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The Future of Imprisonment. By Norval Morris

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BOOK REVIEWS

THE FUTURE OF IMPRISONMENT. BY NORVAL MORRIS.* Chicago: The University of Chicago Press. 1974. Pp. xiv, 144. \$6.95.

*Reviewed by Christopher T. Bayley***

In the rapidly developing critique of America's prison system and sentencing practices, *The Future of Imprisonment* by Norval Morris has emerged as a seminal work. It is really two books. The first part deals with the moral and practical efficacy of prison (or "loss of liberty") and sets forth Morris' views on rehabilitation. The second part considers two aspects of the narrow question of imprisonment:

- (1) How do we decide who should be imprisoned; and
- (2) Based on our knowledge of the failure of past and present penal institutions, how should a prison for repetitively violent criminals be modeled in terms of physical plant and program?

Implicit in Morris' concentration on the decision to imprison and the prison system itself is an acknowledgement that loss of liberty by institutionalization is indeed an appropriate criminal sanction. It is in this recognition that Morris' book assumes major contemporary importance. To be more precise, Morris does not view imprisonment as a "last resort";¹ rather, he views it as a perfectly legitimate and morally justifiable consequence of proven criminal activity.

Morris' initial chapters, "Prison as Coerced Cure"² and "Rehabilitating the 'Rehabilitative Ideal'"³ are an important foundation for acceptance of the fundamental idea that prison, and, indeed, punishment in general, belong in our criminal justice system. It is in the first portion of the book that Morris makes his major contribution to the debate between those who view the legitimate goal of imprisonment as rehabilitation and those whose jurisprudential model for incarceration is punishment. Morris criticizes the current treatment-oriented approach as defective in that "prison behavior is not a predictor of com-

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1. P. 6.

2. Pp. 1-27.

3. Pp. 28-57.

munity behavior.”⁴ In addition, he finds a “psychological fallacy”⁵ in the treatment approach. Cures of the psychoanalytic variety must be voluntarily complied with to be effective.

Morris writes with such wit and lack of pretention that the result is a most interesting and convincing argument for the “punishment” model of imprisonment. Witness the introductory language on his purpose:⁶

At all events, it may help to carry discussion beyond the present polar dogmatisms of the punishers of crime, with their mindless reliance on the prison, and the curers of criminals, with their boundless confidence in the enforceability of the Sermon on the Mount.

. . . .
It is not, I think, menopausal depression that leads me to believe that the proper use of imprisonment as a penal sanction is of central practical and theoretical importance to the future of social organization generally. From such large pretensions, let me turn to the subject of this book—the future of imprisonment.

Morris begins by setting the current debate over “treatment” or “punishment” in its historical context. The development of prisons, and the subsequent abolition or abatement of imprisonment are fascinating stories in and of themselves. After briefly examining “the dangers of diversion,”⁷ *i.e.*, that in its control features diversion may be more coercive than imprisonment, Morris begins to develop his fundamental theme. He firmly establishes the middle ground which allows both imprisonment and rehabilitation, but under conditions far different from the working model existing in most states today.⁸ Morris believes that rehabilitation is consistent with imprisonment but notes that the two concepts are often confused:⁹

Rehabilitative programs in prisons have been characterized more by false rhetoric than by solid achievement They have been corrupted to punitive purposes. But it does not follow that they should be discarded.

Thus, rehabilitation is not bad per se, but is bad when it

4. P. 16.

5. P. 17.

6. P. 3.

7. P. 9.

8. P. 28.

9. P. 13.

becomes a means for the incarcerated person to end his imprisoned status sooner than would have been the case had he not gone through "rehabilitation." My own view is that rehabilitation has been perverted in the current system because it *has* become the purpose of sentencing for many judges. The offender enters a program not after making a fundamental personal decision to change, but because it is a way to avoid punishment. We have even seen cases where the convicted person actually invents a "problem" which supposedly underlies his criminal conduct so the judge will focus on treating that rather than punishing him. Morris argues that:¹⁰

"Rehabilitation," must cease to be a purpose of the prison sanction. This does *not* mean that the various developed treatment programs within prisons need to be abandoned; quite the contrary, they need expansion.

