1984

The Pit and the Pendulum: Correctional Law Reform from the Sixties into the Eighties

Donald W. Dowd

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Criminal Law Commons, and the Criminal Procedure Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/vlr/vol29/iss1/1

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
THE PIT AND THE PENDULUM: CORRECTIONAL LAW REFORM FROM THE SIXTIES INTO THE EIGHTIES*

DONALD W. DOWD†

FROM this point in the eighties it is difficult to look back on the demands for reforms and change in the sixties and early seventies without many, many sour and painful memories of uncouth protests by still more uncouth young people fighting and frightening an often repressive, unresponsive, and uncomprehending “establishment.” Television imprinted vivid and lurid pictures of civil rights marchers set upon by dogs; of the rioting, the pillaging and burning of Newark and Watts; of students dying at Kent State; of snarling, cursing students “trashing” and occupying classrooms and administrative offices at Columbia, Cornell, and Harvard; of sit-ins, lie-ins, and love-ins. It is with a shudder and sense of relief that we seem to have put that behind us.1

As the demands may now seem to have been strident, the responses to them now seem to have been unrealistic and unrealizable. The fate of the War on Poverty is too close to the fate of the war in Vietnam. The assumption that with our indomitable will and with our unlimited resources we could solve any problem proved unfounded. We have often lost will, and have realized that our resources are far from unlimited. We have come out of the sixties and seventies a good deal more subdued; more civil but more selfish, more “realistic” but less hopeful.

* This paper was delivered as the Seventh Annual Donald A. Giannella Memorial Lecture at Villanova University School of Law, April 15, 1983. The Villanova Law Review co-sponsors the Giannella Lecture.

† Professor of Law and Director of the Institute for Correctional Law, Villanova University School of Law. A.B. Harvard College, 1951; J.D. Harvard University School of Law, 1954.

1. Much has been written on this turbulent era. See, e.g., D. HALBERSTAM, THE BEST AND THE BRIGHTEST (1972); J.F. HEATH, DECADE OF DISILLUSIONMENT: THE KENNEDY-JOHNSON YEARS (1975); J. LESTER, REVOLUTIONARY NOTES (1969); W.L. O’NEILL, COMING APART: AN INFORMAL HISTORY OF AMERICA IN THE 1960’s (1971); N. SAYRE, SIXTIES GOING ON SEVENTIES (1973).
We should not forget that the sixties and seventies were also a
time of excitement and imagination. The gains in civil rights and
civil liberties may now seem endangered, but our vision was perma-
nently altered. We had a glimpse, however dim, of the Great Society.

"Penal Reform" or "Correctional Reform" was a part, if only a
small part, of the grand design for the Great Society. As our com-
mitment to the Great Society has faded, we should not be surprised to
see that our commitment to correctional reform has also greatly di-
minished. The pendulum has indeed swung.

May I suggest, however, that the questions which were asked are
still very much worth asking, and that the approach to correctional
reform developed in the sixties introduced important new issues and
involved significantly different players than had been involved in pre-
vious attempts at penal reform. For there were many previous at-
ttempts, and the pendulum has swung violently before. Prior reforms
had focused on two perceived defects in the penal system: its inhu-
manity and its futility. In both a constitutional and moral sense, we
are bound by the idea that punishment should not be cruel or "unu-
usual." We judge the effectiveness of punishment against several
goals. The first is retribution. At its worst, this can mean mere ven-
geance; at its best, a careful balancing of the offense against the sanc-
tion. Our "object all sublime . . . is to make the punishment fit the
crime." The next is rehabilitation—to effect a positive change in the
offender. Another is deterrence—to prevent others from committing
crime by the awful example of punishment. Yet another is incapaci-

2. Among the various committees set up by President Lyndon Johnson was the
Presidential Commission on Law Enforcement and Administration of Justice. Exec.
Order No. 11,236, 3 C.F.R. 329 (1964-65 Comp.). One of the express purposes of this
commission was to
[d]evelop standards and make recommendations for actions which can be
taken by Federal, State, and local governments, and by private persons and
organizations, to prevent, reduce, and control crime and increase respect for
law, including, but not limited to, . . . improvements in correction and re-
habilitation of convicted offenders and juvenile delinquents.

Id. § 2(2).

3. For a general history of penal experimentation and reform, see T. ERIKSSON,
THE REFORMERS (1976); B. McKELVEY, AMERICAN PRISONS: A HISTORY OF
GOOD INTENTIONS (1977).

4. See U.S. CONST. amend. VIII. This amendment provides as follows: "Exces-
sive bail shall not be required, nor excessive fines imposed, nor cruel and unusual
punishment inflicted." Id.

For a discussion of the recognized objectives of the punishment process, see S.
KRANTZ, CASES AND MATERIALS ON THE LAW OF CORRECTIONS AND PRISONERS' RIGHTS 25-57 (2d ed. 1981). See also THEORIES OF PUNISHMENT (S.E. Grupp ed.
1971).

