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The Future of Imprisonment

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BOOK REVIEWS

THE FUTURE OF IMPRISONMENT. By *Norval Morris*. Chicago: The University of Chicago Press. 1974. Pp. xiv, 144. $6.95.

"Prison is, in practice, the ultimate power the democratic state exercises over a citizen,[1] yet we lack a jurisprudence of imprisonment" (p. ix). Professor Norval Morris' *The Future of Imprisonment* is a bold attempt to fill this jurisprudential void.[2] Undaunted by the expectation that he "will be attacked from the right as too permissive and idealistic and from the left as too punitive and opportunistic," (p. 2) Professor Morris has embarked on a "search . . . for a new model of imprisonment that provides for the legitimate exercise of society's power over the convicted criminal and protects fundamental principles of justice. It is a jurisprudential model rather than an operational model; the discussion is more of the forces that shape the prison than of the operation of the prison community, though the two are, of course, intertwined" (p. x).

Despite these claims by the author, the book is not mainly one of jurisprudence in the traditional sense. It is not primarily "an investigation of an abstract, general and theoretical nature which seeks to lay bare the essential principles of law and legal systems."[3] Quite the contrary, Professor Morris deals not only in the abstract, general, and theoretical, but also in the concrete, specific, and practical.[4] The result is a contribution not only to traditional jurisprudence, but to what has often been called realist jurisprudence[5] as well. This bifurcated contribution is an outgrowth of the two distinct themes treated in the book: the structuring of imprisonment and the justification of imprisonment.

1. Excluding, of course, "the anachronism of capital punishment [that] persists in some places as a rarely invoked return to barbarism" (p. 2).

2. Professor Morris' despair over the lack of a jurisprudence of imprisonment is a reflection of the despair felt by many scholars over the lack of a jurisprudence of sanctions in general: "Despite the presumed importance of sanctions in the legal process, . . . serious attention has rarely been paid to the topic." Schwartz & Orleans, *On Legal Sanctions*, 34 U. CHI. L. REV. 274, at 274 (1967). Nevertheless, as Schwartz and Orleans point out, there have been a few "[n]otable efforts to deal systematically with the topic [that] range from BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1823), to CARLSTON, LAW AND ORGANIZATION IN WORLD SOCIETY (1962)." *Id.* at 274 n.2. Other such efforts include H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968) (especially pp. 23-34); and Griffiths' response, *The Limits of Criminal Law Scholarship*, 79 YALE L.J. 1393 (1970).

3. SALMOND ON JURISPRUDENCE 1 (12th ed. P.J. Fitzgerald 1966).

4. Thus, Professor Morris' justification for his work has little to do with whether there ought to be prisons. Rather, he has stated, "I am confirmed in persevering in this foolhardy effort . . . by what seem to me . . . obvious realities. First, the prison shows no sign of disappearing anywhere in the world" (p. 12).

5. *Cf.* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 11 (1966).

I. The Structuring of Imprisonment

Convinced that the practice of imprisonment will persist, that it will play an important societal role for generations to come, that its present administration leaves much to be desired, and that other reformers have little to offer,[6] Professor Morris has suggested reforms for the administration of imprisonment that he believes will preserve its proper purposes—deterrence and retribution—while concomitantly increasing the effectiveness of rehabilitative programs.[7] The essential features of these proposed reforms can be briefly summarized: First, participation in rehabilitative programs must be made completely voluntary, or, as Professor Morris puts it, there must be "*substitution of facilitated change for coerced cure*" (p. 27; emphasis original); and, second, offenders must be given increasing increments of freedom to test their ability to function in society.

6. "They may sometimes concur on what is wrong but they lack the inner compass of shared principles to chart a path to other than ameliorative change. There is a fervor and factionalism, a modishness, in their recommendations that seriously impede correctional reform" (pp. 1-2). Professor Morris' opinion is difficult to evaluate as the only antecedent of "they" is the word "reformers." He gives no citations and thus leaves us to speculate who these modish, impassioned impediments to correctional reform are. He may, of course, be including everyone but himself. If so, the wisdom of his evaluation is open to question. The most likely explanation of this passage, however, is that the wisdom of it was not intended to be scrutinized. Thus, to borrow Harry Kalven's description of Justice Holmes' performance in Buck v. Bell, 274 U.S. 200 (1927), this passage "may in the end survive as a monument only to the wit but not the wisdom" of Professor Morris. Kalven, *A Special Corner of Civil Liberties: A Legal View*, 31 N.Y.U. L. Rev. 1223, 1234 (1956).

