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## The Proper Role of Criminal Law

The following is an excerpt from a forthcoming book *Struggle for Justice* published by Hill and Wang. We feel that this work can serve as an invaluable resource in criminal law reform. Questions concerning this document should be referred to the American Friends Service Committee, 100 North 15th Street, Philadelphia, Penn. 215-LO 3-9372.



The best-known concerns of Friends have been expressed in their testimony against war, capital punishment, and the oppression of minorities. Based on respect for the dignity of the human personality, these testimonies have their roots in an unquenchable belief in the ability of groups and individuals to grow and to perfect the quality and conditions of their lives together.

It would be naive not to acknowledge the blunders that an uncritical faith can produce. The horror that is the American prison system grew out of an eighteenth-century reform by Pennsylvania Quakers and others against the cruelty and futility of capital and corporal punishment. This two-hundred-year-old experiment has failed.

The question of crime, justice, and punishment has become a major public issue once again. Many Americans have substantial fears for their own safety and worry about criminal acts that may take place against them. Rational or irrational, this fear is a fact. That its consequence might be a severe curtailment of freedom for all citizens is a serious consideration. We believe that force, intimidation, and repression undermine rather than insure an orderly society in which human dignity can flourish.

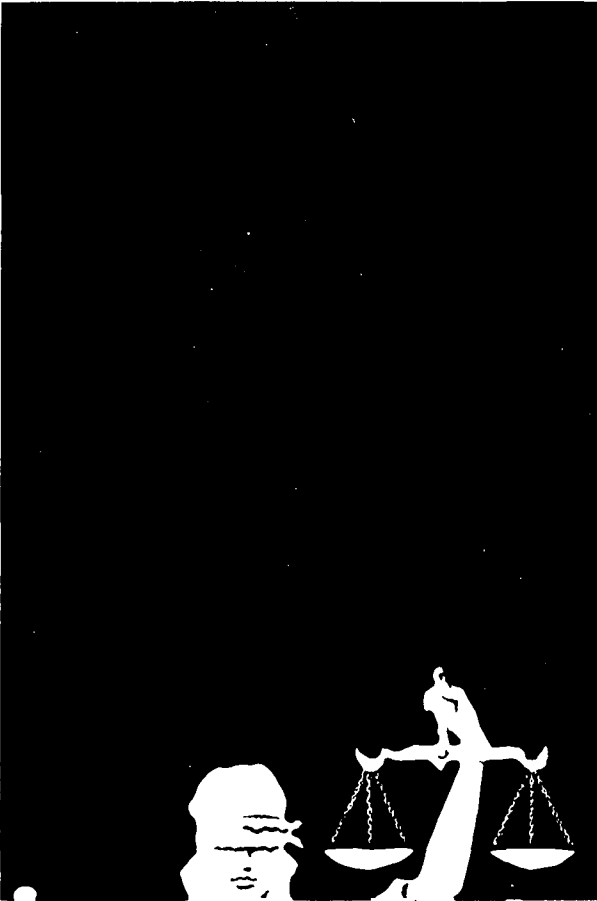
Even as our Working Party<sup>1</sup> has labored, a low visibility revolution has been taking place around us. In penitentiaries in Indiana and Florida, jails in New York City and the District of Columbia, and in California's San Quentin, to name but a few out of hundreds, prisoners have gone on strike, have lashed

out at the symbols of their imprisonment, have even maimed themselves to call attention to their plight. These upheavals warn the public that prisoners will no longer submit to whatever is done to them in the name of "treatment" or "rehabilitation."

Let us turn to the task of spelling out the general principles of a criminal justice system that is consistent both with our democratic ideals and with our recognition of the problems of maintaining a just social order.

Here we will suggest that the law should deal only with a narrow aspect of the individual, that is, his criminal act or acts. We will urge that the law be applied uniformly to all offenders. We will spell out our principles of restraint, urging that criminal sanctions be imposed only when other remedies have proved inadequate. Briefly we will explore alternatives and adjuncts to penal sanctions, urging that they be truly voluntary and available to all.

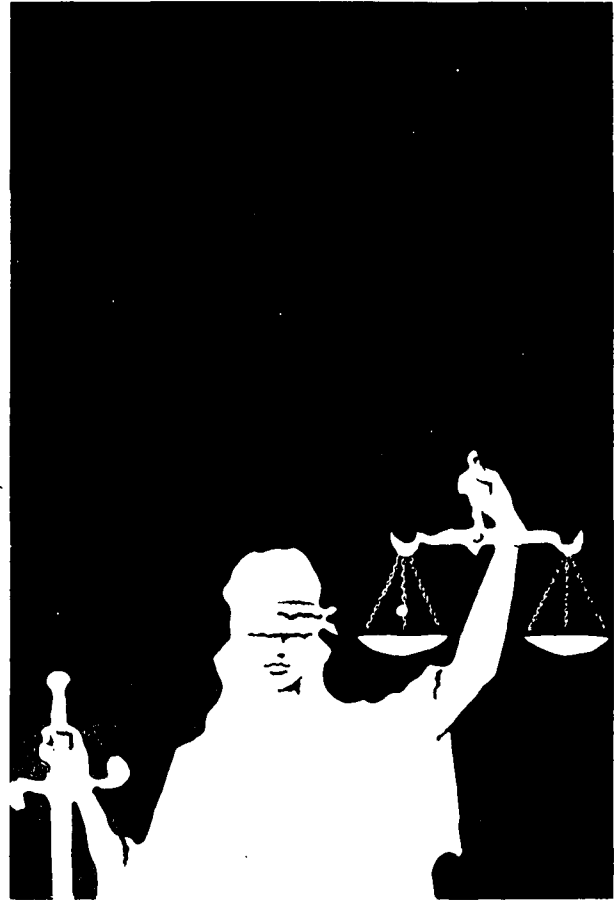
Several conclusions serve as foundations to our view of the proper role of criminal law. The first of these is that imprisonment is inherently punitive. Call it what you will, dress it with whatever motives you like, depriving someone of his or her freedom is punishment. Secondly, in our view, treatment mixed with coercion is scientifically unfeasible and morally objectionable. Coercing persons into treatment routines or imprisoning them and making their participation in rehabilitative programs a condition of their release has not, in any sense we can measure or evaluate, made them into less criminal and more



