Impediments to Penal Reform

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In this country, in contrast to Europe, criminology has not found a secure home in the law schools, nor have judges and lawyers manifested esteem for criminological and penological speculations. Happily, for reasons which pertain to the broad sweep of social and political change rather than to any process of intellectual conversion, the days of neglect are passing. The discipline of criminology, if discipline it be or can become, will hereafter play an increasing role in the life of the law schools of this country. For this reason, quite apart from proper reservations about any incumbent of the chair, the establishment of the Julius Kreeger Professorship of Law and Criminology is of importance to this law school, fixing these studies into the structure of our Faculty; of importance to the law schools of the United States as an act of leadership in legal education; and, I hope, of importance to the communities we seek to serve.

In an inaugural lecture one is permitted to make a testament about one's field, to offer a broad theoretical statement of an intellectual position. On the theme of penal reform my testament is easy to make and unchallengeable: We need more knowledge of the efficacy of our

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various penal sanctions in their deterrent and educative roles in the community at large and with the individual offender. None will challenge this; but its affirmation does not achieve much. It has truth but lacks momentum. The point has been made with wearisome repetitiveness.¹

So I would like to pursue a narrower question. Why is it that so little headway is made? What are the impediments to the acquisition of these types of knowledge? It is probable that here, too, progress presupposes some degree of clarity in recognition of the obstacles to progress. I do not mean to dwell on the political and economic obstacles to penal reform. That these may on occasion be massive, no one can doubt. I have in mind rather the impediments of inadequate theory and the gaps in our knowledge that may well in the long run prove more intractable than the political exigencies and the chronic shortage of men, money, and materials with which a selfish community burdens its penal reformers.

It is to be noted that the handicaps of a defective theory and of exiguous information about our penal methods, to which I will point, have not precluded the development of an appreciably powerful and effective penal reform movement; there is no paradox here, since the mainspring of penal reform has been neither empirically validated knowledge nor a developed theory. Decency, empathy, the ability to feel at least to a degree the lash on another's back, the removal occasionally of our customary blinkers to human suffering, a respect for each individual springing from religious or humanitarian beliefs—these have been the motive forces of penal reform and not any validated knowledge concerning the better prevention of crime or recidivism. We have built an intellectual superstructure to our developing sense of identity with all fellow humans, criminals and delinquents not excepted, but it is an edifice of rationalizations. Perhaps this is an overstatement, perhaps a more precise analysis of this relationship between mind and heart in penal reform is that our uniform experience, critically analyzed, seems to be that we can indulge our sense of decency, of the reduction of suffering even by criminals, without any adverse effects on the incidence of criminality. The history of penal reform thus becomes the history of the diminution of gratuitous suffering.

¹ Most emphatically I do not wish to be misunderstood as suggesting that we do not now have knowledge that could be applied to the better prevention and treatment of crime. There is a culture lag here too. The knowledge of the criminologist may be exiguous, but it is ample indeed compared with that of those who are responsible for our legislation and practice in this field.

Capital punishment moves from being the basic punishment for all felonies to an exceptionally inflicted indecency in which we place little trust and have little confidence. And the change is not the product of research studies that would satisfy the empiricists of this law school. The same is true of all the ornate and obscene forms of corporal punishment which constituted our heritage of penal sanctions for non-capital offenses. Likewise, that convicts ceased to be transported to the southeastern shores of this continent and to the pleasant sunny climes of Australia had little to do with any assessment of the effectiveness of the sanction of transportation in deterring men from criminal conduct. Yet again, many of the indignities and cruelties of that American invention, the prison, to be found in the original Auburn and Pennsylvania systems, have been eliminated or ameliorated, not because of developing knowledge about the more effective prevention of crime or of recidivism, but because they inflict needless suffering. The crime and recidivist situations at least did not deteriorate upon our casting aside the gallows, the lash, the lock-step, the broad arrow, and the rules of solitude and silence. And much indeed yet remains to be done along these lines. The diminution of gratuitous human suffering, gratuitous in the sense that no social good whatsoever flows from it, that it in no wise diminishes the incidence or seriousness of crime and delinquency, remains an important purpose of penal reform. One does not have to travel far from this place today to find thousands of convicted persons, adult and juvenile, subjected needlessly to such suffering and for grossly protracted periods. Moreover, most such suffering is more than useless; it is harmful to us. It tends to increase the social alienation of those we punish beyond our social needs, and it is highly probable that we pay a penalty in increased recidivism and increased severity of the crimes committed by those who do return from such punishment to crime. Studies of the inmate culture have confirmed the alienating effect of the prison, its creation of a community of the self-identified as aggrieved. The inmate culture has high efficiency in communicating criminal and anti-conventional values in a situation ideal for their transmission and consolidation. The prison engenders more than social alienation; it fosters and confirms maladjustment.

These, then, have been our main guidelines to penal reform: the humanitarian diminution of gratuitous suffering and the self-serving reduction of social alienation. It becomes clear, however, that these guidelines are gradually becoming insufficient. New directions must be charted. The Swedish adult correctional system provides an excellent case study in this impending need. In terms of the amelioration

of penal conditions little remains to be done. There obtains in that country as little interference as reasonably possible with the convicted criminal's life, an energetic attempt is made to preserve his social ties by probation systems, and, if it should be necessary to incarcerate him, to do so briefly and in conditions of reasonable comfort with as little disruption of those social ties as possible. No large penal institutions; regular home leave; over a third of prisoners held in open conditions lacking bolts, bars, and walls; adequate work and vocational training; a sense of near equality in the relationships between prisoners and staff; these have become the hallmarks of the Swedish prison system. Along this path, in Sweden, they have gone about as far as they can go. Not quite; there are still a few remaining traditional lock-ups to be eradicated; there still remain a few needless indignities and hardships. Nevertheless, in the broad, the guidelines of empathy and minimizing alienation have served to their limit. Further guidance will not come from the heart; the head must be more directly engaged. And that means a program of research and training which is in Sweden hardly officially envisaged, let alone pursued. The same is true, though at a much earlier stage of development, in this country. Take, for example, the half-way house movement which is spreading so rapidly. It shortens prison sentences, it sometimes serves as an alternative to institutionalization, it provides a bridge between the institution and the community, it supports probation and parole arrangements for some offenders, and there is great enthusiasm for it. Yet, in my view there is no established information showing that it better protects the community or better reforms criminals than the sanctions it is supplanting. We are enthusiastic about it because it assists us to avoid harm; not because we know that it assists us to achieve positive good. It was for this same reason that we eliminated the lash.

What, then, are the limitations on this process of ameliorating the prisoner's lot and of reducing the punishment of the convicted criminal and young offender? Limitations there must be, else no punitive action whatsoever would be appropriate. We must recognize our present penal reform movement as an uneasy series of compromises between punitive aggression and rehabilitative empathy and build towards correctional systems, for adult and young offenders, rationally related to our social purposes. Penal reform must stretch beyond its traditional humanitarian purposes to achieve a larger social protection from crime and recidivism. There are obstacles to this effort; I propose to consider certain of them under the following four headings: deterrence; less eligibility; the limits of the rehabilitative ideal; and the ethics and strategy of research.

I. DETERRENCE

As Sir Arthur Goodhart recently wrote, if punishment "cannot deter, then we might as well scrap the whole of our criminal law."² Indeed, to my knowledge, every criminal law system in the world, except one,³ has deterrence as its primary and essential postulate. It figures most prominently throughout our punishing and sentencing decisions—legislative, judicial, and administrative. We rely most heavily on deterrence; yet we know very little about it.

