But until a revolutionary situation exists in the United States, conventional politics has the undeniable advantage over *armchair* revolution in that it can accomplish some positive changes.[13] If prison reform groups are to have any real hope of modifying the prison system in the foreseeable future, they must begin to focus their energies on established political institutions, for in the foreseeable future it is through these institutions that change must come.

13. Participation in conventional politics should not be considered inconsistent with the long-run possibilities of revolutionary change. Every modern revolution has been preceded by a period of halting social reform which appears to have whetted, rather than satisfied, the appetite of the oppressed for liberation.

CHAPTER 14:

Change Through the Courts

by Brian Glick

Courts and lawyers have always been very important to the prisoner. They put him behind bars and yet, at the same time, offer one of his few hopes for early freedom. Since the 1960s courts and lawyers have also begun to deal with the internal operation of prisons. Lawyers have filed suits to protect prisoners' legal rights and improve prison conditions and they have won some major courtroom victories. Some of this increasing legal activity on behalf of prisoners has strengthened the political struggle to change both prisons and the class and race relations which determine how prisons are used. It has not, however, had significant direct impact on prison life. Its limits are rooted deep in the American legal system and revealed throughout prisoners' experiences with the law.

PRISONERS AND THE LAW

Prisoners know, better than most people, the sham and corruption, and the class and race bias, of criminal law enforcement in the United States. They know the assembly-line processing that passes for representation by public defenders. They know that judges and prosecutors are political appointees

who, in many cases, have literally bought their positions.[1] They know that these well-paid, professionally privileged men, almost all of them white, fear and look down on the poor men and women, very disproportionately nonwhite, whom they send to prison. Prisoners know also that "white-collar" criminals generally do not serve time because their crimes are not considered a serious threat to the social order, they have money for bail and private counsel, and prosecutors and judges treat them more as equals.[2]

Most prisoners are behind bars as the result of a "plea bargain," a deal between the public defender, the prosecutor, and, more often than not, the judge. More than 90 percent of the people convicted of crimes in the United States plead guilty. Typically, a poor defendant is charged with a more serious crime than can be proved in court. He is threatened with certain conviction and maximum sentence if he stands trial, but promised leniency if he pleads guilty to a lesser offense. Frightened, intimidated, confused by court procedures, held for weeks or months in a degrading detention cell, under pressure from police, prosecutors, and his own attorney, even the totally innocent poor defendant usually "cops a plea." Frequently the authorities do not keep their end of the bargain and the defendant serves many more years in prison that he was led to expect.[3]

The process which put him behind bars is, to the prisoner, one face of the law. The other face is legal action to release him

1. The going rate for a New York City judgeship in the late 1950s was a contribution to the local Democratic party reportedly ranging from a minimum of $20,000 to as much as two years' salary as a judge, or approximately $60,000. Wallace Sayre and Herbert Kaufman, *Governing New York* (Russell Sage Foundation, 1960), p. 542.

2. Data for rate of conviction and time served by class, race, and type of offense can be found in tables 1, 2, 4, 5, 9, and 10 in this book.

3. Sometimes the prosecutor and judge double-cross a defendant and give him a heavier sentence than they promised. More often they deceive him by not explaining how much time he can serve for the crime to which he pleads guilty, especially in states which use the indeterminate sentence. For a general description and analysis of the "plea-bargaining" process, see Abraham Blumberg, *Criminal Justice* (Chicago: Quadrangle, 1967).

from prison and protect his rights while he is there. This positive side of the law is limited in its capacity to help the prisoner by the same biases and bureaucratic mentality that helped put him in prison in the first place.

Judges generally consider themselves too busy to take seriously the writs of habeas corpus by which prisoners seek release from prison. Every year thousands of prisoners submit such writs to have their criminal convictions declared invalid. Although decisions of higher courts have cast doubt on the constitutionality of procedures by which many of them have been convicted, only a handful are allowed to appear in court to argue the merits of their cases, and still fewer ultimately win their freedom. In many places the prisoner simply receives a form postcard indicating that his writ has been denied and giving no further explanation.[4]

The courts even dispose casually of legal papers which have been carefully prepared by competent "jailhouse lawyers" who specialize in writing writs for fellow prisoners. Several courts have ignored writs prepared by one of California's most skilled jailhouse lawyers when they were submitted in the prisoner's name, only to grant relief when the identical documents were resubmitted under attorneys' names.[5]

For most of the country's history, lawsuits that challenged the

4. Habeas corpus is the only procedure by which a prisoner can challenge his conviction if he has lost his appeal, failed to file a notice of appeal within the brief period of time allowed by law, or waived his right to appeal by entering a plea of guilty. Most prisoners file in the state courts, where their writs are treated in the manner described here. A prisoner who believes his conviction violates the U.S. Constitution or statutes can submit a writ of habeas corpus to a federal court, which generally will treat his case more responsibly.

The writ of habeas corpus is also the form prisoners generally use to attack prison conditions in the state courts. Prisoners' experience using habeas corpus for this latter purpose is included in the general discussion below of legal action to change the internal operation of prisons.

5. John van Geldern, the jailhouse lawyer who had these experiences described them in letters to me. Since prisoners are authorized by law to submit writs of habeas corpus on their own behalf, there is no legal reason why a writ submitted by a prisoner should receive less attention than an identical document submitted on his behalf by an attorney. That an attorney's signature makes a difference to many judges reveals their biases against prisoners.

internal operation of prisons did not receive even the cursory consideration generally given to writs seeking release from prison. Until the 1960s the courts openly refused to determine the merits of such litigation. Following a "hands-off policy," they let prison staff do as they pleased, free from judicial interference.[6]

The courts gave three reasons for this policy, all of which reveal the political biases of the judiciary. Two of the reasons, "separation of powers" and "lack of judicial expertise," had not stopped the same courts from restricting government agencies that regulate business activity: for years the courts have carefully examined and significantly limited the work of the Securities Exchange Commission, the Interstate Commerce Commission, and numerous other administrative agencies.[7] The third reason the courts gave for refusing to decide prison cases, "fear of undermining prison discipline," indicates the real ideological basis of the hands-off doctrine. Where poor people are concerned, especially poor blacks and Latinos, the courts have been willing to sacrifice constitutional rights in order to strengthen social control.

The hands-off policy prevailed until mass movements in the 1960s began to resist the oppression of blacks, Latinos, and poor whites, who together make up the bulk of the prison population. In this new political climate, the courts could no longer openly ignore the widespread violation of prisoners' constitutional rights. So judges began to rule on cases concerning the internal operation of prisons—although, as we shall see, they did not give up the ideology underlying the hands-off doctrine but instead found new ways to achieve its objectives.