7. Ironically, Professor Morris desires to increase the rehabilitative effects of coercive state intervention notwithstanding his conclusion that, unlike deterrence and retribution, rehabilitation is not a proper penal purpose. He says:

> "Rehabilitation," whatever it means and whatever the programs that allegedly give it meaning, must cease to be a purpose of the prison sanction. This does *not* mean that the various developed treatment programs within prisons need to be abandoned; quite the contrary, they need expansion. But it does mean that they must not be seen as *purposive* in the sense that criminals are to be sent to prison *for* treatment. There is a sharp distinction between the purposes of incarceration and the opportunities for the training and assistance of prisoners that may be pursued within those purposes.

(Pp. 14-15; emphasis original.)

Professor Morris rejects rehabilitation as a proper purpose of the criminal justice system because he fears the abuse that might result if the substantive criminal law moves away from outright prohibition toward administrative regulation, and if the practice of diverting people from the traditional processes of the system to rehabilitative programs continues:

> The present danger is that the regulatory and licensing techniques that will supplant the overreaching criminal law in the areas of complaintless crimes, and the diversionary techniques that will protect offenders from the greater rigors of imprisonment, may lead to a substantial extension of social control by official state processes rather than to a reduction. We face a difficult trade-off. We risk substituting more pervasive but less punitive control mechanisms over a vastly larger number of citizens for our present discriminatory and irrational selection of fewer citizens for more punitive and draconian punishments.

(P. 10). Although his fear of pre-trial diversion may be justified, I doubt that there will be any immediate drastic reduction in the pervasiveness of the substantive criminal law. As Thurman Arnold said of much of the law constituting the overreach, it is "unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals." T. Arnold, Symbols of Government 160 (1930).

With regard to his first point, Professor Morris has come to believe that the promises of coerced rehabilitation—the medical model of treatment—are empty, since we lack the ability either to diagnose or to cure the "disease" of criminality.[8] He ascribes the failure of diagnosis to the fact that "[p]rison behavior is not a predictor of community behavior" (p. 16).[9] Similarly, the failure to effect cures is said to be due to the inability to coerce psychological change, a point on which few disagree. As James Coleman has expressed it: "Some degree of cooperation on the part of the individual receiving help is considered essential if psychotherapy is to have much chance of success."[10]

Although Professor Morris is probably correct in assuming that coerced psychotherapy is generally ineffective, he does not limit his criticism to psychologically oriented programs. Instead, he groups all rehabilitative programs together—educational, vocational, and psychological—and rejects them all if participation is coerced (pp. 17-20). It is not self-evident that all nonvoluntary programs should be condemned, however. For example, employment is one of the three factors[11] known to be positively correlated with success on release. Thus, if job skills can be coercively imparted, the possibility exists of effecting some "cures" through coerced rehabilitative programs. Of course, the issue is by no means a simple one. The presence of job skills neither guarantees the presence of a job, nor assures the presence of an attitude that will utilize those skills upon release. Moreover, while it is likely that more offenders could be coerced into participation in vocational programs than would volunteer, how well those coerced would learn, and the effect of coercion on the attitude of those who would have volunteered, remain to be determined. Until these questions are answered by empiricism, not rhetoric, the wisdom of Professor Morris' position will remain in doubt.[12]

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8. Professor Morris was not the first to have reached this conclusion. *See, e.g.*, J. Andenaes' collection of his own works, PUNISHMENT AND DETERRENCE (1974), especially ch. VI, "The Future of Criminal Law."

9. This has long been believed. *See, e.g.*, J. DEVON, THE CRIMINAL AND THE COMMUNITY 6 (1912) ("The study of the criminal has mainly been based on observation and examination of persons in prison; but in prison the criminal is not himself").

10. J. COLEMAN, ABNORMAL PSYCHOLOGY AND MODERN LIFE 663 (4th ed. 1972). *See also* H. PACKER, *supra* note 2, at 256. A point mentioned (p. 80), though largely undiscussed by Professor Morris, is that even if we could "diagnose and cure" it is not at all clear that we would go to the expense of doing so. *Cf.* Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987, 1012-14 (1940).

11. The others are aging and the existence of a supportive social group.

12. Professor Morris seems to realize this, just as he seems to recognize the relationship (or lack of relationship) between job skills and jobs. (*See* pp. 15-16). Thus, his "lumping" is all the more curious. Perhaps it can be explained by what appears to be a supplementary justification for his position:

> It is important to be clear why the rehabilitative ideal is not acceptable as a purpose of punishment. . . . After all, if we are sufficiently ruthless in the matter, we *can* coercively cure criminals. The risk of repetition of behavior troublesome

