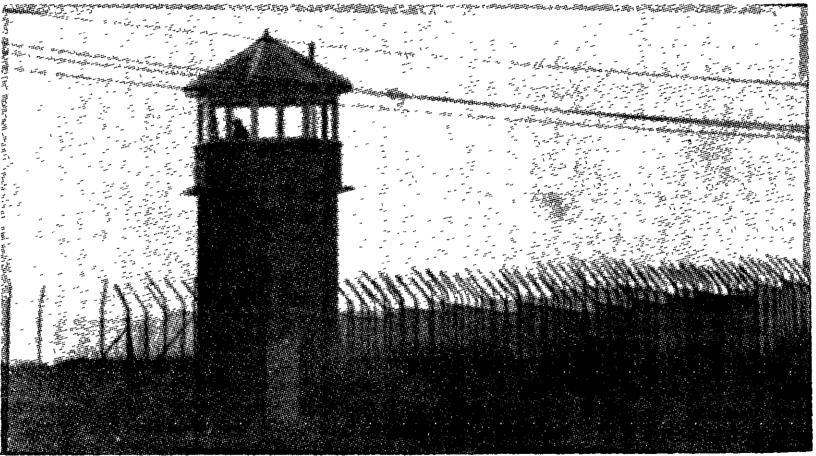

PRISONS...
A Legal Vacuum

by Mr Justice Staples

What I have to say here today is said out of my concern, as a private citizen, for the way in which things are done in the name of the law in N.S.W. I do not say these things in right of my office. They were matters argued by me before my appointment, and they gain no greater creedence now that I say them again by reason of my present position. In those circumstances and more particularly because I will be tilling some rather old ground to some of you, I ask that my remarks be not reported in the press. I put them before you for your consideration, it is to this audience that I address myself and to no other.

The reason that I make my appearance under these conditions today is simply that I want to make a gesture of complete solidarity with Tony Green. Already, I know a great number, a number of persons holding a high office in this state have been reported as scandalised that I should be associated with this forum and with Tony Green and so that there can be no doubt that I have made a deliberate decision to identify myself with Green I mention this matter now. The fault in this association lies not with Green or with myself but with those very same persons who sat in monumental silence when Jack Grahame, Len Evers, George Petterson, Tom Kelly, myself and others went to men of authority and decision in this state and told them about the events in Bathurst in Oct. 1970, told them about the wounded bodies, amongst them Tony Green in the wing blocks of that town. We didn't excite even a glimmer of curiosity or remorse and then last year in February at Bathurst it happ-

ened again; this time there was ample warning to those who prefer to see sudden and unpleasant events in politics and public administration giving to them proof of their concept of some kind of international conspiracy.

Nonetheless I dont wish to enter into controversy with those who would complain of my presence here today; I dont wish to challenge them by drawing my office into the controversy. I speak simply as a private citizen. Sensationalism will not rid us of the prisons in this state. Only a cultural upheaval will do that. I would wish to see the day when no man is held under the conditions of the modern prison in N.S.W. but since it will not be done overnight I can see no contribution coming from anything reported in tomorrow morning's press.

The absolute and deliverate alianation of the prisoner is pursued as a matter of policy founded upon rules of law. In the N.S.W. prison system rule 8 of the Prison Rules made under the Prisons Act prescribes that an officer shall not gossip with a prisoner nor allow any familiarity on the part of the prisoner towards himself of any other officer in the prison. In that rule is the beginning of a relationship which is doomed to frustrate all prospects of the successful re-introduction of a released prisoner back into a so-called communicating respective, interacting society. A policy allegedly aimed at rehabilitation and an end to recidivism is founded on a legal rule prescribing alienation. It's little wonder to me then that in the end the victims of this policy eventually resort to what his Honour Judge Goran was recently pleased to call terrorism, in order to revenge themselves upon those who enforce such unnatural conditions of human society upon men.

Our aim should be to decarcerate the prisoners :- in this work the courts and the lawyers have a critical role to play. I doubt that it will be decisive. I believe that the decarceration of the prisoners will eventually be the work of the prisoners themselves. Part of their struggle however will be pursued in the courts and with the aid of lawyers before judges. And the judges of this State as I will demonstrate however, are reluctant in the extreme to challenge the administrative arrangements of the prison officials who function under the Prisons Act. The reluctance of the courts to interfere in the prisons reflects broader social attitudes about incarceration.

