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# THE FUTURE OF IMPRISONMENT: TOWARD A PUNITIVE PHILOSOPHY

NORVAL MORRIS\*

PROPER use of imprisonment as a penal sanction is of primary philosophical and practical importance to the future of society. With the increasing vulnerability of our social organization and the growing complexity and interdependence of governmental structures, reassessment of appropriate limits on the power that society should exercise over its members becomes increasingly important. Perhaps if the "prison problem" is solved, many of the uneasy tensions between freedom and power in postindustrial society will diminish. The effort made here will, I hope, contribute to the solution of the "prison problem" by offering a new model of imprisonment that recognizes fundamental principles of justice as well as the legitimate exercise of society's power over the individual.

We need to address two blunt questions in constructing a new model of imprisonment: (1) Why imprison a convicted criminal in the first instance? (2) Why not imprison all convicted criminals until risk of future criminality is past? Any useful response to these questions requires me to outline a philosophy under which imprisonment can be applied with restraint and humanity until it is no longer needed for social control.

My premise throughout is that penal purposes are properly retributive, deterrent, and incapacitative. Attempts to add reformatory purposes to that mixture—as an objective of the sanction as distinguished from a collateral aspiration—yield neither clemency, justice, nor, as presently administered, social utility. We may utilize our rehabilitative skills to assist the prisoner 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.<sup>1</sup>

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This article is a revised version of the third of three lectures given by the author in the Thomas M. Cooley Lecture Series, University of Michigan Law School, on March 19, 20, and 21, 1974.

1. The proper use of rehabilitation in the prison context was fully explored by Professor Morris in the first Cooley lecture. The reader interested in a more complete exposition of Professor Morris's views may consult N. MORRIS, *THE FUTURE OF IMPRISONMENT*, to be published shortly by the University of Chicago Press. For another recent view, see L. OHLIN, *CORRECTIONAL STRATEGIES IN CONFLICT*, paper presented to the American Philosophical Society, Nov. 9, 1973 (to be published in the *Proceedings of the Society*).—Ed.

### I. WHY SHOULD A CONVICTED CRIMINAL BE IMPRISONED?

As usual, clarification of what is not involved in this question is a necessary prelude to answering what is. I am not discussing the challenging and significant problems involved in setting terms of imprisonment in a way that guarantees that like cases will be treated alike and all treated fairly. The principles suggested will, with suitable modifications, apply to the assessment of the appropriate duration of imprisonment by the legislature and by the judge, and to all sentencing decisions as they are later taken by parole boards and correctional authorities. However, for ease of analysis the present effort isolates the issue of imprisonment *vel non*. The objective is to offer principles to aid a judge in determining whether he should impose a sentence of imprisonment or some lesser sanction. Although these principles apply whenever this issue is addressed—by the legislator, the prosecutor, the judge, the parole board member—analysis is focused on the judge's decision.

Clarity is best served by sketching the complete model in relatively narrow compass before elaborating on its details. First, three principles to guide the decision to imprison are submitted:

(1) Parsimony: The least restrictive or least punitive sanction necessary to achieve defined social purposes should be chosen.

(2) Dangerousness: Prediction of future criminality is an unjust basis for determining that the convicted criminal should be imprisoned.

(3) Desert: No sanction greater than that "deserved" by the last crime or bout of crimes for which the offender is being sentenced should be imposed.

Thereafter, three conjunctive preconditions to the judicial imposition of a sentence of imprisonment are developed in more concrete form:

(1) Conviction by jury or bench trial or a procedurally acceptable guilty plea to an offense for which the legislature has prescribed imprisonment;

(2) Determination that imprisonment is the least restrictive sanction appropriate in the particular case because either a) a lesser punishment would depreciate the seriousness of the crime(s) committed; b) imprisonment of some who have done what the particular criminal has done is necessary to achieve socially justified deterrent purposes, and his punishment ad-

vances that end; or c) other less restrictive sanctions have been frequently or recently applied to him; and

(3) Judgment that imprisonment is not a punishment that society would deem undeserved or excessive in relation to the last crime or series of crimes that the individual has committed.

It may assist to offer some commentary on the principles suggested to guide the decision to imprison and then to draw a sharp contrast between the preconditions to imprisonment submitted here and those adopted in most of the recent criminal codes.

#### A. *Parsimony*

The first principle recommends parsimony in the use of imprisonment. This principle is not novel. A presumption in favor of punishments less severe than incarceration pervades all recent scholarship and most legislative reforms. Justification for this utilitarian and humanitarian principle follows from the belief that any punitive suffering beyond societal need is, presumably, what defines cruelty. Emerging case law and commentary supports this principle of the least drastic means.<sup>2</sup> Specifically, the draftsmen of the American Law Institute's (ALI) Model Penal Code sought to include the principle in the Code's main article on sentencing. Section 7.01, enumerating "Criteria for Withholding Sentence of Imprisonment and for Placing Defendant on Probation," directs the court to order other punishments unless "imprisonment is necessary for protection of the public."<sup>3</sup> Over one-half of the states have undertaken substantial revision of their criminal codes during the past decade, all profoundly influenced by the ALI model. The same influence is apparent in current proposals for reform of the federal criminal code. In accord are the American Bar Association's Project on Minimum Standards for Criminal Justice<sup>4</sup> and the recommendations of the two national crime commissions of the past decade.<sup>5</sup> Moreover, although constitu-

2. See, e.g., Singer, *Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative as Applied to Sentencing Determinations*, 58 CORNELL L. REV. 51 (1972). Cf. *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1968); *Goodwin v. Oswald*, 462 F.2d 1237 (2d Cir. 1972); Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

3. MODEL PENAL CODE (Prop. Official Draft, 1962) [hereinafter ALI CODE]. Of special interest are sections 7.01(1)(a), 7.01(2)(i), and 7.03(3). Cf. *id.*, Article 6.

4. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES §§ 2.2, 2.3 (1968) [hereinafter ABA PROJECT].

5. PRESIDENT'S COMM. ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 141-43 (1967); NATIONAL ADVISORY COMM. ON

tional support for the parsimony principle is hesitant, the analogies are clear. Imprisonment as a sanction for a common cold or for being a narcotic addict would be unconstitutional;<sup>6</sup> to place a prisoner involved in a scuffle into maximum security segregation for two years may be invalid as punishment not reasonably related to the infraction for which it was imposed;<sup>7</sup> and the death penalty would be unconstitutional for a rape in which life was neither taken nor endangered.<sup>8</sup> Finally, courts and legislatures have expressly accepted the principle of parsimony in relation both to the civil commitment of the mentally ill and the conditions of their detention.<sup>9</sup> Goldstein, Freud, and Solnit, in their important new study *Beyond the Best Interests of the Child*, offer a principle similar to that of the least restrictive or least punitive sanction, applicable to all situations in which child placement by a court is involved, expressly including juvenile delinquency matters involving violence. Even were the law to make society's immediate safety the primary goal, they would argue that the least detrimental alternative placement should be selected.<sup>10</sup>

The wisdom of parsimonious use of imprisonment is no longer questioned, unless doubt is cast upon it by the second fundamental question we face—why not imprison all criminals convicted of serious crime until risk of their recidivism is past? I will return to that question shortly.

### B. *Dangerousness*

With the second principle—that dangerousness as a predictor of future criminality is an unjust basis for imprisoning—we move from the broadly accepted to the highly contentious.

Let me try to define the issue precisely before grappling with it. Courts around the world impose imprisonment instead of community-based punishments, or increase terms of imprisonment beyond the measure that the specific crime justifies, for a variety of grounds that resemble what I will call "dangerousness." The grounds include:

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CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE ON CORRECTIONS 150-54 (1973) [hereinafter TASK FORCE ON CORRECTIONS].

6. *Robinson v. California*, 370 U.S. 660, 667 (1962).

7. *Fulwood v. Clemmer*, 206 F. Supp. 370 (D.D.C. 1962).

8. *Ralph v. Warden*, 438 F.2d 786 (4th Cir. 1970), *cert. denied*, 408 U.S. 952 (1972).

9. See *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969); *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1969); D.C. CODE ANN. § 21-545(b) (1966); *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1245-53 (1974).

10. A. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 153 (1973).

The criminal committed crime before; he committed this type of crime before; he committed many crimes before; he has made a profession of crime; he committed many other crimes at about the same time as this one; he acted with peculiar brutality, or used a gun, or determinedly retained the proceeds of his crime; or there has been a recent rash of similar crimes. All these grounds merit consideration. I set them aside in favor of closer analysis of one other ground that seems to be gaining acceptance in the United States and in Europe, namely, that the crime and what we learn of the criminal lead us to the view that he probably will commit a serious crime of personal violence in the future. This prediction is what I will term the prediction of dangerousness.

There is a seductive appeal to separating the dangerous and the nondangerous offender and confining imprisonment principally to the former. It would be such a neat trick were it possible: prophylactic punishment—the preemptive judicial strike, scientifically justified—designed to save potential victims of future crimes and at the same time minimize the use of imprisonment and reduce the time served by most prisoners. But it is a trap. Social consequences are often counterintuitive. The concept of dangerousness is so plastic and vague, its implementation so imprecise, that it would not substantially reduce the present excessive use of imprisonment.

It must be admitted, however, that dangerousness as a determinative guide to the use of imprisonment does have impressive support. Perhaps most impressive are the reform efforts of Herbert Wechsler, Paul Tappan, Francis Allen, and a small group of other scholars and practitioners in the mid-1950's and early 1960's. Those efforts, doubtless the most important attempt to bring rationality to the criminal law since the codification efforts of Macauley and Stephen in the last quarter of the nineteenth century, are embodied in the sentencing provisions of the ALI Model Penal Code.<sup>11</sup> The themes behind the provisions are, in the main, sound and worthy of emulation. First, fines and community-based treatments such as probation, where reasonably applicable, are preferable to imprisonment as penal sanctions. Second, the range of prison sentences for felonies should be reduced to three or four categories of gravity. Third, within those categories, the grounds on which a court may exercise its discretion to impose imprisonment should be defined with some degree of precision. A principal aim throughout, if judges can be persuaded or required to give reasons for their sentences, is to build a common

