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In Memoriam: Norval Morris (1923–2004)

*The editors of The University of Chicago Law Review respectfully
dedicate this issue to the memory of Norval Morris*

James B. Jacobs†

In Robertson Davies' splendid novel *The Manticore*, the Jungian psychoanalyst explains to the protagonist that a man has many fathers, each playing a different role at a different point in the life course. Norval Morris was my intellectual father. He gave birth to my career and shaped it at key points. He was my mentor for more than thirty years. He provided inspiration, example, support, encouragement, criticism, and affection. He initiated me into a professional family of which he was godfather, and he shared his own wonderful nuclear family with me. As I entered middle age myself, Norval became a friend and colleague—but always my mentor.

I met Norval Morris in the fall of 1970 as a student in his first-year criminal law class. I loved the course and admired Norval's brilliance, wit, charisma, energy, and passion for criminal justice. He hired me to serve as his research assistant during my 1L summer. Even then, he was thinking of presenting his intellectual ideas in literary form. We worked with Gordon Hawkins, Wayne Kerstetter, and others to write a Shakespearean play around the doctrines of mens rea, diminished capacity, and the insanity defense. The play never made it to the stage,

† Chief Justice Warren E. Burger Professor of Constitutional Law and the Courts, Director, Center for Research in Crime and Justice, New York University School of Law. These remarks and the ensuing remarks were delivered at a memorial service for Norval Morris on March 31, 2004.

but it undoubtedly set the stage for Norval's later fictional work. I often had lunch (always at the next-door American Bar Foundation) with Norval, Wayne, Hans Mattick, Franklin Zimring, and other eminent scholars and practitioners who passed in and out of Norval's orbit.

One day during my second year of law school, Norval told me that he would arrange for me a summer Ford Foundation fellowship at Stateville Penitentiary in Joliet, Illinois. With my student colleagues slated to work at prestigious Chicago law firms, I couldn't believe my good luck. I was surprised when my parents reacted silently to my excited phone call explaining that I was going to prison. Norval Morris's name has always opened doors for me, even at Stateville in the summer of 1972. I had free run of the joint. The inmate gang leaders approached (confronted) me the first day, demanding proof that I was not an undercover agent. When I revealed that I was Norval Morris's student, the whole atmosphere changed. The name Norval Morris was whispered from one to another. The inmates knew Norval's reputation as a passionate advocate of prisoners' rights, and my status as his protégé was sufficient to vouch for me.

Norval made me feel that my work was important, and encouraged me to do more of it and better. He encouraged me to write and publish my study of Stateville's prison gangs. He took me along to a major conference on prison reform in Williamsburg, Virginia, and to a sentencing conference in Albany, New York. He often invited me to lunch with his criminal law colleagues. He gave me drafts to read and treated me like a junior colleague, even when I wasn't. He taught me what it means to be a mentor.

Norval paved the way for me to matriculate in the University of Chicago sociology department and came up with the funding to make it possible. He introduced me to the eminent University of Chicago sociologist, Morris Janowitz, who soon became my second mentor. Even though, as Professor Bernard Meltzer regularly reminded me, my grades were not spectacular, Norval enthusiastically recommended me to the Cornell faculty, which hired me in 1975. He immeasurably boosted my credibility by presenting a major lecture at Cornell my first year there. Several years later when I moved to New York University, Norval came for two visiting semesters and gave me the splendid opportunity to co-teach a seminar on sanctions with him.

Perhaps Norval's most important example for an aspiring criminal law professor was how he regarded his field and his work. He believed in the importance and integrity of academic work. Unlike some academic lawyers, he never treated academic work as a game or as a vehicle for showing off his brilliance. He cared passionately about justice, about our justice institutions, about the people who work in the criminal justice system, and especially about those on the receiving

end of the criminal justice system. Over thirty-five years, Norval Morris thoroughly imbued me with these values, shaping my professional identity and career.

* * *

James R. "Chip" Coldren, Jr. †

It is an honor to speak here today and to share a few thoughts about Norval that I feel are important. It is fitting that I have just returned with several of my colleagues from a monitoring visit to the Sheridan Correctional Facility—we dedicate our work today to Norval.

