

CALIFORNIA'S PRISON SYSTEM: WE MUST BRING IT INTO THE TWENTIETH CENTURY

By WALTER KARABIAN

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California operates the largest penal system in the nation, and the best. Yet, if you were to enter this progressive system as a misfit in 1971, you would be virtually certain to emerge in 1975 not only less able to function on the outside, but much more defeated and dangerous than you were when you entered.

The California correctional system, praised by no less a penal authority than Karl Menninger as "far out in the lead among the states, with excellent programs of work, education, vocational training, medical services, group counseling, and other rehabilitative activities,"¹ is critically close to failure. If it does indeed represent the optimum to be found in the 50 states, one despairs to imagine what conditions are like in the other 49.

Anyone remotely connected with criminal justice in California will tell you that the system itself is in dire need of rehabilitation. The only question is how—and how quickly—this can be done. Can we solve the problems besetting our criminal and correctional procedures with money, more trained personnel, a more humane and far-sighted treatment program for the men in our prisons? Of course we can. But given the temper and priorities of the times, these resources are not likely to be forthcoming. Yet, from a purely pragmatic point of view, much can be done by simply beefing up

existing programs and putting into practice inexpensive but highly promising ideas for penal reform.

There are nearly 30,000 felony offenders in California's prisons. Roughly half this number are non-white. The prototypical inmate is young, undereducated and was chronically unemployed on the outside. His life experiences have been predominantly negative. His self-image is low, his sensitivity to injustice high. He is vulnerable at every point and he knows it.

From this man and his counterparts behind bars, one hears an almost unanimous litany of trouble. Facilities are 50 percent overcrowded. To survive at all, he must endure a pitiless assault on the last vestiges of his identity and individuality: homosexual rape, hours of idleness, inadequate or nonexistent medical and psychiatric care, smoldering racial tensions often fired to flashpoint by untrained and openly hostile guards, bad food, filth—the list is long. But, as degrading as these conditions are, the overwhelming concern of this man is the unyielding and mindless nature of the bu-

1. At a recent news conference, however, following his address before a NAACP Legal Defense Fund seminar in Los Angeles, Menninger referred to all American prison systems as a "shambles—beastly, unworkable and expensive." Their sole effect, he said, is "to degrade and humiliate people and rob them of their human dignity." *Los Angeles Times*, May 23, 1971.

reaucracy that manipulates his life, not only while he is in custody, but after he has been released on parole.

For him, the twin symbols of this bu-reaucracy are the indeterminate sentence and a wholly deficient rehabilitation program.

California pioneered the adoption of the indeterminate sentence, whereby a felony offender is remanded to prison for "the time prescribed by law" rather than a time certain. The Legislature sets minimum and maximum terms for each offense. As conceived by early reformers, the indeterminate sentence was basic to rehabilitation and early release, providing the flexibility necessary for weeding out of the prison population those persons who, but for the time certain of their commitment, could be leading useful lives on the outside. In theory, at least, it transfers the sentencing function from the courts to the professional prison staff, persons trained to observe the inmate at close range and make a judgment as to his fitness for parole not on the basis of his crime, but on the circumstances surrounding it and the subsequent "modification of anti-social behavior" he demonstrates in prison. It allows the "rehabilitated" inmate to be released sooner than would be possible under a fixed sentence.

In practice, however, prison administrators have found the indeterminate sentence to be a formidable disciplinary weapon, a weapon against which there is virtually no defense. As applied today, the indeterminate sentence assures much longer sentences than would be imposed by the courts for all but the most docile inmates. It comes down hardest, of course, on "trouble-makers," a group variously described as religious and political nonconformists, ethnic "leaders," psychotics, "writ-writers" in pursuit of due process, and behavioral deviants, depending upon the bias of the decision-maker. "From the vindictive guard who sets out to build a record against some individual, to the parole board, the indeterminate sentence grants Corrections the power to play God with the lives of inmates."²

That prison officials should seek discretion over sentencing is not surprising. They are, after all, saddled with the job of managing the prisons, and "from the official's point of view a first requisite is effective influence over inmate conduct. So long as inmates desire freedom, restrictions on freedom — threatened or actual — will provide a possible strategy for control, for effective influence; and the Correctional Establishment as a whole is premised on the desire of inmates for freedom."³

In fact, of course, the actual length of an individual's sentence is determined by the Adult Authority, a nine-member board consisting of the Director of the Department of Corrections and eight gubernatorial appointees. While the Penal Code states that members should "have a varied and sympathetic interest in corrections, sociology, law, law enforcement, and education,"⁴ the present board is made up primarily of former policemen, prosecutors, FBI and Corrections personnel. This body serves as the parole board, charged to "determine and re-determine" the length of time a man must serve. It has the power to make a judicial determination of sentence, to retract that determination and refix sentence, to grant parole and to revoke parole, and its decisions are rarely subject to review or appeal.

