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THE CRIME OF CRIMINAL SENTENCING BASED ON REHABILITATION

Louis R. Lopez*

I. INTRODUCTION

In February, 1980, 33 convicts were killed at the New Mexico State Prison near Santa Fe in one of the bloodiest and most atrocious riots in American prison history.¹ There was no one else killed apart from the convicts, and all of the dead were reportedly killed by other convicts. It was reported that some of the victims were beheaded, while others were mutilated in other ways or burned beyond recognition with a blow torch.² The rampage will probably set off another debate on prison reform among lawyers, judges, and criminologists, as happened after Attica in 1971. This will unfortunately show convicts that the best way to get attention paid to their problems is through violence.

A lively debate began in the late 1970's on the topic of criminal sentencing.³ A major attack was launched on the indeterminate sentence and its companion concepts of probation and parole.⁴ Changes in state law on indeterminate sentencing were

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1. Williams, Kasindorf & Katel, *The Killing Ground*, NEWSWEEK, Feb. 18, 1980, at 66.

2. *Id.*

3. See, e.g., P. O'DONNELL, M. CHURGIN & D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM (1977); REPORT OF THE TWENTIETH CENTURY TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976); E. VAN DEN HAAG, PUNISHING CRIMINALS (1975); J. WILSON, THINKING ABOUT CRIME (1975); Cei, *The Indeterminate Sentence at the Crossroads*, 3 NEW ENG. J. PRISON L. 85 (1976); Radzinowicz & Hood, *Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem*, 127 U. PA. L. REV. 1288 (1979); Symposium on Sentencing, (Pts. 1 & 2), 7 HOFSTRA L. REV. 1, 243 (1978-79); Zalman, *The Rise and Fall of the Indeterminate Sentence*, (pts. 1 & 2), 24 WAYNE L. REV. 45, 857 (1977-1978).

4. All of the books in note 3 *supra* questioned the indeterminate sentence. Some articles doing the same are Bayley, *Good Intentions Gone Awry: A Proposal For Funda-*

made,⁵ but some writers rose to defend the indeterminate sentence and its justification—the rehabilitative theory of punishment.⁶ It is not clear how long and intense the struggle will be before the rehabilitative (a.k.a. reform, treatment) theory is put to rest or at least put in proper perspective; it should exist not as a basis for a sentencing plan but as an auxiliary and voluntarily administered method for helping prisoners to understand themselves and modify their conduct.

The intention of this Article is to examine the inadequacy and lack of scientific development of the rehabilitative theory which precludes its use as a rationale behind criminal sentencing. Institutional problems in its practical application will be examined, but most importantly, questions will be presented about underlying flaws in the theory of how it is supposed to work even under ideal institutional conditions.

There is an urgent need to carefully study other theories of punishment in order to determine which ones are acceptable as justifications for punishing wrongdoers. It will serve no purpose to abandon the rehabilitative theory if it is thoughtlessly replaced by a theory which is equally, if not more, objectionable. There are those who would maintain that every different punitive philosophy can be satisfied by a single sentencing scheme, but this is difficult to accomplish, especially in view of the fact that philosophers often see those justifications which are opposed to their own view as unjust or immoral.⁷

mental Change in Criminal Sentencing, 51 WASH. L. REV. 529 (1976); Fogel, *Justice, Not Therapy: A New Mission for Corrections*, 62 JUDICATURE 372 (1979); Weinstein, *Sentence Without a Period . . . The Paradox of Criminal Sentences*, 32 Mo. B.J. 490 (1976).

5. See, e.g., CAL. PENAL CODE § 1170 (West Supp. 1980) (specifies determinate sentences with three permissible sentences for each violation); 1977 N.M. LAWS, ch. 216 (institutes definite sentencing from range of permissible sentences and abolishes parole board discretion); OR. REV. STAT. §§ 161.535, 161.555, 161.605, 161.615 (1977) (classifies offenses and permissible sentences).

6. *Legislation to Revise and Recodify Federal Criminal Laws: Hearings on H. R. 6869 Before the Subcommittee on Criminal Justice of the Committee on the Judiciary*, United States House of Representatives, 95th Cong., 2d Sess., pts. 1-3, at 2389-90 (1978) (statement of Chief Judge David Bazelon) [hereinafter cited as *Hearings on H. R. 6869*]; A. SMITH & L. BERLIN, INTRODUCTION TO PROBATION AND PAROLE 254-261 (2d ed. 1979); Reid, *Rebuttal to the Attack on the Indeterminate Sentence*, 51 WASH. L. REV. 565 (1976); Stürup, *Indeterminacy as Individualization*, 14 SAN DIEGO L. REV. 1039 (1977).

7. "[t]he traditional aims of retribution, rehabilitation, deterrence, and social defense are mutually contradictory at several junctures in logic, criminal procedure, and

The common philosophical justifications for the institution of punishment are the following:

- (1) Retribution—punishment is justified merely because the offender has committed a wrong.
- (2) Deterrence—punishment is justified in order to deter the offender from committing further crimes in the future and to deter other members of society in general.
- (3) Rehabilitation—the offender needs to be rehabilitated so that he will behave in a socially acceptable manner.⁸
- (4) Incapacitation—justifies the incarceration of the offender for the protection of society.⁹
- (5) Condemnation—the infliction of punishment upon the guilty person is the symbolic condemnation by society of the individual.¹⁰

Some have apparently assumed that retribution's "eye for an eye" prescription is the only other alternative to rehabilitation. This is a dangerous reversion to primitive ideas and can be used

prison technique—not to mention human psychology." CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, AND JUSTIFICATIONS 231 (R. Gerber & D. McAnany eds. 1972) [hereinafter cited as CONTEMPORARY PUNISHMENT]. Yet the proposed new Federal criminal code attempts to satisfy all of these objectives and more. Criminal Code Reform Act of 1979, S. 1722, 96th Cong., 1st Sess. §§ 101(b) and 2003(a)(2). It also appears that rehabilitation crept back in after previous bills and was given full status as a sentencing goal. §§ 101(b)(4) and 2003(a)(2)(D). In § 2003(a)(2)(D) the imposition of a sentence is strangely justified if there is a need to provide "the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

The Criminal Code Reform Act of 1979, known as H.R. 6915 in the House of Representatives, never won floor consideration in either house of the 96th Congress. 38 CONG. Q. WEEKLY REPORT 3503 (1980).

8. See generally CONTEMPORARY PUNISHMENT, *supra* note 7; T. HONDERICH, PUNISHMENT, ITS SUPPOSED JUSTIFICATIONS (1970); PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT (G. Ezorsky ed. 1972); THEORIES OF PUNISHMENT (S. Grupp ed. 1971); Benn, *Punishment*, 7 ENCYC. OF PHILOSOPHY 29 (1967).

9. See CONTEMPORARY PUNISHMENT, *supra* note 7 at 129-174.

10. "What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition." Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 404 (1958). See also *Hearings on H. R. 6869*, *supra* note 6, at 1333 (testimony of Andrew von Hirsch); Feinberg, *The Expressive Function of Punishment*, 49 THE MONIST 397 (1965); Gusfield, *On Legislative Morals: The Symbolic Process of Designating Deviance*, 56 CALIF. L. REV. 54 (1968).

to justify long sentences which are questionable in effectiveness.¹¹ Unfortunately, some legislators have probably seen the rejection of rehabilitation as a call for long sentences as well as harsh or indifferent treatment. In New Mexico this growing hard-line attitude may have significantly contributed to the Santa Fe riot.

The New Mexico prison facility was designed to hold a maximum of 800 prisoners, but it contained 1136 at the time of the riot.¹² On July 1, 1979, New Mexico had abandoned indeterminate sentences in favor of a system of definite sentencing,¹³ but the purpose of the change was in reality to require longer periods of incarceration.¹⁴ Apparently the change was made without accompanying provision for the construction of adequate facilities to hold the additional population to be expected from more severe sentences. The overcrowding actually arose out of the old, supposedly more lenient system of indeterminate sentencing, but indifference to these conditions was probably facilitated by the increasing emphasis on retribution. Overcrowding in prisons is not a problem unique to New Mexico. It was claimed in early 1980 that throughout the United States 45% of all inmates lived

11. The United States has the highest percentage of total population confined in prisons (compared to European countries) and sentences for equivalent crimes that are several times longer. *Hearings on H.R. 6869, supra* note 6, at 1743 (statement of Milton Rector).

Studies reveal that the severity of the punishment actually increases the probability of recidivism. Antunes & Hunt, *The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy*, 57 J. URB. L. 145, 156 (1973). In their own analysis of findings, the authors concluded that the certainty of punishment is more effective than severity in reducing crime rates. Severity alone is not associated with lower crime rates. *Id.* at 151. See generally J. ANDENAES, *PUNISHMENT AND DETERRENCE* (1974); F. ZIMRING & G. HAWKINS, *DETERRENCE* (1973).

For legal and philosophical articles and books discussing the subject of retribution see J. KLEINIG, *PUNISHMENT AND DESERT* (1973); N. MORRIS, *THE FUTURE OF IMPRISONMENT* (1974); A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 45-55, 66-76 (1976); Armstrong, *The Retributivist Hits Back*, 70 MIND 471 (1961); Clear, *Correctional Policy, Neo-Retributionism, and the Determinate Sentence*, 4 JUST. SYS. J. 26 (1978); Finnis, *The Restoration of Retribution*, 32 ANALYSIS 131 (1971); Gardner, *Renaissance on Retribution: An Examination of [A. von Hirsch's] DOING JUSTICE*, 1976 WIS. L. REV. 781 (1976); Klein, *Revitalizing Restitution: Flogging a Horse That May Have Been Killed for Just Cause*, 20 CRIM. L.Q. 383 (1978); Kleinig, *The Concept of Desert*, 8 AM. PHILOSOPHICAL Q. 71 (1971); Mundle, *Punishment and Desert*, 4 PHILOSOPHICAL Q. 216 (1954).

12. Williams, Kasindorf and Katel, *supra* note 1, at 66.

13. 1977 N.M. LAWS, Ch. 216 § 19.

14. Note, *Definite Sentencing in New Mexico: The 1977 Criminal Sentencing Act*, 9 N.M. L. REV. 131, 132 (1979).

in overcrowded conditions.¹⁵

II. HISTORICAL DEVELOPMENT

The historical movement toward rehabilitative sentencing theory and practice was with various exceptions a gradual move toward greater compassion and humanitarianism. Unfortunately, although the rationale behind the design of a statutory sentencing scheme can be fraught with good intentions, the actual results can prove to be devastatingly harmful and unnecessarily cruel. Originally, punishment was in the hands of individuals, families, and social groups who took it upon themselves to gain restitution or wreak vengeance upon the wrongdoer. Eventually, such a state of affairs was deemed undesirable and government stepped in¹⁶ to impose social order through law.¹⁷ For many centuries and until comparatively recent times, punishments were to a great degree corporal¹⁸ and capital punishment was widely

15. NEWSWEEK, Feb. 18, 1980, at 68. In 1977 the problem was pointed out in *The Problem of Prison Overcrowding and Its Impact on the Criminal Justice System, Hearings Before the Subcommittee on Penitentiaries and Corrections of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 1 (1978). The report of the hearings stated "the Federal prison system is 28 percent over capacity nationally and, on the average, State prisons are 11 percent over capacity." *Id.* The reason is not clear for the discrepancy between the 1977 Senate hearing figures and the 1980 Newsweek percentage, but it is possible that the degree of overcrowding increased that much during the three-year interval.

16. [G]overnment concern with punishing persons who commit crimes developed primarily to replace private vengeance-seeking by the victims and their kin. [I]t seems well established that penal activity is a prerequisite to . . . other functions by government and religious institutions; when there is no penal program, the regulation of society by church or state is continually subject to restriction by the anarchy of private feuding among offenders and victims.

Glaser, *Penology*, 11 INT'L ENCYC. SOC. SCIENCES 513-14 (1968).

17. This is an important fact that should be pointed out to those who take the extreme position that society would in the end be better off if legal sanctions were totally abolished. This is based on the contention that criminals are not deterred in any case, and that those who are law-abiding would remain so regardless of the threat of imprisonment or other legal sanctions. Unfortunately, such a state of affairs could result in having people take restrictive measures on their own against those offenders who would fail to be restrained by their own moral inhibitions. This retaliation would not necessarily be motivated by a desire for vengeance but could easily be occasioned by a belief in the deterrent value of retaliation or by the simple need for self-defensive measures.