5. GILBERT & SULLIVAN, The Mikado, Act II.
tation—to free society from the threats of the criminal by the simple expedient of making sure he is not on the streets.

For most of our not too civilized history, retribution was the key to punishment.6 The most pressing impetus to reform was the simple revulsion of sensitive citizens to the barbarity of the punishments, the cruelty and viciousness of the prison wardens or guards, the filth, stench and chaos of the jails or prisons, the lack of food and medical care and, often more serious, the lack of protection offered to prisoners. It is not mere coincidence that those who fought to ameliorate the plight of the slaves, the mentally ill in Bedlam, or the children working in dark satanic mills were also concerned with the plight of prisoners. Reform at this level is not concerned with saving prisoners’ souls, making them better or more useful, or with reducing crime, but with simple humanity.

But there were those who did see corrections (as its name may suggest) as a tool for making offenders better people by “saving” them in a religious sense, educating them, or, in more modern jargon, resocializing or curing them. The desire on the part of the faithful to lead others to the faith so that they too could lead moral and crime-free lives is both understandable and commendable. In some instances, the law’s rigor was tempered with mercy by pardoning prisoners or reducing the punishment of those who confessed and saw the error of their ways. More frequently, the punishment itself was designed to accomplish this purpose. For example, the Pennsylvania Quaker experiment with separate and solitary confinement isolated the prisoner with just the Bible and his lonely thoughts and allowed only the infrequent, official, upright prison visitor.7

6. In the eighteenth century, Cesare di Beccaria first postulated the theory that a criminal should be punished because he has exercised his free will in such a way as to infringe upon the rights of others. See C. BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENT (1872) (Dei Delitti e delle Pene, first published 1764). Beccaria’s theory that punishment should be directly proportional to the crime committed quickly gained wide acceptance. See N. KITTRIE & E. ZENOFF, SANCTIONS, SENTENCING, AND CORRECTIONS (1981). For further discussion of eighteenth century acceptance of retributivist theories of punishment, see J. HOWARD, THE STATE OF THE PRISONS IN ENGLAND AND WALES (4th ed. 1972). See also J. HEATH, EIGHTEENTH CENTURY PENAL THEORY (1963). For twentieth century views on retribution, see THEORIES OF PUNISHMENT (S.E. Grupp ed. 1971).

7. H. ALLEN & C. SIMONSEN, CORRECTIONS IN AMERICA: AN INTRODUCTION 27 (1981). The Quaker experiment began in 1790 when the Quakers convinced the Pennsylvania legislature to declare a wing of the Walnut Street Jail a penitentiary for convicted felons. Id. (citing N.K. TEETERS, THE CRADLE OF THE PENITENTIARY (1955)). This was the first instance of incarceration being used exclusively for the correction of prisoners. Id. The program developed at the Walnut Street Jail eventually came to be known as the “Pennsylvania system.” Early proponents of the Pennsylvania system included Benjamin Franklin and Benjamin Rush. Id.
Faith in God’s ability to change man was in large part supplanted by faith in man’s ability to change man. As we relied on our schools to make better citizens, could we not rely on education and useful work to make prisoners better and, more important, to make them law-abiding members of society upon their release? As faith in schools and work declined, faith in therapy grew. Did we need a medical model? Could we not cure offenders? Should we try behavior modification or group therapy? Did not the social sciences give us better diagnostic and predictive skills so that we could select and treat those who most needed or would most benefit from our rehabilitative efforts? Educationists, psychiatrists, sociologists, and assorted therapists were all called in to rehabilitate the offender.8

For others, however, penal reform was not primarily concerned with the inhumanity of our penal system or the possibility of rehabilitation, but rather with making our correctional system do better what they conceived to be its primary purposes—to make our society safer by removing the dangerous offender and to serve as an objective lesson to deter those who otherwise might become offenders. Few of these “reformers” would wish to revert to the torture, the mutilation, the drawing and quartering that was so common in earlier ages, but many would support long prison sentences and capital punishment. Few would wish to return to the conditions of the eighteenth century jail or prison, but many would assert that a prison should not be a “country club,” and would tolerate severe overcrowding rather than risk the release of dangerous criminals.9

The sixties and seventies may not have had many religious correctional reformers (although born-again ex-prisoners as diverse as Eldridge Cleaver10 and Chuck Colson11 have advised us on corrections); but there were still those capable of being shocked by the state of our jails and prisons. Many more had faith in our ability to rehabilitate offenders, and an ever-growing number were concerned primarily with deterrence and incapacitation.

