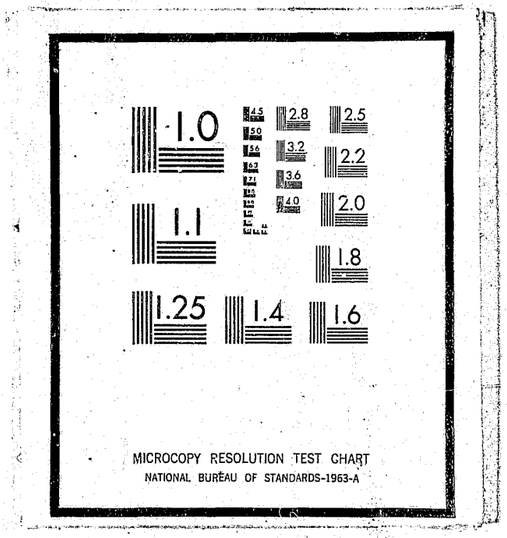

Recent Developments in Correctional Case Law

by William T. Toal

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The South Carolina Department of Corrections and the Court Decisions Research Project staff are aware of the progressive and humane programs in correctional systems throughout the United States. Photographs which depict the negative aspects of prison life are included in this publication to illustrate research findings and are in no way meant to reflect unfavorably upon positive correctional programs.

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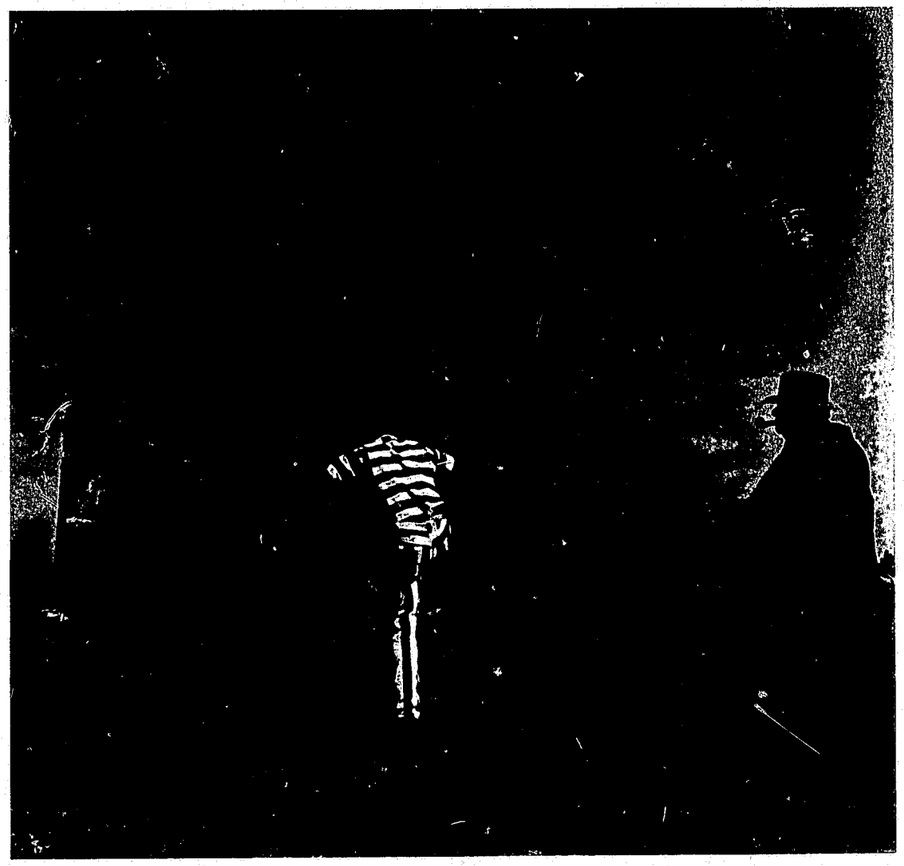
about the author

William T. Toal is an assistant professor of law at the University of South Carolina Law School. A 1968 graduate of that school, he served as editor-in-chief of the *Law Review*. Toal later became law clerk to Clement Haynsworth, Chief Judge of the U. S. Court of Appeals for the Fourth Circuit. After a year as assistant public defender of Greenville County, South Carolina, he returned to USC where he is currently director of legal clinics, including the Corrections Clinic, which offers legal assistance to indigent inmates.

Foreword

Recent Developments in Correctional Case Law is being published as a special issue of *RESOLUTION of correctional problems and issues*. This volume includes an analysis and practical summary of more than 450 court decisions pertinent to corrections which have been rendered from 1972 until Spring of 1975. This publication encompasses decisions from state supreme courts, federal district and circuit courts, and the United States Supreme Court. It is intended as a practical guide for evaluating correctional policies and practices and as an aid to those researching correctional case law.

Correctional case law prior to 1972 was presented in *The Emerging Rights of the Confined,* which was published by the South Carolina Department of Corrections under an earlier grant.

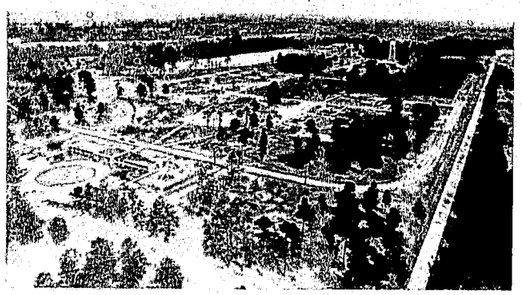


Section 1

History and Development

The October 1973 term of the Supreme Court of the United States will probably have more impact on the rights of confined persons than any other previous term. In it, the Court determined procedures for disciplinary hearings involving loss of good time;[1] set standards for censorship[2] and inspection[3] of inmate mail; settled disputes over inmate access to media representatives[4] and media access to specific inmates;[5] regulated interview policies for agents of attorneys;[6] upheld legislative distinctions for preferential rehabilitative treatment;[7] and required assistance for inmates filing civil rights actions.[8] In addition, the Burger Court's decisions on searches of persons lawfully in custody[9] and decisions restricting the scope of the exlusionary rule[10] are likely to limit substantially the rights of inmates. This massive intrusion into the correctional process seemingly sounds the death knell for the hands-off doctrine. And certainly it does to the extent that the hands-off doctrine implies that courts will dismiss any claim having to do with prison life, conditions, or processes. Paradoxically, however, the end result of all this interference in the process will be less interference in the process.

In *Procunier v. Martinez*[11] the Court struck down overly broad mail censorship regulations and overly restrictive legal visitation regulations, but in doing so it paid homage to the hands-off doctrine: "Traditionally, federal courts have adopted a broad hands-off attitude toward the problems of prison administration. In part, this policy is the product of various limitations on the scope of federal review of condi-



tions in state penal institutions. More fundamentally, this attitude springs from complementary perceptions about the nature of problems and the efficacy of judicial intervention. Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism."

The Court's clearly expressed predisposition to defer to official judgment of correctional administrators has a decided impact on the decisions it makes. In *Wolff v. McDonnell*[12] the Court agreed that a disciplinary hearing ought to be allowed in order to call witnesses and present documentary evidence. Nevertheless, it did not *require* such procedures because "many prison officials, on the spot and with the responsibility for the safety of inmates and staff, are reluctant to extend the unqualified right to call witnesses; and in our view, they must have the necessary discretion without being subject to unduly crippling constitutional impediments."

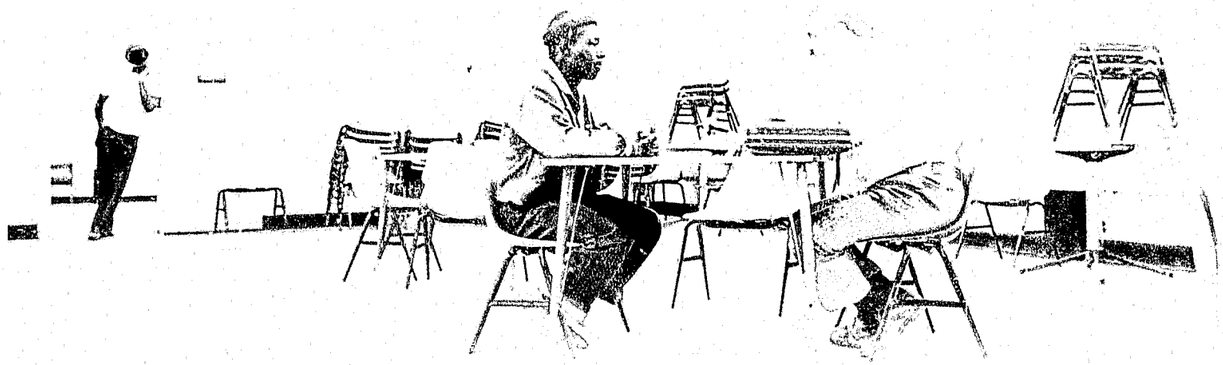
In addition to the deferral to official judgment, the Court shows a keen awareness of institutional goals. While the mere mention of the words *security, order, rehabilitation,* and *administrative convenience* would hardly overwhelm inmate protagonists, the Court is sensitive to the goals implied by these words. In one case the Court stated, "It is in the light of these legitimate penal objectives that a court must assess challenges to prison regulations based on asserted constitutional rights of prisoners."[13]

The sound discretion of the prison administrator, then, in light of institutional objectives, is a major consideration when courts are making decisions on prison-related cases. It is true that certain procedures have been required which may initially cause some administrators difficulties. But in the design of those procedures, deference to the expertise of prison officials is common. Institutional goals are weighed heavily against asserted rights. The import of these cases is clear. When the procedure for making decisions is fair and the justification for decisions can be explained reasonably, courts will keep their hands off decisions made by corrections officials. Decisions which are procedurally fair but substantively wrong will likely escape unfavorable judicial review except in outrageous cases. A review limited to procedural due process assumes that the decision-makers are fair and well-motivated. When this assumption is true, prison officials, with their superior expertise, are more likely than the courts to make correct decisions, and the hands-off doctrine truly makes sense. Unfortunately, confidence in the expertise and judgment of correctional officials is not the only reason courts have adopted a hands-off policy. As footnote nine in *Procunier v. Martinez*[14] indicates, there are those who would defer because inmate claims are many and often frivolous, and because resources are few.

At the same time, the number of cases in the area of prison law evidence the Court's strong interest in the plight of inmates. Any lessening by prison officials of the protections of the rights of inmates is likely to result in further action by the Supreme Court. In the meantime, there are lower courts all over the land ready and willing to inject themselves into prison management whenever fundamental rights are violated. In the final analysis, courts must and will be the final arbiters of the constitutional rights of inmates.

FOOTNOTES

1. *Wolff v. McDonnell*, 418 U.S. 539 (1974).
2. *Procunier v. Martinez*, 416 U.S. 396 (1974).
3. *Wolff v. McDonnell*, 418 U.S. 539 (1974).
4. *Pell v. Procunier*, 417 U.S. 817 (1974).
5. *Id.; Saxbe v. Washington Post Company*, 417 U.S. 843 (1974).
6. *Procunier v. Martinez*, 416 U.S. 396 (1974).
7. *Marshall v. United States*, 414 U.S. 417 (1974).
8. *Wolff v. McDonnell*, 418 U.S. 539 (1974).
9. *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973); *United States v. Edwards*, 415 U.S. 800 (1974).
10. *E.g., United States v. Calandra*, 414 U.S. 338 (1974); *Michigan v. Tucker*, 417 U.S. 433 (1974).
11. 416 U.S. 396, 404-05 (1974) (footnotes omitted).
12. 418 U.S. 539, 566-67 (1974).
13. *Pell v. Procunier*, 417 U.S. 817, 823, 3203 (1974).
14. 416 U.S. 396 at fn. 9 (1974).



Section 2

Access to Courts and Counsel

Preventing Communication with the Court—Regulation of Mail

An inmate's right of free access to the courts was guaranteed by the Supreme Court's decision in *Johnson v. Avery*.[1] The Court stated, "It is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed."[2] The question of whether this prohibition is absolute has occupied the attention of many courts since 1969, when the *Johnson* case was decided. In 1974, there are indications that such protection is absolute.[3]

In *Procunier v. Martinez*[4] California prison inmates challenged the constitutionality of certain prison regulations relating to the censorship of prisoners' incoming and outgoing mail. These regulations authorized censorship of statements that "unduly complained" or "magnified grievances" or were "otherwise inappropriate." The Supreme Court held that such regulations were unconstitutional.

The Court did not decide the case by describing how much of an individual's free speech right survived incarceration. Instead, the Justices held that such regulation impinges on the rights of the outside correspondent. Therefore, censorship of mail was held justified only if it furthers an important and substantial governmental interest in prison security, order, or rehabilitation, *and* is no greater an intrusion than is necessary to further the legitimate governmental interest involved. In addition, the Court stated

that any decision to censor a particular letter must be accompanied by minimal procedural safeguards against arbitrariness or error.[5]

The Court cited examples of justifiable censorship of prisoner mail: letters containing escape plans, proposed criminal activity, and encoded messages. Prison administrators, the Court concluded, are not to be required to show with certainty that adverse consequences would result from the failure to censor a particular letter. "But," it added, "any regulation or practice that restricts inmate correspondence must be generally necessary to protect one or more of the legitimate governmental interests."[6]

The Court also indicated that policies at other well-run institutions would be relevant, but not determinative, to the decision on the need for a particular restriction.[7] As an example, the Court utilized the regulations of the Federal Bureau of Prisons,[8] which authorize restriction of inmate mail for any one of the following reasons: violating postal regulations; discussing criminal activities; carrying on a business; communicating in code; and communicating in a foreign language (unless communication in English is impossible).[9]

A court, as a receiving correspondent, has a great interest in getting communications from inmates; and in mail addressed to the courts, the countervailing need for security is diminished. While *Procunier* indicates that, under certain circumstances, censorship of mail might be permissible, it offers absolutely no support for the contention that mail may be *withheld* from the courts.

Support for the concept of free access to the courts has been found in many constitutional amendments: the first amendment right to use the mails;[10] the first amendment right to petition the government (including the courts) for redress of grievances;[11] the sixth amendment right to effective assistance of counsel;[12] and the due process clauses of the fifth[13] and fourteenth[14] amendments. The very nature of the right involved has led courts to the conclusion that a custodian may not impair an inmate's access to the courts.[15] One court has even recognized that an inmate's right to access is as complete as that of any citizen.[16] Access to the courts is fiercely protected because the courts recognize that without such a right all other inmate rights are "illusory" in that they would be entirely dependent for their existence upon the whim or caprice of prison administrators.[17]

A general allegation that unidentified outgoing mail has not been forwarded by prison officials has been held to be insufficient to state a claim which the courts would review.[18] Instead, the inmate must allege that a *specific* letter was never delivered to a *specific* court. In such cases, even those courts which normally "refuse to interfere with internal prison management" will make an exception and review the claim.[19]

The prison administrator is given the opportunity to refute any claim that he has refused to deliver an inmate's letter to a court. If he can show that the inmate has filed many claims in the past and that the court has received considerable correspondence concerning the pending claim, a court will probably recognize the invalidity of the allegation and decide the issue in favor of the administrator.[20] If, however, the court has not been receiving correspondence from the inmate, and if the inmate properly phrases his complaint, the court will probably review the merits of his charge.[21]

If, however, the allegation is true and the prison administration has attempted to deny the freedom to use the mails to persons who have been convicted of crime, the administrator is in a virtually untenable position. Since unincarcerated citizens have free use of the mails, the government must show a compelling state interest to justify the unequal treatment of inmates.[22]

After the *Martinez*[23] decision, it is probable that mail from a prison inmate to a court cannot be censored. Courts seem to agree that censorship of such outgoing mail serves no substantial governmental interest in prison security or order and does not aid in prisoner rehabilitation. The insufficiency of a governmental interest in these areas has frequently been recognized over the past few years.[24]

Whether mail to a court may be opened and inspected for contraband, as opposed to the reading of it, is a question not so easily answered. Three approaches have been taken by the courts: the communication (1) may be inspected;[25] (2) may not be inspected except under the most unusual circumstances, such as a ticking from a box-shaped package;[26] or (3) may not be opened at all.[27] The first approach assists prison authorities in insuring that contraband is not present within the prison. The second looks to the safety of the judge to determine the need for such an inspection. The third recognizes the need for free and uninhibited access to the courts, frequently considered an essential right.

Recent cases indicate that blanket inspection of mail addressed to courts is indeed unwarranted. There may be a lesser form of regulation which would accomplish the same governmental objective, or a court may simply hold that the governmental interest itself is insufficient to outweigh the rights of the inmate. The second approach, however, seems entirely justified in that the inmate is insured uninhibited access to the court under all circumstances except those in which prison authorities reasonably believe that there may be some physical danger to the court, to themselves, or to any intervening carriers.

As an alternative, there seems to be nothing inherently improper in fluoroscope or metal detector inspection of outgoing mail. Of course, if it is determined that such mail must be opened, minimal due process seems to require that it be opened, except in emergencies, in the presence of the inmate.[28]

On the other hand, courts seem to agree that mail from a court to a *pre-trial detainee* may not be opened, whether or not the envelope is marked "privileged."[29] The courts generally rely on the first and sixth amendments as the basis for this decision.[30]

Since an inmate has practically an unrestricted right to correspond privately with the courts,[31] censorship of mail *from* a court apparently will not be allowed under *Martinez*.[32] Once again it is doubtful whether prison administrators can successfully argue that an uncensored communication from a court may be harmful to prison security or order, and such censorship can surely have no positive rehabilitative effect.

Inspection of such mail for contraband is another difficult issue. In *Frye v. Henderson*,[33] the Court of Appeals for the Fifth Circuit stated that prison officials could open all incoming mail and specifically held that inspection of an inmate's letter from a court to determine if contraband were enclosed did not violate any rights of a prisoner.[34] In *Wolff v. McDonnell*,[35] the Supreme Court adopted a similar view in relation to mail from attorneys. "The possibility that contraband will be enclosed in letters, even those from apparent attorneys, surely warrants prison officials in opening the letters."[36] In such cases, the opening of mail purportedly from the court would probably be justified.

Regulation of Communications from Inmates to Public Officials

The first amendment guarantees the right of citizens—including state prisoners[37]— to petition the government for redress of grievances. It has therefore been held unconstitutional for a prison official to intercept, to fail to deliver, or to photocopy without good cause any inmate mail to legislators, executive officers, administrative bodies or other public officials."[38] It has been held that such actions infringe not only on the rights of the inmate but also on the right of public officials to be informed.[39]

Lower courts have divided on the question of whether inmate mail to public officials may be censored. New York has held that censorship, to insure reasonableness and propriety, is allowable.[40] However, the great weight of authority has prohibited any censorship of such mail.[41] *Martinez* probably supports these cases since censorship of mail to public officials could hardly further any important governmental interest in the safety or order of the prison. Censorship will probably be upheld only when authorities can show a clear and present danger to security.[42]

The courts that have considered inspection of correspondence to public officials have indicated, however, that it *is* permissible to inspect such communications for the presence of contraband.[43] But this authorization is usually accompanied by the demand that such inspection be kept to a bare and necessary minimum[44] and be made in the presence of the inmate.

Regulation of Communication from Inmate to Attorney

It has been held to be unconstitutional for prison officials to intercept a letter from an inmate to his attorney.[45] This rule applies when the letter in question concerns potential litigation of any sort, whether civil or criminal in nature.[46] Even when a letter is concerned with a pending federal case not his own, an inmate request that his attorney visit him to discuss its possible future application to legal actions must be delivered.[47] The delivery of such mail is required by the sixth amendment's guarantee of effective assistance of counsel.

The question of whether an inmate's communications to his attorney may be censored has been hotly litigated over the past two years.[48] Most courts agree that the confidentiality accorded to inmate mail to attorneys is at least as great as that accorded to any other correspondence.[49] However, on the specific censorship issue the courts have divided three ways: allowing censorship;[50] allowing the reading and examination of, but not other interference with, such communication;[51] and flatly prohibiting any censorship.[52]

Those courts which permit censorship of inmate-attorney mail do so to insure the reasonableness of the communication and to insure that the communication deals only with things germane to the attorney-client relationship. Prison officials have not yet explained how this form of censorship furthers a legitimate governmental interest in the security or order of the institution. Courts which have adopted the second view allow the mail to be read but require—absent evidence of clear abuse of access, such as the transmittal of contraband or the laying of plans for the commission of an unlawful act[53]—that the mail be forwarded. This intrusion finds some support in *Martinez* footnotes which cite with apparent approval censorship regulations which allow a reading to search for such abuses.[54]

The third approach—prohibition on any censor-

ship—recognizes the unrestricted right of an inmate to correspond confidentially with his attorney.[55] This need for confidentiality, coupled with the recognition in *Martinez*[56] of the difficulties attorneys may have in visiting prisons, should lead to the adoption of a prohibition against censorship of mail to attorneys.