Another problem with Professor Morris' plan to expunge coercion from rehabilitative programs stems from his belief that not only must the overt forms of coercion be eliminated, but the subtle as well. For example, he apparently feels that the mere "suggestion that a prisoner's release may be accelerated because of participation in such programs, [or] that it might be delayed or postponed because of failure to participate" (p. 18) could vitiate the effectiveness of these programs.[13] It may not be possible, however, to eliminate the coercion that results from the "suggestion" that release and participation in rehabilitative programs may be linked, even if that suggestion is never officially articulated. This is so because the prisoners' perceptions may be distorted. As Professor Morris says: "Even when our prison purposes are indeed both benevolent and rehabilitative, there is no reason to assume they are so viewed and experienced by the convicted offender" (p. 15). Thus, if prisoners will not believe that programs are "benevolent and rehabilitative" when they are, why should we expect them to believe the other side of the coin—that there will be no amelioration of the sentence (length or conditions) as a result of participation? They may flock to these programs in the belief, albeit mistaken, that doing so will curry favor with the administration, much as inmates flocked to chaplains when they were first introduced into prisons.[14] The point is, of course, that if prisoners do not believe the programs are voluntary and that no amelioration of the sentence will result from participation, then the "coercion" that Professor Morris believes must be eliminated for these programs to be truly rehabilitative will remain. This may well prove to be an insurmountable problem.

Still, Professor Morris appears to be on the right track. If

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to any society by any member of that society can be terminated by capital punishment, by banishment, or by protracted imprisonment. Nor need that imprisonment be for life; aging cures all but the most exceptional proclivities to violent crime. The rejection of that model of treatment as a part of crime control flows not from lack of power or competence to influence the criminal's behavior but from historical evidence about the misuse of power and from more fundamental views of the nature of man and his rights to freedom. These properly limit the power that we wish to accord the state over the individual. We do not suspect, we know, that such powers tend to be abused.

(P. 26; emphasis original.) I must say, however, that this paragraph is mystifying. What Professor Morris has done, of course, is to switch horses in midstream. He is no longer discussing rehabilitation and the "curing" of criminals, at least not as any *compos mentis* rehabilitationist I know of would discuss it. One does not "cure" criminals through banishment and death. Furthermore, Professor Morris did not have to take this peculiar path. Rather than picking on rehabilitation, he should have pointed out that any practice that in the final analysis is predicated on coercive control can be abused and distorted; there is nothing unique about rehabilitation in this regard.

13. Professor Morris does think that a prisoner ought to be compelled to participate in a program up to the point where he can intelligently evaluate it (pp. 18-19).

14. See H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 494 (3d ed. 1959).

recidivism rates are any indication, the coerced programs have been failures. In any case, if the coercion is removed a few prisoners may benefit, while the rest will be saved the effort of going through the meaningless ritual that often appears to characterize participation in these programs. This is, at least in part, what Professor Morris hopes to accomplish through the substitution of facilitated change for coerced cure.

A necessary step toward removing coercion from rehabilitative programs is Professor Morris' suggestion that the first parole release date should be determined promptly at the beginning of an offender's sentence. Presently, most parole boards do not determine the first parole release date until late in the sentence; often, participation in prison programs is taken into account in determining the release date, and this has the tendency to coerce participation. Accordingly, Professor Morris points out that "[t]he link between release on parole and involvement in prison programs" (p. 35) can best be broken by making the prisoner aware of the date of his release at the beginning of his sentence—contingent only upon no major breach of prison discipline (p. 35). Once this has been accomplished, "the prisoner and the prison authorities could turn their attention to arranging an educational, training, or treatment program relating available services to the prisoner's felt needs" (p. 39). Furthermore, the system could then move toward achieving the second principal reform of the structuring of imprisonment proposed by Professor Morris: the "graduated testing of fitness for freedom" (p. 27).

According to Professor Morris, a prisoner's ability to function in society ought to be developed and tested by prison programs rather than simply estimated. He suggests that a complex of partial release programs be developed, ranging from short furloughs to prerelease hostel placements. These programs would be designed to decrease the chance of future criminality by allowing the prisoner to rebuild his self-confidence, reestablish invaluable family and social ties, and perhaps, obtain a job.[15]

In short, the unifying thread of Professor Morris' treatment of the structuring of imprisonment is a concern with maintaining the deterrent and retributive aspects of the penal system, while concurrently maximizing the rehabilitative aspects of the programs

15. Professor Morris is not adverse to imposing conditions on parole, which is an extension of the concept of graduated testing, so long as the conditions are imposed as a result of anamnestic predictions (pp. 39, 42-43). If we know that certain influences are highly correlated with criminal activity on the part of a particular prisoner, requiring him to avoid these influences may decrease the chance of future criminality. If he cannot avoid them, then the chance of future criminality is sufficiently high to lock him up for a little ameliorative aging. Actually, Professor Morris does not address the question of enforcing the parole conditions, but there is little choice other than parole revocation. For a more troublesome problem see note 44 *infra*.

presently administered. Although at points I have quibbled with him,[16] in the main his proposals appear sound, commendably humane, and very likely to lead to improvement if implemented.

