Buffalo Law Review

Volume 21
Number 3 *Prisons on Trial: A Symposium on the Changing Law of Corrections*

Article 9

4-1-1972

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David F. Greenberg
Committee for the Study of Incarceration

Fay Stender
Prison Law Project

THE PRISON AS A LAWLESS AGENCY

DAVID F. GREENBERG* AND FAY STENDER†

In a remarkably prophetic passage, W. E. B. DuBois described, more than half a century ago, the desperate plight of black people trying to free themselves from the suffocating confinement of social imprisonment:

> It is difficult to let others see the full psychological meaning of caste segregation. It is as though one, looking out from a dark cave in a side of an impending mountain, sees the world passing and speaks to it; speaks courteously and persuasively, showing them how these entombed souls are hindered in their natural movement, expression, and development; and how their loosening from prison would be a matter not simply of courtesy, sympathy, and help to them, but aid to all the world. One talks on evenly and logically in this way, but notices that the passing throng does not even turn its head, or if it does, glances curiously and walks on. It gradually penetrates the minds of the prisoners that the people passing do not hear; that some thick sheet of invisible but horribly tangible plate glass is between them and the world. They get excited; they talk louder; they gesticulate. Some of the passing world stops in curiosity; these gesticulations seem so pointless; they laugh and pass on. They still either do not hear at all, or hear but dimly, and even what they hear they do not understand. Then the people within may become hysterical. They may scream and hurl themselves against the barriers, hardly realizing in their bewilderment that they are screaming in a vacuum unheard and that their antics may actually seem funny to those outside looking in. They may even, here and there, break through in blood and disfigurement, and find themselves faced by a horrified, implacable, and quite overwhelming mob of people frightened for their own very existence.[1]

DuBois could as easily have been describing the almost insurmountable difficulties today's actual, not metaphorical, prisoners face in communicating the nightmares of their lives to those outside the walls, and the violent repression of even their slightest efforts to obtain some breathing space for themselves. The simi-

* B.S., University of Chicago, 1962; Ph.D., 1969. Senior Fellow, Committee for the Study of Incarceration; founder of Chicago Connections—a prisoner support group.

† B.A., University of California at Berkeley, 1953; J.D., University of Chicago, 1956. Co-founder and staff attorney, Prison Law Project, Oakland, California.

The views expressed herein are those of the authors and do not necessarily reflect the position of the Committee for the Study of Incarceration.

1. W. DUBOIS, DUSK OF DAWN 130-31 (1968).

larity in the situation of prison inmates and that of black people in the larger society is too striking to be written off as merely metaphorical. Convicted criminals were the one category to which the thirteenth amendment's prohibition of involuntary servitude explicitly did not apply. Exploitation of prisoners' slave labor in the form of chain gangs and the convict lease system continued after chattel slavery had been ended, and survives today in the form of lucrative "Prison Industries," which return substantial profits to state and federal treasuries because of their exemption from minimum wage laws. The parallel reaches much farther, extending even to the reactions of those in power when the oppressed reach for emancipation. In each case those with unanswered and long-standing grievances began to take matters into their own hands, acting in response to a "long train of abuses and usurpations"; in each case the official response has been "shoot first and ask questions later." Whether initiated by those in prison or those outside, attempts to achieve social change were met with arrests, beatings, killings, with newspaper editorials deploring "excesses" and admonishing restraint and patience, with official investigating committees representing anyone but those who suffer, and with a flurry of public concern polarized between those advocating even harsher repression and those wishing to save the system with a few inconsequential reforms—but which in any event dissipates in days or weeks leaving nothing changed. The parallel is doubly striking in that, likely as not, the prisoner is black or brown.

The significance of these parallels, as well as their implication for an understanding of American society, deserves exploration. The significance of racial discrimination in the South was vigorously debated in the early days of the civil rights movement. Was Mississippi an "aberration" of the American system? So contended the liberals. Was it simply America writ large? So contended the radicals. The same question can be asked of the prison system. Are the horror stories acted out in so many prisons mere "exceptions" to a usually benign "correctional" system, or do they on the contrary reflect something essential to the entire prison system, if not to American society as a whole? Is Attica an anomaly, or is it the crux of the entire system, reaching out to those on parole, and beyond them to the man or woman in the ghetto or barrio or slum or political movement, whose physical location is far from the penitentiary?

A. *Leviathan and the Rule of Law*

We can answer this question only by examining the prison system in its relation to society. The text which perhaps poses this problem best for us was written more than three hundred years ago by Thomas Hobbes, who asserted that unless human greed and aggression were curbed by fear of punishment, civilization itself would disintegrate:

> [D]uring the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man. . . .
>
> . . . In such condition, there is no place for Industry; . . . no Arts; no Letters; no Society and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.[2]

Hobbes argued that social cohesion could be created and maintained through intimidation, to be accomplished by an immensely powerful unitary state apparatus, the Leviathan.

Contemporary Americans are in an excellent position to assess Hobbes' contention. We are all aware of the extent to which the fear of state-imposed punishment constrains our action and leads us to toe the line; in this respect Hobbes' faith in the Leviathan was not unjustified. At the same time, fear of punishment has never succeeded in eliminating domestic violence or theft. Furthermore, the last four decades have seen a steady growth in the strength of the executive branch of government. Hundreds of thousands of Asians have died under its bombs and bullets in a war that has raged unabated for a decade, despite its overwhelming unpopularity in recent years. Traditional vehicles of protest and opposition politics have had little if any impact on its continuation. Nor have they had substantially greater impact on domestic problems of poverty or racism. The system's inflexibility in the face of efforts to bring about changes by "working within the system" has led to pervasive feelings, shared by black, brown, white, young, intellectual, and many others, that the executive is unrestrainable, unlimitable, unstoppable. New techniques of protest and expression of dissent and opposition flow from a deep and empirically well-founded belief that the old ones have had very limited utility.

2. T. HOBBES, LEVIATHAN ch. 13, at 62 (1651).

Living in the belly of the Leviathan, American prisoners have reason to be more acutely aware than perhaps anyone else of what Hobbes' philosophy has meant. Is it not those who are most firmly in the grip of Leviathan who live in "continuall feare, and danger of violent death"; those most rigidly controlled by the State whose lives are "solitary, poore, nasty, brutish and short"? The facts speak for themselves.

A recent federal court decision in the Eastern District of Virginia documented many instances of abuse suffered by prisoners in that state; we quote only one:

> The Court finds that in late August of 1970, Lassiter was placed in a meditation cell by reason of the fact that he was mentally disturbed and his behavior was sometimes uncontrollable. . . . Breeden, through an inmate named Marsh Whitney, secured copies of records of Lassiter's psychiatric care over the three prior years.
>
> Between August 25th and Lassiter's death, while Lassiter was confined to a meditation cell, he screamed day and night apparently seeking help. . . .
>
> Efforts were made by Breeden to bring to the attention of the prison nurse the records he had secured from inmate Whitney. On August 27th Breeden spoke to a lieutenant and subsequently gave him a copy of what purported to be a doctor's letter diagnosing Lassiter's condition as chronic schizophrenia. On August 29th Breeden wrote to Superintendent R.M. Oliver about the case.
>
> Lassiter continued to scream for help until he died on August 31st.[3]

Similar circumstances and events have been reported elsewhere.[4] In San Quentin George Jackson and two other prisoners

3. Landman v. Royster, 333 F.Supp. 621, 638 (E.D. Va. 1971).

4. According to a San Quentin inmate:

> For years San Quentin has been a chamber of horrors to convicted felons hapless enough to be placed here. The nightmares that take place have never been related except in whispers late at night among the cons themselves; in whispers because to discuss these atrocities openly might cost one more than he can afford. His life. Those who become aware the quickest are the ones who don't readily adjust to harsh treatment and eventually wind up in one punishment center or another. This is where education about life in San Quentin begins. You never forget the screams late in the night, the bloody pulp that was once a man hurried out on a stretcher before daybreak, the report of accident or suicide in the newspaper a few days later, the smirking nightshift guard standing on the tier giving a blow-by-blow description to his dayshift buddy. Once you hear how a certain guard paid a convict a few cartons of cigarettes to kill another, your education is complete. From then on, when an officer grabs a convict and pushes him around, you don't wonder why so few fight back.

G. Saladin in R. MINTON, INSIDE: PRISON AMERICAN STYLE 97-98 (1971).

were slain last August. Two days after their deaths, the following affidavit was released by all 26 inmates who were in the Adjustment Center where the three slain men were incarcerated.