In the sixties the U.S. political and economic system came under widespread attack. Through the civil rights movement, ghetto rebellions, the Black Panther party, and local commu-

6. "Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts," in *Yale Law Journal,* 72 (1963), p. 506.
7. L.L. Jaffe, *Judicial Control of Administrative Action* (Little, Brown, 1965).

nity groups, black people were at the cutting edge of mass action for basic change. Black prisoners, and others who learned from them, came to understand prison as one part of an unjust system in which power is based on class and race. They no longer accepted their treatment in prison as proper or inevitable, and began working to change it.[8]

The political developments which led prisoners to challenge prison conditions in the sixties also affected judges and lawyers. The U.S. Supreme Court, influenced by the new political climate, expanded the constitutional rights of poor and minority people and imposed new constitutional constraints on public officials. Lawyers mobilized by the civil rights movement and the "war on poverty" began to represent poor people in constitutional test cases in federal court.

Central to the new litigation was the revival of the Federal Civil Rights Act of 1871. This law had been enacted during Reconstruction to enable black people to by-pass the state courts and sue in the more responsive federal courts to enforce their newly won constitutional rights against racist state and local officials. As the southern white aristocracy regained its power after Reconstruction, federal court rulings effectively nullified the Civil Rights Act. The U.S. Supreme Court did not fully overturn these rulings until 1961, early in the nation's second period of mass struggle for the liberation of black people.[9]

8. Chapter 12 of this book reviews the political history of the prison movement.
9. The Civil Rights Act is codified as section 1983 of Title 42 of the United States Code and known colloquially among lawyers as "section 1983." The key U.S. Supreme Court decision resurrecting the Act was *Monroe* v. *Pape,* 365 U.S. 167 (1961). For a general history of the Act and the court cases which interpret it, see Thomas Emerson, et al., *Political and Civil Rights in the United States,* 3rd ed. (Boston: Little, Brown, 1967), II, ch. 15, and sources cited there. In this instance, as in many others, although one cannot *prove* causal connection between political developments and court decisions, their coincidence in time and connection in content make it reasonable to assume that the political events substantially influenced the direction of court rulings which could, in terms of legal doctrine, have been quite different.

In 1964 the Supreme Court confirmed that the Civil Rights Act entitles prisoners to sue state officials in federal court,[10] and federal judges began issuing rulings to protect the legal rights of prisoners. The most far-reaching court decisions came in the early 1970s, as the interconnected political and legal developments of the sixties came together around prisons. Strikes and rebellions inside prison grew more radical and more frequent by 1970, and political movements outside began to pay more attention to prisons.[11] Many lawyers responded to and aided these developments. Prison law became a new specialty. Judges—as always both contributing to new political struggles and deflecting them—began to decide more and more cases in favor of prisoners.

Although the new court decisions made a practical difference for a few prisoners and were sometimes useful in political efforts to change prisons, they had little direct significant effect on prison life. It is necessary to examine these decisions in order to understand their practical limitations. The following summary of the law of prisoners' rights is intended to provide a descriptive basis for the critical analysis which makes up the bulk of this chapter.

THE LAW OF PRISONERS' RIGHTS

The decisions prisoners won between 1964 and 1972 prohibit prison authorities from impeding prisoners' efforts to obtain judicial relief or from discriminating against prisoners on the basis of their religion, race, or sex. They also outlaw the worst conditions and forms of punishment in prison, require that prison officials provide some procedural safeguards when they discipline a prisoner, and protect some forms of political expression by prisoners.

10. *Cooper* v. *Pate,* 378 U.S. 546 (1964).
11. See chapter 12 of this book.

Administrative Interference with Prisoners' Access to Court

In its first prison decision the U.S. Supreme Court held in 1941 that prison authorities may not screen writs of habeas corpus to determine which will be submitted to court.[12] Soon afterward the court ruled that official interference with a prisoner's efforts to appeal his conviction would similarly deny him the due process of law guaranteed by the Fourteenth Amendment to the U.S. Constitution.[13] These decisions established for prisoners a general right of unimpeded access to court, which federal courts defined in more detail during the 1960s. It is now illegal for a prison official to confiscate, censor, delay, or otherwise interfere with legal papers or correspondence addressed to a court. Nor, according to the courts, may a prisoner be punished for suing the prison administration or criticizing it in court.[14]

Recognizing that a prisoner cannot effectively prepare legal papers without access to expert assistance and legal research materials, the courts have provided some protection in these areas as well. Although prison authorities do not need to provide lawyers for prisoners they must let prisoners consult with their own lawyers. Prisoners are supposed to be allowed private meetings with their lawyers, free from human or electronic surveillance. It is also illegal for prison officials to confiscate or

12. *Ex Parte Hull,* 312 U.S. 546 (1941).
13. *Cochran* v. *Kansas,* 316 U.S. 255 (1942); *Dowd* v. *U.S. ex rel. Cook,* 340 U.S. 206 (1951).
14. Citations to most of the court decisions summarized in this chapter can be found in two comprehensive articles which review prison law decisions through 1970. William Bennett Turner, "Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation," *Stanford Law Review,* 23 (1971), pp. 473–518, and Ronald Goldfarb and Linda Singer, "Redressing Prisoners' Grievances," *The George Washington Law Review,* 39 (1970), pp. 175–320. I will provide references only for especially important decisions and for cases decided since 1970. Important decisions about prisons since October 1971 are reprinted in *The Prison Law Reporter,* available in law libraries and by subscription, 1st Floor, Hoge Building, Seattle, Washington 93104.

delay correspondence between prisoners and their lawyers. Whether prison officials may read such mail and delete nonlegal matter, however, remains unsettled. Some courts accept such inspection while others limit or prohibit it.[15]

Since most prisoners cannot afford to retain private counsel and few states provide free legal aid for prisoners, the courts have had to protect prisoners' ability to represent themselves. In 1969 the U.S. Supreme Court ruled that prison authorities who do not provide lawyers for prisoners may not stop prisoners from helping each other with legal work.[16] In 1971 the Court upheld a ruling that prisons must maintain minimally adequate law libraries for prisoners.[17] Lower courts, however, have let prison authorities make jailhouse lawyers obtain permission to practice, work only for free, and comply with reasonable restrictions as to when, where, and how they help other prisoners. Prison authorities may also prohibit a writ writer from keeping lawbooks or completed legal papers in his cell and sharing them with other prisoners, on the pretext that he might extract compensation for the use of these resources.

Religious, Racial, and Sexual Discrimination

The revival of the Federal Civil Rights Act led to a raft of federal lawsuits in the mid-sixties, asserting a prisoner's right to practice his or her religion. These suits were mainly initiated by the Black Muslims who were, at that time, the group most

15. In addition to the cases cited in the law review articles listed in note 14, see *Smith* v. *Robinson*, 328 F. Supp 162 (D. Ma. 1971), which entitles a prisoner to be present when prison staff open letters from his attorney to check for contraband.