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11. ALI CODE, *supra* note 3, §§ 701-09.

law of sentencing. Provisions for appeal against sentence have similar purposes. Finally, however, the Model Penal Code and its progeny provide for the imposition of "extended terms" of imprisonment upon persistent, professional, psychologically disturbed, and dangerous or multiple offenders.<sup>12</sup>

The final provision, specifically as it makes dangerousness a determinative guide to the use of imprisonment, has been widely adopted. The National Council on Crime and Delinquency (NCCD), for instance, maintains that "confinement is necessary only for offenders who, if not confined, would be a serious danger to the public."<sup>13</sup> The 1973 Task Force on Corrections of the National Advisory Commission on Criminal Justice Standards and Goals recommends that "state penal code revisions should include a provision that a maximum sentence for any offender not specifically found to represent a substantial danger to others should not exceed 5 years for felonies other than murder."<sup>14</sup> Extended terms beyond five years, indeed up to twenty-five years, might be imposed on the "persistent felony offender," the "professional criminal," and the "dangerous offender."<sup>15</sup> The Code has also profoundly influenced the reshaping of the criminal codes of a number of states<sup>16</sup> and other states are in the process of emulation. If Congress acts on a new federal criminal code, I have no doubt that it will also incorporate sentencing provisions fashioned after the ALI Model Penal Code prototype.<sup>17</sup>

The various proposals share a desire to reduce the use of imprisonment as a penal sanction by favoring less drastic punishments, by shortening prison sentences imposed on those criminals who have to be imprisoned, and by selecting defined categories of criminals for

12. *Id.* § 7.03. See also ADVISORY COUNCIL OF JUDGES OF THE NATL. COUNCIL ON CRIME AND DELINQUENCY, MODEL SENTENCING ACT, art. III, § 5 (1972); ABA PROJECT, *supra* note 4, §§ 2.5, 3.1. An excellent guide to the literature in this area and the area of sentencing and correctional issues generally is R. GOLDFARB & L. SINGER, AFTER CONVICTION (1973).

13. *The Nondangerous Offender Should Not Be Imprisoned, A Policy Statement*, 19 CRIME & DELINQUENCY 449, 449 (1973).

Sometimes the same theme is developed in different and more apparently acceptable language. The American Assembly's Report on "Prisoners in America" recommended that "[h]igh risk offenders may be required to serve fixed periods of time. Low risk offenders should be released to community-based programs as soon as feasible." REPORT OF THE 42D AMERICAN ASSEMBLY 7 (December 17-20, 1972). For the background reading to this report see PRISONERS IN AMERICA (L. Ohlin ed. 1973).

14. TASK FORCE ON CORRECTIONS, *supra* note 5, at 150.

15. *Id.* at 155-57.

16. *E.g.*, ILL. REV. STAT. ch. 38, § 1005-6-1 (1973); N.Y. PENAL LAW § 65.00 (McKinney Supp. 1973).

17. See NATIONAL COMM. ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE § 3202(5) (1970) [hereinafter STUDY DRAFT].

protracted incarceration, largely on grounds of their dangerousness. Admittedly benevolent purposes inspire these legislative and scholarly reform efforts. Only the dangerous are to be imprisoned; only the very dangerous are to be protractedly imprisoned. However, we are far enough down the road of penal reform to realize that benevolent purposes do not guarantee beneficent results.

One can well understand the politics of the taxonomy without accepting the concepts on which it is based. An effort to confine imprisonment to the dangerous has obvious political appeal. Provision for extended sentences for the particularly dangerous may allow us to avoid the worst abuses of the habitual criminal and the sexual psychopath laws whose application has proved grotesquely unjust throughout this country.<sup>18</sup> Indeed, the political justifications for the use of the dangerousness concept are sometimes expressly recognized. For example, the report of the National Advisory Commission suggests that "[c]lear authority to sentence the 'dangerous offender' to a long term of incapacitation may induce the legislature to agree more readily to a significantly shorter sentence for the nondangerous offender."<sup>19</sup> In other words, let us continue to deal unjustly with a few so that we can persuade the legislature to deal more effectively and fairly with the many!

Predictions of future criminality, it is submitted, are an unjust basis for imposing or prolonging imprisonment. Despite the weight of authority supporting the principle of dangerousness, it must be rejected because it presupposes a capacity to predict quite beyond our present or foreseeable technical ability. We are not inquiring whether the ill-educated, feckless, vocationally deprived ghetto youth is likely to be involved in crime—of course he is. We are not talking about minor crime or crime in general. The focus is on our capacity to predict crimes of some gravity, mostly crimes of violence to the person.