> We, the undersigned, each being held incommunicado because of suffering from both wounds and internal injuries inflicted on our persons by known and unknown agents of Warden Louis S. Nelson.
>
> That Warden Louis S. Nelson and Associate Warden James W. L. Park, through their agents did, on August 21, 1971, kill one George Jackson, and conspired to murder the undersigned who refused to join in the state official's conspiracy.
>
> That Officers Doe 1, Doe 2 and Doe 3 did open the cell gates and order the undersigned to come from their cells, thereafter gunshots or what appeared to be gunshots went off and all went into the cells in the back of the same building to avoid being shot. Thereafter the prison guards, armed with guns, entered the cell block and ordered the undersigned to come out or be killed. The undersigned was ordered by the officers to take off all their clothes and walk from the cell one at a time. Each of the undersigned received vicious physical beatings by prison guards with blackjacks, clubs and guns. Each of the undersigned was handcuffed and made to lay on the ground naked from approximately 4 o'clock P.M. to 10 o'clock P.M., at which time, one inmate, Allen Mancino, who was hand- and leg-chained on the ground was begging the guards to loosen the handcuffs cutting him, and was told to keep his mouth shut by the officer guard who shot part of his leg off with a rifle. There, Mancino was made to lay, begging for a doctor for approximately an hour before the guard would allow him moved. Thereafter, the undersigned was made to lay on the grounds while prison guards threatened to kill them and shot all around the undersigned; beating the undersigned in such a way wounds and injuries still show on them, their bodies, and they still suffer from aforesaid beatings, and are being held incommunicado by Warden Louis Nelson. While being held incommunicado, the undersigned are being constantly threatened by prison guards.
>
> That the undersigned are suffering from the wounds, injuries and living in an atmosphere of fear by reasons that have been heretofore stated.
>
> That the undersigned are denied the right to have legal papers, and seek permission from this court to further offer affidavits in testimony upon hearing, if heard by this court.
>
> That defendant Nelson will continue his beastly acts while the court grant the relief sought. I declare under penalty of perjury the foregoing is true and correct.[5]

5. The affidavits are in E. MANN, WHY IS GEORGE JACKSON DEAD? 14 (1971).

Nor is San Quentin unique in the California prison system. The following statements were written by prisoners in the Correctional Training Facility at Soledad:

> O Wing. Where guards beat on guys for almost nothing, where one Doctor hack took convicts by force out of their cells and gave them shock treatments strapped on a common barber shop chair. Where convicts were thrown gas bombs in their cells after being beaten to subdue them they called it. Where guards opened convict cell doors on purpose with others they knew would fight, or stab, or kill each other . . . .
>
> . . . .
>
> A black inmate by the name of P. refused to come out of his cell and was repeatedly tear-gassed until he passed out. He was then taken to the officers' area and when he regained consciousness a struggle insued and inmate P. was wantonly beaten and was called "nigger" repeatedly. He was then taken to the hospital; he died the same day. His death was passed off as heart failure.
>
> After the murder of P. by prison officials there were never more than six Blacks allowed on Max Row which houses 24 inmates thus the remaining 18 cells were occupied by Anti-Black Caucasian and Mexican inmates who race-talk us in shifts so that its done 24 hours a day. On their exercise periods they spit, throw urine, and feces in our cells while the officials stand by in indifference and approval. They, the officials, call us HAMMERS and NIGGERS (both mean the same thing).
>
> The prison officials here stopped serving the meals and they immediately proceeded to poison our meals by filling food to be issued to us with cleanser powder, crushed glass, spit, urine and feces while the officials stood by and laughed.
>
> . . . .
>
> On the 28th of December a list was passed out announcing the opening of the Max Row exercise yard on the 29th. It didn't open because there was still some work yet to be done. But I did notice that white inmates and officials were awfully cheerful for some reason or another and they continuously didn't forget to remind us of the yard opening soon.
>
> On January 13, 1970, seven Blacks and eight Caucasians were released to O Wing yard for exercise. There was no gang fight as was reported to the news media; only seven inmates actually engaged in physical combat to the best of my knowledge. The first shot killed N. who was only a few feet from me and as I turned to go to him and see how bad he was hurt E. and M. were only a short distance from me and yelled to me to watch out and I turned

to face the attack directed at me by two Caucasians who were running towards me. E. started for N. to presumably see how badly he was hurt and to protect him from being attacked while he was down. But he was shot dead a few feet from N., before he reached him and M. was shot dead trying to come to my assistance. There were NO warnings of any kind given before the shooting, there was NO ganging up on any inmate by Blacks. The guard in the tower leaned out of the window with his gun from the time the first Black inmate arrived on the yard.

I looked at the tower guard and he was aiming the gun toward me and I thought then that he meant to kill me too, so I moved from the wall as he fired and went over to stand over inmate M., all the time looking the guard in the gun tower in the face. He aimed the gun at me again and I just froze and waited for him to fire, but he held his fire. After I saw he was not going to fire, I pointed to where inmate M. lay, with two other Black inmates bending over him, and started to walk toward the door through which we had entered the yard, and the tower guard pointed the gun at me and shook his head. I stopped and begged him for approximately ten minutes to let me take M. to the hospital but all he did was shake his head. Then I started forward with tears in my eyes, expecting to be shot down every second. The tower guard told me, "That's far enough." Then another guard gave me permission to bring M. off the yard and I was ordered to lay him on the floor in the officer's area and go to my cell, which I refused to do until M. was taken to the hospital.[6]

These reports are only a tiny fraction of those arriving in a steady stream at the law offices of attorneys engaged in prison litigation.[7] We wish they were exceptional; unfortunately they are not. What has been reported here could be documented in most prison systems throughout the country. Any effort to make sense of these stories, whose unreality and unbelievability is matched only by the similar incredible and paralyzing surrealism of reports from Nazi concentration camps,[8] must begin with an analysis of Leviathan's failure to secure human freedom, dignity, or even physical survival for prison inmates.

One might begin such an analysis with Montesquieu's discovery that both freedom and security could be enhanced and multiplied by the multiplication and dispersion of power:

6. The documents quoted are available from the Prison Law Project, 5406 Claremont Ave., Oakland, Cal. 94618.

7. *See, e.g.*, MAXIMUM SECURITY: LETTERS FROM PRISON (E. Pell ed. 1972), *noted in* 21 BUFFALO L. REV. 1007 (1972).

8. H. ARENDT, THE ORIGINS OF TOTALITARIANISM 437-59 (1958).

> To prevent this abuse [of power], it is necessary from the very nature of things that power should be a check to power.[9]

Etched deeply into the minds of the Founding Fathers of the United States, this insight resulted in a system of checks and balances being built into the government they designed. Aware that power undivided, unopposed, unchecked could only lead to tyranny, they wrote safeguards into the Constitution.

B. *Lawlessness Within the Prison*

In recent decades those safeguards have proved utterly incapable of controlling the growing power of the executive. Neither Congress nor the judiciary has been able or willing to check a war conducted without a shred of legality. In the prison system, the absence of checks or balances is nothing new. Legislatures have never had an abiding interest in the subject. The courts have traditionally refused to intervene in what they have found convenient to consider the prerogative of the executive. This attitude is only beginning to change.

Screened from public visibility and immune from effective accountability to other branches of the government, the predictable abuses took place and continue to occur. There is almost nothing the prison cannot do, and does not do to inmates, including keeping them beyond the expiration dates of their sentences (via procedures declaring them dangerous or mentally ill). It can and does transfer them far from their families; limit and restrict their visitors; censor what they read, what they may write; decide whom they may associate with inside, what medicine or other medical care they will or will not receive, what education they may or may not have, whether they will be totally locked up, for weeks, months, occasionally even years, or enjoy limited physical freedom. Inmates' personal property may be misplaced and destroyed, incoming and outgoing letters sometimes not delivered, and, in the extreme, prisoners may be starved, brutalized and killed.

Administrative decisions within the prison including punitive measures such as transfer and solitary confinement are not subject to due process procedures and are ordinarily immune from judi-

9. C. DE MONTESQUIEU, THE SPIRIT OF LAWS bk. XI, pt. 4 (T. Nugent transl. 1949). *See also* the discussion in H. ARENDT, ON REVOLUTION ch. 4 (1963).

cial review. In most jurisdictions judges have wide latitude in fixing the length of sentence (except in California where the Adult Authority sets the sentence), and parole boards have similar latitude in determining how much of the sentence will be served in prison. Parole boards may deny or grant parole on the basis of information unavailable to prisoners or their attorneys, on the basis of criteria which, if they exist at all, are secret. On the grounds that parole is a privilege, not a right, these decisions are ordinarily not reviewable by the courts. In short, prisoners are at the mercy of the prison system. The monolithic Leviathan has brought in its wake all the abuses Hobbes intended it to remedy.

Does this mean that every administrator is malevolent or every guard brutal? That every prisoner is denied medical care, or every prisoner sent to the hole is falsely accused? That every prison is a Soledad or San Quentin? Certainly not. There are a few "good men" in corrections and some sensitive guards, though the constraints of their occupations seriously limit the impact of their sensitivity or "goodness." There are also prisoners who abuse other prisoners. For that matter, there were inmates of Nazi concentration camps who exploited other inmates, and there were Nazis who refused to kill. There was even a showcase concentration camp which the Red Cross was allowed to inspect.[10] This hardly mitigated the atrocities. Free from any other constraints, the humanitarian sentiments of some prison employees have simply not acted as effective restraints against abuses.

According to Philip Selznick,

> The essential element in the rule of law is the restraint of official power by rational principles of civic order. . . . Legality imposes an environment of constraint, of tests to be met, standards to be observed, ideals to be fulfilled.[11]

By this definition, whatever the statutes may say, whatever reformers have hoped, prisons have been and are *lawless agencies.* This has been the characterization of almost all observers not directly connected with prison administration, and indeed from some correctional personnel as well. In his recent law review article, William B. Turner, Assistant Counsel of the NAACP Legal and Educational Fund, Inc. (San Francisco) opens with Simon Sobel-

10. H. ARENDT, EICHMANN IN JERUSALEM 82 (1963).
11. P. SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 11 (1969).

off's statement that Acton's classic proverb about the corrupting influence of absolute power is true of prison guards, and closes by referring to the "lawless sphere of our system of criminal justice." [12]

Most agencies of government, no matter how abusive, how oppressive, are ultimately accountable, reviewable, finally responsive in some definable way, to the processes of "law"—that is, some body of limiting rules, regulations, restraint—whether flowing from the Constitution, public opinion as expressed through representatives, court decision, or through other processes which are understood and enforceable, at least to some extent, by those whom the agency affects. The prison system is almost totally non-responsive to "due process of law" or "law" itself.

