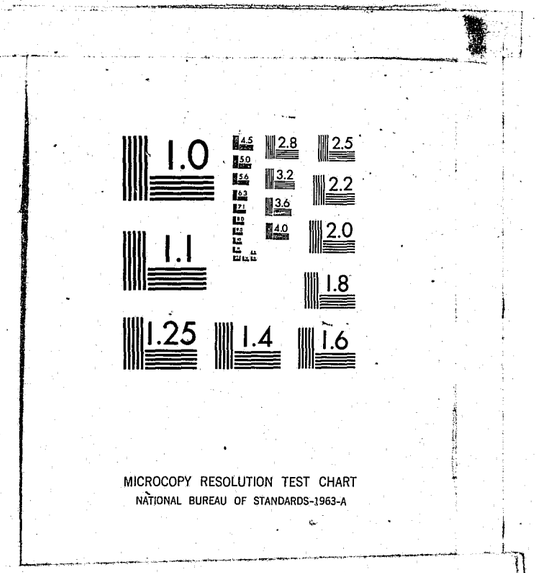

Federal Probation

DECEMBER 1980

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All phases of preventive and correctional activities in delinquency and crime come within the fields of interest of FEDERAL PROBATION. The Quarterly wishes to share with its readers all constructively worthwhile points of view and welcomes the contributions of those engaged in the study of juvenile and adult offenders. Federal, state, and local organizations, institutions, and agencies—both public and private—are invited to submit any significant experience and findings related to the prevention and control of delinquency and crime.

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Federal Probation

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VOLUME XXXXIV DECEMBER 1980 NUMBER 4

This Issue in Brief

Prisoners' Rights Litigation: A Look at the Past Decade, and a Look at the Coming Decade.--A number of startling changes have occurred in the prisons during the 1970's, according to Richard G. Singer, professor of law at Rutgers University. The question he explores in the first part of his article is whether these changes are attributable, in whole or in part, to the prisoners' rights movement, and specifically the litigation arm of that movement. In the second part he discusses the impact the recent Supreme Court case of *Bell* v. *Wolfish* will have on prison litigation in the future.

Children of the Holocaust and Their Relevancy to Probation: Presentence Investigations and Case Planning.--Federal Probation Officer Stephen L. Wishny of Los Angeles suggests that a social history of parent or parents as survivors of the Holocaust, or survivors of like social trauma, might provide an additional element in explaining defendant behavior and developing treatment plans. His article reexamines a presentence investigation in the light of recent research in the field of Holocaust survivor psychology and discusses casework planning from the same perspective.

Managing the Interoranizational Environment in Corrections.--In the face of declining governmental and public support for human service programs, correctional administrators will be required to do more with fewer resources, asserts Dr. Ronald I. Weiner, associate dean of The American University School of Justice. One approach for becoming more competent in the management of scarce resources is the necessity for understanding interorganizational problems in corrections and designing effective strategies to overcome them, he maintains. Management training in corrections would be wise to expand its knowledge base beyond concern for the administration of personnel and programs internal to the organization. Future training needs will require both knowledge and strategies for more effectively negotiating favorable relationships with other organizations in the task-environment, he concludes.

Fines as an Alternative to Incarceration: The German Experience.--Although many issues of correctional reform have been discussed and debated in the United States during the last decade, the potential role of financial penalties (fines) is not among the issues raised. This omission, according to Professor Robert W. Gillespie of the University of Illinois, stands in sharp contrast to similar discussions and policy innovations in Europe regarding fines. The innovations in recent German penal policy and practice in the use of fines is reviewed and contrasted to the role accorded fines in selected United States courts.

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Assessing Parole Violation Rates by Means of the Survivor Cohort Method.--The examination of parole violation statistics will invariably show a larger number of parole violators each month during the first year or so of parole as compared to the number of violators during the latter parole periods. Two reasons could account for this. Either the probability of violation is highest during the immediate postrelease period, or the number of parolees "at risk" is greater thus providing a larger pool of possible violators. The purpose of this article by George F. Davis, supervisor of information systems for the California Youth Authority, is to present additional data relating to the issue of whether the early months on parole are the most risk-prone.

Purchasing Services in a Community-Based Juvenile Corrections System: The Ohio Experience.--Despite the widespread practice of state juvenile corrections agencies contracting with private agencies to provide residential and social services, there is little in the literature concerning what is needed to develop and maintain a successful purchase of service system, writes Don G. Shkolnik, community residential services administrator for the Ohio Youth Commission. A review of the strengths and weaknesses of such a system is the backdrop against which the Ohio Experience is examined.

His Day in Court.--Frederick Greenwald, executive director of International Probation and Parole Practice, believes that sentencing the alien offender is as vital a part of the judicial process as the sentencing of a citizen or long-time resident. It may have far-reaching effects both on the individual and the nations, not to mention the families involved. He states that when economic and social costs and values are weighed, the balance favors providing equal rights to the alien offender and an equal opportunity to the court to have benefit of full and complete knowledge of the offender when considering the sentence to be imposed.

Patterns of Probation and Parole Organization.--Organizational relationships between programs providing services to mutual clients have a critical impact on the timeliness and quality of those services, according to authors Charles L. Johnson and Barry D. Smith. Their article discusses the impact on services of organizational relationships among probation, parole, and correctional functions. At issue is the compliance of each state with specific portions of standards recommended by the National Advisory Commission on Criminal Justice Standards and Goals.

Understanding Alcoholism and the Alcoholic Offender.--Alcoholism is a major national health problem in the United States. Its costs to American society in terms of mortality, economic loss, and social and emotional disturbance are escalating. Current research evidence indicates that there is a basis for optimism in treating the alcoholic when the focus of treatment is on alcoholism as a primary disease entity rather than as a symptom of an underlying emotional disturbance or inter-personal problem. This article by Professor Gloria Cunningham of Loyola University of Chicago discusses the implications of emerging knowledge about alcoholism for criminal justice practice.

Prisoners' Rights Litigation: A Look at the Past Decade, and a Look at the Coming Decade

BY RICHARD G. SINGER
Professor of Law, Rutgers University, Newark, N.J.

