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## SYMPOSIUM—PRISONERS' RIGHTS

### FOREWORD—PENITENTIARIES PRODUCE NO PENITENTS

GEORGE EDWARDS\*

The conclusion that the American prison system is a failure is gradually seeping into public consciousness. Unless there is a dramatic change, the impact of this conclusion is likely to be felt more in the courts than in the statehouses of the nation. The tragedy of that, of course, is that governors and legislatures are much more directly responsible for the prison problems and can much more easily do something about them.

The massive involvement of released prisoners in our mounting crime rate, the explosion at the Attica prison (vividly dramatized by TV), the exposures of the horrors of the Arkansas prison camps, the expanding concept of constitutional rights in the United States Supreme Court, an indictment of the penal system by a great psychiatrist, and the speeches on penal reform of the Chief Justice of the United States Supreme Court all illustrate the increasing awareness of the problem.

From these (and other sources) come some conclusions. Penitentiaries of today are brutal institutions—sometimes (maybe frequently), regardless of the motivations of the prison administrators. The standard prison experience includes deprivation of any normal social contact and any normal sex life. In addition, for *most* prisoners there is the horror of enforced idleness, unrelieved by either education or work. For younger prisoners there is the possibility—sometimes the probability—of homosexual rape and the certainty of years of close association with the selected worst citizens of the state. And in many prisons (and jails) beating, flogging and the "hole" are still the fundamental disciplinary tools.

The vengeance aspect of criminal servitude is still dominant. But vengeance breeds vengeance. The young offender who is brutalized by ten years of the penitentiary life described above does not come out a penitent. Often he returns to society as a potential killer. It is all too true that most of our penal institutions prove to be schools for

crime. There are, of course, exceptions to the indictment just stated.<sup>1</sup> There are also at least three justifications for the system itself.

1) It is cheaper *in the short run* than any intelligent institutional alternative.

2) It does serve to protect society from individuals who have demonstrated a proclivity for violent crime *for the exact term of their incarceration*.

3) Imprisonment does serve to emphasize unacceptable standards of conduct and thus arguably deter from such conduct other members of society—*usually those least in need of the lesson*.

Exceptions and justifications to the contrary notwithstanding, many of us (including many correction professionals) have long been aware that 1) iron bars alone do not cure criminals; 2) penitentiaries produce no penitents; 3) our prisons' main product is crime; 4) with what we now know, we can do better; 5) *in the long run*, correctional reform would save both lives and money.

Nonetheless, there has been a consistent record of failure in efforts to get governors and legislatures even to examine the problem seriously, much less undertake the great reforms that are needed. And until fairly recently, much the same could be said about the courts.

In the short space of ten years, however, the courts have begun to turn the spotlight of national concern upon the most festering problems in American prison systems. In so doing marked changes in the law pertaining to prisoner rights have been declared which would have been impossible a decade ago. This hasn't happened primarily as a result of a sudden change of legal philosophy on the part of either courts or individ-

<sup>1</sup> The federal prison system (due to the leadership of people like James V. Bennett and Myrl Alexander and their influence on Congress) is better staffed, better administered and more oriented toward correction than the penal systems of the states taken as a whole. Similar comment may be made about some institutions in many states. Favorable as this may sound, however, it must be remembered that this comparison is made against a terribly low standard.

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ual judges. As is true with most examples of creative legal change, events (such as those referred to above) rather than legal cerebration seem responsible for most of the shift in public and judicial response.

Ten years ago I wrote concerning the courts' treatment of the constitutional prohibition against "cruel and unusual punishment":

The procedural problems involved in invoking the Eighth Amendment (particularly in regard to treatment after sentence) are numerous and formidable. The repeated failure of the courts to find a remedy suggests the exercise of judicial ingenuity to avoid the constitutional mandate. The Eighth Amendment and its state counterparts provide no general appellate power to review sentences that are statutorily authorized and that are not clearly a judicial abuse of the prohibition on cruel or excessive punishment. Further, a review of cases in which relief was sought from punishment asserted to be cruel and unusual shows that sometimes the consciences of civilized men, at least as represented in the highest appellate courts, are not easily shocked.<sup>2</sup>

I quote this dismal view here both to provide a basis for contrast in relation to the changes of a decade—and to observe that even with these changes, the observations still have some validity.

