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THE DISCOVERY OF PRISON REFORM

FRED COHEN *

A sure sign of a movement in law is the volume and length of judicial opinions and law review writing.¹ This *Symposium* itself is exceptionally good evidence that prison reform has arrived. Only a few years ago it was accurate to state that the volume and variety of legal claims made by prisoners—indeed, by offenders located throughout the correctional process—was greatly increasing, although losses far outnumbered wins.

Today, the volume and variety of prisoner litigation continues to grow but now prisoners are beginning to win more often and some of these victories must be regarded as important.² These ostensible gains in litigation are matched by legislative debate, if not affirmative action, the emergence of new publications dealing with prisoners, new organizations, the inevitable conferences and a growing political consciousness among inmates.³

It shall not be my purpose to deflate the significance of prisoner litigation or the overall prison reform movement.⁴ Indeed, it is out of a concern for basic change in prisons—in the entire correctional process—that I shall approach some of the recent decisions by offering more questions than applause and by looking to the future instead of expressing satisfaction with the present.

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1. See, e.g., R. SINGER, *PRISONERS' LEGAL RIGHTS: A BIBLIOGRAPHY OF CASES AND ARTICLES* (1972).

2. Of particular interest are those decisions recognizing an inmate's right to procedural due process in disciplinary proceedings, outlawing some disciplinary measures, taking cognizance of the emergence of *Miranda* claims and the expansion of first amendment rights.

3. See, e.g., the discussion of recent legislation in 1 *PRISONERS' RIGHTS NEWSLETTER* 17 (Sept. 1971) which is a new publication in the area of correction law; *THE PRISON LAW REP.* (Administration of Criminal Justice and Prison Reform Committee of Young Lawyers Section of the American Bar Assoc., Oct., 1971) is another such publication. Recent conferences on prisons and prison reforms include the National Corrections Conference (Williamsburg, Va., Dec. 6, 1971) and the National Conference on Prisoner's Rights (Chicago, Ill., Nov. 5-7, 1971) sponsored by the American Civil Liberties Foundation, The Committee for Public Justice, and The Playboy Foundation.

4. One writer actually states that the proliferation of inmate litigation "is responsible both directly and indirectly for many disciplinary problems in prisons." M. Feit, *Prison Discipline and the Inmate Sense of Injustice* chs. XII, XIII, 1971 (unpublished master's essay in State Univ. of New York at Albany, School of Criminal Justice).

As the prison reform movement gathers adherents and momentum, it appears to be acquiring its own sense of righteousness.⁵ The appeal—particularly after a tragedy as monumental as Attica—is irresistible. Persons who are desperate for help as well as those who are desperate to help are not easily distracted by such matters as an inventory of gains and an assessment of goals or questions concerning whether or not the tactics and strategy adopted will further or retard agreed upon goals. Men are not led into battle with cries for restraint or pleas for more research nor by conceptual inquiries and the necessity of working out carefully considered alternatives to incarceration.

Nor do I propose that they should be. As Leslie Wilkins has stated, changes occur most quickly and obviously not as a logical response to research findings, but as a result of riots, concern over costs, as a humanitarian response to a lowered tolerance of degrading and brutalizing conditions and to increased awareness of the extent of deprivations of civil liberties.⁶ As the post-Attica experience in New York unfolds, it is clear that those who control and guide the direction of change are not the inmates who created its possibility. The question, of course, should be the nature and direction of change and the initial battle should be waged over objectives. What is likely to occur, however, is that the tactics of reform will become confused with objectives and the questions to be asked will be framed in such a way that while the answer is clear, the possibility of achieving desirable change will remain problematic.

The experiences gained during the sixties should teach us that social movements are short-lived and too easily co-opted. For example, the student rights movement unquestionably brought some changes to the campus although the precise dimensions are unknown. The calm which now pervades the campus hardly represents broad satisfaction with the outcome of the movement. Rather, it appears to be bounded by a tight labor market and

5. An aspect of this righteousness is the way prisoners are being romanticized and treated as though the term describes a single, homogeneous group. Malcolm Braly, who has spent years in prison, states: "Convicts are the new vogue because they least appear to bring some active focus to a revolution that is growing increasingly sluggish. And convicts, starved as they are for identity, are going to play along with it to the hilt." Braly, *The Men Behind Bars: In and Out of Vogue*, *The Village Voice*, Jan. 27, 1972, at 34, col. 3.

6. Wilkins, *Variety, Conformity, Control and Research: Some Dilemmas of Social Defense*, 28 INT'L REV. OF CRIM. POLICY 18 (1970).

fuelled by bewilderment and frustration. What faculty member has not witnessed a student group win the right to participate in decision-making only to relinquish the hard won right by non-attendance? That the explanation for apparent apathy is the realization that the concession was more symbolic than real serves only to underscore the theme of this article.

As the current prison reform movement approaches adolescence, it seems appropriate to explore the inherent limitations and dangers of some of the strategy being employed—litigation in particular—and to invite an assessment of gains and losses. A judicial opinion is not self-executing and thus it is time to inquire about the implementation of legal victories. No one who is familiar with correctional administrators believes that a courtroom victory for an inmate is followed by a staff meeting on how best to implement the letter and spirit of the decision. Indeed, it is far more likely that the meeting will involve the problem of how to avoid the ruling or achieve minimal compliance.

I. THE CREATION OF FAILURE

Prisons are so widely viewed as failures that it is difficult to find informed spokesmen to speak on their behalf. Among the critics are Chief Justice Burger, who recently said that it takes but a single visit to a prison to acquire a zeal for prison reform; President Nixon, quoted as saying, "The American system for correcting and rehabilitating criminals presents a convincing case of failure;" and former Attorney General Mitchell, who was "appalled at the situation in many of our prisons today."⁷ The consensus on prison failure has never been greater, the sense of despair never deeper. Attica is stark testimony to the fact that many men were willing to die rather than live in a situation that had become intolerable. Do the prisoners and guards at Attica become so many dead bodies or the first to fall in the beginning of a movement that sweeps clean our moribund prison system? How many Atticas will be required first to humanize the system and then to adopt alternatives to incarceration for the vast majority of offenders?

In the rush to engage the prison it seems appropriate to men-

7. Address by former Attorney General John N. Mitchell, National Corrections Conference, Williamsburg, Va., Dec. 6, 1971.

tion that the penitentiary has not always been with us and that it was not born out of despair.⁸ In the late eighteenth century jails were constructed in the belief that local control of crime was not adequate and on the principle that punishments must be certain but humane.⁹ By the 1820's, the faith of the 1790's seemed misplaced. Experts sought the causes of crime in the lives of those who were incarcerated.¹⁰ Cause, it came to be believed, could always be traced to some traumatic event during childhood and thus criminality was determined to begin with the family.

Once the seeds of criminality were sown, the community presented all the necessary ingredients for a life of crime—liquor, theaters, and bawdy houses were constant temptations. The urgent need to construct a special and well organized world, one that insulated the deviant from the corrupting influences of the community, seemed eminently sensible. As always, the diagnosis contained the cure, although leaders in the Jacksonian era faced a dilemma which continues to haunt us. If the causes of crime were to be found in the community then is it more expedient to alter the community or alter the individual's relationship to the community?

The answer then, as now, was the penitentiary—a place that would be uniquely American and become a showplace for the world. Prisoners would be totally isolated from the external community and from each other. In Philadelphia, the doctrine of silence and isolation was carried to the point that officials placed a hood over the head of a new prisoner while escorting him to his solitary cell so he could not see or be seen by other inmates.¹¹ These notions, of course, were consistent with the prevailing diagnosis. Punishment, in the sense of the gratuitous infliction of pain, was not an objective.

As is well known, the Auburn and Pennsylvania Plans for isolation and silence quickly degenerated. Guards even came to

8. The discussion in notes 9-16, *infra* is substantially from D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* chs. 3 & 4 (1971) which is the best history available on the development of the penitentiary as well as other institutions.

9. This represented the triumph of the beliefs set forth in C. BECCARRIA, *ON CRIMES AND PUNISHMENTS* xi (H. Paolucci transl. 1963) (known in the colonies as early as 1770).

