at correctional reform, even their genuine efforts, appear as tokenism. The promises serve only to fan the flames of discontent. Within prisons anger explodes into violence. And outside the walls, fear, resentment and disillusionment steadily increase.

From Dream to Nightmare

To understand the disillusionment it is necessary to look briefly at the past. For the penitentiary system of today is not a purely fortuitous development. It is an American invention for which we can justly claim the credit and must also bear the blame. At first it was largely a matter of credit. It certainly reduced the barbarity of the capital and corporal punishments it replaced.

Thus Francis Lieber, who translated Tocqueville and Beaumont's *On the Penitentiary System in the United States*, was in no doubt about the merits of the system. Writing from "Manhattanville, City of New York" in 1833, he said, "[i]t is a matter of pride to every American, that the new penitentiary system has been first established and successfully practiced in his country. That community which . . . persevered in this novel experiment, until success has crowned its perseverance, must occupy an elevated place in the scale of political or social civilization. The American penitentiary system must be regarded as a new victory of mind over matter—the great and constant task of man."¹⁵

Lieber was not alone in his admiration. In the first half of the 19th century there was a regular flow of European visitors who came to inspect and report on the new penal systems and new prisons in America. The United States was accorded wide recognition and respect for its fertility of thought and energy in "the American system of reformatory prison discipline." Charles Dickens, visiting Philadelphia in 1842, said "[t]he Falls of Niagara and your penitentiary are two objects I might almost say I most wish to see in America."¹⁶

Today there are many who feel that what happened at New York's Attica Correctional Facility in September 1971, earlier at San Quentin, later at Rahway, and in many other prisons, is seen as final confirma-

15. G. DEBEAUMONT & A. DETOCQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE* 6 (1964) (F. LIEBER TRANS.).

16. J. SHEARER & N. TEETERS, *The Prison at Philadelphia Cherry Hill, THE SEPARATE SYSTEM OF PENAL DISCIPLINE: 1829-1913* (1957).

tion of the failure of the experiment begun with such high hope by the Philadelphia Quakers in 1790 in the Walnut Street Jail. One thing is certain. Progressive politicians and correctional administrators can no longer assume that penal reform is widely accepted as A Good Thing which reasonable people everywhere will automatically endorse. Penal reform is under attack from both the revolting left and the punitive right. Could it be that the Quakers' benevolent dream has ended as a bloody nightmare?

The Revolting Left; the Punitive Right

The case for such a conclusion is not difficult to sustain. By one of those ironic juxtapositions which make soap opera out of history, the bloodbath at Attica coincided with the publication of *Struggle for Justice*. In that report, today's Quakers condemn their predecessors with the peculiar ferocity characteristic of relations within family groups, noting unkindly that "the horror that is the American prison system grew out of an eighteenth-century reform by Pennsylvania Quakers."¹⁷ They condemn what they call "the correctional treatment" model—the coerced cure of the sociologically "sick" criminal—as based on assumptions that are either "unsubstantiated or in conflict with basic humanitarian values."¹⁸ And they state categorically: "This two-hundred year old experiment has failed."¹⁹

With Friends such as these, the American prison system needs no enemies. But it has them, and in ever growing numbers. The majority of them are considerably less concerned about human rights or humanitarian values than the American Friends Service Committee. Their dissatisfaction with the correctional treatment model stems from a quite different ideological basis. For them, that model is misconceived not because it involves some lack of respect for individual rights, but rather because it is seen as representing a misguided and sentimental departure from older and sounder punitive principles.

This viewpoint was forcefully expressed some 35 years ago by the late Director of the F.B.I. when he said that "what the criminal fears" is

unrelenting punishment. That is what he understands, and nothing else, and that fear is the only thing which will force him into the ranks of the law-abiding. There is no royal road to law enforcement. If we wait upon the medical quacks, the parole panders, and the misguided sympathizers with habitual criminals to

17. *STRUGGLE FOR JUSTICE*, *supra* note 14, at 6.

