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Prison Reform Revisited: A Judge's Perspective

The Honorable Morris E. Lasker*

I am grateful for the opportunity to participate with all of you in coming to grips with "the unfinished agenda" of prison reform litigation. My credentials may be a bit rusty from recent non-use, but my continuing interest in the subject is keen.

During the Beame administration in New York City, there was a serious riot of prisoners at the House of Detention for men on Rikers Island.¹ Among others, including Ben Malcolm, the Commissioner of Corrections, and Bronx District Attorney Mario Merola, and I participated, at the request of the Prisoners Committee, in the negotiations to end the riot. I am glad to say we were successful.

Some years later I had occasion to give a lecture at the state penitentiary at Green Haven. After the lecture, a prisoner introduced himself, saying: "Judge, I don't know if you remember me, but we met at the Rikers Island riot."

I regret that I no longer have such active connections with the subject, but my twenty-four-year stint in presiding over prison reform litigation in New York City has imbued me with a deep and continuing interest in the accomplishments and frustrations of the Prison Reform Movement.

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1. See Thomas J. Lueck, *Benjamin Malcolm, New York City Jail Chief, Dies at 81*, N.Y. TIMES, May 30, 2001, at C18.

Professor Mushlin has asked me to talk about a judge's perspective on prison reform litigation, including such questions as: judicial oversight of conditions of confinement; whether litigation has made a difference; whether there are regrets; and what should be done differently?

To the extent that these questions deal with the past, they are easy to answer. There is no doubt in my mind that the involvement of the federal courts in ensuring constitutional conditions of confinement has, during the last thirty years or so, significantly improved those conditions in the institutions with which I am personally familiar. In this discussion, I take the term "conditions of confinement" to include both physical conditions, such as cleanliness, minimal space per inmate, temperature control, noise control, edibility, cleanliness and adequacy of food, adequate opportunity for physical exercise, limitations on lock-in, personal sanitation, and such non-physical conditions as fair and adequate classification and disciplinary systems. Such a listing is not intended to be, nor can it be, exhaustive in this brief discussion.

I do not assert that, even today, these conditions are perfect in any institution, but I am convinced that they have been substantially improved over the years as a result of prison reform litigation.

In New York City, the Manhattan House of Detention (known to all as the "Tombs") has been rebuilt from stem to stern to produce decent conditions of confinement, proving that it is easier to rebuild than reform; and very substantial progress has been made at the numerous facilities on Rikers Island and in the boroughs.²

However, the goal of completely acceptable conditions has not been *fully* met, even in New York City. This is demonstrated by the fact that the litigation is now in its 33rd year, presently under the able supervision of Judge Harold Baer, who has skillfully navigated the shoals of the Prison Reform Litigation Act.³ Indeed, it is in the nature of *institutional* reform liti-

2. See Philip Shenon, *Tombs to Reopen With A New Look*, N.Y. TIMES, Oct. 17, 1983, at A1.

3. Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; 42 U.S.C. §§ 1997-1997h).

gation—not just prison reform cases—that it is a lot easier to initiate the litigation than it is to end it. In such cases, we seem destined to move constantly halfway to the goal line, but rarely, or never, to make it all the way.

Yet, in spite of the gratifying progress, I do have regrets. I regret that I didn't finish the job in New York. I regret that prison reform litigation has impelled Congress to enact the Prison Reform Litigation Act, which, although not fatal, impedes appropriate and necessary progress. I regret the resort to privately operated prisons, the use of which may in some cases have been prompted by prison litigation. I regret the continuance, even today, of the conditions that permitted the murder of John Geoghan, a prisoner in a Massachusetts correctional facility;⁴ and the state of affairs in, for example, Alabama's Limestone Prison, where the federal government has sued the Alabama Department of Corrections and its medical contractor for failing to care for prisoners who are desperately sick.⁵

My regret, however, do *not* mean that I have doubts as to the appropriateness of prison reform litigation as an exceedingly important tool in improving prisons when either the legislature, or the executive, or both, are failing in their duties to assure constitutionally adequate conditions. However, I do conclude, with a caveat: that, as in the case of planning for war in a foreign country, participants in prison reform litigation should arrange, at an early stage in the litigation, the establishment of an exit strategy, which should be regarded from the onset as a matter of importance to all parties.