The changes have come in both case law and events, both of them so numerous that selection is essential.

#### THE WARREN COURT

Underlying the change in legal attitudes toward prisoner problems is the marked change in attitude of the Warren Court toward federal enforcement of rights protected by the Federal Constitution. Many of the failures to vindicate such rights (such as those pointed out above) were based upon procedural barriers at the courtroom door. The Warren Court took those barriers down.

The first case of great significance in this regard was *Monroe v. Pape*,<sup>3</sup> where the court permitted a suit for damages against some Chicago police officers brought under a civil rights statute passed in the aftermath of the Civil War.<sup>4</sup> Then followed

<sup>2</sup> S. RUBIN, H. WEIHOFEN, G. EDWARDS & S. ROSENZWEIG, *THE LAW OF CRIMINAL CORRECTION* 383 (1963).

<sup>3</sup> 365 U.S. 167 (1961) (Illegal search and seizure held to state cause of action for damages).

<sup>4</sup> 42 U.S.C. § 1983 (1970) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or

a trilogy of significant habeas corpus cases in the Supreme Court.<sup>5</sup> These served to make the federal courts fully available to prisoner complaints about state authorized violations of federal constitutional rights which resulted in their incarceration. None of the cases just referred to dealt with treatment of prisoners in penitentiaries. And, indeed, the Warren Court dealt directly with only a few complaints about prison abuses.<sup>6</sup> But the Court's new willingness to make the federal courts available for trial of federal constitutional violations which the states themselves had either authorized or ignored laid the foundation for much which has happened since.

#### THE CUMMINS PRISON FARM

There is, I think, some value in describing the prison problem in the calm language of the courts. What follows are some of the findings of federal courts after full evidentiary hearings concerning the most infamous of Arkansas' prison farms.

The first case about Cummins was decided in 1965. It was an attack upon prison punishment as inflicted by "trusties" or wardens—beatings by fists or by a leather belt with a wooden handle. The belt was five feet in length, four inches wide and one-quarter inch thick. The district judge's opinion says:

There are no written rules or regulations prescribing what conduct or misconduct will bring on a whipping or prescribing how many blows will be inflicted for a given act of misconduct. The punishment is administered summarily, and whether an inmate is to be whipped and how much he is to be whipped are matters resting within the sole discretion of the prison employee administering the punishment, subject to the present informal requirement of respondent that the blows administered for a single offense shall not exceed ten.<sup>7</sup>

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Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and Laws shall be liable to the party in an action at law, suit in equity, or other proper proceeding for redress.

<sup>5</sup> *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963); *Sanders v. United States*, 373 U.S. 1 (1963).

<sup>6</sup> See *Johnson v. Avery*, 393 U.S. 483 (1969) (In absence of state provision to assist illiterate or poorly educated inmates in preparing petitions for post conviction relief, state could not enforce a regulation barring inmate from furnishing such assistance to other prisoners).

<sup>7</sup> *Talley v. Stephens*, 247 F. Supp. 683, 688 (E.D. Ark. 1965).

The court further found that petitioner Talley had been whipped by the assistant warden,<sup>8</sup> assaulted by a convicted murderer who served as petitioner's "line rider",<sup>9</sup> and been subject to assaults and other reprisals for seeking recourse in the federal courts.<sup>10</sup> Indeed, the day following the testimony of the petitioner in this case, the district court found:

Talley and the other members of his squad were put to work picking cotton, and that after the work proceeded about 30 minutes Warden Harmon called Talley out of the long line and administered him nine blows with the strap.<sup>11</sup>

In the second Cummins case, the district court judge summarized his findings and enjoined the enumerated acts:

There can be no doubt that the brutal and sadistic atrocities which were uncovered by the investigation of the State Police in August and September of 1966 cannot be tolerated. The court has reference to the use of a telephone shocking apparatus, the teeter board, strapping on the bare buttocks, and other torturous acts of this nature.<sup>12</sup>

The district judges who first dealt with Cummins' problems enjoined the whippings as administered, but refused to enjoin whipping as such if properly controlled and supervised. As to this issue the Eighth Circuit (with now Justice Blackman writing for the court) reversed, holding:

With these principles and guidelines before us, we have no difficulty in reaching the conclusion that the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment; that the strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess; and that it also violates those standards of good conscience and fundamental fairness enunciated by this court. . . .<sup>13</sup>