The emphasis on correctional reform for several decades had been primarily on rehabilitation.12 The apparent failure of the prom-

12. See notes 3 & 8 and accompanying text supra.
ise of rehabilitation has given a good deal of ammunition, however, to those who now prefer to rely on deterrence or incapacitation as goals. A bombshell report by Robert Martinson purported to show that no reliable previous study had established that rehabilitation programs had any effect whatsoever.\(^{13}\) Martinson caused critics from both the right and the left to question the efficacy of rehabilitative programs on prisoners and the use of rehabilitative criteria in sentencing or release decisions.\(^{14}\) Prison education, psychological or psychiatric services, probation, parole, alternative sentences, all the hard-won reforms of modern penology, were put into question. The only problem facing the hard-line school of reform is that sound data seems equally lacking to support the accuracy of the effect of deterrence and the determination and prediction of dangerousness which are at the heart of their proposals. One set of unproven or unprovable assumptions has been exchanged for another.

As indicated, long-standing disputes about retribution, reformation, deterrence, and incapacitation were carried on and intensified in the sixties and seventies by reformers who would change the system in the name of compassion, rehabilitation, or efficiency. The new element was the enormous expansion of legal considerations and a much greater involvement of legal professionals in corrections. In this respect, correctional law reform is very much the stepchild of the civil rights movement's emphasis on rights and equality; it reflects the unprecedented concern for due process in the criminal law which began in the Warren Court.\(^{15}\) In thinking about corrections, we now have to think not only about what is humane, what deters, or what rehabilitates; we have to think as well about what is constitutional, what is legal, what rights offenders have, what process is due, and what equality is compelled.


\(^{15}\) For a general, historical discussion of the Warren Court, see D.E.J. MACNAMARA & L. MCCORKLE, CRIME, CRIMINALS AND CORRECTIONS 63-74 (1982).

At one time the courts took a "hands-off" position so extreme that prisoners were characterized as slaves of the state. In the sixties and seventies we were deluged with first a trickle, then a torrent, of court cases which dealt with almost every aspect of the correctional system: sentencing, probation, cruel and unusual forms of punishment in the prisons, solitary confinement, transfers, medical treatment, religious rights, free speech, access of the press, and parole. Class actions, in the sweeping mode of court intervention prevalent in the sixties and seventies, were instituted against whole prison systems. Remedies were fashioned as imaginative as those in the school desegregation or voting rights cases. Where previously there was a virtual dearth of comment on prisoners' rights, there emerged a whole literature. Casebooks were written and courses were given.

The legalization of correctional reform may be seen not only in greatly expanded litigation concerning prisoners' rights and remedies, but also in the attempt to develop procedures that adhere more closely to a due process model. Much more detailed and careful sentencing codes were drafted. Procedures were advanced for hearings in prisons to consider everything from prison discipline to the grant-
ing of parole. In fact, comprehensive correctional codes were drafted to cover every aspect of correctional law.\textsuperscript{20}

Of perhaps even greater significance, basic assumptions about the desirability of individualized sentencing and treatment were challenged as not conforming to legal standards of fairness since, as we have seen above, the underlying factual assumptions may not be statistically or scientifically verifiable. Moreover, such individualization is always open to arbitrary administration to the apparent disadvantage of the poor, the black, the uneducated—those already so sorely disadvantaged.\textsuperscript{21}

Another major effect of the legalization of correctional reform is that a great many more judges, lawyers, and even law professors have joined the ranks of the correctional reformers. For perhaps the first time, the organized bar at the highest level has become actively concerned with corrections. Leaders of the bar such as the late Robert Kutak of Omaha, and former ABA president Bernard Segal of Philadelphia, were actively involved in reforms of corrections.\textsuperscript{22} Chief Justice Burger has frequently spoken out on correctional questions.\textsuperscript{23} Judges in Pennsylvania, such as President Judge Edmund Spaeth, Jr. of the Pennsylvania Superior Court and Judge Richard Conaboy of the United States District Court for the Middle District of Pennsylvania dealt with corrections not only from the bench, but also as leaders in establishing and guiding significant groups dedicated to

\begin{flushleft}

\textsuperscript{21} See, e.g., M. Frankel, \textit{Criminal Sentences: Law Without Order} (1973) (strongly criticizing individualized and indeterminate sentencing as arbitrary and frequently subject to abuse); \textit{American Friends Service Committee, Struggle for Justice} (1971) (proposing a framework for reform of general applicability, including a Bill of Rights for Prisoners).

\textsuperscript{22} Mr. Segal is the Chairman of the law firm of Schnader, Harrison, Segal & Lewis in Philadelphia, and was formerly President of the American Bar Association, President of the American Bar Foundation, and Chancellor of the Philadelphia Bar Association.

\end{flushleft}
improving corrections in this state.24

At this point, I should like to become a bit more personal in my comments. Although I have been interested in the larger questions of correctional law and their national or international implications, I have always been most concerned with particular reforms proposed for a particular place by particular people whom I could get to know and with whom I could join efforts. For this reason I am most grateful that I have been able to live and work here in Pennsylvania during the last twenty years.