PART I

AFTER a decade of prisoners' rights litigation, it seems propitious to assess the impact of the litigation upon prisons. In the past decade, courts have had to balance the task of protecting the rights of individual prisoners with the task of protecting inmates both from each other, and from arbitrary decisions by correctional administrators which typified the prison system in the preceding years. What have been the gains and losses of that litigation? How can we evaluate this decade of judicial intervention in the prison setting? And what is the likely future of the litigation movement?

It seems clear that a number of startling changes have occurred in the prisons during the 1970's (even though many would argue that prisons remain essentially as inhumane, oppressive, and class oriented as they ever were).[1] The question I wish to explore in the first part of this article is whether these changes are attributable, in whole or in part, to the prisoners' rights movement, and specifically the litigation arm of that movement. I shall sketch some of the changes which I think have occurred in the past 10 years, and whether litigation has been responsible for them.

At least two things, I think, need to be said initially about the judicial involvement in corrections which began in the late 1960's, in part because there is always a tendency to forget the obvious. First, courts did not enter the arena of corrections willingly and gleefully, looking for some way to castigate prison administrators.

For over a century, courts had consistently refused to consider any complaint by a prisoner about the conditions of his confinement; they had taken the well-known "hands off" position. A prisoner was, in the words of one court, "the slave of the state," beyond the pale of judicial, or indeed legal, assistance. Courts had deferred to the assumed expertise of prison administrators. It was only when the complaints began to detail conditions so crass, so gross, as to shock the minds of all decent people that the courts became involved. It may be useful to recall the conditions in one solitary confinement cell in one state, which prompted the first significant prison conditions case, *Jordan v. Fitzharris:*[2]

> During plaintiff's confinement in said strip cell, plaintiff was forced to remain in said strip cell with said flaps and door of the second wall closed. As a result, plaintiff was deprived of light and ventilation for twelve days, except that twice a day the door of the second wall was opened for approximately fifteen minutes.
>
> The interior of said strip cell is without any facilities, except that there is a raised concrete platform at the rear of the cell containing a hole to receive bodily wastes. There is no mechanism within the cell for "flushing" bodily wastes from this hole. "Flushing" is controlled by personnel of the Correctional Training Facility from the exterior of said strip cell. The hole was only "flushed" at approximately 8:30 a. m. and 9:00 p. m. on some of the twelve days plaintiff was confined in said strip cell.
>
> During plaintiff's confinement in said strip cell, the strip cell was never cleaned. As a result of the continuous state of filth to which plaintiff was subjected, plaintiff was often nauseous and vomited, and the vomit was never cleaned from the plaintiff's cell. When plaintiff was first brought to the strip cell, the floor and walls of the strip cell were covered with the bodily wastes of previous inhabitants of the strip cell. Said strip cell had not been cleaned for at least thirty days before plaintiff was confined therein.
>
> Plaintiff was forced to remain in said strip cell for twelve days without any means of cleaning his hands, body or teeth. No means was provided which could enable plaintiff to clean any part of his body at any time. Plaintiff was forced to handle and eat his food without even the semblance of cleanliness or any provision for sanitary conditions.
>
> For the first eight days of plaintiff's confinement in said strip cell, plaintiff was not permitted clothing of any nature and was forced to remain in said strip cell absolutely naked. Thereafter, plaintiff was given a pair of rough overalls only.
>
> Plaintiff was forced to remain in said strip cell with no place to sleep but upon the cold concrete floor of the strip cell, except that a stiff canvas mat approximately 4½ feet by 5½ feet was provided. Said mat was so stiff that it could not be folded to cover plaintiff without such conscious exertion by plaintiff that sleep was impossible. Plaintiff is six feet and one inch tall and could not be adequately covered by said stiff canvas mat even when holding said mat over himself. The strip cell was not heated during the time that plaintiff was forced to remain there.

Second, corrections was not the only, and in fact not even the most important, area into which judicial review probed. The era of the 1960's reawakened all of us, including judges, to the vast uncharted discretion which we had delegated to per-

[1] This question is for another day; by mentioning the substantial reforms which have occurred in prisons, I do not intend to be taken as suggesting that these reforms necessarily have made prisons acceptable. That they have—or would have absent other events—made prisons more liveable, at least for those confined to them 24 hours a day, seems clear.

[2] 237 F. Supp. 674 (M.D. Cal. 1966).

sons claiming to be experts. Schools, mental hospitals, the military, and many other institutions were all subjected to the light of impartial evaluation. All these institutions were found wanting. The current reevaluation of discretionary sentencing shows that this concern continues but in prisons, perhaps more than any other area, obstinacy and contempt for judicial scrutiny was more widespread.

That may in part be a result of a misunderstanding of what judicial review is, and why it is critical to any system which purports to follow the rule of law. Judge David Bazelon perhaps put it better than anyone has: [3]

> Not only the principle of judicial review, but the whole scheme of American government, reflects an institutionalized mistrust of any unchecked and unbalanced power over essential liberties. That mistrust does not depend on an assumption of inveterate venality or incompetence on the part of men in power, be they Presidents, legislators, administrators, judges, or doctors. It is not doctors' nature, but human nature, which benefits from the prospect and the fact of supervision. . . Judicial review is only a safety catch against the fallibility of the best of men; and not the least of its services is to spur them to double-check their own performance and provide them with a check-list by which they may readily do so.

One commentator has put it this way: [4]

> In the short run . . . there may be a perception of harassment, intrusion, and usurpation. The interventions of the law would never have occurred in the first place had . . . professionals regulated and monitored themselves and their institutions, although in many cases they were powerless to do so, and defended evils not of their own making. In any event, effective self-regulation is extraordinarily difficult for all. Because it cannot effectively be accomplished the law must, in some cases, intervene and provide protections and safeguards that would otherwise not be forthcoming. . . This requires openness of mind, an abandoment of defensiveness, and a preparedness to modify and even give up long-established practices and perspectives that are no longer valid.

