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PRISON: THE JUDGE'S DILEMMA

IRVING R. KAUFMAN*

I. INTRODUCTION

In choosing the subject matter and then in preparing the lecture, it became apparent to me how appropriate to this occasion were Learned Hand's introductory comments to his Holmes Lectures on the Bill of Rights. He said: "My subject is well-worn; it is not likely that I shall have new light to throw on it; but it is always fresh, and particularly at the present time it is important enough to excuse renewed examination."1 No one, I am sure, will take issue with my view that the subject of prisons and prisoners has occupied so many people for so long that it can withstand just one more reexamination.2 The temptation to speak of prisons as rotten, fetid cages of inhumanity which breed more crime than they prevent, and to use similar language to describe our modern system of corrections, is ever-present.3 But I shall resist the temptation, and I shall attempt to speak instead with a more muted, but hopefully analytic voice.

* Judge, United States Court of Appeals for the Second Circuit. This article was delivered as the Third Annual John F. Sonnett Lecture, on November 20, 1972, at Fordham Law School. The text remains substantially as it was delivered. Justice Tom Clark of the Supreme Court of the United States, retired, and Cearbhall O'Dalaigb, Chief Justice of the Supreme Court of Ireland, have previously presented the Sonnett Lecture.


3. One federal district court judge, in response to the flood of prisoner rights cases brought in the courts, has stated: "I am persuaded that the institution of prison probably must end. In many respects it is as intolerable within the United States as was the institution of slavery, equally brutalizing to all involved, equally toxic to the social system, equally subversive of the brotherhood of man, even more costly by some standards, and probably less rational." Morales v. Schmidt, 340 F. Supp. 544, 548-49 (W.D. Wis. 1972).

4. "The only thing I can't resist," Oscar Wilde is known to have said, "is temptation."
While I do not wish to imply that I blindly endorse the present penological system, I wish also to avoid a fashionable despair that serves to excuse inaction.

As I have indicated, the fact that prisons and courts are the subject of my talk is neither accidental nor of minor significance. Five years ago, this lecture more likely would have dealt with procedures in criminal courts. I might have explored the implications of the then brand new *Miranda* rule and stressed the overall significance of increased supervision by federal courts of state criminal procedure. However, my concern is not with criminal suspects, or criminal defendants, but with criminals, and with society's response to the convicted lawbreaker. That difference is symbolic of how thought and emotions about the criminal law have developed in a half-decade. During that period of time a large segment of the public, and the inner sanctum of professionals who deal with crime and criminals on a daily basis, have focused their attention on the same issues. This was not always the case. Five years ago, criminal and constitutional lawyers were occupied primarily with fairness and equity in the ways people were processed through the criminal courts. Today, however, the focus seems significantly different. Attention has shifted from how people are processed through the criminal justice system to an intensive examination of the system itself. I will describe at greater length throughout this talk how our concern at present has shifted from what I shall loosely call procedure to substance. Stated in broader terms, the core of the dilemma which is the subject of my lecture is shaped by a certain confusion, or at least ambiguity, concerning the purpose of the criminal law and the most appropriate method of responding to those who violate the law. This ambiguity prompts a number of important questions, some examples of which are: what function is served by sending drunks, drug addicts, prostitutes, and gamblers to prison? What can prisons, or police, or the criminal law generally do to prevent violent street crime like mugging? Although these questions and others like them are being asked by people of different interests and disciplines, they in essence raise two issues: what is the aim of the criminal law, and what role do prisons play in giving effect to that aim?

Clearly, the impulse behind this kind of questioning is an increasing professional and societal concern over what happens to a convicted criminal after he is sent to prison. Despite the fact that even the Supreme Court has spoken of the "substitution of deterrence and reformation in

6. Chief Justice Burger recently stated: "It must be ironic to a prisoner to recall that society spared no expense to afford him three, four or five trials and appeals, at enormous costs, but then proceeds to forget his plight." *N.Y. Times*, Nov. 18, 1972, at 39, col. 8.
place of retaliation and vengeance as the motivation for public prosecution," the hard truth is that punishment and retribution are the primary, if not the only, functions currently served by most correctional institutions. 8 In the foreground of the public's mind, it seems to me, are two thoughts. One is the horror of Attica and all it symbolizes about the daily life of prisoners and about society's attitudes toward them. The second involves the inmate recently discharged from a prison who shortly thereafter is arrested for another mugging, or for armed robbery, or for rape. This is the familiar problem of inmate recidivism which plagues our system of corrections. The magnitude of this problem is largely responsible for an increasing public awareness that "rehabilitation," the great battle cry of prison reform, is one of the great myths of twentieth century penology. 9 In New York State prisons, for example, in 1970, 82 percent of those committed to a correctional center had prior adult criminal records. 10 Federal statistics are equally depressing: 63 percent of federal parolees—the "golden boys of the prison system"—and 76 percent of those inmates released at the end of their regular terms of confinement were rearrested within six years. 11 In the face of these shocking statistics, the public rightfully demands to know exactly what is happening to prisoners inside those walls, and why the inevitable result of confinement does little good for the prisoner and even less good for society. Lawyers also ask this question, but in their own legalistic and obscure language. When translated their queries become questions about what the courts will do, if anything, if the institutions in which we put criminals fail properly to perform the job they are required to perform. On this question I shall attempt to shed some light.

It is appropriate at this point to take a necessary detour in order to reach my destination. 12 The disillusionment with our correctional system and the search for alternatives to prison has opened a wide area of investigation. The public, lawyers, and thus inevitably the courts are in-

8. The view that prisoners are sent to prison not as punishment, but for punishment, is held by at least four prisoners, see Griswold, supra note 2, at 32. See generally Mead, The Psychology of Punitive Justice, 23 Am. J. Soc. 577 (1918).
9. For a contrary view, see In re Timbers, 226 F.2d 501 (6th Cir. 1955), and note the remarkable "rehabilitation" of that distinguished gentleman.
12. T. S. Eliot made the point in this fashion:

   We shall not cease from exploration
   And the end of all our exploring
   Will be to arrive where we started
   And know the place for the first time.