Prison administrators understand the vulnerability and powerlessness of inmates, parolees, and their families. Indeed, reprisals can be so severe against prisoners who attempt to obtain redress in any way but the most supplicant manner that many used to prefer (and some still do) to suffer in silence, rather than risk years in solitary or a denial of parole. Administrators act with total, arbitrary authority to avoid any action—whether legislative or judicial, or from the community or from attorneys—which asserts an inmate's rights or desires as against the desires of the prison system. The taxpayer's money is spent to pay the Attorney General to oppose any attempts in court to change these conditions, whether it be to get access to prisoners' files, or have inmates represented at the parole hearing, or to permit the public to see the strip cells or hear the prisoners testify in open court as to these conditions.

Access to the prisons is denied to almost all, and the few taken on tours are presented carefully constructed tableaux. The prison has two distinct faces: one for the public, which it presents through skilled public relations personnel and a budget provided by taxpayers for that purpose alone; the other, to prisoners. In the wake of lies about the way hostages at Attica died and a host of contradictions in official stories about the death of George Jackson, one can only ask whether *anything* prison officials say is believable.

In the late sixties the federal courts began, very slowly, and

12. Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 518 (1971). *See also* Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969).

under tremendous pressures from prison rebellions with their attendant publicity and public interest, from numerous pro se petitions by prisoners, and from extremely carefully designed lawsuits brought by attorneys working with the National Lawyers Guild, American Civil Liberties Union, NAACP Legal Defense and Educational Fund, and private attorneys for such prisoners as Martin Sostre, George Jackson and John Clutchette, to abandon the unqualified "hands-off" doctrine which had previously characterized their approach to all prison problems.

The sweeping decision of United States District Judge Motley, in *Sostre v. Rockefeller*,[13] although seriously cut back by the Second Circuit, heralded some change in judicial attitudes toward the seething mass of discontent and the continual allegations of brutality and administrative abuse in the prisons. Despite some favorable decisions [14] upholding prisoners' first amendment rights and indicating an intent to put some limits on the conditions prevailing in solitary confinement and the length of time prisoners could be kept there, the actual situation in most prisons did not change much.

Thus, several years ago, a Soledad inmate sued Superintendant Cletus Fitzharris for inflicting cruel and unusual punishment upon him by keeping him in a tiny strip cell without light, ventilation, clothes or body covering, where he was forced to sleep naked on a cold concrete floor, deprived of any way to clean himself, and forced to eat in the stench and filth caused by his own vomit and body wastes. In finding Fitzharris guilty, the court said:

> [W]hen, as it appears in the case at bar, the responsible prison authorities in the use of the strip cells have abandoned elemental concepts of decency by permitting conditions to prevail of a shocking and debased nature, then the court must intervene . . . to restore the primal rules of a civilized community in accord with the mandate of the Constitution of the United States.[15]

Today one is told that there are no more strip cells at Soledad, but the letters already quoted from inmates describe condi-

13. 312 F. Supp. 863 (S.D.N.Y. 1970), *rev'd in part sub nom.*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir.) (en banc), *cert denied*, 92 S. Ct. 719 (1971).

14. Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971), *appeal docketed*, No. 71-2357 (9th Cir., Aug. 30, 1971); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).

15. Jordan v. Fitzharris, 257 F. Supp. 674, 680 (N.D. Cal. 1966).

tions the same or worse; worsened by repeated tear-gassings of the entire tier of O Wing, sometimes directly into the faces of the prisoners. Today inmates have toothbrushes, but sometimes the guards come into their cells while the inmates are at court or visiting relatives, and mix their tooth powder with cleanser. Mr. Fitzharris, so sharply censured by the court, has recently been promoted to the position of Deputy Director of the Department of Corrections of the State of California.

The lack of substantive change was due to many factors, most of them interrelated, including the ability of prison administrators to engage, at public expense, in dilatory appeals to avoid instituting court-ordered reforms; the reluctance of the court to enforce detailed orders or to look into the same practice under a different label, for example, punitive or disciplinary segregation now called "administrative segregation"; and the massive ability of administrators to circumvent court-imposed limitations by such methods as the mooting of a case which looked as though it might set a precedent limiting the authorities' powers, and simply ignoring court orders. Most prisoners are indigent, and the few attorneys working in the field cannot file an order to show cause every time there is a violation of a court order.

As with the judicial victory in *Jordan v. Fitzharris*,[16] the authorities in California found a way around the ruling of the district court in *Grady v. Procunier*,[17] enjoining the Soledad administrators from interfering with confidential communications with attorneys. The background of the *Grady* case is instructive as to the pressures which result in some judicial intervention. Shortly after the killing of three black inmates in Soledad's O Wing exercise yard on January 13, 1970, various inmates, including survivors of the incident itself, began trying to write to attorneys and relatives concerning the incident. The prison authorities held up much of this mail altogether. An injunction was secured on behalf of the named plaintiff and the other inmates, and for almost a year much of Soledad's inmate mail to attorneys did leave the prison sealed. Some—there is no telling how much—did not. When the Department of Corrections first implemented the rule state-wide, and permitted sealed letters to attorneys from all prisons in California,

16. *Id.*
17. No. C-70-298 ACW (N.D. Cal., Mar. 20, 1971).

then revoked the rule in April of 1971, Robert Charles Jordan, Jr. (the same Jordan who brought the 1966 case) instituted suit which is presently pending in the California Supreme Court. In the Attorney General's return in that matter, the state filed exhibits purporting to show the dangers to security of inmate-attorney confidential correspondence. The state attached xeroxed copies of letters which had purportedly gone out sealed from inmates during the period when the sealed letter rule was in effect.

The treatment of Black Muslims is another example of prison intransigence in the face of court orders. Although the religious rights of Black Muslims were upheld in several decisions, pork continued to be served frequently in the prisons. Many Muslims were put in segregation or denied parole in reprisal for their religious affiliation and activities, although the paperwork in their files may have carefully avoided mention of this, and would typically include a range of accusations, including conspiracy to agitate or overthrow the prison administration.

During the negotiations over the inmate discipline plan ordered by Judge Zirpoli (the Ninth Circuit twice refused to stay implementation of this plan, which was required to implement the rudimentary attributes of due process in the San Quentin disciplinary proceedings), and in discussions between Department of Corrections personnel and legislators concerning the Adjustment Center Bill,[18] prison authorities and the Director of Corrections were frank to say that they would simply put men into solitary confinement by the administrative segregation route if too many limits were placed on the use of solitary confinement as punitive discipline.

They have done so. Many inmates, most of them black, but including brown and white, were put into indefinite segregation, immediately after the death of George Jackson on August 21, 1971, and remain in solitary confinement at this writing (January, 1972).

18. The Adjustment Center Bill, AB 2904, SB 1610, introduced by Assemblyman John Dunlap (D. Vallejo) and Senator Mervyn Dymally (D. Los Angeles) in the 1971 California legislative session, incorporated some of the features of Judge Zirpoli's decision in *Clutchette,* and added restrictions on the use of solitary confinement. Its most novel feature required the prison authorities to show cause, in superior court, with the right to counsel and cross-examination, etc., that the inmate was a danger to himself or others, if the authorities wished to keep him in solitary confinement more than 30 days in any 6 month period. The bill passed the Assembly, 42-32, picking up a good deal of Republican as well as Democratic support, passed the Senate Judiciary Committee, 7-5, and died in the Senate Finance Committee.

The Department acknowledges that most of them committed no in-prison offense of any kind, but asserts the right of prison administrators to lock-up anyone—indefinitely—whom they "feel" is dangerous, or whom any custodial personnel "feel" "might" contribute to tension in the prison. Lawsuits challenging this widespread practice at three different prisons are at present pending in the state and federal courts in California: *Bly v. Procunier* (San Quentin),[19] *In re Henderson* (Folsom),[20] and *In re Hutchinson and Irvin* (Deuel Vocational Institution (DVI)).[21]

Circumvention or outright violation of court orders is by no means unique to California. Following the massacre at Attica in September, 1971, a federal district court judge in Buffalo ordered Attica authorities to admit a group of lawyers and physicians seeking to provide counsel to inmates who might be interviewed by state police investigators. They were not admitted, and the order was later vacated.[22] At a Conference on Prisoners' Rights held in November, 1971 under the sponsorship of the American Civil Liberties Union, attorneys engaged in prisoners' rights litigation frequently asked "How does one get a court decision implemented?" It had been their experience that refusal on the part of prison administrators to implement court-ordered reforms was pervasive.

In addition to its frank communication that it would by-pass the Adjustment Center bill and other prison reform bills if passed, the California Department of Corrections vigorously lobbied—at public expense—in opposition *to every single one of 175* prison bills introduced into the 1971 session of the California State Legislature. It is certain that some would have passed without this extremely well-planned and coordinated opposition. The very fact of a Corrections Department lobbying against prison reform bills in the legislature (and by-passing the intent of them if they are passed) presents serious problems in the light of a concept of

19. No. C-71-2019 (N.D. Cal., filed Oct. 21, 1971) (submitted and now pending before Judge Zirpoli).

20. Petition dismissed by Superior Court, Sacramento County, order to show cause pending in Court of Appeals, Third Appellate District, therein numbered 3 Crim. 6461.

21. Complaint not acted upon by Superior Court, San Joaquin County, order to show cause pending in Court of Appeals, Third Appellate District, therein numbered 3 Crim. 6427, 6428; petition for writ of mandamus to compel disclosure to petitioners' counsel of the central files relied upon by prison authorities to continue indefinite lock-up, *denied* by California Supreme Court January 14, 1972.

22. N.Y. Times, Sept. 15, 1971, at 33, col. 2.

an even-handed legal process. What is the rationale for a Department of Corrections to lobby in the legislature? When the courts announce that a particular prison problem may be one for the legislature, it is probable that they do not consider the fact that the administrators have a sophisticated and vigilant lobby in that legislature.