II. The Justification of Imprisonment

Professor Morris' major contribution to traditional jurisprudence is his presentation of principles to guide the distribution of imprisonment. He does not attempt to justify the practice of imprisonment itself;[17] instead, he assumes it is justifiable on the basis of retribution and deterrence (p. 58), although he neither clarifies what he means by retribution[18] nor examines the mechanics of deterrence. His failure to discuss the problems of justification and retribution is in fact refreshing; notwithstanding the fame of these issues in the history of the philosophy of law, "perhaps they are not so important as the amount of time and ink expended upon them suggests."[19] However, his failure to discuss deterrence more fully is troublesome, for if it is the case that the primary deterrent to the commission of criminal acts is a desire to comply with the community's shared norms[20] (rather than, for example, the fear of unpleasant consequences),[21] then it seems futile for Morris to discuss the principles of imprisonment under the rubric of deterrence without also discussing the substantive criminal law. In short, one must come to Professor Morris' discussion of the distribution of imprisonment willing to "cut through the rhetorical foliage that characterizes most jurisprudential discussion of the purposes of punishment" (p. 58) by disregarding the substantive criminal law, disposing

16. One might quibble over other things as well, such as his use of quick and overly sharp characterizations. On page 29, for example, he labels some potential criticisms of his work "nihilistic anxieties," which is less than enlightening. I also doubt whether he really believes that all other work in the area has reflected either "mindless reliance on the prison," or "boundless confidence in the enforceability of the Sermon on the Mount" (p. 3). Many of the works he cites in his excellent collection of source materials (pp. 123-36) disprove the validity of such a characterization, and surely Professor Morris realizes this. Perhaps the only criticism that can be directed at his reference list is that it lacks historical perspective on many issues. Professor Stolz has said of the field of legal education that "[a]rticles could be lifted out of the Law School News of 1915 and passed off today as tolerably fresh ideas," Stolz, *Training for the Public Profession of the Law (1921): A Contemporary Review*, in H. Packer & T. Erlich, New Directions in Legal Education 227, 228 (1972); the same may be said here.

17. For a discussion of the general justifying aim/distribution dichotomy see H. Hart, Punishment and Responsibility 8-13 (1968).

18. For an examination of the concept of retribution see Griffiths, *supra* note 2, at 1418-21.

19. H. Hart, Law, Liberty and Morality 2 (1963).

20. *See* J. Bentham, Theory of Legislation 272 (R. Hildreth trans. 1864).

21. *See* J. Andenaes, *supra* note 8, at 35.

of the general justifying aim of punishment by *ipse dixit*, and ignoring the question of severity.[22]

The essence of Morris' proposal is simple: upon an acceptable conviction,[23] any sentence imposed must be necessary to achieve defined social purposes and should be limited by a retributive maximum. Imprisonment is not justified unless a lesser punishment would depreciate the seriousness of the crime, or would not satisfy socially justified deterrent purposes, or has been recently or frequently applied to the offender (pp. 59-60). Finally, Professor Morris believes that predictions of future criminality ("dangerousness") cannot justify imprisonment, although predictions based on a prisoner's anamnesis may justify other restrictions, such as conditional sentencing.[24]

For the most part, Professor Morris' proposal is sound. Two of its components, however, seem troublesome and demand attention.[25] First, it is difficult to understand why a sentence of imprisonment should be mandated when "other less restrictive sanctions have been frequently or recently applied to [the] offender" (p. 60). Second, it is not at all clear why predictions of "dangerous" criminal behavior ("crimes of some gravity" (p. 34)) cannot justify the decision to imprison (pp. 59-60).

As to the first issue, Professor Morris has said: "[T]here must be a role for the residual penal sanction, imprisonment, if the lesser sanctions have been appropriately applied and contumaciously ignored and the offender comes yet again for punishment" (p. 79). Why imprisonment should serve as a "residual penal sanction" escapes me, however, particularly in light of Professor Morris' statement that such punishment is necessary because the "criminal law must keep its retributive promises" (pp. 79-80). If there is no retributive promise demanding imprisonment for a certain offense

22. Morris passes over the question of severity, isolating the issue of "*imprisonment vel non*" to facilitate exposition (p. 59). To do so he assumes that imprisonment is more severe than any other usable sanction (p. 59).

23. In Morris' view, most convictions today are not acceptable because of the abuses of plea bargaining (pp. 46, 50-57). For a contrary view see Enker, *Perspectives on Plea Bargaining*, in U.S. TASK FORCE ON THE ADMINISTRATION OF JUSTICE, PRESIDENT'S COMMN. ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 108 (1969).

24. *See* note 15 *supra*.

25. Of course, Professor Morris' lack of discussion of a number of issues may also trouble the reader. For example, he does not explain how "social purposes" are to be defined, how potentially conflicting social purposes are to be reconciled, how one ascertains the punishment that will have the optimum deterrent effect, or whether it is possible to determine the "objective gravity of [a] crime" (p. 74) (although with regard to this last question, he does say: "Desert is, of course, not precisely quantifiable . . . . [V]iews of the proper maximums of retributive punishments differ dramatically between countries, between cultures and subcultural groups, and in all countries over time" (pp. 75-76)).

