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A WORLD OUTER SPACE PRISON: A PROPOSAL

BY LUIS KUTNER*

The inadequacies of present incarceration methods in terms of prisoner rehabilitation and inefficient utilization of manpower resources have often been discussed by modern penologists. The present emphasis on prisoner reformation is to some degree in conflict with basic penological concepts of punishment and isolation of criminals from society. Professor Kutner suggests in this article that advancing space technology will someday allow for the realization of an alternative to present prisons—a world outer space prison for future institutionalization of criminals. The recent success of Apollo 8 astronauts in orbiting the Moon and returning to Earth and the projected mission of the crew of Apollo 11 to land an American on the Moon's surface in July of 1969 adds a distinct aura of possibility to his suggestion. He discusses the historical precedent of banishment and then notes the lack of any substantial legal obstacles in establishing his proposed prison. Certainly, Professor Kutner's thesis is a novel and interesting proposal for solution of the ever-growing problems of penal reform in the world today.

I. THE PROPOSAL

THIS article proposes the establishment of an orbital world prison¹ at the turn of the 20th century, to hold the entirety of the planet's population of felons.² The proposal for such a United

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¹ The term "orbital" is used within the context of this paper to denote both natural orbiting bodies such as the Moon, and those made by man.

² It must be noted at the outset that short term incarceration will still be handled on the Earth.

The term "felon," as used within the scope of this work, shall only include those mentally responsible for their acts, and is not to include those sentenced to very short term incarceration. In addition, as will be noted later in the text, special provision will be made for those incapable of rehabilitation.

Most people today think of banishment, if at all, only in relation to fiction, antiquity, or both. "The device of thrusting out of the group those who have broken its code is very ancient and constitutes the most fearful fate which primitive law could inflict. The offender . . . was driven forth naked into the wild." Plucknett, *Outlawry*, 11 ENCYC. SOC. SCI. 505 (1933). Genesis relates that Adam and Eve were banished from Eden, and "it has indeed been contended that the mark set on Cain was not so much a miraculous or talismanic sign for the protection of his life, as a sign probably connected with one of the most ancient of all forms of judicial punishment [—banishment]." Fink, *Crimes and Punishments Under Ancient Hindu Law*, 1 L. MAGAZINE & REV. (4th Ser.) 321, 333 (1875). The ancient civilizations of Babylon (F. HARPER, *THE CODE OF HAMMURABI KING OF BABYLON* 55 (1904) (154 of the Code)), Greece (Z. CHAFEE, *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787*, at 205 (1956)), and Rome (E. SUTHERLAND & D. CWESSEY, *PRINCIPLES OF CRIMINOLOGY* 268 (1960))

Nations penal colony is set forth, not for any intrinsic romance it might be thought to possess, but as a practical solution to the penological problems presently existing in the world and those which we may expect to arise as a result of the growth in world population. The United States is already dedicated to the creation of a space station in the form of a Manned Orbital Laboratory³ and to the exploration and utilization of the Moon. Public discussion may lead to a recognition that the physical remoteness of outer space may also serve a useful penal purpose.

Briefly, the outer space prison envisioned would be a permanent space station, created by a treaty-statute and administered by an international agency. Through the soilless growth of plants and edible algae, it would be self-sufficient in food and oxygen but dependent on the Earth for such necessities as medical supplies and electrical equipment. No opportunity would be allowed for the seizure of a space vehicle by a convict and his return to Earth. For that reason the prison would offer a more nearly perfect deterrent than can be provided by any prison from which an inmate can contemplate escape. Within its confines the prison could afford the inmates relative liberty of movement and normal family and sexual relations since prisoners' families could be allowed to accompany them if they wished. Also, prisoners might marry and begin their families while in prison. The odious apparatus of bars and walls could be greatly reduced or done away with altogether. Thus, the world outer space prison would represent a kind of "leveling up" for the world prison population, an incarceration under more humane conditions than one would reasonably expect the majority of them to have known. The proposed institution should be attractive to those seeking the broadest

employed banishment, and England made extensive use of it for centuries. By the midnineteenth century, however, the English lost interest in banishing citizens. "No power on earth, except the authority of Parliament, can send a subject of England, *not even a criminal*, out of the land against his will." 4 HAWKINS, PLEAS OF THE CROWN 298 (1795).

At the time the union was formed, banishment did not appeal to the United States, which had so recently been used as a depository for Europe's "refuse."

The idea of such laws would have been repulsive to men of that time [1789].

Banishments were a thing of the remote past . . . Very likely the Constitution would have failed of ratification if the members of the state conventions had been told that the proposed national government would be able to throw people out of this country.

Z. CHAFEE, *supra* at 205-06. The practice was not entirely repugnant to the colonists, however, as is illustrated by the cases of Roger Williams and Anne Hutchinson. See W. DOUGLAS, AN ALMANAC OF LIBERTY 135 (1954).

"Banishment, however, did not go the way of the pillory and the whipping post. Although banishment of a citizen from the country has in recent years been no more than a theoretical possibility, at the state level banishment exists as a practical fact . . ." Armstrong, *Banishment: Cruel and Unusual Punishment*, 111 U. PA. L. REV. 758-59 (1963). See also Simsarian, *Outer Space Cooperation in the United Nations*, 57 AM. J. INT'L L. 854 (1963).