18. See W. ANDREWS, *OLD-TIME PUNISHMENTS* (1970) for descriptions of such punitive instruments as the ducking stool, pillory, finger pillory, stocks, whipping, repentance stool, etc. See generally G. NEWMAN, *THE PUNISHMENT RESPONSE* (1978); D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* (1971).

used.¹⁹

The beginning of modern penology is often traced back to 1764, the year in which Cesare Beccaria wrote his *Essay on Crimes and Punishments*.²⁰ Beccaria urged that punishments should be calculated to inflict no more pain than necessary to counterbalance the pleasure that might be gained from the commission of an offense by a wrongdoer. Beccaria's method was a utilitarian approach which soon became accepted throughout most of Europe. The approach has come to be called "classical" criminal law and is essentially deterrence theory.

Around the time of the American Revolution, the Quakers in Pennsylvania came up with a novel approach to imprisonment.²¹ The Quakers saw prison as an opportunity for convicts to engage in penitent thought and devised prison construction which provided separate cells for each offender. Bibles and religious tracts were provided for each cell and little or no work was required. The penitentiary system spread rapidly and became the predominant scheme in continental Europe during the nineteenth and twentieth centuries. An advantage that has been claimed for the penitentiary system is that it provides for minimal communication between inmates which in turn prevents the further learning of criminal behavior.²²

19. "[i]t was the commercial and industrial development to a 'modern' England that expanded the death penalty until hundreds of petty acts were punishable by death. Group hangings were conducted for the edification of the public, which in the main regarded them as boisterous entertainments." S. RUBIN, *LAW OF CRIMINAL CORRECTION* 21 (2d ed. 1973). See also L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750* (1948).

In the colony of Massachusetts in the 1640's, there was a strong religious basis for capital punishment. "[B]iblical authority was cited for" fifteen capital crimes including idolatry, witchcraft, blasphemy, homosexuality and false witness, W. BOWERS, *EXECUTIONS IN AMERICA* 167 (1974). "Ironically, the wide-spread adoption and use of capital punishment in the Western World came with the ascendancy of Christendom in the Middle Ages," *id.* at 166. In 19th century America, there was an expansion of the capital penalty which paralleled the similar increase that took place in England and which was associated with the institution of slavery. Capital crimes in slave states included such acts as slave stealing, concealing a slave with intent to free him, and circulating seditious literature among slaves (second conviction). *Id.* at 172-73. See generally J. LAURENCE, *A HISTORY OF CAPITAL PUNISHMENT* (1960).

20. C. BECCARIA, *ON CRIMES AND PUNISHMENTS* (1963).

21. See S. RUBIN, *supra* note 19, at 27-30; D. ROTHMAN, *THE INVENTION OF THE PENITENTIARY* (1967).

22. This accords with Edwin H. Sutherland's theory of differential association. See E. SUTHERLAND & D. CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 77-97 (10th ed. 1978). Suther-

The "reformatory" movement flourished in the latter part of the nineteenth century. The "mark" system gained popularity and was the precursor of today's "good time."²³ The mark system awarded inmates numerical credits for each period of good behavior and subtracted these credits or "marks" for misconduct. Eventually, the second quarter of the twentieth century saw greater emphasis on "individualized treatment." This development paralleled and was bolstered by the increased use of probation and parole.²⁴ Historically, it appears that the policy regarding penal institutions moved gradually from one characterized by vengeance, harshness, violence, and insensitivity to the individual, to one which was supposedly more humanitarian and more concerned with underlying psychological motivations causing criminal behavior and with the changing of those motivations. Yet, in spite of this seeming progress, problems and irregularities in penal statutes and prison conditions are too often seen.

III. PROBLEMS WITH REHABILITATIVE PRACTICE

A. SENTENCING AGONY

Under the rehabilitative theory judicial discretion has been quite broad, based on the idea that the punishment should fit the criminal and not the crime. Sentencing should be "individualized" depending upon such factors as the particular circumstances of the crime, the prisoner's previous criminal record, and the chances that another crime will be committed. Consequently, the judge must have a great deal of discretion in order to treat offenders on a more individual basis. Unhappily, this automatically leaves the door wide open for disparity.

land hypothesized that criminal behavior was learned as the result of process of association with criminal behavior patterns. This learned behavior predominated over the habits learned from association with lawful behavior patterns.

In the United States the penitentiary system did not become as widespread, Glaser, *supra* note 16, at 515. Instead the Auburn system came to prevail. It employed solitary confinement at night but required congregate work in the daytime. It also became known for the striped suit. *Id.* See E. SUTHERLAND & D. CRESSEY, *CRIMINOLOGY* 487 (8th ed. 1970).

23. The reformatory movement borrowed the idea of the mark system from a penal colony in Australia which was under the direction of Alexander Maconochie, an imaginative innovator. Glaser, *supra* note 16, at 515. The reformatory movement emphasized education and vocational training and is generally considered to have begun in the United States at the Elmira Reformatory in New York. *Id.*

24. See Glaser, *supra* note 16, at 514-15.

First, what is known as a presentence report contains criteria which often facilitate disparity in sentencing. A presentence report, written after a background investigation of the offender has been made, is supposed to aid the sentencing judge in making a proper decision. Unfortunately, such a report is difficult to compile and time-consuming.²⁵ Consequently, the judge does not necessarily get a truly accurate picture of the convict's background and personality. But, even assuming a perfectly accurate report, the criteria upon which the judge evaluates the offender unintentionally, but inevitably, provide for discriminatory treatment against certain social classes. The *Task Force Report: Corrections* lists basic criteria which are usually dealt with in presentence reports: "A fully developed presentence investigation usually includes, among other items, an analysis of the offender's motivations, his identification with delinquent values, and his residential, educational, employment, and emotional history."²⁶

In comparing a white-collar criminal or a middle-class suburbanite drug dealer with someone from the ghetto accused of burglary, a judge would probably determine that the latter would require the longer confinement.²⁷ Such an evaluation would be quite reasonable since it is well known that delinquent values are learned through association with those who hold such values,²⁸ and it is also a long-held belief that criminal values and behavior (at least the kind for which people are sent to prison) are more prevalent in economically deprived, central-city areas²⁹ than in the suburbs. Furthermore, it is much more likely that those coming from the suburbs will have the educational background that will make them more attractive in the job market, thus giving them the opportunity to gain employment which is

25. *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections* 18 (1967) [hereinafter cited as *Task Force Report: Corrections*].

26. *Id.*

27. S. RUBIN, *supra* note 19, at 763.

28. E. SUTHERLAND & D. CRESSEY (8th ed.), *supra* note 22, at 83.

29. *Task Force Report: Corrections*, *supra* note 25, at 2. The Commission was appointed by President Johnson in 1965 to investigate the problems and causes of crime. It consisted of 19 commissioners aided by numerous staff members, consultants and advisers. It held hundreds of meetings, interviewed thousands and came out with several publications, R. QUINNEY, *CRIMINOLOGY* 267 (1975). The commissioners were law enforcement officials, judges, lawyers, law professors, and other professionals. *Id.*

looked upon favorably by the courts. In addition, statistics show that people with less education tend to be convicted for a much greater proportion of crimes.³⁰ Given these criteria for deciding on the appropriate sentence, is there any wonder that one often hears charges of discrimination against the poor and minorities? As the Attica Commission observed: "Many blacks . . . believe there is a double standard of justice and protection for blacks and whites. There are similar inequities between rich and poor."³¹

The indeterminate sentence has by its very nature allowed for disparity in sentencing. There are several forms of indeterminate sentences, but the most common source of indeterminacy comes from the parole system, in which a convict is eligible for parole after one-third of the sentence pronounced by the judge has expired.³² Release may occur at any time between the first day of eligibility and completion of sentence. There is also room for unequal sentences in that the judge will have a range of sentences to choose from, including a suspended sentence and probation.³³ The indeterminate sentence has been a big cause of consternation for prisoners. "Inmates have always detested the indeterminate sentence and have preferred fixed sentences and 'good time' laws."³⁴

There were numerous studies in the 1970's showing the common existence of sentencing disparity.³⁵ However, the prob-

30. *Task Force Report: Corrections*, *supra* note 25, at 2. It was widely known long before this Task Force Report was released that those with low education and those from economically deprived areas tended to show up more often on prison rolls than those with more education and from more prosperous neighborhoods.

31. *Attica: The Official Report of the New York State Special Commission* 29 (1972) [hereinafter cited as *Attica*]. The Attica Commission was appointed by Governor Nelson Rockefeller to investigate the New York prison system in general and in particular the Attica prison insurrection of September, 1971 which left 43 people dead when state troopers moved in with rifles to retake control of the prison. Like the President's Commission, it was composed of government officials and prominent professionals.

32. An example of this has until now been found in the Federal statutes, 18 U.S.C. § 4205(a) (1976).

33. 18 U.S.C. § 3651 (1972). In Texas it is provided that for a first degree felony a sentence may be imposed "for life or for any term of not more than 99 years or less than 5 years." TEX. PENAL CODE ANN. tit. 3, § 12.32(a) (Vernon Supp. 1980-1981).

34. Martinson, *The Paradox of Prison Reform*, in *PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT* 301, 320 (G. Ezorsky ed. 1972). See D. LIPTON, R. MARTINSON & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT* (1975).

35. See, e.g., A. PARTRIDGE & W. ELDRIDGE, *THE SECOND CIRCUIT SENTENCING STUDY*,

lem was not as new as might have been thought. Widespread disparity in sentencing had long before been pointed out.³⁶ There has been considerable recent discussion of the statistics showing the problem, and more of it is not necessary here except for a couple of examples. In a 1972 study of federal courts, six of the twenty-one districts studied sent those convicted of burglary to prison, while two districts placed those convicted of the same crime on probation.³⁷ With regard to homicide and assault, all those convicted in the Northern District of New York were placed on probation, but none were placed on probation in the Northern District of Texas and in the Western District of Mis-

A REPORT TO THE JUDGES OF THE SECOND CIRCUIT (1974); L. WILKINS, D. GOTTFREDSON, J. CALPIN, & A. GELMAN, *SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION* (1978) (study of Colorado and Vermont); Diamond & Zeisel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. CHI. L. REV. 109 (1975) (study of Northern District of Illinois and Eastern District of New York); Seymour, *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S. B.J. 163 (1973), reprinted in 119 CONG. REC. 6060 (1973).

36. It was stated in *President's Commission on Law and Administration of Justice, Task Force Report: The Courts* 23 (1967) [hereinafter cited as *Task Force Report: The Courts*]; "The existence of disparity has been amply demonstrated by many studies. It is a pervasive problem in almost all jurisdictions." The Report went on to cite studies of disparity as well as the extremely uneven results of questionnaires given to judges by the Federal Institute on the Disparity of Sentences. *Id.* The problem of severity of sentences, especially as compared to European countries, was discussed in *A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures* 56-57 (1967). See also Bennett, *Countdown for Judicial Sentencing*, in *OF PRISONS AND JUSTICE*, S. DOC. NO. 70, 88th Cong., 2d Sess. 328 (1964); Gaudet, Harris & St. John, *Individual Differences in the Sentencing Tendencies of Judges*, 23 J. CRIM. L.C. & P.S. 811 (1933); McGuire & Holtzoff, *The Problem of Sentence in the Criminal Law*, 20 B.U. L. REV. 423 (1940). In *Countdown for Judicial Sentencing*, *supra*, James V. Bennett, former Director of the Federal Bureau of Prisons, commented at 331:

Take, for example, the cases of two men we received last spring. The first man had been convicted of cashing a check for \$58.40. He was out of work at the time of his offense, and when his wife became ill and he needed money for rent, food, and doctor bills, he became the victim of temptation. He had no prior criminal record. The other man cashed a check for \$35.20. He was also out of work and his wife had left him for another man. His prior record consisted of a drunk charge and a nonsupport charge. Our examination of these two cases indicated no significant differences for sentencing purposes. But they appeared before different judges and the first man received 15 years in prison and the second man 30 days.

These are not cases picked out of thin air.

