OUTSIDE LOOKING IN

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PREFACE

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Three years ago, when I worked as a Program Planning Officer in the U. S. Office of Education several staff members of the Bureau of Prisons tried valiantly to convince us that Office of Education programs should be extended to include concern for and support of education and training projects in correctional institutions. Funds were sought to support reading development programs, teacher training institutes and various research and demonstration projects. These efforts were met politely, but in the intramural discussions which followed, the prevailing opinion was that correctional education and training were not really the concern of the U. S. Office of Education. A small minority, which did not share this view, were able to deliver some token support for a modest number of projects, particularly as they related to the so-called "disadvantaged" or "culturally different" student population—who happened to be in prison. The Vocational Rehabilitation Administration (now SRS) in HEW was one of the few Federal agencies which offered early leadership in correctional assistance programs.

Now, three years later, the situation has changed radically. Many major Federal programs actively interpret their responsibilities to include concern and support for innovation and improvement in the law enforcement and criminal justice systems. The Manpower Development and Training Administration, Housing and Urban Development, the U. S. Office of Education, The Teacher Corps, The National Endowment for the Arts and Humanities, and many other Federal agencies are cooperating to bring the 20th Century into the criminal justice system of this country.

A major landmark, in recent years, was passage of the

Omnibus Crime Bill in 1968 and establishment of the Law Enforcement Assistance Administration. A special session of the ACA Centennial Convention and the Monographs which comprise this publication have been made possible by an LEAA grant. LEAA, and other sponsors of this effort, believe that an examination of the criminal justice system by a group of informed "outsiders" can contribute to sharpening our focus as we examine some old as well as some new problems. These activities are further evidence of the growing awareness and involvement in this country's correctional process.

Some people argue that the increasing costs of maintaining prisoner populations is the major reason for this increased awareness; others argue that we are maturing as a nation and our human values are improving. We leave to historians the resolution of these claims. The fact that prisons and prisoners are receiving increased attention is self-evident and gratifying, regardless of *"why."*

The invitation to so called "outsiders" to help in the change process is significant in a system which has primarily examined itself, from within, in the past. The unifying theme of the three papers which follow is that rapid change is critical. They all urge that we waste no time on trying to determine *why* the situation is as bad as it is and *who* is to blame. The consensus is unmistakable; the humane and economic waste in our correctional systems is profound and extensive and unnecessary. None argues for a perfect utopian world; each makes specific recommendations for practical and possible modifications. Each says that no one segment in our society or in "the establishment" can make the necessary changes alone. It needs the best in each and all of us.

It seems to me that only the most oversensitive and insecure among us will become defensive in reacting to the penetrating exposure and positive recommendations of these panelists. There is so much room for improvement that it is nonsensical to argue about details at this point. We need not wait for the grand design or the perfect solutions to begin immediately to build toward a just and effective "system."

OPENING REMARKS

RICHARD W. VELDE

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The field of Corrections has consistently been plagued with many inequities and inadequacies which have tended to minimize the development and implementation of effective treatment approaches and programs. Much of this dilemma has been associated with the absence of sufficient financial resources; however, this is by no means the only significant difficulty with which Corrections must contend. As indicated earlier, the Law Enforcement Assistance Administration of the U. S. Department of Justice, represents a major effort on the part of the Congress to provide federal support to units of State and local government for the development and implementation of programs that are directed toward improving and strengthening the criminal justice system.

The LEAA commitment to support efforts aimed at bringabout improvements in the Corrections system is reflected in the discretionary funds distribution carried out during the 1970 fiscal year. LEAA approved $7,902,541 in discretionary grants submitted under the Corrections Improvement Programs of the LEAA Corrections Program Division. These approved projects will undoubtedly complement the investments made in Corrections programs by each State under the LEAA "block grant" formula of fund allocation.

LEAA shares the "growing awareness" of Correctional needs that must be met in order to have an effective Correctional process as well as an efficient criminal justice system. Accordingly, the demonstrated concern to improve and strengthen the "system" of criminal justice will continue to guide LEAA program activities during subsequent allocation of financial assistance. The urgency for positive change is

underscored by the following presentations which have been prepared by professionals who possess the capability and experience to make such critical analyses and sound recommendations. The contention that all elements and segments of society must join together to launch a coordinated attack to improve the administration of criminal justice is well taken. It captures the tone of present (and future) LEAA endeavors to stimulate change by improving the criminal justice system through the effective use of federal assistance by units of State and local government.

FROM THE OUTSIDE LOOKING IN: IS YESTERDAY'S RACISM RELEVANT TO TODAY'S CORRECTIONS?

BY HONORABLE A. LEON HIGGINBOTHAM, JR., JUDGE

BIOGRAPHIC NOTE

Judge Higginbotham has served as Judge, U. S. District Court for the Eastern District of Pennsylvania since 1964. At the time of his appointment he was the youngest person to be appointed a Federal District Judge within 30 years. He received his BA from Antioch College and his LLB from Yale. He has served as a member of the Federal Trade Commission, appointed by President John F. Kennedy. Judge Higginbotham has received more than fifty local, regional and national honors and serves as Director and Trustee of numerous foundations, universities and Commissions. He is a Director of the NAACP Legal Defense and Educational Fund, a member of the Commission on Reform of Federal Criminal Laws and member and Vice-Chairman of the National Commission on the Causes and Prevention of Violence. Judge Higginbotham is a much sought after speaker, well known for his penetrating and courageous remarks, accompanied by a charismatic style—a rare combination.

SUMMARY

The failures within our correctional institutions are part of our larger failures throughout society. Racism, past and present, is a significant contributor to these failures. We must recognise that our Constitution was, in part, a racist document and for at least seventy-eight years, through the full force of law, it sanctioned racism and its devastating brutality.

Escalating crime and violence in the United States are by-products of this racism. The eradication of racism and its attendant pathology can do much to improve the criminal justice system. Negroes are conspiculously absent from administrative and supervisory ranks in correctional institutions and agencies and make up a disproportionately small part of line staff.

A simultaneous war against poverty and racism must accompany the war against crime.

The issue is: can we now move forward together and agree to spend the billions of dollars which are needed to eradicate the racism and its attendant failures in housing, employment, health care, education and the mis-administration of justice?

While on July 4, 1970, Bob Hope, Billy Graham, and 350,000 persons were celebrating "Honor America Day," in Washington, D. C., a prison riot was starting at Holmesburg Prison, Philadelphia, Pennsylvania.[1]

Throughout the nation, many were speaking about the "Living Spirit of the Fourth of July," super stars gave their talents; thousands gave their prayers, songs and cheers. For the Washington, D. C. celebration, President Nixon had said: "The Declaration of Independence is the greatest political achievement in the history of man. We are the beneficiaries of that achievement . . . yet there is something remaining to be done in order to make Honor America Day the kind of special occasion we all want it to be. It is my hope that each of us will take away not only our proud memories of this, but also the living spirit of the Fourth of July as well, a spirit that created a free and strong and independent nation. But as a spirit that can truly honor America not only today but always."

While Fourth of July orators were lauding the principles involved in our nation's first violent revolution, at Holmesburg, Pennsylvania, there was "Fighting between black and white prisoners, armed with knives, cleavers and other instruments seized from the chief steward's office" in "the worst riot Holmesburg has ever seen." "About four hundred of the thirteen hundred prisoners were involved in the disorder which started about 1:10 p.m., in the mess hall when a black prisoner punched a white guard who fell to the floor." Police Commissioner Rizzo said this "immediately set whites and blacks at each other, guards became involved and six were used as hostages. Some were beaten and at least one was stabbed before they were released when heavily armed police and dogs poured into the prison." Ninety per cent of the thirteen hundred Holmesburg prisoners are black.[2]

A week after the riot the superintendent of the prison at Holmesburg reported that they had "segregated the institution's white and black prisoners as a temporary emergency

[1] Earlier that week along with Cardinal Krol, the Managers of the Philadelphia Eagles football team and the Phillies baseball team, I had talked to Bob Hope in support of the "Honor America Day."

[2] The Philadelphia Inquirer reported that "Shortly after the outbreak began, rioters sent word they wanted to see United States District Judge A. Leon Higginbotham, Jr., a Negro. The jurist was in Ocean city." Though Commissioner Rizzo sent police officers out to find me, I could not be located since I was playing in an amateur tennis tournament.

measure to help prevent further outbreaks of violence." In the riot more than eighty prisoners and twenty-five guards were injured.

Superintendent Hendricks placed the blame on "hard-core black militants." The rioting was not totally racial. All of the black prisoners did not attack all of the whites. As Superintendent Hendricks reported some "black guards were stabbed by black inmates and many blacks came to the defense of whites." Yet, no one can deny the heavy racial components involved in these incidents.

The reaction to the riot has followed the traditional pattern. Many urging more rigid disciplinary procedures at the prison, some urging less discipline and more privileges, some insisting on expanding the number of guards and giving guards authority to carry guns. The State Board of Judges is initiating an investigation. The district attorney is initiating an investigation. The Philadelphia Bar Association has commented on the district attorney's investigation, and some citizens' groups have asserted their concerns and anxieties about overcrowded conditions at this 78 year old prison. But I have cited the happenings at Holmesburg because they symbolize a more basic issue than just another riot: the issue of the interrelationship between the riot of July 4, 1970 and our nation's failures in Philadelphia on July 4, 1776. Perhaps the riot asks us: can we have long term racial peace or justice within correctional institutions without a determined commitment to obliterate racism in our society generally? Perhaps the riots pose for each professional in corrections the question: have you personally contributed to prison rioting by sanctioning overt racism or by remaining a part of a silent majority which fails to condemn racism or fails to actively work towards its eradication? Perhaps the riot begs us to look honestly at our nation's true racial heritage and to put today's problems in a fair and honest racial historical perspective. *Perhaps the rioting requires us to answer the question of why it is that so many men have become, in the words of Superintendent Hendricks, "hard core black militants."*

Obviously many aspects of our correctional system must be improved. Nevertheless, I submit that if we fail simultaneously to deal with the patent racism in and outside of our institutions, then many other improvements will be of mini-

mum value. Many are anxious to speak about the general failures of our correctional institutions, but only a few are willing to talk with candor on the public record about racism, past and present, in our society, and the past and present racism in our correctional institutions. To this vacuum of inattention I direct my remarks. To some extent I may annoy many of you. For there are bitter racial truths of the past which many would like to forget. And there are difficult problems of the present which may seem almost unsolvable. But we do not aid the cause of justice by acting as if these problems are non-existent or can be solved merely by waiting until tomorrow.

Perhaps we can gain some insights from the story about the New England judge who presided over a suburban juvenile court. Above his chair in his mahogany-paneled courtroom was a huge picture of George Washington. In making inquiries to ascertain whether a particular juvenile was fit for probation, the judge would ask two questions. The first question was, "Who is the man in back of me?" If the boy responded, "George Washington," the judge thought that the juvenile had sufficient intellectual acumen to perhaps be amenable to the process of reasoning. Then he would ask the juvenile, "What was George Washington most famous for?" If the juvenile instinctively replied, "He never told a lie," the judge felt that the juvenile had then demonstrated sufficient moral character to be deemed worthy of probation.

Finally, one day, a black lad charged with delinquency came before the New England judge. As some of you may know, in the urban centers and in the suburban centers black and white are not always in perfect communication, and the black boy had not learned the judge's interrogation game which all of the white boys knew. To the first question asked the black boy instantly replied, "George Washington." To the second question, "What is that man most famous for?" the young black boy hesitated. He looked at the floor, then he looked up at the ceiling. The judge repeated his question, "What is that man most famous for?" Then, without batting an eye, the boy looked directly at the judge and said, "Sir, he is most famous for owning slaves." And thus, in the two different responses you have capsuled the issue of law, order and racism.

I submit that there is an inter-relationship between our failures on July 4, 1776 and what happens in prison racial riots in 1970. Let us start out by honestly facing the issue of what was the nature and breadth of our democracy during those good old days of our forefathers. There has always been a fundamental ambiguity in the collective commitment of this society to the ideals upon which it is allegedly based. From a racial historical perspective, the most often quoted words of the Declaration of Independence, "We hold these truths to be self evident, that all men are created equal," were in fact at the very hour of their declaration being repudiated by the racial practices in this nation. For the perspective of my present remarks, perhaps the most relevant words in the Declaration of Independence would be the statement that "The history of the present king of Great Britian is a history of repeated injuries and usurptions, all having in direct object the establishment of an absolute tyranny over the states. *To prove this let facts be submitted to a candid world.*" Thus, in the words of the Declaration of Independence, can you be receptive to having "*facts submitted*" to you *candidly*—within a historic racial perspective—facts which speak not of the king's tyranny over states, but of our forefather's tyranny over black men? You should welcome my candor if you truly desire to get optimum racial peace in our correctional institutions and in our society generally.

In 1775, the Continental Congress met in Philadelphia and noted its declaration of the causes and the necessity of taking up arms, stating that: "Our cause is just . . . our internal resources are great, the arms we have been compelled by enemies to assume, we will, in defiance of every hazard . . . employ for the preservation of liberty being with one mind *resolved to die free men rather than to live slaves.*" While the founding fathers did not want to be slaves of the king—they nevertheless repudiated freedom for black men.

