

KEYNOTE ADDRESS

THE HONORABLE MORRIS E. LASKER*

I am pleased to join the distinguished participants in this colloquium devoted to the prison overcrowding crisis. Prisons and jails are overcrowded. That is an obvious fact. Courts can take judicial notice of it. Further, it is a proposition which governors, attorney generals and corrections commissioners are asserting, although in the past they earnestly resisted such allegations.

The existence of the crisis is now generally accepted as true. However, the word "crisis" means many things, and the outcome of this conference may depend on the sense in which the word is intended to be used. For example, if the term is meant to suggest "crisis atmosphere," in which, because of the pressures of events, hasty and ad hoc decisions must be made, the contribution of the colloquium will be limited. A definition more suitable for dealing with the problem is Webster's: "the point of time when it is decided whether an affair or course of action shall proceed, be modified or terminate." For us this point of time is now. The decision we face is whether the course of action which created the present state of affairs shall proceed, be modified or terminate. Changing the present state requires deliberate and considered discussion leading to long-term remedies.

The task of a keynoter is to set the issue in perspective. This is best done by considering how we got where we are, what the scope of the problem is, and what the range or mix of solutions may be.

Let us consider how we got here. Certain facts and characteristic American attitudes stand out and help to illuminate the subject.

Item 1: We are a society whose ideal is, properly, that the rule of law should prevail. The other side of that coin is that "there ought to be a law" covering every troublesome problem of society, and that enactment of laws will solve any problem.

Item 2: Reality teaches that the enactment of laws does not automatically solve a problem. Citizens violate the laws. When this happens the Puritan in us prescribes punishment of the violator. Moreover, we believe that punishing the offender will solve the dilemma.

* United States District Court Judge, Southern District of New York. Judge Lasker was appointed United States District Judge for the Southern District of New York on June 24, 1968 and entered on duty October 3, 1968. He received a B.A. degree from Harvard University in 1938 and an LL.B. degree from Yale University Law School in 1941.

Judge Lasker formerly served as Staff Attorney for the United States Senate Committee Investigating National Defense Programs, 1941-1942; Town Attorney, New Castle, New York, 1955-1957; and Justice of the Peace, New Castle, 1957-1958. In 1976 he was appointed to the Judicial Conference Committee on Admission of Attorneys to Federal Practice.

Item 3: The easiest way to deal with “problem” people, whether criminal offenders, juvenile delinquents, the aged or the mentally ill, is to “put them away.” As the expression goes, they are out of sight and therefore out of mind. This is a particularly good way of creating the *illusion* of solving the problem, especially if, after the inmate is put away, the key is thrown away.

Item 4: America is one of the largest countries in the world and, for a half century or so, has been the richest. Accordingly, we have proceeded on the assumption that we can always build and pay for whatever facilities are needed to house the inmates and do the job.

These attitudes, perhaps illusions, have, at least since World War II, confronted terrible and unanticipated realities which have brought us where we are. The aftermath of war, as it always does, dissolved the cement of social cohesion, the adherence to standards of conduct, and the respect for authority. Whole new populations of rural, untutored descendants of slaves or non-English speaking communities were thrown into the cities of this country. The growth of crime, resulting in important part from these factors, struck fear into the hearts of fellow citizens. This fear was heightened beyond its appropriate reality by sensationalism in the print and electronic media. A revolution of rising expectations on the part of the underclasses added to the confusion. Reaction at the political level, whether legislative, executive or judicial, resulted in the imposition of sentences even heavier than those under the already heavy sentence structure which characterized the administration of justice in the United States. With hindsight we are not surprised that, in spite of massive efforts to prevent it, American prisons are vastly overcrowded.

This brings us to the scope of the problem. Let us measure it by considering three of the largest prison systems in the country—those of California, New York and the Federal Government. At the end of 1973, there were 19,794 prisoners in the California system.¹ Nine years later, that is three months ago, there were 34,459.² New York held 12,945 prisoners at year end 1973,³ and 27,910 on December 31, 1982.⁴ The Federal Government roster increased from 22,815⁵ to 29,673 in the same period.⁶ The total

1. NAT'L CRIM. JUST. INFORMATION AND STATISTICS SERVICE, U.S. LAW ENFORCEMENT ASSISTANCE ADMIN., 1974 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 434 [hereinafter cited as SOURCEBOOK].

2. BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 1982 2 Table 2: Prisoners Under Jurisdiction of State and Federal Correctional Authorities by Region and State, Year End 1981 and 1982 (the 1982 data is preliminary and subject to revision) [hereinafter cited as PRISONERS 1982].

3. SOURCEBOOK, *supra* note 1, at 434.

4. PRISONERS 1982, *supra* note 2, at 2.

5. SOURCEBOOK, *supra* note 1, at 434.

6. PRISONERS 1982, *supra* note 2, at 2.

prison population of the United States at the end of 1973 was 204,349.⁷ It is now over 412,000,⁸ not counting the hundreds of thousands of inmates in jail.⁹

In palmier times such an explosion of prison population might conceivably have been accommodated by the construction of new facilities. We may question today whether this was the proper solution. However, one of the few virtues of the economic slump of recent years has been to teach both those who are responsible for dealing with the problem *and* the public at large what the costs of building and maintaining those facilities are. Even America's wealth is not limitless or capable of financing the project without jeopardizing expenditures on other meritorious social demands.

Moreover, the scope of the problem is not limited to population figures and the taxpayers' burden. It includes the effects of overcrowding on the prisoners themselves and the correction officers who guard them. Overcrowding intensifies every difficulty that naturally inheres in the exceedingly tough job of keeping persons under lock and key. Some effects are almost universally accepted by those operating the criminal justice system as well as by scholars who study it. Overcrowding adds seriously to tensions between prisoners and between prisoners and guards, exacerbates the problem of idleness, puts strains on food and sanitation service, and restricts access to recreational and educational programs. As proven at Attica, New Mexico, Ossining and other prisons, such problems can lead to the catastrophe of riots and the tragedy of large losses of life.

So we come to the question of the range and mix of possible solutions—which is what this colloquium is all about. The present crisis has certainly not arrived unexpectedly. Its shadow has loomed for some years. Competent professionals have alerted the community all along. As the conference agenda indicates, a good deal of hard thinking has been put into the attempted development of palliatives which perhaps cumulatively may effect a cure.

Prison population and overcrowding are functions of social decisions such as the determination of sentences, the availability of noncustodial remedies, the rate at which population is maintained, and the activities which occur inside the institution. It is not surprising that the conference participants approach the overcrowding problem from directions which reflect these decisions.

This afternoon's sessions deal basically with what to do with the prisoner. Who should go to prison, and for how long? What should the criteria

7. SOURCEBOOK, *supra* note 1, at 434.

8. PRISONERS 1982, *supra* note 2, at 2.

9. Jails exclude federal and state prisons or other correctional institutions, institutions exclusively for juveniles, and other facilities which retain persons for less than forty-eight hours.

be for making such decisions? What release mechanisms should be available, and who should apply them? What sentences are available or can be developed as alternatives to incarceration, and who should be eligible for them? If we wish to invoke these alternatives, are the resources available? Should incarceration be reserved exclusively for the regular, habitual criminal, and can we tell in advance who the habitual criminals are or will be? Are we in effect doing that already whether deliberately or by instinct?

Tomorrow's sessions deal with bricks and mortar. How do we get prisons built? What is necessary to galvanize the support of the community? What solutions are available if the public votes "no" on financing but cries "yes" on incarceration? What can be done inside the institutions to cope with overcrowding? How can their programs and services be arranged to minimize the impact of overcrowding? And, finally, what can be expected from resort to litigation, if necessary?

In sum, the sweep of the colloquium is as wide as, but not wider than, the scope of the problem.

The subject we deal with is grave, and its influence on society will be profound whether action is taken or not. It requires the kind of thought that this conference is intended to foster. However, any long run or permanent solution will require more. A comprehensive approach requires involvement not only by those who attend this conference but also by professional correctional officials, legislators, judges and newspaper and television correspondents. The convenors of this colloquium have earned the thanks of the criminal justice profession for creating the opportunity for an important contribution to the solution of the bedeviling problem before us. We owe it to ourselves and the community to make the most of the opportunity.