Although predictions of violent crime can fail in two ways, we

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18. See generally Cohen, *Administration of the Criminal Sexual Psychopath Statute in Indiana*, 32 IND. L.J. 450 (1957); Granucci & Granucci, *Indiana's Sexual Psychopath Act in Operation*, 44 IND. L.J. 555 (1969); Hacker & Frym, *The Sexual Psychopath Act in Practice: A Critical Discussion*, 43 CALIF. L. REV. 766 (1955); Swanson, *Sexual Psychopath Statutes: Summary and Analysis*, 51 J. CRIM. L.C. & P.S. 215 (1960); Tappan, *Some Myths About the Sex Offender*, 19 FED. PROB., June, 1955 at 7; Note, *Out of Tune with the Times; The Massachusetts SDP Statute*, 45 B.U. L. REV. 391 (1965); Note, *The Plight of the Sexual Psychopath: A Legislative Blunder and Judicial Acquiescence*, 41 NOTRE DAME LAW. 527 (1966); Note, *The Illinois Sexually Dangerous Persons Act*, 1966 U. ILL. L.F. 449; Comment, *California's Sexual Psychopath—Criminal or Patient?*, 1 U. SAN FRAN. L. REV. 332 (1967).

19. TASK FORCE ON CORRECTIONS, *supra* note 5, at 156.



have developed an extremely useful technique to conceal the most troublesome failures from ourselves. Illustratively, suppose that we attempt to project future violence to the person from among one hundred convicted criminals. Permit me to invent figures that are far superior to any we can now achieve. Assume that of the one hundred, we select thirty as likely future violent criminals. Despite our prediction, all one hundred are either released or left at large. Observing their subsequent careers, we obtain the results with hypothetical precision. Of the thirty predicted as dangerous, twenty do commit serious crimes of violence and ten do not. Of the seventy we declare to be relatively safe, five commit crimes of violence and sixty-five do not. Table I summarizes the data:

TABLE I

Prediction		Result	
		No Violent Crime	Violent Crime
Safe	70	65	5
Violent Crime	30	10	20
	100	75	25

Reading this chart one might claim "We had eighty per cent success in our prediction, successfully preselecting twenty out of the twenty-five who later committed serious crimes of violence." We failed to select five of the one hundred who later proved to be dangerous, but that seems a minor failure compared with the twenty serious crimes we could have prevented. Note, however, that we also failed in another way. We selected ten as dangerous—as likely to commit crimes of violence—but they were not. Had we exercised greater power over the thirty that we predicted as dangerous we would have failed in our prediction by needlessly detaining ten persons. More succinctly, we made twenty "true positive" predictions of violence and ten "false positive" predictions.

To increase our claimed eighty per cent success—to diminish the number we predicted as safe but who were in fact dangerous—we could certainly increase the number of our true positive predictions of dangerousness, but only at the cost of substantially increasing the number of false positive predictions. There, if you will reflect on it, is the moral dilemma we face: How many false positives can we justify in exchange for preventing crimes perpetrated by the true positives? I shall return to this dilemma below.

Rarely in practice do we have an opportunity to confront the naked jurisprudential issues in the neat hypothetical form posed

here. Moreover, we possess an extremely convenient mechanism by which to conceal from ourselves our critical incapacity as predictors—the mask of overprediction. If in doubt, put him in or keep him in. Why risk injury or death to potential innocent victims, particularly since the freedom involved is that of a person who has been convicted of crime? I do not mean to sound pejorative; I would no doubt feel pressured to do the same thing myself. If unsure about the future violent behavior of a person currently under control and for whom that control can legally be prolonged, the politically safe choice is to give the benefit of the doubt to any future victim rather than to the criminal or to the prisoner. What is wonderfully convenient about this overprediction of risk is that the predictor does not know who in particular he needlessly holds. Further, he is most unlikely to precipitate any political or administrative trouble in ordering or prolonging imprisonment. By contrast, one is quite likely to be in water too warm for comfort when those people whom one has released, but who could legally have been detained, *do* involve themselves in crimes of violence, particularly if those crimes are sensationally reported. Hence, the path of administrative and political safety is the path of the overpredicted risk.

A further important consequence of the mask of overprediction is that we lack sufficient empirical studies of our predictive capacity. All of us, of course, are masters at retrospective prediction, characterized by the tired phrase, "I told you so." We are less sure of our capacity as prospective predictors, in part because we are not in the position critically to test our predictions while those we have predicted as dangerous languish in institutions. Two recent opportunities to test the matter demonstrate the point. One occurred by force of a judicial decision, the other by the diligence of an imaginative and protracted research effort.

The United States Supreme Court's decision in *Baxstrom v. Herold*<sup>20</sup> presented a natural experiment in the overprediction of dangerousness. The state of New York had been classifying psychologically disturbed prisoners as suitable for detention in the institution for the criminally insane at Dannemora.<sup>21</sup> Some were held in this institution beyond the term of their sentence, if, after psychiatric examination, they were deemed mentally ill and dangerous to themselves or to others. The Court affirmed the rather obvious proposition that such prisoners could not be held beyond the period of their

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20. 383 U.S. 107 (1966).

21. See also *Carroll v. McNeill*, 294 F.2d 117 (2d Cir. 1961), *vacated*, 369 U.S. 149 (1962).

original criminal sentence without receiving the usual due process protections of the ordinary civil commitment procedures. When the prisoner's criminal sentence expires he must be given the same protections given ordinary persons, not merely the lesser protections the state extends to mentally ill prisoners. The immediate administrative effect of this decision was to compel the release or transfer to ordinary mental hospitals of each of the 967 "Baxstrom patients." They had to be either released into the community or committed to civil mental hospitals pursuant to ordinary civil commitment procedures.