T. S. Eliot, Four Quartets: Little Gidding V (1943).
creasingly concerned with a fuzzy and largely uncharted area outside the criminal law—"the borderland of criminal justice"—in which people who have not been convicted of any crime are placed in large institutions and forced to remain there for long periods of time. I am referring to compulsory confinement of persons who are thought to be inappropriate subjects for a strictly criminal sanction. Among these are alcoholics, drug addicts, social misfits, the mentally ill, and even troublesome children whom many, if not all, states control by the operation of special non-criminal statutes.13 Exactly what happens to people who are committed under their authority is a most fascinating subject in its own right but one which I will only touch on, lest it swallow up my main subject. I simply urge you to keep in mind, in the interstices, as it were, the thought that the conditions of civil commitment are often difficult to distinguish from the conditions of imprisonment.14 For that reason, prison problems are not unique to penal institutions but apply as well to a host of restraining and detention facilities.

To make my subject more manageable, I will commit myself to speak primarily as a federal judge who has dealt with some of these questions, and who fears that what we have heard so far of these issues in the

13. It has been estimated that 90% of all patients in American mental hospitals are placed there by some form of involuntary commitment. See generally Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess. 11 (1961). New York's "treatment" laws are not atypical. For example, N.Y. Mental Hygiene Law § 31.27 (McKinney Supp. 1972), provides: "Involuntary admission on medical certification (a) The director of a hospital may receive and retain therein as a patient any person alleged to be mentally ill and in need of involuntary care and treatment upon the certificates of two examining physicians, accompanied by an application for the admission of such person." Identical language appears in N.Y. Mental Hygiene Law § 35.23 (McKinney Supp. 1972), treating involuntary admission of alcoholics to alcoholism facilities. For New York's treatment of narcotic addicts see N.Y. Mental Hygiene Law §§ 81.01-36 (McKinney Supp. 1972), particularly § 81.03, which defines a narcotic addict as "a person who is at the time of examination dependent upon opium, heroin, morphine, or any derivative or synthetic drug of that group or who by reason of the repeated use of any such drug is in imminent danger of becoming dependent . . . .", and § 81.13(e)(1), which provides that "[t]he period of commitment to the [narcotics addiction control] commission shall be a period of unspecified duration . . . ."

As to treatment of juveniles see N.Y. Family Ct. Act §§ 711-84 (McKinney 1963). Section 712(b) defines a "[p]erson in need of supervision" as a "male less than sixteen years of age and a female less than eighteen years of age who is an habitual truant or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority." Sections 754 and 756 authorize the Family Court to place a person adjudged to be a "person in need of supervision" in a "youth opportunity center" for an initial period of eighteen months, "and the court in its discretion may, at the expiration of such period, make successive extensions for additional periods of one year each," not to extend beyond the child's eighteenth birthday, if male, and twentieth birthday, if female.

federal courts are only faint rumblings of an impending tremor. Whether, when it subsides, that tremor will have left confusion and disrepair in its wake or whether instead it will have given those in positions of responsibility the motivation to rebuild and reshape our institutions on much firmer foundations, is a question that will be decided by the thoughtfulness and perseverance of the men and women who lead us.

For judges, these crucial issues will be posed in the form of lawsuits that unfortunately require enormous expenditures of time, and further congest our courts. This, however, is not the only dilemma facing courts in attempting to resolve the prison mess, for it is an essential theme of this lecture that one attribute shared by all lawsuits that challenge the constitutionality of conditions of confinement is a demand upon courts to reform a system dominated by coercion by applying more coercion. We know that prisoners cannot be forced into rehabilitation. The question remains how far can courts go in compelling prison officials to undertake the task of reform.

I propose, then, to try, haltingly and with some trepidation, to sketch the contours of the problems I have just noted. Having done so I will recommend some ways of analyzing these problems—although I do this with still a greater sense of setting out, without a guide, into territory about which little is known except that the terrain is exceedingly dangerous. In this task I take comfort in the words of Mr. Justice Holmes, who said: "[C]ertainty generally is illusion, and repose is not the destiny of man."15 We shall have to be satisfied not with conclusive answers but with the probings of a restless mind.

II. PUNISHMENT OR TREATMENT?

The question I would initially like to explore with you is fundamental to any investigation of the problem of prisons: to what extent and under what kinds of laws is imprisonment justifiable as punishment for crimes, and to what extent and under what kinds of laws is coercive restraint justified as treatment for a socially dangerous "illness"? This is a basic issue society must face in its approach to harmful conduct and in its search for solutions to the prison dilemma.

That this problem is, as I have asserted, fundamental to the problem of prisons is well-illustrated by a recent publication of the American Friends Service Committee, entitled "Struggle for Justice."16 Although my reference to the publication is not to be considered an endorsement of its conclusions, I believe it is very important for people who think

about the criminal justice system, and for judges in particular, to understand the thrust of the attack on prisons discussed in that book. The argument made there underscores the fundamental challenge to the prison system currently confronting the courts and legislatures. It represents the most widely discussed alternative to the traditional role of prisons currently espoused by some responsible reformers. Were it a fully effective alternative, I would not need to speak about problems in our prisons. But a brief analysis demonstrates the limits of this proposed alternative, and points us in the proper direction for our discussion of the central problems courts will continue to face in attempting to aid in resolving the prison crisis.

