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CORRECTIONS AND SIMPLE JUSTICE

JOHN P. CONRAD*

Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. . . . The only thing that permits us to acquiesce in an erroneous theory is the lack of a better one; analogously, an injustice is tolerable only when it is necessary to avoid an even greater injustice. Being first virtues of human activities, truth and justice are uncompromising.¹

JOHN RAWLS
A Theory of Justice

Until very recently, thoughtful and humane scholars, administrators, and clinicians generally held that it was the business of the prison and other incarcerating facilities to rehabilitate offenders. In addition to a rhetoric of rehabilitation appropriate for the influence of public opinion, this conviction was substantively expressed in the organization of services for offenders. Educators, psychologists and social workers were added to the permanent staff in the contemporary prison.

In the last few years, however, the weight of informed opinion in the United States about correctional rehabilitation has shifted to the negative. Rehabilitation, while still recognized as a meritorious goal, is no longer seen as a practical possibility within our correctional structure by the empirical observer. Nevertheless, the ideology of people-changing permeates corrections. Modern prisons remain committed to treatment; echelons of personnel to carry it out are established on every table of organization. The belief that a prisoner should be a better man as a result of his confinement guides judges in fixing terms and parole boards in reducing them. Rehabilitation continues to be an objective in good standing.

The dissonances produced by this conflict between opinion and practice are numerous, profound, and destructive of confidence in the criminal justice system. Whether these dissonances can be settled remains to be seen, but, clearly, understanding is critically important to improvement of the situation. In this article I shall explain the change in rehabilitative thought and consider the significance of that change. I shall then review some

of the more striking examples of policy departures grounded on rejection of the concept of rehabilitation and conclude with a new conceptualization of the place of corrections in criminal justice. My analysis and conclusions are intended to contribute to the vigorous dialogue which is necessary for the understanding and resolution of any public problem in a democratic society. In the case of corrections, the problem is the attainment of simple justice, a goal which must be achieved if civilized order is to continue.

THE DEVELOPMENT AND REJECTION OF THE REHABILITATIVE NOTION

The idea of rehabilitation is not rooted in antiquity. Until the eighteenth century, charity was the most that any deviant could hope for and much more than most deviants—especially criminals—received. Any history of punishment before that time is an account of grisly and stomach-turning horrors administered by the law to wrong-doers.² Our forebears behaved so ferociously for reasons which we can only reconstruct with diffidence. The insecurity of life and property must have played an important part in the evolution of sanctions so disproportionate to harm or the threat of harm, but there was certainly another source of our ancestors' furious response to the criminal: The war they waged against crime was partly a war against Satan. They believed that crime could be ascribed to original sin, that Satan roamed the world seeking the destruction of souls, and that his handiwork could be seen in the will to do wrong. The salvation of the innocent depended on the

* Senior Fellow in Criminal Justice, The Academy for Contemporary Problems, Columbus, Ohio.

¹ J. RAWLS, *A THEORY OF JUSTICE* 3-4 (1971).

² See, e.g., H. BARNES, *THE STORY OF PUNISHMENT* (1930); G. IVES, *A HISTORY OF PENAL METHODS* (1970).

extirpation of the wicked. It is only in light of belief systems of this kind, varying in detail from culture to culture, that we can explain the Inquisition, the persecution of witches, and the torturing, hanging, drawing, and quartering of common criminals.

The Enlightenment changed all that. If pre-Enlightenment man teetered fearfully on the brink of Hell, desperately condemning sin and sinners in the interest of his own salvation, the philosophes conferred an entirely new hope on him. Rousseau's wonderful vision of man as naturally good relied partly on an interpretation of primitive society which we now dismiss as naive, but the world has never been the same since he offered his alternative.³ Once relieved of a supernatural burden of evil, man's destiny can be shaped, at least partly, by reason.

Reason created the obligation to change the transgressor instead of damning him or removing him by execution or transportation. The history of corrections, as we now know it, can be interpreted as a series of poorly controlled experiments to see what could be done about changing offenders. It started with incarceration to remove offenders from evil influences which moved them to the commission of crime, a reasonable proposition, given what was known about the conditions which created crime.⁴ It is noteworthy that the theoretical basis for expecting benefits from incarceration depended on the perception that the causes of crime might be found in the community rather than in the criminal.

This theory did not survive for long. The actual benefits of incarceration were difficult to identify in support of the expectations of the early American idealists responsible for the original notion. Incarceration was now seen as a satisfactory punishment to administer to the criminal, and if a rationale was needed for it, Jeremy Bentham and the Utilitarians provided it.⁵ Punishment would rehabilitate if administered by the "felicific calculus," according to which the proper amount of pain could be administered to discourage the transgressor from continuing his transgressions.