Cummins, however, serves to highlight other aspects of our prison problems than corporal

punishment. In a later case another district judge dealt with prisoner protests about the state's failure to protect them from the violent and sadistic felons with whom it insisted they live. Most will, I think, find it difficult to disagree with the court's concluding sentence ultimately given effect in its order:

At times deadly feuds arise between particular inmates, and if one of them can catch his enemy asleep it is easy to crawl over and stab him. Inmates who commit such assaults are known as "crawlers" and "creepers," and other inmates live in fear of them. The court finds that the "floor-walkers" are ineffective in preventing such assaults; they are either afraid to call the guards or, in instances, may be in league with the assailants.

The undisputed evidence is to the effect that within the last 18 months there have been 17 stabbings at Cummins, all but one of them taking place in the barracks, and four of them producing fatal results. At least two of the petitioners now in isolation have been assailants in stabbing incidents and others have been the victims of such incidents.

The Court is of the view that if the State of Arkansas chooses to confine penitentiary inmates in barracks with other inmates, they ought at least to be able to fall asleep at night without fear of having their throats cut before morning, and that the State has failed to discharge a constitutional duty in failing to take steps to enable them to do so.<sup>14</sup>

#### THE ATTICA RIOT

The story of the Attica riot is much fresher in public memory. And because it was widely publicized on TV, and the final tragedy occurred in the full glare of nationwide news coverage, it has become the focus of much national prison debate. Unfortunately, most of the debate has pertained to what happened *after* the revolt occurred, rather than on what caused it in the first place. Important as are the deaths of 11 guards and 32 prisoners, even more important are the factors, widely present in other prisons, which may cause more prisoners to court Attica-type execution by similar violence against the system.

*Newsweek's* summary on this score bears repetition:

Avoidable or not, the disaster at Attica bore hard lessons for the entire nation. It drew attention, in the most dramatic possible way, to the incendiary

<sup>8</sup> *Id.* at 688.

<sup>9</sup> *Id.* at 688-89.

<sup>10</sup> *Id.* at 690.

<sup>11</sup> *Id.* at 691.

<sup>12</sup> *Jackson v. Bishop*, 268 F. Supp. 804, 815 (E.D. Ark. 1967).

<sup>13</sup> *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968).

<sup>14</sup> *Holt v. Sarver*, 300 F. Supp. 825, 830-31 (E.D. Ark. 1969), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

condition of many American prisons. Sheer desperation was perhaps the main fuel of the convicts' hopeless revolt: "If we can't live like human beings, at least we can die like men" became one of the most popular refrains in the teeming prison yard during the tense weekend siege. The list of 28 demands accepted by the state—among them, religious freedom, a healthy diet, adequate medical care, non-censorship of outside publications except where prison security was imperiled—opened a rare public window on a world where men have virtually no rights, only privileges granted sparingly by hardened and underbudgeted administrators. Even a few of the 30 hostages who were set free said the demands were mostly fair. Ironically, many of the demanded reforms lay in directions along which Commissioner Oswald himself had been trying to move—and which were now, after Attica, in danger of abandonment in the midst of redoubled security consciousness.<sup>15</sup>

These suggestions, which many citizens might disregard, are underlined by a glimpse of Attica after the riot, as seen by one of America's most respected and most conservative courts:

[I]n support of plaintiffs' Eighth Amendment claims, detailed evidence was furnished by plaintiffs to the effect that beginning immediately after the State's recapture of Attica on the morning of September 13 and continuing at least until September 16, guards, state troopers and correctional personnel had engaged in cruel and inhuman abuse of numerous inmates. Injured prisoners, some on stretchers, were struck, prodded or beaten with sticks, belts, bats or other weapons. Others were forced to strip and run naked through gauntlets of guards armed with clubs which they used to strike the bodies of the inmates as they passed. Some were dragged on the ground, some marked with an "X" on their backs, some spat upon or burned with matches, and others poked in the genitals or arms with sticks. According to the testimony of the inmates, bloody or wounded inmates were apparently not spared in this orgy of brutality.

The barbarous conduct testified to by various witnesses and taken as true by Judge Curtin for the purposes of his interlocutory decision—the beatings, physical abuse, torture, running of gauntlets, and similar cruelty—was wholly beyond any force needed to maintain order. It far exceeded what our society will tolerate on the part of officers of the law in custody of defenseless prisoners.