As someone who became close to Norval in recent years, I can only say that I treasure the time that I had with him, as I imagine that all of you do. The truth is, I feel that I've been close to Norval for longer than I have known him personally. That's the way he was. He was, and is, part of all of us.

Permit me to begin by repeating a few lines I heard him say several times when he opened conferences that I attended. Just listen for a minute and you'll hear some vintage Norval Morris. He would be announced as the keynote speaker, to generous applause, and he would walk up to the microphone and say something like this:

I appreciate the opportunity to speak today and I will humbly offer some thoughts of mine on the topic, but I begin with an apology. My wife tells me that there are two main problems with my public speaking. The first problem is that I tend to wander from the topic I have chosen. The second problem is that I tend to wander back to it.

How precious, and how typically Norval.

Let me say at the outset here that in my view Norval Morris was, and still is, an important element in American legal culture. His vision, his perspectives, his concerns, and his tenderness are part of our legal learning and our legal thinking. We cannot discuss many topics pertaining to justice, penology, criminal law, or law and psychiatry without encountering Norval. He is there. He is here, with us.

Now, things like this don't just happen. Norval wasn't someone who wrote or said something and just happened to be in the right place at the right time so that it stuck. I want to speak about three

† President, John Howard Association.

qualities in Norval that help explain how and why he became so integral to our way of thinking.

Consistency. If you read Norval's work you find a remarkable consistency in his basic values and his basic approach to solving problems. These include common sense; paying attention to research, data, and experience; learning from the past; holding criminals accountable; and being sensible about punishment (that is, developing punishment policy and administering punishment that is consistent with what psychology and psychiatry tell us about human behavior). He did this without seeming repetitive and without seeming boring (because he was a very good writer). The people I respect and admire are those who are consistent in their values. We should recognize Norval for this.

Intellectual rigor. Norval's work, and his arguments, are sound, based on what research and intellectual traditions tell us. When you read Norval's work you read material that has solid grounding in empiricism, logic, and, again, common sense.

Compassion. Sometimes when I think about Norval, I think that he must have had different eyes than most other people. I honestly believe he had concern in his heart for everyone. When he met someone, anyone—a student, a colleague, a judge, a police officer, an incarcerated individual, a politician, an administrator—he saw a soul, a heart, a human being worthy of his attention and his concern, no matter what the issue of the day or the topic of conversation. He was consistent in this as well, and I stand here as one of the many beneficiaries of his compassion, in both my personal and my professional life.

Norval served on the board of directors of the John Howard Association for twenty years. The John Howard Association, among other things, embodies our compassion for the imprisoned in Illinois, and Norval served us well, in several different capacities, over those years. Bear in mind, however, that Norval joined the Howard League in England (our counterpart overseas) over fifty years ago. So for longer than I have lived on this earth, Norval dedicated part of himself to aiding those who are incarcerated, as well as their family members and others who care about them. I don't need to tell those present here that that sort of compassion is hard to come by.

We are all mere human beings, as Norval would readily recognize. So let us do this. When we find ourselves wandering from what Norval has taught us, let us wander back to it.

Franklin E. Zimring†

The warmth and vitality of Norval Morris's personality were so intense, his institution building was so important, that his scholarly contribution to the criminal law is in danger of not being emphasized in a memorial like this. So I want to briefly discuss both the contributions Norval made to Anglo-American criminal law and the methodology that enabled this Australian visitor to identify and to fill major gaps in American criminal law.

Let me begin with a list of six of Norval's milestone contributions to American criminal law and explore their common roots.

(1) The critique and reworking of the rehabilitative ideal beginning in publications during the 1950s and fully stated in *The Future of Imprisonment*.¹ Norval's solution was a facilitative rather than coercive model of programs in prisons.

(2) His demonstration of the problematics of the equal punishment of offenders—stated in his bicentennial lecture of 1976.² That was an era when treating like cases alike was a mantra—almost regarded as a sufficient condition for justice. Norval's dissent was an important corrective.