contented or more effective individuals. As measured by their tendencies to recidivate or by other success criteria, persons receiving no treatment do just about the same as persons receiving treatment of all kinds. Unless we want to accept some preposterous standards for evaluating the effectiveness of treatment efforts, we must conclude, after decades of experimentation, that treatment has failed miserably. Not only has treatment not produced any desirable changes, it has increased the numbers and suffering of those receiving the treatment.

More important, even if treatment were scientifically feasible, we would object to it on moral grounds. The goal of imposing manipulative routines for the purposes of effecting basic changes in "personalities" offends us. In fact, the whole deterministic view of man that underpins these strategies contradicts the values of free choice, individual autonomy, and self-determination that we embrace.

The third emphasis in our analysis is that discretionary power leads to serious undesirable consequences, both intended and unintended. Decisions are made upon irrelevant or discriminatory criteria. Though this has been the intention of some persons in the criminal justice system, in most instances it has been the unintended result of furthering other goals, such as bureaucratic efficiency. The result of discretion, by and large, has been to select out not the most dangerous criminals, not the classes of criminals who would respond to certain selected treatment routines, not the individuals or groups who are the greatest



threat to the social order, but to select out those persons with less power and influence, persons who are perceived as the greatest nuisances or those who most offend against middle-class morality or who refuse to knuckle under to prison authorities.

We hope the criminal justice system we sketch below manages to escape these abuses while also avoiding new pitfalls.

### **Punishment to Fit the Crime**

The first principle in our scheme follows directly from our views on treatment and discretionary power. This is the principle that the law should deal only with a narrow aspect of the individual, his criminal act or acts.

The whole person is not the concern of the law. Whenever the law considers the whole person it is more likely that it considers factors irrelevant to the purpose of delivering punishment. The other factors, by and large, have been and will certainly continue to be characteristics related to influence, power, wealth, and class. They will not be factors related to the needs or the treatment potentialities of the defendant.



One may contend that following this principle will eliminate the consideration of mitigating factors or other circumstances that qualify the seriousness of the criminal act and should therefore be considered in the delivery of a criminal sanction. If there are mitigating circumstances society feels should be considered in administering the law, these should be spelled out in defining the criminal act and not left unstated to be filled in later by functionaries operating with wide discretionary powers, functionaries who nearly always will consider factors irrelevant to the treatability of the criminal or to actual harm toward society.

Our desire to maximize the democratic values of self-determination necessarily calls for maximum tolerance for disparate life-styles. To cope with the problem of maintaining a workable cooperative relationship between individuals in extremely complex social organizations, we ought to fit the punishment to the crime, not the person.

When we punish the person and simultaneously try to treat him, we hurt the individual more profoundly and more permanently than if we merely imprison him for a specific length of time. We make it more difficult for him to be received back into full dignity. And more importantly, we do not succeed in maximizing compliance with the law, since focusing on the criminal tends to support the fiction that a few "criminals" are the most frequent and most dangerous lawbreakers rather than the more tenable view that criminal acts are committed by a very large number of persons, per-

haps the vast majority, who are spread throughout all sectors of society.

A necessary corollary of our principle of punishing for the act is that specific punishment be assigned to the act. All persons found guilty of the same criminal act under the same circumstances are dealt with uniformly.

Two exceptions to this corollary exist, which do not damage the general principle. The first is that society may want to assign more intense punishments to repetitions of the same criminal act or class of criminal acts, such as crimes of theft, crimes involving assaults on persons, or for felonies in general. For many crimes there might be no jail term for the first offenses. These qualifications can be clearly spelled out in the definition of the act and the punishment, and do not allow our old nemesis, the misuse of discretionary power, to slip back into the administration of the law.

The second exception is that some small proportion of the punishment may be left variable in order to award conformity to rules during periods of punishment and thereby reduce social control problems in prisons. For example, in many penal systems time off is ordinarily given good behavior. Such a practice can continue, though it must be recognized that when good time is regularly given, failure to grant good time is itself the delivery of a penal sanction. Therefore it is a judicial matter and the accused prisoner should enjoy the safeguards of due process.

## The Principal of Restraint

The law is not the proper social instrument for solving most of the problems it attempts to solve. Therefore criminal law must be limited by the general rule of restraint. This restraint takes three forms.

The first form of restraint is applied in determining what behavior should be prohibited. A cost-accounting system should be used to determine this. That is, values of autonomy, individual dissent, property, and cultural diversity must be weighed, as must the value of reducing human suffering caused by punishing persons for law-violations. All these are weighed against the urgency of the need for a high level of compliance with a particular social norm and the possibility of achieving this by law. We prohibit something only when the following conditions hold:

1. *There is a compelling social need to require compliance with a particular norm.* We mean by a compelling social need that the rights, the safety, or the general well-being of individuals and groups is threatened in some concrete way, and not just their "moral sensibilities." We know that here we face a problem. It can be argued that in order for society to exist, some central moral order must be upheld. Widespread nonconformity with cultural norms is thought to weaken the fabric of society. We disagree with this argument. In our opinion the legal system is not the only or the most important basis of order. In this complex and diversified world, social organizations can tolerate a much wider variety of behavior than is presently allowed. In fact, tolerance of a wider range of behavior patterns is a necessary condition not only of a workable, equitable, and humane criminal justice system, but of our very society, if it is to continue in forms consistent with our democratic values.