Several studies of the subsequent careers of these predicted dangerous criminals have sought to determine the results of the mass release occasioned by the Supreme Court's decision. The broad conclusion is that there was gross overprediction of dangerousness. Perhaps the most intensive study was that reported in 1971 by Doctor Henry Steadman and his associates. They conclude, in part:

Two striking facts about the Baxstrom patients are the high proportion released after transfer to the civil hospitals and the low proportion subsequently readmitted . . . .

. . . .  
. . . [D]uring their first year of civil hospitalization the Baxstrom patients were not as troublesome as had been expected. Our findings suggest that they were equally not dangerous after they were released. Between 1966 and 1970, barely 21 of the 967 Baxstrom patients returned to Matteawan or Dannemora. All of the findings seriously question the legal and psychiatric structures that retained these 967 people for an average of 13 [years] in institutions for the criminally insane.<sup>22</sup>

The Baxstrom patients certainly proved less dangerous than predicted. The Steadman study worked with 246 of the 967 released. Only three per cent of that group were returned to correctional facilities or institutions for the criminally insane between 1966 and October 1970. Their release rate from civil hospitals was higher than that of comparable patients civilly committed to state hospitals. With respect to their community adjustment, a large number—fifty-six per cent of the males and forty-three per cent of the females—had no subsequent readmission to mental hospitals during the four years cov-

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22. Steadman & Halfon, *The Baxstrom Patients: Backgrounds and Outcomes*, 3 SEMINARS IN PSYCHIATRY 376, 384 (1971). The findings are updated in Steadman & Keveles, *The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-70*, 129 AM. J. PSYCHIATRY 304 (1972). A book-length analysis of the careers of the Baxstrom patients, related to other studies of the criminally insane, is currently being considered for publication under the title of H. STEADMAN & J. COCOZZA, *CAREERS OF THE CRIMINALLY INSANE*.

ered by the study. Subsequent criminal activity was also low. Thirteen of the eighty-four released patients for whom there was adequate follow-up information had a total of eighteen criminal contacts with the police, a remarkably low rate considering the fact that all had been held as dangerous criminals, likely to be violent.

In effect, the Supreme Court in *Baxstrom* compelled the testing of our predictions of violence; the test revealed massive overprediction. To regard practice in New York and the institutions of Dannemora and Matteawan as lying outside the mainstream of practice in institutions for the criminally insane would be erroneous. The story of the Baxstrom patients could be told for many of the people we currently hold in prisons and mental hospitals in many parts of the world because we deem them likely to be involved in future violence.

A recent research project lends further support to this conclusion. In October 1972, Doctors Harry Kozol, Richard Boucher, and Ralph Garofalo reported on a ten-year study designed to test their capacity to define and predict dangerousness.<sup>23</sup> They selected a high risk group of offenders in Massachusetts prisons. With unusually extensive clinical and social case work resources—independent examinations in every case by at least two psychiatrists and a social worker—they endeavored to predict the likely future dangerousness of each offender prior to his consideration for release. They identified for the releasing authority those offenders who in their view were dangerous and those who were not. Their thesis was that “[t]he validity of our diagnostic criteria and the effectiveness of treatment may be judged by comparing the behavior of patients released on our recommendation with the behavior of those who were released against our advice.”<sup>24</sup> Table II summarizes the results of the Kozol study:<sup>25</sup>

TABLE II

Prediction	Result	
	No Violent Crime	Violent Crime
Safe	386	31 (1M)
Violent Crime	49	17 (2M)
	435	48

The Kozol team was attempting to predict serious assaultive behavior. They were remarkably effective predictors, functioning at

23. Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 *CRIME & DELINQUENCY* 371 (1972).

24. *Id.* at 389.

25. The figures “1M” and “2M” in the violent crime column refer to one murder and two murders, respectively.

the forefront of our present clinical predictive capacity.<sup>26</sup> Though the likelihood of assaultive behavior was more than four times greater among those released against the researchers' advice than for those released on their advice,<sup>27</sup> consider the cost paid. Of the forty-nine who were released against the advice of the Kozol team, thirty-two did not subsequently commit any serious assaultive crimes during five years of freedom. Saving each true positive—benefiting the community and, indeed, the offender by preventing his inevitable commission of a serious assaultive crime—requires the detention of two others who were also expected to be involved in serious assaultive behavior, but who, in fact, would not be so involved were they released. Detention of two false positives is the cost of preventing one true positive. Kozol and his associates are, of course, fully aware of this tradeoff, and their report is a model of the careful collection of data that policy makers must have to face the difficult jurisprudential and ethical problems that underlie the proper use of imprisonment.<sup>28</sup>

We must not leave this area without appreciating the political danger in the current widespread acceptance of dangerousness as a justification for imposing imprisonment or as a basis for prolonging the duration of a prison term. So imprecise is the concept of dangerousness that the punitively minded will have no difficulty in classifying within it virtually all who currently find their miserable ways to prison, and, in addition, many offenders who currently receive probation or other community-based treatments. One need not look

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26. The results here are far superior to parole boards' capacity to predict violence on parole. Two recent studies from the California Department of Corrections research group by Doctor Wenk and his associates should give pause to any member of a parole board who has confidence in his capacities as a seer of future violent crime. The effort by this skilled group to develop a "violence prediction scale" for use in parole decisions resulted in eighty-six per cent of those identified as potentially dangerous failing to commit a violent act (more accurately, to be detected in a violent act) while on parole. See Wenk, Robison & Smith, *Can Violence Be Predicted?*, 18 CRIME & DELINQUENCY 393 (1972), and the excellent study of this problem by Geis and Monahan, *The Social Ecology of Violence*, soon to be published in MAN AND MORALITY (T. Lickona ed.).