18. *Id.* at 83.

19. *Id.* at v.

protect our lives and property from the criminal horde, then we must also resign ourselves to increasing violence, robbery and sudden death.²⁰

Many citizens—perhaps a majority—would agree and also say that Mr. Hoover has been proven right. They would point with conviction to increasing problems of crime as we purport to be rehabilitating criminals. Moreover, they would say that in imposing severe punishments we would be giving offenders what they deserve. It is right and proper that they should be made to suffer for their offenses. And if the penalties really hurt, they will not only prevent the offender from repeating his offense, but also deter others who might be tempted to commit similar crimes.

A view similar to this, although unfashionable amongst liberal intellectuals, would probably be regarded by Archie Bunker and the square majority as self-evident. Nor can the hard line position be dismissed out of hand. Few feel the lash on another's back and it seems obvious to the unreflective that condign punishments deter. Absent a showing of effective reformatory processes, a strong case can be made for severe penal sanctions, combining security, firm discipline and deterrence. Indeed, there is a sense in which it is incontrovertible, because any failure, even centuries of failure, is seen as merely demonstrating the need for more severe punishments.

The Cant of Criticism

What Sterne called "the cant of criticism" is not confined to literary critics. The ideologues of both the left and the right demonstrate the same facility in the use of fashionable stock phrases and contemporary catchwords as a substitute for analysis in the field of social criticism.

When the American Friends Service Committee complains that "accepted correctional practice is dominated by indoctrination in white Anglo-Saxon middle-class values," and that "most correctional academic and liberal-reformist groups" have "enhanced" the principle of discretion "with tenacity,"²¹ that is part of what they are doing. The notion that "the functionaries" support a discretionary criminal justice system because "life is made easier for those who run the system . . . and those they serve, the dominant classes of the society,"²² is either a

20. Address by J. Edgar Hoover, Daughters of the American Revolution annual convention, April 23, 1936, *quoted in* SUTHERLAND AND CRESSEY, *CRIMINOLOGY* 347 (8th ed. 1970).

21. *STRUGGLE FOR JUSTICE*, *supra* note 14, at 43, 125. In addition to such cant, however, the Friends express a valid objection to the principle of discretion. See text page 758 *infra*.

22. *Id.* at 135.

distortion or betrays an ignorance of the reality of the correctional worker's life.

It is ironic that having had these tasks imposed on them by the Quakers of the late 18th century, those working in corrections should now be abused by the Quakers' 20th century descendants for performing them. Having taken nearly 200 years to recognize that it is time to go back to the drawing board, a less arrogant posture might have been more appropriate.

The crux of the matter as the Friends Committee candidly acknowledges is providing for a tenable alternative model of a criminal justice system. Yet their rhetoric presents no program which has the slightest chance of political acceptance. Their ultimate aim for reform is dependent upon the doubtless admirable but penologically irrelevant task of restructuring the entire range of social and economic institutions in our society.²³

The "Conservative" Prisoners

It is instructive by way of contrast with the rhetoric of the right and the left to look at the demands actually formulated by the prisoners at Attica. At the time of the riot, some of them were cited as demonstrating the prisoners' dangerous radicalism. *Time* magazine described them as "revolutionary." But it is difficult to see how they could be so regarded. Apart from those which arose specifically out of the riot situation, such as the request for an amnesty for inmates taking part in the rebellion, the sacking of the warden and the request for transportation to a nonimperialist country (which was ultimately dropped), the demands on the list were remarkably innocuous.

Most of them could easily have been compiled by a group of white middle-class Protestant prison reformers. The prisoners requested realistic, effective rehabilitation programs for all inmates "according to their offense and personal needs."²⁴ They asked for a variety of things such as a modernized inmate education system, expanded work release programs, adequate medical treatment, the abolition of censorship of newspapers, magazines and other publications, freedom for inmates (at their own expense) to communicate with anyone they please. None of the items constituted a rejection of, or a threat to, the system. Nor did New York State Corrections Commissioner Russell G. Oswald so regard them. He was able, therefore, to agree to put into effect the proposals for reform over which he had power, and to

23. *See id.* at 154, 158.