These words fit corrections precisely. But they are written NOT to correctional administrators, but to those who manage mental health facilities; once again, the point is that judicial intervention is not limited to corrections, and the message of judicial review cuts across professional borders.

Let me now outline some of what I believe are the more salient changes in prisons in the past decade.

(1) *The involvement of other disciplines in prison reform.* Surely one of the most dramatic events in the 1970's was the growth of the kinds of persons and national organizations concerned with prison reform. The bar was obviously high on this list, with the creation of the American Bar Association's Commission on Correctional Facilities and Services, and the recent report of the ABA's Standards Relating to the Legal Status of Prisoners. While the general movement for legal reform in all areas provided some of the impetus to these activities, the prisoner litigation movement, a movement in which and with which lawyers felt comfortable, was a prime genesis.

Another involvement of lawyers was the promulgation of the *Model Sentencing and Corrections Act* proposed by the National Conference of Commissioners on Uniform State Laws. As the name of the organization suggests, it comprises only lawyers. This effort is unquestionably a response to the growing recognition by lawyers of the part which law, and the case decisions, play in penal reform.

A second major national organization which has become involved in prison reform is the American Medical Association. Here, too, the litigation arm played its part. The original AMA survey of jails, in 1973, was sparked in some measure by the need of lawyers, including litigators, for information about medical conditions in penal institutions; the ABA Commission helped the AMA in its initial survey. Since then, that organization, both with ABA consultation and on its own, has delved deeply into that field. As a result, other medical disciplines and organizations, such as the American Psychiatric Association, have similarly become involved and have proposed, among other things, national standards relating to their field, applied to correctional facilities. Medical conditions in prisons and jails have unquestionably improved as a result.

(2) *The development of grievance mechanisms, prisoner councils, etc.* In 1967, the President's Crime Commission called for a "collaborative" prison, in which decisionmaking would be shared by administrators and prisoners. We are, of course, nowhere near that point, but it is certainly true that the development of grievance mechanisms, which characterize most state prisons today, as well as the establishment of ombudsmen, prisoner councils, or other devices by which minor concerns of prisoners may be resolved is at least partially an attempt by correctional administrators to pretermit litigation. It is possible that these devices might have been created, in some prisons, even in the absence of the litigation movement, but it is similarly no overstatement to say that the growth is due in some part to lawyers. Indeed, the Center for Correctional Justice, which devised some of the prototypes for grievance machinery, was headed by two lawyers, Linda Singer and Ronald Goldfarb.

(3) *Changes in mail correspondence, visitation, facility tours, and other mechanisms by which the prison is more publicly accessible and visible.* This, I think, is almost entirely a result of litigation. Again, some of the rules which were changed were so ludicrous as to warrant belief that they would have fallen with the change of administrations which were presaged by the 1960's. But certainly contact visitation, now generally held to be a constitutional right at least for pretrial detainees, [5] as well as relaxation of the general rules relating to correspondence, [6] can be attributed to litigation.

Additionally, through both litigation, and through the efforts of the United States Bureau of Prisons, sparked in large part by James Bennett, and continued by the present director, Norman Carlson, many Federal judges have toured both Federal and state facilities, returning with a better awareness of the institutions to which they send prisoners. Some states—such as New Jersey—have undertaken similar efforts to increase both judicial and public interest and awareness of the prison system.

This increased visibility is, perhaps, the single most important change which has occurred in prisons, for it makes all within the facility—inmates as well as guards and administrators—responsible for their acts in a way which was simply not true before. The suspicion that the Bastille walls were built to keep others out, rather than inmates in, remains; but the possibilities of exclusion are unquestionably reduced from a decade ago, and manifestly for the better.

(4) *The disappearance of "strip cells."* Again, the conditions in strip cells were so anomalous that any new type of administration would have found difficulty continuing them. But it remains true that the widespread disappearance of such cells is the legacy of litigation.

Many would argue that this change—indeed perhaps all the changes I will discuss—is cosmetic only; that the "administrative segregation" and "punitive segregation" cells which have generally replaced "solitary" are little better than their predecessors. And if one thinks of the restrictions still placed upon persons in that type of confinement, there is some justification for that view. Nevertheless, I dissent. Even if prisoners chafe at administrative segregation, even if prisoners' rights advocates would prefer to see amelioration of some of the harshness of those conditions and restrictions as well, the fact is that the days of the "solitary" are by and large gone.

(5) *The "bureaucratization" and regularization of the prison.* I borrow this phrase, and some of the ensuing thoughts, from Professor James Jacobs of Cornell, one of the outstanding social analysts of the structures that are prisons. As Professor Jacobs demonstrates compellingly in his book, *Stateville,* old-line wardens found it increasingly difficult to deal with litigation and the changes that it brought, particularly the challenge to the previously total hegemony they had wielded.

Perhaps one archetype of this phenomenon was a former chairman of the United States Parole Board. When challenged in court to explain the denial of permission to a parolee of the right to travel to California to deliver a speech, the chairman simply refused to appear in court, thereby assuming his defeat, and sparking Judge Marvin Frankel to castigate him openly in a public, written opinion. [7]

So, many of the old-liners left. And in their place came persons who, even if they had "worked their way up" in the ranks, were primarily bureaucrats, who sought to govern if not by consensus at least by acquiescence. Furthermore, as Jacobs points out, litigation required defending prison rules and regulations, which in turn required that (1) there BE rules and regulations, and (2) that records be kept of the implementation and application of these rules. Bureaucrats feel comfortable with these notions; the previous school did not.

This aspect of the effect of litigation—the regularization of prison practices—has many beneficial results. Prisoners know, more clearly, what is expected of them. They know, at least in many systems, the penalties which may be imposed for violation of the rules. Unlike the situation 10 years ago, when any violation could—and often did—result in any sanction prison officials wished to impose, many prisons have established a schedule of violations and proportionate punishments. Furthermore, regularization also requires prison officials to more carefully consider the actual interests they seek to protect, and the precise mechanisms by which that protection may be achieved. This in itself has resulted in the change of some prison regulations, as well as the rethinking of the rationale of many prison rules.