³ Cf. Cooper, *Manned Orbiting Laboratory: A Major Legal and Political Decision*, 51 A.B.A.J. 1137 (1965).

possible scope for prison reform. In addition, the world outer space prison would offer a uniform "total" reform, rather than a piecemeal, country-by-country reform.

Reformers are looking for a system of penology which will better accomplish the tasks penal institutions are supposed to serve. The most basic of these tasks is the removal of the criminal from society for the proper period of time. The remoteness of space certainly accomplishes this purpose. A prison in which one is incarcerated is punitive, wherever it might be located, thus satisfying another of the commonly accepted purposes of penal institutions. The purpose which our present system of penology has failed to accomplish is that of rehabilitation. Perhaps the use of outer space for the incarceration of prisoners will present an opportunity for the accomplishment of this task.

In modern times, prison officials agree that all prisoners who can work, should work.⁴ There appears to be disagreement as to what the purposes of convict labor should be,⁵ but rehabilitation should be one such purpose. In addition to keeping prisoners active so they do not become animals in a cage, prisoners should be taught skills which will be of assistance to them upon their release. The emphasis in such labor should be on teaching inmates to work for a living upon release and to discipline themselves in their work. However, no prison system presently can supply the vast majority of prisoners with useful jobs or the incentive to do a job well. Many penal institutions are unable to supply all prisoners with even useless tasks.

There is a possible solution to this situation in a prison in outer space. At the end of the 20th century, the governments of Earth will find it necessary to colonize the Moon. At that time there will be important tasks to be performed on the Moon's surface. Some of these tasks, such as construction and mining, although unusual in the mode of performance, will be familiar to the prisoners, but many will be entirely new, such as farming without soil. If prisoners were to be used as the initial colonists on the Moon, there would be ample work to be done by all. The work would be necessary to their survival and necessary to the people of Earth. The prisoners would have a special importance to themselves and to Earth, the psychological benefits of which could be tremendous. The training given will have untold benefit. Since the prison will have to be reasonably self-supporting, the prisoners will be required to learn nearly all trades and professions. Prisoners will be given a feeling of adequacy and accomplish-

⁴ N. CANTOR, CRIME AND SOCIETY 145 (1939).

⁵ *Id.*

ment which is necessary to their rehabilitation, and which cannot be given to them on Earth.⁶

Many penologists believe that one of the best ways to rehabilitate an antisocial person is to train him to live in a society of rules which he helps to promulgate. Self-discipline in prison life is perhaps the most progressive reform ever suggested for penal institutions. Self-government systems have been attempted several times, but all have been abandoned. However, some actually worked well,⁷ and many penologists of this century still feel that with proper supervision, the system can succeed. "It is probable . . . that the most effective agency in advancing the cause of the reformation of the criminal . . . [is] the education of the prisoner for a normal life after his release."⁸ The principle behind inmate self-government is that one learns by doing.

One basic objection to self-government is that people in prison have already demonstrated their lack of self-control. There are two important answers to such an objection.⁹ First, many convicts have a great deal of self-control but have used it for antisocial purposes. Second, with regard to those persons who lack self-control, the self-government system is more likely to remedy their deficiency so that they may become useful members of society. A system that thinks for the prisoners in every respect, and which teaches them nothing about social coexistence, fails in its objective of inculcating prisoner self-control.

The principle of self-government would find its best chance for success in a prison which would require minimum restraint on prisoners' physical activity and in which normal family and social relationships might be continued. Self-government is an effort to train persons in the art of living in concert. "It implies a strengthening of the ability to exercise one's own faculties — something needed mightily in the world at large. It implies freedom to choose one's own friends, to dispose of one's leisure hours, to order one's own life. . . . Under the autocratic system of prison government the faculties of inmates are kept in abeyance or killed outright."¹⁰ "Self-government seeks to rescue the prisoner from this. . . . Such a regime sets up a new fealty for the prisoner to guide his life. . . . The new fealty at which self-government aims is loyalty to the whole body of prisoners."¹¹ Certainly, a colony on the Moon, having the common goals of mutual dependency and working together, would have the greatest

⁶ *Id.* at 151.

⁷ F. WINES, PUNISHMENT AND REFORMATION 375 (1918).

⁸ *Id.* at 365.

⁹ *Id.* at 373.

¹⁰ *Id.* at 365.

¹¹ *Id.* at 371.

opportunity to develop an individual's loyalty to the entire group.

It must be noted that not all prisoners will be sent to prison on the Moon. Prisoners who are incorrigible and cannot be reformed¹² will be placed in an "Alcatraz in Space." This will be an orbiting space station in typical prison style. The entire prison can be controlled and observed from Earth by closed circuit television. With our expected advances in technology by the end of this century, the only prison personnel necessary will be repairmen for computers and wiring should there be malfunctions and a medical and psychiatric staff to treat the prisoners for physical ailments and mental problems. Necessary supplies and food will be delivered by spacecraft, but no prisoner will be allowed access to the unloading area until after the spacecraft has left.