2. *There is no feasible but less costly method of obtaining compliance.* In our opinion other mechanisms to promote compliance with basic social standards have not been adequately investigated, though recently there has been some thought and activity in this direction. For instance, some insurance companies have made locking one's car a prerequisite for car theft insurance. Jane Jacobs, a student of the city, has made many suggestions on physical design features that could reduce crimes committed on city streets. Much more attention must be placed on exploring other forms of promoting compliance with norms, keeping in mind that the costs of prohibiting something and then following through on the prohibition are quite high.

3. *There is some substantial basis for assuming that the imposition of punishment will produce greater benefit for society than simply doing nothing.* The imposition of punishment, it seems, is superior to doing nothing when either there is strong reason to believe that the behavior in question is capable of being deterred or when the norm is one where non-compliance is generally felt to be so serious that doing nothing will be unacceptable to individuals or groups in society. Murder is an example of the latter. Although murder is one of the crimes least capable of

being deterred, since it most often is more impulsive than calculated, it is doubtful that members of society would tolerate doing nothing about it. On the other hand, there are many less serious infractions, such as passing bad checks, which could well be removed from the criminal law.

The second form of restraint is the principle of last resort. A responsible physician does not decide to proceed with a dangerous and costly operation until he has exhausted less risky methods of treatment. To a surprising degree, criminal law disregards this sensible position of not proceeding with a criminal prosecution on a first arrest, although we have noted that such discretion is exercised in a discriminatory manner. The law, however, fails to make such an approach mandatory. There are no doubt countless instances in which the criminal remedy is pursued entirely unnecessarily. It would be wholly consistent with our previously stated values to write provisions for alternatives into criminal law before the final coercive sanction.

Finally, the third form of restraint is restraint in the severity of punishment. Considerable evidence suggests that increasing the intensity of criminal sanctions fails to increase compliance to social norms. If deterrence works, then it seems to be the existence and not the intensity of punishment that deters. Moreover there are negative human costs in increasing the severity of punishment. The most obvious is of course the increased suffering of those who receive the more severe punishment. Beyond this, we now have some evidence that the permanent damage — in terms of social incapacitation of the punished — increases greatly with increased severity. Considering mainly increased lengths of sentences, several studies have indicated that where all other factors are controlled, the longer the sentence the higher the likelihood of returning to prison.

Specifically, we urge that the lengths of sentences be vastly reduced. For most crimes the average sentences are longer in the United States than in any other industrialized country. These excessively long sentences damage the individual and have not proved effective as a general deterrent.

Out of respect for the innate worth of every human being, we are also deeply opposed to the death penalty and fervently hope the Supreme Court will have abolished it as cruel and unusual punishment by the time this report appears.

## Uniformity of Application

The basic meaning of "law," it seems to us, is holding all responsible to the same rule. This basic principle has been lost in recent decades as the focus of the criminal system shifted from the act to the individual, giving rise to the practice of varying

criminal sanctions according to individual characteristics. Since there is no sound scientific or moral basis for doing this, we recommend strongly a return to the principle of uniform application of penal sanctions.

The morality of this position is clear. Law is the governance of human affairs by rules, rules that in a democratic society must apply to all. The failure to follow this principle results in general feelings of injustice. Moreover, failure to cast the net of law over the largest population possible is also experienced as an injustice by the smaller population that is caught. If only a very small percentage of the persons violating a particular law are apprehended, as is presently the case, these persons will always experience a sense of injustice. A major effort must be made to maximize the number of persons who are held responsible for commissions of a crime.

There are two very practical reasons for spreading the application uniformly among the largest possible number of persons. The first is to maximize general compliance to the norm. Although increasing the severity of penalties does not increase compliance beyond a certain point, increasing the certainty of application does. For instance, after examining some of the literature on deterrence, Richard Salem and William Bowers concluded that:

those studies which do attempt to separate the effects of severity and certainty, whatever their methodological shortcomings, indicate that certainty rather than severity of legal sanctions is the primary deterrent factor.

Another benefit in uniformity of application over the largest number of persons is that the human costs of enforcement are spread among the largest feasible number of offenders. This is not only more consistent with our sense of justice, it is ultimately more humane, since it allows more persons to share the burden of criminal law.

### Alternatives and Adjuncts to Penal Sanctions

In recommending the separation of helping and coercive functions of the criminal law, we may have conveyed the impression that we support abandoning the goal of helping the defendant or prisoner. This is far from the truth. We envision a vast expansion of the range of educational, medical, psychiatric, and other services available not only to prisoners but to all people. Quality services now enjoyed by an elite should be made free and accessible to all. High priority should be given to using this country's resources to allow each member of our society to develop his or her potentialities to the fullest.

Increasing the role of voluntary organizations can act as a leavening agent throughout our whole society. Such groups will be described in the Epilogue.

In concluding these suggestions let us again emphasize two attitudes we have maintained throughout this presentation. The first is that of modesty. We thoroughly recognize that the problems of justice and the administration of the law are extremely complex. We do not want to suggest that we have supplied any simple directions to guide us out of the present morass of the criminal justice system. To some extent we recognize that many of the problems we have dealt with involve complex contradictions, perhaps inherent, insoluble contradictions. From this standpoint our suggestions are offered as crudely spelled out principles, which, at best, will serve as guides for future directions. They are in no way intended as a blueprint for the erection of the perfect criminal justice system.

Secondly, we do not want to convey the impression that we are overly hopeful that the goals we outline are within immediate reach, or for that matter that reaching them will solve all the problems of criminal justice. In the hope that they will prove useful, we offer our principles to advance the ongoing struggle.

### Epilogue: Action

The quest for justice is endless — a struggle not a goal. We have proposed across the board changes in the criminal justice system, convinced that such changes will go a long way toward correcting present abuses. In this Epilogue we come to terms with the toughest part of the problem: How do we move the struggle forward?