Whether mail may be opened and inspected is also an unsettled question with some cases permitting[57] and others condemning[58] such action. In *Goodwin v. Oswald,*[59] the Second Circuit held that, in order to restrict attorney-inmate mail, the state must show a compelling governmental interest centering about prison security, or a clear and present danger of a breach of prison security, or some substantial interference with orderly prison administration. Unless a prison administrator can show a substantial governmental interest by demonstrating how contraband leaving the prison is a threat to internal security and order, it is doubtful that he can authorize the inspection of mail from an inmate to an attorney for the presence of contraband.

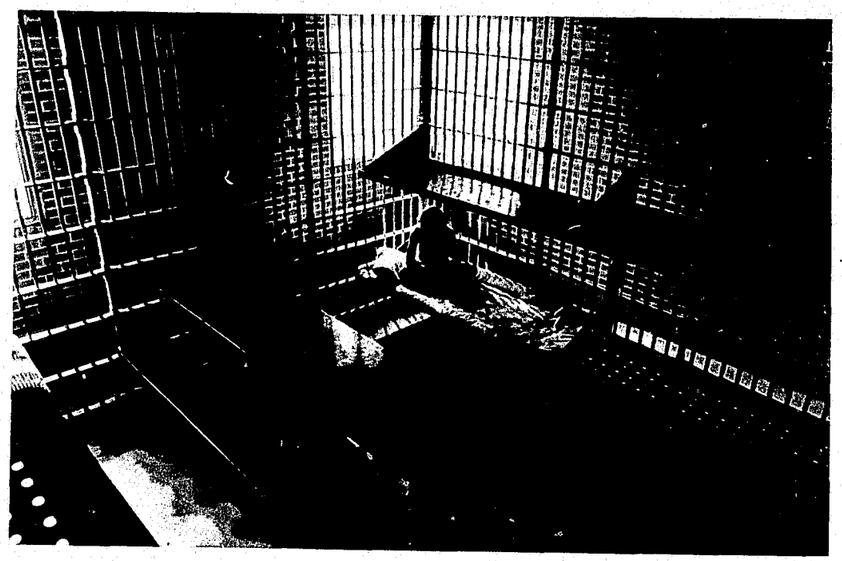
In *Wolff v. McDonnell*[60] the Supreme Court held that prison officials have the right to open and inspect mail clearly marked as coming from attorneys. The State had conceded that such action must be taken in the presence of the inmate, as the lower courts had required. The Court found no constitutional right not to have mail opened but found substantial justification for the practice even if a right had been found. The Court concluded that the institutional need to exclude contraband outweighs any infringement of the inmate's rights. Moreover, the presence of the inmate at the opening of the mail reduces the possibility of any later repercussions. Even though this holding does not require the inmate's presence, wise administrators will include that precaution to prevent future lawsuits.

Regulation of Inmate Assistance

The right of an inmate to receive assistance in the preparation of legal materials and the extent to which this right may be regulated is becoming a settled area. First, prison officials cannot prohibit inmate assistance if other adequate legal aid is not available.[61] The right to such aid extends to cases under civil rights acts as well as to *habeas corpus* actions.[62] The right of an inmate to such assistance, however, is conditional and arises only when the state fails to provide a reasonable alternative.[63] Thus, a rule forbidding inmates from reading one another's transcripts affects access to courts and should be stricken unless the government provides an alternative method by which an inmate might receive assistance.[64] If an alternative provided by the state is determined to be reasonably adequate, then a regulation prohibiting inmate assistance will stand.[65]

The phrase "reasonable alternative" imposes an affirmative obligation on the state to provide inmates with some form of effective assistance in the preparation of their legal cases,[66] and the burden of proving that the alternative is reasonable is on the state.[67] The state must produce evidence that establishes in specific terms what the need for legal assistance is and must show that the state is meeting such need.[68]

Prison officials may, however, make reasonable regulations limiting the time, place, and manner of prisoner assistance without violating inmates' civil



rights.[69] However, such regulations may not have the effect of discriminating against certain classes of inmates.[70] For example, in a prison which allowed no alternatives, a regulation which forbids the carrying of legal papers in prison areas shared with other inmates, the passing of legal papers to other inmates, and the preparation of legal papers in behalf of or jointly with other inmates was held to operate as a barrier to illiterate-indigent access to the courts and, as such, was held to violate the due process clause of the fourteenth amendment.[71]

Where inmate assistance is allowed, prison officials may require that such assistance come from an inmate at the same institution. In one case prison officials refused to deliver correspondence to an inmate from an inmate of another institution, and the action was upheld by the court.[72] In general, any reasonable prison regulation concerning inmate assistance will be upheld if it does not adversely affect access to the courts.[73]

Regulation of Legal Materials

Permissible conduct by prison officials in regulating possession of and access to legal materials is an issue which has been extensively litigated in the past few years. While no clear-cut answers have been provided by the courts, several trends have become indentifiable.

It is generally agreed that an inmate has no right to use the prison law library except as is necessary to insure access to the courts.[74] Therefore, if alternative means of access, such as public defenders or law school clinical programs, are provided, prison officials need not provide for inmate access to law books.[75] The burden of proving both the acceptability of any restriction and the adequacy of an alternative is on the prison official.[76] For example, in one case evidence showed that the right of access was effective since the public defender was readily available; therefore, state-imposed restrictions on the use of typewriters, duplicating machines or legal materials were held to be reasonable.[77] However, an inmate plaintiff in a civil rights suit was granted the opportunity of trying to prove that prison officials, by denying him access to legal materials on the grounds that he already had an attorney, were unreasonably impairing his access to the courts.[78]

When prison officials allow access to legal materials, several additional questions present themselves: What is the permissible extent of regulation of personal legal materials? How adequate must the library be kept? How current must the library be kept? What are the limits of permissible restrictions on the access to the law library that can be imposed on the general prison population? How are inmates in segregation to be treated? The answers to these and related questions are undergoing rapid change.

Prison officials generally cannot confiscate the personal law books of an inmate.[79] If the books are taken, a plea for relief must allege that such action by prison authorities infringes on the inmate's access to the courts. If the inmate merely alleges that the books were removed, the court will not entertain his claim.[80] When the claim is properly phrased and proved, however, the inmate will generally be successful. For example, one court has held that destruction of legal materials of an inmate as contraband when they are discovered in the possession of

another inmate is not permitted unless the prison officials can demonstrate that such action is necessary to maintain prison discipline.[81]

Safety and order of the prison must be the basis of any restriction on an inmate's possession of legal material. One regulation which provided that personal accumulations of legal materials over that ordinarily allowed in space available inside the inmate's living quarters would be shipped home, or destroyed, at the inmate's option, was declared reasonable because it insured the safety of the institution.[82] In another instance, a regulation permitting confiscation of all inflammable materials, including law books, during a riot situation was upheld. Of course, when the riot situation passed, the materials had to be returned.[83]

The adequacy of the prison law library is also a factor in guaranteeing an inmate's access to the courts.[84] It is a federally protected guarantee.[85] The library must enable prisoners to do legal research and prepare motions. Therefore, a prison library which merely contained a few volumes of the state code[86] and one that had many volumes of the *Federal Reporter (Second)* and the *Federal Supplement* missing[87] have been held to be inadequate. Inadequate facilities have also been found to affect the right of access to the courts, as in the case of a twelve-foot by twelve-foot library with a seating capacity of eight, in a prison of 700 inmates.[88] Inadequacies of this nature can be negatived, however, by showing implementation of a viable library improvement plan.[89]

The issue of how current the legal materials must be is still unsettled. One court has held that the fact that a library is out of date is an insufficient allegation to state a civil rights claim and that the lack of the most up-to-date law books does not act as a denial of access to the courts.[90] However, two very recent cases have taken a contrary view. In one, the court held that the failure to keep the statutes and digests up-to-date infringed on the prisoner's right of access to adequate legal materials.[91] In another, a county jail was required to keep a copy of *United States Law Week* on file because without it inmates would not have access to an adequate prison library.[92]

Earlier cases have held that rules establishing time limits on access to law books do not deprive an inmate of access to the courts.[93] However, the trend is toward recognizing that imposition of such limits may affect the inmate's right of access.[94] It has recently been held that a time limit is an unreasonable restriction if prison officials have given no valid justification for limiting access to law books.[95] What constitutes a "valid justification" is unclear, but it could refer to the concern that other inmates have equal access to the books.

Two 1974 cases have held that even prisoners in segregation have a right of access to legal materials.[96] Both cases balanced the state's interest in imposing punishments for rule violations against the right to seek redress of alleged grievances and decided in favor of the constitutional right. It therefore appears that a trend is developing that will require a showing of impending danger to prison security or order before prison officials will be justified in refusing legal materials to confined persons.

Attorney Visitation

The right of an inmate to meet with his attorney is subject to reasonable regulations, the concern of which may range from security and discipline to the maintenance of simple "housekeeping" rules, as in the case of a rule banning visitation during lunch periods.[97] However, rules which "dilute" the right to counsel can be countenanced only under circumstances amounting to compelling and overwhelming state interest.[98] In the absence of such an interest, an inmate can recover in a civil rights action if he shows that prison officials, acting under color of state law, have actually infringed on his right to counsel.[99] He is not required to show that the action has harmed him in any way; such harm is presumed.

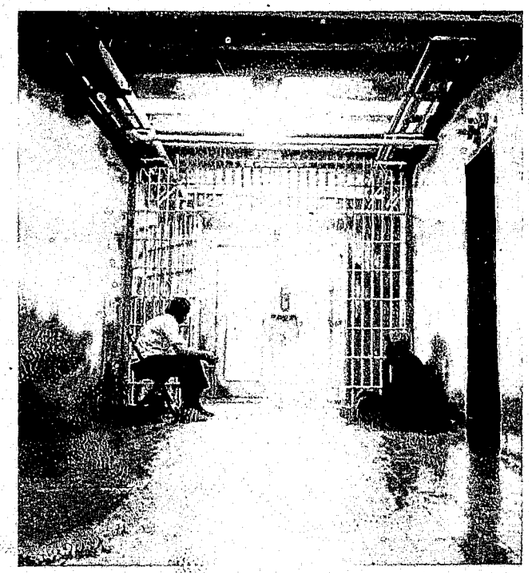
Just a few years ago it was generally held that communications with attorneys need not be carried out in complete privacy.[100] There is now an extraordinary trend toward granting an inmate the right to communicate with his attorney in absolute privacy, notwithstanding legitimate interests in the proper administration of prisons.[101] Another view permits rules allowing the physical observation of an inmate-attorney meeting so long as no attempt is made to listen to the conversation, but even this limited intrusion is only allowable when it is necessary for the maintenance of internal security and order.[102] To insure that any intrusion is the minimum necessary, all intrusions, it seems, will be closely scrutinized by the courts. In one recent case, a prison warden was convinced that attorneys were smuggling contraband into the prison. He therefore took action which compromised the confidentiality of the attorney-inmate conversation. His actions were condemned by the court, which held that interference in such a case could be justified only upon proof that contraband was coming into the prison and that the attorneys were responsible.[103] Since the attorneys offered to submit to a search prior to an interview, that proof was impossible.

The prison must also provide adequate facilities in which these private meetings may take place.[104] The location must be sufficient to insure the confidentiality of the matters discussed.[105] Failure to provide adequate facilities constitutes a denial of *effective* assistance of counsel.[106]

An inmate has a right to meet either with the attorney "of record" or with an agent (including a law student) representing that attorney.[107] The Supreme Court recently held, in *Martinez*, that a bar against attorney-client interviews conducted by law students or other legal paraprofessionals that was not directed at eliminating some colorable threat to security and which created an arbitrary distinction between law students employed by attorneys and those participating in law school clinical programs (against whom the bar did not operate) constituted an unjust restriction on an inmate's right of access to the courts.[108]

Punishment

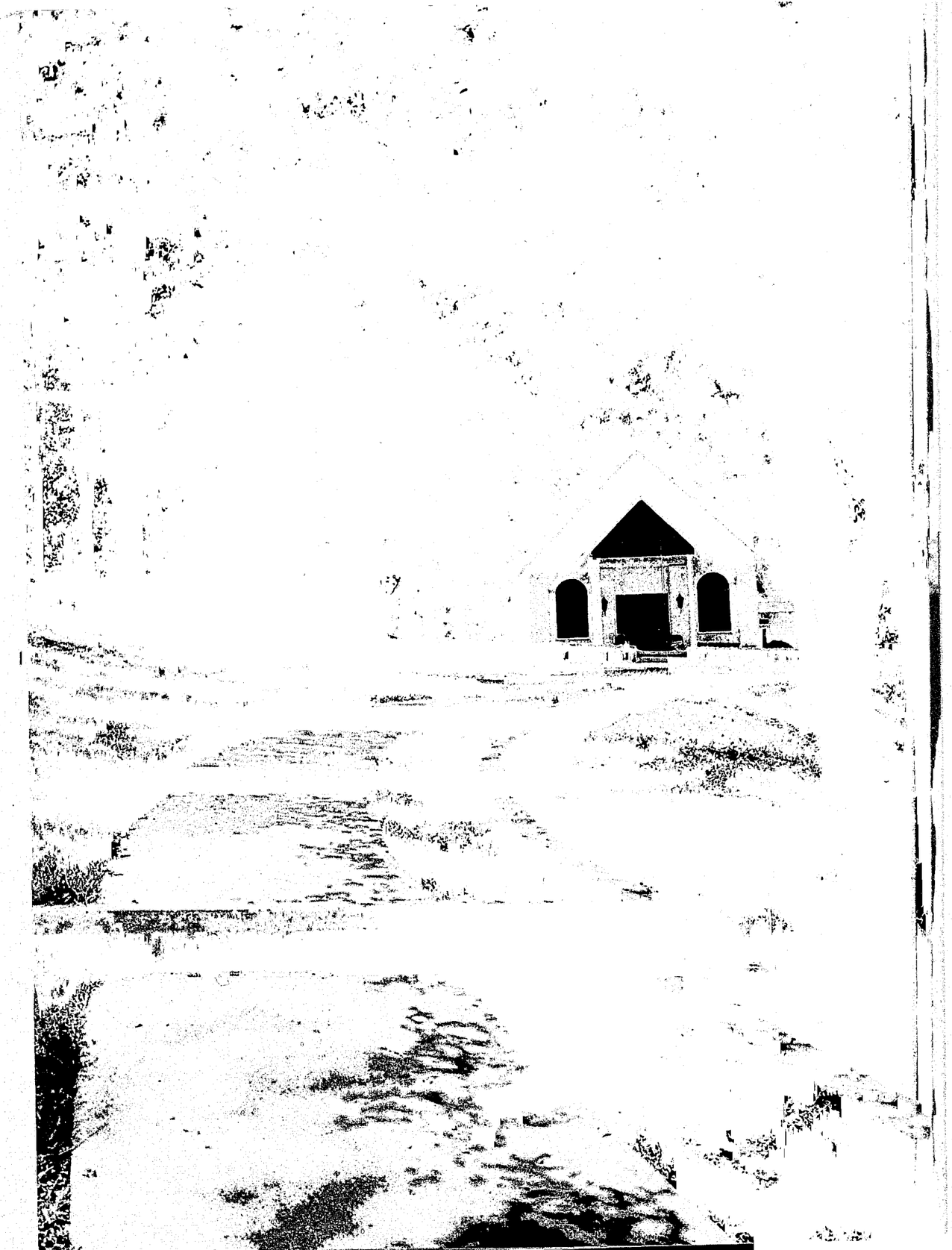
It should briefly be noted that an inmate may not be punished for communicating with public officials, the courts, or attorneys[109] nor for filing legal action against prison officials.[110] Where no reasonable alternative to inmate assistance is provided, inmates may not be punished for giving or receiving assistance.[111] Punishment may, however, be imposed if monetary consideration is given for the assistance.[112]



FOOTNOTES

1. 393 U.S. 483 (1969).
2. *Id.*
3. *Procunier v. Martinez*, 416 U.S. 396 (1974).
4. *Id.*
5. *Id.*
6. *Id.*, 414.
7. *Id.*, at n. 14.
8. Policy Statement 7300 I A, Federal Bureau of Prisons.
9. *Id.*
10. *Inmates of Milwaukee County Jail v. Petersen*, 353 F. Supp. 1157 (E.D. Wis. 1973); *Morales v. Schmidt*, 340 F. Supp. 544 (W.D. Wis. 1972).
11. *Woods v. Burton*, 8 Wash. App. 13, 503 P. 2d 1079 (1972); *cf. Cruz v. Beto*, 405 U.S. 319 (1972).
12. *Adams v. Carlson*, 352 F. Supp. 882 (E.D. Ill. 1973), *aff'd* 488 F.2d 619 (7th Cir. 1973).
13. *Newkirk v. Butler*, 364 F. Supp. 497 (S.D. N.Y. 1973), *substantially aff'd* 499 F.2d 1214 (2d Cir. 1974).
14. *Andrade v. Hanuk*, 452 F.2d 1071 (5th Cir. 1971); *see also Goodwin v. Oswald*, 462 F.2d 1237 (2d Cir. 1972).
15. *Aikens v. Lash*, 371 F. Supp. 482 (N.D. Ind. 1974); *Gomes v. Travisono*, 353 F. Supp. 457 (D. R.I. 1973), *aff'd* 490 F.2d 1209, *modified* ___ F.2d ___ , 16 Cr. L. Rptr. 2296 (1st Cir. 1974); *Cross v. Powers*, 328 F. Supp. 899 (W.D. Wis. 1971). One court has stated, however, that the Constitution merely requires that prisoners have "reasonable" access to the courts. *Knell v. Bensinger*, 498 F.2d 1014 (7th Cir. 1973). Refusal to mail a letter addressed to the court would probably be considered "unreasonable" by that very court. *Cf. Adams v. Carlson*, 488 F.2d 619 (7th Cir. 1973).
16. *Corby v. Conboy*, 457 F.2d 25 (2d Cir. 1972).
17. *Adams v. Carlson*, 488 F.2d 619 (7th Cir. 1973).
18. *Pinkston v. Bensinger*, 359 F. Supp. 95 (N.D. Ill. 1973).
19. *See, e.g., Hooks v. Kelley*, 463 F.2d 1210 (5th Cir. 1972).
20. *See Jones v. Superintendent*, 370 F. Supp. 488 (W.D. Va. 1974). *See generally* McAninch and Wedlock, *The Emerging Rights of the Confined*, 36 (1972) (hereinafter cited as *Emerging Rights*).
21. *Emerging Rights* at 36.
22. *See Nickl v. Schmidt*, 351 F. Supp. 385 (W.D. Wis. 1972); *Burnham v. Oswald*, 342 F. Supp. 880 (W.D. N.Y. 1972). *But see Morales v. Schmidt*, 489 F.2d 1335, 494 F.2d 85 (7th Cir. 1974) (reasonable relationship).
23. *Procunier v. Martinez*, 416 U.S. 396 (1974).
24. *Johnson v. Lark*, 365 F. Supp. 289 (E.D. Mo. 1973); *Nickl v. Schmidt*, 351 F. Supp. 385 (W.D. Wis. 1972); *Guajardo v. McAdams*, 349 F. Supp. 211 (S.D. Tex. 1972), *vacated for failure to convene a three-judge court*, 491 F.2d 417 (5th Cir. 1974). *But see Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972), which endorsed such censorship under tightly structured regulations and under clearly defined and unusual conditions. *See also People v. Manganero*, 72 Misc.2d 381, 339 N.Y.S.2d 196 (1972), where the court permitted such censorship to insure "propriety." Under *Procunier* such a basis for censorship seems groundless.
25. *Baker v. Beto*, 349 F. Supp. 1263 (S.D. Tex. 1972), *vacated for failure to convene a three-judge court*, 491 F.2d 417 (5th Cir. 1974); *Dreyer v. Jalet*, 349 F. Supp. 452 (S.D. Tex. 1972), *aff'd* 479 F.2d 1044 (5th Cir. 1973).
26. *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972).
27. *Barlow v. Amiss*, 477 F.2d 896 (5th Cir. 1973); *Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973); *Worley v. Bounds*, 355 F. Supp. 115 (W.D. N.C. 1973).
28. *Cf. Wolff v. McDonnell*, 418 U.S. 539 (1974).
29. *See, e.g., Inmates of Milwaukee County Jail v. Petersen*, 353 F. Supp. 1157 (E.D. Wis. 1973).
30. *Berch v. Stahl*, 373 F. Supp. 412 (W.D. N.C. 1974); *Rhem v. Malcolm*, 371 F. Supp. 594 (S.D. N.Y. 1974), *aff'd in relevant part* 507 F.2d 333 (2d Cir. 1974).
31. *Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973); *But cf. Jones v. Carlson*, 495 F.2d 205 (5th Cir. 1974).
32. 416 U.S. 396 (1974).
33. 474 F.2d 1265 (5th Cir. 1973).
34. *Id.*
35. 418 U.S. 539 (1974).
36. *Id.*, at 577.
37. *See generally United States v. Savage*, 482 U.S. 1371 (9th Cir. 1973); *United States ex rel. Miller v. Twomey*, 479 F.2d 701 (7th Cir. 1973), *cert. denied* 414 U.S. 1146; *Ross v. Blackledge*, 477 F.2d 616 (4th Cir. 1973); *Gray v. Creamer*, 465 F.2d 179 (2d Cir. 1972).
38. *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972). *See also Worley v. Bounds*, 355 F. Supp. 115 (W.D. N.C. 1973).
39. *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971).
40. *People v. Manganero*, 72 Misc. 2d 381, 339 N.Y.S.2d 196 (1972).
41. *Guajardo v. McAdams*, 349 F. Supp. 211 (S.D. Tex. 1972), *vacated for failure to convene a three-judge court*, 491 F.2d 417 (5th Cir. 1973); *see also Johnson v. Lark*, 365 F. Supp. 289 (E.D. Mo. 1973); *Yarish v. Nelson*, 27 Cal. App. 3d 893, 104 Cal. Rptr. 205 (1972) (prohibiting censorship of mail from a pre-trial detainee to a public official).
42. *See, e.g., Dreyer v. Jalet*, 349 F. Supp. 452 (S.D. Tex. 1972), *aff'd* 479 F.2d 1044 (5th Cir. 1973).
43. *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972).
44. *Wolff v. McDonnell*, 418 U.S. 539 (1974).
45. *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972).
46. *Gomes v. Travisono*, 353 F. Supp. 457 (D. R.I. 1973), *aff'd* 490 F.2d 1206 (1st Cir. 1974), *modified* ___ F.2d ___ , 16 Cr. L. Rptr. 2296 (1st Cir. 1974). *But see Evans v. Moseley*, 455 F.2d 1084 (10th Cir. 1972).
47. *Preston v. Cowan*, 369 F. Supp. 14 (W.D. Ky. 1973).
48. All agree that mail of a pre-trial detainee should not be censored. *See Johnson v. Lark*, 365 F. Supp. 289 (E.D. Mo. 1973); *Conklin v. Hancock*, 334 F. Supp. 1119 (D. N.H. 1971); *Yarish v. Nelson*, 27 Cal. App.3d 893, 104 Cal. Rptr. 205 (1972).
49. *Heft v. Carlson*, 489 F.2d 268 (5th Cir. 1973); *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd* 501 F.2d 1291 (5th Cir. 1974); *Rhem v. McGrath*, 326 F. Supp. 681 (S.D. N.Y. 1971); *North v. Superior Court*, 8 Cal.3d 301, 502 P.2d 1305, 104 Cal. Rptr. 833 (1972).
50. *Lee v. Slynchcombe*, 347 F. Supp. 1076 (N.D. Ga. 1972); *People v. Manganero*, 72 Misc.2d 381, 339 N.Y.S.2d 196 (1972); *McKinney v. State*, 491 S.W.2d 404 (Tex. Ct. App. 1973).
51. *Wright v. McMann*, 460 F.2d 126 (2d Cir. 1972); *United States v. Wilson*, 447 F.2d 1 (9th Cir. 1971). *Cf. Wilkerson v. Skinner*, 462 F.2d 670 (2d Cir. 1972).
52. *Corby v. Conboy*, 457 F.2d 251 (2d Cir. 1972); *Worley v. Bounds*, 355 F. Supp. 115 (W.D. N.C. 1973); *Inmates of Milwaukee County Jail v. Petersen*, 353 F. Supp. 1157 (E.D. Wis. 1973); *Guajardo v. McAdams, 349 F. Supp. 211 (S.D. Tex. 1972), vacated on procedural grounds*, 491 F.2d 417 (5th Cir. 1974); *In re Jordan*, 7 Cal.3d 930, 103 Cal. Rptr. 849, 500 P.2d 873; *People v. Holzer*, 25 Cal. App. 3d 456, 102 Cal. Rptr. 11 (1972).
53. *Wright v. McMann*, 460 F.2d 126 (2d Cir. 1972); *cf. Wilkerson v. Skinner*, 462 F.2d 670 (2d Cir. 1972).