27. More than thirty-four per cent of the "Violent" group were reportedly involved in violent assaultive behavior. This compares to an incidence of such behavior among the "Safe" group of slightly more than eight per cent.

28. A vigorous reanalysis of the implications of the Kozol study is being pursued by Doctor Kozol, Professor Alfred F. Conard of The University of Michigan Law School, Professor Franklin E. Zimring of The University of Chicago Law School, and the author. It threatens to produce another methodological article on the predictability of dangerousness. At issue are (a) the implications of the nonrelease of certain offenders, not included in the study, who were classified as dangerous by Doctor Kozol and his associates, and (b) the appropriate attribution of unreported or undetected crimes to those described in this text as the subjects of false positive predictions of violence.

too closely at the populations of city jails and state prisons before safely rationalizing their inclusion under the expansive rubric of "dangerousness."

Yet, it must be admitted, our inability to predict dangerousness with any acceptable measure of certainty does not alone compel the abandonment of dangerousness as a determinant of the decision to imprison. There are those, no doubt, who would accept the cost. Thus, any firm conclusion drawn from these observations on our modest capacity to predict violent behavior must await resolution of the second question addressed here—why risk any future criminality by releasing convicted criminals? My own conclusion may properly be foreshadowed: As a matter of *justice* we should never take power over the convicted person based on uncertain predictions of his dangerousness.

### C. *Desert*

The third general principle guiding the decision to imprison dictates a maximum of punishment limited by the concept of desert: No sanction greater than that "deserved" by the last crime, or series of crimes, for which the offender is being sentenced should be imposed. The principle strikes directly at the larger question I have deferred, namely, why not hold all convicted criminals until risk of recidivism is past? My answer, in part, is that the link between established crime and deserved suffering is a central precept of everyone's sense of justice, or, more precisely, of everyone's perception of injustice. To use the innocent as a vehicle for general deterrence would be seen by all as unjust, although it need not be ineffective if the innocence of the punished is concealed from the threatened group. Punishment in excess of what the community feels is the maximum suffering justly related to the harm the criminal has inflicted is, to the extent of the excess, a punishment of the innocent, notwithstanding its effectiveness for a variety of purposes.

That the concept of desert is not quantifiable and that it varies in time and place under the stress of changing circumstances does not reduce its central importance as a necessary ceiling of punishment.

### D. *Preconditions to Imprisonment*

To take the matter beyond generalities and offer a more precise answer to the question of when a sentence of imprisonment may

justly be imposed, we should contrast the provisions of the ALI Model Penal Code with the substantially different preconditions to imprisonment offered above.

Section 7.01 of the Model Penal Code directs the court not to sentence the convicted criminal to imprisonment unless:

- (a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or
- (b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
- (c) a lesser sentence will depreciate the seriousness of the defendant's crime.<sup>29</sup>

Later state and federal reforms of sentencing practice have built upon, and, in varying degree, adopted these three criteria for resolving the question of whether or not to imprison.<sup>30</sup>

As we have seen, criterion (a) is entirely unacceptable as a matter of principle. We lack the capacity to predict dangerousness that this criterion assumes, and, even if we could predict with substantially greater precision, to take power based on such a prediction is, as discussed below, an abuse of human rights.

The second criterion—the need for correctional treatment—unambiguously accepts the worst assumptions underlying the coercive rehabilitative model. It too must be rejected as an abuse of power over the individual. “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 we must abandon the variety of treatment programs developed within prisons. On the contrary, they need expansion. However, it does mean that they must not be seen as purposive in the sense that criminals are sent to prison *for* treatment. We must draw a sharp distinction between the primary purposes of incarceration and available opportunities for the training and assistance of prisoners that may be pursued within those purposes.<sup>31</sup>

The third criterion—that any punishment other than imprisonment would not sufficiently reflect the seriousness of the defendant's crime (sometimes expressed, “that imprisonment is necessary to deprecate the crime”) has received universal acceptance, and, currently at least, provides an unavoidable justification for imprison-

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29. ALI CODE, *supra* note 3.

30. See, e.g., ILL. REV. STAT. ch. 38, § 1005-6-1 (1973). See also STUDY DRAFT, *supra* note 17, § 3101.

31. See note 1 *supra*.

ment. It reflects the obverse of the argument of the maximum deserved punishment as a ceiling to punishment. Retribution, socialized under the criminal law from its roots in individual vengeance, not only limits the worst suffering we can inflict on the criminal but also dictates the minimum sanction a community will tolerate. For example, the typical wife slayer convicted of murder is most unlikely to be involved in future criminality, would be a safe bet under Model Penal Code criterion (a) were it acceptable, and probably needs none of the retraining contemplated by criterion (b). Nonetheless, he cannot, as a routine matter, be put on probation or given a suspended sentence, even were a showing made that the incidence of wife slaying would not increase upon a reduction of the frequency of imprisonment of wife slayers. The criminal law has general behavioral standard-setting functions; it acts as a moral teacher, and consequently requires a retributive floor to punishment as well as a retributive ceiling.

