Volume 22 | Issue 1 Article 1

1976

Due Process in the Prison: A Third Form

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Villanova Law Review

VOLUME 22 DECEMBER 1976 NUMBER 1

DUE PROCESS IN THE PRISON: A THIRD FORM

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Editor's Note

This article was originally delivered as an address to the Institute of Correctional Law Conference on Due Process in the Prison, held at the Villanova University School of Law on January 30 and 31, 1976. The address was delivered extemporaneously from an outline, and the wording is derived from the transcript of the conference, which is on file at the Institute of Correctional Law, Villanova University School of Law, Villanova, Pennsylvania. The transcript of the address was edited to eliminate some of its oral quality and to provide substantive clarification in some parts. Supporting footnotes were supplied where appropriate.

The Editors

I WOULD LIKE TO TRACE THE WAY in which the due process clause has evolved. We forget that due process is a very flexible and very expansive concept. The most forceful way I can think of to remind you how flexible and how expansive it is, is to give you an admittedly superficial history of the due process clause of the fourteenth amendment. I hope the value of this background will be to suggest the directions in which due process must go, if the courts are going to be able to cope with the problems of due process in the prisons. There will be many different points of view with respect to which is the proper direction, but I suggest that we can make a better judgment in choosing among those points of view if we bear in mind the history of the clause. I will suggest, at the end of my remarks, my own opinion as to the course of the due process doctrine in the future. I have no idea what the reaction will be to my own feeling about how due process might develop, but I hope to provoke discussion, because judges, attorneys, and corrections officials are the people who are giving daily meaning to due process.

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The place to start is with the language of the fourteenth amendment, which states: "nor shall any State deprive any person of life, liberty, or property, without due process of law."[1] The first thing to notice about this language is that it limits action — deprivation — by a state. But in fact, it is exactly the same language as is contained in the fifth amendment, which provides, with respect to the federal government: "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."[2] From the outset of our constitutional history, the fifth amendment's requirement of due process was regarded as requiring due process only in the enforcement of the law; it was not thought to pertain at all to the content of the law.[3] Consequently, when the first cases came up after the ratification of the fourteenth amendment, the Supreme Court took the same very limited view of the fourteenth amendment's due process clause as it had in interpreting that clause in the fifth amendment.

The great decision was the *Slaughter-House Cases*.[4] A Louisiana statute provided that a given corporation had the exclusive right to butcher cattle in New Orleans.[5] An action was brought by the other butchers, who asserted that the statute was contrary to the fourteenth amendment's due process clause, because it deprived the butchers of their property.[6] It put them out of business. The Supreme Court rejected that argument very summarily, simply stating: "Under no construction of the due process clause that we have ever seen . . . can the restraint imposed by the state of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision."[7]

Just a few years later, in *Munn v. Illinois*,[8] the Supreme Court again refused to invalidate a statute which was alleged to be a denial of due process.[9] There, the statute regulated the rate that could be charged for the warehousing of grain.[10] Chief Justice Waite wrote for the Court: "We know that this is a power [of rate regulation]

1. U.S. CONST. amend. XIV, § 1.
2. U.S. CONST. amend. V.
3. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856). *See generally* Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911).
4. 83 U.S. (16 Wall.) 36 (1873).
5. *Id.* at 59.
6. *Id.* at 60.
7. *Id.* at 81.
8. 94 U.S. 113 (1877).
9. *Id.* at 134.
10. *Id.* at 123.

which may be abused, but that is no argument against its existence. For protection against abuses by Legislatures, the people must resort to the polls, not to the courts."[11]

Those words were written in 1877. Within about twenty years, the Court entirely reversed itself and transformed the due process clause into one of the most effective weapons against the legislature. The philosophy that so led the Court had been stated by Justice Bradley in the dissent in the *Slaughter-House Cases*.[12] He argued that the butchers, like any other citizens, had a fundamental right — he used the word "fundamental," but he was really talking about "natural rights"[13] — to choose their calling.[41] He declared: "[A] law which prohibits a large class of citizens from adopting a lawful employment . . . does deprive them of liberty, as well as property, without due process of law."[15]