As Thomas Jefferson was to observe later, his draft of July 2nd including a clause "Reprobating the enslaving the inhabitants of Africa, was struck out in (deference) to South Carolina and Georgia, who had never attempted to restrain the importation of slaves and who on the contrary still wished to continue it."

Not only is there a correlation between the problems we

now face because of the failures of our founding fathers to take a forthright position in 1776, we must also recognize that from its very origin in 1787, our constitution was in part a racist document. For at least seventy-eight years through the full force of law it sanctioned racism and its devastating brutality. The law and order of that day, the preamble of the constitution, states:

> "We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Yet that did not mean a perfect union for blacks. It did not mean justice for blacks, it did not mean promoting the general welfare for blacks, and it did not mean the blessings of liberty for blacks, and it was unconcerned about their posterity.

Article I, Section 3, of the Constitution provided at that time, as you undoubtedly know, that:

> "Representatives and direct taxes shall be apportioned among the several states . . . according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those persons bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons."

"Three-fifths of all other persons."

This section was so artfully drawn that it demonstrated at that first constitutional convention what I believe is true now and has been true ever since that date—the greater political skills of the southern legislators. For in that document, when using the term "Three-fifths of all other persons," they studiously avoided the word "slaves" and thus avoided making manifest on its face that it was a document which sanctioned cruelty to mankind. What article I, Section 3, really meant was that a southern planter owning five hundred slaves would when electing representatives for the United States Congress have three hundred times greater leverage than one businessman or a free citizen of Massachusetts.

When the issue of ratification of the constitution was before the South Carolina House of Representatives one of the framers of the constitution, General Charles Cotesworth Pinckney of South Carolina spoke to that body on the issue of slavery. He said: "I am of the same opinion now as I was two years ago, when I used the expressions the gentleman has

quoted . . . that while there remained one acre of swamp land uncleared of South Carolina, I would raise my voice against restricting the importation of Negroes. I am as thoroughly convinced as that gentleman is, that the nature of our climate and the flat, swampy situation of our country, obliges us to cultivate our lands with Negroes, and without them South Carolina would soon be a desert waste."

Some of you may ask, what is the relevance of the ratification of the United States Constitution in 1789 to today's correctional problems? What is the relevance of General Pinckney's 1789 remarks to riots in the 1970's? For such relevance I suggest that you read *The Autobiography of Malcolm "X,"* describing his experiences in prison, his experiences talking to Black Muslims there. Think first in terms of what General Pinckney said, "That while there remained one acre of swamp land uncleared in South Carolina, I would raise my voice against restricting the importation of Negroes," and then listen to Malcolm "X's" reaction to the importation of Negroes. Malcolm "X" describes his early conversations with a follower of the Honorable Elijah Muhammad in prison, where, the follower said to Malcolm: "You don't even know who you are . . . you don't even know, the white devil has hidden it from you, that you are of a race of people of ancient civilizations and riches in gold and kings. You don't even know your true family name, you wouldn't recognize your true language if you heard it, you've been cut off by the devil white man from all true knowledge of your own kind. You have been a victim of the evil of the devil white man ever since he murdered, raped and stole you from your native land in the seeds of your forefathers."[3] Malcolm "X" describes his beliefs as they became developed in prison, as he became a believer in the Honorable Elijah Muhammad. From his studying, he concluded: "Human history's greatest crime was the traffic in black flesh when the devil white man went into Africa and murdered and kidnapped to bring to the west in chains, in slave ships, millions of black men, women and children, who were worked and beaten and tortured as slaves.

"The devil white man cut these black people off from all knowledge of their own kind, and cut them off from any knowledge of their own language, religion, and past culture,

[3] Malcolm "X", *The Autobiography of Malcolm X*, New York: Grove Press, 1964 (p. 161).

until the black man in America was the earth's only race of people who had absolutely no knowledge of his true identity.

"In one generation, the black slave women in America had been raped by the slavemaster white man until there had begun to emerge a homemade, handmade, brainwashed race that was no longer even of its true color, that no longer even knew its true family names. The slavemaster forced his family name upon this rape-mixed race, which the slavemaster began to call 'the Negro'."[4]

Why have I taken time out to cite our nation's constitutional heritage and to compare it with Malcolm "X's" comment? Is it to antagonize you, to anger you? Of course not! I cite this history because we will never be able to communicate to thousands of black men locked up in our prisons today unless we at first honestly look at our past history. We will not be able to solve today's racial problems either in our prisons or on the outside merely by suggesting that some of the black men who are angry are a few isolated hard-core militants. Perhaps we make the first step of the long hard journey ahead by our honesty and willingness to admit that our nation has caused much rage, that our nation has often been grossly unjust in the treatment of blacks and that we have an obligation to work swiftly to eradicate the many consequences of that injustice, rather than to keep pretending that the problem never existed.

In his famous opinion in the Dred Scott case, Chief Justice Taney, writing for the Supreme Court, held in 1857 that a black man "has no rights which the white man was bound to respect." Again, that was law and order as pronounced by the Supreme Court. When in 1896 Mr. Justice Brown's opinion in *Plessy* v. *Ferguson* sanctioned state-imposed racial segregation, that also represented a concept of law and order, one which retarded our nation for more than five decades, and whose tragic aftermath we are still witnessing and suffering from today. As thousands of laws have been ground out and reinforced by new governmental and business practices, we have often had law and order, but not racial justice.

If you cannot accept my analysis, then please read and comprehend the report of the 1968 National Advisory commission on Civil Disorders, popularly known as the Kerner Report. This commission composed of eleven moderate Americans of whom only two were black, said in its introduction, only two years ago: "What white Americans have never fully understood—but what the Negro can never forget—is that white society is deeply implicated in the ghetto, white institutions created it, white institutions maintain it, and white society condones it."

[4] Malcolm X, *The Autobiography of Malcolm X*, New York: Grove Press, 1964, p. 162.

I submit that any objective scholarly study would corroborate the Kerner Commission's conclusions. And more important, a major factor in every prison racial riot is that most black prisoners believe as the Kerner Commission found that "White society is deeply implicated in the ghetto, white institutions created it, white institutions maintain it and white society condones it."

But there are probably some among you who could not be moved by the findings of any commission. One commission's report will be disregarded by some individuals because it was appointed by a Democratic president. Another commission's report will be disregarded because its members were predominantly Republicans or academicians or businessmen. So if you can't pay attention to the findings of these great commissions, maybe you will listen to the words of one of the most noble men ever to walk in America, who is entitled to a place in history, equal to that of Thomas Jefferson, George Washington and Abraham Lincoln. He is Frederick Douglass, born a slave and one of the distinguished abolitionists, who said in 1857:

> "When justice is denied, where poverty is enforced, where ignorance prevails, and where any one class is made to feel that society is an organized conspiracy to oppress, rob and degrade . . . neither persons nor property will be safe.
>
> "Hungry men will eat, desperate men will commit crime, outraged men will seek revenge."

Finally, if there are any here who are oblivious to the moving words of the great abolitionist, let me quote to you the words of a great poet, William Shakespeare, in *"The Merchant of Venice"*—Act III, Scene 1, when Shylock spoke: (speaking of Antonio)

> ". . . He hath disgraced me . . . scorned my nation . . . cooled my friends . . . heated mine enemies, and what's his reason? I am a Jew. Hath not a Jew eyes? Hath not a Jew hands, organs,

dimensions, senses, affections, passions? Fed with the same food, hurt with the same weapons, subject to the same desires, healed by the same means, warmed and cooled by the same winter and summer as a Christian is? If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die? And if you wrong us shall we not revenge? If we are like you in the rest, we will resemble you in that. If a Jew wrong a Christian what is his humility? Revenge. If a Christian wrong a Jew, what should his sufferance be by Christian example? Why revenge. The villainy you teach me I will execute, and it shall go hard but I will better the instruction."

As I look at the escalating crime and violence in this country, as I look at the increased polarization, I say to you of the American Correctional Association that if you will not accept the findings of moderate groups, such as the Kerner Commission, or the words of Frederick Douglass, then look at William Shakespeare. Use him as your reference in forecasting the future of our society. Examine to what extent we have injustice in this country and our pace in eradicating it, and think of William Shakespeare's response. Is not some of the racism and the hatred and the violence and even the crime we see in this country an exemplification of what Shakespeare meant when he said: ". . . the villainy you teach me I will execute, and it shall go hard but I will better the instruction." Of course I do not urge villainy, and of course I do not urge violence, but I urge the eradication of that villainy, I urge our getting down to business now and eradicating the racism with all of its attendant pathology.

Some of you may say, now, Judge, you're being unfair to us, we're not living in 1857 when Chief Justice Taney wrote the *Dred Scott* opinion, and it is not fair to evaluate us on the basis of the constitutional convention of one hundred and eighty-three years ago. If you make that argument you miss my point completely, for I am not suggesting or arguing a concept of individual guilt, I am discussing the concept of racism—institutional, historical and legal racism and its impact in creating today's racial pathologies. But you would be right in insisting that I also analyze the problems and accomplishments subsequent to the *Dred Scott* opinion, the Emancipation Proclamation and *Plessy* v. *Ferguson.* For it is essential that we look not only at the failures of a century ago, we must also recognize the failures of *our* generation, as well as the successful accomplishments of the last three decades.

II

You are entitled to an evaluation beyond 1776 and beyond 1896; so let us look at the issue of racism during the last thirty years, and particularly since the termination of World War II, presumably fought for the four freedoms. During this thirty year period of course there have been significant steps towards repudiating the old racial injustice: The United States Supreme Court's opinions in 1944 in *Smith* v. *Albright,* the key primary voting rights case; *Brown* v. *Board of Education* in 1954;—the several Civil Rights Acts from the late 1950's to the Housing Act of 1968; the proliferation of Executive Orders and Fair Housing Laws and Fair Employment Laws. All of these constituted advances toward creating law and order within a context of justice. Yet, is it these advances which advocates of law and order are urging and supporting? Or are they talking about a concept of law and order which merely keeps the lid on riots, without any concern about the economic and racial causes of rioting, without any concern about eliminating rat-filled homes and overcrowded schools, and without concern about opening the doors to employment opportunities?

Has the advancement in civil rights come about by any leadership from people in the correction field either in their individual or institutional capacity? What has been their position on integration in education? Have the leaders in corrections been in the vanguard of the battle for human rights in eradicating racism, or have our correctional practices been at the other end of the spectrum similar to the experiences cited in the June, 1969 *Virginia Law Review,* wherein an inmate said he became accustomed to being addressed as nigger and boy by the all white supervisory force." (55 Va. L.R., 795.)

Is it without significance that a recent report of the Joint Commissions on Correctional Manpower and Training in a study of correctional administrators found that ninety-five per cent are white in the adult field and that ninety-seven per cent white in the juvenile; ninety-four per cent white in first line supervisors? Is it without significance that one of their most important findings was that "minority group members are being aggressively recruited and trained for responsible jobs in other sectors of the American economy? But if there are such

efforts in corrections, they have had little impact on the overall situation. While Negroes make up twelve per cent of the total population, only eight per cent of correctional employees are black. Negroes are conspicuously absent from administrative and supervisory ranks, and they form only three per cent of all top and middle level administrators."

Sometime ago I had the opportunity to speak to a group of successful businessmen, many heads of large corporations—I would assume that their median income was in excess of fifty thousand dollars per year. They were concerned about the riots in our cities and the tragic and increasing tension between some segments of the community and law enforcement authorities. To test their sense of history, I asked: "When in the last fifteen years was it first necessary for the President of the United States to call out federal troops to enforce law and order?" Some said Watts, others said Detroit, a few said Newark, but none of them gave the correct answer.

The first time was in 1957—when President Eisenhower had to call out the federal troops against Governor Faubus (troops headed by General Walker) to assure the right of twelve black students to enter Central High School in Little Rock, Arkansas. Federal troops had to be called out to enforce a valid decree of the United States Supreme Court! And when was the second time, ladies and gentlemen? In 1962 at the University of Mississippi, so that James Meredith, a returning veteran, could enter a state-supported university. When was the third time? In 1962 in Alabama—when President Kennedy had to federalize the National Guard as the then Governor of Alabama "bravely" stood in front of the admissions office, with three television microphones around his collar, shouting in defiance against the admission of two nice black kids who were citizens of *his* state and wanted to attend the University of Alabama.

The deputy attorney general on the scene at the University of Alabama when this confrontation occurred was Nicholas Katzenbach, who later became attorney general and undersecretary of state. On September 25, 1968, he testified before the National Commission on the Causes and Prevention of Violence; I asked him:

Do you believe that when major public officials, who have taken an oath to enforce the Constitution of the United States,

wilfully flaunt the orders of the court, that that plays an even larger role in causing young people not to believe in our system than would be the case of another individual who might even be a looter or a criminal? Mr. Katzenbach's response was:

"Yes, I do, I do very much, Judge. I have, as you would imagine, very strong feelings on the subject."

You could see how deadly serious Mr. Katzenbach was and what a significant, moving moment it was. He had been at the University of Alabama and the University of Mississippi when federal troops were called. He went on to say:

"As I said in my statement, when this is done in the name of law and order, it bothers me even more because it tends to disparage, and it has succeeded to some extent in disparaging the term "law and order." The term "law" should not be an invidious term. As a lawyer, law teacher, public official, I devoted most of my time trying to do something about law, trying to make law more just. As an important public official, governor of a state, ignores court orders and then goes and preaches the needs for law and order, it seems to me that that term is as degenerated as it could be."