At the present time the prison population in the United States is some 300,000 individuals, or approximately 0.014% of the total population.¹³ Were the American average to obtain for the world, approximately 3,500,000 persons would now be behind bars. With the expected growth in overall population,¹⁴ the end of this century will see a world prison subculture of some seven to ten million people. The use of habitable space in an overcrowded world for the socially negative task of housing these numbers may still be possible at the end of the century in states possessing extensive internal hinterlands. However, smaller states will doubtless be attracted by any scheme that can free land within their borders. Many of these smaller states have already had experiences, unlike the United States, in the physical seclusion of prisoners in remote penal settlements. They may see the idea of a prison in space as a reasonable alternative to use of their land for long term incarceration.¹⁵

II. LEGAL STATUS OF THE PENAL COLONY

The penal colony is not an institution well known to Americans. Nevertheless, the permanent or temporary exile of felons is quite old in common law. From quite early times people have been banished from England¹⁶ for a variety of crimes, usually political, and trans-

¹² Failure to exclude such persons from the early self-government experiments is commonly stated to have been a major cause of their failure or limited success. See N. CANTOR, *supra* note 4, at 154; F. WINES, *supra* note 7, at 374-75.

¹³ NEWSPAPER ENTERPRISE ASSOCIATION, INC., *THE WORLD ALMANAC AND BOOK OF FACTS* 692 (1967).

¹⁴ G. HARDIN, *POPULATION, EVOLUTION, AND BIRTH CONTROL* 98 (1964).

¹⁵ As Ricardo would say, it is not necessary that the construction of an extraterrestrial prison be cheap; it is only necessary that land be extremely dear so that the cost of the prison be at least of the same order of magnitude as the cost of developing a previously unused land area. If the costs are at all comparable, the noneconomic advantages of the orbital prison may be expected to exert a great persuasive force on the feasibility of such a project.

¹⁶ E. ROBSON, *THE CONVICT SETTLERS OF AUSTRALIA* 5 (1965).

portation of a sort was sanctioned by an Act of Parliament during the reign of Elizabeth I and was permitted under the Poor Law.¹⁷

Acts of 1585,¹⁸ 1593,¹⁹ and 1598²⁰ prescribed banishment for Jesuits, Popish adherents, and "rogues," allowing courts to send them beyond the seas to such places as the Privy Council might appoint.²¹ By the time of the American Declaration of Independence, transportation of criminals had become "a major ingredient of English criminal law."²² It had arguably established itself among those common law powers retained by the new government after the Revolution.²³ Common law was also acquainted with the punishment of banishment to the galleys by which a prisoner was kept off of English soil and confined to a floating platform until the expiration of his sentence.

Transportation in the strict sense was established by an Act of Parliament in 1717²⁴ which declared that to rectify the "great want of servants" in the colonies and to deter crime at home, certain classes of felons would henceforth be punished by transportation abroad for life. Previously, transportation had usually been only for a period of years.²⁵ To that extent, the English law was familiar with the use of the American colonies not merely as places of permanent exile but also as penal colonies for temporary exclusion.²⁶

During the period of 1717-1776, a number of Acts of Parliament expanded the power of transportation, and it appears that about 30,000 persons were banished during that time.²⁷ With the outbreak of hostilities in America the practice ceased for a time. Then, in 1779, Parliament gave courts the power to banish felons "beyond

¹⁷ Poor Law of 1562, 5 Eliz., c. 3.

¹⁸ 27 Eliz., c. 2 (1585).

¹⁹ 35 Eliz., c. 2 (1593).

²⁰ 39 Eliz., c. 4 (1597).

²¹ N. SHAW, *CONVICTS AND THE COLONIES* 23 (1966).

²² *Id.* at 25.

²³ It is not clear whether a power to banish resided intrinsically in medieval courts or was established by Act of Parliament. A number of older writers, including Blackstone, deny that transportation existed at common law, while others assert that it may have so existed. See M. MCKISACK, *THE FOURTEENTH CENTURY, 1307-1399*, at 487 (1959). However, it is common doctrine that certain Acts of Parliament of the same time period as the enactment of the first transportation Acts have been incorporated into the American common law, e.g., the Statute of Wills and the Statute of Frauds.

²⁴ 4 Geo. 1, c. 11 (1717).

²⁵ N. SHAW, *supra* note 21, at 23.

²⁶ The concept of the penal colony does not imply that the entirety of the colony be a prison or even that there be any prison within the colony. Both the Tsarist penal settlements and the French settlements in French Guiana allowed in some circumstances relative liberty of movement and "normal" family relations. Thus, the fact that Jamaica as a whole was not a penal settlement does not prevent us from seeing that the English law used it as one. For a further discussion of the life of the "free" convict see BOURDET-PLEVILLE, *JUSTICE IN CHAINS* (1960).

²⁷ A. SMITH, *COLONISTS IN BONDAGE* 5 (1947).

the seas,"²⁸ which by this time meant Australia. It should be noted that the physical remoteness of Australia placed this penal colony at the greatest distance achievable under the technology of the time.