Consequently, many arbitrary rules have been abolished. One such example often haunts me. In a mid-Western prison, I saw a prisoner sentenced to 5 days solitary confinement because he had sat on a bench in the yard. There was a rule—no one sits on the bench.

Only prodding by the Governor's Commission, which was visiting the prison that day, uncovered the "reason" for the rule: some 10 years prior, the

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[3] *Covington v. Harris,* 419 F. 2d 617 (D.C. Cir. 1969)

[4] Brooks, "The Impact of Law on Psychiatric Hospitalization: Onslaught or Imperative Reform?", in 4 New Dir. for M.H.S. (1979)

[5] See, e.g., *Rhem v. Malcolm,* 527 F.2d 1041 (2d Cir. 1975); *Jordan v. Wolke,* 460 F. Supp. 1080 (E.D. Wis. 1978).

[6] E.g., *Procunier v. Martinez,* 416 U.S. 396 (1974).

[7] It may be no mere coincidence that it was Frankel's book, *Criminal Sentences,* which spawned the way for sentencing reform in the Federal system and which may yet, as a byproduct, result in the abolition of the United States Parole Commission.

bench had been painted, and the rule had been established that no one should sit on the wet bench. The bench had dried, but the rule had remained intact. The prisoner was ultimately exonerated; he did not serve his 5 days in solitary. But more importantly, prison officials removed that rule from the books. Perhaps it would not have happened had we not been there, and had we not had the implicit power of the Governor's office behind us. But I suspect that many such rules—"vicious eyeballing" was one which always fascinated me—have been removed from the books. The millenium has not yet been reached (there are still regulations which vaguely prohibit innocuous offenses, such as "cursing" or "talking"), but I think it clear that the path toward rationality is by now well trod.

It would be at least penultimate folly to suggest that this evolution of bureaucracy might not have occurred in any event. Time alone would have required the replacement of the oldlines warden with someone, and in this age of increasing bureaucracy, LEAA funding, SLEPA's, and governmental red tape, it is possible that only the type of prison administrator whom Jacobs has in mind might have survived in an event. [8] But it is at least arguable, I believe, that the litigation movement acted as a catalyst to this movement, and hastened the day for the regularization of the prison system.

(6) *The growth of judicial remedies.* Finally, I would add to this list the development in prison litigation of substantial new, and newly invigorated, remedies. I refer, of course, to masters, monitors, human rights committees, etc. There is now a modest debate in the legal literature over whether these remedies are new or only newly resuscitated, [9] but it surely cannot be doubted by anyone that the remedies, whether new or old, are now more visible than had previously been the case. That a Federal court should appoint a state governor as the receiver for the state prison system is, remarkable. To lawyers the important point is not whether these remedies are good or bad. The critical aspect is the strong likelihood that the prison institution litigation which has occurred in the past decade will encourage courts in other areas to use more incentive to mold remedies. That is "new blood," even if it is "old blood."

I would count each of these changes as benefits, which the prison litigation movement has brought or a least helped bring about. But there are also, I think, some changes, at least partially the result of the movement, which have been substantially detrimental, even to the prisoners themselves.

(1) *The increasing polticization of prisoners.* Prisoners have never loved their keepers. And, in the age of minority rights, in light of the grossly disproportionate numbers of minorities who are confined in prisons, [10] it would be unthinkably naive to expect that they would love them even as much as they did in the 1940's. But even with this said, and even if the antagonism is understandable and justifiable, it is surely not unfair to suggest that litigation, which thrives on the establishment of adversariness, has added to this "we-they" relationship. To be sure, as I have suggested, mechanisms have been devised to reduce this tension as well; but it is at least arguable that there has been a darker side to the effect of litigation. [11]

(2) *The growth of prison guard unions.* The litigation movement is sometimes charged with some responsibility for the growth of prison guard unions. Whether correctional administrators count this ultimately as a gain or a loss, they clearly often count it as a nuisance. And surely to the extent that guards complain that they are "the only ones without rights," and seek to change this unionization, the litigation arm of the prisoner movement can be seen as a causal factor.

It is very likely that this would have occurred in any event. The growth in every governmental system of public employee unions has been explosive in this decade; there is no reason to think that the prison would have been impregnable forever. I am made even more wary of crediting—or blaming—the litigation movement in this country for the guards' unions, by a recent commentary on prison reform which declared that, among the obstacles to prison reform was the "collective hostility of prison officers, angry as never before over their pay and conditions and incensed over what they see as the preferential treatment given to prisoners." That would seem to fit the current American situation like a glove—except that it is a comment on English prisons, [12] in which there has been virtually no litigation, and relatively little legal movement of any kind, toward affirming that prisoners have legal RIGHTS. Thus it may simply be that, for other reasons, the perceptions of prison line officers have changed over the past 20 years, albeit perhaps aggravated by the fact of being brought into court as well as into the captain's office.

I count these aspects as deleterious side-products of the prisoners' rights movement, including the litigation part of that movement. I suspect—at least I hope—that they are temporary setbacks, and that we will move, in the 1980's, toward that "collaborative institution" which the 1967 Crime Commission envisioned and paeanized. But there is no doubt that these developments have increased the difficulty of prison management and, indirectly at least, heightened the dangers inherent in living in prison.

Lawyers are also sometimes blamed for the increase in violence allegedly occurring in prisons. There are several responses to this charge. First, there is not really much hard evidence to support, or to disprove, the allegations of prison administrators that the prisons are becoming more violent. There is also a suspicion that the fears may be exaggerated. One remembers that in the 1960's prison authorities were holding the bastion against the Muslims, who became in the 1970's at least tolerable allies in keeping the peace. Moreover, since administrators for many years kept no records of such violence, whether inmate-inmate, inmate-guard, or guard-inmate, there is no basis for meaningful comparison. Furthermore, again because the information is still solely within the control of prison administrators, any statistical evidence would be, at the very least, suspect. And the few total assessments that are made are far too easily dismissed, or at least dismissable.

