Pace Law Review

Volume 24
Issue 2 *Spring 2004*
Prison Reform Revisited: The Unfinished Agenda

Article 1

April 2004

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Michael B. Mushlin, *Foreword - Prison Reform Revisited: The Unfinished Agenda*, 24 Pace L. Rev. 395 (2004)

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PACE LAW REVIEW

Volume 24 Spring 2004 Number 2

Symposium
Prison Reform Revisited: The Unfinished Agenda

Foreword
Prison Reform Revisited: The Unfinished Agenda October 16-18, 2003

Michael B. Mushlin*

One should expect an organizer of an event to sing its praises. As one of the facilitators of *Prison Reform Revisited: The Unfinished Agenda* I will not disappoint.[1]

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1. Fred Cohen, William Collins and Michele Deitch who served with me as co-conference organizers. Without them the success of the conference would not have been possible. I also am grateful to Pace Law School, and to Dean David Cohen for

Prison Reform Revisited: The Unfinished Agenda, which was held at Pace Law School from October 16-18, 2003, was a remarkable event.[2] At this conference—a summit really—leading academics, attorneys, prison reformers, judges, prison officials and international prison reformers gathered at Pace Law School and the New York State Judicial Center in White Plains, New York to discuss how to advance the cause of prison reform in the U.S. This issue of the *Pace Law Review* is devoted to the papers presented in connection with that important conference.

It was clear from the outset that there was a pent up need for this conference. Sweeping legal, political and demographic changes over the past three decades have reshaped the role of prisons in American life. Beginning in the 1960s and 1970s federal courts created a new body of constitutional law—known as prisoners' rights law.[3] Utilizing the constitutional doctrines established by this new body of law, federal district courts handed down a number of sweeping decisions ordering systemic changes to remedy barbaric prison conditions.[4] The courts of appeals and ultimately the U.S. Supreme Court ratified the ap-

providing the initial and continuing support for the conference. I also would like to thank the New York State Judicial Institute and the Open Society Institute for their support. Finally, my thanks go to my research assistants, Susan Edwards, Class of 2004 and Noelle Crisalli, Class of 2006 Pace Law School, for their assistance. The conference and this symposium issue is dedicated to the memory of Professor and Dean Emeritus Norval Morris, of the University of Chicago School of Law, who had a distinguished career as an academic, criminologist and prison reformer and whose letter to conference participants is as eloquent a statement of the reason why prison reform is crucial as any I have every read.

2. This is not simply my opinion. Conference participants agreed overwhelmingly. One said the conference "more than exceeded my expectations. I was overwhelmed with new ideas and saw all sorts of important things in a new light." Another stated that this was "as good a meeting as [he] had ever attended . . . no the best single focus session ever." Michael B. Mushlin, Prison Reform Revisited: The Unfinished Agenda: Final Report 8 (June 2004) (unpublished manuscript, on file with author).

3. The "hands off" doctrine in effect until the late 1960s and 1970s precluded courts from entertaining prisoners' rights suits no matter how substantial the inmate's claims. But that doctrine lost credibility with the rise of civil rights. When the "hands off" doctrine finally fell, courts began to enforce basic constitutional rights of inmates. For a description of the "hands off" doctrine and its demise *see generally* MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS, §1 (3d ed. 2002).

4. *See, e.g.*, Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part and rev'd in part*, 679 F.2d 1115 (5th Cir. 1982); Rhem v. Malcolm, 371 F. Supp. 594 (S.D.N.Y. 1974), *aff'd*, 527 F.2d 1041 (2d Cir. 1975); Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 525 F.2d 965 (5th Cir. 1976).

proach taken by these decisions.[5] Enough time has passed since those cases were decided to assess the lessons that can be learned from the litigation that transformed the face of American corrections. One objective of the conference was to do just that.[6]

However, the conference did more than just take stock of the historic changes in corrections brought about by this landmark litigation. It also paid attention to the current situation. The legal and political environment has changed dramatically since the early prisoners' rights cases were decided. The U.S. Supreme Court which ended the "hands off" doctrine and opened the way for reform, in recent years has consistently ruled against the claims of inmates. In the process the Court has made new law which restricts prisoners' rights in ways evocative of the discredited "hands off" doctrine.[7] Congress made an additional inroad when, in 1996, it passed the Prison Litigation Reform Act (PLRA).[8] This law erected new barriers between inmates and the judiciary. The conference assessed the

5. *See, e.g.*, Turner v. Safley, 482 U.S. 78 (1987) ("[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution."); Wolff v. McDonnell, 418 U.S. 539 (1974) (proclaiming that "there is no iron curtain drawn between the Constitution and the prisons of this country"); Procunier v. Martinez, 416 U.S. 396 (1974) ("a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.").

6. "Whenever an event looks forward to the future, there is some need to revisit and reconstruct the past." Rachel F. Moran, Forward, *Taking Stock: Women of All Colors in Legal Education*, 53 J. LEGAL EDUC. 467, 467 (2003).

7. The "new" prisoners' rights cases while not reestablishing the "hands off doctrine," do create new barriers to the success of inmate litigation. *See, e.g.*, Lewis v. Casey, 518 U.S. 343 (1996) (holding that prisoners do not have a constitutional right of access to the courts for pressing civil matters such as divorce or property proceedings and that the right of access, to the extent it applies, can only be invoked upon a finding that an inmate has suffered actual injury to a non-frivolous lawsuit regardless of how deficient is the assistance the inmate receives from prison officials); Sandin v. Conner, 515 U.S. 472 (1995) (holding that law and regulations which had created liberty interests in the past not longer create liberty interests unless, as a result of the law or regulation, the inmate was subject to an "atypical and significant hardship" beyond that which is inherent in the "ordinary incidents of prison life").

8. Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; 42 U.S.C. §§ 1997-1997h).

impact of these dramatic changes on the future of prison litigation and prison reform.

