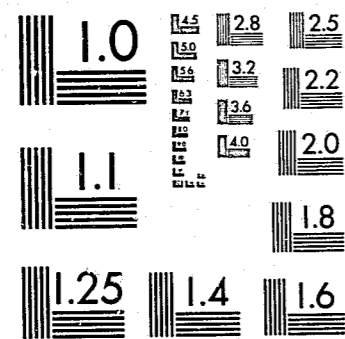


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WORKSHOP  
PAPERS

HISTORICAL APPROACHES  
TO  
STUDYING CRIME

OCTOBER 11-12, 1979

UNEDITED DRAFT

United States Department of Justice  
 Law Enforcement Assistance Administration  
 Henry S. Dogin, Administrator  
 National Institute of Law Enforcement  
 and Criminal Justice  
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\*WORKSHOP PAPERS

Prepared for  
 Special National Workshop

HISTORICAL APPROACHES TO STUDYING CRIME

Chantilly, Virginia

October 11-12, 1979

For

THE NATIONAL CRIMINAL JUSTICE RESEARCH UTILIZATION PROGRAM

These papers are being presented at a Special National Workshop held pursuant to Contract No. J-LEAA-004-79 awarded to University Research Corporation by the U.S. Department of Justice, Law Enforcement Assistance Administration, under the Omnibus Crime Control and Safe Streets Act of 1968, as amended. The points of view or opinions expressed do not necessarily represent official policy or positions of the U.S. Department of Justice.

\*Unedited Draft. Not for Publication.

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Section I

The Politics of Criminal  
Justice Reform in  
Nineteenth-Century France\*

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Thomas J. Duesterberg  
August 25, 1979

\* I have received invaluable assistance on this paper from Elizabeth Muenger. This paper has been prepared for delivery to the symposium on History and Crime sponsored by the NILECJ.

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Section IX

For the Good of All:

The Progressive Tradition in Prison Reform

David J. Rothman

In criminal justice, as in so many other areas of American life, the Progressive era marked a major dividing point. Reformers in the opening decades of the twentieth century not only broke with inherited traditions but laid out an agenda for social and economic change that would dominate through the 1950's. They established both the means and the ends for a liberal social policy, the tactics and the goals that enlightened and benevolent-minded citizens were to pursue. Hence, this period has a particular fascination for the historian of criminal justice as well as for social policy analysts. To the historian, Progressivism represents a critical moment in modernization, when the nineteenth century gave way to the twentieth in substantive terms. To the policy analysts, it stands for the origins of all that we are in revolt against today. From prisons to mental hospitals to schools, the Progressive platform is under current attack. Critics may be less certain of where to move, but they do agree on what they wish to avoid.

Nowhere do these generalizations hold more force than in criminal justice. It was the Progressives, for example, that enacted probation and parole statutes; they invented the juvenile court and offered a new model for prisons and juvenile reformatories. Looking at their programs from the perspective of the nineteenth century, the Progressives were the successors to the Jacksonians, in the sense that

presupposed that surveillance and assistance could join together, that the roles of counselor and police officer were identical. Let the probation officer always bear in mind," one of the program's leading advocates told his colleagues, "that he is not only a social worker, but that he is also an officer of the court and the state." The therapeutic and police functions, however, were not in opposition.

"He need not worry, he will still help the prisoner.... For the great social discovery of these days...is just this: The interest of the prisoner and the interest of the state are, in fact, identical; the best service to one is also the best service to the other."

This premise was equally relevant to the juvenile court. "Its great discovery," in the words of another reformer, was that "individual welfare coincided with the well-being of the state. Humanitarian and social considerations thus recommend one and the same procedure." The court could simultaneously and without contradiction promote "sympathy, justice and even the self interest of society." And the judge who decided that a delinquent should be sentenced to a training school was not elevating the safety of the community over the welfare of the child. To incarcerate the young, as the most important decision upholding the constitutionality of the juvenile court ruled, was not to deprive them of their liberty but to exercise "the wholesome restraint which a

the duty of criminal justice to adapt him to his society. Still, whatever the interpretation, environmental or psychological, both schools agreed wholeheartedly on the need to explore in depth the state of the criminal himself, not just to pass on what he had actually done. Accordingly, criminal justice officials required vast discretionary authority. Only by giving them wide latitude would it be possible to move from punishing the criminal to treating and rehabilitating him.

To Progressives, this formulation seemed so much superior to inherited practices (or, more accurately, what they defined as inherited practices), that they were remarkably confident of the wisdom of their program. From their perspective, the alternative to treatment was vengeance, a motive which might have been acceptable in more primitive societies but certainly had no place in their own. Moreover, when justice represented nothing more than the infliction of punishment, the offender would inevitably repeat his crime; he was likely to come out of prison embittered and ready to seek his retribution. A treatment orientation, on the other hand, was far more humane and effective. To make this point, Progressives delighted in using a rhetoric of medical treatment, offering analogies drawn from medicine. In criminal justice, as with disease, the purpose of intervention should be to cure; and just as doctors enjoyed wide discretion in treating and releasing

life in the normal society. It was absurd to force men to live in silence or to march in lock step when the ultimate purpose of prison life should be to prepare them for reentry into the community. It was ridiculous to cut them off from intercourse with the outside community when the point was to be training them to become lawful members of society. No Progressive spokesman made the case for this position more forcefully than Thomas Osborne, and his eagerness to bring sports, exercise, social occasions, movies, and even self-rule inside the prisons represented the goal of all Progressive reformers.