While he rejects rehabilitation as a goal of imprisonment, the author recognizes the utility of having such programs available to prisoners. Morris would substitute "facilitated change," *i.e.*, treatment programs voluntarily chosen which have no relationship to the time to be served, for "coerced cure," which is the "corruptive" linking of successfully completing a rehabilitation program to the time to be served.¹¹

This is the first principle for Morris' new model of imprisonment, "*the substitution of facilitated change for coerced cure.*"¹² The second principle, which is the subject of the second chapter, is "*the substitution of graduated testing of fitness for freedom for parole prediction of suitability for release.*"¹³ Here again, Morris refreshingly analyzes current practices and describes convincingly the logical and practical defects in them. The present practice in most states which have adopted the "reform" of indeterminate sentencing is for each incarcerated person to have his release date reviewed on a periodic, sometimes even annual, basis. The parole board or its equivalent has the power to, and in practice does, change the time of release depending on whether they believe the person to have been rehabilitated.¹⁴ In his subchapter

10. Pp. 14-15 (emphasis in original).

11. P. 27.

12. *Id.* (emphasis in original).

13. *Id.* (emphasis in original).

14. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 279, § 31 (1972); MICH. COMP. LAWS ANN. § 769.8 (1968).

entitled "Predicting and Paroling,"¹⁵ the author describes various predictive methods and concludes that they are all inadequate and uncertain. He argues that "[t]he link between release on parole and involvement in prison programs must be broken."¹⁶ He claims that all the evidence indicates that there is no way to predict from "in-prison" conduct how well a person will do "on the outside." Morris then cites several studies for the proposition that "*predictions of avoidance of conviction after release are no more likely to be accurate on the date of release than early in the prison term.*"¹⁷

Rather than engage in the game of prediction through annual or periodic parole hearings, Morris' plan would set a definite release date at the commencement of incarceration, based on the relevant statutes, considerations of the crime, and the offender's criminal history. He would also implement techniques for the graduated testing of fitness for release, but it is unclear exactly how those "techniques of graduated testing"¹⁸ would differ from the "present faulty and fraudulent parole predictions of such fitness."¹⁹ Ideally, Morris would abolish parole (as the proposed sentencing act in Illinois does),²⁰ but he acknowledges that there may be political reasons for preserving parole temporarily. Basically, he is concerned with the opposition which the threat of abolition would arouse from those whose jobs are threatened. His compromise would take the resources of the parole system and apply them to the task of setting a release date at the commencement of the offender's term. It is interesting that California, the birthplace of indeterminate sentencing, has recently through its Adult Authority announced a radical change from regular review of parole dates to an advance fixing of those dates, to be affected only by "good time" calculations.²¹ The good time deductions also

15. Pp. 31-34.

16. P. 35.

17. *Id.* (emphasis in original).

18. P. 36.

19. *Id.*

20. The Illinois legislative committee studying the revamping of the criminal justice system has recently proposed a sentencing act which would impose flat sentences and abolish parole. This bill will be introduced in the Fall 1975 term of the Illinois legislature. The change has Governor Daniel Walker's strong support. News From the Office of the Governor No. 180-75 (Feb. 18, 1975).