24. *Time*, *supra* note 1, at 21.

seek the support of the legislature for the rest. This was not difficult for him since most of the items on the list were things he had earlier promised to implement.

When one considers the seven principles offered by the McKay Commission as the path away from Attica and toward the new penology, it becomes apparent that they are in the mainstream of the liberal reformers castigated by the Quakers. The conservative prisoners and the no-doubt "middle-class" members of the New York State Special Commission on Attica want an end to the indignities and degradations of prison life, more community ties with the institution, reformative and rehabilitative prison programs, trained prison staffs, vocational and educational programs, defined standards for the exercise of the parole discretion—in short, "realistic, effective rehabilitation programs."²⁵

There is a remark near the end of the Friends' Report which is relevant here. "The experts—even the most enlightened and progressive—also line up solidly in support of the system, asking only for more of the same."²⁶ Yet if we read carefully the Attica prisoner proposals, the conclusion is inescapable that that is precisely what the prisoners too were doing—asking for more of the same.

Their demands do not constitute a revolutionary manifesto or an assault on the foundations of the institution of imprisonment. They contain little which does not fully accord with the spirit of the celebrated "Declaration of Principles" of 1870. Nor did the prisoners behave like revolutionaries. When one looks at recent riots in American prisons their most surprising feature is that the prisoners exercised appreciable restraint. Even those who feel no sympathy for them must acknowledge that they have stopped far short of inflicting those deaths and injuries on prison staff which it was certainly in their power to encompass. The tragedy of Attica where 43 men died, a death toll surpassed only once before in the history of American prison riots, is that the issue in that confrontation was really only the simple request that we implement unkept promises over a century old.

The Progressive Penologists

Is there anything more to be said? Many penal reformers and progressive penologists would not think so. The truth is, they would say, correctional reform has not yet been treated as a serious enterprise in this country. It is not so much that criminal justice system reforms

25. MCKAY COMMISSION, *supra* note 7, at 251-57.

26. STRUGGLE FOR JUSTICE, *supra* note 14, at 156.

have failed; it is rather that they have been token changes, nibbling away only at the periphery of the problem, with the larger system remaining untouched. We have a few door-step reforms, a few new facades; but corrections remain a Potemkin village.

It is not that we are facing a hideously intractable problem to which no solution is known. We know perfectly well what should be done. We know that we must better distinguish those criminals who present a serious threat to the community from the nuisances who continue to clutter our correctional system. The criminal justice system must become the agency of last resort for social problems; the institution must become the agency of last resort for correctional problems. And, in one sense, we must break down *all* the walls; the walls must not keep community influences out of such custodial institutions as we retain. We know that we must increase community links in all our treatment and control processes. We know we must expand and more effectively graduate our armamentarium of reactions to crime and to the convicted criminal.

We recognize that we must somehow escape from the crippling idleness, lack of training, inhumanity and futility of the mega-prison which still characterizes most state systems. We know that the prisoner must be given work and an opportunity to develop himself, and that if we wish to reduce his later depredations on society, it is incumbent upon us to give him some opportunity of a tolerable life of conformity when he is released from our control. We know our prisons are too large and generally too remote. We know all these things and some of them we have known for over a century. The riots and strikes have merely underlined the need for renovation of our correctional system.

Given more prison violence, a political backlash may well occur. But as yet the prison riots have not produced any powerful political or popular backlash. Most politicians have not reacted with retributive aggression to the violently expressed, but in many cases entirely legitimate, complaints of the prisoners. For the time being, federal and state governments and the preponderance of public opinion increasingly support the movement toward substantial correctional reform. There is, as the reformers see it, a large measure of agreement within the correctional field, and with those from without who have studied the matter, on the broad path to be followed. All that remains is to carry through the plans of the Pennsylvania Quakers—an end to tokenism; on with rehabilitation!