What happened in that period of the late 1800's and early 1900's was that the state legislatures were responding to the dislocations created by the industrial revolution, and they enacted all kinds of remedial legislation.[16] Justice Bradley's theory of natural rights was repeatedly argued to the Supreme Court by those who objected to having their businesses regulated in this manner.[17] So within about twenty years, the courts heeded those appeals, and completely reversed the philosophy they had taken regarding the content of due process.[18] The Justices made this change in a very interesting way. First, the Court held that the police power of the state was restricted to promoting public health, morals, and safety.[19] Second, the Court changed the burden of proof. It used to be that a statute was presumptively valid.[20] Gradually, the Court shifted the burden, so that where the statute affected what the Court considered to be a natural or fundamental right of a person — the liberty to make a contract,[21] the right to hold property[22] — the burden fell on the state to show that the statute was authorized by the

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11. *Id.* at 134.
12. 83 U.S. (16 Wall.) at 111 (Bradley, J., dissenting).
13. *Id.* at 114; *see* B. TWISS, LAWYERS AND THE CONSTITUTION 105 (1942).
14. 83 U.S. (16 Wall.) at 120.
15. *Id.* at 122.
16. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 553–54 (9th ed. 1975).
17. *See, e.g.,* Davidson v. New Orleans, 96 U.S. 97 (1877).
18. *See* Allgeyer v. Louisiana, 165 U.S. 578 (1897); Mugler v. Kansas, 123 U.S. 623 (1887).
19. *See* New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650, 672 (1885).
20. *See* Mugler v. Kansas, 123 U.S. 623, 661 (1887), *citing* The Sinking Fund Cases, 99 U.S. 700, 718 (1878).
21. *See* Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).
22. *See* Holden v. Hardy, 169 U.S. 366, 392–93 (1898).

Constitution, not merely that it was not forbidden by the Constitution.[23] Finally, in deciding whether the state had met that burden, the Court did not hesitate to look outside of the record and take judicial notice of facts that would persuade it as to whether the statute was proper. The great case that illustrated this method was *Lochner v. New York*,[24] decided in 1905. There, the Court held invalid a statute that restricted employment in bakeries to ten hours a day and sixty hours a week.[25] The Court announced that the statute was an unconstitutional interference with the right of adults to enter into contracts with respect to their livelihood.[26] The state submitted considerable medical evidence in support of the statute,[27] but the Court, unmoved, replied with this language: "To the common understanding the trade of a baker has never been regarded as an unhealthy one . . . . It might be safely affirmed that almost all occupations more or less affect the health . . . But are we all, on that account, at the mercy of legislative majorities?"[28]

The Court had completely changed its position. Thirty years later, it completely changed its position again. In 1937, in the case of *West Coast Hotel Company v. Parrish*,[29] the Court upheld minimum wage legislation[30] and initiated a process of overruling a whole series of cases, *Lochner*[31] among them. As we all know, the Great Depression had struck, and the rights to liberty and property were no longer regarded as absolutes. Instead, it was acknowledged that the liberty of one person might be used in such a way as to coerce another person, and it was recognized that the legislature had the right to intervene to mitigate the effect of such coercion.[32] This shift of position represented a great triumph for Justice Holmes, who filed a series of classic dissents, beginning with *Lochner*.[33] In one of them, he commented that it was a legitimate objective of the legislature to try to establish the equality of position between the parties in which the liberty to contract operates;[34] and in *Lochner*, he pointed out that the majority's definition of liberty depended upon accepting a given economic theory which was

23. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938).
24. 198 U.S. 45 (1905).
25. *Id.* at 52.
26. *Id.* at 64.
27. *Id.* at 59.
28. *Id.*
29. 300 U.S. 397 (1937).
30. *Id.*
31. 198 U.S. 45 (1905).
32. *See* E. CORWIN, LIBERTY AGAINST GOVERNMENT 158–61 (1948).
33. 198 U.S. at 74 (Holmes, J., dissenting).
34. Coppage v. Kansas, 236 U.S. 1, 27 (1915) (dissenting opinion).