We will start by examining the difficulties involved in making changes in the criminal justice system. Then we will propose a framework for evaluating present or proposed actions. On this basis we will briefly examine a variety of actions and groups dealing with the police, the courts, and the prisons.

The problems we confront are profound. Their dependency upon the values and practices of the whole society require basic social and economic change. These changes are essential to the creation of the criminal justice system we envision. It is clear to us that such a system would work admirably if it could be implemented all at once. Working piecemeal presents thornier problems. Do proposed actions lead toward basic change, weakening the system of oppression? Or do they strengthen the system in the long run by tapping discontent without creating structural change?

The criminal justice system has a phenomenal capacity to absorb and co-opt reforms. Throughout the years reformers have won all sorts of concessions. Many specific abuses have been halted or diminished. But the system grinds on inexorably. No matter how many new police have been hired, how many new courtrooms and prisons built, the system has remained overcrowded. Reforms have not succeeded in getting the sys-

tem off people's backs. Increased discretionary powers have not led to more equal law enforcement. The criminal justice system is not solely responsible for the level of crime and violence in our society, but few would claim that the system has functioned effectively to diminish these problems.

There is evidence that much of the public is profoundly punitive, not only toward serious crime, but toward many acts we believe should be removed completely from criminal law, such as many unlawful sex practices, all drug use, most minor crimes of theft. Simultaneously, perhaps to resolve the conflict they feel between their punitive response and their more humanitarian nature, many persons support forced rehabilitation. They support police discretion to control persons who threaten their property, lives, or values. A shocking example of this support is James A. Michener's recent discovery, when investigating the shootings at Kent State University, that the mother of two Ohio college students advocated firing on students even for minor practices, such as going barefoot and wearing long hair.<sup>2</sup> One factor to be considered in evaluating proposed action is its value in educating the public.

The criminal justice system is also firmly supported by most of those who work as part of it — police, judges, prison administrators, probation officers, and other functionaries. Any change that threatens their security or power they naturally resist. They seek to increase their budgets and programs, especially those that increase the discretionary power of parole boards to keep order in the prisons. The police, from the cop in the patrol car up to the chief, use their discretionary powers every day. These aspects of the system are not going to be changed without a vigorous counterstruggle by the incumbents. How do proposed actions measure up in this regard?

The experts — even the most enlightened and progressive — also line up solidly in support of the system, asking only for more of the same. Most established penologists and criminologists support the treatment and individualized treatment principles. Most legal scholars support the principle of discretion. We venture to hope that this report will inspire reconsideration by such experts. How might proposed actions help in this sphere?

Though there is little support on the level of officials and authorities for the changes we recommend in the criminal justice system, this does not mean all are content with the system as it is. In limiting the scope and functions of criminal law, we envision a corresponding expansion of the voluntary sphere of our society. We envision the growth of community. By "community" we mean people taking action together to attain shared objectives. A community might be a neighborhood, a religious, ethnic, racial, or occupational group, or simply persons with a common goal, such as a peace group. Today a variety of community organizations are engaged in actions involving aspects of the criminal justice system. We will describe some of these groups in this Epilogue.

Evaluating projects is difficult. Many objectionable practices — from solitary confinement to discre-

tionary power — were adopted partly or mainly through the efforts of well-intended reformers. Will the changes we recommend turn out to be two-edged swords?

Pretrial release is a case in point. We urge the abolition of cash bail and the pretrial release of nearly all those accused of crimes. But today we find ourselves in a situation in which half the persons in local and county jails are being held for reasons other than having been convicted of a crime. Simple justice demands the release of these men and women. Indeed, many programs in recent years have focused on this problem. At first pretrial release programs, such as that of the VERA Foundation for Criminal Justice in New York City, were hailed as major advances. Now we see that these programs, by and large, have not reduced the number of those in prison awaiting trial. Today many pretrial release programs have criteria for release as stringent as the official programs they were intended to augment or replace. Sometimes their criteria are so stiff that they are even less available to the poor and powerless than bail bondsmen!

There has been strenuous debate within the Working Party as to what kinds of action we can wholeheartedly recommend. Can we develop action suggestions that really grow out of our study and our insights? According to one viewpoint, the magnitude of the problems of criminal justice is so great that most forms of action are counterproductive. These members of the Working Party are comfortable only with long-range educational efforts that will produce, we hope, the kind of society in which the criminal justice system we envision will be not only possible but inevitable. Others in the Working Party, more closely attuned to the day-by-day struggles and achievements of those working for social change, are more hopeful. They see many openings. They are convinced of the need for vigorous actions in the area of criminal justice and offer the framework that follows as a basis for action. Throughout its deliberations the Working Party has been united in the determination to avoid hollow theorizing, to avoid drawing up a Utopian proposal that cannot be implemented. We are united in the fervent desire to do away with the cruelty and waste that now exist in the sphere of criminal justice and to work toward a system more equitable for all.

In this time of change and disorder we recognize that strong actions might worsen the situation. The specter of wholesale repression looms. At the same time, an ever-increasing number of persons are becoming aware of the defects in our most basic social and economic institutions, including those of criminal justice. Out of this ferment change is bound to come. There is no guarantee that this change will be in the direction of greater freedom and justice for all — but surely this possibility exists. We seek here for actions that might lead the way.

## Framework for Action

Central to our framework for action is the concept of *empowerment*. As a basis for social change, start with the people who suffer most grievously under the present system. Actions that shift power relationships, that place power in the hands of the heretofore powerless, have the potential for creating basic change. Such actions place people in new relationships to institutions. This is our primary criterion for evaluating present or future actions.