While prison reform has always been important, the conference demonstrated that the need for reform has never been more urgent than now.[9] The unprecedented increase of imprisonment over the past three decades is a development of historic dimensions. With over two million of its people in its prisons and jails, the United States is now the world's incarceration leader.[10] Many people who never would have been in prison before are incarcerated today for non-violent offenses. The mentally ill, the poor and racial minorities are dramatically over represented in our nation's prisons.[11] Moreover, American prisons have become increasingly harsh and now use a segregation-type confinement called "supermax." Although more than 600,000 people leave prison every year, there is a failure to link the newly released offenders to appropriate community resources.[12] With millions behind bars, prisons consume more and more resources. The siphoning off of scarce funds to build and manage prisons directly affects the lives of millions of

9. If anything in the months since the conference the need for prison reform has taken on even greater significance in light of the abuses of Iraqi inmates at the infamous Abu Ghraib prison. *See* Farnaz Fasshi et al., *U.S. Begins Prisoner-Abuse Probes—Photos of Iraqi Detainees Mistreated by Americans Spark International Anger*, WALL ST. J., May 3, 2004, at A3; James Risen, *GI's Are Accuses of Abusing Iraqi Captives*, N.Y. TIMES, Apr. 29, 2004, at A15; *see also* LTG ANTHONY R. JONES & MG GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB PRISON AND 205TH MILITARY INTELLIGENCE BRIGADE (2004), *available at* http://news.findlaw.com/nytimes/docs/dod/fay82504rpt.pdf.

10. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. NO. NCJ 203947, PRISON AND JAIL INMATES AT MIDYEAR 2003 1 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim03.pdf [hereinafter MIDYEAR 2003]; *see also* ROY WALMSLEY, WORLD PRISON POPULATION LIST, FINDINGS 234 1 (2003), *available at* http://www.homeoffice.gov.uk/rds/pdfs2/r234.pdf.

11. *See* FRED COHEN, THE MENTALLY DISORDERED INMATE AND THE LAW § 1.6 (1998); *see also* MIDYEAR 2003, *supra* note 10; *see generally* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. NO. NCJ 195670, SPECIAL REPORT, EDUCATION AND CORRECTIONAL POPULATIONS 10 & tbl.14 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULL. NO. NCJ 174463, SPECIAL REPORT, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS (1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mhtip.pdf.

12. *See generally* Reginald A. Wilkinson et al., *Prison Reform Through Offender Reentry: A Partnership Between Courts and Corrections*, 24 PACE L. REV. 609 (2004); *see also* Reginald A. Wilkinson, *Offender Reentry: A Storm Overdue*, 5 CORRECTIONS MGMT. Q. 46 (2001).

Americans even if they are not imprisoned. These developments made this an auspicious moment for a national prison reform conference.

Thus, the conference came at a critical juncture. It also had ambitious goals. Its purpose was to bring leading figures in the struggle for prison reform together to take stock of the present situation, assess the successes and failures of the past, and begin to chart new approaches for the future.

The participants were experts and advocates with different perspectives and with diverse expertise. The assembly included over one hundred leaders from twenty states and two foreign countries.[13] The participants included some of the foremost prisoners' rights lawyers,[14] human rights activists,[15] federal and state judges,[16] state legislators,[17] prison officials[18] and aca-

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13. Participants attended from: Alabama, Arizona, California, Connecticut, District of Columbia, Florida, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New York, Ohio, Pennsylvania, Texas, Virginia, Washington, Canada and Great Britain.

14. Such as Elizabeth Alexander, Executive Director of the National Prison Project, ACLU, Washington D.C.; Alvin J. Bronstein, Executive Director Emeritus of the National Prison Project, ACLU, Washington D.C.; Rose Braz, Critical Resistance, California; Eric Cadora, Program Officer, After Prison Initiative, Open Society Institute, New York; Jonathan Chasan, Prisoner's Rights Project, New York; Fred Cohen, Arizona; William C. Collins, Washington; Michele Deitch, Center for Criminal Justice Initiatives, Texas; Charles A. Fasano, Director, Prisons & Jail Program, John Howard Association for Prison Reform, Illinois; David C. Fathi, Staff Counsel, National Prison Project, ACLU, Washington D.C.; Jenni Gainsborough, Director, Penal Reform International, Washington D.C.; Robert Gangi, Executive Director, The Correctional Association of New York; Steve Martin, Attorney, Texas; Marc Mauer, The Sentencing Project, Washington D.C.; and Karen Murtagh, Prisoners' Legal Services, New York.

15. Such as Jamie Fellner, Director of U.S. Programs Human Rights Watch, New York; Lisa Kung, Staff Attorney, Southern Center for Human Rights, Georgia; and Joanne Mariner, Human Rights Watch New York.

16. The Hon. Harold Baer, United States District Judge, Southern District of New York; the Hon. Morris E. Lasker United States District Judge, Senior Status, District of Massachusetts; and the Hon. Richard F. Braun, New York State, Supreme Court Justice, New York County.

17. Senator Donald Cravins, State Legislator, Louisiana; and Representative Kay Khan, State Representative for the 11th Middlesex District in Newton Massachusetts.

18. Prison officials included: Anthony J. Annucci, General Counsel, New York State Department of Corrections; Donna Clement, Arizona Department of Corrections; Martin F. Horn, Commissioner, New York City Department of Corrections; Gary Johnson, Executive Director, Texas Department of Criminal Justice; Carl Reynolds, General Counsel, Texas Department of Criminal Justice; Bruce Skolnick, Assistant Attorney General, Arizona; Greg Trout, Department of Rehabilita-

demics in the field.[19] It is no exaggeration to say that this was as knowledgeable and as committed a group of prison reformers as have assembled in this country in recent times.[20]

This symposium issue of the law review is devoted to the publication of twenty three papers and talks presented at the conference. The papers cover five vital topics: 1) accomplish-

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tions and Corrections, Ohio; Art Wallenstein, Director, Montgomery County Department of Corrections and Rehabilitation, Maryland; Reginald A. Wilkinson, Director, Department of Rehabilitation and Corrections, Ohio; and Joseph Williams, Superintendent, Lincoln Correctional Facility, New York.