10. This methodological error is repeated to this day.

11. See E. LIVINGSTON, *INTRODUCTORY REPORT TO THE CODE OF PRISON DISCIPLINE* 51 (1827). Livingston would later be acclaimed for the penal code he drafted for Louisiana which, among other things, was notable for the solicitude shown the offender.

bribe prisoners to achieve compliance. New York, for example, was committed to obedience at any cost. The prisoner must submit and the ball and chain as well as whippings certainly were in order—not to punish—to achieve submission to authority. The military model, which persists today, became increasingly attractive and no one could doubt who were the enlisted men and who were the officers.

With the emergence of the Auburn and Pennsylvania Plans in the Jacksonian era, institutionalization had become the choice of first resort. What is important in this brief historical sketch is that confinement was not originally conceived as punishment but as a necessary ingredient of cure. The construction of the fortress penitentiary and the removal of the offender from the community flowed directly from the diagnosis of criminality. In the zeal to achieve reform, who could fault the early leaders if they failed to consider what might be done with fixed solutions should there be a change in the popular beliefs on the causes of criminality?

If there is one constant factor in the contemporary search for the causes of crime, it is the diversity of methodology, beliefs and theories.¹² Criminology has reached the point where two distinguished scholars now say,

[T]he attempt to establish all-embracing theories of criminal behavior—themes that in one formulation include explanations of incest, shoplifting, malicious mischief, gambling, burglary and anti-trust violations—has tended to produce statements that either are so general that they are applicable with only slight alterations as explanations of all human behavior, criminal and noncriminal, or so tautological that there [*sic*] are merely extended definitions of the behavior they seek to explain.¹³

In the same vein, Leon Radzinowicz suggests that the most that can be done is to throw light on the combination of factors or circumstances that can be associated with crime.¹⁴

Thus, the fortress prison has far outlived its original rationale and its survival is dependent on *post hoc* rationalizations that rarely comport with acceptable (*i.e.*, contemporary) notions of criminality. Indeed, a study of some of the major prisoners'

12. For an excellent summary, see M. WOLFGANG & F. FERRACUTI, *THE SUBCULTURE OF VIOLENCE: TOWARDS AN INTEGRATED THEORY IN CRIMINOLOGY* ch. II (1967).

13. H. BLOCH & G. GEIS, *MAN, CRIME AND SOCIETY* 81 (1st ed. 1970).

14. See generally L. RADZINOWICZ, *IN SEARCH OF CRIMINOLOGY* (1961).

rights decisions discloses that administrators uniformly contend—and even the most progressive courts uniformly accept—that security and good order are primary institutional objectives.¹⁵ Such a proposition is urged and accepted without dissent and apparently without the realization that what originally was a secondary consideration incident to the pursuit of cure has been converted into a primary rationale both for the continuation of the prison and the deprivation of numerous rights.¹⁶

II. THE EVOLUTION OF PRISONERS' RIGHTS

Prisoners never have been without any legal rights. Aside from any constitutional or statutory requirements, our courts have held that prison authorities must keep their prisoners free from harm and provide the basic necessities of life: medical care, clothing, shelter, and food. Thus, even without the current embellishments, prison authorities are under a duty to maintain the minimal conditions necessary to sustain life and health.¹⁷

The key word in the above sentence is *minimal*. For example, in 1963 a prisoner at the Utah State Prison complained about the quality and quantity of food provided him in the maximum security wing of the prison. He received two meals a day in rather small portions and complained that the service was unsanitary and the food always cold when served. More basically, the prisoner testified that he always felt hunger pangs. The court relied on the testimony of the prison doctor to the effect that since there had not been a case of malnutrition in at least five years and hunger pangs are necessarily subjective, the claim must be dismissed.¹⁸

In *Holt v. Sarver*,¹⁹ Judge Henley described the Arkansas prison fare as neither appetizing nor attractive, but nonetheless wholesome. The "grue" which was served consisted of meat, potatoes, vegetables, eggs, oleo, syrup and seasoning all baked to-

15. See, e.g., *Sostre v. McGinnis*, 442 F.2d 178, 200 (2d Cir. 1971) where discipline and good order are held to be sufficient interests to justify regulation of a prisoner's mail.

16. A writer who is also an active and successful litigator on behalf of prisoners appears to accept security as a penological goal and concedes that prison administrators are the best judges of how to achieve it. Millemann, *Prison Disciplinary Hearings and Procedural Due Process—The Requirement of a Full Administrative Hearing*, 31 MD. L. REV. 27, 49 (1971).

17. F. COHEN, *THE LEGAL CHALLENGE TO CORRECTIONS* 66 (1969).

18. *Hughes v. Turner*, 14 Utah 2d 128, 378 P.2d 888 (1963).

19. 300 F. Supp. 825 (E.D. Ark. 1969).

gether in a pan and served in four inch squares. The judge found that there had been occasions where the food was tainted by dogs or birds but concluded that none of the petitioners appeared to be suffering from malnutrition.²⁰

Still more recently, a federal judge reviewed the use of a bread and water diet in the Virginia penitentiary system. The judge found that the 700 calories provided were intended to physically debilitate the prisoner and as such constituted a prolonged sort of corporal punishment forbidden as cruel and unusual punishment under the eighth amendment.²¹

I refer to these cases—separated by eight years yet spanning the era of increasing prisoners' rights litigation—to illustrate just how minimal a prisoner's rights are and to indicate the protracted period invariably required first to accept the existence of a right, then to give it substance and scope and finally to implement it.

What is minimally required for human survival (in the physical sense) has now become the foundation for increasingly sophisticated claims by prisoners and their lawyers. However one may ultimately assess the actual gains of prisoner litigation, one point is abundantly clear: an educational process has occurred. When the opinions written in some of the more recent cases are compared with opinions written only a few years ago, the difference in technique, content, and principle is startling.²² Whether or not this increase in judicial sophistication has trickled down to prison officials and line officers is quite another matter.

What might be termed the second era of prisoners' rights is characterized by the emergence of moderately successful litigation and encompasses three major areas each with subsidiary spin-offs: ²³ 1) access to the courts, including communication with legal counsel and access to legal materials; ²⁴ 2) religious free-

20. *Id.* at 832.

21. *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971). A bread and water diet thus joins the use of corporal punishment (the strap) as punishment forbidden by the eighth amendment. See *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968).

22. Compare *Hatfield v. Bailleaux*, 290 F.2d 632 (9th Cir. 1961) with *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971).

23. See F. COHEN, *supra* note 17, at 67-76. For a more recent and comprehensive account, see Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175 (1970).

24. The high point in this area recently was reached in *Lynch v. Gilmore*, 400 F.2d 228 (9th Cir. 1968), *aff'd*, 401 U.S. 906 (1971). See 21 BUFFALO L. REV. 987 (1972).

dom;²⁵ and 3) the proscription of cruel and unusual punishments.

One way to describe the above three areas is a judicially recognized and (hopefully) enforced alteration of the prior status of the prisoner. The earlier legal status of prisoner was scarcely recognizable as the equivalent of human status. Any Humane Society would claim that domestic animals have at least the right to the sort of minimal care and protection that allowed for survival. Prisoners were hardly afforded any more. Indeed, with a cognitive and experiential apparatus not shared by other animals, denial of the right to minimal psychic integrity placed the human-turned-prisoner in a more deprived status than a dog or a cat.

Without wishing to appear to make excessive claims for the advances of the second era, the enlargement of prisoner status is not without significance. To hold, for example, that a prisoner must be guaranteed reasonable access to the courts, that he must suffer no reprisals for his efforts, and that there is a right to some form of assistance, recognizes the prisoner as a jural entity.²⁶

According a prisoner the absolute right to freedom of religious *belief* is as pious a proposition as the solemn statement that we all have this freedom. Obviously, what matters is the way in which our beliefs may be exercised, particularly if those beliefs deviate from the conventional. As is well known by now, it is the Black Muslims who have fleshed out the law in this area.²⁷ The consequent side effect of the recognition of a limited right to the free exercise of religion is the addition of yet another affirmative dimension to the status of the prisoner. To have accomplished this in the context of a religion that includes political and racial beliefs not likely to accord with the views of judges or, certainly, the typical prison official, is all the more important.

