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The Future of Prison Reform Efforts

Keynote Speech Prison Reform Revisited: The Unfinished Agenda

Alvin J. Bronstein*

Good evening. I was supposed to introduce Professor Norval Morris¹ as your keynote speaker this evening. Unfortunately, Norval advised the conference organizers that he was not well enough to make the trip from Chicago. I am sure that we all miss him and wish him well.

I had planned, in introducing Norval, to tell you briefly about his arrival in Montgomery, Alabama, where he was to participate in the statewide Alabama prison conditions case that was mentioned earlier today.² In preparing for the trial in that case, the National Prison Project and local counsel retained four corrections experts, in addition to other experts on environmental health, safety and classification issues. Some months before the trial was scheduled to begin Norval called me and said that he had heard about the case and was interested in our theory. If we could prove that the totality of conditions in Alabama's prisons actually made people worse, less able to function

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1. Professor Norval Morris was a Julius Kreeger Professor of Law and Criminology Emeritus, former Dean of the University of Chicago Law School (1975-78) and founding director of the Law School's Center for Studies in Criminal Justice.

2. *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976).

when they were released from prison, that would be a violation of the Eighth Amendment's prohibition against cruel and unusual punishment. We discussed what his role might be in light of the fact that we had all these other experts who had actually toured the prisons. We agreed that he might play an important role by listening to the other experts describe the awful conditions and then provide his opinion on what the court might do to remedy the situation.

In August of 1975, all of the plaintiffs' lawyers and experts gathered at the downtown Motor Inn, the motel nearest to the federal courthouse in Montgomery. We had been there for a few days of preparation when Norval arrived late on the Sunday before the trial was to commence. Our group was already at dinner in the motel restaurant, the only ones present, when Norval arrived. He sat down at the table and greetings were exchanged. The waitress approached and said to Norval, "Y'all want something to drink?" He responded, in his charming Australian accent, "May I please see the wine list?" She looked at him as though he were a Martian and said, "We got red and we got white." Norval, ever the gentleman, surrendered and asked for a glass of red wine.

Looking back at the reform movement of the past thirty years, I again read Norval Morris's very important book, *The Future of Imprisonment*.³ He said,

[p]rison is, after all, the largest power that the state exercises in practice, on a regular basis, over its citizens—though the anachronism of capital punishment persists in some places as a rarely invoked return to barbarism. Perhaps if we can bring principle and justice to the exercise of the power of imprisonment, much else will improve in the uneasy tension between freedom and authority in post-industrial society.⁴

He then continued by referring to the work of the two national crime commissions of the late 1960s and early 1970s.⁵ Both had recommended the swift abatement of imprisonment and the 1973 National Advisory Commission on Criminal Justice Standards and Goals "urged a moratorium on the construction of all new institutions for adult or juvenile offenders" and recom-

3. NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (1974).

4. *Id.* at 2.

5. *Id.* at 5-6.

mended that “the institution should be the last resort for correctional problems.”⁶ Norval went on to say:

[t]he criminal law’s reach has been extended in this country far beyond its competence, invading the spheres of private morality and social welfare, proving ineffective, corruptive, and criminogenic. This overreach of the criminal law has made hypocrites of us all and has cluttered the courts and filled the jails and prisons, the detention centers and reformatories, with people who should not be there.⁷

When that was written, we had about 350,000 men, women and children in our nation’s jails and prisons.⁸ Today, we have over 2,100,000.⁹

In preparing some other material, I came across the 15th Anniversary edition of the *National Prison Project Journal*.¹⁰ This was in 1987, the glory days of our work in prison litigation. At that time, we had obtained court orders governing conditions in the entire state system, or the major institutions, in twenty-three states. During the course of the anniversary celebration, we held workshops and then had a full day symposium.¹¹ Note the similarities with this Pace University Symposium: we divided the sessions into first “The History of Prisoners’ Rights Litigation,” and “The Future of Prisoners’ Rights Litigation.” It sounds familiar.

Just as we had some comments here by Judge Lasker,¹² we opened the 1987 symposium with remarks by Senior U.S. District Judge Robert R. Merhige, Jr.¹³ We then had Bill Turner, the original lead counsel in the Texas prison case.¹⁴ Today Bill’s

6. *Id.* at 6.

7. *Id.* at 7.

8. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 2002 495 tbl.6.22 (Kathleen Maguire & Anne L. Pastore eds., 2002).

9. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, BULL.No. NCJ 203947, PRISON AND JAIL INMATES AT MIDYEAR 2003 1 (May. 2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim03.pdf>.

10. See generally THE NATIONAL PRISON PROJECT JOURNAL (ACLU), Fall 1987.

11. See *National Prison Project 15th Anniversary Symposium Agenda*, THE NATIONAL PRISON PROJECT JOURNAL (ACLU), Summer 1987, at 14.

12. The Honorable Morris E. Lasker is a United States District Court judge currently sitting in the District of Massachusetts.

13. The Honorable Robert R. Merhige, Jr., was a United States District Court judge for the Eastern District of Virginia from 1967–98.

14. Ruiz v. Johnson, 154 F. Supp. 2d 975 (S.D. Tex. 2001).

former law partner and co-counsel in Texas, Donna Brorby, is here. We had Lynn Walker, former Chief of the Special Litigation Section of the United States Department of Justice. Today Shanetta Brown-Cutlar, Chief of Special Litigation, is with us.¹⁵ Vince Nathan, who spoke to us earlier today, was one of the 1987 speakers on the Future of Litigation. Allen Breed, the first Director of the National Institute of Corrections (NIC), was one of our speakers then. Morris Thigpen, the current NIC Director, is with us today. Charles Ogletree, then an adjunct professor at Harvard Law School was one of the 1987 speakers. Today we have Harvard Law School Professor Margo Schlanger with us. Finally, the keynote speaker in 1987 was Norval Morris, who had been scheduled to talk to you this evening. To quote a famous athlete, "it's like déjà vu all over again"¹⁶

The first message, then, to be taken from this conference, is that "prison reform" must not be limited to improving prison conditions and challenging the awful things that go on in our jails and prisons. It must also be about reducing the use of imprisonment in this country by "promoting . . . constructive non-custodial sanctions which encourage social re-integration while taking account of the interest of victims."¹⁷ My colleagues from Penal Reform International (PRI) will recognize that last sentence from PRI's mandate.

PRI works primarily in developing nations in Latin America, South Asia, Africa, the Middle East and the new democracies in the former Soviet Union in Eastern and Central Europe and Central Asia.¹⁸ I would like to suggest that we can learn something from PRI's work there.

In April of 1999 in Egham, England, PRI and the International Centre for Prison Studies (ICPS), its partner organization, gathered 120 people from fifty countries in all five

15. Shenetta Brown-Cutlar is the Acting Chief of the Special Litigation Section of the Civil Rights Division of the United States Department of Justice. The Special Litigation Section is charged with taking action to protect the constitutional rights of institutionalized persons.

16. YOGI BERRA ET AL., WHEN YOU COME TO A FORK IN THE ROAD, TAKE IT! INSPIRATION AND WISDOM FROM ONE OF BASEBALL'S GREATEST HEROES 68 (2001).

17. Penal Reform International, Presentation of Penal Reform International (PRI), at http://www.penalreform.org/english/frset_pre_en.htm (last visited Aug. 11, 2004).

18. *Id.*

continents for five days to consider "A New Approach for Penal Reform in a New Century."¹⁹ It is important here to explain the difference between "penal reform," the term used at Egham, and "prison reform," the phrase used at this Pace Symposium. At PRI, we think of penal reform as changing and reforming the entire criminal justice system, not just the jails and prisons.²⁰ At the end of five days, all of the participants agreed on "A New Agenda for Penal Reform in a New Century."²¹ This was not a simple task as the reporters and drafters had to work in four languages. I want to read just one section that was described as the elements of a new agenda:

The understanding that penal reform is an essential part of good governance.

The awareness that penal reform cannot proceed without changes to the criminal justice system as a whole and that crime prevention in and by civil society is essential to the success of penal reform.

The recognition that, in dealing with poverty and the disadvantaged, it is vital that justice should be accessible and that there should be penal reform.

The determination to make sure that everyone, especially the poor and marginalized, has equal access to the justice system.

The need for all accused to have a fair trial under due process of the law.

The recognition that drug abuse is usually better dealt with inside the health or social welfare care system rather than the criminal justice system, especially when there is no violence involved.

The need to enrich the formal judicial system with informal, locally based, dispute resolution mechanisms which meet human rights standards.

The assurance that people understand how courts and the criminal justice system operate.

Openness and accountability in all aspects of the operation of the criminal justice system.

Penal reform that is an all-embracing and consultative process.²²

19. Penal Reform International, *A New Agenda for Penal Reform*, at http://www.penalreform.org/english/models_egham.htm (last visited Aug. 11, 2004).

