

Norval Morris as Penologist: An Exception Who Proved the Rule

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 force 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.¹

—Norval Morris, 1966

On account of a peculiar academic division of intellectual labor, sentencing reform is the province of criminal law academics and philosophers while prison reform is the province of civil liberties and constitutional law specialists and sociologists. In general, sentencing theorists do not study prisons and prison reformers do not study sentencing jurisprudence. The sentencing jurisprudence literature treats incarceration as a generic sanction, more or less in the abstract. Those academics do not concern themselves with how prisons are designed, how they are managed, and what goes on inside them. In other words, it matters not at all if, for example, a proposed thirty- to thirty-six-month sentence will be served in a brutal and hellish penitentiary or in a comfortable minimum-security institution. No trade-off is recognized between the sentence's duration and the severity of penal regime under which it will be served.

Sentencing theorists, who debate the appropriate duration of prison sentences, down to months, weeks, and sometimes days, ignore what imprisonment should entail. How deprivational should prison be? Should prisoners have to endure confinement in their cells twenty-three or even twenty-four hours a day? Should they have to endure bad food, unhygienic environment, excruciating noise, secondhand smoke, censored reading material, sexual deprivation, and so forth? Should they have a right to work? Should they be allowed to watch television and movies? Should they be given or be allowed to purchase snacks, soda, candy, and ice cream? Sometimes these questions are “answered” by legislatures or by federal

judges in the context of conditions of confinement lawsuits. Mostly, prison officials provide the answers based on their own sentencing philosophy or, more practically, based on resources, logistical constraints, and negotiations with the prison officers' unions. Sometimes the de facto answers are vastly different from the formal answers. Prison officials may want noise levels to be low, sanitation to be high, food to be tasty and nutritious, and safety to prevail, but they are unable to implement those preferences because of lack of resources, administrative competence, or inmates' cooperation.

Norval Morris, Julius Kreeger Professor of Law and Criminology at the University of Chicago Law School for four decades (and a former dean), was the exception who proves the rule. More than any other sentencing theorist of his generation, Norval Morris understood that an incarcerative sentence involves both duration of confinement and conditions of confinement. He argued that the actual penal sanction, as it was experienced by convicted offenders, should not be left to arbitrary decision making, budgetary contingencies, or bureaucratic competencies. Rather, it should be a matter of policy and of jurisprudence. The guiding principle should be to treat the imprisoned inmate as a citizen behind bars, to respect his or her dignity and humanity, and to encourage (not coerce) self-change.

Morris is renowned as a sentencing theorist, which indeed he was. However, he was also, and perhaps “primarily,” a penologist and prison reformer. Actually, he saw sentencing reform and prison reform as two sides of the same coin, arguing in print, public speeches, and behind-the-scenes advocacy with legislators, judges, and corrections officials that both sentencing and sanctions should be as humane as possible.

His professional efforts were rooted in his belief that state-imposed punishment for crime should be restrained and that criminal defendants and prisoners should be treated with respect and decency, not only because it is humane but also because the moral level of society is raised by treating respectfully even the most vilified members of society. Morris believed that the more humane treatment of prisoners would ultimately lead to a generally better society.



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Morris sought to reduce the “gratuitous suffering” imposed on inmates of prisons and jails.² He urged his contemporaries to regard incarcerated offenders as fellow human beings, not as enemies of the state and society. He believed that prison could be made a positive experience, at least for those who wanted to change their lives. He strongly and famously opposed coercing personal reform by linking participation in prison programs to an early release date, but he energetically campaigned for voluntary prison programs that would be of assistance to inmates who wanted to improve their chances of living within the law upon release from prison.

Morris persistently campaigned for a science of corrections, based on careful evaluation of initiatives and experiments in the United States and abroad. Morris recognized that “prison” included a wide range of practices, institutions, and living conditions and that a prison sentence might be served in horrendous conditions or in relatively comfortable conditions.