So that no one will misunderstand me, I am concerned about the outbreak of riots and massive public disorders. I do not urge, I do not sanction, I do not suggest violence as a way to correct our system. And I appreciate that law enforcement officials are obligated to use reasonable force to bring these outbreaks to an end at the earliest possible time. Yet I am concerned equally about these individuals who condemn only the riots without any willingness to probe the causes.

III

Where Do We Go From Here

I have been discussing the linkage between our past racist practices and today's racial tensions. But the task of the professional, the social scientist, of the educated man and the concerned citizen, is far greater than that of being merely an issue-raiser. In a real sense, he must have the capacity to be an issue-resolver. So where do we go from here? We may have a full awareness that law and order has not always been synonymous with justice when it comes to the black man.

Can we have justice in this decade, in our nation? The Kerner Commission, in talking about racial division, said:

> "This deepening racial division is not inevitable. The movement apart can be reversed. The choice is still possible. Our principal task is to define that choice and to press for a national resolution. To pursue our present course will involve the continuing polarization of the American community and, ultimately, the destruction of basic democratic values. The alternative is not blind repression or capitulation to lawlessness. It is the realization of common opportunities for all within a single society. This alternative will *require a commitment to national action*—compassionate, massive and sustained, backed by the resources of the most powerful and the richest nation on this earth. From every American it will require new attitudes, new understandings, and, above all, new will. The vital needs of the nation must be met; our choices must be made, and if necessary new taxes enacted."

During the last five years three great documents have been presented to the American public by the Crime Commission, the Kerner Commission and the Violence Commission. No one has analyzed nor spoken of the Crime Commission and the Kerner Commission Reports with greater clarity than has McGeorge Bundy, the distinguished and effective president of the Ford Foundation. He has said:

> "A careful study of these two reports is a simple moral obligation of anyone, anywhere in our society who thinks that he has made a serious contribution by promising, or even only phrasing the quick solution of law and order. For what these reports make plain is that the nature of crime and of violence among us is so complex and various, so deeply rooted in our society as a whole, so closely related to social, economic and political problems that run far beyond the writ of the policeman, or even the court, and so gravely affected by the incomplete and imperfect behavior of every single one of us that the official or private citizen who makes it seem that law and order will come easy or cheap is a man who deceives his listeners—and perhaps himself."

How many of those who respond so readily to pleas for law and order have addressed themselves to the fact that the slogan implied higher taxes? More than two hundred specific recommendations by the Crime Commission expressed its deep conviction that:

> "If America is to meet the challenge of crime, it must do more, far more than it is doing now . . . it must spend time and money. It must resist those who point to scapegoats, who use slogans about crime by habit or for selfish ends (even if it is politically successful). We must recognize that a government of a free society must act not only effectively but fairly. It must seek knowledge and admit mistakes."

When I reflect upon the violence of 1968 resulting in the assassinations of Martin Luther King and Senator Robert

Kennedy, I find it particularly ironic that some of those who shout loudest for law and order are among those who grieve least for these lost leaders. In Atlanta on the day of Martin Luther King's funeral, as I walked from the Ebenezer Baptist Church to Morehouse College, I saw no crepe around the office of the Governor of Georgia. As Mr. Bundy has so pointedly emphasized, to answer the question of law and order, we must first ask, "Whose law and whose order?" Does the man who speaks of law and order mean equal justice in our court, with the guarantees of rights which the poor need more than the rich? Does he intend by the slogan to insist on enforcement and improvement of the laws which are supposed to protect the ignorant tenant from the corrupt landlord, or the gullible buyer from the overcharging seller? Does he, in short, mean justice for all or simply peace of mind for those who already have what they need?

In recent years there have been massive appeals to the person who is described as the "forgotten American." The forgotten American is purported to be one who does not walk in picket lines, does not join protest organizations, pays his taxes and seldom complains about his country. Certainly I appreciate this forgotten American's patriotism and love for his country and I applaud him for it. But I wonder whether the mythical forgotten American could more aptly be described as a "forgetting American," one who has made it and is willing to forget about the lack of justice and opportunity for those on the other side of the track and in the ghetto. As I view my college generation, it was predominantly a silent generation, which later rose into the affluent society and invaded suburbia. Now many of these illustrious graduates, after having made it, believe that they are the forgotten Americans. But they have won the major benefits from our society. It was not necessary for them to picket to get a hot dog in a five-and-ten cent store in Birmingham, nor to petition the President to guarantee their southern relatives the right to vote in Mississippi or Alabama or Georgia; they needed no executive order to bar their employer from racial or religious discrimination. Thus, if we really are going to meet the question, if we are going to solve the problem of law, order and justice, we have got to talk in terms of massive programs for employment, education, welfare, housing, health; sub-

stantial improvement in the functioning of law enforcement agencies, our courts, and what in so many states is the sad, sad, almost medieval quality of our penology and correctional systems. This is the challenge for the educated man, this is the challenge for these scientists, to move past the simplicity of the catch-phrase slogan of law and order and to create the system, the mechanism of a new tomorrow which assures to all of our citizens a concept of law and order which is truly based on "justice for all."

If there are any among you who believe that our problems can be solved by waging only a war against crime without a simultaneous war against poverty and racism, then you do not comprehend the most significant finding of the Crime Commission's Report. For that great commission, headed by the then Attorney General Nicholas Katzenbach said:

> "Warring on poverty, inadequate housing and employment is warring on crime. A civil rights law is a law against crime. Money for schools is money against crime. Medical, psychiatric and family counselling services are services against crime. More broadly and most importantly, every effort to improve life in America's inner cities is an effort against crime."

Thus, can we escape our major failures by scapegoating and blaming all of today's trouble on hard-core black militants? Is there any correlation between the number of "hard-core black militants" and the escalating hard-core unemployment among blacks in our cities? The June, 1970 unemployment report establishes that in poverty areas the unemployment among non-white teenagers is 34.2%, twice that of whites. In other neighborhoods the unemployment of non-whites is 29% as compared to 13.8% of whites. Whereever you go, the unemployment rate is generally double for blacks as compared to whites.[5] Is there any significance that the official seasonably adjusted unemployment rate for non-white tecnagers in poverty neighborhoods today has increased from 24.7% a year ago to 34.2% today? Looking at those facts, Jacob Cohen said, in the New York Times, recently:

> "The true picture is undoubtedly worse because official statistics cannot encompass the many school dropouts who have never even begun to look for work. Or those 16 to 18 year olds who are officially in school, but hardly ever attend. Or those very grown up and angry 13 to 15 year olds who are on the streets all the time. Quite simply, there are tens of thousands of black teenagers in the cities today who know hardly anyone who is doing, or is about to do, honest work."

[5] New York Times, Sunday, July 19, 1970, E-2.

Do we expect racial tensions to subside when companies which two years ago took on hard-core unemployed after the Detroit riot, now have had to lay off at least fifty per cent of those hired. Chrysler Corporation alone has laid off 7,000 such formerly and yet again "hard-core unemployed" trainees.

From our whole survey of violence in America, the National Commission on the Causes and Prevention of Violence concluded: "Violence has usually been the lava flowing from the top of a volcano fed by deeper fires of social dislocation and injustice; it has not been stopped solely by capping the top, but has usually subsided when our political and social institutions have managed to make the adjustment necessary to cool the fires below. If our future is to be more just, less violent, less crime-ridden, and free of fear, we obviously must do much better than we are now doing to speed social reform and simultaneously improve the effectiveness of the entire law enforcement system of the nation. Only in an orderly society can we achieve the advances which militants and moderates alike know are required."

In the summary of our findings, we emphasized that "In our judgment the time is upon us for reordering our national priorities and for greater investment of resources in the fulfillment of two basic purposes of our Constitution—to establish justice and to insure domestic tranquility." We talked in terms of an increased expenditure on these issues of twenty billion dollars "partly by reducing military expenditures at the conclusion of the Vietnam War." I think that we've got to allocate this amount of money *now* with or without the prompt termination of the Vietnam War. In my separate statement, filed with the Violence Commission Report, I noted:

In the last 25 years our country has been deluged with significant presidential and national fact-finding commissions, starting with President Truman's Commission to Secure These Rights in 1947. Some of the other great commissions have included the Crime Commission (President's Commission on Law Enforcement and Administration of Justice), The Council to the White House Conference to Fulfill These Rights, the Kerner Commission (National Advisory Commission on

Civil Disorders), the Kaiser Commission (President's Committee on Urban Housing), and the Douglas Commission (National Commission on Urban Problems). Thus, the problems of poverty, racism, and crime have been emphasized and re-emphasized, studied and re-studied, probed and re-probed.

Surveying this landscape, littered with the unimplemented recommendations of so many previous commissions, I am compelled to propose a national moratorium on any additional temporary study commissions to probe the causes of racism, or poverty, or crime, or the urban crisis. The rational response to the work of the great commissions of recent years is not the appointment of still more commissions to study the same problems—but rather the prompt implementation of their many valuable recommendations.

The Kerner Commission concluded its report as follows:

> "One of the first witnesses to be invited to appear before this commission was Dr. Kenneth B. Clark, a distinguished and perceptive scholar. Referring to the reports of earlier riot commissions, he said:
>
> 'I read that report . . . of the 1919 riot in Chicago, and it is as if I were reading the report of the investigating committee on the Harlem riot of '35, the report of the investigating committee on the Harlem riot of '43, the report of the McCone Commission on the Watts riot.
>
> 'I must again in candor say to you members of this commission—it is a kind of Alice in Wonderland—with the same moving picture re-shown over and over again, the same analysis, the same recommendations, the same inaction'."

IV

In summary, let us focus once again on the reality of the inter-relationship between our forefathers' failures on July 4, 1776, all of the subsequent intermittent failures and the prison racial riots of 1970. The issue is not whether we should condemn our forefathers for their failures or even our generation for our failures. But instead the issue is can we now move forward together and agree to spend the billions of dollars which are needed to eradicate the pathology of racism and its attendant failures in housing, employment, health care, education and the mis-administration of justice, and in the process let us make an equal resolve to eliminate the total pathology of poverty—thus giving all of its victims—be they white or black, brown, yellow or red, whether they live in the north or south, east or west—a new opportunity for full dignity in the develpment of their maximum potential.

Too many persons feel that they can do nothing to influence the direction and destiny of this nation. Too many persons blame the tragedies of the hour on some purported hard-core black militants, student agitators, or nondescript outsiders.

Because of our refusal to solve the real, critical problems, because of our persistent preference to scream the easy cliche as a substitute for action, I sometimes wonder whether our nation will be able to reach its potential of greatness. In fact, I sometimes wonder about our long-term capacity for survival. I wonder whether we will take those necessary steps to de-escalate either prison racial tensions or the nation's racial tensions. The Violence Commission concluded its introduction by saying:

> "When in man's long history other great civilizations fell, it was less often from external assault than from internal decay. Our own civilization has shown a remarkable capacity for responding to crises and for emerging to higher pinnacles of power and achievement. But our most serious challenges to date have been external—the kind this strong and resourceful country could unite against. While serious external dangers remain, the graver threats today are internal; Haphazard urbanization, racial discrimination, disfiguring of the environment, unprecedent interdependence, the dislocation of human identity and motivation created by an affluent society—all resulting in a rising tide of individual and group violence.
>
> "The greatness and durability of most civilizations has been finally determined by how they have responded to these challenges from within. Ours will be no exception."

Now let me conclude as I did my separate statement with the Violence Commission by quoting a distinguished black psychiatrist, Dr. Price Cobb. He expresses a concern which is even more urgent now than when it was uttered a year ago:

"If violence continues at its present pace, we may well witness the end of the grand experiment of democracy. The unheeded report of the Kerner Commission pinpointed the cause of our urban violence, and this report presents the tragic consequences when those in power fail to act on behalf of the weak as well as the powerful.

"This country can no longer tolerate the divisions of black and white, haves and have-nots. The pace of events has quickened and dissatisfactions no longer wait for a remedy.

"There are fewer great men among us to counsel patience. Their voices have been stilled by the very violence they sought to prevent. Martin Luther King, Jr., the noble advocate of non-

violence, may have been the last great voice warning the country to cancel its rendezvous with violence before it is too late.

"The truth is plain to see. If the racial situation remains inflammatory and the conditions perpetuating poverty remain unchanged, and if vast numbers of our young see small hope for improvement in the quality of their lives, then this country will remain in danger. Violence will not go away because we will it and any superficial whitewash will sooner or later be recognized."

FROM THE OUTSIDE LOOKING IN: OR THE SNAIL'S PACE OF PENAL REFORM

BY DR. NORVAL MORRIS

BIOGRAPHIC NOTE

Dr. Morris is Julius Kreeger Professor of Law and Criminology and Director, Center for Studies in Criminal Justice, University of Chicago. He was born in New Zealand, graduated from Melbourne University, Australia (LI.B. and LI.M.) and London University, England (Ph.D.) and now lives and works in the United States. He serves as editor and advisory committee member for many learned journals as well as a member of many special Commissions, Advisory Committees, and special Councils dealing with the Criminal Justice system. He is presently chairman of the Illinois Governor's Advisory Council on Adult Corrections. Dr. Morris is the author of many articles and books; his most recent "The Honest Politician's Guide to Crime Control" was co-authored with Gordon Hawkins and was published by the University of Chicago Press, 1970.