16. *Johnson* v. *Avery*, 393 U.S. 483 (1969). In *Novak* v. *Beto*, no. 31116 (5th Cir., Dec. 9, 1971), 1 Pris. Law Rptr. 85, a federal appellate court held that two lawyers and three law students do not provide an adequate alternative in Texas. The court indicated, however, that Texas needs only to make available enough lawyers for habeas petitions and does not need to concern itself with assistance to prisoners filing civil rights suits against prison conditions.

17. *Gilmore* v. *Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970), affirmed sub nom. *Younger* v. *Gilmore*, 404 U.S. 15 (1971).

actively organizing among prisoners.[18] Prisoners now have the legal right, within "reasonable restrictions," to hold religious services, consult and correspond with a minister of their faith, possess religious books, subscribe to religious literature, and wear religious medals and other symbols. The courts are split as to whether prison officials must prepare separate food for prisoners whose religion requires a special diet.

Judges have agreed, after some initial conflict, that racial segregation of prisoners is unconstitutional, under the principle of the Supreme Court's school desegregation decision *(Brown* v. *Board of Education).*[19] The courts have also banned racial discrimination. Prison officials may not, for instance, let prisoners subscribe to white-oriented publications but prohibit literature directed to blacks. The courts are split over whether a prisoner has a legal standing to challenge racial discrimination in prison hiring practices.

Responding to the resurgent movement for women's liberation, the Supreme Court held in 1971 that unreasonable discrimination based on sex denies women equal protection of the law.[20] A federal judge has applied this principle to require that women prisoners be included in work furlough programs, previously open only to men.[21] As of mid-1972, however, the courts had not applied the equal protection clause to ban discrimination against homosexual prisoners.

Conditions and Treatment

The Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishment. In a string of decisions begin-

18. See chapter 12 of this book.

19. The Brown decision is reported in 347 U.S. 483 (1954). A recent, well-reasoned decision that prohibits racial segregation in prisons is *McClelland* v. *Sigler*, 327 F. Supp. 829 (1971).

20. *Reed* v. *Reed*, 92 S. Ct. 25, 35 L. Ed. 2d 225 (1971). See also *Sailor* v. *Kirby*, 5 Cal 3d 1 (1972).

21. *Dawson* v. *Carberry*, Civil No. C-71-1916 (N.D. Calif. Nov. 19, 1971).

ning in 1966 federal judges interpreted this provision to prohibit both corporal punishment of prisoners—flogging, tear gassing, chaining or handcuffing them within a cell—and exceptionally degrading conditions of solitary confinement.[22] Opinions in the solitary confinement cases examined conditions in the disciplinary sections of a particular prison—inhuman food, cold, darkness, bad sanitation, poor clothing, no beds or mats—and found that taken together these conditions amount to cruel and unusual punishment. But the courts have not specified minimum standards which prisoners and their lawyers could then invoke to challenge conditions in other prisons. Nor have judges been willing to rule that prolonged isolation is unconstitutional regardless of conditions.[23]

Only one state, Arkansas, has been ordered to improve conditions in the mainline as well as the maximum-security sections of its prisons.[24] And this was only to make Arkansas prisons more like prisons elsewhere by providing some form of rehabilitation program and ending the state's unique system of substituting inmate "trustees" for outside staff in most guard and low-level administrative positions. Federal judges have ordered local officials to overhaul general conditions in a number of county jails, but these decisions have been mainly to protect people awaiting trial, who are not supposed to be punished until after they have been convicted.

The courts have not been able to prohibit forced labor in

22. The latest and most sweeping of these decisions, *Landman* v. *Royster*, 333, F. Supp. 621 (E.D. Va. 1971), prohibits use of bread and water diet, chains, handcuffs, tape, or tear gas for purposes of punishment, keeping a prisoner nude, and placing more than one prisoner in a solitary cell. But *Novak* v. *Beto* (note 16) allows a starvation diet (two pieces of bread per day) so long as hygiene is adequate.

23. In *Sostre* v. *Rockefeller*, 312 F. Supp. 863 (S.D.N.Y. 1970), Constance Baker Motley held that confinement in punitive segregation for more than 15 days constitutes cruel and unusual punishment. That part of her decision was reversed, however, in *Sostre* v. *McGinnis* 442 F. 2d 178 (2nd Cir. 1971).

24. *Holt* v. *Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), affirmed 442 F. 2d 304 (8th Cir. 1971).

prison because the U.S. Constitution (in the Thirteenth Amendment) explicitly authorizes the involuntary servitude and enslavement of prisoners. Courts have held, however, that it is cruel and unusual punishment to make a prisoner work when he is seriously ill.

They have also imposed on prisons a general duty to provide medical care for prisoners. Complete denial of medical treatment to a prisoner who needs it violates the Eighth Amendment. As long as some care is provided, however, the courts will not evaluate its adequacy. Even widespread systematic medical malpractice had not been held unconstitutional as of mid-1972. Nor had judges recognized the right of a prisoner to refuse potentially harmful medical treatment as long as it is not explicitly punitive. They have even upheld the forced injection of Anectine to deter aggression by inducing general paralysis and drowning sensations.[25]

Several federal court decisions in 1970 and 1971 (most of them pending appeal in 1972) require that prison officials meet constitutional standards of due process of law before they severely punish a prisoner.[26] Severe punishment, under these decisions, includes any loss of good-time credits or prolonged confinement in an isolation cell, adjustment center, or segregation area, even when officials claim that such confinement is merely "administrative," "for the good of the institution," or for the convict's protection. Before they impose such punishment,

25. This use of Anectine (technically succinylcholine chloride) is known as "aversive conditioning." One recent court decision upholding such conditioning is *Mackay* v. *Procunier*, Civ. No. S-1983 (E.D. Cal., Nov. 2, 1971). Judges have also let prison staff forcibly inject heavy doses of Thorazine, Prolixin, and other strong tranquilizers, despite medical knowledge of the possibility of serious adverse effects. Prolixin is allowed in *Smith* v. *Baker*, 326 F. Supp. 787 (W.D. Mo. 1970), Thorazine in *Peek* v. *Ciccone*, 288 F. Supp. 667 (W.D. Mo. 1969).