—if the offense falls below that level of severity where "any lesser punishment would depreciate the seriousness of the crime" (p. 60)—then why should the mere *repetition* of the offense justify imprisonment? Presumably, whatever retributive impulses were generated by the commission of the earlier offense were satisfied by the sanction imposed.

Of course, one might conclude that repetitive criminality itself gives rise to retributive impulses, separate from those stemming from the individual acts committed—that "the sum is greater than its parts." A society insufficiently outraged by a particular act to imprison the actor may become sufficiently outraged by the actor's commission of a subsequent similar act to justify imprisoning him, notwithstanding the fact that the retributive impulses generated by the earlier act had been satisfied. Whether or not this is what Professor Morris had in mind cannot be ascertained from his book, unfortunately, since he did not expand upon his cryptic comment that "the criminal law must keep its retributive promises."

If this is Professor Morris' justification for imprisoning the recidivist petty offender, however, he has taken a position that is inconsistent with the remainder of his scheme. Because of his position on the prediction of future criminality, Professor Morris rejects the notion of using considerations of "special deterrence" in the sentencing process; that is, he refuses to punish the multiple offender more severely for the specific purpose of deterring him from committing future offenses. But, since the residual penal sanction is not to be invoked unless "the lesser sanctions have been . . . contumaciously ignored," it is obviously directed to the case where a sanction has failed to deter an individual from committing subsequent criminal acts. Thus, if the "rhetorical foliage" is pierced, the essence of the proposal is to allow increasing punishments until an offender no longer offends. In short, while Professor Morris has publicly barred his front door to specific deterrence, he has surreptitiously slipped the bolt on the rear entrance.[26]

The second issue demanding attention—Professor Morris' principle that prediction of dangerous criminality is an unjust basis for imposing imprisonment—is troublesome for two reasons: the statistical studies Morris relies upon to justify his principle are open to differing interpretations and, more importantly, he inadequately addresses the possibility that our ability to predict criminality will improve.

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26. There is yet another possible justification for Professor Morris' proposal. Repetitious criminality can itself be viewed as an "offense" that must be deterred. Thus, under principles of general deterrence, imprisonment might be the appropriate sanction to apply to persons who plan a "life of crime." However, predictive problems arise under this theory as well. For example, how can a system that cannot make predictions of criminality determine who has planned a life of crime?

Professor Morris makes much of the aftermath of the Supreme Court's decision in *Baxstrom v. Herold.*[27] The Court in that case held that New York Correction Law § 384[28] violated the equal protection clause by authorizing a person to "be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York."[29] As a direct result of *Baxstrom*, 967 patients formerly held by the New York Department of Corrections in Dannemora and Matteawan State Hospitals were transferred to civil hospitals or released.

Under Professor Morris' interpretation, New York's defective statutory scheme had resulted in prisoners being "held in [Dannemora and Matteawan] beyond the term of their sentence if, after psychiatric examination, they were deemed mentally ill and dangerous to themselves or others" (p. 69). Thus, according to Professor Morris, "the Supreme Court . . . compelled the testing of our predictions of violence, and the test revealed massive overprediction" (p. 70)—only 2 per cent of a sample of 246 patients released or transferred from Dannemora were returned to institutions for the criminally insane, only 19.6 per cent of the males and 25.5 per cent of the females demonstrated assaultive behavior in civil hospitals, and, most striking of all, "56% of the males and 43% of the females . . . had no subsequent readmission to mental hospitals during the four years of follow-up" (p. 70). From these impressive figures Professor Morris concludes that we lack predictive capacity; but closer analysis is warranted, for he may be wrong in his characterization of the statutory scheme, and the figures he presents are subject to another interpretation.

In 1961, the year Johnny Baxstrom was sent to Dannemora, if a physician or psychiatrist was of the opinion that an inmate was "insane,"[30] New York law provided that the inmate could be transferred to Dannemora and retained there "until legally discharged."[31] If the Director of Dannemora was of the opinion that the insanity persisted, he could apply for certification of the inmate within 30 days of the expiration of the inmate's term. The prisoner would be certified if the court was convinced "that such person may require

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27. 383 U.S. 107 (1966).

28. This section has since been repealed. *See* Law of July 29, 1966, ch. 891, § 1, [1966] N.Y. Laws 1880.

29. 383 U.S. at 110.

30. "Insane" was defined as having "equal significance to the words 'mentally ill,'" Law of April 14, 1946, ch. 751, § 2(15), [1946] N.Y. Laws 1468 (repealed 1972), and a "mentally ill person" was simply one "afflicted with mental disease to such an extent that for his own welfare or the welfare of others, or of the community, he requires care and treatment." Law of April 14, 1946 ch. 751, § 2(8), [1946] N.Y. Laws (repealed 1972).