21. There is also a flat sentencing bill in the California legislature. Assemblyman Sirody introduced A.B. 1440 on April 3, 1975. Senator Nejedly introduced a similar bill, S.B. 42, which was heard on August 13, 1975 and taken under submission by the Criminal Justice Commission of the California legislature.

apply to the proposed Illinois statute.²² In the state of Washington, the Board of Prison Terms and Paroles has recently adopted a rule ending its practice of annually reviewing parole dates, and itself is developing a matrix of terms of imprisonment to be applied at the commencement of sentence and based on the nature of the crime and the criminal history of the offender.²³

In concluding his chapter on "Rehabilitating the 'Rehabilitative Ideal,'" Morris steps back from the correctional institution to the courtroom and prosecutor's offices. He correctly perceives that "[o]ur present sentencing practices are so arbitrary, discriminatory and unprincipled that it is *impossible* to build a rational and humane prison system upon them."²⁴ In recognizing these flaws in present-day sentencing, he takes a line with which I happen to concur, and which has been advanced by such distinguished jurists as Marvin E. Frankel²⁵ and Constance Baker Motley.²⁶ Further, Morris offers his own ideas on the minimum conditions of the fair sentence based on what the offender has done, rather than his personal characteristics. The sentencing discussion includes a section on plea bargaining, for as Morris recognizes, the vast majority of those convicted and sentenced for serious offenses have pleaded guilty.

In joining the plea-bargaining debate, Morris attempts to square this practice with his overall concern for fairness and certainty in punishment. He rightly condemns "overcharging,"²⁷ a process by which a prosecutor may obtain a guilty plea to the offense he should have charged the defendant with initially. This, in effect, creates a false impression of pleading to a lesser offense.

Morris concurs with the *ABA Standards for the Prosecution Function*²⁸ that the judge should have a role in plea bargaining. His plan for "principled plea bargaining"²⁹ would in fact involve five parties at interest in the pretrial dispositive process: judge, prosecutor, defense counsel, accused, and victim. Regarding the

22. See note 20 *supra*.

23. Washington State Board of Prison Terms and Paroles, Board Rule 5.170 (1975).

24. P. 45 (emphasis in original).

25. See generally M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

26. Motley, *Criminal Law: "Law and Order" and the Criminal Justice System*, in *PERSPECTIVES ON JUSTICE* (1975).

27. P. 53. I agree that charging more than can be proved is an inappropriate use of prosecutorial discretion, but I do not think that it is a serious problem in King County.

28. ABA STANDARDS, *THE PROSECUTION FUNCTION* § 4.3, *Commentary* (Approved Draft, 1971).

29. Pp. 51-57.

latter, his description of a current inadequacy of the system is right on target. Victims are indeed "used" by the system instead of being the true customers of it. From my personal experience, I would stop short of this elaborate five party plea-bargaining system, but only for practical reasons. I feel that fairness as well as the victim's interest can be served by "principled plea bargaining" between the prosecutor and defense counsel, subject to the approval of the judge, if *standards* are adopted and followed.³⁰ The victim's interest can be served by informing him or her of what is transpiring and by encouraging involvement to the extent desired in the trial and sentencing hearings. A victim program was started in our office one year ago which consisted of sending a letter to each victim asking for information on possible restitution which we could use at sentencing. We have now expanded the program with the help of concerned citizens groups in high crime areas. We send a victim information brochure describing how a case makes its way through the system, and solicit the personal appearance of the victim at sentencing.

The final paragraph in this vital section of Morris' book connects his comments on various parts of the system and summarizes his preconditions for creation of a model prison system:³¹

To try, as the young now advise, to get it all together: there can be no rational future for imprisonment unless present plea bargaining practices, which are the main dispositive technique for sentencing criminals, are rendered principled and orderly, and unless sentences imposed at trial by the judge and thereafter by the parole board are set free from the crippling link between prison program and release date. If these liberations are achieved, then applying principles earlier enunciated, prison may play a rational and functional role in the criminal justice system.

As a final point let me emphasize why this is an important

30. Under a grant from the Law Enforcement Assistance Administration, the California District Attorneys' Association has recently published a massive volume of filing and disposition standards. The results of this study are compiled in the UNIFORM CRIME CHARGING MANUAL (1974). The practice standards themselves may be found in a shorter volume entitled CALIFORNIA UNIFORM CRIME CHARGING STANDARDS wherein § II(a)(4) provides that:

The prosecutor should not use the charging process to induce a guilty plea to a lesser charge prior to trial; there should be a reasonable expectation of conviction on the designated charge.