Ignorance of the consequences of penal sanctions on the community at large is a constant inhibitor of penal reform. Punishment sometimes deters, sometimes educates, sometimes has an habituating effect in conditioning human behavior; but when and how? Our ignorance is a serious obstacle, whatever our regulatory objectives. And of equal importance, we are hesitant to think only in terms of what the individual convicted offender needs to turn him away from crime because we fear that to do so would sacrifice the general deterrent, educative, and habituating effects of our penal sanctions. Thus, if penal reform is to become rational, it is essential that we begin to learn the extent to which our diverse sanctions serve prospective public purposes apart from their effects on the sentenced criminal; absent this knowledge, striking a just balance between social protection and individual reclamation is largely guesswork.

The deterrence argument is more frequently implicit than expressed; the debate more frequently polarized than the subject of a balanced discussion. When I listen to the dialogue between the punishers and the treaters, I hear the punishers making propositions based on the assumption that our penal sanctions deter others who are like-minded from committing crime. And I hear the treaters making propositions concerning the best treatment for a given offender or class of offenders which are based on the assumption that our penal sanctions do not at all deter. There is rarely any meeting of the minds on the issue central to the discourse. And it is not as if such knowledge is unobtainable; it has merely not been sought with anything like the energy and dedication that has been given to the expensively outfitted and numerous safaris that have searched for the source of criminality. The polar argument becomes a bore; a modest beginning on the search for more knowledge becomes a compelling need. We have endured a surfeit of unsubstantiated speculation, continuing quite literally since man first laboriously chipped out his penal codes on tab-

² Goodhart, Book Review, 74 *THE LISTENER* 1006 (1965).

³ *KRIMINALLOVEN OG DE VESTGRØNLANDSKE SAMFUND* (Greenland Criminal Code 1962).

lets of stone or scrawled them on chewed and pounded bark. It is time we did better. To do so it may be wise first to get our terms clear, then to assess what we now know, and then to suggest a strategy for our search.

European criminologists draw a distinction between special and general deterrence which is helpful to our purposes. By special deterrence they refer to the threat of further punishment of one who has already been convicted and punished for crime; it may be the same medicine that is threatened as a method of dissuading him from recidivism or it may be a threat of a larger or different dose. Special deterrence thus considers punishment in the microcosm of the group of convicted criminals. General deterrence looks to the macrocosm of society as a whole (including convicted criminals). It would seem hard to deny that for some types of crime and for some types of people, the individual superego is reinforced and to a certain extent conditioned by the existence of formal punishments imposed by society, and that we are influenced by the educative and stigmatizing functions of the criminal law. Further, it seems reasonable to aver that for some people and for some types of crime the existence of punishment prevents them as potential offenders from becoming actual offenders, by the very fear of the punishment that may be imposed upon them. These two broad effects can be regarded as processes of general deterrence. For purposes of research it may, of course, be necessary to separate these various strands that I have woven together in the concept of general deterrence.

The acquisition of knowledge concerning special deterrence may be achieved by substantially the same methods that will be suggested hereunder as means of dispelling our ignorance of the reformative effects of our treatment methods. In the meantime, this gap in our knowledge is less inhibitory of penal reform than our uncertainty about the general deterrent effects of criminal sanctions and of the possibly adverse consequences of too rapid a shift to predominantly reformative processes.

What, then, do we know of general deterrence? In September, 1965, at the Fifth International Congress of Criminology, held in Montreal, Professor Johannes Andenaes of Oslo University gave a paper, *Punishment and the Problem of General Prevention*⁴ which better answers that question than anything else I know in the literature. My comments now are therefore confined to this reference to Professor Andenaes' paper and to an effort to underline its central theme which

⁴ The paper is reprinted in Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966).

was that "the problem is not one of determining whether . . . [general deterrent] effects exist; it is one of determining the conditions under which they occur and the degree to which they occur."⁵

Perhaps the capital punishment controversy has produced the most reliable information we have on the general deterrent effects of a criminal sanction. It seems to me well established, as well established as almost any other proposition in the social sciences, that the existence or non-existence of capital punishment as a sanction alternative to protracted imprisonment for convicted murderers, makes no difference to the murder rate or the attempted murder rate. Suppose this is true; there is a temptation to extrapolate such a proposition to other crimes. This temptation should be resisted for it is quite easy to demonstrate contrary situations for other crimes where increased sanctions (maintaining stable reporting, detection, arrest, and conviction rates) lead to reduced incidence of the proscribed behavior. For example, by way of extreme contrast to murder, parking offenses can indeed be reduced by an increased severity of sanctions if one is determined about the matter. And, even with regard to capital punishment for murder, if the secret heart of an abolitionist must be bared, general deterrence still probably functions peripherally.

It seems to me probable that even here general deterrence continues to operate, but in a perhaps unexpected way. It is likely, taking all the available evidence into account and yet using the room for speculation that it allows, that the existence or non-existence of capital punishment for murder is irrelevant to the number murdered or attempted to be murdered but is marginally relevant to who they are. I am suggesting that the difference of sanctions conditions not the rate but in a very few cases who shall be the victims; that the ambit of the circle of victims remains the same but the difference of penalty influences peripherally the victim selection process. In the Report of the Ceylon Commission on Capital Punishment⁶ I offered some reasons in support of that conclusion which need not now be rehearsed; all that needs to be said for my present theme is that here too a better understanding of the operation of our general deterrent processes could lead to more effective social control.

We need a series of soundings in deterrence, studies aiming at measuring the general deterrent processes of the criminal law in a variety of areas of social control; and we are now beginning such soundings

⁵ Andenaes, Punishment and the Problem of General Prevention 60 (September 1965). The quotation is from a summary by Professor Andenaes which was not reprinted in Andenaes, *supra* note 4.

⁶ Report of the Commission of Inquiry on Capital Punishment, Sessional Paper XIV at 42-52 (1959) (Ceylon).

in the Center for Studies in Criminal Justice. The slaughter on the roads might well be reduced were we to have more understanding of the ways in which criminal sanctions might inhibit drunken and dangerous driving—the design of empirical studies to acquire this knowledge lies well within our competence. It is my submission that such soundings could and should be made for all those many efforts we pursue to achieve social control by means of deterrent criminal sanctions. To fail to define our purposes for punishing any human being is to make Pilate's choice; to define our purposes and yet to make no effort to test the capacity of our means to attain them is a similar though a lesser sin against the light. Nor are we as bereft of insights as I may so far have suggested. Professor Andenaes has outlined what knowledge of this type has been gained by the criminologists; but on this topic there are several other disciplines, further advanced than are we, capable of guiding our search. Philosophers have, of course, long speculated about these problems; more recently, other disciplines, particularly psychology and psychiatry, have begun to contribute the chips of knowledge which will make up the mosaic of general deterrence. Kurt Lewin and his followers working on Field Theory; those studying the concept of cognitive dissonance; the educational psychologists and those interested in animal behavior (only somewhat disparate fields) all have contributions to make to our manipulation of criminal sanctions for general deterrent purposes. And the psychiatrists, both those of Freudian orientation and their collectivist colleagues, more interested in conditioned behavior, have knowledge relevant to our task. Indeed, one of the problems in this search for understanding of this basic postulate of the criminal law—that its sanctions deter—is the collation of information from such a disparity of disciplines that the capacity of any one man to draw it together is impossibly strained. Happily there are methods of handling even this difficulty and of achieving interdisciplinary collaboration on the acquisition of the fundamental knowledge of penal sanctions which Hammurabi really needed but did not have before he leapt to that codifying exercise which has sustained his name and inspired his equally unsure successors.