I became seriously interested in corrections at the prodding of Senator Harry Shapiro in 1966.25 Senator Shapiro was a distinguished lawyer who had had a remarkable career not only in the law, but also in politics and public service. When I first met him he was in his eighties and, filled with the optimism and energy of old age, he was determined to do something about sentencing. He thought Pennsylvania could adopt a much better system of sentencing than the casual and often arbitrary system then in effect. He invited Judge Spaeth, who was just beginning his judicial career on the common pleas court, several other lawyers, and me to a meeting to form an informal committee under the sponsorship of the Pennsylvania Bar Association to consider a new sentencing act. I was asked to prepare a study on sentencing, a task much easier than it would be now, and we were underway. Senator Shapiro paid the cost of the Committee, not out of a governmental grant, but out of his pocket. Unfortunately, he did not live to see the Committee become a regular committee of the Pennsylvania Bar Association and, as such, a body responsible for the initiation of major changes in Pennsylvania's sentencing law. Under the Bar Association's auspices, and under the leadership of Judge Spaeth, the Committee drafted and promoted a Sentencing Procedures Act. The Committee was broadly representative of those who would seem to have differing attitudes toward sentencing. Lawyers from the District Attorney's Office, the Public Defender, and private defense practice all participated, and found they could work easily and well together.

Miracle of miracles, not only was support given by the Bar Association, but approval from the Trial Judges Association was obtained.

24. Judge Spaeth served as Chairman of the Criminal Justice Committee of the Pennsylvania Bar Association, and currently serves as Chairman of the Board of Directors of the Institute of Correctional Law, Villanova University School of Law.

Judge Conaboy was Chairman of the Pennsylvania Joint Council on the Criminal Justice System.

25. Senator Shapiro served both the Democratic and Republican parties in the Pennsylvania legislature, and is a former Pennsylvania Commissioner of Welfare.
Ultimately, the Pennsylvania legislature adopted the proposed draft and it became the law. This was correctional law reform proposed and drafted not by a prison society, a welfare group, nor others traditionally concerned with penal reform, but rather by judges, lawyers, and law professors. The Sentencing Procedures Act had been drafted by lawyers for lawyers. It was designed to be used in court to aid both counsel and the judge in arriving at a fairer sentence. In its provisions for alternatives to sentencing it incorporated what were considered to be the most advanced ideas in corrections: creative probation, work release, and psychiatric dispositions. The Sentencing Procedures Act did not, however, directly affect those responsible for administering the correctional system.

The next task undertaken by the Committee, the drafting of a Code of Probation and Parole, was quite a different matter. The Parole Board and prison administration had to be considered. The support of those who had been so long concerned with the problems of prisons and prisoners—the prison societies and other civic groups—was essential.

It was an enormous step forward to have the judges and lawyers involved, but others who were affected by such changes could not be ignored. In order to involve all those who would be affected by such proposed changes and to listen to their comments and reactions, the idea of the Institute of Correctional Law at Villanova Law School was developed. It was hoped that the same feeling of collegiality, the same free exchange of ideas, and the same willingness to work for a common end that existed in the diverse group of lawyers on the Committee would be maintained in a diverse group of lawyers and non-lawyers, all interested in improving correctional law in Pennsylvania. We hoped that, with a meeting place in a neutral law school setting, and with a regular but diversified group of participants, a forum could be established in which we could consider concrete proposals for reform, exchange ideas, express concerns, and learn from each other. Besides judges and lawyers such as those who had been on the Committee, the participants included correctional officers ranging from the Commissioner to the guards, members of the Board of Probation and Parole, probation and parole officers, local and county jail personnel, educators, psychiatrists, civil rights advocates, prison society members, representatives of ex-offender groups, students, and many private citizens. Consensus, a too-common sixties' term, was neither required nor indeed expected. As a result, it was often

achieved. Common concern and good will bound the participants. Although we offered neither vacations at exotic beaches nor lavish entertainment, some funds were needed to support the institute beyond the kind of public spirited generosity known by Senator Shapiro. We needed grants and, like others in the seventies, we obtained support from the Law Enforcement Assistance Administration through the Pennsylvania Governor's Justice Commission and matching support from the Villanova Law School.

A quick review of the sessions held by the Institute will illustrate some of the major concerns of corrections reformers in the seventies. The inaugural meeting considered the proposed Code of Probation and Parole. No one questioned whether there should be probation or parole, but only how such systems could operate more fairly and effectively. At a subsequent meeting, the then-innovative pre-conviction probation program that had been promulgated by the Criminal Rules Committee of the Pennsylvania Supreme Court was considered.27 It has the now quaintly archaic name given by Judge Sidney Hoffman of the Pennsylvania Superior Court, "Accelerated Rehabilitative Disposition.” Another meeting was devoted to the pre-release procedures developed by the Pennsylvania Department of Corrections in which selected prisoners were released before parole.28 The effect of a rash of court decisions requiring greater due process in prisons which seemed then to be a harbinger of a whole new age of prisoners’ rights was the topic of a subsequent meeting.29 Two sessions

27. See Accelerated Rehabilitative Disposition, PA. R. CRIM. P. 175-85 (Purdon 1983). Pursuant to the Accelerated Rehabilitative Disposition (A.R.D.) procedures, a defendant who successfully completes the prescribed program may have the charges dismissed upon application to the court. Id. 185. The successful completion of the A.R.D. program is not tantamount to a finding of innocence. The successful participant is, however, entitled to have his or her record of arrest expunged. See Commonwealth v. Armstrong, 495 Pa. 506, 434 A.2d 1205 (1981); Commonwealth v. McKellin, 9 Pa. D.&C.3d 572 (1979).