The debate has deep roots in history. Prisons were introduced in this country as part of a major reform effort in the early nineteenth century, an effort aimed at relieving the criminal justice system of being compelled to choose between freedom or death as the only available responses to criminal conduct. Prisons evolved, largely under the influence of the Pennsylvania Quakers, into institutions that established, for those convicted of crimes, a regimen of hard work, discipline, training in practical skills, moral education, and solitary confinement—an agenda of life that was conducive to meditation and silent penitence. The aim of this enterprise was not merely to punish wrongdoing, but to reform the wrongdoer as well.

Gradually, toward the end of the second half of the nineteenth century, a second reform impulse led to the formation of what is considered to be the standard liberal approach to prisons. Ever since, despite its failures,

17. Prisons have not always existed. There was a time when society’s response to the commission of crime was swift and decisive. Through the eighteenth century, execution was generally the only available “sentence” for a wide range of offenses, while less serious offenders faced public punishment, including whipping and maiming. See Attica Report, supra note 2, at 6. Thomas Eddy, a Quaker philanthropist living during the colonial period, commented: “The tears of the sympathetic, and the voice of the benevolent, had made but slow progress against the apathy of the great mass of mankind, and the vindictive spirit of a few, who believe, or profess to believe, that the world should be governed by a rod of iron. The hearts of the people were made callous by the sight of the stocks, whipping posts, pillories in every shire town or considerable village. Flagellation with cat-o’nine tails burning in the hand or forehead with a hot iron, cropping the ears of prisoners in the pillory, were all common sights to the youngest as well as the oldest portion of the community.” Quoted in 2 M. Haft & M. Hermann, Prisoner’s Rights 332-33 n.9 (1972) [hereinafter cited by volume as Prisoner’s Rights]. Imprisonment during the early 1800’s was the reform movement’s response to the horror of public capital and corporal punishment. See O. Lewis, The Development of American Prisons and Prison Customs, 1776-1845, at 7-24 (1967).

18. The Walnut Street Jail, a pre-trial detention facility in Philadelphia, was remodeled into a new prison around 1790, after prompting by the Society of Friends. This prison is generally believed to be the first of its kind in the United States. See 2 Prisoner’s Rights, supra note 17, at 334.
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it has been touted as the "new" penology, it has been touted as the "new" penology, a penology that is presently about a century "new." It is based on the idea that prisoners should be treated rather than punished.

I wish to stress that the "new penology" is not simply an academic game conjured up one sleepless night by an insomnious professor. This theory, unlike most, seeks to translate its philosophical musings into actual statutory language. It urges a response to criminal conduct that focuses on the individual, and the causes of his unlawful behavior, in the hopes of "curing" him of a social "illness."21


20. The new penology, perhaps, may be even older than that. See, e.g., Jeremy Bentham's model prison plans sketched in his Panopticon, 4 The Works of Jeremy Bentham 37 (J. Bowring ed. 1843).

21. The so-called beneficiaries of a regimen of involuntary treatment number in the tens of thousands. This group of prisoners includes drug addicts and other perpetrators of what is commonly referred to as the victimless crime. It embraces men and women convicted of crimes without victims, whose prison term depends upon someone's decision that they are in need of special treatment and assistance. It counts among its members that class of people who have been found too unsound mentally to be capable of standing trial for an offense for which they are charged, and those persons found to have committed crimes at a time when they were insane. And, finally, it includes those who fall within the jurisdiction of juvenile and family courts—in New York, they are called "persons in need of supervision," and in other states, they are called incorrigible or morally depraved children—who find themselves arrested, forcibly detained, and incarcerated not necessarily because they have committed criminal acts but because they have not acted in the way responsible children are required to act. See note 13 supra. What all these persons have in common is that pursuant to statute they are involuntarily confined in many instances without the benefit of the full range of procedural protections which our system of justice normally affords a criminal defendant. As the Supreme Court has noted, it is one virtue of the criminal justice system that the duration of incarceration is limited by statute. Therapeutic commitment, however, lacks this feature because a "patient" is generally committed indefinitely, or until he is cured. Powell v. Texas, 392 U.S. 514, 529 (1968). For a discussion of the problem of indeterminate sentences see Frankel, Lawlessness in Sentencing, 41 U. Cin. L. Rev. 1, 29-40 (1972).

Presumably, there must be some feature characterizing treatment of this kind that permits the imposition of concededly coercive sanctions in such cases without the benefit of due process afforded the criminally accused. The fundamental questions posed by this class of prisoners are: what rule of law justifies their incarceration, and how long may their confinement continue?

One approach to this question is to look at the rationale of those cases that prohibit criminal laws from being overly vague. The cases teach that criminal laws must define crimes with sufficient specificity to give adequate notice as to exactly what conduct is outlawed and what conduct permitted. A law that says "You must not be bad" and then goes on to punish persons who are "bad" hardly gives a law-abiding citizen much in the way of guidance as to how he may hope to avoid being punished. The vagueness doctrine compels legislatures, in drafting criminal codes, to spell out exactly what they mean by "bad." If they cannot accomplish that relatively simple task, the constitution would seem to be a barrier to permitting them to punish others for their legislative failures. The vagueness doctrine, as applied in the
This leads me to mention a line of relevant case law, represented by the important decision of *Robinson v. California*, decided by the Supreme Court in 1962. In *Robinson*, the Court ruled that the criminal law could not be used against a person merely because he suffered from the condition or status of being addicted to a narcotic drug. In sum, the Court said legislatures cannot make it a crime to be a drug addict. I hasten to add that acts associated with addiction remain crimes: a person may not purchase drugs, or possess them, or sell them, free of criminal liability. But the Court laid down the doctrine that drug addiction itself is an illness and therefore no more open to criminal punishment than other kinds of illnesses. In the Supreme Court's view, punishing a man for being a drug addict was like punishing a man for having a cold. There was, however, a caveat to that decision. Although the Court said that punishment for addiction was unconstitutional, other forms of state response to the problem of addiction were not prohibited. Specifically "treatment," and here I mean involuntary so-called civil treatment of drug addicts, was approved by the Court. *Robinson* implies that a similar response is appropriate for other persons such as the mentally ill and troublesome children whose "status" raises serious social problems.

