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## THE COURTS' RESPONSIBILITY FOR PRISON REFORM

EDMUND B. SPAETH, JR.†

## I. INTRODUCTION

COURTS, AS A RULE, are like Victorian children: they speak only when spoken to. Thus, it may be said that their responsibility for prison reform is limited to the adjudication of such cases as prisoners, or perhaps wardens, may present. After examining, and participating in, such adjudications, however, I have concluded that the courts' responsibility for prison reform may not be discharged within the usual confines of a "case" or "controversy,"<sup>1</sup> and that if the courts are to serve with honor, they must say what they expect the prisons to do, and try to make them do it.

## II. THE LIMITATIONS OF PRISONERS' SUITS

The courts' responses to prisoners' suits have proceeded from indifference to confusion, or, at least, uncertainty.<sup>2</sup>

Over and over again it has been held either that the court has no jurisdiction to hear the suit,<sup>3</sup> or that the complaint fails to state a cause of action because it concerns a matter within the prison administrator's discretion, which the court will not review.<sup>4</sup> It seems not to have mattered, or at any rate, not to have mattered enough, that the consequence of such abstention was that no examination was

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1. Cf. U.S. CONST. art. III, § 2.

2. See generally Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 U. KAN. L. REV. 493 (1970); Comment, *The Rights of Prisoners While Incarcerated*, 15 BUFFALO L. REV. 397 (1965); Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962); Note, *Judicial Intervention in Prison Administration*, 9 WM. & MARY L. REV. 178 (1967); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963); Note, 84 HARV. L. REV. 456 (1970).

3. *Oregon ex rel. Sherwood v. Gladden*, 240 F.2d 910 (9th Cir. 1957); *Banning v. Looney*, 213 F.2d 771 (10th Cir.), cert. denied, 348 U.S. 859 (1954); *Williams v. Steele*, 194 F.2d 32 (8th Cir.), cert. denied, 344 U.S. 822 (1952); *Siegel v. Ragen*, 180 F.2d 785 (7th Cir.), cert. denied, 339 U.S. 990 (1950); *Powell v. Hunter*, 172 F.2d 330 (10th Cir. 1949); *Curtis v. Jacques*, 130 F. Supp. 920 (W.D. Mich. 1954); *People v. Collins*, 200 N.Y.S.2d 919 (1960).

4. *Kostal v. Tinsley*, 337 F.2d 845 (10th Cir. 1964), cert. denied, 380 U.S. 985 (1965); *Harris v. Settle*, 322 F.2d 908 (8th Cir. 1963), cert. denied, 377 U.S. 910 (1964); *Childs v. Pegelow*, 321 F.2d 487 (4th Cir. 1963), cert. denied, 376 U.S. 932 (1964); *Hatfield v. Bailleaux*, 290 F.2d 632 (9th Cir.), cert. denied, 368 U.S. 862 (1961); *Tabor v. Hardwick*, 224 F.2d 526 (5th Cir.), cert. denied, 350 U.S. 971 (1955); *Ortega v. Ragen*, 216 F.2d 561 (7th Cir. 1954), cert. denied, 349 U.S. 940 (1955); *State ex rel. Renner v. Wright*, 188 Md. 189, 51 A.2d 668 (1947); *Commonwealth ex rel. Smith v. Banmiller*, 194 Pa. Super. 566, 168 A.2d 793 (1962).

made of a claim, for example, that a prisoner had been beaten to death,<sup>5</sup> or that he had been kept in an isolation cell for a year and a half without proper medical treatment,<sup>6</sup> or that he had been kept in an isolation cell for two months without any clothes or blankets.<sup>7</sup>

I do not mean to oversimplify. There is something to be said for abstention; judges have neither the time nor resources to manage the prisons.<sup>8</sup> Nevertheless, one comes from the cases at least with no pride, and sometimes in shame.

When reviewing Sidney and Beatrice Webbs' book on English prisons, Bernard Shaw said:

Judges spend their lives in consigning their fellow creatures to prison; and when some whisper reaches them that prisons are horribly cruel and destructive places, and that no creature fit to live should be sent there, they only remark calmly that prisons are not meant to be comfortable; which is no doubt the consideration that reconciled Pontius Pilate to the practice of crucifixion.<sup>9</sup>

This is very painful, and I suspect that it was more remorse than precedent that inspired the now famous statement by the Court of Appeals for the Sixth Circuit, *per curiam*, that:

A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law. While the law does take his liberty and imposes a duty of servitude and observance of discipline for his regulation and

5. Clark v. Ferling, 220 Md. 109, 151 A.2d 137 (1959).

6. Snow v. Gladden, 338 F.2d 999 (9th Cir. 1964).

7. United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956), *cert. denied*, 353 U.S. 964 (1957).

8. In this respect, it is interesting to note the following observations taken from an address by The Honorable Wade H. McCree, Jr., Judge, United States Court of Appeals for the Sixth Circuit, during the proceedings of the Fifth Judicial Institute, sponsored by the Crime Commission of Philadelphia, November 21-22, 1969, reported in THE PRISON JOURNAL, at 30-31 (Autumn-Winter, 1969):

Last summer, I was a member at the law faculty of the Salzburg Seminar in Austria and I took a busman's holiday and audited a criminal trial in which a Yugoslav migrant worker was tried and convicted of altering his entry permit. The judge and I discussed the trial when it was concluded, and he invited me to visit the jail which was in a connecting building. I accepted, and was agreeably surprised by its high level of sanitation and by the facilities for work and education even though it was for short term convicts and for persons detained awaiting trial. However, the most interesting discovery was to learn that the judge had general superintendence over the management of the jail and that the warden, who was responsible for its actual operation, was required to answer to the judge for any shortcomings in the treatment of inmates. Of course, Austria doesn't have our separation of powers and both the warden and the judge were employees of the Ministry of Justice.