Still, one cannot totally reject the anecdotal accounts of gang violence, and racial warfare, which are continually brought to us by both prisoners and correctional personnel. And to some degree, lawyers must recognize that their litigation has added to this. Everytime a gang member is released from disciplinary segregation because his punishment was imposed without a due process hearing, everytime a prisoner is allowed to carry a religious medal, everytime a strip search is foregone because of a fear of an adverse court decision, two things occur: (1) The prisoner may become too convinced of his own power and the lack of power of correctional personnel; (2) a risk of serious danger is posed to all within the correctional institution, including, most obviously, other prisoners.

Some lawyers might respond to this charge that it is speculative -- that the danger might not ever eventuate. And, of course, to the extent that the initial disciplinary sanction was an "exaggerated response," this is a fair rejoinder. Or, it could be argued, on a more abstract level, that if the injury occurs, it is because of the prison environment, rather than the prisoner. This is persuasive only if one believes that guns, and not people, kill.

No. Lawyers cannot so easily avoid the truth of the charge which administrators level at them—that they unleash the potentiality of danger and then leave the management of that danger to others. The proper response is not only to acknowledge the accuracy of this charge, but to embrace it affirmatively. Lawyers are trained expressly to ignore such imputations. We represent—to the best of our ability, and not halfheartedly—those we KNOW to be guilty of criminal acts; professional ethics demand nothing less. Indeed, everytime a lawyer attacks power, wherever situated, a potential of risk to the community is created. But that is one of the main functions of law, and is particularly the function of law in a democracy. As Justice Marshall recently put it, [13] democracy is inherently a risk-taking institution. Even more than most governmental forms, democracy takes chances in exchange for freedom. Sometimes the gamble does not appear to pay—lives are lost, persons injured. But it is the faith, not simply of lawyers, but of all of us, that in the long run that gamble will prove more beneficial than detrimental.

The problem, of course, is that prison administrators, like the rest of us in our "real" lives, live in the short-run. Rhetoric about the long-run does not bandage wounds or console survivors. But rather than blame lawyers for attempting to bring the long-run to prisons, correctional administrators should at least occasionally step back and look at the long-run with us. I have heard many in corrections bemoan the fact that their previous training, in social work, management, etc., has prepared them little for the day-to-day operations of a prison. They, and other administrators, should go to the well of the long-run for refreshing, to consider (or reconsider) not what to do about tomorrow's count, but to think of what person 50, 75, 100 years from now will think of our current sanctions, and attempt, on occasion, to move toward that goal.

Recent events have made me very disconsolate about this possibility. I have heard tales of administrators who wish to fight every piece of litigation SIMPLY because it is litigation, who have

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[8] See also Alexander, "The New Prison Bureaucrats and the Court: New Directions in Prison Law," 56 Tex. L. Rev. 501 (1978).

[9] See Brakel, special Masters in Institutional Litigation, 1979 Am. Bar F. Res. J. 543; Eisenberg and Yeazell, The Ordinary and Extraordinary in Institutional Litigation, 93 Harv. L. Rev. 465 (1980); Special Project, the Remedial Process in Institutional Reform Litigation, 78 Colum. L. Rev. 784 (1978).

[10] This is a slightly qualitative, but mostly quantitative, judgment. While there is some evidence that there is some racial discrimination in sentencing, the quantitative disparities arise from differential prosecution, i.e., prosecuting robbery and burglary instead of embezzlement and computer fraud. This differential may be well justified, indeed expected, by all; but to prosecute crimes which will be committed almost solely by the poor, in which disproportionate numbers are minorities, inevitably results in the observed disproportions.

[11] In other areas of the law, this is obvious. Even in divorce cases, for example, the litigative struggle intensifies the difficulties between the parties. Because the litigation is short-lived, and thereafter each party may go her/his separate way, the tension created is offset by the gain of objectivity and justice. But when the parties *do not* go their separate ways, but return to the arena, the residual effect is more worrisome.

[12] Zellick, The Case for Prisoners' Rights in J. FREEMAN, PRISONS - PAST AND FUTURE 105, 116 (1978). See also, Thomas, "A Good Man for Gaoler?" Crisis, Discontent and the Prison Staff, *id.* 53.

[13] *Jones v. North Carolina Prisoners Labor Union*, 433 U.S. 119 (1977) (Marshall, J., dissenting).

argued that they have complied with a court order requiring "cocktail-like tables" in a dining facility by installing high chairs and tables, bolted to the floor, because any table off which one may imbibe a cocktail is by definition a cocktail table. This obstinacy is not only silly; it undermines the hope that lawyers and correctional administrators can, with others, achieve a more humane prison *while still achieving the goals of security and protection.* It is done in other prison systems, and the challenge which lawyers, and others, have laid to administrators is to prove (not merely allege) that it is not possible in this country. That proof is yet to be forthcoming.

The changes which I have outlined here—more visible prisons, run by administrator-bureaucrats, in which there is a growing dialogue between prisoners and managers—will, eventually, help change the face of prisons. The millenium is not yet; I am no chiliast. But few, including, I think, fair and honest prison administrators, will deny that the changes are, on balance, modest achievements toward justice in those institutions. In the next part of this article, I shall try to suggest where the litigation movement will go during the 1980's, and the issues it will bring to both judicial and public scrutiny.

PART II

Any assessment of the future of correctional law must deal initially with the recent Supreme Court case of *Bell v. Wolfish.* [14] In that case, the Court seemed to abdicate all judicial responsibility for prisoners' rights, leaving all determination to the expertise of prison administrators, to whom, said the Court, judicial tribunals owe "due deference." Taken at its broadest, and not restricted to its facts, *Bell* might be thought to mean virtually the end of successful prison litigation. I do not think that will be the case, for several reasons.

First, there is substantial doubt whether the lower courts will follow *Bell* even where it purports to apply. The *Bell* court stressed in several spots the alleged inadequacy of the record; prisoners' counsel are bound to learn, from the *Bell* decision, that they need an impeccable record, and they must clearly articulate the constitutional grounds on which they seek relief. Counsel who do this offer to the lower courts a chance to distinguish *Bell.* Moreover, the *Bell* court suggested that at least part of the decision might not apply to "traditional" institutions. Since the court left this term somewhat ambiguous, it will fall to the lower courts to interpret that language. I suspect they will do so quite broadly.