19. Academics included: Lynn Branham, Associate Dean, Thomas M. Cooley Law School, Michigan; Joe Colquitt, Beaseley Professor of Law, University of Alabama Law School; Brett Dignam, Clinical Professor of Law, Yale Law School; David Dorfman, Professor of Law, Pace Law School; Malcolm M. Feeley, Clearie Sanders Clement Dean's Chair, University of California at Berkeley School of Law; Craig Haney, Chair, Department of Psychology, University of California; Kay Harris, Professor, Department of Criminal Justice, Temple University; Michael Jackson, Professor of Law, University of British Columbia, Vancouver, Canada; James B. Jacobs, Professor of Law, New York University School of Law; Michael Jacobson, Professor of Law and Police Science, John Jay College of Criminal Justice; Charles Lanier, Professor, School of Criminal Justice, State University of New York; Vincent M. Nathan, Professor of Criminal Justice, University of Toledo; James E. Robertson, Professor, Minnesota State University; Margo Schlanger, Associate Professor of Law, Harvard Law School; and Hans Toch, Professor, School of Criminal Justice, State University of New York.

20. The conference proceedings were divided into three major parts and six major sessions over the course of two days. Part one focused on the courts and prison reform, the sessions were titled as follows: Accomplishments: Taking Stock; Compelling Contemporary Issues for Change; Anatomy of the Modern Prisoners' Rights Lawsuit: Coping with the Obstacles. Part two focused on the international context of prison reform, contrasting the situation in the United States with levels and conditions of incarceration in other similar societies. Part three focused on the future of prison reform efforts.

The conference addressed a number of critical questions including: Have the courts made a difference in the quality of prison conditions? Have there been unintended consequences from the prison reform movement? What is the current state of the law (i.e., obstacles posed by the Prison Litigation Reform Act, recent case law, etc.)? What is a judge's perspective; did two decades of oversight reform a particular prison system? What constitutes meaningful oversight when courts are no longer involved? How can a modern prisoners' rights case be structured to avoid the pitfalls established by the Supreme Court and Congress? What reform vehicles exist as an alternative to litigation? What information do we need to enable us to decide upon effective litigation strategies? Of what use is international law—treaties, conventions, international condemnation, etc.—in prison reform efforts in the United States? What can we learn from prison reform efforts around the world? Does it make sense to pursue a formalized written agenda for prison reform in this country (as was developed at a recent international conference)? Do we need greater linkages between the prison reform community and the criminal justice reform community?

ments and setbacks of prison reform litigation; 2) characteristics of the modern American penal system and mass incarceration; 3) the modern prisoners' rights lawsuit; 4) an international perspective on U.S. prison reform; and 5) perhaps most importantly, the future of prison reform. Together these articles provide a reservoir of ideas for present and future prison reformers to draw upon. This issue, therefore, makes an important contribution to the literature on prisons.

It is fitting that the *Pace Law Review* has chosen to publish these works. This ensures that the conference will not be simply "an occasion that made for a lively exchange but then survived only in the fading memories of the participants."[21]

Taking Stock of Accomplishments and Failures of Prison Reform Litigation

The first set of articles takes stock of the accomplishments of the last three decades of prisoners' rights litigation.[22] Each author concludes that by and large this litigation has been a success. As one author concludes, "many American prisons and jails would still be stuck in the 1960s but for court intervention or the serious threat of court intervention."[23] At the same time each author points out limitations of this type of litigation.

Regarding the accomplishments, Professor Vincent M. Nathan's article, entitled *Have the Courts Made a Difference in the Quality of Conditions—What Have We Accomplished to Date?*,[24] asserts that prisoners' rights litigation has led to the ameliora-

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21. Moran, *supra* note 6, at 470.

22. The contributors of these articles include Vincent M. Nathan, a noted prison monitor with thirty years of experience in many major prison cases and now a professor of criminal justice; Judge Morris E. Lasker, a United States District Judge who handled landmark litigation involving New York City jails including the infamous Manhattan House of Detention, know as the "Tombs;" Malcolm M. Feeley, a Claire Sanders Clements Dean's Chair Professor of Law at the University of California at Berkeley, one of the leading scholars on the impact of litigation on social institutions (with Van Swearingen), and James B. Jacobs, Chief Justice Warren E. Berger Professor of Constitutional Law and the Courts and Director, Center for Research in Crime and Justice at New York University School of Law, an internationally know sociologist and legal scholar (with Elana Olitsky).

23. William C. Collins, *Bumps in the Road to the Courthouse: The Supreme Court and the Prison Litigation Reform Act*, 24 PACE L. REV. 651, 668 (2004).

24. Vincent M. Nathan, *Have the Courts Made a Difference in the Quality of Conditions—What Have We Accomplished to Date?*, 24 PACE L.REV. 419 (2004).

tion of severe prison conditions, including inadequate medical care, environmental conditions, horrendous overcrowding, unnecessary and excessive force and kangaroo court disciplinary proceedings.[25] Professor Nathan identifies two other less concrete, but equally significant, consequences of this litigation: First, it has had a "vast impact on the thinking and mindset of correctional administrators . . ."[26] and second it has restored self-respect to inmates who are no longer "mere castaways . . . no longer anyone's slaves."[27]

Nevertheless, Professor Nathan concludes that judicial intervention has not been a cure-all. He writes that while "[j]udicial intervention over the past three decades has had an enormously positive impact on the operation of correctional institutions in the United States and on the conditions in which prisoners live and staff work[,]"[28] it did not addressed—and thus, did not reduce—reliance on incarceration as a punitive sanction.[29] He also acknowledges that courts have not ended racial discrimination in prisons anymore than racism has been eradicated from other aspects of our society.[30]

Judge Lasker, who had a front row seat as the district judge who supervised over thirty years of litigation about conditions in New York City jails,[31] agrees. Judge Lasker's conclusion that there is "no doubt in my mind that the involvement of the federal courts in ensuring constitutional conditions of confinement has, during the last thirty years or so, significantly improved those conditions in the institutions with which I am personally familiar"[32] is a powerful endorsement of the beneficial role of judicial intervention to protect the fundamental rights of inmates. But, he too, cautions that while prison reform litigation is an "exceedingly important tool in improving

25. *Id.* at 423-26.

26. *Id.* at 424.

27. *Id.* at 425.

28. *Id.* at 420.

29. Nathan, *supra* note 24, at 421.

30. *Id.* at 422-23.