Nineteenth century Americans were finicky

³ See J. ROUSSEAU, *AN INQUIRY INTO THE NATURE OF THE SOCIAL CONTRACT* (1791).

⁴ See D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* (1972), in which the author traces the origins of this hypothesis, its consequences, and the influences it has exerted long since it was disconfirmed.

⁵ See J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (rev. ed. 1823).

about human misery, and they did not like to see it administered intentionally. They responded to the rhetoric of rehabilitation as expressed, for example, in the famous 1870 Declaration of Principles of the American Prison Association.⁶ This time, reason provided a new objective, and a new logic to justify it. The prison's purpose was no longer simply to punish the offender, but the prisoner was to be cured of his propensity to crime by religious exhortation, psychological counseling, remedial education, vocational training, or even medical treatment. The Declaration of Principles maintained that some of the causes of crime are to be found in the community. However, while incarcerated, the offender was to be changed for the better lest he be released to offend again. No one seriously advocated that felons should be confined until there was a certainty of their abiding by the law; it was impractical to carry this logic that far.

Gradually, empiricism took control of correctional thought. Its triumph was hastened by the peculiarly available data on recidivism, which was easily obtained and obviously related to questions of program success or failure. Correctional rehabilitation was empirically studied in details ever more refined. In a 1961 paper, Walter Bailey reviewed the evidence available in a hundred studies of correctional treatment and found it wanting in support for the belief that prison programs are related to parole success.⁷ A much more massive review, by Lipton, Martinson, and Wilks, still unpublished, was completed in 1969 and reaches the same conclusion.⁸ In their impeccably rigorous evaluation of group counseling, Kassebaum, Ward, and Wilner fully substantiate the negative conclusion of their predecessors.⁹ In the absence of any strong evidence in favor of the success of rehabilitative programs, it is not possible to continue the justification of policy decisions in corrections on the supposition that such programs achieve rehabilitative objectives.

⁶ See TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE, PRISON ASSOCIATION OF NEW YORK, 26TH ANNUAL REPORT (1870).

⁷ Bailey, *An Evaluation of 100 Studies of Correctional Outcomes in THE SOCIOLOGY OF PUNISHMENT AND CORRECTION* 733 (2d ed. N. Johnston, L. Savitz & M. Wolfgang eds. 1970).

⁸ This work is summarized in R. Martinson, *Correctional Treatment: An Empirical Assessment*, 1972 (available in photocopied typescript from The Academy for Contemporary Problems, Columbus, Ohio).

⁹ G. KASSEBAUM, D. WARD & D. WILNER, *PRISON TREATMENT AND PAROLE SURVIVAL* (1971).

Paralleling the last twenty years of evaluative research has been much empirically based theoretical work. The classic study of the prison community by Clemmer¹⁰ imposes a structure on observation which, in turn, leads to the theoretical contributions of such writers as Schrag,¹¹ Sykes,¹² Goffman,¹³ and Irwin.¹⁴ Each of these workers brought a different perspective to his analysis, and the methodologies vary fundamentally. However, the picture of the prison which emerges clearly accounts for the unsatisfactory results of all those evaluative studies. The prison is an institution which forces inmates and staff alike to adjust to its requirements. These accommodations are inconsistent with rehabilitation. They are directed toward the present adjustment of the individual to the austere unnatural conditions in which he finds himself. In some prisons survival becomes a transfixing concern. In any prison, regardless of the hazards to personal safety, the discomforts and irritations of the present occupy the attention of everyone. Inmates are obsessed with their places in an unfamiliar but constricted world and their hopes for release from it. Staff members are required to give most of their attention to the "here and now" problems of life in custody, whose relationship to rehabilitation is strained at best.

Under these conditions, relationships and attitudes in even the most enlightened prison are determined by group responses to official coercion. The ostensible program objectives of rehabilitation may be a high school diploma, a new trade, or increased psychological maturity, but the prevailing attitudes towards programs will be determined by group opinions about their value in obtaining favorable consideration for release. Whatever his motivations, man may learn a lot by engaging in a vocational training program. However, the statistical success of such programs in increasing the employability of released inmates is imperceptible. The reasons for this situation are still subject to speculation, but the inference is that few of those involved take the program seriously. The learning process passes the time which must be served and qualifies the individual for the favorable consideration which he desperately seeks. But expectation of a career in a learned vocation does not influence the learner.

¹⁰ D. CLEMMER, *THE PRISON COMMUNITY* (1958).

¹¹ Schrag, *Leadership Among Prison Inmates*, 19 *AM. SOCIOLOG. REV.* 37 (1954).

¹² G. SYKES, *THE SOCIETY OF CAPTIVES* (1958).