By this we do not mean to give a blanket endorsement to all grass-roots projects. We do not mean to romanticize the efforts of abused peoples to get themselves together. Each endeavor obviously must be evaluated on the basis of its own accomplishments.

This is a particular problem in the field of criminal justice, where those at the bottom of the heap tend to be so maimed by institutionalization that it is difficult for them to act freely. Some ex-prisoner groups are mainly reformist and rehabilitative. They tend to reinforce the present setup.

For example, a convict-run halfway house might adopt a disciplinary code for members more punitive than that in the prison from which they came. There is always a danger that such a group will become "soft cops," behaving repressively under the guise of autonomy. They might even become "hard cops," as harsh and dictatorial as some of the system's current functionaries.

The point bears emphasizing that the components of an alternative system tend to be of a piece. They cannot easily be implemented piecemeal. Fixed and uniform sentences imposed by the legislature, for example, would contribute little toward the elimination of discrimination and inequity unless the discretionary powers of police and prosecutors were curbed at the same time. The capacity of one part of the criminal justice system to negate reforms affecting only other parts of the system is considerable.

Therefore, we have attempted to cut across institutional lines. It is not possible, for example, to analyze the prisons adequately without understanding the processes whereby police arrest, district attorneys prosecute, attorneys defend, and courts sentence, since these decisions determine the input to the prisons. Effective strategies for action can be worked out only in light of these structural interrelationships.

The following suggestions are designed to begin to get people moving. By tackling some problems in ways that will necessarily be small and inadequate, concerned individuals can in the process be learning, involving new people, and coming up with ways to go beyond these proposals. The list is not inclusive. Doubtless other valuable projects are under way in many parts of the country. Here we consider briefly a few projects about which members of the Working Party happen to have information.

## Self-Determination

The concept of empowerment leads to the organization of oppressed peoples and abused groups for self-determination. Reform efforts of the past excluded the views and experiences of these groups. Their presence in future social change efforts will be a major innovation.

Finding the only channel open to it, the thrust for self-determination within prisons has taken the form of resistance and strikes. We note the courage of prisoners all over the nation who, at great risk to themselves, point to the barbarity and inhumanity of their confinement, demanding that its causes, not merely its present misery, be changed. A new commitment and awareness flourishes among these men and women. We stand beside them in their struggle.

One outgrowth of these struggles has been prisoners' organizations. In-prison groups have yet to survive, because of the awesome power of authorities to crush or disembowel such groups in a total institution such as a prison, but doubtless prisoners will eventually establish the right to participate in such groups. Implementation of the Prisoners' Bill of Rights (discussed below) will be an important factor in assuring the existence and growth of these efforts.

Parole regulations forbid ex-prisoners from associating with each other, but this has not succeeded in blocking the emergence of ex-prisoners' organizations across the country. Although some of these groups operate within the rehabilitative framework furnished by the prison experience — even functioning at times as "soft cops," performing such custodial functions as supervising parole — the trend in these groups is more and more toward empowerment. Thus, released convicts work together to improve their own lot and that of their brothers and sisters still in prison. An example of this surge of fervor within prisoners' groups is furnished by the preamble to the constitution of the California Prisoners Union, which held its first statewide convention in June 1971.

We the convicts and our people imprisoned or at large throughout the state of California are being subjected to a continuous cycle of poverty, prison, parole and more poverty; the same cycle that prisoners the world over have endured since the first man was enslaved. It is more than a game of Crime and Punishment: it is a social condition of inequality and degradation that denies us the opportunity to rise up and pursue a dignified way of life as guaranteed by the United States Constitution. Once convicted, forever doomed has been the practice of society. We are the first to be accused and the last to be recognized. We are branded the lowest of all people: we the convicted class.

The right to organize for protection and survival is an inalienable right which is guaranteed to all people regardless of their social, racial, religious, economic, or political condition. Therefore, we the convicted class have banded together to form a cooperative Union to be hereafter called the California Prisoners Union. We believe the creation of this Union will enable us to put an end to injustice, protect the lives and interests of our people, gain our constitutional rights and free us of our bondage.

A far different group, also a victim of institutionalization and racism, is experimenting with self-determination. Organizations of black police officers within big city police departments are becoming in-



creasingly militant. Groups such as the Guardians, the Afro-American Patrolman's League, and the Society of Afro-American Policemen are pressing for more black police and for equal promotional policies. They are becoming more keenly aware of the disparities in police service to and in the control of the black and white communities. The black officer, especially if he lives in the community he serves, might play a bridging role and might also act as a buffer between his community and the larger police force.

The National Council of Police Societies (COPS), representing thousands of black policemen and police-women, has issued a strong statement recommending adoption by all police departments of the guidelines issued by the President's Crime Commission for the use of a policeman's gun. Pointing out that predominantly white police organizations do not represent their interests except in such matters as salaries, COPS has gone on record in supporting the establishment of civilian police review boards to "offset the rubber-stamp punishments now being carried out in present police trial boards when dealing with the police officer's negative treatment of the poor and black community."<sup>3</sup>

### Making the System Visible

It is difficult for a middle-class person to envision the degradation and depersonalization typically experienced by a black in the hands of the police, the courts, the prisons. Often Chicanos, Chinese, and other non-English-speaking people are even worse off. To make this system visible, to pierce the veil of secrecy that allows unspeakable practices, should be a major thrust of actions in the area of criminal justice. The public shows a propensity for shutting its eyes to these disturbing facts. Prisoners are nearly always out of sight and out of mind for the vast majority of people. Exposing the barbarism of courts and prisons can bring the plight of convicts into the public consciousness. Information can be an important resource in changing public attitudes.