54. *Procunier v. Martinez*, 416 U.S. 396 at fn. 14-15 (1974).
55. *Barlow v. Amiss*, 477 F.2d 896 (5th Cir. 1973); *Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973).
56. *Procunier v. Martinez*, 416 U.S. 396 (1974).
57. *Lemon v. Zelker*, 358 F. Supp. 554 (S.D. N.Y. 1972); *In re Jordan*, 7 Cal.3d 930, 103 Cal. Rptr. 849, 500 P.2d 873 (1972).
58. *Inmates of Milwaukee County Jail v. Petersen*, 353 F. Supp. 1157 (E.D. Wis. 1973).
59. 462 F.2d 1237 (2d Cir. 1972).
60. 418 U.S. 539 (1974).
61. *Novak v. Beto*, 453 F.2d 661 (5th Cir. 1971); *Johnson v. Alldredge*, 349 F. Supp. 1230 (M.D. Pa. 1972); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971); *Cross v. Powers*, 328 F. Supp. 899 (W.D. Wis. 1971).
62. *Wolff v. McDonnell*, 418 U.S. 539 (1974).
63. *In re Boag*, 35 Cal. App.3d 866, 111 Cal. Rptr. 226 (1973).
64. *Nickl v. Schmidt*, 351 F. Supp. 385 (W.D. Wis. 1972). *See also Wolff v. McDonnell*, 418 U.S. 539, 578-79 (1974) (dicta).
65. *Novak v. Beto*, 453 F.2d 661 (5th Cir. 1971); *Brown v. Pitchess*, 112 Cal. Rptr. 350 (1974).
66. *Souza v. Travisono*, 368 F. Supp. 959 (D. R.I. 1973), *aff'd* 498 F.2d 1120 (1st Cir. 1974); *Morales v. Schmidt*, 340 F. Supp. 544 (W.D. Wis. 1972).
67. *Wolff v. McDonnell*, 483 F.2d 1059 (8th Cir. 1973), *aff'd as to this question*, 418 U.S. 539 (1974).
68. *Id. See also Souza v. Travisono*, 368 F. Supp. 959 (D. R.I. 1973), *aff'd* 498 F.2d 1120 (1st Cir. 1974).
69. *McCarty v. Woodson*, 465 F.2d 822 (10th Cir. 1972); *Johnson v. Alldredge*, 349 F. Supp. 1230 (M.D. Pa. 1972); *Cruz v. Beto*, 329 F. Supp. 443 (S.D. Tex. 1970).
70. *Id.*
71. *Cross v. Powers*, 328 F. Supp. 899 (W.D. Wis. 1971). *See also Nickl v. Schmidt*, 351 F. Supp. 385 (W.D. Wis. 1972).
72. *Heft v. Carlson*, 489 F.2d 268 (5th Cir. 1973). *See also Wilkerson v. Warden*, 465 F.2d 956 (10th Cir. 1972).
73. *See generally Wells v. McGinnis*, 344 F. Supp. 594 (S.D. N.Y. 1972).
74. *Collins v. Haga*, 373 F. Supp. 923 (W.D. Va. 1974); *Johnson v. Anderson*, 370 F. Supp. 1373 (D. Del. 1974), *Slopak v. Cupp*, ___ Or ___ , 513 P.2d 531 (1973); *People v. Rhinehart*, 9 Cal.3d 139, 507 P.2d 642, 107 Cal. Rptr. 34 (1973). This rule applies equally to pre-trial detainees. *See Lee v. Slynchcombe*, 347 F. Supp. 1076 (N.D. Ga. 1972); *People v. Fitzgerald*, 29 Cal. App.3d 296, 105 Cal. Rptr. 458 (1973).
75. *Noorlander v. Ciccone*, 489 F.2d 642 (8th Cir. 1973); *Adams v. Carlson*, 488 F.2d 619 (7th Cir. 1973); *Collins v. Haga*, 373 F. Supp 923 (W.D. Va. 1974); *Bauer v. Sielaff*, 372 F. Supp. 1104 (E.D. Pa. 1974); *Souza v. Travisono*, 368 F. Supp. 959 (D. R.I. 1973), *aff'd* 498 F.2d 1120 (1st Cir. 1974); *White v. Sullivan*, 368 F. Supp. 292 (S.D. Ala. 1973); *Dreyer v. Jalet*, 349 F. Supp. 652 (S.D. Tex. 1972).
76. *Johnson v. Anderson*, 370 F. Supp. 1373 (D. Del. 1974); *cf. Berch v. Stahl*, 373 F. Supp. 412 (W.D. N.C. 1974).
77. *Noorlander v. Ciccone*, 489 F.2d 642 (8th Cir. 1973); *Hampton v. Schauer*, 361 F. Supp. 641 (D. Colo. 1973).
78. *Cruz v. Hauck*, 475 F.2d 475 (5th Cir. 1973), *vacated* 404 U.S. 59.
79. *Lathan v. Oswald*, 359 F. Supp. 85 (S.D. N.Y. 1973).
80. *Wells v. McGinnis*, 344 F. Supp. 594 (S.D. N.Y. 1972).
81. *Johnson v. Alldredge*, 349 F. Supp. 1230 (M.D. Pa. 1972), *aff'd as to guard who allegedly destroyed material*, 488 F.2d 820 (3d Cir. 1973).
82. *Noorlander v. Ciccone*, 489 F.2d 642 (8th Cir. 1973).
83. *Adams v. Carlson*, 488 F.2d 619 (7th Cir. 1973).
84. *Hampton v. Schauer*, 361 F. Supp. 641 (D. Colo. 1973); *Brown v. Pitchess*, 112 Cal. Rptr. 350 (1974).
85. *Morales v. Schmidt*, 340 F. Supp. 544 (W.D. Wis. 1972). This portion of the opinion apparently was not involved in the appeal. *See* 489 F.2d 1335 (7th Cir. 1973) and 494 F.2d 85 (7th Cir. 1974). *But see Page v. Sharpe*, 487 F.2d 567 (1st Cir. 1973), in which the court held that a county sheriff was not required to supply prisoners with law books.
86. *White v. Sullivan*, 368 F. Supp. 292 (S.D. Ala. 1973).
87. *Aikens v. Lash*, 371 F. Supp. 482 (N.D. Ind. 1974).
88. *Nickl v. Schmidt*, 351 F. Supp. 385 (W.D. Wis. 1972).
89. *Hampton v. Schauer*, 361 F. Supp. 641 (D. Colo. 1973).
90. *Brown v. Sielaff*, 363 F. Supp. 703 (W.D. Pa. 1973).
91. *Aikens v. Lash*, 371 F. Supp. 482 (N.D. Ind. 1974).
92. *Brown v. Pitchess*, 112 Cal. Rptr. 350 (1974).
93. *See, e.g., Cruz v. Beto*, 329 F. Supp. 443 (S.D. Tex. 1970) (Time limit: 12 hrs/week), *aff'd* 445 F.2d 801 (5th Cir. 1971), *vacated* 405 U.S. 319 (1972) (to consider adequacy of library). *See also Jordan v. Johnson*, 381 F. Supp. 600 (E.D. Mich. 1974) (11 1/2 hrs/week).
94. *Newkirk v. Butler*, 364 F. Supp. 497 (S.D. N.Y. 1973), *aff'd sub silentio as to this point* 499 F.2d 1214 (2d Cir. 1974); *Nickl v. Schmidt*, 351 F. Supp. 385 (W.D. Wis. 1972).
95. *Wolff v. McDonnell*, 483 F.2d 1059 (8th Cir. 1973), *aff'd as to this point* 418 U.S. 539 (1974). *Cf. Diamond v. Thompson*, 364 F. Supp. 659 (M.D. Ala. 1973).
96. *Aikens v. Lash*, 371 F. Supp. 482 (N.D. Ind. 1974); *Johnson v. Anderson*, 470 F. Supp. 1373 (D. Del. 1974). *But cf. Bauer v. Sielaff*, 372 F. Supp. 1104 (E.D. Pa. 1974).
97. *Souza v. Travisono*, 368 F. Supp. 959 (D. R.I. 1973), *aff'd* 498 F.2d 1120 (1st Cir. 1974).
98. *Id. See also Via v. Cliff*, 470 F.2d 271 (3d Cir. 1972); *Berch v. Stahl*, 373 F. Supp. 412 (W.D. N.C. 1974).
99. *Via v. Cliff*, 470 F.2d 271 (3d Cir. 1972).
100. *See generally Emerging Rights* at 54.
101. *Adams v. Carlson*, 488 F.2d 619 (7th Cir. 1973); *Souza v. Travisono*, 368 F. Supp. 959 (D. R.I. 1973), *aff'd* 498 F.2d 1120 (1st Cir. 1974); *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972); *Smith v. Robbins*, 328 F. Supp. 162 (D. Maine 1971); *People v. Finchum*, 33 Cal. App.3d 787, 109 Cal. Rptr. 319 (1973); *North v. Superior Court*, 8 Cal.3d 301, 502 P.2d 1305, 104 Cal. Rptr. 833 (1972); *In re Jordan*, 7 Cal.3d 930, 500 P.2d 873, 103 Cal. Rptr. 849 (1972).
102. *Baker v. Beto*, 349 F. Supp. 1263 (S.D. Tex 1972), *vacated on procedural grounds* 491 F.2d 417 (5th Cir. 1974).
103. *Adams v. Carlson*, 488 F.2d 619 (7th Cir. 1973).
104. *See, e.g., State v. Jones*, 37 Ohio St.2d 21, 306 N.E.2d 409 (1974).
105. *Souza v. Travisono*, 368 F. Supp. 959 (D. R.I. 1973), *aff'd in part* 498 F.2d 1120 (1st Cir. 1974).
106. *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972).
107. *Souza v. Travisono*, 368 F. Supp. 959 (D. R.I. 1973), *aff'd in part* 498 F.2d 1120 (1st Cir. 1974).
108. *Procunier v. Martinez*, 416 U.S. 396 (1974).
109. *Simpson v. Wainwright*, 488 F.2d 494 (5th Cir. 1973); *Corby v. Conboy*, 457 F.2d 251 (2d Cir. 1972); *Johnson v. Anderson*, 370 F. Supp. 1373 (D. Del. 1974); *Dreyer v. Jalet*, 349 F. Supp. 452 (S.D. Tex. 1972).
110. *Christman v. Skinner*, 468 F.2d 723 (2d Cir. 1972).
111. *Novak v. Beto*, 453 F.2d 661 (5th Cir. 1971); *Lathan v. Oswald*, 359 F. Supp. 85 (S.D. N.Y. 1973).
112. *McCarty v. Woodson*, 465 F.2d 822 (10th Cir. 1972).



Section 3

Religion

The first amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The state is thus prevented through excessive entanglements from either fostering or hindering a religion.[1] A distinction has of necessity been drawn between the right to believe in a religion and the right to practice the tenets of that religion. The former right is unlimited; the latter, subject to limitation when a compelling state interest can be shown.[2] Prison authorities, with their great need for controlling activities, may obviously impose greater restrictions on the exercise of religion by inmates than would otherwise be permitted. Thus, while an inmate retains his freedom of religion during incarceration, the necessities of confinement may restrict the scope of that freedom.[3] The basic tension between the establishment clause and the free exercise clause in a closed society helps to explain the deferral to judgments of prison officials in some decisions affecting religious freedoms. In such a society, any action like building a chapel or appointing a chaplain tends to violate the establishment clause of the first amendment, but the failure to undertake these activities would make seemingly impossible the exercise of religion, at least in traditional ways.[4]

Establishment of Religion

Because strict enforcement of the establishment clause might restrict the free exercise of religion by other prisoners, complaints alleging violation of the establishment clause by the use of state money to pay for chaplains or churches are not normally upheld.[5] More difficulty is encountered when prison or parole policy encourages religious activities. In *Cruz v. Beto*,[6] for example, the Supreme Court considered a case in which an inmate charged that prison authorities were violating the establishment clause by rewarding orthodox religious activities with favorable job assignments and early parole release. The Court, in its *per curiam* opinion, did not consider the allegation; but Justice Rehnquist, in his dissent, stated that the inmate's claim was without merit.[7]

The use of chaplains in submitting reports to the parole board came under attack in *Remmers v. Brewer*,[8] but the court found no violation of the establishment clause absent a showing that a particular religion was fostered. It should be noted that the reports of the chaplains were not shown to deal solely or primarily with religious activities or the lack of them. On the other hand, another court, in treating chaplains' reports which did deal with religious activity, found that knowledge of the existence of these reports tended to compel religious activity unconstitutionally.[9]

Two priests in *O'Malley v. Brierley*[10] claimed the right to visit inmates to counsel with them and conduct religious services. While the court found that inmates have a first amendment right to such services, provided no overriding state interest be shown, it

added that the priests did not have the rights they claimed because their actions would unconstitutionally establish a religion and breach the wall of separation between church and state.

Compulsory chapel attendance is more clearly the establishment of religion. Even so, *Nelson v. Heyne*[11] upheld mandatory attendance of incarcerated juveniles at non-denominational services. The compulsory requirement was upheld as an integral part of a disciplinary scheme designed for rehabilitation purposes. The court noted that the youths were not required to believe, only to attend. The case is bottomed, however, on constitutional quicksand since the same justifications were asserted and rejected in *Anderson v. Laird*.[12] The military academies sought to uphold their traditional compulsory chapel on the grounds that it instilled discipline and encouraged moral behavior, but the court found a violation of the establishment clause.

Exercise of Religion

The bulk of prison litigation concerning religious freedom focuses upon the exercising of religious beliefs. One set of cases examines the emotionally charged threshold question of which set of ideas are entitled to the status of religious beliefs. These same cases and others then look into what restrictions may be placed on the exercise of religious beliefs because of the necessities of incarceration.

A convicted thief, Harry W. Theriault, proclaimed himself Bishop of Tellus—originally, at least, as a joke—and catapulted himself and his Church of the New Song into a wave of litigation similar to that engendered in the '60's by the rise of the Black Muslim religion. Prison authorities charged then that the movement merely advocated racial hatred and political anarchy, but the Black Muslim religion is now firmly established.[13] Bishop Theriault, whose claimed authority comes from the book of Revelation in the Bible, and members of his church professed a belief in a unifying and harmonizing force or spirit called Eclat, which they believe resides in all things. Prison authorities at the Atlanta Penitentiary, perhaps justifiably, were skeptical of Theriault's new-found religion because his prison stay has been marked by verbal abuse directed at and physical attacks on prison guards; consequently, the authorities denied the Church of the New Song the opportunity to hold meetings. Officials at the Iowa State Prison found similar claims of belief in the Church of the New Song incredible and forbade meetings of purportedly interested inmates. The cases arising from these denials provide an interesting comparison.[14]

In preface to the comparison, a digression to explore traditional indicia of a religion may be appropriate. No single test dominates. One factor considered is the history and age of the sect.[15] Another test is whether the asserted religion has the characteristics associated with traditional "recognized" religion.[16] A final factor, or perhaps an additional one, is the sincerity of belief in those who espouse the religion.[17]

In the case arising out of Atlanta, the district court examined the tenets of Eclatarianity and acknowledged it as a religion. It recognized that the sect had begun as a game but noted that Theriault had begun to take his own religious claims seriously and ordered that the exercise of their religion be allowed.[18] On appeal, however, the circuit court reversed and ordered an examination of the sincerity of the asserted beliefs.[19] The district court in Iowa, like the Georgia district court, ordered officials to allow members of the Church of the New Song opportunities for the exercise of their religion in the same degree as other inmates. The court was "not insensitive to the problems of a prison administrator faced with a profusion of religious claims by those whose faith may appear both strange and incomprehensible, if not downright false and insincere, but found that concern cannot justify a voyage into the unchartered hazards of religious censorship."[20] The eighth circuit affirmed, noting that, if the religion were a hoax and were used as a front, prison officials could take appropriate action.[21] The rationale for such a decision seems to be that prison officials do not inquire into the sincerity of the beliefs of persons who attend traditional religious services, that most religious leaders would encourage such attendance, and that the overriding institutional concern for security is threatened no more by insincere worshippers in one meeting than by those in another. The courts seem to feel that control of the size and time and place of the meeting, coupled with the ability to monitor and terminate meetings, provides sufficient insurance that institutional goals will be met and that insincere inmates will not long support religious services from which they derive no benefit.

The recognition of proliferating religions, while causing some hardships, need not cause *undue* hardships. While a prison cannot discriminate against a minority religion,[22] identical facilities need not be provided for each religion. In *Cruz v. Beto*[23] the Supreme Court required that a reasonable opportunity be afforded all prisoners to exercise their religious freedom, but stated that a "place of worship need not be provided for every faith regardless of size; nor must a chaplain, priest or minister be provided without regard to the extent of the demand."