37. Administrative Office of the United States Courts, *Federal Offenders in United States District Court*, App. Table X-4 (1972), reprinted in Kennedy, *Toward a New System of Criminal Sentencing: Law with Order*, 16 AM. CRIM. L. REV. 353, 363 (1979).

souri.³⁸ The flexibility given the judge for accomplishing the objective of individualized rehabilitation unwittingly gives judges wide room to express their own prejudices and predilections, quite apart from considerations related to rehabilitation.³⁹

A few states have revised their statutes to get away from indeterminacy and rehabilitative practice.⁴⁰ The proposed new federal criminal code tries to accomplish this through sentencing guidelines established through a sentencing commission⁴¹ and the appellate review of sentences.⁴² These changes go a long way, but there probably is still too much room for sentencing injustice due to the retention of some variability, supposedly in order to be able to take account of aggravating and mitigating circumstances.⁴³ Some have also supported the retention of some flexibility, based not on rehabilitative considerations but on the perceived need that each individual be judged according to all the circumstances surrounding the particular case.⁴⁴ Thus "individualized treatment" gives way to "individualized justice." Such an approach naively assumes the omniscient, God-like ability of judges to prescribe the exact amount of punishment that is correct in each and every case. Whether variability is maintained under the guise of rehabilitation or individualized justice, the problem remains that prisoners may compare different sentences for the same crime and possibly find no justification for the difference. Even if the judge's decision is perfectly correct, the perception of inequality will very likely produce bitter anger and

38. *Id.*

39. For some examples of judges' bias see W. GAYLIN, *PARTIAL JUSTICE: A STUDY OF BIAS IN SENTENCING* (1974); Bennett, *The Sentence—Its Relation to Crime and Rehabilitation*, in *OF PRISONS AND JUSTICE*, *supra* note 36, at 307 (1964); Austin & Williams, *A Survey of Judges' Responses to Simulated Legal Cases: Research Note on Sentencing Disparity*, 68 J. CRIM L. & C. 306 (1977).

40. See, e.g., CAL. PENAL CODE § 1170 (West Supp. 1980); 1977 N.M. LAWS, ch. 216; OR. REV. STAT. §§ 161.535, 161.555, 161.605, 161.615 (1977).

41. Criminal Code Reform Act of 1979, S. 1722, 96th Cong., 1st Sess. § 991 (1979) (amendment to Title 28).

42. *Id.* at § 3725.

43. See generally *id.* at § 994 (c) (amendment to Title 28). This flexibility has been questioned because the sentencing guidelines could turn out to be confusing. The best way to eliminate disparity would be to require determinate sentences, after consideration of alternative sanctions. *Hearings on H. R. 6869*, *supra* note 6, at 1902 (statement of Alvin Bronstein, ACLU Prison Law Project).

44. *Hearings on H. R. 6869*, *supra* note 6, at 2389-90 (testimony of David Bazelon). See also Bazelon, *Criminals Are the Final Result of "Our Failing Social Justice System,"* CENTER MAGAZINE, July/August, 1977, at 28.

disrespect for the law.⁴⁵

The pronouncements of the early proponents of the indeterminate sentence were full of concern for the reformation of criminals,⁴⁶ but the benefits of better inmate control and longer sentences were also perceived.⁴⁷ A speaker at the 1870 Prison Congress pointed out that "[r]eformation is the work of time; and a benevolent regard to the good of the criminal himself, as well as to the protection of society, requires that his sentence be long enough for reformatory processes to take effect."⁴⁸ At the 1930 Prison Congress the New York Commissioner of Corrections observed:

[The prisoner's] knowledge that he may be restrained only for a definite period is in many instances the rock on which our plans split. "The judge gave me ten years. I can do that standing on my head," a prisoner once said to me. But if the judge had been able to say not less than ten years and as much longer as seems necessary, we should have witnessed a different reaction on his part.⁴⁹

It was well known in the beginning of the rehabilitation era that the indeterminate sentence helped to increase the average length of time served.⁵⁰ This does not seem to have changed in more recent years. Sol Rubin, former counsel for the National Council on Crime and Delinquency, wrote "[T]his 'treatment' idea, indeterminate sentences, has had its principal effect [in] increasing terms of imprisonment."⁵¹ It has been pointed out

45. "Unjustified disparity adversely affects correctional administration. Prisoners compare their sentences, and a prisoner who is given cause to believe that he is the victim of a judge's prejudice often is a hostile inmate, resistant to correctional treatment as well as discipline." *Task Force Report: The Courts*, *supra* note 36, at 23.

46. For instance, Zebulon Brockway, warden of the Elmira Reformatory in New York, spoke in favor of the indeterminate sentence at the 1870 Prison Congress: "Let prisons and prison systems be lighted by this law of love. Let us leave, for the present, the thought of inflicting punishment upon prisoners to satisfy so-called justice, and turn toward the . . . protection of society by the prevention of crime, and reformation of criminals." J. MITFORD, *KIND AND USUAL PUNISHMENT* 79 (1973) (citing AMERICAN CORRECTIONAL ASSOCIATION, *CONGRESS OF CORRECTIONS PROCEEDINGS* 6 (1870)).

47. J. MITFORD, *id.*, at 81-83.

48. *Id.* at 83-84.

49. *Id.* at 82.

50. *Id.* at 84 (citing 1915 study).

51. Rubin, *The Concept of Treatment in the Criminal Law*, 21 S.C.L. REV. 3, 5 (1968).

that emphasis on individualization through indeterminate sentences has not only increased the average sentence imposed, but also the average length of time actually served.⁵² Of course, such a trend may at least be partly explainable on the basis of various social factors; however, it probably also indicates two things—that long incarceration is overlooked because it is supposedly done for benevolent purposes, and that the concept of rehabilitation has not worked.

B. PAROLE ANXIETY

Courts have generally given a great deal of freedom to parole boards in that parole board decisions are not reviewable, and board members are not always obligated to give the inmate candidates reasons for their decisions.⁵³ Naturally, much room is

52. After studying findings by the Federal Bureau of Prisons, George Dix stated, "The proposition that emphasis on individualization causes longer actual incarceration as well as longer potential incarceration finds some support in a comparison of definite and indeterminate sentencing practices." Dix, *Judicial Review of Sentences: Implications for Individual Disposition*, 1969 L. & Soc. ORD. 369, 413 (1969). Maryland's indefinite confinement of one of its "defective delinquents" was challenged in *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972). The Supreme Court refused to allow continued confinement of the plaintiff-inmate after he had served the five-year sentence which had been given by the sentencing court. McNeil was being detained because he had refused to talk to psychologists and thus made it impossible for them to evaluate his condition. In a concurring opinion, Justice Douglas cited statistics showing "that 20% of Patuxent inmates at that time were serving beyond their expired sentences and of those paroled between 1955 and 1965, 46% had served beyond their expired sentences." 407 U.S. at 257. See Carney, *Indeterminate Sentence at Patuxent*, 20 CRIME & DELINQUENCY 135 (1974). David Gilman, counsel for the National Committee on Crime and Delinquency, concluded:

The indeterminate sentence is widely—and mistakenly—regarded as a means for reforming deviant behavior by individualizing the rehabilitative process. In theory, its promise of possible early release is supposed to act on the sentenced inmate as an incentive to reform; in practice, it has debased both the "rehabilitative ideal" and the prisoners subjected to the process.

Gilman, *Developments in Correctional Law*, 20 CRIME & DELINQUENCY 169, 178 (1974).

53. *The President's Commission On Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society* 12 (1967) [hereinafter cited as *The Challenge of Crime in a Free Society*]:

Except for sentencing, no decision in the criminal process has more impact on the convicted offender than the parole decision, which determines how much of his maximum sentence a prisoner may serve. This again is an invisible administrative decision that is seldom open to attack or subject to review. It is made by parole members who are often political appointees. Many are skilled and conscientious, but they generally are

left for arbitrariness and unequal treatment of the inmates.⁵⁴ Inmates easily perceive such practices and understandably become resentful about continued confinement and the bizarre procedures involved in gaining freedom.⁵⁵ To be sure, most board members perform their work conscientiously and do a good job, considering the problems concerning the judgment of prisoner attitudes, and predictions about the possibility of future criminal behavior.⁵⁶

But one would naturally expect that most parole board members would be mental health professionals—psychiatrists, psychologists, social scientists—who would have a definite expertise in assessing a criminal's attitude change, and who could accurately predict future criminal behavior in each individual. Instead, one usually finds the parole board largely composed of political appointees⁵⁷ formerly connected with law enforcement

able to spend no more than a few minutes on a case. Parole decisions that are made in haste and on the basis of insufficient information, in the absence of parole machinery that can provide good supervision, are necessarily imperfect decisions. And since there is virtually no appeal from them, they can be made arbitrarily or discriminatorily.

54. The actual procedures involved in reviewing a potential parolee's record are discussed in *Attica*, *supra* note 31, at 96:

The average time of the hearing, including time for reading the inmate's file and deliberation among the three Commissioners present is 5.9 minutes. The parole folder may have as many as 150 pages of reports on the inmate. The Commission went on to describe that two of the board members may be reading the next inmate's file while the inmate presently before the board is being interviewed. The questions that are asked are often superficial. The inmate is often left with the feeling that his case was not given due consideration after years of waiting.

55. "Far from instilling confidence in the Parole Board's sense of justice, the existing procedure merely confirms to inmates, including those receiving favorable decisions, that the system is indeed capricious and demeaning." *Id.* at 98.

56. Yet, reviewing the U.S. Board of Parole, Kenneth Culp Davis, a noted observer of administrative agencies, had this to say: "The performance of the Parole Board seems on the whole about as low in quality as anything I have seen in the federal government." K. DAVIS, *DISCRETIONARY JUSTICE* 133 (1969).

57. *The Challenge of Crime in a Free Society*, *supra* note 53, at 12. This does not seem to have changed much since the late 1960's. In California the nine member Board of Prison Terms is appointed totally by the Governor with the advice and consent of the Senate, CAL. PENAL CODE § 5705 (West Supp. 1980).

It was the British who first originated a parole system in the mid-1800's, Glaser, *supra* note 16, at 519. A prisoner who had behaved well was released near the end of his sentence so long as he did not get into any trouble with the law. The system was called

as prosecutors, prison officials, and policemen. In California in the early 1970's there was one dentist on the Adult Authority, which was consequently labelled by the prisoners "eight cops and a dentist."⁵⁸

Participation in institutional programs looks favorable on an inmate's record when it comes time to go before the parole board. It is a favorable comment upon the prisoner if it is shown that he has worked continuously in prison jobs, that he has taken school courses, that he has participated in therapy groups, and that generally his attitude has steadily improved since entering prison.⁵⁹ Robert Martinson, a sociologist, made some interesting observations of prisoner responses to institutional programs. He noted what happened when prisoners eventually realized that they would have to go before the parole board:

This naturally led to second-guessing "the board." In California, one formula—believed to be foolproof by its inmate adherents—prescribed a short period of intense "messaging up" on first entering prison followed by a mixture of one-half group therapy and one-half vocational training

conditional release on licence and required that the released prisoner report regularly to the nearest police station. In the United States this system was named *parole* (meaning *word* in French) because the prisoner was presumably set free on his word of honor not to create mischief if released. It was first instituted at the Elmira Reformatory in 1877.

58. J. MITFORD, *supra* note 46, at 86. Some effort has been made by the California legislature to seek a more diversified composition of the Board of Prison Terms (the parole board has been renamed twice since it was called the Adult Authority). The statute providing for the appointment of the nine members provides that the board "shall reflect as nearly as possible a cross section of the racial, sexual, economic, and geographic features of the population of the state," CAL. PENAL CODE § 5075 (West Supp. 1980). It has to be pointed out that while this guideline makes it less likely that the board would be dominated by law enforcement officials, it is far from being a guarantee against that result.

The California law requires that the three-member county boards of parole commissioners be constituted as follows: "(1) [s]heriff or in a county with a department of corrections, the director of such department, (2) the probation officer, and (3) a member not a public official to be selected by the presiding judge, if any, or, if none, by the senior judge. . . ." CAL. PENAL CODE § 3075 (West Supp. 1979). Clearly with such a configuration in the membership, the law enforcement professionals have a balance of power. The county boards are free to make their own rules, CAL. PENAL CODE § 3076(a) (West Supp. 1979). The Board of Prison Terms is also allowed to promulgate its own rules and regulations but must follow certain guidelines, CAL. PENAL CODE § 5076.2(a) (West Supp. 1979).