Morris’s knowledge of prisons was based on extensive prison visiting and interaction with prison officials in Australia, Asia, Europe, and the United States. In the early 1960s, he spent two years as director of the United Nations Institution for the Prevention of Crime and Treatment of Offenders. With funds and staff provided by the UN, Australia, Belgium, Britain, Canada, Denmark, Holland, Japan, New Zealand, Sweden, and the United States, the Institute conducted training courses for senior correctional and crime prevention officers of eighteen Asian governments. Those attending the courses included judges, prosecutors, police, prison officials, and probation and parole personnel. In addition, the Institute sponsored a full-fledged research program. In later years, Morris relied on this and other foreign prison visits to rebut claims by various legislators or corrections officials that such and such a reform was impossible.³

After settling in the United States in 1964 at the University of Chicago, Morris quickly became one of the nation’s most prominent and articulate proponents for prison reform. In Illinois, he played a special role as something of an *éminence grise*. For two decades he was a member of the advisory board of the Chicago-based John Howard Association, one of the oldest and best-regarded prison reform organizations in the country. In the early and mid-1970s Morris served as a close adviser to Peter Bensinger, a young businessman appointed to head the Illinois Department of Corrections. It was based on that relationship that Professor Morris launched my career by sending me (then a second-year law student) to Stateville Penitentiary (Joliet, Illinois) for a summer to observe all aspects of that prison’s regime and, of course, to report and discuss my observations with him.⁴ His influence with Bensinger also contributed to the founding of the Illinois Correctional Academy, which became one of the nation’s best training institutions for prison officers and staff. Of course, Morris participated in various Academy courses.

Morris was practically unique among academics at top-ranked universities in creating a bridge between the worlds of academia and prison practice. In the summer of 1972, Morris ran an Institute for Criminal Justice Executives at the University of Chicago. Forty carefully selected state correctional officials met with scholars and policy makers over three months to absorb and discuss criminal justice research and ideas. Each participant was assigned a project and reported on it when the group reconvened the next summer. Morris lobbied for the creation of the National Institute of Corrections (NIC), which Congress established in 1974 (partly in response to the 1972 Attica riot) under the umbrella of the Federal Bureau of Prisons. He served on NIC’s advisory board from its founding until his death, rarely missing a meeting. That service strengthened his collegueship and friendship with NIC’s director, Morris Thigpen, and Federal Bureau of Prisons Directors Norman Carlson and Kathy Hawk Sawyer as well as with numerous state correctional leaders. According to his advisory board colleagues, Morris was a relentless proponent of evidence-based corrections (before the term became popular) and evaluation research.

Morris was a gifted and eloquent public speaker, often invited to address gatherings of legislators, judges, and correctional officials. On such occasions, he did not shy away from challenging and sometimes excoriating the nation’s correctional leaders for accepting the status quo and for failing to publicly denounce conditions and practices in their own and other prisons that they knew to be unconscionable.⁵ Drawing on his encyclopedic knowledge of prison history,⁶ Morris challenged correctional leaders to follow in the footsteps of some of their boldest and most famous predecessors.⁷ Despite such criticisms, Morris was well liked by many prominent prison officials, probably because they knew he appreciated the importance and difficulty of their work and because of his unquestioned commitment to working to improve the system. He certainly understood the moral dilemma of prison executives and staffs who had to participate, often unwillingly, in the infliction of gratuitous suffering.

In 1975, Morris volunteered to testify as an expert witness for the plaintiff-inmates in *Pugh v. Locke*, a case brought by the ACLU’s National Prison Project challenging the totality of conditions in Alabama’s prison system.⁸ On cross-examination, Morris called the Alabama prisons “uncivilized.” Federal District Court Judge Frank Johnson’s decision for plaintiffs and sweeping remedial order was a milestone in prisoners’ rights litigation and prison reform. In the years that followed, Morris continued to enjoy a good working relationship with Al Bronstein, director of the ACLU’s National Prison Project. This relationship and role also nourished Morris’s extensive knowledge of the American correctional scene.