At the same time, another design attracted the Progressives, a model of the prison as hospital. Particularly those who were convinced of the psychological (as opposed to environmental) causes of deviancy felt comfortable with this scheme. For them, the prison was to institute classification schemes, employ psychologists and psychiatrists to diagnose and treat the various types of criminals, and establish the individual programs that would be rehabilitative for each of them. Reformers devoted enormous attention to devising taxonomies for criminals. They distinguished between "socially adaptable" and "socially unadaptable" offenders, or between "situational cases," ("the man whose circumstances and situation are at the bottom of his difficulties,") and "asocial cases," ("the men who believed in belonging to the gang who are going to

from premise to program with a sure sense of the possibilities for improving the prison system, more, the possibility of controlling if not eradicating crime.

However attractive the model in its formulation, actuality was far different. No sooner does one move to examine the realities of prison life from 1900 through the 1950's than one discovers the incredible gap that separated rhetoric from performance. Yes, the Progressive principles did have some bearing on the daily prison routine. Over these years, prison bands, commissaries, freedom of the yard, movies, radios, abolition of rules of silence and lock step were all implemented in one or another jurisdiction; and many prisons did institute classification systems and hire psychologists for their staffs. But nowhere, and this sweeping generalization is valid, were prisons able to become normal communities or hospitals. There is no need to belabor the point here; all of the failings of prisons need not be recited. Suffice it to say that substituting baggy grey pants for stripes did not make for a normal community; nor did placing one psychologist on a staff to serve 3,000 inmates constitute meaningful treatment. Instead, it is more important to examine the causes of failure, to understand the dynamics that undercut the reform effort.

The list of problems is certainly a long one. The disparity between rhetoric and reality is so great that there is no

analysis that pursues this matter poses an even more fundamental question. Is it possible to guard in a humane way? Can a prison system step short of cruel and unusual punishment? The answer to both these queries may well be, no.

Let us address first the easier of the two issues. With some confidence the historian can conclude that among the most important failures of the Progressive design was the fact that the needs of custody again and again undercut the reform program. The Progressive attempt to make prisons into places of treatment, into normal settings, ran up against the need to hold men securely, to administer a system that was escape-proof, that did the job of incapacitation. Evidence for this statement abounds. Almost without exception, prison wardens were qualified only to administer a custodial program. Recruitment ran from police work to prison work. So too, employment in other prison posts, from the assistant warden to the rank and file guards, followed this identical pattern. Practically no training programs existed for any prison staff, but what few efforts were made involved exclusively the use of firearms and the maintenance of discipline. Further, the rules and regulations of prison life looked exclusively to custody, to preventing riots and escape, to holding prisoners securely. However staunchly Progressives might urge making a prison like the community, when it came to internal discipline there was no room for justice--security was the first and last

all clear, however, that solitary, as actually administered in these decades (with a total deprivation of all comforts, most sanitary facilities, and food) was less brutal than the whip. Even more important, solitary did not serve to outlaw the whip but rather, for the difficult case, solitary came first and then the whip.

Surviving documents do not allow historians to produce quantitative measurement of punishment. Prisons, like Southern plantations, either did not keep records or kept untrustworthy records of the exercise of punishment. More than one investigatory body was frustrated by the fact that "the method of discipline is the most difficult thing to cover because the prison officials are sensitive about it and the prisoners are intimidated from testifying." Nevertheless, it is not difficult to come to the conclusion that punishment not only undercut a rehabilitative effort but was altogether cruel.

It is useful to review one incident in detail, not because it offers a clue to the extent of punishment, but because it clarifies the dynamics at work in prison punishment. In the spring of 1939, 41 inmates in San Quentin went on a hunger strike in order to protest the institution's food; they refused to enter the mess hall or to go to work. The principal keeper immediately confined them to solitary, and what happened to them there became the subject of an investigation. First, the San Quentin Prison Board conducted closed hearings on

affairs and no one had the right to second-guess them.

"There is no authority by which you can limit the amount or the severity of the punishment, provided the circumstances in the original instance required it or justified it." Such a notion as cruel or unusual punishment had no meaning within a prison. Everything depended upon the amount of provocation and the force needed to maintain control.