59. See, e.g., MICH. COMP. LAWS ANN. § 791.235 (Supp. 1979); N.Y. EXEC. LAW § 259-i(2)(c) (McKinney 1980). See also CITIZENS' INQUIRY ON PAROLE AND CRIMINAL JUSTICE, INC., PRISON WITHOUT WALLS 21 (1975) [hereinafter cited as PRISON WITHOUT WALLS].

with a *gradual* reduction in prison misbehavior
and a few carefully written letters to close kin.⁶⁰

The Attica Commission made the following observation: "by 1971 conditional release and parole had become by far the greatest source of inmate anxiety and frustration. There were very few inmates interviewed by the Commission who did not list parole and "CR" [conditional release] among their chief grievances."⁶¹

Once the inmate actually gets an opportunity to go before the parole board, he is faced with vague and sometimes ludicrous standards to be met. Take the following example of criteria for a parole board to follow in its hearings:

[T]he board of parole shall have before it . . . a report . . . as to the extent to which such prisoner has responded to the efforts made in prison to improve his mental and moral condition, with a statement as to the prisoner's then attitude towards society, towards the judge who sentenced him, towards the district attorney who prosecuted him, towards the policeman who arrested him, and how the prisoner then regards the crime for which he is in prison and his previous criminal career.⁶²

These standards of evaluation clearly favor the inmate who is astute enough to take the right prison programs and educational courses. They gauge rehabilitation by means of changes in attitude which can be superficial. It helps an inmate to have a job if parole is sought.⁶³ This can work discriminatorily against an in-

60. Martinson, *supra* note 34, at 320.

61. Attica, *supra* note 31, at 91-92.

62. The example is taken from N.Y. CORREC. LAW § 214(4) (McKinney 1972) (repealed by 1977 N.Y. Laws, ch. 904, §2). The provision was replaced by N.Y. EXEC. LAW § 259 (McKinney 1980). In § 259i(2)(c), reference is made to parole release standards which are still vague and open to wide variance in application. For instance, the parole board is to consider "the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates" and "release plans including community resources, employment, education and training and support services available to the inmate."

63. N.Y. EXEC. LAW § 259-i(2)(c). The former statute, N.Y. CORR. LAW § 214(4) (McKinney 1972) referred directly to the importance of having a job. Recent changes in the California law require that the Board of Prison Terms look at a prisoner's record more retrospectively rather than prospectively. That is, the Board is directed to take a close

mate who has poor ties to the outside.

Even if the courts were to decide to grant extensive rights to convicts at parole hearings, there would still be problems for a prisoner granted parole. Once on the street, the inmate finds that he is not as free as he might have thought. Many parole board rules are means of ensuring that the parolee does not get into trouble or escape. The parolee is required to obey the parole officer's instructions at all times.⁶⁴ Associating with ex-convicts is forbidden,⁶⁵ and yet this may be quite difficult since many dear friends may have a record, and they may live quite close at hand. Permission from the parole officer is required to marry,⁶⁶ obtain a driver's license,⁶⁷ or leave the state.⁶⁸ The parole officer is supposed to counsel and guide the ex-offender in starting a

look at the crime for which the offender was sent to prison in determining when parole should be granted rather than look at future indications and conditions in the convict's life upon release. For instance, CAL. PENAL CODE § 3041(a) (West Supp. 1979) specifies that the parole release date is to be "set in a manner that will provide uniform terms for offenses of similar gravity and magnitude" and § 3041(b) requires that the Board set a release date unless the gravity of the offense requires the consideration of public safety.

64. *See, e.g.*, N.Y.C.R.R. § 1915.10, cl. (3)(a) (1975).

65. *Id.* cl. 7(b).

66. *Id.* cl. (8).

67. *Id.* cl. (10)(b).

68. *Id.* cl. (2). In California there have been some changes in parole along with recent changes in the penal law. These changes have apparently been made in accordance with the idea that the purpose "for imprisonment for crime is punishment." CAL. PENAL CODE § 1170(a)(1) (West Supp. 1979). The statute strives for greater determinacy in sentencing by specifying three time periods for a judge to choose from in setting a sentence, with the time periods differing by only one year in length. CAL. PENAL CODE § 1170(a)(2) (West Supp. 1979). The statute still keeps the notion of parole "in the interest of public safety" and "to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition" to living in general society. CAL. PENAL CODE § 3000 (West Supp. 1979). The period of parole is to be not more than three years, § 3000(a), but in the case of life imprisonment not more than five years, § 3000(b). While the change in statutes and the philosophy behind them avoids the old approach of seeing parole as purely a part of the rehabilitative process, it still does not eliminate the uncertainty created for the free prisoner by parole as well as the possibility of injustice and abuse of the system by those officials who would be less sensitive. It is true that proper educational and personal counseling can be very beneficial to a convict in making the transition back to the general population, but the benefit is questionable if the aid is given on the involuntary basis found in parole. *See* text accompanying note 61 *supra*.

In the event that the Board of Prison Terms decides not to set a date for parole release after the parole hearing, the board is to send the inmate a written statement informing him of his failure to receive parole and "suggest activities in which he might participate that will benefit him while he is incarcerated." CAL. PENAL CODE § 3041.5(b)(2) (West Supp. 1979). The implication is that the old method will be continued in gauging a prisoner's readiness to go to the outside by his participation in certain courses and activities while in prison. *See* text accompanying notes 59 and 60 *supra*.

new life in society. Yet the parole officer must declare the parolee in violation of parole if any rules are broken. This puts the officer in an ambivalent position, making the inmate reluctant to place trust in the counselor.⁶⁹

Restrictions on a convict's freedom and continuous surveillance by the parole officer can only prolong the anxiety and uncertainty while awaiting release by the parole board. This continuing torment will more likely be seen as a disguised form of mental punishment, rather than as a benevolent effort to ensure rehabilitation.

C. RECIDIVISM

Martinson claimed that in 1967 he and his colleagues began a search of all studies of correction treatment published since 1945. The search took six months and turned up 231 accepted studies. The researchers' conclusions were "that the present array of correctional treatments has no appreciable effect—positive or negative—on the rates of recidivism of convicted offenders."⁷⁰

Other studies are in accord. In 1971 Robison and Smith reviewed research findings relating to five different approaches in correctional processes. The approaches were the following:

- (1) imprisonment over probation,
- (2) longer sentences,
- (3) treatment programs,
- (4) intensity of parole or probation supervision,
- (5) outright discharge from prison over release on parole.

The authors found no significant difference among any of the five different approaches.⁷¹ A three-and-a-half-year study declared New York City's rehabilitation and prison diversion programs a failure, and noted that within one year of entering these programs, 41 percent of those enrolled had been arrested

69. *Task Force Report: Corrections*, *supra* note 25, at 67.

70. *Martinson*, *supra* note 34, at 317.

71. *Robison & Smith, The Effectiveness of Correctional Programs*, 17 *CRIME & DELINQUENCY* 67 (1971).

again.⁷² Twenty-nine percent were rearrested for violent crimes such as homicide, rape, robbery, and aggravated assault.⁷³ The Committee for the Study of Incarceration, first organized in 1971, published a report condemning the rehabilitative theory of punishment based on effectiveness studies of correctional programs.⁷⁴

IV. FUNDAMENTAL DEFECTS IN THE REHABILITATIVE THEORY

A. THREE APPROACHES TO REHABILITATION

Under rehabilitation, the purpose of punishment is to get the offender to change his way of thinking so that he can no longer have any inclination to commit crime and so will become a constructive member of society.⁷⁵ Yet the theory of rehabilitation has long been criticized for allowing punishment of a person far in excess of the penalty which would ordinarily be imposed.⁷⁶ If this and other criticisms of rehabilitation had been heeded from the beginning, much of the pointless agony which has been inflicted in the name of rehabilitation might have been avoided. Perhaps if a closer look had been taken at some of the underlying assumptions of the rehabilitative theory, it could have been realized that the idea of rehabilitation was bound to fail. Three

72. Fishman, *An Evaluation of Criminal Recidivism in Projects Providing Rehabilitation and Diversion Services in New York City*, 68 J. CRIM. L. & C. 283, 299 (1977).

73. *Id.*

74. A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* xxxvii-xxxviii (1976). "[T]he rehabilitative model, despite its emphasis on understanding and concern, has been more cruel and punitive than a frankly punitive model would probably be." *Id.* at xxxviii. This book was a report of the Committee for the Study of Incarceration. The Committee's conclusion was based on a summary of effectiveness studies prepared for the Committee and later printed in Greenberg, *The Correctional Effects of Corrections*, in *CORRECTIONS AND PUNISHMENT* 111 (D. Greenberg ed. 1977). The Committee and its findings have received considerable attention since the publication of their report in 1976.

75. A. SMITH & L. BERLIN, *TREATING THE CRIMINAL OFFENDER* 89 (1974); H. EYSENCK, *CRIME AND PERSONALITY* (1964).

76. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224 (1954). Lewis was especially concerned with the excesses which might be overseen because of the proposed humanitarian and benevolent intentions behind prolonged incarceration. As Lewis puts it, "They may be more likely to go to Heaven yet at the same time likelier to make a Hell of earth." *Id.* at 227. For other articles and books pointing out possible dangers and abuses involved in the rehabilitation approach before 1970, see F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* (1964); J. MARTIN, *BREAK DOWN THE WALLS* (1954); S. SHOLAM, *CRIME AND SOCIAL DEVIATION* (1966); Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L.C. & P.S. 226 (1959).

important assumptions with inherent weaknesses were that prisoners could be rehabilitated through (1) psychological rehabilitation, (2) vocational rehabilitation, and (3) moral rehabilitation. These weaknesses are serious enough to be fatal to the rehabilitative theory, and form the underlying explanation for the failure of reform.

B. PSYCHOLOGICAL REHABILITATION

An inmate at Maryland's Patuxent Institution was quoted in a candid interview:

Look, man, most of us are good at shamming. We grew up in the streets surrounded by confidence games. Literature is available to everyone now—hell, we talk as much about the Oedipus complex as about baseball. We know what these cats want to hear. Not the real gory stuff—what you're really thinking—because that scares 'em and makes 'em think you're still dangerous. But you spill your guts in a nice kind of way and act as if you're gaining all these insights. Now that you know yourself and that you killed that girl because you were really killing your mother, you don't have to kill anymore. It doesn't occur to 'em that I want to kill my mother several times over.⁷⁷

Martinson made some observations on prison therapy programs:

Inmates would present renditions of what they imagined to be the deep Freudian cause of their present sad state. The sophisticated young counsellors called this "shucking." They agreed that they were involved in a form of professional "shucking" when they permitted the men to explain things in this stereotyped way. One professional justification was that this mutual shucking could produce a more verbal offender who, hopefully, would turn to less violent and impulsive crimes when released.

Group sessions were called "correctional treatment" and were taken seriously by anyone who wished to rise in the ranks. Middling budget requests were expected to be prefaced by justifi-

77. Prettyman, *The Indeterminate Sentence and the Right to Treatment*, 11 AM. CRIM. L. REV. 7, 26 (1972).

cations linking new programs to treatment theory. It is difficult to argue—in the face of all this—that treatment has never been given a chance to work.⁷⁸

According to psychological rehabilitation, people behave on the basis of the conditioning received in their previous environment. Values and beliefs are molded by what is taught. Consequently, once in prison, convicts can be taught that peaceful, law-abiding values are to be preferred over criminal values, and they will then emerge as respectable citizens.

The rehabilitation theory is clearly applicable in the cases of those who are adjudged criminally insane.⁷⁹ In such cases, every effort must be made to get the offender to adopt the outlook of a socialized, law-abiding citizen. As long as the prisoner does not genuinely adopt this outlook, confinement must con-

78. Martinson, *supra* note 34, at 312. Similar observations have been made by others; see, e.g., Irwin, *Adaptation to Being Corrected: Corrections from the Convict's Perspective*, in *HANDBOOK OF CRIMINOLOGY* 971 (D. Glaser ed. 1974). The difficulty in treating involuntarily committed patients has been pointed out in S. HALLECK, *PSYCHIATRY AND THE DILEMMAS OF CRIME* 33 (3rd ed. 1971); T. SZASZ, *LAW, LIBERTY AND PSYCHIATRY* 97, 215-16 (1963).

