HUMANIZING THE CRIMINAL PROCESS: SOME DECISIONS OF MR. JUSTICE MARSHALL

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Mr. Justice Marshall is most often associated with cases involving the judiciary's obligation to protect the rights of minorities. He has been one of the Court's most articulate spokesmen in jealously guarding the rights and freedoms associated with the Equal Protection Clause of the Constitution. But his commitment to protection for the poor and disadvantaged goes beyond his leadership in the area of civil rights and extends to his less heralded concern for assuring the basic fairness of the criminal justice system.

Before coming to the bench, Justice Marshall's career was that of a lawyer at the cutting edge of a legal revolution which changed the nature of American society. For almost 30 years, Justice Marshall used the courts as his forum for the cause of civil rights.[1] His historic role as an advocate in that cause ultimately led him to argue before the Supreme Court the watershed desegregation case of *Brown v. Board of Education*.[2] In *Brown* and its progeny, the Court, responding to carefully wrought advocacy, embraced the cause of racial equality.

Those decisions have changed not only the law of the land but the social perceptions of our people. It is not surprising then that Justice Marshall should have continued to demonstrate such great concern for preserving our adversary system of justice, which produced these historic decisions. A theme that runs through many of Justice Marshall's opinions is his determination that rich and poor alike have the benefit of the adversary process and that our adversary system of justice really be adversary and really do justice.

I

Since a legal system based on adversary confrontation assumes that both sides have adequate representation, the key to that system for indigent criminal defendants is the right to the effective assistance of counsel. When the Supreme Court first established the right of a criminal defendant in a capital case to the representation of counsel, in *Powell* v. *Alabama*,[3] almost 45 years ago, it also remembered that the right to counsel carries a constitutional guarantee for his effective assistance. In the intervening years, the Court has repeatedly extended the right to counsel; first, to all criminal defendants (*Gideon* v. *Wainwright*)[4]

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1. For an interesting discussion of Justice Marshall's role in early civil rights litigation, *see generally* R. Kluger, *Simple Justice* (Knopf 1976).

2. 349 U.S. 294 (1955).

3. 287 U.S. 45 (1932).

4. 372 U.S. 335 (1963).

then to all defendants who face a loss of liberty (*Argersinger* v. *Hamlin*)[5] and progressively to every essential element of the criminal justice process, ranging from identification line-up to appeal. The rationale for the Sixth Amendment right to counsel has rarely been so well articulated as by Justice Sutherland in *Powell*:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate . . . ?[6]

Yet, at no point in the intervening half-century has the Supreme Court gone appreciably beyond the statement in the seminal *Powell* case in defining the effective assistance of counsel.[7] Although some courts have gone considerably further in defining what the right to effective assistance means,[8] there are still many courts which require a counsel's failures to be so obvious and so serious as to make the trial itself a "mockery of justice," a standard which "abdicates any judicial supervision over attorney performance so long as the attorney does not make a farce of the trial."[9] As Justice Brennan admitted at the end of the Supreme Court's last term, "most courts, this one included, traditionally have resisted any realistic inquiry into the competency of trial counsel."[10] Justice Marshall has not suffered well the courts' reluctance to give greater substance to an indigent defendant's right to the effective assistance of counsel.

The first opinion written by Justice Marshall for the Supreme Court firmly established the right of an indigent defendant to the assistance of counsel at sentencing.[11] That opinion was early evidence of the Justice's commitment to assuring that the adversary process illuminates and shapes the court's treatment of every criminal defendant, rich or poor. And, the role which the Justice articulated for counsel at sentencing was that of the diligent and active advocate, because "the necessity for the aid of counsel in marshaling the facts, introducing evidence

5. 407 U.S. 25 (1972).

6. 287 U.S. at 68-69 (1932).