28. See 37 PA. ADMIN. CODE §§ 95.111-95.118 (Shepard’s 1982) (setting forth minimum criteria for pre-release, application procedures, responsibility of staff and procedures for revocation and suspension of pre-release transfers). Pursuant to the pre-release program, inmate-participants may engage in work release, educational/vocational release, temporary home furlough or community services. Id. § 95.111.

were devoted to reviewing a model correctional code developed by the Commissioners on Uniform State Laws, which was suggested for adoption in Pennsylvania.30

The vitality and variety of the sources of correctional law reform in the seventies can be seen by noting the sources of these proposals—a Pennsylvania Bar Association committee, the Supreme Court's Criminal Rules Committee, the Pennsylvania Department of Corrections, state and federal courts, and the Commissioners on Uniform State Laws. All were deeply involved in advancing novel corrections proposals on the assumption that innovative ideas could and would improve corrections. The proposals for changes were, for the most part, consistent with a rehabilitative goal.

But there were other changes in the wind. The second conference held by the Institute to consider parole was not entitled "Another Proposed Parole Code," but rather "The Future of Parole?" Dave Fogel presented harsh criticism of parole release procedures and parole supervision, both as to their fairness and their effectiveness.31 Judge Marvin Frankel, at a conference on sentencing in Pennsylvania, attacked the flagrant abuses of discretion in sentencing. Judge Frankel challenged the accepted notions which favored vesting the judge with the unfettered right to choose any sentence he considered appropriate, limited only by a statutory maximum.32 Indeed, out of the ideas put forth at that conference, another Institute participant, Judge Anthony Scirica, developed the proposal for a form of presumptive sentencing based on guidelines which have since been promulgated by the Pennsylvania Sentencing Commission which Judge Scirica chairs.33

30. For a reference to the model correctional code, see note 18 supra. Transcripts of conferences of the Institute for Correctional Law are available in the office of Professor Donald W. Dowd, The Institute for Correctional Law, Villanova Law School, Villanova, Pa. 19085.


For a discussion of the judicial response to extrajudicial controls on sentencing, see Robin, Judicial Resistance to Sentencing Accountability, 21 CRIME & DELINQ. 201 (1975).

33. See 42 PA. CONS. STAT. ANN. §§ 2151-2155 (Purdon 1981) (Pennsylvania Commission on Sentencing). This commission consists of eleven members, including two members of the Pennsylvania House of Representatives, two members of the Senate of Pennsylvania, four judges of Pennsylvania courts, a district attorney, a defense attorney, and either a professor of law or a criminologist. Id. § 2152(a).

Elsewhere, Professor James Q. Wilson of Harvard, in his all-too-influential book, “Thinking About Crime,” gave academic respectability to a harsh theory of incapacitation. Professor Wilson gained the support of liberals such as Senator Edward Kennedy. Quaker and civil rights groups supported a study entitled “Struggle for Justice.” This study assailed the inequality and arbitrariness of most correctional decisions, and called for less discretion and more certainty. Professor Andrew von Hirsch developed a “justice model” for sentencing which emphasized the offense rather than the offender, and which revitalized the notion of retribution as a primary goal of punishment. Other studies purported to develop predictive techniques which could justify selective incapacitation.

At a time of an increasing crime rate and an even greater increase in the fear of crime, the effect of such ideas on the legislature, the courts, and correctional officials has been predictable. It may have been the intention of “Struggle for Justice” and of scholars such as Professors Fogel and von Hirsch, to have shorter, surer, and fairer punishments, but it is doubtful that such a result could be achieved in the current cold climate. Legislatures have moved from presumptive sentences to more and more mandatory sentences and to increasing, not decreasing, punishment. The Supreme Court has sanctioned overcrowding and lower due process standards in prisons. Judges are imposing longer sentences, but are still criticized as being too lenient.

35. See N.Y. Times, Dec. 6, 1975, at 29, col. 1. Senator Kennedy criticized the perceived leniency of both prosecutors and the courts, particularly as manifested in the practice of plea bargaining. Id. The Senator also spoke out in favor of mandatory minimum sentences without probation or parole. Id.
36. For a discussion of the study set forth in Struggle for Justice, see note 19 and accompanying text supra.
38. See, e.g., M. Peterson & H. Braiker, Who Commits Crimes (1981) (identifying characteristics of criminal offenders by criminal record, race, age, self-descriptions, motivations, and other factors).
41. Edward Rendell, District Attorney of Philadelphia, has frequently criticized Philadelphia judges for lenient sentencing. See, e.g., Judges Ignore Sentencing Guidelines,
greater numbers of prisoners and no corresponding increase in the resources available.