The vagueness doctrine has particular relevancy to the problem of "treatment" statutes. One cannot seriously urge that a law that triggers involuntary restraint for persons found to be "morally depraved," for example, measures up to the rigorous standards defined by that doctrine. The hard question to be answered is: under what conditions will a non-criminal state sanction be appropriate for persons who are indeed morally depraved to the extent that they pose a substantial threat to the safety of society?

If there is to be confinement that is not "punishment," so as to justify less than full due process safeguards, it would seem that there would have to be a trade-off at some point. A jurisprudence that undertakes to analyze these treatment statutes might conclude that incarceration on the basis of a condition or a status may be legitimate and justifiable only when the regulatory statute is narrowly drawn so as to reasonably define, within the scope of current knowledge and expertise, the status or condition regulated. And, of course, the law must authorize a treatment regimen that is appropriate to the malady.

The use of the vagueness doctrine, which I have suggested, would permit courts to deal with all coercive laws—penal and treatment—with a single tool and along a single line of analysis. The generally applicable principle would be that all coercive laws may not give those who enforce them unreasonable discretion to use the laws for purposes not authorized or justified by the legislature.

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23. Id. at 666.
The Robinson case leaves us wrestling with the problem of how to distinguish treatment from punishment. This is becoming an acute problem for courts because there is an increasing awareness that many putative treatment institutions have the attributes of prisons. The problem, as Mr. Justice Marshall saw it in 1968 in Powell v. Texas,25 is to avoid sacrificing procedural rights for the sake of treatment when all that is accomplished is the hanging of a new sign reading “hospital” over one wing of the jailhouse. As Mr. Justice Cardozo once said: “Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”26 We must beware, therefore, that treatment does not simply become a euphemism for punishment.

Recently, a three-judge court on which I sat struck down a statute that permitted the incarceration of adolescents in prisons which housed adult criminal offenders27—and the Supreme Court affirmed the ruling without hearing argument.28 The law in question was a treatment statute29 which triggered imprisonment based on a finding that an offender was “morally depraved” or in danger of becoming so. We decided that the statute was clearly criminal in character and that it not only was overly vague but punished a status as well.30

If, as some say, one way of solving the prison problem is to treat offenders rather than to punish them, we cannot escape facing up to the problem this alternative will pose. Because of the too-often blurry distinction between treatment and punishment, many have argued that institutions charged with the responsibility of treating individuals committed to their control must provide some special therapy that is suited to the disease. It will not do, as I have said, simply to recast the nasty problem with a more palatable label, and hope in that way that the agonizing dilemmas posed by the Atticas in our land will gracefully disappear. The “treatment” of criminal offenders is obviously not the panacea for the problems of rehabilitation that we might have hoped it to be.31 While there may be more humane and more constructive alternatives to punishment or prisons, I have tried to show that we cannot get far by skirting the issue. To that issue, I would now like to turn.

30. The children in Gesicki were confined in an adult prison, a feature which earmarked the statute as at least ancillary to the state's criminal code and which seriously undermined the state's argument that treatment, not punishment, was the aim of the law.
III. JUDICIAL INVOLVEMENT IN PRISON PROBLEMS

I have tried to suggest thus far that the problem of prisons goes much deeper than the issues normally presented in so-called "prisoner rights" litigation. Mr. Justice Holmes, in his treatise The Common Law, insisted that "[t]he first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution. At the same time, this passion is not one which we encourage, either as private individuals or as law-makers."\(^{32}\)

Justice Holmes' view may be called the "fall-back theory of collective vengeance." It says that when all else fails, at the very least punishment has the virtue of preventing private vengeance. This is hardly a roseate picture of our corrections system, but a closer look reveals that on the whole Justice Holmes' view is one that accurately describes prison life. For no matter what function apart from vengeance we may assign prisons to serve—be it deterrence, rehabilitation, or even isolation—the clear consensus is that performance of those functions by the prison system is at best sub-optimal. No doubt this failure of performance is inherent in a system based upon conflicting premises and competing goals. If so, it is time we recognized that fact.

But prisons will be with us for a long time to come, and they will not cease to be a focus of the most bitter controversy. As long as this problem persists, courts will be confronted with the perplexing dilemma of applying the Constitution to the complex relationship that exists between a prisoner and the state.

The Constitution, however, is not the private preserve of courts alone, and certainly judges make no claims to superior political wisdom. Other branches of government, and private citizens as well, have an obligation under our system to remedy social ills.\(^{33}\) Only when there has been a failure of alternative solutions will the machinery of judicial intervention be activated. There has been just such a failure with respect to the prison problem.