Dividing into two-member panels, assisted by case-hearing representatives, the Adult Authority renders 30,000 to 40,000 determinations yearly. The inevitable result of this crushing caseload is that an inmate's hearing before the Adult Authority, the outcome of which will determine whether or not to fix sentence and grant parole,⁵ generally lasts a scant 10 minutes. And these 10 minutes are not exclusively his—while one member listens to the proceedings, the other

2. Jessica Mitford, "Kind and Usual Punishment in California," *The Atlantic Monthly*, May, 1971.

3. Sheldon Menninger, *Strategies of Control*, University of California, Center for the Study of Law and Society, 1968.

4. California Penal Code, Section 5705.

5. The Adult Authority is under no legal obligation to set the sentence and generally does not do so until it is ready to grant parole.

is reading the dossier on the next inmate.

The panel's decision is based on information to be found in the prisoner's file,⁶ a collection of material, little of it sworn, consisting of whatever the authorities know about the man: comments of the trial judge and the prosecutor, the probation officer's report, psychiatric evaluation, reports by guards of "deviant" behavior (which can run the spectrum from refusal to eat breakfast to attempted suicide)⁷ and disciplinary infractions. While the guards and other prison personnel are encouraged to familiarize themselves with the prisoner's folder, the prisoner is at no time permitted to see it. Further, if parole is denied, the prisoner is not entitled to know why it is denied, nor is his attorney. No transcript is made of the hearing; family members, the press and legal counsel are all excluded from the proceedings.

Should an inmate's case for parole survive an examination of his folder, it remains vulnerable to the whims and biases of the parole panel. Lacking any guidelines of an official nature, California's parole policy is subjective rather than scientific. Inmates find that as the parole panels rotate, so do the indicia of "rehabilitation."⁸

Thus, determination of sentence parole is almost totally discretionary, and its arbitrary exercise has resulted in abuses of every kind. Examples abound of parole denials in clear violation of constitutional guarantees.

THE RESULT of the indeterminate sentence has been that the median time served in prison has risen dramatically in the past decade. In 1960, the median time served in California was 24 months; by 1968 it had risen to 36 months, an increase of 50 percent in eight years, and it continues to rise.⁹ Yet, the 1970 report of the Assembly Select Committee on the Administration of Justice confirms what modern criminologists have been saying for years, that the character of convicted felons does not alter appreciably from

one year to the next, that "persons committed to prison in 1960 . . . were essentially the same type of person as those committed for a similar offense in 1968."

The man committed to prison today is no more dangerous, hostile or menacing to society than the felon committed last year or the year before. There is, therefore, no logic to justify the increase in time served. It should be noted that the reluctance of the Adult Authority to release men from custody has not reduced California's increasing crime rate.

Longer sentences are costly to the State;¹⁰ but far worse, they do not result in good behavior after release. On the contrary, persons serving longer terms are less likely to readjust on the outside than those serving short terms.

In fact, studies show that persons serving longer terms recidivate at a rate 10 percent higher than short termers.

6. There is no procedural guarantee that the parole board will review all the facts concerning an individual case: "At present, a counselor spends from five to 15 minutes with the inmate in evaluating his 'progress' of the previous year. (Inmates) wonder, what kind of an accurate evaluation even a qualified person could make in that length of time?" Institute for the Study of Crime and Delinquency, (45) p. 78.

7. The Caucus of Black Elected Officials of the California State Legislature, in its 1970 report on conditions at Soledad, made the following recommendations: "We strongly urge that accusations of improper behavior brought against inmates for minor offenses — like refusal to shave when no mirror is available — be excluded from an inmate's permanent dossier and that no indication of such accusations reach the eyes of the Adult Authority (emphasis theirs). Black Caucus Report, "Treatment of Prisoners at California Training Facility at Soledad Central," The California Legislature, p. 11, 1970.

8. ". . . the time an individual spends in prison seems to depend on three factors: (1) The values and feelings of individual parole board members. (2) The 'mood' of the public. (3) Institution population pressures." California Legislature, Assembly Criminal Procedure Committee, *Deterrent Effects of Criminal Sanctions*, p. 40, May, 1968.

9. See Adult Authority Manual of Statistics for 1945 through 1966, March, 1967, Table 1, and *Analysis of the Budget Bill, 1969-70*, p. 131.