Let us consider a few reasons for this great swing of the pendulum. First, to echo what I noted about many of the reforms of the sixties, unreasonable demands were made on the system, and unreasonable promises were made by those who supported those reforms. No correctional reformer should have ignored the public's deep concern with the apparently ever-increasing crime rate. We cannot be concerned about the offender to the extent that we become callous toward the victim. We must make every effort to see that we have a more peaceful and secure society so that we may have far fewer victims. We must make sure that victims of crime are treated with dignity, that their voices are heard, and that, insofar as it is possible, they are made whole. In fact, to contrast concern for the victim and the offender is a false opposition. The same concern for justice and human dignity is behind efforts to find a way to keep us from being victims of crime, to help those who are its victims, and to reform the correctional system. Yet, the over-selling of the rehabilitative goals by those involved in corrections led many to think that the plight of the victim, the seriousness of the crime, and the security of the people had been unappreciated or ignored.

The public was also led to believe that through modern rehabilitative correctional practices, crime could be reduced. Alas, this does not seem to be so. If rehabilitation does not reduce crime, should we not rely on deterrence or incapacitation? The idea is appealing but, I think, fallacious. The major unfulfilled promise of corrections is that by our choice of punishments, and through our way of treating offenders, we can significantly reduce crime. To some extent, all the various aims of punishment can be achieved. And, to some extent, punishment does diminish crime. Without doubt, some are deterred from crime by fear of punishment. Some prisoners, in the jargon of the seventies, got their act together, were rehabilitated and now lead crime-free lives. Some who considered committing serious crimes on the streets do not do so because they are incapacitated. But to suggest that by concentrating on rehabilitation or on deterrence or incapacitation we can seriously control the crime rate is to promise what we have no good reason to believe we can deliver. Corrections is but the neck of the funnel. It cannot control what goes into it. As the pendulum has swung from the failed promises of rehabilitation, it will likely

swing back after the promises of deterrence and incapacitation prove equally illusive.

Even if it is unreasonable to expect a general reduction in crime as a result of correctional efforts, it is not unreasonable to expect that the system should at least achieve its goals with those who are in its maw. As we have seen through the sixties, the most generally agreed upon goal of sentencing was rehabilitation. Programs in prisons were introduced to rehabilitate. Even pre-trial probation could be called Accelerated Rehabilitative Disposition. Not only were the rehabilitative effects of such procedures and programs in doubt, but behind the facade of rehabilitation there was often found uncontrolled arbitrary action and, in some cases, extreme coercion which would violate any standard of equality and fairness. That there were distinct flaws in the rehabilitative model both as to effectiveness and fairness cannot be doubted. This loss of faith in the rehabilitation model, not only as a panacea for the general reduction of crime but on its own terms as well, was a main reason for the pendulum’s swing.

But perhaps the most important reason for the pendulum’s swing away from social commitment and optimism was our general withdrawal of support from what I might call “life’s losers.” Both as a result of a changed economy and a change in the dominant political and social philosophy, we have seen a decline in all levels of social services. Surely the prisoners have less call on our sympathy or generosity than the unemployed, the homeless, the mentally ill, or the handicapped. To be concerned with the imprisoned may be one of the beatitudes, but, to use an ugly word of the seventies, we must “prioritize.” And when we “prioritize,” the prisoner comes out with a very low priority indeed. By definition, he is an offender. He brought it on himself. Worst of all, he does not vote. If we cannot care for the innocent, why should we care for the guilty?

We can see why the pendulum has swung. Yet, the picture is not all bleak for those concerned with better correctional law. Many of the criticisms of the older shibboleths of reform were deserved, and although we may be afraid of the pendulum’s swing, I do not think it will swing all the way back to the point at which corrections were before the sixties. There may be no growth in prisoners’ rights, but existing rights will not disappear. Lawyers and the prisoners themselves will continue to seek remedies in the courts. The effect of legal-

42. See von Hirsch, supra note 34.
ization will continue to be felt.\textsuperscript{44} Although there will be cutbacks, there will be no wholesale jettisoning of correctional programs. The pressure of sheer numbers will probably limit a general adoption of longer or mandatory sentences. Inertia will stop the swing.

May I suggest also that there are steps which can be taken to push the pendulum back. First, since there has been a predictable, and perhaps reasonable, reaction to our overpromising in the past, we must refrain from overpromising now. We must make it clear that one cannot solve the problem of crime by manipulating punishment. This is much more easily said than done, since simple solutions have much more appeal than modest disclaimers. Moreover, just as we should avoid making unfulfillable claims, we should question the assertions of those who do make such claims. We should also be more honest and avoid selling innovative changes such as work-release, furloughs, pre-release or the like as rehabilitative when, in reality, they may be justified only by reasons of cost, practicality, and humanity.