26. *Clutchette* v. *Procunier*, 328 F. Supp. 767 (N.D. Cal. 1971); *Bundy* v. *Cannon*, 328 F. Supp. 165 (D. Md. 1971); *Urbano* v. *McCorkle*, 334 F. Supp. 161 (D. N.J. 1971); *Sostre* v. *Rockefeller* (note 23); *Landman* v. *Royster* (note 22). Other decisions are cited in the articles by Turner and Goldfarb and Singer (note 14).

officials are supposed to give the prisoner written notice of the charges against him (so he can prepare his defense) and an opportunity for a "fair hearing" on those charges. One court has required that prison authorities make known in advance "reasonably definite" written rules specifying standards of conduct and punishment for various offenses.[27]

These court rulings do not entitle a prisoner to all the safeguards of a criminal trial. Nor do they guarantee a right of appeal outside the prison system. The prisoner is entitled, however, to call witnesses on his behalf, confront and cross-examine adverse witnesses, and have the assistance of private counsel or a "counsel-substitute" (a prisoner or prison staff member). Although the officials who conduct the hearing may work for the prison system, they cannot have been previously involved in the incident at issue, and their decision is supposed to be based only on evidence introduced at the hearing.

A very few decisions have also required notice and a rudimentary hearing in cases of "minor" punishment, such as a fine or the loss of commissary, recreation, or other privileges.[28] The prisoner may present his side of the story, but he cannot bring outside counsel or confront and cross-examine witnesses who testify against him. One court has required this minimal procedure whenever a prisoner's security classification is downgraded.[29] Other decisions, however, uphold the transfer of a prisoner from a minimum-security prison to the mainline of a maximum-security facility as purely adminstrative and therefore requiring no procedural safeguards.[30]

Prison officials have appealed most of the decisions that require fair disciplinary and parole procedures. In the one appeal

27. *Landman* (note 22), pp. 654–656. Although the decision strikes down "agitation" and "misbehavior" as insufficiently definite, it allows such vague offenses an "insolence," "harrassment," and "insubordination."

28. *Landman, Bundy, Clutchette.*

29. *Morris* v. *Travisono,* 310 F. Supp. 857 (D.R.I. 1970). This decision merely ratified new rules issued by prison officials.

30. See *Bundy,* for example.

decided as of mid-1972, the appellate court upheld prisoners' right of due process in cases of severe punishment, but refused to specify minimum procedures—leaving that up to prison officials (who have done nothing pending a Supreme Court decision on whether to review the case).[31] The other appeals are expected to fare as poorly or worse.

Political Expression

Most of the disciplinary procedure suits were brought by political activists within the prisons—Martin Sostre in New York, John Clutchette and George Jackson in California, Maryland prisoners accused of leading work stoppages and forming an "unauthorized inmate association," jailhouse lawyers and an alleged strike leader in Virginia. While the courts have been willing, in these and some other cases, to specify the forms officials must follow to punish prisoners, they have done little to protect the substance of the activities for which prisoners are punished. The courts have been especially hesitant to recognize prisoners' First Amendment rights in relation to correspondence, literature, and speech within prison.

Some courts have invalidated punishment based on the content of a prisoner's letters and severely limited official censorship of prisoners' correspondence. One court recently ordered prison officials to let prisoners send news media letters critical of prison administration.[32] Yet, other courts have held that censorship does not abridge prisoners' right to free speech, and no court has stopped prison authorities from reading a prisoner's mail or deciding with whom he can correspond.[33]

31. *Sostre* v. *McGinnis* (note 23).

32. *Nolan* v. *Fitzpatrick,* 326 F. Supp. 209 (D. Mass. 1971), affirmed 451 F. 2d 545 (1st Cir. 1971).

33. The ocassional exception, noted above, involves correspondence with attorneys and courts, which some courts have protected from all inspection. In *Palmigiano* v. *Travisono,* 317 F. Supp. 776 (D. R.I. 1970), a federal court severely limited official inspection of mail to and from prisoners awaiting trial, on the basis of reasoning which may also help convicted prisoners.

New York officials have been told they cannot punish a prisoner for possessing black nationalist and revolutionary literature, but that they can confiscate the literature if there is reason to fear the prisoner might subvert prison discipline by letting other prisoners read this material.[34]. The courts also ordered New York officials to let any prisoner receive the newsletter of an ex-convict organization moderately critical of prisons, but they allowed the same officials to restrict the Black Panther paper to party members, control its dissemination to other prisoners, and decide "when and how" Panthers may read it.[35] Other courts have let prison authorities screen out "reasonably objectionable," "inflammatory," or "subversive" articles or publications.

The courts have held that prisoners' speech within prison can be limited only if there is a "clear and present danger" to prison security. They have, however, generally accepted official judgments as to when such a danger exists. As recently as 1966, for instance, a U.S. Court of Appeals upheld punishment of a prisoner for "agitating" by circulating and posting on the prison bulletin board copies of a letter he had sent to the governor suggesting prison reform and urging prisoners to make their grievances known.[36] No court has upheld for prisoners the right, constitutionally protected outside, to freely assemble and organize for political purposes. Officials are free to disband prisoners' organizations, stop them from distributing political literature within prison, and transfer organizers to other parts of the state.

34. *Sostre* v. *McGinnis* (note 23).
35. *Fortune Society* v. *McGinnis,* 319 F. Supp. 901 (S.D.N.Y. 1970); *Shakur* v. *McGrath,* an unreported opinion in civil case #4493, S.D.N.Y., Dec. 31, 1969.
36. *Landman* v. *Peyton,* 370 F. 2nd 135 (4th Cir. 1966).

THE LIMITS OF JUDICIAL ACTION: A CASE STUDY by John van Geldern

[Although many of the decisions prisoners won in the sixties and seventies marked a radical departure from earlier legal reasoning, they have had little direct effect on the day-to-day operation of prisons. For the most part, prison officials have simply ignored court rulings or made insignificant superficial adjustments. Inhuman cell conditions, vicious brutality, arbitrary punishment, and racial discrimination continue unabated. John van Geldern, a leading California jailhouse lawyer, shows in the following report how prison officials have circumvented even the decisions protecting prisoners' access to the courts.]

For many years now, courts throughout the land have consistently held that prisoners have a right of access to the courts. This right represented a breach in the wall of silence surrounding prisons. It meant that prison practices could be revealed to the world outside through the courts. And it gave the prisoner an avenue through which to seek judicial redress.

Threatened by the prospect of lawsuits and publicity, prison authorities circumvented every decision which expanded the prisoners' right of access to the courts. For example, when the courts held that a prisoner cannot be denied parole for unsuccessfully petitioning for habeas corpus, prison authorities took a new semantic tack. They thereafter denied parole so long as the prisoner had any action *pending* in the courts.