(3) His classic dissection *The Felon's Responsibility for the Lethal Acts of Others* in the mid-1950s.³

(4) His identification of retributive considerations as both a floor and a ceiling of just punishment—what he called a limiting principle—combined with his forceful rejection of the false hope of desert as a defining principle of punishment.

(5) His identification of the development of what he and Gordon Hawkins called “an administrative law of crime” in their *Letter to the President on Crime Control*.⁴

(6) His demonstration of the need for “intermediate” punishments in *Between Prison and Probation*.⁵

† William J. Simon Professor of Law, Boalt Hall, University of California at Berkeley.

¹ Norval Morris, *The Future of Imprisonment* (Chicago 1974).

² Norval Morris, *Criminal Law—Some Second Century Problems and Third Century Solutions*, in Bernard Schwartz, ed, *American Law: The Third Century: The Law Bicentennial Volume 89* (NYU 1976).

³ Norval Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U Pa L Rev 50 (1956).

⁴ Norval Morris and Gordon Hawkins, *Letter to the President on Crime Control* 15 (Chicago 1977).

Those are six of ten or twelve major contributions. For a short list it is a very long list indeed. But I have not touched on his great work about mental health and criminal law, summarized in *Madness and the Criminal Law*,⁶ or mentioned his bestselling book with our friend Gordon Hawkins, *The Honest Politician's Guide to Crime Control*.⁷ Nor have I referred to his recent alarm about hyper-maximum security prisons or to *The Oxford History of the Prison*.⁸

What Norval brought to each of these problems was appreciation for how the world actually works and how practices were likely to evolve; his was an essentially worldly criminal law. He enjoyed analytic gymnastics when in the classroom but his principal tool to select topics as a law scholar was his appreciation of how institutions operated. His critique of the rehabilitative ideal was informed by the smell and taste of real prisons, and so was his prescription of facilitative programming. Where the Model Penal Code project could be innocent of practice and dangerously reliant on theory, Norval always brought his deep understanding of how people and institutions really work to his scholarship.

The real world impetus for the search for intermediate sanctions comes from the frustrations of sentencing judges. The American criminal court is musclebound—it can either punish too little or punish too much in hundreds of thousands of cases. From this, it is a small step to recognizing the strategic importance of intermediate punishment, such an obvious step that I wonder why it took so long to generate.

In the legal academy, being practical and experience-based are not usually regarded as cardinal virtues. In the imaginative hands of Norval Morris, however, such worldly insights were at the core of brilliantly original scholarship.

⁵ Norval Morris and Michael Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* (Oxford 1990).

⁶ Norval Morris, *Madness and the Criminal Law* (Chicago 1982).

⁷ Norval Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control* (Chicago 1970).

⁸ Norval Morris and David J. Rothman, eds, *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford 1995).

Kathleen Hawk Sawyer†

Norval was a tremendous visionary in criminal justice, and particularly in my area of criminal justice—corrections. Jim Jacobs indicated he spent a summer in prison because of Norval. I spent twenty-seven years in prison, and Norval was there looking over our shoulders all the while.

Norval's impact on the federal prison system dates back to the early 1970s when he was working on his book, *The Future of Imprisonment*. He sent a draft of the book to Norm Carlson, then director of the Bureau of Prisons, and that was the beginning of a long friendship between Norval and Norm, and the beginning of Norval's substantial impact upon federal prisons, and prisons across this country and throughout the world. When I became director in 1992, Norval was gracious in extending his friendship and his counsel to me as well.

Back in 1974, when *The Future of Imprisonment* was published, the Bureau of Prisons was building a new prison in Butner, North Carolina. New prison construction was a rare occurrence in those days, unlike today when regrettably we open three or four new federal prisons each year.

The Bureau was seeking a special mission for Butner. Word got out that the Bureau was to operate an "experimental prison," which conjured up images of *A Clockwork Orange*, an image that took a while to dispel. A decision was made, with Norval's involvement, to have two missions for Butner. The first was a mental health mission (one of Norval's passions), and the second was designed around Norval's scholarly vision of how an ideal prison for serious offenders might be structured—his *Future of Imprisonment*—where inmate programs, other than work, were offered and available, but not coerced or mandated. Norval gave intellectual respectability to what prison officials had come to understand, that prisons cannot force change on an offender. Positive change can only come about with personal motivation and commitment from the offender. The prison's role is to provide those opportunities and an environment within which positive change can occur.