This expectation is enhanced by the experience of *Meachum v. Fano.* [15] In that case, the Supreme Court held that due process does not require a hearing either before or after a prisoner is transferred to another prison, at least in the majority of cases, unless there is a "liberty interest" created by state law. The fact is that many lower Federal courts have refused to follow *Meachum,* finding state-created liberty interests in the most arcane of situations. [16]

Those lower Federal courts which do "narrow" or "distinguish" Bell will do so primarily because of one overriding reality -- they will see the prison conditions and hear the prison witnesses. Judges who tour most prisons today are unlikely to be totally unaffected. [17] And when, as is today still too often the case, prison administrators demonstrate a lack of familiarity with the concepts of penology, or even a lack of familiarity with what occurs within their own system, trial courts are not likely to give the full deference which Justice Rhenquist admonished upon them.

Second, there are many areas of legal concern which *Bell* leaves untouched. They can be divided into two subgroups: (1) the "traditional" causes of action; (2) "new" complaints. As to the first subgroup, it is clear that *Bell* left standing virtually every question with which the Court had previously dealt, and with which the courts had been confronted during the 1970's—first amendment rights, [18] medical care, [19] protection of inmates from assaults, [20] access to the courts, [21] and due process. [22] On most of these the Court had previously spoken at least somewhat favorably, and it is doubtful that the courts will now take a "harder" approach than they have previously adopted.

Medical care is the most difficult area of these to assess. As one writer has noted. [23] *Estelle,* in its own terms, dealt only with a claim for damages brought by a single prisoner who alleged that he had not been properly treated. *Estelle* cannot be applied to a "systemic" challenge without distorting both the language of the eighth amendment and the impelling ideas behind it. It is fully probable, therefore, that the lower courts will allow, and sustain, challenges to general medical practices and systems, and continue to order sweeping changes. The same will likely be true, where a prisoner, or class of prisoners, injured or assaulted by other prisoners or guards, seeks a systemic remedy for more protection. There is already substantial indication that the courts will not adopt the *Estelle* "intent" approach in such circumstances.

Finally, many state courts who, 20 years ago, would have taken a total hands-off approach may be more receptive to broad prison-wide suits today. Since *Bell* speaks only of Federal constitutional issues, it is open to those courts to predicate relief on state statutes or constitutions. And that is exactly what state courts have done. A recent example is *Cooper v. Morin,* [24] in which the New York Court of Appeals said that even if *Bell* could be construed as suggesting that the Federal constitution did not require contact visitation for pretrial detainees, the state constitution required such a program. I expect to see that approach taken increasingly by state courts.

If there is some abatement of "traditional" lawsuits, either because of *Bell,* or because there are other avenues, such as grievance mechanisms, by which some of these complaints may be resolved, there will be an increase of other kinds of complaints, some of which will directly affect the correctional administrator, and all of which will have ringing repercussions in the correctional system generally.

(1) *Equal Protection Suits.* Virtually none of the litigation thus far has involved women prisoners; indeed, the first major decision on the rights of women prisoners, viz-a-viz men prisoners, was handed down in Michigan only 3 months before the decade ended. [25] But that decision established what is likely to be the pattern of decisions where women prisoners challenge their conditions as inferior to those of male prisoners. The court there rightly recognized that women prisoners generally are afforded fewer rehabilitation programs, and worse treatment than are men. Moreover, what little rehabilitation there is, is highly stereotyped—while food management courses in the male prisons meant commercial food activities, in the women's prison it meant learning how to cook meals for the family. Womens' prisons are generally less well funded (per capita), have inferior medical care, fewer (and more "womanly") recreational facilities and tend to be more personally demeaning. [26]

Women are often excluded from work release programs, or other such offerings, and, at least prior to the 1970's, were statutorily sentenced to longer terms in some states in order to afford more time to "rehabilitate" them. [27] There is some evidence today that parole decisions as to women are made in such terms, while parole decisions with regard to men are tending, more and more, to reflect a "desert" notion.

There is also a strong likelihood that women prisoners in the 1980's will seek judicial assistance in maintaining the family unit; more specifically, that they will seek to require the prison to establish nurseries and other facilities in which their children may be housed on prison grounds while they are serving their terms. Some states already recognize this right, and have begun to establish programs; others may be compelled to do so by court order. There is, of course, much room for debate about the wisdom of such a course of action, and that debate is sure to infiltrate the courtroom, as well as the offices of correctional administrators. Recently, the Model Sentencing and Corrections Act, after reviewing the literature on the subject, concluded that prison systems should experiment with such programs; [28] the material which was relied upon to reach that conclusion, as well as more recent studies, will surely create litigational possibilities in the 1980's. And, of course, if women establish their right to such programs, male prisoners, on the basis of equal protection, will seek equal rights.

(2) *Sexual Discrimination in Employment.* A second, but just as challenging, area which has already seen some litigation but which is certain to see more, is that of the rights of women to be employed in correctional facilities. The tensions allegedly created by employing female guards in male institutions pit correctional administrator against the force of the Equal Employment Opportunity Act and the male prisoner's right of privacy against the right of the female to be employed.

Several cases have held that prisoners have a right to privacy not to be watched by guards of the opposite sex while they are undressed, or in the shower or toilet. [28A] Some courts have held that precluding female guards from work in the

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[14] 441 U.S. 520 (1979).

[15] *Meachum v. Fano,* 427 U.S. 215 (1976).

[16] A recent survey by the National Association of Attorneys General found the lower courts mixed in their reaction to *Meachum.* NAAG, ADMINISTRATIVE SEGREGATION OF PRISONERS: DUE PROCESS ISSUES (1979). There is no evidence to suggest that this trend has changed since that report was issued.

[17] This was made pellucid by the decision in *Ramos v. Laam,* in which the Federal court ordered the closing of the principal Colorado state prison; the decision was rendered several months after *Bell,* which the court cited in its opinion.

[18] *Procunier v. Martinez,* 416 U.S. 396 (1974).

[19] *Estelle v. Gamble,* 429 U.S. 97 (1976).