Let me conclude this theme by a possibly too whimsical allegory. Some people tell me that the world is flat; that if you punish one, that will deter the others. And it is plainly clear that for a variety of purposes they are correct, just as for many purposes—tennis, building a house—the world is clearly flat. But there is a certain roundness alleged by some dreamers. They claim that if you sail in one direction you get back to where you started. They suggest it is their long and

tragic experience that those who would deter others from acting by threatening or even demonstrating that they will suffer, often experience the very action they seek to deter; that those who would reduce crime by terror often live deeply fearful of violent crime. Let us kill one in ten; that will stop their resistance! Hang the murderers; that will reduce the murder and attempted-murder rates! Bomb their cities; that will bring them to the conference table! And I conclude, on this topic, as I hope you do, that those who would pin their larger faith to deterrence are unwise; and that those who deny its operative relevance in many mundane and smaller areas of behavioral control are likewise unwise. What we need are some soundings in deterrence, some tracings of this shore, so that we shall begin to know where the flatness of the human personality is relevant and where the roundness; for what purpose this particular world is flat and for what purposes round. Given these insights, a massive impediment to penal reform would be cast aside.

II. LESS ELIGIBILITY

The principle of "less eligibility" is the reverse side of the coin of deterrence. Sidney and Beatrice Webb defined this principle, in relation to the 19th century Poor Laws in England, as follows: "The principle of less eligibility demanded that the conditions of existence afforded by the relief [of the pauper] should be less eligible to the applicant than those of the lowest grade of independent labourers."⁷ When applied to penal sanctions, and certainly to prisons and reformatory institutions, it means that the conditions of the convicted criminal should be "less eligible" than those of any other section of the community. Jeremy Bentham, in his *Panopticon*, adopted this principle: "[T]he ordinary condition of a convict . . . ought not to be made more eligible than that of the poorest class of subjects in a state of innocence and liberty."⁸

The principle of less eligibility has, as you see, an attractive simplicity. If the conditions of the convicted criminal are to be better than those of any other group in the community, then that group, when they know of this fact, will hurry to join their more fortunate brethren—and the gates lie open via crime. Far from being deterred, they will be attracted. In 1939, Hermann Mannheim regarded this principle of less eligibility as "the most formidable obstacle in the way of penal reform."⁹ In the years since Mannheim wrote, the prin-

⁷ WEBB, ENGLISH POOR LAW POLICY 11 (1963).

⁸ 4 BENTHAM, WORKS 122-23 (1893).

⁹ MANNHEIM, DILEMMA OF PENAL REFORM 59 (1939).

ciple seems to have declined in significance, certainly at the administrative level. The Federal Bureau of Prisons has for years in its institutions for younger adults and older youths been providing vocational training programs which are only now gradually being emulated by the Job Corps and which have long been superior to the vocational training opportunities which would have been available to the inmates had they not been convicted of federal offences; and these training opportunities are offered in material and physical conditions manifestly superior to those in which otherwise all but a few would be living. The same is true in many prisons and reformatories,—for example the forestry camps run by the Illinois Youth Commission. The conditions there are certainly not luxurious, but they are better physically than those in which many of the youths live in the depressed neighborhoods from which they come.

And if one goes further afield to test this, say to Polynesia, in the jail at Fiji a bell would ring loudly at five in the afternoon to summon the prisoners working on the docks, it being well understood that those who were not within the walls by five fifteen would have to fend for themselves that night—and would be arrested the next morning. They rushed to jail at the summons of the bell; but few were thereby expressing an affection for jail life. And in the Nukulofa, on Tonga, in the Friendly Isles, the capital of the last kingdom in Oceania, where the unsylphlike Queen Salote has recently been succeeded by her son, King Tupou II, the main prison, an open institution, is known as "Government College."

The truth is that at all levels of cultural development we seem to accept that compulsory treatment, with the stigma of crime, and pursuant to a judicial sentence, is not likely to be positively attractive to other than those who by long institutionalization have been habituated to it.

Thus, though the principle of less eligibility remains a rationalization for the punitive emotions of men, it is not at present a serious bar to penal reform. There is, however, one other aspect of this principle of less eligibility that may merit a passing glance. Assume that to keep a prisoner costs the community about \$2,500 a year. It may be cheaper, if our prediction instruments were at all reliable, to leave him at large and by weekly subsidy of \$40 to reward his virtuous avoidance of crime; like a reverse income tax, a reverse crime prevention contribution. It may be cheaper, but it won't soon happen. We may doubt the deterrent efficacy of a sanction but we had better, for the time being, not make our punishments positively attractive. Nor do I fear that my successors in this chair will have serious difficulty in

avoiding any problems of less eligibility as they discover and define the rules of sound penal practice in relation to our deterrent and reformatory purposes.

III. THE LIMITS OF THE REHABILITATIVE IDEAL

A new but nevertheless serious impediment to penal reform is our growing skepticism about the wisdom of indulging in practice our desire better to treat convicted criminals by mobilizing for that purpose the developing skills of the relevant social sciences. We have come to fear that by so doing we will sacrifice many of the traditional and important values of justice under law. The rehabilitative ideal is seen to import unfettered discretion. Whereas the treaters seem convinced of the benevolence of their treatment methods, those being treated take a different view, and we, the observers, share their doubts. The jailer in a white coat and with a doctorate remains a jailer—but with larger powers over his fellows. It is clear that absent definition of the proper limits of the rehabilitative ideal, this lawyer-like skepticism of ours is a serious theoretical and practical impediment to penal reform.

No one has deployed for our consideration better than our colleague, Francis Allen, in *The Borderland of Criminal Justice*,¹⁰ the potentiality for injustice that lies within the rehabilitative ideal. He has demonstrated how the rhetoric of treatment may cloak the realities of persecution and how claims to therapy may conceal mass banishment to institutions devoid of treatment processes and profoundly insensitive to human rights. But we cannot repudiate this whole approach to punishment; we cannot nowadays reject rehabilitative purposes and take refuge in the prayer for judges in the Book of Common Prayer, so close in spirit to that of the developing Common Law, that “they may truly and indifferently minister justice, to the punishment of wickedness and vice, and to the maintenance of . . . true religion and virtue.” Inexorably our purposes become forward looking, and inevitably we must incorporate into our sentencing and correctional processes large measures of the rehabilitative ideal.

The dangers of abuse of the rehabilitative ideal are real, but they must not tempt us to inaction; we must not let our skepticism of the reformer’s simplistic enthusiasm lead us to a flat and unproductive opposition. We must not be entirely sicklied o’er with the pale cast of thought. Throughout all developed legal systems the rehabilitative ideal sweeps steadily over the jurisprudence of the criminal law and it is regrettable for lawyers to oppose it. We may be skeptical of any

¹⁰ ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* (1964).

rounded Positivist theory, cautious of the School of Social Defence, and even doubt that Marc Ancel's recent graceful study¹¹ of the penal philosophy of that school accurately phrases correctional realities; but we can hardly oppose their aim or doubt their future significance.

I do not seek to rebut the thesis that the rehabilitative ideal can be abused and has frequently been abused; it seems to me proper to look with suspicion on those who seek power over the lives of others, including the criminal and the juvenile delinquent, on the ground that it will be exercised for their own good and hence for the larger social good. I offer, rather, some suggestions of principle by which we may have our cake and eat it—I hope to suggest principles by which the rehabilitative ideal may be accepted as a guide to social action while at the same time its threats to human rights, its 1984-ish potentialities, can be avoided.