Butner opened in 1976 and attracted worldwide attention for its "open" environment, an environment which allowed inmates to move freely within a secure perimeter—Norval's vision. Norval was so concerned that his vision be implemented "correctly" that he made multi-

† Retired Director, Federal Bureau of Prisons.

ple visits to the Butner facility. On two occasions, he actually spent the night in the facility, with the inmates, so that he could witness the program firsthand and interact with inmates and staff. Such an overnight stay was unheard of in federal prison, but to quote Norm Carlson, who was director at the time, “Norval could be very persistent.”

Norval enjoyed telling the story of his first night in the prison. He arrived at the dining hall for the evening meal just as the mental health inmates were arriving as well. One of the mental health inmates asked Norval, “Where’re you from?” To which Norval replied, “Australia.” The inmate was mystified and said, “Well, how the hell did you get here?” The inmate was really quite perceptive. Many, including the warden, wondered the same thing.

Norval’s second major contribution to corrections was his role in the creation of the National Institute of Corrections—an extension of the Federal Bureau of Prisons whose mission is to provide training and technical assistance to state and local corrections. He was on the original task force that created the National Institute of Corrections, and served on its advisory board since the agency’s inception in 1974 until his death. Such tenure was not an easy task when you consider he had to be reappointed by each attorney general and approved by the White House. Some of his writings did not make him very popular with the leadership of either party.

I served on that board for ten years with Norval, and it was clear that he felt a primary shortcoming of criminal justice was its lack of evaluation and research. He recognized the need to use empirical data to build a foundation of what worked and what did not, and emphasized that the practice of corrections should be based on science whenever possible. We could always rely on Norval at board meetings to challenge us on these issues—he was the conscience of the board. And I’m quite certain that board members will hear Norval’s voice for years to come, challenging them to ensure decisions are based on credible research and evaluation.

Norval forced people to think about issues that were complex and usually not very popular. Issues like rational sentencing policies, the mentally ill in prison, super-max prisons, and the possibility of innocent inmates on death row facing execution for crimes they did not commit. He challenged others to think about these issues and forced them, as only Norval could, to defend their positions on such topics. He left no one off easy.

But Norval was not an ivory tower academic. His feet were firmly planted in the real world. He understood the need for prisons, even super-max prisons, which he believed to be misused in some prison systems. He visited our federal super-max facility in Colorado and called me to share “some concerns.” Knowing his reservations about

such facilities, I pulled out a very large notepad expecting to hear a long list of concerns. To my surprise, he only cited the need for more educational opportunities. This exemplifies why practitioners listened so carefully to Norval. His observations were always well thought out, in context, and very much on point.

Norval's extraordinary combination of energy, insight, wisdom, compassion, and wit were unsurpassed. And the field of corrections, although still far from the ideal that Norval envisioned, is far more just and humane because of this wonderful man's passion and concern. His impact is immeasurable, and he will be greatly missed.

* * *

Albert W. Alschuler†

I want mostly to remember a particular time and place—1967 and the Center for Studies in Criminal Justice. Two years earlier, Norval Morris and the University of Chicago Law School had established the Center with a \$1 million grant from the Ford Foundation, and in 1967, Norval offered me a fellowship there. I anticipated a year of quiet research, writing, and contemplation, but I obviously did not know Norval or the University of Chicago Law School.

When I arrived, I was plunged into the Center's manic examination of nearly every criminal justice issue. As the Center's codirector, Norval had hired a former juvenile thief and assistant jail warden, Hans W. Mattick. Hans studied many things, particularly jails, which he described as the cloacal region of American corrections. (You can look up that academic word later.) 1967 was Frank Zimring's first year on the faculty. He was the only person ever to move from the Law School's third-year class to its tenure-track faculty without so much as a clerkship in between. Frank was only the first of many Morris protégés who did research for the Center as students or fellows and later became prominent criminal justice scholars. Mike Tonry, Dick Frase, Bill Geller, Wayne Kerstetter, Marc Miller, and Jim Jacobs were among the others. This group dominated a generation of criminal justice scholarship and was, I think, the Center's most important product.