31. *See, e.g.*, Benjamin v. Malcolm, 564 F. Supp. 668 (S.D.N.Y. 1983), *aff'd*, 803 F.2d 46 (2d Cir. 1986); Rhem v. Malcolm, 432 F. Supp. 769 (S.D.N.Y. 1977); Martarella v. Kelly, 349 F. Supp. 575 (S.D.N.Y. 1972); *see also* Floyd Abrams, *Morris E. Lasker: A Dedication*, 50 BOOK L. REV. xxvii (1984).

32. Hon. Morris E. Lasker, *Prison Reform Revisited: The Unfinished Agenda*, 24 PACE L. REV. 427 (2004).

prisons,"[33] courts cannot achieve "reformation of incarceration policy."[34]

Professor Malcolm M. Feeley and Mr. Van Swearingen, in their article[35] make the important point that one of the effects of prison reform litigation is that it has led to the increased bureaucratization of American corrections. Professor Feeley and Mr. Swearingen point out that this is a "double-edged sword."[36] On the one hand, it increases professionalization of operations; on the other hand, it "enhances the capacity for control."[37] The danger is that prison officials will "ward off judicial scrutiny by adopting only the patina of bureaucratic form."[38] Thus, "[l]itigation has made prisons more, not less effective and efficient in the pursuit of [its] mission. It has provided prisons with a new form of legitimacy."[39] But it also "strengthen[s] control systems and increase their legitimacy."[40] With the increased power that litigation has given prison administrators, Professor Feeley and Mr. Swearingen conclude, without the right values from the people who manage the facilities the threat is that the major lasting change brought on by litigation is that it will replace the lawless chaos of the old prisons with a new "iron cage' of bureaucracy.[41]

James B. Jacobs and Elana Olitsky echo this theme. They persuasively argue that prison officials must be more professional and humane for lasting change to be achieved.[42] Professor Jacobs and Ms. Olitsky contend that while "litigation has played a crucial role in exposing unconstitutional conditions" courts alone cannot bring sustained compliance with constitu-

33. *Id.* at 429.

34. *Id.* at 431.

35. Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts, and Implications*, 24 PACE L. REV. 433 (2004).

36. *Id.* at 466-75.

37. *Id.* at 435.

38. *Id.* at 472.

39. *Id.* at 475.

40. Feeley & Swearingen, *supra* note 35, at 475.

41. *Id.*

42. James B. Jacobs & Elana Olitsky, *Leadership & Correctional Reform*, 24 PACE L. REV. 477 (2004) (arguing that without "intelligent, competent, and even inspiring prison leadership, there is little chance of creating decent, much less constructive prison environments and operations").

tional norms.[43] Courts can set standards. However, they argue that courts are "less effective in creating decent conditions and operations and ineffective in bringing about excellent conditions and operations. These goals require the commitment and skills of correctional managers who can creatively solve (or at least manage) the incredibly difficult problems that prisons and jails face."[44] Their article details how the key to the permanent establishment of decent prisons is "professional correctional leadership."[45] This requires adequately recruiting and training a new generation of at least 32,000 correctional personnel to manage and lead America's prisons.[46] These leaders must be encouraged "to rethink the whole mission and scope and organization of 'corrections' "[47] To achieve this critical goal the authors assert will require a national commitment and "a federal initiative that looks to improve the nation's overall human correctional infrastructure."[48] As a key part of that national commitment the authors state nothing less than that, "the best national prison and jail college in the world" is required.[49]

The Modern American Penal System

While conditions in many American prisons have improved as a result of court intervention the papers presented in this issue describe some of the problems that still remain, including the development of supermax prisons, the sexual abuse of inmates and the mal-treatment of the mentally ill. These issues, which are finally beginning to receive the attention they deserve, are addressed by papers presented at the conference.

Jennifer R. Wynn and Alisa Szatrowski in their article[50] describe how modern super-maximum prisons operate. According to the authors these "newest additions to the correctional landscape" are proliferating.[51] In these grim places which are

43. *Id.* at 494.
44. *Id.* at 495.
45. *Id.* at 477.
46. *Id.* at 482.
47. Jacobs & Olitsky, *supra* note 42, at 482.
48. *Id.* at 489.
49. *Id.* at 490.
50. Jennifer Wynn & Alisa Szatrowski, *Hidden Prisons: Twenty-Three-Hour Lockdown Unites in New York State Prisons*, 24 PACE L. REV. 497 (2004).
51. *Id.* at 498.

"highly secure prisons within prisons or freestanding facilities . . . inmates are confined twenty-three hours a day . . . all movement is monitored by video surveillance and assisted by electronic door systems."[52] These systems, which apply modern technology to the "task of social control,"[53] have been used for the most troublesome inmates in the modern prison system, many of who are mentally ill. In New York the authors indicate that almost a quarter of all inmates being held in super maximum security prisons are mentally ill.[54] One of the consequences of housing mentally ill persons in these harsh conditions, rather than treating them for their illness, is that there are high rates of self-mutilation and suicide attempts.[55]

James E. Robertson in his article[56] adds to the grim portrayal of the modern American prison. Professor Robertson describes an oppressive gender system that pervades penal life and functions largely apart from the rule of law. Professor Robertson's article describes the culture of "hypermasculity," which makes sexual abuse more of a possibility and describes the law's inadequate response to the crises.[57] This system creates conditions which lead to prison rape, a problem that has gone on for too long without being adequately addressed.[58]

The defining characteristic of the modern American prison system is its sheer enormity. Therefore, in addition to prison conditions, attention focused at the conference on the social consequences of the unusual reliance on imprisonment that has arisen in the past several decades. Vincent Schiraldi, in his fascinating piece,[59] gives numerous examples of the staggering use

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52. *Id.* (citation omitted).

53. *Id.* (quoting Craig Haney, *Infamous Punishment: The Psychological Consequences of Isolation*, NAT'L PRISON PROJECT J. (ACLU/Nat'l Prison Project), Spring 1993, at 3).

54. *Id.* at 500.