The dignity of the courtroom — the respectable front for the sordid practices of the criminal justice system — strikes many observers as particularly offensive. Court-watching projects can be an excellent method for gaining an understanding of the system and its shortcomings. Such projects should assign high priority to training the volunteers that participate to use the experience gained as a tool for challenging the injustices of the system and bringing about change. These projects can take the form of monitoring and research/action, helping to create an alliance of legal-aid services for poor defendants, and publicizing corrupt court and prison practices. Tactics as diverse as town meetings, guerrilla theater, and non-violent direct action can be used to bring illegal or

inhumane conditions to public attention.

All these methods have been used by the Friends Suburban Project in Chester, Pennsylvania. Stemming from court-watching, an action/research project found that 75 percent of those brought into court were black or Puerto Rican. Blacks had more serious charges brought against them and more often faced multiple charges. More than half the black defendants spent one to two weeks in jail prior to trial, no whites more than a week. Half the occupants of the county jail were there because of inability to post bail. Blacks suffered harsher disposition of their cases, with one-third held over for court on more serious charges, as opposed to 14.5 percent of the whites. No whites paid a fine of more than \$100 but 10 percent of the blacks did. Two-thirds of all defendants were not represented by an attorney.

This experience motivated project participants to take action in several ways. They helped set up a bail assistance program administered by a black community group. They sought to increase legal representation by pressuring Legal Services and by creating a program whereby third-year law students, supervised by practicing attorneys, worked as volunteers in the court. Project participants also had occasion to resort to civil disobedience and were arrested in the courtroom. They involved the American Civil Liberties Union in test cases designed to modify unsatisfactory courtroom practices. By involving more and more volunteers and through speaking engagements, newspaper and radio interviews, and other means the project participants sought to make the system increasingly visible.

In 1967, discovering that there was almost no relevant data on jail conditions for female prisoners, the Pennsylvania Division of the American Association of University Women designed a project to survey jails in fifty-four Pennsylvania communities. They discovered that little thought is given to women prisoners, a fact that holds true nationally. About half the women and girls in Pennsylvania jails are held on minor charges. It became apparent that a particular burden for women prisoners is worry about their children. While the county "cares for" children of mothers sentenced for an appreciable length of time, when mothers are arrested and held for a few days the care of their children is uncertain and an additional source of anguish for the women. The AAUW's survey led to the establishment, with the Friends Prison Service Committee, of an organization that is working for the creation of a network of statewide community centers, which will provide family counseling, job training, and medical treatment for women. A staff member of the new organization has started a group for women ex-prisoners.

When files stolen from the FBI office in Media, Pennsylvania, were mailed to sympathetic newsmen, to groups working for social change, and to other concerned individuals, many Americans were shocked to discover the extent to which the FBI engages in political surveillance and the extent of the FBI's network of paid informers. Further opportunities to make visible the actions of the FBI arose when their search for the

files focused for a time on the West Philadelphia community of Powelton Village. Agents flooded the neighborhood, most of them armed, some sporting scraggly beards and "mod" clothing in an attempt to blend into the scene. They attempted to question residents, but found most persons uncooperative. They followed people from the community with as many as four cars at a time. They used a sledgehammer to beat down the door of a National Action/Research on the Military Industrial Complex (NARMIC) staff worker who had prepared a pamphlet on the Media files. Even this failed to intimidate the community. Residents picketed the FBI office the following morning. Demonstrations sprang up whenever agents parked their cars in the neighborhood. Agents were photographed and a wall poster was published identifying the agents and informing community members of their rights. An air-horn system was installed to alert residents in case of another raid. A "Your FBI in Action" street fair was held, with local and national news media alerted to help prepare other communities for the eventuality of harassment by secret police.

Additional public education efforts to make the system visible include seminars, speaking engagements by ex-prisoners, and performances of a prison play *The Cage*, written and acted by ex-prisoners from San Quentin. Another approach is a coffee-house project located near a prison. A coffeehouse can offer various services to the prisoners and their families. It can provide a meeting place for the full range of people involved with the prison.

### Building Power within the Community

The life of a community and the operations of its justice institutions are closely related. Past reform efforts have concentrated on the institutions while ignoring the community, thus diminishing the ability of people to influence the lives of those within the institution. Empowerment means establishing new relationships between people and the institutions that determine public policy. Most of the projects we have discussed so far to some extent build power within the community; in the following section we will consider projects and groups more directly focused on building community power.

COPPAR, the Council of Organizations on Philadelphia Police Accountability and Responsibilities, tries to build police accountability in a city where the mayor has abolished the police-civilian review board by executive fiat. COPPAR points out that "abuses committed by the police are [rarely] directed against either organized crime or professional criminals . . . Police abuses largely arise from the relations between the police and the socially discontented elements of our city — the poor, the blacks, the Spanish-speaking and the young."<sup>4</sup> COPPAR seeks to

document and publicize the cases of persons who have suffered mistreatment at the hands of the police and to seek redress through existing channels, through the courts and through political action.

Without any change in present police structures, minority or youth communities could assume noncriminal police functions, such as dealing with housing and other emergencies, notifications of deaths, search for lost children, and the location of stolen or abandoned automobiles. Through such a group the community could bring pressure on practices harmful to the community. It could confront and offer to help its own members trapped by heroin and enlist their aid in coping with sources of supply. Youth gang wars could be halted and healthier outlets for youthful energy created. Informers and provocateurs within the community could be confronted and expelled from the community. A web of available community services, controlled by those who need and use them, could persuade people in turn to these agencies, rather than to the police, for assistance in social disturbances and family disputes.

A special community, with unique needs and problems, is that formed by the families of men and women in prison. In San Francisco some "prison widows" formed a group called Connections to meet these needs. Transportation is organized to outlying prisons on visiting days. Baby-sitting service is provided, as is temporary foster parent care. Help for drug addicts and alcoholics is made available on a voluntary basis. People are helped in their struggles with legal aid and the welfare bureaucracy. Medical care is made available. Discussion groups help prisoners' wives share their experiences and deal with their problems. A speakers bureau educates the public on the plight of prisoners and their families. Connections also lobbies and sponsors demonstrations on issues concerning prisoners. The idea seems to be spreading; Connections organizations have also been formed in Chicago and Minneapolis.