Since the administrators can, and do, perform favors and give special dispensations to various of each legislator's constituents upon the legislator's request (made possible by the discretionary system of justice we criticize later), many of the legislators fear to attack the Department or press strongly against the Department's wishes. The recent spectacle of a liberal California legislator praising the Director of Corrections publicly—privately admitting that the situation is deplorable—would appear to manifest another indication of lawlessness, signalling the closing off of yet another channel of possible redress for prisoners, that of reform through the legislature.

C. *Lawlessness and the Minority Experience*

There is, no doubt, a certain paradoxical quality to the suggestion that a law enforcement agency should itself be lawless, operating in total disregard for and in frequent violation of the law. This seeming paradox will not, however, be unfamiliar to blacks and other minorities who have been well educated, as victims, in the abuses of the law, evasions of the law, and violations of the law on the part of law enforcement agencies.

Victimization of black people at the hands of law enforcement is nothing new in the United States. As slaves, they had the legal status of cattle or real estate and were totally unprotected by the criminal law, though masters' property rights in their chattel were fully protected. Freed Negroes hardly fared much better. They were tried in separate courts, and could be enslaved as punishment for criminal offenses, as well as for nonpayment of fines or taxes. Slave patrols were empowered to punish freed Negroes without trial. After the Civil War, emancipated slaves were doubly victimized by a repressive and discriminatory system of law enforcement, and by the widespread extra-judicial use of Lynch's Law.

In many instances, summary justice was imposed with the encouragement if not the participation of law enforcement officials,

and not merely in the South. To quote only two examples, a Congressional Committee investigating the pogrom which broke out in East St. Louis in 1917 reported that:

> [S]o great was the indifference of the few policemen who remained on duty that the conclusion is inevitable that they shared the lust of mob for negro blood, and encouraged the rioters by their conduct . . . .[23]

After citing a number of incidents where police beat and shot Negroes without cause, the report concludes:

> Many other cases of police complicity in the riots could be cited. Instead of being guardians of peace they became a part of the mob by countenancing the assaulting and shooting down of defenseless negroes and adding to the terrifying scenes of rapine and slaughter.[24]

Following a riot in Harlem in the spring of 1935, the Mayor's Commission on Conditions in Harlem commented on police relations with the community they were charged with protecting:

> While one would not expect the policemen in Harlem to show any appreciation or understanding of the sociological factors responsible for crime in the community, the discipline of the Police Department should see to it that they do not become the persecutors and oppressors of the citizens of the community. Nevertheless, it is true that police practice aggressions and brutalities upon the Harlem citizens not only because they are Negroes but because they are poor and therefore defenseless.[25]

The reports of the National Advisory Commission on Civil Disorders or newspaper accounts of pre-dawn raids on Black Panther Party headquarters and apartments in various cities make clear to the doubting that police lawlessness has by no means disappeared. The badge provides immunity from prosecution or conviction: police homicide is almost by definition "justified."

Nor is lawlessness within the criminal justice system confined

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23. B. Johnson, J. Raker, M. Foster & H. Cooper, REPORT ON THE SPECIAL COMMITTEE AUTHORIZED BY CONGRESS TO INVESTIGATE THE EAST ST. LOUIS RIOTS, H.R. DOC. NO. 1231, 35th Cong., 2d Sess. 8 (1918), *quoted in* THE POLITICS OF RIOT COMMISSIONS 1917-1970, at 69 (A. Platt ed. 1971).

24. *Id.* at 70.

25. The Mayor's Commission on Conditions in Harlem, The Negro in Harlem: A Report on Social and Economic Conditions Responsible for the Outbreak of March 19, 1935 ch. IX (New York Municipal Archives, unpublished), in THE POLITICS OF RIOT COMMISSIONS 1917-1970, at 178 (A. Platt ed. 1971).

to the police department. There is discrimination in the setting of bail, exclusion of minority groups from jury panels, and blatant prejudice and outright illegality on the part of the minor judiciary in courts throughout the land. While the legal profession has been energetic in proposing ways to control obstreperous defendants, the far more widespread and serious problem of controlling judges has not even been addressed.[26]

Disraeli's phrase, "The Two Nations" seems entirely appropriate when speaking of American criminal justice. In the sensitive and profoundly juridical and political introduction to the volume *Life at the Bottom,* Gregory Armstrong points out that the poor and the ostracized minorities have been taught to accept the *justice* of their debased condition, a condition in which:

> Black skin, brown skin, powerless, poor housing, cheap clothes, bad teeth, chronic debilitating illness, all the other stigmata of poverty, in terms of the actual functioning morality of the American culture . . . are the equivalent of criminal acts. . . . There are two Americas, one governed by law, conferring certain basic human right on its citizens; the other without law or justice, its citizens completely deprived of even the most rudimentary human rights. . . . In the reality of American daily life they are just as totally excluded from all the rituals and functions that confer the rights and privileges of humanity.[27]

For the last three hundred years, law and lawlessness have gone hand in hand in contributing to the oppression of persons of color. The law itself has often been openly discriminatory and repressive, but repression has never been confined to the law. While many of the *legal* disabilities created by *openly* discriminatory legislation have been repealed or struck down by the courts, illegal acts of repression and discrimination as well as legal but covert forms of these activities continue unabated. As an example of the latter we refer to the public defender system created when the Supreme Court ruled that indigent defendants must be provided legal counsel. The ruling has been satisfied formally, but defendants are still denied adequate, effective legal representation. Only the appearance has changed. Veiled from public consciousness by secrecy and insulated from other pressures, the prisons have not even had to change the appearances.

26. Schwartz, *Judges as Tyrants,* 7 CRIM. L. BULL. 129 (March 1971).
27. G. ARMSTRONG, LIFE AT THE BOTTOM XII-XIII (1971).

D. *The Social and Political Context of Lawlessness*

Of all major contemporary political ideologies, only fascism elevated official lawlessness to a basic principle of political ideology and practice.[28] The State itself was subordinated to the Party, and the Party to the Führer or Party Leader, whose commands overruled and superseded law. German law and the Weimar Constitution were by no means repealed when the Nazis came to power,[29] though this could easily have been done. To have operated according to law, even Nazi law, would have been too limiting, too constraining. It was more convenient not to have any, so the laws were simply ignored. The resulting elimination of all fixed rules and regulations with their accompanying predictability had enormous advantages in implementing a reign of terror. This terror was not unleashed purely out of sadism or nihilism, though both elements were certainly present, but on behalf of an ideology of racism, which achieved its fullest realization in the extermination camps, motivated by the necessity of atomizing a population so as to neutralize and eliminate possible sources of countervailing power, with the ultimate aim of overcoming class conflict—without, however, abolishing classes.[30]

Both in Italy and in Germany, fascism in power served the needs and interests of the monopoly capitalists.[31] In the name of the *Volk,* conflicting classes and interests were to be united harmoniously by a social organization which incorporated them and which excluded and even exterminated those who for biological or political reasons could not be incorporated in the consensus, for example, Jews, gypsies, Communists. In practice, it would have been impossible to serve incompatible interests at the same time, and fascism did not even bother to try. The victory of fascism in Germany and Italy may be traced to the collapse of socialist and communist movements in the face of the cultural crisis of modernization, the political crises associated with the end of the First World

28. Lawlessness was also pervasive in Stalinist Russia, but was never elevated to a basic principle of political conduct.

29. H. ARENDT, THE ORIGINS OF TOTALITARIANISM 394 (1958).

30. H. MARCUSE, *The Struggle Against Liberalism in the Totalitarian View of the State,* in NEGATION 3 (J. Shapiro transl. 1968), *originally published* ZEITSCHRIFT FUR SOZIALFORSCHUNG, vol. III (1934).

31. H. MARCUSE, REASON AND REVOLUTION 410 (1941); F. NEUMANN, BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM (1942).

War, and the economic crises of post-war Europe.[32] Traditional liberal ideology was not capable of coping with these crises either. Its sustaining tenets of laissez-faire economics had little relevance to the economic collapse and its ideology was no longer capable of holding things together.[33] Faced with this situation, some liberals held firmly to their principles no matter what, unable to accept an ideology which proclaimed:

> The individual, so we teach today, has as such neither the right nor the duty to exist, since all rights and all duties derive only from the community.[34]

Others abandoned the ideology which was no longer able to provide protection for their property rights as it had in the past. Thus Giovanni Gentile, the liberal educator and philosopher, addressing a letter to Mussolini at the time the latter joined the Fascist Party, writes:

> As a liberal by deepest conviction, I could not help being convinced, in the months in which I had the honor to collaborate in the work of your government and to observe at close quarters the development of the principles that determine your policies, that liberalism as I understand it, the liberalism of freedom through law and therefore through a strong state, through the state as ethical reality, is represented in Italy today not by the liberals, who are more or less openly your opponents, but to the contrary by you yourself. Hence I have satisfied myself that in the choice between the liberalism of today and the Fascists, who understand the faith of your Fascism, a genuine liberal, who despises equivocation and wants to stand to his post, must enroll in the legions of your followers.[35]

Fascist ideology, then was one solution to a crisis to which traditional liberal thought had become irrelevant. Liberalism had admirably represented the interests of competitive entrepreneurial capitalism; fascism was better suited to the highly centralized monopoly capitalism which had come to dominate the economic life of all industrialized western nations in the early decades of this century.

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32. I. SILONE, POSTWAR SOCIALISM IN NEITHER LIBERTY NOR BREAD: THE MEANING AND TRAGEDY OF FASCISM 10-11 (F. Keene ed. 1940).