Speaking in 1961 at this law school, on the occasion of the celebration of the enactment of the Illinois Criminal Code, I tried to sketch the dangers of abuse of human rights from assumptions of power for rehabilitative purposes and then offered the following two principles to avoid these dangers:

1. *Power over a criminal's life should not be taken in excess of that which would be taken were his reform not considered as one of our purposes.* The maximum of his punishment should never be greater than that which would be justified by the other aims of our criminal justice. Under the power ceiling of that sentence, we should utilize our reformatory skills to assist him towards social readjustment; but we should never seek to justify an extension of power over him on the ground that we may thus more likely effect his reform. This principle should be applied to the exercise of legislative, judicial, and administrative power; it should be applied to substantive law as well as to procedural processes.
2. *Correctional practices must cease to rest on surmise and good intentions; they must be based on facts.* We are under a moral obligation to use our best intelligence to discover whether and to what extent our various penal sanctions do in fact reform.

Few will oppose this second principle or deny the need to establish empirically valid foundations for the methods we use in preventing and treating crime; and no one will doubt that the more secure this foundation the more possible it will be to avoid abuse of human rights from ill-founded claims of rehabilitative capacity. In the next section

11 ANCEL, *SOCIAL DEFENCE—A MODERN APPROACH TO CRIMINAL PROBLEMS* (1965).

of this paper I shall deal with some problems of the ethics and strategy of research in this field; let me, however, now offer some comments on the first principle—that rehabilitative purposes cannot justify an extension of power over the individual offender.

In 1964, in *Studies in Criminal Law*,¹² Colin Howard and I again offered this principle of the punitive ceiling for consideration. Two commentators have since criticized this principle—Professor Sanford Kadish and Mr. Richard F. Sparks. Professor Kadish described it as “debatable”;¹³ Mr. Sparks more curtly categorized it as “mistaken.”¹⁴ Professor Kadish pursued his criticisms by means of interrogatories to which I shall now file a reply. He asked, “why should the rehabilitative purpose be subordinated to the deterrent, vindictory, and incapacitative purposes so that the former may be accomplished only within the limits of confinement appropriate to the latter?”¹⁵ My reply is: whatever their historical roots, these other purposes now function also as a ceiling to punishment, whereas the rehabilitative ideal does not. It is true that the price-list of deterrence and retribution varies greatly from jurisdiction to jurisdiction, and from time to time within any one jurisdiction, but within that price-list, excessively inflated though it may be, we do have a concept of an excessive punishment. That is not true of reform. It is open ended; it cannot be excessive; if we are acting for the good of the subject of the action there need be no limit to our benevolence; it is untrammelled by any sense of injustice.

Professor Kadish rounds out his interrogatories by this comment: “Now if . . . [the] limiting principle [is] to govern only pending the development of proven therapeutic knowledge and techniques, the answer may be a political and practical one: namely, that during this period (which may, of course, not pass for generations, if ever) the historic function of deterrence and incapacitation provide the most likely practical protection against the great potentialities for extended deprivations of freedom in open-ended rehabilitative programs. . . . [But] the ground becomes much shakier if . . . [the] principle [is] to operate even on the assumption of assured rehabilitative success.”¹⁶ Mr. Sparks makes the same point,¹⁷ rejecting the offered principle on an assumption that precise reformatory and predictive skills will ultimately be available. Their concession is large indeed,

¹² MORRIS & HOWARD, *STUDIES IN CRIMINAL LAW* (1964).

¹³ Kadish, Book Review, 78 HARV. L. REV. 908 (1965).

¹⁴ Sparks, *Custodial Training Sentences*, 1966 CRIM. L. R. 96 n.44.

¹⁵ Kadish, *supra* note 13, at 908.

¹⁶ *Id.* at 908-09.

¹⁷ Sparks, *supra* note 14, at 96 n.44.

and perhaps I should bear their strictures with equanimity, for if the principle I have offered can serve as an insulation from the dangers and excesses of the rehabilitative ideal until our reformatory capacities are effective, measurable, and predictable in the individual case, then it is an important principle indeed with a healthy and long life ahead—a principle which demands the allegiance of Professor Kadish and Mr. Sparks and not their distant condescension, for it will see them and me to our graves.

Let me go further, however, and argue for the longer applicability of this principle by testing it beyond that span of years, whatever it be, and by assuming circumstances of certainty of rehabilitative success. Is the ground then really much shakier, as Professor Kadish suggested? I would ask—does the state in which criminology has reached that eminence of knowledge compulsorily apply its certainly reformatory processes to people identical with the criminal in all respects, of equal danger, of equal reformatory need, differing only in the fact that they have not been convicted of a crime? If yes, then act under whatever such powers, consensual or imposed, you have over the non-criminal and do not needlessly clutter up sentencing and correctional processes in this way. If no, then to exert these larger reformatory powers only over the criminal is a gross injustice.

I appreciate that I am advocating a natural law type of limitation to punishment, not easily capable of formulation in terms which exclude an imprecise individual and community sense of injustice; but that does not preclude its being a sound rule for avoiding the potentiality for injustice in the rehabilitative idea. The late C. S. Lewis was, it seems to me, clearly right when he argued:

[T]he concept of Desert is the only connecting link between punishment and justice. It is only as deserved or undeserved that a sentence can be just or unjust. I do not here contend that the question "Is it deserved?" is the only one we can reasonably ask about a punishment. We may very properly ask whether it is likely to deter others and to reform the criminal. But neither of these last two questions is a question about justice. There is no sense in talking about a "just deterrent" or a "just cure." We demand of a deterrent not whether it is just but whether it will deter. . . . Thus when we cease to consider what the criminal deserves and consider only what will cure him or deter others, we have tacitly removed him from the sphere of justice altogether; instead of a person, a subject of rights, we now have a mere object, a patient, a "case."¹⁸

¹⁸ Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 225 (1953).

The principle I have offered would, I submit, allow ample room for indulgence of our rehabilitative purposes without risking injustice. It may be thought that this suggested principle suffers from too little thrust; that it is almost axiomatic. I would deny this. It is not academic and remote. Had it guided reform, the unjust excesses of insufficient procedural and substantive protections of the purportedly reformatory treatment of juvenile offenders and adult sexual criminals, of narcotic addicts and mentally retarded or disturbed offenders, the improper use of the indefinite and indeterminate sentences, and the degeneration of parole systems, all of which have been so widespread, so wicked and so socially harmful, would not have occurred. A more cogent criticism of the principle I have offered may be that it is too restrictive; that, if seriously applied, it would preclude reformatory and community protective processes which all would regard as desirable. Let us test this.

Could such a rule apply to the gravely psychologically disturbed criminal or to the mentally defective criminal who may have to be detained indefinitely? I think it could and should. I would argue that the gross defects in the sexual psychopath laws of this country were and are exactly of this nature. I would submit that grave injustice flows from combining the two concepts of criminality and mental ill health when one is quantifying the duration of custodial control that the state may properly exercise over people having both deficiencies.

This argument has recently received high judicial support. In *Baxstrom v. Herold*,¹⁹ the Supreme Court held that the petitioner, a convicted criminal who had been civilly committed as his term of imprisonment approached its end, "was denied equal protection of the laws by the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York."²⁰ The Court expressly rejected the argument that the state had legislatively created a reasonable and therefore constitutional classification of the "criminally insane" for this purpose, as distinguished from the "civilly insane." "For purposes of granting judicial review before a jury of the question whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments."²¹

For the crime he has committed, if that be proved, the offender, sane or insane, should properly be punished or treated (call it what

¹⁹ 383 U.S. 107 (1966).