not written into or otherwise a part of the Constitution.[35] By the time the Court finished overruling cases such as *Lochner,* it had returned to the statement made by Chief Justice Waite in *Munn,* that if legislation had somehow interfered with their natural rights, people should resort to the polls rather than the courts.[36]

While all of that change was going on, an entirely different conception of due process developed and expanded. The due process concept found in cases such as *Lochner* is frequently referred to as substantive due process.[37] As the Court moved away from substantive due process, its attention returned to procedural due process, which is where due process originated.[38] The question underlying procedural due process, and the question with which corrections officials are daily concerned, is what procedures must be followed in enforcing a given law? The basic approach taken by the Court in answering that question is that the requirements of procedural due process will vary according to the particular case.[39] Procedures adequate to determine a welfare claim, for example, may not be adequate in trying a felony case.[40] But as the cases have developed, certain basic requirements may be discerned. There must be notice, and that notice must be sufficient to inform the interested parties of the pendency of the proceeding, and to enable them to prepare for it.[41] There must be a hearing before an impartial tribunal,[42] and during the hearing, it must be possible to confront and cross-examine witnesses.[43] There must be a reasoned decision of record.[44]

On the civil side, procedural due process has developed an extraordinary reach. It touches everything from deportation,[45] to replevin

35. 198 U.S. at 75 (dissenting opinion).

36. Munn v. Illinois, 94 U.S. 113, 134 (1877).

37. *See* G. GUNTHER, *supra* note 16, at 548–656.

38. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856) (upholding the constitutionality of a distress warrant procedure); G. GUNTHER, *supra* note 16, at 507.

39. *See, e.g.,* Rochin v. California, 342 U.S. 165 (1952).

40. *Compare* Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare claims), *with* Duncan v. Louisiana, 391 U.S. 145 (1968) (trial of felony case).

41. Covey v. Somers, 351 U.S. 141 (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

42. Armstrong v. Manzo, 380 U.S. 545, 552 (1965); *In re* Murchison, 349 U.S. 133 (1955).

43. Pointer v. Texas, 380 U.S. 400 (1965); Greene v. McElroy, 360 U.S. 474, 496–97 (1959).

44. Wichita R.R. & Light Co. v. PUC, 260 U.S. 48, 57–59 (1922).

45. *See, e.g.,* United States *ex rel.* Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 106 (1927).

of personal property,[46] garnishment of wages,[47] confession of judgment,[48] termination of welfare benefits,[49] claims for social security,[50] and other areas.

Even more dramatic has been its development on the criminal side. It used to be that there was a marked difference between procedural due process in a state court and in a federal court. In a federal court, the contents of procedural due process were largely defined — and are largely defined — by the Bill of Rights, particularly the first eight amendments.[51] This proposition did not hold true in the state courts. The state courts were bound only by the fourteenth amendment's due process clause, and for many years, the Court required only fundamentally fair procedures.[52] Justice Cardozo's test was whether the procedural right involved was "implicit in the concept of ordered liberty."[53] Today, there is very little difference between federal and state procedure. I believe there is still room for some difference, but I am uncertain as to the extent.

Justice Black was the great leader in bringing state procedure into parity with federal procedure, and as a result of his persuasion,[54] most of the procedural requirements of the Bill of Rights have been absorbed by the due process clause of the fourteenth amendment: the fourth amendment protection against unreasonable searches and seizures;[55] the fifth amendment guarantee against double jeopardy[56] and the right not to incriminate oneself;[57] the sixth amendment right to a speedy,

46. *See, e.g.,* Fuentes v. Shevin, 407 U.S. 67 (1972).

47. *See, e.g.,* North Georgia Finishing, Inc. v. Di-Chem., Inc., 419 U.S. 601 (1975); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

48. *See, e.g.,* Swarb v. Lennox, 405 U.S. 191 (1972).

49. *See, e.g.,* Goldberg v. Kelly, 397 U.S. 254 (1970).

50. *See, e.g.,* Richardson v. Perales, 402 U.S. 389 (1971).