[20] E.g., *Woodhous v. Comm.,* 487 F. 2d 889 (4th Cir. 1973).

[21] *Bounds v. Smith,* 430 U.S. 817 (1977).

[22] *Wolff v. McDonnell,* 418 U.S. 539 (1974). The response of the lower Federal courts to Meachum indicates that there will be an increase, rather than a decrease, in procedural protections required before major changes in conditions can be effected; a growing number of courts is likely to find a "state created interest" in the prisoner's remaining where, and as, he is.

[23] Note, The Difficulty in Defining Constitutional Standards for State Prisoners' Claims of Inadequate Medical Treatment, 17 Duq. L. Rev. 687 (1978-79).

[24] 49 N.Y. 2d 69, 399 N.E. 2d 1188 (1980).

[25] *Glover v. Johnson,* 478 F. Supp. 1075 (E.D. Mich. 1979).

[26] Note, The Sexual Segregation of American Prisons, 82 Yale L.J. 1229 (1973).

[27] See, e.g., *State v. Chambers,* 63 N.J. 287 (1973).

[28] Conference of Commissioners on Uniform State Laws, *Model Sentencing and Corrections Act,* Section 4-116 (1978).

[28A] In re Long, 55 Cal. App. 3d 788, 127 Cal. Rptr. 732 (1974) (male inmates sued to preclude presence of female guards); *Forts v. Ward,* 434 F. Supp. 946 (S.D.N.Y. 1976), rev'd and remanded, 566 F. 2d 849 (2d Cir. 1977) (female inmates sued to preclude presence of male guards); *Avery v. Perrin,* 473 F. Supp. 90 (D.N.Y. 1979) (Woman guard may deliver mail to male inmates in their cells.)

"private" areas of the prison is not a violation of equal employment opportunity. [29]

Some of these cases, however, required that the female guards be hired, but placed in other areas. [30] These decisions, if rendered after the 1977 Supreme Court decision of *Dothard v. Rawlinson,* [31] have distinguished the *Dothard* case; it is likely that that opinion, which allowed Alabama not to hire women guards for the main maximum security prison in that state because the prison was a "jungle," will become a "derelict on the waters of the law"—restricted to those prisons which, by self-admission, are "jungles." Few states will be willing to make such an admission.

(3) *Training.* A third area of litigation is likely to focus on the evolving requirement that correctional systems train their guards properly, and teach them to use only as much force as necessary in quelling prisoner violence or resistance. [32] Some courts have ordered that prison guards be given training in race relations; [33] as the data on prison guards become more sufficient, more litigation is likely to arise here as well.

These cases are thus far quite ambiguous in most situations, since they do not tell us what kind of training is "adequate," but only that there is a need for "adequate" training. This is generally because of the procedural posture of these cases—a prisoner sues the county, the court finds the county (or state) not properly subject to suit, and dismisses. The prisoner appeals, and the appellate court *agrees* that IF the plaintiff prisoner can prove that inadequate training *caused* his injury, he *may* win.

(4) *Guards and Unions.* A fourth area, closely related to the third, is the rights of prison guards. Many of these cases will be labor cases, based primarily on state and Federal labor relations statutes. But some will deal with nonstatutory, non-negotiable issues. For example, one court has held that a prison guard has a constitutional right not to follow orders which he reasonably believes would violate a prisoner's rights, and that he cannot be penalized, much less fired, for such a refusal. [34]

The explosion of guard unions during the 1970's is surely going to have an effect on litigation in the 1980's. Unions may seek to intervene in litigation, rather than be represented by the correctional department. And, in some instances, the intervention may be on behalf of prisoners, particularly where the remedy sought is increased training, and an increased number of security personnel.

The legal issues of whether the guards' unions will be allowed to intervene, particularly since they are directly affected by changes in prison practices, and directly protected by contractual arrangements with the Department (which may prohibit specific changes without union approval), is at least as intricate and complex as the social and political changes which the unions have generally made in any event. As a result, there will be much more negotiation among the three sides to the conflict, with the threat of litigation by either the guards or the prisoners hanging in the background.

(5) *Parole.* Throughout the 1970's, it appeared that a revolution in parole practices might be judicially implemented or mandated. Notwithstanding the *Greenholtz* case, [35] in which the Supreme Court said that potential parolees were not entitled to a full due process hearing being considered for parole, that day is yet to come. The 1970's saw a virtual flood of studies of the parole release system. [36] As those data are reviewed by prison advocates, substantive challenges to parole practices will increase dramatically. The recent case-law involving the practices of the United States Parole Commission, which has resulted in some changes in that agency's procedures and substantive criteria, is only the tip of a very large iceberg. Unless there is legislative restriction (as in Oregon) or abolition (as in Minnesota of parole released practices, the 1980's will see the intervention of courts in these agencies' activities as well, with obvious implications for the prison system. Similar challenges to parole supervision practices, particularly involving the conditions of parole (and probation) are hovering over the system. [37]

[29] *Reynolds v. Wise,* 375 F. Supp. 145 (N.D. Tex. 1974); *City of Philadelphia v. Pennsylvania Human Relations Commission,* 3 Commw. Ct. 500, 300 A. 2d 97 (1973); *Iowa Dept. of Soc. Serv. v. Iowa Merit Employ. Dept.,* 261 N.W. 2d 161 (Iowa 1977). *Wolfish v. Levi,* 439 F. Supp. 114 (S.D.N.Y. 1977), aff'd 573 F. 2d 118 2d Cir. (1978), r'vd. on other grounds, 441 U.S. 521 (1979).

See Comment, Sex Discrimination in Prison Employment: the Bona Fide Occupational Qualification and Prisoners' Privacy Rights, 65 Iowa L. Rev. 428 (1980) (an outstanding analysis). Note, Balancing Inmates' Right to Privacy with Equal Employment for Prison Guards, 4 Womens' Rights L. Rptr. 243 (1978).

[30] E.g., *Gunther v. Iowa State Men's Reformatory,* 462 F. Supp. 952 (N.D. Iowa 1979), aff'd F. 2d (8th Cir. 1/11/80).

