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Prisoners' Rights - A Prosecutor's View

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OMETIMES YOU FEEL that somebody has stolen your best line before you have had a chance to speak. Just a little over nine years ago, I edited a Note on the developing law concerning constitutional rights of prisoners, and I remembered as I was preparing for this Symposium that the author of that Note had started off with two wonderful quotations with which I planned to open my presentation here. One was the language which Judge Spaeth read from Ruffin v. Commonwealth, the 1871 Virginia case which equated prisoners with slaves; the other was the quote from the sixth circuit's opinion in Coffin v. Reichard, holding that prisoners retain all their rights except those which must be taken from them. Perhaps it is an example of the slow pace of progress in the recognition of prisoners' rights that the most telling statements on the issue were available to be quoted — and were quoted — in 1962. They remain today the best judicial summaries of the opposing points of view on the rights of prisoners.

There is one great difference. When the Note I spoke of was written, the author did not have available to cite any significant body of legal literature on the topic. He found a field which was virtually unexplored. Today, by contrast, this Symposium is perhaps a culmination of interest in one of the most frequently discussed and explored areas in the criminal law. It had already become an area of growing concern to courts and commentators as the Warren Court led a constitutional law revolution which tended to focus attention on the rights of persons accused of crimes, although the Court's


2. 62 Va. (21 Gratt.) 790 (1871).
3. 143 F.2d 443 (6th Cir. 1943).
4. The only attempt at a full discussion of the area appeared at the Note was being edited. See Urbania, Rights of Prisoners in Confinement, 8 Crime & Delinquency 121 (1962). Three earlier student works had explored limited aspects of the question and constituted the whole learned literature on the subject when the Note was originally written. See Note, 33 Neb. L. Rev. 434 (1954); Note, 59 Yale L.J. 800 (1950); 2 J. Pub. L. 181 (1953).
emphasis was on events between arrest and direct appeal. It took impetus from the development of procedures which made it easier for prisoners to litigate questions of alleged deprivations of rights through federal habeas corpus, through new or expanded state remedies, and, particularly, through growing federal litigation under the federal Civil Rights Act. And, if Chief Justice Burger is not committed to an extension of the constitutional law revolution with respect to the rights of persons accused of crime, it would appear from his preappointment speeches that this is because he believes that a larger proportion of the resources devoted to dealing with crime must be spent on rehabilitating convicted persons rather than convicting them in the first place.

Thus, it is likely that there will be a growing interest not merely in the essentially negative constitutional rights — against physical violence, against unnecessary invasions of privacy, against racial segregation, against denials of religious freedom, against arbitrary punishment — but in more positive programs — for rehabilitation and retraining, for psychological counselling, for education, for medical treatment of drug addiction, alcoholism and chronic debilitating diseases, for programs which will even look beyond the prison walls to the support of the families of prisoners and the creation of a place in

8. With respect to sentenced prisoners, presumably the vehicle will be the various post conviction hearing acts adopted to remove hearings on alleged constitutional deprivations from the federal to the state forum in the first instance, and following the Supreme Court's decision in Case v. Nebraska, 381 U.S. 336 (1965). But most of these acts were so narrowly drawn that even convicted prisoners may be unable to attack prison conditions under them. See e.g., Act of January 25, 1966, P.L. 1380, § 3, Pa. Stat. tit. 19, § 1180-3 (Supp. 1971). The Pennsylvania Supreme Court presently has before it the case of Commonwealth ex rel. Bryant v. Hendrick, No. 625 (January Term, 1970), in which the Commonwealth appealed from a grant of habeas corpus for an untried prisoner based on eighth amendment grounds, contending that mandamus or equity rather than habeas corpus was the proper form of action for bringing about changes in prison conditions. Although the Pennsylvania Supreme Court has yet to rule in this case, it seems safe to predict that it will hold that prison conditions can be the subject of litigation under some form of civil action. It is equally clear that unsentenced prisoners must, and sentenced prisoners may, have to rely on such a form of civil action if these issues are to be litigated in the Pennsylvania state courts. The existence of similar procedural problems under the law of many, if not most states, undoubtedly explains why most such litigation is being carried out in the federal courts under the Civil Rights Act despite that Act's limitation to enforcement of federal constitutional guarantees.