The constitutional right to be free from cruel and unusual punishments—whether from fellow prisoners or prison employees—can be said to be simply a restatement of the right to physical

25. This is not to slight racial segregation, see *Lee v. Washington*, 390 U.S. 333 (1968) (per curiam), nor the critical problems of racial tensions in prisons. The three areas described in the text represent volume vis-à-vis implications of significance.

26. The right of access now is so clear that courts hardly pause to debate the proposition. See, e.g., *LeVier v. Woodson*, 443 F.2d 360 (10th Cir. 1971).

27. On the special dietary needs of Muslims, see *Barnett v. Rodgers*, 410 F.2d 995, 1001-03 (D.C. Cir. 1969). The Black Muslims are sometimes referred to as the Jehovah's Witnesses of penal litigation.

survival which, as I previously noted, always had been the rule. However, elevating the proposition to one of constitutional dimension serves the additional function of assuring federal jurisdiction and thus, generally, a more receptive forum than most state courts.²⁸ Even here, enthusiasm for doctrinal enlargement should be tempered by an effort to assess actual results.

The concentration camp conditions in the Arkansas State Penitentiary system eventuated in a finding that the system as it then existed was unconstitutional. *Holt v. Sarver* involved the first judicial attack on an entire system and demonstrated the value of a class action as opposed to an individual lawsuit.²⁹ Conditions in Arkansas were so debased that the federal district judge found that a sentence of imprisonment amounted to banishment from civilized society to a world where human life and the most elemental of human decencies ceased to exist.

Despite the shocking dimensions of the cruelty and inhumanity of the Arkansas situation, the relief actually afforded seems pale by comparison. For example, the court found the isolation cells to be in very poor condition and even rat infested but since the overcrowding had been relieved, the court was reluctant to interfere with their continued use.³⁰ The disrepair of some of these cells was laid to incorrigible prisoners without a hint of recognition that the system previously described could easily lead any man to foul his cage.³¹

In sum, while the judicial treatment of the Arkansas system must be characterized as an advance—both in procedural and substantive terms—the situation there was shown to be so far beyond redemption that any remedy short of a total injunction on the use of the facilities would itself be cruelly disproportionate to the findings. The result is reminiscent of much discussion that immediately followed the Attica uprising: conditions are not good and must be changed but, of course, change takes time. Those who must suffer while the debate continues are, of course, the prisoners.

28. For a discussion of state court receptivity to prisoners' claims, see generally Schwartz, *A Comment on Sostre v. McGinnis*, 21 BUFFALO L. REV. 775 (1972).

29. *Holt v. Sarver*, 309 F. Supp. 362, 381 (E.D. Ark. 1970). The superintendent of the Tucker State Prison Farm subsequently was indicted for the inhumane treatment of inmates. He was acquitted as were five other Arkansas officials who had previously been indicted. N.Y. Times, Nov. 23, 1969, at 32, col. 1.

30. *Holt v. Sarver*, 309 F. Supp. at 378.

31. *Id.*

We are now well into a new era of prisoners' rights litigation. The issues are changing, although they are logically connected to the claims of the prior eras, and the clients are changing—they are scarcely recognizable. It is not possible to accurately measure the extent to which prior litigation has contributed to the current discovery and popularity of prison reform, but it would be difficult not to accord it a major role. In my own experience in visiting and talking with numerous inmates (adult and juvenile) and parolees, there can be no doubt that their self-image has been dramatically altered. Where two or three years ago the questions asked of me would be almost exclusively concerned with defects in the conviction or, with regard to prison conditions, loss of good time and the vagaries of detainers, now the discussion focuses on *rights*—the right to a fair parole hearing; the right to gain access to the ubiquitous file; the right to privacy; the right to political and labor organization; the right to be free of physical brutality as well as psychic terror; the right to procedural fairness; the right to "read anything I damn please"—to be free of "the man." The offender has come to realize that for all practical purposes his immediate relief is not in the hands of the executive or the legislature or—with distressingly few exceptions—correctional administrators. Advances that are not attributed to prison rebellions seem most closely linked to successful litigation.³² That this may prove to be dangerously romantic and disillusioning is the one point that I hope remains with the reader.

Samuel Jordan, writing while confined in prison, carries the point far beyond reform through litigation and raises distressing questions about the totality of reform.³³ He characterizes reformers either as humanist, realist, or streamliner. While differing in technique and analysis, their single objective, according to Jordan, is to make prison work.³⁴ For him, the future is the prisoner and the prisoners' struggle can be understood and resolved

32. Of course there is another view of the role of lawyers and litigation. An extreme view is that of Moe Comancho, President, California Correctional Officers Association. In testimony, he concluded that prison violence is an outgrowth of revolutionary recruitment and agitation most commonly occurring through inmate contact with lawyers. *Hearings Before Subcommittee No. 3 on Corrections of the House Comm. on the Judiciary*, 92d Cong., 1st Sess., ser. 15, pt. II, at 58 (1971).

33. Jordan, *Prison Reform: In Whose Interest?*, 7 CRIM. L. BULL. 779 (1971).

34. *Id.* at 786.

only within the context of the "urge to freedom on the part of Black and working-class people."³⁵ The unwillingness and inability of courts to participate in an alteration of the racial and class structure of prisons is painfully obvious. It remains to be seen whether the ostensible gains achieved through litigation serve to advance or retard the effort to deal with prisons as the most flagrant example of the race-class bias which pervades the entire criminal justice system.

The discovery of prisoners' grievances by legal writers is a fairly recent phenomenon. It is only recently that there have been reported decisions of sufficient quantity to allow for an inventory and analysis of the issues. With legislation in this area practically nonexistent, it is understandable that the initial focus was on what courts have done and what they might do. With the courts as the only faintly responsive organ of government, it was inevitable that prisoners and their lawyers would direct their attention to change through litigation. Although the adoption of an adversary model—change through procedural due process—may not have been inevitable, it was the handiest analogue for many problems. Lawyers argued for individual relief and system change on the basis of rights that, once extended, would somehow dent the total control exercised by prison officials. Writers like Samuel Jordan had not yet been heard from and suggestions that "some items in the due process grab-bag are relied on more as articles of faith than as documented solutions" went unheeded.³⁶

The objectives of the second era of prisoners' rights to a large extent remain unrealized and, while not often articulated, continue to be the basis of much litigation. The prison community is viewed—and accurately so—as a lawless enterprise lacking in substantive and procedural safeguards.³⁷ The ease with which prisoners can be manipulated and abused led naturally to call for visibility and accountability, for reliability in fact-finding and rationality in conclusions, for an end to physical abuse and for some limitation on the total discretion exercised by those in authority.

35. *Id.*

36. See F. COHEN, *supra* note 17, at 106.

37. See generally Greenberg & Stender, *The Prison As a Lawless Agency*, 21 BUFFALO L. REV. 799 (1972).

These must be viewed as the minimal objectives of prison reform through legal devices. They are desirable regardless of the correctional philosophy employed and regardless of an institution's ranking on the basic decency scale. In pursuit of these objectives, reformers should be aware of the complexities of translating an appellate decision into operational reality and the distinction between gaining a specific procedural right and the realization of a larger objective. One need only look to the efforts of the Warren Court to trace the source of this point.

Looking past the prisoners' rights area for a moment there can be little disagreement with the observation that the so-called Due Process Revolution hammered out by the Warren Court is over. There unquestionably were real gains in the almost total incorporation of the Bill of Rights and the fleshing out of additional content to apply as well to the states as the federal system.³⁸ If the decisions, in toto, turn out to be doctrinally weak and operationally suspect, then at least there is the symbolic victory. Now that we have *Winship*, *Benton*, *Duncan*, *Klopfer*, *Gault*, *Pointer*, *Malloy*, *Gideon*, *Ker*, *Mapp*, *Robinson*³⁹ and the like are we able to say that there is now basic change in the criminal justice system? Has *Miranda* actually brought the constitution to the gatehouse? Has *Gault* revolutionized the juvenile justice system?⁴⁰ If the answer is no—even a halting, uncertain, we-need-more-studies-type no—can we comfortably expect that the reform-by-analogy approach in the prisoners' rights area will escape the fate of the pretrial and trial phases of the system as well as the parallel juvenile justice system?