Another interesting ruling was handed down in *Kennedy v. Meacham*, [24] in which plaintiff inmates alleged first amendment violations in that they were not allowed to place religious materials of their "satanic religion" on the bulletin board although they were allowed to place them on a shelf beneath the bulletin board and in that they were not allowed to keep Baphomets, bells, candles, pointing sticks, rings, incense or black robes in their cells. The court, distinguishing between the absolute ban on the establishment of religion and the qualified right to the free exercise of religion, found the restrictions on this exercising of religion permissible in a prison setting. The court was careful to point out that there was no proof that other religious sects were treated differently.

Other factors may result in restrictions on the normal exercise of religion. In some cases, courts hold that prisoners who are justifiably isolated may be denied the right to attend worship services.[25] When the refusal to allow attendance at group services is based not only on the disciplinary status of the prisoner but also on his prior history of disruptive activity, prison officials are on even sounder footing. In *La Reau v. MacDougall*,[26] a prisoner in a segregation unit sought the right to attend Mass. The court recognized that the attendance at Mass is a fundamental practice in the Catholic religion. Nevertheless, the inmate's past activities in disrupting prison order was considered sufficient justification for restricting the practice. In this case, the prison authorities were doubly protected since an alternate means for taking Mass, individual service by a priest, was available. (The availability of alternate means may well prove the deciding factor in such cases.) In *Davis v. Schmidt*,[27] however, the court held that a prisoner in isolation, even though he had a prior history of setting fires, could not totally be denied access to the Bible. Access could, however, be limited to supervised short periods.

Dietary laws, particularly with persons of Jewish and Black Muslim faiths, present problems to the efficient operation of a prison system. When the menu allows for a selection and pork-free items offered are sufficient to prevent malnutrition, prison officials need not offer a special diet to religious sects.[28] In *Barker v. Blackledge*,[29] however, the court required a greater degree of official deference to Black Muslim dietary requirements. Upon an allegation that the pork diet was nutritionally deficient, the court placed the burden on the prison to show why it could specially prepare an ulcer diet but not a pork-free one.

Religious beliefs concerning wearing apparel or hair style sometimes conflict with institutional needs for security and identification; but it has been found that, in cases of such conflict, the religious belief must yield.[30] However, some erosion of this doctrine may be seen in the case of pre-trial detainees.[31]

For activities not normally fundamental to the exercise of religion, even less justification is required for their restriction. Thus, a program to foster religious brotherhood by having participants correspond with each other and exchange small gifts on birthdays and at Christmas has been properly refused.[32]

In another case, the need for prison security and the need for compliance with visiting rules were considered sufficient grounds for refusing to allow a Mormon "home evening program," in which a Mormon elder would adopt a prisoner and visit him for counselling and spiritual guidance.[33]

The trend indicates that restrictions on religious activities should be as few as the demands for security, efficient operation, order and rehabilitation permit.

FOOTNOTES

1. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *rehearing denied* 404 U.S. 876 (1971).
2. *Reynolds v. United States*, 98 U.S. 145 (1878).
3. *Cruz v. Beto*, 405 U.S. 319 (1972); *Cooper v. Pate*, 378 U.S. 546 (1964).
4. *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (concurring opinion).
5. *Id.*, at fn. 72.
6. 405 U.S. 319 (1972).
7. *Id.*, at 323-24.
8. 361 F. Supp. 537 (N.D. Iowa 1973), *aff'd* 494 F.2d 1277 (8th Cir. 1974), *cert. denied* ___U.S.___, 43 U.S.L.W. 3281 (Nov. 12, 1974).
9. *Theriault v. Carlson*, 339 F. Supp. 375 (N.D. Ga. 1972), *rev'd on other grounds* 495 F.2d 390 (5th Cir. 1974), *rehearing denied* 498 F.2d 1402.
10. 477 F.2d 785 (3d Cir. 1973).
11. 355 F. Supp. 451 (D.C. Ind. 1972), *aff'd and remanded for further proceedings*, 491 F.2d 352 (8th Cir. 1974), *cert. denied* ___U.S.___, 42 U.S.L.W. 3692 (June 15, 1973).
12. 466 F.2d 283 (D.C. Cir. 1972), *cert. denied* 409 U.S. 1076.
13. *See, e.g., Ross v. Blackledge*, 477 F.2d 616 (4th Cir. 1973).
14. *Compare Theriault v. Carlson*, 339 F. Supp. 375 (N.D. Ga. 1972), *rev'd* 495 F.2d 390 (5th Cir. 1974) *with Remmers v. Brewer*, 361 F. Supp. 537 (N.D. Iowa 1973), *aff'd* 494 F.2d 1277 (8th Cir. 1974), *cert. denied*___U.S.___, 43 U.S.L.W. 3281 (Nov. 12, 1974).
15. *See Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972); *Cruz v. Beto*, 405 U.S. 319, 322 (1972).
16. *Remmers v. Brewer*, 361 F. Supp. 537 (N.D. Iowa 1973), *aff'd* 494 F.2d 1277 (8th Cir. 1974), *cert. denied*___U.S.___, 43 U.S.L.W.328 (Nov. 12, 1974); *Fulwood v. Clemmer*, 206 F. Supp. 370 (D.D.C. 1962).
17. *Theriault v. Carlson*, 495 F.2d 390 (5th Cir. 1974).
18. *Theriault v. Carlson*, 339 F. Supp. 375 (N.D. Ga. 1972).
19. *Theriault v. Carlson*, 495 F.2d 390 (5th Cir. 1974).
20. *Remmers v. Brewer*, 361 F. Supp. 537, 542 (N.D. Iowa 1973).
21. *Remmers v. Brewer*, 494 F.2d 1277 at fn. 1 (8th Cir. 1974).
22. *Cruz v. Beto*, 405 U.S. 319 (1972). *Cf. Kaufman v. Johnston*, 454 F.2d 264 (3d Cir. 1972).
23. 405 U.S. 319 at fn. 2 (1972).
24. 382 F. Supp. 996 (D. Wyo. 1974).
25. *E.g., Pinkston v. Bensinger*, 359 F. Supp. 95 (N.D. Ill. 1973).
26. 473 F.2d 974 (2d Cir. 1972), *cert. denied* 414 U.S. 878.
27. 57 F.R.D. 37 (W.D. Wis. 1973).
28. *Elam v. Henderson*, 472 F.2d 583 (5th Cir. 1973).
29. 477 F.2d 616 (4th Cir. 1973).
30. *E.g., Rinehart v. Brewer*, 360 F. Supp. 105 (S.D. Iowa 1973), *aff'd* 491 F.2d 705 (8th Cir. 1974); *Williams v. Bolton*, 342 F. Supp. 1110 (E.D. N.C. 1972).
31. *E.g., Collins v. Schoonfield*, 363 F. Supp. 1152 (D. Md. 1973); *Smith v. Sampson*, 349 F. Supp. 268 (D. N.H. 1972).
32. *McLaughlin v. Cunningham*, 344 F. Supp. 816 (W.D. Va. 1972).
33. *Fallis v. United States*, 476 F.2d 619 (5th Cir. 1973).

Section 4

Correspondence and Visitation

Courts generally recognize that a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.[1] The right to send and receive correspondence and meet and speak with visitors is a first amendment right, well recognized as being fundamental. Before deprivation of a fundamental constitutional right may be authorized, the state must show a compelling need for such interference.[2] Restrictions on these rights are generally upheld after a showing by prison authorities that the regulation is related both reasonably and necessarily to the advancement of some justifiable prison purpose.[3]

In spite of this, the District Court for the Southern District of Texas has stated that the first amendment freedom of speech must be one of the first rights to fall before reasonable restrictions by prison officials.[4] The usual rationale for such restrictions is that the maintenance and preservation of order and security permits prison officials reasonable regulation over correspondence and visitation.[5] Other than dissatisfied inmates, few question the necessity of regulations prohibiting mailing communications which are truly obscene, which threaten or blackmail, which plot escape or other criminal activity, or which contain secret codes.[6]

More substantial questions are raised over interference with the right to communicate with the media, public officials, and attorneys. Also, the scope and propriety of restrictions on the freedom to discuss religious beliefs and the right to communicate with family and friends have been the subject of frequent litigation.

It has commonly been held that the examination of communications, except for letters to and from attorneys and courts, is a reasonable exercise of a prison administrator's discretion in which the federal courts will not interfere.[7] Some courts have held that prison authorities have the right to adopt reasonable restrictions on the conduct of inmates, such as inspection of all mail for the presence of contraband.[8] Others have held that control of all mail to and from inmates in prisons is essential to the maintenance of order within the prison.[9]

But the courts have tempered their view of non-interference in prison administration.[10] They now frequently recognize that, when cases of constitutional dimensions arise, the courts cannot simply abdicate their function out of a misplaced deference to the hands-off doctrine.[11] Therefore, when a prisoner makes a specific allegation of unconstitutional treatment, federal courts must become involved in the administration of prisons to the limited extent necessary to determine (1) whether the inmate is constitutionally entitled to the particular right claimed; (2) if so, whether such right has been infringed; (3) and, if so, what the appropriate remedy is.[12]

The courts follow this analysis by balancing the asserted need for the regulation in preserving security and insuring orderly administration against the claimed constitutional right and the degree to which it has been impaired.[13] Some courts have stated that the balance should be "tipped" in favor of the prison regulation,[14] while another suggests that the expert opinions of the prison administrator should be given special weight.[15] This bias, if taken at face value, distorts the test. The balancing process compares the nature of the rights being infringed with the need for the challenged regulation. Prison authorities are experts in only one of these areas—and the constitutionally less important one at that.[16] Curtailment of the constitutional rights of an inmate should be permitted only to the extent necessary to maintain the fine balance between individual and societal rights.[17]

Justice Powell, in his concurring opinion in *Procunier v. Martinez*,[18] carefully examined whether the purported need to read mail to prevent escapes exists and suggested means of discovering contraband less intrusive than reading incoming mail. Most courts have required an examination of this kind into whether the claimed need for security or rehabilitation compels the restriction on first amendment rights.[19] Prison administrators need not tolerate speech which endangers the security of their institution,[20] but the placement of a "security and rehabilitation" tag on a regulation will not render it safe from attack. Courts will inquire into the actual relationship between the regulation and its stated purpose of security of rehabilitation. The deprivation of fundamental first amendment rights will undoubtedly receive even stronger scrutiny.[21]

Correspondence with Counsel

The right of unimpeded access to the courts[22] implies a similar right of access to counsel.[23] It is therefore not surprising to note that courts uniformly hold that prisoners, even those in isolation,[24] have an absolute right to receive mail from an attorney.[25] Any restriction which is placed on receipt of such mail must be justified by prison authorities by showing a clear abuse of access by the inmate or his attorney or a compelling state interest centering around prison security.[26] However, because of the tremendous constitutional emphasis on the right to effective assistance of counsel, it is questionable whether any court would find the state interest compelling enough to restrict such assistance absent an extreme emergency.

While some cases have permitted limited censorship of an attorney's letters to his inmate client,[27] the overwhelming weight of recent decisions has condemned such practice.[28] The *Martinez*[29] decision reinforces this latter view but does permit censorship when such action is shown to be the minimum restriction necessary to insure prison security, order or rehabilitation. Prison officials will be hard pressed to meet such a standard.

Inspection of incoming mail from an attorney has received different treatment in various courts. The Court of Appeals for the Fifth Circuit, for example, stated that an inmate's incoming mail from his attorney may be opened to determine whether contraband is being sent into the prison. This was held to be a legitimate prison policy which does not abridge any federally protected right of the inmate.[30] The Courts of Appeal for the Seventh and Eighth Circuits have taken a contrary view. They maintain that prison officials may open incoming mail from attorneys only when they have reasonable belief, based on evidence, that a particular letter contains contraband. In all other cases the danger that an attorney, an officer of the court, would send contraband into the prison is too remote and too speculative to justify a prison regulation permitting the opening and inspection of *all* legal mail.[31] In addition, these courts require that the inmate be present whenever incoming attorney mail is opened.[32]

This latter view is much more attuned to the importance and confidentiality of the attorney-client relationship, but the very recent decision by the United States Supreme Court in *Wolff v. McDonnell*[33] signals victory for fifth circuit approach. Because of a concession by the State of Nebraska, the Court decided only that officials could open any incoming mail from an attorney in the presence of the inmate. The Court indicated that when the state did not read the mail and the inmate was present, it had "done all, and perhaps even more, than the Constitution requires."[34] Other language in the opinion suggests that prison officials might be able to do more than merely inspect for contraband in the inmate's presence. Justice White's opinion for the majority carefully notes that *Procunier v. Martinez*[35] protects the first amendment rights of correspondents with prisoners and that no first amendment rights of prisoners in this context had been recognized by the Court. He then rejected the notion that correspondence with counsel is a vital part of the sixth amendment right to counsel or that inspection of mail from counsel is a substantial obstacle to access to the courts. Two other recently reported cases[36] have found that the inmate's need for confidentiality in communications with his attorney outweighs the administrative difficulties encountered by requiring the inmate's presence. Accordingly, the courts forbade censorship—that is, the reading as opposed to the inspection—of mail from attorneys and required the inmate's presence at the opening and inspection of such correspondence.

Access by means of letter to public officials has no greater claim, and perhaps a lesser one, to constitutional protection than access to attorneys. It seems likely, then, as the fifth circuit has done,[37] that regulations concerning the handling of mail from public officials will be analyzed in the same way as those concerning attorney mail.

Correspondence with the Media

Most access to media issues are addressed in section five, but a brief comment concerning correspondence with the media is appropriate here. The leading case in the area still appears to be *Nolan v. Fitzpatrick*,[38] which adopted a view somewhat similar to that later employed by the Supreme Court in *Procunier v. Martinez*.[39] The *Nolan* court held that an inmate's right to send letters to the press could be limited only with respect to letters which would convey or concern contraband or a plan of escape or which were used as a device for evading prison regulations.[40] These abuses necessitated censorship. Since then, some lower courts have held that prisoners have an absolute and unrestricted right to mail letters to the media.[41]

It is probably safe to say that the *Nolan* decision represents the general view. But, because *Pell v. Procunier*[42] stresses written communication as an acceptable alternative to full visitation rights with the media, further restriction in the form of censorship will undoubtedly be closely scrutinized prior to acceptance by courts. Justifications based on the security and good order of the prison should be well thought out and documented.

Religious Correspondence

The traditional hands-off rule still is given limited recognition in the area of religious correspondence. One court recently stated that, although restrictions on inmate correspondence may not be imposed so as to discriminate against a particular religious belief, prison administrators have wide discretion in restricting and controlling the exercise of that belief.[43] This view seemingly ignores the free exercise of religion clause of the first amendment.[44] Consideration must be given to the fact that not all important first amendment rights are lost upon incarceration and that the more fundamental the right the less likely the possibility that it will be taken.[45]

The majority of the courts are beginning to adopt this "fundamental right" approach. The new direction of the courts may have been necessitated by, and surely was complicated by, the advent of "new" religions in prisons. For example, a district court dismissed a case involving the "Church of the New Song," in which an inmate alleged that his communications with his church were being interfered with by prison officials; but the circuit court remanded the case for a full evidentiary hearing, stating that the allegation, if proved, stated a claim against prison officials.[46] A similar result was reached when an inmate alleged that prison officials had interfered with communications with his "spiritual advisor."[47]

Procunier v. Martinez,[48] although relying on first amendment rights of persons not incarcerated, will invalidate restrictions on religious correspondence, provided first amendment rights survive incarceration, unless the state can show that restrictions on religious correspondence serve a substantial interest in prison security and that such restrictions are the minimum necessary to advance that interest.[49]

Private and Business Correspondence

A generally accepted rule states that prison officials may impose control over communications from inmates to their families and friends.[50] Prior to *Martinez*, however, the courts had been unable to agree on the nature and limits of that control. In no other area of the law surrounding prisoner communications was the prison administrator less ably guided by the courts.

Regulations concerning communications to and from pre-trial detainees typifies the chaos. For instance, several courts have held that a pre-trial detainee has a first amendment right to communicate by letter with his family and friends.[51] In Connecticut,

however, communication with friends was held to be privilege to be granted or withheld at the discretion of prison authorities.[52] To further confuse matters, the District Court for the District of Maryland has stated that limitations on the private communications of pre-trial detainees should be kept to a bare and necessary minimum.[53] Finally, yet another district court has flatly declared that mail from a pre-trial detainee to his family and friends can be censored.[54] These pronouncements may serve to guide prison administrators in the particular districts, but they provide no guidance to others.

The situation worsens when one reviews rules which apply to convicted inmates. The courts have considered controls over the delivery of mail and have reached totally contradictory results. For example, one court has held that allegations that letters to an inmate's family were not mailed because they contained "begging" stated a civil rights complaint.[55] A different court, however, has held that allegations that letters to an inmate's family were not mailed because they referred to unspecified "illegal prison treatment and punishment" failed to state a civil rights complaint because the allegation was too unspecific.[56] Courts have held that it is unconstitutional to intercept, to fail to deliver, or to photocopy without good cause a letter of an inmate to his family.[57] Others have stated that a prisoner's right to mail letters to family and friends is not absolute and, in some circumstances, may be denied.[58] Still another has held that private communications may be restricted as a legitimate disciplinary device.[59]

This entire approach ignores the rule that prison officials do not have *carte blanche* to disregard the constitutional rights of inmates in the name of discipline.[60] The other extreme is also well represented: one court has held that a restriction on the sending of Christmas cards may be a violation of the first amendment.[61] Another has stated that when prison authorities prevented an inmate from communicating with a minor child who was living with his wife, they violated the inmate's "freedom of expression," since prison authorities cannot limit first amendment rights unless restrictions are related both reasonably and necessarily to advancement of some justifiable purpose of imprisonment.[62]

Procunier v. Martinez[63] provides needed guidance in this area. The court there held that censorship of an inmate's mail is not permissible unless it furthers some substantial governmental interest in prison security or order or furthers inmate rehabilitation.[64]

In one of the early interpretations of *Martinez,* a district court has upheld censorship of incoming publications that contain the following: (1) information regarding the manufacture of explosives, incendiaries, weapons or escape devices; (2) instructions regarding the ingredients and/or manufacture of poisons or drugs; (3) clearly inflammatory writings advocating violence, etc.; and (4) judicially defined obscenity.[65] These criteria are similar to those cited with apparent approval in *Martinez,* and such standards will likely continue to receive judicial approval when combined with a speedy review process.

The authority of prison officials to limit the general correspondence of an inmate to persons whose names appear on an approved mailing list has generally been upheld.[65] Once it has been determined that the addressee is a proper recipient however, it is impermissible to withhold delivery of a communication.[67]

In compiling such a list, prison authorities may send questionnaires to prospective correspondents and may make local inquiries as to the criminal record, if any, of such individuals. The authorities may also request the consent of an adult correspondent and may require the approval of an adult parent or guardian of a minor before the inmate is permitted to correspond.[68]

Censorship of incoming mail from persons on a "correspondents list" is steadily becoming more restricted. In 1972, one court held that such mail can be read only insofar as it is necessary to determine if the sender is indeed an approved correspondent.[69] In 1973, a court held that since outgoing mail should not be censored at all (because of the inability of the prison to show the furtherance of a substantial governmental interest in prison security), there should no longer be any correspondents lists.[70] *Procunier v. Martinez*[71] was limited to direct personal correspondence between inmates and those who have a particularized interest in communicating with them. Thus, future mailing list cases will be concerned with the questions of who has a particularized interest and what justification can be marshaled for any restriction.

Correspondence While in Isolation or on Death Row

Prison officials cannot refuse to deliver incoming or outgoing mail of prisoners in segregation to any extent greater than that ordinarily allowed.[72] One court reviewed a prison policy in a segregation unit which restricted court correspondence to cases with prescribed deadlines and allowed the mailing of only one letter per week. The court, finding the procedure clearly unreasonable, held that such a regulation completely impedes an inmate's access to the courts and counsel and therefore is illegal.[73] The Supreme Court in *Procunier v. Martinez,* however, reserved the question whether a temporary prohibition against personal correspondence as a disciplinary sanction would be proper.[74]

Earlier cases have held that censoring the correspondence of inmates on death row violates no first, sixth or fourteenth amendment rights of the inmate.[75] Now, however, *Procunier v. Martinez*[76] requires a showing that the governmental interest in security or order furthered by such censorship can be insured only by such action. It will be very difficult for prison officials to show how censorship of such letters in a way different from that of other mail is essential to prison security and order.