10. Chief Justice, then Judge Burger's judicial philosophy was best detailed in his May 21, 1967, commencement address at Ripon College, reprinted as Burger, Paradoxes in the Administration of Criminal Justice, 58 J. Crim. L. 428 (1967).
the community to which a prisoner can return with some likelihood of remaining there successfully.

If Judge Spaeth believes that positive programs can be formulated and mandated by the courts as part of their responsibilities for the judgments of sentence which they impose, and if Mr. Rabinowitz believes that these programs, or many of them, can be created and enforced through constitutional litigation under the Bill of Rights, I am convinced that most of the programs for rehabilitation of prisoners and many of the programs for the amelioration of their surroundings can only come about through the action of the legislature because, in a democracy, it is the people speaking through the legislature who decide how to allocate the resources of the community, subject only to broad constitutional proscriptions. But, before elaborating on this, I would like briefly to discuss the standing of a prosecutor to speak on the issue of rights of prisoners, and to comment even more briefly upon what may be even more important than the rights of actual prisoners — the right not to be made a prisoner if some less burdensome punishment will as well serve society's interests.

I. THE ROLE OF THE PROSECUTOR

Under Pennsylvania law, as under the law of most American jurisdictions, the prosecutor, whatever his title, has a concern with the rights of prisoners on three separate but overlapping levels.

A. The Prosecutor of Crimes Against Prisoners

The first responsibility of the District Attorney of Philadelphia is as a law enforcement officer, a prosecutor, in Philadelphia County. In 1968, and again in 1970, a series of heinous crimes were

11. The 1968 investigation is described in detail in Davis, Report on Sexual Assaults in the Philadelphia Prison System and Sheriff’s Vans, an unpublished but widely circulated report by then Chief Assistant District Attorney Alan J. Davis at the end of a two-month investigation which was conducted jointly by the Philadelphia District Attorney's Office and the Philadelphia Police Department. This 103 page report not only described in detail the sexual assaults, but pinpointed the shortages of personnel and inadequacies of building design which made the assaults possible and, finally, proposed improvements in program and facilities which could prevent further assaults. In addition, the investigation produced the evidence which led to the successful prosecution of the perpetrators of the assaults — prosecutions which with the increases in the number of guards, minor improvements in the facilities at the Philadelphia Detention Center and the replacement of the inhuman prison vans with properly supervised buses, marked the end of forcible sexual assaults as a common occurrence.

12. Similarly, the 1970 investigation is described in Crawford, Preliminary Report on the July 4, 1970 Riot at Holmesburg Prison, a similar unpublished but widely circulated document. This 123 page report of the second joint effort of the Philadelphia District Attorney and Police Department found personal violence the hallmark of the riot. Thus, of the thirty-four rioters arrested, sixteen were awaiting trial on charges of murder and ten on charges of robbery; of the 104 persons
committed in the Philadelphia prison system. These were not, for the most part, crimes either by or upon prison guards, but crimes directed at prisoners by other prisoners. Thus, for example, the prosecutions following the 1968 investigation of homosexual assaults were confined almost completely to attacks by one prisoner on another, and the prosecutions following the Holmesburg riot in 1970 similarly focused upon assaults on prisoners, although twenty-nine guards were included among the many injured on this occasion. Quite apart from the more notorious outbreaks which led to the major investigations by the District Attorney of Philadelphia in 1968 and 1970, prison life tends to be less than completely peaceful. On a regular basis prisoners fall victim to sexual and physical assaults by their fellow prisoners, and these incidents are made no less destructive by their comparative infrequency in recent years.