[M]istreatment of the inmates in this case amounted to cruel and unusual punishment in violation of their Eighth Amendment rights.<sup>16</sup>

Many may tend to excuse the brutality pictured above because it came in the period immediately after the revolt and its bloody end which left 11 guards dead (at least 9 of them by state gunfire). But the real insight to be gained from the facts found by the Second Circuit pertains to what it reveals about the background of the revolt. If these things could happen while Attica was in the full glare of world concern, consider what could have happened when most people in America would not have known there was a town or a prison by that name.

One other fact on Attica's past has by no means received sufficient attention. At the time of the revolt 88% of the prisoners were black or Puerto Rican, whereas all the prison guards and supervisors were white.

On a more hopeful note, *Newsweek's* last comment bears notice:

Perhaps, as Mr. Nixon suggested, 'like all tragic events, it has its affirmative aspects.' Perhaps it will cast much needed light into the dark corners of American prison life.<sup>17</sup>

#### THE CRIME OF PUNISHMENT

Under this title Dr. Karl Menninger, one of the nation's leading psychiatrists, has written what one of my former colleagues on the Michigan Supreme Court would have called "a writ of arousal." It has been pronounced one of the most important books of 1968 and is bound to have continuing effect.

Eloquently, sometimes passionately, he indicts the whole present system of criminal punishment as brutal, archaic and socially disastrous. He says:

The public will grow increasingly ashamed of its cry for retaliation, its persistent demand to punish. This is its crime, *our* crime against criminals—and incidentally our crime against ourselves.<sup>18</sup>

Menninger distinguishes between punishment and penalty by equating punishment with penalty *plus* vengeance.<sup>19</sup> He maintains that the imposition of punishment may aggravate crime. The victim of the vengeance omnipresent in both sentencing and prison treatment frequently returns to society inclined to seek vengeance himself.<sup>20</sup>

<sup>17</sup> NEWSWEEK, Sept. 27, 1971, at 24.

<sup>18</sup> K. MENNINGER, *THE CRIME OF PUNISHMENT* 280 (1968).

<sup>19</sup> *Id.* at 202-04.

<sup>20</sup> *Id.* at 214-18.

<sup>15</sup> NEWSWEEK, Sept. 27, 1971, at 22-23.

<sup>16</sup> *Gonzales v. Rockefeller*, — F.2d — (2d Cir. 1971).

Menninger's most important message is that, given existing knowledge, better treatment is possible as to most offenders. But such treatment must be based on acceptance and love rather than rejection and hate.<sup>21</sup> As to this last point, Men-

<sup>21</sup> I once put this principle in a paragraph of directions in our psychiatric hospital:

If we can love: this is the touchstone. This is the key to all the therapeutic programs of the modern psychiatric hospital; it dominates the behavior of its staff from director down to gardener. To our patient who cannot love, we must say by our actions that we do love him.

You can be angry here if you must be; we know you have had cause. We know you have been wronged. We know you are afraid of your own anger, your own self-punishment—afraid, too, that your anger will arouse our anger and that you will be wronged again and disappointed again and rejected again and driven mad once more. But we are not angry—and you won't be either, after a while. We are your friends; those about you are all friends; you can relax your defenses and your tensions. As you—and we—come to understand your life better, the warmth of love will begin to replace your present anguish—and you will find yourself getting well.

*Id.* at 260-61.

Hope is just as important as love in the therapeutic attitude.

*Id.* at 261.

When the community begins to look upon the expression of aggressive violence as the symptom of an illness or as indicative of illness, it will be because it believes doctors can do something to correct such a condition. At present, some better-informed individuals do believe and expect this. However angry at or sorry for the offender, they want him "treated" in an effective way so that he will cease to be a danger to them. And they know that the traditional punishment, "treatment-punishment," will not effect this.

What *will*? What effective treatment is there for such violence? It will surely have to begin with motivating or stimulating or arousing in a concerned individual the wish and hope and intention to change his methods of dealing with the realities of life. Can this be done by education, medication, counseling, training? I would answer *yes*. It can be done successfully in a majority of cases, if undertaken in time.

The present penal system and the existing legal philosophy do not stimulate or even expect such a change to take place in the criminal. Yet change is what medical science always aims for. The prisoner, like the doctor's other patients, should emerge from his treatment experience a different person, differently equipped, differently functioning, and headed in a different direction from when he began the treatment.