A challenging proposal for involving the community, initiated by black inmates at the state prison at Gratersford, near Philadelphia, seeks to create a program whereby representatives of the inner-city coalition would conduct ongoing seminars within the prison to prepare prisoners to work to "erase the sale/use of narcotics among the community's youth." The seminars, which would be kept small to promote the growth of trust and acceptance between the prisoners and members of the coalition, would meet once a week or at least twice a month. "The coalition should have a specific program," say the authors, "consistent with the initial aim of the proposal — convincing inmates that despite their circumstances they have an obligation to convince all others, similarly situated, that selling scag [heroin] is killing our children and tearing the black community apart."

In a street extension of the proposal the authors suggest that the coalition engage a black advertising firm to map a saturation campaign — including the mass media, billboards, buttons, bumper stickers, and oral messages by students and others — not only to assault the black entrepreneur of heroin but to seek out the

sources of supply. The aroused community should put pressure on the police for more effective protection. Community people should become aware of the sources of supply and publicize them.

This is an ambitious but fascinating empowerment possibility.

### A Bill of Rights for Prisoners

Most of the projects discussed thus far would be on more solid ground if a Prisoners' Bill of Rights were implemented. Groups might choose working for this implementation as a primary focus. Progress toward the system of criminal justice we envision cannot proceed very far without the acceptance of basic civil rights for prisoners.

The concept of prisoners' rights stems directly from consideration of human dignity and the rights of citizenship. These rights should not be annulled by the fact of imprisonment. Rights for prisoners, once established, should be tools prisoners can use in influencing public policy about the penal system and in defending themselves against an oppressive bureaucratic system.

The following Bill of Rights for Prisoners is based upon these premises:

1. Prisoners are entitled to every constitutional right exercised by the outside population except for those inherently inconsistent with the operation of the institution. The burden must be on the institution to show why it is necessary to deprive inmates of certain rights, rather than on the inmates to show why they should not be deprived of them.

2. Since prisons are governmental institutions, the public has a right to information about the operation of prisons and access to the prisons. Prisoners have the right to public scrutiny of prisons for the same reason that the accused have a right to a public trial.

3. Prisoners are persons dependent for their survival and well-being on the same essentials as their fellow citizens outside the walls.

For these reasons the Bill of Rights for Prisoners includes the following:

1. Unrestricted access to the courts and to confidential legal counsel from an attorney of the individual's choosing or from a public defender. Adequate opportunity to prepare legal writs.

2. Freedom from the actuality or threat of physical abuse whether by custodial personnel or other prisoners.

3. Adequate diet and sanitation, fresh air, exercise, prompt medical and dental treatment, and prescription drugs.

4. Maintenance of relationships by frequent meetings and uncensored correspondence with members of

the immediate family, personal friends, public officials, and representatives of the community. Regular opportunity for conjugal visitation by the granting of home furloughs.

5. Reasonable access to the press, through both interviews and written articles.

6. Freedom of voluntary religious worship and freedom to change religious affiliation.

7. Established rules of conduct available to prisoners in written form. Prohibition of excessive or disproportionate punishments. Procedural due process in any disciplinary hearing that might result in loss of good time, punitive (involuntary) transfer, or an adverse affect on parole decisions. Due process includes the right to independent counsel, the right to cross-examination, the right to subpoena witnesses, and the right to avoid self-incrimination.

8. Opportunity for the prisoner voluntarily to avail himself or herself of uncensored reading material and facilities especially provided for vocational training, counseling, and continuing education.

9. Opportunity in prison through work-release for work at prevailing wages. Eligibility for social security, unemployment compensation, and public assistance benefits upon release. Exclusive title to and control over all products of literary, artistic, or personal craftsmanship produced on the prisoner's own time. Freedom from compulsion to work.

10. A judicial proceeding for the determination of parole that incorporates full due process in the determination of sentence and parole date, including established rules of parole-board conduct. Parole may be revoked only upon conviction of a crime and only after a judicial hearing.

11. Full restoration of all civil rights and privileges upon release from prison. The right to vote in any election in which a prisoner would be entitled to vote if he had not been confined.

12. Unrestricted ability to petition for a redress of grievances. A separate authority with the power to correct instances of maladministration, abuse, or discrimination. Freedom from reprisals for making complaints.

Although prisons even with rights would still be punitive, we feel strongly that the Bill of Rights for Prisoners offers a method of working for change in the justice system, which would begin to lessen the human costs of penal coercion. The movement for prisoners' rights runs directly counter to the growth of unfettered discretionary powers; it calls for shifting power from administrators toward those who are on the receiving end. This was vividly illustrated recently by a statement of the New York City Commissioner of Corrections when attorneys for accused Black Panthers succeeded in getting the federal court to compel "Corrections" to allow them reasonable opportunity to consult with their jailed clients. The commissioner is, of course, aware that bargain-basement justice, including his own operation, depends upon maintaining a large proportion of "subjects" who are cowed and manipulatable and who do not demand their "rights." When the court order came down against him, his pre-

dictable complaint to reporters was: "What if all our inmates demanded the same thing?" Translated, what he said was: What if all our powerless inmates suddenly started demanding rights that defendants with a higher socioeconomic status enjoy as a matter of course?

Recent court decisions are beginning to recognize the constitutional rights of prisoners. A judge ordered the release of inmates of a particularly atrocious jail in Gallup, New Mexico, on the grounds of cruel and unusual punishment. Judge Constance Baker Motley awarded monetary damages to Martin Sostre for having been held in solitary confinement for more than a year. Judge Motley insisted that requirement of due process be met in future disciplinary proceedings. Although this decision is being appealed, this case might be a harbinger of a reversal of the courts' long-standing policy of refraining from interference with prison administration.