If only one of the Code's criteria proves acceptable, what should we substitute? The three criteria I have offered could form the foundation for a jurisprudence of the imprisonment decision for legislatures and courts that care to create a statutory and common law of imprisonment.

The first criterion derives directly from the Code and requires only brief amplification. Imprisonment should be the least restrictive punishment appropriate in a given case because any lesser punishment would depreciate the seriousness of the crime(s) committed. An example of a typical murderer has been suggested; many others come to mind based on the brutality of the crime or the particular circumstances or notoriety of the criminal. Many white-collar crimes or crimes by those in positions of public responsibility or high public office belong in this category. The criterion requires, in brief, the lowest level of clemency tolerable under current punitive mores.

My second criterion—the necessities of general deterrence and the appropriateness of this offender for deterrent purposes—finds no place in current codes but remains, in my view, inescapable.<sup>32</sup> For example, it forms the principle on which rests the entire structure of income tax sanctions. Not every tax felon need be imprisoned, only a number sufficient to keep the law's promises and to encourage the rest of us to honesty. Present arrangements for imprisoning federal

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32. See generally F. ZIMRING & G. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* (1973).



tax offenders give an object lesson in the parsimonious application of general deterrent sanctions: Approximately 80 million tax returns were filed in 1972; only forty-three per cent of the 825 individuals convicted of tax fraud were jailed.<sup>33</sup>

General deterrent purposes are also justified in many other areas of the criminal law, although they will frequently not call for imprisonment in areas serving merely regulatory purposes. The limitation of the maximum deserved punishment for the particular offender precludes imprisonment in this context unless, of course, the violation follows repeated breaches of the law, in which event the third suggested justification of imprisonment will apply.

The third criterion for imposing imprisonment concerns cases in which lesser sanctions have frequently or recently been imposed on a given offender for earlier bouts of crime. This *faute de mieux* criterion is also subject to a retributive maximum; no repetition of the entirely inconsequential should lead to imprisonment. However, there must be a role for imprisonment if lesser sanctions have been appropriately applied and the offender comes yet again for punishment. The criminal law must keep its retributive promises, although it need not be precipitous in moving to its heavy weaponry.

These principles—the least restrictive sanction; imprisonment only when any alternative punishment would depreciate the seriousness of the crime, or is necessary for general deterrence, or when all else practicable has been applied; the whole limited by a concept of the maximum deserved punishment—offer a basis on which a rational use may be made of imprisonment.

One further comment is pertinent. No principled jurisprudence of sentencing will emerge before legislatures bring order to their penal statutes or before judges routinely provide reasons for the sentences they impose. Only in this manner can the broad and detailed sweep of a common law of sentencing evolve.

## II. WHY NOT IMPRISON ALL CONVICTED CRIMINALS UNTIL RISK OF FUTURE CRIMINALITY IS PAST?

It was suggested above that the incarceration of persons beyond a just maximum period for the sake of preventing the future crimes of a "dangerous" minority is improper. But why should we not try coercively to "cure" criminals, either in the therapeutic sense of

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33. The conviction figures include convictions after trial as well as pleas of guilty and *nolo contendere*. 1972 COMM. OF INT. REV. ANN. REP. 18-19.

changing their behavior or in the sense of insulating ourselves from their future depredations? Is opposition to such cures a question of our inability to do so or an acknowledgement that it would cost too much? Or are there other reasons? Suppose we could, by an injection invented tomorrow, transform the criminal lion to the conforming lamb? For "cures" in the second sense—merely protecting the unconvicted from the convicted—we have the machinery at hand. Capital punishment is an unqualifiedly successful cure; castration, either surgically or chemically achieved, substantially diminishes rape-specific recidivism. Virtually all criminals can have their subsequent violent crime dramatically reduced by detaining them in prison until their fiftieth birthdays. Why should we not detain all predicted dangerous offenders beyond the just maximum period of imprisonment for what they have done? After all, such punishment will, as adequately demonstrated by the Kozol study, protect from serious personal injury the likely victims of at least one of each three so detained. Surely, some will no doubt argue, thus to prevent serious crime justifies protracted incarceration of those who are, after all, convicted felons.

The question pushes us to fundamentals. Is it a utilitarian issue or one of justice? The answer depends on the question's frame of reference. If the discussion of values be confined to the criminal law, surely imprisonment beyond the otherwise just punishment may be based on current predictions of dangerousness. We can in this manner prevent some serious crimes of violence—and those who pay the cost of the gradual capital punishment that is protracted imprisonment are not particularly valuable citizens anyhow. The community seems prepared to meet the relatively small costs of providing the prison cages; it seems, if anything, quite pleased to do so.