Visitation

The need for prison discipline and security is a recognized justification for the regulation of visitation.[77] Although conditions of visitation are fundamental simultaneously to institutional security and inmate morale, when the two are in conflict, the need for security is paramount. The need must, however, be supported by the evidence.[78]

Prison visitation rights may be curbed by prison officials by instituting reasonable regulations over the privilege,[79] but due process requires that visitation be curbed only to the extent necessary to assure institutional security and administrative manageability.[80] Restrictions on visitation would not, however, be used to punish the inmate. Regulations which permit visitation by only the immediate family are generally acceptable,[81] as are rules requiring the presence of prison officials during visitation.[82] The result may be unfair to those a long distance from home or to those with no immediate family, but it is doubtful that the courts would find such unfairness constitutionally impermissible. Visitation of persons in segregation may be regulated by any special precautions deemed necessary or appropriate by the warden.[83]

Regulation of prison visitation is, however, governed by constitutional principles and is not left completely to the discretion of prison authorities. Courts have stated that to deny the visitation privileges of an inmate without reasonable justification might amount to cruel and unusual punishment under the eighth amendment.[84] However, the courts are more likely to decide a case on fourteenth amendment grounds. The courts recognize that state law may withdraw certain benefits, such as visitation, during incarceration. Such a withdrawal may be unconstitutional, however, if the deprivation is a result of an arbitrary and capricious action by prison administrators.[85] For example, in *Houston Chronicle Publishing Co. v. Kleindienst,*[86] the court reviewed a rule which granted unlimited discretion over prison visitation to prison officials. The regulation, which allowed administrators to deny visits when, in their opinion, such visits would not be in the best interests of society or might endanger the security of the institution, was held to be unconstitutional on its face.[87] This view is supported by dicta in a recent Supreme Court case, *Pell v. Procunier.*[88]

Another basis upon which a visitation suit may be successful arises when an inmate alleges denial of visitation privileges on racial grounds. If proven, such an allegation would clearly be a violation of equal protection.[89] In one case in which racial discrimination was alleged, the district court refused to consider the merits of the case, stating that the hands-off doctrine precluded review. The upper court reversed and remanded the case, stating that the hands-off doctrine does not apply to equal protection cases.[90]

There has been some recent litigation by inmates attempting to establish a constitutional right to conjugal visits. Such cases are generally brought on cruel and unusual punishment grounds.[91] The courts have refused to recognize the right to such visits, stating that the entire issue of conjugal visits is a question of public policy and, therefore, is a matter for legislative, not judicial, action.[92] Until recently, no case had dealt with the argument (suggested by cases such as *Griswold v. Connecticut*[93] and *Loving v. Virginia*[94]) that conjugal relationships are vital to the preservation of the marital relationship, the maintenance of which is a fundamental right.

In *Lyons v. Gilligan,*[95] however, plaintiffs, claimed that the failure to grant conjugal visits deprived them of the right to marital privacy and constituted cruel and unusual punishment. The court rejected both claims. The right to privacy cases were distinguished on the basis that in them there had been an intrusion by the government into a place in which marital privacy already existed. The court refused to extend the cases to create a duty to provide a place for marital privacy. The court examined the claimed deprivations from a lack of sexual contact and found them not incomparable to other deprivations of prison life. Finally, it examined conjugal visiting programs in other states, admitted that the trend toward allowing such visits is one of the indicators of the "evolving standards of decency" under the eighth amendment, but held that withholding conjugal visiting privileges is not cruel and unusual punishment.

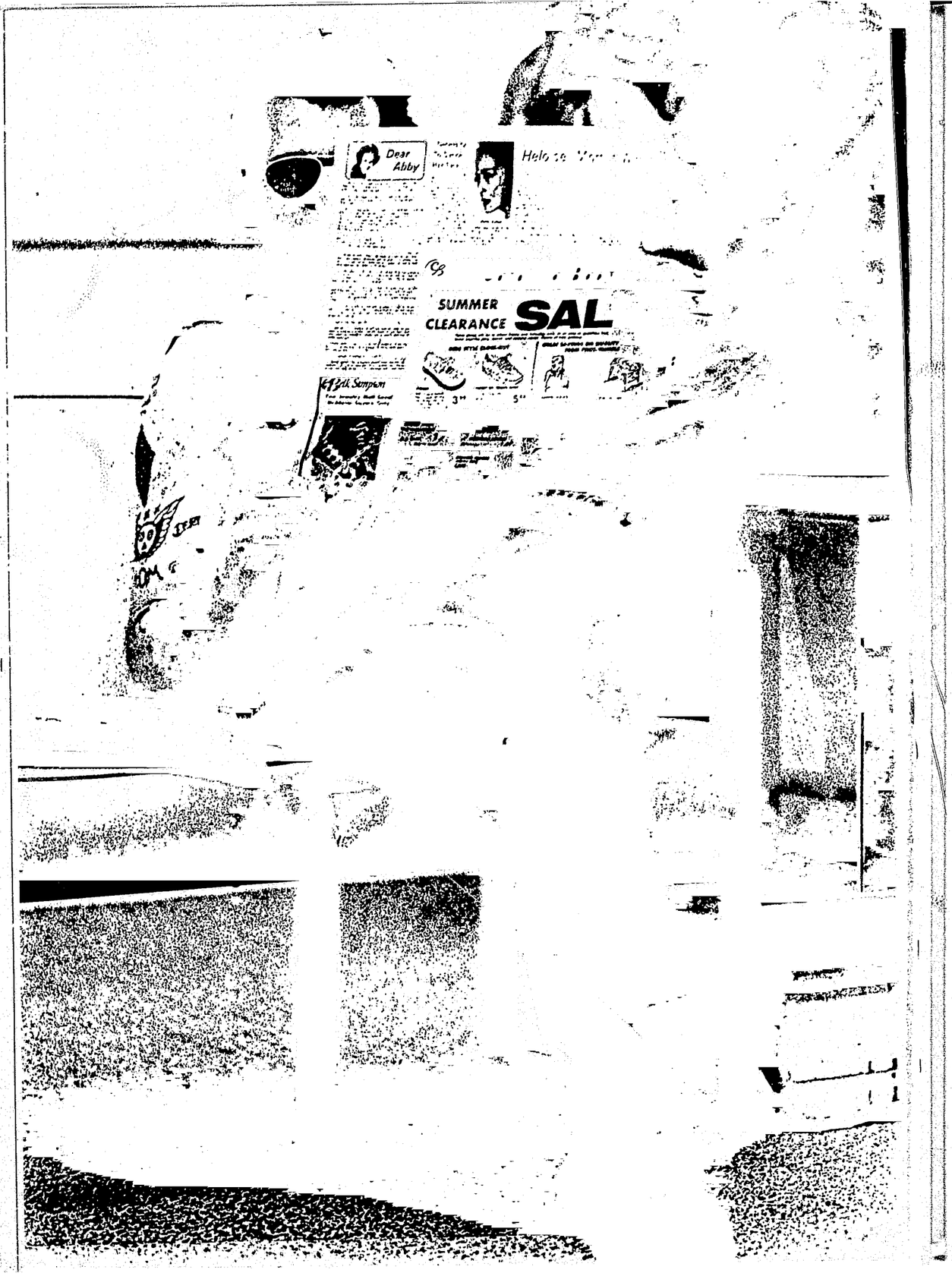
More limited tactile stimulation has, however, received judicial sanction in an order which requires officials of the Tombs in New York City to allow contact visits. The court did approve a limitation on the amount and quality of the contact.[96]

Whether a visitor and the inmate may communicate in private or whether prison officials may monitor such conversations is an unsettled question. The general view is that monitoring of an inmate's conversations with his non-attorney visitors violates no right of privacy which he may possess.[97] A contrary view is, however, beginning to emerge. For example, a recent California case held that a conversation between an inmate and his spouse is carried out under a reasonable expectation of privacy and therefore cannot be monitored.[98] The next few years may see additional rulings in this area.

It is apparent that visitation may be regulated, but only when the regulations are designed to insure institutional security and are applied in an unbiased and virtually automatic manner. In other words, control of visiting privileges should not be left to the discretion of operating personnel. If these guidelines are followed, reasonable prison visitation procedures will be upheld by the courts.[99]

FOOTNOTES

1. *See, e.g., Sostre v. Otis*, 330 F. Supp. 941 (S.D. N.Y. 1971).
2. *Rowland v. Sigler*, 327 F. Supp. 821 (D. Neb. 1971), *aff'd* 452 F.2d 1005 (8th Cir. 1971). *See also Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971).
3. *Bryant v. Ciccone*, 493 F.2d 321 (8th Cir. 1974); *Lemon v. Zelker*, 358 F. Supp. 554 (S.D. N.Y. 1972).
4. *Lamar v. Coffield*, 353 F. Supp. 1081 (S.D. Tex. 1972).
5. *See, e.g., Procunier v. Martinez*, 416 U.S. 396 (1974); *Yarish v. Nelson*, 27 Cal. App. 3d 893, 104 Cal. Rptr. 205 (1972).
6. *See Preston v. Cowan*, 369 F. Supp. 14 (W.D. Ky. 1973); *Burnham v. Oswald*, 342 F. Supp. 880 (W.D. N.Y. 1972).
7. *Woods v. Yeager*, 463 F.2d 223 (2d Cir. 1973); *Johnson v. Lark*, 365 F. Supp. 289 (E.D. Mo. 1973).
8. *Crafton v. Rose*, 369 F. Supp. 131 (E.D. Tenn. 1972); *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd* 501 F.2d 1291 (5th Cir. 1974).
9. *McLaughlin v. Cunningham*, 344 F. Supp. 816 (W.D. Va. 1972). *Cf. Preston v. Cowan*, 369 F. Supp. 14 (W.D. Ky. 1973); *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd* 501 F.2d 1291 (5th Cir. 1974); *State v. McCoy*, ___Or. App.___, 521 P.2d 1074 (1974).
10. *Clements v. Turner*, 364 F. Supp. 270 (D. Utah 1973); *United States v. Brierley*, 331 F. Supp. 1182 (W.D. Pa. 1971).
11. *See, e.g., Brenneman v. Madigan*, 343 F. Supp. 128 (N.D. Cal. 1972).
12. *Gray v. Creamer*, 465 F.2d 179 (3d Cir. 1972).
13. *Moore v. Ciccone*, 459 F.2d 574 (8th Cir. 1972); *Johnson v. Lark*, 365 F. Supp. 289 (E.D. Mo. 1973); *Smith v. Robbins*, 328 F. Supp. 162 (D. Maine 1971), *aff'd in relevant part* 454 F.2d 696 (1st Cir. 1972). *See generally Braxton v. Carlson*, 483 F.2d 933 (3d Cir. 1973); *Castor v. Mitchell*, 355 F. Supp. 123 (W.D. N.C. 1973).
14. *Baker v. Beto*, 349 F. Supp. 1263 (S.D. Tex. 1972), *vacated on procedural grounds* 491 F.2d 417 (5th Cir. 1973).
15. *Seale v. Manson*, 326 F. Supp. 1375 (D. Conn. 1971).
16. *See Board of Regents v. Roth*, 408 U.S. 564 (1972); *Gomes v. Travisono*, 353 F. Supp. 457 (D. R.I. 1973), *aff'd in part and reversed in part*, 490 F.2d 1209 (1st Cir. 1974), *vacated for consideration in light of* Wolff, 418 U.S. 909.
17. *State v. McCray*, 267 Md. 111, 297 A.2d 265 (1972). *See also Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973).
18. 416 U.S. 396 (1974).
19. *Adams v. Carlson*, 488 F.2d 619 (7th Cir. 1973).
20. *Diamond v. Thompson*, 364 F. Supp. 659 (M.D. Ala. 1973).
21. *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971).
22. *See generally* Section 2.
23. *Lathan v. Oswald*, 359 F. Supp. 85 (S.D. N.Y. 1973).
24. *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972).
25. *Corby v. Conboy*, 457 F.2d 251 (2d Cir. 1972); *Evans v. Moseley*, 455 F.2d 1084 (10th Cir. 1972). The same rule applies to pre-trial detainers; *see Berch v. Stahl*, 373 F. Supp. 412 (W.D. N.C. 1974); *Brenneman v. Madigan*, 343 F. Supp. 128 (N.D. Cal. 1972).
26. *Goodwin v. Oswald*, 462 F.2d 1237 (2d Cir. 1972).
27. *See, e.g., People v. Manganero*, 339 N.Y.S.2d 196 (1972).
28. *Rhem v. Malcolm*, 371 F. Supp. 594 (S.D. N.Y. 1974), *aff'd* 507 F.2d 333 (2d Cir. 1974); *Johnson v. Lark*, 365 F. Supp. 289 (E.D. Mo. 1973); *Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973); *Lathan v. Oswald*, 359 F. Supp. 85 (S.D. N.Y. 1973); *Conklin v. Hancock*, 334 F. Supp. 1119 (D. N.H. 1971); *Smith v. Robbins*, 328 F. Supp. 162 (D. Maine 1971), *aff'd in relevant part* 454 F.2d 696 (1st Cir. 1972).
29. *Procunier v. Martinez*, 416 U.S. 396 (1974).
30. *Faye v. Henderson*, 474 F.2d 1263 (5th Cir. 1973).
31. *Adams v. Carlson*, 488 F.2d 619 (7th Cir. 1973); *Wolff v. McDonnell*, 483 F.2d 1059 (8th Cir. 1973), *rev'd in relevant part* 418 U.S. 539 (1974). *But cf. Smith v. Robbins*, 454 F.2d 696 (1st Cir. 1972).
32. *See also Procunier v. Martinez*, 416 U.S. 396 (1974).
33. 418 U.S. 539 (1974).
34. *Id.* at 577.
35. 416 U.S. 396 (1974).
36. *Veach v. People of State of Illinois*, 504 F.2d 1100 (7th Cir. 1974) (decided prior to *Martinez* and *Wolff*); *Frazier v. Donnelon*, 381 F. Supp. 911 (E.D. La. 1974).
37. *See* note 30 *supra*.
38. 451 F.2d 545 (1st Cir. 1971). *See also Emerging Rights* at 73-74.
39. 416 U.S. 396 (1974).
40. *Sullivan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971). *See also Burnham v. Oswald*, 342 F. Supp. 880 (E.D. N.Y. 1972).
41. *Preston v. Cowan*, 369 F. Supp. 14 (W.D. Ky. 1973); *Guajardo v. McAdams*, 349 F. Supp. 211 (S.D. Tex. 1972), *vacated on procedural grounds* 491 F.2d 417 (5th Cir. 1973). *See also Brown v. Hartness*, 485 F.2d 238 (8th Cir. 1973); *Seattle-Tacoma Newspapers Guild v. Parker*, 480 F.2d 1062 (9th Cir. 1973); *McMillian v. Carlson*, 359 F. Supp. 1182 (D. Mass. 1973), *vacated for consideration of Supreme Court cases*, 493 F.2d 1217 (1st Cir. 1974); *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972).
42. 417 U.S. 817 (1974).
43. *McLaughlin v. Cunningham*, 344 F. Supp. 816 (W.D. Va. 1972).
44. *See generally* Section 3.
45. *See Remmers v. Brewer*, 475 F.2d 52 (8th Cir. 1973), *cert. denied*___U.S.___, 43 U.S.L.W. 3281 (Nov. 12, 1974); *Moore v. Ciccone*, 459 F.2d 574 (8th Cir. 1972); *Gaugh v. Schmidt*, 369 F. Supp. 877 (W.D. Wis. 1974); *Rinehart v. Brewer*, 360 F. Supp. 105 (S.D. Iowa 1973), *aff'd* 491 F.2d 705 (8th Cir. 1974); *National Prisoner Reform Association v. Sharkey*, 347 F. Supp. 1234 (D. R.I. 1972); Opinion of the Justice, ___ Mass. ___, 298 N.E.2d 829 (1973); *People v. Epps*, 71 Misc.2d 1075, 338 N.Y.S.2d 297 (1972).
46. *Remmers v. Brewer*, 475 F.2d 52 (8th Cir. 1973), *cert. denied* ___ U.S. ___, 43 U.S.L.W. 3281 (Nov. 12, 1974).
47. *Neal v. Georgia*, 469 F.2d 446 (5th Cir. 1972).
48. 416 U.S. 396 (1974).
49. *Id.* However, an earlier case has held that an incarcerated priest had no right to send out his sermons. *Berrigan v. Warden*, 322 F. Supp. 46 (D. Conn. 1971), *aff'd on other grounds*, 451 F.2d 790 (2d Cir. 1971).
50. *Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973); *Worley v. Bounds*, 355 F. Supp. 115 (W.D. N.C. 1973); *Wells v. McGinnis*, 344 F. Supp. 594 (S.D. N.Y. 1972); *Yarish v. Nelson*, 27 Cal. App.3d 893, 104 Cal. Rptr. 205 (1972).
51. *Guajardo v. McAdams*, 349 F. Supp. 211 (S.D. Tex. 1972), *vacated on procedural grounds* 491 F.2d 417 (5th Cir. 1973); *Brenneman v. Madigan*, 343 F. Supp. 128 (N.D. Cal. 1972). *See also Berch v. Stahl*, 373 F. Supp. 412 (W.D. N.C. 1974).
52. *Seale v. Manson*, 326 F. Supp. 1375 (D. Conn. 1971).
53. *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972). *But see People v. Von Diezelski*, 355 N.Y.S.2d 556 (1974).
54. *Conklin v. Hancock*, 334 F. Supp. 1119 (D. N.H. 1971).
55. *Corby v. Conboy*, 457 F.2d 251 (2d Cir. 1972).
56. *Wells v. McGinnis*, 344 F. Supp. 594 (S.D. N.Y. 1972).
57. *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972). *See also Adams v. Carlson*, 352 F. Supp. 882 (E.D. Ill. 1973), *aff'd* 488 F.2d 619 (7th Cir. 1973).
58. *Corby v. Conboy*, 457 F.2d 251 (2d Cir. 1972).
59. *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd* 501 F.2d 1291 (5th Cir. 1974).
60. *Cf. Procunier v. Martinez*, 416 U.S. 396 (1974).
61. *Brown v. Hartness*, 485 F.2d 238 (8th Cir. 1973).
62. *Lemon v. Zelker*, 358 F. Supp. 554 (S.D. N.Y. 1972).
63. 416 U.S. 396, 94 S. Ct. 1800 (1974).
64. *Id.* One Court has adopted this view; *see Morales v. Schmidt*, 494 F.2d 85 (5th Cir. 1974). For rationale behind earlier decisions to the contrary, *see, e.g., Woods v. Yeager*, 463 F.2d 223 (3rd Cir. 1972); *People v. Manganero*, 339 N.Y.S.2d 196 (1972).
65. *Gray v. Creamer*, 376 F. Supp. 675 (W.D. Pa. 1974).
66. *See, e.g., Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973).
67. *Adams v. Carlson*, 352 F. Supp. 882 (E.D. Ill. 1973), *aff'd* 488 F.2d 619 (7th Cir. 1973).
68. *Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973).
69. *Guajardo v. McAdams*, 349 F. Supp. 211 (S.D. Tex. 1972), *vacated on procedural grounds* 491 F.2d 417 (5th Cir. 1973).
70. *Preston v. Cowan*, 369 F. Supp. 14 (W.D. Ky. 1973); *see* text accompanying note, Section 2, *supra*.
71. 416 U.S. 396 (1974). See general discussion of case in Section 1 *supra*.
72. *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972).
73. *Simmons v. Russell*, 352 F. Supp. 572 (M.D. Pa. 1972). *See also Johnson v. Anderson*, 370 F. Supp. 1373 (D. Del. 1974).
74. *Procunier v. Martinez*, *supra* at fn. 12.
75. *See, e.g., Sinclair v. Henderson*, 331 F. Supp. 1123 (E.D. La. 1971).
76. 416 U.S. 396 (1974).
77. *Pinkston v. Bensinger*, 359 F. Supp. 95 (S.D. Ill. 1973).
78. *Rhem v. Malcolm*, 371 F. Supp. 594 (S.D. N.Y. 1974), *aff'd* 507 F.2d 333 (2d Cir. 1974).
79. *Mathis v. Superior Court*, 28 Cal. App.3d 1038, 105 Cal. Rptr. 126 (1972).
80. *Rhem v. Malcolm*, 371 F. Supp. 594 (S.D. N.Y. 1974), *aff'd* 507 F.2d 333 (2d Cir. 1974); *Patterson v. Walters*, 363 F. Supp. 486 (W.D. Pa. 1973).
81. *Rowland v. Wolff*, 336 F. Supp. 257 (D. Neb. 1971); *Seale v. Manson*, 326 F. Supp. 1375 (D. Conn. 1971).
82. *Pinkston v. Bensinger*, 359 F. Supp. 95 (S.D. Ill. 1973).
83. *Rhem v. Malcolm*, 371 F. Supp. 594 (S.D. N.Y. 1974), *aff'd* 507 F.2d 332 (2d Cir. 1974). *Cf. Claybrone v. Long*, 371 F. Supp. 1320 (M.D. Ala. 1974).
84. *Thomas v. Brierley*, 481 F.2d 660 (3d Cir. 1973). *Cf. Almond v. Kent*, 459 F.2d 200 (4th Cir. 1972).
85. *United States ex rel. Miller v. Twomey*, 479 F.2d 701 (7th Cir. 1973), *cert. denied* 414 U.S. 1146; *Rowland v. Wolff*, 336 F. Supp. 257 (D. Neb. 1971); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971).
86. 364 F. Supp. 719 (S.D. Tex. 1973).
87. *Id.*
88. 417 U.S. 817 (1974).
89. *Thomas v. Brierley*, 481 F.2d 660 (3d Cir. 1973).
90. *Henry v. Van Cleve*, 469 F.2d 687 (5th Cir. 1972). *Cf. Brenneman v. Madigan*, 343 F. Supp. 128 (N.D. Cal. 1972).
91. *E.g., Stuart v. Heard*, 359 F. Supp. 921 (S.D. Tex. 1973).
92. *Id.*; *Wilkinson v. McManus*, ___ Minn. ___, 214 N.W.2d 671 (1974).
93. 381 U.S. 479 (1965).
94. 388 U.S. 1 (1967).
95. 382 F. Supp. 996 (D. Wyo. 1974).
96. *Rhem v. Malcolm*, 371 F. Supp. 594 (S.D. N.Y. 1974), *aff'd* 507 F.2d 333 (2d Cir. 1974).
97. *Christman v. Skinner*, 468 F.2d 723 (2d Cir. 1972).
98. *People v. Finchum*, 33 Cal. App.3d 787, 109 Cal. Rptr. 319 (1973).
99. Certain prisoner transfer cases (*see* Section 17, *infra*.) may be interpreted as indicating that visitation may be becoming a "right." For example, one case held that a prisoner to be transferred more than 2,000 miles from his family suffered a grievous loss." *Capitan v. Cupp*, 356 F. Supp. 303 (D. Or. 1972). However, once a transfer hearing was conducted, such a transfer would be upheld. It is therefore unclear whether transfer cases support the contention that visitation is a "right."