[31] 433 U.S. 321 (1977).

[32] See *Owens v. Hass,* 601 F. 2d 1242 (2d Cir. 1979) (County can be liable under Sec. 1983 for inadequate training program.)

[33] *Taylor v. Perini,* 359 F. Supp. 1185 (N.D. Ohio 1973). See also *Gates v. Collier,* 390 F. Supp. 482 (N.D. Miss. 1975), *Taylor v. Perini,* 431 F. Supp. 566 (N.D. Ohio 1977); *Mitchell v. Untreiner,* 421 F. Supp. 886 (N.D. Fla. 1976).

[34] *Harley v. Schuykill County,* 476 F. Supp. 191 (E.D. Pa. 1979).

[35] *Greenholtz v. Inmates of Nebraska State Penal Complex,* 442 U.S. 1 (1979).

[36] E.g., Sacks, Promises, Performance and Principles: An Empirical Study of Parole Decision-making in Connecticut, 9 Conn. L. Rev. 347 (1977); Heinz, Heinz, Snderowitz and Vance, Sentencing by Parole Board: an Evaluation, 67 J. Crim. L. & Crim. 1 (1977); Scott, The Use of Discretion in Determining the Severity of Punishment for Incarcerated Offenders, 65 J. Crim. L. & Crim. 214 (1974); M. Gottfredson, Parole Board Decisionmaking: A Study of Disparity Reduction and the Impact of Institutional Behavior, 70 J. Crim. L. and Crim. 77 (1979).

[37] A good example of this may be *Panko v. McCauley,* 473 F. Supp. 325 (E.D. Wis. 1979), in which the court held that a condition that the parolee not "frequent" taverns and other places which sold alcohol, while not unconstitutionally vague on its face, was not understood by the parolee, and hence was unconstitutional as applied, where the parolee visited one tavern once during an entire year, to celebrate his birthday with family and friends. In order to reach this conclusion, the Federal court reviewed the state court record – a highly extraordinary step, which may presage more intense scrutiny of parole revocations in the future.

(6) *Classification.* There is also a strong likelihood that we are going to see a more discreet type of litigation than we have seen heretofore, at least in the area of classification. In *Bell,* the court indicated that in some instances pretrial detainees may in fact have fewer rights than prisoners because jails hold persons who would normally be classified from minimum security to maximum security ratings, while prisons differentiate among these ratings, and in many states, house differently ranked prisoners in different institutions. The implication was that at least minimum security prisoners might be entitled to more rights than maximum security prisoners. If that implication is grasped it would seem inevitable that prison litigation in the 1980's will seek to surround classification decisions with a great deal more precision than has occurred before. And, once those classifications are made, prisoner advocates are likely to argue for greater freedoms for those not ranked as maximum security risks.

This suspicion is enhanced by the Supreme Court's recent decision in *Vitek v. Jones.* [38] The court there held that, before a prisoner could be transferred, on a quasi-permanent basis, to a mental hospital, a due process hearing had to be held. The court first found a "state-created liberty interest," as required by *Meachum.* But the court THEN proceeded, unnecessarily, but in very strong dictum, to declare that even if there had not been such an interest, the prisoner's "grievous loss" would have required a due process hearing. This resuscitated language which many thought had died with the *Meachum* decision, and suggests that the Court (or at least the five members who dealt with *Vitek* on the merits) may yet be willing to rediscover losses which activate procedural (and possibly substantive) due process. In any event, Vitek's reembracement of "grievous loss" certainly adds ammunition to those who wish to attack, directly, the arbitrary and whimsical classifications decisions one often finds in prisons.

(7) *Sentencing.* Finally, of course, there will be immense changes in the sentencing systems in virtually all of our states. Many of these changes will occur initially through legislation, as the movement toward determinate sentencing, and to a lesser (unfortunately) extent toward desert sentencing, increases. But those new sentencing schemes, as well as the present indeterminate systems which are still the majority in this country, will come under increasing scrutiny in the courts.

Challenges to sentencing on the ground that the sentence imposed is disproportionate to the gravity of the offense and the moral culpability of the offender are likely to increase. The past decade has seen a growing number of such challenges, and courts in several instances have invalidated penalties on this basis; the most famous thus far, of course, is the *Coker* case, in which the Supreme Court declared unconstitutional the imposition of the death penalty for rape. [39]

The early 1970's saw an enormous outpouring of litigation against prisons, most of it well-founded. But there was a tendency for prisoner rights' advocates to characterize, and caricature, all prison officials as the personification of all that is arbitrary, vicious, mean-minded. On the other side, many prison administrators clearly believed that those who advocated prison reform were either thoughtless revolutionaries or idealistic visionaries, unfamiliar with even the basic realities of the correctional world. To some degree, both perceptions were justified. But to a far larger degree, they were, as are all stereotypes, unwarranted. In the middle of the 1970's, there evolved a recognition on both sides that accommodations could be reached which did not jeopardize the interests which both sides sought to achieve and protect. Prison administrators came, in some instances, to encourage litigation as a means of obtaining larger budgets with which useful and meaningful reforms could be attained. Prison litigators understood more carefully the concerns of administrators; this was particularly true when prisoners themselves told their counsel that some of the challenged practices were desirable, at least in the institutions in which they were confined. A dialogue began. It has been hesistant, intermittent, and sometimes spotted with the distrust that arises between any groups which find themselves enmeshed in litigation. In the 1980's, that dialogue will, inevitably, become a trialogue, as prison guards, and their unions, join in the discussion. But I am hopeful that if there is good will on all sides, we can achieve more nearly the goal which all of us have—a fair, humane prison system which, at the same time, protects and assists those who are relegated to our bastilles. We will not, in the next 10 years, or even the next 20, attain that goal. And there are some goals, such as the abolition of prison or the establishment of a truly collaborative system, about which we will continue to disagree. But if those disagreements are ones of principle, and not simply of posturing, surely we can more closely realize a fair and effective system.

[38] U.S. (1980).

[39] *Coker v. Georgia,* 433 U.S. 584 (1977).

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