51. *See* Duncan v. Louisiana, 391 U.S. 145, 149–50 n.14 (1968); Grosjean v. American Press Co., 297 U.S. 233, 243–44 (1936); Twining v. New Jersey, 211 U.S. 78, 99 (1908).

52. *See* Ker v. California, 374 U.S. 23, 44 (1963) (Harlan, J., concurring).

53. Palko v. Connecticut, 302 U.S. 319, 324–25 (1937).

54. For a sampling of Justice Black's reasoning, *see* Duncan v. Louisiana, 391 U.S. 145, 162 (1968) (concurring opinion); Mapp v. Ohio, 367 U.S. 643, 661 (1961) (concurring opinion); Irvine v. California, 347 U.S. 128, 139 (1954) (dissenting opinion); Rochin v. California, 342 U.S. 165, 174 (1952) (concurring opinion); Adamson v. California, 332 U.S. 46, 68 (1947) (dissenting opinion).

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

56. Benton v. Maryland, 395 U.S. 784 (1969).

57. Malloy v. Hogan, 378 U.S. 1 (1964).

public, jury trial,[58] the right to notice of charges, confrontation, compulsory process, and counsel;[59] and the eighth amendment protection against cruel and unusual punishment.[60] All of those protections, formerly applicable only as part of due process in the federal courts, are now applicable as part of due process under the fourteenth amendment in the state courts. The result has been to transform criminal trials.

Here is a colorful example. If federal agents seized evidence without a proper warrant, they could not use it in a federal trial. The local police, however, were not bothered with any "vexatious unreasonable search and seizure requirements;" if they seized the evidence without a proper warrant, they could use it themselves, in a state trial, or they could walk down the street and give it to the federal agents, who could then use it in the federal trial, on the reasoning that not they, but the local police had seized it. The name of the doctrine allowing this practice was the "silver platter" doctrine,[61] for obvious reasons. Now the local police are just as bound to get a search warrant as the federal agents.[62]

There are many other elements of procedural due process that have been developed since the Court has struggled with these concepts. I will mention only a few of them. A statute will be held to deny due process if it is too vague to give the defendants notice of what they are supposed to have done wrong.[63] A statutory presumption, either expressed or implied, may be struck down as a denial of due process.[64] In this connection, the great case is the one involving Timothy Leary.[65]

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58. Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right to a speedy trial); Turner v. Louisiana, 379 U.S. 466 (1965) (right to impartial jury); *In re* Oliver, 333 U.S. 257 (1948) (right to a public trial).

59. Washington v. Texas, 388 U.S. 14 (1967) (compulsory process); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation); Gideon v. Wainwright, 372 U.S. 335 (1963) (counsel); Scott v. McNeal, 154 U.S. 34 (1894) (notice of charges).

60. Furman v. Georgia, 408 U.S. 238 (1972); Trop v. Dulles, 356 U.S. 86 (1958); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 466 (1947) (Frankfurter, J., concurring).

61. The "silver platter" doctrine was explained by Justice Frankfurter, in Lustig v. United States, 338 U.S. 74 (1949), as follows: "The crux of that doctrine is that a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a *silver platter.*" *Id.* at 78–79 (emphasis added).

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

63. *See, e.g.,* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Jordan v. DeGeorge, 341 U.S. 223 (1951). *See generally* Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67 (1960).

64. *See, e.g.,* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (presumption implied by the application of public school maternity leave regulation); Heiner v. Donnan, 285 U.S. 312 (1932) (presumption expressly written into federal tax statute).