When the volume of prisoner-authored petitions for judicial relief grew to a flood in the mid-1960s (as a result of court decisions and other factors), prison authorities took more overt action to stop the erosion of their previously unrestrained power. They made each prisoner fill out a form for everything he did in seeking access to court, from requesting to use the law

library to mailing a petition to a court or receiving visits from court-appointed attorneys. Each form was clearly marked in the lower left-hand corner: "copy to central file." The prisoner's counselor or other prison officials would remind the prisoner that the Adult Authority, which reads the central file to decide whether to grant or deny parole, frowns on "writ writers."

In 1967 the director of the California Department of Corrections ordered all lawbooks then in California prisons destroyed, except for seven approved books which were all but useless in preparing habeas petitions and totally useless in presenting Federal Civil Rights action. Even the approved books could be read only with the warden's special permission. At the same time, prisoners were prohibited from purchasing or possessing their own lawbooks and from helping each other prepare legal papers.

Guards began to harass jailhouse lawyers. They took away and destroyed legal materials. Some writ writers were thrown into the hole and brutalized. Disciplinary infractions were manufactured against us and used as a basis for denying parole. The most successful writ writers were arbitrarily designated strike agitators and transferred to lockup sections of other institutions. We were moved from prison to prison, never left in any one place long enough for a local court to rule on our legal actions to stop this harassment. Meanwhile all of a prisoner's accumulated legal material would be conveniently "lost in transit."

Finally we were able to get a lawsuit out of Folsom prison to the U.S. District Court, together with a motion for a temporary restraining order. The court ordered the Corrections Department to stop destroying books and stop implementing the rest of its directive until a final decision in the case.

This, however, did not stop the attorney general from issuing surreptitious orders to the State Law Library and to prison wardens listing the books which prisoners were not to check out or read. Particular volumes were allowed into prison only when

ordered by an official for his own use. On May 28, 1970, three years after the director's order had been issued, a federal court finally upheld prisoners' rights to unrestricted access to law books in the case of *Gilmore, van Geldern* v. *Lynch.*[37] Before the ruling could have any effect, however, the attorney general appealed to the U.S. Supreme Court, which did not affirm the lower court decision until November 6, 1971.[38]

In the meantime the Supreme Court had ruled in *Johnson* v. *Avery*[39] that a state must let prisoners help each other with legal papers unless it provides a reasonable and effective alternative. Though the mandate of that ruling was quite clear, California prison administrators devised numerous ways to circumvent it.

New rules made it a prison infraction to have in one's possession anyone else's legal materials or transcripts. Other rules authorized prison wardens to designate when and where prisoners could assist each other with legal work. The place designated usually would accommodate no more than 15 or 20 prisoners (out of 2,000 to 3,000), and the location and times would be all but impossible for many prisoners.

In 1970, in the case of *In re Harrell,* the supreme court of California firmly reiterated the doctrine of *Johnson* v. *Avery,* but this ruling also went all but unheeded.[40] Prison camp centers and such places as Tehachapi, Chino, and California Men's Colony at San Luis Obispo continued to implement the overruled and repealed director's rules of pre-*Gilmore,* pre-*Johnson,* and pre-*Harrell.*

At California Men's Colony, anyone who became known as a writ writer was immediately charged with one or another offense and shipped to the segregation units of Folsom, San Quentin, or Soledad prison. The prison librarian at CMC still

37. *Gilmore* v. *Lynch,* 319 F. Supp. 105 (N.D. Cal. 1970).
38. *Younger* v. *Gilmore,* 404 U.S. 15 (1971).
39. *Johnson* v. *Avery* 393 U.S. 483 (1969).
40. 2 Cal. 3rd 675 (1970).

discourages the use of the law library by requiring that a man get a pass from the captain's office before he can use lawbooks. Only 20 to 30 such passes are issued per day.

Donations of lawbooks from outside groups or lawyers are not permitted. The Inmate Welfare Fund, which pays for the operation and book purchases of prison libraries, still cannot be spent on lawbooks. And two weeks after the Supreme Court affirmed the *Gilmore* decision, the CMC librarian stated he would not change his policy since the U.S. Supreme Court does not run "his" library. So the fight goes on.

THE LIMITS OF JUDICIAL ACTION: A GENERAL ANALYSIS

Van Geldern shows what little effect judicial decisions have had in protecting prisoners' rights of access to court. His conclusions are not unique to this one area of prison law. Prison administrators have been even more brazen in their disregard for legal rulings about areas of prison life less directly involving the judiciary; and judges have been more hesitant to press for change in those areas. Prisoners' legal rights to minimally decent living conditions, freedom from brutality, fair disciplinary procedures, and racial equality have been even less honored in practice than their right of access to court.

This failure of judicial decisions to significantly alter prison life does not stem only from the recalcitrance of prison officials. Nor can it be fully explained by the difficulty prisoners have found in obtaining effective legal representation. The limits of judicial action to change prisons are also rooted deep in the American legal system.

One source of these limits lies in the internal structure of the legal system. Some of the apparently farthest-reaching prison decisions—almost all of those requiring fair disciplinary procedure—have come from U.S. district courts. The losing party is entitled to appeal a district court decision to a U.S. circuit court

of appeals, and the loser there may petition the U.S. Supreme Court to review the appellate decision.[41] Each level of review can easily take a year or more. Higher courts were expected to narrow or reverse many prison decisions pending appeal early in 1972, especially because Nixon's judicial appointments have made these courts very conservative in matters of criminal law enforcement. District judges, fearing their rulings will not survive appeal, generally have not exercised their power to enforce their orders pending appeal. As a result, illegal practices continue unrestrained and a number of apparently significant prison decisions have had little direct effect on prison life.

Even after it is final and theoretically in force, a court order binds only the parties named in a particular lawsuit. The typical suit covers a single prison. No suit can cover more than one state's prison system. New lawsuits have to be organized in every jurisdiction, despite similarity in prison conditions and procedures. Before a decision can affect the great majority of prisoners, the expensive and time-consuming process of preparing a suit, litigating, and defending appeals must be repeated in place after place. Even after this long process, a favorable decision in one part of the country does not guarantee similar decisions elsewhere, for not every judicial precedent is legally binding. The only decisions a court must respect are those rendered by a higher court having jurisdiction over it. Traditionally, a court also follows its own prior decisions. Precedents outside these two categories are merely advisory; they show one judge how another judge interpreted the law. Thus, the U.S. Supreme Court decision is the "law of the land" binding on all federal and

41. A suit which challenges a statewide law, regulation or administrative practice is heard by a special three-judge district court from whose decision the losing party can appeal directly to the U.S. Supreme Court. Prisoners' lawyers generally have tried to avoid this route, however, because it can take months for judges to determine whether a particular case is appropriate for a three-judge court and because it is easier to find one sympathetic judge than two out of three (especially when one of the three must come from the Court of Appeals, which generally is more conservative than the district courts).

state courts. But a decision of a federal court of appeals binds only the U.S. District Courts in one appellate region; state courts, and federal courts in other circuits, are free to render contradictory decisions. A district judge's opinion does not bind even other judges in the same district. A decision of a state supreme court is binding in that state, but is only a basis for analogy in other states.