In this light, it is a remarkable tribute to the capacity for growth inherent in our legal institutions that courts have found ways of securing at least minimal compliance with the Constitution in our nation's prisons. The development of this area of the law has been startling. To speak only of the federal courts, with which I am most familiar, I can say that the


\(^{33}\) Cf. Beal v. Lindsay, 468 F.2d 287 (1972).
frequency with which prisoners turn to the courts for assistance has
taken on amazing proportions. In 1930, the number of post-conviction
motions and petitions filed by state prisoners was less than 100. In fiscal
year 1972, their number increased to 12,088. An additional 4,179 motions
and petitions for relief were filed by federal prisoners, for a total of
16,267 so-called prisoners' rights suits reaching federal judges. Among
these suits there are, without question, many frivolous claims. For ex-
ample, one inmate has brought suit against a prison warden for denying
him the right to read Playboy magazine. And not long ago, a group of
prisoners insisted that they had a constitutional right to be served
chateaubriand in their dining room—and with wine too!35 Perhaps this
indicates that we are getting a better class of prisoners. But undeniably,
the rush of litigation has resulted in a substantial enlargement of prisoner
rights. The legal debate no longer seriously questions the existence of
those rights, or the competence of courts generally to enforce them—
although some still argue that federal courts should not become involved
in state prisoner cases, or that at the very least access to federal courts
should be barred until after state courts have ruled.36 I shall not address
myself to that issue for to do so could consume the balance of the lecture.
Suffice it to say that in the main, the debate now focuses on the precise
nature of prisoner rights and the role courts ought to play in the prison
process, as compared to other agents of reform such as legislatures, ex-
ecutive branch officials, administrators, and private citizens. These two
heated issues—the content of prisoner rights and the role of the courts
in prison administration—will occupy center stage for the remainder of
the lecture.

Turning first to the content of these rights, I cannot hope to go through
the encyclopedia of inmate rights that have received judicial protection
over the years.37 It will be enough if I recount something of the history
of that struggle, and summarize some of the more important decisions

34. Annual Report of the Director of the Administrative Office of the United States
Courts, Table 17, at II-29 (1972).
36. In Rodriguez v. McGinnis, 451 F.2d 730 (2d Cir. 1971), a panel of the Second Circuit,
with one judge dissenting, held that prisoners must first exhaust state judicial remedies be-
fore bringing suits challenging the conditions of their confinement under 42 U.S.C. § 1983
(1970). The court, en banc, disagreed, 456 F.2d 79 (2d Cir. 1972), and the Supreme Court
37. An in depth consideration of all aspects of the prisoner rights problem is the two
volume edition of M. Haft & M. Hermann, Prisoner's Rights (1972). Also valuable is The
Prison Law Reporter, published by the Administration of Criminal Justice and Prison Re-
form Comm. of the Young Lawyers Section of the American Bar Ass'n. For a proposed
code of prisoner's rights see Comm. on the Model Act, Nat'l Council on Crime and Delin-
in the field. Of primary significance is the fact that the legal wall which courts formerly erected to shield themselves from prisoner litigation is crumbling. This shield—known as the "hands-off doctrine"—found its fullest expression over one hundred years ago in the Supreme Court of Virginia's disdainful and paternalistic portrayal of prisoners as "slave[s] of the State," with only those rights "which the law in its humanity accords to him." More often than not this meant no rights at all. The hands-off doctrine has now taken its place in the dustbin of legal history. The effect of the hands-off rule was to isolate prisoners from society to an even greater extent than the physical segregation resulting from their imprisonment. It is clear that neither society nor the prison population reaped any discernible benefits from judicial adherence to the hands-off approach.

The total isolation of prisons from society was the most destructive aspect of our penal system. It is fitting, therefore, that the earliest decision to cast doubt on the hands-off rule, Ex parte Hull, a 1941 Supreme Court case, guaranteed prisoners access to at least one responsive forum by forbidding officials from screening prisoner petitions to courts for habeas corpus relief. Because full and free access to the courts is absolutely indispensable to the full development and effective enforcement of even the most minimal of other safeguards, currently the law in this area is the most expansive and well developed of any in the field of prisoner rights. Marked ancestral features are recognizable in Hull's most recent progeny. Thus, in 1969 the Supreme Court assured prisoners help in preparing court petitions when they can find a willing colleague ready to play the part of jailhouse lawyer. The Court ruled that unless prisons provide inmates with legal assistance, officials may not prevent inmates from helping each other in the preparation of legal documents. And only last term, the Supreme Court reiterated and strengthened the well established rule that prisoner petitions must be viewed with unusual generosity, and may not be dismissed by a trial judge when a federal claim can possibly be extracted from documents submitted to the court. Finally, other courts have sought to protect communications between prisoners and courts, lawyers, and public officials against unnecessary official censorship.

39. 312 U.S. 546 (1941).
Armed with books, technical assistants, unlimited supplies of paper and pencils, guarantees of anonymity, and open channels of communication, prisoners cannot be expected to become suddenly shy or reticent in the coming years. It is a prospect no conscientious and hence overworked judge will entirely welcome, yet it is also not the unexpected end result of the cases I have described. The important effect of these decisions is to provide prisoners with a forum in which to air legitimate grievances. An important by-product of these cases is that it brings judges into closer contact and familiarity with prisons and prisoners. Both of these developments—prisoner access to courts and court access to prisoners—are responsible for the rapid development of prisoner rights in other major areas. I refer to prisoners' first amendment rights, rights to procedural due process in serious prison disciplinary proceedings, and the constellation of substantive rights secured to inmates that is associated with the eighth amendment's ban on cruel and unusual punishment.

Apart from access to courts, attorneys and public officials, probably the most often litigated and well established area of prison law involves freedom of religion, a phenomenon largely attributable to litigation initiated by Black Muslims. Federal courts seem to be in substantial agreement that prisoners may gather for religious services, consult ministers of their faith, subscribe to and possess religious books, and correspond with their spiritual leaders, subject only to reasonable regulation of time, place, and manner.43

Where freedom of religion is not an issue, the law is more nebulous and ill-defined. In general, courts have approached questions of a prisoner's right to possess literature and his right to correspond with people outside prison who have no specially protected legal or religious status with a measure of caution. Judicial restraint in these areas is a result of the absence of any reasonably defined limiting standards once courts begin to overturn the discretion of prison administrators. Courts are simply not equipped with the tools or experience to decide whether, for example, a prisoner's correspondence list should be limited to three people, thirty people, or whether it should be restricted at all.44 Moreover, courts are naive in their understanding of the operation of clearly volatile prison subcultures. The end results that might accompany unrestricted recognition of first amendment rights in prison are largely unpredictable. Speech otherwise innocuous may have a direct, immediate and serious impact upon

43. E.g., Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Long v. Parker, 360 F.2d 816 (3d Cir. 1968); Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967); Sostre v. McGinnis, 334 F.2d 906 (2d Cir.), cert. denied, 379 U.S. 892 (1964).
the community of inmates. Without knowledge of the reasonable consequences of intervention, courts must proceed with caution. Thus, although judges realize that institutions that rely on a veil of silence to protect themselves from criticism may become calcified, prison officials still must retain substantial discretion in day-to-day decision-making. I would suggest, however, that the presence of restraining influences on aggressive court action makes this area especially appealing for non-judicial solutions.