SUMMARY

In the century since the Cincinnati Declaration of Principles, the rate of development in corrections has been of glacial speed; regrettably, that Declaration remains a contemporary guide. We learnt, contrary to what was believed in 1870, that correctional reform requires advance in the entire criminal justice system. We have learnt, too, that effective correctional planning requires that we measure the consequences of our correctional efforts.

The criminal justice system can be fair; it can be humane; it can be efficient and expeditious; to a degree, it can reduce crime. It cannot substantially improve the quality and opportunity of life.

The "clients" of corrections are the rejects and scapegoats of society. To date, leadership in corrections has, in the main, been vacillating and sporadic. An aid to the generation of forceful leadership would be the development, like other professions, of self-policing techniques, giving the force of professional authority to the enunciated Declarations of Principles. Leadership would also gain from a clearer definition of the purposes of corrections, and the diverse roles of correctional workers in relation to different categories of criminals.

In these difficult tasks, the leaders of corrections will need allies. They should seek them among judges and among the emerging, energetic, innovative younger members of the legal profession, unlikely though this advice may seem in view of the present chasm between the two professions.

Mayor Daley, moved by his sixty-eighth birthday to pensive reflection on life and politics, concluded his analysis in a hard, gem-like phrase, highly apposite to our concerns: "that which keeps us apart is our inability to get together." Could anything be more insightful? His wise aphorism guides me, as an outsider looking in at correctional reform, to conclude that "that which keeps us back is our inability to get ahead". Why this inability? My assigned task is to answer that question; but first a demonstration that we indeed enjoy no more than a glacial rate of development cannot be burked. Thereafter, some reasons for this snail's pace and some suggestions as to what might be done to expedite reform will be offered, in the following sequence:

A The Glacial Rate of Change.
B The Politics of Reform.
C Leadership.
D Purpose and Roles Unresolved.
E Judges, Lawyers, and Law Professors.
F Where to go? What to do?

A *The Glacial Rate of Change*

The laggard pace can be observed by visiting most city jails, most penitentiaries, most probation and parole services. They are, by and large, crowded and unseemly, abundant in despair and justified cynicism—and it is frequently not only the offenders who "want out". But for our present centennial purposes, an historical perspective rather than these dogmatisms may better demonstrate the snail's advance.

In 1854, Captain (later Sir Walter) Crofton became the Director of Convict Prisons in Ireland and proceeded to apply the correctional theories that Captain Alexander Maconochie had enunciated in the previous decade and tested in Norfolk Island, Australia, from 1840 to 1844. The framers of the Cincinnati Declaration of Principles in 1870, whose vision we now properly celebrate, were express in their recognition of their indebtedness to Maconochie and Crofton. They also acknowledged the importance of Matthew Davenport Hill's writings in the 1830s, and his work from 1839 onwards as Recorder of Birmingham—a judicial post from which he exercised great influence on correctional reform in England. Crofton and Hill

submitted papers to the 1870 Congress. The American correctional leaders, Hubbell, Wynes, Dwight, Sanborn and Brockway all affimed their debt to the Australian, English and Irish penal reform movement. Maconochie's writings were particularly influential in the 1870 Declaration of Principles; "not only are its sentiments his: studded through the Declaration will be found his very language".[1] The words of clause fourteen are taken directly from two of Maconochie's pamphlets. His influence on no less than thirteen other clauses of the Declaration of 1870 is likewise apparent. "Constantly its framers adopted Maconochie's ideas, and sometimes when expressing them they used arresting phrases taken from his writings".[2]

Thus our "centennial" celebration stretches over several continents and covers at least one hundred and thirty years. This point is made neither for chauvinistic reasons nor to stress the international influence on American penal reform—though both are no doubt relevant. What is suggested is that the 1870 Declaration though old, internationally influenced, and only slightly revised (1960) continues to stand as an important guide to our future path. For one hundred and thirty years at least the path has been clear, and the 1870 pointer remains of true direction. We have followed it only a few steps. The Declaration is a contemporary document; read it and translate its older idiom into our modern verbosities and you will see in it many, if not most, of our modern aspirations.

Perhaps, perhaps, over these ten decades we have reduced the infliction of gratuitious suffering on convicted offenders. But even this I doubt; the pressure of numbers on overcrowded systems has probably more than adversely compensated for our attempts to reduce corporal punishments and physical sufferings. At all events, the movement towards affirmative reformative efforts, to make our prisons, in Maconochie's and Hill's terms, "moral hospitals" has hardly been expeditious and our community-based treatment facilities are but in the infancy of their growth. We lack knowledge of the success of most reformative efforts we make; we plead for minor

[1] *Alexander Maconochie of Norfolk Island* by John Vincent Barry, Oxford University Press, 1958, at page 231. I am indebted to the late Sir John Barry and his writings for this historical analysis of the 1870 Declaration.

[2] Ibid at 232. The clauses referred to are two, four, five, seven, nine, ten, thirteen, sixteen, nineteen, twenty-two, twenty-nine, thirty and thirty-three of the Declaration of 1870.

ameliorations; we are far from in the advance guard of social reform.

Of course, the federal system and several of the states have produced correctional systems—if the jails be excluded—which have served to elevate the standards of humanity and of correctional efficiency of the rest. Indeed, if one made a selection of somewhat isolated and diverse correctional efforts in this country, one could put together a worthwhile composite system. It is thus clear that not only knowledge, certainly since 1870, but even sporadic established experience, far outstrips the generality of practice.

Why the hesitant crawl of correctional reform? I have only a few ideas to offer; not a rounded analysis. The latter, I hope, may come from the critical discussions at our centenary meeting.

B *The Politics of Reform*

Alexis de Tocqueville, it should be remembered, visited this country not with the notion of preparing a definitive text on democracy—which he did—but rather to study the penal system. He was one of those, like others in America and Europe, who, as he wrote, looked confidently to the imminent day "when all criminals may be radically reformed, the prisons be entirely empty, and justice find no crimes to punish". A century and a half later his sanguine reverie can hardly be said to have been achieved. But de Tocqueville should not be regarded as an isolated dreamer. His approach was mirrored by many in Cincinnati in 1870. Indeed, the proceedings as a whole at that conference reveal the then-current optimistic belief that if prisons could be made clean and humane, if the prisoners could be given educational and vocational training and wise religious and philosophic insights of themselves and their roles in society, then, like the Marxist state, crime would wither away.

Our political perspectives have shifted dramatically and this shift is of singular significance to the rate of change in correctional reform. We no longer believe that corrections alone can cure crime. Indeed, we don't see crime as curable; we see it rather as an undesirable but unavoidable concomitant of social freedom. Each unit of freedom to grow carries

with it a risk of misdirected growth. Crime can be minimized and controlled; perhaps culturally determined crime can be substantially reduced and idiosyncratic crime more earlier detected and treated. But the correctional system is not seen as central to these purposes. The change in our aspirations over the century can be seen by comparing the confident beliefs in the correctional curability of criminals and crime of the 1870s with a 1970 statement in the Report of the President's Task Force on Prisoner Rehabilitation (pp. 6 and 7) which would, it is believed, reflect the views of most in attendance at this 1970 Conference: "anyone concerned with prisoner rehabilitation also is concerned, perforce, with the reason people commit crimes. Obviously a program designed to restore offenders to the community must be based on some views about why they left the community in the first place. We have no novel thought about this much-discussed subject. We simply wish to record our agreement with the National Crime Commission, the Riot Commission, the Violence Commission, and scores of other thoughtful and painstaking analyses, that some of the toughest roots of crime lie buried deep in the social conditions, especially poverty and racial discrimination, that prevail in the nation's inner cities. These conditions not only make it difficult for millions of Americans to share in America's well-being, but make them doubt society's good faith toward them, leaving them disposed to flout society. America's benefits must be made accessible to all Americans. How successfully America reduces and controls crime depends, in the end, upon what it does about employment and education, housing and health, areas far outside our present mandate or, for that matter, our particular competence. This is not to say that improvements in the correctional system are beside the point; on the contrary, many more improvements than those we call for in this report are needed, in fact overdue. Our point is that improvements in the correctional system are necessarily tactical maneuvers that can lead to no more than small and short-term victories unless they are executed as part of a grand strategy of improving all the nation's systems and institutions."

Crime, we now recognize, is deep-seated in the structure of society and corrections is only a small part of a system of social control applied to define, inhibit, reduce and treat crime and criminals. We are of more modest aims than our cen-

tennial fathers. Further, it is now seen that corrections is but a sub-system of the criminal justice system, and that an advance in effectiveness of any one of those sub-systems requires the advance of all; that unless we plan for effectively interfaced police, courts and corrections sub-systems we will be merely tinkering and patching, and not unleashing whatever crime prevention and treating potential the criminal justice system may be capable of. In short, one clear advance since 1870 is our rather depressing realisation that the politics of correctional reform are vastly more complex, more interrelated with the work of the police and the courts, ultimately more dependent on general social structure, than was previously believed.

Thus, the ceiling of aspiration of correctional reform, as distinct from social reform, has dropped. This reduction of range should have brought an increment of achievement, but it has not. There still persists a belief in the availability of quick, and often cheap, solutions to long-standing deep-seated social problems. Funds are still misallocated within the criminal justice system; we continue to plan in isolation, and to plan without any clear idea of the flow of our clients through the police, prosecutoral, defence, trial, and corrections subsystems. We lack quantified knowledge of the success of our diverse efforts, and quantified knowledge is all that matters here; though correctional administrators of the 1970s seem quite as reliant on individual success stories as their centennial ancestors. Raconteurs still dominate measurers in assessing corrections; and the consequence is a verbose ignorance in which the social scientist is a barely tolerated decoration on the firm facade of repeated failure, which is called experience.

Whereas the modern correctional administrator may be more modest in his expectations than was his predecessor, he is the servant of a criminal justice system of quite remarkable lack of modesty—nowhere more than in this country. For complex historical and social attitudinal reasons, not germane to our present concern, the criminal law has been used in this country not only in an effort to protect citizens against violence and the threat of violence, against major depradations to their property and attacks on the processes of government —which make up its proper role—but has been turned towards

coercing men to private virtue. And with startling lack of success. The criminal law grossly overreaches itself in a host of victimless, moralistic "crimes". When the criminal law invades the spheres of private morality and social welfare it proves to be ineffective, criminogenic, and, for our purposes what is worse, diverts corrections from its clear, socially protective function. In the result, we have unwise legislation criminalising public drunkenness and vagrancy, and extending the law's reach beyond its competence in relation to narcotics and drug use, gambling, disorderly conduct, abortion, an extensive range of consensual adult sexual practices, and the non-criminal aspects of juvenile delinquent behaviour. This overreach of the criminal law has made hypocrites of us all and has confused the mission of corrections. The unmaking of law is more difficult than its making; to express moral outrage at objectionable conduct and to urge its legislative proscription is a politically popular posture; on the other hand, to urge the repeal of sanctions for any objectionable conduct is politically risky since it tends, in the vulgar mind, to be expressing approval of that conduct. But corrections, as indeed the rest of the criminal justice system, must reduce its load to that which it has some chance of carrying and the leaders in corrections must, politically difficult though it may be, take public positions to that end. Correctional leaders must help us to exclude from allegedly correctional processes those who should not be there. So far their silence has been of Trappist proportions.

Too many nuisances, of no social threat, who have encompassed no social harm, are sent to prison or are put on probation. Too often we are fighting the wrong war, on the wrong front, at the wrong time; so that our capacity to fight where we might be protective of the community and useful to the convicted offender is attenuated.

It is a mistake to expect too much not only of corrections but also of the criminal justice system as a whole. That system can be fair; it can be humane; it can be efficient and expeditious; to a degree it can reduce crime. It cannot substantially improve the quality and opportunity of life. It cannot save men from themselves. It can be a savage instrument of tyranny, yet it can be only a hall-mark of, and not a means of achieving, an harmonious and decent community life.

Another political barrier confronts correctional leadership. Our clients are politically the least eligible of groups. They are usually voteless; they are always unpopular. Politicians who espouse the cause of penal reform rarely gain votes thereby; the hard-nosed, superficial, angrily expressed, punitive imprecation wins the votes. Criminals are the rejected and the scapegoats of society and we shall not swiftly change the community's attitudes to them. And yet you as correctional administrators have to suggest that these rejects and misfits should sometimes be preferred to others in the community, that they should actually be better treated in some ways than their unconvicted brothers.

If there is unemployment in the community, is the discharged offender really to be employed while an unconvicted person wants work? Are we really to extend vocational training to the criminal which is not available to citizens generally? Difficult as this reply may seem: for the community's sake, quite apart from the interests of the offender, we had better extend our maximum efforts to control and support the convicted offender in a non-criminal life, even if we thus appear to favor him over his unconvicted brother. If this means better training and employment services for him than a parsimonious community allows the generality of its citizens, so be it. The task of the penal reformer, as a servant of a criminal justice system, is to reduce crime; in this instance, by reducing recidivism. We do no injury to the rest of the community if we try to provide educational and employment services in advance of those generally available.