Convicts composed the majority of the population of Australia well into the 19th century. "As late as 1841," one authority has written, "approximately one-fifth of the population of New South Wales was described as 'bond' and twenty years previously the proportion of transported convicts had been only slightly less than that described as 'free.'"²⁹ It is striking that the original justifications of the system of transportation were the same as some of those³⁰ which could be made for a world prison in space: (1) the economic rationality in moving men from an area of overpopulation; and (2) its relative humaneness (transportation was seen even in this period as a reform, since the alternative then was hanging).³¹

The deportation of felons was a familiar aspect of the continental systems as well as of the common law. France began the practice in 1797 with the exile of a number of political prisoners to French Guiana and continued this practice with some interruptions until World War II.³² During the last century, Italy maintained the punishment of deportation to coastal agricultural colonies and during the Fascist period sent political prisoners to nonagricultural islands near Sicily. In Russia the exile of political prisoners to Siberia began with an order by Peter the Great in 1710. Convicts were also transported to Sakhalin and to Turkistan. The Netherlands maintained penal settlements in Batavia, the Moluccas, and the Penguin Isles. Denmark had utilized Greenland at one time for penal purposes, and both Chile and Ecuador have kept such colonies on Pacific isles. Thus, it is apparent that the physical exclusion of prisoners (which may have had its origin in a primitive desire to remove them from sight) was a device used quite commonly until our generation. It was used not just by despots or barbaric nations but also by civilized and progressive states. Many of the colonies, however, either from their natural unhealthy conditions or the lapses in administration caused by their distance from the seat of government, degenerated. They became brutal and degrading, and developed conditions of the sort associated with the name "Devil's Island." In England the

²⁸ 19 Geo. 3, c. 74, § 1 (1779).

²⁹ N. SHAW, *supra* note 21, at 153. It should be remembered, however, that the felons transported may have been a group unrepresentative of criminal behavior by modern standards. Felonies in 18th century England included a great number of crimes we should now consider petty and not indicative of an antisocial character as well as a number of political crimes. A majority of the transportees appear to have been convicted of various kinds of theft. *Id.*

³⁰ As mentioned earlier, there are other perhaps more persuasive justifications for the suggested prison space.

³¹ G. GRUENHUT, *PENAL REFORM* (1948).

³² *Id.* at 137.

abuses connected with the "lending out" system of renting convict labor in Australia led to the Penal Servitude Acts of 1853 and 1857 which abolished the system of penal transportation.³³ Similar legislation has been enacted in several countries.

If the penal colony is to be resurrected in the humane and novel form proposed by this article, it will be necessary to address attention to the legislation by which the various governments have divested themselves of the power to transport convicts. It will also be necessary to combat the significant and justifiable public prejudice created by abuses of this penal tool in the past.

On the whole, international law has accorded treatment of prisoners to the exclusive concern of municipal law, even when movement of prisoners between nations is involved. Certain exceptions to this rule have evolved. For example, there is the case of conduct called "denial of justice"³⁴ whereby one state becomes liable to another for tortious acts committed by its officials against a national of another state in administering its system of justice. Nevertheless, with regard to the right of a national penal system to transport prisoners either internationally or to outer space, it seems that the older view making it the exclusive concern of municipal jurisprudence is still the dominant doctrine. Since the foundations of state power lie in the power to penalize, no power is more jealously guarded by states, and nowhere is the concern of others more quickly rebuked. Presently, international law does not forbid national participation in a joint extraterrestrial prison. The concept of the prison is merely

³³ One other major objection and cause of failure of the penal colony in Australia (as well as penal colonies elsewhere) was that raised by the law-abiding residents to the forcing of prisoners upon their developing society. It is evident that there is no society on the Moon to raise such an objection.

³⁴ See Lisistyn, *The Meaning of the Term 'Denial of Justice,'* 30 AM. J. INT'L L. 632 (1936); Fitzmaurice, *The Meaning of the Term 'Denial of Justice,'* 1932 BRIT. Y.B. INT'L L. 93; A. FREEMAN, INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE (1938). In some cases the tortious act has consisted merely of a refusal to grant access to a court or to grant a judgment; in others a tort is said to be committed when the administration of justice (including the amenities offered by the prison system) fall below some standard (see W. BISHOP, INTERNATIONAL LAW 643 (1962)), even if nationals of the offending state are treated in no different fashion. The theory on which the recovery is founded is sometimes an obligation on the part of the state to behave in accordance with the demands of universal equity and sometimes a claim by the offended state that its dignity and welfare have been wronged by the wrong done its national (W. BISHOP, *supra* at 641-47). In either instance the essence of the claim is the alien nationality possessed by the individual in the offending state's judicial or penal system. This derives from the reluctance of traditional international law to admit that individuals could have juridical existence for the purpose of making claims. In addition the International Declaration of Human Rights (G.A. Res. of Dec. 10, 1948, 3(1) U.N. GAOR 71, U.N. Doc. A/810) contains certain clauses touching upon penal conditions, such as Article 5 — forbidding "cruel, inhuman, or degrading treatment or punishment" and Article 9 — forbidding "arbitrary arrest, detention or exile," but the Declaration is in no sense a binding agreement. Mrs. Eleanor Roosevelt, United States Representative on the Human Rights Commission of the Economic and Social Council, said with regard to the effect of the Resolution: "It is not a treaty; it is not an international agreement. It does not purport to be a statement of legal obligation." U.S. Dep't of State, Bull. No. 19, General Assembly Adopts Declaration of Human Rights 751 (1948).

an extension of the earlier penal colonies, which were not attacked by any state as invalid under international law. Prisoners of war, however, may present a special problem in the interpretation of the special conventions regulating the incarceration to which they may be subjected.³⁵ Similar to aliens who are "denied justice," such prisoners are in the special class of those tinged with an international interest by definition. Provision for their special treatment does not contradict the general rule of noninterference in matters of domestic penal administration.