79. Even the concept of criminal insanity has been brought into question because of its vagueness. Cressey concluded:

Research studies conducted by scholars representing different schools of thought have found no trait of personality to be very closely associated with criminal or delinquent behavior. No consistent, statistically significant difference between personality traits of delinquents and personality traits of non-delinquents have been found. The explanation of criminal behavior, apparently, must be found in social interaction . . .

E. SUTHERLAND (8th ed.), *supra* note 22, at 156-57. Cressey, of course, had a bias against psychiatric theory, and in favor of sociological explanations such as that of his colleague Sutherland who formulated the theory of differential association. See note 22 *supra*. "In some states the vagueness of both the criminal law concepts and psychiatric concepts allows some criminals to be declared "insane," and thereby escape punishment; and it allows some psychotics to be punished for crime rather than treated for mental disease." E. SUTHERLAND (8th ed.), *supra* note 22, at 156. A psychiatrist who has written a book on the subject does not feel very optimistic about the treatment of the psychiatric problems of criminals.

The great majority [of felons with psychiatric problems] are sociopaths, alcoholics, or drug dependent. And, unfortunately, available treatments for these conditions are still not dependable in most cases. So, while efforts to treat these disorders are appropriate, it is difficult to be persuaded that current psychiatric treatment is likely to be very effective.

S. GUZE, *CRIMINALITY AND PSYCHIATRIC DISORDERS* 136-37 (1976).

tinue for the protection of society.⁸⁰ It is another matter, however, to hold that *all* criminals are somehow sick and in need of rehabilitation.

Yet this therapeutic model has been embraced by some.⁸¹ It assumes, for instance, that the ordinary criminal who mugs an elderly man has no conception of the harm that he is doing, or that all rapists fail to see that to physically beat and force someone to submit to their wishes is wrong. The wrongdoer is in a sense acting uncontrollably, much like a person suffering from an epileptic fit. The embezzler does not rationally calculate the chances of being caught; the action is compulsive, much like a kleptomaniac who can't help but take the property of others.

Other rehabilitationists do not go as far as to characterize criminal behavior as an illness, but they nevertheless generally refrain from saying that any moral judgments can be made or that the concept of personal responsibility is a viable one.⁸² This group is represented by the behavioral psychologists who see the solution as one of "reconditioning" the criminal by methods such as behavior therapy.

The feature these two different approaches have in common is optimism with regard to the prospects of rehabilitating the individual.⁸³ There is the belief that truly effective methods

80. This is the punishment philosophy known as incapacitation. See note 9 *supra* and accompanying text.

81. See E. SUTHERLAND (8th ed.), *supra* note 22, at 54-55 for a discussion of the psychiatric school and its central belief that "a certain organization of the personality, developed entirely apart from criminal culture, will result in criminal behavior regardless of social situations." *Id.* at 54. There is also a discussion of the clinical method used for treatment at 356-58. See also K. MENNINGER, *THE CRIME OF PUNISHMENT* 253-64 (1968).

82. H. EYSENCK, *supra* note 75; H. WEEKS, *YOUTHFUL OFFENDERS AT HIGHFIELDS* (1958); L. McCorkle, *Group Therapy in the Treatment of Offenders*, *FEDERAL PROBATION*, December 1952, at 22.

83. Do I believe there is effective treatment for offenders, and that they *can* be changed? Most certainly and definitely I do. Not all cases, to be sure; there are also some physical afflictions which we cannot cure at the moment. Some provision has to be made for incurables—pending new knowledge—and these will include some offenders. But I believe the majority of them would prove to be curable. The willfulness and the viciousness of offenders are part of the thing for which they have to be treated. These must not thwart the therapeutic attitude.

K. MENNINGER, *supra* note 81, at 261.

can be developed and successfully implemented. It is assumed that sufficient knowledge concerning human psychology has been attained for rehabilitating criminals. Furthermore, it is assumed that such methods will present no danger to fundamental rights.⁸⁴

The most widely used method of psychological rehabilitation has been psychotherapy, both individual and group. One would hope that a method of treatment which is employed extensively, and which in turn has an effect on convicts' actual length of confinement, would be effective in the great majority of cases. While positive results in each and every case might be too much to ask, it would at least be expected that most inmates undergoing psychotherapy would be rehabilitated within a reasonable amount of time. Furthermore, one could expect that a

84. The excesses to which a rehabilitative approach can lead have made themselves clearly evident in juvenile and insanity proceedings. The special treatment of juvenile delinquents and the mentally ill is often justified under the rubric of *parens patriae*. The case of *In Re Gault*, 387 U.S. 1 (1967) presents an interesting illustration of what can happen with regard to the observance of proper procedural due process when it is believed that special state power is being exercised over a person mainly for his own benefit. The case involved a 15-year-old boy who was taken into custody for allegedly having made lewd telephone calls. He was committed to the Arizona State Industrial School until the age of twenty-one, after a hearing before a juvenile court judge. The Supreme Court held that certain procedural due process rights had been violated. It stated that due process required that in juvenile commitment proceedings (1) written notice be given to the child and his parents or guardians, (2) advice be given of the right to counsel, (3) the privilege against self-incrimination is applicable, and (4) the right of confrontation of witnesses is applicable. The Court reviewed the historical development of the procedures that had come to be accepted in the juvenile court system, *id.* at 14-18. In writing the opinion for the Court, Justice Fortas pointed out that early reformers advocated the idea that it was not the state's role to determine guilt or innocence in juvenile cases. The child was not to feel that he was on trial, but rather that he was being placed in the care of the state:

The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be "treated" and "rehabilitated" and the procedures, from apprehension through institutionalization, were to be "clinical" rather than punitive.

These results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the state was proceeding as *parens patriae*. The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme

Id. at 15-16 (footnote omitted). See also N. KITTRIE, *THE RIGHT TO BE DIFFERENT* (1971); Coleman & Solomon, *Parens Patriae Treatment: Legal Punishment in Disguise*, 3 *HASTINGS CON. L.Q.* 345 (1976).

successfully treated prisoner would go on to lead a law-abiding life after release from prison.

Whether psychotherapy can meet these not so stringent standards for treatment methods is highly doubtful. The effectiveness of psychotherapy has been brought under serious question with regard to the treatment of the general population.⁸⁵ General criticism of psychotherapy (this term will be used synonymously with psychoanalysis) goes back a long way. In 1937, for instance, in a study of a group of untreated, inadequately treated and fully treated patients, it was found that 61% of the untreated and inadequately treated patients show marked changes for the better. It was found doubtful that psychotherapy was very beneficial in achieving desired results.⁸⁶

In 1952 H.J. Eysenck made a now classic analysis of psychotherapy.⁸⁷ He later expanded and reinforced his previous critical findings.⁸⁸ Eysenck admitted that his study was open to criticism for certain defects in his methods;⁸⁹ the author, however, pointed out that the burden was really on the proponents of psychotherapy to prove its beneficial results.⁹⁰ In his paper, Eysenck concluded that studies:

fail to prove that psychotherapy, Freudian or otherwise, facilitates the recovery of neurotic patients. They show that roughly two-thirds of a group of neurotic patients will recover or improve to a marked extent within about 2 years of the onset of their illness, whether they are treated by means of psychotherapy or not.⁹¹

Others have also pointed out this phenomenon, called spontaneous remission, by which neurotic disorders disappear after a

85. In relation to criminal offenders, there are further complications in addition to the general ones. See text accompanying notes 105-113 *infra*.

86. Curran, *The Problem of Assessing Psychiatric Treatment*, 233 LANCET 1005 (1937). For other early criticism see Myerson, *The Attitude of Neurologists, Psychiatrists and Psychologists Towards Psychoanalysis*, 96 AM. J. PSYCH. 623 (1939).

87. Eysenck, *The Effects of Psychotherapy: An Evaluation*, 16 J. CONSULT. PSYCH. 319 (1952).

88. H. EYSENCK, *THE EFFECTS OF PSYCHOTHERAPY* (1969); Eysenck, *The Effects of Psychotherapy*, in HANDBOOK OF ABNORMAL PSYCHOLOGY 697 (H. Eysenck ed. 1960).

89. Eysenck, *supra* note 87, at 323.

90. *Id.*

91. *Id.* at 322. But cf. R. SLOANE *et. al.*, *PSYCHOTHERAPY VERSUS BEHAVIOR THERAPY* (1975) (a study containing results more favorable to psychotherapy).

certain period of time, even without psychotherapeutic treatment.⁹² In a study of two groups of sixty-eight applicants at an outpatient psychiatric clinic, one group was given immediate crisis intervention treatment, while the other was put on a waiting list. At the end of six weeks, it was found that those who had only waited improved at about the same rate as those who had received treatment.⁹³ Similar research has been done on the placebo effect of sugar pills given to neurotic patients.⁹⁴ Apparently the taking of a sugar pill announced as therapeutic to those seeking help is about as effective as psychotherapy. Psychologists Bergin and Garfield admitted that placebos "too often yield improvement figures very close to therapy group figures."⁹⁵

It has been claimed that psychotherapy has been harmful to many clients.⁹⁶ In a survey of 150 experienced therapists and researchers, almost all agreed that there was a real problem with negative effects.⁹⁷ Dr. Robert Spitzer of the New York Psychiatric Institute declared that "negative effects in long-term outpatient psychotherapy are extremely common."⁹⁸ Several respondents expressed concern over the worsening of symptoms.⁹⁹ Of those mentioned, increases in anxiety and hostility, destructive

92. R. STUART, *TRICK OR TREATMENT: HOW AND WHEN PSYCHOTHERAPY FAILS* 49 (1970). See also Bergin, *Some Implications of Psychotherapy Research for Therapeutic Research*, 71 J. ABNORM. PSYCHOL. 235 (1966); Bergin, *The Effects of Psychotherapy: Negative Results Revisited*, 10 J. CONSULT. PSYCH. 244 (1963); Butler, *Self-Concept Change in Psychotherapy*, 6 COUNSELING CENTER DISCUSSION PAPERS 1 (1960).

93. Gottschalk, Fox & Bates, *A Study of Prediction and Outcome in a Mental Health Crisis Clinic*, 130 AM. J. OF PSYCH. 1107 (1973).

94. M. GROSS, *THE PSYCHOLOGICAL SOCIETY* 26-28 (1978). See, e.g., J. FRANK, *PERSUASION AND HEALING: A COMPARATIVE STUDY OF PSYCHOTHERAPY* 141-43 (rev. ed. 1973); SHAPIRO, *Placebo Effects in Medicine, Psychotherapy and Psychoanalysis*, in *HANDBOOK OF PSYCHOTHERAPY AND BEHAVIOR CHANGE: EMPIRICAL EVIDENCE* 439 (A. Bergin & S. Garfield ed. 1971); Brill et al., *Controlled Study of Psychiatric Outpatient Treatment*, 10 ARCHIVES OF GEN. PSYCH. 581 (1964); Park & Covi, *Nonblind Placebo Trial: An Exploration of Neurotic Patients' Responses to Placebo When Its Inert Content is Disclosed*, 12 ARCHIVES OF GEN. PSYCH. 336 (1965).

95. M. GROSS, *supra* note 94, at 26.

96. *Id.* at 40-43. "Psychotherapy may be harmful as often as helpful, with an average effect comparable to receiving no help." C. TRUAX & R. CARKHUFF, *TOWARD EFFECTIVE COUNSELING AND PSYCHOTHERAPY* 21 (1967). It must be noted that most of those writers who have found psychotherapy wanting are strong proponents of behavior therapy.

97. Hadley & Strupp, *Contemporary Views of Negative Effects in Psychotherapy*, 33 ARCHIVES OF GEN PSYCH. 1291 (1976).

98. M. GROSS, *supra* note 94, at 42.

99. *Id.*

acting out, and lowered self-confidence are of particular concern in the case of prisoners.

What is at the root of the bad effects of psychotherapy? It has been suggested that only a small proportion of therapists may account for the positive outcomes.¹⁰⁰ Dr. Paul Meehl fears that only one out of four therapists may be competent.¹⁰¹ While this may be an exaggerated fear about the competence of trained psychiatrists and psychologists, other studies have shown that their competence is no better than that of untrained laymen. Hospital aides,¹⁰² college students¹⁰³ and college professors¹⁰⁴ have all had the same rate of success as have trained therapists.