Nevertheless, he exercised his concern and the inmates knew of it and looked to him as a kind of Ombudsman for their problems.

We judges can't and shouldn't do that, but we should stimulate the public to manifest a greater concern about what happens to the sentenced convict.

9. G.B. Shaw, THE CRIME OF IMPRISONMENT 14 (1946), published as a preface to S. & B. Webb, ENGLISH PRISONS UNDER LOCAL GOVERNMENT (1922), quoted in Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 558 (1963).

that of other prisoners, it does not deny his right to personal security against unlawful invasion.<sup>10</sup>

No doubt the reference in this passage to "a duty of servitude" was an oblique repudiation of the observation by the Virginia Supreme Court of Appeals in 1871 that the prisoner is "the slave of the state."<sup>11</sup> But if the prisoner is not a slave, neither is he a free man, and it remains for the courts to define what they mean by the prisoner's "right to personal security against unlawful invasion."

Generally, definition has been attempted in constitutional terms. Perhaps most notable has been the decision of the Federal District Court for the District of Arkansas declaring that confinement in the state prison system constituted cruel and unusual punishment prohibited by the eighth amendment.<sup>12</sup> Other amendments have also served as the basis for granting relief,<sup>13</sup> and, in addition, relief has been granted on other grounds as well. For example, it has been held that a complaint charging negligence for failure to maintain proper guards, with the result that plaintiff was beaten in the prison yard, states a cause of action under the Federal Tort Claims Act.<sup>14</sup> Furthermore, a writ of mandamus has been issued upon a showing that the prison administration discriminated against the petitioner in a manner contrary to the prison regulations.<sup>15</sup>

10. Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 225 U.S. 887 (1945).

11. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

12. Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970). *See* Weems v. United States, 217 U.S. 349 (1910); Commonwealth *ex rel.* Bryant v. Hendrick, No. 1567, (April Sessions, 1970), Nos. 353, 354, (May Sessions, 1970), Court of Common Pleas, Philadelphia County (cases not reported). *See also* Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970).

13. First amendment right to free speech: Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970); *cf.* Dayton v. McGranery, 201 F.2d 711 (D.C. Cir. 1953); Davis v. Superior Court, 175 Cal. App. 2d 8, 345 P.2d 513 (Dist. Ct. App. 1959). First amendment right to freedom of religion: Howard v. Smyth, 365 F.2d 428 (4th Cir. 1966), *cert. denied*, 385 U.S. 988 (1967); Williford v. California, 352 F.2d 474 (9th Cir. 1965); Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961); United States *ex rel.* Oakes v. Taylor, 269 F. Supp. 1022 (E.D. Pa. 1967); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962); Brown v. McGinnis, 10 N.Y.2d 531, 180 N.E.2d 791, 225 N.Y.S.2d 497 (1962). Sixth amendment right to counsel: Johnson v. Avery, 393 U.S. 483 (1969) (upheld right to access to "jailhouse lawyers"); Bailleaux v. Holmes, 177 F. Supp. 361 (D. Ore. 1959), *reversed sub nom.* Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961), *cert. denied*, 368 U.S. 862 (1961) (in dictum, however, recognized reasonable access to the courts under fourteenth amendment due process); Brabson v. Wilkins, 45 Misc. 2d 286, 256 N.Y.S.2d 693 (Sup. Ct. 1965), *modified* (but right to access to counsel affirmed), 267 N.Y.S.2d 580 (App. Div. 1966). Due process access to courts: *see* Fallen v. United States, 378 U.S. 139 (1964); *cf.* Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961); United States *ex rel.* Wakeley v. Pennsylvania, 247 F. Supp. 7 (E.D. Pa. 1965).

14. Muniz v. United States, 305 F.2d 285 (2d Cir. 1962), *aff'd*, 374 U.S. 150 (1963).

15. Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962). Federal civil rights legislation has also served as a basis for relief: Sostre v. McGinnis, 334 F.2d 906 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964); Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961); and due process has served as a basis for granting habeas corpus relief:

It might be supposed that such varied and resourceful litigation ensures prison reform. I suggest, however, that it does not. My apprehension may be explained by an examination of three opinions.