7. For a broader discussion of the problem of ineffectiveness of counsel, see Bazelon, The Defective Assistance of Counsel, 42 U. CINN. L. REV. 1 (1973), and sources cited at *id.*, 1, n.1. *See also*, Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L. REV. 811 (1976).

8. In 1973, the Court of Appeals for the D.C. Circuit, in United States v. DeCoster, 487 F.2d 1197 (1973), set out a new and detailed standard for what constitutes effective assistance of counsel, based on the ABA *Standards Relating to the Defense Function*. Other appellate courts have developed similar standards which give form and substance to the right to effective assistance of counsel. *See* Moore v. United States, 432 F.2d 730 (3d Cir. 1970) (en banc); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968) *cert. denied*, 393 U.S. 849 (1968); see Herring v. Estelle, 491 F.2d 634 (7th Cir. 1974); United States v. Easter, 539 F.2d 663 (8th Cir. 1976).

9. Wainwright v. Sykes, 45 U.S.L.W. 4807, 4820 n.16 (June 23, 1977) (Brennan, J., dissenting). *See* cases cited in Bazelon, *The Defective Assistance of Counsel*, *supra* at 28 n.76.

10. *Id.* at 4820.

11. Mempa v. Ray, 389 U.S. 128 (1967). For a discussion of judicial remedies for ineffective assistance of counsel at sentencing, see United States v. Martin, 475 F.2d 943, 956 (D.C. Cir. 1973) (Bazelon, C.J., dissenting).

of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent."[12]

Unfortunately, however, Justice Marshall's commitment to assuring that counsel fulfills the role required of him by the rigors of the adversary system often has been expressed in dissent. In the case of *Dukes* v. *Warden*,[13] the Court upheld a trial court's decision not to allow the defendant, Dukes, to withdraw his guilty plea. Justice Marshall, in carefully perusing the record, discovered that defendant had been resisting his attorney's advice to plead guilty; that Dukes finally agreed to plead guilty only while he was recuperating from his attempted suicide; that defense counsel admitted he might have been too forceful in securing the plea; and that Dukes' attorney was representing two other defendants whose wrongdoings that attorney later blamed on Dukes, a strategy the lower court termed "highly improper."[14] On the basis of this record, Justice Marshall chastised the majority for its failure to face the real issue—whether Dukes' counsel had rendered effective representation.[15]

In the guilty plea context, counsel may be the only means of assuring that the accused makes a knowing choice. As Justice Black explained in *Von Moltke* v. *Gillies*:[16]

> Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered.[17]

Because Dukes had presented a plausible case that the conflict with his attorney had deprived him of counsel's effective assistance in deciding what plea to enter, Justice Marshall would have held that Dukes had a right to withdraw his guilty plea before sentencing.

In a more recent case, *Brescia* v. *New Jersey*,[18] a petition for certiorari raising a claim of ineffectiveness of counsel was before the Supreme Court. The trial court had appointed a member of the local Public Defender's office to represent the defendant. On the first day of the trial, the appointed public defender sought to be relieved on the grounds that he was not sufficiently prepared. The Judge agreed to replace the attorney with another member of the same public defenders' office who happened to be in the courtroom at the time, but insisted that the trial begin the same day. The new attorney vigorously and repeatedly protested that he was totally unprepared and sought a continuance, but to no avail. The judge gave the new attorney just the noon recess to review his predecessor's inadequate files and to prepare for trial. The defendant was convicted and, after appeal through the state courts, sought review by the Supreme Court on writ of certiorari. The Court denied the writ. Justice Marshall, joined only by Justice Brennan, dissented from the Court's refusal to face the difficult issue of what constitutes the effective assistance of counsel.