¹³ E. GOFFMAN, *ASYLUMS* (1961).

¹⁴ J. IRWIN, *THE FELON* (1970).

The data are not as exhaustive as one would like. Perhaps Glaser's study of the effectiveness of the federal prison system¹⁵ provides the most conclusive picture of the bleak situation. The motivation to enroll in various self-improvement activities for release qualifications is conceded by the author. Neither in Glaser's own study of federal prisoners nor in the studies by others reported by him is there any strong evidence that educational and vocational training are related to post-release success. To this day, we have only anecdotal evidence that any inmate graduates of vocational training programs are successfully placed in careers for which they were trained.

The final word on coercion in the administration of rehabilitation programs may have been pronounced by Etzioni,¹⁶ whose analysis of compliance structures uses the prison as a paradigm of coercion. In Etzioni's formulation, the response to coercion is alienation. He holds that alienation from authority is at its highest when authority uses force to obtain compliance. As force is explicit and to be encountered continuously in the prison, it is obvious that alienation will be universal, although it will take many forms, both active and passive. Indeed, Etzioni hypothesizes that when a prison administration attempts to obtain compliance by other means than coercion it loses stability. Yet it is the very alienation of the prisoner which severely restricts his will to accept the goals of the staff. To choose to be committed to any activity is one of the few choices which cannot be denied the prisoner. For the inmate to accord the staff his volition is an act of enlightened self-interest which exceeds the perspective of most prisoners.

Rehabilitation has been deflated as a goal of correctional custody by empiricism and by sociological theory. Its claims, however, have not been refuted by these forces alone. The findings of research have been paralleled by staff disappointment, scepticism in the media, and administrative policy changes.

It is not possible to document so subjective a change as the loss of confidence in rehabilitation by correctional staff. Indeed, there are still many who continue with program development in the prisons and hope for the best. The establishment in 1969 of the Kennedy Youth Center in Morgantown,

¹⁵ See D. GLASER, *THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM* 260-84 (1964).

¹⁶ See A. ETZIONI, *THE ACTIVE SOCIETY* 370-75 (1968). See also A. ETZIONI, *A COMPARATIVE ANALYSIS OF COMPLEX ORGANIZATIONS* 12-22 (1961).

West Virginia, represents the persisting faith of the staff and consultants of the Federal Bureau of Prisons. It seems that the Bureau's faith is indomitable. For example, an experimental prison will be built in Butner, North Carolina, to study further the potentiality of treatment in custodial conditions. However, it would be difficult to find a comparable professional investment in institutional treatment. The fervid hopes engendered by the group counseling movement of the late fifties and early sixties have faded into routines and motions.

The part played by journalists in the change of correctional ideology is also hard to evaluate. The contributions of observers so diverse as Jessica Mitford,¹⁷ Ben Bagdikian,¹⁸ Ronald Goldfarb,¹⁹ and Eddie Bunker,²⁰ have vividly documented the futility of the prison as a rehabilitative agency. The extent to which they have changed public opinion is open to some question, in the absence of a recent poll, but there is a consistent theme in their writing which runs counter to the assumptions of rehabilitation. This theme flourishes without evident response to the contrary.

Administrative policy change has been easy to document. The California Probation Subsidy Act of 1965,²¹ a landmark piece of legislation, states that as many offenders as possible should be channeled into probation, limiting the use of incarceration to cases where the protection of the public requires it. The program has been described in detail elsewhere,²² but it is firmly based on the proposition that correctional rehabilitation cannot be effectively carried out in conditions of captivity. Whether it can be carried out in the community remains to be seen. As Hood and Sparks have remarked, the research which shows that probation is at least as effective as incarceration "cannot

be interpreted as showing that probation is especially effective as a method of treatment."²³

Nevertheless, the California act has been emulated in several states.²⁴ It represents a gradual shift which has already emptied some prisons and training schools. The shift has taken a much more abrupt form in Massachusetts, where in March, 1972, all juvenile correctional facilities were closed. The commissioner then responsible, Jerome Miller, acted on the conviction that such facilities do much more harm than good—if they can be said to do any good at all. The attention which the Massachusetts program has drawn because of its almost melodramatic timing has evoked singularly little debate. The local response in Massachusetts has been a fierce controversy, which the program has so far survived, but there has been at least a tacit acceptance throughout the country that the juvenile correctional facility is an institutional arrangement which can and should be terminated.

These academic and public developments portend the collapse of correctional rehabilitation as we have known it for the past twenty-five years. They confront the nation with a continuing need for the prison and no way to make it presentable. The apparatus of education, social casework, and psychiatry at least serve to disguise the oppressive processes required to hold men, women, and children in custody. To rehabilitate is a noble calling; to lock and unlock cages has never been highly regarded. The issue is apparent to many observers, but it is not surprising that we lack a consensus on its resolution.