65. Leary v. United States, 395 U.S. 6 (1969).

Under the particular statute, if he possessed marijuana, he was presumed to know that it was illegally imported.[66] The Court found such a presumption to be arbitrary and a denial of due process.[67] A violation of due process will be found if the prosecutor suppresses evidence favorable to the defendant.[68] A court will not be permitted to accept a guilty plea unless it is sure that the defendant is entering the plea voluntarily and intelligently, and it cannot be sure until it satisfies itself that the defendant knows a great deal about the right to a jury trial, the conduct of a jury trial, the charge, the elements of the offense, and the sentences that may be imposed.[69] A defendant's right to counsel includes the right to appellate counsel.[70] If the defendant is put on probation or is released on parole, the probation or parole cannot be revoked without quite an elaborate procedure.[71] This last example is particularly interesting and important. It used to be said that one had to bear in mind whether a right or a privilege was involved,[72] and parole and probation were regarded as privileges.[73] Probation was considered a gift or "act of grace"[74] by the government to the prisoner. When dealing with privileges, the defendant was not entitled to due process, and the defendant was only entitled to due process when there was an interference with rights.[75] Such distinctions are not drawn today.[76] In 1963, then Judge, now Chief Justice, Burger wrote an opinion in which he indicated that the prisoner had little need for due process before a parole board, because a parole board was not to be regarded as an adversary of the prisoner; it had the prisoner's interests at heart; its concern was rehabilitation.[77] Later, Chief Justice Burger wrote these words in

66. *Id.* at 30.
67. *Id.* at 36, 53.
68. Brady v. Maryland, 373 U.S. 83 (1963).
69. Boykin v. Alabama, 395 U.S. 238 (1969).
70. Douglas v. California, 372 U.S. 353 (1963).
71. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probation); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole).
72. *See* Numer v. Miller, 165 F.2d 986 (9th Cir. 1948); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968).
73. Escoe v. Zerbst, 295 U.S. 490 (1935) (probation); Ughbanks v. Armstrong, 208 U.S. 481 (1908) (parole).
74. Escoe v. Zerbst, 295 U.S. 490, 492 (1935) (Cardozo, J.).
75. *See* Van Alstyne, *supra* note 72, at 1440.
76. *See, e.g.,* Graham v. Richardson, 403 U.S. 365, 374 (1971); Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). *See generally* Van Alstyne, *supra* note 72, at 1458–64.
77. Hyser v. Reed, 318 F.2d 225, 237 (D.C. Cir.), *cert. denied,* 375 U.S. 957 (1963). The procedural protections due a parole applicant are roughly equivalent to those afforded the convict at the sentencing proceeding. Menechino v. Oswald, 420 F.2d 403 (2d Cir. 1970), *cert. denied,* 400 U.S. 1023 (1971).

Morrissey v. Brewer:[78] "By whatever name the [probationer's or parolee's liberty is called], the liberty is valuable and must be seen as within the protection of the fourteenth amendment. Its termination calls for some orderly process, however informal."[79]

I offer this very summary history, because, as you look back and consider how changeable and how expansive the definition of due process has been, you can sense how the courts are almost inevitably propelled into the prison. As recently as thirty years ago, the prevailing doctrine was that prisoners forfeited all of their liberties,[80] as shown by that old case out of Virginia which described the prisoner as a "slave of the state."[81] Fortunately, this idea is no longer with us.[82] In 1948 the Supreme Court said that a prisoner only lost so many rights and privileges as justified by the considerations underlying our penal system.[83] More recently, a court has noted that a convict is a person entitled to the protection of the fourteenth amendment.[84] Given this framework, the courts had to wonder what protections were afforded by the fourteenth amendment and what considerations were underlying our penal system, and as they wondered, they have become increasingly anxious. On the one hand, the Court has observed: "Federal courts sit not to supervise prisons . . . . We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs."[85] On the other hand, the same Court indicated in the same paragraph, that it does sit "to enforce the constitutional rights of all 'persons,' including prisoners."[86]

The Supreme Court's most recent decision, *Wolff v. McDonnell*,[87] reflects this tension between protecting without supervising.[88] I do not see any easy resolution of the tension. In fact, I see the tension increasing to the point where the courts will have to devise a third form of due process, applying not simply to a given individual whose liberty may be threatened, but encompassing the entire criminal justice system. The fundamental hope underlying procedural due process is

78. 408 U.S. 471 (1972).
79. *Id.* at 482.
80. *See* S. KRANTZ, THE LAW OF CORRECTIONS AND PRISONERS' RIGHTS 227 (1973).
81. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).
82. *See* Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944), *cert. denied*, 225 U.S. 887 (1945).
83. Price v. Johnston, 334 U.S. 266, 285 (1948).
84. Washington v. Lee, 263 F. Supp. 327, 331 (M.D. Ala. 1966), *aff'd mem.*, 390 U.S. 333 (1968).
85. Cruz v. Beto, 405 U.S. 319, 321 (1972).
86. *Id.* at 321.
87. 418 U.S. 539 (1974).
88. *See id.* at 556.