20. *Id.*

21. *Id.*

22. *Id.*

So, to repeat the first lesson we should take away from this symposium: we have to look at the larger criminal justice picture and not just work to improve our prisons and jails.

The second lesson, I think, is that we have to do much more than litigation. We have to think of public education and of organizing groups of ex-prisoners and their families, even much more than the excellent work done now by Charlie and Pauline Sullivan at CURE²³ and Julie Stewart at FAMM.²⁴ I know that Michael Blaine²⁵ is organizing a new group of ex-prisoners as described in the current issue of the American Correctional Association publication, *Corrections Today*.²⁶ And we have to work with victims' groups because now they are almost entirely co-opted by the prosecutors.

There is a window of opportunity on the horizon. As you know, Supreme Court Justice Anthony Kennedy delivered a very important speech at the American Bar Association (ABA) annual convention in San Francisco this past August.²⁷ He criticized mandatory minimum sentencing, he lamented the overuse of incarceration in America and he called for reform.²⁸ The ABA has responded by creating a "Kennedy Commission" that we hope will address the issues raised by Justice Kennedy.²⁹ The Commission will hold its first set of hearings in mid-November.

23. Citizens United for Rehabilitation of Errants (CURE), a grassroots prison reform organization was founded by Charles and Pauline Sullivan in San Antonio, Texas. This organization expanded to a state organization in 1974, a national organization in 1985 and had its first national convention in 1987.

24. Julie Stewart is President and founder of Families Against Mandatory Minimums (FAMM).

25. Michael Blain is a former prisoner and a graduate of the University of Maryland who works with the Justice Policy Institute in Washington, D.C. He received a Soros Justice Fellowship to enable him to organize a network of inmates, former prisoners and their families to participate in a national movement to advocate for prisoner's rights and criminal justice policy reform.

26. See Vanessa St. Gerard, *An Interview with Michael Blain: Soros Justice Fellow at the Justice Policy Institute*, CORRECTIONS TODAY 112 (2003).

27. Justice Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Address at the American Bar Association Annual Meeting (Aug. 9, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

28. *Id.*

29. See *Justice Kennedy Commission Launches Hearings*, WASHINGTON LETTER (ABA, Chicago, Ill.), Dec. 2003, available at <http://www.abanet.org/poladv/letter/03dec/5.html>.

Finally, and we will hear more about this tomorrow morning, we need to look to international human rights instruments, treaties and standards to support our legal actions and our public policy work. My own organization, the National American Civil Liberties Union (ACLU), resisted using international law and standards for the first eighty-two years of its existence. Last week in Atlanta, the ACLU sponsored "ACLU Human Rights at Home: International Law in U.S. Court Conference."³⁰ The times, they are a-changing.

Courts in the United States are beginning to be more receptive to the idea of looking at international law and practice. In *Atkins v. Virginia*, the Supreme Court made reference to international practice in ruling that the execution of the mentally retarded was unconstitutional.³¹ Justice Ginsburg, in her concurring opinion in the Michigan affirmative action case examined the approach of other countries.³² Most important, in *Lawrence v. Texas*, the sodomy case, Justice Kennedy, writing for the majority, cited decisions of the European Court of Human Rights.³³ Less than two months ago, the Supreme Court of Missouri, in striking down that state's death penalty as applied to juveniles, discussed the international consensus against executing juveniles and cited international treaties on the rights of children.³⁴

Two very large professional organizations, the ABA and the American Correctional Association, have held separate and joint meetings to discuss the application of international standards, treaties and norms, in the treatment of prisoners and in the training of prison staff. These are important new developments.

In March of 1996 there was a retirement party and dinner for me as I stepped down as Director of the National Prison Project, or as a colleague from India told me, "Think of it as rising above, rather than stepping down." Nils Christie, the distinguished Norwegian criminologist, came to the event from Oslo

30. ACLU, Human Rights at Home: International Law in U.S. Court, at <http://www.aclu.org/hrc/> (last visited Aug. 11, 2004).

31. *Atkins v. Virginia*, 536 U.S. 304, 323 (2002).

32. See *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (Ginsburg, J., concurring).

33. *Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003).

34. *Simmons v. Roper*, 112 S.W.3d 397, 402 (Mo. 2003).

and spoke during the proceedings. He ended by saying, "You may not retire; look at how many people you have in prison in this country." He said, "You must keep up the struggle."

I hope that you will all join me in continuing the struggle. Thank you.