12. *Id.* at 135.
13. 406 U.S. 250 (1972).
14. *Id.* at 268.
15. *Id.* at 264.
16. 332 U.S. 708 (1948). For a discussion of ineffectiveness of counsel in guilty plea cases *see* United States v. Simpson, 475 F.2d 934 (D.C. Cir. 1973) (Bazelon, C.J., dissenting) and cases cited in Bazelon, *supra*, at 34-47; *see* Daugherty v. Beto, 388 F.2d 810, 814-15 (5th Cir. 1967) (Rives, J. dissenting), *cert. denied*, 393 U.S. 986 (1968).
17. *Id.* at 721.
18. 417 U.S. 921 (1974).

The state court had determined that it had been proper to continue Brescia's trial because "the lack of investigation lays at the doorstep of the Public Defender," accepting the State's argument that petitioner had no right to complaing about the late appointment of his counsel, because both the original and the substitute attorney were from the same agency. Justice Marshall's response to this argument makes clear his concern for preserving the adversary process and the importance to that process of the Sixth Amendment right to effective assistance of counsel:

> Timely appointment and opportunity for adequate preparation are absolute prerequisites for counsel to fulfill his constitutionally assigned role of seeing to it that available defenses are raised and the prosecution put to its proof.
>
> . . . .
>
> The issue in determining whether a defendant has been deprived of the effective assistance of counsel is not whether the defense attorney is culpable for the failure but only whether, for whatever reasons, he has failed to fulfill the essential role imposed on him by the Sixth Amendment. No matter upon whose doorstep the judge cared to lay blame for counsel's lack of preparation, the cost of the failure should not have been visited upon the defendant—who was without responsibility.[19]

The Justice's commitment to the adversary system of criminal justice found its most recent expression in his dissent in *Weatherford* v. *Bursey*.[20] The Court there reversed a decision of the Court of Appeals for the Fourth Circuit, which had overturned a criminal defendant's conviction on the grounds that the presence in a meeting between the defendant and his counsel of an undercover agent, arrested with the defendant, constituted a denial of the defendant's Sixth Amendment right to counsel. The Court found that because the undercover agent had not reported the content of these attorney-client communications to the prosecution, there was no constitutional violation. Justice Marshall, again joined by Justice Brennan, dissented in an opinion which returned to the familiar theme of the centrality of effective assistance of counsel to the adversary process.

> [T]he integrity of the adversary system and the fairness of trials is undermined when the prosecution surreptitiously acquires information concerning the defense strategy and evidence (or lack of it) . . . . [G]overnment incursions into confidential lawyer-client communications threaten criminal defendants' right to the effective assistance of counsel.[21]

Rejecting the contention that the defendant had not been prejudiced, Justice Marshall argued that the right to the effective assistance of counsel is so precious that it ". . . need[s] 'breathing room to survive' . . . and a prophylactic prohibition on all intrusions of this sort is therefore essential."[22]

The same concern for giving "breathing room" to the precious Sixth Amendment right to counsel has led several courts, as suggested by Justice Marshall's dissents in *Brescia* and *Weatherford*, to move away from due process notions of "fairness" to prescriptive rules defining minimum standards of adequacy for defense counsel. Such prescriptive standards put counsel on notice as to the minimum duties he owes his client, so he can fairly be held accountable for meeting those responsibilities. Specific standards give trial judges a better under-

19. *Id.* at 924-26.
20. 429 U.S. 545, 561 (1977).
21. *Id.* at 562-63.
22. *Id.* at 565.

standing of when counsel's performance is likely to be found unsatisfactory by an appellate court, as well as a potent means of ensuring that counsel meets these minimum standards. Moreover, an appellate court, by having relatively specific standards against which to judge counsel's actions (or lack thereof), is spared the difficult task of determining whether a trial was "fair"—too often a subjective and abstract inquiry. Finally, a normative definition of what constitutes the effective assistance of counsel is consistent with the right to counsel's Sixth Amendment origins and avoids misplaced reliance on the Fifth Amendment Due Process clause's more generalized guarantee of a "fair" trial. *United States* v. *DeCoster*;[23] *Moore* v. *United States*;[24] *Coles* v. *Peyton*.[25]