²⁰ *Id.* at 110.

²¹ *Id.* at 110-11.

you will) for no longer than would be regarded as a just and deserved punishment were his sanity or psychological balance or social dangerousness not in issue. If he is to be held for any period in excess of that, we should apply to him only the other existing powers that a state takes over all its citizens, criminal and not criminal, on grounds of their mental ill health. If it be argued that this is playing with words, I would suggest that the contrary is true and that the present situation reflects gross abuse flowing from failure to maintain necessary separation between two appropriately distinct processes of state control over the individual. The protections that we have accorded the non-criminal citizen in relation to his commitment to mental institutions, may or may not be adequate; but at least they are likely to be more clearly defined than those available to the convicted criminal, and their application will minimize the double stigmatization which is such a fertile source of injustice.

Could such a principle apply to young offenders who may, it is argued, for relatively minor offences have to be held protractedly under the control and protection of the state? I think it could and should. The late Paul Tappan has compellingly demonstrated the abuses to the rights of the child that have flowed from the unfettered benevolence of the juvenile court movement in this country.²² There are at present two contrary movements in the common law world with reference to the juvenile court, both of which have tendencies conforming to the principle I have offered, though they are diametrically opposed movements. On the one hand, there is in this country an increasing insistence on due process in the children's and juvenile courts, and a movement towards the provision of counsel for those children and their families.²³ Involved in this movement is a strong suggestion that such great powers over a child's life cannot be justified by the court's benevolent purposes. There is, I would hope, an effort to incorporate a concept of a maximum or a ceiling of a deserved sanction as applicable to the child, in relation to the harm that he has inflicted on society, and an endeavor to move beyond that limited power over him only when either there is agreement by all parties (if possible, including the child) concerning the wisdom of certain retraining processes, or when such processes are justified entirely apart from his criminality and under powers that the state holds over all children, delinquent and non-delinquent alike.

The contrary movement, but also tending to conform to my offered

²² U.N. DEPT OF PUBLIC INFORMATION, *COMPARATIVE SURVEY OF JUVENILE DELINQUENCY*, PART I: NORTH AMERICA (ST/SOA/SB.1/REV) (1958).

²³ *Kent v. United States*, 383 U.S. 541 (1966).

principle, is to be found in a recent White Paper published by the Home Office in the United Kingdom²⁴ recommending the total abolition of all juvenile courts for children under sixteen in the belief that the problems they present can be best handled on a consensual basis between child, parents, and the welfare authorities of the state; and that the hearing, the day in court, and the sentence are not necessary. Absent a continuing consensus on the best treatment, from time to time, there would be a power of reference to new family courts to be established for the sixteen to twenty-one age group which would also serve several other functions of a family court. Here again, but working from the other end of the spectrum, there is a deliberate effort to divorce deserved punishment from desired treatment, and the effort is much to be welcomed.

In sum, I would suggest that there is a clear difference between the medical, social welfare, psychiatric, and child care functions of the state and its police and correctional functions. There is too much confusion of purposes and too frequently a sacrifice of justice when we combine the several justifications the state may have for taking power over a citizen's life and in so doing expunge or attenuate the existing limitations and controls of power that each has developed. This confusion, productive of injustice, is frequently to be observed. I saw it first ten years ago in a most virulent form in the institution for defective delinquents in Bridgewater, Massachusetts (I hear it has much improved since then), where men were held for a combination of crime and retardation much longer and in grossly less attractive circumstances than they would have been had these labels not been combined. In the sexual psychopath laws of this country the mental health power has infested the judicial power over criminals with like result. The juvenile court suffers a similar and needless confusion of heads of authority. And many plans advanced to meet the problem of narcotic addiction, not the least being recent so-called Civil Commitment Legislation in New York,²⁵ suffer pathologically from this unjust cumulative mixture of state powers. I am not preaching a sterile separation of powers which would impede penal reform. The rehabilitative ideal has luxuriant opportunity to contribute to human welfare and the diminution of individual suffering without arrogating to itself such extra power. Its leading qualities for decades at least, and probably permanently, should be a modest diligence. But, limited in this way, the rehabilitative ideal demands the lawyer's energetic support, not his dis-

²⁴ G.B. Home Office, *The Child, the Family and the Young Offender*, Cmnd. 2742 (1965).

²⁵ N.Y. Sess. Laws 1966, ch. 192, §§ 200-13.

tant criticism, for amongst our purposes of punishment it alone offers hope for a more decent, safer, and happier community.

Let me go beyond defense of this principle of punitive ceiling and try to take the matter one step further by offering an outline of another process which seems to me to bear on our agreed aim of rehabilitation without tyranny. Perhaps, as one method of avoiding the injustice of the unfettered benevolence of the rehabilitative ideal, we should make more use of administrative controls of punishing-treating processes rather than to pursue only the separation of powers theme I have advanced. I confess to uncertainty about this, but nevertheless think it proper to offer it for your critical consideration.

Perhaps the Scandinavian Ombudsman²⁶ is the type of administrative control we should use in our efforts to obtain the advantages of penal sanctions turned towards better reform and more efficient community protection without risking the manifest individual injustices than can ensue? Certainly, the Ombudsman does appear to have this effect in the Scandinavian systems. Complete freedom of access of the prisoner to the Ombudsman and his staff allows one agency of the state, with the high degree of autonomy that the Ombudsman has achieved, effectively to protect the prisoner from any excesses in the rehabilitative purposes which guide another agency of the state, the prison authority. The same is true of the appointment of the "next friend" to all prisoners sentenced in Denmark to indefinite terms; this mechanism allows such a prisoner, through his next friend, easy access to a court to seek his release from custody on the ground that the treatment purposes claimed as justification for the indeterminate custody that is being exercised over him have either been fulfilled or are not being seriously attempted. It may be, therefore, that by administrative processes we could greatly reduce the threat of injustice in the rehabilitative idea; but certainly until such administrative processes were entrenched and efficiently functioning I would reaffirm the principle that power over a criminal's life should not be taken in excess of that which would be taken were his reform not considered as one of our purposes.²⁷

²⁶ See Gelhorn, *The Swedish Justitieombudsman*, 75 YALE L.J. 1 (1965).

²⁷ Every legal system provides for extending the periods of imprisonment for recidivists and habitual criminals. Such an increase of punishment is justified by the purpose of "warehousing." Our aim here is not reformative, though we preserve the hope that the deterrent effect of the more protracted imprisonment and the reformative efforts that may be made during it will in some cases have the effect of leading the persistent offender to a law-abiding life. In fact, of course, the processes of growing older, of maturing, eventually lead virtually all such hardened, repeated offenders to a marginally conforming non-criminal life. Our "warehousing" does give opportunity for this reform to take effect by effluxion of time. See MORRIS, *THE HABITUAL CRIMINAL* (1951).

IV. ETHICS AND STRATEGY OF RESEARCH

Earlier I noted gaps in our knowledge of deterrence and suggested means for filling them. Knowledge of the deterrent efficacy of various punishments is, however, only half the basic necessary information, for if rational decisions are to be made concerning penal sanctions we need also to know the likely effect of the proposed punishment on the particular person to be punished. This likelihood can be judged at present only as a combined statistical and clinical prediction, and then only in terms of probability. Here too the gaps in our knowledge are chasms and we must consider how they can be filled.²⁸ It will be found that some serious obstacles of an ethical and strategic nature stand in the way of an easy acquisition of this knowledge.