Whenever a crime of violence is committed upon a prison inmate, the District Attorney is immediately called upon to protect the rights of the victim under the same system by which we put people in prison in the first place. We are never completely happy about this because we have a feeling that to rely upon imprisonment as a way of "breaking" a person of anti-social habits, when the person we are trying to re-educate with imprisonment is already in prison, has a built-in indication of futility. For example, we have a right to seek life sentences for a large number of the prisoners who held hostages during the July 4th riot because that is what the legislature has provided for.

identified as participants, thirty-nine were accused of murder and thirty of robbery. Despite this evidence that the prime cause of the 1970 riot was the gathering of a critical mass of violence, the report also discussed conditions at Holmesburg Prison which contributed at least in part to the riot, and recommended changes in structure, staffing and program aimed at preventing any possible recurrences. The report also recommended the arrest and prosecution of those individuals who could be identified as principals in the riot.

A far more difficult problem arises where the accused, rather than the victim, is a member of the prison staff. Thus, for example, the first prosecution following the 1968 investigation was of a staff member who was acquitted when the jury chose to believe his word over that of a number of inmates accused of various heinous crimes. Similarly, the investigation of retaliatory attacks by prison guards after the July 4 riot has proven far more difficult than the investigation of the riot itself. Many of the prisoners believed to have been victims of such attacks have refused to give any statements, and other persons who have come forward as willing sources of information have proved lacking in that which they promised. Thus, while an allegation that a prisoner was beaten or sexually assaulted by a correctional officer normally will result in a greater investigative effort by the District Attorney than a similar allegation that a beating or assault was perpetrated by one not sworn to uphold the law, the chances are that the longer investigation will produce a lesser result. Nevertheless, the same duty of the District Attorney to investigate and prosecute crimes against prisoners exists whether the perpetrator is a fellow prisoner or a prison guard.
for that crime. I assume that we will not ask for such sentences, or even consider doing so, but it is a difficult problem to deter assaults on prisoners. The District Attorney is the law enforcement officer called in for protecting prisoners' rights through the prosecution of those who infringe these rights criminally, but all he does is create more prisoners.

B. The Mandamus Power

When the legislature created the office of District Attorney and did away with deputy attorneys general who had previously handled the prosecution of crimes throughout the Commonwealth of Pennsylvania, they left to the District Attorney more than the bare right to prosecute. In addition, for example, the District Attorney can bring mandamus actions in Philadelphia County for matters which take place in Philadelphia County. Accordingly, the District Attorney's Office has filed a mandamus suit which is still under litigation. The suit is against the Board of Trustees of the city prisons, the city administration, and the City Council, seeking to enforce a series of legislative duties which we believe is incumbent upon the defendants to carry out.

C. The Power To Investigate

Another power of the Attorney General which was inherited by the District Attorney is the broad power to investigate matters in any way related to violations of the law within the jurisdiction in which he serves. For instance, the July 4th riot at Holmesburg was investigated not merely because it was our duty to prosecute those who had committed crimes in the course of the riot — or to determine whether we could prosecute — but because, as both the investigator and prosecutor of criminal activity in Philadelphia and as the institution which asks the courts to send people to prison, the District Attorney must feel some concern to know what is going on, some concern to be able to make wiser choices, and some concern with the operation of the prison.

Whichever role he finds himself in, prosecutor of crimes, civil litigator, or investigator, the District Attorney is likely to approach the question of the rights of prisoners from a viewpoint distinguished not by the breadth or narrowness of the range of rights to which he believes a prisoner is entitled, but by the reasons behind and the duties attached to these rights. In an age when others may believe in one form of determinism or another, a prosecutor must believe that a person charged with a crime was morally responsible for his acts. But, if the prisoner were a free man who, in the eyes of the law, chose to commit the crime for which he may be convicted and punished, he is likewise a free individual who can and should be encouraged to exercise that freedom within the law. To anyone who believes that an individual may be held accountable for his evil acts, rights must follow from this responsibility.