While this judicial autonomy enables exceptionally liberal federal judges like Constance Baker Motley in New York and Alfonso Joseph Zirpoli in California to make new law for prisoners, it simultaneously limits the impact of their rulings.

It also helps judges in the lower-level state courts—which still receive the bulk of suits against prisons—to circumvent the prisoner-rights decisions of federal and higher state courts. These judges have developed ingenious methods implementing the spirit of the hands-off doctrine. When a complaining prisoner is transferred to another part of the state, the local judge typically dismisses the prisoner's suit as "moot," despite higher-court rulings that a suit should not be dismissed under these circumstances if a favorable ruling would affect other people or clarify a significant legal question. When a local judge cannot avoid ruling on a suit against a prison administration, he often denies relief after perfunctory procedures like those used to dispose of prisoners' writs for release. A judge in one California county with a large prison regularly refers prison suits to the local district attorney or court clerk. This official "investigates" by way of conversation or correspondence with prison officials. He then routinely prepares an order, which the judge signs, denying relief without a hearing—solely on the basis of the institution's version of the facts.[42]

42. This procedure is described in *Reaves* v. *Superior Court*, 99 Cal. Rptr. 156 (1971). The decision in the Reaves case prohibits use of the local district attorney as the "investigator" upon whose report the prisoner's writ is denied, but the decision allows the court to use the very same procedure if the court clerk serves as "investigator." The California Supreme Court has refused to review the decision. A very rare exception to the general practice of lower state courts in prison cases is the broad, strong decision of the circuit court for Montgomery County, Maryland in *McCray* v. *Maryland*, Misc. Pet. 4363 (Nov. 11, 1971), 1 Pris. L. Rptr. 92, regarding procedures for disciplining or transferring prisoners, conditions in disciplinary areas, and mail censorship.

Judges in the federal and higher state courts who have been willing to decide cases in favor of prisoners have resurrected the hands-off doctrine when it comes to the enforcement of their own rulings. As van Geldern has shown, judicial rulings are far from self-enforcing—especially against prison officials who, like the California Men's Colony librarian, consider the prisons "their" property to be run as they choose. Yet the courts have been reluctant to take the measures needed to ensure that their decisions are obeyed. They either refuse to define specifically what must be done, or they let prison authorities ignore orders which do spell out specific changes.

Some prison decisions merely set forth general principles of law, such as due process, and rely for compliance on the good faith of the very officials whose rampant disregard for the law forced the prisoners to seek judicial relief. Other decisions are narrowly based on a detailed description of a complex of conditions and practices in a particular prison at a specific time. Since the decision prohibits only that one combination of factors, authorities can claim compliance after making insignificant adjustments. After a much-heralded 1966 federal court decision outlawed the use of "strip cells" to discipline prisoners at Soledad, prison officials merely changed the name to "quiet cells" and replaced toilets which only guards could flush and so-called oriental toilets (holes in the floor) with automatic flush toilets. Six years later cells identical in almost all other respects were still in use throughout the state.[43]

Even when the court order is specific and comprehensive, rarely is a specific time limitation imposed on prison officials. The judge who in May, 1971, required specific changes in San

43. *Jordan* v. *Fitzharris*, 257 F. Supp. 674 (N.D.Cal. 1966).

Quentin disciplinary procedures still was overseeing negotiations between prisoners' lawyers and prison authorities in mid-1972. Only in a very few cases have the courts been willing to assess damages to compensate prisoners for injuries suffered as a result of deprivation of their constitutional rights.[44] Despite frequent flagrant violations of judicial edicts, no judge has held a prison official in contempt of court, and fined or jailed that official, for failing to comply with a court order.[45]

If all prison decisions to date were enforced as effectively as possible, they still would not seriously limit the power of prison officials. The new court rulings generally allow prison officials to determine, without procedural safeguards, where each prisoner lives within the prison system, when and where he is transferred, and what privileges he receives. Prison staff retain significant influence over when a prisoner is released. They handle all incoming and outgoing mail. They are allowed to decide who can correspond or visit with a prisoner and the circumstances of each visit. They control, within broad limits, what each prisoner eats, where he sleeps, what reading material he receives, what he can have in his cell, his sanitation facilities, exercise periods, education and work programs, and medical care. Officials can confiscate reading material, stop prisoners from sharing literature, and punish organizers and "agitators."

Since visiting, correspondence, and literature remain restricted, prisoners have trouble learning of new legal decisions and outsiders cannot easily determine when a court ruling has been disobeyed. Official control over prison life means that a prisoner who tries to assert his legal rights, or complains when other prisoners are abused, can find his privileges lost, his mail misplaced, his food and cell a mess, visiting obstructed, a program he needs for parole suddenly closed, a complaint filed

44. In the Jordan case, for instance, the court denied damages without comment. The major exception is *Sostre* v. *Rockefeller* (note 23), in which a prisoner was awarded $25 for each of 374 days of illegal solitary confinement.
45. Goldfarb and Singer, "Redressing Prisoners' Grievances," p. 281.

against him for a mysterious prison stabbing—and on and on and on.

The courts cannot effectively impose a "rule of law" in the form of due process administrative procedure. It would be totally impracticable for prison officials to hold even a rudimentary hearing over each of innumerable daily administrative decisions which affect a prisoner's life. While court decisions may force officials to provide minimal due process before they withdraw privileges available to the general prison population, the courts cannot possibly require a hearing for every prisoner who applies for a job-training program, a new pair of glasses, special medication, honor block, work furlough, or a conjugal visit. Nor can the courts force officials to hold a hearing each time they relocate a prisoner separating him from his friends, cutting short his education and training programs, and forcing him to adjust to a new community. Finally, due process cannot provide protection against unauthorized, informal punishment by the guards who control food, mail, access to medical care, and the prisoner's general living conditions.

Where due process *can* reasonably be required without making a prison administratively inoperable, it will ultimately make little real difference in how the prisoner is treated. An occasional prisoner may escape the most serious punishment if prison officials decide he does not merit the time and expense of a full hearing. When the officials consider a disciplinary case worth the effort, however, they will be able to use the new procedure to impose the same punishments.