This problem of the criminal's "less eligibility" in the eye of the public is a political reality of the criminal justice system; it need not, however, be excessively fettering. It is indeed cramping if leadership is weak and is prepared to move only with majority community support—which is rarely to be found. Fortunately for our purposes, most citizens are apolitical in this sphere; they are uninvolved and are interested only in the sensational aspects of our work. They will, without frequent qualm, accept police, court and correctional developments of which they are glad to remain largely ignorant. Public opinion does not set the pace of reform though it may limit that pace and sometimes condition its direction.

Community support for and participation in the criminal justice system is thus relevant but not determinative.

The correctional administrator's clients are voteless, politically unpopular, and socially threatening. Their suffering, if it occurs, moves the community in only the most severe and exceptional cases. Few feel the lash on another's back. Prisons are hidden places, the wall keeps in and keeps out, and prisoners are the least eligible of political beneficiaries. Yet, for the larger social good, and because this is the work to which he has put his hand, the correctional administrator must ensure the possibility of future social acceptance and economic productivity for his clients.

In the light of social attitudes towards convicted offenders and the political responses to those attitudes, it is clear that even reasonably expeditious correctional progress will demand leadership of high quality, of strength and determination. Here as elsewhere, leadership is required for political progress in a democracy (perhaps particularly in a democracy) and the sad truth is that corrections suffers seriously from a scarcity of that essential commodity.

C *Leadership*

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 phrases on the matter; corrections has attracted too many second-class minds who have provided timorous and vacillating leadership. The boat is, I am constantly told, not to be rocked. Public attitudes, I am told, are antipathetic to rehabilitative efforts and favour only punitive segregation; hence the limelight is not for us. And our political masters are pleased with us only when there is nothing to report and nothing being reported. Our duty is, I am assured, to take those who are sent to us, not to comment, certainly in public, on the appropriateness of their sentence, and quietly to keep the prisons secure and scandal from their gates. The primary enemy is the press; the secondary enemy that meddlesome group of do-gooders and academics whose heads are in the woolly clouds of reform and who could not run a prison to save their necks.

There is no particular need, I am advised, critically to evaluate the consequences of correctional efforts. Every new method happily proves to be a success since it is to be judged by standards forged by those critical bellows of public relations; the objectively assessed experiment is to be eschewed at all costs since "statistics can prove anything" and outsiders will, ignorant of correctional problems as they are, cause only trouble.

Perhaps I exaggerate; but not much. Where are the powerful voices in correctional administration demanding more effective political and community support of correctional efforts? Or, to put it even more aggressively, how many of you took an active political role over those many months of legislative consideration of the Omnibus Crime Control and Safe Streets Act of 1968, on which so much of correctional development will now turn?

Correctional leadership maintains a reserved silence in the face of the legislative processes, federal and state, speaking when spoken to, and then humbly. We lack a lobby. The police and the courts are not similarly reserved. Our reticence serves society poorly and impedes penal reform.[3]

A mark of a mature profession is that it is self-policing; that it defines minimum standards expected of its members and establishes machinery to exclude those who fail to achieve and those who repudiate these defined standards. Of course, in some professions at some times these efforts at enforcement of minimum professional standards are corrupted and are used to protect the slothful, inefficient and incompetent; but it is hard to envisage a developed profession in which the professionals do not seek to protect their reputation and their social competence by some such methods. If correctional administration is a profession, and I believe it can be if it is not so as yet, there is urgent need for leadership in establishing methods of ejecting those who fail to achieve or adhere to minimum professional standards. We have a fine Declaration of Principles but no enforcement machinery. The leaders in corrections are rarely heard attacking those responsible

[3] On this theme, as my friend Lovell Bixby points out, the only organisation he knows of that regularly took an open, public and critical position in response to inhumanities and brutalities in prison—the Osborne Association—became moribund for lack of support from the rest of the correctional community.

for brutalities and inefficiences in correctional institutions.

The current move towards a penal institution accreditation system is to be welcomed; but for me the test is the frequency with which I hear the leaders in corrections speaking out in public in firm criticism of the brutalities and inhumanities that are so easily to be found in our jails and prisons. Some will lose their jobs by doing so. A close friend of mine is one such; he fell from grace for a few years, without any voices from corrections coming to his aid, though they well knew that his allegations of physical brutality by named staff to youthful inmates were true. The personalisation of this point is perhaps ill-mannered, but the point can best be made from first-hand knowledge. Another example: I found eighteen men who had been illegally imprisoned (in the narrowest sense; with no valid warrant to hold them) each for over twenty-five years. They are now out. But the point is that several senior people in corrections, of position in your organization, had also known about it for years and had let themselves be turned aside from action by the pressures of bureaucratic conformity. And finally, again within my experience, another close friend, a deputy warden of a city jail, who keeps a typed resignation ready for presentation to his employing authority on the day that any child under sixteen spends the previous night in the jail. And the result, it does not happen. I know many jail administrators who do *not* follow this practice.

It is, I suppose, a traditional complaint of the middle-aged to look about and to cry "where are the giants of yesteryear?" Perhaps I share this menopausal depression, but . . . where are the Fenner Brockways and the Enoch Wynes of today, where are the Croftens, Davenport Hills and Maconochies to affirm and apply correctional views and practices unpopular to the majority of the public and disturbing to their political representatives? Leadership is not achieved by the General who checks carefully where his troops have gone and follows decorously and bravely behind. If we wait for majority public opinion to guide us, we shall wait long. The duty of the correctional leader is surely to test the limits of the political tolerability of the reforms in which he believes and to press strongly for their achievement.

D *Purposes and Roles Unresolved*

Correctional fiefdoms have grown by happenstance. By and large, the judges control probation, prisons are state departments, jails are local government at its most atomised, while parole and parole supervision wander about administratively. The roles of federal, state and local administrations overlap and fluctuate. And the administrative complexity of corrections is matched by the multiplicity of police and court services that produce the grist for the correctional mill.

Why the judges should control probation supervision and not imprisonment is far from clear. Why a youth who uses a car not his own and crosses a state line should be treated under federal legislation designed to deal with interstate car stealing rings is likewise obscure. Indeed, it is not abundantly obvious that there should be a federal correctional system at all; or, if there is, how to divide its jurisdiction with the states. There are other federal models with different practices: the Australian, where the state takes the federal prisoner on a paid *per diem* basis; the Canadian, where the federal authority provides the penitentiaries for the provincial offender. I am not arguing for any of these structures; I am merely making the point that in the ten decades we today contemplate from outside, there is lack of consideration of and experimentation with the diverse administrative structures which corrections could adopt. The range and shape of our roles is a product of chance rather than reflection.

There is some advance recently. New York, Illinois and, in its own exuberant way, California, and other states are moving towards enunciation of Codes of Corrections in which not only will these jurisdictional roles be better defined but in which, following the wise initiative of the American Law Institute's Model Penal Code, an effort will be made to state the different social purposes sought to be achieved at the sentencing, institutional, parole and community supervision levels.

This articulation of our purposes and of our jurisdictional roles is a desirable underpinning of correctional leadership. The ambivalence of the citizen and of the politician —who desires rehabilitation of the convicted offender, but not in *his* electorate; and who is in favour of the vocational training and gainful employment of the prisoner, provided

it influences not at all *his* economic environment—can be better faced when our deterrent, retributive and rehabilitative purposes are forthrightly faced and their intermix, for different categories of offenders at different stages of the criminal justice system, precisely formulated. Surely, in less than the next century we shall achieve this at least. I do not think that we shall achieve it by following a medical model, which seems to me frequently to have led us astray into inefficiency and injustice; I think that overt social protection with human rights and self-determination constantly considered will make up the leitmotif of advance. But all that is now clear is that our present diverse purposes with different catagories of offenders at different stages of the criminal justice system stand in need of more precise formulation —to be followed, one hopes, by acceptance and implementation. They must not be left to rest in their present undefined, amorphous inconsistencies.

E *Judges, Lawyers and Law Professors*

With these imprecations hurled from outside at corrections, it is no doubt in the cause of courtesy as well as honesty to turn a critical eye on the lawyer's role in the criminal justice system, and particularly in corrections. A theme of this paper is that corrections suffers from an almost paranoid intellectual and political seclusion; it is notably isolated from the emerging forces of law reform, which have characterized other branches of American law over the past twenty years, particularly commercial law and, to a lesser extent, the substantive criminal law.

It is relevant to note that when three addresses on "corrections from the outside looking in" are required for an important correctional congress, the outsiders chosen for this purpose are respectively a judge, a practising lawyer, and a law professor. Are we really outsiders? Why are we seen as outsiders? Are we not, and why are we not seen as, colleagues deeply-involved in your work? In fact, we three are. But it must be admitted that our profession as a whole is far too little involved in correctional work, and, in the result, in my view, the field of corrections suffers substantially. If blame be allocated for this separateness, I would attribute the major fault to the lawyers but would not acquit corrections entirely.

Certainly, correctional leadership could and should do a great deal more to build bridges to collaboration.

I first came to this country for a year in 1955, returned again for a year in 1961, and since 1964 have made my home here. In this relatively brief period I have seen dramatic developments in the lawyers' attitudes to criminal law and, more recently, to sentencing and corrections. The pattern of change is particularly visible in the Law Schools. Fifteen years ago the better law students were hell-bent for Wall Street and La Salle Street and the advanced money-grubbing for which the institutions at which I taught had trained them. Today the better law students are mainly interested in the contribution that they and the law can make in the broad area of social welfare, certainly not excluding the criminal law. They are increasingly involved in legal aid to the indigent and in insisting that the leading law firms facilitate their egalitarian and social welfare efforts. Their impact on the substantive criminal law is already apparent; an impact will in due course be made on corrections.

And the law schools have greatly increased their offerings in this field. In those distant days of my former legal education, criminal law formed a smallish part of a generic course on "Wrongs—civil and criminal". This year at the Law School of the University of Chicago, and we are not atypical (though, properly, we are not in arrears in legal education), the law student must take a substantive Criminal Law course in two quarters of his first year, and may take courses in subsequent years in Criminal Procedure, a new course called Criminal Justice System, as well as much law and practice bearing on these problems in courses on Evidence, Constitutional Law, Administrative Law. Further he has available to him several seminars of relevance to criminal law and to corrections. In time, the lawyers will be well trained to collaborate with corrections and will have cast off their simplistic notions of your work.

Likewise, in those last fifteen years the initiatives of the American Law Institute in its Model Penal Code has improved the substantive criminal law of many states. Admittedly, the criminal courts, particularly the criminal courts of first instance in the cities, impose the law's delays in prodigious measure and are a scandal of inefficiency and unseemliness.

But the movement towards better standards, with the establishment of Institutes of Judicial Administration, and the increasing involvement of judges and leading practitioners in Sentencing Institutes and in administrative reforms in court processes, are welcome no less because they are grossly overdue. And, as has been mentioned, the efforts to produce Codes of Corrections in several states are already productive of innovative ideas and will, it is hoped, generate a useful fillip to correctional reform.

The initiative of the Supreme Court of the United States and of other leading courts moves beyond better protecting the rights of the accused to better protection of the rights of the sentenced offender. This, as my colleague in corrections Robert Kutak has sharply revealed, will be a spur and a stimulus to the achievement of some of the minimum standards of decency, efficiency and humanity in corrections to which we all adhere. You may see this as a strange and unwelcome form of collaboration between our professions; to me it is clearly a desirable development, promising a new breakdown of the walls which isolate corrections from social advance.

I urge you not to resist these hesitant steps of the law and lawyers towards a larger involvement in corrections. Do not emulate the shrill and irresponsible cries of the police as the exclusionary rules of search, seizure and arrest were further developed over recent decades. On the contrary, it will be, in my view, to the distinct advantage of our field of mutual concern if you help to build every bridge within your competence towards collaboration between corrections and the courts, between your work and judicial sentencing, so that ultimately we may move towards a socially protective, humane and efficient system of sentencing and corrections. There will yet remain another bridge to build, over more difficult terrain than that which now separates our two fields; if we are to have a socially protective, humane and efficent criminal justice system, planning and practice will require close collaboration between police, courts and corrections—from that, as yet, we seem far removed.

F *Where to go? What to do?*

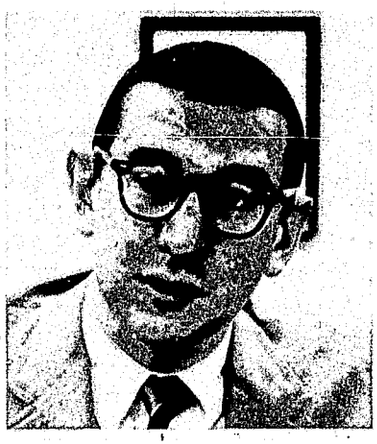
My recommendations, for what they are worth, are the mirror images of the critical views I have offered. In general

those in corrections and the informed outsiders agree on the path ahead. This path was in large part cleared in 1870 and has since been better defined and illuminated by some sporadic experience, by scholarship, and by a series of national and state commissions of enquiry. Corrections must become more community based; the barriers between institutions and the community must be broken down; we must cease to imprison the nuisance as distinct from the criminal who has encompassed substantial social harm, and imprison the latter only when no other appropriate treatment is acceptable. To achieve these ends, the purposes of corrections must be better defined and the roles of the diverse correctional workers better articulated. To these ends, collaboration with other elements of the criminal justice system is essential and more forceful leadership must emerge. The profession of corrections must be prepared strongly to criticise and, if necessary, to eject from its fold those of its practitioners who fail to achieve its expressed minimum standards; the inhumane and inefficient must no longer be protected by a professional, isolated freemasonry. Corrections must become a more public enterprise; we must lure responsible power in the community—the press, the lawyers, the politicians—to cross the walls of separateness now cast around corrections. In sum, correctional leadership must take more risks and must refuse to be the slavish hand-maiden of an ill-informed and punitive public and their disinterested political leaders. Correctional leaders will need allies; they are there if you will cultivate them.