Morris’s most ambitious prison writing was the last chapter of *Future of Imprisonment* where he set out a blueprint for a reform prison based on a therapeutic model, but one that separated programming from

release so that inmate participation would be truly voluntary.⁹ Morris believed that if such a prison could succeed with the most dangerous offenders, it would demonstrate that all prisoners could be treated more humanely. While program participation would be voluntary, Morris required (as a condition of remaining at the model prison, but not as a condition of release from prison) all inmates to participate in group therapy sessions led by lay staff members.¹⁰ The Federal Bureau of Prisons adopted this design, at least in part, for its new Butner Correctional Center in North Carolina. Morris took a strong interest in Butner's operations and for years was a frequent visitor and contributor to the evolution of its policies and practices. He even had himself locked up overnight at Butner so that he could experience the regimen over a twenty-four-hour period.

In the late 1980s and early 1990s, Morris added yet another dimension to his prison experience. He served as a court-appointed special master in *Williams v. Lane*, a case involving protective custody at Stateville Penitentiary. The protective custody prisoners claimed that the restrictive and deprivational conditions of their protective confinement (far worse than that of mainstream inmates) constituted a constitutional violation. With Morris's assistance, the parties negotiated a consent order that provided protective custody inmates with better living and programmatic opportunities.¹¹ Morris and his assistant Judy Cottle made regular visits to Stateville to monitor the prison's compliance with the consent decree.

Morris offered one of his most powerful criticisms of the corrections establishment in one of his last articles, coauthored with Leena Kurki. Writing in *Crime and Justice: An Annual Review of Research* (a publication that Morris and Michael Tonry founded in 1977), the authors attacked the operation—and essentially the existence—of super maximum security (“super max”) prisons that a majority of states had constructed in the 1990s and 2000s.¹² To appreciate the importance of Morris's critique of prisons, one need only contrast his humane plan in *The Future of Imprisonment* for handling the “worst of the worst” inmates with the super max regimes created in the late twentieth century. According to Kurki and Morris, “Not one of the state supermax prisons is necessary and all are a grave error in the sad tale of man's brutality to man.”¹³

Norval Morris's Unfinished Agenda

In setting all facets of the prison regime (e.g., living conditions, work, food, recreation), where should legislative lawmaking leave off and administrative rule making begin? Why should judges be in control of setting the conditions of probation, but not the conditions of confinement? Should sentencing judges have any role in determining the severity of imprisonment?¹⁴

Should such questions be addressed by sentencing commissions and sentencing judges, or are they properly left to the discretion of prison officials who can call upon

their own philosophies of punishment for answers? How might sentencing guidelines take the severity of punishment into account? Should they set out standards covering conditions of confinement and the operating procedures of the prison regime? Should they provide for some kind of trade-off between duration of confinement and severity of confinement? Should a prisoner qualify for earlier release if his sentence was served in a severely deprivational penal institution? Should prisoners (mostly white-collar and white) who serve their time in minimum-security camps not qualify for early release so that they not be doubly advantaged?

Could sentencing theorists take into account the fact that a sentence to imprisonment, even in the same jurisdiction, could mean assignment to a wide range of different institutions that differ dramatically in terms of deprivations, safety, programs, and health care? In their book, *Between Prisons and Probation: Intermediate Punishments in a Rational Sentencing System* (1990), Norval Morris and Michael Tonry made an important start on attacking this question. They argued that a rational sentencing scheme could equate so many days in jail with so many units of a nonincarcerative sanction like fines, community service, intensive probation, and in-patient drug treatment. It would not be a huge jump from that mathematics to a formula that would calibrate the duration of an incarcerative sentence to the conditions under which it is served.

Admittedly, discounting the duration of an incarcerative sentence on account of its intensity would not be an easy task. Valid security concerns justify imposing a more stringent regime on some prisoners, especially on those who while incarcerated have victimized staff or other prisoners. However, prisoners are initially assigned to different prisons based on a prediction of their risk of dangerousness and escape. This essentially unreviewable prediction is made by prison officials, not by a sentencing commission or sentencing judge. How often the decision results in the imposition of gratuitous suffering can only be conjectured.