It is natural for the public to doubt that this can be accomplished with criminals. But remember that the public *used* to doubt that change could be effected in the mentally ill. Like criminals, the mentally ill were only a few decades ago regarded as definitely unchangeable—"incurable." No one a hundred years ago believed mental illness to be curable. Today *all* people know (or should know) that *mental illness is curable* in the great majority

ninger says:

[W]e have at hand great quantities of research findings which clearly indicate what we should be doing. Much indeed we don't know, but we are not doing one-tenth of what we should about what we already do know.<sup>22</sup>

It is, of course, a commentary upon how truly badly off we are in relation to the prison problem that the very use of the words "love" and "hope" in relation to treatment of adult prisoners will cause many of us to reject everything that Menninger has to say. And yet, concerning ourselves (as normal human beings), we would just as easily agree that love and hope are the most fundamental of human values.

#### CHIEF JUSTICE BURGER

The present Chief Justice of the United States has placed the weight of his high office behind efforts toward major penal reform.

In 1969 he told the American Bar Association:

For many years we neglected the entire spectrum of criminal justice. Slowly but with increasing pace we have corrected procedural inequities. . . . In time we must take stock of what we have done and see whether all of it is wise and useful and constructive.

Meanwhile we must soon turn increased attention and resources to the disposition of the guilty once the fact-finding process is over. Without effective correctional systems an increasing proportion of our population will become chronic criminals with no other way of life except the revolving door of crime, prison and more crime.<sup>23</sup>

Much more recently at the 1971 National Conference on Corrections, the Chief Justice called criminal correction the "most neglected" part of the criminal justice system and defined six urgent needs in relation to it. The Chief Justice first called attention to the inadequate physical plant of our prisons itself, pointing out that rising crime has created severe overcrowding and that prisons "are poorly located and inaccessible to the families of the inmates, too far away from facilities for work

of instances and that the prospects and rapidity of cure are directly related to the availability and intensity of proper treatment.

*Id.* at 257-58.

<sup>22</sup> *Id.* at 277.

<sup>23</sup> Address by Chief Justice Burger, American Bar Assn. Convention, Dallas, Texas, Aug. 11, 1969, as quoted in 39 GEO. WASH. L. REV. 185 (1970).

release programs, and located in areas that do not provide adequate housing for personnel of the institutions."<sup>24</sup> The Chief Justice then emphasized the need to recruit prison staffs of the highest caliber and training and the need to classify and separate clearly different types of offenders to prevent prisons from criminalizing their occupants. Chief Justice Burger also pointed out that the failure of our prisons to provide their youthful occupants with exercise programs to "burn off the surplus energies of youth" and with work and educational programs which will motivate inmates to improve themselves. Society has "a moral obligation to try to change an offender—to make a reasonably successful human being out of him."<sup>25</sup> Finally, the Chief Justice stressed the need that every individual has to communicate with others. Every inmate should be given an opportunity to communicate with those who run the institutions and should be given a chance to regulate part of his life.<sup>26</sup>

It is notable that Justice Burger's speech was not concerned primarily with the elimination of prison practices which could appropriately be held to be abuses of the Federal Constitution. This illustrates the fact that the courts have indeed two major concerns with prisons. The first, of course, is in stopping such treatment of human beings as is illustrated by the quotations from the Arkansas and the Attica cases. But the second, and equally important, is implementing fulfillment of the rehabilitation function of the criminal law. Each of these topics, of course, would represent subject matter for a volume, but the scope of this paper will only allow a few paragraphs of summary.

#### COURT REMEDY FOR CONSTITUTIONAL ABUSES

Legal attacks upon prison conditions have been filed in many different forms. No attempt will be made in this article to compile the long history of frustration of the great majority of these and the more recent history of success of some of them.