For even the most progressive court decisions, dealing with the most severe forms of punishment, give the prisoner far fewer rights than he was afforded at his original trial. His will be a closed trial, from which officials may exclude family, friends, and news media. He is not entitled to appointed counsel and will have difficulty obtaining free legal aid. He has no right to trial by a jury or even by a judge who does not work for the prison, and no right of appeal outside the prison system. The officials who conduct his hearing will be free to doubt the

credibility of the prisoner's witnesses and accept only the testimony of witnesses against him. Since witnesses will not have to testify under oath, and therefore will not be liable to charges of perjury, prison staff will find it easy, whenever necessary, to bribe and coerce other prisoners to testify falsely against the prisoner. We have seen how the full panoply of constitutional safeguards does not protect poor people from being sent to prison without regard to the evidence against them. Should prison officials ever be forced to hold due process disciplinary hearings, they will be in an even better position to manipulate constitutionally required procedures to ratify almost any action they choose to take.

If prison officials remain free in practice to punish whomever they please, they can continue to use adjustment centers and solitary confinement to force prisoners to abandon their legal rights and submit to administrative totalitarianism. In a setting of such total staff control, judicial rulings against racial discrimination cannot stop white guards—taught racial superiority and hatred since childhood and allowed little other real power—from promoting interracial strife and taking out their personal problems on black and brown prisoners. (Integration of prison staff, were the courts to order it, still would leave whites in charge at the top—able to pick, train, and direct the nonwhites they hired.) Nor, in a society in which male identity is so deeply rooted in the illusion of sexual superiority, can judicial rulings stop all-powerful prison staff from using their control of prison life to extract sexual privileges from both men and women prisoners, and from treating women and homosexual men differently from heterosexual male prisoners.[46]

The enormity of official power and the weakness of judicial

46. The point is not that women prisoners and gay men are generally treated more harshly, but that women are offered very different rehabilitation programs and models, based on sexist notions of the proper role of women, and that gay men frequently are segregated from other prisoners and specially mistreated.

control over prisons becomes graphically clear in times of crisis. Events following the murder of George Jackson at San Quentin prison in August, 1971, illustrate the limits of legal action to protect prisoners' rights. Guards stripped Jackson's adjustment center tier mates, forced them to crawl naked on gravel, threatened and beat them, and shot one prisoner in the leg. For days the authorities kept out press, lawyers, legislators, doctors, and family. Political periodicals and underground papers were banned from San Quentin and most other prisons. Ethnic culture associations were shut down and their leaders transferred to other prisons. Hundreds of prisoners were locked up throughout the state as "potential troublemakers," even though they were not charged with violation of any prison rules. Many of these prisoners were transferred from minimum-security prisons to the adjustment centers of Folsom and San Quentin. Some were kept in isolation for several months. They received no hearings, or only sham hearings without clear charges or procedural safeguards.

Judicial precedents prohibit most of these measures. Corporal punishment, discipline without a hearing, racial discrimination, denial of access to attorneys, punishment for political beliefs, censorship of newspapers, denial of medical care, inhuman conditions in lockup cells—all have been held unconstitutional. Lawyers filed a flurry of suits late in August and throughout the fall. But no court would act until February, 1972, and then only to help a single prisoner locked up for radical politics for more than five months starting the day after Jackson was shot.[47]

The judges who failed California prisoners after the San Quentin incident were not unusually reactionary. The U.S. dis-

47. *In re Hutchinson*, 100 Cal. Rptr. 124 (1972). Court action following Attica was similarly late and inadequate. See 1 Pris. L. Rptr. 16, 65; *Inmates of Attica v. Rockefeller*, Nos. 284, 334 (2nd Cir. Dec. 1, 1971).

trict judge who stalled a suit challenging the mass lockup at San Quentin had earlier required overhaul of local jail conditions and due process in disciplinary hearings.[48] He is generally regarded as one of the country's most liberal and socially conscious jurists. Nor are the judges who have failed to enforce their prison decisions especially conservative. That they have decided cases in favor of prisoners indicates, in fact, that they are more liberal than most.

The problem does not lie in the morality or courage of individual judges. The limits of judicial action to change prisons are rooted in the very nature of courts and law. For real reform to occur, judges would have to transfer authority over prisons to prisoners themselves or to black, brown, and poor white communities, since only people with the same cultural background and class interests as prisoners can be counted on to respect prisoners' rights. Such a substantial change in power relationships is obviously beyond the legal or political capacity of a court, however.

The function of a judge is to enforce laws which establish and maintain a particular economic system and social order. The constitutional provisions he applies—due process, equal protection, free speech, no cruel and unusual punishment—are standards for regulating how state power is exercised, not for determining what groups or classes exercise that power. A judge does not have the means to enforce his decisions by himself. He depends on moral authority derived from his role within the established order and on the threat of violence from the police and other armed forces of the state. His decisions become mere rhetoric if he steps outside his assigned role and orders actions which the state will not back up.

Nor is a judge at all likely to want to transfer government power from prison authorities to prisoners or poor communities. Judges are beneficiaries of the current social order. It is in

48. The lockup suit is *Bly* v. *Procunier*, C-712019 AJZ (N.D. Cal. 1971).

their interest to support the structures of power which maintain that order. A judge's public position, educational background, class, race, and professional status lead him to identify with prison administrators and to fear and misunderstand convicts. It is the judge, after all, who initially incarcerates blacks, Latinos, and poor whites while releasing their "white-collar" counterparts. He cannot be expected, once those same people are in prison, to move to enhance their political power at the expense of public officials who share his basic outlook and interests.

Although many judges probably wish that prisoners were better treated, and would try to be more humane if they had direct responsibility for prison administration, the U.S. political and legal system gives them neither the power nor the inclination to enforce basic changes in the internal power structure of prisons. As a result, court rulings can have little significant impact on prison life.

THE POLITICAL USES OF LEGAL ACTION

Direct impact on official behavior is not the only measure of legal action. For many years after the Supreme Court's landmark school desegregation decision, more black students attended racially segregated classes than had before the decision. Yet *Brown* v. *Board of Education* helped launch the black liberation struggles of the sixties, which won some concrete gains for black people and set in motion other popular movements for radical change.

Legal action to change prisons can be similarly evaluated. Prisons cannot change significantly without a restructuring of the class and race relations which determine which persons are in prison and who controls the legal system which puts and keeps them there. Prisoners' struggles are an important part of efforts to alter these fundamental power relationships. Courtroom victories and legal representation of prisoners can help

prisoners' struggles to grow, though they may also be misused in ways which hinder those struggles.

Favorable judicial rulings encourage prisoners, providing them with another small weapon with which to fight. Van Geldern and other jailhouse lawyers would be even less able to defend themselves without the decisions in *Johnson, Harrell,* and *Gilmore.* The overall impact these and other decisions have on immediate conditions in prison and on the growth of collective struggle depends on how the rulings are used to promote organization and confrontation—on how courtroom victories are integrated into political strategy. It is on the basis of this understanding of legal action as one method of struggle "by any means necessary" that revolutionaries like Martin Sostre and Ruchell Magee have trained themselves to be effective jailhouse lawyers.