Here in King County we are completing our fifth draft of standards to govern these prosecutorial functions.

31. P. 57.

book. There is a wide and dangerous gap today between those who run our corrections systems and the general public. This is certainly true in our jurisdiction where the problems are benign compared to those with even higher crime rates and serious systemic problems.

Citizens, who centuries ago gave up their right of personal retribution to the state, expect that state to exact, if not a pound of flesh, at least reasonable measures of accountability ("Just desserts" as articulated by C. S. Lewis)³² and deterrence. The state, or its "criminal justice system" is not doing this at present. Unless the performance improves and is perceived as improving, pressures for vigilante solutions will mount.³³ Also, the self-enforcement ethic, which has made everything from our traffic laws to our tax codes work, will be seriously undermined.

We need efforts to reach across this gap, appealing with equal plausibility to those involved in the prison system and ordinary citizens. Morris does this: he is reasonable but unafraid to identify the Emperor's nakedness. Although he is careful to keep it a *principled* debate, this can and should be a book of greatest *practical* impact.³⁴

32. C.S. Lewis, *The Humanitarian Theory of Punishment*, in *GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS* (W. Hooper ed. 1970).

33. *TIME*, June 30, 1975, at 13.

34. For other input in the debate, see Morris' excellent "Selected Readings and References" list at page 123. Two significant books published since *THE FUTURE OF IMPRISONMENT* are: James Q. Wilson, *THINKING ABOUT CRIME* (Basic Books, 1975) and Robert Martinson, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT* (Praeger, 1975).

THE OTHER GOVERNMENT: THE UNSEEN POWER OF WASHINGTON LAWYERS. By MARK J. GREEN.* New York: Grossman Publishers. 1975. Pp. xxi, 318. \$12.50.

*Reviewed by Eugene H. Nickerson***

This book is an entertaining and provocative study of Washington lawyers who make a handsome living representing rich and powerful corporations before the federal establishment and the courts. The tale has been told before by Joseph Goulden in *The Superlawyers*,¹ but he ranged over a series of Washington legal luminaries from Clark Clifford and Thomas Corcoran, the prototypes of the individual practitioner thought to have "influence," to the great Washington firms which operate in a less flamboyant fashion. Here the focus is on Covington & Burling as the city's preeminent firm and Lloyd Cutler of Wilmer, Cutler & Pickering, as a shining example of the Washington lawyer who has climbed to the top as head of a large firm.

Mark J. Green has been associated with Ralph Nader's efforts to reform corporate America and has been a prolific author in that vein. He writes in a fast-paced, effective style. Here his theme is that these lawyers, "who are among the most powerful people in the country today,"² spend most of their waking hours assisting big business—often by means of cunning and unethical tactics—to perpetrate acts which are damaging and frequently downright dangerous to the public interest.

As the subtitle of the book indicates, Mr. Green believes that the Washington lawyers have "power" and that it is "unseen." This book, in the Nader tradition, is an attempt to throw light on the shadows in which Washington lawyers work. The author has no doubt of their influence over the way we live:³

Thus, what the social Philadelphia lawyer was two generations ago and the financial Wall Street lawyer one generation ago, Washington lawyers are today—as the locus of public power shifts from pedigree, to money, to politics. They are to all law-

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1. J. GOULDEN, *THE SUPERLAWYERS: THE SMALL AND POWERFUL WORLD OF THE GREAT WASHINGTON LAW FIRMS* (1971).

2. P. 4.

3. P. 4.

yers and citizens what the heart is to the body: by dint of central location and essential function, both are the reigning organs of their respective body politic.

In particular, their power stems from the fact that their practice involves administrative agencies which can dispense or limit great wealth to the nation's giant corporations. These agencies are more susceptible than the courts to *ex parte* persuasion and subtle, and sometimes not so subtle, influence.