One of the earliest studies testing the effectiveness of psychotherapy involved the attempt to avert criminal behavior in growing young boys. It is known as the Cambridge-Somerville Youth Study.¹⁰⁵ Six hundred and fifty underprivileged boys between the ages of six and ten were randomly divided in two equal groups. The boys were supposed to be "potential delinquents." One group was given psychotherapeutic counseling and the other was used as a control and not treated in any way. After the eight-year experiment, the boys were evaluated and it was surprisingly found that the group on therapy had committed 264 crimes while the untreated boys had committed 218 offenses.¹⁰⁶

With regard to psychotherapy aimed specifically for criminal offenders, there are many obstacles to a successful outcome. First of all, psychotherapy takes a long time. Most analyses last at least two years with sessions taking place four or more times a week. It is not unusual for an analysis to last more than five years.¹⁰⁷ Clearly many offenders would not be successfully

100. *Id.* at 43.

101. *Id.*

102. Torrey, *The Case For the Indigenous Therapist*, 20 ARCHIVES OF GEN. PSYCH. 365 (1969).

103. *Id.*

104. M. GROSS, *supra* note 94, at 53 (reporting on Strupp, unpublished paper on Vanderbilt University study, 1977).

105. See E. POWERS & H. WITMER, AN EXPERIMENT IN THE PREVENTION OF DELINQUENCY: THE CAMBRIDGE-SOMERVILLE YOUTH STUDY (1951).

106. M. GROSS, *supra* note 94, at 24.

107. Stewart, *Psychoanalysis and Psychoanalytic Psychotherapy*, in 2 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY/II 1803 (2d ed. A. Freedman, H. Kaplan, & B. Sadock 1975) [hereinafter cited as COMPREHENSIVE TEXTBOOK].

treated since many of them do not stay in prison more than two years. This would be especially true of first offenders who generally get shorter sentences than repeating offenders. Yet, it is probably more important to reach first offenders because they are less likely to have become hardened criminals and thus more easily rehabilitated.

There are certain characteristics required of a person undergoing psychotherapy which make it doubtful whether most prisoners would stand a great chance of success through psychoanalytic sessions. Some of the prerequisites which must be possessed by a client are listed in the *Comprehensive Textbook of Psychiatry/II*:

[P]sychoanalytic psychotherapy . . . presupposes a high level of sophistication on the part of the patient, ability and willingness to introspect, to tolerate frustration and discomfort for extended periods of time while psychotherapy gradually takes hold, a readiness to locate the primary sources of unhappiness within oneself rather than assign them to oppressive social conditions, a deep commitment to self-development and self-realization, and considerable inner resources (usually termed "ego strength") to see things through.¹⁰⁸

Some of the prerequisites listed are in fact the very opposite of traits that are generally believed to characterize most lawbreakers. For instance, convicts often will not be introspective. Their frustration threshold may be low, which is one of the explanations for their resort to crime in many situations where other persons would seek to solve problems through other means. It would seem that a psychotherapist has a formidable task, perhaps an insurmountable one, just in getting a prisoner to reach a point where he would be a suitable subject for psychotherapy.

A recent development has begun and is known as short-term psychotherapeutic sessions which last for a relatively short period of time. This approach would seem to lend greater hope for effective treatment of prisoners who are not incarcerated for

108. Strupp & Blackwood, *Recent Methods of Psychotherapy*, in *COMPREHENSIVE TEXTBOOK*, *supra* note 107, at 1918.

several years at a time. Yet one of the proponents of short-term psychotherapy points out that the motivation of the client is the most important criterion in the effectiveness of the treatment.¹⁰⁹ For this reason, short-term psychotherapy is effective with only certain persons. A client must be introspective, honest about emotional difficulties, willing to participate actively, willing to change, and curious about the inner self.¹¹⁰

The fundamental rule of psychotherapy is an important requirement that was first postulated by Sigmund Freud.¹¹¹ This rule is that the therapist is to listen, understand, and interpret, while the patient is to be completely candid with the analyst, revealing even that which may seem disagreeable and unimportant.¹¹²

Upon reflection, it can be seen that the fundamental rule is bound to fail in psychotherapy with prisoners under the rehabilitation-based application of parole. As far as the prisoner is concerned, the primary, almost exclusive, goal is to get out of prison as soon as possible. To go on parole, the prisoner must show the parole board evidence of sufficient rehabilitation. A statement in the file from the psychotherapist saying that the inmate has been "cured" is very valuable in this respect. Consequently, the prisoner sees the task as being how best to get the psychotherapist involved in making the assessment that the prisoner/patient has responded favorably to psychotherapeutic treatment. This involves convincing the therapist that the prisoner is now rehabilitated enough to be allowed to return to the outside world.¹¹³ The prisoner will not be interested in truly reforming social behavior because that may take extensive, complex, and confusing self-revelation which would probably extend the time spent in prison. In effect, the prisoner sees the analyst as an obstacle—a hurdle to get over, around or past as swiftly as possible. There is no true *joint* effort, between analyst and prisoner, to solve behaviorial problems.

109. P. SIFNEOS, *SHORT-TERM PSYCHOTHERAPY AND EMOTIONAL CRISIS* 84 (1972).

110. *Id.* at 85.

111. Stewart, *supra* note 107, at 1803.

112. *Id.* See also FREUD, *An Outline of Psychoanalysis*, in 23 STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 174 (Hogarth Press 1963).

113. See text accompanying notes 60, 77 and 78 *supra*.

Related to prisoner candor is the issue of therapist credibility. The inmate may totally distrust the prison therapist, or perhaps get some feeling that the therapist wants to help. In neither case can the prisoner trust completely in the therapist. After all, the therapist is part of the prison administration and has duties to others besides the prisoner. The therapist must respond to superiors for any bad judgment, and, even more importantly, the therapist has a duty to society, and in good conscience should not recommend for release anyone who may still pose a danger to society.¹¹⁴

Such a situation works against a positive outcome in psychotherapy. A therapy client must trust the therapist in order to feel free to reveal the inner self honestly and completely. This trust is greatly facilitated whenever the client perceives the analyst as a credible person. Research findings have confirmed the proposition that highly credible therapists have a more positive effect on therapy outcome,¹¹⁵ because highly credible therapists do not need the reassurance of clients to the extent that low-credibility therapists do.¹¹⁶ It is clear that in a prison setting, psychotherapy is made much more difficult by the naturally low credibility of any therapist in the unavoidably ambivalent position of psychoanalyst and administrator.

114. The case of *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976), is of interest in this connection. In that case, psychotherapists were sued by the parents of a girl who was murdered by a patient of the psychotherapists. The patient had told the psychotherapists that he planned to kill the victim. The California Supreme Court held that the defendant psychotherapists were immune from liability for failure to confine the patient for mental illness. The court relied on the immunity granted by CAL. GOV'T CODE § 856 (West 1979) to public employees in all cases involving the decision to confine a mental patient. *Id.* at 448, 551 P.2d at 351-52, 131 Cal. Rptr. at 31-32. The statute, however, provides an exception to the grant of immunity in those cases in which negligence is found.

On the basis of this case, it seems that prison therapists would be relatively free from liability in recommending the release of a prisoner except in those cases in which negligence could be proven. On the other hand, the court in *Tarasoff* found that the psychotherapists could be held liable for failure to warn the victim of the impending threat to her life as disclosed to them by their patient.

115. Beutler et al., *Attitude Similarity and Therapist Credibility as Predictors of Attitude Change and Improvement in Psychotherapy*, 43 J. CONSULT. & CLIN. PSYCH. 90 (1975); Beutler, Jobe, & Elkins, *Outcomes in Group Psychotherapy*, 42 J. CONSULT. & CLIN. PSYCH. 547 (1974); Beutler, *Predicting Outcomes of Psychotherapy*, 37 J. CONSULT. & CLIN. PSYCH. 41 (1971). See also R. SLOANE et al., *supra* note 91, at 224; Aronson, Turner, & Carlsmith, *Communicator Credibility and Communicator Discrepancy as Determinants of Opinion Change*, 67 J. ABNORM. PSYCH. 31 (1963).

116. Beutler et al., *supra* note 115, at 90-91.

Another factor to be considered in gauging the effectiveness of prison psychotherapy is the middle-class orientation of most psychoanalysts. It has been pointed out that psychoanalysts have generally taken an interest only in the treatment of middle-class patients.¹¹⁷ For this reason, it is not surprising that it has been claimed that middle-class psychoanalysts and blue collar patients can't relate to each other.¹¹⁸ In this regard, Freud himself realized that a client had to possess a generally accepted system of values in order for psychoanalysis to work.¹¹⁹ Needless to say, the counseling of a prisoner must almost always involve an examination of basic values.

It should be pointed out that there is no widespread optimism today with regard to finding effective methods of treatment of the adult referred to as a sociopath or anti-social. It has been said that "the evidence is insufficient to support any conclusions about treatment of the adult antisocial."¹²⁰ It would be helpful to keep this in mind when considering the possibilities under behavior therapy, and before becoming too hopeful about the prospects of that approach. Behavior therapy is neither as esoteric nor as cruel as many have been led to believe.

Part of this misconception about behavior therapy is due to the fact that within penal institutions "behavior therapy" and "behavior modification" have often been used as euphemisms for drug control, psychosurgery, and solitary confinement.¹²¹ Behavior therapy is really the systematic application of principles of learning to the treatment of behavior disorders.¹²² Putting it

117. Spiegel, *Psychoanalysis—For an Elite?*, 7 CONTEMP. PSYCH. 48 (1970); Szalita, *Reanalysis*, 4 CONTEMP. PSYCH. 83 (1968).

118. A. HOLLINGSHEAD & F. REDLICH, *SOCIAL CLASS AND MENTAL ILLNESS* (1958).

119. We point out the difficulties of the [psychoanalytic] method to [the neurotic patient], its long duration, the efforts and sacrifices it calls for; and as regards its success, we tell him we cannot promise it with certainty, that it depends on his own conduct, his understanding, his adaptability and his perseverance.

FREUD, *Introductory Lectures on Psycho-Analysis (Parts I and II)*, 15 STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 1 (Hogarth Press 1963).

120. Winokur & Crowe, *Personality Disorders*, in COMPREHENSIVE TEXTBOOK, *supra* note 107, at 1293, 1296.

121. Burchard & Harig, *Behavior Modification and Juvenile Delinquency*, in HANDBOOK OF BEHAVIOR MODIFICATION AND BEHAVIOR THERAPY 405 (H. Leitenberg ed. 1976).

122. K. O'LEARY & G. WILSON, *BEHAVIOR THERAPY* 16 (1975). This textbook contains a detailed characterization of behavior therapy at 16-17.

very simply, behavior therapy attempts to correct undesirable behavior or habits or to reinforce desired habits through methods of conditioning. The common methods used are operant conditioning, desensitization, and aversion therapy.¹²³ Alcoholism, for instance, is often treated by chemical aversion therapy.¹²⁴ The various methods need not be explained for the purposes here, but it should be pointed out that it is hard to find many studies indicating positive results with adult delinquents.¹²⁵ The field of behavior therapy is relatively new. Much research is needed before the true effectiveness and ultimate limitations of its approach are fully known. This alone seems reason enough to refrain from basing any punitive philosophy upon the hope that behavior therapy will have any significant effect on prisoner attitudes and behavior.

In addition, there are two assumptions regarding the behavior therapy of criminals which need further corroboration as to their validity. These are that (1) the behavior sought to be reinforced in therapy is relevant to the kind of behavior needed for community adjustment and survival, and (2) behavior, once modified in the special environment within the prison, will be maintained on the outside after release.¹²⁶ Assumption (1) could very well fail if prisoners, whose behavior was positively modified under behavior therapy in prison, leave prison and return to former habits. This could very understandably occur if the behavior change learned in prison were unrelated to the behavior changes needed to lawfully cope on the outside. Assumption (2) is open to question because it could turn out in various cases that an inmate's behavior would be positively modified in prison and even remain lawful for some time after release from prison, but then with time revert to unlawful ends. This could be caused by opposing, detrimental influences toward unlawful behavior which would override the previously learned behavior, or by forgetting the learned behavior due to the failure to receive necessary reinforcement.