Let me end where I began guided by the great thoughts of Mayor Daley who once urged us at the University of Chicago to continue our unremitting efforts to climb to new levels of platitude! I hope I have not, in this address, achieved that result; if acerbity has offended, I apologise, but I remain disturbed by the squalor and inefficiency of contemporary corrections in this great and rich country and believe that competence, power, and leadership to achieve an expeditious growth towards decency and efficiency in corrections is gathered together at this conference.

FROM THE OUTSIDE LOOKING IN: GRIM FAIRY TALES FOR PRISON ADMINISTRATORS

BY ROBERT J. KUTAK



BIOGRAPHIC NOTE

Mr. Kutak is a practicing attorney associated with the firm of Kutak Rock Campbell and Peters (Omaha, Nebraska). He received his B.A. and J.D. from the University of Chicago. He has served as Administrative Assistant to U.S. Senator Roman L. Hruska and was Vice Chairman of the Nebraska Commission on Law Enforcement and Criminal Justice.

Mr. Kutak has served on numerous government committees and councils, most recently on the President's Task Force on Prisoner Rehabilitation and the LEAA National Advisory Task Force on Correctional Architecture. He also represented the United States, as did both other panelists, at the Fourth United Nations Congress on the Prevention of Crime and Treatment of Offenders (1970).

SUMMARY

Correctional administration is at the crossroads. Inmates can be expected to bring more cases challenging the inadequacies in the present system. Courts are assuming a new activism. A series of important judicial decisions point to increasing involvement of courts in protecting the rights of prisoners to fair and decent treatment. The correctional process is not suddenly being singled out and made the isolated object of legal concern. Concern about how public officials make decisions is occurring on a broad front. Prison officials would be well advised to recognize the trend of the times and shape for themselves the future of corrections.

"The prophecies of what the courts will do
in fact, and nothing more pretentious, are
what I mean by the Law."

O. W. HOLMES, JR.:
The Path of the Law

I. WHAT'S HAPPENING

Courts are assuming a new activism in their approach to corrections. Perhaps this is attributable to a growing impatience with American penology which uses, as Norval Morris observes, eighteenth and nineteenth century methods in the middle of the twentieth century.[1] Four decisions this year suggest that the courts may take the lead in protecting the rights of prisoners with the same intensity and thoroughness that they have exercised for many years in the fields of race relations, rights of accused, and reapportionment. These cases signal a changing judicial attitude that must be recognized by those involved in the correctional process.

A United States District Court in Arkansas ruled that confinement in that state's penitentiary system is cruel and unusual punishment under the Eighth Amendment of the United States Constitution.[2] The court rejected rationalizations offered for conditions prevalent in the Arkansas system and declared the whole prison operation unconstitutional. This broad ruling was the culmination of several years of extensive litigation.[3]

The Arkansas prison system consists of two farms where convicts work in the fields to raise products to be sold by the state.[4] The farms have extraordinary deficiencies. There are very few paid employees. Almost all the clerical duties and the vast majority of the disciplinary actions are carried out by trusties. Further, trusties are the only guards on duty most of the time. They are often armed with shotguns and thus have nearly absolute power of life and death over other

[1] N. Morris & G. Hawkins, *The Honest Politician's Guide to Crime Control* (1969).
[2] Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969) (connected case).
[3] Courtney v. Bishop, 409 F. 2d 1185 (8th Cir. 1969) (use of solitary allowed); Jackson v. Bishop, 404 F. 2d 571 (8th Cir. 1968), *rev'g*, 268 F. Supp. 804 (E.D. Ark. 1967) (use of strap enjoined); Talley v. Stephens, 247 F. Supp. 683, 689, (E.D. Ark. 1965) (use of strap disallowed except if inflicted "as dispassionately as possible and if by responsible people"). Cf., Stephens v. Dixon, No. L-3112, at 10 (Cir. Ct. Baker county, Ore., May 31, 1967).
[4] The facts described herein are abstracted from the court's opinion in Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970). For a more complete description of the Arkansas prison system, see Murton and Hyans, *Accomplices to the Crime* (1969).

inmates. All too frequently, trusties have brutal dispositions resulting in a reign of terror.

Convicts not in isolation are confined at night in open dormitories in which rows of beds are side by side. Inmates holding grudges against other inmates need only "creep" or "crawl" to stab their victims in the night, confident that the "trusty" guards will probably not intervene. In addition, no efforts are undertaken to protect prisoners from homosexual assaults. To avoid such attacks the inmates must "come to the bars" at the front of the barracks and cling to them all night.

There is no meaningful program of rehabilitation. The system inflicts suffering without concern for treating inmates' criminal behavior in preparation for their release. Finally, it was discovered that the prison yard contained the bodies of prisoners who mysteriously died in prison. Courts were thus unknowingly sentencing offenders to homosexual abuse, physical torture, and in some cases even to death. The government had lost control of the situation.

The federal court concluded not only that Arkansas could not be allowed to operate a prison system so inconsistent with the safeguards of the Eighth Amendment, but required that administrators file a written report setting forth what they would do to remedy prison conditions.[5]

Conditions in the city jail in New Orleans, Louisiana, have also been held to violate the Eighth Amendment.[6] The federal district court found that Orleans Parish Prison is in deplorable condition and ordered repairs to be made "without delay." City officials were required to file reports within 30 days describing progress in performing the work.

The Orleans Parish Prison was designed for 450 inmates, but houses some 800 to 900 inmates. The facility is in such disrepair that windows must be boarded up to prevent inmates from pulling the bars out of the decaying windows and rotting plaster board. The ventilation is therefore so limited that

[5] Prison officials must report regularly to Chief Judge Henley. Presently, the judge has under advisement the practice of punishing prisoners by confinement to an abandoned ball field. In a case involving a single prisoner, but not the entire system, Judge Harris in Jackson v. Sarver, No. PB 70 C-35 (E.D. Ark. July 23, 1970) found that a prisoner had been confined from May 14, 1970 to the date of the order to an "abandoned ball field" continuously without shelter, bedding or sanitary facilities. He found the practice unconstitutional and ordered that the prisoner could only be confined in normal working hours and then sanitary facilities must be available. Further, the prisoner must be given the "same shelter from the elements, change of clothing and opportunities to perform acts of personal hygiene that are generally available to the prison inmates as a whole."
[6] Hamilton v. Schiro, Civil No. 69-2443 (E.D. La. June 25, 1970).

temperatures in the jail are often over 100 degrees. The entire structure is infested with rats and vermin. It is a serious fire hazard. An inspection found 29 fire code violations, some of which were blatant.

Inmates are in constant fear of physical attack. There are no isolation areas for such prisoners as sexual offenders, and men who require unusual disciplinary controls. As a result they are sometimes put in cells with first offenders.[7]

The court concluded:

> "Prison life inevitably involves some deprivation of rights, but the conditions of plaintiffs' confinement in Orleans Parish Prison so shocked the conscience as a matter of elemental decency and are so much more cruel than is necessary to achieve a legitimate penal aim that such confinement constitutes cruel and unusual punishment in violation of the United States Constitution."[8]

Judicial probes of prison systems have not been limited to the South or to systems involving cruel and unusual punishment. Inmates in Rhode Island challenged the segregation and classification system of the Adult Correctional Institute.[9] The petitioners had been placed in the behavioral control unit of the state penitentiary. They alleged that while in the behavioral control unit they were denied the opportunity to engage in regular prison activities and that the facilities had deteriorated and constituted a serious health hazard. In addition, they alleged that prison officials often acted discriminatorily and arbitrarily in classifying security risks.

The court decided to conduct a series of conferences "both in the adversarial atmosphere of the court room" and "in the negotiation climate of the court chambers"[10] with counsel for the inmates and administrators. These conferences produced a code of rules and regulations governing the discipline and classification of inmates.

In the new code is a rule requiring review of classifications by a board at regular intervals or at such time as a major change in an inmate's program is contemplated. In addition, the privileges and restrictions of each classification category are enumerated. Administrative procedures for the

[7] *Id.* at 4.
[8] *Id.* at 6.
[9] Morris v. Travisano, 310 F. Supp. 857 (D.R.I. 1970). The classification system was as follows: Category "A" prisoners were allowed to take advantage of all educational and rehabilitative programs and also full visiting privileges. Category "B" were not allowed employment and were allowed visitors only if clean shaven. Category "C" were allowed to do only housekeeping duties and visitors only under supervision of an administrator.
[10] *Id.* at 858.

classification board were adopted, requiring that a record be made of the proceedings and that notification be furnished the inmate of any contemplated change in classification and the reasons for it. Further, a procedural outline of disciplinary action was formulated in which the following steps were required:

1. Written charge by reporting officer or employee.
2. Investigation and review by superior officer.
3. Hearing before Disciplinary Board.
4. Administrative review.
5. Maintenance of a record.[11]

Thus, sweeping changes were made in classification and segregation procedures. The new procedures greatly restricted unreviewed administrative discretion, which one writer has called the central evil of prison life.[12]

In developing the new code, the court did not adjudicate legal and factual issues in the usual manner, but became an active participant in the formulation of the rules and regulations. Penologists of national reputation were consulted. The court even sent the proposed rules to the inmates for their comments or objections. Precautions were taken to protect the integrity of the inmate survey. Arrangements were made for the inmate comments to be dropped into a locked box, which was brought to each cell and then delivered unopened and uncensored to the court. After taking these comments into consideration, the court ordered the new rules and regulations put into effect. It also retained jurisdiction to consider the reclassification of prisoners who still remained in the behavioral control unit.

Some inmates were still not satisfied with the physical conditions of the unit. To aid their counsel in preparing further cases, the court sent a form letter to the inmates asking whether they would allow counsel to see their comments with the assurance that the contents would not be revealed to prison officials.

As sweeping as these cases are, perhaps the most significant case with regard to judicial intervention occurred in the United States District Court for the Southern District

[11] Regulations Governing Disciplinary and Classification Procedures at the Adult Correctional Institutions, State of Rhode Island 14 (February 9, 1970).
[12] P. Hirschkop and M. Millemann, *The Unconstitutionality of Prison Life*, 55 Va. L. Rev. 795 (1969).

of New York.[13] In *Sostre* v. *Rockefeller*, an inmate sued under the Civil Rights Act of 1871 for damages for deprivations inflicted upon him under color of law by prison administrators.[14] The inmate was no stranger to prison officials nor to the courts, having secured during prior incarcerations certain unrestricted religious liberties for Black Muslim prisoners.[15]

When again sentenced to prison, Sostre immediately was transferred from one institution to another based on what an official termed "the best interests of the state and the inmate."[16] He was placed in solitary for trying to mail a certificate of reasonable doubt to a state court. He was again placed in solitary for trying to mail some handwritten notices to the court and for the further reason that he refused to tell the warden what the letters "RNA" meant in a letter he wrote to his sister.

The inmate spent thirteen months in solitary with only one other prisoner housed in the same group of cells. He remained in the cell around the clock. He was allowed one hour per day of recreation in a small, completely enclosed yard, but refused this "privilege" because it was conditioned upon a mandatory "strip frisk" including a rectal examination. He was not permitted to use the prison library, read newspapers, see movies, or attend school or training programs.

The court said that the incarceration was "physically harsh, destructive of morale, dehumanizing in the sense that it was needlessly degrading, and dangerous to the maintenance of sanity when continued for more than a short period of time, which should certainly not exceed 15 days."[17] The court further stated:

> " . . . Sostre was sent to punitive segregation and kept there until released by court order not because of any serious infraction of the rules of prison discipline, or even for any minor infraction, but because Sostre was being punished specially by the Warden because of his legal and Black Muslim activities during his 1952-1964 incarceration, because of his threat to file a law suit against the Warden to secure his right to unrestricted correspondence with his attorney and to aid his codefendant, and because he is, unquestionably, a black militant who persists in writing and expressing his militant and radical ideas in prison."[18]

[13] Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970).
[14] 42 U.S.C. §1983 (1964).
[15] Sostre v. McGinnis, 334 F. 2d 906 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964); Pierce v. La Vallee, 293 F. 2d 233 (2d Cir. 1961).
[16] Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970).
[17] *Id.* at 867.
[18] *Id.* at 868.

The court found that the officials involved had acted with bad faith and malice and awarded the inmate $9,300 compensatory damages (computed at the rate of $25 a day for each of the 372 days spent in solitary) and $3,720 punitive damages.