As Professor Amsterdam shows so well, the advances made by the Warren Court did more to create the possibility and appear-

38. *Williams v. Florida*, 399 U.S. 78 (1970), holding that 12 man juries are not constitutionally required in state criminal proceedings, is an example of the dilution of a federal rule previously viewed as "untouchable." Incorporation followed by interpretation rarely has produced this sort of dilution by *renvoi*.

39. *In re Winship*, 397 U.S. 358 (1970); *Benton v. Maryland*, 395 U.S. 784 (1969); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *In re Gault*, 387 U.S. 1 (1967); *Pointer v. Texas*, 380 U.S. 400 (1965); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Ker v. California*, 374 U.S. 23 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Robinson v. California*, 370 U.S. 660 (1962).

40. One study found that juveniles with counsel are more likely to be incarcerated than juveniles without counsel. Duffee & Siegel, *The Organization Man: Legal Counsel in the Juvenile Court*, 7 CRIM. L. BULL. 544, 552 (1971).

ance of rights than actual rights.⁴¹ The totality of decisions that make up the Due Process Revolution—obviously, some more than others—turn out to be conceptually flabby and operationally imperfect. Where the accused must be informed before he can act against self-interest, the waiver doctrine is a handy escape provision. If the police do err, then the doctrine of harmless error is available and growing in popularity. The complexities and safeguards of search and seizure law are “ameliorated” by finding apartment doors open and contraband in plain view or in being fortunate enough to observe a suspect “drop” something to the ground which on inspection happily appears to be a narcotic drug.⁴² At another level, the broadside attacks on law enforcement by the Warren Court—the distrust of power and doubts as to competence and worthiness of objectives—have ironically resulted in the broadest political and economic support enjoyed by the police in generations.

This is not the occasion to grapple with the complexities of due process nor to give detailed attention to each of the particular areas encompassed by that sweeping term. My effort is cautionary and my impressions far exceed the data.⁴³

By focusing on the efforts of the judiciary, the Supreme Court in particular, to achieve change through constitutionally imposed safeguards, three distinct but overlapping points may be made. First, the failure of doctrinal change to achieve either operational or system change is clear. Second, there is the reminder of the inherent limitations on the judiciary's willingness and ability to control practices at the operational level. In the same way that

41. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U.L. REV. 785, 803 (1970).

42. Martin Garbus, a New York City attorney, tells me that, based on police testimony in drug cases, it appears that every apartment door in Harlem is open and that nearly anyone in New York carrying drugs automatically drops it at the first sight of a police officer. See Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 754-57 (1970).

43. For example, I would not argue with the point that the right to counsel has been generally more beneficial to defendants than *Miranda* has been to suspects. Even with counsel, however, there are doubts. In an exhaustive study of the Boston lower court system, it was shown how the right to counsel is used to manipulate pleas through waiver, promises of leniency and rapid processing. The statistics demonstrated that defendants without lawyers did receive more lenient sentences. See Bing & Rosenfeld, *The Quality of Justice: In the Lower Criminal Courts of Metropolitan Boston*, 7 CRIM. L. BULL. 393, 423 (1971).

the Warren Court dealt primarily with police-prosecution practices (vis à vis laws and regulations), courts dealing with prisoners' cases find that in the absence of written law and regulations they must deal with specific practices. The low level of visibility in police decision-making is replicated and exceeded by the control asserted by officials over the conduct of prison affairs. A court may find itself drafting a code of regulations in the genre of a *Miranda* opinion, but will that court, even if it is much closer to the scene, be in any better position than the distant Supreme Court to assure compliance?⁴⁴ Third, there is the problem of change by analogy. The existence of "a problem" often is shown merely by demonstrating that a certain rule applies in one area but not in another. Once it is shown, for example, that the right to counsel is critical at trial, by a parity of reasoning it can be shown that where counsel may not be required—say at interrogation or sentencing—there is a problem. The statement of the problem—typically in analogical form—carries with it the answer.

Reasoning and argument by analogy is, of course, not unique to the legal profession. However, in fashioning litigation—particularly when the case involves a challenge to an existing practice—lawyers seem umbilically tied to the use of analogy. In the prisoners' rights area—indeed, in the entire correctional area—one of the dominant approaches can be reduced to a syllogistic type statement: Process A is virtually identical to process B. Process A requires an X while process B does not. Therefore process B should have an X.⁴⁵

The trap of excessive reliance on analogy is the limitation it imposes on the development of more creative solutions to the problem and the apparent tendency to accept on faith the inher-

44. As will be discussed, several lower courts recently have sought to impose detailed regulations on prison systems and in the framework of a declaratory judgment-injunctive process maintained jurisdiction for the purpose of assuring compliance.

45. X's may be counsel, notice, an impartial tribunal, specificity in rules and the like. The invested process (A) will be found by looking to virtually any situation—especially the pretrial and trial aspects of criminal law—where liberty or a "grievous loss" are involved. Process B, the one found lacking, is found by looking at almost any aspect of prison life and regulation.

See *Goldberg v. Kelly*, 397 U.S. 254 (1970), requiring the rudiments of procedural due process before welfare benefits may be terminated. *Goldberg* has now become a necessary citation in any effort to extend procedural due process to prisoners' grievances, particularly those involving internal discipline.

ent worth of the missing factor.⁴⁶ In the prisoner area, more and more courts are dealing with prisoners' grievances concerning disciplinary procedures. On the one hand, the grievances are real enough. Rules either are nonexistent or so vague as to be meaningless. The invocation and processing of alleged violations generally lacks even a semblance of procedural regularity.

Prisoners rightly complain about false charges, being accused and adjudged by the same person, the denial of notice of charges, and a fair opportunity to defend or explain before an impartial tribunal, lack of legal assistance and dozens of other similar items. If the automatic response to these grievances is the handiest analogue, once again the definition of the problem will be allowed to create the solution. For example, is the problem the right to legal counsel at disciplinary proceedings or is it better stated as the inability of most prisoners to adequately prepare and represent themselves even if given the chance?

Should the problem be defined as a lack of legal counsel, then the demand will be for counsel. It is exceedingly unlikely that lawyers in sufficient numbers in reasonable proximity to outlying institutions will ever be available. If assistance and representation is the issue—and given the fact that the sixth amendment has not yet been moved into disciplinary proceedings—perhaps the search should be for a lay advocate or legal assistant-type program. Perhaps a better solution lies with a truly independent ombudsman along with the type of labor negotiation model being experimented with in the District of Columbia.⁴⁷

I have not selected the counsel issue and identified possible options because this is the most vital issue or the possible options the best solutions. The point is meant to be illustrative only and to underscore the importance of being more precise in the definition of the problem and to urge escape from the trap of inade-

46. Consider the Alice-in-Wonderland faith and energy invested in the neutral and detached magistrate and warrant process, and the primary reliance on the exclusionary rule to alter police behavior. In the battle to control the police and bring a modicum of fairness to defendants, the objective tended to be submerged and the handiest solution adopted.

47. The Center for Correctional Justice, funded by OEO, contracts with other agencies for civil and criminal legal services for inmates. The Center's objectives are to negotiate binding agreements with institutional officials—indeed to do so with inmate negotiating teams—before litigation and surely before the Attica boiling point is reached. See Interview with Linda Singer, *Attica: A Look at the Cause and the Future*, in 7 CRIM. L. BULL. 817, 839-43 (1971).

quately defined problems which may promote unrealistic and unworkable solutions.

III. A NEW ERA

At this point let us examine some of the very recent decisions that represent the beginning of the new era of prisoners' rights. The basic framework for this exploration is the tactical question that nags at many thoughtful lawyers who are engaged in this reform movement: do you retard the reduction of prison populations or even their eventual demise by winning such items as the right to read *Playboy*, to exercise more frequently, to be notified in writing of a disciplinary charge or to receive and send uncensored mail? The answer given me by one active litigator is that he is not the one to tell a prospective inmate client that he should remain in solitary until the revolution. Another perspective was provided by Richard Shoblad, a former inmate, who is now organizing the National Prisoner's Alliance.