In *McBride v. McCorkle*,<sup>16</sup> the Appellate Division of the Superior Court of New Jersey had before it a petition for an order to show cause directing the principal keeper of the state prison to explain why he was subjecting petitioner to cruel and unusual punishment through prolonged solitary confinement, and why he was denying petitioner the free exercise of his religion to attend Mass. The court treated the prison system as a state administrative agency. Finding a final decision by the agency, the court proceeded to review the petition according to the following test:

There must be a rule of reason in all prison discipline. Conduct leading to open rebellion or insolence on the part of prisoners cannot be permitted. A prisoner forfeits his free choice of conduct at the moment of his commitment, especially where such conduct is calculated to destroy the order and effectiveness of the institution.<sup>17</sup>

The court found that the petitioner had neither been subjected to cruel and unusual punishment nor denied the free exercise of his religion. The difficulty, however, is that these conclusions were reached with no definition of what was the purpose of the prison. Thus, one is left to wonder how the court satisfied itself that the discipline imposed on the petitioner was necessary to the "effectiveness of the institution," absent a definition of what the institution was supposed to do.

In *In re Ferguson*,<sup>18</sup> ten inmates of a state prison filed a petition *in propria persona* with the Supreme Court of California for a writ of habeas corpus seeking, *inter alia*, the removal of restrictions imposed on their claimed religious activities as Black Muslims. The court appointed counsel and issued an order to the Director of Corrections to show cause. In response, the Director admitted that he had determined that the Muslims should not be classified as a religious group, and said that because the petitioners believed in the supremacy of "the dark-skinned races," and would "kneel to no one" who did not believe in their God, they "present[ed] a problem in prison discipline and management."<sup>19</sup> The court discharged the order to show cause and denied the petition for a writ. Granting that free-

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United States *ex rel.* Noia v. Fay, 300 F.2d 345 (2d Cir. 1962), *aff'd on other grounds*, 372 U.S. 391 (1963); United States *ex rel.* Marcial v. Fay, 247 F.2d 662 (2d Cir. 1957), *cert. denied*, 355 U.S. 915 (1958).

16. 44 N.J. Super. 468, 130 A.2d 881 (1957).

17. *Id.* at 478, 130 A.2d at 886.

18. 55 Cal. 2d 663, 361 P.2d 417, *cert. denied*, 368 U.S. 864 (1961).

19. *Id.* at 667, 670, 361 P.2d at 418, 420.

dom of religion is guaranteed by the fourteenth and first amendments, the court, nevertheless, held that:

[I]t [does not] appear that petitioners may rely on federal constitutional guarantees since, of necessity, inmates of state prisons may not be allowed to assert the usual federal constitutional rights guaranteed to nonincarcerated citizens.<sup>20</sup>

The court did acknowledge, however, that "in cases of extreme mistreatment by prison officials, an inmate of a state prison may obtain relief on federal constitutional grounds."<sup>21</sup>

Notwithstanding this seeming recognition of constitutional relief, the court was nevertheless "reluctant to apply federal constitutional doctrines to state prison rules reasonably necessary to the orderly conduct of the state institution."<sup>22</sup>

Again, one is left to wonder. The court's candor in stating its dilemma is refreshing. How, indeed, can rights designed for free men be applied in prison? How can a rule be said to be "reasonably necessary" when there is no definition of the objective that the rule is designed to achieve? When the court said, "reasonably necessary to the orderly conduct" of the prison, did it mean that the maintenance of order by itself was enough to overcome the Constitution?

In *Sostre v. McGinnis*,<sup>23</sup> the problem suggested by these questions almost emerges; indeed, perhaps it does emerge. The suit was by inmates of a state prison who sought relief under the Civil Rights Act against interference with their practices as Muslims. After discussing various aspects of Muslim doctrines, as these pertained to the problems of whether the doctrines constituted a religion, and the impact on prison discipline of persons who demanded segregation between whites and blacks and taught that whites were "evil," the Court of Appeals for the Second Circuit concluded as follows:

The problem presented by the Muslim group is not whether they should be permitted to have congregational services, a minister, religious literature, but rather, under what limitations protective of prison discipline they should be permitted these rights.

It is of little use for us to announce that because of the religious content of the Muslims' beliefs and practices they must be given the right, even in prison, to follow the dictates of their faith, if we find it necessary immediately to add, "Of course all these rights are subject to such reasonable rules and regulations as the authorities impose."

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20. *Id.* at 671, 361 P.2d at 421.

21. *Id.*

22. *Id.*

23. 334 F.2d 906 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964).

In other words the nub of this whole situation is not to be found in the existence of theoretical rights, but in the very practical limitations on those rights which are made necessary by the requirements of prison discipline.

It is not the business of the Federal Courts to work out a set of rules and regulations to govern the practice of religion in the state prisons. Surely this is a task for the state authorities to undertake. We do not stop with an empty declaration of rights accompanied by generalities as to proper limitations on those rights. We prefer, having given expression to the requirement that insofar as possible within the limits of prison discipline the Muslims be allowed what they ask for, not to leave it at that, but to request that the state authorities propose the rules or regulations which they believe are necessary.<sup>24</sup>

The court therefore reversed and remanded with instructions to the district court to retain jurisdiction pending action by state authorities.

It is difficult to know how to appraise this decision, for appraisal depends upon an unanswered question. When the prison authorities do propose regulations "which they believe are necessary," what will the court do then?<sup>25</sup> If the courts accept a regulation as necessary because the prison authorities say it is, we shall have gained very little.

I do not mean to deprecate what has been accomplished. It may be hoped that some prisons will be somewhat better places because the courts have shown an increased willingness to examine prisoners' claims.<sup>26</sup> Nevertheless, unless relief is to be limited to "cases of ex-

24. *Id.* at 911-12.