Before considering them, it should be noted that these two areas of information relevant to any punishing decision (general deterrence and rehabilitative potential) interrelate differently at different stages of the punishing process, and interrelate differently for different types of crimes. Thus, the legislator when addressing himself to the definition of the available sanctions for a given type of criminal behavior will be thinking largely in terms of available knowledge concerning deterrence and to a lesser extent will need to take into account problems of individual treatment and rehabilitation. By contrast, the prison administrator or the probation administrator rarely has to give much consideration to problems of deterrence but stands in larger need of

²⁸ It would be a disservice to exaggerate our lack of knowledge of the efficacy of certain penal sanctions. Cynicism is a cheap commodity and gives a spurious air of wisdom. We have, for example, reasonably securely established that there are large categories of criminal offenders, adult and juvenile, who can be treated better on probation than in institutions. By "better" here I mean that they have no higher recidivist rate (though their closer supervision would make it likely that a larger proportion of their offenses would be detected—that their "dark figure" of crime would be less than that of those sent to prison and observed after release), that it is cheaper to treat them on probation than in prison (quite apart from other welfare costs that are also minimized), and that when probation is given to this category of offenders there appears to be no consequential increase in the rate of crime for which the criminal sanctions alternatively used might be thought to have a deterrent effect. This type of knowledge is important, and has emerged from a multitude and variety of studies. It guides social planning to a degree, and there remains much to be done on the basis of the already acquired knowledge of this type and range. Yet it is not cynicism to mention its defects. It suffers from too gross a grouping of personality types and persons subject to social pressures, and omits any analysis of the dynamic relationships between personality and community processes relevant to human behavior. It is highly probable that within the gross groups so tested there are some who need prison and not probation. And further, probation and prison are not unities, in themselves, but are rather diverse bundles of treatment and custody methods. The step from our present too broad analysis of competing treatment methods toward the gradual development of a treatment nosology demands much more refined and narrow controlled experimentation, and is an inevitable precursor of rational penal reform.

information about the likely therapeutic effects of his decisions on the individual offender. The judge imposing sentence faces a more complex balance between the deterrent and individual treatment processes of the criminal law. And for the judge, the relationship between these two processes, rehabilitative and deterrent, cannot be stated as an equation applicable to all crimes; it varies greatly from one type of crime to another. For example, many murderers could safely be released from the court without further punishment on the day that they are convicted of their murder. Deterrence will, however, be a primary and usually controlling consideration precluding such a decision. By contrast, a criminal frequently previously convicted of a relatively minor offense who has just been convicted for this offense again will raise problems in which his individual needs and the needs of society for protection from him will bulk very much larger than any questions of deterring others from the type of behavior of which he has been last convicted.

Though this interrelationship between the deterrent and treatment purposes of the criminal law is thus dynamic and diverse, in most sentencing situations a rational balancing can be achieved only if some information relevant to both aspects is available.

It has recently become fashionable to stress our lack of knowledge of the relative efficacy of our various treatment methods and I do not wish on this occasion to retrace that melancholy story. The central question eludes us: which treatment methods are effective for which types of offenders and for how long should they be applied for optimum effect? Criminological research has been unwisely concentrated on the search for that will-o-the-wisp, the causes of crime, glossing over the likelihood that crime is not a unity capable of aetiological study. "What are the causes of disease?" is surely as hopelessly wide and methodologically inappropriate a question as is the question "what are the causes of crime?" At last, however, there is widespread verbal agreement (if not action) that we must critically test our developing armamentarium of prevention and treatment methods, and that to do so requires testing by means of controlled clinical trials. Follow-up studies, association analysis, predictive attributes analysis²⁹—no matter how sophisticated other research techniques we apply, we cannot escape the need for direct evaluative research by means of clinical trials. And this leads me to the next impediment to penal reform—clinical trials themselves raise important ethical issues that demand consideration.

In medical and pharmacological research the clinical trial is well

²⁹ See WILKINS, *SOCIAL DEVIANCE*, ch. 9 (1965).

established and has proved of great value in the development of therapeutic methods. Where there is genuine doubt as to the choice between two or more treatments for a given condition, efficient experimentation requires that the competing methods be tested on matched groups of patients. Of course, the analogy between the doctor's "treatment" and the court's or penal administrator's "treatment" is imperfect. Both the subject of medical diagnosis and the criteria of successful treatment are better defined, and the patient consents to treatment while the criminal does not. Problems of abuse of human rights thus obtrude when it is sought to apply the clinical trial to correctional practice. Is it justifiable to impose a criminal sanction guided by the necessities of research and not the felt necessities of the case?

The experience of this law school with the Jury Project³⁰ underlines the need carefully to consider the ethics of social experimentation. Clearly there was no unethical experimentation in that project, but it did reveal the deep emotional and irrational anxieties in the community that empiricism stirs when directed towards social processes which are strongly believed in. One must not, without reckoning the risk, gaze into the face (or even, like my colleagues, an orifice) of the Oracle!

There is, however, a respectable and reasonable ethical argument against clinical trials of correctional treatment methods which must not be burked in our enthusiasm for the acquisition of knowledge. It runs like this: Terrestrially speaking, man is an end in himself; he must never be sacrificed to some self-appointed superman's belief that knowledge about man's behavior is of greater value than respect for his human rights. This is particularly true if the sacrifice is made without his uncoerced and fully informed choice. The explorer may, choosing thus freely, risk his life in the pursuit of knowledge. The citizen may, under certain controlled conditions, risk his life and physical well-being in furtherance of medical experiments. But when hint of coercion, or restraining or unduly influencing pressures appear, it is (choose your epithet) sinful, unethical, socially unwise, to permit such sacrifice of the individual to the supposed collective good.³¹ The argument shifts, of course, in wartime; but then the threat to the collectivity is seen as the overwhelming value.

Put in less pretentious terms, the proposition is: given that our knowledge is exiguous, nevertheless, we must at all times act in the way

³⁰ See Kalven & Zeisel, *The American Jury and the Death Penalty*, 33 U. CHI. L. REV. 627 (1966); Friendly, Book Review, 33 U. CHI. L. REV. 884 (1966).

³¹ See *Do We Need New Rules For Experiments on People*, Saturday Rev., Feb. 5, 1966, pp. 64-70.

that within that knowledge is thought best for the individual we are treating. When the problem of his treatment raises (as it does generally in relation to criminal sanctions) the issue of the proper balance between the community's need for protection from him and people like him, and his treatment needs if he is to be reestablished as a member of society, conforming sufficiently to avoid criminal conduct, the same principle holds true; we are never justified in applying other than our best judgment concerning that balance for the sake of experimentation aimed at expediting the acquisition of knowledge of how to handle like cases in the future.

It is my view that the ethical argument against clinical trials is not convincing and that, given certain safeguards, it is entirely appropriate, indeed essential, for evaluative research projects of this type to be built into all new correctional developments. The two safeguards that I have in mind may not in perpetuity solve the problem, but they do at least provide sufficient protection of human rights for many decades of correctional research.

First, we do not have to apply such research techniques at the stage of judicial sentencing; they can well operate within the sentence that the judge has determined to be the just and appropriate sentence. Secondly, by applying a principle which might be called the principle of "less severity," abuse of human rights can be minimized.