55. Wynn & Szatrowski, *supra* note 50, at 516.

56. James E. Robertson, *A Punk's Song About Prison Reform*, 24 PACE L. REV. 527 (2004).

57. *Id.* at 532-37. *But see* Prison Rape Elimination Act of 2003, Pub. L. 108-79, § 1(a), 117 Stat. 972 (codified at 42 U.S.C. §§ 15601-15609 (2003)).

58. Robertson, *supra* note 56, at 527-57.

59. Vincent Schiraldi, *Digging Out: As U.S. States Begin to Reduce Prison Use, Can America Turn the Corner on its Imprisonment Binge?*, 24 PACE L. REV. 563 (2004).

that the United States currently makes of incarceration. To cite just a few examples from Mr. Schiraldi's powerful paper:

- More people have served time in prison then the populations of twenty-eight states and the District of Columbia combined;[60]
- At the current rate of incarceration one out of every fifteen Americans born in 2001 can expect to spend some time in prison during their life;[61]
- An African-American boy born today has twice the chance of landing in prison then he has of attending college;[62]
- Spending for incarceration has grown at a rate greater than 2½ times the rate of increase in spending for education.[63]

Mr. Schiraldi points out that the more public awareness there is of this unprecedented use of incarceration the more likely it is that the public will demand a change in policy. He also makes clear that change will not be free. If deincarceration is to work, alternatives to incarceration must be developed. There is public support for these changes. Mr. Schiraldi cites polls that show that nearly 62% of the American people believe that non-violent drug crimes should be handled by treatment and counseling rather than imprisonment.[64] This is a substantial shift and suggests that with the right kind of advocacy national crime policy could be changed to a more sensible and humane use of imprisonment.

Eric Lotke and Peter Wagner add another interesting perspective. In their article entitled, *Prisoners of the Census Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From*, they describe that the U.S. Census counts prisoners as permanent residents of the community in which the prison is located, not the communities from which they come.[65] Mr. Lotke and Mr. Wagner demonstrate that this method of counting people has substantial impact on electoral apportionment and financial distributions of government aid in ways which favor rural communities and dis-

60. *Id.* at 563 (citation omitted).
61. *Id.* at 563-64 (citation omitted).
62. *Id.* at 564 (citation omitted).
63. *Id.* at 565 (citation omitted).
64. Schiraldi, *supra* note 59, at 567 fig.3.
65. Eric Lotke & Peter Wagner, *Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From*, 24 PACE L. REV. 587 (2004).

favor the residents of the urban minority populations from which the prison population is largely drawn.[66] With so many people in prison the census decision also affects political apportionment. Since most prisons are in rural areas the decision to count inmates as being residents of the community in which the prison is located means an increase in rural voting strength and a decrease in urban voting strength, since most prisoners are from urban communities.[67]

As Vincent Schiraldi notes "releasing inmates with no support services is unpopular with the public and risks endangering public safety."[68] The final article in the section on the modern prison system thankfully ends on a more positive note, with a hopeful description of a system to ease the difficult transition from prison to the free world. In their article, Reginald A. Wilkinson, Gregory A. Bucholtz and Gregory M. Siegfried describe the system that Ohio uses to deal constructively with the problems that arise when massive numbers of people who have been imprisoned are returned, as most surely will be, to the communities from which they are drawn.[69]

The authors, one of whom is the Commissioner of Corrections for Ohio, depict the Ohio system that they have implemented for offender reentry. This system provides support in six areas, employment, family, substance, community functioning, personal and emotional stability and attitude.[70] It also makes use of a new type of court, "reentry courts," to assist in the process. These courts provide "graduated sanctions, positive reinforcement and marshal resources . . . ."[71] The authors concluded that with careful attention to the problem a well

66. *Id.* at 590-93 ("30% of new residents of upstate New York were prisoners . . . nearly 200 counties in the American have more 5% or more of their population in prison."). Mr. Lotke and Wagner also found that, "[n]early 9% of all African American men in their twenties and thirties live in prison. Most of this group is apportioned to legislative districts that do not reflect their communities of interest or their personal political concerns." *Id.* at 593.

67. *Id.* at 593-600.

68. Schiraldi, *supra* note 48, at 583.

69. Wilkinson et al., *Prison Reform Through Offender Reentry: A Partnership Between Courts and Corrections*, 24 PACE L. REV. 609 (2004).

70. *Id.* at 614-15.

71. *Id.* at 619.

thought out reentry program with sufficient resources can significantly reduce recidivism.[72]

Anatomy of Modern Prisoner's Rights Suit

Prisoners' rights litigation is no doubt more difficult now than it was in its heyday, in the 1970s and 1980s. Changes in doctrine by the U.S. Supreme Court limit rights; the Prison Litigation Reform Act makes even those limited rights more difficult to enforce. In addition to these well known limitations there are other legislative initiatives that have been implemented in recent years.[73]

Despite the difficulties of modern prisoners' rights litigation the conference confirmed that it still continues and has vitality. A number of papers shed new light on modern prisoners' rights litigation.

William C. Collins, who was an assistant Attorney General in Washington state, was a litigator for defendants in prisoners' rights cases and is now co-editor of the *Correctional Law Reporter*, in his paper, *Bumps in the Road to the Courthouse: The Supreme Court and the Prison Litigation Reform Act*[74] does an excellent job of contrasting the critical distinctions between current prisoners' rights litigation and the litigation of the past thirty years. In doing so he shows how much more difficult current prisoners' rights litigation is when contrasted with the 1970s, when this litigation was just beginning. In the early days of prison reform litigation courts were confronted with essentially lawless institutions in which the "warden's word alone had been law and oversight of any sort was typically lacking."[75] To counteract this state of affairs, courts in the early prisoners'

72. *Id.* at 628-29.