25. A partial answer to this question appears in *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971). There, in an action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and 28 U.S.C. §§ 133, 1343(3), the lower court had granted *Sostre* compensatory and punitive damages and injunctive relief against various New York prison authorities. On appeal, the order was substantially modified. A majority of the court of appeals, sitting *en banc*, held, *inter alia*, that the confinement imposed on *Sostre* was not cruel and unusual punishment, and that the lower court had gone too far in requiring procedural due process in disciplinary proceedings. In other respects, however, the court upheld *Sostre's* claims, as for example, with respect to his right to communicate with counsel or public officials. The opinion is notable for its express recognition of the fact that many penologists do not think that "correctional" systems do any correcting. In general, however, the court declined to define by what standards a prison should be measured. Instead, with frequent expressions of reluctance to interfere with the prison officials' discretion, it limited itself to consideration of whether *Sostre's* constitutional rights had been violated. In this respect, the following language of the court is indicative of the position taken:

We do not doubt the magnitude of the task ahead before our correctional systems become acceptable and effective from a correctional, social and humane viewpoint, but the proper tools for the job do not lie with a remote federal court. The sensitivity to local nuance, opportunity for daily perseverance, and the human and monetary resources required lie rather with legislators, executives, and citizens in their communities. [Citation omitted.] 442 F.2d at 205.

See also *Walker v. Blackwell*, 411 F.2d 23 (5th Cir. 1969); *Sharp v. Sigler*, 408 F.2d 966 (8th Cir. 1969); *Knuckles v. Prasse*, 302 F. Supp. 1036 (E.D. Pa. 1969).

26. Cf. *Progress Report of the Chairman of the Board of Trustees and the Superintendent of the Philadelphia Prisons* (December, 1970), which stated that the population of the Holmesburg Prison had, in less than six months, been reduced from 1310 to 746. On August 11, 1970, a three judge court had held that to confine an

trement mistreatment,"<sup>27</sup> when a court is told that a prison regulation is "necessary," it must ask, "Necessary for what?" At least, it must if it wishes its review to be more than an obeisance to a warden's asserted expertise.

When this is appreciated, the limitations of prisoners' suits become apparent: so far the suits have been unable to prod the courts into asking, "Necessary for what?" It is not surprising that this has been so. Prisoners' suits are stated in negative terms: not what is good, but what is cruel and unusual, or otherwise unconstitutional, or a denial of civil rights, or a tort. Consequently, the courts have responded negatively: not by prescribing a model, but by forbidding something, or by awarding damages. And so the prisons have continued, little changed, to be "schools of crime."<sup>28</sup>

### III. THE COURTS' RELATIONSHIP TO THE PRISONS

No doubt it will be suggested that to remark that the courts have failed to prescribe a model that prisons should emulate demonstrates a misunderstanding of the courts' role. Courts do not prescribe models; rather, they proceed obliquely, hoping that by their prohibitions others, better fitted, will be encouraged to do the prescribing.

This point of view, besides being prudent, has the sanction of tradition.<sup>29</sup> Two observations, however, may be made. The first is that the difference between a prohibitory and prescriptive order is often slight, and may be merely semantic. When a court announces that it will prohibit as evidence the fruit of an unconstitutional search,<sup>30</sup> it may as well prescribe what the police must say when they apply for a search warrant,<sup>31</sup> and how they must act when they execute

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untried prisoner there constituted cruel and unusual punishment. *Commonwealth ex rel. Bryant v. Hendrick*, No. 1567, (April Sessions, 1970), Nos. 353, 354, (May Sessions, 1970), Court of Common Pleas, Philadelphia County (cases not reported).

27. *In re Ferguson*, 55 Cal. 2d 663, 671, 361 P.2d 418, 421.

28. See generally TIME MAGAZINE, Jan. 18, 1971, at 48-55; 5 TRIAL, at 10-23 (Oct.-Nov. 1969). See also Burkhart, *Why Prisons Aren't the Answer*, The Sunday Bulletin (Philadelphia), Jan. 10, 1971, § 2, at 1; Burkhart, *Lifer Imprisoned for 26 Years Tells Of Frustration and Despair*, The Evening Bulletin (Philadelphia), Jan. 11, 1971, at 1, col. 1; Burkhart, *Women In Prison Tell of Loneliness, Boredom*, The Evening Bulletin (Philadelphia), Jan. 12, 1971, at 3, col. 3; Burkhart, *Graterford Reported Tense A Year After Strike*, The Evening Bulletin (Philadelphia), Jan. 13, 1971, at 3, col. 3; Burkhart, *Detention Job Overloads Phila. Prisons*, The Evening Bulletin (Philadelphia), Jan. 14, 1971, at 3, col. 3. Cf. G. JACKSON, SOLEDAD BROTHER, THE PRISON LETTERS OF GEORGE JACKSON (1970).

29. Compare A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970), with Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971). (As must be apparent from what has already been said, in this debate I am with Judge Wright.)

30. *Mapp v. Ohio*, 367 U.S. 643 (1961).