Unlike rehabilitation, a then more fashionable purpose of punishment, deterrence had been the subject of astonishing scholarly neglect. Norval made research on this topic a priority and brought a friend and intellectual soulmate, Gordon Hawkins, from the Univer-

† Julius Kreeger Professor of Law and Criminology, The University of Chicago.

sity of Sydney to do it with Frank. During the same year, almost as an afterthought, Norval wrote with Gordon the classic *The Honest Politician's Guide to Crime Control*. Gordon's collaboration with Frank, which ultimately produced ten books of original research, continued throughout Gordon's career. When Frank called to inform me of Gordon's death eight days after Norval's, he said, "We have to stop meeting like this."

Norval and Gordon were two of the many scholars who gave the Center its international cast. The preeminent criminal law theorist, Johannes Andenaes of Norway, was in residence while I was, and the great Danish psychiatrist Georg Stürup had been there the year before. Norval's strategy was to expose younger scholars to the senior intellectual figures in the field, and the chemistry worked. Dusan Cotic of Yugoslavia supplied an Eastern European perspective, and an LLM student named David Libai, who was to become Israel's Minister of Justice, wrote under Norval's supervision about comparative criminal procedure.

While I was at the Center, Hans Zeisel wrote a major study of jury behavior in death penalty cases. Ken Davis wrote *Discretionary Justice*, focusing in substantial part on police and prosecutorial discretion. Jerry Skolnick studied policing. Dallin Oaks published his book with Warren Lehman on indigent appeals and began his work on the Fourth Amendment exclusionary rule. Mark Haller researched the history of organized crime in Chicago. Tony Platt studied the Center's project for providing legal services to youth while writing a history of the juvenile court movement. Two programs in addition to the Center's neighborhood law office for juveniles sought to combine action with research—a probation officer case aid project and Mel Goldberg's office in the Cook County jail providing civil legal services.

At the center of the Center and of these diverse projects was Norval—buoyant, supportive, engaged, and much too generous. He and I clashed about research methods, as we did years later when we taught a seminar on Social Science Research and Law, but Norval let me do it my way while providing wise counsel and ample support. There was never any orthodoxy at the Center apart from a commitment to enlarging the understanding of crime and justice. While Norval taught his classes, wrote his books, and took an active hand in every project, he also found time to defeat every other tennis player on the faculty except Stanley Kaplan and (sometimes) Bernie Meltzer, and also to conduct chess games by mail with people throughout the world, pilot airplanes, and spend happy hours with Elaine and three sons he adored.

The outcome of several Center projects, including all of the action-research projects, was disappointing. Norval had realized all along

that some would fail. He wrote in *The Honest Politician's Guide to Crime Control*:

The criminal justice system may be compared to a blind man far down the side of a mountain. If he wants to reach the top, he must first move. And it matters little whether his first move is up or down because any movement with subsequent evaluation will tell him which way is up. A step by step process of experimenting, evaluating, and modifying must be undertaken. Both innovation and the subsequent evaluation of its consequences are essential to climbing up.¹

Norval was constantly engaged in the world of action as well as the world of reflection. Shortly after he arrived at Chicago, he discovered eighteen men who were illegally confined in the psychiatric division of the Menard State Penitentiary and arranged their release. These men had been held unlawfully for twenty-five years. Norval's work as a special master for a federal district court led to a consent decree to protect the constitutional rights of inmates of the protective custody unit of the Stateville Penitentiary. He served for many years on the Chicago Police Board.

During a 1980s visit to Stateville, Norval introduced me to a bright, engaging inmate who seemed to run the law library. Norval later played a critical role in proving that someone else committed the murder for which this inmate, James Newsome, was serving a life sentence, and James received a full pardon. There was much more to the story than that, and at the time of Norval's death, he was writing a book about it with Locke Bowman.