73. One of these is described by Anthony J. Annucci, Deputy Commissioner and Counsel to the New York State Department of Correctional Services, in his article, *New York's Expanded Son of Sam Law and Other Fiscal Measures to Deter Prisoners' Suits which Satisfying Outstanding Debts*, 24 PACE L. REV. 631 (2004). In his article Mr. Annucci describes how the New York State Legislature has tightened laws that set aside, in escrow, any funds that an inmate receives for satisfaction of claims filed by victims of that inmate. These laws, while making it more difficult for inmates to recover for their injuries, do at least provide some measure of restitution for the victims of crime. *See id.*

74. Collins, *supra* note 23.

75. *Id.* at 655.

rights cases developed standards of review that forcefully inserted the judiciary into areas of prison management in order to ensure the rule of law. These decisions, Mr. Collins argues, changed the attitudes of prison officials.[76]

Now, however, because of drastic cutbacks in the decisional law and the enactment of the Prison Reform Litigation Act, which "limit[s] the powers of the federal courts in ordering relief in inmate cases,"[77] it is much more difficult for inmates to prevail in these lawsuits. After an extensive and clear review of all these developments, Mr. Collins concludes, "that the federal lawsuit as a vehicle for major prison reform is something whose heyday has passed."[78] He then asks poignantly "Is what remains enough to hold correctional institutions and agencies accountable for the care and treatment they provide inmates?"[79]

The remaining articles attempt to answer that critical question. Several give cause for encouragement. Dave C. Fathi, Senior Staff Counsel for the National Prison Project of the ACLU Foundation, in his article *The Common Law of Supermax Litigation*,[80] brings light to bear on what, before this article, was an inaccessible body of law dealing with the constitutionality of super maximum security prison conditions. His article surveys the settlement terms of supermax cases from Wisconsin, Ohio and New Mexico.[81] These agreements, Fathi argues, have established a "common law" jurisprudence which establishes a "judicial consensus that the Eighth Amendment is violated when the seriously mentally ill or developmentally disabled are held in supermax . . . " security prisons.[82]

Mr. Fathi reveals that these settlements and court orders also establish that all inmates in super maximum security prisons are entitled to at least five hours a week of out of cell time, to visiting, to possession of personal property and to access to telephones.[83] Thanks to Fathi's article we now have "a roadmap

76. *Id.* at 651-55.
77. *Id.* at 669.
78. *Id.* at 674.
79. Collins, *supra* note 23, at 674.
80. David C. Fathi, *The Common Law of Supermax Litigation*, 24 PACE L. REV. 675 (2004).
81. *Id.*
82. *Id.* at 681.
83. *Id.* at 685-89.

for mitigating the most inhumane and oppressive features of supermax confinement."[84]

Al Gerhardstein, an experienced prisoners' rights litigator in his article[85] offers a series of practical suggestions on how a plaintiff's lawyer can best negotiate the present obstacles to successfully prosecuting prisoners' rights cases, from case selection through verdict. This article which covers client selection, prefiling tasks, discovery, pretrial conferences, jury selection, jury instructions, verdict forms, trial presentation, witness order and topics, common evidentiary issues, damages and attorney fees is a valuable reference to any attorney considering representing an inmate in such a case. Mr. Gerhardstein concludes that in the current climate the best way to use litigation to obtain institutional prison reform is to bring cases seeking large damage awards rather than pursue cases seeking injunctive relief.[86]

Heather Barr, staff attorney with the Urban Justice Institute, in her article *Connecting Litigation to a Grass Roots Movement: Monitoring, Organizing, and Brad H v. City of NY*,[87] sees another use of prison litigation to obtain systemic reform. Ms. Barr has brought litigation in state court on behalf of mentally ill inmates in New York City jails. The litigation deals with the rights of newly released mentally ill inmates to receive essential medical and social services immediately upon their release from prison or jails.[88] Ms. Barr writes that the problems facing mentally ill inmates are more complex than just the discharge plan-

84. *Id.* at 690.

85. Alphonse Gerhardstein, *A Practitioner's Guide to Successful Jury Trials on Behalf of Prisoner-Plaintiffs*, 24 PACE L. REV. 691 (2004).

86. *Id.* at 691-92.

87. Heather Barr, *Connecting Litigation to a Grass Roots Movement: Monitoring, Organizing, and Brad H. v. City of NY*, 24 PACE L. REV. 721 (2004).

88. In *Brad H. v. City of New York*, 712 N.Y.S.2d 336 (Sup. Ct. 2000), a class of inmates who were confined in New York City jails for over twenty-four hours and who were receiving treatment for mental illness brought an action against the City of New York and petitioned the court for an order requiring the City to provide mentally ill inmates with adequate discharge planning. Prior to this action, the City did not offer any substantive discharge planning for mentally ill inmates. Rather, the typical practice was to take inmates to a subway station in Queens in the early hours of the morning and provide them with $1.50 and a two-fare metrocard. The court held that the City's failure to proved adequate discharge planning to mentally ill inmate did, in fact, violate the state Mental Hygiene Law and granted the inmates' motion for a preliminary injunction. *See id.*

ning issues presented by the litigation she is pursuing. But these more global problems, such as finding affordable housing for newly released inmates, are not as susceptible to change through litigation. These problems require political action. Ms. Barr argues based on her experience—which is dramatically recounted in her article—that litigation even though not addressed to these issues can nevertheless assist in advancing non-litigation goals. In her words litigation can "cross pollinate" and make both approaches—legal and political—more effective.[89]

William J. Dean, Executive Director of Volunteers for Legal Services Inc., in his published remarks,[90] sees additional opportunities in modern prisoners' rights litigation. Mr. Dean describes programs by two Wall Street law firms and by the American College of Trial Lawyers to provide attorneys to represent inmates in their lawsuits. According to Mr. Dean, the value of these volunteer efforts is greater than one might expect. The inmates obtain valuable legal assistance, which is the immediate goal. But another goal is also achieved; working on these cases transforms these attorneys, who otherwise would have no interest in prison reform. As one attorney whom Mr. Dean describes put it, "I had had no prior contact with prison. No longer will I shrug my shoulders when I hear about prisons and prisoners."[91] Mr. Dean concludes that these attorneys "are valuable recruits to the cause of prison reform."[92]

Three articles tackle the complex problems of enforcement of court orders. One is an intriguing collaborative article entitled *Effective Post-PLRA Settlement Models A Case Study of Arizona's Protective Segregation Lawsuit*[93] written by attorneys for both sides, a prison administrator and by the special master appointed by the court to oversee enforcement of the decree in a

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89. Barr, *supra* note 87, at 723 ("Our experience reaching out to these family members has highlighted for what an unusual opportunity for community organizing may be created by litigation efforts. Successful litigation, or even just discovery, may offer lawyers an opportunity to reach a group of people who otherwise would be difficult to find through outreach.").