III. A WORLD PRISON AND OUTER SPACE LAW

We must consider the legality of a world prison in outer space law, since there probably will be no unanimity among the nations in this venture. As a basic principle, it may be said that the use of outer space for the placement of penal satellites, just as for any other non-harmful purpose, is a lawful activity which does not infringe on the right of any state.³⁶ Support for this principle is to be found both in the declarations of states and in their practice. During the International Geophysical Year and for more than 14 months thereafter, states launched a variety of missiles and space vehicles in the belief that space was a *res communis omnium* which might be investigated by all, regardless of the national territory traversed by the vehicle during the course of its flight. General acceptance of this practice enabled the United Nations Ad Hoc Committee on the Peaceful Uses of Outer Space to find as early as 1959 that outer space was "freely available for exploration and use by all in accordance with existing or future international law or agreements."³⁷

This view is logically unavoidable. "It would be quite impossible to consider a situation in which a spacecraft orbiting at more than 17,000 miles an hour found itself theoretically subject to one rule over the high seas and a different one over a subjacent state."³⁸ While a space station can be placed in a stationary orbit in relation to a posi-

³⁵ Since the World Prison would meet the rather minimal physical standards of the various P.O.W. Conventions prima facie, the chief question would be whether confinement in the extraterrestrial prison could be said to violate any of the general clauses against cruel treatment which the Conventions normally contain, and whether any international or national tribunal would be empowered to hear the complaint. See McGinniss, *International Bill of Rights for Prisoners of War*, 2 CLEV.-MAR. L. REV. 158 (1953).

³⁶ For an authoritative account of the growth of this principle see M. McDUGAL, H. LASSWELL, & I. VLASIC, *LAW AND PUBLIC ORDER IN SPACE* 323-59 (1963). More recent discussions of this point include Cooper, *Legal Problems of Spacecraft in Airspace*, Festschrift fuer Otto Riese 465 (1964); Goedhuis, *Conflicts of Law and Divergencies in the Legal Regimes of Air Space and Outer Space*, 109 RECUEIL DE COURS DE L'ACADEMIC DE DROIT INTERNATIONAL 263. A somewhat divergent view is proposed by the Soviet author Hlestov in *The Elaboration of Space Law Norms*, SOVETSKOE GOSUDARSTVE I PRAVO 67-75 (No. 6, 1964).

³⁷ 14 U.N. GAOR, Annexes, Agenda Item No. 25, U.N. Doc. A/4141 (1959).

³⁸ Cooper, *supra* note 3, at 1140.

tion on Earth and thus avoid the problem of territorial violation after its placement, there is no way to avoid such violations in the time between launching and final position in space. Fortunately, the ancient example of the first *res communis*, the ocean, and the concurring judgments of the great powers have enabled the world to escape attempts to bar the use of any part of outer space to any state or for any peaceful purpose. A noted authority on the law of outer space states, "Slowly and inexorably we are coming to accept the fact that legal status of outer space and the high seas differs very little, if at all. Historically, it should be noted that the space above the high seas has long been accepted as having the status of the seas themselves."³⁹

This principle of free access, which we may here designate as the principle of nonappropriation, protects the use of outer space by any state for such nonmilitary purposes as the seclusion and confinement of felons. The principle is founded not merely in the absence of protest during and since the International Geophysical Year, but also in several sweeping and unhesitating statements made by spokesmen for various nations in the forum of the United Nations General Assembly. The principle of nonappropriation was reaffirmed in the Resolution passed by the General Assembly on December 20, 1961, under the title "International Co-operation in the Peaceful Uses of Outer Space."⁴⁰ This Resolution, which Vlasic calls a "landmark in the evolution of basic legal principles relating to the exploration and use of outer space,"⁴¹ may be taken with some reservations as declarative (if not binding in itself) of the current state of the rights and duties which nations claim to be associated with traffic in outer space.⁴²

A number of authors have regarded this and later resolutions (to be discussed below) as having a binding power; as unanimous declarations of the law, they are thought to express the assent of nations, despite the absence of the usual formalities which attend international agreement. Some hesitancy, however, is in order when dealing with what one scholar calls "instant" international customary law.⁴³ Resolutions are not binding *qua* resolutions, even if they are

³⁹ *Id.* at 1139.

⁴⁰ G.A. Res. 1962, 18 U.N. GAOR 15, U.N. Doc. A/5026 (1961).

⁴¹ Vlasic, *The Growth of Space Law 1957-65: Achievements and Issues*, YEARBOOK OF AIR AND SPACE LAW 365 (1967).

⁴² See also The Declaration of Legal Principles Governing Activities of States in the Exploration and Use of Outer Space, G.A. Res. 1721, 16 U.N. GAOR 6, U.N. Doc. A/5656 (1963). In many ways, the Declaration is more significant than G.A. Res. 1962, *supra* note 40. Jenks, for example, calls it *The Twelve Tables of the Law of Space* (SPACE LAW, 1965), but there is no need to examine it here in detail since it affirms the principle of nonappropriation declared by the earlier Resolution.