On the other hand, a different frame of reference leads to a different answer. Incarceration based on predicted dangerousness is unjust not because of a concern for the diminution of crime or the protection of prisoners. Rather, we should oppose excessive punishments because of fundamental views of human dignity. We do not suspect, we know, that respect for the human condition requires drawing precise justiciable restraints on powers assumed over other persons. Slavery, in certain settings, provides a clearly desirable social and economic way of life—for other than the slaves. We reject it for a larger view of man and society in which we establish dogmatic prescriptions of human dignities, and, to the best of our governmental abilities, protect them. Fairness and justice in the individual

case, not a generalized cost-benefit utilitarian weighing, dictate the choice.

Liberty, Rawls tells us, may only be limited in the interest of liberty itself and not for other social and economic advantages.<sup>34</sup> We may accept the proposition, and, with Rawls, test our principles of justice by asking whether "free and rational persons," ignorant of their own abilities and social positions and standing in what Rawls terms "the original position," would adopt minimum standards for prison and criteria for imprisonment. Rawls does not reach this question. At the "original position" he would exclude the prisoner from the group of "free and rational persons concerned to further their own interests . . . in an initial position of equality."<sup>35</sup> Thus, assuming the individual can by his behavior choose not to become a prisoner, one could argue that from behind "the veil of ignorance" that characterizes social contracting at the original position, no one would identify himself as a potential prisoner. No one would, therefore, concern himself with the presence or absence of fair and just criteria for imprisonment.

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34. J. RAWLS, *A THEORY OF JUSTICE* 244 (1971). The reader unacquainted with Rawls's theory may be assisted by a summary of his "Main Idea," and of his view that liberty may be limited only for the sake of liberty. Such summarization is a task not to be attempted without an intellectual safety net. So, let me offer the words of H.L.A. Hart:

[P]rinciples of justice do not rest on mere intuition yet are not to be derived from utilitarian principles or any other teleological theory holding that there is some form of good to be sought and maximised. Instead, the principles of justice are to be conceived as those that free and rational persons concerned to further their own interests would agree should govern their forms of social life and institutions if they had to choose such principles from behind "a veil of ignorance"—that is, in ignorance of their own abilities, of their psychological propensities and conception of the good, and of their status and position in society and the level of development of the society of which they are to be members. The position of these choosing parties is called "the original position."

Hart, *Rawls on Liberty and Its Priority*, 40 U. CHI. L. REV. 534, 535 (1973). "[L]iberty is given a priority over all other advantages, so that it may be restricted or unequally distributed only for the sake of liberty and not for any other form of social or economic advantage." *Id.* at 536.

Specifically, Rawls considers strict compliance [or ideal] as opposed to partial compliance theory . . . . The latter studies the principles that govern how we are to deal with injustice . . . . Obviously the problems of partial compliance theory are the pressing and urgent matters. These are the things that we are faced with in everyday life. The reason for beginning with ideal theory is that it provides, I believe, the only basis for the systematic grasp of these more pressing problems."

J. RAWLS, *supra*, at 8-9. I am, therefore, encouraged—with confidence in the value of the inquiry if not in the precision of the argument—to suggest that the same principles that move beyond utilitarian analysis in the assessment of justice in strict compliance legal theory are also applicable to criminal punishments.

35. J. RAWLS, *supra* note 34, at 11. He therefore does not reach the issue of the prisoner's relationship to "justice as fairness."

This seems a much too narrow view. I could swiftly persuade a mass of "original position contractors" (quite apart from any imprecise sentiments about "there, but for the Grace of God, go I") that they might well be born into a highly criminogenic social group—a disrupted family setting, membership within a prejudiced class with life experiences typified by fortuitous involvement in crime—bearing substantial risks of imprisonment for serious crime. Because all human behavior results from the interaction between endogenous processes and exogenous pressures and circumstances, the blanket exclusion of prisoners from Rawls's "worst-off members of society" on the strength of a purported dominance of the individual's rationality and self-determination is unfounded. In considering prisons and prisoners from behind the veil of ignorance, therefore, we should include ourselves as potentially within the prison population; we would, in that context, subscribe to concepts of fairness and justice that preclude the sacrifice of the individual prisoner to a supposed larger social good.

Whatever my lack of clarity in relating Rawls's fundamental principles of justice to the sentencing of convicted criminals, and to the proper limits of imprisonment and prison punishments, this much seems clear: Not 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.

Utilitarian values, of course, also limit punitive excess. Were the punishment for the most trivial crime as severe as that for the most serious any efficacy in differential deterrence or in the moral force of the criminal law would dissipate. Nonetheless, the chief limitation remains our view of justice as fairness, according defined minimum freedoms and dignities to man *qua* man. The perception that abuse of governmental power is a central problem of the human condition and that treatment of the criminal is closely bound to that problem serves as the fundamental inhibitor of excess.

A proper cynicism about the likely abuse of power compels a limitation on maximum control over the criminal to that justified, wholly apart from considerations of curing him of his crime or protecting the rest of us permanently from future risk. We all know that if criminals are coercively cured today, the rest of us may tomorrow be regarded as in need of remedial training, both to achieve our maximum social potential and to minimize collateral injuries to others. If criminals, 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.