To the extent then that the courts retreat from the prison, they create a legal vacuum. There are few signs yet that we are about to follow the course pursued in the courts of the United States of America in interfering with prison administration. Although the various inquiries in Victoria in particular and even late lamented promises of a Royal Commission into Bathurst promise some small hope of ultimate public scrutiny and control. In order to appreciate in some context how far we have to go with a view to involving the legal system in the

oversight of life of persons and behaviour of persons in N.S.W. prisons I would like to give you an outline of developments that occurred in the last 15 years or so in the United States of America. I will then bring to your attention by way of contrast some events that occurred in our courts in 1974, some of which or all of which, some of you may have heard me speak about from time to time, but which I would like to repeat again in the context of the U.S. experience in order to give some whole picture to the sad state of the law when it comes to the protection of prisoners here in our own community.

For the purpose of the remarks I wish to make I will draw heavily in the first instance on an article published in the Civil Liberties Review of Fall 1973 by David J. Rothman.

* 1. Rothman states that :

'As late as 1951 , when hearing an appeal on a prisoner's claim of a right of correspondence, one Federal circuit judge declared : " We think it is well settled that it is not the function of the courts to superintend the treatment and discipline of persons in penitentiaries, but only to deliver from imprisonment those who are illegally confined. ,, (Stroud v. Swope, 1951) His colleague wrote a concurring opinion just to protest the waste of time in such a suit. "I think that a judge of a court as busy as the one below ,, he announced, "should not be compelled to listen to such nonsense,, '

* 2. Rothman goes on to say that during the course of the 1960's "the courts suddenly reversed their position. From cases not directly concerned with incarceration came decisions making the Eighth Amendment binding on the states, decisions holding that petitions claiming infringement of civil rights could be brought to Federal courts before state remedies were exhausted, and broadening the use of habeas corpus petitions. "

He notes that the reasons for this shift "lie in an arena much wider than the courts. Changes in the nature of the inmate population and in the legal profession, new ideas about the deviant, about incarceration, and about our society all influenced the transformation. The courts did not move eagerly. The hands-off policy seemed so prudent that most judges took up incarceration reluctantly, against their better wishes. "
The shift came, inch by inch, precedent by precedent, and not as a result of a carefully conceived strategy by judges or inmates or lawyers. The reversal was haphazard, each step taken almost grudgingly until to everyone's surprise the precedent, added up to a new doctrine.

That the transformation came first to the prisons was unanticipated.

One might have predicted that the courts would move initially to improve the lot of the mentally ill. The insane after all were the more helpless and less dangerous group. Many of them had been confined involuntarily on the promise of treatment, so that relatives with standing in the community might have sparked a protest. Instead, very different considerations shaped the story. Prison cases originated randomly but the sequence of issues added up to a pattern that could not have been more effective in activating the courts, had it been carefully designed. The process of change is best understood by examining the roles of the three major groups of participants in this drama :

The inmates who first pressed the cases, the reform minded lawyers who broadened the issues to be considered, and the judges whose opinions broke with the 'hands off' tradition. *3

Rothman then says, and I shall quote from further words of his in this context : -

" Although Federal judges have insisted as early in the 1940's that prisoners should be able to contact the court free from the whim or discipline of prison officials, these decisions did not contribute in any significant degree to the demise of the 'hands off' doctrine. Rather the first breakthrough came in the early 1960's the direct

result of black Muslim agitation and then sporadically between 1961 and 1966, individual inmates, also on their own initiative, broadened the charges and requested relief from cruel and unusual punishments. Although the Black Muslims had focused on the unwarranted nature of prison discipline, they had also complained of the bare concrete isolation cells in which inmates were fed "one teaspoon of food and a slice of bread at each meal " and were denied even blankets and matresses; *4 and those words as cited by Rothman in the context of what I will refer to later you might care to recall;

He goes on to say "In the late 1960's a number of highly skilled lawyers, usually acting on their own with minimal outside support, took up the cause of prison reform. Many of them were civil rights lawyers who, in a sense, followed their clients into jail. The cases brought by inmates, particularly blacks, eventually attracted attorneys eager and accustomed to litigating issues of deprivation of rights. The chronicles of many prisoners' rights lawyers appears in their movements from civil rights litigation to contesting prison segregation to arguing the constitutionality of prison practices. Draft resister cases were another common point of entry during the Vietnam war. * 5

He goes on to say " although the efforts of activist lawyers had not sparked the prison cases their impact was neverthless critical to the movement. These lawyers acted in many jurisdictions, giving national scope to the changing judicial doctrines. The precedents had been established in a few districts. The explosion of cases after 1969 took lawyers from one region to another. Moreover, activist lawyers broadened the questions to be litigated, pressing not only religion and punishment issues but attacking parole procedures as well.' *6

Most important, Rothman notes that "the lawyers initiated litigation on the nitty gritty, petty, but important details of prison life. Now the judges learned not only about the glaring abuses in isolation cells and the sickening practice of whipping, but about the less dramatic but still vital issues of due process, of visitation and correspondence rights, of rights to medical treatment and law books. On these issues, jailhouse lawyers had considerably less expertise . The first inmate suits had impact partly because the conditions they highlighted were so gross as to stand in obvious need of remedy. But it was another matter to persuade courts that many habitual annoyances and restrictions in prisons raised fundamental constitutional issues. That required a professional and specialized core of reform minded litigators who had legal talent and some financial resources."