Were he still with us, I think Norval Morris would urge us (1) to make all penal institutions less deprivational; (2) to conduct careful research on the least restrictive prison regime consistent with reasonable safety for staff and inmates; and (3) to consider accelerating the release date of those prisoners who, not on account of prison misconduct, serve time in the worst conditions. At the very least scholars and practitioners who are deeply involved in sentencing reform can learn from Morris's ideas and from his example by putting prison conditions on their research and policy agendas.

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Notes

¹ Norval Morris, *Impediments to Penal Reform*, 33 U. CHI. L. REV. 627, 628 (1966).

² See, e.g., NORVAL MORRIS & JAMES B. JACOBS, PROPOSALS FOR PRISON REFORM (Public Affairs Committee 1980).

³ See, e.g., Norval Morris, *Prison in Evolution*, 29 FEDERAL PROBATION 20 (1965); Norval Morris, *Lessons from the Adult Correctional System of Sweden*, 30 FEDERAL PROBATION 3 (1966).

⁴ This experience ultimately resulted in JAMES B. JACOBS, *STAT- EVILLE: THE PENITENTIARY IN MASS SOCIETY* (1977).

⁵ See, e.g., Norval Morris, *From the Outside Looking In: Or the Snail's Pace of Prison Reform*, in *OUTSIDE LOOKING IN 29* (Washington, D.C.: Department of Justice, Law Enforcement Assistance Administration, 1970) ("Delicacy would suggest a graceful compliment or two to the correctional leaders present at this centennial celebration; but a sense of the importance of their work compels an abrasive lack of politeness. To put no fine phrase on the matter; corrections has attracted too many second-class minds who have provided timorous and vacillating leadership.").

⁶ Morris's encyclopedic knowledge of prison history and practices is evident in NORVAL MORRIS & DAVID ROTHMAN, *OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* (1995).

⁷ "It is, I suppose a traditional complaint of the middle-aged to look about and cry, 'where are the giants of yesteryear?' Perhaps I share this menopausal depression, but where are the Fenner Brockways and Enoch Wines of today, where are the Croftons, Davenports, Hills and Maconochies to affirm and apply correctional views and practices unpopular to the majority of the public and disturbing to their political representatives?" Morris, *From the Outside Looking In*, *supra* note 5, at 31. Morris's admiration for Alexander Maconochie (1787–1860) is creatively presented in Morris's fictional history of Maconochie's governorship of the penal colony on Norfolk Island. See NORVAL MORRIS, *MACONOCHE'S GENTLEMEN: THE STORY OF NORFOLK ISLAND AND THE ROOTS OF MODERN PRISON REFORM* (2002).

⁸ See *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd as modified*, *sub nom Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, *sub nom, Ala. V. Pugh*, 483 U.S. 913 (1978).

⁹ Interestingly and importantly, THE FUTURE OF IMPRISONMENT was also Morris's most significant contribution to sentencing theory.

¹⁰ Morris was persistently optimistic about the potential of lay therapy. "Through group counseling, group therapy, guided group interaction, unstructured group discussions—however it is described, groups of prisoners are being brought together in relatively free verbal association to discuss their adjustment to society . . . from the interaction between the small group and the individual, some prisoners are better able to understand their previous careers and the risks they run if they continue to pursue the same patterns." MORRIS & JACOBS, PROPOSALS FOR PRISON REFORM, *supra* note 2, at 20.

¹¹ *Williams v. Lane*. No. 81C0355, N.D. Ill. 1988.

¹² Leena Kurki & Norval Morris, *The Purposes, Practices and Problems of Supermax Prisons*, in 28 CRIME & JUSTICE: A REVIEW OF RESEARCH 385 (Michael Tonry ed., 2001).

¹³ *Id.* at 421.

¹⁴ As Norval Morris asked rhetorically, "Why the judge should control probation supervision and not imprisonment is far from clear." Morris, *From the Outside Looking In*, *supra* note 5, at 32.