Mr. Green attributes the reluctance of these practitioners to attract the attention of the media in large part to the deleterious effect which public attention would have on their influence. As legal sociologist Edwin Smigel once noted, they regard "their organizations in much the same manner as clergymen think of the church—as an institution that should not be studied."⁴

Despite their success, the Washington law firms are decidedly more Democratic than Republican and are primarily concerned with public policy issues rather than purely financial matters. Therefore, they attract more liberal lawyers, and "it is precisely this evolution that has led to the essential dilemma of Washington practice: liberal lawyers toiling for illiberal clients on great policy issues."⁵ This, Mr. Green says, leads the Washington firms to do a fair amount of *pro bono publico* work, "now considered legal chic."⁶

After brief and vivid sketches of the history of Covington & Burling and of the career of Lloyd Cutler,⁷ Mr. Green surveys seven areas in which he says Washington lawyers in general, and Covington & Burling and Lloyd Cutler in particular, have helped to thwart the public interest: antitrust, drugs, foods, tobacco, automobiles, airplanes and trains, and the media.

The author then describes in some detail how these firms defeated or delayed the public interest in each of these fields, and he elaborates on and traces the application of ten techniques of Washington law firms—techniques he denominates the Ten Commandments of Washington Law. They are:⁸

4. P. 6.

5. P. 11.

6. P. 244.

Their motives vary from a sense of professional responsibility to the psychological and political need to legitimize what some consider '*pro malo*' work, to an understanding of good recruiting—or some combination of all three. P. 262.

7. "On the one hand he's a corporate devil and on the other hand he's a nineteenth-thirties' liberal." P. 45.

8. Pp. 12-15.

- I. *Reputation* — [T]he impression of power is power
-
- II. *Intelligence* — [Q]uite simply, brains.
-
- III. *Reconnaissance* — In a place where information can be power, Washington lawyers often act as legal radar.
- IV. *Interlocking Interests* — [Sitting on the board of a corporate client or previously working for an agency.]
- V. *Preferential Access* — [Ability to] get to see the influential
-
- VI. *Lobbying* — Access gets you through the door; lobbying is what you say when you sit down.
- VII. *Law-writing* — Even better than lobbying sympathetic legislators for a law is writing it for them.
- VIII. *Inundation* — [T]he more briefs and motions the better [because] a heavyweight can always beat a flyweight.
- IX. *Delay* — [F]or those seeking to avoid regulation, no decision is often a favorable decision.
- X. *Corruption* — High stakes, desperate wealthy clients, and compromisable officials can combust into corruption, involving unethical lawyers as well.

It all makes a fascinating, if not unsuspected story, and in a time of increased cynicism concerning lawyers stemming from the Watergate scandal, this book serves to illuminate legal abuses which perhaps have escaped the general public's eye. It will add to the pressure for an answer to the question of what is to be done to curb those abuses.

As I reached the end of the book, I found myself wishing that Mr. Green would devote more of his considerable talent and obvious intelligence to seeking that answer. He devotes one last, scanty chapter to benevolent yearnings for more ethical practices among lawyers (and for less hypocrisy about the American Bar Association's CODE OF PROFESSIONAL RESPONSIBILITY), and he discusses in one page the encouragement that the governmental and legal system lends to legal chicanery.⁹

One of the reasons I find such meager treatment unsatisfactory is that I do not believe that lawyers, even Washington lawyers as Mr. Green defines them, are all that "powerful."¹⁰ This country is still to a large degree corporate America, as Messrs. Nader and Green know only too well. Lawyers are far from being

9. Pp. 285-86.

10. Jerry S. Cohen, in a review of the book in THE WASHINGTON MAGAZINE, June, 1975, makes somewhat the same point.

“the reigning organs”¹¹ of the country and are too often the eager handmaidens of the corporate kings. Indeed, the facts which Mr. Green has marshalled establish that they are handmaidens who are all too complacent about the objectives of their clients and would do well to assert a greater measure of independence.