33. K. POLANYI, THE GREAT TRANSFORMATION (1957).

34. H. MARCUSE, *supra* note 31, at 413, *quoting* O. Dietrich in VOLKESCHE BEOBACHTER, Dec. 11, 1937.

35. H. MARCUSE, *supra* note 30, at 11, *quoting* 4 AUFBAU 233 (F. Karsen ed. 1931).

The United States economy is likewise highly centralized; its manufacturing and financial sectors are dominated by oligopolies, mostly operating on a multi-national scale. Through a small interlocking elite, these enterprises are well-integrated with the government, which defends their interests.[36] In this respect the United States resembles fascism. There are of course differences, but similarities as well. Like the fascist states, the United States is openly imperialist. While racism in the United States has a different character than it did in Germany (since blacks are not regarded as enemies of society to be exterminated, but rather are hated, feared, and yet have been too valuable as sources of cheap labor to be annihilated), the connection between lawlessness, racism, and imperial expansion is characteristic of both societies. American prisons are not, of course, extermination camps, but the differences between the O Wing of Soledad and the concentration camps should not be exaggerated either.

Unlike Germany or Italy under fascism, the United States is at least formally a parliamentary democracy, though many of the most significant public issues are decided outside the formal framework of government, with the corporate elite often playing a decisive role at the highest levels.[37] Opposition politics and freedom of the press, of speech, etc., have not been eliminated, as in the totalitarian states, so much as they have been bypassed. The elite's command of vast wealth and its control of major universities and news media, as well as its access to almost unlimited resources of government and its legacy of legitimacy, enable its ideas and programs to dominate the public forum almost free from challenge.

Though there are doubtless many reasons for the comparatively conservative temper of American working people, surely part of the explanation resides in the extraordinary heterogeneity of the working population. Although the elite is rather homogeneous and is predominantly white, Anglo-Saxon and Protestant, workers by contrast have been differentiated along racial, religious, ethnic, and cultural lines. These divisions have helped to inhibit the development of a *class* consciousness, as distinguished from a racial, national or religious identity. Historically, these divisions

36. G. WILLIAM DOMHOFF, WHO RULES AMERICA (1967) and THE HIGHER CIRCLES: THE GOVERNING CLASS IN AMERICA (1970); J. WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900-1918 (1968).

37. *Id.*

were exploited by the business elite and encouraged by it, since it was advantageous to keep workers divided. Only in the last decade, in response to growing black militancy, radicalization and resort to extra-legal tactics, has part of the ruling elite changed its valuation of racial separation and has instead begun to foster racial integration.

Because of its heterogeneity, different segments of the working population experience quite different aspects of American social reality, and develop correspondingly different conceptions of that reality.[38] Thus George Jackson could in all honesty sign his letters[39] from Soledad, "From Dachau with love," while middle class readers could in equal honesty react with bewilderment because they were not able to discern any signs of fascism in their suburb.[40] Indeed, many were led to believe that George Jackson and others like him, rather than the dominant elite, were the primary threat and cause for concern. This misperception has led many individuals to support the political and economical system although they could benefit by changing it.

Only when repression becomes so visible that all the nation sees it—as it did during the Democratic Party Convention in Chicago in August, 1968, at Kent State and Jackson State in May, 1970, or at Attica in September, 1971—does much of the population receive even an inkling of what prisoners, or radicals or black people and other minorities face every day. This was, of course, the reason why the slogan, "The whole world is watching" had such significance to demonstrators in Chicago. It wasn't so unusual for demonstrators to be clubbed or arrested by police; what was novel was the knowledge that television screens across the country would show what was happening. This is infrequent, however, and what seems to be the isolated character of these events then gives them the appearance of inexplicable aberrations from what is assumed to be usually fair and impartial law enforcement practices. Cognitive dissonance contributes to the readiness with which such events are dismissed as atypical; if taken as symptomatic, many cherished and time-honored beliefs about American society would have to be abandoned. Furthermore, the world-view which a more accurate

38. Marx & Engels, *The German Ideology* in K. MARX & F. ENGELS, BASIC WRITINGS ON POLITICS AND PHILOSOPHY 246 (L. Feuer ed. 1959).

39. SOLEDAD BROTHER: THE PRISON LETTERS OF GEORGE JACKSON (1970).

40. This specific formulation is due to Eric Mann, (private communication).

perception of reality might suggest would very likely make personal demands which many individuals might not wish to face. These phenomena contribute to what Marxists have called "false consciousness."

The genius of the American criminal justice system has been the extent to which it has accommodated itself to the heterogeneity of the American population. It might be very difficult to sustain lawlessness in prisons or in court if all of us were exposed to it. But this never happens. Most Americans are never processed by the police, courts and prisons. With few exceptions, this unenviable experience is reserved for those with dark skin, little money, for cultural deviants, and those with threatening ideas. Indeed, more than one-third of all prisoners are black,[41] though blacks constitute only about 12% of the population; other minority groups are similarly over-represented. The reason is not that these groups are the most criminal in our society; the explanation lies in the systemic biases and discriminatory institutional practices which characterize the enforcement of the law as well as its legislation.[42]

In the context of existing law enforcement practices, the prison system helps to sustain the myth that certain groups of people (for example, blacks, the Spanish-speaking, Indians, poor whites) are inferior, defective, dangerous, not to be trusted: it discourages challenges to the existing political and economic order by reminding members of those groups that the violence of the state can and will be unleashed against them if they get out of line. Through the systematic non-enforcement of laws against business and governmental crime it not only helps to sustain the existing political and economic order but allows that order to clothe itself with a false mystique of lawfulness. The sophistication of the legal system enables it to accomplish many of these goals without violating the law, but when these methods are inconvenient or unavailable, illegal methods can be used.

On the whole the system has worked remarkably well; the government and the economy have been more stable than in many countries. In recent years this system has come under attack—pri-

41. FEDERAL BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, CHARACTERISTICS OF STATE PRISONERS 1964.

42. STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 107-12 (prepared for the American Friends Service Committee 1971).

marily from racial and ethnic minorities and students, but from others as well. This has been true within the prison. Strikes, protests, revolts, have taken place in numerous prisons throughout the country. Many aspects of the prison system have been challenged by those outside as well. Much of the lawlessness in prison has been directed at those who are suspected of involvement in such efforts, or who could be tempted to such involvement in the future and need to be discouraged in advance.

Thus, in California, where a variety of political groups ranging from the Black Panther Party to the United Prisoners Union have engaged in organizing inside the prison system, the reaction of officials after George Jackson's killing has been severe. The underground press has been banned, book censorship tightened, lawyers' visits sharply restricted, and new restrictions on correspondence imposed. At most prisons, black and Chicano groups previously authorized have been disbanded and leaders subjected to "bus therapy"—transfer to other institutions. To prevent new collectives from replacing those disrupted by transfers, many prisoners suspected of political activity are transferred not just once, but repeatedly. Hundreds of others suspected of agitation and organizing have been locked up and subjected to extreme conditions, as indicated in the following affidavit:

> Until October 8, 1971 I was a prisoner on the mainline of California Men's Colony-East CMC, a medium security prison in San Luis Obispo, where I had been for about 2½ years with a clean disciplinary record. . . . October 8 I was awakened at 1:00 A.M. by about 8 to 10 guards . . . shackled and without a coat taken to a bus. I was one of the first to arrive at the bus and I watched thirty other Black men arriving two at a time from the four different quads at CMC; many were under escort of 15 guards . . . . All thirty-one of this group at CMC had been active members of the Afro Unity Association (AUA), which had been a recognized Black ethnic organization, which had authorization from the prison to exist. I have learned that after we were transferred that organization was totally disbanded by the prison officials at CMC . . . . Early that same morning we arrived at Soledad Prison and were taken to O Wing, the Soledad Adjustment Center . . . . I was put in a cell which had water on the floor upon my arrival. The toilet was cracked with sharp edges protruding upward, and filth from human waste was . . . on the floor.
>
> On that same day that we arrived in Soledad we appeared before the "Rover Board," composed of officials from the Depart-

ment of Corrections in Sacramento. They said that we were all under suspicion for disrupting the activities of CMC and considered a threat by the administration. They gave no greater detail to support their claim, and concluded by saying that we would be sent to different prisons throughout the state; . . . after remaining in O Wing for almost one week, I was transferred to San Quentin with nine other men. Some of this group was taken directly to B Section segregation unit and the Adjustment Center . . . . The next day . . . four other men . . . and I were taken . . . to B Section segregation unit (the hole), with no reason given for this move. I was put in a cell on the fourth tier. I had no sheets or pillow . . . . I had no eating implements, *i.e.*, plastic spoon or drinking cup. I had to eat and drink out of my hands and I was denied soap to wash my hands with. These conditions remained the same throughout my stay in B Section.

On October 20, 1971 I went before a committee in B Section. I was told of a plot to kill members of the administration at CMC in which I was alledgedly [sic] involved. No details were given and no evidence was put forward to support these serious accusations. The committee members merely repeated that my involvement in the alleged plot was documented and refused to specify what form the "documentation" took. They further accused me of making "threats of death" on other prisoners, similarly without any specifics . . . none of these accusations ever resulted in my being given a disciplinary write up. . . .

On October 21, 1971 I was moved to A Section and put under close custody. I was put into a cell which has water leaking from the face bowl. I have asked to have the damage repaired and to be moved to another cell many times. I have newspapers on the floor an inch thick and they are soaked with water, and the smell is overpowering. Because of the dampness and cold from many broken windows and inadequate heating, I stay under the bed covers most of the day. Roaches have taken up residence because of the filth. Nothing can be put on the floor and walking to the toilet, a distance of only two feet, is miserable. I have been electrically shocked by the loose hanging wire from the light fixtures over a half dozen times when passing it. Prison officials have made no effort to fix this either.[43]

In New York, an ultra-security "maxi-maxi" is under serious consideration for prisoners suspected of radicalism, and in California there is a move afoot to transfer all Adjustment Center inmates to the California Medical Facility at Vacaville, where a facade of psychiatry and treatment may be used to prevent access to this

43. Reported in THE STAFF 16 (P.O. Box 46090, Los Angeles, Cal. 90046, Dec. 10, 1971).

facility and its maximum security sections. In Illinois the old Joliet Branch of the Illinois State Penitentiary has already been converted into such an institution, and three guards were fired for informing the press that prisoners were being starved, beaten and tortured. The secrecy and tight security planned for all these institutions will make it easier for authorities to perpetrate lawless violence against prisoners.