⁴³ Cheng, *United Nations Resolutions on Outer Space: 'Instant' International Customary Law?*, 5 INDIAN J. INT'L L. 23 (1965).

reached after a degree of negotiation and discussion that commonly accompanies the formation of treaties. Nevertheless, it is certain that states may bind themselves unilaterally by the expression of a sufficiently clear intention to be bound by the content of the resolution. The problem is to determine whether this description fits the facts of a particular case. Only France has as a matter of course denied any binding force to these resolutions.⁴⁴ Other states, including the Soviet Union, seem willing to admit varying degrees of legal significance to these expressions of general opinion and desire. The Soviets, for example, while not explicitly repudiating declarations made on the floor of the General Assembly with unanimous consent, requested that the principle of outer space law be formalized in an agreement, a request to which the United States and others ultimately acceded by formulation of a Space Treaty.⁴⁵

It is not within the scope of this article to consider whether the formulation of principles such as nonappropriation in a treaty must be considered as implicit admissions by the signatories that the prior statements made through the United Nations General Assembly lacked the binding force of a treaty. It should be noted, however, that this distinction between treaties and carefully prepared unanimous resolutions, a distinction which may be called orthodox, has been repudiated by a number of writers. Thus, Professor Sohn states, "If most U.N. members backed . . . a declaration while abstentions or objections were few, by this very fact it becomes law."⁴⁶ Also, Mr. Abram Chayes, formerly Legal Advisor to the Department of State, has said in discussing this question:

Whatever the source may be, the United States accepts these principles (those of the Resolution) as stating the law, and I suspect that most other States would also. We have witnessed in this field a significant and novel kind of law-making activity that has established a sound and useful basis for more intensive legal development and that is attributable in a large presence and action of international organization.⁴⁷

If Mr. Chayes is correct in saying that the Resolution "states the law," we may say that the principle of nonappropriation (which is essential to confirm the legitimacy of the construction of any permanent space station) has been in effect in an overwhelming majority of all nations since December 1961.

⁴⁴ See ANNOTATED REVIEW OF U.N. AFFAIRS, 1962-63, at 95 (Swift ed.).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ A. Chayes, *International Organization and Space*, in PROCEEDINGS OF THE CONFERENCE ON THE LAW OF SPACE AND OF SATELLITE COMMUNICATIONS 58 (Chicago, May 1963). The opinion of Mr. Chayes is followed by many authorities. See Vlasic, *supra* note 41, for a gathering of them.

The Resolution of the General Assembly passed on December 13, 1963,⁴⁸ like that of December 20, 1961, declared that international law, including the Charter of the United Nations, furnishes the principles which shall guide the extraterrestrial conduct of states. It affirmed that states are liable for their acts in outer space, whether those acts are carried out by the states themselves, by nongovernmental agencies, or by international organizations. Thus, an attempt is made to incorporate all past international law by reference. States are not assumed to have greater or different powers above the ionosphere than they have beneath it. As suggested above, the treatment of prisoners not otherwise tinged with an international interest does not become a matter of international concern merely because the state controlling their destinies moves them across a nonappropriable area, the ocean. The exact language of the Resolution is: "outer space and celestial bodies are free for exploration and use by all states on a basis of equality and in accordance with international law." The effect of the language is to deny that new rights are created or old rights affected by the mere facts of extraterrestriality. Without digressing into a lengthy analysis, it can be mentioned that the Space Treaty of January 27, 1967, through its first and second articles, reaffirms the principle of nonappropriation.⁴⁹ The placement of the reaffirmation is significant because it demonstrates the fundamental character of the principle of nonappropriation. Logically, the "openness" of space to all must be considered a primary hypothesis without which the matter cannot be carried further. This fact has been recognized by states since the days of Sputnik, and it may be assumed that the principle will still be in force at any later time when the construction of a space station of immense proportions will be technically feasible. The principle is founded on the real interests of the states participating in spatial exploration; without it they would suffer disruptive claims of exclusive possession. Such claims create the possibility of the extension of violence into the cosmos. Further, the environment beyond the ionosphere is now and will remain for some time suffi-

⁴⁸ Declaration, *supra* note 42.

⁴⁹ The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies, January 27, 1967, TAIS No. 6347; G.A. Res. 2222, 16 U.N. GAOR 13, U.N. Doc. A/6316 (1966). The importance of the treaty of course is that it reaffirms the principle of nonappropriation in a form universally agreed to be binding. This article has not dealt with the treaty at great length because it was felt necessary to show that the rule of nonappropriation may have a "common law" background preceding its "statutory enactment. The true significance of the resolutions preceding the Treaty is that they demonstrate a general agreement among nations that the rule of nonappropriation is a logical and practical necessity—which in turn suggests that the rule will still be in force in the period to which the article mainly addresses itself, the end of the present century. However, the problem of the relation between the Treaty and resolutions is a fascinating and unavoidable one since one may expect further resolutions in the future. See Schick, *Problems of a Space Law in the United Nations*, 13 INT'L AND COMP. L.Q. 969 (1964); Christol, *Space Stations: A Lawyer's Point of View*, 4 INDIAN J. INT'L L. 488, 490 (1964).

ciently hostile to man to make it self-evident that no artificial barriers of nationality should stand in the way of mutual aid between crews of space ships and between crews and ground support personnel. The obvious analogy is found in Antarctica, where the hostility of the biosphere maintains the principle of nonappropriation quite as much as does the relative valuelessness of the land. Recognizing these facts, states such as the United States which admit the binding character of General Assembly resolutions have shown themselves willing to be bound to the principle of nonappropriation from the first days of astral exploration. Unless the conditions of travel in outer space change beyond recognition, there is no reason to suppose that this principle will be abandoned, nor is there reason to suspect that future international law may specifically ban from the skies one of the uses to which geographical remoteness has traditionally been put—the establishment of penal colonies.