The way we determine guilt or innocence is through an adversary process. Without an advocate for the defense, who is effective and prepared, the value of the adversary process is lost and the legitimacy of the criminal justice system is seriously impaired. Justice Marshall's opinions demonstrate his uncompromising commitment to giving content to the right to the effective assistance of counsel, by facing an issue which the Court has avoided for nearly half a century, ever since that right was first articulated in *Powell*. Justice Marshall repeatedly has articulated his belief in "[t]he centrality of the right to counsel among the rights accorded a criminal defendant . . . '[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.' "[26]

II

The Justice's concern for the adversary process goes beyond the issue of effective assistance of counsel. The right to counsel serves to assure that judicial decisions are informed. It is not surprising, therefore, that the Justice's concern for the integrity of the adversary process also has led him to espouse procedural reforms to assure that judges' decisions are reasoned responses to the facts of the individual case.

In *Mempa*,[27] Justice Marshall explained that a defendant must have the assistance of counsel in marshalling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case at sentencing.[28] In later cases, the Justice carried on this theme by seeking to assure that the defendant's case at sentencing would be fairly considered; that sentencing decisions are reasoned and informed; and that each decision fully considers the needs of the individual defendant.

In 1972 and 1973, several federal Courts of Appeal considered the meaning of the Youth Corrections Act, 18 U.S.C. §§ 5005 *et seq.*, which defines the circumstances under which a youthful offender can be sentenced as an adult by a federal court. These cases turned largely on the provision of Section 18 U.S.C. § 5010(d), which provides that "if the Court shall find that the youth offender will not benefit from treatment, [under the Youth Corrections Act], then the Court may sentence the Youth Offender under any other applicable penalty provision."

23. 487 F.2d 1197 (D.C. Cir. 1973).
24. 432 F.2d 730 (3rd Cir. 1970) (en banc).
25. 389 F.2d 224 (4th Cir. 1968), cert. denied, 393 U.S. 849 (1968).
26. Bresera v. New Jersey, 417 U.S. 921, 924 (1974) (dissent from denial of certiorari). Quoting Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956).
27. Note 11, *supra*.
28. *Id.* at 135.

Every appellate court which faced the issue required that, as a precondition to sentencing an eligible young person as an adult, the trial judge make a finding that the youth would not benefit from treatment under the Act. But a conflict arose among the circuits as to whether this finding had to be accompanied by a statement of reasons.[29]

When the issue reached the Supreme Court, a majority of the Justices held that a statement by the trial judge merely that he had found the youth would not benefit was adequate to justify adult sentencing.[30] Justice Marshall dissented, joined by Justices Douglas, Brennan, and Stewart. After carefully reviewing the history of the Youth Corrections Act, Justice Marshall concluded that a statement of reasons was also required, because:

> As conceived by the Court, . . . the required 'no-benefit' finding is no finding at all, but merely a ritualistic invocation of the statutory language. . . . A mere parroting of the statutory language is hardly an affirmative finding. The Court's opinion seems to indicate that the sentencing Judge need not mean what he says when he pronounces the no-benefit litany. Although the Court requires him to go through the charade of saying that the offender would not benefit from treatment under the Act, it apparently does not require that the Judge actually find no benefit but only that he be aware of the Act and reject it. I think it remarkable that this Court should approve such an empty and duplicitous ritual.[31]

Justice Marshall has often stated his view that the legitimacy of the judicial process derives in part "from the tradition that, unlike the other branches of government, judges are required to give reasons for their decisions and to justify those decisions by reference to some broader principle."[32] The potential value of a statement of reasons for sentencing decisions was explained by Justice Marshall as follows:

—"Requiring a statement of reasons would encourage trial judges to direct their attention to the crucial questions of benefit and treatment, to take a hard look at the relevant factors, and to focus on value judgements inherent in their sentencing decision."[33]