Aggressive litigation and favorable court rulings can also help to build an outside political movement to support prisoners and expose prison conditions. The process of litigation is an important source of publicity and pressure, regardless of the final outcome. Newspapers, radio, and TV describe the conditions and treatment which a lawsuit challenges. Prison authorities are interviewed and asked to explain their actions. State officials must expend time and resources defending themselves in court and in the media. They may decide to lay off a prisoner because of the public attention focused on his situation.

Courtroom victories can, however, lead to serious long-range political errors. We have been taught that law is separate from politics, that judges are disinterested and objective, that whatever is legal is proper and everything illegal is wrong. As a result, court rulings against prison practices legitimize the prison movement for large numbers of people. More people will believe a judge who says that prison conditions are desperately bad than would accept the word of a convict or a radical lawyer. It is tempting for a movement to try to exploit this popular view of the law by framing its objectives in terms of

prisoners' legal rights and an end to official lawlessness. This tactic obscures the basic class and race issues of prisons. In fact, law is a tool of whoever exercises political power, and judges protect the established order, including the present prison system, by making that order appear legitimate and moral. A radical movement's efforts to educate people about this conservative political function of law are undermined when the movement opportunistically uses the mystique of the law, and thereby reinforces that mystique, in pursuit of short-term gains in public support.

Another potential political pitfall in trying to change prisons through legal action lies in exaggeration of the significance of a court order. Prisoners and their supporters can easily gain the impression that an issue has been settled when in fact they have won only a very limited victory, useful mainly as a weapon for further struggle. When the newspapers carried front-page stories in the fall of 1971 announcing a new judicial "Bill of Rights" for Virginia prisoners they did not inform their readers that it could be two or three years before the decision takes effect, that narrowing or reversal is quite possible on appeal, that the decision pertains mainly to the disciplinary process and jailhouse lawyers, that it affords prisoners only a watered-down version of a few of the protections guaranteed in the real Bill of Rights, and that court rulings generally have had little effect on the internal operation of prisons.[49] Many earnest supporters of prison reform have stopped demanding change in California's disciplinary procedures because they assume California prisoners have been receiving due process hearings since the *Clutchette* decision was announced in May 1971.[50] In fact, as of mid-1972 no California prison had significantly changed its disciplinary procedure.

49. *Landman* v. *Royster* (see note 22). A typical news account appeared in the *San Francisco Chronicle*, Nov. 1, 1971, p. 1.
50. *Clutchette* v. *Procunier* (see note 26).

A good lawyer does not represent his clients only in court. Through informal pressure lawyers can sometimes ease the situation of individual prisoners, such as by arranging for treatment by a private physician or for a transfer to a prison closer to home. Because of the prisoner's unique isolation, his lawyer serves as an important link to the world outside prison. The lawyer can be an important source of moral support and friendship to a prisoner allowed few other correspondents and visitors. The lawyer also provides badly needed information about events outside prison and a means for the prisoner to communicate to the outside world about developments inside. During the period when California allowed sealed correspondence between prisoners and their lawyers, letters from prisoners provided the first detailed public information about the horrors of prison conditions. These letters have been important in developing public awareness of prisons and political motion for change.[51]

The prisoner's lawyer can also play a harmful role. Since lawyers can visit prisoners and correspond with them more easily than most people, they exercise substantial control over the information which the public and the prison movement receive about conditions and struggles within prison. They are often looked to by the media and legislators as spokesmen for the prison movement. In these roles, as in the planning and carrying out of litigation, lawyers are under no economic pressure to accept political direction from prisoners since they almost always work without fee. Since their livelihoods do not depend on their clients' satisfaction with their work, they are free to act in whatever manner they consider most effective. In this context, lawyers' professional elitism and the racial and class differences between them and their clients often lead lawyers to subordinate the needs and desires of prisoners to their own notions of political strategy.

51. Many of these letters have been collected by Eve Pell in *Maximum Security* (New York: Dutton, 1972).

Lawyers have been known to censor prisoners' letters politically before releasing them and to downplay the militance of revolutionary prisoners. Speaking for the prison movement, they have focused on lawlessness and atrocities, obscuring the basic questions of class and race and reinforcing conservative myths about law.

Lawyers understandably evaluate strategic and tactical options, especially regarding litigation, in a framework of change through the courts. They may refuse to file a politically useful suit for fear it will establish a harmful precedent for future cases, or they may reject politically important trial tactics on the grounds that they detract from the chances of winning the particular suit. Many lawyers for prisoners overlook the broader political effects of their choices or regard those effects as secondary. As a result, they make decisions which contradict the interests of the prisoners they represent and undercut the prisoners' political struggle.

The law is thus an ambiguous weapon for the prisoner. The class and race biases which helped put the prisoner behind bars also limit the aid judges and lawyers will give him once he's there. The internal structure of the legal system and the judges' lack of independent political power further limit the impact of judicial rulings on the practices of prison staff. Court rulings and legal representation can be misused so that they hinder prisoners' political struggles more than they help them.

Still, prisoners have at least won judicial recognition of their constitutional rights of unimpeded access to court, religious, racial, and sexual equality, minimally decent living conditions, freedom from brutality, fair disciplinary procedures, and a limited degree of political expression. These legal victories have done much to expose prison conditions and to encourage and assist political struggle in and outside prison. Prisoners, lawyers,

and political activists who understand the limits and pitfalls of legal action have learned to use lawsuits and legal representation as one weapon in the struggle for the social and political revolution which alone can change U.S. prisons.

CHAPTER 15

Prison Reform and Radical Change

By Erik Olin Wright

PERSPECTIVES ON REFORM

The basic premise of most efforts to reform the prison system is that this can be done without any fundamental transformation of the structure of society as a whole. When prisons are viewed as autonomous institutions, separate and isolated from society, the solution to their oppressiveness becomes quite simple: those aspects of prison life that are oppressive simply need to be exposed and laws need to be passed to change them. Such a view does not imply that change will necessarily be easy, but that all that needs to be altered is the defective elements in the institution, not the society as a whole.

This perspective is certainly appealing. It enables the reformer to focus his energies on a narrow problem without having to worry a great deal about larger social and political issues. Many liberal reformers see the fundamental task of prison reform as simply convincing those in power of the soundness of particular changes in the prison system, rather than struggling against that power structure for political control.

In contrast, radicals see prisons as intimately bound up with the class and power structure of the society as a whole. Stated simply, the liberal perspective on reform is that fundamental