that, by insisting upon sound procedure, the enforcement of the law may be made fair. Perhaps the most famous due process case is *Gideon v. Wainwright*,[89] which held that the accused must have counsel. Why does he need counsel? Because a trial cannot otherwise be fair; the accused does not know enough to protect himself: he cannot decide what evidence is admissible, and he cannot really understand the indictment. Criminal defendants need lawyers to guide them.[90] If that fundamental hope is to be realized, I suggest that procedural due process must go a great deal farther than it has so far, because there are many highly arbitrary, unregulated aspects of the administration of criminal justice today. These aspects must be brought within the ambit of procedural due process if we are to have any expectations of a fair administration of the criminal law. For instance, in Pennsylvania the choice of which cases to prosecute, and which cases to divert away from prosecution and into what is known as Accelerated Rehabilitative Disposition (ARD)[91] is almost entirely arbitrary at present. The amount of bail[92] fixed, or the decision to grant bail at all, is almost entirely arbitrary. Sentencing[93] is almost entirely arbitrary, in due process terms. The Supreme Court has started to nibble at the due process implications of sentencing. The key case is one in which the record demonstrated that in imposing sentence, the judge had taken into account facts that were not true.[94]

Even within the prison, due process must be extended. Having put aside the old privilege/right dichotomy,[95] the classification procedures become critically important.[96] Does a prisoner have a right to health care as a matter of due process? The Court will find itself backed into that consideration, because it has already held in *O'Connor v. Donaldson*[97] that a state cannot confine a civilly committed person, without treatment, if that person is nondangerous and could live in normal society either alone or with aid from family or friends.[98] The *Donaldson* holding is very narrow,[99] but these narrow holdings have a

89. 372 U.S. 335 (1963).
90. *Id.* at 345.
91. PA. R. CRIM. P. 175–85.
92. PA. R. CRIM. P. 4003–04.
93. PA. R. CRIM. P. 1401–09.
94. Townsend v. Burke, 334 U.S. 736 (1948).
95. For a brief discussion of the right/privilege dichotomy, *see* notes 72–76 and accompanying text *supra*.
96. Federal courts have already been called upon to review state classification procedures. *See, e.g.*, Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970).
97. 422 U.S. 563 (1975).
98. *Id.* at 576. Although the Court remanded to the court of appeals the question of the hospital superintendent's personal liability, the Court's holding impliedly acknowledged that such personal liability was possible. *Id.* at 576–77.
99. *See id.* at 573.

way of expanding. I think it will expand from the civil field into the criminal field. An action is now pending in Philadelphia, asserting that prisoners who need mental health care in the Philadelphia County prisons are entitled, as a matter of law, to have it.[100] The action was brought under the Mental Health and Mental Retardation Act,[101] but the constitutional overtones are very apparent.

What about prisoners' right to work? Do they have a right to be paid for work? Is running the prison with prison labor, especially if the prisoner is a detentioner and thus presumed innocent, in conformity with due process? Whatever the answers to those questions, the traditional hope of the law is that procedural due process will work out answers, and when the answers are worked out, the result will be fairly administered prisons. My closing point is this proposition: I do not think we will find the answers; I do not think we can. Because of my belief in that respect, I think that due process is going to move in a direction that it never has moved before.

The prisons now are in for very hard days. On the one hand, more and more people are going to enter the prisons. The sentences are not going to get shorter; they will get longer. A number of legislatures are choosing to enact mandatory sentencing statutes. Meanwhile, prison budgets are not going to be increased sufficiently, if at all. New York City is broke. Philadelphia is in trouble. All the big cities are in the same position. Furthermore, few people care. There will not be the push to make prisons the sort of institutions where the procedural due process that has already evolved, or will evolve, can work. If these predictions are correct, there will be a very painful confrontation. It has already happened in New York City. What does a court do when, under the principles of due process, it concludes that a prison does not

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100. Green v. Soffer, No. 3381 (C.P. Phila., filed March 28, 1973).