On the outside, whether and to what extent a framework of legality is retained is likely to depend on the extent and seriousness of the challenge the dominant elite must face. At present the challenge is not yet serious and is moreover confined to limited strata of the population. Thus it seems unlikely that the government will resort to the kind of total lawlessness experienced under Nazism; it is more likely to use the law as an instrument of repression increasingly—as it is already doing—and merely supplement this repression with illicit means when there are particularly strong reasons for doing so. To the extent that legitimated authority breaks down, however—and this has certainly been the trend of the last decade—violence may be the only alternative open to the government if it wishes to avoid collapse. In any event, lawlessness in American prisons—and outside them—is anything but an anomaly; like lawlessness in Nazi Germany or Fascist Italy, it serves very real functions in the defense of an imperialist, oligopoly capitalism based on racism and exploitation.

What often seems like an "over-reaction" to challenge may seem less functional, and may spring from irrational elements in human motivation as well as from systematic elements in decision-making. Racial prejudice may have been promoted for the most crass economic motives, but it can hardly be denied that many believed in the tenets of racism. Bernard Diamond has described from a psychoanalytic viewpoint, how attitudes toward the moneyless and helpless may be characterized on the one hand by guilt-induced love and a desire to help, and on the other hand, by hatred, which in turn leads to fear:

> The concurrent hatred implies fear—deep, primitive, unconscious fear—that the very existence of the poor and weak in society threatens the existence of that society. Punitive sanctions must then be applied to control those whom one fears, to make certain that they do not grow and prosper and gain the strength to fulfill their threat of usurpation of power. As the individual most fears death

> and annihilation, so society most fears anarchy and revolution. The poor and dependant, as a class, become endowed with magical, destructive powers totally out of proportion to reality. They become sacrificial recipients of scapegoated sins, but at the same time they are tabooed objects who cannot be destroyed without dire consequences.[44]

This hypothesis may help to explain the similarity in the response of early nineteenth century American communities to the indigent, to orphans, the aged, the insane, and criminals, all of whom were for the first time, subjected to incarceration.[45] On the other hand, while the "magical, destructive powers" of criminals imputed to be dangerous have often been exaggerated (in the case of blacks possibly by a fear that they would treat whites as they had themselves been treated), the loving component of this dialectic has often been missing. Criminals, it seems plausible, were preserved in institutions beginning in the early nineteenth century not because they were "tabooed objects who cannot be destroyed without dire consequences" but rather because the prison, asylum, reformatory seemed like admirable places to assimilate immigrant cultures to an older, native American culture, and in particular to discipline potential workers for the farms and industries of a labor-short economy.

It is equally plausible that what seems like "over-reaction" can be interpreted as a perception on the part of authorities that their exploitative practices and mystifying ideology are extremely vulnerable to coherent organized opposition, which must therefore be suppressed at all costs. Opposition must therefore be coopted and absorbed, or else crushed. Its survival would be too threatening.

E. *The Failure of Liberal Ideology*

The inability of whites and other middle class individuals to understand the experiences of minority groups has its roots not only *directly* in the very different experiences of these groups, but also indirectly, in the failure of the political thought to which the population is exposed during its education, to assess accurately

44. Diamond, *The Children of the Leviathan: Psychoanalytic Speculations Concerning Welfare Law and Punitive Sanctions*, 54 CALIF. L. REV. 357, 362 (1966).

45. D. ROTHMAN, DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (1971).

the significance of certain developments which have taken place in modern political institutions. The system of checks and balances devised by the framers of the Constitution was devised before the profusive growth of administrative agencies within the executive branch of government. These agencies have not been brought under effective control by that system, nor have new effective controls been instituted.

Although the American bourgeoisie, in contrast to its European counterpart, never had to wage a revolutionary struggle against an incumbent, economically anachronistic feudal aristocracy or monarchy, it was deeply influenced at the time of its War of Independence by the ideas formed in Europe in the course of the struggle there—particularly by such ideas as the rule of law, due process, and equality before the law. These ideas were intended to limit the state as to occasions on which it could interfere with individuals and also in the manner of that intervention. They were also intended to eliminate the elite privileges which the feudal aristocracy and clergy had enjoyed. These concepts were at the core of eighteenth century penal theory [46] and were embodied in the French Penal Code of 1791 as well as in the American Constitution.

The extent to which the attempt to implement some of these principles in the European judicial system was linked with class struggle is indicated by the manner in which the drive against informality and judicial discretion lost its momentum and fizzled out as the bourgeoisie who had mounted it consolidated their political power:

> Both the principle of proportion and the refined methods of criminal procedure were products of the bourgeois revolutions. Formalization of criminal justice offered many advantages in the central European countries where feudal-absolutist forces still retained much of their strength, as well as in the western countries where political power was long an object of struggle between different groups. The independence of the judiciary and the rationalization of criminal law were excellent weapons in the struggle against the remnants of feudalism and absolutist bureaucracy. . . . The refinement of procedural methods was one of the most effective ways of protecting the acquisition and extension of economic power by means which were sometimes questionable even from

46. J. HEATH, EIGHTEENTH CENTURY PENAL THEORY ch. 1 (1963)

> the standpoint of the ruling classes. In the struggle against the lower classes, on the other hand, the independence of the judiciary, drawn solely from the upper classes, revealed itself to be not too great an obstacle in spite of formalism of method. In countries like England, informal patriarchal procedures were retained for petty offenders, that is to say, for lower-class crimes. . . .
>
> The end of the nineteenth century marks the close of the period of antagonism between the last remnants of feudalism and the administrative bureaucracy on the one hand and the middle class on the other. As the latter strengthened their hold over the machinery of government and administration, it became less and less necessary to continue the process of formalizing criminal law as a guarantee of their social and economic position. . . . It was no longer necessary to protect the bourgeoisie against the arbitrariness of the administration, now that the two were largely identical.[47]

In the United States, where the highest echelons of the capitalist class felt confident of controlling the administrative apparatus of the state they were content to leave its operation unfettered by formal rules and legal restrictions; thus the business regulatory agencies were accorded wide discretion because the business community felt assured that the agencies would operate in the interests of the industries they were intended to regulate.[48] Where the wealthy felt less confident of their control, they insisted on the most meticulous and thorough development of rules and their uniform application, as in tax law.

As described in *Struggle for Justice*,[49] a recent report on crime and punishment prepared for the American Friends Service Committee, from which we draw extensively in this section, the interests of the dominant class in the area of criminal law administration, were best served by providing judges, prosecutors and parole boards with vast unreviewed and unchecked discretionary powers, ostensibly justified as meeting the needs of the individual defendant—treating the criminal, not the crime. Since members of this class knew that lawyers, prosecutors and judges tended to be drawn from their own ranks or else were totally subservient to them, there was little doubt in their minds that this slogan would

47. G. RUSCHE & O. KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE 142-44 (2d ed. 1968).

48. *See* G. WILLIAM DOMHOFF, THE HIGHER CIRCLES: THE GOVERNING CLASS IN AMERICA chs. 5 & 6 (1970).

49. For a description of these discretionary powers, see STRUGGLE FOR JUSTICE, *supra* note 42, at 124-44.

provide a respectable cover for ignoring or wrist-slapping the upper and middle class criminal who posed no political threat to the established order, while allowing the full weight of law enforcement to be brought to bear against those without money or power to fight back, that is, against the group the elite was especially concerned to deter—not so much because they were worried about petty violations of the law but rather because they saw in this class the potential seedbeds for revolution. Under the discretionary system of justice they devised, individuals in low income brackets who committed minor crimes were often punished with a severity far exceeding that meted out to those who committed far more serious offenses, for example, waging illegal war, price-fixing on a massive scale, pollution of the environment, placing unsafe cars on the road, maintaining dangerous working conditions, leasing slum apartments, practicing racial discrimination, etc.

In his extensive writings studying the relationship of legal institutions to their social and economic context, Max Weber viewed the question of discretion somewhat differently. Although recognizing that:

> 'Equality before the law' and the demand for legal guarantees against arbitrariness demand a formal and rational 'objectivity' of administration, as opposed to the personally free discretion flowing from the 'grace' of the old patrimonial domination . . .[,] [50]

he nevertheless asserts that

> [t]he propertyless masses especially are not served by a formal 'equality before the law' and a 'calculable' adjudication and administration, as demanded by 'bourgeois' interests. Naturally, in their eyes justice and administration should serve to compensate for their economic and social life-opportunities in the face of the propertied classes. Justice and administration can fulfill this function only if they assume an informal character to a far-reaching extent.[51]

While Weber was correct in seeing a connection between the rise of rationalized law and the commercial interests of the bourgeoisie, which demanded predictability, the middle class is certainly not the only group in society to benefit from certainty, due

50. M. WEBER: ESSAYS IN SOCIOLOGY 220 (H. Gerth & C. Wright Mills eds. 1946).
51. *Id.* at 221.

process or equality under law. The "propertyless masses," to the extent that they are aware of the problem, understand that their social disadvantages are at present held *against* them by criminal justice functionaries, and that a non-discretionary system would be to their advantage because they would then gain the benefits now enjoyed by the well-to-do. Thus, a reduction in the discretionary powers of prison officials and parole boards was demanded by Attica prison inmates, and constitutes an important part of the demands raised by other groups, such as the United Prisoners Union, and the women who went on strike at the Federal Reformatory for Women in Alderson, West Virginia.