Section 5

Access to Media

Access to Particular Books, Periodicals, Etc.

Pre-trial detainees should not be denied the right to receive a book through the mail or from any other source if such publication is available to the public generally.[1] Thus, a regulation which prevents receipt by a detainee of any publication other than those sent directly from the publisher has been held to be constitutionally invalid.[2] Similarly, restrictions on the availability of daily newspapers in any prison, but especially in one housing pre-trial detainees, must be affirmatively justified or will be held to be invalid.[3] Of course, detainee possession of such reading matter may be preceded by a careful examination for contraband.[4]

Affirmative justification for official action is the key to successful regulation of inmate access to reading matter. The first amendment rights to hold and express beliefs and to receive information is one which the courts will protect with "special solicitude."[5] In fact, the Supreme Court has stated that any system of prior restraint on expression comes to the courts bearing a heavy presumption against its constitutional validity.[6] The lower courts have specifically recognized that the first amendment freedom to receive ideas of every sort extends to an individual who has been convicted of a crime and imprisoned.[7] This right of state inmates is protected by the due process and equal protection clauses of the fourteenth amendment.[8]

On the other hand, the first amendment rights of prisoners are by no means absolute. Prison authorities remain free to regulate inmate access to reading matter. Such regulation, however, must not be such as to abrogate the inmate's rights, nor more restrictive than is justified by the perceived need.[9] Instead, prison administrators must realize that the inmate has a constitutional right to read whatever he pleases and that only a compelling state interest centering on prison security, or a clear and present danger of a breach of prison discipline, or some substantial interest in orderly institutional administration can justify curtailment of such a constitutional right.[10] Some courts allow limitations on access to reading matter to prevent unrest or to punish misbehavior.[11] Others require prison administrators to prove that the interest of the state in maintaining order and discipline actually outweighs the interests of inmates in freely exercising their first amendment rights.[12]

The right to receive publications is constitutional; it is not a matter of administrative grace.[13] Courts will not be reluctant to strike down prison regulations which are found to be unreasonable, arbitrary, or not reasonably related to the needs of penal administration.[14] Therefore, convicted criminals cannot constitutionally be subjected to a regime under which their rights are dependent upon actions of prison officials wholly unaccountable in the exercise of their power.[15]

Where broad, all-inclusive restrictions on first amendment rights are placed into effect, the state must justify such restrictions with solid fact, not surmise.[16] For example, when a prison attempted to suppress the book *Soul on Ice,* the allegation that "there are too many weak-minded people in this unit" was not adequate to justify suppression.[17] In another case, claims of state prison authorities that free access to newspapers had a disruptive effect on prisoners and that accumulations of newspapers raised serious problems of fire prevention did not constitute a basis for a total restriction on inmate access to news.[18] Instead, the state must prove that the interception of a particular copy of a newspaper will promote a compelling state interest,[19] such as institutional security. In addition, authorities are required to show that prison security is at stake before racial minority and political publications may be excluded from the prison.[20] For this reason it has been held that a black militant inmate may possess militant publications until such time as the state can produce evidence that the inmate causes such materials to be circulated while he avocates overthrow of the institution.[21]

A non-discriminatory rule cutting off access to books, magazines and periodicals while the inmate is in solitary confinement has been held to serve state interest in the discipline of an inmate. Delay of access to reading materials occasioned by such a rule involves no compromise of first amendment rights, and enforcement of the rule is not considered to abridge improperly the rights of persons so confined to free expression under the first amendment.[22] The Supreme Court in *Procunier v. Martinez* reserved a similar question of whether access to mail may be limited as a disciplinary sanction.[23]

Prisoner access to allegedly obscene materials is currently an unsettled area of prison law. In a very recent case correctional officers denied an inmate, without judicial process, the opportunity to read books which dealt with sexual matters. The court held that such action denied the inmate rights secured to him by the first and fourteenth amendments.[24] It is therefore apparent that any deprivation on obscenity grounds requires appropriate review. There are two traditional grounds upon which a sanction to deprive an inmate of reading material may be obtained.[25] The first of these states that if prison officials can convince a court that the material is obscene under Supreme Court standards, then a prohibition of such materials will be upheld. But the Supreme Court has recently ruled that obscenity questions will be decided on the basis of local community standards.[26] If the "local community" is adjudged to be the community in the vicinity of the prison, materials available in that community must not be prohibited, under this test, inside the prison. However, it is possible that the "local community" in such a case would be held to refer to the prison population itself. Ironically, if this approach is adopted, it is unlikely that prison administrators will be able to satisfy the Supreme Court's requirements.

The alternative ground is to show that non-suppression of a particular allegedly obscene book will cause a clear and present danger of homosexual assault. Again, such an allegation must be proven by fact and not by surmise.[27] Otherwise, allegedly obscene materials could be banned arbitrarily and unconstitutionally.[28]

Prison officials may make reasonable regulations as to the circulation of magazines, newspapers, and books, and the courts generally will not interfere in such administrative matters.[29] Officials have some, but not unlimited, discretion over the amount of material which may be kept in a cell[30] and over the number of publications received by each inmate.[31] These restrictions are justified on grounds of administrative convenience as they reduce the burden of examining an unduly large number of incoming materials. In addition, considerations of space, sanitation, safety and orderliness permit restrictions on an inmate's possession of reading matter which would be constitutionally offensive if ordinary citizens were involved.[32] So long as prison officials do not abuse their authority they may reasonably restrict the number of publications received and retained by an inmate.

Procedural Safeguards

Preservation of first amendment rights in prison depends upon procedures as well as upon the standards by which publications ordered by inmates are judged.[33] Whether procedural protections are due in any particular instance depends not upon whether the governmental benefit is characterized as a "right" or a "privilege," but upon whether the individual will suffer a grievous loss. The question is concerned not only with the weight of the individual's interest but also with whether the interest is within the purview of the "liberty" or "property" language of the fourteenth amendment.[34] Once it is determined that due process procedures apply, there is flexibility in determining what procedural protections are demanded in the making of a given decision.[35] The Supreme Court has held that the decision to censor or withhold any material from an inmate *must* be accompanied by minimum procedural safeguards against arbitrariness or error.[36] It is therefore clear that corrections officers cannot deny an inmate access to reading materials he has ordered unless such officials promptly initiate proceedings against the material.[37]

Minimal procedural requirements for censorship of reading materials are set forth in *Sostre v. Otis.*[38] The court required the screening of incoming literature by a committee made up of prison officials from a number of disciplines. The evaluation was to be guided by a presumption that the literature was acceptable. Any rejection had to be based on specific published criteria, and the decision had to be made within specified time limits. The inmate had to be given notice of the reason for any delay and was to be permitted to present arguments to the committee. This test has been adopted by most jurisdictions which have considered the question.[39] It has also been applied when the right to interview or be interviewed is being considered.[40]

Some courts have gone further. For example, the District Court for the Southern District of Texas has held that, since the inmate is permitted to present arguments for the acceptance of questioned material, due process requires that he be allowed to review the material at least once before the hearing.[41] Such a review is necessary if the inmate is to present an informed argument; but the right to receive a review copy invalidates the whole process—the inmate will have already read the publication which he is asking that he have access to. Such a procedure does, however, limit distribution to a single inmate.

The adoption of sound procedures is wise, for once due process is accorded, courts will not insert themselves in censorship decisions.[42]

Access to the Inmate by the Media

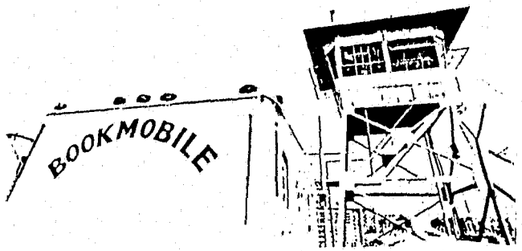
Interviews of inmates by media representatives has been an area of considerable recent litigation. It is generally recognized that access by the news media to the inside of a prison is the most effective way to give meaning to the rule that the public has a right to know what goes on inside prison walls.[43]

The first amendment freedom of the press doctrine runs through all press interview cases. While it is recognized that the right to publish does not include an unrestricted right to gather information or untrammeled access to inmates,[44] the right would be empty if restrictions prevented the press from informing the public of newsworthy events.

One of the most consistently litigated questions has centered on permissible official action when the press requests an interview with a particular inmate. The Court of Appeals for the Ninth Circuit has adopted the view that if prison authorities were to grant news media extensive access to prison facilities and personnel and the right to unlimited confidential correspondence with inmates, a bar on interviews with particular inmates would not unduly restrict the flow of information to the public.[45] The major rationale for this view is the "big wheel" theory. If an inmate were frequently the subject of attention by the press, his stature in the eyes of other inmates would increase. If he then preached against prison discipline in the press, he could cause unrest in the prison. Hence, the interview with a particular inmate may be forbidden.[46]

The opposite view has been adopted by the Court of Appeals for the District of Columbia.[47] That court emphasized that the right of access to newsworthy events is a necessary antecedent to the right to publish and that any state-imposed restriction on that right would be justified only after a showing of compelling state interest. The court held free communication with inmates by mail to be inadequate since such communication lacks the spontaneity and flexibility of a personal interview and denies the reporter the ability to follow a line of questioning wherever it may lead. This court stated that the right to interview is necessary to freedom of the press, and it expressly rejected the "big wheel" theory.

Two recent Supreme Court decisions have firmly settled the conflict.[48] In *Pell v. Procunier,*[49] prison inmates challenged a California provision which forbade press interviews with specific inmates. They maintained that such a regulation violated their first



and fourteenth amendment rights of free speech. The Court recognized that inmates retain all first amendment rights which are not inconsistent with incarceration and that challenges to alleged restrictions on such rights must be analyzed by balancing the rights against the goals and needs of the corrections system.

In *Pell,* the Court emphasized that several alternative methods of communications with the press were kept open. First, under the *Procunier v. Martinez*[50] doctrine, the inmate was free to correspond by mail with media representatives. Second, the California visitation procedures, which allow reasonably open visitation by family, friends, clergymen and attorneys, allow for further communication from the inmate to his visitor and from them to the press.

In addition, in California newsmen are free to visit the prisons, speak briefly with inmates they encounter, and request an interview with an inmate who is then selected at random by prison authorities. These procedures permit the press to report on conditions within the prisons.

In considering the "big wheel" theory, the Court held that the prison's interest in security, together with available alternative methods of communication, outweighs the inmate's interest in individual interviews and therefore upheld the California procedure.[51]

In the second case, *Saxbe v. Washington Post Co.*,[52] media representatives challenged a federal regulation which prohibited personal interviews with specific inmates. The Court held that the regulation did not abridge the freedom of the press since it did not deny press access to any sources of information available to the general public. Instead, the regulation was merely a particularized application of the general rule that no one, other than family members, friends, clergymen and attorneys, may enter a prison and designate a particular inmate whom he would like to meet.[53]

These two decisions make it extraordinarily easy for prison authorities to prohibit press interviews of specific inmates. Since *Procunier v. Martinez*[54] allows inmate communication by mail with the media, administrators wishing to prohibit specific interviews should insure that visitation privileges are ample and allow the press to visit the prison freely, to speak briefly with inmates encountered during the visit, and perhaps to interview at greater length an inmate selected at random by the prison authorities.

Alternative means of communication between the press and the media, such as those suggested, are necessary to the decision not to grant specific interviews. As the Court noted, "So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that, in drawing such lines, prison officials must be afforded great latitude."[55]

If the alternative lines of communication are not available, it is reasonable to expect that the Court will require prison authorities to honor press requests for individual interviews. A short circuit in the alternate lines of communications could be caused by the inability of an inmate to take advantage of his right to communicate because of, for example, his illiteracy. But the Court suggested that this difficulty could be surmounted by allowing the inmate the assistance of others in preparing his correspondence.[56] Another source of difficulty might come with overly restrictive visiting privileges. Visitation by attorneys[57] and clergymen[58] is an established constitutional right. Thus, the only possible restrictions on visiting greater than were factually present in *Pell* would be in the area of visits from family and friends. No sound reason can be advanced for excluding visits from close family members, but restrictions of visits by friends would probably not unduly limit the alternate means of communication.

The monitoring of inmate-media interviews by prison authorities is currently held acceptable. However, the inmate may not be subjected to reprisal or retaliation because of what he has said to the interviewer. The correctional officer may monitor the conversation only to prevent the discussion of escape plans or the transfer of contraband and may not interrupt or interfere with the conversation in any way.[59] Corrections authorities may use methods to monitor interviews other than the physical presence of an officer, such as the use of a tape recorder; but, if such a device is used, the newsman and the inmate should be given prior notice.[60]

An inmate has a limited right to publish his thoughts and feelings while in prison, but such activity is subject to reasonable regulation by prison authorities. The determination of which prisoner-written articles would be circulated throughout the prison population *via* an inmate periodical has been considered a matter within the discretion of state authorities.[61] A regulation allowing an inmate to submit articles for publication as long as they do not deal with certain specified subjects, such as criminal careers, was held to be constitutional.[62]

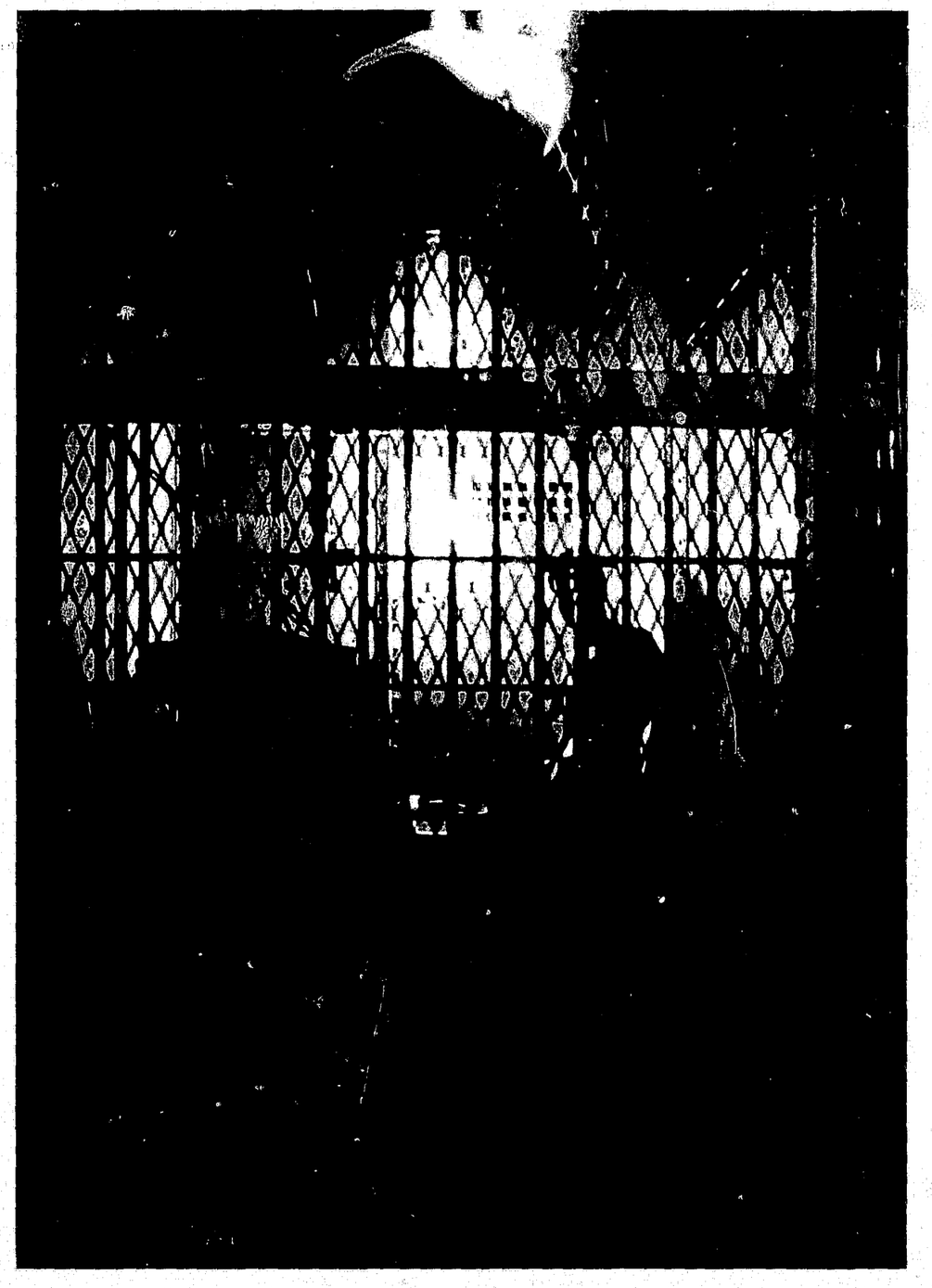
In another recent case,[63] Vermont inmates were publishing a prison newspaper and refused to follow guidelines set out in an agreement with prison officials. Contrary to the guidelines, they printed articles which attacked certain individuals. Officials refused distribution outside the prison, attempted to suppress delivery within the prison, and finally shut down the operation of the newspaper. The inmate editors and one outside subscriber filed suit. The district court held that the principles of *Procunier v. Martinez*[64] regulating the censorship of mail applied equally to the censorship of a prison newspaper and that no prison newspaper may be censored unless it constitutes a threat to security, order, or rehabilitation. In examining the articles complained of, the court found no such threat. In deciding whether termination of the operation of the paper was proper, the court found few prison newspaper cases. It looked instead to cases involving school papers. The court held that although papers may be discontinued for reasons wholly unrelated to the first amendment, the paper cannot be terminated because officials object to editorial comment. Nor does it matter that prison funds are expended when freedom of expression is involved. The court found, however, that regulation, including prior censorship of issues, is proper when legitimate governmental interests are involved.[65] It authorized such regulations provided they include speedy review of submitted material, a statement of reasons for any rejection, and an opportunity for rebuttal by the editorial staff before an official not involved in the original determination.

In addition to censoring material, officials can apparently charge the inmate a portion of royalties and profits from writings published while in prison, but only if the charge is reasonably related to costs or unless there is some other valid institutional purpose.[66]

FOOTNOTES

1. *Inmates of Milwaukee County Jail v. Petersen*, 353 F. Supp. 1157 (E.D. Wis. 1973).
2. *Rhem v. Malcolm*, 371 F. Supp. 594 (S.D. N.Y. 1974), *aff'd and remanded* ___ F.2d ___ (2d Cir. No. 329, Nov. 8, 1974).