—"Requiring a statement of reasons ". . . might . . . contribute to rationalizing the sentencing process and to decreasing disparities in sentences. Articulating reasons should assist a trial judge in developing for himself a consistent set of principles on which to base his sentencing decisions."[34]

—"A statement of reasons may also be of use to correctional authorities in their handling of the prisoner after sentence. The kind of correctional and rehabilitative treatment an offender receives should take into account the reasons for his sentence."[35]

29. The Courts of Appeals for the First, Second, Third, Fourth, Fifth, Sixth and District of Columbia Circuits all held that a statement of reasons is required. Brooks v. United States, 459 F.2d 1059 (6th Cir. 1974); United States v. Kaylor, 491 F.2d 1133 (2d Cir. 1974) (en banc); United States v. Coefield, 155 U.S. App. D.C. 205, 476 F.2d 1152 (D.C. Cir. 1973) (en banc); Cox v. United States, 473 F.2d 334 (4th Cir. 1973) (en banc); United States v. MacDonald, 455 F.2d 1259 (1st Cir. 1972); *cf.* Small v. United States, 304 A.2d 641 (D.C. Cir. 1973). Only the Seventh Circuit Court of Appeals had held that a statement of reasons was not required. United States v. Dorszynski, 484 F.2d 849 (7th Cir. 1973).

30. Dorszynski v. United States, 418 U.S. 424 (1974).

31. *Id.* at 451-52.

32. Address by Justice Thurgood Marshall to the Conference on World Peace Through Law, Abidjan, Ivory Coast, 1973.

33. *Id.* at 457.

34. *Id.* at 455.

35. *Id.* at 455.

—"A disclosure of reasons may also aid the defendant's counsel to insure that the sentence is not premised on misinformation or inaccuracies in the material upon which the sentencing judge relies" or upon legally impermissible factors.[36]

—"[A]n articulation of reasons may actually contribute to the offenders' rehabilitation by avoiding any feeling that his sentence was arbitrary."[37] As one noted federal trial court judge recently observed, "[t]he absence of any explanation or purported justification for the sentence is among the more familiar and understandable sources of bitterness among people in prison."[38]

—Finally, reasoned sentencing decisions may enhance the legitimacy of the sentencing process as perceived by the general public.[39]

Although Justice Marshall's dissent was limited to the statutory language of the Youth Corrections Act, the reasoning of his opinion extends far beyond. And within it lies an important nexus between the role of counsel and the problem of sentencing.

Justice Marshall's arguments for a requirement that a trial court state the reasons for its sentencing decisions have been supported by a broad range of commentators.[40] In August of last year, the Pennsylvania Supreme Court held that henceforth whenever a trial judge subject to that court's supervisory jurisdiction imposes sentence, the judge's reasons for the imposition of the particular sentence must be articulated for the record.[41] The Pennsylvania court's reasoning closely tracked Justice Marshall's dissent in *Dorszynski*. The recodification of the Federal Criminal Code recently reported by the Senate Judiciary Committee also would require that, in all federal criminal proceedings, the trial judge state reasons for the imposition of a particular sentence. As is too often the case in the criminal law, however, this small step forward was accompanied by a major step

36. *Id.* at 455.

37. *Id.* at 456.

38. M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 42-43 (1972).

39. 418 U.S. at 456.