Mr. Shoblad recounted that he had recently attended a meeting on the West Coast called, as he said, by some radical groups. The group quickly reached agreement that prisons must go at which point Shoblad rose to ask what the plans were "for the guys in the joint." One of the organizers jumped to his feet and proclaimed, "Some of *them* must be prepared to die."

Despite the urgency of providing relief to those who remain incarcerated and the arrogance of those who are prepared to volunteer the lives of others, the initial question—and its assumptions about the validity of prisons—will not disappear. In dealing with this dilemma George Bernard Shaw said:

Therefore, if any person is addressing himself to the perusal of this dreadful subject in the spirit of a philanthropist bent on reforming a necessary and beneficent public institution, I beg him to put it down and go about some other business. It is just such reformers who have in the past made the neglect, oppression, corruption and physical torture of the old common gaol the pretext for transforming it into the diabolical den of torment, mischief, and damnation, the modern model prison.⁴⁸

In October, 1971, United States District Judge Robert R. Merhige, Jr. handed down a scathing 74 page decision in a class

48. G.B. SHAW, *THE CRIME OF IMPRISONMENT* 13 (Philosophical Library ed. 1946).

action filed against Virginia's top correctional officials.⁴⁹ Attorney Phil Hirschkop, in charge of the litigation, was quoted as hailing the decision as "a bill of rights for inmates."⁵⁰ *Landman v. Royster*⁵¹ does indeed represent the high water mark in legal safeguards extended to prisoners who are alleged to have violated prison rules.

The Virginia State Penitentiary System had not reached the same depths of degradation as the Arkansas system,⁵² yet the practices found to exist on the basis of 10 days of testimony would not be described as humane treatment by hard-working and well-intentioned correctional employees. Judge Merhige found that the practices complained of were "not isolated deviations from normal practice but rather indicated traditional procedures in the state penal system."⁵³

Some of the punishments regularly employed in Virginia consisted of a bread and water diet, which provided a daily intake of 700 calories; placing an inmate in chains or handcuffs in his cell—in one case chaining a prisoner who demanded medicine to his cell bars with his neck taped against the bars for 14 hours; taking away an inmate's clothing while in solitary and keeping him in an unheated cell with open windows in the winter; crowding men into a single "solitary cell"; using tear gas to silence men in their cells; extensive use of solitary confinement (266 days in one case) for acting as a "jailhouse lawyer"; and the denial of medical treatment.⁵⁴ As uncivilized as these practices are, they lack the full flavor of the Arkansas experience where the trustee system allowed prisoners to beat and kill each other; where the use of dormitories for sleeping encouraged nocturnal stabbings, killings and homosexual rape; where officials demanded sexual favors from the wives of inmates in return for some minor favor; and where the "Tucker telephone" was used on an inmate's genitals to shock him into submission.

Landman's condemnation of the Virginia practices may not be surprising. However, what is pleasantly surprising—in the

49. Much of the background for the case is contained in Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969).

50. NEWSWEEK, Nov. 15, 1971 at 39.

51. 333 F. Supp. 621 (E.D. Va. 1971).

52. *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970).

53. 333 F. Supp. at 645.

54. This is a representative, not a complete, listing.

sense that it is novel—is the effort by the court to articulate some principles to assist in distinguishing sanctions that are constitutional from those that are unconstitutional and the linking of those principles to procedural minima.

“Deprivations of benefits of various sorts may be used so long as they are related to some valid penal objective and substantial deprivations are administered with due process.”⁵⁵ Judge Merhige cannot be seriously faulted for not clearly stating what constitutes a valid penal objective. He makes a decent start by indicating that “security” or “rehabilitation” are not shibboleths to justify any treatment, and by imposing on prison authorities, when faced with a legal challenge, the obligation of showing a (presumably reasonable) relationship between means and ends.⁵⁶

In a previous work, I struggled with a similar problem. My suggestion then was: “In order to have a principle that separates the housekeeping decision from the right determinative decision, it is necessary to go beyond the suggestive metaphors. The principle suggested here is that *the greater the impact on the conditions of present or prospective liberty, or the physical and psychic integrity of the prisoner, the greater (or more plausible) the claim to substantive and procedural safeguards.*”⁵⁷ As I read *Landman*, it includes this principle and goes further by making clear that sanctions are subject to both a rule of minimal decency—put in cruel and unusual punishment terms—and a rule of rationality—put in reasonable relationship terms.

Should *Landman* survive appeal (or negotiations on the order) and should it commend itself to other courts, it raises some interesting possibilities. On the one hand, the opinion shows that at least one judge is sensitive to the ease with which correctional officials, aided by professional staff, can create their own reality through verbal manipulation. By linking “security” and “rehabilitation,” the court may not have foreclosed claims that what appears to be punishment actually is treatment, but a predicate is established to head off such efforts.⁵⁸

55. *Landman v. Royster*, 333 F. Supp. 621, 645 (E.D. Va. 1971).

56. *Id.* That the burden of justification is on prison officials may be a liberal reading of the opinion. However, in taking the opinion as a whole this seems to be a reasonable inference.

57. F. COHEN, *supra* note 17, at 78.

58. See *McCray v. Maryland*, Misc. Pet. 4363 (Md. Cir. Ct., Montgomery County,

In relation to future projections about corrections, this becomes a most important point. For one thing, the corrections community seems clearly committed to the notion of community-based programs.⁵⁹ These programs, in turn, are couched in treatment-rehabilitation language and are insistent on high flexibility in order to achieve their reintegrative aims. Within the concept of high flexibility is the insistence on the power to quickly move offenders in and out of programs as well as in and out of variably secure facilities. The very existence of such programs is (and will be) offered as proof of decency, rationality and good intentions, and any effort to impose such "legalisms" as notice and a hearing or specificity in rules and regulations regarded as the antithesis of such programs. One court, in what is regarded as an enlightened opinion, has already laid the groundwork for the future of correctional resistance. "[Corrections] has the right to transfer prisoners from one institution to another, whether to a higher, equal or lower security status, for administrative, therapeutic, adjustment or other reason, without the need for a hearing under these procedures."⁶⁰ The same court made it plain that a prisoner had no right to remain in any particular institution and, by implication, no right to in any way construct a case for admission to a particular program or setting.⁶¹

Returning to *Landman*, the court enjoined the practices previously described as violative of cruel and unusual punishment and proceeded to deal with the procedural issues, making it plain that the initial reluctance to do so was overcome by evidence that innocent men repeatedly had been disciplined. The court utilized the increasingly popular "balancing test" to determine what process was due. That due process was required never was seriously in doubt. On the one side is the individual's interest in avoiding sanctions which, though presumably constitutional—solitary confinement, denial of good time credits, "padlocking"

Nov. 11, 1971). Here the legal challenge was directed at Pautuxent Institution and the Defective Delinquent Act of Maryland. Pautuxent was established as a diagnostic and treatment facility for offenders who seem most in need of treatment. Its failures and cruelties are reviewed in this opinion and in the face of a defense that relied on the institution's treatment objectives.

59. See, e.g., Conrad, *Introduction*, 381 ANNALS xii (1969). This article introduces a symposium exploring the future of corrections.

60. *Bundy v. Cannon*, 328 F. Supp. 165, 173 (D. Md. 1971).

61. *Id.*; accord, *Clutchette v. Procunier*, 328 F. Supp. 767, 780 (N.D. Cal. 1971).

in a cell, and maximum security confinement—nonetheless constitute severe punishment. On the other side, the court identifies the legitimate prison functions of discipline, speed in punishing misbehavior and the sidetracking of administrators from nondisciplinary duties.⁶²

Landman clearly strikes the balance in favor of procedural due process for the inmate. In so doing, the court divides infractions into major and minor categories, the former encompassing the utilization of *any* solitary confinement, transfer to maximum security confinement, loss of good time or padlock confinement in excess of ten days.⁶³

For major infractions, due process requires an *impartial tribunal* (*i.e.*, preclusion of the official who reports the violation), a *hearing* (*i.e.*, the right to present evidence and voluntary witnesses), written *notice*, reasonable *time* to prepare (no minimal time stated), *confrontation* and *cross-examination* of adverse witnesses and a decision based on *evidence in the record*. No appellate procedure was required and, though plainly troubled by this, the court would not extend the right to appointed counsel but did (where substantial sanctions are possible) allow the appearance of retained counsel as well as a minimum of four days postponement in order to secure counsel.⁶⁴ Inmates are to be permitted to be represented by lay advisors, either a fellow inmate or a member of the noncustodial staff.⁶⁵

Minor infractions, such as those which may carry small fines, loss of commissary rights, restriction of recreational privileges or padlocking for less than ten days can be treated in more summary fashion. For these infractions the court would require only verbal notice and the opportunity to be heard before an impartial tribunal, with a chance to confront and cross-examine the complaining officer and to present testimony in defense.

