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PRISON REFORM IN THE FUTURE — THE TREND
TOWARD EXPANSION OF PRISONERS' RIGHTS

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A PART of our problem with prisons is that the courts in the United States are authorized to impose very long prison terms. Sentences are long not only in terms of authorized maximums, but also in terms of the amount of time spent in prison. Anyone who has dealt with European students knows how appalled they are by this system. A two-year sentence on the continent is considered very harsh and is reserved only for a quite serious offender.

We ought to begin to take with great seriousness a main point which Mr. Crawford made: every proposal for the reform of our sentencing procedure sets as a primary goal that the ordinary outcome of a criminal conviction will be probation. Imprisonment should not be the ordinary thing, but the exceptional occurrence.

Some of our conversation has suggested that there is a good deal of agreement around this table. I suspect that this is not the case. I think, were we to consider issues in detail, we would very quickly be in great disagreement about the function of institutions. What is the proper function of the courts, the legislatures and executive? What are the limits of the wisdom and power of each? What must be left to administrators for determination? What are the opportunities of each of these institutions for information gathering, for enforcement, and for promulgation? I would suspect we will find a great deal of disagreement about that as we get into the subject. How much liberty is compatible with the order necessary in any kind of institutional confinement — a closed society — where the principal concern of each inmate is to get out? The decision-making process in respect to that question is not quite like the decision-making process appropriate, for example, to the city of Philadelphia. We would also be required to make some close judgments about what regulation was really rationally related to some reasonable degree of order, and which ones could be done away with. I think we would get into enormous disagreement about what it is we could actually accomplish in a program of rehabilitation. What are the programs which in fact change the character of human beings? Each person has a set of problems which trips him up every day as he attempts to func-

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tion. In some sense, then, everyone is a candidate for rehabilitation. My question is what *have you* personally done, or *could you* do to change that? We are very good at imagining programs of change for other people, but do not very often apply them to ourselves.

Indeed, I would think that one first step to take with respect to the prison system is to mute the talk of rehabilitation and concentrate on another somewhat different question: how much harm is the system doing and how much harm can we stop? That would busy us for fifteen years, without getting into the whole difficult area of what kind of treatment can one give people to change their habits in some way. What sort of incentives? The ignorance which we possess on this subject is depressing.

My approach to this subject is unhappily academic. I am forced to this approach because I live in an ivory tower; everyone else on the panel, with the exception of the moderator, has been out in the world in a sense that I have not. However, it might not be wholly beside the point to review in orderly fashion what the legal possibilities are on the constitutional level.

Central to our thinking ought to be the thirteenth amendment against slavery. That amendment is not much help in this context since, although it does prohibit slavery and involuntary servitude, it specifically excepts punishment for crime. The eighth amendment, on the other hand, has a lot of life to it these days. It can help us when treatment is disproportionate to conduct, and when a system is so terrible it offends a basic sense of dignity. We also have the fourteenth amendment with the first eight amendments incorporated therein (with only a couple of minor and, for our purposes, unimportant exceptions). Through the fourteenth amendment, we can go back and take some sustenance from the first amendment respecting free speech and freedom of religion. We can take further sustenance from the sixth amendment's right to counsel. In short, we can take the first eight amendments and explore how they may be relevant in a prison setting.

On the question of procedure we have the Due Process Clause. Some litigants have centered arguments on the ninth amendment, which states that the enumeration of rights in the first eight shall not be construed to deny rights that otherwise belong to the people. Some litigants, however, attempt to identify new rights not listed in the Bill of Rights.

The issue, as I see it, is not whether the Constitution is irrelevant to prison administrators' decisions. That it is is clear to me. The

question is what the Constitution requires in a prison setting. Prison institutions are state institutions, and hence are governed by the Constitution in so far as it limits state action. The issue again is what kinds of things does the Constitution require. I would suspect that as the law develops there will be a set of things recognized as rights of prisoners — rights rooted in the Constitution — which will be quite a different list from the complete range of rights which protects people in the open society.

I want to discuss very briefly two extraordinarily interesting cases. They have both been mentioned. One is from Arkansas¹ where a federal judge decided that the entire prison system of Arkansas violated the Constitution. He held that the two prison facilities were denials of constitutional rights — in particular, the eighth amendment covering cruel and unusual punishment.

The Arkansas prison system of that day had some very special characteristics. First of all, the biggest correctional facility of the state of Arkansas made the state a little money off farming, in addition to paying all the bills for the inmates. In short, the prison showed a profit. It showed a profit in part because not very many people were hired to run the institution. The task of guarding the prisoners was put into the hands of other prisoners. Trustees with guns guarded prisoners in the fields. I would suppose that to be one of those trustees, one did not necessarily have to be a good fellow. One qualification might be that you be a good shot — a qualification not necessarily possessed by the gentlest of souls. The judge did declare the whole prison system unconstitutional. One thing he might have done would have been to issue a writ of habeas corpus releasing the entire prison population forthwith. He did not do that. He gave the state some time to change its institutional practices.

The trial judge threatened to release everyone, unless the state would quickly show substantial progress. The relief granted was not unlike the 1954 school segregation cases² except that the phrase “with all deliberate speed” has a little more push to it because the judge possesses a very powerful and effective weapon — an order to release all the inmates — which could not have been appropriate with respect to the common school.