Penal Reform for 1985

It is no longer enough merely to reiterate 18th and 19th century

penological principles, however. In the post-Attica climate of the 1970's the comfortable certitudes of the past sound sanguine and ingenuous and have lost their credibility. Moreover, all criticism cannot be dismissed as cant. The rhetoric of the Friends and the cynicism of the hard-liners both contain a core of cogency which cannot be so artlessly evaded.

Thus the Friends are clearly right in their central thesis: the concept of coerced cure in the correctional field is a dangerous delusion. In the field of psychological medicine it is widely agreed that psychotherapy, particularly if it is of the psychoanalytic variety, must be voluntarily entered into by the client or patient if it is to be effective. In this respect there is a significant difference from physical medicine where the cooperation of the patient, although desirable, is not always absolutely necessary, and where "cure" is a vastly different concept. Yet in the field of penology the analogy with physical medicine has dominated correctional practice since the beginning of the penitentiary system when the Quakers prescribed compulsory religious observance and enforced penitence as the principal specifics.

We should abandon the model of physical medicine as a guide. Education, vocational training, counselling and group therapy should continue to be provided, but on an entirely voluntary basis. There should be no suggestion that a prisoner's release might be accelerated because of participation in such programs nor that it might be delayed or postponed because of failure to participate. Nor in reality should these factors have anything to do with the length of sentence served. The approach adopted should be in no way *coercive* but simply *facilitative*.

The other major objection to the treatment model voiced by the Friends is equally valid: the abuse of discretionary power present in each stage of the existing criminal justice system. Moreover, it has long been recognized that the rehabilitative ideal constitutes an implicit threat to human rights. The literature is immense and includes many novels. Aldous Huxley in *Brave New World*, George Orwell in *1984* and David Karp in *One* all sketch a conforming, regimented, painfully benevolent world in which the criminal law, usually under another name, is used as an instrument of tyrannical coercion in the guise of reformatory treatment. *A Clockwork Orange* is merely the most recent example of this genre—and in its debased Kubrick form as distinct from the Burgess original, a strangely equivocal one.

The rehabilitative ideal on its own implies unfettered discretion. Whereas the treaters seem convinced of the benevolence of their treat-

ment methods, those being treated take a different view, and we share their doubts. The jailer in a white coat with a doctorate remains a jailer, but with even larger powers over his fellows. It is clear that, absent definition of the proper limits of the rehabilitative ideal, this skepticism of the treatment model is entirely salutary. The dangers of abuse of human rights from assumptions of power for rehabilitative purposes must be met.

A major step in this direction would be the adoption of a simple principle: *power over a criminal's life should not be taken in excess of that which would be taken were his reform not considered as one of our purposes.* His maximum punishment should never be greater than that which would be justified by the other aims of our criminal justice. Under the power ceiling of that sentence, we should make available facilities to assist him toward social readjustment; but we should never seek to justify an extension of power over him on the ground that we may thus more likely effect his reform.

A second step toward penal reform without abuse of human dignity is this: *for prediction of success on parole as a determinant of release we must substitute graduated testing of fitness for freedom.* The rehabilitative model and the coerced cure system presupposes a parole board capable of determining the optimum release date for the prisoner—knowing when the serum has taken, when the disease is at its nadir, when the antibodies are at their zenith, and releasing accordingly. In the California totally indeterminate sentence that model reaches its ultimate acceptance.

It would be a great trick if we could do it, but we cannot. As yet, no link has been established between what happens in prison and the later conduct of discharged offenders. It may be hard to train an aviator in a submarine, but it is even harder to predict improvement in his flying potential from what he does in a submarine. Central to the coerced cure is the parole prediction; both must be abandoned.