Compared to other recent decisions, *Landman* reads like a Magna Carta. For example, in *Bundy v. Cannon*, United States District Judge Thomsen found that the Maryland Penitentiary System systematically imposed severe sanctions on inmates with-

62. *Landman v. Royster*, 333 F. Supp. at 644.

63. *Id.* at 654.

64. *Id.*

65. *Id.*

out the semblance of procedural regularity.⁶⁶ He too recognized a need to divide major and minor infractions for the purpose of determining what process is due.⁶⁷ Yet, the relief afforded in *Bundy*, representing a form of consent decree between opposing counsel, falls short of that extended in *Landman*. For example, major violations are those which may incur a sentence (and the word "sentence" is used) of confinement in excess of fifteen days or a loss of good time in excess of five days. The decision as to what constitutes a major or minor violation appears to be exclusively in the hands of the Adjustment Team—the euphemism for the disciplinary tribunal. Violations are not categorized in advance and thus the criteria for the decision must be based on the sanction that may be imposed. That this process is circular is apparent and the invitation to predetermine the matter is, of course, transparent.

A Maryland inmate is given the right to lay representation, written notice of the charge and at least 48 hours to prepare; the right to call one or more witnesses *if* the Team determines it is practical; the right to cross-examine witnesses who testify *if* the Team deems it relevant and the Team's decision must be based on substantial evidence and is to include a summary of the evidence.⁶⁸ The inmate's rights, such as they are, are not to be unreasonably withheld or restricted by the Team. Provision is made for a hearing officer from the office of the Commissioner of Correction, although it is only as of this writing that funds have been allocated for that purpose. It appears that the hearing officers will be employed by the Department and are likely to be composed mainly of former correction officers.

The *Bundy* decision clearly leaves a vast amount of discretion with correctional officials. Indeed, by admonishing the Adjustment Team to not unreasonably withhold or restrict the minimal procedural rights extended, the court tacitly permits the "reasonable" denial of all rights excepting perhaps notice and some form of hearing.

66. 328 F. Supp. 165, 173 (D. Md. 1971).

67. "The protracted segregated confinement in maximum security quarters and/or the loss of 'good time' . . . constitute punishment sufficiently severe to require minimum due process safeguards." *Id.*

68. In requiring substantial evidence, *Bundy* may actually exceed *Landman*. However, the difference may be more apparent than real given the ease with which the requirement may be met with verbal manipulation.

In *Clutchette v. Procunier*,⁶⁹ the federal district court also was confronted with a constitutional challenge to disciplinary procedures. United States District Judge Zirpoli rejected the argument that the Department of Corrections had complete discretion over the confinement of a prisoner subject only to the proscriptions of the cruel and unusual punishment clause and California statutes.⁷⁰ Proceeding on the "grievous loss" theory of *Goldberg v. Kelley*,⁷¹ the court aligned itself with *Landman* and *Bundy* in recognizing the double-deprivation aspect of imprisonment—that is, it recognized that the use of walls-within-walls, and the extension and consequent deprivation of certain amenities while confined cannot be left to the whims of correctional personnel. For serious punishments, *Clutchette* requires notice, the right to call witnesses, confrontation and cross-examination, the use of a counsel-substitute or legal counsel if the case will be referred for prosecution, a decision based on the evidence, and a decision by an impartial tribunal.⁷²

In *Landman* the court was troubled by the vagueness of the prison rules.⁷³ *Landman* went so far as to hold "that the existence of some reasonably definite rule is a prerequisite to prison discipline of any substantial sort."⁷⁴ The court found that "misbehavior," "misconduct" and "agitation" are so vague that they provide no fair warning that certain conduct is punishable and, in practice, permit punishment for such protected activities as gaining access to the courts.⁷⁵ On the other hand, *Landman* upheld such offenses as "insolence," "harassment" and "insubordination."

What appears to be developing—and it should not come as a surprise—is an increasing judicial acceptance of the necessity for some procedural regularity in prison discipline and a recognition of the need to separate major from minor infractions. Except for *Landman*, and a few other recent decisions, the need to announce in advance and with reasonable precision just what conduct is

69. 328 F. Supp. 767 (N.D. Cal. 1971).

70. *Id.* at 780.

71. 397 U.S. 254 (1969).

72. 328 F. Supp. at 781-84. Serious punishments are indefinite confinement in the adjustment center or segregation, punishments which may increase the sentence, any fine or forfeiture and any type of isolation longer than ten days.

73. See also *Morris v. Travisono*, 310 F. Supp. 857 (D.R.I. 1970).

74. *Landman v. Royster*, 333 F. Supp. at 656.

75. *Id.*

subject to discipline—in effect, a Prison Penal Code—has not been touched. There is an obvious irony in requiring certain procedural formalities without at the same time requiring some assurance that the substance of the matter is itself constitutionally acceptable.

Among the more troublesome aspects of the new procedural requirements are those relating to an impartial tribunal and representation. It is obviously necessary to disqualify the individual who reports the infraction, but how much is gained by allowing his fellow officer or immediate superior to sit in his stead? And, absent some sort of program which is accepted by the prison officials, inmate representation of other inmates is loaded with such dangers as that the inmate advocate will either curry favor with the officials or be subject to intimidation and reprisals. Either way, the person accused suffers. Representation by staff carries with it similar doubts plus the additional factor of a pervasive distrust of the staff by inmates (and possibly vice-versa). Also one wonders how a confidential relationship can be established between an inmate and a staff member in light of current organizational arrangements. Typically, all staff members are employed by the administrative head and are required—by rule or common practice—to report infractions. Obviously, this creates a situation where a reasonable defense effort is in serious jeopardy.

Nonetheless, the *norms* of an impartial tribunal and the need for representation have been established and, given the nature of prison life, must be counted as gains for prisoners. However, I am not prepared to hail these decisions as a veritable bill of rights nor do I believe that their logical extension should be so viewed. The quest for procedural fairness unquestionably is worthy of support as well as the investment of time and energy. Decisions like *Landman*, even if operationally suspect, have immense symbolic value for prison inmates. They are provided with a new set of verbal symbols which, in turn, provide the right to demand at least minimal justification from a system that normally reserves the right to be completely arbitrary in its exercise of total control over those in its charge. The risks that concerned George Bernard Shaw appear to be quite different than the risks of procedural gains. Shaw must have been concerned with those reformers who set out to change prison programs and convert inmates into right thinking, upstanding citizens. Procedural re-

formers should not believe that their goals are loftier than lifting some of the weight of an oppressive system from the inmates and diluting the absolute discretion of prison officials.

The struggle to expand and implement procedural due process in prison should be viewed as transitional and not be allowed to become terminal. Even with this important limitation much remains to be accomplished before the rights gained on paper are likely to result in changes in official behavior. This, of course, implies that the correction community does not greet decisions like *Landman*, *Bundy*, and *Clutchette* with an embracing enthusiasm. It implies further that most prison authorities—like law enforcement officials reacting to the Warren Court—will seek minimal compliance and maximum avoidance when a ruling is viewed as impairing efficiency or creating the potential for disorder. It is still true that for most wardens, a good prison is a quiet and efficient prison.

I do not mean to leave the impression that the current era of prisoners' rights has involved only procedural issues. Indeed, there are several areas of prison life now under challenge that represent a potential for change which far exceeds that which is possible through procedural safeguards alone. Before touching on those areas and suggesting the direction of further judicial probes, it will be useful to recapitulate the prior discussion and add some embellishments.