40. ABA, *Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures*, § 5.6(ii) and commentary (b), at 270-271 (1968); ABA, *Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences* § 2.3(e) and Commentary (c), at 45-47 (App. Draft 1968); National Advisory Commission of Criminal Justice Standards and Goals, Corrections, Standard 5.19—Imposition of Sentence at 195-96 (1973); Model Sentencing Code, § 10; M. Frankel, *Criminal Sentences: Law Without Order* 39-49 (1972); R. Goldfarb & L. Singer, *After Conviction* 191-95 (1972); Bayley, *Good Intentions Gone Awry—A Proposal for Fundamental Change in Criminal Sentencing*, 51 WASH. L. REV. 529 (1976); Berger, *Reducing Sentencing Disparity: Structural Discretion and the Sentencing Judge*, 32 J. MISS. B. 414 (1976); Berger, *Equal Protection and Criminal Sentencing: Legal and Policy Considerations*, 71 NW. UNIV. L. REV. 29 (1976); Berkowitz, *The Constitutional Requirement for a Written Statement of Reasons and Facts in Support of the Sentencing Decision: A Due Process Proposal*, 60 IOWA L. REV. 205 (1974); Coburn, *Disparity in Sentences and Appellate Review of Sentencing*, 25 RUTGERS L. REV. 207 (1971); Frankel, *Lawlessness in Sentencing*, 41 UNIV. CINN. L. REV. 1 (1972); Horowitz, *Improving the Criminal Justice System: The Need for a Commitment*, 51 WASH L. REV. 607 (1976); Kutak and Gottschalk, *In Search of a Rational Sentence: A Return to the Concept of Appellate Review*, 53 NEB. L. REV. 463 (1974); Wyzanski, A Trial Judge's Freedom and Responsibility, 65 HARV. L. REV. 1281 (1952); Comment, *Criminal Sentencing: An Overview of Procedures and Alternatives*, 45 MISS. L. J. 782 (1974); Comment, *Appellate Review of Sentences: A Survey*, 17 St. Louis Univ. L.J. 221 (1972); Comment, *Sentencing Study*, 52 Wash L. Rev. 103 (1976); Comment, *Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study*, 69 YALE L.J. 1453 (1960); Note, Appellate Review of Sentences and the Need for a Reviewable Record, 1973 DUKE L.J. 1357 (1973); Note, *Toward Lawfulness in Sentencing; Thank you Professor Dworkin*, 5 RUT.-CAM. L. REV. 80 (1973); Note, *Criminal Law-Authority and Scope of Appellate Review of Criminal Sentences Within the Statutorily Prescribed Maximum*, 22 UNIV. KAN. L. REV. 606 (1974).

41. Pennsylvania v. Riggins, 377 A.2d 140 (1977).

back. The proposed recodification would also eliminate the special treatment afforded young offenders by the Youth Corrections Act.[42]

The Youth Corrections Act was an experiment in criminal justice, "born of an urgent concern for the rehabilitation of young offenders and a determination to reach some of the underlying causes of criminal behavior."[43] Not only did the Act promise rehabilitative services to these young offenders, but it also provided a sentencing judge with expert diagnostic assistance in determining whether an offender would benefit from those rehabilitative services. 18 U.S.C. § 5010(e). My own court required that these reports also reveal "what the decision makers understand to be the meaning of rehabilitation and the means for achieving it, and . . . to what extent the Youth Corrections system provides those means."[44]

Nonetheless, too many of the reports I have seen offered little more than vague and unexplained code words. These reports would recommend denial of Youth Act sentencing because the defendant was "street-wise" or because he needed a "longer term of treatment" or "more structured environment" than the Youth Act facility could offer. Judicial probing revealed that many of these code words reflected not an offender's resistance to rehabilitation, but the Youth Center's lack of space or services.[45]

In *Dorszynski*, Justice Marshall warned that a judge should assure himself "of the adequacy of [these reports] and the propriety of [their] recommendation."[46] In my own Circuit, Judge Barrington Parker studied the preparation of Youth Act evaluative reports and concluded that the study process was "marred by a lack of understanding of the kind of information which the courts need. . . ."[47] Similarly, Judge Charles R. Richey held lengthy hearings on the Youth Act evaluation process and found it wanting. His searching inquiry into the development of the reports led him to propose new guidelines for their preparation.[48] Both of these inquiries also surfaced important questions about the nature and adequacy of the rehabilitative services available under the Act.