The courts also seem to have exercised judicial caution in dealing with prison disciplinary proceedings which impose administrative sanctions on inmates. The strategy of litigators in this area has been to try to import into prison disciplinary proceedings the full range of procedural safeguards guaranteed to a defendant in a criminal case. Judicial response has been patterned on the developing law of procedural due process as it relates to other important governmental actions, such as parole revocation and termination of welfare benefits, in which the seriousness of a threatened loss is balanced against the state's interest in speedy and efficient administration. Case by case adjudication must be the rule in this area.

In the closed prison world where none is free to escape the company of unknown enemies, the apparent or actual erosion of official authority may have serious consequences unforeseeable not only to the courts but to prison officials as well. The risks involved in hedging disciplinary authority with trial-type formalities must therefore be justified by something more than a remote and speculative gain in the accuracy of the factfinding process. Without considering in detail how these general considerations might be applied to each asserted procedural right, I suggest that there are strong reasons for enforcing the requirements of notice, of a neutral decisionmaker, and of an opportunity for the prisoner to present a case in opposition to that brought against him. These guarantees may be viewed as minimally necessary to safeguard the integrity of the factfinding process. Beyond these requirements, however, there may be sound reasons for not imposing procedures appropriate to criminal trials upon prison disciplinary proceedings. Indeed, greater accuracy in

48. But see Krause v. Schmidt, 341 F. Supp. 1001 (W.D. Wis. 1972); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Clutchette v. Procurier, 328 F. Supp. 767 (N.D. Cal. 1971). These cases have extended due process protection to include the right to call witnesses, the right to cross-examine witnesses against the prisoner, and the right to representation at a hearing, if such assistance is required.
factfinding may better be assured by other measures, such as a guarantee
that prison authorities affirmatively conduct a thorough and impartial
investigation of the questioned conduct before charging the prisoner.
In the prison context, it may be well to stress the virtues of a fair in-
vestigative rather than a strictly adversarial process. Otherwise, inmates
will find themselves challenging their accusers, a rather awkward posture
for a prisoner who knows he will be subject to the control of those author-
ities he presumes to challenge for a substantial time to come.

I have been portraying the judge's dilemma faced with prisoners' 
claims as turning on a conflict between values protected by the Con-
stitution on the one hand, and the unpredictable effects of court interven-
tion in prison affairs on the other. This dilemma seems most acute in
the area I have left for last: the application of the eighth amendment's 
ban on cruel and unusual punishment to conditions of confinement.

I believe courts are moving toward a satisfactory resolution of the 
problems in this area by requiring prisons to conform to commonly ac-
cepted minimum conditions of a decent and healthy life. Such patent 
barbarisms as those disclosed in Wright v. McMann,46 a case decided sev-
eral years ago by a panel on which I sat, no longer will be tolerated. The 
allegations in the complaint, which for purposes of the appeal we were 
bound to take as true, since the complaint was dismissed without a hearing 
by the district judge, told Wright's story of conditions in Dannemora 
prison in most eloquent language. It said:

[T]he . . . solitary confinement cell wherein plaintiff was placed was dirty, filthy and 
unsanitary, without adequate heat and virtually barren; the toilet and sink were en-
crusted with slime, dirt and human excremental residue superimposed thereon; plaintiff 
was without clothing and entirely nude for several days . . . until he was given a thin 
pair of underwear to put on; plaintiff was unable to keep himself clean or perform 
normal hygienic functions as he was denied the use of soap, towel, toilet paper, tooth 
brush, comb, and other hygienic implements and utensils therefore; plaintiff was 
compelled under threat of violence, assault or other increased punishments to remain 
standing at military attention in front of his cell door each time an officer appeared 
from 7:30 A.M. to 10:00 P.M. every day, and he was not permitted to sleep during the 
said hours under the pain and threat of being beaten or otherwise disciplined there-
fore; the windows in front of his confinement cell were opened wide throughout the 
evening and night hours of each day during subfreezing temperatures causing plaintiff 
to be exposed to the cold air and winter weather without clothing or other means of 
protecting himself or to escape the detrimental affects thereof; and the said solitary 
confinement cell was used as a means of subjecting plaintiff to oppression, excessively 
harsh, cruel and inhuman treatment specifically forbidden by the Eighth Amendment 
to the United States Constitution.50

It was not too difficult for a court to find the conditions described by the 
prisoner in his complaint to be "subhuman." Accordingly, we reversed

49. 387 F.2d 519 (2d Cir. 1967).
50. Id. at 521.
the dismissal and directed the district court to proceed to trial. The recent litigation history of that case is worth mentioning. Upon remand, a trial was held and Wright successfully proved that the charges he had asserted were true. Judgment was entered in his behalf and compensatory damages were awarded to him. That decision was affirmed by our court, and the Supreme Court recently denied certiorari.