II. The Right Not To Be A Prisoner

Some words concerning the view of the Philadelphia District Attorney's Office on the function of prison are also in order here. There was a time when imprisonment was viewed as the normal end of a criminal prosecution. That is hardly the view of a progressive District Attorney's Office, in Philadelphia or in any community. Prison is a last alternative — primarily for crimes of a violent nature. We certainly try various other methods of adjustment rather than prison. We try them in Juvenile Court and in the Municipal Court in Philadelphia where the existence of an absolute right to appeal has made those courts extremely susceptible to working out solutions that are educative and rehabilitative rather than punishing because when imprisonment is imposed, the result is almost invariably an appeal. Given a case like North Carolina v. Pearce — which suggests that an appeal can never result in a heavier sentence — a prisoner has nothing to lose in fighting punishment. He may, however, lose a great deal in fighting a rehabilitative probation program, a therapy program, or something of that sort.

Finally, the District Attorney of Philadelphia has recently instituted a pre-indictment probation program under which every case that was not eligible for municipal or juvenile court treatment is reviewed. Presently I am reviewing them myself. All of those cases not involving a recidivist or a crime of violence are being taken to a judge — presently the Honorable J. Sidney Hoffman of the Superior Court.
Court of Pennsylvania — for his review to see if a pretrial probation program is not the best answer. The program uses more carrot than stick in the sense that one is placed on probation while indictment is deferred from six months to a maximum of two years. During the time that indictment is withheld, and assuming that the person carries out what therapy programs are prescribed or, in some cases, does nothing more than stay out of trouble, he then has what I like to call “Hyannisport probation.” At the end of six months or a year of not being involved with drugs or something of that sort, the charges are dismissed. I guess we took the view that if it was good for the Kennedy kids, it will be good for the citizens of Philadelphia. Almost twenty percent of the people who would otherwise be indicted are going into the program. A computer has its hand on the pulse of the program, and six months from the middle of February, 1971, we will begin to receive the first printouts which will tell us whether the program has been any kind of a rehabilitative success. 20

In addition, Philadelphia prosecutors are firm believers in probation: in psychiatric probation, in medical probation, in the use of therapy programs. Drugs clearly are at the root of a great many crimes in major cities today, and prison, apart from being an institution which may dry people out in the most brutal fashion, serves little purpose. Again, the real reason for having prisons is as a last resort for violent criminals.

Professor Louis B. Schwartz, in setting out some recommendations for the new proposed federal criminal code, discussed prisons in very intelligent terms. 21 He and his staff recommended one other use for prisons that I have not as yet mentioned. Prisons may be a useful “wrist-slap” for the youthful offender who has stolen his

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20. After four months of operation, it is possible to give a somewhat broader picture of the pre-indictment program than could be given at the time of the original panel preparation. The present statistics show that of 5,129 transcripts returned by Municipal Court Judges to the Grand Jury, 973 (19.0%) were selected for presentation to Judge Hoffman. Of these transcripts, 421 of them concerned minor property offenses (burglary not of an occupied dwelling, larceny, receiving stolen goods and various fraud offenses); 371 represented narcotics offenses (possession of marijuana, dangerous drugs or very small quantities of hard narcotics in the hands of the user); and the remaining 181 represented a large range of cases from drunken driving to indecent exposure to minor weapons and assault cases where there were mitigating circumstances to justify departure from the normal standards against any crimes of violence whatever. Although a few defendants have been found ineligible for the program, have requested trial instead, or have simply failed to appear, 512 defendants have been accepted into the program and are presently engaged in earning a discharge of the charges against them. Approximately 400 other cases are awaiting hearing before Judge Hoffman over the next six weeks.