IMPACT OF EMPIRICISM ON CORRECTIONS POLICY

The Report of the Corrections Task Force of the President's Commission on Law Enforcement and the Administration of Justice in 1967 initiated a series of public considerations of the problems of corrections. Its opening adjuration in the chapter of summary recommendations begins:

It is clear that the correctional programs of the United States cannot perform their assigned work by mere tinkering with faulty machinery. A substantial upgrading of services and a new orientation of the total enterprise toward integration of

¹⁷ Mitford, *Kind and Usual Punishment in California*, THE ATLANTIC MONTHLY, March, 1971, at 45, in B. ATKINS & H. GLICK, PRISONS, PROTEST AND POLITICS 151 (1972).

¹⁸ B. BAGDIKIAN & L. DADE, THE SHAME OF THE PRISONS (1972).

¹⁹ Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175 (1970).

²⁰ Bunker, *War Behind Walls*, HARPER'S MAGAZINE, February, 1972, at 39. See also E. BUNKER, NO BEAST SO FIERCE (1972).

²¹ CAL. WEFL. & INST. CODE § 1820 *et seq.* (West 1972).

²² See R. SMITH, A QUIET REVOLUTION (1972). See also KELD GORD *et al.*, COORDINATED CALIFORNIA CORRECTIONS: THE SYSTEM (1971) (known as THE KELD GORD REPORT). See also L. Kuehn, Probation Subsidy and the Toleration of Crime, August, 1972 (paper presented at the Criminology Session of the Annual Meeting of the American Sociological Association, New Orleans, Louisiana).

²³ R. HOOD & R. SPARKS, KEY ISSUES IN CRIMINOLOGY 187-88 (1970).

²⁴ See, e.g., NEV. REV. STAT. § 213.220 *et seq.* (1971); WASH. REV. CODE ANN. § 13.06.010 *et seq.* (1962). The state of Ohio has legislation under study which would approach the California model. At the time of this writing, the California model is the most advanced in concept and implementation.

offenders into the main stream of community life is needed.²⁵

With this blessing a profusion of community-based correctional programs ensued. Furloughs, work-release units, and half-way houses are now common rather than experimental. The use of volunteers is seen as natural and necessary rather than an administrative inconvenience suffered in the interests of public relations. The improvement of the old programs of probation and parole is slow and, in some states, imperceptible, but the Corrections Task Force started a movement which has gained momentum. The growing confidence in corrections in the community is reflected in the decelerated growth of prison populations at a time when crime rates are increasing as never before. In some states, especially California, the numbers of felons in state prisons has dramatically declined. In many others, including Ohio, Minnesota, and Illinois, the decline in actual institutional populations has been more modest, but that they have declined at all is significant in view of the rise in both populations and rates of crime and delinquency.

These events reflect hundreds of decisions by judges and parole board members. Policy is changing before our eyes. We can see from the data where it seems to be going. We can also see from current official studies that there is much concern about corrections at high executive levels. There is a continuing agreement that something must be done about its apparent ineffectiveness, its wastefulness, and the danger to society presented by the processes of incarceration.

The most prominent of these studies is the massive report of the Corrections Task Force of the National Commission on Criminal Justice Standards and Goals.²⁶ The Commission's recommendations are exhaustive, but some of them are particularly significant of the great shift which has taken place. Perhaps the greatest achievement of the Commission is its forthright recognition of the community at large as both a breeder of criminal activity and the most logical correctional base. The reasons behind this conclusion include findings that

²⁵ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 105 (1967).

²⁶ The Report of the Corrections Task Force is in press at the time of this writing. Necessarily, its citation at this point cannot be specific. The reader is particularly referred, however, to the introductory Chapter 1, a summary of the findings, and the final Chapter 18, Priorities and Implementation.

traditional penal institutions tend to compound rather than alleviate the problems they are designed to correct, that most offenders are treated disproportionately to their potential violence and danger, and that imprisonment has a negative rather than positive effect on the offender's ability to reassimilate into the community upon release. On the other hand, the Commission concluded that community-based programs seem to be capable of providing community protection and by their very nature do not create the environmental problems inherent in the traditional penal institutions. "The move toward community corrections implies that communities must assume responsibility for the problems they generate."²⁷

The results of the study find practical expression in recommendations which are stunningly direct. The Commission prescribed that no new juvenile institutions be built and that existing institutions be replaced by local facilities and programs. The suggestions concerning adult corrections were somewhat more cautious: absent a clear finding that no alternative is possible, no new adult institutions should be built either. The point is that the Commission has no confidence in the value of the prison for any purposes other than punishment and incapacitation. The logic carries the Commission to the conclusion that the country has more prisons than it needs and that it should entirely discontinue the incarceration of juvenile offenders.