101. *See* Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN. tit. 50, §§ 4101-4704 (1969). Certain definitional sections of the Mental Health and Mental Retardation Act have recently been repealed by the Mental Health Procedures Act of 1976 (the 1976 Act), Act No. 143, §§ 101-503, 1976 Pa. Legis. Serv. 345-61 (to be codified as PA. STAT. ANN. tit. 50, §§ 7101-7503).

Section 102 of the 1976 Act states in pertinent part: "It is the policy of the Commonwealth . . . to seek to assure the availability of adequate treatment to persons who are mentally ill . . . ." Act No. 143, § 102, 1976 Pa. Legis. Serv. 346 (to be codified as PA. STAT. ANN. tit. 50, § 7102). Section 401(a) of the 1976 Act provides that if a prisoner "is or becomes severely mentally disabled, proceedings may be instituted for examination and treatment under the civil provisions of this act in the same manner" as if he were not a prisoner. Act No. 143, § 401, 1976 Pa. Legis. Serv. 357 (to be codified as PA. STAT. ANN. tit. 50, § 7401). Perhaps the policy of the Act and its nondiscriminatory application to prisoners can be construed as creating a prisoner's right to adequate treatment, at least as to those prisoners who are "severely mentally disabled."

give due process, and the prison officials answer in effect: "We are doing the best we can?" Either the court backs down, or the court closes the prison. A federal district court judge in New York took the latter course, saying generally: "If you do not make the Tombs in conformity with principles of constitutional law, I will close it," and he closed it.[102]

I suggest that closing the prisons is not a solution, and that something else must be worked out. I think the alternative is to develop a far more expansive view of due process. Reflecting upon the history of due process and the extraordinary changes that it has already undergone, I do not hesitate to make such a suggestion. This new due process will have to view the administration of criminal justice in systemic, rather than in individual, terms. The only case that I know of which has expressly taken this approach is a case out of Philadelphia, where the court pointed out that the Philadelphia prison violated the constitutional rights of the prisoners in a variety of respects.[103] But then it further pointed out that relief could not be expected solely by reforming the prison.[104] Recently, there was a conference of prison superintendents and others concerned with prisons, from seventeen southern states.[105] These people asserted that there is no sense of coordination or planning in the criminal justice system; that the police, the prosecutors, and the courts all acted without any consideration of the impact that their unrelated and disjointed decisions might have upon the prisons.[106] The inevitable result is that prisons are hopelessly unable to conform to the legal requirements that evolving principles of procedural due process are imposing upon them.

The Philadelphia Commission for Effective Criminal Justice has made a survey of the Philadelphia criminal justice system, with this

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102. Rhem v. Malcolm, 377 F. Supp. 995 (S.D.N.Y.), *aff'd*, 507 F.2d 333 (2d Cir. 1974). The Second Circuit Court of Appeals affirmed the district court's finding that the prison, as operated, violated the Constitution, but remanded for a reconsideration of the remedy. Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974). On remand, the district court entered judgment and held that the prisoners, who had since been transferred to another prison, had the same constitutional rights regardless of where they were confined. Rhem v. Malcolm, 389 F. Supp. 964 (S.D.N.Y.), *aff'd* 527 F.2d 1041 (2d Cir. 1975).

103. Jackson v. Hendrick, No. 2437 (C.P. Phila., filed Apr. 7, 1972). The trial court also ordered the appointment of a master to aid in preparing a plan to correct prison conditions. *Id.* On appeal, the commonwealth court reversed this appointment Hendrick v. Jackson, 10 Pa. Commw. Ct. 392, 309 A.2d 187 (1973). On further appeal, the Pennsylvania Supreme Court reinstated the trial court's appointment of a master. Jackson v. Hendrick, 457 Pa. 405, 321 A.2d 603 (1974).