IV. AMERICAN LAW AND THE WORLD PRISON

The applicability of American municipal law to the problem of the prison will be of the greatest importance in the construction of the institution (whether satellite or Moon based). This is so since it may be assumed that, even at that time, American financial and technical assistance will be necessary to the project. If any provision of the Constitution or later law forbids American participation, it seems likely that the prison could literally never “get off the ground.”

The obvious question is whether confinement in such an institution would violate the prohibition of the eighth amendment against cruel and unusual punishment. It might be said, for example, that the exile of prisoners to such a distance and their resulting incarceration in a hostile environment subjects them to unusual and dreadful mental pain. They would be in constant danger of collision with meteors; the long-range effect of cosmic rays might be unknown for generations. Such arguments would stress the difficulty of escape from the gravitational field of the Earth and the uncertainties of life on the space station or on the Moon when that escape has been attained.

The world prison would constitute a novel and possibly severe form of punishment. However, the eighth amendment has never been interpreted to mean that a new method of punishment could not be introduced. The definition of “cruelty” must “draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁵⁰ A significant case for the present inquiry is *Francis v. Resweber*.⁵¹ The petitioner, saved from death by mechanical failure

⁵⁰ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

⁵¹ 329 U.S. 459 (1947).

of the electric chair, failed in his claim that it would be cruel and unusual to let the State of Louisiana have a second try. In a 5-4 decision the Supreme Court said that the constitutional prohibition applied to "cruelty inherent in the method of punishment" and not to unforeseeable accidents. The argument of the dissent that the impact on the prisoner should be determinative was rejected as unworkable.

The notion that American law does not extend to the physical removal of offenders has no foothold in our courts. Deportation is a common consequence of many acts,⁵² and until recently, so was involuntary expatriation.⁵³ The test of "cruelty inherent in the method of punishment" suggests that here, as in many other areas, the Court is referring to a "balancing" of the various elements inherent in a particular method of punishment. The "balancing" test implies that the Court would consider the advantages of the world prison, its rehabilitation potential, its relative liberty of movement, and the social relations it could offer to the prisoner. Unless American prisons have changed beyond all recognition by the end of the century — and such sweeping change is always difficult under a federal system and in an area of law traditionally left to states — it is likely that incarceration in the world prison will be an improvement in the lot of the prisoner sent to it from the United States. At the present time, there is only one American prison system permitting conjugal visitation,⁵⁴ despite evidence that the privilege of such visitation improves morale and reduces homosexuality. If the world prison were to embody the most advanced penal practices, it seems idle to say that it would be regarded as "inherently cruel" merely because it is physically remote and places the inmates in some danger. No one would doubt, for example, the power of the United States to create a civilian prison in Alaska or a military prison at the American base in Thule, Greenland, though in either case a power failure could mean death. The world prison need not be seen in a different light.

Attention should also be directed to such state-federal questions as may arise from the confinement of all prisoners in a single institution. If American participation in the world prison were thought to be unconstitutional, or contradictive of statute, it is by no means necessary that participation be abandoned for that reason. With regard to conflict with statute, we must note the "Chinese Exclu-

⁵² For a collection of these offenses, see Immigration and Nationality Acts of 1952, 8 U.S.C. §§ 1251-60 (1964).

⁵³ *Afroyim v. Rusk*, 387 U.S. 283 (1967).

⁵⁴ Hopper, *Conjugal Visiting in the Mississippi State Penitentiary*, 29 FEDERAL PROBATION 39 (1965). The author points out that in the opinion of the guards the practice of permitting conjugal visits has reduced homosexuality and improved morale among the inmates. It should be noted that the Mississippi practice was never a deliberate reform, but is merely a privilege granted prisoners through custom.