There exists a substitute to the parole prediction. Increasingly, we allow prisoners controlled freedom on work release, furloughs, open institutions and halfway houses. Such testing of freedom must be given step-by-step to all but a few prisoners. Success on the first test will lead to further testing of freedom, with the whole process limited by the maximum of the sentence imposed.

But the adoption of these two principles does not meet the most fundamental criticism of all. The crucial issue is this: are we justified in making any further investment in reform and rehabilitation? Both the Friends and the hard-liners are united in their condemnation of

"the treatment-oriented correctional routine" as a sham and an example of "the menace of good intentions." In order to meet this challenge a third step must be taken.

The third essential step is this: *correctional practices must be based on facts*. We are under a moral obligation to use all our intelligence to discover the social consequences of various penal sanctions. Few will oppose this principle or deny the need to establish empirically-valid foundations for the methods we use in preventing and treating crime; and no one will doubt that the more secure this foundation, the more possible it will be not only to avoid abuse of human rights from ill-founded claims of rehabilitative capacity, but also to provide effective protection for society.

That we are only now beginning to take that step is utterly deplorable. No excuse can be offered for senior officials in the many state departments of correction who use substantial community funds and considerable personnel in the treatment of adult and juvenile offenders. The demands of sound business practice alone should by now have led such departments to test critically the marginal return in crimes prevented from each successive reformative technique applied or extended. It is obviously wise economic practice to try to discover the return from your investment. When the investment is in the happiness of law-abiding sections of the community, the prevention of social suffering and the confidence of all people in their physical safety and the protection of their property, such an effort is overwhelmingly necessary.

If we are to know which sanctions best serve our diverse purposes in punishing various types of criminals, we must use all the methodological skill available to find out how our present methods work. No penal experiment should ever be introduced without accompanying techniques for discovering whether it serves a valuable social purpose. To continue to dissipate our resources and exercise great power over the lives of others without such evaluative research is a sin against our moral duty to use intelligence in our social organization.

The Politics of Penal Reform

A clear advance since the last century is the realization that the politics of correctional reform are vastly more complex, more interrelated with the work of the police and the courts, and ultimately more dependent on general social structure than was previously believed. Corrections inherits many of the defects in the organization and work of the police and the courts. It is only a sub-system of the criminal jus-

tice system; an advance in effectiveness of any of those sub-systems requires the advance of all. Unless we plan for effectively interfaced police, courts and corrections sub-systems, we will be merely tinkering and patching, not unleashing whatever crime prevention and treating potential of which the criminal justice system may be capable.

Yet, whereas the modern correctional administrator may be more modest in his expectations than was his predecessor, he is the servant of a criminal justice system remarkably lacking in modesty. The criminal law has been used in this country not only in an effort to protect citizens against violence and the threat of violence, against major depredations to their property and attacks on the processes of government, but has been turned toward coercing men to private virtue—and with a startling lack of success. The criminal law grossly overreaches itself to embrace a host of victimless, moralistic “crimes.” And this is a major obstacle to the development of a rational correctional system.

We have unwise legislation criminalizing public drunkenness and vagrancy, and extending the law’s reach beyond its competence in relation to narcotics and drug use, gambling, disorderly conduct, abortion, an extensive range of consensual adult sexual practices and the non-criminal aspects of juvenile delinquent behavior. This overreach of the criminal law has made hypocrites of us all and has confused the mission of corrections. Too many nuisances, who have committed no social harm, are sent to prison or are put on probation. Too often we are fighting the wrong war, on the wrong front, at the wrong time, so that our capacity to fight where we might protect the community and help the convicted offender is attenuated. Corrections, as indeed the rest of the criminal justice system, must reduce its load to that which it has some chance of carrying.

A second major obstacle is this: penal reform lacks a constituency. Why should a governor or a political party support reform in the criminal justice system? Insofar as the “law and order” appeal is not merely an appeal to racial prejudice, it does not seem to have been a very successful vote getter. Similarly, appeals to the desirability of substantial reform in the criminal justice system will attract few votes—indeed, they may lose them.