Next, I would suggest that in both the selection and administration of punishment we should abandon the idea that the various goals of punishment are in competition, and that one must be advocated at the expense of another. For instance, we must always consider the nature and the seriousness of the offense. One of the most outrageous examples of an exaggerated rehabilitative model was the completely indefinite sentence—under which a judge could impose a penalty ranging from one day to life—without any relation to the seriousness of the offense.\textsuperscript{45} The same vice exists in a long sentence purporting to incapacitate, or to deter, when the sentence is not justifiably rooted in the actual seriousness of the offense. A life sentence that would effectively incapacitate a Peeping Tom is likely to keep him from repeating his offense, but such a sentence would shock our consciences. A life sentence for tax evasion would indeed deter, but would be singularly unpopular, especially on April fifteenth. A sentence can be inappropriately lenient as well. A brutal assault would warrant more than a fine. Repeated burglaries by an offender indicate a likelihood of harm which would seem to require incapacitation. The public has the right to harbor its horror toward the offense and to have its desire for safety respected. Sentences which ignore these concerns would be outrageous.

\textsuperscript{44} For a discussion of the "legalization" of correctional reform in the sixties and seventies, see notes 17-20 and accompanying text supra.

\textsuperscript{45} For a discussion of the criticism of judges possessing completely discretionary sentencing power voiced by Judge Marvin Frankel, see note 32 and accompanying text supra.
A sentence imposed without consideration of its effect on the actual man or woman sentenced would be just as outrageous. A person is not an abstraction, not an "it." The possibility of rehabilitation is an element of any sentence except capital punishment. If every sentence has a rehabilitative element, it is clear that those charged with the administration of the sentence must be concerned with rehabilitation, even if the sentence’s primary purpose is incapacitation or deterrence.

Deterrence is also an element of any sentence. Many are deterred by the mere prospect of arrest, others by the shame of conviction, and still others by fear of the punishment imposed. The deterrent aspect may be hard to measure, but it is always present and must always be considered.

Finally, it is perhaps too obvious to state that any sentence to a jail or prison, and par excellence, a capital sentence, incapacitates to some degree.

Thus, most sentences serve more than one of the goals of punishment. In selecting the sentence there cannot be a reliance on just one. It is a mistake to advance one goal as paramount, and misleading to make promises based on a single theory. For this reason, I think that much of the drive to limit or eliminate discretion is misguided. We could give the pendulum a significant push and reduce the pressure for mandatory sentences if this were recognized. To do so would be a great accomplishment, for the widespread adoption of mandatory sentences is the most serious result of the pendulum’s swing.

I think mandatory sentences are unwise and unjustified.\(^ {46} \) I suggest that we know far too little about the effect of mandatory sentences in reducing crime to justify them. We do know that mandatory sentences can result in tragic injustices in particular cases and can clog the courts and the correctional system. Consider a mandatory two-year prison sentence for an assault in which the offender carries a gun. In one of the countless disputes concerning trespassing in the wilds of Bucks County, Farmer Brown mistakenly believes he has the right to eject someone whom he believes to be a trespasser, and threatens him with a gun. The trespasser complains to the police. Should the farmer be charged with an assault in which a gun was used when we know that, if convicted, the farmer must go to prison for two years? Would Farmer Brown ever plead guilty, or would he not always demand a jury trial? If tried, would a jury, aware of the two-year mandatory sentence, convict even if it were

\(^ {46} \) For a discussion of the movement toward mandatory minimum sentences, see notes 39-43 and accompanying text supra.
clear that the farmer was in error as to his right to use force and, therefore, did commit the offense?

The above example illustrates three problems inherent in mandatory sentences. First, there will always be some situation in which the application of the mandatory sentence will be inappropriate. A mandatory sentence which might have seemed to make sense when thinking about muggers in Philadelphia, creates an absurd result when applied to a bucolic dispute in Bucks County. Second, mandatory sentences will almost always result in demands for jury trials. Third, mandatory sentences will not eliminate discretion, but merely shift it. To avoid the two-year sentence, discretion may be exercised by the prosecutor in refusing to bring the charge, or by the jury in refusing to convict.

If Farmer Brown does go to prison for two years, regardless of how clearly it appears that he creates no danger to society and how irrelevant rehabilitation may be, he must serve out his entire sentence, taking up resources that might better be used for more serious cases. Moreover, the prisons will not have to receive only Farmer Brown, but many others who would likewise never be there but for such mandatory provisions. Such sentences thus put costly and unnecessary pressures on our correctional resources.