There is nothing to be put in the history of the Law in N.S.W.

which can in any way equate with the experience , the achievements and the extent of the agitation in the courts of the United States on issues such as I've referred to in the work of Rothman that I have quoted.

I would like to take you through some of the recent experiences of an attempt made quite deliberately by members of the legal profession of this state (N.S.W.) to involve the courts in scrutiny and control of the behaviour of the Department of Corrective Services. In the discussion that I put to you I suppose one would have to find clearly the evidence of an unending series of defeats. But while there have been those defeats, there has at the same time, been laid a great deal of public concern for all to see, about the way those who speak in the name of law and order do business in a crisis.

It can be argued, that for the citizen, the law is not a refuge against inequality, oppression or needless criminality. Moreover, it can be argued that the law can be deliberately manipulated by the executive to protect or advance the interests of officials, more especially where the judicial officers conceive their function primarily to be, as it is commonly phrased from the Bench, to "uphold the law", meaning that part of the law which it is the clear wish of the offical before the court to see upheld and enforced.

Attorney William Kunstler telling inmates he has agreed to represent them at negotiations. (WideWorld – Prisons)

The manner in which the courts of New South Wales have responded to the aftermath of the destruction of the Bathurst Goal by fire on 3 February 1974 and to the troubles of the N.S.W. prison system in 1973 and 1974 provides material for discussion in this respect. Nothing, in my view, exposes the soft underbelly of the expection of equality and liberty under the law for all the citizens of New South Wales than does the performance of the law enforcement agencies and the courts as illustrated in those particular areas lately.

Prison law, prison policy and prison reform are matters shot through with complex and often irreconcilable objectives. How unsatisfactory on even the most cursory examination in the condition of prison law and prison administration is shown by the fact that the phrase "prison reform" comes quickly into any discussion abou the gaols. No prison administrator could hope to enjoy general credence if he were to take his stand upon the proposition that out gaols are perfect examples of sound public administration.

The very nature of a prison ensures that inequality, injustice and oppression are imposed as a matter of policy in order to maintain unchallenged mastery over the men confined. Rehabilitation takes second place to repression, psychiatry falls before security. Ultimately, in New South Wales at least, gaols function on the premise that the confinees are utterly outlaws, enjoying no rights under the law, and certainly no protection from the courts. Our judicial officers have washed their hands of concern for the prisoners, of concern to see that they are given the same protection in law as the free citizen? to see that some cushion is offered against the pressure of the people who enjoy physical pweer over the bodies and minds of the inmates, whenever a prisoner calls for less weight.

It is necessary to say at the outset that the standpoint of my criticism of recent events proceeds merely upon the basis that a prisoner may not be declared in law to be an outlaw, and therefore he is entitled to be protected by the law. Where violence is done to him, he should be entitled to see his assailant dealt with under the ordinary law, notwithstanding that he is a prison official. Precisely because he is so vulnerable to wrong, he deserves to be doubly protected. If these concepts are not practical, and indeed if they are offensive, then it would be better that we abandon the pretence that prisoners are not outlaws, and that we openly and roundly declare that the law stops at the prison gate.

* 1. Decarcerating Prisoners and Patients by David J. Rothman, Civil Liberties Review Fall 1973 p.8

*2. ibid p.ll

* 3 ibid p.12

*4 ibid pp.12-13

*5 ibid p. 14

*6 ibid p.14

*7 ibid p.14

NOTE: The second half of Mr. Justice Staples' speech to the Alternatives To Prison Conference will appear in the next issue.

What is justice when prejudice lingers
And cunning cops dipping their fingers
Into the proceeds rightfully mine
And all I'm pulling is heaps of time
I tell ya, pal, my day will come

Judge and Society, sitting in their glory
They won't listen to my side of the story
No bloody fear, they're so full of hate
They just want to slam that gate.
I tel ya, pal, my day will come.

Yes, they'll get theirs, no two ways
Spending heaps of cell-filled days
And when they lob, I'll laugh like Jack
And up and tell 'em, right fucking WHACK
I tell ya, pal, my day will come

Jeff Cooper