21. See NATIONAL COMM’N ON REFORM OF FEDERAL CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE, Part C (1970). Professor Louis B. Schwartz of the University of Pennsylvania Law School was Director of the Staff.
fourth or fifth car, or for the man who cannot seem to keep himself from writing other people's names on checks. These people are not violent and the crimes which they commit are offenses against property and not against an individual. It might seem that this type of an offender would not ordinarily be responsive to the punishment of prison. However, it may very well be that a thirty or sixty day prison sentence will be just the impetus needed to break a pattern of that sort. This is a suggestion that makes some sense to me.

In addition, prisons today are clearly serving a useful function in quarantining people. I guess among Mr. Brierley's clients at Western, Frank Phelan would be a good example of someone whom none of us would like to see released after nothing but an extraordinary rehabilitation program. There are many more people who have committed repeated crimes of intense violence with whom I, at least, would be frightened to share the streets. In fact, if they were out, I would rather be in.

The third potential use of prison is rehabilitation and retraining. I know of no really good rehabilitation programs in existence anywhere at a state prison level, nor have I much faith in claims of such programs at the federal level or hope that some clearly more successful programs in Scandinavia or the low countries would work under the vastly different conditions existing in urban America. Thus, except in rare instances of defendants who appear likely to be benefited from a regimen of rote progression of the seasons worthy of the life of a ninth century serf, no prosecutor will willingly send a defendant to prison for education or job training. Rather, any thoughtful prosecutor, like any honest defendant, views imprisonment as a "deadend road" or, at best, as a shock treatment which may be bad enough to convince its beneficiary that crime really does not pay.

There are, of course, two problems which appear to me to be inherent in this sort of realistic view of prison. On the one hand, if not merely defendants and defense counsel, but judges, prosecutors and even the public at large begin to recognize prisons as a last resort alternative, the prisons will be faced with a more and more difficult population to deal with, and the increasingly violent prisoners will demand more and more of the time of the prison staff in purely custodial functions as each prisoner poses an increasing threat to his


fellow prisoner. 24 Second, if, on the other hand, the prison system is to become a place which offers positive rehabilitation beyond that available to people "on the street," then we must give some thought to the question of why we permit those accused of crimes to go to such lengths to avoid prison. A good rehabilitation program, like schooling or treatment for a communicable disease, should not be given only to those proven guilty beyond a reasonable doubt. More importantly, if we really believe in a prison system built for rehabilitation, I question the propriety of using our trial courts to mold police conduct by various exclusionary rules. If I have tuberculosis, I do not try to suppress the X-rays that a doctor took of me in order to keep myself out of the hospital and avoid treatment. Our criminal system presently is based on intense avoidance of imprisonment of any sort, and seems to build on a premise that the prison system is not a rehabilitative agency at all, but truly an agency of punishment. I don't know where the solution lies, but I suppose that it must begin with some rehabilitation programs built into the prisons to see whether this will lead to a lessening of efforts to avoid the prisons. We are now running a schizophrenic system by talking about a prison arrangement which we ask, on the one hand, to be some sort of hospital, and on the other, a trial system which gives even the person most in need of rehabilitation every right to try to avoid incarceration.

To return to the original topic of this digression, prosecutors, like defendants, are not confused about prisons. Unless and until prisons can be viewed as agencies for real rehabilitation, they will be viewed as a last resort of the criminal process, and every effort of prosecutor and defendant will be made to guarantee that persons convicted of crimes will enjoy a practical right not to be a prisoner so long as there is a reasonable prognosis that the defendant can safely be allowed to be rehabilitated in the community. 25