31. Law of April 8, 1933, ch. 150, § 1, [1933] N.Y. Laws 549 (repealed 1962).

care and treatment in an institution for the mentally ill . . . ."[32] Upon such a finding the prisoner was placed "in an appropriate state institution of the department of mental hygiene or of the department of correction as may be designated . . . by agreement between the heads of the two departments."[33]

Thus, the law did not require that a predisposition to violence be shown prior to an inmate's certification, nor was the word "dangerous" anywhere used; once it was determined that a prisoner might "require care and treatment in an institution for the mentally ill," the place of confinement was a matter of administrative discretion. In fact, prisoners were the only persons who could be civilly committed to Dannemora without a "judicial determination that [they were] dangerously mentally ill,"[34]—this was the second justification the Supreme Court gave for its holding in *Baxstrom.* Baxstrom himself is proof that administrative discretion, not predictions of dangerousness, determined placement upon the expiration of a prison term: "[T]he administrative decision to retain Baxstrom in Dannemora . . . was made despite the otherwise unanimous conclusion by testifying psychiatrists, including an independent examining psychiatrist and [the Assistant Director of Dannemora], that there was no reason why Baxstrom could not be transferred to a civil institution."[35] One must therefore take with a grain of salt Professor Morris' statement that "[i]t is important to remember that all of the Baxstrom patients were convicted criminals being held as likely to be dangerous if released" (p. 69). While some, perhaps most, of the patients were held on the basis of "dangerousness," this was certainly not true of them all.

Furthermore, Professor Morris' use of the *Baxstrom* studies[36] to demonstrate our lack of capacity validly to predict dangerous behavior is of questionable value. Consider the figure he quotes that 56 per cent of the males and 43 per cent of the females in the sample studied had no subsequent readmission to mental hospitals during the follow-up period. While this is an impressive figure, what it obscures is more impressive than what it reveals—that of the 246 patients studied, 125 were not released within the four-year follow-up period[37] and could not, obviously, be "readmitted." Thus, another

32. Law of April 8, 1933, ch. 150, § 1, [1933] N.Y. Laws 549 (repealed 1962).

33. Law of April 8, 1933, ch. 150, § 1, [1933] N.Y. Laws 549 (repealed 1962).

34. 383 U.S. at 110.

35. 383 U.S. at 112 n.3.

36. Professor Morris has relied on the work of Steadman and his associates for his information. *See* Steadman & Halfon, *The Baxstrom Patients: Backgrounds and Outcomes,* 3 SEMINARS IN PSYCHIATRY 376 (1971); Steadman & Keveles, *The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-1970,* 129 AM. J. PSYCHIATRY 304 (1972).

37. Steadman & Halfon, *supra* note 36, at 382.

way of characterizing this data is to say that 49 per cent of the patients were never released from custody and 75 per cent of them were under state control at some point during the four-year follow-up. Furthermore, of the 25 per cent who were not subsequently readmitted, it was not known how many had died.[38]

Consider as well the fascinating figure, also relied on by Professor Morris, that only 13 of the 84 released patients for whom there was adequate follow-up had criminal contacts with the police. This fails to disclose that a "criminal contact" was defined "as one in which an arrest was made and charges pressed . . . ."[39] Thus, Professor Morris' presentation does not reflect the fact that there were 21 arrests without conviction where "rehospitalization was without exception the alternative to trial"[40] and "23 noncriminal police contacts by 19 patients."[41] In short, the figures Professor Morris focuses on do not accurately reflect the subsequent behavior of *Baxstrom* patients, their interaction with the police, or their criminality. Furthermore, these figures only reflect the number of ex-patients caught, not the number actually committing an arguably criminal act—a distinction Professor Morris made while discussing parole predictions (p. 72), but did not make here.

Finally, there is one point that is altogether absent from Professor Morris' discussion—the age profile of the sample. As Professor Morris points out elsewhere: "Virtually all criminals can have their subsequent violent crime dramatically reduced by detaining them in prison until their fiftieth birthdays" (p. 80). As of December 1970, the surviving males in the *Baxstrom* sample had a mean age of 49.8 years; the surviving females had a mean age of 51.9 years. "In sum, we are dealing with an older middle-aged population,"[42] and since members of such populations do not often engage in violent or assaultive behavior, it should not be surprising that the *Baxstrom* patients failed to do so.

While I do not wish to suggest that we presently have an accurate predictive ability, the figures Professor Morris uses neither prove that such ability does not exist nor that it could not be developed.[43]

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38. *Id.* at 381.

39. *Id.* at 383.

40. *Id.*

41. *Id.*

42. *Id.* at 378.