As we have seen, the assault on discretion has been made not only by those who support long mandatory sentences to deter or incapacitate, but also by those who wish to “legalize” the correctional system by applying abstract notions of equality and due process. But equality is not achieved by ignoring real differences, and due process does not require procedures that effectively prevent action. In the name of justice, we could be led to consistent application of what in seventies’ jargon could be called a “worst-case scenario.” A judge decides what sentence is justified in the worst case and then, to be fair, applies it uniformly in all cases. The prison official decides, in order to avoid questions of fairness in selection, to do away with all furloughs or pre-release programs. The parole board is abolished in the name of fairness, or if it still exists, it takes no chances and also applies the worst-case scenario, releasing only when it could be subject to no criticism for its choice on the grounds of fairness. Such a development, from the prisoners’ perspective, may seem like destroying a Vietnamese village to save it. Prisoners might well wish to be saved from such saviors.

I suggest that abolishing discretion will not accomplish the goals of either the right or the left. The problem lies in developing both the proper factual basis and the proper standards for the exercise of dis-
cretion. We need adequate guidelines, not presumptions nor mandates. We need adequate review, both in the courts and in the correctional system. A better understanding of the need for controlled discretion would go a long way toward pushing the pendulum back.

Finally, I would suggest that we not lose sight of the fact that the prison is always in danger of again becoming the pit. I hope we do not lose our capacity for being shocked. I hope that we will not be satisfied with jails and prisons that are functionally just warehouses or zoos. No general theorizing about crime or corrections should keep us from looking at the reality of prison life. Low priority notwithstanding, standards of care must be demanded in our prisons, and we must be aware that imprisonment is one of the greatest affronts the state can impose upon an individual. Prison may be a necessary evil, but it is an evil and one that requires control through constant vigilance.

We should not lessen our efforts to find alternatives to imprisonment, or to develop reasonable release procedures. Moreover, the light of the law should shine into our prisons and jails. Administrators and courts should not ignore prisoners’ rights. One of the ironic paradoxes of corrections is that the institutions charged with the punishment of those who have violated the law are themselves all too often lawless. To be concerned with prisoners’ rights is not to ignore the appropriateness or the need for punishment, but is only to insure that such punishment is itself carried out lawfully in a lawful atmosphere.

My suggestions of methods by which the pendulum may again be pushed back must seem disappointing. I have come up with no unifying theory that would reduce crime and perfect corrections. I may seem to be suggesting more of the same. I am afraid that, in one sense, this is so. The major concerns that have led to correctional reform are, and will remain, the same: a minimum standard of humanity in dealing with offenders; correctional decisions which are consistent with the public’s abhorrence for crime and need for safety, yet which leave offenders better citizens rather than more hardened criminals; and a growing awareness that offenders are, and remain, men and women entitled to the protection of the law. I welcome the legalization of corrections. However, we must continue to pursue the major reforms: the need for some individualization in sentencing; the development of alternatives to incarceration; the fostering of rehabilitative programs in prisons; the development of release techniques

47. For a discussion of the movement toward the legalization of correctional reform in the sixties and seventies, see notes 17-20 and accompanying text supra.
such as furloughs, work-release, pre-release and parole. What is required is an ongoing effort to develop ways of assuring fairness of administration and accountability. I am in no way discouraging or discounting new ideas and new techniques. But I think we should be careful not to despair too easily over what has been done, nor put too much faith in novel nostrums.

We need the old reformers as well as the new ones. The humanitarians, the sociologists and the educators as well as the lawyers and judges must be involved. Their numbers will never be great, but without such reformers, our consciences would not be pricked. We would be without those who can give us new ideas or question old ideas. We would be without those who can challenge the professionals, the guards, the wardens, the probation and parole officers, and all those who earn their livings in the field of corrections. But it is not just a question of challenging these workers in the vineyard. We must be able to listen to them, to develop mutual respect and an ability to work together.\footnote{We know that professionals in corrections are often overworked, underpaid, undervalued, and defensive. However, we should not forget that the support of these hard-pressed public servants is at the heart of any reform, for it is they who often make the difference between words and actions.}

To go back to an earlier theme, the kind of work accomplished at the sessions of the Institute should not be lost in the shifting sands of federal funding.\footnote{We must continue to have an opportunity to meet, to talk, to listen, to suggest, and to react. I do not expect startling reforms, just the hard work of rethinking old ideas, testing new ideas, and discovering again and again the need for reform and the limits of reform in corrections. We must be concerned, for in meting out its punishments, society exercises its most awesome power and, therefore, faces its greatest responsibility.}

Let us hope that the pendulum never swings back to unaccountable, inhuman oppression in the name of punishment. Let us not be surprised that it will swing to and fro between reforms allegedly for the benefit of the prisoner, and those allegedly for the benefit of society; but let us attempt to reach that equilibrium between clear ration-

\footnote{For a discussion of the composition of the Pennsylvania Commission on Sentencing, see note 33 \textit{supra}.}

\footnote{For a discussion of the Institute for Correctional Law, see notes 27-30 and accompanying text \textit{supra}. I suggest that this heterogeneous group could serve as a model for even greater cooperation among the various and dissimilar parties necessarily involved in the corrections reform process.}
ality and warm humanity; between a strong sense of justice and Christian compassion that so characterized the man to whose memory this lecture has been dedicated.