25. The real discussion in this Symposium concerns almost entirely the rights of sentenced prisoners, and does not explore the probably more serious problems of unsentenced and untried prisoners for whom rehabilitation programs are almost never attempted; classification to separate violent from non-violent prisoners or aggressive homosexuals from their natural victims; and the fact that facilities are most often aging, and unsanitary county jails are manned by the lowest paid and least trained correctional officers in the entire prison system. Thus, for example, the Holmesburg Prison riot involved unsentenced prisoners largely unclassified and almost totally unengaged in any constructive programs. The magnitude of the problem of unsentenced prisoners may be seen in the National Jail Census released by the Law Enforcement Assistance Administration and the Census Bureau, which indicated that about 52% of the 160,863 persons incarcerated in locally administered American jails as of March 15, 1970 were confined for reasons other than being convicted of a crime. See 8 Crim. L. 2276 (January 29, 1971).
III. The Legislature As The Source Of Prisoners' Rights

Let us assume that a defendant has committed acts which overcome the presumption that prison is not the place for him. Even the most humane of us must conclude that a defendant who has committed murder or rape or robbery or assault with intent to kill, as proven beyond a reasonable doubt, and has shown no indication that he will not repeat his conduct if he be released on probation, belongs in prison rather than in the community. Assuming further that the sentencing judge accordingly sentences him to a term of imprisonment, we must then return to the question of what rights he has as a prisoner.

A. The Constitutional Protections

Turning to specific rights of prisoners to be free from various abuses, I wonder how many rights there are concerning which there is going to be any disagreement among the panel when we get down to the end of it. I guess that, along with Mr. Brierley, I am supposed to represent the "right" wing, the "right deniers," and Mr. Rabinowitz the "left" wing, the "right claimers." Yet, I could not find much in Mr. Rabinowitz' presentation with which to disagree. With respect to his remarks, everytime I saw a spot where I would say "but not that," he would say "but not that." So, there is not going to be much to fight about so long as the topic remains the right of prisoners to be free from constitutional deprivations. For example, the time must be close when no prison administrator will claim that he can censor mail when he permits the same prisoners free conversation with visitors. Similarly, everyone must agree that denial of food, water, exercise and contact with fellow prisoners is a severe deprivation of a prisoner's rights, although there may be some disagreement with respect to the degree that those rights must be allowed, and the circumstances under which they may be limited as punishment for violation of reasonable prison regulations calculated to make it possible to operate the essentially anti-social prison world.

Somewhat more disagreement may exist when we turn to the topic of procedural due process surrounding punishment of prisoners for violation of prison regulations and of the rights of other prisoners. Thus, for example, I do not believe that a prisoner cannot be punished until after a trial complete with right to counsel and all the other aspects of criminal law due process. Rather, under the tense situations in a prison, there has to be a much swifter system than that sort of
system which Gideon and its brethren, unfortunately, have given us in the criminal courts as a by-product of some very vital rights. It also must be a system that is subject to scrutiny and review afterward, but it may have to be in terms of Alice in Wonderland: punishment first, and trial afterward. There may be no other way to run a prison institution.

B. Positive Rehabilitative Programs

If there is little disagreement concerning the right of prisoners to be free from deprivation of constitutional rights to those freedoms which can be exercised in prison as well as outside prison but for unnecessary limitations imposed by the prison authorities, there is a substantial disagreement among the panelists when the question of the “right” of prisoners to a positive program of rehabilitation is concerned. This disagreement does not occur with respect to those services which are freely supplied to all citizens — schooling for juveniles, clinics for the aged or indigent, and the like — whether or not they are in prison. There must be some question about any “right to rehabilitation” in prison to the extent that at present people who have committed no crime have no “right to habilitation” in the first place. In fact, it is a most peculiar social system which posits that when a person finally becomes bad enough, he can be habilitated or rehabilitated and made into a useful citizen with a good skill and a good education, but, up to that point, he is not guaranteed this training.