As a result of the conscientious efforts of jurists like Judges Parker and Richey, the Youth Act offered the promise of reasoned sentencing decisions illuminated by the adequate diagnostic services. By thus focusing diagnostic resources and judicial attention on the individual offender, the Act made the courts into a social laboratory.in which to examine the circumstances of life that brought a particular offender to the bar of justice in the hope that "Such examination might bring us a step closer to meeting 'the problem of crime . . . at this focal point' by identifying the causes."[49] Only by understanding why the young people being studied at Youth Centers today had run afoul of the criminal laws, will we begin to learn how to keep the children of tomorrow from emulating those failures.

Unfortunately, the promise of the Youth Corrections Act has fallen victim to the curse of unrealistic expectations. The Act's basic premise, rehabilitation—by

42. S. 1437, 95th Cong., 1st Sess. § 2003(6) (1977).
43. United States v. Phillips, 479 F.2d 1200, 1205 (D.C. Cir. 1973).
44. 479 F.2d at 1205.
45. United States v. Tillman, 374 F. Supp. 215 (D.D.C. 1974), *vacated* for rehearing *en banc* (August 10, 1973); United States v. Riley, 481 F.2d 1127 (D.C. Cir. 1973); United States v. Phillips, 479 F.2d 1200 (D.C. Cir. 1973).
46. 418 U.S. at 459.
47. 374 F. Supp. 215, 227 (D.D.C. 1974).
48. United States v. Norcome, 375 F. Supp. 270, 279-94 (D.D.C. 1974).
49. Phillips, 479 F.2d at 1205-06 (D.C. Cir. 1973).

which I mean educational, counseling and social services programs—has come under fire as an ineffectual means of reducing crime. But the Act should never have been sold on the premise that it would reduce crime. A significant reeducation in street crime will only come with social reform which address the poverty, deprivation, unemployment and discrimination which breeds that crime.

The value of the Youth Corrections Act lies in its potential for providing greater understanding of the causes of crime and in the humanity it affords those who have access to its rehabilitative services. The need for a humane environment in our correctional system is a need well understood by Justice Marshall. For example, in *Procunier* v. *Martinez*,[50] Justice Marshall argued that prison officials should not have a right to read inmate mail as a matter of course:

> When the prison gates slam behind an inmate, he does not lose his human quality; his yearning for self-respect does not end, nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment. Whether an O. Henry writing his short stories in a cell or a frightened young inmate writing his family, a prisoner needs a medium for self-expression.[51]

Justice Marshall's dissent in *Dorszynski* clearly articulates the case for requiring a statement of reasons for sentencing decisions. Although his dissent was limited to the statutory language of the Youth Corrections Act, the reasoning of his opinion extends far beyond. Within it lies an important nexus between the role of counsel and the problem of sentencing. Implicit in *Dorszynski* and many of his other opinions is Justice Marshall's deep commitment to humane and individualized justice—to a criminal justice system in which the man is not lost for the crime.

III

In seeking to give substance to the precious but largely ill-defined right to the effective assistance of counsel and in chastising the Court for allowing a statutory requirement for reasoned sentencing decisions to be rendered a sham, Justice Marshall's opinions evidence a common theme. Only by giving a clear content to the role of counsel and by requiring careful and reasoned justifications for sentencing decisions can the criminal justice process be humanized—made to accommodate the individual needs of each individual defendant. It is counsel's role to be the advocate for his client and the court's role to recognize the needs and circumstances of that individual, as presented by his counsel. It is this view of our system of justice, as humanitarian rather than mechanistic, which allows Justice Marshall to fulfill so well the role he has articulated for the judiciary.

> [T]o recognize the worth of every individual as Courts do every time they resolve lawsuit; [and, in so doing] . . . confronting injustice in the scores of individual cases which, in the aggregate, make up the difference between a humanitarian democracy and a ruthless dictatorship.[52]

50. 416 U.S. 396 (1974).
51. 416 U.S. at 428.
52. Address by Justice Thurgood Marshall, *supra* note 32.