Courts are now confident enough of their role as guardians of basic rights to recognize that human dignity demands more than mere freedom from a bestial, subhuman existence. Courts are increasingly willing, for example, to require prisons to provide a diet meeting minimum nutritional standards recommended for the general population, to furnish prisoners with sufficient opportunity for physical exercise to maintain their bodies in reasonably good condition, and to refrain from imposing conditions that will impair the prisoner’s mental health. No longer will courts approve the absolute denial of reading matter, and the insistence upon total prisoner silence as routine punishment for prisoner misconduct.

Thus, it is apparent that this area of the law is in a state of flux. Courts have been responding on a case by case basis, as if tiptoeing in a garden of delicate flowers. But try as they do, courts, in the end, are simply not up to the task of policing and administering, much less devising, new rehabilitative programs for our nation’s prisons. A judge is far removed from the atmosphere of the maximum security prison and his sole personal contact with the hard tensions of the prison comes in the form of arid, though able, adversarial debate within the secure walls of a courthouse. He simply does not have the precise sense for the nuances or even the sweat of prison life.

There are encouraging signs, however, that courts will not be left to go it alone in trying to reform prisons. I will briefly indicate what I believe are the most interesting remaining alternatives and complements

51. Id. at 527.
53. 460 F.2d 126 (2d Cir. 1972).
58. Id. at 193-94. Courts have even been willing to hold an entire prison system unconstitutional in violation of the eighth amendment. See Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971); Jackson v. Hendrick, 40 U.S.L.W. 2710 (Phila. C. P., Apr. 7, 1972).
to judicial intervention. I shall then conclude with some reflections, and perhaps even some predictions, for the future.

One very hopeful sign of legislative and administrative willingness to assume some of the burden of ameliorating conditions in prison is reflected in regulations recently promulgated by the New York Department of Corrections that govern prisoner correspondence. I will not go into a detailed analysis of the new provisions, but one development is of particular interest because it well illustrates the kind of healthy interplay between courts and other branches of government that may be the hope for the future of prison reform. The Court of Appeals for the Second Circuit, sitting en banc, held in Sostre v. McGinnis, a case of importance in this branch of the law, that censorship of inmate letters to courts, lawyers and public officials violated first amendment rights of prisoners.60

But the court did not prohibit prison officials from reading mail—incoming and outgoing—to or from courts, attorneys and others, to ascertain whether these letters contained contraband, or included possible escape plans.61 Three weeks after Sostre was decided, the New York Department of Corrections adopted a policy of permitting inmates to send sealed letters to legal and public officials, and to receive letters from such persons without any censorship.62 The department adopted the sensible rule of requiring only that letters be opened in the presence of guards so as to permit a spot check for contraband.

This example of judicial restraint and administrative initiative illustrates a point I stressed earlier that courts need not be the sole guarantor of individual liberties, although they must always be available to serve that purpose. Courts generally will be unable to compel adoption of what they believe to be the best prison policy. For despite what conservative critics of the courts have said, there are many policies judges favor that they cannot find written into the Constitution.

Enlightened rule-making is most certainly a necessary element in any program of prison reform. But just as courts have learned the difficulty of securing prison compliance with their orders, progressive administrators have also experienced the frustration of attempting to move an intractable bureaucracy of prison guards—whose ideas about maintenance of prison discipline may conflict with attempted efforts at reform. Thus, it may be important to bring an independent but non-judicial agency into the prison system—a concept represented by the ombudsman, now in practice in

59. 442 F.2d 178 (2d Cir. 1971), cert. denied, 404 U.S. 1049 (1972).
60. Id. at 200.
61. Id.
Minnesota, and suggested as a device for general adoption by a Committee of the Bar Association of the State of New York—to give prisoners a forum in which the merits of their complaints may be rationally considered. The mediation function served by the ombudsman is potentially very significant for the courts for it provides a screening device which may effectively limit the number of less important prisoner cases now finding their way into the federal courts. Any progress in that direction is, of course, a welcome sign.

These suggestions for reform by no means exhaust the possibilities available to diligent and nimble minds, but hopefully they illustrate the different directions that are open to us. And the extent to which courts will continue to intervene in prison problems will depend, to a large extent, upon how effective other methods prove to be in the long run. Litigation, as we know, generally represents a failure of other ways to solve problems. If that failure persists, courts will continue to intervene.

IV. CONCLUSION

I have spoken on a number of important topics that currently share the spotlight in the debate over prison reform. My principal concern has been with the function of institutions of confinement in our system of criminal justice and the appropriate attitude courts should take in responding to complaints about the prison system. It is the general drift of the lecture that in both areas, performance has been sub-optimal.

But there is a unity between these two themes that transcends this mere shared lack of success. It is at least arguable that intervention by prison administrators in the lives of prisoners and intervention by judges in the lives of prison administrators are unsuccessful for the same basic structural reasons.

The first is the most obvious: if we assume that the central aim of any criminal justice system is to effect a decrease in the incidence of future crime, and we then agree that decriminalizing persons who are now criminal would contribute substantially to that end, we come up shorthanded at the end of the proposed syllogism for the sad reason that no one has any real idea how to go about doing the job with any degree of consistent success. Few would suggest that prison administrators are trying to

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achieve high recidivism rates. They obviously think, however, that alternatives to their present techniques will be no better, and will likely be worse on that score. Though they know that they do not have the answers, and that present trends will not be allowed to continue indefinitely, still they do not know what else to do.

What they do know is that judges do not know how to cut down on recidivism either, especially when they sit outside the system and peek in, only to launch through the peephole an occasional thunderbolt. They also know that judges' traditional concerns are, by and large, not really with rehabilitative success. Judges are bound to maximize due process, but there is absolutely no demonstrable relationship between greater due process for prisoners and greater rates of rehabilitation.