To substantiate these views, the guard in charge of solitary, one Lewis, explained why the punishment escalated. A back-up sanction was always required within a prison. If one penalty did not work, a tougher one had to come next--and this was always the case. When Lewis had arrived at San Quentin, solitary was too lax. "It had been a failure... the men had no further fear of solitary.... The men would lay back in there; they would talk and laugh and raise all the trouble that they cared to... solitary to them was a joke." As Lewis took charge, the warden's only instructions were "to keep order in solitary." So first he instituted a rule of silence; then he took away reading materials and next, the right to smoke; still "they didn't mind solitary" so he "pinched down a little harder." He prohibited the men from sitting on their beds during the day. "But I still found that some men would stay in there week after week." So he came up with something new: drawing a 22-inch circle on the floor and having the inmates stand in it for five hours a day, without moving--

forms of correction did not work, harsher ones had to be employed, and the process of escalation had an inevitability about it. If solitary was not sufficient to compel obedience, then corporal punishment had to follow, or else the prison would become a circus. Without embarrassment, prison officials were prepared to act upon and defend publicly the notion that "there is no authority by which you can limit the amount or the severity of the punishment, provided the circumstances in the original instance required it or justified it." And with this pronouncement we come to the essence of prison administration, to the need, first and last, to keep order, a need which simply did not allow a system, even had the technology been available, to implement a rehabilitative program.

Rather than offer further examples to confirm this point (in a forthcoming publication, I will relate the history of the Norfolk penitentiary in the early 1930's, to demonstrate that even an experimental prison designed expressly to carry out rehabilitation soon became more like San Quentin than a community or a hospital), let us here explore a rather intriguing sort of confirmatory evidence. The 1930's was a period in which prison movies enjoyed unprecedented popularity. In fact, Americans took their image of the prison life from these films and the image was, on the whole, accurate. (For example, one favorite film technique was to spin a newspaper around and then rest on its headline, "Parolee commits...." The scene



animal-like men who would stop at nothing. This scene served the movie makers well in two distinct ways. First, it allowed them to have their hero foil the escape, show his true colors, and be rewarded with release. The escape, in other words, gave them a way to get their hero out of prison. But it also served a second function. With the escape foiled, the hero and the warden would engage in a brief dialogue to the effect that the prison was filled with desperate men who would stop at nothing to escape. In fact, when the plot to escape was foiled, its leader would, like a savage beast, bring about his own death by leaping from the wall or choosing to run for it although gunfire was all around him. And so the hero and the warden would acknowledge that although prisons were terrible places, there really was no element of choice here--given the needs of custody, the institution could organize itself in no other way. The inmates had to be incapacitated at all costs--and the prison routine had to satisfy this need. In sum, in the film as in real life, the need of custody took first place. Everything had to be forgiven in the name of security.

This statement brings us to the second and much more difficult problem: on the basis of this historical record what conclusions may be drawn for present-day policy analysts? To frame the issue more specifically, on the basis of an understanding of this dynamic, is it appropriate to conclude

with the techniques employed. We would be well aware from the outset that the program only worked with a group of already cooperative prisoners and, thus, we would understand that the system had only limited, not general, applicability. Second, we would also recognize that although it might be possible to administer one decent institution, that institution would depend, necessarily, upon the presence of a less desirable back-up. Yes, prison A might be able to reduce its custodial needs, but only by relying upon the security of prison B. One can tamper with a single and distinct element in the system, not with the system as a whole.

It may be appropriate (and the tentative language is purposeful) to move even beyond this position in order to suggest that not only is the burden of proof shifted onto the innovator, but that he has an extraordinary difficult presumption to overcome: absent the most compelling justification, we remain suspect not only about the ability to deliver rehabilitation, but the ability to maintain a humane level of custody. This point is particularly relevant at this moment because it has become popular to argue that strictly custodial prisons, which do not depend upon the rationale of rehabilitation, can serve incapacitative purposes, and serve them decently. While a rationale of incapacitation may be more honest than a rehabilitative one,

it does lend the impression that one can hold the inmate and not do harm, that confinement and decency throughout all sectors of an incarcerative system can be achieved.

To those who would hold to such a position, who would promote incapacitation as a legitimate purpose and justify incarceration through it, the issue of responding to the difficult case, the escalation of sanctions, is no less pressing. They, too, are duty bound to explain how they can administer a system of incarceration that is not cruel. Otherwise, we will have to make a calculation that they do not suggest: Is so much incarceration worth so much brutality?

To the degree that one is persuaded of the validity of the dynamic described here, then a series of policy statements become appropriate. Since the historical record does not suggest alternatives to incarceration, and since to date there is a marked scarcity of suggestions as to how punishment of serious offenders can be carried out without incarceration, this analysis does not lead to an abolitionist position, to breaking down the prison walls once and for all. But it does point to other, less dramatic but no less important, conclusions. First, given the intrinsic character of the system, it would seem not only fair but wise to begin to dispense sentence time in spoonfuls (more like Holland and Denmark), than in bucketfuls, which has characterized American sentencing practices from the nineteenth century to the present. Second, the doubtful cases

should be excluded from an incarcerative sanction. Wherever possible, offenders should be spared incapacitation because of its uncontrollable excesses. Third, this approach would place a new premium on imaginative solutions to the problems of crime, so that we would be far more prepared than we are now to experiment with alternatives. At the moment such experimentation seems incidental to the system, the work of a reformer here or there. The effort should be mainstream, one of the first obligations of criminal justice administrators.

It may not be possible in this society to abolish altogether a system of incarceration. However, it may be possible to resort to it less frequently, to use it for fewer people, and for shorter times. If the historical record moved twentieth century punishment in that direction, it would have made a major contribution to promoting decency in criminal justice.

**END**