90. William J. Dean, *Anatomy of the Modern Prisoners' Rights Lawsuit: Coping with the Obstacles*, 24 PACE L. REV. 739 (2004).

91. *Id.* at 742.

92. *Id.*

93. Hill et al., *Effective Post-PLRA Settlement Models: A Case Study of Arizona's Protective Segregation Lawsuit*, 24 PACE L. REV. 743 (2004).

contested prison case in Arizona. In this article Debbie A. Hill, Larry Hammond, Bruce Skolnick, Steve Martin and Donna Clement recount how much progress can be made if the parties, rather than fight, engage in a collaborative effort using prison litigation to achieve positive change.

Carl Reynolds, General Counsel for the Texas Department of Criminal Justice in his piece, *Effective Self-Monitoring of Correctional Conditions*,[94] deals with the problem of what a conscientious prison administrator should do once the courts relinquish control over prison conditions cases. The article describes how a department of corrections can monitor itself for constitutional violations. Mr. Reynolds outlines a number of techniques that can be employed to obtain critical information and to ensure that constitutional rights of inmates to decent treatment are being met.[95] The key to the success of such an effort, Mr. Reynolds argues, is that when control of prisons is placed, by courts, back in the hand of the executive and legislative branch of a state government, prison administrators must "recognize the continuing moral lesson that [the court's] findings held for the state."[96] He concludes that because "of the frail humanity of the people whom society and the criminal justice process condemn to multi-year imprisonment," correctional leadership must be "committed to the core moral importance of" ensuring constitutional treatment for all in its charge.[97]

Elizabeth Alexander, Executive Director of the National Prison Project of the ACLU, disagrees that the good faith of prison administrators and compliance programs such as Mr. Reynolds describes is enough. In her article, *"Watching the Watchmen" After Termination of Injunctive Relief*,[98] she brings to a close this section of the symposium issue by stressing that despite the good faith of prison officials there is a continuing need for judicial involvement. In her article she makes a powerful argument that despite the Prison Litigation Reform Act, courts should be able to reopen judgments, under Federal Rule

94. Carl Reynolds, *Effective Self-Monitoring of Correctional Conditions*, 24 PACE L. REV. 769 (2004).

95. *Id.*

96. *Id.* at 791.

97. *Id.* at 792.

98. Elizabeth Alexander, *"Watching the Watchman" After Termination of Injunctive Relief*, 24 PACE L. REV. 793 (2004).

of Civil Procedure 60(b)(6), to enforce them if plaintiffs' counsel can show that defendants, after termination of the agreement, have allowed conditions to return to an unconstitutional state.[99]

The International Context of U.S. Prison Reform

Too often discussions about prison reform in America take place in a vacuum without any consideration of the international context. Several papers presented here attempt to correct that imbalance. Alvin J. Bronstein and Jenni Gainsborough in their article, *Using International Human Rights Law and Standards for U.S. Prison Reform*,[100] make a case for the use of international standards by courts adjudicating prisoner rights claims. They argue that, "As a key advocate for human right worldwide, the U.S. unquestionably has a moral responsibility to accept as binding the human rights standards by which we judge the conduct of other states."[101] They then survey the human rights standards recognized by international law that are applicable in American prisons.[102] These standards include guarantees of "the basic rights to life, health, fairness and justice, humane treatment, dignity and protection from ill treatment or torture."[103]

Baroness Vivien Stern and Andrew Coyle, both of Great Britain, gave spellbinding talks to conference participants that

99. *Id.*

100. Alvin Bronstein & Jenni Gainsborough, *Using International Human Rights Laws and Standards for U.S. Prison Reform*, 24 PACE L. REV. 811 (2004).

101. *Id.* at 814.

102. Bronstein & Gainsborough, *supra* note 100; *see, e.g.*, *Standard Minimum Rules for the Treatment of Prisoners*, E.S.C. Res. 633C (XXIV) U.N. ESCOR, Annex 1, U.N. Doc. A/CONF/611 (1950), U.N. ESCOR, Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), *amended by* E.S.C. Res. 2076, (LXII), U.N. ESCOR, Supp. No. 1, at 35, U.N. Doc. E/5988 (1977); *Universal Declaration of Human Rights*, G.A. Res 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 5, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953); African Charter on Human and People's Rights, June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986); American Convention on Human Rights, Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

103. *Id.* at 823 (quoting VIVIEN STERN, A SIN AGAINST THE FUTURE: IMPRISONMENT IN THE WORLD 192 (1998)).

are published in this edition.[104] Baroness Stern and Mr. Coyle are founders of Penal Reform International, an organization that surveys prison conditions around the world.[105] Together their papers put into perspective the American penal system compared with prison systems in other countries. It comes as no surprise, but is sobering nevertheless, to hear what Stern and Coyle have to say.

Mr. Coyle reported America belongs to a select group of "countries which actually appear to like prison" and use it not for reasons directly linked neither to crime nor the reduction of crime, nor even the punishment of crime.[106] "Instead," he states, imprisonment in the U.S. "is linked to control of marginalised and impoverished groups in society. The prison is being used to deal with a plethora of social problems, which properly should not come within the ambit of the criminal justice system."[107] Recounting this grim reality, Mr. Coyle in his paper reflects that "[o]ne day in the distant future, people will probably look back . . . and will wonder how we could do that to our fellow human beings in the name of justice."[108]

Baroness Vivien Stern in her paper also lamented America's "great incarceration experiment . . . ."[109] To Baroness Stern "[p]rison is an expensive way of making bad people worse."[110] Having studied prison systems throughout the world Baroness Stern minced no words when she said that comparatively the U.S. prison system is "monstrous, deformed and abnormal."[111] In her words one finds an eerily echo of the scandal at Abu Graib.[112] Listen to how she describes how much of the world views the U.S. because of its prison system:

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104. Andrew Coyle, *Prison Reform Efforts Around the World: The Role of Prison Administrators*, 24 PACE L. REV. 825 (2004); Baroness Vivien Stern, *Prison Reform and the Power of Ideas: Building Political Will*, 24 PACE L. REV. 833 (2004).