This, I think, points up a second unity in the themes I have presented, and one which I find more interesting, more significant than the unity of shared ignorance. It is that the relationship between courts and jailors, and the relationship between jailors and prisoners, are ones in which there is an attempt to coerce virtue as defined by the coercer. Even if we were of one mind about the function of prisons, it is hard to imagine a more inefficient system of administration than the coercion of unwilling people over whom one has authority.

Let me expand on this point through the use of a metaphor. Picture the correctional system for a moment as a division of a large corporation. Imagine that there is a corporate desire to expand foreign sales, and that to that end selected personnel have been designated to learn foreign languages prior to becoming salesmen. A staff of teachers has been hired to effect this acquisition of language skills.

Now assume that the salesmen-candidates are selected after tests have been administered to them, designed to uncover (a) their linguistic skills and (b) their desire to learn foreign languages. But remarkably, only those who have scored the lowest on both tests have been selected. The teachers are then chosen from the rather shallow pool of those willing to take on the job of teaching something hard to a group of students pre-selected on the basis of deficiencies in motivation and talent. Before beginning their assignment, the teachers are informed by corporate officers that they must force the salesmen to learn foreign languages or their jobs are on the line.

It soon becomes obvious that no one knows very much about language teaching. The teachers are closest to the on-line problems but they haven't been doing very well. Deep down they believe they are doing about as well as they can, given the material and the nature of the students. The corporate heads have a great many other things to do. They worry not only about teaching languages, but about corporate public relations, costs,
shareholder desires and so on. But from time to time, a vice president in charge of language improvement may descend, *deus ex machina*, and punish the teachers, not only for failing to teach languages to more than two-thirds of the students, but for other things too, for instance getting stories about nasty teaching techniques into the newspapers or for failing to hold long, individual conferences with each student. That is, the teachers are generally punished for things which, if done the way the bosses want them done, would in the opinion of the teachers cut down teaching success.

And so it goes, with this division running about as inefficiently as any division can run. For it has been set up so that the bosses must try to force the teachers to force the students to learn, and most of the expense of the system goes into trying to make people do things that they do not want to do. This is the antithesis of sound managerial organization. The whole idea in a sound system is to bring about cooperation in a common endeavor among top management, line personnel and employees. You cannot run a good business by concentric levels of threat and punishment any more than you can efficiently so run a family, a baseball team—or a corrections system.

That has been a pretty extended metaphor but, I believe, a sound one. The corrections system will never run with any real efficiency until (a) prisoners want to be “reformed,” (b) prison administrators want to help them to reform, (c) courts want to help both towards a system of reform, and (d) they all define reform in the same way. That is going to take a lot of social change. I like to think for instance, that most prisoners do not want to be “crooks” but I also doubt that all of them want to be what we generally conceive of as “productive members of society” either. Pending those millennial changes it would seem that our corporation ought to shoot for the following direction of transition:

1. Top management—courts, legislatures and the executive—ought to define what prices will not be paid for “efficiency” in deterring crime, no matter how effective it may be. That is, even if flogging, or year-long solitary confinement under subhuman conditions could be shown to decrease recidivism, that would be irrelevant because at a certain point there are criteria other than efficiency that must guide our system of corrections. But the most important point here is that courts—and others—in setting out these definitions, should make clear that they do not pretend to know penology better than the jailors but only to know the moral and legal principles that override penological efficiencies. No one should pretend that due process decreases crime, but rather that it increases due process—an independent goal.

2. Line administrators—wardens, guards, and others—should be
chosen for their congruence with the socially determined aim—deterrence, rehabilitation, punishment, or whatever mix—and then once chosen, should be allowed some play in attempting to reach it, so long as they willingly share the overriding goals like due process. If they do not, they must be coerced or replaced.

3. Prisoners should be convinced that they are part of the process of their own change, an irreplaceable part, and if they refuse to cooperate they can seriously interfere with, if not destroy, the process of rehabilitation for all others incarcerated.

For a long time to come, then, if not forever, the criminal justice system will continue to operate on the model of concentric layers of coercion, a grossly inefficient model, but its tendency ought to be in the direction of replacing that model with one of communication and cooperation. Courts cannot keep hands-off prison problems, and the dilemmas of which I have spoken tonight will continue to be bothersome. But courts, to be effective, must justify their interventions as the product of trying to preserve non-penological values, such as protecting constitutional rights, not as the product of superior penological wisdom.

I have spoken of the "new penology" and the problems involved in a program of "treatment" of prisoners. I have reviewed some of the more significant developments in the law of prisoner rights, especially concerning the application of the first, eighth and fourteenth amendments in the prison setting. My intention has been to indicate that willing as they are, courts simply cannot solve the dilemmas of the prison mess by themselves. Prisoners and their lawyers who look only to the courts for relief are, in effect, trying to replace one system of coercion with another, a result that will have some momentary advantage but will be of little social benefit in the long run. Mutual commitment—and I do mean commitment—to change and improvement on the part of courts, prisoners, administrators, legislatures and community groups is, I have suggested, a far better approach to achieving lasting prison reform.

Even this, however, is not the final answer. The impetus for change, as we all know, stems from mounting public criticism of the manner in which prisoners are treated under our present system of corrections. The public, I believe, has finally come to realize that its past attitude of not-so-benign neglect towards prisoners and the schools of crime in which they are confined has largely been responsible for many of the problems of which I have spoken. Society is beginning to see the direct link between crime in the streets and the shame of our prison system, and it is this understanding which holds out the greatest promise of significant change for the future.

Of one thing, at least, I can be certain. It is the fact that only when the
public is willing to pay the price of reform, and to commit adequate funds—I mean tax dollars—to improve the conditions of confinement in prison, will we be able to move on from the stage of diagnosing an illness to prescribing a cure for it. And I leave you with the hopeful thought that, at least, from where I sit, there are encouraging signs that the dream of prison reform may yet become a reality.