10. According to the California Assembly Office of Research, the institutional cost per year of maintaining an inmate is \$3,012. As we have noted, the average sentence is 36 months, which raises this figure to \$9,036, per commitment episode. (These figures represent the saving to the State per inmate if the institution were closed.)

More compelling, since 30 percent of this population returns to prison within two years, the cost of an average "unsuccessful" commitment episode, based upon a return to prison for 18 months on a technical violation, is more than \$13,000. The average cost for those returned to prison from parole with a new felony conviction is more than \$18,000. Such offenders usually spend 36 months in prison before being re-paroled.

In effect, California's parole policyacerbates the problems it was designed to solve. It operates as a mindless, moving conveyor belt upon which our felons are tossed with total disregard for the human pileup at the other end.

The cost to the individual in prison, however, is beyond measure. He does not know how much time he will serve until the end of his sentence, since his sentence is not fixed until that time. If parole is denied he has no recourse. The meting out of an indeterminate sentence amounts to summary injustice to him, a major source of anger, resentment, bitterness and defeat. Psychologically, he faces more uncertainty than most in our society. He cannot plan or prepare for the future. He is in every way the pawn of a swollen bureaucracy. It is no wonder that a crisis in our prisons is upon us.

The legislation I introduced in the 1971 Session of the Legislature will buy time, time to devise and expedite criminals and correctional procedures to reduce permanently our prison population, an essential first step to long-range penal reform. It includes a measure that would require parole of most prisoners at the completion of the minimum sentence.¹¹ Under this proposal, the Adult Authority would continue to determine sentence length, but a felon would serve only the legal minimum behind bars, and the balance on parole. Further, if parole were denied, the burden of proof would rest with the parole board, and grounds for denial would be reduced to clearly discernible facts relating to the nature of the original crime and the prisoners' history of excessive criminality or violence. This proposal also reduces to five the members of the Adult Authority and specifies that, in addition to the Director of Corrections, they shall consist of an experienced criminal attorney, a behavioral scientist, a person trained in the education of disadvantaged persons, and a law enforcement administrator, all "with substantial records of achievement."

A second measure¹² provides that the Adult Authority officially "show cause"

whenever the automatic parole is denied by submitting a written report of each denial which meets specifications to be determined by the Bureau of Criminal Statistics.

This proposal would bring our parole policy under critical scrutiny and eliminate irregularities inherent in any purely arbitrary exercise of authority.

An equally important component of this legislative package seeks to put some economic bone and tissue on the Department of Corrections' rehabilitative arm, California Correctional Industries.¹³ Established to provide "training in work habits and work skills to the inmates as a means of improving employment opportunities after release" and "prevent idleness," this program is self-supporting and even modestly profitable. Yet, the entire program employs barely 10 percent of the State's prison population.

According to a recent estimate, there is at least a nine-month waiting period to get into Industries. And, for the fortunate few who make it, many of the jobs are sadly ill-suited to prepare them for life on the outside. At Soledad prison, for instance, where more than half of the 2,787 inmates will be returned to the urban centers, only 400 are working. Of the 400, nearly half work in dairy and hog ranch programs. At Folsom, about 150 inmates of the 600 employed are learning to make license plates, a skill which cannot be utilized outside prison.

In addition, many jobs being done on prison equipment by inmates are automated on the outside; thus, men train for obsolete work. But to automate in prison would further reduce the number of jobs in Correctional Industries, so inmates continue to do busy work on outdated equipment for an outrageously low pay scale that ranges from two cents to 16 cents an hour.

Finally, prison-made goods are often inferior to those manufactured in private industry. Recently, the State requested

11. Assembly Bill 2064. A similar provision is included in Assembly Bill 483, introduced by Assemblyman Leo J. Ryan.

12. Assembly Bill 2816.

13. Assembly Bill 2062.

clothing manufacturers to submit, along with their bid, assessments as to the durability of their shorts, T-shirts and denims. These estimates revealed that the quality of prison-made clothing was so low and frequency of replacement so high that the State paid 12 percent more because it used Correctional Industries clothing.

Since the Correctional Industries program must be self-supporting, and the productivity per inmate is as little as one-sixth of that of a worker in private industry, the profit margin is slim indeed. At that, where private industry might use a portion of its profits to expand operations or purchase new equipment, much of the Correctional Industries are turned over to the States' General Fund.

Recently the textile mill at San Quentin was closed; so was the cannery at Folsom. Yet, the most innovative proposal in last year's Correctional Industries report, was for a "vast plan for providing several new laundries consistent with the long-range needs of Mental Hygiene."