Obviously, if the Commission's plan is to be carried out, the correctional continuum must heavily stress alternatives to incarceration. Such a continuum must call for communities to increase social service resources to provide for diversion of offenders from criminal justice processing to the greatest extent possible. It must call for a sentencing policy which relies much more explicitly on suspended sentences, fines, court continuances, and various forms of probation in which emphasis is given to the provision of services. Prisons must be reserved for offenders guilty of crimes of violence, and perhaps for other offenders whose crimes are so egregious as to require this level of severity to satisfy the community's desire for retributive justice.

The Commission is not alone in its outspoken demand for change. Compared to the final report of the Wisconsin Citizens' Study Committee on

²⁷ NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, WORKING PAPERS C-3 (1973).

Offender Rehabilitation,²⁸ the recommendations of the National Advisory Commission are conservative. The Wisconsin report, issued in July, 1972, begins by establishing as "its most fundamental priority the replacement of Wisconsin's existing institutionalized corrections system with a community-based, non-institutional system." The reasons for this admittedly radical proposal are unequivocal. First, "current Wisconsin institutions cannot rehabilitate." Second, "de-institutionalization of Wisconsin's correctional system would, in the long run, save considerable tax dollars." The Committee considered action to "de-institutionalize" the correctional system so urgent that its accomplishment before mid-1975 was recommended. Although the Governor to whom this recommendation was addressed has not adopted it, the significance of such a recommendation from a committee composed of persons drawn from the informed and established professional and business communities is not to be dismissed as an exercise in flighty liberalism. The Wisconsin correctional apparatus has long been admired as an adequately funded, professionally staffed, and rationally organized system, second to none in these respects. If prisons could rehabilitate, some sign of their capabilities to do so should have emerged in that state. This committee looked carefully for such a sign and could find none.

The alternative system recommended for Wisconsin begins with a call for pre-trial diversion of some offenders on the decision of the District Attorney, the use of restitution as an alternative to the full criminal process, and decriminalization of

fornication, adultery, sexual perversion, lewd behavior, indecent matter and performances, non-commercial gambling, fraud on inn or restaurant keepers, issuance of worthless checks, fraudulent use of credit cards, non-support, the possession, sale and distribution of marijuana, and public drunkenness.²⁹

The confirmed addict and the chronic alcoholic are recognized as helplessly infirm persons. The Task Force urged a policy of treatment rather than prosecution, and a program of services rather than incarceration. The recommendations call for the establishment of services which do not now exist in Wisconsin. There is a realistic confrontation with

the probable outcome of most services for these gravely handicapped persons: "[T]he committee feels that flexible programming and expectation of failure must be a part of any development of drug treatment programs."³⁰

Nevertheless, it is the clear responsibility of the state to provide treatment within a framework in which at least some success can be rationally expected. Even some custodial care will be required for addicts and alcoholics who can be treated in no other way. It is noteworthy, however, that the possibility of providing such custodial care in prison settings is considered only for those addicts who have been guilty of ordinary felonies, and even then such persons are to have the option of treatment in facilities designed for addicts. No consideration was given to the use of correctional facilities for standard treatment for addicts of any kind.

The Wisconsin Task Force saw that their recommendations went several steps beyond the current public consensus. Nobody knows for sure what the limits of public tolerance for change in corrections may be, but even the forthright writers of this report knew that there is a wide gap between a rationally achieved position in these matters and its acceptance by the electorate. This is especially true in the field of narcotics addiction, where lack of accurate information and a plethora of well-meant misinformation, have done so much to distort public opinion. We are so thoroughly committed to the use of the criminal process for the control of social deviance that alternatives are difficult to design with confidence, notwithstanding our knowledge that the criminal justice system is demonstrably ineffective for many kinds of social control. Recognition of the irrationality of this situation does not provide us with obvious remedies. The weakness of this excellent report is that its recommendations can be readily dismissed by the administrator as impractical, even though the present system is itself shown to be thoroughly impractical on the basis of its results.

The Wisconsin study of corrections provides a startling example of the dissatisfaction evoked by an apparently advanced correctional program when dispassionately studied by citizens concerned with the claims of justice and rationality. In Ohio, another Citizens' Task Force on Corrections reported to the governor on the state of the corrections system, but in this case, the Task Force was confronted by one of the most decrepit correctional

²⁸ WISCONSIN COUNCIL ON CRIMINAL JUSTICE, FINAL REPORT TO THE GOVERNOR OF THE CITIZEN'S STUDY COMMITTEE ON OFFENDER REHABILITATION (1972).