104. Jackson v. Hendrick, No. 2437 (C.P. Phila., filed Apr. 7, 1972).

105. N.Y. Times, Jan. 25, 1976, at 24, col. 1. These corrections officials met under the auspices of the Southern Governors Conference in Nashville, Tennessee. *Id.*

106. *Id.*

very problem in mind. A handful of the facts that the Commission found will illustrate the problem: an estimated $261 million is invested in the criminal justice system in Philadelphia in a year; approximately $132 million of that amount goes for arresting people; and $78 million of it goes for trying them; the prisons get $16 million; probation and parole get $5.7 million.[107] The figures themselves suggest a disproportion, but the problem goes deeper than this superficial indication. These enormous sums of money are allocated without any previous planning, without any thought as to what impact the conduct of one component of the system will have on another. There is no evaluation of the programs or activities undertaken by any of the components. Some of the results are very striking. From 1972 to 1974, with enormous backlogs in the courts, a staggering number of gambling cases were tried, with remarkable results: less than ten percent were found guilty, and only a handful went to jail.[108] In another instance, a program was set up to try to relieve the overcrowding in the prisons by providing for pretrial services and conditional probation.[109] It was funded to handle 1500 people, but its case load was 185.[110] No one has monitored this program. No one has asked: "What went wrong?"

As for diversion, it is said that the criminal justice system would collapse but for the number of people being diverted out of it. But the criteria by which the diversion decision is made are not even written, much less promulgated. What sort of followup is there? No one knows. In 1972, when that Philadelphia court looked at the prisons, it discovered that forty-five percent of the detentioners were in prison for only seven days.[111] In other words, their bail would be set, but they could not make the bail initially; therefore, they went through the full-dress criminal process; they were taken by the sheriff to the prison; they were classified, issued clothing, and assigned a cell; and then within seven days, they managed to make the bail and were released.[112] The process is utterly disruptive of any orderly administration

107. PHILADELPHIA COMMISSION FOR EFFECTIVE CRIMINAL JUSTICE, FACT SHEET AND COMMENTARY 1 (1975).

108. *See* 1972 ANNUAL REP. OF PHILADELPHIA COMMON PLEAS & MUNICIPAL COURTS 26, 48; 1973 ANNUAL REP. OF THE PHILADELPHIA COMMON PLEAS & MUNICIPAL COURTS 21, 43; 1974 ANNUAL REP. OF THE PHILADELPHIA COMMON PLEAS & MUNICIPAL COURTS 20, 41.

109. INSTITUTE FOR CRIMINAL LAW AND PROCEDURE, GEORGETOWN UNIVERSITY LAW CENTER, SECOND YEAR REPORT, EVALUATION OF CONDITIONAL RELEASE PROGRAM, PHILADELPHIA, PENNSYLVANIA 9 (1975).

110. *Id.*

111. Jackson v. Hendrick, No. 2437 (C.P. Phila., filed Apr. 7, 1972).

112. *Id.; see* note 103 *supra.*

of a prison. Since that time, there have been many programs instituted,[113] but the percentage of seven-day detentioners remains fifty-one percent.[114] That indicates a complete lack of control.

Somewhere along the line — and I suggest that it will have to be in the courts — a judge will be forced to say: "I cannot look at a given, individual prisoner to see whether he is getting due process. I know that he is not getting it. The prison in which he is an inmate is overwhelmed by its physical difficulties. Therefore, the only way that procedural due process can be achieved is not through an individual approach, but an approach which considers the individual in an entire system and makes the system itself follow some minimum degree of rational planning." I would agree at once that no court has said anything similar. Due process has not gone nearly so far. But we have seen how it has changed since the late 1800's, and how fast it is changing now. It is not my prediction, but it is my hope that it will go in the direction that I have outlined for you.

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113. *See generally* PHILADELPHIA COMMISSION FOR EFFECTIVE CRIMINAL JUSTICE, CRIMINAL JUSTICE GUIDE (1975).

114. PHILADELPHIA COMMISSION FOR EFFECTIVE CRIMINAL JUSTICE, FINAL REPORT ON INTERVENTIONS TO REDUCE SHORT-TERM DETENTION 2 (1975) (prepared by F. Farrow and T. Gilmore).