Experiment at the judicial stage is not necessary since correctional sanctions already include wide diversities of treatment within the judicially imposed sentence. A defined term of imprisonment may in any one state involve a commitment to possibly extremely different types of institutions having substantially different reformatory processes and with appreciably different degrees of social isolation. And given the operation of discretionary release procedures, including parole, most prison sentences permit widely differing periods of incarceration. Likewise, a sentence of probation can lead to a close personal supervision or to the most perfunctory experience of occasional reporting. The range of subtreatments within each correctional treatment is thus very wide; so wide that ample room for evaluative clinical research into these subtreatments exists without interference with judicial processes. Of course, as information relevant to sentencing emerges from such administratively created clinical trials, it will be fed back into the judicial process and will then create new opportunities for further evaluative research. And knowledge will grow without experimentation at the judicial level.

"Less severity" is the other safeguard. By this I mean that the new treatment being studied should not be one that is regarded in the mind

of the criminal subjected to it, or of the people imposing the new punishment, or of the community at large, as more severe than the traditional treatment against which it is being compared. To take a group of criminals who otherwise would be put on probation and to select some at random for institutional treatment would be unjust; conversely, to select at random a group who would otherwise be incarcerated and to treat them on probation or in a probation hostel would seem to be no abuse of human rights. Applying this principle it is possible to pursue many decades of valuable evaluative research.

There are many methodological problems in evaluative research. I do not wish to deal with them now, but rather to continue to focus on these ethical issues. Have these two principles of administrative rather than judicial experimentation and "less severity" sufficiently disposed of the ethical problems? Let us probe this question by the classroom method of a hypothetical case. Last night this problem was on my mind when I went to sleep and I had a dream which still troubles me. I dreamt that I observed and heard a conversation between a furious burglar sitting in his cell and a garrulous social scientist. Physically, each was a Lombrosian stereotype, and their speech too was a caricature of what one would expect from their widely different backgrounds and experiences. I cannot precisely recall their words, and perhaps it is a mercy that neither the sociologese nor the scatological blasphemy have remained in my mind. I can, however, describe the situation in which they found themselves and, later, in less colorful terms than theirs, tell you the substance of their conversation.

In my dream I saw the furious burglar sitting in his cell. He was part of our control group. The experiment had been impeccably and carefully designed. We desired to test the wisdom of releasing a defined group of offenders some three months earlier than they would otherwise be released by sending them to a recently established halfway house where daily they would go out to work and where their evenings and leisure time would be devoted to guided group interaction, using the most modern techniques, and to other processes designed for their easier and more effective resettlement into the community. This relatively new type of facility had been legislatively and administratively established as an "experiment" which, as you know, is the name of all new penal developments. This experiment differed from the usual experiment in that the social scientists were allowed to make it an experiment.

The group of offenders thought suitable for this new type of treatment had been carefully delineated in terms of their personalities and background. Since the halfway house could accommodate only twenty

people it became necessary to discover how many such offenders would be found in the prison system. A careful assessment of the prison population and cautious predictions of its likely future shape led to the view that there were at any one time forty prisoners precisely matching the criteria for selection for this new treatment facility. It was therefore decided that the diagnostic center would be responsible for the selection of the prisoners who fell and might fall within this category; that they would be given a code number; and that chance would be allowed to condition whether a man fell within the T group, and would go to the new halfway house, or the C group, and would be treated just as he would have been had the facility not been built. It was, of course, early and necessarily decided that the C group must never know that this had happened and that the T group must never know that they were part of a controlled experiment—though, of course, it would be clear to them that new opportunities were being given to them. They must believe that they were given these opportunities because the staff of the diagnostic center had convinced the parole board of their peculiar suitability for the halfway house. They might prefer to believe that they had conned the diagnostic center and the parole board, this being an even better belief, experimentally speaking. My furious burglar fell within the C group. My social scientist had been garrulous indeed, and a series of indiscretions had led to him revealing this fact to the burglar. That is why the burglar was furious.

FB (Furious Burglar): You mean you're holding me here because of some . . . experiment!

GSS (Garrulous Social Scientist): Yes.

FB: Why didn't you tell me?

GSS: It would spoil the experiment . . . the Hawthorne effect, you know.

FB: Habeas corpus? What chance?

GSS: That is a somewhat difficult question. I am told that it has some constitutional aspects to it. To my knowledge the matter has never been tested. You should ask our Legal Aid Division.

FB: Wasn't it tested in the Nuremburg Trial?

GSS: Everyone knows that was different.

FB: How different?

GSS: Well, you see, the Nazi experimentation met our criterion that the decision must be administrative and not judicial but it did not meet the important and to my mind determinative criterion;

that is, that the new treatment we are testing must be, in our eyes, and in your eyes, and in the eyes of all right-minded members of the community, a lesser infringement on freedom, a lesser suffering, then the traditional punishment against which it is being tested and which would otherwise be applied to everyone. You have not lost anything; twenty people just like you have gained, but you have not lost. And think what good you do for others. We will learn how to develop better release procedures; earlier release for some is a likely result; crime will be diminished. You should be thanking me, not complaining.

FB: I'm complaining. Obfuscate it as you will, because of your . . . experiment, I'm here. Have I an action in false imprisonment against you, or the warden, or the governor?

GSS: That too is a matter for our Legal Aid Division but I don't think you do. We have not increased the maximum of your legally prescribed punishment in any way. Why are you complaining? You had a fifty per cent chance of getting out three months ago; we were quite fair; without us you would have had no chance.

FB: You lie. The halfway house would have been set up whether you had anything to do with it or not. The prison administrators are not conned by you social scientists; that's just the way they get federal subsidies. I know and you know that I am peculiarly suited to release to a halfway house and that I can talk well to the parole board and that if you had kept your white coat out of it I would have had at least an eighty per cent chance of being sent to that halfway house. By grouping me with those other thirty-nine and tossing coins, you reduced my chances to fifty per cent. Surely it must be clear to you that it is thirty per cent likely that I am here because of your . . . experiment.

GSS: All of us must suffer in the cause of science, you know. Your error lies in failing to appreciate that men must fall into categories for purposes of social research, they cannot be seen entirely as individuals, and we treated you fairly as part of your appropriate category.

And then the garrulous social scientist stalked out of the cell mumbling, "How else will we ever learn?" and slammed the cell door shut behind him, which awakened me. The dream continues to trouble me. I think there were one or two more things that the garrulous social scientist should have said in his own defense, but I am not sure that they are finally convincing. He should have pointed out the random-

ness of the whole edifice of correctional sanctions. He might well have stressed that repeated studies over the past forty years have beyond a doubt established the gross irrational variations in sentencing practice, even within the same courthouse, and should have tried to persuade the burglar that this type of experimentation was one effective way of acquiring knowledge relevant to the elimination of such unjust disparities. He might have more strenuously argued that the need to devise treatments suitable to categories of individuals sometimes of necessity involves an insufficiently fine balancing of differences between them, and that the burglar's differences from the other thirty-nine in the punishment control group were so slight as to be immeasurable in the macrocosm of the sentencing and punishing jungle. I think he should have tried more diligently to persuade the burglar of the need for such groupings of individuals, if knowledge of rational treatment methods is ever to be acquired. I doubt that he would have succeeded, and I am convinced that it is unwise to employ a garrulous social scientist.