²⁹ *Id.* at 50.

³⁰ *Id.* at 77.

programs in the country. Generations of pound-foolish fiscal maladministration had produced a situation in which underpaid, poorly supervised staff worked in slovenly, malodorous prisons filled to the bursting point with idle prisoners. The atmosphere thus created had exploded more than once, convincing even the most fiscally conservative persons that something had to be done. The response was the construction of a large new prison in the most remote area in the state. It was obsolete at the time of its design and will probably be a burden to distort the criminal justice system of Ohio for centuries to come.

The *Report of the Ohio Citizens' Task Force on Corrections*³¹ was written in the context of a perceived need for "de-institutionalization." Concerned with bringing about some organizational coherence in an agency which conspicuously lacked this basic element, it devotes much time and space to recommendations for the creation of an effective management structure, an equitable personnel policy, a Training Academy, and a Division of Planning and Research. However, the Task Force stresses at the outset of its report that even if all its recommendations were to be immediately implemented, "the public would not be protected one iota more."³² The report emphatically asserts:

We must cease depending on institutionalization as an adequate response to the law offender and protection of the public. Instead, we *must* develop a system of community-based alternatives to institutionalization.... The emphasis of the future must be on alternatives to incarceration. The rule, duty, and obligation of this Task Force is to communicate this vital conclusion to the public.³³

Since the publication of this report in December, 1971, the Division of Correction has been transformed into an adequately staffed Department of Rehabilitation and Correction. An administrative group is at work on the development of an adaptation of the California Probation Subsidy Act as the most likely strategy for the creation of a sufficient range of community-based alternatives to incarceration. The new penitentiary at Lucasville has been opened. In spite of its preposterous location far from the cities from which its inmates come, it at least has made possible a decision to demolish the infamous old prison at Columbus.

The Ohio Youth Commission, charged with the maintenance of a correctional program as well, has re-organized to make its preventive program more than nominal. The de-institutionalization of Ohio corrections has not been accomplished, nor will it be accomplished soon, but a structure of administrative planning, research, and evaluative management has been created on the basis of which rational change can be expected. Already the state's confined population has declined by ten percent, in spite of a steadily increasing rate of commitments. Drift and expediency were the villainous influences identified by the Citizens' Task Force; they have been replaced by policies which require rational decision-making. The transformation is not fool-proof, but it will at least discourage fools from rushing in.

Faced with a rapid expansion of its population and the unique problems brought about by its isolation from the rest of the country, Hawaii has drawn on the resources of the National Clearinghouse for Criminal Justice Planning and Architecture to Develop a Correctional Master Plan.³⁴ The plan explicitly credits the state with a more adequate delivery of correctional services than is available in many states. However, it does not go far enough. It retains a significant emphasis on traditional institutionalization which "is probably the most expensive response and also the least effective that a criminal justice system can make in dealing with criminal behavior."³⁵ Cited as support for the ineffectiveness of such institutionalization are the increased crime rate and high recidivism.

The approach adopted by the Hawaii planners borrows from the concept of the National Clearinghouse and represents the best current example of a fully developed correctional program based on the Clearinghouse guidelines. To summarize the work of the Clearinghouse in an article such as this is a daunting task; the published *Guidelines*³⁶ constitute a weighty volume addressed to the whole span of correctional issues. However, the core ideas are simple and identifiable. First, the planning of correctional systems will eliminate the costly waste incurred by needless building of security housing.

³⁴ See STATE LAW ENFORCEMENT AND JUVENILE DELINQUENCY PLANNING AGENCY, CORRECTIONAL MASTER PLAN 26 (1973).

³⁵ *Id.*

³⁶ F. MOYER, E. FLYNN, F. POWERS & M. PLAUTZ, GUIDELINES FOR THE PLANNING AND DESIGN OF REGIONAL AND COMMUNITY CORRECTIONAL CENTERS FOR ADULTS (1971). See particularly Section D, *Planning Concepts*.

³¹ OHIO CITIZENS' TASK FORCE ON CORRECTIONS, FINAL REPORT TO GOVERNOR JOHN J. GILLIGAN (1971).

³² *Id.* at A-8.

³³ *Id.* at A-8, A-9 (emphasis in original).

Second, community-based alternatives to incarceration can afford both protection for the community and effective reinstatement services for the vast majority of offenders. Third, the safe assignment of offenders to correctional services requires a process of differential classification, preferably in an "Intake Service Center." Fourth, for the control of dangerous offenders a "Community Correctional Center" should be incorporated in the system with full provision for maximum custody. Throughout the conceptual development of the Clearinghouse *Guidelines* there is the tacit assumption that environmental influences are the most accessible points of intervention as to any offender and the diagnostic task is to identify those influences which can be brought to bear on his resocialization. Most social science students of criminal justice issues will recognize these assumptions as hypothetical at best, but their humane and rational intent is obvious. Clearly, an urgent task for research is the evaluation of the consequences of their implementation under such circumstances of full acceptance as the state of Hawaii has accorded.