We have seen that prisoners are gaining new rights which enable them to challenge both the type of discipline sought to be imposed and the manner in which such decisions are reached. This, in essence, represents the combined (and not unimportant) gains of the expansion of procedural due process and the constitutional proscription of cruel and unusual punishments. Courts have recognized the fundamental proposition that, at least for procedural purposes, infractions must be divided into major and minor categories. There is a hint that prisons will be held to a requirement of publishing rules in advance with the subsidiary requirement that such rules be specific and reasonable.

Reasonableness is being discussed in terms of requiring that the rules be adopted in pursuit of a valid penal or correctional objective. To date, the professed objectives of security and good order have been invested with an almost magical quality. An administrator need only describe the problems of facing thousands

of incarcerated men who may in an instant overwhelm his under-trained and overworked personnel and the point is driven home.

Linked with the emergence of a judicial perspective that the validity of prison rules may not be self-evident is the doctrine of the least restrictive alternative.⁷⁶ Assuming that the burden may be placed on the system to demonstrate both the validity of the rule and that it is the least onerous means of accomplishing a valid penological purpose, the stage is set for some very interesting interrogation. Beyond the need for security, what will a warden answer to the question: what are your objectives?

A judicial strategy which actually required an administrator to demonstrate the effectiveness of deterrence or institutional treatment programs would create an impossible burden. It is clear that we have practically no reliable studies on recidivism, either in terms of causes or numbers. Parenthetically, we also are unable to say—except by inferences drawn from ethical or humanitarian considerations—whether prisons with the worst internal conditions contribute more to recidivism than those with a more humane atmosphere.⁷⁷ The primitive state of the data and the lack of definitive studies suggests that whoever wins the battle over the burden of proof, wins the war.

The procedural and substantive rights previously discussed lay the predicate for yet another possible gain—an effort to achieve informational due process. Put more grandly, this means the right to shape and share information which will be used to make decisions that are vital to an inmate. A prisoner is a number and a file and the information and conclusions that go into that file determine the individual's future. He is diagnosed, evaluated, and reported; he is mature or immature, maximizing or failing to maximize his prison experience; he is ready or not yet ready for release. As Leslie Wilkins has discussed, some words—like “immature” are lethal, having 100 percent kill when they appear in a parole file.⁷⁸ After all, release depends on maturity and there is no immediate recovery from “immaturity.”

Presumably, one of the objectives of procedural regularity in disciplinary proceedings is to contribute to the accuracy of infor-

76. Cf. *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969).

77. See N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 115-33 (1970).

78. See Wilkins, *supra* note 6.

mation in the file and the rationality of conclusions made thereafter. Thus, if an inmate receives all the due process he can handle and the file still reflects an incident, how much has been gained? Judge Zirpoli in *Clutchette* was sensitive to this issue because of the peculiarities of the California system.⁷⁹ In California, the tie between the paroling authority and the institution is absolutely clear. The Adult Authority sets the date for earliest release—the functional equivalent of the minimum sentence elsewhere—and the candidate's institutional record is a major, if not the most crucial, determinant of release on parole.

Thus, the state of the record relates to liberty in its most pristine form. It is one thing to win the right to procedural safeguards and quite another to win the right to periodic review of the file, the right to shape the record by additional inputs or to dissent from what cannot be removed or even to have experts read entirely different conclusions into the record.

While the problem of control over information and conclusions is dramatically illustrated in the California system, it exists in every system about which I have information. Pennsylvania, for example, without a similar sentencing structure, has exactly the same problem. I recently observed parole hearings in the Pennsylvania system and was given the opportunity to study the same file used by the board member in deciding whether or not to grant parole. In every instance, the crucial factor was the summary of the candidate's prison behavior. Violations were listed in summary fashion and the volume of cases so great that little or no time existed for explanation.

Fighting was considered to be a major problem, indicative of violent propensities. Whether or not there was provocation or a reasonable effort at self-defense simply could not be known. On the one hand, it may be argued that a fair disciplinary proceeding will result in an accurate record. On the other hand, with no control over what is fed into the file or the conclusions that are drawn, even a dismissal of the prior charges may appear in the file as evidence of a litigious troublemaker. At another level of abstraction perhaps all this merely illustrates, once again, is the inherent limitations on procedural safeguards and the decisiveness of existing power arrangements in prison.

79. *Clutchette v. Procunier*, 328 F. Supp. at 777.

The first amendment right to freedom of speech—previously submerged in dealing with a prisoner's right of access to the courts—has taken on an important new role.⁸⁰ The first amendment encompasses the right of the prisoner to communicate with the outside world and the right of those outside to communicate with the prisoner.⁸¹ Judicial disapproval of mail censorship has reached the point where one court held that outgoing mail to attorneys and public officials cannot be opened or delayed while incoming mail from the same parties can be opened (but not read) to check for contraband, but only in the presence of an inmate.⁸²

The emergence of the first amendment in the prisoner's rights area represents some possibilities not inherent in procedural safeguards. To the extent that the first amendment will allow prisoners to reach the outer world with their grievances and allow them any communicative material available to us, it will have succeeded in piercing the isolated world of the prison. Prisons thrive on sensory deprivation, on manufacturing a total environment. Why do prison authorities express such fear about inflammatory political tracts, racially oriented writing, sexually explicit material, even keeping abreast of current affairs? The answer most often given is the ubiquitous need to maintain good order and discipline and thus determine what material might "incite and stimulate in an unhealthy manner."⁸³

In addition to the communicative aspects of the first amendment, prisoners are accorded the right to petition for redress of grievances and this should be interpreted to encompass the right to associate with each other for the purpose of bettering their conditions, political activity and even the creation of unions.⁸⁴ In the same fashion that a balancing of interests is used to determine what process is due, the parameters of speech and assembly can be determined. Once again, the prison should be required to

80. See generally Note, *The Right of Expression in Prison*, 40 S. CAL. L. REV. 407 (1967).

81. See *Palmigiano v. Travisono*, 317 F. Supp. 776, 786 (D.R.I. 1970).

82. *Smith v. Robbins*, 328 F. Supp. 162, 165 (D. Me. 1971).

83. *Jackson v. Godwin*, 400 F.2d 529, 531 (5th Cir. 1968).

84. See Comment, *Labor Unions for Prison Inmates: An Analysis of a Recent Proposal for the Organization of Inmate Labor*, 21 BUFFALO L. REV. 963 (1972).

justify suppression and to demonstrate the utilization of the least restrictive alternative.⁸⁵

IV. PRELIMINARY QUESTIONS AND OBSERVATIONS

The movement to bring a modicum of legal rights has been discussed through the admittedly idiosyncratic selection of cases and issues. In this effort I have been more concerned with the limitations inherent in judicially imposed rules, in particular those dealing with internal procedures, than their affirmative aspects. It now seems appropriate to turn the inquiry around and deal in a more positive and less cautionary fashion with the rights of prisoners.

A coherent theory of legal change in corrections should recognize both the potential and the limitations of change through litigation. I do not propose to repeat the cautionary remarks previously made, but wish only to underscore the necessity of being sensitive to the problem. In addition, winning a case the wrong way can create the possibility for disastrous consequences in the future.

For example, to win a particular issue by a solid showing of institutional ineffectiveness creates the strong possibility of laying the groundwork for utilization of practices that ask to be evaluated only in terms of effectiveness. Behavioral modification programs and electronic surveillance devices are off the drawing board and await only the failure of community-based treatment programs.⁸⁶ Operant conditioning and aversive suppression techniques along with electronic monitoring of an individual's behavior obviously raise the gravest sort of questions concerning human dignity and liberty. In addition to high claims of efficiency, proponents of their adoption need only argue that offenders have very few rights now and in light of the failure of all other techniques "we at least deserve a chance." Thus, another caution based on estimates of the future: when the ineffectiveness of prisons is to be used as a basis for gaining a particular legal right, the argument should always include the proposition that

85. See Bass, *Correcting the Correctional System: A Responsibility of the Legal Profession*, 5 CLEARINGHOUSE REV. 125, 149 (1971).

86. See R. SCHWITZGEBEL, *DEVELOPMENT AND LEGAL REGULATION OF COERCIVE BEHAVIOR MODIFICATION TECHNIQUES WITH OFFENDERS* (Pub. Health Serv. Publ. No. 2067, 1971).

the right is necessary regardless of the failures of corrections, that ineffectiveness is but one aspect of the argument and is raised to rebut claims that the addition of the right will impair a program that might otherwise succeed.