Some have suggested that one way of avoiding this dilemma is, in an experiment of this type, to have arranged that both the treatment and the control groups obtained an advantage over the traditional punishment. That is, that in the previously considered experiment, twenty should be sent to the halfway house three months before their otherwise planned release and twenty should be completely released at the earlier time. Though this minimizes the ethical problem, it does not eliminate it. Now the furious burglar who is complaining is to be found in the halfway house bewailing the fact that he is under the degree of control that he is there. And also, it becomes a different experiment, and it will be necessary if effective knowledge is to be gained from the experiment to compare both our freely released group and our halfway house group with some control group still in the institution if the maximum knowledge is to be gained from the experiment—and they have cause for complaint.

In their *Delay in the Court*,³² Zeisel, Kalven, and Buchholz devote a chapter to "The Case for the Official Experiment." They consider the possible constitutional limitations on freedom to mount a controlled experiment and point out the tendency of the results of such experimentation to diminish discrimination:

Paradoxically . . . if the purpose of the experiment is properly pursued, any discrimination that it might have brought about during its operation would be eliminated after the ex-

³² ZEISEL, KALVEN & BUCHHOLZ, *DELAY IN THE COURTS* (1959).

periment is ended. Whichever treatment emerged from the experiment as superior would become the general rule, thus not only ending discrimination but also improving the law for all. If, on the other hand, the experiment should not reveal any difference in the two treatments, any claim of discrimination is authoritatively disproved.³³

This may well be true as a matter of constitutional analysis, but not in terms of the possible discriminations of sanctions which chance will allocate between individuals during the experiment. This, the authors of *Delay in the Court* expressly recognize: "In setting the limits within which they may permit legal experimentation, the courts will, as always, weigh the good which it attempts against the evil which, if only temporarily, it may bring about."³⁴

In conclusion, let me say that it is my position that the ethical difficulties in empirical evaluation research are so slight as not to constitute a serious impediment to it. I confess that I feel happier when such projects test differences of practice within existing treatments, so that no burglar will bother to be furious, but I know that is no answer. My final reason for not being persuaded by the furious burglar, even in his precise situation, is this: the whole system of sanctions, from suspicion to arrest to trial to sentence, punishment, and release is now so full of irrational and unfair disparities that marginal arguments of the type the furious burglar produces are to me lost in the sea of injustice from which in the long run we can only be saved by these means. Yet I remain on his side to the extent that I abhor experimental design which is not anxiously perceptive of these ethical problems and does not do its utmost to minimize them.

Putting the ethical obstacles aside, I come to one last but serious strategic impediment to the immediate potentiality of empirical evaluative research to lighten our ignorance of treatment methods. It is peculiarly difficult to organize an effective evaluative program from outside the penal system itself. It may be that only from within the administration can effective and continuing research programs be mounted; and it is certain that it cannot be mounted from without unless there is enthusiastic and strong support for it from within. Thus, California is now producing more meaningful evaluative research than any other state or country in the world. One reason is that the Adult and Youth Authorities in that state have built their research programs deeply into their administrative structures. The same thing is in very

³³ *Id.* at 246.

³⁴ *Id.* at 247.

small part true in the United Kingdom and to some degree in the federal systems and some of the more progressive states; but it is the rare exception and certainly not the rule.

Let me mention some of the difficulties of "outside research"; for example, research mounted by a university department with the permission of the relevant correctional authority. Let it be supposed that the senior administrators of that authority are wholly and fully persuaded of the need for such quality control of their product. Even so, what is in it for the front of the line staff who must be involved in the project? What effect does the project have on, for example, their mileage allowances? What can they gain from it for themselves? How can their quiet insidious lack of enthusiasm be reconciled with the supportive needs of an active research project? Only if research skills and supportive efforts are part of the career line to promotion is it likely that they will be fully supportive. Within the universities, where they are a part of the normal career promotion and status lines, it is well and easy to talk of the high challenge and value of the acquisition of this type of knowledge. It may appear quite otherwise when one is daily engaged in the treatment of criminals, particularly when the knowledge itself which is being sought is likely to be such as to cast a serious doubt on the social value of one's own efforts.

Politically, if the results of research evaluative of an existing practice are adverse to it, one's opponents and critics may use it unfairly to discredit not only those administering the correctional system but also the appointing authority who is politically responsible. Political battles may be fought while mounted on the charger of research. Further, in the usual overcrowded, understaffed, exiguously budgeted correctional agency, the unanticipated extra work that is created by a research project for an already fully occupied staff leads not only to lack of enthusiasm for the research project, but may change the nature, methods, and objectives of the research.

These problems are multiplied when the responsible administrators are not totally persuaded of the value of such research but rather are convinced of the socially useful quality of their product as it stands. They need no quality controls of their product—they daily see that it is good. They have, in short, a vested interest in the preservation of current practices. I do not mean offensively to imply that those in charge of correctional agencies or institutions want, for any financial or personal reasons, to preserve inefficiencies in the system. If it were such a corrupt vested interest it would be a less serious obstacle to penal reform. The point is that their motives are of the best. They have total confidence in the quality of their agency or institution. They

are ignorant of developments elsewhere and of existing theoretical speculations and research. They are suspicious of the outsider claiming research skills and critical capacities who yet obviously lacks comprehension of the day-to-day difficulties of correctional work. Many are fine people, devoted to minimizing human suffering, pursuing their work as a humanitarian dedication. Their salaries are not high nor is their status in the eyes of the community. Psychological mechanisms must come to their aid to convince them of the social value of what they are doing. Dr. Schweitzer would not have been easy to persuade that he was doing more harm than good in the Congo; and the analogy is close in the mind of the devoted and ambitious correctional officer and administrator.

Like the other impediments to penal reform to which I have pointed, this one is not an impossible obstacle. There is an increasing movement amongst the leading correctional administrators of the world gradually to incorporate some evaluative research programs into their new developments. The swell is slight, but it is perceptible. There will be setbacks, but the shape of future growth is clear. Likewise, the "outsider" in the university need not at all despair of gaining collaboration from those daily involved in correctional practice in his research enterprise, provided he realizes that it is necessary when designing his experiment to take into account the material and psychological needs not only of the subjects of his experiment but also of those involved in their treatment. It is no good persuading correctional administrations to allow a research enterprise to be pursued within their organizations unless the collaboration includes the clearest understanding about the roles of those employed in that administration and incorporates advantages to them which will not adversely affect the experiment as an experiment but will provide an incentive for their interested collaboration.

V. CONCLUSIONS

1. To date, our guidelines to penal reform have been humanitarian and aimed at diminishing the prisoner's needless suffering and reducing his social isolation. This sentiment now provides an insufficient frame of reference for penal reform.
2. The fundamental postulate of the criminal law is that punishment deters, yet we have only random insights into the deterrent efficacy, if any, of our diverse sanctions. This knowledge, seriously pursued, would not long elude us.
3. The principle of "less eligibility" is no longer a practical impediment to penal reform.

4. There are no dangers in our espousing the rehabilitative ideal provided
 - a) power over a criminal's life is not taken in excess of that which would be taken were his reform not considered as one of our purposes, and
 - b) all supposedly reformatory processes are subjected to critical evaluation by empirical research methods.
5. Provided experiments are designed with an eye to avoiding abuse of human rights, and for the time being avoid clinical testing at the judicial stage and adhere to the principle of "less severity," the clinical trial is as appropriate to penal reform as it is to medical therapy.
6. Research directed towards penal reform is a responsibility of the penal administrator. The outsider, the scholar in a university, may be a useful collaborator but only if the penal administrator is convinced of the necessity of such research and will organize his staff and their promotion lines to encompass research activities.