43. Professor Morris also relies on Kozol, Boucher & Garafalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQUENCY 371 (1972). An analysis of Morris' reliance on this study could also be done, but the point has, I believe, been made. Morris recognizes some of the weaknesses of his reliance on this study (p. 72) but fails to mention others. The authors themselves concluded that "[it] appears that dangerousness can be reliably diagnosed and effectively treated." *Id.* at 392. For the contrary view with regard to diagnosis see Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974).

Certainly the empiricism he presents is not the sort upon which unqualified "principles" ought to be implemented, yet he seems to hang an important principle on this empirical peg: "[A]s a matter of *justice* we should never take power over the convicted criminal on the basis of unreliable predictions of his dangerousness" (p. 73; emphasis original).[44]

Professor Morris does not rely entirely on empiricism, however, for he proceeds to supplement this rather dubious empirical argument with an even more questionable assertion: "[N]ot only lack of knowledge forces us to hesitate to impose dramatic or Draconian 'cures' on criminals; basic views of the minimum freedoms and dignities rightfully accorded human beings stay our punitive hands" (p. 83). Had he relied solely on empiricism, I would have little trouble with his argument. While one might disagree, for example, with the assertion that, based on a prediction of violent criminality with a probability of validity of thirty per cent, a convicted offender ought not to be preventively detained, at least the argument is clear. When that argument is abandoned for one based on "minimum freedoms and dignities rightfully accorded human beings," my discontent no longer stems merely from disagreement over the weight to be given certain empirical data, for Professor Morris and I have reached a qualitative impasse.

Consider the simplest case—a mad scientist who is convicted of a crime and for whom a valid prediction is made that if released he will blow up the world. While this may seem absurd, it would be just as absurd to let our hypothetical Dr. Strangelove loose to hatch his scheme based upon the "minimum freedoms and dignities rightfully accorded human beings."[45]

The conclusion of the Kozol study is not unqualified, however: "It is clear that we must improve our diagnostic and therapeutic competence to insure that fewer dangerous persons are let out and fewer nondangerous persons are kept in." Kozol, Boucher, & Garafolo, *supra*, at 392.

44. Curiously, Professor Morris rejects anamnestic predictions here as well, notwithstanding that he would allow such predictions to affect conditions of parole. *See* note 15 *supra*. How these two positions can be reconciled is not clear, as both entail restricting freedom on the basis of predictions of future criminality. Furthermore, Morris does not attempt a reconciliation (*see* p. 66).

45. It would be just as absurd, of course, to let him go if he had not been convicted of another crime; much of the confusion that permeates Professor Morris' discussion of predictions of dangerousness results from his failure to recognize this. Quite simply, predictions of dangerousness are not relevant to the punishment an offender receives when the appropriateness of the sanction is determined (as Professor Morris would determine it) by principles of retribution and general deterrence. Retribution, whether what is meant be revenge, retaliation or expiation, relates punishment to the act done (or the act and its consequences), while general deterrence is concerned only with the effect on the rest of society of punishing one person for what he has done, or what the rest of society can be convinced he has done. Professor Morris need have gone no further, it seems to me, than embrace retribution and general deterrence as the justifications of punishment to exclude predictions of dangerousness from the determination of the proper sentence.

Rather than rest on absurdity, however, let us move toward reality: Consider the case of an offender convicted for murder for whom a prediction is made that if released at that point in time at which retribution and general deterrence are satisfied, he will, beyond a reasonable doubt, kill again. In other words, assume that our predictive ability has improved to the same level of certainty as that required for a criminal conviction,[46] and that the same question of preventive detention is posed. Surely at this point Professor Morris would not take his objection to "unreliable predictions of . . . dangerousness" (p. 73) beyond its logical boundaries by arguing that the margin of error contained in the "beyond a reasonable doubt" standard mandates that our murderer be released. If so, the same logic could be applied to determinations of prior criminality to vitiate criminal trials. In other words, while the determination that something has happened in the past or is about to happen in the future may be impossible to make with 100 per cent probability of validity,[47] at some point a high probability of a phenomenon's occurrence must enable us to act on the assumption that it has occurred or will occur.[48] The question must then be faced whether there is a notion of "justice" that demands this hypothetical killer be released; if so, I cannot find it. Whatever loss results to the offender is more than offset by the elimination of the strong probability of a future murder.

But, hypotheticals can be changed; my murderer could be transformed into your illegal expectorator, and the same questions posed. If faced with a prediction that, beyond a reasonable doubt, an offender convicted of illegal expectoration will offend once more if released at that point in time at which general deterrence and retribution are satisfied, what result? Certainly he should not be locked up until his salivary glands wither away. But, why not? Obviously, expectorating may not be a serious enough societal harm ever to justify imprisonment. But, were there circumstances under which imprisonment could be justified, given the nature of the crime, we might feel more at ease utilizing a standard of predictive validity

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46. It is easier to state this standard than to define it. *See In re* Winship, 397 U.S. 358, 369-72 (1970) (Harlan, J., concurring).