These ideas suggest that if we are going to speak in terms of rights to a broad level of positive services, we must go far beyond applying these rights to prisoners. There is, however, at least one analogy which would give prisoners a special claim. The same basic principle that allows the federal government — which has no right to subsidize religion — to supply chaplains to the armed forces, may provide that, if people are taken out of the place where they can find their own churches or their own education or their own job training, and confined within a wall, they have a legitimate claim to have supplied to them what could have been enjoyed, whether or not the


27. I do not mean to suggest that prisoners should not be given education and training. The legislature may well determine — either from compassion or as a part of a policy to protect society as a whole — that prisoners should be given education and training. My only question is whether, should the legislature decline to make provision for such training, a prisoner can compel the prison authorities to provide it anyhow despite the fact a person not in prison cannot compel the civil authorities to provide him the same benefits.
state provided these services outside. However, I see a substantial equal protection problem when prisoners begin to claim a right to things not generally available to all citizens outside the prison walls.

C. Who Allocates the Resources of Society?

It seems to me that the real question posed in this Symposium is not what rights we might want to grant to prisoners, but what privileges, beyond those rights which the Constitution requires, should be granted to prisoners at the expense of society as a whole. Once the rights outlined in the Constitution have been satisfied, the people are free to determine where they will spend society's resources. I still believe that in a democracy, it is through the legislature, and not through the courts that the people make their choice.

In fact, having read hundreds of cases concerning claims of prisoners, and having listened to constant appeals that we turn to the courts to deal with the prison system and protect the rights of prisoners, I have become convinced that perhaps more publicity and more use of the political process, in the first instance, is in order. I know of no better evidence of this than the fact that for many years the federal courts in New York have been trying to bring about the creation of a series of rules and regulations for the New York prison system. It suggests to me that the country as a whole — particularly our lawyers and those of us who still feel close to the law schools — began during the early days of the Warren Court to believe that the only way to get right done was by going to the courts — forgetting the legislature and the executive — and saying that we will sue about it.

There are two major objections to this philosophy. One is that it is beastly slow, and the second is that if one has any real use for democracy, one suspects that the courts are a place to go as a last resort. It is normal to count on the legislature and the executive to set the proper standards for operating a society. Otherwise, I could imagine, without much difficulty, a law suit in Philadelphia County brought on behalf of the students in the Philadelphia school system demanding a right to a better education in the schools. I cannot easily distinguish that suit from similar suits brought on behalf of the prisoners in the Philadelphia prisons demanding a right to rehabilitation. I can imagine other suits to enforce proper medical care being brought on behalf of the indigent persons who use Philadelphia General Hospital, and suits to enforce proper rubbish removal being brought on behalf of those who use the Streets Department to remove their rubbish. Slowly, the entire government of the City of Philadelphia

or the State of Pennsylvania would fall into receivership. Resort to total court supervision may be necessary in terms of bankrupt institutions, but I think Philadelphia, unlike the Penn Central, is still viable, and I don't think we need a judicial receivership. I would suggest that one of the things that we should consider instead is that the political process deserves more concern and — despite our disinclination to think this as lawyers — the courts less concern in this question.

D. The Legislature Has Done Its Job

Although one may sometimes forget, it was the legislature and not the courts which created the great schemes of social protection upon which society depends — social security, medicare, the G.I. Bill of Rights, unemployment compensation, aid to dependent children, and the like. Similarly, the Pennsylvania legislature has repeatedly done its part to create substantial positive rights for prisoners by defining acts to be done on behalf of prisoners which the District Attorney's Office believes the courts will enforce in appropriate litigation. Accordingly, the courts have no need to usurp the legislative function on the ground that prisoners, like the poor, racial minorities, farmers, or the aged, somehow lack the voting power to obtain legislative consideration.