The reason for this is the cost factor. The reformers who promise that they can do better with less money deceive themselves; there will need to be an attraction of additional funds to this area if reforms are to be achieved. Such funds would have to be taken from elsewhere and that will cost more votes than correctional reform attracts. So we have to rely on that most precious commodity, disinterested political leadership. It is not a commodity that has traditionally been in over-

supply. If we are to obtain disinterested political leadership we have to use our best influence to persuade both major political parties to depoliticize correctional reform.

Yet having recognized the existence of obstacles to reform it is not necessary to relapse into a jaundiced defeatism. Let us briefly list the principal requirements needed to achieve reform. In the first place, prison reform needs more money. To argue that, in the long run, investment in more effective corrections will save the community money is no doubt true but, as Maynard Keynes observed, in the long run we will all be dead. Yet the criminal justice system is an important hallmark of the civilization of a society, and crime seriously affects the quality of life in this country, particularly in its cities and suburbs. The system merits financial support.

Staff is the second requirement. The front-line staff turnover in some of our major institutions remains a serious problem. We must create career lines and in-service training programs that make correctional work a professional and appropriately remunerative vocation. Members of minority groups must be recruited and we must turn to our largest reservoir of available talent—women. Women should be employed at every level of the correctional process from top administration to guard in a man's prison. The fears of rape and obscene abuse are respectively unreal and trivial; the language, if not already known, can be quickly taught. And the observable fact is that men behave better in the presence of men and women rather than men alone, and happily the world is bisexual.

A third requirement is that the judiciary and the legal profession should play a part in the reform of the correctional system. Fortunately they have begun to do so. The recent abandonment of the courts' "hands off" doctrine in relation to prison conditions has precipitated a flood of habeas corpus and civil rights actions which are of immense significance. This development constitutes a politically and practically important lever of change for improved prison conditions. At long last, corrections is emerging from its legal, political and social isolation.

Impossible Dream?

The sheer complexity of building a humane and efficient criminal justice system has not as yet been fully realized. The criminal law not only properly seeks to protect our persons, property and governmental processes from serious harm but also, with overreaching exaggeration of its competence, still seeks to guard us from vice and sin without suc-

cess, and with a pervasively corruptive influence on both police and minor officials.

The proper definition of the police role and the proper organization of policing in this country are tasks that make the cleaning of the Augean stables appear as a gentle morning's exercise. And Sisyphus had it easy compared with solving the problems of reform in our criminal courts, particularly our criminal courts of first instance, with their gross delays, their cluttered calendars, their total reliance on unseemly charge and plea negotiation and bargaining.

The undergrowth is vast and critically entangled. Those who work in corrections inherit the products of these earlier, squalid, discriminatory and inefficient sub-systems. It is time we set out more determinedly, with more political sophistication, on the path to a criminal justice system which respects human dignity, helps to protect the community from serious crime, and disposes of its business with reasonable expedition and efficiency. The terrain is difficult indeed, but the path is clear.

If there are lessons to be learned from Attica, this is surely one of them: there are no simple, swift solutions. It is, of course, doubtful whether the obvious and available longer term cures will be applied. The American citizen has surely demonstrated his capacity to live with luxuriant crime rates and to tolerate a grossly inefficient criminal justice system. Political leadership does not have the longest of attention spans; the fashion of political interest in crime and crime control is transient, except shortly before elections.

Men remain caged; other men continue to be paid to watch them; yet others to watch the watchers—and write about them! This Philadelphia Story is a sad chapter in the history of man's inhumanity to man and his curious affection for dysfunctional social processes. Change will be slow. The prisons will not suffer the swift abatement they deserve. Social evolutionary processes *are* slow; but in corrections they have been too slow. Our present almost catatonic inertia is unjustified; the dream of an effective and humane correctional system is not an impossible one.