The upper classes were not alone in wanting a system of discretionary justice; the concept had very wide support. To punitively-oriented police officials and prosecutors it meant the ability to hold criminals they regarded as especially dangerous for periods of time far longer than rule of law would make possible or retributive principles of sentencing legitimate. It provided prison administrators with a perfect control apparatus. Where variation in the length of sentence and inequality of treatment have been legitimated on the basis of supposed treatment needs, they can be, and are manipulated to secure good behavior. It is ordinarily not necessary to beat prisoners to make them behave; it is only necessary to threaten parole denial.

Liberal penologists and reformers liked the discretionary system because it meshed so perfectly with their goal of rehabilitating prisoners during their incarceration. This aim had roots in religious and humanitarian sentiment in the early part of the nineteenth century, and indirectly in English utilitarian philosophy. It received enormous impetus from the positivistic school of criminology, with its deterministic models of human behavior and its tendency to view crime as analogous to disease, and the criminal as a patient, to be cured. Adherents of this school implicitly assume that empirically identifiable factors distinguish criminals from non-criminals, and can be used to classify the former for treatment strategies. It is assumed that these exist or can be devised, and that one can tell when the treatment has succeeded. Although these premises may have seemed plausible fifty or a hundred years ago when sociologists were deeply impressed by the determinism of the physical sciences, none of them has been confirmed and the

prospects for their confirmation in the foreseeable future are not bright.[52]

Although the policy of confining prisoners in order to treat them has yet to prove itself in the form of an effective treatment program, it has nevertheless retained an extraordinary hold on correctional thinking despite this practical failure. This may be attributed to the covert functions the ideology serves. It helps liberals relieve their guilt feelings over having to punish people, it allows prison employees to feel they are doing something useful by "helping" their charges, and as already mentioned it provides an admirable control device. In addition it serves to discredit prisoners by convincing both them and the public at large that prisoners are incarcerated because of some personal rather than a social defect. Finally, it provides prison administrators with a language of euphemisms with which to disguise practices which the public might find unpalatable if labeled honestly. (Instead of the hole, we have the "meditation room" or the "Adjustment Center.")

The link between the treatment philosophy and positivist criminology was a consequence of the recognition that not all criminals are alike. It was then argued that judges ought to have substantial discretionary powers to devise a sentence based on the individual treatment needs of the criminal being sentenced. Later it was argued that experts should make such decisions, and so the parole board was given the power to determine how long a prisoner actually served. This system reached its pinnacle in California where the Adult Authority fixes the sentence within a very wide range specified by the legislature (for example, one to life, ten to life, one to fifteen), grants and revokes parole, and can refix the original sentence.

The resulting unequal treatment of prisoners in a curious way ended up mirroring inequalities outside the prison. Prisoners who conform to all expectations, who come from white, middle class backgrounds (there aren't that many of them but there are some) are given favorable consideration for placement in halfway houses, minimum security institutions and early release on parole. Those who get into trouble or are black or hold the wrong political views are placed in high security institutions and are de-

52. For a critique of the individualized treatment philosophy, see STRUGGLE FOR JUSTICE, *supra* note 42, at ch. 6.

nied release. The resulting differentiation of prisoners along lines of class, race and privilege helps to keep them divided just as the identical divisions among those on the outside help to keep workers divided. Guards are well aware of this and have often encouraged racial hostility between prisoners on the basis of a "divide and conquer" philosophy.[53] The official fostering of racial hostility is only part of a broader policy of keeping inmates divided. In the words of a noted penologist, it is the aim of prison administrators

> to keep inmate society as unorganized as possible, to prevent individuals from joining forces. To this end, psychological solitary confinement is substituted, to the fullest extent possible, for physical isolation. This permits inmates to work and to participate in prescribed activities, but it minimizes the danger of violence, revolt or riot. To facilitate the state of unorganization or anomie, administrators always admonish inmates to "do your own time," and consistently, officially distribute rewards such as parole and good-time allowances to inmates who remain isolated from other prisoners.[54]

This atomization helps to keep prisoners powerless, as in any other totalitarian society.[55] In fact, "classification," a standard item in the rehabilitationist repertoire, is actually a sophisticated control device. In a prison system composed of a number of different prisons, the difference between a Soledad or San Quentin and a minimum security farm helps to insulate different classes of prisoners from one another, and contributes to conformity by creating the threat of transfers for misbehavior.

With support from diverse elements—from criminologists, liberals, reformers, police officials, prosecutors, judges, prison administrators—a web of discretionary power was created that in effect largely placed prisoners outside the protection of the law and increased their powerlessness. Equality under law, due process, predictability have all disappeared.

Accustomed by the discretionary system to making decisions free from any accountability, prison officials were placed in an environment conducive to lawlessness—not just the lawlessness of

53. *See, e.g.*, Minton & Rice, *Race War at San Quentin*, RAMPARTS, Jan. 1970 at 18; Wessner, *Racism in Federal Prison*, THE PEACEMAKER, May 2, 1970.

54. Donald R. Cressey, in the foreward to the reissued text of the classic work by D. CLEMMER, THE PRISON COMMUNITY 59 (1958).

55. H. ARENDT, *supra* note 9, at 59.

parole boards, transfers or disciplinary proceedings, but also the lawlessness of physical violence. There is no little irony in this outcome. A discretionary treatment system was promoted by liberals on the grounds that it would help prisoners and at the same time let them out earlier—as soon as they were cured. Many reformers managed to convince themselves that by converting the punitively oriented prison functioning in the framework of a rigid, non-discretionary system to a rehabilitative or treatment-oriented discretionary system, they could somehow humanize the prison experience.

These reformers overlooked the obvious: treatment is not the opposite of punishment; reward is the opposite of punishment, and no one has seriously proposed rewarding prisoners. The view that imprisonment for punishment should be regarded as a barbaric anachronism while imprisonment for treatment is benign and progressive can be sustained only by denying the experience of the prisoner, who is subjected to the same indignities, deprivations and humiliations under either system. Indeed, the therapeutic regime brings with it new hardships and humiliations. The uncertainty over the length of confinement significantly adds to the psychological hardship of incarceration, while the view of the criminal as sick, not in control of his or her own actions, is demeaning and insulting to human dignity. Furthermore, since treatment is defined as help, and help cannot be punitive, those who are incarcerated in order to be treated are stripped of legal protections which as criminals they would enjoy.[56] This process is carried to its ultimate in so-called civil commitments which because they are supposedly motivated by benevolence, are not considered punitive, even when imposed coercively and involve physical environments indistinguishable from prisons.

By ignoring the reality of treatment as experienced by its recipients and by distinguishing "good" from "bad" prisons by the motives of society's judges and jailers, the ultimate dehumanization of prisoners has been achieved: they are literally not there. Historical evidence suggests that powerlessness actually bestows a kind of invisibility; those without power disappear from view as if they wore a magical cloak. At a time when slavery flourished, one

56. N. KITTRIE, THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY (1971); T. SZASZ, LAW, LIBERTY AND PSYCHIATRY (1963).

English traveler could write about his trip through America with the words:

> In a course of 1200 miles I did not see a single object that solicited charity.[57]

Only by rebelling, by stepping out of their place of powerlessness and acting together, generating the power of collective action, do those who "dwell in darkness" (Brecht) step into the spotlight of history and in so doing shed their cloak of invisibility. Rebelling prisoners have been doing just that.

In essence, the reformers who supported this system of vast, unchecked discretion placed their faith in some assumed inevitable benevolence of those in power, naively overlooking the more realistic conclusion that unchecked power is susceptible of abuse no matter what its motives, and that when the motives seem most benevolent, the abuses may be all the more dangerous because they are unchecked by any humanitarian constraints. (Why should I be limited in what I do to you when it's for your own good?) Criminal justice functionaries were of course well aware of these considerations of power; it was precisely because the reforms in question strengthened them at the expense of convicts that they supported the reforms. Prisoners are becoming increasingly aware of the pitfalls of a discretionary system, and the connections between their own powerlessness and their victimization on the part of the lawless prison system it created. It is this realization which accounts for the shift in demands from those which have traditionally been raised by prisoners in the past and which can be satisfied without upsetting the power relations of the prison (for example, better food) to those which seek to limit the discretionary power of authorities and shift the balance toward the prisoners.

The foregoing analysis leads to several conclusions. First, the prison system is indeed no aberration, but a rather central element to American society. It has been shaped, and in turn reinforces

57. H. ARENDT, *supra* note 9, at 63-64, which also quotes John Adams:

> The Poor man's conscience is clear; yet he is ashamed. . . . He feels himself out of the sight of others, groping in the dark. Mankind takes no notice of him. He rambles and wanders unheeded. In the midst of a crowd, at church, in the market . . . he is in as much obscurity as he would be in a garret or a cellar. He is not disapproved, censured, or reproached; *he is only not seen* . . . .

See also R. ELLISON, INVISIBLE MAN (1952) (a contemporary fictional representation of the same phenomenon).

and supports the perpetuation of a status quo characterized by racism, inequity and exploitation. The lawlessness of that system was not an accidental by-product or an oversight, but actually crucial to the social functions the prison has performed. It is clear that a return to rule by law, rather than rule by men, or lawlessness, would represent a significant victory for those who are now most seriously victimized. It would seriously handicap those now in control of the prisons by limiting their ability to take reprisals against those engaged in political activity within the prisons, and in so doing it would create space for those activities.

This is, of course, a transitional, not a final, goal. Due process and uniform application of unambiguous rules are by themselves incapable of eliminating the disadvantages moneyless individuals or members of feared or hated minorities will experience in court as a result of their status. A law against armed robbery means one thing to an unemployed black male living in an impoverished ghetto and quite another thing to someone with a secure job and steady income. This is not, as Weber believed, an argument in favor of discretion, since under the present socio-economic system such discretion will inevitably turn such social disadvantages into liabilities in the courtroom. It does, however, point to the limitations of formal equality under conditions of social inequality. This limitation is one that jurists have been reluctant to realize.