In sum, I cast a vote for prison reform litigation as an impressively effective instrument for assuring constitutionally acceptable prison conditions.

Nevertheless, another more daunting challenge lies ahead.

Today—some thirty to thirty-five years after courts began to accept responsibility for assuring decent prison conditions, the corrections community faces an even larger and more difficult problem—that is what I call America's love affair with imprisonment.

4. See Daniel J. Wakin & Katie Zezima, *Abusive Ex-Priest is Killed in Prison*, N.Y. TIMES, Aug. 24, 2003, at A1.

5. See Carla Crowder, "Medical Failure" Blamed in HIV Inmate Deaths, BIRMINGHAM NEWS, Aug. 28, 2003, at 1A.

As we meet, there are approximately 2,000,000 persons in prison or jail in the United States.⁶ This figure compares with approximately 330,000 who were confined in 1970, the year that the New York City litigation commenced.⁷ The increase in incarcerated persons per thousand is substantially greater than the growth in population during that period.⁸

This audience does not need to be reminded that the substantial increase in the *rate* of incarceration has been fueled by the play-it-safe politics of being “tough on crime” as a formula for election (or evasion of defeat) by political office holders.⁹

The result has been incarceration in the United States at a level among the highest in the world¹⁰—which affects not only those who are in custody, but the millions more who are on probation (where it still exists), or parole, as well as their families.

Among the perversities of the system are the facts that persons of color and Latinos are incarcerated at a significantly higher rate than average, and that, as a result of the enactment of “three strikes you’re out” statutes, the prison population is aging significantly—costing prison systems substantial sums for the care of relatively harmless people.¹¹ Fortunately, the excesses of the system are finally being recognized by the states as they are forced to reduce the costs of their correctional systems, and are doing so, in a number of cases, according to the Vera Institute, by enacting laws to reduce or do away with prison sentences for certain nonviolent criminals.¹²

At the federal level, however, the problem of excess imprisonment is aggravated by Attorney General Ashcroft’s policy of

6. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, BULL. NO. NCJ 200248, PRISONERS IN 2002 1 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf>.

7. JENNI GAINSBOROUGH & MARC MAUER, DIMINISHING RETURNS: CRIME AND INCARCERATION IN THE 1990s (2000), available at <http://www.sentencingproject.org/pdfs/90no39.pdf>.

8. See Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 743 (1993) (noting the increase in the rate of incarceration).

9. See Elaine R. Jones, *Violent Crime Control and Law Enforcement Act of 1994: The Failure of the “Get Tough” Crime Policy*, 20 DAYTON L. REV. 803 (1995).

10. *Id.*

11. *Id.* at 804.

12. Paul von Zielbauer, *Rethinking The Key Thrown Away: As Ashcroft Cracks Down, States Cut Prison Terms*, N.Y. TIMES, Sept. 28, 2003, at A41.

all but eliminating plea-bargaining¹³ and by Congress' passage of the Feeney Amendment, which substantially circumvents the authority of the sentencing judge to depart downward, and which provides that sentencing decisions are to be reviewed de novo by the court of appeal.¹⁴

If I am correct in concluding that the criminal justice system of this country is incarcerating citizens at an unjustifiable level with clear overtones of racial discrimination, the quest is, where do we go from here? *This* issue is very different from the issue of prison conditions. Resort to the courts was appropriate and useful in the fight to improve prison conditions, but reformation of incarceration policy cannot be achieved by litigation. A change in the incarceration policy can only be achieved by political action, directed, for the most part, against Congress and state legislatures rather than, as in the cases of prison conditions litigation, against the executive.

Influencing incarceration policy will not be an easy job. It will not depend on resort to the language of the Fifth or Fourteenth Amendments or (in light of Supreme Court opinions legitimizing the most sever sentences) the Eighth Amendment, but rather on rallying the troops to support (or oppose) legislation.

To sum up, we have—on the whole, but not everywhere—come a long way in assuring decent conditions of confinement in American correctional facilities, but we have a long way to go to bring justice to the American incarceration policy.

It is a pleasure to be back in the company of so many skilled and caring practitioners, and I wish the conference well.

13. *Id.*

14. See generally *Materials From Interested Groups Opposing Original Feeney Amendment*, 15 FED. SENTENCING REP. 346 (2003).