3. *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972).
4. *Inmates of Milwaukee County Jail v. Petersen*, 363 F. Supp. 1157 (E.D. Wis. 1973); *Laaman v. Hancock*, 351 F. Supp. 1265 (D. N.H. 1972).
5. *Newkirk v. Butler*, 364 F. Supp. 497 (S.D. N.Y. 1973), *aff'd in relevant part* 499 F.2d 1214 (2d Cir. 1974); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971).
6. *Heller v. New York*, 413 U.S. 483 (1973).
7. *Johnson v. Anderson*, 370 F. Supp. 1373 (D. Del. 1974); *Gaugh v. Schmidt*, 367 F. Supp. 877 (W.D. Wis. 1974); *cf. Pell v. Procunier*, 417 U.S. 817 (1974).
8. *See, e.g., Urbano v. McCorkle*, 334 F. Supp. 161 (D. N.J. 1971), *aff'd* 481 F.2d 1400 (3d Cir. 1973).
9. *Newkirk v. Butler*, 364 F. Supp. 497 (S.D. N.Y. 1973), *aff'd in relevant part* 499 F.2d 1214 (2d Cir. 1974); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971).
10. *Seale v. Manson*, 326 F. Supp. 1375 (D. Conn. 1971). *See also Laaman v. Hancock*, 351 F. Supp. 1265 (D. N.J. 1972).
11. *Worley v. Bounds*, 355 F. Supp. 115 (W.D. N.C. 1973). *See also Johnson v. Anderson*, 370 F. Supp. 1373 (D. Del. 1974).
12. *Hoggro v. Pontesso*, 456 F.2d 917 (10th Cir. 1972).
13. *Gaugh v. Schmidt*, 369 F. Supp. 877 (W.D. Wis. 1974).
14. *United States ex rel. Miller v. Twomey*, 479 F.2d 701 (7th Cir. 1973); *Seale v. Manson*, 326 F. Supp. 1375 (D. Conn. 1971).
15. *Brenneman v. Madigan*, 343 F. Supp. 128 (N.D. Cal. 1972).
16. *Washington Post Company v. Kleindienst*, 357 F. Supp. 770 (D. D.C. 1973), *aff'd* 494 F.2d 994 (D.C. Cir. 1974), *rev'd on other grounds* 417 U.S. 843 (1974).
17. *Worley v. Bounds*, 355 F. Supp. 115, 119 (W.D. N.C. 1973).
18. *United States ex rel. Marricone v. Corso*, 365 F. Supp. 576 (E.D. N.Y. 1973).
19. *Rowland v. Sigler*, 327 F. Supp. 821 (D. Neb. 1971), *aff'd* 452 F.2d 1005 (8th Cir. 1971).
20. *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972).
21. *Larkins v. Oswald*, 364 F. Supp. 1374 (W.D. N.Y. 1973).
22. *Johnson v. Anderson*, 370 F. Supp. 1373 (D. Del. 1974).
23. 416 U.S. 396 at fn. 12 (1974).
24. *Gaugh v. Schmidt*, 369 F. Supp. 877 (W.D. Wis. 1974).
25. *See generally Emerging Rights* at 84.
26. *Miller v. California*, 413 U.S. 15 (1973), *rehearing denied* 414 U.S. 881.
27. *Cf. Washington Post Company v. Kleindienst*, 357 F. Supp. 770 (D.D.C. 1973), *aff'd* 494 F.2d 994 (D.C. Cir. 1974), *rev'd on other grounds* 417 U.S. 843 (1974).
28. *See* Notes 14-15 *supra.*
29. *Theriault v. Carlson*, 339 F. Supp. 375 (N.D. Ga. 1972), *rev'd on other grounds* 495 F.2d 390 (5th Cir. 1974).
30. *Adams v. Carlson*, 488 F.2d 619 (7th Cir. 1973).
31. *Laaman v. Hancock*, 351 F. Supp. 1265 (D. N.H. 1972).
32. *Id.*
33. *Gaugh v. Schmidt*, 369 F. Supp. 877 (W.D. Wis. 1974).
34. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Morrissey v. Brewer*, 408 U.S. 471 (1972).
35. *Morrissey v. Brewer*, 408 U.S. 471 (1972).
36. *Procunier v. Martinez*, 416 U.S. 396 (1974).
37. *Guajardo v. McAdams*, 349 F. Supp. 211 (S.D. Tex. 1972), *vacated on procedural grounds* 491 F.2d 417 (5th Cir. 1973), *cert. denied* ___ U.S. ___, 94 S. Ct. 2403 (1974).
38. 330 F. Supp. 941 (S.D. N.Y. 1971).
39. *Id. See also Capitan v. Cupp*, 356 F. Supp. 302 (D. Ore. 1972); *Laaman v. Hancock*, 351 F. Supp. 1265 (D. N.H. 1972); *Burnham v. Oswald*, 342 F. Supp. 880 (W.D. N.Y. 1972).
40. *Burnham v. Oswald*, 342 F. Supp. 880 (W.D. N.Y. 1972).
41. *Guajardo v. McAdams*, 349 F. Supp. 211 (S.D. Tex. 1972), *vacated on procedural grounds* 491 F.2d 417 (5th Cir. 1973), *cert. denied* ___ U.S. ___, 94 S. Ct. 2403 (1974).
42. Unless the result was clearly arbitrary or capricious. *See, e.g., Holland v. Oliver*, 350 F. Supp. 485 (E.D. Va. 1972).
43. *See, e.g., Burnham v. Oswald*, 342 F. Supp. 880 (W.D. N.Y. 1972).
44. *Yarish v. Nelson*, 27 Cal. App.3d 893, 104 Cal. Rptr. 205 (1972).
45. *Seattle-Tacoma Newspaper Guild v. Parker*, 480 F.2d 1062 (9th Cir. 1973).
46. *See Seale v. Manson*, 326 F. Supp. 1375 (D. Conn. 1971).
47. *Washington Post Company v. Kleindienst*, 494 F.2d 994 (D.C. Cir. 1974).
48. *Saxbe v. Washington Post Company*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).
49. 416 U.S. 396 (1974).
50. 416 U.S. 396 (1974).
51. *Pell v. Procunier*, 417 U.S. 817 (1974).
52. 417 U.S. 843 (1974).
53. *Id.*
54. 416 U.S. 396 (1974).
55. *Pell v. Procunier*, 417 U.S. 817 (1974).
56. *Id.*, at fn. 5. *Cf. Johnson v. Avery*, 393 U.S. 483 (1969).
57. *See* Section 2 *supra.*
58. *See* Section 3 *supra.*
59. *Burnham v. Oswald*, 342 F. Supp. 880 (W.D. N.Y. 1972).
60. *Id.*
61. *See Jones v. Rouse*, 341 F. Supp. 1292 (M.D. Fla. 1972).
62. *Theriault v. Carlson*, 339 F. Supp. 375 (N.D. Ga. 1972), *vacated on other grounds*, 495 F.2d 390 (5th Cir. 1974).
63. *The Luparar v. Stoneman*, 382 F. Supp. 495 (D. Vt. 1974).
64. 416 U.S. 396 (1974).
65. *See also Jones v. Rouse*, 341 F. Supp. 1292 (M.D. Fla. 1972).
66. *In re Geldern*, 97 Cal. Rptr. 598, 489 P.2d 578 (1971).



Section 6

Grievances

Resolution of inmate grievances in a swift, effective manner is a major goal of both inmates and prison officials; but grievance resolution by court decision is slow, time-consuming and often unsatisfactory to both groups. While courts must remain as final arbiters of matters of constitutional importance, alternatives to the lengthy court process are desirable since prolonging a controversy is beneficial to neither inmates nor prison officials. Administrators are seeking suitable alternatives and courts are providing encouragement.

In *Procunier v. Martinez* the Supreme Court observed in a footnote that courts are "ill-suited to act as the front-line agencies for the infinite variety of prisoner complaints" and that "the capacity of our criminal justice system to deal fairly and fully with legitimate claims will be impaired by a burgeoning increase of frivolous prisoner complaints."[1] The sheer volume of prisoner claims has thus led many to the conclusion that alternative means of resolving these conflicts must be developed.

Chief Justice Warren Burger of the Supreme Court has used the weight of his office to propose reform in processing prisoner complaints.[2] He has called for creation of a statutory administrative procedure to hear complaints of federal prisoners and would require that an inmate resort to those procedures prior to filing a complaint in federal court. Second, he has called for the establishment of informal grievance procedures in state systems.

On February 14, 1974, the Bureau of Prisons responded with a policy statement,[3] the purpose of which is to provide a "viable complaint procedure (which) will serve the inmates, the administration, and the courts."[4] The policy requires that a local warden answer prisoner complaints in writing within fifteen days. If relief is not granted, appeal may be made to the director, who must answer within thirty days. The fifth circuit has been sufficiently impressed with the procedure to require an inmate to resort to it prior to filing a claim in federal court.[5] It has done so even in a case apparently alleging violations of constitutional rights.[6] The requirement of exhaustion here is not particularly burdensome. The policy sets short maximum time limits in which a reply must be made, and the entire administrative process would take no more than forty-five days.

Some states have set up grievance mechanisms.[7] Maryland's statutory procedure was but recently enacted when the fourth circuit refused to require exhaustion of those remedies prior to the filing of an action under the Civil Rights Act.[8] The court noted that when the Grievance Commission became fully operative it might re-examine the question of whether exhaustion of state remedies was required. The apparent invitation of the fourth circuit was accepted later by a Maryland district court, which held that resort to the grievance procedures is required.[9] The opinion contains no discussion of cases which hold that exhaustion is not a prerequisite to federal jurisdiction under the Civil Rights Act.[10]

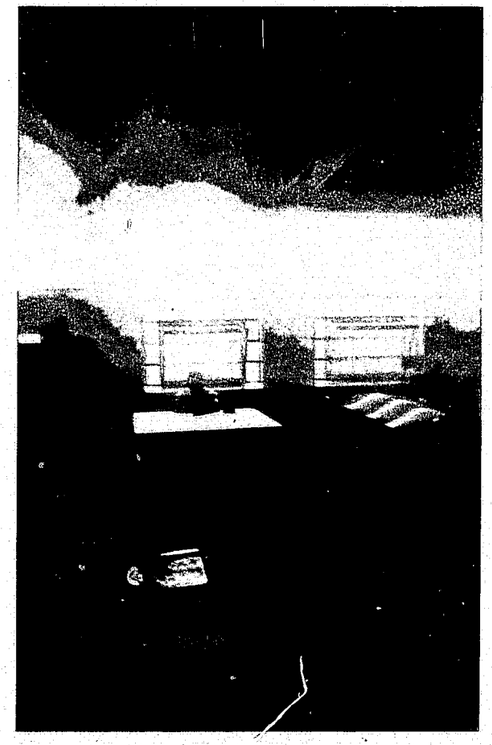
Other grievance procedures are being explored by administrative officials. The use of ombudsmen to investigate grievances is increasing.[11] Two basic models have emerged. In the first, the ombudsman reports directly to someone within the department of corrections in order to resolve grievances. In the other, the ombudsman has an independent statutory power base. The latter approach, of course, opens the correctional process to public scrutiny, while the former approach depends on the good faith of prison officials for its success.[12]

Inmate councils have been suggested and adopted as another method of solving inmate grievances.[13] The use of prison newspapers[14] and the use of impartial arbitrators with power to bind officials to their decisions[15] have also been suggested. Also, recent use of professional mediators from the Department of Justice's Community Relations Service has proved beneficial in solving prison disputes.[16]

The pay scale in prison industries is a source of many inmate grievances. One method being devised by prisoners to solve these grievances is the organization of prison labor unions. Although these unions are designed to solve labor problems, one judge has suggested that the union might be used to "seek more peaceful ways of resolving prison problems."[17] The judge agreed with the authors of an article in the Indiana Law Journal[18] that prison administrators should welcome unions. In the unlikely event that officials do so, the expected tide of cases exploring whether there is a right to unionize will be stemmed. Otherwise, we may expect to see rapid development in this area. In one recent case, the court balanced the first amendment rights to associate with others in a group and to take group action against the needs for security and order within the prison and held that there was no right to form a prisoners' union.[19]

FOOTNOTES

1. 416 U.S. 396, 94 S. Ct. 1800 at n. 9 (1974).
2. 59 A.B.A.J. 1125, 1128 (1973).
3. *See Thompson v. United States Federal Prison Industries*, 492 F.2d 1082, 1085 (5th Cir. 1974).
4. *Id.*
5. *E.g., Thompson v. United States Federal Prison Industries*, 492 F.2d 1082 (5th Cir. 1974).
6. *Jones v. Carlson*, 495 F.2d 209 (5th Cir. 1974); *see also Waddell v. Alldredge*, 480 F.2d 1078 (3d Cir. 1973).
7. *See* L. Singer and J. Keating, Prison Grievance Mechanisms, 19 Crime and Delinquency, 367 (1973).
8. *Hayes v. Secretary, Department of Public Safety*, 455 F.2d 798 (4th Cir. 1972).
9. *Hyde v. Fitzberger*, 365 F. Supp. 1021 (D. Md. 1973).
10. *E.g., Monroe v. Pape*, 365 U.S. 167 (1961); *Damico v. California*, 389 U.S. 416 (1967).
11. *See Inmate Grievance Procedures*, South Carolina Department of Corrections, Collective Violence Research Project (1973); L. Singer and J. Keating, Prison Grievance Mechanisms, 19 Crime and Delinquency 367, 373-74 (1973); Note, 3 Pac. L.J. 166 (1972).
12. *Id.*
13. *Inmate Grievance Procedures, supra* note 11 at 17-18; L. Singer *supra* note 11 at 371-72.
14. *Inmate Grievance Procedures, supra* note 11 at 18.
15. L. Singer, *supra* note 11 at 376-77.
16. *See Frazier v. Donnelon*, 381 F. Supp. 911 (E.D. La. 1974); *see also* 16 Cr. L. Rptr. 2104 (1974).
17. *Goodwin v. Oswald*, 462 F.2d 1237 (2d Cir. 1972) (concurring opinion).
18. Note, "Unionizing America's Prisons — Arbitration and State Use," 48 Ind. L.J. 493.
19. *Parka v. Manson*, ___ F. Supp. ___, 16 Cr. L. Rptr. 2257 (D. Conn. 1974).



Section 7

Grooming and Attire

Questions of grooming and attire have received limited attention from the courts during the past two years. Assertions continue to be made that regulations affecting grooming violate the constitutional rights of the inmate. The courts have met such claims with mixed reactions but are beginning to become more uniform in their approach to the problem. The major themes of this area of the law are therefore becoming identifiable, but there are signs of major dissatisfaction with the rationale for these decisions.

If an unincarcerated individual has no fundamental right to manage his own appearance, then prison authorities will have little trouble justifying grooming rules for prisoners. If, on the other hand, individuals do have such a fundamental right, then prison officials must justify any infringement, generally by showing a need based on the security of the institution.[1]

The courts have yet to reach a consensus, but the weight of authority indicates that unincarcerated civilians do have a right to determine their own personal appearance.[2] The Constitution limits the ability of a state to regulate the personal appearance of its citizens.[3] This limitation is the result of the theory that a choice of personal appearance is one ingredient of an individual's personal liberty. Courts therefore hold that any restriction on that right must be justified by a legitimate state interest that is reasonably related to the regulation.[4] The justification must comply with all due process safeguards.[5] One court has found a right to regulate one's own personal appearance founded upon the first, the ninth, and the fourteenth (the equal protection clause) amendments.[6] Another has found such a right in the "penumbra" of the Bill of Rights.[7]

This view has not been unanimously adopted. Courts occasionally hold that certain specified sections of the Constitution do *not* protect the "freedom of appearance" right.[8] The more prevalent view, however, recognizes the existence of a constitutional right, which may be limited as circumstances require,[9] to wear one's hair at the length one chooses.

Regardless of the view adopted towards free individuals, it is clear that prison officials may regulate the hair length of inmates within their care.[10] The state must show a rational basis for its regulation, reasonably related to a legitimate state interest.[11] The court must then weigh the competing interests of the inmate against those of the state and determine whether the restriction on individual freedom is proper.[12] To justify grooming restrictions, the needs of identification, health and security are usually advanced by prison administrators. These reasons are generally sufficient to counterbalance prisoner preferences.[13] For example, one court held that regulations of a federal correctional center which governed the length of hair were valid and reasonably supported asserted needs of identification and hygiene. Nor was the regulation unreasonable, the court maintained, even when applied to a scarred and lame American Indian prisoner who wished to return to "old Indian traditions and customs."[14] If the regulation applies equally to all convicted inmates, it will generally be upheld. Substantial dissatisfaction with these reasons has been shown by one dissenting judge, who found them "illusive."[15]

Permissible actions toward pre-trial detainees are more stringently limited. A recent New York case indicates that justifiable grooming regulations may be applied equally to pre-trial detainees and convicted prisoners without transgressing constitutional limitations.[16] This lower state court view, however, contradicts the weight of authority. Courts generally hold that imposition of normal prison grooming regulations on pre-trial detainees is a violation of due process.[17] Even separate regulations, applicable only to pre-trial detainees, will not be upheld unless *far* less severe than those which apply to the general prison population.[18]

When a prisoner categorizes his right to govern his personal appearance as he pleases as a religious freedom, he has no greater chance of success than if he makes a more conventional constitutional claim. For example, in a recent case prisoners claimed membership in a religious organization known as the "Church of the New Song." A tenet of that organization freed each man to project his own "natural image." The court was unimpressed and rejected a claim that a state prison regulation governing hair length violated members' freedom of religion.[19]

Punitive action may be taken against inmates who refuse to comply with prison grooming regulations. Indefinite placement of prisoners in administrative segregation for non-compliance with hair length regulations has been upheld against a claim of cruel and unusual punishment.[20] The regulation authorizing certain punishments must sufficiently identify the allowable degree of punishment to enable inmates to receive advance notice of possible sanctions. For example, it has been held that failure to have a conforming haircut would not amount to "flagrant or serious misconduct" within the meaning of a Nebraska statute which provided that "good time" could be withheld in cases of "assault, escape, attempt to escape, or other flagrant or serious misconduct."[21]

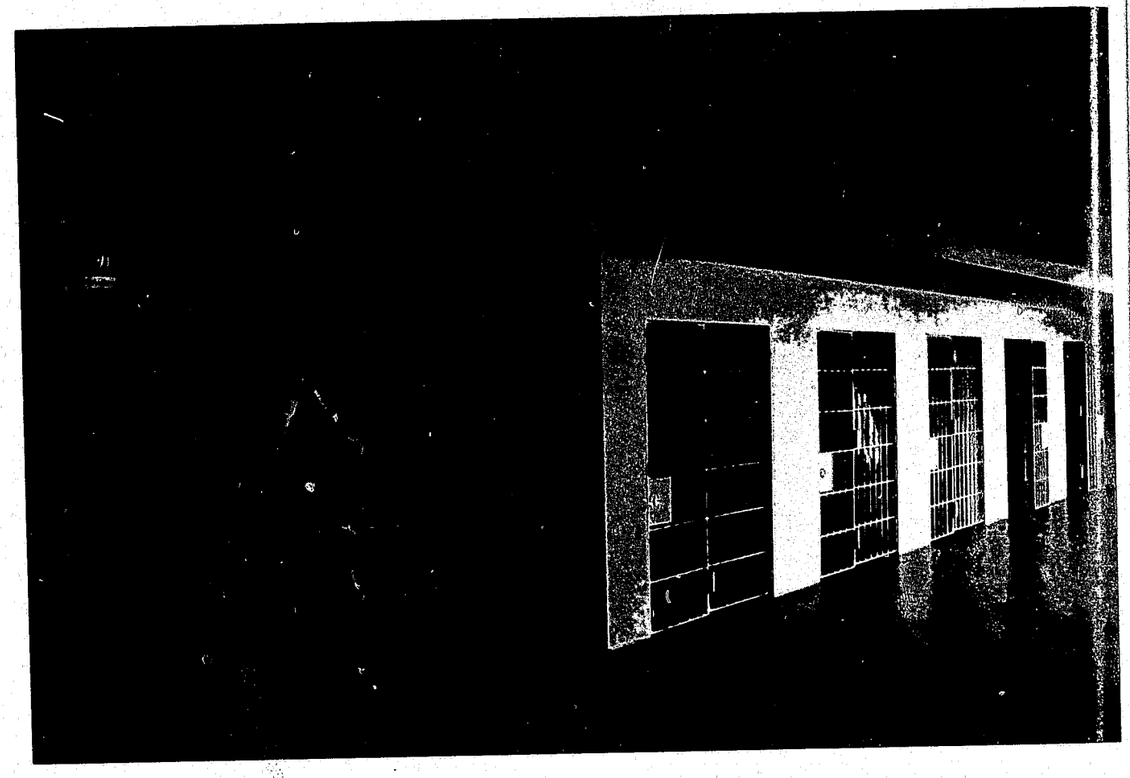
Another objection which has been raised against the validity of grooming regulations has been based on the ethnic character of regulations involved;[22] such regulations are said to be racially discriminatory in nature. When faced with such an argument, the courts have routinely rejected it. For example, in a North Carolina case, inmates alleged that prison regulations had the effect of prohibiting black inmates from wearing "Afro" haircuts. The court found no discrimination against Blacks because the regulation on length applied to everyone in the system. In addition, the regulation did not subject the inmates to cruel and unusual punishment or deprive them of property without due process of law.[23] In another case it was determined that classifications within the regulations of a federal correctional institution governing hair length were not unreasonable and were not violative of equal protection in spite of the fact that they made no provision for Indians while specifically authorizing Blacks to wear "Afros."[24]

There is little case law dealing with permissible inmate attire, but apparently attire is more easily regulated than is grooming. The applicable cases have generally dealt with the wearing of medallions. Restrictions imposed by prison officials as to possession of medals worn around the neck are consistently held to be within the discretion of prison officials by reason of the potential danger of such medals as weapons.[25] However, the exercise of discretion may not be predicated on an administrative determination that certain medals are and others are not religious in character.[26] The determination must be concerned with the potential danger of the medal as a weapon. Thus, an individual wearing a peace medallion may not be punished for his political views,[27] but probably may be disciplined for possession of a potential weapon.