Things have not changed much since 1934 when Mr. Justice (later Chief Justice) Harlan F. Stone warned that the growth of big business had “made the learned profession of an earlier day the obsequious servant of business, and tainted it with the morals and manners of the market place in its most anti-social manifestations.”¹² It may be true, as Mr. Green says, that “no ethical obligation required Lloyd Cutler . . . to oppose, systematically, nearly every automobile-safety improvement on behalf of Detroit.”¹³ The “power” rested with the automobile manufacturer and not with its advocate. It is an indirect and dubious method of assuring safe automobiles to deplore their maker’s spokesman. Power must be attacked at its sources and not through its symptoms.

This is not to suggest that the lowly social ethic of many lawyers is to be applauded. Mr. Green is effective in pointing to the contrast between the standards which lawyers set for themselves in the ABA CODE OF PROFESSIONAL RESPONSIBILITY and those they in fact embrace. A lawyer is prohibited from involvement or acquiescence in the “commission of an unlawful act, even if received in confidence He should, if unable to get the client to cease the conduct, make such disclosures as may be necessary to protect those against whom the conduct is threatening or working illegal harm.”¹⁴ Can the spirit of this be squared, asks Mr. Green, with a lawyer’s direction of “a delaying action that permitted the continued marketing of a drug known to be dangerous by his client and presumably by himself”?¹⁵

It is not enough to recite, as Lloyd Cutler has done apparently in his own defense,¹⁶ that the adversary system, not the lawyer, is charged with finding the truth. As Mr. Green points out,¹⁷ the adversary process is more the exception than the rule

11. P. 4.

12. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 6-7 (1934).

13. P. 273.

14. Pp. 270-71.

15. P. 273.

16. See Cutler, Book Review, 83 HARV. L. REV. 1746 (1970).

17. P. 274.

in Washington. The agencies permit wholesale *ex parte* visits. In Congress, there is obviously no formal adversary system. Lobbyists patrol Capitol Hill and agency corridors with unremitting vigor. Would it not make sense to introduce the elements of an open adversary process in the agencies and the Congress? And does not the present post-Watergate atmosphere present an opportunity to do so?

Moreover, if it is unethical for a lawyer to unnecessarily delay a proceeding or to inundate his opponent with paper, how much more deplorable is it for the agency or the court to tolerate such behavior? Our only remedy lies not with disciplining the lawyer, desirable as that may be. It is also possible to insist that our public agencies fulfill their responsibilities. Should not more efforts be directed to obtaining laws and regulations to that end? And what measures, procedural or otherwise, can be taken to minimize the tendency, on which all objective observers agree, of government agencies to take the part of those whom they are supposed to regulate and "play the role of the watchdog holding the lantern for the thief."¹⁸

These seem to me to be questions deserving consideration perhaps prior to those asked about lawyers. But in the end, procedural nicety can only mitigate or delay undesirable substantive public consequences. To prevent them, and, equally as important, to protect the long-range public interest, the focus must be on those who in fact wield the greatest economic power in our society. They are not lawyers. It was coal manufacturers, not their legal advocates, who held and exercised the power to sustain the veto of the strip mining bill. It is the automobile manufacturers, not their lawyers, who persist in making vehicles which pollute the air, and successfully thwart legislative attempts to bring about manufacturing reform.

All this is not to justify or excuse the lawyer's complicity in assaults upon the public weal. Perhaps this book will contribute to the rebirth, which now seems to be occurring, of Justice Louis Brandeis' belief that lawyers are in a special sense a public utility with responsibilities beyond the interests of their clients.¹⁹

18. Jerry S. Cohen, *THE WASHINGTON MAGAZINE*, June, 1975, at 158.

19. [A]ble lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected their obligation to use their powers for the protection of the people. We hear much of the "corporation lawyers," and far too little of the people's lawyer. The great opportunity of the American bar is and will be to stand again . . . ready to protect the interests of the people.

Brandeis, *The Opportunity In The Law*, 39 AM. L. REV. 555, 559 (1905).