Although implicit in many legal treatises, this limitation is glaringly visible in C. K. Allen's introduction to the Oxford University World Classic Edition of Henry Sumner Maine's *Ancient Law*,[58] the first modern comparative study of early legal institutions, written, interestingly enough, by a British colonial administrator. Allen reflects a prevalent agreement that "it is not too much to say that with the appearance of this book modern historical jurisprudence was born." [59] Prior to Maine's study, first published in 1861, England had produced a theory of law which by "its exclusion of historical considerations from the province of jurisprudence led it into the radical fallacy of regarding all systems of law as being typified by Western European monarchical states." This work deeply influenced the development of British anthropology: Maine's skepticism concerning "any attempt to establish

58. H. MAINE, ANCIENT LAW (introduction by C. Allen 1931).
59. *Id.* at IX.

a single, invariable scheme of development for the human race in all its branches" [60] and his attempts to relate legal to other social institutions were congenial to the structuralist viewpoint.[61]

Although Maine had attempted to place all legal systems on an equal footing, the development of English jurisprudence as well as American Constitutional theory grew out of the study of white institutions and historical development, and came to define systems in which a white minority exercised power over whites and blacks, with the latter having little or no participation in the formulation of ideas, ideals, ideology, law, or power relations except as recipients, defendants, prisoners, victims.

Maine himself was by no means immune from culture-laden value judgments. His conclusion (later elaborated by such scholars as Weber [62] and Durkheim [63]) that "[t]he movement of the progressive societies has hitherto been a movement from Status to Contract" [64] exhibited a certain ethnocentricity. (In fact, its self-congratulatory Hegelianism was welcome to Western legal theorists and historians.) Professor Allen's introductory text comments:

> [Maine's] aphorism sufficiently expresses a principle with which no historical jurist nowadays has any quarrel—namely the emergence of the self-determining, separate individual from the network of family and group ties; or, in the briefest terms, the movement from group to individual . . . . It is to be observed that Maine guardedly said that this movement had *hitherto* been characteristic of the progressive societies. Many are now asking, with complacency, whether the contrary movement, from contract to status is not setting in. It is quite certain that the absolute self-determination of the individual, which nineteenth century *laissez-faire* enshrined in the hallowed phrase 'freedom of contract' has become much modified in our own day; and the place of the individual in society is governed far more extensively by the particular grouping, in which, not always by his own free choice, he finds himself, than it was when *Ancient Law* was written. It may be that when the part which was once played by the family nidus will be played in the future by the syndical nidus; it may be that Maine's famous principle will some day be regarded simply as a parenthesis in social history. Whether this, if it should happen, will be the

60. *Id.* at XXI.
61. Goddard, *Limits of British Anthropology*, 58 NEW LEFT REV. 79 (Nov.-Dec. 1969).
62. M. WEBER, ON LAW IN ECONOMY AND SOCIETY (M. Rheinstein ed. 1967).
63. E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (G. Simpson transl. 1964).
64. H. MAINE, *supra* note 58, at ch. XXVI.

> mark of progressive or of retrogressive societies is a controversial question very fitting for every thinking man's contemplation. . . .[65]

These remarks fail to distinguish between limiting and emancipating group ties, and overestimate the historical impact of "freedom of contract." Even at its zenith, this freedom was in reality quite limited; it certainly never applied to slaves, for example. Like the laissez-faire liberal theories of classical economics, we have here a philosophy which enshrines the idea of free individuals entering into contracts under conditions of *formal* equality, but which overlooks the actuality of unequal social status (for example, black, brown, poor) to which a system of laws is then in theory uniformly applied. The resulting economic inequalities and differential distribution of political power are inexplicable and unresolvable within the framework of liberal theory. When faced with the kind of a crisis which developed in post-World War I Europe, the theory collapses, giving way to new ideologies such as fascism. The resolution of this difficulty requires a transformation of society, though not the transformation fascism sought. Only when wealth, income and power are distributed with at least approximate uniformity can freedom of contract be something other than a mystified, fetishized version of inequality.

The significance of these comments is amplified when we consider the relevance of Maine's description of the role which the study of law plays in the history of nations and in the development of the intellectual faculties, to the prison setting. Maine writes:

> there are two subjects of thought—the only two perhaps with the exception of physical science—which are able to give employment to all the powers and capacities the mind possesses. One of them is metaphysical inquiry, which knows no limits so long as the mind is satisfied to work on itself, the other is Law, which is as extensive as the concerns of mankind. It happens that, during the very period indicated, the Greek-speaking provinces were devoted to one, the Latin-speaking provinces to the other, of these studies. I say nothing of the fruits of speculation in Alexandria and the East, but I confidently affirm that Rome and the West had an occupation in hand fully capable of compensating them for the absence of every other mental exercise . . . . We should reflect that the

65. *Id.* at XXVI-XXVII.

> earliest intellectual exercise to which a young nation devotes itself is the study of its laws.[66]

This was certainly the case in colonial America.

There is some irony in the fact that one of the major preoccupations of the convicted class is increasingly the study of laws. This interest is hardly surprising: convicts are condemned through the processes of law and criminal justice administration; by mastering these tools they hope to understand how they are victimized, the better to combat that victimization. Because of the basic lawlessness of the court, prison and parole system, the possible uses of law are very limited at present, though they represent the only alternative to the risks of direct action. More striking, this increased sophistication in the law is advancing in precisely the same proportion as the convicted class becomes aware of itself as a status, as a "nation." The concept of a "Bill of Rights" for prisoners, extending constitutional protections and legal guarantees to members of the convicted class, has been central to the work of Prisoners Unions, for example. And the developing black organization, consciousness, power, entity—nation if you will—also increasingly devotes itself not only to self-expression, economic advancement and the pursuit of political power, but to the study of laws. *But to whose laws?* So long as the distribution of power and wealth is unchanged, resort to an exclusively legalistic approach to change is likely to be at best an ineffectual, defensive strategy. On the other hand, as part of a strategy aimed at the acquisition of power on the part of a self-conscious class—blacks or prisoners—resort to legal tactics may be far more effective. In the civil rights movement, for example, attacks on racial discrimination in the courts were complemented by picketing, boycotts, marches and demonstrations and other forms of pressure from an aroused community.

F. *Prison Issues and Social Change*

In the context of the prison this suggests several things. First, attempts to alleviate oppressive prison conditions cannot avoid dealing with questions of power. A mere improvement in the physical conditions of confinement will do little to alleviate the lawlessness which the lack of power invites. The relevant concept here is

66. *Id.* at 299-300.

"prisoners' rights"—*rights,* not privileges which can be manipulated or withdrawn as a control device and which tend to set against one another those who need to act in unison.

Second, the struggle around prison-related issues cannot be separated from struggles around other social issues. The society in which prisoners are brutalized and killed at Soledad and San Quentin and Attica and Tucker Farm in Arkansas is the same society which slaughtered Indians and then Vietnamese, in which Panther leaders are shot to death while they sleep, in which voter registration workers are killed in Mississippi. It is a society in which both unemployment and corporate profits are high and the possibility of satisfying work is denied to the many while urgent social needs go unmet. More than a century ago Marx described the industrial proletariat as:

> a class with *radical chains,* a class of civil society which is not a class of civil society, . . . a sphere which has a universal character by its universal suffering and claims no *particular right* because no *particular wrong* but *wrong generally* is perpetrated against it; which can invoke no *historical* but only its *human* title, . . . a sphere, finally, which cannot emancipate itself without emancipating itself from all other spheres of society, and thereby emancipating all other spheres of society, which, in a word, is the *complete loss* of man, and hence can win itself only through the *complete re-winning of man.*[67]

This is true today of prisoners. While smaller victories can and must be pursued, the Soledads and Atticas can be relegated to the dustbins of history only as part of a far-reaching transformation of the entire society.

An important part of any effort to build a liaison between the prisoner movement and those working for social change outside the prison must be an attempt to open the prison to the outside. The community, through its leaders, representatives and ordinary members, must have access to prisoners, and have free and private communication, in person and by letters, with inmates. Prisoners must be allowed visitors of their choice—at convenient times of course, but under conditions of privacy allowing for uninhibited communication. If medical treatment is at issue, private physicians must be allowed access to inmates. Competent legal represen-

67. MARX, *Toward the Critique of Hegel's Philosophy of Right,* in K. MARX & F. ENGEL, *supra* note 27, at 264-65.

tation must be allowed and provided in all matters of privilege denial or other disciplinary and punitive treatment. By stripping away the cover of secrecy from the prison, these steps would contribute significantly to curbing the present lawlessness of the prison, and would increase society's awareness of what is now done in its name.

At the corner stone of a dialectical understanding of historical process is the concept that the existing society already contains within it and even produces those elements which will contribute to social change. Imperial domination leads to national liberation movements, domestic racism to a new sense of identity and self-assertion on the part of minority groups. America is producing people who cannot live satisfying lives unless the character of the nation is altered; consequently they attempt to effect those alterations. The prison itself has produced the prisoner movement. This movement is still in its infancy; prisoners are only just now coming to an informed sense of identity and a consciousness of the possibilities of collective action. Prisoners unions, strikes, revolts —these are the first visible signs of these stirrings. It is from the prisoner movement, the ex-convict movement, that leadership will come in struggles relating to the prison—and no doubt in other struggles as well. But support from all of us is needed, and must be forthcoming, not only for prisoners' sakes, but for our own. For the prison indeed oppresses not just those who are locked behind its bars. It reaches out to every one of us.