This history up to 1962 may be found in "The Law of Criminal Correction."<sup>27</sup> The history since then has been set forth in the articles which follow in this symposium, in an excellent law review

<sup>24</sup> Address by Chief Justice Burger, 1971 National Conference on Corrections, summarized in 10 BNA CRIM. L. REPTR. 2238 (Dec. 29, 1971).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> S. RUBIN, *et al.*, *supra* note 1.

article by Goldfarb and Singer,<sup>28</sup> in Judge Blackmun's opinion in *Jackson v. Bishop*,<sup>29</sup> and in Judge Kaufmann's opinion in *Sostre v. McGinnis*.<sup>30</sup>

Prisoners seeking a forum to air prison grievances have attempted mandamus,<sup>31</sup> damage actions,<sup>32</sup> class actions, civil rights actions and petitions for writs of habeas corpus. Of these, the last two, habeas corpus and civil rights actions, are probably the most feasible in most prisoner situations, and each has been recently the subject of consideration in a prisoner rights petition in the United States Supreme Court.

Habeas corpus traditionally, of course, has been thought of as attacking only the validity of the imprisonment itself.<sup>33</sup> But there are many instances where courts have allowed a habeas petition to be considered where the only relief that it sought was relief from allegedly unconstitutional terms of imprisonment.

As far back as 1944 my court, the United States Court of Appeals for the Sixth Circuit, declared that habeas corpus was an appropriate method for attacking constitutionally abusive treatment during legally valid incarceration.<sup>34</sup> Just this past year the United States Supreme Court again validated this view by a majority per curiam opinion which held that a prisoner's petition for writ of habeas corpus properly raised the issue of the constitutionality of the living conditions and disciplinary measures enforced upon them at the Missouri State Penitentiary.<sup>35</sup> The Court also noted that in any event the petition could appropriately be treated as an action under the Civil Rights Statute, and remanded it for hearing on that ground also.

On January 13, 1972, the petition of one Francis Haines, a prisoner at the Illinois State Peniten-

<sup>28</sup> Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 185 (1970).

<sup>29</sup> 404 F.2d 571 (8th Cir. 1968).

<sup>30</sup> 442 F.2d 178 (2d Cir. 1971).

<sup>31</sup> *See, e.g.*, *Paniagua v. Mosely*, 451 F.2d 228 (10th Cir. 1971) (Duty of officer must be well defined, and peremptory to extent that it is a positive command and plainly described as to be free from doubt before madamus will lie).

<sup>32</sup> The doctrine of sovereign immunity may bar bringing suit against the governmental unit. *But see Baker v. Washington*, 448 F.2d 1200 (D.C. Cir. 1971) (Sovereign immunity not a bar to a prisoner's suit for damages if vicarious liability can be shown).

<sup>33</sup> *McNally v. Hill*, 293 U.S. 131 (1934) is the major Supreme Court case espousing this view.

<sup>34</sup> *Coffin v. Reichard*, 143 F.2d 443 (6th Cir. 1944).

<sup>35</sup> *Wilwording v. Swenson*, 404 U.S. 249, *rev'g* 439 F.2d 1331 (8th Cir. 1971). *See also Johnson v. Avery*, 393 U.S. 483 (1964); *In re Bonner*, 151 U.S. 242 (1894).

tiary, was decided in the Supreme Court of the United States.<sup>36</sup> Haines had sued the governor and other state officers and prison officials under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970).<sup>37</sup> He claimed damages for injuries asserted to have been suffered after prison officials placed him in solitary confinement as a disciplinary measure. He also claimed denial of due process in the proceedings which led to the solitary confinement. The District Court had dismissed the complaint for failure to state a cause of action upon which relief could be granted, stating that only in exceptional circumstances should courts inquire into the internal operations of state penitentiaries, and the Court of Appeals for the Seventh Circuit affirmed.<sup>38</sup> The Supreme Court of the United States reversed unanimously, stating that the petitioner in his inartfully pleaded petition had nonetheless stated enough facts to be entitled to an opportunity to offer proof. The judgment was vacated and the case was remanded to the District Court.

Since many more cases of claimed abuses of constitutional rights are heard than are the subject for the granting of relief, petitioner may be a long way away from securing anything which he desires. But these cases illustrate one tremendously important fact: what goes on in the prisons of America is no longer going to be concealed behind stone walls. And examples of inhuman abuse through physical punishment or physical torture simply cannot stand the light of day. In addition, since the Supreme Court pointed squarely to Haines' claims of due process abuse, it is well to remember that this is the same Court which recently decided that a welfare recipient could not be cut off of welfare without at least a rudimentary hearing if he protested that decision.<sup>39</sup>