The momentum of the traditional correctional policies will not be suddenly halted. Regardless of the enjoiners of the Law Enforcement Assistance Administration and of the recommendations of Citizens' Commissions across the country, more jails will be built, and many offenders will occupy their cells who might just as well be enrolled in an appropriate community program. Neither the staff, the agencies, nor the sentencing policies are fully enough developed to allow for an immediate implementation of the enlightened recommendations of the Task Force Reports. In a world in which the costs of incarceration have reached annual per capita costs which far exceed average citizen incomes, the future of incarceration must be constrained by a policy of rigorous selectivity. The informed opinion that coerced rehabilitation is an impractical objective is equally welcome to humane liberals and fiscal conservatives. The task of research is to collect the information which will support the strategy of change.

THE DEMOBILIZATION OF CORRECTIONS

Where will the momentum of change in corrections lead the criminal justice system? In so emotionally charged a set of issues as surrounds the disposition of convicted offenders, it is futile to predict the probable course of events. Criminologists have known for a long time that the execution

of murderers cannot be shown to deter murder, but the retributive motive still permeates our culture, and it is not at all certain that the abolition of capital punishment is permanent. Hatred of the criminal and fear of his actions have nothing to do with reasoned plans to protect ourselves from him or to change his behavior. In a period in which crime has assumed the quality of obsessive concern in our society, the wonder is that so many are able to accept the dispassionate view of the offender which characterizes the recommendations of the numerous study commissions working on the renovation of the correctional system. The threat of an irrationally repressive policy is still a real one. The recent demand by Governor Rockefeller for draconian laws to imprison for life the vendor of narcotics will at least serve as a reminder how tenuous may be our hold on rational correctional concepts. Nevertheless, this portent and others like it can be offset by the widespread belief that rational change is possible and desirable. Some encouragement however, may be taken in the support of this position by a broad spectrum of political opinion. The concern for correctional change is not confined to the various liberal shades.

We should specify the structural changes in the criminal justice system which the new correctional ideology implies. Much of the rhetoric of skepticism challenges us to justify the retention of any part of the present correctional system. We are told that the criminal justice system is nothing more than an instrument for the regulation of the poor, and that therefore the interests of justice would be best served by its abolition. This kind of effervescence serves to discredit the motives and good sense of the correctional reform movement, which draws on the evidence of social research to reach conclusions which both establish the obsolescence of the present system and indicate fruitful directions for its renovation. It is time that we considered where these directions will take us.

First, although we do not know how the prison can be converted into a rehabilitative institution, it will have to be retained for the protection of society from some violent and dangerous offenders from whom no alternative means of protection exist. These prisons must be small. They must provide for the long-term prisoner in ways which support psychological stability and his integrity as a person. These objectives require that he should have latitude for choice, that he should have a sense of society's concern for his welfare, and that his

life should be restricted as little as possible given the purposes to be achieved in restricting him at all.

The retention of the prison for the containment of the dangerous offender assumes that he can be identified. This assumption is open to attack. The inference that all offenders who have been guilty of major violence will present continuing hazards to the public is refuted by the consistently low rates of recidivism of released murderers. Therefore, we are reduced to predicting a hazard of future danger from the determination of a pattern of repetitive violence. Many authorities on criminal justice will be dissatisfied with the potential for abuse in this kind of prediction.³⁷ Acknowledging the validity of this criticism, I can only respond that the confidence which a changing system of social control must maintain will rapidly erode if dangerous and predatory offenders are released from prison to resume the behavior for which they were confined in the first place. Until a more satisfactory basis for their identification can be found, we shall have to tolerate some injustice in order to avoid the greater injustices of needlessly confining the obviously harmless. Social science must persist in the improvement of our power to identify the dangerous offender. The quality of justice is heavily dependent on the increase of knowledge in this age when vengeance is being replaced with reconciliation.

The remainder of the correctional panoply is a dubious asset to justice. We have established probation and parole, halfway houses, work-release programs, group homes, and community correctional centers in an effort to create alternatives to incarceration. The effort has largely succeeded; informed observers have been convinced, and policy has changed sufficiently to reduce the rate of commitment to prison in most of the jurisdictions of the country. As humanitarian reforms, these alternatives were essential. They still are. But, there is little evidence to show that these programs are really more effective than the prisons they replace. They are certainly no worse.