123. S. BACHMAN, *THE EFFECTIVENESS OF PSYCHOTHERAPY* 145 (1971).

124. *Id.*

125. The textbooks cited *supra* notes 121 and 122—like others—discuss various aspects of behavior therapy, including juvenile delinquency, but there is no discussion of approaches to adult delinquency.

126. Burchard & Harig, *supra* note 121, at 416.

Reversion to criminal behavior could also occur if the change was not genuine in the first place. This brings up the question of whether behavior therapy would be vulnerable to the same manipulations by inmates as were previously discussed in connection with psychotherapy. This result seems very likely, if behavior therapy is tied in with parole in the same manner as presently employed prison methods. A showing of positive behavior change by the inmate is helpful in obtaining an earlier release on parole. Given this situation, it is quite plausible that inmates could enter behavior modification programs and learn—either through word of mouth or through trial and error—the particular behavior which is looked upon favorably in the eyes of the therapists. This behavior could then be effectively mimicked to effectively impress the therapists and then, eventually, the parole board.¹²⁷

The criticism of psychological methods (in particular, psychotherapy) catalogued here is not intended as conclusive proof that these methods are useless. Nor is it advocated that these methods should never be used in a prison setting under any circumstances. It is only intended to demonstrate that there is enough doubt about the actual effectiveness of therapy to warrant considerable reluctance in using it as a foundation for a correctional philosophy.

Returning to the specific criticism leveled against the rehabilitative theory—that it justifies punishment in excess of what would ordinarily be the penalty—it must be seen that this objection is hard to overcome. In order to be consistent, the proponent of rehabilitation must require that the offender not be allowed to leave prison until he has been “rehabilitated.”¹²⁸ Otherwise he will present a threat to society and probably will commit more crimes. Since, of course, rehabilitation methods

127. See note 78 *supra* and accompanying text.

128. Federal Judge Matthew Byrne, Jr. described the process this way:

Inherent in the indeterminate sentence procedure is the stimulation of an offender's incentive towards rehabilitation. He is aware that under the program designed for him there will be periodic revaluations of his potential for parole, and that he will return to the community only when his attitudes and patterns of behavior have been sufficiently modified.

Byrne, *Federal Sentencing Procedure: Need for Reform*, 42 L.A.B.A. BULL. 563, 567 (1967).

will supposedly reform almost anyone, it will merely be a matter of a short time before each convict is reformed.

This, needless to say, is the crucial flaw in the argument. If human knowledge were developed to the point where all but the most incorrigible offenders could be rehabilitated in due time, such a system would work marvelously and would surely meet with the approval of all. The problem is that the knowledge and the ability to deal with the problems of criminal behavior and motivation is far from being fully developed. Consequently, to prolong incarceration in an attempt to apply half-proven and ineffective methods of rehabilitation is not only reprehensible but downright cruel.¹²⁹ It is granted that all this is perhaps being done with the best of intentions, but the effect is still unsavory.¹³⁰

Apart from the problem of prolonged detainment, the effect on the prisoner's attitude may well be detrimental and opposite to the positive effect which was originally desired.¹³¹ Under the therapeutic and behaviorist approaches, it is likely that the convict will realize that the reason that he continues to be confined is that he is considered to be sick and that he is being detained for his own good.¹³² The prisoner may well come to regard this

129. M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 90-94 (1973).

130. See quote from Lewis, *supra* note 76.

131. J. CONRAD, *CRIME AND ITS CORRECTION: AN INTERNATIONAL SURVEY OF ATTITUDES AND PRACTICES* 53-54 (1965).

Our concern here is to record the present situation [of the treatment process] as one of the most seriously irrational elements of American prison administration. Its consequences in the creation of tension, alienation, and manipulation of services for secondary gains have never been adequately studied. It is a reasonable hypothesis, however, that the indeterminate sentence as at present administered not only contributes to the great length of American sentences but also the essentially antitherapeutic culture which prevails despite the increase of services.

Id. at 54.

132. The term *therapeutic* is used here synonymously with *psychotherapeutic*. The convict may form the belief that if he were imprisoned simply on the basis that he had done something wrong, he might not be held for as long a time. If he is detained under the guise of treatment, then the authorities have the excuse that he has to be detained longer because treatment takes much time. Martinson pointed out:

The . . . Attica prison revolt reflected a growing disgust with what inmates regarded as the hypocritical fakery of treatment. Convicts know that treatment spokesmen denounce "punish-

as a mere hypocritical excuse for the continuation of his torment.

C. VOCATIONAL REHABILITATION

Vocational training presents another problem. In some cases, prisoners may be trained and provided jobs after release, but these jobs may only be menial ones with little opportunity for advancement.¹³³ It is perhaps true that many inmates could never be suited to work at anything but menial or hard physical labor. However, one should be careful not to sell prisoners short. A good number of them are no doubt quite intelligent and capable of holding interesting jobs which require a good deal of responsibility. To give one of these inmates a demeaning job may well bring back much of the same kind of frustration which caused the turn to crime. After all, given the prospect of having to work at some of the menial jobs that are available today, it may well be that one would find some very respectable people turning to crime rather than having to face such a fate.¹³⁴ A good program that strived to get prisoners sufficiently interesting jobs might very well affect the rate of recidivism.¹³⁵ However, employment programs, like other programs, have often been used by prison administrators as a means for rewarding good prisoners and punishing bad ones.¹³⁶

Effective job training in prison has been obstructed by (1)

ment," but advocate life on the installment plan, a terror described by Franz Kafka. As the myth of treatment has been coopted by correction officials, it has ceased to grip anybody. Those closest to the offender—the correctional officers—tend to view it as a form of "brainwashing." It could be argued (and was) that if treatment didn't rehabilitate, at least it kept the lid on.

Martinson, *supra* note 34, at 321.

133. PRISON WITHOUT WALLS, *supra* note 59, at 85.

134. See K. LASSON, THE WORKERS: PORTRAITS OF NINE AMERICAN JOB HOLDERS (1973), describing the duties and tribulations of jobs which can be tedious, demeaning and unfulfilling. See also S. TERKEL, WORKING (1974).

135. Sol Chaneles, a co-director of a New York State study on prisoner rehabilitation programs, claimed that many job training programs are ineffective because they provide training for jobs that are low-paying, menial, and offer little opportunity for future advancement. Chaneles says that the New York study found that only those programs combining realistic job training and placement in worthwhile jobs had any effect on the rate of recidivism. Chaneles, *Project Second Chance: A Program for Exconvicts That Works*, PSYCHOLOGY TODAY, March, 1975, at 43, 45.

136. *Id.* at 44.

the widespread employment of prisoners in prison maintenance tasks, and (2) restrictive state and federal laws limiting the sale of prison-made goods.¹³⁷ Prison administrations have sought to reduce prison costs by using inmates in tasks such as janitorial, cooking, and laundry services.¹³⁸ The skills acquired from performing such tasks are, needless to say, minimal. At the same time, these skills are in low demand on the labor market on the outside.¹³⁹ Consequently, once an inmate who has learned only these skills is released, he or she will have to plunge into a highly competitive job market where chances of finding employment are small and discouraging.

An even more significant obstacle to meaningful job education is the numerous legal restrictions on the sale of prison products. After prison industries became popular, labor and industry complained that these industries were an unfair source of competition and had to be curbed.¹⁴⁰ As a result, very restrictive laws were passed. The federal government does not allow convict labor to be used in government contracts exceeding \$10,000,¹⁴¹ nor can it be used on highway construction.¹⁴² States generally do not allow the sale of prison goods to purchasers other than government institutions.¹⁴³ Needless to say, restrictions of this sort will have to be eliminated before meaningful vocational training can be instituted in prison.

The problem, however, does not seem to merely involve restrictive laws and menial tasks. Vocational rehabilitation programs that have been well-equipped have been a cause of disap-

137. Miller & Jensen, *Reform of Federal Prison Industries*, in CORRECTIONS AND ADMINISTRATION 319, 333 (G. Killinger, P. Cromwell, Jr., & B. Cromwell eds. 1976) [hereinafter cited as CORRECTIONS AND ADMINISTRATION]. In California a maximum limitation of \$350,00 per year was set in 1955 on the value of production of any single prison industrial or agricultural enterprise. CAL. PENAL CODE §§ 5091(b), 5093 (West 1970). This ceiling can be adjusted in accordance with the wholesale price index. CAL. PENAL CODE § 5091(b)(3) (West 1970). It is obvious that such a limitation will not allow for very extensive enterprise, especially in a state with as large a prison population as California.

138. Miller & Jensen, *supra* note 137, at 333.

139. Miller, *Vocational Training in Prisons: Some Social Policy Implications*, in CORRECTIONS AND ADMINISTRATION, *supra* note 137, at 314, 318. "[O]ver two-thirds (68.7 percent) of the work assignments in prison are in occupational categories of the least demand (i.e., unskilled and semiskilled maintenance and prison industries)." *Id.* at 318.

140. Miller & Jensen, *supra* note 137, at 323.

141. 41 U.S.C. § 35(d) (Supp. 1979).

142. 23 U.S.C. § 114(b) (1966).

143. Miller & Jensen, *supra* note 137, at 331.

pointment. The Report of the Committee for the Study of Incarceration concluded that studies fail to show lower rates of recidivism even in well-staffed and well-equipped programs.¹⁴⁴ An official report of the California system where vocational rehabilitation had been used extensively concluded: "Profiting from the experience of history, the Department of Corrections does not claim that vocational training has any particular capability of reducing recidivism."¹⁴⁵ The problem is apparently deeper than lack of training for interesting jobs. As in the case of psychological rehabilitation, the difficulty is probably a deeper one involving the underlying assumptions of rehabilitation.

The principal underlying assumption behind vocational rehabilitation has been that the reason that many persons have turned to crime is that they simply lacked the job skills necessary to compete in the labor market. Consequently, these people (of course, predominantly poor) are forced to resort to crime as a result of economic necessity. The solution, then, is to impart the necessary job skills to those who are lacking them. It is not noticed that there are many in the same circumstances who never turn to crime and who often work menial jobs all their lives. It is not asked whether the difference between those who commit crimes and those who do not is more often one of attitude rather than training.

It seems futile to provide vocational training to those who for attitudinal reasons are not able to hold even a good-paying, interesting job, unless the problems relating to attitude are also dealt with effectively. A favorable attitude toward work itself is probably even more important than the acquisition of job skills in prison.¹⁴⁶ A study of adults with antisocial or sociopathic personalities made in the 1960's indeed found that employment was the most frequent area in which problems were encountered. Problems were not always necessarily related to insufficient training. Rather, typical problems were frequent job changes, lengthy periods of unemployment, and interpersonal problems

144. A. VON HIRSCH, *supra* note 74, at 15.

145. DICKOVER, MAYNARD, AND PAINTER, A STUDY OF VOCATIONAL TRAINING IN THE CALIFORNIA DEPARTMENT OF CORRECTIONS, CAL. DEP'T OF CORREC. RESEARCH REPORT NO. 40, 10 (1971). See generally D. LIPTON, R. MARTINSON & J. WILKS, *supra* note 34, at 343.

146. D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 259 (1964); Pownall, *Employment Problems of Released Prisoners*, 3 MANPOWER 27-30 (1971).

with bosses and peers.¹⁴⁷

Indeed, problems in adjustment and acceptance of the burdens and indignities of work may provide the explanation for the present failure of vocational programs. Vocational training undoubtedly helps many released convicts to find jobs where they can employ new skills, and eventually adjust to the demands of work. On the other hand, one reason that the recidivism rates have not fallen significantly is probably that many other ex-convicts, in spite of new vocational abilities, simply have not developed the discipline and patience necessary to put up with the many pains and inconveniences which everyone must face in the working world. The pressure and boredom of regular attendance at work, punctuality, and the often similar, repetitive, daily routine is something that is hard for most people to accept, but there are those who simply do not accept it, run away from it, and then resort to crime. Another problem is often present whenever the ex-convict is unable or unwilling to compromise effectively with his peers or to defer to the authority of his superiors. Clearly, those who are suspicious or resentful of authority in general will find it hard to accept the idea of having to obey orders for years to come from those above, whom they may neither respect nor trust.