Another important issue relates to the need for goal clarification with the corollary need for greater definitional precision and the separation of goals from tactics. In the first instance, it is vital to ask what are the appropriate overall objectives of the prison reform movement and to what extent can prisoners' rights litigation be made coordinate with those objectives?

One increasingly popular point of view is that prisons must be abolished.⁸⁷ Support for this position is based variously on humanitarian or philosophical grounds, or the more pragmatic approach that prison does not work. The latter position, of course, assumes an understanding of the objectives of prison. If it should be shown that prison is designed for temporary or prolonged incapacitation to be imposed in an unpleasant or even cruel fashion, that it is aimed at nurturing the very deviance it professes to eliminate or reduce, then prison might be said to be a success. One can argue that the prison is a failure only if one assumes that contemporary prisons are designed to achieve some affirmative result.

Norman Carlson, Director of the Federal Bureau of Prisons, recently was asked if the ultimate reform of prisons is their abolishment. He replied that from a utopian point of view that would be a desirable objective but that, practically, there will remain the need to incarcerate the hard core offenders who are the dangerous, assaultive types.⁸⁸ Inherent in this response is the notion that while some prisons cannot (or will not) be abolished, imprisonment for many offenders presently incarcerated can be abolished. This, in turn, leads to the further observation that it is a mistake, as well as a disservice to the individuals involved, to refer to prisoners as though they were homogeneous in relevant characteristics.

Mr. Carlson's position, as I understand it, is consistent with that of the National Prisoners' Alliance which takes the view that

87. See, e.g., D. GREENBERG, *THE PROBLEM OF PRISONS* 3 (1970).

88. Interview with Norman Carlson, *Attica: A Look at the Causes and the Future*, in 7 CRIM. L. BULL. 817, 832 (1971).

the immediate as well as intermediate goals of reform must be directed at the reduction of prison populations. The reduction position faces the obvious questions of how to decide who stays in, for how long and for what objective. Should the reduction position prevail—and its chances for success far exceed those of the abolitionists—the most likely result is that prisons of the future will house the chronic offender, those who are considered to be dangerous by virtue of a propensity toward physical violence and possibly the political offender.⁸⁹

In addition to abolition and reduction, there is the objective of making prisons more humane and civilized in their operation. The thrust of my prior observations about the decisions requiring procedural reform would naturally lead the reader to conclude that one can reasonably expect little more even from a decision as progressive as *Landman*.

That a *Landman* or *Bundy* or *Clutchette* may not do more is not also to say that the results achieved necessarily are inconsistent with abolition or reduction. Procedural due process becomes an attractive trap when it is elevated to a primary objective and when there is no follow-up to assure compliance. As a primary objective, it can only bring healthy pressure to bear on the internal functioning of the prison. An appellate decision announcing a new inmate right also becomes a flag to be waved by those who are engaged in negotiation efforts on behalf of inmates: "a court has required this, now shall we talk?" However, if those who achieve these victories abandon prison reform and leave rights to exist only on paper, this could dash the hopes of those who seek a modicum of fairness and decency from their keepers.

The limitations of procedural innovation suggest that litigation experts should be working closely both with other action-reform groups as well as a study group like the Committee for the Study of Incarceration, commonly known as the Goodell Committee. This Committee is conducting a conceptual inquiry into incarceration and alternatives.⁹⁰ They are concerned with the

89. By political offender I refer to those who are prosecuted in an effort to suppress a movement designed to achieve social and economic change. I do not mean to include those who despite the seeming apolitical nature of their offense view themselves as political prisoners because of the racial-class bias of the criminal justice system.

90. An aspect of the inquiry is available in an article by the Executive Director of the Committee. See von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717 (1972).

nature, purposes and utility of incarceration. Action-reform groups abound. Those with a significant number of former inmates, like the Fortune Society, seem to be particularly relevant to a coordinated effort.

I do not propose a coordinated effort merely to be fashionable or even democratic in appearance. Ultimately, reformers must move beyond the critical stance and formulate alternatives with which they can respond when the inevitable "but what is your solution" is asked. Obviously, the validity of a criticism is not dependent on the existence or viability of an alternative. But it is also true that inertia takes over in the absence of some apparently workable alternative.

The point of urging coordination is a recognition of the limitations of what lawyers know and are able to do and of the necessity of adding the perspective of the detached scholar as well as the experiences of those who have been consumers of correctional justice. The kind of pressure that can be brought to bear by action groups is considerably different than the litigation enterprise or the drafting and promotion of change through legislation. Let me now return to other matters that lawyers may find useful to litigate in the near future.

What lawyers are able to do is, of course, a function of what courts are willing to do. It may be the right time to begin raising cruel and unusual punishment arguments *at the point of sentencing*. That is, one can argue either that any confinement or, more likely, confinement in one of the more primitive institutions is itself a cruel and unusual punishment.⁹¹ By raising the issue at sentencing one may diminish the natural hesitancy of a judge to release a person already confined; additionally, for the individual litigant, this creates sentencing options other than incarceration.

For those already confined it is possible to develop a constitutional rule of privacy based on the fourth amendment and a liberal reading of *Griswold v. Connecticut*⁹² and *Stanley v. Georgia*.⁹³ In both of these decisions, the Court gave high priority to the protections to be afforded a man in his *home*. When an individual is sentenced to prison that is the only home he has during his incarceration and, in rhetorical fashion, I ask why

91. Cf. *Holt v. Sarver*, 309 F. Supp. at 380-81.

92. 381 U.S. 479 (1965).

93. 394 U.S. 557 (1969).

should he not enjoy freedom from arbitrary intrusions? The answer from corrections will be the need for security and order which, of course, is similar to the answer of law enforcement as to why the warrant procedure is untenable. The right to privacy would not include the right to resist any searches or seizures. If there is cause to believe that an inmate has a weapon or contraband, then a reasonable search could be permitted. If a truly independent ombudsman or hearing officer is built into the disciplinary system, he might also supervise the administration of search and seizure. Should the right to privacy be breached then, at the least, the newly created impartial tribunal would be required to dismiss any charges emanating from the illegal activity.⁹⁴

Another tactic worthy of further exploration and use is the suit for compensatory and punitive damages allowable under 42 U.S.C. section 1983. One case upheld as reasonable an award of \$25.00 per day for every day spent in illegal segregation.⁹⁵ The total award amounted to \$9,300 and was deemed the personal liability of the offending warden. Perhaps I place exaggerated faith in the potential for altering official behavior by reducing the generally limited cash reserves of a prison official. My suspicion, however, is that money damages may be as effective a deterrent as anything the courts might devise in this area.

Beyond this—and this may be beyond the scope of litigation—it should be required that the correction bureaucracy announce its stated goals, its strategies for achieving them and then regularly report (in a fashion other than the slick annual report with pictures) on what progress has been made toward achieving them. It seems utterly irrational to continue to confine hundreds of thousands of men and not require that system to justify itself.

This article has approached the matter of prison reform with both a profound distrust for prison administration and a sense of *déjà vu* about current reform efforts. The litigation efforts to date deserve credit for forcing a small opening in a system sorely in need of ventilation.

The needling and nagging of prisoners' rights lawyers has

94. For an excellent discussion of the right to privacy in prison, see Singer, *Privacy, Autonomy, and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degradation Process in Our Prisons*, 21 BUFFALO L. REV. 669 (1972).

95. See *Sostre v. McGinnis*, 442 F.2d 178, 204 (2d Cir. 1971).

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provided inmates with an arsenal of verbal symbols that may well make it easier for a man to do time. No one who is on the outside has standing to discount that.

The task now, as I see it, is to avoid the exaggeration of what is possible through litigation, to inventory and consolidate gains and to link up with other reform efforts—ranging from high level study efforts to action oriented groups—and move in the direction of achieving overriding objectives. Bringing decency and regularity to the prison should be viewed as a transitional step on the road to the elimination of the fortress prison and the utilization of any institution as a choice of first resort. The burden of demonstrating the viability of our prisons is on those who manage them and it is a burden they cannot meet.