Corrections officials are not unaware of the deficiencies of the Industries program. They know that there are too few jobs. But, they also know that inmate participation in other rehabilitative programs, such as vocational training and academic courses, is also woefully inadequate. These efforts, well-intended though they are, are failing. They reach only a fraction of the State's inmates. They occupy less than four hours a day of the prisoners they reach.

The inadequacy of Correctional Industries reflects both political pressure and economic reality. Within the 103 million dollar prison budget, there is no allocation for the subsidy of this program. (Only five cents of every prison dollar is now spent on rehabilitation.) Even if the economy were stronger and funds available, it is unlikely that the non-voting prison population would receive them.

To make matters worse, private industry has generally opposed measures which might increase Industries' production or place Industries on a more competitive footing — this in spite of the fact that

the total Industries output comprises only 0.1 percent of total manufacturing and wholesale sales in California.

As it is, prison-made products may be sold only to tax-supported agencies, and total production is limited by law. Yet, when Folsom sought to reduce losses in its metal-stamping industries by expanding to metal desks, private industry lobbied against it so vigorously that it succeeded in limiting the sale of those desks to State offices only. Similarly, fear of competition has prompted organized labor to lobby against efforts to develop prison industry.

The legislation I have proposed would neutralize the conflict between Correctional Industries and private industry. It would expand employment and training opportunities for inmates by providing financial incentives to private industries to expand their operations to include the State's prisons. Among these incentives are tax deductions to participating firms for a percentage of the training costs and wages of inmates; payment by the State of a portion of inmate wages for a fixed period of time while training; and a provision entitling a participating firm to a 10 percent price preference over out-of-state businesses on purchases made by the State.¹⁴

Participating firms would be required to hire their inmate employees upon their release if their performance while in prison had been satisfactory.

Products and profits from a participating firm's prison branch would, of course, belong to the firm, but inmates would be included within any labor contract between the private firm and its other employees. Inmates would also be entitled to join unions as dues-paying members.

Inmates in the program would reimburse the State from their earnings for the reasonable cost of their confinement.

14. By judicial determination, the California Preference Law, Section 4330, which entitled California firms to a five percent price preference over out-of-state businesses, was declared unconstitutional in 1970 (53 Ops. Atty. Gen. 72, 2/11/70), but contracts entered into by the State of California prior to this ruling are legal and binding on all the parties to the contract.

The balance of an inmate's earnings would be applied to pay any personal debt or other obligations, the remainder to be held in trust in a savings account until the inmate is released.

This plan would create a productive environment within the prisons. It would revitalize the concept of rehabilitation by providing inmates with realistic training for work on the outside, a marketable skill, the capability of providing for his family while he is confined, and money in the bank when he is released.

Nearly 80 percent of California's convicts go to prison for non-violent crimes. Before their prison experience, they are not unlike their counterparts on the outside. But, once in prison, dehumanizing pressures rapidly corrode any ties that remain with the outside, to the end that most convicts re-enter civilian life full of rage and bitterness toward the system that locked them up.

If we can begin to stimulate in the men inside the walls the rhythm and routine of life and work on the outside,¹⁵ we might be able to restore some semblance of balance and reason to life inside. At the very least, the system will cease to destroy men as inexorably as it does now.

Currently, there are nearly 100 bills pending in the California Legislature, touching almost every aspect of prison reform. But in the final analysis, the most enlightened measures can only bring cosmetic relief to a system which has simply grown too large to be adequately or intelligently administered.

We are, as I have said, buying the time necessary to achieve fundamental prison reform. A basic requisite to that reform is a reduction in the prison population.

Ironically, while there is little disagreement among penal experts that prisons fail as a means of punishment or as instruments with which to change criminal behavior, prison overcrowding, rather than humanitarian concern, emerges as the most compelling liberalizing force in the correctional field.

Nationwide, new programs are being developed to relieve the crush of prison population by the treatment and control

of offenders in the community rather than in prison. (In Los Angeles County, 2,000 probation officers supervise 61,300 adults and juveniles in the community, and the results, in terms of recidivism, have been impressive.)¹⁶ In addition to release under supervision, reformers are advocating — and trying — weekend leaves, work-release programs, outside classes and halfway houses as alternatives to simple incarceration.

In my view, however, a permanent reduction in prison population can only come about through a careful redefinition of the criminal law to exclude offenses against private morality and taste. Assuming the essential function of the criminal law to be the protection of our persons and property, the American tradition of using it also to regulate the moral conduct of the individual citizen is a major cause of prison overpopulation. Worse, this "overreach" of the criminal law has so overloaded our entire criminal justice system, that it is wholly defective as a means of protecting us against those activities which are the proper concern of the criminal law — crimes of violence, serious depredations of property, and the exploitation of the defenseless and the young.