sion" case, *Chae Chan Ping v. United States*,⁵⁵ in which, after holding that a certain Act of Congress contravened the provisions of a treaty, the Supreme Court said: "[B]ut it is not on that account invalid or to be restricted in its enforcement. The treaties were of no greater legal obligation than the Act of Congress. . . . [T]he last expression of the sovereign will must control."⁵⁶ If an alleged conflict arose between an American commitment by treaty to participation in a world prison and the Constitution, it is interesting to note that courts are obliged to construe them "so as to give effect to both."⁵⁷ While it has been said that the treaty power does not extend so far as "to authorize what the Constitution forbids,"⁵⁸ this is not determinative of whether the Constitution forbids any specific act to which the government purports to be obliged by treaty. There is no lack of brave language about the Court's eternal vigilance in the defense of civil liberty,⁵⁹ but on a number of occasions treaties or merely executive agreements have been used to alter the rights and property of states and citizens. In *United States v. Pink*,⁶⁰ the Federal Government brought suit in a state court to recover certain assets which it claimed belonged to it by assignment from a foreign government. The assignment had been made as part of an executive agreement. The state court had opposed the attempted recovery as a confiscation, but the Supreme Court brushed aside that point by reference to the Supremacy Clause in Article VI of the Constitution. In addition, the Court said that the executive agreement in controversy had the dignity of a treaty made with consultation of the Senate. It would appear from cases such as *United States v. Pink* and *United States v. Belmont*,⁶¹ as well as from the more famous cases of *United States v. Curtiss-Wright Export Corp.*,⁶² and *Missouri v. Holland*,⁶³ that individual and state rights may be altered by treaty and by executive agreement, despite all rhetoric to the contrary. It is entirely a matter of *which* rights are in question, their political and moral significance, and the balance of necessity which the Court reaches in considering them. If this be accepted, it is another way of saying that the Constitution as interpreted by the Supreme Court over a number of generations has given the Executive (or at least, the Executive plus two-thirds of the Senate) the power to affect the rights and property of indi-

⁵⁵ 130 U.S. 581 (1889).

⁵⁶ *Id.* at 600.

⁵⁷ *Whitney v. Robertson*, 124 U.S. 190, 194 (1887).

⁵⁸ *De Geofroy v. Riggs*, 133 U.S. 258, 267 (1890).

⁵⁹ For example, see *Reid v. Covert*, 354 U.S. 1 (1956), where the absolute inability of the Executive to avoid constitutional limitations is maintained even with some passion.

⁶⁰ 315 U.S. 203 (1942).

⁶¹ 301 U.S. 324 (1937).

⁶² 299 U.S. 304 (1936).

⁶³ 252 U.S. 416 (1920).

viduals and states by international compact. The true extent of this power is undetermined for the most part. In itself, this fact is not overly frightening — the extent of the Presidential war power is equally vague — and recognition of it helps to free some measure of fear that American participation in the proposed Prison might be limited by the impact of other governmental institutions.

Finally, were American participation to be presumptively unconstitutional under the state of constitutional law existing at the end of this century, it by no means necessarily follows that the Executive is forbidden to enter into a participatory agreement. Doctrine exists to the effect that the Constitution does not require the President and Congress to give independent consideration to the constitutionality of actions.⁶⁴ In this view the separation of powers frees nonjudicial authority of the need to "second-guess" the Court's interpretation of the Constitution. "But nothing," writes Thomas Jefferson, "in the Constitution has given them [the Supreme Court] the right to decide for the Executive, more than the Executive has a right to decide for them."⁶⁵ The discussion referred to in the notes indicates that several other of our most prominent Chief Executives have been of the opinion that the President is not bound to determine in advance and to conform his acts to what he thinks may be the attitude of the Court. Executive action, even in plain opposition to the Court's presumed desire, need not be futile if it is understood as an attempt to educate and rouse public opinion. It is a common saying that, ultimately, the Court does follow the election returns. No more powerful device exists for the education of the public than controversial Executive action.

Before concluding, it should be mentioned that attention must be paid to the drafting of the provisions concerning the accompaniment of prisoners by their families. There must be no Hobson's choice offered to the families of prisoners since that would work a familial guilt, causing what Article III, section 3 of the Constitution calls "corruption of the blood."

CONCLUSION

This article has proposed the construction of a space station of immense proportions or a station on the Moon, or both, to house the entirety of the world's felons. A review of the relevant international, outer space, and American domestic law has revealed no significant obstacle in law to defeat such a project. It is further urged that the proper body to affirm the necessity of such a penal institution

⁶⁴ N. DOWLING & G. GUNTHER, *CONSTITUTIONAL LAW* 47-49 (1965).

⁶⁵ *Id.* at 47.

and to conduct the initial studies is the United Nations. Through its General Assembly and the Committee on the Peaceful Uses of Outer Space, the U.N. has taken a preeminent position in the formation of outer space law from its inception. COPUOS, which possesses both legal and scientific subcommittees of proven worth, is the obvious forum in which the formulation of the prison's technical, legal, and administrative problems could take place.

Ultimately, a United Nations world agency for prisons might administer the institution for all participating states. Each state would contribute in proportion to its ability to pay, rather than in proportion to the number of prisoners it has contributed. To do otherwise would penalize the poorest and most populous states and discourage their participation in the plan. It may be assumed that prisoners from these populous states are among those who would profit most from the reforms embodied in the prison. Provision would also have to be made for variance in the capacity of states to engage in the technical task of constructing the prison.

The proposal for a world outer space prison suffers from two problems of time. First, we are too close to some of the past's penal colonies, and the very phrase "penal colony" still summons up justifiable horror. This difficulty must be met head on; it must be generally understood that the world outer space prison would be an attempt at prison reform on a scale previously unattainable and not an attempt to sweep undesirables under the rug. Secondly, the current generation is too far from the end of the century. Imaginations do not easily leap to the period in which this proposal will be technologically commonplace. However, the distance to be covered is only 31 years, not an age or an epoch. If that future time is reached, and nations are still unprepared to seize the novel opportunities then available, it will be due to the failures of imagination of the statesmen who practice in this generation.