47. For interesting discussions of this point see Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065 (1968); Dershowitz, *Preventive Detention: Social Threat*, TRIAL, Dec.-Jan., 1969-1970, at 22.

48. The California supreme court recently demonstrated sufficient confidence in predictions of dangerousness to hold that psychiatrists had a duty to warn a person of threats made on his life by a patient with violent tendencies. Tarasoff v. Regents of Univ. of California, — Cal. 3d —, 118 Cal. Rptr. 129, 529 P.2d 553 (1974). "[A] patient with severe mental illness and dangerous proclivities may, in a given case, present a danger as serious and as foreseeable as does the carrier of a contagious disease or the driver whose condition or medication affects his ability to drive safely." — Cal. 3d at —, 118 Cal. Rptr. at 135, 529 P.2d at 559.

more stringent than that of "beyond a reasonable doubt." As the gap between "beyond a reasonable doubt" and certainty begins to narrow, the reluctance to detain expectorators preventively may diminish proportionately. In other words, the use of preventive detention may mandate a sliding scale that balances the societal values to be protected and the accuracy of the predictions involved.[49] In any case, the issue is much more complex than Professor Morris' analysis would suggest. As the predictions upon which preventive detention and other coercive techniques are based improve, and thus the empirical hiding place Professor Morris has relied upon dissipates, more will be required to dispose of these problems than to assert, "they violate justice." A careful analysis of the costs and benefits would be a good starting point, but one that Professor Morris unfortunately chose to ignore.[50]

III. The Future of Imprisonment

Professor Morris has attempted to accomplish several difficult tasks in his new book. Most notably he has attempted to predict the future, and influence the development, of a stagnant social institution. Only time will tell if he has achieved either of these goals, just as only time will tell the ultimate worth of his attempt to rationalize the distribution of imprisonment.

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49. For an interesting essay on the problems of preventive detention see Dershowitz, *On Preventive Detention*, N.Y. Rev. Books, March 13, 1969, at 22.

50. Professor Morris concludes this section with one final argument: "If criminals, if the mentally ill or the retarded are subjected to coercive control beyond that justified by the past injuries they have inflicted, then why not you, and certainly me? We find ourselves in the business of remaking man, and that is beyond our competence; it is an empyrean rather than an earthly task" (p. 84). Still, I am not convinced. First, I take it that Morris is bound by his own parameters, and the issue of an improper substantive criminal law is not before us. That "you, and certainly me" will not be subjected to any sanction unless convicted of a criminal act must be assumed, in other words, to enable us to deal with the propriety of any particular sanction. Second, in one very real sense all law is an attempt to remake man and thus "an empyrean rather than earthly task." If certain coercive sanctions are only quantitatively different from others, *i.e.*, 100 per cent effective, then it is paradoxical to disallow them solely because they achieve their objective. Moreover, whether these sanctions are qualitatively different involves a question whose answer must ultimately rest on faith. There is no qualitative difference between psychosurgery, when its only effect on an inveterate thief is to inhibit his thievery completely, and a criminal sanction that has the same effect on another. If, on the other hand, the second thief could have chosen to take the risk and continue thieving, but chose otherwise, then a qualitative difference appears. In other words, if psychosurgery were sufficiently advanced so as to affect only the ability to commit a prohibited act, whether it would differ qualitatively from a penal threat would be a function of the existence of free will.

Nor does Morris' discussion of J. Rawls, A Theory of Justice (1971), yield much. He concludes by saying: "[W]e would . . . subscribe to concepts of fairness and justice that preclude the sacrifice of the individual prisoner to a supposed larger social good" (p. 83). Suffice it to say that how this statement can be reconciled with Professor Morris' reliance on general deterrence—the paradigm case of sacrificing an individual to a "supposed larger social good" (*see* I. Kant, The Philosophy of Law 194-98 (Hastie transl. 1887))—escapes me.

Although at many points the book suffers from Professor Morris' preoccupation with style rather than substance, nonetheless it is a work well worth reading. In his attempt to reconcile the brutality of crime with the brutal treatment society has accorded its criminals, Professor Morris has raised some of the fundamental questions facing our society. The book is an enlightening glimpse of one very humane man as he attempts to reconcile his humanity with the need he sees to occasionally inflict punishment on another.[51]

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51. I have not dealt with chapter 4, "A Prison for Repetitively Violent Criminals," which "is a sketch of how already recommended principles of imprisonment might promptly be applied to, and tested on, a defined group of prisoners" (p. 86). Although in many ways this is the most interesting part of the book, I have not reviewed it because Professor Morris says that a much more complete research design is available for the "interested scholar or administrator" (p. 117). I wrote Professor Morris for the design on Dec. 20, 1974, and have yet to receive it. Since the plan is ostensibly much more complete than the chapter, I prefer postponing consideration of this model prison until I can view the work in its entirety.