Already many courts have begun to move to compel remedies, many of which prison officials have long desired but which governors and legislatures have not been willing to provide. Direct judicial supervision of major reconstruction of at least two state prison systems (those of Arkansas<sup>40</sup> and Virginia<sup>41</sup>) has been undertaken by the Federal courts. Quite similar court supervision of

major changes to require compliance with Federal constitutional standards is currently in progress in relation to a number of other institutions. Among them, the Wayne County Jail<sup>42</sup> in Detroit, Michigan, the Lucas County Jail<sup>43</sup> in Toledo, Ohio, the Maryland Defective Delinquent Center<sup>44</sup> at Patuxent, Maryland, and the Washington D. C. Youth Center.<sup>45</sup>

#### PRISONER TREATMENT IN INSTITUTIONS

Beyond doubt one of the most important aspects of prison reform is reform of law and sentencing practices so as to see that only those who represent real threats to society are ever held in security type institutions. Correctional literature is full of comments by wardens who estimate that less than 15% of the prisoners committed to them in their judgment represent threats of violence to the community if released. This strongly suggests two things: first, much wider use of probation treatment and supervision in the normal community; second, where a confinement program is thought necessary for nonviolent crimes because of recidivism or a need for social deterrence the institution can and should be of a vastly different type than those which we have been discussing.

At a meeting last fall on Law and Psychiatry, organized by the Ditchley Foundation at Ditchley House in England, I presented some recommendations in relation to treatment in penal institutions<sup>46</sup> to a group consisting primarily of penologists, judges and psychiatrists. Treatment consists of constructing a good society around the offender. To this purpose, I recommended the following standards for institutional treatment:

- 1) No institution larger than 500.
- 2) Psychiatric clinic for each institution, with responsibility for diagnosis and planning and staff training.

<sup>42</sup> Wayne County Jail Inmates v. Wayne County Board of Commissioners (Wayne County Cir. Court Civ. No. 173217).

<sup>43</sup> Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971), *opinion awarding relief*, 330 F. Supp. 707 (N.D. Ohio, 1971).

<sup>44</sup> McCray v. State, 40 U.S.L.W. 2307 (Cir. Ct. Montgomery C., Md., Nov. 11, 1971).

<sup>45</sup> United States v. Alsbrook, 336 F. Supp. 937 (D.D.C. 1971).

<sup>46</sup> Based in part upon NATIONAL COUNCIL ON CRIME AND DELINQUENCY, A MODEL ACT FOR THE PROTECTION OF RIGHTS OF PRISONERS (1972), and REPORT ON THE FIRST UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND TREATMENT OF OFFENDERS, STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS AND RELATED RECOMMENDATIONS (1956).

<sup>36</sup> Haines v. Kerner, 92 S. Ct. 594 (1972).

<sup>37</sup> See note 4 *supra*.

<sup>38</sup> Haines v. Kerner, 427 F.2d 71 (7th Cir. 1970).

<sup>39</sup> Goldberg v. Kelly, 397 U.S. 254 (1969).

<sup>40</sup> Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

<sup>41</sup> Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).

3) Diagnostic receiving facility for period of adjustment and classification.

4) Counselling staff. No case load larger than 100.

5) Staff should not be chosen for custody purposes alone, but also for capacity to set example for qualities of friendliness and leadership.

6) Staff should offer a racial composition (at least somewhat) similar to that of inmates.

7) Encourage employment of group therapy under clinic guidance,

(a) employing counselling staff if available;

(b) if such staff is not available, employing volunteer citizens from nearby community.

8) Encourage use of open type institutions for all inmates who can as a practical matter be handled there.

9) Encourage institutional use of work release and home visits, particularly before parole for all prisoners thought to be capable of successful use of such methods.

10) Full employment or educational programs for all completely institutionalized prisoners.

11) Encourage institutional use of marital visits in prison when home visits are not feasible.

12) Encourage use of half-way houses as first step toward parole.

13) Recognize as goals: a) retain person committed for period required by law, and b) send him back to society a better citizen than he was when he entered institution.

While the Ditchley treatment group endorsed most of the principles outlined above, it is perhaps worth noting that the two which dealt with an effort to begin to normalize prison sex practices as nearly as may be were both turned down. The uttered objections dealt with concerns about public reaction to making even conjugal visits available to prisoners inside or outside the walls. Obviously vengeance continues to play a major role in determining the fate of persons institutionalized for crime.