Judges, corrections officers and policemen agree that they could serve with far greater efficiency if the system were relieved of that class of offense known as "victimless crime," offenses such as prostitution, abortion, homosexuality, drunkenness, vagrancy, gambling and drug use. According to the President's Commission on Law Enforcement and the Administration of Justice, these offenses account for fully half of the six million non-traffic arrests of adults per year in the United States. Because these crimes lack victims, that is complainants who seek the protec-

15. Another proposal in this legislative package, AB 2063, would provide facilities to enable inmates to spend two-day visits, at least three times a year, with those persons who have been approved on the inmate's visitation or correspondence list. The inhuman sexual deprivation endured by prison inmates has produced a prison environment where homosexual rape is commonplace; in addition, prolonged separation has resulted in the destruction of the marriages of countless convicts.

16. "Justice on Trial," *Newsweek*, March 8, 1971.

tion of the criminal law, there is growing sentiment among the experts that they are not the legitimate concern of the criminal law.

In his excellent book on the control of crime, Norval Morris states, "In this country we have . . . a long tradition of using (the criminal law) as an instrument for coercing men to virtue. It is a singularly inept instrument for that purpose. It is also an unduly costly one, both in terms of harm done and in terms of the neglect of the proper tasks of law enforcement."¹⁷

Most of our legislation concerning narcotics, gambling and sexual behavior is based on the erroneous assumption that the criminal law has the capacity to alter human proclivities. Yet, there is no evidence that the incursion of the criminal law into the spheres of social welfare and private morality has brought about the Millenium. We do not drink less alcohol or take less drugs, nor are we sexually more strait-laced by dint of criminal sanction.¹⁸

As a case in point, examine what happened in California after the Legislature had imposed a mandatory sentence of one to 10 years in prison for the possession of marijuana. In 1961, the Legislature removed the sentence of 0-12 months in county jail as an optional penalty for possession, and imposed the stiffer sentence. At the same time, it also increased penalties for sale and for offenders with prior convictions.

Did these sanctions limit the sale or possession of marijuana? On the contrary. In 1961, the year the sanctions were imposed, there were 3,500 arrests for marijuana offenses. By 1966 this figure had increased to 18,000, a rise of 400 percent.

By 1970, 43 percent of *all* felony arrests in California were drug arrests.

Statistics relating to arrests and convictions for other "victimless" crimes seem to support the proposition that criminal sanctions serve almost no deterrent purpose. In fact, the overreach of the law contributes to the crime prob-

lem. We have only to remember that the "Noble Experiment" of 1913 spawned more than the romantic era of bathtub gin and speakeasies. It also helped to finance the largest criminal industry in the modern world.

I am not unmindful of the fact that a review of the criminal law raises many legal and administrative issues; there are legitimate objections to the repeal of certain criminal statutes. My point is that inevitably we will have to undertake such a review as an alternative to the penal approach, which is both wasteful and futile. As Myrl Alexander, director of the Federal Bureau of Prisons noted, "We all recognize that the traditional institutions of the past haven't produced the desired results . . . imprisonment is a failure."¹⁹

Our resources in manpower and money are by no means infinite. We have a clear responsibility to apprehend and confine the dangerous offender, and to rehabilitate him when possible. We cannot hope to succeed in even this limited pursuit if we remain wedded to a concept of criminal law which does not distinguish between the felon who steals property and endangers lives, and the non-violent offender who violates private codes of social conduct. Imprisonment is not the answer to the national problems such an offender creates or the social displacements which spawn his behavior. We can no longer afford to pay the heavy concomitant costs of perpetuating a system which fails to come to grips with this reality.

17. Morris, Norval and Gordon Hawkins, *The Honest Politician's Guide to Crime Control*, Page 5.

18. There is some evidence that the extensive use of criminal sanctions may actually *decrease* the public safety. A recent study by Herbert Packer concluded, in a chapter on drug use, abortion, gambling, alcoholism and "white-collar" crime, that, "It is by no means clear that we can persuade the public to view conduct as wrongful by making it criminal. Law, even criminal law, simply is not that potent a weapon for social control. Our experience with the use of the criminal sanction during the Prohibition period suggests that the reverse is true . . . There is indeed some reason to fear that sensitivity toward the criminal sanction has decreased as the formal apparatus of the criminal law has been called on to deal with a wide variety of morally neutral conduct . . ." Packer, Herbert L., *The Limits of the Criminal Sanction*, page 359, 1968.

19. *Los Angeles Times*, November 17, 1968.