For many years, Norval moderated a seminar at the Aspen Institute with Justice Harry Blackmun. The evolution of Justice Blackmun's views on the death penalty is a familiar story. As a U.S. Court of Appeals judge, Blackmun responded to proof of racial discrimination in the administration of capital punishment by writing, "We are not yet ready to condemn and upset the result reached in every case of a negro rape defendant in the State of Arkansas on the basis of broad theories of social and statistical injustice."² Before leaving the Supreme Court, he wrote in a dissenting opinion, "From this day forward, I no longer shall tinker with the machinery of death."³ What role Norval played in the development of Justice Blackmun's jurispru-

¹ Norval Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control* 261-62 (Chicago 1970).

² *Maxwell v Bishop*, 398 F2d 138, 147 (8th Cir 1968).

³ *Callins v Collins*, 510 US 1141, 1145 (1994) (Blackmun dissenting).

dence is anyone's guess, but the deep bonds of affection between the two men were apparent.

Norval was as eloquent a writer of the English language as the University of Chicago Law School has ever seen, yet he was even more effective on the podium than in print. His practice was to labor over his speeches but then put the text aside to keep it from coming between him and his audience. I was astonished to discover how nervous he was before some appearances—a mark, I think, of his humility and determination to be worthy of an audience. Gordon Hawkins wrote, “Perhaps the qualities which most impress themselves on those who have worked with him are his immense vitality . . . , the total absence of animus or rancor in disagreement or dispute, and his instant and generous recognition of distinction in others.”⁴ Norval enjoyed the many honorary degrees and other distinctions that came his way, but he did not believe the citations.

Norval would have wanted this occasion to be more about his ideas and his causes than about his personal qualities, and he would have wanted us to be passionate and politically incorrect in discussing them. He was a noted opponent of common sense, which, he said, made the world flat because it seemed that way to him. His commitment was to the empirical reexamination of things commonsensical. He criticized, for example, the common sense proposition that increased punishment reduces crime. If that proposition were true, he said, the United States would be the safest country in the world.

Norval knew what was true about crime and justice. I'll end with passages from his two most recent books—perhaps not his last book if Locke Bowman can complete the Newsome story. From *Maconochie's Gentlemen*:

People change. They learn. They “grow up.” Most learning and emotional growth is self-motivated and self-induced. It requires the rest of us not to get in the way, to facilitate, but not try to impose change. Most delinquent and criminal adolescents in all societies become productive, conforming citizens on their own, if they are allowed to A brief experience of living behind bars induces compliance in a few, while another few are peculiarly resistant to the threats and realities of punishment. Meanwhile, for the greater incarcerated mass, prison renders them more rebellious to authority, more criminous, since the very essence of prison—absolute control and repression of individuality—is

⁴ Gordon Hawkins, *Introduction*, in Gordon Hawkins and Franklin E. Zimring, eds, *The Pursuit of Criminal Justice: Essays from the Chicago Center* 1, 14 (Chicago 1984).

criminogenic. That the majority [of] people released from prison do not return is a testament to human adaptability.⁵

And from *The Oxford History of the Prison*:

Wars on crime and wars on drugs are regularly declared in powerful rhetoric promising the enemy's surrender. But success never attends these efforts; there is no victory and no armistice. Instead, a new war is declared, as if the previous war had never taken place [V]ote gathering by these . . . means is a sin against the future.⁶

When I first encountered the electricity of Norval Morris, he was forty-four and I was twenty-six. He had done everything there was to do in the world except stay in one place, and he was the person all of us younger inhabitants of the Center for Studies in Criminal Justice wanted to be. None of us, however, and no one else we knew came close to matching his combination of energy, enthusiasm, insight, wisdom, wit, adventure, compassion, dedication, and loving spirit. It was an inspiration to know him, and a lot of fun too.

⁵ Norval Morris, *Maconochie's Gentlemen: The Story of Norfolk Island & the Roots of Modern Prison Reform* 181 (Oxford 2002).

⁶ Norval Morris, *The Contemporary Prison: 1965–Present*, in Norval Morris and David J. Rothman, eds, *The Oxford History of the Prison: The Practice of Punishment in Western Society* 258 (Oxford 1995).