105. *See* Penal Reform International, *at* http://www.penalreform.org.

106. Coyle, *supra* note 104, at 827.

107. *Id.* at 828.

108. *Id.* at 832 (quoting William Omaria, *Afterward* to PRISON CONDITIONS IN AFRICA: REPORT OF A PAN-AFRICAN SEMINAR IN KAMPALA, UGANDA 91 (1997)) (internal quotations omitted).

109. Stern, *supra* note 104, at 834.

110. *Id.*

111. *Id.* at 835.

112. *See supra* note 9.

https://digitalcommons.pace.edu/plr/vol24/iss2/1

> For the rest of the world the image of the prisoner in the United States is the picture of a black man in an orange jump-suit wearing leg chains. This is a caricature, a crystallisation. It is unfair and far from reality. But it symbolises something. It is a symbol of gross racial disparity, so gross as to provoke disbelief that it is tolerated . . . [i]t is a symbol of dehumanisation . . . [i]t is a symbol of ill-treatment and cruelty . . . ."[113]

The Future of Prison Reform Efforts

Perhaps the most important contribution of the conference was its discussion of how to best advance the cause of prison reform today. Alvin J. Bronstein, in his keynote address[114] made three important points. First, " 'prison reform' must not be limited to improving prison conditions and challenging the awful things that go on in our jails and prisons. It must also be about reducing the use of imprisonment in this country . . . ."[115] The second message is that prisoner reformers can no longer, as they have in the past, rely so heavily on litigation. Reformers, Bronstein maintained, "have to do much more than litigation."[116] Public education and organizing citizen groups is critical to success. Bronstein's final message is that American prison reformers ought to draw more support from international human rights standards.[117]

The final paper published here, by Michele Deitch entitled, *Thinking Outside the Cell: Prison Reform Litigation and the Vision of Prison Reform*,[118] deserves careful reading. In it Ms. Deitch pulls together the essential message of the conference. Ms. Deitch stresses that prison reformers cannot assess progress or success without having a vision of "the transformed prison."[119] To her this includes a prison system which incarcerates far fewer prisoners and those who are incarcerated have shorter sentences and are housed in prisons where

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113. Stern, *supra* note 104, at 835-36.

114. Bronstein, *Keynote Speech, Prison Reform Revisited: The Unfinished Agenda*, 24 PACE L. REV. 839 (2004).

115. *Id.* at 842.

116. *Id.* at 844.

117. *Id.* at 842-46.

118. Michele Deitch, *Thinking Outside the Cell: Prison Reform Litigation and the Vision of Prison Reform*, 24 PACE L. REV. 847 (2004).

119. *Id.*

> The culture . . . is entirely different: inmates and staff would treat each other with dignity and respect, offenders would not be psychologically or physically harmed by their prison experience; and institutions would be open and transparent, . . . [r]ehabilitation would be stressed above all: there would be strong efforts made to sustain bonds between inmates and the outside world; facilities would be smaller and located closer to urban communities and families; programs would be offered that help offenders treat their addictions, become educated, learn meaningful work skills, and learn to be responsible citizens. And prisons would be held accountable for meeting the needs of prisoners and rehabilitating them.[120]

Having such an explicit vision allows prison reformers to look critically at their own activities and determine for themselves how to proceed. Ms. Deitch acknowledges that there are real limits to what litigation can achieve. At the same time, litigation cannot be overlooked, as some may believe. By the same token, Ms. Deitch cautions that prison reformers, in their zeal to end the regime of mass incarceration, must not forget that prison conditions must also be reformed. She notes that "[w]e cannot sacrifice those living under horrendous conditions today even for long-term vision. Prison reform litigation is absolutely necessary if we are to have even incremental improvements in prison operations."[121] Thus, the fight for prison reform must take place on multiple fronts. Doing so in Ms. Deitch's terms is learning to "think outside the cell."[122]

Conclusion

If *Prison Reform Revisited: The Unfinished Agenda* and the symposium issue which preserves the conference teaches us anything it is this: the struggle for a transformed prison system is surely worth the effort and surely not over. The conference rightly celebrates the victories of prison reform efforts over the past three decades and documents that much has been accomplished. At the same time the conference demonstrated, sometimes in graphic, troubling ways that much more remains to be done. The problem is urgent, indeed maybe as critical as any

120. *Id.* at 848.
121. *Id.* at 849.
122. *Id.* at 855.

domestic social issue facing this country. But the papers presented here show that reform is possible. If the conference leads to an added awareness of the urgency of the need for true penal reform and an understanding of the problem and its solutions it was more than worth the effort. The proper agenda for "penal reform," to borrow Al Bronstein's phrase, is ambitious to be sure and certainly unfinished, but who can doubt that the goal of a transformed prison system is worth the fight?

No one expressed why prison reform is so important more eloquently than the late Norval Morris, the noted prison reformer, criminologist, law professor and dean emeritus at the University of Chicago Law School.[123] Professor Morris was to have been the keynote speaker at the conference. When illness prevented him from attending, he sent a letter containing the following message to the conference participants:

> "Why do prison conditions matter." Of course they matter to the prisoners, but why to us? They, after all, are not the most desirable social group for our solicitude. The children of the poor lead them in need for medical assistance, education, and for some in social environment. And there are other similar more needy groups. Why then do we care about prisoners' living conditions?
>
> Is it because "What you do unto the least of these you do unto me." This is a wonderful aphorism but in a secular world it does not take us very far.
>
> Is it because the criminal law of punishment exercises the greatest power the state assumes over the citizen in time of peace and because an unfailing indictor of abuse of state power generally is abuse of the punishment power. It is the hallmark of the dictatorship.
>
> Or is it because the sensitive judge and the sensitive observer always sees the man in the dock as a replica of himself, identifies with him, empathizes with him, knows that there but for the grace of God go I, thinks he could well be his brother, or father, or even himself, had the cards been differently dealt. . . .[124]

123. This symposium issue of the Pace Law Review is dedicated to Professor Morris.

124. Letter from Norval Morris to Michael B. Mushlin dated (Oct. 13, 2003) (on file with author).