Two groups dedicated to fundamental change in the prison system through litigation and other steps have emerged: the Prisoner Rights Council in Philadelphia, which involves agency people, ex-prisoners, and lawyers, and the Coordinating Council for Prisoners Rights in New York. These groups might be the forerunners of a nationwide network enabling the exchange of briefs and legal research.

As prisoners and their lawyers organize around the Bill of Rights for Prisoners, citizen groups can join with them, their families, and the numerous ex-prisoner groups. Particular emphasis should be placed on access to the prisons for public and press to pierce the wall of secrecy behind which the prisons operate. The Bill of Rights provides a useful tool for educating the public and legislative bodies and could be used as a legislative proposal. Outsiders can help by providing publicity for prisoner demands, by seeing to it that legal support is available, and by demonstrating their solidarity with prisoners' demands to indicate to administrators and government the seriousness of their determination that conditions be changed.

### Getting the Justice System off our Backs

A major emphasis of this study has been to cut back the inevitably coercive criminal law and to avoid using the criminal justice system to solve social problems. Past reform efforts have often resulted in the extension of coercive powers and in the increased penal costs of longer sentences. Although prison systems have continued to expand, they remain overcrowded. We must find ways to cut back this system. Crimes without victims and pretrial detention could be eliminated.

At the heart of our approach to the problems of criminal justice is the desire to transfer power from the police/courts/prisons to the people. To accomplish this, certain functions of the criminal justice

apparatus will be transferred to voluntary organizations. The police/courts/prisons will be used only as a last resort, to cope with problems that cannot be handled in more humane ways.

We recommend that a full range of therapy, counseling, and psychiatric and educational services be made available, free, on a voluntary basis, to the entire population, inside prisons and on the street. A model for such services now exists within the youth culture. Organizations such as HELP in Philadelphia, the Medical Committee for Human Rights 1012 Program in Syracuse, and dozens of others across the country offer free help, no questions asked, no matter what the problem. They help with drug and other health problems, housing, unwanted pregnancies, problems with the draft, psychiatric and emotional problems. They are manned mostly by young volunteers. Most of the contact is by telephone, which has the advantage of preserving the privacy of the individual needing help. Basically they are referral services, directing callers to resources that already exist within the community. As such resources are expanded, the usefulness of such organizations will also increase.

This approach could be applied to other constituencies. Crisis centers are sorely needed to provide help for alcoholism and drug problems on a voluntary basis. A variety of counseling services related to jobs, vocational training, temporary housing, emergency funds, or simply a retreat to get oneself together are needed.

Compatible with the goal of empowering people and helping them to find a base from which to put their lives together are centers where men and women coming out of prison can find a noninstitutional atmosphere. There they join forces to govern their living conditions, find employment or educational options, and begin to build an alternate life-style to that of prison, a life-style that is satisfying and rewarding.

Such a center can become a focus for community groups interested and involved in the problem of prisons and can help to train them for more effective action. The Austin MacCormick Center in San Francisco has begun a series of seminars, symposia, and luncheon programs bringing together community and business leaders, people from the universities, professionals, ex-convicts, and the general public to discuss specific issues and explore meaningful ways of coping with problems in the area of crime and criminal justice.

Increasing understanding and support for the provision of such services, wider involvement of volunteers, and increased communication among those concerned with various aspects of criminal justice is the goal. At present the state of public ignorance about the underlying problems of criminal justice is appalling. By default, public policy is largely determined by self-interest groups. It is little understood or acknowledged, for instance, that, as Ronald Goldfarb has written, "we have in America a dual system of criminal punishment, one public, the other private, each operating very differently from the other." In our system the services privately available to the more affluent as alternatives to incarceration should

be publicly available to all. No one should be imprisoned until the community has made all its facilities available on a voluntary basis *prior* to incarceration.

One obvious rallying point is opposition to the construction of new prisons. As a reform, "modern" prisons may relieve the harsher physical hardships of doing time, but the essential punitive element of prison — deprivation of liberty and free choice — remains. When pressures for reform lead to demands, to relieve "overcrowding" by adding new cell or bed space, the result is inevitable: the coercive net of the justice system will be spread over a larger number of people, entrapping them for longer periods of time. If prisons are overcrowded, ways should be found to cut back the mass of criminal laws and the types of enforcement that send so many people to prison. The construction of new prisons is not compatible with our view of the proper role of criminal law in a democratic society.

### Justice as a Public Issue

The kinds of action we have described point the way to a criminal justice system that is more humane and more equitable for *all* the people. More ideas, more actions, more proposals are needed. Work toward such a system of justice will create ripples throughout our whole society, having a salutary effect on all our institutions and policies.

1 G. Richard Bacon, Richard Boardman, Spencer Coxe, Caleb Foote, James W. Giles, David Greenberg, Mike Ingerman, John Irwin, Alex Knopp, Sam Legg, Jan Marinissen, Charlotte Meacham, Edwin C. Morgenroth, Chairman, Tom Melson, George Sawyer, Jane Schulman, and Mark Morris, staff writer.

We know by experience that people grow not simply by what they hear or even what they think, but through action. Therefore, as well as scholars working in the field of criminal justice, our Working Party includes those who have been on the receiving end of the justice system. Several Working Party members have served prison terms — one spent two years on death row, one is currently imprisoned, and two have family members behind bars. Since we believe that experience is best expressed by those who have "been there," our Working Party is made up of women and men familiar with the administration of criminal justice through their work, visitation, or life inside.

2. *Kent State: What Happened and Why* (New York, Random House, 1971).

3. *Philadelphia Tribune*, June 11, 1971

4. COPPAR position paper, March 26, 1970.