31. *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964).



the warrants<sup>32</sup> or arrest a suspect.<sup>33</sup> When a suspect is held entitled to counsel, at preliminary arraignment,<sup>34</sup> at trial,<sup>35</sup> and on appeal,<sup>36</sup> the state is entitled to consider that it has been directed to increase its appropriation to the Public Defender. When an election is enjoined or set aside because the election district is disproportionate,<sup>37</sup> the command to redraw the district boundaries is plain enough. Sometimes the court makes the command explicit, as when it prohibits the use as evidence of a confession unless prescribed warnings have been given the suspect.<sup>38</sup> Even when prescription does not accompany prohibition, there is the hint that prescription may follow. If schools are not desegregated, the court, however reluctantly, may require busing or other action devised by the court to achieve desegregation.<sup>39</sup>

The second observation is, that even if in most cases the courts should limit themselves to prohibition rather than prescription, with respect to prisons the case is different. For prisons, unlike the police, boards of elections, or school districts, are instruments of the courts. Their task is to execute the courts' sentences. Accordingly, the courts have the most immediate reason possible to prescribe how the prisons shall be conducted.

The fact that the courts have nevertheless not prescribed, often, as has been observed, declining even to examine a prisoner's complaint, much less doing anything about it, may perhaps be explained as historical accident. Until the nineteenth century, persons convicted of a crime were not imprisoned at all.<sup>40</sup> Prisons were places of detention for those who were awaiting trial or were being held for such matters as ransom, heresy, or debt. A person convicted of crime was not punished by being committed to prison; he was hung, or mutilated, or flogged, or submerged in cold water, or put in the stocks, or otherwise corporally punished. The first use of a prison as an instrument of punishment occurred in 1681 in the colony of West Jersey, where the Quakers, who disliked corporal punishment, provided a workhouse to confine convicted criminals at hard labor. According to

32. *Chimel v. California*, 395 U.S. 752 (1969).

33. *Terry v. Ohio*, 392 U.S. 1 (1968); *Beck v. Ohio*, 379 U.S. 89 (1964); *Johnson v. United States*, 333 U.S. 10 (1948).

34. *Coleman v. Alabama*, 399 U.S. 1 (1970).

35. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

36. *Douglas v. California*, 372 U.S. 353 (1963).

37. *Reynolds v. Sims*, 377 U.S. 533 (1964).

38. *Miranda v. Arizona*, 384 U.S. 436 (1966).

39. *United States v. School District 151 of Cook County, Illinois*, 286 F. Supp. 786 (N.D. Ill.), *aff'd*, 404 F.2d 1125 (7th Cir. 1968) (see especially the dissenting opinion of Duffy, J., at 1138).

40. See generally Barnes, *The Contemporary Prison: A Menace to Inmate Rehabilitation and the Repression of Crime*, 2 KEY ISSUES, at 11-12 (1965); Leopold, *Imprisonment Has No Future in a Free Society*, 2 KEY ISSUES, at 24-26 (1965); Weeks, *Treatment: Past, Present, and Possible*, 2 KEY ISSUES, at 57-59 (1965).

Barnes, the "practical birth place" of our present prison system, not only in the United States but in the world, was the Walnut Street Jail, established in Philadelphia in 1790, to be followed by the prison at Auburn, New York, completed in 1819, and the Eastern State Penitentiary in Philadelphia, completed in 1829.

If a judge knows that the prisoner in the dock, if convicted, will be dealt with summarily by corporal punishment, it is natural for the judge to concentrate upon the process by which guilt is determined and not to concern himself with the mechanics of how the corporal punishment is inflicted. This attitude seems to have carried over after corporal punishment was abandoned, with the courts evidently regarding confinement in a cell as an event as automatic and as much beyond their concern as a flogging. For a while, this attitude was justified. Confinement in a cell and a flogging were comparable events; the proponents of confinement offered it as simply one form of punishment substituted for another thought to be more cruel. Before long, however, it became apparent that imprisonment was often more cruel than corporal punishment. A prisoner kept in solitary confinement year after year and permitted to see no one suffered more anguish than he would have at the whipping post.<sup>41</sup> To be sure, it was argued that by being confined the prisoner would be led to repent and reform, but this was too plainly a rationalization to be convincing. By the middle of the nineteenth century, Sir Walter Crofton and his associates had instituted the so-called Irish prison system, designed to rehabilitate inmates and prepare them for a law-abiding life. This attracted reformers in the United States, and led to the famous Declaration of Principles of 1870 at the Cincinnati Prison Conference, which led to the opening in 1876 of the Elmira Reformatory.

I do not mean to suggest that the reformers carried the day. Generally, prisons have not yet caught up to the Cincinnati Declaration. In 1922, Tannenbaum said:

We must destroy the prison, root and branch. That will not solve our problem, but it will be a good beginning. . . . Almost anything will be an improvement. It cannot be worse. It cannot be more brutal or more useless.<sup>42</sup>

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41. Cf. Charles Dickens' conclusion, after an 1842 visit to the Eastern State Penitentiary:

My firm conviction is that, independent of the mental anguish it occasions — an anguish so acute and so tremendous, that all imagination of it must fall far short of the reality — it wears the mind into a morbid state, which renders it unfit for the rough contact and busy action of the world. It is my fixed opinion that those who have undergone this punishment MUST pass into society again morally unhealthy and diseased.

C. DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 157-58 (undated).

42. F. TANNENBAUM, WALL SHADOWS: A STUDY IN AMERICAN PRISONS 141-42 (1922), quoted in 2 KEY ISSUES, at 9 (1965).

In 1933, Sellin said:

Even the prisons of the western world have not yet reached the minimum demands for decent physical treatment. . . . Penal institutions are now largely peopled by recidivists. . . .<sup>43</sup>

And in 1970, the Director of the Institute of Correctional Administration at The American University said:

It can be stated conservatively that over half of the major prisons and reformatories in the United States are just "sweet jails" — institutions where prisoners dawdle at their work, engage in a variety of desultory social and educational activities, receive good medical care, and live under so-called programs of treatment which have little or no relation to the particular criminal problem of any one of them.<sup>44</sup>

But the failure of the reformers may, to a considerable extent, be attributed to the indifference of the courts. When the reformers had demonstrated that at least one purpose of imprisonment was rehabilitation, the courts should have recognized that a judgment of sentence to prison was a continuing judgment. No chancellor would order a defendant to abate a nuisance within a given time, and forget about the case. Yet judges committed men to prison for years, and forgot about them.

This indifference, I believe, is one of the principal reasons for the disrepute into which the courts have fallen. And properly so. Suppose a surgeon were asked to perform a routine — not emergency — operation with an instrument known to be defective. He would be properly criticized. Furthermore, his reputation would suffer if he attempted to defend his actions by saying that the instrument was the best the hospital had provided. When a judge sentences a man to prison, knowing that the prison not only will not rehabilitate the prisoner but will make him worse, it is hardly persuasive to reply to public criticism that the prison is the best the legislature and executive have provided.

You will observe that in speaking this way I have turned the discussion around. We started with a consideration of what prisoners' rights were, as these appeared from an examination of suits brought by prisoners. The problem now, however, is not what rights prisoners have, but what rights the public has. A sentence to prison has several purposes: it should be just to the prisoner in that it is not disproportionate to his offense; it may deter others from committing a like

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43. Sellin, *Penal Institutions*, 12 *ENCYCLOPEDIA OF THE SOCIAL SERVICES* 63-64, quoted in 2 *KEY ISSUES*, at 8-9 (1965).

44. Gill, *A New Prison Discipline*, *FEDERAL PROBATION*, June, 1970, at 30.

offense; and it should protect the public, at once, by taking the prisoner out of the community, but also ultimately enabling, or at least helping, the prisoner to return to the community as a law-abiding citizen. When a judge sentences a man to a prison that will probably make him less fitted to act as a law-abiding citizen, the sentence fails in one of its major purposes.<sup>45</sup>

#### IV. HOW CAN THE COURTS FULFILL THEIR RESPONSIBILITY FOR PRISON REFORM?

It is submitted that, if the courts are to fulfill their responsibility for prison reform by making their sentences more effective, there are two efforts in which they should engage. The first of these is in the context of prisoners' suits, and the second involves court administration.

##### A. *Prisoners' suits*

It has been seen that relief in prisoners' suits will be limited, and consequently the prisons will change little so long as the courts continue to subordinate prisoners' rights to prison regulations asserted by the warden to be "necessary." If the courts will recognize, however, that the warden is on the court's business, it will follow that the warden will be regarded as an officer of any agency comparable to any administrative agency entrusted with governmental business. His assertion that something is "necessary" may then be reviewed, and a prisoner asserting that it is not "necessary" may request the review. If the court will further define the purposes of what it expects the prison as its agency to achieve, the review will not be confined to the negative and limited test of whether a constitutional right has been violated, but may be conducted according to a broader test designed to determine the effectiveness of the prison's execution of the court's sentence. An example seems appropriate. If one purpose of a prison sentence be to help the prisoner become a law-abiding citizen by the time he is released, is it reasonably necessary to this purpose that the prisoner

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45. Perhaps it may be said that with respect to a prisoner condemned to death, the only function of the prison is to confine him until he is executed. Even in such a case, however, the prisoner may receive a reprieve, and, as is true of many prisoners sentenced to life imprisonment, eventually be released. For a discussion of the relationship of the goals of rehabilitation, deterrence, and prevention, see L. FULLER, *ANATOMY OF THE LAW* 32-36 (1968). As Fuller observes, in some cases deterrence will be the sole purpose of the sentence (imprisonment of a corporate official for price fixing), and in others, prevention will be (rehabilitation of dangerous offender not practical because of psychological reasons). But in most cases rehabilitation is so clearly at least one, and probably the principal, purpose of the sentence, that discussion here of the philosophy of punishment would be beside the point, which is not to suggest that there is a constitutional right to rehabilitation. Cf. *Powell v. Texas*, 392 U.S. 514, 530 (1968) ("This Court has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects. . . .") The issue is what is an effective sentence.

be forbidden visits by his children or denied books sent him by his parents? Is it necessary that he be required to have his hair cut short, submit his mail to a censor or work in a shop or on a farm that teaches him nothing that will enable him to get a job?