A few of the legislative protections granted prisoners by the Pennsylvania legislature will illustrate this point:

In 1931, the legislature mandated that Philadelphia construct a jail system so that "every person committed thereto, whether upon conviction or otherwise, may be confined separately and apart from every other person committed thereto." That strikes me as a demand that we not put three to a cell or even two to a cell. In 1835, the legislature said that prisons in Philadelphia must provide "a jacket and trousers of cloth or other warm stuff for the winter and lighter materials for the summer. Two changes of linen shall be furnished to each convict every week in summer and one in winter." That was in 1835. Considering the change in standards outside since then, one would hope that the prisons would have improved on those minimum requirements. I think that many of the prisoners in Phila-

34. PA. STAT. tit. 53, § 13644 (Supp. 1971).
35. PA. STAT. tit. 61, § 629 (1964).
Philadelphia would be delighted to be able to enforce that mandate. Again quoting from the 1835 Act: the city must provide a "physician to visit the prison daily, visit and prescribe for all who are sick and at least once a month to visit every convict confined in said prison."36 This law came just after the great Quaker prison on Fairmount Avenue was opened. If you remember its wall from passing it, you will see why there was some concern among the humane people on the legislature to put in regulations like this. From 1835 again: to see that three members of the Board of Trustees "visit the prison at least once a week and oftener, if necessary, to see that the duties of the several officers and attendants are performed."37 Not the courts, but the Board of Trustees, are to take care of this. Again 1835: "provide for said prisoners suitable provisions and bedding . . . and to confine all persons other than convicts separate and apart from each other."38

Another example — this one from the Philadelphia Home Rule Charter — demonstrates a relatively recent innovation which requires the Department of Welfare to:

[R]ecommend and bring to the attention of the officers and board of trustees . . . standards and methods helpful to the government in administration of such institution and for the betterment of the conditions of their inhabitants, . . . establish and arrange for the maintenance of industries and where feasible farms in or in connection with City penal, reformatory or correctional institutions for the compensable employment of all physically capable persons sentenced to such institutions, . . . arrange for the compensable employment of inmates of City penal reformatory or correctional institutions at such work or labor within or upon the grounds of any City institution as may be necessary for its maintenance.39

Back in 1907, the legislature required the administration to adopt rules and regulations concerning labor by sentenced prisoners "to secure humane treatment of said prisoners and to provide continuous and helpful employment."40 In 1923, the prison administration was ordered to provide every person confined daily with "at least two hours daily, physical exercise in the open, weather permitting, and upon such days upon which the weather is inclement, such persons shall have two hours daily physical exercise indoors of such prison."41

39. Philadelphia Home Rule Charter, § 5-700 (c) and (d) (1951).
The following are duties of various prison authorities or trustees as defined in a 1955 law: to diagnose, classify and place each sentenced prisoner in prison, considering "the problem of rehabilitation, security, adequacy of facilities and such other factors will serve to promote the rehabilitation of prisoners consistent with the security and protection of the county."42 Under the Act of 1835, as amended in 1917, the trustees have the duty to apply "for such sum or sums as may be necessary or required for . . . any deficiency in keeping, furnishing, and maintaining said prison in conformity with the provisions of this act."43 The legislative body has the duty to "appropriate such sum or sums as may be necessarily required for any deficiency in keeping, furnishing and maintaining said prisons."44

If you rely on the legislature to define the rights of prisoners, it may be that the courts will be needed to force the prison authorities to obey the legislative mandate. But there is a fairly comprehensive program in Pennsylvania for the protection of specific rights, including not only many of the rights all of us agree are absolute rights of prisoners — rights to medical care, to clothing or to food — but, in addition, rights to positive programs of rehabilitation which I, at least, believe a prisoner could not demand as a right if the people, speaking through the legislature, had not chosen to give them to him.

IV. Conclusion

There is, I suppose, no disagreement with the proposition that every prisoner is entitled to whatever constitutional rights he would have had outside prison, except for those rights whose loss is a necessary element of imprisonment. But when the focus shifts to positive programs created for the rehabilitation of the prisoner, I, for one, would be somewhat disturbed if the prison system became a place where everyone had a right to the kind of training, education, medical treatment and other care which those who have not committed crimes are denied on the outside. It may be that the people, speaking through their legislatures, will make such positive programs available to prisoners — and, perhaps to all citizens. But, it seems to me that only the representatives of the people have the right to make this choice.