The acquisition of new vocational skills will not solve personal problems related to employment that are of a psychological nature. In fact, it is not at all rare to hear of persons convicted of robbery or larceny who committed the crimes while profitably employed. Upgrading skills to where a person can become engaged in work that is more interesting is no solution either. After all, even the vice-presidents of corporations must often take their orders from above, and those people lucky enough to find exciting and highly fulfilling work must observe some form of regularity and punctuality while sometimes experiencing frustration. The solution to the personal problems encountered by some during employment would appear to be psychological counseling, but this is questionable in view of the shortcomings that have been discussed relating to psychological counseling. It would probably take a long time to change atti-

147. L. ROBINS, *DEVIAN'T CHILDREN GROWN UP: A SOCIOLOGICAL AND PSYCHIATRIC STUDY OF SOCIOPATHIC PERSONALITY* 295 (1966).

tudes developed over years, and furthermore, it would not be possible to know whether the attitudes had truly changed until the prisoner was released and given a chance on a real job for an extended period of time.

Still another reason that vocational rehabilitation is less effective than expected is probably the fact that many criminals have apparently made a choice to pursue a life of crime—so-called “career criminals.”¹⁴⁸ Economists have argued that crime, under contemporary conditions, may actually be a wise choice in economic terms.¹⁴⁹ This is probably most true of economic crimes such as robbery and burglary. Clearly, in the case of career criminals, vocational training will be of little help. Probably much the same can be said in the case of those who commit murder, rape, or assault. In many cases a career criminal may have adequate vocational skills and yet have decided that holding up banks offers a much better opportunity for large, long lasting economic gains. Robbing may also be considered more exciting than punching a clock regularly, as well as offering many of the other attractions of self-employment. Theft provides the possibility of long vacations between successful “jobs.”

D. MORAL REHABILITATION

Emphasis on moral reform tacitly assumes that there is a sufficiently uniform set of moral values which is acceptable to all persons—what is necessary is that those who have not adopted those beliefs (the criminals) be enlightened by those who have happened to discover the morally enlightened path (the administrators).¹⁵⁰ It is further assumed that prisoners will want to be

148. Career criminal bureaus, sponsored by the Law Enforcement Assistance Administration, have been instrumental in the conviction of many professional criminals who previously eluded authorities in various ways. Through the use of computerized FBI files, it has been found that professional criminals are responsible for a much higher number of crimes than previously believed, and that they are adept at escaping conviction by posing as first time offenders. *See generally* J. PETERSILIA & P. GREENWOOD, *CRIMINAL CAREERS OF HABITUAL CRIMINALS* (1978); J. WILSON, *THINKING ABOUT CRIME* (1975).

149. *See, e.g.*, *THE ECONOMICS OF CRIME AND LAW ENFORCEMENT* 141-212 (L. McPheters & W. Strong eds. 1976); *THE ECONOMICS OF CRIME AND PUNISHMENT* 11-116 (S. Rottenberg ed. 1973).

150. It seems that it would be quite difficult to get a person to adopt a set of values that he has hardly understood or accepted before. As one prisoner put it: “How do you rehabilitate a cat who has never been ‘habilitated?’” Alfred Hassan in *MAXIMUM SECURITY—LETTERS FROM CALIFORNIA’S PRISONS* 22 (E. Pell ed. 1972).

reformed,¹⁵¹ will cooperate with administrators and counselors, and will adopt the values that are imparted to them by their mentors. Furthermore, those who cooperate will do it out of full sincerity rather than out of the realization that it is better to play along in order to get desirable rewards.¹⁵²

Correctional officials who do not take the view that the prisoner is sick, but rather expect the prisoner to become morally rejuvenated, may have to wait a lifetime in order to see this moral awakening. Philosophers have found it difficult to find conclusive reasons for choosing to be moral other than purely prudential reasons like fear of retaliation and rejection by one's peers.¹⁵³ As Kai Nielsen has said, "Viewed purely in the abstract, there indeed is and can be no non-question-begging answer to the question 'Why should I be moral?'"¹⁵⁴ One can think of various specific instances in which a lawbreaker, given particular moral views, would have no real compunction over the criminal act and would be capable of showing outward remorse only in order to gain freedom. An obvious example is that of a poor man who steals out of desperation from a wealthy man who will hardly miss the pilfered property.¹⁵⁵ Other examples would be an otherwise kind man who kills his cruel and persistent blackmailer—a man of despicable character and little true worth as a person; the embezzler who takes a modest amount from his wealthy employer who has never given him a decent wage; the

151. A prisoner may well see the treatment approach as little more than a sham to make his suffering look less harsh to the rest of society. Instead, he may insist that his deprivation be called what it really is—punishment for his breach of legal prohibitions. As a prisoner once wrote: "To punish a man is to treat him as an equal. To be punished for an offence against rules is a sane man's right." W. MACARTNEY, *WALLS HAVE MOUTHS* 165 (1936).

152. Cressey, *Limitations of Treatment*, in *THE SOCIOLOGY OF PUNISHMENT AND CORRECTION* 501, 505-06 (2d ed. N. Johnston, L. Savage & M. Wolfgang 1970).

153. Philosophers of both the Continental and Anglo-American schools of philosophy have found it very doubtful that any absolute moral standards can be formulated. For a discussion of the approach to punishment taken by Jean-Paul Sartre and Albert Camus, see Gerber & McAnany, *Punishment: Current Survey of Philosophy and Law*, 11 ST. LOUIS U.L.J. 491, 502-08 (1967). See also J. SARTRE, *SAINT GENET: ACTOR AND MARTYR* (1965). For two discussions of the problems of moral standards by Anglo-American philosophers, see K. NIELSEN, *REASON AND PRACTICE* (1971) and Thomas, *Why Should I Be Moral?*, 45 PHIL. 128 (1970).

154. K. NIELSEN, *supra* note 153, at 318.

155. "The perennial protection of values by law shields the status quo against innovations and subjects human freedom to oppression and exploitation. The rich man is 'virtuous' and wants everyone else to be so." Gerber & McAnany, *supra* note 153, at 504.

petty thief who is well aware of the fact that there are many white-collar criminals who go unarrested and pay only relatively light fines when they happen to get caught, and the young person who smokes marijuana and believes that there is no wrong in it.

Apart from these examples which involve some justification for the offender's act, there are those more ordinary criminal acts which a prisoner may not consider to be that bad. This may be due to his own personal moral upbringing, or it may be a result of environmental influences and pressures. In a subculture or community in which violence is more readily accepted as a means for solving problems, individuals may not see acts of assault or even murder with very great disapproval in certain cases. Adaptation to violent forms of action may well be necessary to ensure survival. The carrying of a knife or a gun in these situations is often an important measure of self-defense.

Given a social and moral orientation such as this, it would be extremely difficult to change a criminal's views within a reasonable time in a prison setting. It would seem that any genuine change must begin with a truly voluntary desire to change and a certain amount of real cooperation from the prisoner.¹⁵⁶

The previous examples also cast doubt on the therapeutic and behaviorist approaches.¹⁵⁷ It must be asked whether it is possible to *ever* reach a fully developed stage of conditioning techniques which teach the criminal to make the "right" choices. It may well be that many criminals have in fact made what many reasonable people would regard as morally acceptable choices, given the particular circumstances. What techniques will change the attitudes of criminals who have committed crimes which could be seen as being, to some degree, excusable? The desire to inculcate certain values in inmates, which they do not accept and merely perceive as hypocritical, may very well contribute to the hostility felt by the criminal against society. An inmate may very well perceive the deepest falsity when told to abstain from aggression and acquisitiveness, when he is well aware that competition and avarice are commonplace in many

156. See S. HALLECK, *supra* note 78, at 33.

157. The psychotherapeutic approach is discussed in text accompanying notes 84-120 *supra*; the behaviorist approach in text accompanying notes 121-127 *supra*.

segments of American society. The convict may very well wonder at the reasons for containing more open forms of lawlessness, while groups of businesses can sometimes engage in price-fixing and often get away with paying relatively small fines.

V. CONCLUSION

A sentencing structure based on the rehabilitative concept conditions release from prison upon the showing that the prisoner has been rehabilitated. This creates injustices through disparities in sentences and time served. It invites hypocrisy on the part of both inmates and administrators, since prisoners must often mask their true feelings and feign repentance, while administrators are to encourage the "voluntary" rehabilitation of the prisoner but must prolong the imprisonment of those who do not respond to treatment. It is an insult to the prisoner whose criminality is caused by bitterness at society and who—rightly or wrongly—feels justified in committing a crime and consequently does not feel genuine remorse. To tell such an individual to accept treatment, or to insist upon true reformation although the prisoner is not so inclined, is to invite the individual either to lie or to feel a resentment which can only work against any true socialization. It is no wonder that the reduction of recidivism—rehabilitation's primary objective—has not been accomplished.

The rehabilitative theory seeks to justify prolonged confinement if it is judged that the prisoner has not been rehabilitated. Yet, it attempts to make this extremely difficult judgment based on the very limited knowledge of human nature and predictability available today. Rehabilitation allows for the detention of a prisoner who continues to have anti-social feelings and values which conflict with some of the accepted values of society.¹⁵⁸ This detention is continued in spite of the fact that the prisoner may have decided not to commit another crime, but is merely acting in a manner which prison officials deem to be asocial and which is taken to signify the inmate's lingering "dangerousness." This dangerousness is often supposedly demonstrated by the prisoner's membership in groups, or belief in ideologies which are strongly opposed to the currently prevailing social structure and values.

158. See AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE (1971).

Under any of the approaches to reform, the door is left open for abuses in length of confinement whenever rehabilitation techniques work either too slowly or not at all. In addition, it invites the possible disregard of individual rights, especially since correctional officials may become less aware of rights because they see themselves administering a program which is beneficent and humanitarian. Specifically, the denial of due process in interprison proceedings¹⁵⁹ and the use of certain kinds of rehabilitative techniques¹⁶⁰ present ominous threats of infringement on basic individual liberty and dignity.

At the same time, rehabilitation can give relatively early freedom to the hardened, professional criminal who is knowledgeable and adept at feigning repentance and reformation, but who is all the time intending to return to crime. It allows for probation even for serious crimes, on the theory that incarceration would only cause deterioration in the criminal's attitude ("prisonization"). Yet, it disregards the possibility that others might see the offender's release as an indication that the laws are not to be taken seriously and that the price to be paid for crime is a low one.

Serious reconsideration must be made of sentencing based on the rehabilitative theory. It would be better to do away completely with indeterminate sentences and parole boards. Instead, short, definite sentences comparable to those given in Europe could be employed with less room for disparity and greater certainty for the prisoner in making future plans.

In the future, incarceration could more likely be justified on two theories. One is that the threat of punishment is necessary, even if not 100% effective, in preventing crime. This is the theory of deterrence. Once an offense is committed, the offender will simply be told that because of this social breach, punishment must ensue in order to discourage the offender, as well as others, from committing further crimes. The second rationale which may be used is that of incapacitation or isolation of the offender from society. This rationale is particularly applicable

159. For a compilation of articles discussing questions of due process in prison, see *PRISONERS' RIGHTS SOURCEBOOK* (M. Herman & M. Haft eds. 1973).

160. See, e.g., *Symposium: The Control of Behavior: Legal, Scientific and Moral Dilemmas* (pt. 1), 11 *CRIM. L. BULL.* 598 (1975).

to the case of habitual offenders. Incapacitation is really concerned with the protection of the victim or potential victim. It provides as the ultimate justification for imprisonment the protection of innocent individuals who may fall prey to a wrongdoer if he or she is not confined. In the case of habitual offenders who will neither be rehabilitated nor deterred, it is clear that it is nonetheless necessary to imprison them to keep them out of circulation.

As for rehabilitation, there is a definite place for it in the penal system. Meaningful reform programs offered on a voluntary basis would surely be beneficial to those prisoners who participate out of genuine, personal interest and would in general provide another means for bolstering morale. Neither can rehabilitation in the form of psychosurgery, shock therapy, and chemotherapy be entirely dismissed. As an effective and even humane possibility in the future, it could help prisoners without the need for long detention, as well as help to safeguard the well-being of potential victims. Until the time (if ever) that behavioral changes of this kind can prove to be reasonably effective and not unduly cruel, they are best left in the experimental stage with voluntary subjects.