No doubt it will be argued that judges are not penologists and should not meddle in prison administration. However, neither are judges economists, transportation experts, or electrical engineers; and yet they regularly review decisions of the Federal Trade Commission, Interstate Commerce Commission, and Federal Power Commission.<sup>46</sup> As has been said:

The principal purpose of limited judicial review of administrative action is to insure that the decision-makers have (1) reached a reasoned and not unreasonable decision, (2) by employing the proper criteria, and (3) without overlooking anything of substantial relevance. More than this the courts do not pretend to do, and probably are not competent to do. To do less would abandon the interests affected to the absolute power of administrative officials.<sup>47</sup>

Were this approach applied to the review of what happens in prisons, we should all benefit as we always do when the law becomes more just. Cruelties and inadequacies now hidden would be revealed. Prisoners would be given hope and would be helped to become law-abiding citizens. Finally, prison administrators would be encouraged to seek support for changes many of them have long desired.

Not only the principle of judicial review, but the whole scheme of American government, reflects an institutionalized mistrust of any . . . unchecked and unbalanced power over essential liberties. That mistrust does not depend on an assumption of inveterate venality or incompetence on the part of men in power, be they Presidents, legislators, administrators, judges, or doctors. It is not doctors' nature, but human nature, which benefits from the prospect and the fact of supervision.<sup>48</sup>

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46. See Bazelon, *Right to Treatment — Implementation*, 36 U. CHI. L. REV. 742 (1969). With respect to judicial review of the treatment of a person committed to a mental institution, the author makes the following observations:

Very few judges are psychiatrists. But equally few are economists, aeronautical engineers, atomic scientists, or marine biologists. For some reason, however, many people seem to accept judicial scrutiny of, say, the effect of a proposed dam on fish life, while they reject similar scrutiny of the effect of psychiatric treatment on human lives. Since it can hardly be that we are more concerned for the salmon than the schizophrenic, I suspect the explanation must lie in our familiarity with judicial supervision of such matters as railroad rates, airplane design, power plant construction, and dam building. While the importance of this factor can be overestimated, in the law as in all other areas we tend to accept the accustomed and fear the new.

*Id.* at 743.

47. *Covington v. Harris*, 419 F.2d 617, 621 (D.C. Cir. 1969).

48. *Id.*

*B. Court administration*

It may be granted that the usual agencies of prison reform have been the legislative and executive branches. In Pennsylvania today there are developments in those branches which encourage the hope that substantial reform may not be far away. A self-respecting judicial branch, however, will not await legislative or executive initiative. To revert to the example of the surgeon furnished a defective instrument: if he values his professional honor, he will not wait until the hospital administrator perhaps recognizes the need for new instruments; rather, he will go to the administrator and ask for new instruments. If the administrator still declines to act, the doctor will try to compel action. I suggest that this analogy is quite exact, and furnishes an example that the courts might follow.

At least in Pennsylvania, the supreme court has most extraordinary powers of supervision over the lower courts. These powers derive from the supreme court's position as successor to the King's Bench,<sup>49</sup> and have been both confirmed and extended by the new judiciary article of the Pennsylvania Constitution, adopted in 1968.<sup>50</sup> It is interesting to speculate whether the proposition could be defended that pursuant to these powers, the supreme court might prohibit the execution of a judgment of sentence upon sufficient proof that the sentence could not be effectively carried out because of the inadequacies of the prison. However, one need not venture so far. It seems clear that at least the court could require the lower courts, and the prisons as agencies responsible for the execution of the lower courts' judgments of sentence,<sup>51</sup> to submit regular reports from which it could be determined whether the prisons were effective. Suppose it appeared, as I believe it would, that the prisons were so ineffective as to justify the public loss of confidence in the judicial process. What then?

First, the supreme court might petition the legislative and executive branches to appropriate funds and otherwise act so as to improve the prisons. It would be my expectation that such a petition would, if carefully documented, be sufficient, for concern regarding the prisons is by now widespread. But if the petition were ignored, I do not con-

49. *Commonwealth v. Harris*, 409 Pa. 163, 185 A.2d 586 (1962); *Carpentertown Coal & Coke Co. v. Laird*, 360 Pa. 94, 61 A.2d 426 (1948); *Schmuck v. Hartman*, 222 Pa. 190, 70 A. 1091 (1908).

50. PA. CONST. art. 5, § 10.

51. *Cf. Carpentertown Coal & Coke Co. v. Laird*, 360 Pa. 94, 101, 61 A.2d 426, 429 (1948). *See also In re First Congressional District Election*, 295 Pa. 1, 144 A. 735 (1928), holding that the supreme court's supervisory powers extend "not only to inferior judicial tribunals, but also to inferior ministerial tribunals, possessing incidentally judicial powers, and known as quasi-judicial tribunals." *Id.* at 13, 144 A. at 739.

cede the court to be without resource. To the contrary, I suggest that it has the power to compel by writ of mandamus the appropriation of such funds as are reasonably necessary to provide effective prisons.

A pertinent decision has recently been filed by the Supreme Court of Pennsylvania.<sup>52</sup> Generally stated, the facts were these: On June 16, 1970, after the Philadelphia City Council had rejected a request by the Court of Common Pleas of Philadelphia County for additional funds, the President Judge of the court instituted an action in mandamus against the Mayor and other members of the Philadelphia City Government, announcing that:

[A]ny constitutionally established judicial system such as the Court of Common Pleas of Philadelphia has the power to determine for itself what sums are reasonably necessary to carry out its constitutionally mandated functions. . . .