Perhaps the most significant aspect of the case was not the damages awarded, unprecedented as that action was, but the injunctive relief that was granted. The prison administrators were enjoined from placing the inmate in solitary without:

> 1. Giving him in advance of a hearing, a written copy of any charges made against him, citing the written rule or regulation which it is charged he had violated;
> 2. Granting him a recorded hearing before a disinterested hearing officer where he would be entitled to cross-examine his accusers and to call witnesses on his own behalf;
> 3. Granting him the right to retain counsel or appoint a counsel substitute;
> 4. Giving him in writing the decision of the hearing officer briefly setting forth the evidence supporting the decision, the reasons for the decision, and the legal basis for the punishment imposed.[19]

The prison administrators were further enjoined from censoring or refusing to give the inmate any communications from any court, public official, public agency, lawyer, codefendant, or any other inmate requesting his assistance; or from sharing his legal materials with other inmates.[20] In addition, the prison administrators were required to submit proposed rules and regulations for all inmates governing all administrative actions where punishment could include punitive segregation or loss of good time credit.[21]

II. So What

The distinguishing features of these four cases are not the findings of brutality or arbitrary administrative action, but the extraordinary lengths to which the courts went to give relief. In each instance the court did not restrict itself

[19] *Id.* at 869-870.
[20] *Id.* at 884.
[21] *Id.* The District Court has set aside this portion of the order pending appeal. N.Y. Times, June 13, 1970, at 39, col. 3. Judge Foley in Wright v. McMann, Civil No. 66-CV-77 (N.D.N.Y. July 31, 1970) reviewed prison practices at Clinton Prison, Dannemora, N.Y. In addition to relief granted specifically to the petitioners, the judge directed that the rules and regulations to be submitted to Judge Motley pursuant to her order in Sostre be also submitted to him for his review and implementation at Clinton Prison.

to ruling on specific grievances, but undertook an examination of the entire correctional system.

In Arkansas, the court ordered the submission of a comprehensive program to eliminate the unconstitutional aspects of prison life in that state. The court did not just condemn existing practices, but required prison officials to submit a plan for change, much as courts have done in desegregation and reapportionment cases.

In Louisiana, the court required city officials to make extensive repairs at the New Orleans city jail. The court's decision shows that local jails as well as state prisons are subject to judicial scrutiny. The court was simply unwilling to accept deplorable physical conditions in correctional facilities.

In Rhode Island, the court took the unprecedented step of mediating bargaining between counsel for the inmates and prison administrators over rules and regulations for classification. It also solicited inmate opinion regarding the proposed rules before allowing them to be put into effect.

In New York, the court granted judicial protection against deprivation of the inmate's rights. To insure such protection, the court provided procedural safeguards as well as awarded compensatory and punitive damages. The court also required prison officials to submit new rules for all proceedings in which the punishment includes punitive segregation or loss of good time.

These cases are in dramatic contrast to the prevailing judicial doctrine best described as "hands off."[22] The hands off doctrine has taken many forms but can be generally defined as a judicial refusal to review the complaints of inmates that pertain to issues other than the legality of confinement. Despite occasional erosions,[23] the doctrine dominated the judicial attitude in disposing of inmates' complaints well into the 1960's.[24]

A number of legal commentators considering prisoners'

[22] Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 Yale L.J. 506 (1963).

[23] Fay v. Noia, 372 U.S. 391 (1963) (state remedies need not be exhausted in habeas corpus actions in federal court); Monroe v. Pape, 365 U.S. 167 (1961) (state remedies need not be exhausted in civil actions under 42 U.S.C. §1983).

[24] *See, e.g.*, Ruark v. Schooley, 211 F. Supp. 921 (D. Col. 1962); Blyth v. Ellis, 194 F. Supp. 139 (S.D. Tex. 1961); Swanson v. McGuire, 188 F. Supp. 112 (N.D. Ill. 1960).

rights have reappraised the hands off doctrine.[25] They recognize that there is some justification for the doctrine. First, it serves as an effective method of disposing of unreasonable and frivolous complaints that inmates are likely to devise.[26] Second, it is consistent with the courts' traditional function of reviewing administrative decisions for abuse, not substituting the court's judgment for that of the administrative body.[27] Third, it is consistent with the doctrine of separation of powers since the administration of prisons was thought to fall exclusively within the jurisdiction of the executive branch.[28] The rationale of the hands off doctrine, nevertheless, had to be re-examined when abuses of administrative discretion disclosed in prisoners' complaints were weighed against an increasing concern for individual rights.[29]

A recent federal court case in Maryland illustrates the harsh results of the hands off doctrine.[30] The inmate's petition asserted that he has placed naked in a solitary cell in 40 degree temperature, deprived of blankets and a mattress for 27 hours, and denied baths and toiletry articles for 16 days. The court concluded that even if these allegations were true, the facts were not so exceptional or extreme in nature as to override the defense that matters of prison discipline are within the sole discretion of prison officials.

The Supreme Court has recognized that the goal of corrections is rehabilitation, not vindictive suffering.[31] It is not surprising that a counter principle to the hands off doctrine has emerged as courts were confronted with capricious administrative decisions.

[25] R. Mosk, *The Role of Courts in Prison Administration*, 45 L.A. Bar Bull. 319 (1970); Note, *Prisoners' Rights Under Section 1983*, 57 Geo. L.J.. (1969); Vogelman, *Prison Restrictions—Prisoner Rights*, 59 J. Crim. L.C. & P.S. 386 (1968); Note, *The Problems of Modern Penology; Prison Life and Prisoner Rights*, 53 Iowa L. Rev. 671 (1967); E Barkin, *The Emergence of Correctional Law and the Awareness of the Rights of the Convicted*, 45 Neb. L. Rev. 669 (1966); Comment, *The Rights of Prisoners While Incarcerated*, 15 Buffalo L. Rev. 397 (1965); Note, *Constitutional Rights of Prisoners; The Developing Law*, 110 Pa. L. Rev. 985 (1962).

[26] *See* Note, *Legal Services for Prison Inmates*, 1967 Wis. L. Rev. 515. The number of habeas corpus petitions in federal courts from state prisoners had increased from 814 in 1957 to 4,845 in 1965, of which more than 95% were held to be without merit. U.S. Code Cong. & Ad. News 3663 (1966).

[27] Note, *Judicial Intervention in Prison Administration*, 9 Wm. & Mary L. Rev. 178, 180 (1967).

[28] The Federal Prisons and Prisoners Act of 1948, 18 U.S.C. §4001 (1964), withdraws federal prison administration from the province of the courts and places it under the Attorney General.

[29] Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw meaning from the evolving standards of decency that mark the progress of a maturing society").

[30] Roberts v. Pepersack, 256 F. Supp. 415 (D. Md. 1966).

[31] Robinson v. California, 370 U.S. 660, 666 (1962) (criminal punishment for drug addiction is cruel and unusual punishment, since it does not purport to require medical treatment).

The counter principle was first enunciated in 1944 in a case concerning a prisoner who had suffered bodily injury from the assaults, cruelties and indignities of his co-inmates and guards.[32] The lower court dismissed the inmate's petition, holding that on its face it did not state cause for granting relief. The Court of Appeals for the Sixth Circuit reversed, stating:

> *"A prisoner retains all rights of an ordinary citizen except those expressly or by necessary implication taken from him by law.* While the law does take his liberty and imposes a duty of servitude and observance of discipline for his regulation and that of other prisoners, it does not deny his right to personal security against unlawful invasion."[33]

The Court of Appeals for the Fourth Circuit gave new life to the principle in 1966 when it ruled in favor of an inmate who asserted that prison officials had conspired to deny him medical care and maliciously caused him to be placed in solitary confinement.[34] The court said of the traditional defense:

> "The hands off doctrine operates reasonably to the extent that it prevents judicial review of deprivations which are necessary or reasonable concomitants of imprisonment. Deprivations of reasonable medical care and of reasonable access to the courts are not among such concomitants."[35]

The courts have not yet itemized the necessary concomitants of prison life. However, they have rapidly developed the doctrine of retained rights of prisoners and thereby defined to some degree the practices that will not be permitted.[36]

The Supreme Court has not expressly recognized the principle that the prisoner retains all rights except those taken away expressly or by necessary implication of law. But the principle may be implicit in Supreme Court holdings that religious discrimination[37] and racial discrimination[38] in prisons are unconstitutional.

[32] Coffin v. Reichard, 143 F. 2d 443 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945).
[33] *Id.* at 445 (emphasis added).
[34] Edwards v. Duncan, 355 F. 2d 993 (4th Cir. 1966).
[35] *Id.* at 994.
[36] Bethea v. Crouse, 417 F. 2d 504 (10th Cir. 1969) (assaults must be prevented); Jackson v. Godwin, 400 F. 2d 529 (5th Cir. 1968) (Negro Newspapers and magazines may not be withheld); Wright v. McMann, 387 F. 2d 519 (2d Cir. 1967) (inhuman cell conditions not allowed); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969) ("dry cell" enjoined); Jordan v. Fitharris, 257 F. Supp. 674 (N.D. Cal. 1966) (conditions of "strip cells" enjoined).
[37] Cooper v. Pate, 378 U.S. 546 (1946).
[38] Lee v. Washington, 390 U.S. 333 (1968).

III. You Ain't Seen Anything Yet

Procedural Due Process

Even more dramatic changes in the law of corrections can be expected. One case that might have a profound impact was handed down earlier this year. This is the much publicized *Goldberg* v. *Kelly*[39] decision which examined procedures for terminating welfare benefits. The case contains language applicable to many areas where individual rights come into conflict with governmental action.

In *Goldberg*, administrators terminated welfare benefits of several individuals. The terminations were pursuant to established procedures which did not provide for a personal apearance by the recipient, an oral presentation of evidence, or the right to cross examine adverse witnesses. The procedures did provide for a "fair hearing" after termination if requested.

The Court held that benefits can not be terminated until the recipient is granted a personal appearance before administrators, with a right to cross-examine adverse witnesses, to present evidence, and to retain counsel. The Court recognized the basic principle that the individual must be given an opportunity to be heard before he can be penalized. Further it said that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[40]

The implications for correctional administrators are obvious. For one thing, *Goldberg* would require greater procedural safeguards for inmates. The imposition of solitary confinement could take place only after a hearing.[41]

Another significant aspect of *Goldberg* is that welfare benefits were held to be a matter of statutory right for persons qualified to receive them. The Court stated:

> "The constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right'."[42]

Again applied to corrections, this language is in direct con-

[39] 90 S. Ct. 1011 (1970).
[40] *Id.* at 1022.
[41] These safeguards were implemented as to one prisoner in Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970).
[42] Goldberg v. Kelly, 90 S. Ct. 1011, 1017 (1970).

flict with existing case law on the revocation of good time.[43]

The rationale of *Goldberg* may reach other areas of corrections, such as parole revocation. This is reinforced by the reasoning of another recent Supreme Court decision holding that probationers are entitled to a fair hearing at such a proceeding or one with respect to a deferred sentence.[44]

Right to Treatment

It will not be long until an enterprising inmate seeks to enforce his statutory rights to rehabilitation, much as the criminally insane have succeeded in doing.[45] For example, the 1964 Hospitalization of the Mentally Ill Act for the District of Columbia provides:

> "A person hospitalized in a public hospital for a mental illness shall, during his hospitalization, be entitled to medical and psychiatric care and treatment."[46]

Based on this language, the Court of Appeals for the District of Columbia held that a person committed to a mental institution as criminally insane has a statutory "right to treatment," which requires that he be released if he is not accorded such treatment.[47] The court stated that a failure to provide adequate treatment gives rise to serious constitutional questions, but chose to base the right to treatment on statutory grounds. Other courts have based a right to treatment on the Due Process and Equal Protection clauses of the Fourteenth Amendment.[48]

The relevance of these cases becomes clear when it is noted that the institutions involved were actually penitentiary-hospitals. In addition, the right to treatment has not been limited to the mentally ill. The Court of Appeals for the Fourth Circuit has extended the right to habitual criminals classified as defective delinquents,[49] and in the District of Columbia, it has been extended to juvenile delinquents.[50]

[43] *E.g.*, Douglas v. Sigler, 386 F. 2d 684 (8th Cir. 1967) (due process requirements held not applicable to revocation of good time since its allowance a matter of grace rather than right). *Contra*, Rodriquez v. McGennis, 307 F. Supp. 627 (N.D.N.Y. 1969) (discretionary reduction of good time held invalid).

[44] Mempa v. Rhay, 389 U.S. 128 (1967). *See also* dissenting opinion in Menechino v. Oswald, No. 34665 (2d Cir. August 5, 1970) which applies similar logic to allowing counsel at a parole release hearing. *See generally* Kadish, *The Advocate and the Expert Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803 (1961).

[45] *See* Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960).

[46] D. C. Code Encycl. Ann. §21-562 (1967).

[47] Rouse v. Cameron, 373 F. 2d 451 (D.C. Cir. 1966).

[48] Mason v. Superintendent of Bridgewater State Hospital, 353 Mass. 604, 233 N.E. 2d 908 (1968); Eidinoff v. Connolly, 281 F. Supp. 191 (N.D. Tex. 1968).

[49] Sas v. Maryland, 334 F. 2d 506 (4th Cir. 1964).

[50] In re Elmore, 382 F. 2d 125 (D.C. Cir. 1967); Creek v. Stone, 379 F. 2d 106 (D.C. Cir. 1967).