The second case is *Sostre v. McGinnis*,³ the recent decision of the Second Circuit with which Mr. Rabinowitz has been particularly involved. The case posed the question of what kinds of administrative

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

2. *Brown v. Board of Education*, 347 U.S. 483 (1954), 349 U.S. 294 (1955).

3. 442 F.2d 178 (2d Cir. 1971).

regulations do we have inside a prison which might be subject to some sort of constitutional limitations? First of all, is an inmate entitled to uninterrupted contact with counsel by mail? Is mail to be censored when a prisoner wishes to communicate with relatives or friends? May he be put in solitary confinement or special maximum security cells without a hearing? Most prison systems have a scheme called "good time" where a prisoner may reduce the time he serves by periods of good prison behavior. The system makes obeying the rules extraordinarily important for inmates. Must a decision to wipe out "good time" be a decision which can be made by the prison authorities only after some kind of hearing? What kind of hearing? What kind of process must be followed? Is there some outside review of these decisions?

Part of the problem is that the prison life is filled with "low-visibility" decisions. Very few records are kept, and the opportunity for arbitrary treatment is very great indeed. Fleeting incidents do occur. Testimony can be contradicted. It is very hard to get out the facts afterwards.

Some members of this panel have expressed disappointment with the *Sostre* case. I have a happier view of that case.

Prisoner *Sostre*, as the trial Judge Motley saw the matter, had been punished for his expressions of belief and for his attempt to get in touch with legal authorities. The appellate court agreed that *Sostre* had been punished for his attitudes and for what he believed. Yet, the court rejected the notion that the solitary confinement, as such, was a violation of the cruel and unusual punishment provision even though it had lasted a year. This part of the decision is, indeed, a ground for disappointment about the case.

What led the court to take such a position? Judge Kauffman was clearly worried about interfering too much with internal decision-making within the prison system. I am sure he was concerned about the kinds of things that can happen in these institutions; incidents of great violence, great riots. I am certain that he felt no particular expertise about how to run a prison. Beyond that, he tells us what he thinks the eighth amendment requires the judges to do: "As judges we are obliged to school ourselves in such objective sources as historical usage, practice in other jurisdictions and public opinion . . . before we may responsibly exercise the judicial power to declare punishment unconstitutional under the Eighth Amendment."⁴ We may regard that as too narrow a view of the possibilities under the eighth amendment,

4. *Id.* at 191.

but at least it is a position that we can understand and approve if we are conscious of the limitations on the wisdom of judges. *Sostre* did however, go on to make the point that before solitary confinement could be imposed — or at least quickly after imposition — some kind of fact-finding hearing of a rational nature had to take place. The court did not accept the view that a formal adversary hearing was required, nor that a prisoner is entitled to counsel or a counsel substitute. Nevertheless, at least something must happen in the nature of a statement of reasons with an opportunity to challenge them and their factual bases. The exact format for such a “hearing” will be hammered out in other cases. I do not mean to ignore the dissenting opinion of Judge Feinberg, which may well turn out to be seminal. He felt that incarceration in an isolated cell for the reasons stated was a disproportionate punishment and therefore unconstitutional.

Why do I take any comfort from this decision at all? I take comfort because, in part, the case itself raised some hitherto low-visibility decisions to a higher level. Just the mere existence of this opinion is going to excite a lot of comment. Indeed, this case has already become the center of attraction at this conference. I agree with Mr. Taylor that conferences are not very important to the inmates right now, but I put it to you that public concern about how prisons ought to be run is rather a new hot topic of public discussion.

Another thing the *Sostre* case does is affirm a judgment of damages against the warden who was, however, dead at the time of the opinion and therefore left no one to pay those damages. That judgment of money damages under the Federal Civil Rights Act will be a matter of great concern to most prison officials because it is perfectly clear that such money damages will come out of the official's personal purse. I cannot think that this part of the opinion is an empty matter.

Furthermore, we are just at the beginning. You heard in conference today that at the time the first law review article was written in 1959 there was literally nothing to cite. There are a lot of things to cite now, yet we are just taking some first steps. One analogy may be the development of the right to counsel in the area of the juvenile court where, again, you had an institution that traditionally was granted a great deal of discretion. All of a sudden, because of *In re Gault*,⁵ its discretion was limited by numerous procedural safeguards. That development itself was a product of a long period of time. *Gault*, holding that there is a right to counsel, notice, self-incrimination and confrontation, was not a completely new develop-

5. 327 U.S. 1 (1967).

ment in the sense that its legal principles were first announced there. Some state courts had already preceded the *Gault* case. There had been legislative reform in California in 1960, and in New York in 1962 in which procedural safeguards went beyond the 1967 *Gault* opinion. In that five years what was learned in New York City was that the juvenile court could function successfully with procedural safeguards without destroying the institution. The point is a simple one: developments of legal reform need to begin. Limited "first cases" can, and do, start important developments of great significance.

I would like to make one final observation to support an optimistic position. The Chief Justice of the United States Supreme Court has expressed a great concern about improvement of the correctional system. He has said that the procedures by which we convict people have become too cumbersome, and in his view, we should ease the limitations on the process of conviction, and get on with the business of rehabilitation and prison reform. For Heaven's sake, let's take him at his word and go with him.