But the point is to *improve* the effectiveness of the criminal justice system. It must be made possible for the offender to choose a lawabiding life and to act on that choice. Offenders must be seen as people with personal problems of great difficulty. They are now provided with second-

rate services, if they receive services at all. It is incumbent upon a society which creates much of its crime burden from persistence in social injustice to make available services which can extricate criminals from criminal careers. In most communities these services exist. The Massachusetts experiment of last year in large part consisted of an effort to bring to the offender the regular community services which are available to ordinary citizens, rather than select the offender for special correctional versions of these services. The latter do not assure effective assistance. Instead, they assure that the help offenders receive will have some stigma attached, and that treatment will be affected by the persistence of the myth that criminality itself is a condition to be treated.

Courts, as the administrators of justice, should induce service agencies of all kinds to make their services accessible. The court thus becomes a referral agency, opening doors by its authority, perhaps even by the purchase of services, but not by coercion or the implication that the freedom of the offender depends on his obtaining benefits from services rendered. This is a model of service delivery which will be difficult to learn and even more difficult to live with. There will always be an inclination to draw an invidious conclusion from the offender's inability to persevere in a program intended for his benefit, but it is an important step in itself to make it possible for offenders to choose the services. Those who can choose but reject them anyway will not benefit from compulsion.

If services can be made more effective by projecting offenders into the mainstream of community activity instead of keeping them in a correctional backwater, the surveillance of these services can also be improved by transferring that responsibility to the police. No one is served by the pretense that probation and parole officers possess qualifications for the discharge of this function. Law enforcement duties should be performed by the police, who are trained for the task and organized to do it. To expect that probation and parole officers can accomplish anything in this respect that could not be better done by the police is to compound confusion with unreality.³⁸

There are two functions now discharged by probation and parole officers which cannot be easily transferred. The decisions related to the sentence, its imposition, its terms, its completion and

³⁷ See, e.g., von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFF. L. REV. 717 (1972).

³⁸ See E. STUETZ, *SURVEILLANCE AND SERVICE IN PAROLE: A REPORT OF THE PAROLE ACTION STUDY* 70-96 (1972).

revocation cannot be made without essential information systematically collected. The reports which probation officers make to the court and the parole officers make to the parole boards are services to the court which should be carried out by officials under the control of the court.

The information collected by this officer of the court (his functions are so much more specific than those of the present probation officer that we might accurately designate him the Information Officer) will be essential for the service referrals which the court should make. In small courts, information and referral could well be carried out by the same officer; there may be advantages in differentiating the functions in large courts. These residual responsibilities must be maintained, but their discharge will hardly call for the large and many-layered staffs which are to be found in present day probation and parole departments.

There remains the question of sanctions to be imposed on offenders. Less severity but more certainty in punishment will better serve the public protection. The victims of crime should receive restitution from the offender to the limit that restitution is practical. The graduated use of fines, relating them to the offender's resources, has been successfully used in Sweden. An English study, reported by Hood and Sparks,³⁹ indicates that for property crimes, at least, the fine may well be the most effective sanction. Suspended sentences have not been definitively evaluated as to their effect on recidivism. The tolerance of the system for probation and parole services in which contact does not take place after adjudication suggests that we can safely rely on the suspended sentence for a substantial proportion of offenders. Where there is reason to believe that surveillance is necessary, provision for regular police contacts could be made to assure that reliable control is maintained.

³⁹ HOOD & SPARKS, note 23 *supra*, at 188-89.

Such a system would limit the use of incarceration to pre-trial detention of some exceptional defendants, and post-trial detention of only the most dangerous offenders. It would provide protection where it is needed, service where it is desired by the offender himself, and control in the measure that the circumstances of the community and the offender require it. The victim would no longer have to comfort himself with the knowledge that the law had taken its course toward retribution; he would now receive restitution from the offender or compensation from the public funds as the situation might require.

The system would be adjustable by feedback. Increased control would be obtained by increased use of the more severe sanctions where the data on crime rates called for it. This system would be retributive, but the nature of the retribution would be the minimum required by measured experience rather than the ancient demands made by hatred and custom. Where reconciliation can be achieved, it will be eased, and where control is required it will be exercised, but the claims of simple justice will be essential elements of policy.

Justice can only be approached, never fully achieved. However, unless it is indeed the first virtue of the public institutions which administer it, none of the other virtues these institutions may possess will matter. The claims of simple justice are not satisfied merely by the administration of due process, but by the operation of the whole system by methods which restrict liberty only to the degree necessary for public purposes, but nevertheless assure that these restrictions are effective. We are far from such a system now. The removal of the assumptions which the belief in rehabilitation has engendered will make possible a system which will be more modest in aims, more rational in its means, and more just in its disposition.