The logical next step is the extension of the right to treatment to inmates in prisons. The rationale of the cases involving the criminally insane is that the purpose of involuntary hospitalization is treatment, not punishment.[51] Significantly, as far back as 1870 the American Prison Association recognized that rehabilitation and moral regeneration, not the infliction of vindictive suffering, were the paramount aims of correction.[52]

These aims have been incorporated, in one form or another, in many state statutes. Perhaps the New York statutes contain the most detailed statement:

> "The objective of prison education in its broadest sense should be the socialization of the inmates through varied impressional and expressional activities, with emphasis on individual inmate needs. The objective of this program shall be the return of these inmates to society with a more wholesome attitude toward living, with a desire to conduct themselves as good citizens and with the skill and knowledge which will give them a reasonable chance to maintain themselves and their dependents through honest labor. To this end each prisoner shall be given a program of education which, on the basis of available data, seems most likely to further the process of socialization and rehabilitation. The time daily devoted to such education shall be such as is required for meeting the above objectives. The director of education, subject to the direction of the commissioner of correction and after consultation by such commissioner with the state commissioner of education, shall develop the curricula and the education programs that are required to meet the special needs of each prison and reformatory in the department."[53]

The Missouri statute provides:

> "[I]n the correctional treatment applied to each inmate, reformation of the inmate, his social and moral improvement, and his rehabilitation toward useful, productive and law-abiding citizenship shall be guiding factors and aims."[54]

Other states have similar language in their penal statutes.[55]

While some administrators might regard the right to treatment as an undue interference with prison operations, most will perceive that it may well become the catalyst for the reform they have been trying to bring about for so long. The advantage of a statutory right to treatment is that it

[51] Rouse v. Cameron, 373 F. 2d 451, 452 (D.C. Cir. 1966).

[52] *Transaction of the National Congress on Penitentiary and Reformatory Discipline* 541 (Principle II) (1871).

[53] N.Y. Correc. Law §136 (McKinney 1968).

[54] Mo. Ann. Stat. §216.090(1) (1962).

[55] Ga. Code Ann. §77-319 (1964); Ind. Ann. Stat. §13-123 (1956); La. Rev. Stat. Ann. §15-854 (1967). The 1969 Nebraska Legislature passed L.B. 1307 which provides: "There is hereby created within the Department of Public Institutions a Division of Corrections which shall: Develop policies and programs for the correctional treatment and rehabilitation of persons committed to the division." Ch. 817, §6 [1969] Neb. Acts 3075.

is predicated upon state law rather than federal constitutional principles. This means that the field of corrections can avoid the chaos which may occur when federal courts seek to reorganize an entire institutional structure without statutory guidelines.[56] In corrections there is the advantage that existing state laws provide such guidelines. Legislatures may be much more willing to appropriate funds to support their own announced aims than they would be to support federal constitutional mandates which are often regarded as unwarranted interference into state affairs.

Prison Legal Services

The Supreme Court has made it very clear that it will guard jealously prisoners' right of access to the courts and communication with counsel.[57] For many inmates, especially the illiterate, access to the court is only possible if they receive some assistance. In the landmark case of *Johnson* v. *Avery*,[58] the Court held that in the absence of a reasonable alternative, prison regulations cannot prohibit one inmate from providing legal assistance to another. The prisoner in *Johnson* was placed in solitary confinement for assisting other inmates in the preparation of writs, even though no other assistance was available. The Court was obviously unimpressed by the argument accepted by the Court of Appeals that the prisoner's activities constituted the unauthorized practice of law.[59] The Court realistically concluded that the prisoner has little access to lawyers and is entitled to secure assistance from anyone. In effect, the Supreme Court created a right to a "jailhouse" lawyer.[60]

As with all things born of necessity, the alternative of a

[56] Extensive controversy and litigation have arisen from Brown v. Bd. of Educ., 347 U.S. 483 (1954) and Baker v. Carr, 369 U.S. 186 (1962).

[57] Access to the courts cannot be separated from the right to communicate with counsel since both are required if the inmate is to effectively present his complaint. State v. Cory, 62 Wash. 2d 371, 382 P. 2d 1019 (1963), Annot., 5 A.L.R. 3d 1360, 1375 (1966).

[58] 393 U.S. 483 (1969).

[59] *See* Johnson v. Avery, 382 F. 2d 353 (6th Cir. 1967).

[60] The right to utilize jailhouse lawyers has been enhanced in California by the invalidation of a prison regulation prohibiting one inmate from possessing another's legal documents. In re Harrell, 7 Crim. L. Rep. 2278 (Cal. Sup. Ct. 1970). Later this year a three-judge federal court in California will decide if a regulation limiting the contents of prison libraries is an unconstitutional infringement on the right of access to the courts. Grant v. Gilmore, 7 Crim. L. Rep. 2278 (N.D. Cal. 1970). *See also*, Bailleaux v. Holmes 177 F. Supp. 361 (D. Ore. 1959), *rev'd sub nom.*, Hatfield v. Bailleaux 290 F. 2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961) (reversed the lower court's decision that inmates must be allowed to purchase lawbooks, to keep legal materials in their cell if the library is too small and to have legal material free from confiscation by prison authorities).

jailhouse lawyer has many flaws. Jailhouse lawyers usually acquire their skills from the ground up, typically by the preparation of their own petitions. While the experience is valuable, it is hardly a substitute for a formal legal education. They often pursue legal theories which are of no significance to their inmate clients. They may misunderstand or be unware of court decisions which may support their client's claims. They may overlook significant facts which would, if alleged, support a valid claim.[61]

Equally disturbing is a jailhouse lawyer's opportunity to acquire undue influence over other prisoners. Inmates simply do not do favors for other inmates without some kind of remuneration.[62] The jailhouse lawyer's fee may be commissary goods, clothing, or even a homosexual act. The problem can be aggravated by the fact that not all such agreements are honored creating inmate feuds which can lead to physical assualts or worse.

The time has come to provide prisoners with an adequate legal services program. Such a program would have a definite therapeutic and rehabilitative effect. Professional evaluation and handling of the inmate's complaint will create a new respect for the criminal justice system. In addition, many of the obstacles which now hamper effective rehabilitation would be removed if legal assistance were available to prisoners to solve their problems in such areas as domestic relations, creditors' rights, and employment. A valuable side effect would be a reduction in the number of frivolous and time consuming petitions which have created a burden on the courts and prison officials.

There are numerous ways in which inmate legal service programs could be provided.[63] A resident attorney provided by the State could be established within the prison itself. Another alternative would be to enlarge legal aid and community defender offices to handle the complaints of prisoners. An innovative proposal has been suggested by the National Legal Aid and Defender Association. This organization proposes to establish programs in which law students would

[61] Larsen, *A Prisoner Looks at Writ Writing*, 56 Calif. L. Rev. 343 (1968).

[62] Spector, *A Prison Librarian Looks at Writ Writing*, 56 Calif. L. Rev. 365 (1968). *See also* Krause, *A Lawyer Looks at Writ Writing*, 56 Calif. L. Rev. 371 (1968); Note, *Constitutional Law: Prison "No Assistance" Regulations and the Jailhouse Lawyer*, 1968 Duke L.J. 343; Note, *Prisoner Assistance on Federal Habeas Corpus Petitions*, 19 Stan. L. Rev. 887 (1967).

[63] *See generally*, Note, *Legal Services for Prison Inmates*, 1967 Wis. L. Rev. 514.

provide legal assisance to inmates under the guidance of local bar associations.

Recently, the American Bar Association established a Commission on Correctional Facilities and Services, one principal aim of which is to expand the role of the legal profession in the correctional process.[64] The need for providing legal services for prisoners can be regarded as one of the most important areas of concern facing the Commission. In creating this Commission the American Bar Association has recognized the challenge of providing services for prisoners just as it has recognized the challenge of providing legal services for the poor.

Perhaps after noting these developments, it is important to recall the observations of Professor Cohen that "the correctional process has not suddenly been singled out from the criminal justice system, found wanting and made the isolated object of legal concern. Quite the contrary. Concern about how public officials make decisions, how the government and public institutions seek to extend their aid or apply sanctions is occurring on a broad front."[65] Sweeping legal reform is taking place in the areas of student rights, public welfare, juvenile court systems and military justice, to name only a few. The concern over the individual and his right to fair treatment has been summarized by Professor Kadish:

> "A first tenet of our governmental, religious, and ethical tradition is the intrinsic worth of every individual no matter how degenerate. It is a radical departure from that tradition to accept for a defined class of persons, even criminals, a regime in which their rights to liberty is determined by officials wholly unaccountable in the exercise of their power and through processes which deprive them of an opportunity to be heard on the matters of fact and policy which are relevant to the decisions made."[66]

How much further the courts will become involved in the field of corrections depends largely on what prison officials do to change conditions. The President's Commission on Law Enforcement and the Administration of Justice has summarized the problem:

> "Legislation ordinarily provides little guidance for correctional decisions. Correctional administrators have been slow to develop policies and procedures to guide correctional officials and protect

[64] By resolution of the American Bar Association Board of Governors passed February 20, 1970, 56 A.B.A.J. 380 (1970).
[65] F. Cohen, *The Legal Challenge to Corrections*, 2 (1969).
[66] Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 Harv. L. Rev. 904, 923 (1962).

> the rights of offenders. And trial and appellate courts have been reluctant to review either the merits of such decisions or the procedures by which they are made.
>
> "Yet it is inconsistent with our whole system of government to grant such uncontrolled power to any officials, particularly over the lives of persons. The fact that a person has been convicted of a crime should not mean that he has forfeited all rights to demand that he be fairly treated by officials."[67]

Correctional administration is at the crossroads. Inmates can be expected to bring more cases challenging the inadequacies in the present system.[68] Prison officials may stand pat and face the inevitability of judicial intervention. They would be better advised to recognize the trend of the times and shape for themselves the future of corrections.

[67] *President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections*, at 82-83 (1967).
[68] Procedures for detention of prisoners awaiting trial have been challenged in Rhode Island by pretrial detainees who allege that present practices amount to physiological coercion of guilty pleas. They allege they have been denied the right to work so as to be able to buy supplies from the canteen or aid their families, that they are forced to live in smaller more crowded cells, that they are given less exercise and are forced to eat last, only after sentenced men have finished, and that their visiting privileges are substantially more restricted than those of sentenced men. Palmigiano v. Traviseno, Civil No. 4296, (D.R.I., filed June 15, 1970); in Chicago, prisoners of the Cook County Jail have alleged that conditions there are so brutal and unusual as to amount to cruel and unusual punishment. They allege that inmates are deprived of adequate food, sanitation, recreational facilities, and medical attention and are in constant fear of being beaten, burnt or sexually assaulted. In addition, inmate barn bosses, similar to the Arkansas trusties, extorted money and food and did not intervene to halt beatings and sexual assaults. Cook County Jail v. Tierney, No. 68 C 504 (N.D. Ill., filed April 8, 1968). Conditions in the Manhattan House of Detention of New York City (the "Tombs") may be attacked in a suit contemplated by the Legal Aid Society. The suit will allege that shocking conditions in the facility violate the Eighth Amendment. Further, it will be alleged that the Fourteenth Amendment has been violated since most of the men confined are awaiting trial and presumed innocent. N.Y. Times, Aug. 13, 1970, at 24, col. 1.

PERSPECTIVE

NORMAN A. CARLSON

Director
Bureau of Prisons

Early this year, I stood in the Attorney General's office to be sworn in as the new Director of the Bureau of Prisons—all of the men who had served as Bureau Director were present in the room. That fact, perhaps more than any other, characterizes the relative youth of the Bureau and its important work. The Bureau of Prisons, since its inception, like so many other American institutions, has been and continues to be a reflection of the larger community in which we live. Many of the new directions which the panelists have referred to as being timely and necessary could probably not have been discussed just a short time ago. It is inappropriate to think the correctional institutions and, indeed the entire criminal justice system, can assume the leadership in our larger society. Judge Higginbotham is quite correct, in my opinion, when he sees the criminal justice system, of which corrections is only one element, as part of a changing society earnestly seeking new value systems and new priorities. Those of us who have served in corrections for many years would agree that the climate is right for change. If I were to list my own priorities for such change, they would focus on these issues:

1. Increase program alternatives for those offenders who do not require traditional institutional confinement, thereby minimizing the corrosive effects of imprisonment and lessening their alienation from society.
2. Improve the correctional staff through the development of careers that will attract and retain qualified personnel by offering purpose, challenge, reward and

opportunity for continuous personal growth and satisfaction.

3. Improve physical facilities to increase the effectiveness of rehabilitation programs because most of our existing facilities are obsolete, overcrowded and often poorly located.
4. Expand opportunities for steadily increasing involvement by the community in correctional issues and goals.

Achievement of these goals may not be realized in the next decade, nor this century, but we must begin. We must build constructively on the solid foundations laid during the past 100 years. We must add to present resources; we must greatly increase the will to put them to effective use.

MIDSUMMER PANEL MEETING

Panel Members met in Washington, D. C. on July 22 to review their monographs. They were joined by Myrl E. Alexander, Norman A. Carlson, Richard W. Velde, Lawrence A. Carpenter, Michael Kolinchak, Frank Jasmine and Sylvia G. McCollum.

END