If the court system is to be truly independent as an equal coordinate branch, then it must be free of political control and not subject to the whims of either the executive or legislative departments.

. . . . [T]he one who controls the purse strings has the absolute power to control those who depend on the contents of the purse. . . .<sup>53</sup>

On September 30, 1970, a judge specially assigned issued an order awarding plaintiff \$2,458,000. Both plaintiff and defendants appealed. The supreme court affirmed, only reducing the order "to reflect the amount of time remaining in this fiscal year."<sup>54</sup>

The basis of the affirmance was that the judiciary, as "an independent and co-equal Branch of Government, along with the Executive and Legislative Branches" "must possess rights and powers co-equal with its functions and duties, including the right and power to protect itself against any impairment thereof."<sup>55</sup> From this it was held to follow that "courts have inherent power to do all things that are reasonably necessary for the proper administration of their office with-

52. *Commonwealth ex rel. Carroll v. Tate*, \_\_\_\_ Pa. \_\_\_\_, 274 A.2d 193 (1971).

53. Brief for Plaintiff at 1, *Commonwealth ex rel. Carroll v. Tate*, \_\_\_\_ Pa. \_\_\_\_, 274 A.2d 193 (1971).

54. The opinion of the court was by Chief Justice Bell. Mr. Justice Jones filed a concurring opinion, in which Mr. Justice Eagen joined. Mr. Justice Pomeroy filed a concurring opinion and Mr. Justice Roberts filed a concurring and dissenting opinion. Mr. Justice Cohen took no part in the decision of the case.

55. The Chief Justice cited: *Stander v. Kelley*, 433 Pa. 406, 420-24, 250 A.2d 474, 481-83 (1969); *Leahey v. Farrell*, 362 Pa. 52, 66 A.2d 577 (1949); *Wilson v. Phila. School District*, 328 Pa. 225, 228, 195 A. 90, 93 (1937); *Commonwealth v. Mathues*, 210 Pa. 372, 423-25, 59 A. 961 [omitted in Atlantic] (1904); *DeChestellux v. Fairchild*, 15 Pa. 18, 20 (1950); *Commonwealth v. Mann*, 5 W.&S. 403, 406, 408, 410, 420-21 (Pa. 1843); *In re Surcharge of County Commissioners*, 12 D.&C. 471 (Lack. Co. 1928).

in the scope of their jurisdiction. . . ."<sup>56</sup> In reaching this conclusion, the court said:

The confidence, reliance and trust in our Courts and in our Judicial system on the part of the Bench and the Bar, as well as the general public, have been seriously eroded. We cannot permit this to continue.<sup>57</sup>

Mr. Justice Pomeroy largely devoted his concurring opinion to an elaboration of the implications of this statement, noting that:

the erosion referred to cannot be laid at the door of the defendants in this case, nor can the reappraisal of the judicial processes and system, even in Philadelphia, be considered their sole responsibility. The imperative reexamination which the Court has called for is, as I view it, one which must engage the attention and energy of all branches of government and of the public as well, but remain a principal preoccupation and responsibility of the members of the judiciary, particularly of this Court [footnote omitted], and of the bar.<sup>58</sup>

The principal feature of the court's order concerned the demand by the Philadelphia Court of Common Pleas for funds for its adult and juvenile probation departments. At the hearing before the trial judge, the court of common pleas had offered extensive testimony that its probation departments were so understaffed as to render probation frequently illusory.<sup>59</sup> Of the \$2,458,000 awarded by the trial judge, \$1,050,000 was for probation. Probation is but another form of sentence. Thus, I suggest, it has now been established in principle that a court has the inherent power to require the appropriation of such funds as are reasonably necessary to ensure that its sentences will be effective.

## V. CONCLUSION

The Chief Justice of the United States Supreme Court has said:

In part, the terrible price we are paying in crime is because we have tended — once the drama of the trial is over — to regard all criminals as human rubbish. . . . We lawyers and judges sometimes tend to fall in love with procedures and techniques and formalism. . . . The imbalance in our system of criminal justice

56. Quoting *In re* Surcharge of County Commissioners, 12 Pa. D.&C. 471, 475 (Lack. Co. 1928), adopted in, *Leahey v. Farrell*, 362 Pa. 52, 58, 66 A.2d 579, 579-80 (1949).

57. \_\_\_\_ Pa. at \_\_\_\_, 274 A.2d at 199.

58. *Id.* at \_\_\_\_, 274 A.2d at 200 (Pomeroy, J., concurring).

59. Brief for Plaintiff at 59-69, *Commonwealth ex rel. Carroll v. Tate*, \_\_ Pa. \_\_\_\_, 274 A.2d 193 (1971).



must be corrected so that we give at least as much attention to the defendant after he is found guilty as before.

Whether we find it palatable or not, we must proceed, even in the face of bitter contrary experiences, in the belief that every human being has a spark somewhere hidden in him that will make . . . possible . . . redemption and rehabilitation. If we accept the idea that each human, however bad, is a child of God, we must look for that spark.<sup>60</sup>

Thus far the courts, rather than looking, have too often tended to close their eyes. The suggestions in this paper are offered as an encouragement to them to look, and having seen, to act.

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60. 5 TRIAL, at 15 (Oct.-Nov. 1969).