The trend in this area of the law is readily identifiable. If a prison regulation restricts an inmate's freedom to regulate his personal appearance as he pleases, it must be based on a valid state interest. Concern with safety, security, identification and hygiene are valid interests. Courts have accepted these justifications without examining their substance, and properly phrased grooming and attire regulations uniformly applied have been virtually immune from successful attack.

FOOTNOTES

1. See *Emerging Rights* at 98.
2. See, e.g., *Arnold v. Carpenter*, 459 F.2d 939 (7th Cir. 1972).
3. *Owen v. Barry*, 483 F.2d 1126 (2nd Cir. 1973). *See also Garmon v. Warner*, 358 F. Supp. 206 (W.D. N.C. 1973); *Smith v. Sampson*, 349 F. Supp. 286 (D. N.H. 1972).
4. *Id.*
5. *Harris v. Kaine*, 352 F. Supp. 769 (S.D. N.Y. 1972); *Wallace v. Ford*, 346 F. Supp. 156 (E.D. Ark. 1972).
6. *Howard v. Warden*, 348 F. Supp. 1204 (E.D. Va. 1972), *aff'd as to one plaintiff* 474 F.2d 1342 (4th Cir. 1973).
7. *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied* 398 U.S. 937.
8. For example, one court has specifically held that the ninth amendment creates no such right. *Pendley v. Mingus Union High School District*, 109 Az. 18, 504 P.2d 919 (1972), *rev'd on other grounds*, 498 P.2d 586.
9. *Brown v. Schlesinger*, 365 F. Supp. 1204 (E.D. Va. 1973).
10. *See, e.g., Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972). However, allegations asserting the unconstitutionality of such prison regulations do state a claim which should be heard by the courts. *Howard v. Warden*, 348 F. Supp. 1204 (E.D. Va. 1972).
11. *Rinehart v. Brewer*, 360 F. Supp. 105 (S.D. Iowa 1973), *aff'd* 491 F.2d 705 (8th Cir. 1974).
12. *Brown v. Schlesinger*, 365 F. Supp. 1204 (E.D. Va. 1973); *Rinehart v. Brewer*, 360 F. Supp. 105 (S.D. Iowa 1973). *See also Owen v. Barry*, 483 F.2d 1126 (2d Cir. 1973).
13. *Collins v. Haga*, 373 F. Supp. 923 (W.D. Va. 1974) (sanitation and identification); *Rinehart v. Brewer*, 360 F. Supp. 105 (S.D. Iowa 1973) (identification, health and safety); *Howard v. Warden*, 348 F. Supp. 1204 (E.D. Va. 1972) (identification and security); *Williams v. Batton*, 342 F. Supp. 1110 (E.D. N.C. 1972) (identification, hygiene and security).
14. *United States ex rel. Goings v. Aaron*, 350 F. Supp. 1 (D. Minn. 1972).
15. *Rinehart v. Brewer*, 491 F.2d 705 (8th Cir. 1974) (dissenting opinion).
16. *People v. Von Diezelski*, 78 Misc.2d 69, 355 N.Y.S.2d 556 (1974).
17. *See, e.g., Smith v. Sampson*, 349 F. Supp. 268 (D. N.H. 1972).
18. *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972).
19. *Rinehart v. Brewer*, 360 F. Supp. 105 (S.D. Iowa 1973), *aff'd* 491 F.2d 705 (8th Cir. 1974).
20. *Id.*
21. *Wolff v. McDonnell*, 342 F. Supp. 616 (D. Neb. 1972), *aff'd* 483 F.2d 1059 (8th Cir.). *Aff'd in part, rev'd in part* 418 U.S. 539 (1974) with the relevant part not discussed.
22. *See Emerging Rights* at 99.
23. *Williams v. Batton*, 342 F. Supp. 1110 (E.D. N.C. 1972).
24. *United States ex rel. Goings v. Aaron*, 350 F. Supp. 1 (D. Minn. 1972).
25. *See, e.g., Rowland v. Jones*, 452 F.2d 1005 (8th Cir. 1971).
26. *Id.*
27. *Sczerbaty v. Oswald*, 341 F. Supp. 571 (S.D. N.Y. 1972).



Section 8

Disciplinary Methods

After incarceration, a prisoner is subject to institutional regulations and may be punished for violations of those regulations. Limitations on the actions which may be punished, the amount of punishment, and the methods by which punishment is determined arise from the eighth amendment ban on cruel and unusual punishment and the fourteenth amendment right to due process.

Since the constitutional guarantees of the eighth and fourteenth amendments do not apply if action is not punitive, a distinction must first be made between punitive and non-punitive measures. For this reason, administrators often seek to denominate classification and transfer decisions and decisions to place persons in administrative segregation non-punitive. A test used to cut through the nomenclature battle is whether the action causes the inmate a substantial deprivation.[1] A transfer classified as demotional was deemed punitive in *United States ex rel. Neal v. Wolfe*. *Nimmo v. Simpson*[3] regarded reclassification as punitive when the basis for the reclassification was the same as the basis for a disciplinary proceeding. Administrative segregation does not escape being punishment by the placement of talismanic labels such as "threat to security" on the person detained there. Some factual basis for the label must be shown.[4]

Cruel and Unusual Punishment

Once an action is determined to be punitive, some protection is afforded a prisoner by the ban on cruel and unusual punishment. Punishment may be cruel and unusual *per se,* as with the rack and the screw, or cruel and unusual as applied, because of the lack of relationship between the punishment administered and the action which precipitated it.[5] Traditional analysis of cruel and unusual punishment had focused upon physical deprivations such as a lack of heat[6] or hygiene.[7] More recent cases have also considered degrading psychological effects of some types of confinement cruel and unusual punishment.[8]

The use of control chemicals as a means of maintaining or re-establishing security in a prison has been much litigated. The use of these chemicals, despite their known capacity for damage to eyes and sensitive nasal passages, is not recognized as cruel and unusual punishment *per se.* Instead, courts examine the circumstances of the use of the gas and defer heavily to the judgment of the prison guard or administrator who must make a rapid decision in an emergency. Thus, the use of tear gas was deemed proper during a riot when alternative means of control were ineffective;[9] and the use of mace to control a screaming, belligerent prison is not considered cruel and unusual punishment.[10] However, the use of

these chemicals, while proper in an emergency, is improper as summary punishment for minor offenses or as a tool for the maintenance of daily control.[11]

The use of drugs for the purpose of controlling behavior is becoming more and more widespread. It is natural that their use, as well as the use of psychological methods of so-called "behavior modification," will be resented by inmates who have not consented to such treatment. And they will and have sued to enjoin such treatment.[12] It is a subject bound to raise deep emotion. There is, on the one hand, the Orwellian spectre of Big Brother controlling the minds of human beings and, on the other, the claim that these people need treatment, coupled with the claim that the treatment works: the bellicose are made pacific; the naughty, nice. The cases thus far have not elicited philosophical debate, but rather have proceeded on a traditional analysis of whether the use of the drug is treatment or punishment. Not surprisingly the use of a vomit-inducing drug as "aversive stimuli" was classified as punishment, and its use on non-consenting juveniles forbidden.[13] Its use on consenting juveniles was limited to situations in which a doctor individually authorized its use. Similarly the use of tranquilizing drugs for the purpose of controlling excited behavior is forbidden in *Nelson v. Heyne*.[14] The court did, however, recognize the use of such drugs in a properly supervised psychotherapeutic program.

For those wishing to institute drug therapy, it is clear that adequate and proper medical staffing and attention are minimum prerequisites. Beyond that the power of an administrator to interfere with the mind of his charge, even in his own interest, will have to be decided. Increasing litigation in this sensitive area is inevitable.

The use of physical force as a disciplinary tool is permitted only in limited circumstances. In proper cases and in proper proportions, corporal punishment may be administered to incarcerated juveniles.[15]

Isolation is not itself cruel and unusual punishment, but when conditions of filth and deprivation of basic necessities reach such a level that they affront the basic concepts of the dignity of man, its use is considered cruel and unusual punishment.[16]

The physical condition of an inmate may make an otherwise permissible punishment cruel and unusual. For example, an inmate with tuberculosis may not be forced to work in a drafty area.[17]

An inmate may be punished for a wide variety of activities which would not be punishable were he not incarcerated. He may, for example, be disciplined for meeting and kissing his wife in violation of visiting regulations.[18] He may also be punished for consensual homosexual acts, even if those acts are not punishable outside prison.[19] Other activities may not be punished. A prisoner may not be punished solely for seeking access to the courts to challenge the legality or the conditions of his confinement,[20] nor may he be punished because of his race[21] or his religion.[22] The mere holding of social or political beliefs is not punishable. Thus, prolonged isolation of a Black militant with a demonstrated ability to lead others has been declared improper in the absence of an emergency or overt conduct.[23] When the belief translates itself into action, as a refusal to work based on the political belief that prisoners should not work in businesses making a profit, the action may be punished.[24]

Procedural Due Process

In addition to the limited protection afforded by the ban against cruel and unusual punishment, inmates are entitled to certain procedural protections in disciplinary hearings. The Supreme Court in *Wolff v. McDonnell*[25] has spelled out what processes are due in hearings that may result in the loss of good time and possibly in those that might result in solitary confinement.[26] As in *Morrissey v. Brewer*,[27] which set out procedures for a parole revocation hearing, the Court was concerned with the nature of the hearing. The disciplinary hearing was characterized as a procedure which itself might threaten important state interests.[28] Thus, the concern over the "more than . . . theoretical possibility" of retaliation led to rejection of some safeguards and a reliance upon the expertise of prison officials. Three procedural requirements must be met in this kind of disciplinary hearing. First, there must be written notice of the charges at least twenty-four hours prior to a hearing.[29] This first requirement assumes the second—namely, that there will be a hearing at which the inmate may present a defense. Third, there must be a " 'written statement by the fact finders as to the evidence relied upon and reasons' for the disciplinary action."[30]

One more procedure was placed in a "reasonably good idea" category. The Court thought it wise to allow the inmate to call witnesses and to present documentary evidence. The Court fell short of requiring these procedures, which ordinarily are "basic to a fair hearing," because of prison needs to keep hearings within reasonable limits and to avoid risks of reprisals and the undermining of authority.[31] The Court obviously envisions regulations which allow for presentation of witnesses and documentary evidence but would like for prison officials not to have to justify those cases in which, perhaps for good reason, such presentation is deemed unwise.

Officials wishing to avoid future lawsuits would be well advised to write regulations permitting the presence of a full defense but preserving discretion in cases in which substantial disruptions are likely to occur. Similarly, regulations should probably include, except in certain circumstances, the right to confront and cross-examine witnesses, even though the Court has held that "the Constitution should not be read to impose the procedure *at the present time*"[32] (emphasis added). The most obvious circumstances in which these procedures should not be accorded is when the witness is an unknown inmate. Fear of retaliation could dry up that source of information if confrontation were allowed. The emphasized language may well mean that prisons have only a little time in which to develop procedures which adequately protect legitimate institutional interests while insuring the inmate of a fair hearing. Two proposed procedural protections were flatly rejected. The right to counsel was rejected for logistical reasons and for the reason that counsel would give a more adversary cast to the proceedings.[33] Some sort of help for illiterate inmates was suggested. Finally, the prison was allowed to use prison employees who did not participate in the investigation on the Adjustment Committee.[34] It should be noted also that the decision was made non-retroactive.[35]

Although *Wolff* now dominates the field for procedural requirements at disciplinary hearings, it may be well to examine some lower court opinions which fill interstices in *Wolff* or which suggest how procedures recommended but not required there may be implemented.

One such gap in *Wolff* is whether a hearing is required when the possible punishment does not include confinement in solitary or loss of good time. Footnote 19 in *Wolff* suggests that the imposition of lesser penalties may require fewer procedural protections. Although the decision on similar facts would be invalid under *Wolff, Lathrop v. Brewer*[36] suggests a procedure which might arguably be valid for imposition of minor penalties. There an investigating officer made an investigation and presented what was to be an unbiased account of the event. No hearing was required in such a case.

The right to notice of what actions will constitute a violation is an aspect of due process not addressed by *Wolff*. Although the Court mentions the Nebraska Inmate Manual, it is not clear that the manual was made available to inmates. But the courts are agreed that rules must be set out and made available to inmates.[37]

Notification twenty-four hours prior to the hearing is required in *Wolff*, and one other court has put a limit on delay from the time of the infraction.[38] *Inmate 29394 v. Schoen*[39] also sets out details which must be put in the notice: the rule violated, the factual basis for the charge, the time and date of the hearing, the possible punishment, and the consequences of a guilty plea.

The presence of the accused was assumed in *Wolff*. Although the requirement seems axiomatic, one court has upheld the forfeiture of good time credit of escapees in their absence.[40] Such a procedure precludes the possibility of questioning whether an escape is voluntary and whether a sentence is proportionate.[41]

The right to call witnesses and present documentary evidence thought advisable in *Wolff* had been required by lower courts.[42] Limitation on the number of witnesses has been approved for administrative convenience and in the interest of a speedy proceeding.[43]

While lower courts have been split on whether cross-examination and confrontation are required, the better reasoned cases struck a balance between the rights of the accused and the need to protect informers. When an informer needs to be protected, the discipline committee has the responsibility to interview and examine the witness.[44]

Another question left unanswered by *Wolff* is that of what safeguards are appropriate for inmates charged with disciplinary offenses which are also crimes. The first circuit, prior to *Wolff*, had required counsel in these situations to protect the right against self-incrimination.[45] The court had also ruled that the disciplinary board has the right to compel testimony under the grant of use immunity in subsequent criminal trials. These conclusions were reversed by the court[46] on reconsideration after *Wolff*. Instead, the court suggested that *Miranda* protections are the relevant considerations. It also suggested that it would take a long hard look at confessions taken in prison without counsel present. The tenth circuit, on the other hand, stated that use immunity in subsequent criminal proceedings is the appropriate safeguard.[47]

Wolff clearly allows prison employees to serve as members of the disciplinary board. Beyond that, little guidance is given on the composition of the board. In *Steele v. Gray*[48] the court held that there must be "a neutral hearing officer or tribunal which will be likely to arrive at a decision without the likelihood of arbitrary or capricious action."

The *Wolff* requirement of written statement insures that there can be a review to determine if the decision is arbitrary or capricious. Once procedural due process has been granted, courts limit review to that standard.[49]

FOOTNOTES

1. *Cousins v. Oliver*, 369 F. Supp. 553 (E.D. Va. 1974) (classification and administrative segregation); *Newkirk v. Butler*, 364 F. Supp. 497 (S.D. N.Y. 1973), *aff'd as modified* 499 F.2d 1214 (2d Cir. 1974).
2. 348 F. Supp. 569 (E.D. Pa. 1972).
3. 370 F. Supp. 103 (E.D. Va. 1971).
4. *Allen v. Nelson*, 354 F. Supp 505 (N.D. Cal. 1973), *aff'd* 484 F.2d 960 (9th Cir. 1973).
5. *See generally*, Annot., 51 A.L.R.3d 111, 113-21 (1973).
6. *Rozecki v. Gaughan*, 459 F.2d 6 (1st Cir. 1972).
7. *Wright v. McMann*, 460 F.2d 126 (2d Cir. 1972), *cert. denied* 409 U.S. 885.
8. *Rhem v. Malcolm*, 371 F. Supp. 594 (S.D. N.Y. 1974), *aff'd* 507 F.2d 333 (2d Cir. 1974); *Berch v. Stahl*, 373 F. Supp. 412 (W.D. N.C. 1974).
9. *Poindexter v. Woodson*, 357 F. Supp. 443 (D.C. Kan. 1973).
10. *See Crafton v. Rose*, 369 F. Supp. 131 (E.D. Tenn. 1972).
11. *See Knecht v. Gillman*, 488 F. 2d 1136 (8th Cir. 1973).
12. *Id.; Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974), *cert. denied*.
13. *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973).
14. 491 F.2d 352 (7th Cir. 1974), *cert. denied*.
15. *Id.*
16. *LaReau v. MacDougall*, 473 F.2d 974 (2d Cir. 1972), *cert. denied* 414 U.S. 878.
17. *Woolsey v. Beto*, 450 F.2d 321 (5th Cir. 1971).
18. *United States ex rel. Colon v. Norton*, 335 F. Supp. 1316 (D. Conn. 1972).
19. *United States v. Brewer*, 363 F. Supp. 606 (M.D. Pa. 1973), *aff'd* 491 F.2d 751 (3d Cir. 1973).
20. *Hooks v. Kelly*, 463 F.2d 1211 (5th Cir. 1972); *Castor v. Mitchell*, 355 F. Supp. 123 (W.D. N.C. 1973).
21. *Cf. Allen v. Nelson*, 354 F. Supp. 505 (N.D. Cal. 1973), *aff'd* 484 F.2d 960 (9th Cir. 1973).
22. *Cruz v. Beto*, 405 U.S. 314 (1972).
23. *In re Hutchinson*, 23 Cal. App.3d 337, 100 Cal. Rptr. 124 (1972); *see also Szczerbaty v. Oswald*, 341 F. Supp. 571 (S.D. N.Y. 1972) (wearing of peace symbol).
24. *Leaman v. Hancock*, 351 F. Supp. 1265 (D. N.H. 1972).
25. 418 U.S. 539 (1974).
26. *Id.*, at In. 19. *See Taylor v. Schmidt*, 380 F. Supp. 1222 (W.D. Wis. 1974).
27. 408 U.S. 471 (1972).
28. *Wolff v. McDonnell*, 418 U.S. 539 (1974).
29. *Id.*, at 564.
30. *Id.*, quoting from *Morrissey, supra* 408 U.S. at 489.
31. *Id.*, at 566.
32. *Id.*, at 567.
33. *Id.*, at 569-70.
34. *Id., at 570-71.*
35. *Id.*, at 573-74.
36. 340 F. Supp. 873 (S.D. Iowa 1972).
37. *Landman v. Royster*, 354 F. Supp. 1292 (E.D. Va. 1973); *Goldsby v. Carnes*, 365 F. Supp. 395 (W.D. Mo. 1973); *Bones v. Warden*, 352 N.Y.S.2d 119 (1974); *In re Lamb*, 34 Ohio App.2d 85, 296 N.E.2d 280 (1973). *But see United States ex rel. Johnson v. Chairman*, New York Board of Parole, 500 F.2d 925 (2d Cir. 1974).
38. *King v. Higgins*, 370 F. Supp. 1023 (D. Mass. 1974), *aff'd* 495 F.2d 815 (1st Cir. 1974).
39. 363 F. Supp. 683 (D. Minn. 1973).
40. *State ex rel. Mitchell v. Warden*, 343 N.Y.S.2d 543 (1973).
41. *Downes v. Norton*, 360 F. Supp. 1151 (D. Conn. 1973).
42. *Workman v. Mitchell*, 502 F.2d 1201 (9th Cir. 1974); *United States ex rel. Miller v. Twomey*, 479 F.2d 701 (7th Cir. 1973), *cert. denied* 414 U.S. 1146; *Palmigiano v. Baxter*, 487 F.2d 1280 (1st Cir. 1973), *vacated for reconsideration in light of* Wolff, ___ U.S. ___, 94 S. Ct. 3200, *Murphy v. Wheaton*, 318 F. Supp. 1252 (N.D. Ill. 1974).
43. *Inmate 29394 v. Schoen*, 363 F. Supp. 683 (D. Minn. 1973).
44. *Palmigiano v. Baxter*, 487 F.2d 1280 (1st Cir. 1973), *vacated for reconsideration in light of* Wolff ___ U.S. ___, 94 S. Ct. 3200; *Wesson v. Moore*, 365 F. Supp. 1262 (D. Va. 1973).
45. *Palmigiano v. Baxter*, 487 F.2d 1280 (1st Cir. 1973), *vacated for reconsideration in light of* Wolff, ___ U.S. ___, 94 S. Ct. 3200.
46. *Palmigiano v. Baxter*, ___ F.2d ___, 16 Crim. L. Rptr. 2295 (1st Cir. 1974).
47. *Shimabuku v. Britton*, 503 F.2d 38 (10th Cir. 1974).
48. 223 N.W.2d 614 (Wis. 1974).
49. *See Dixon v. Henderson*, 493 F.2d 467 (5th Cir. 1974).

Section 9

Punitive Isolation and Administrative Segregation

Punitive isolation is separation for punitive reasons from the general inmate population; administrative segregation is separation from the general population as a custodial classification and security device. The result is the same regardless of the nomenclature, so it is not surprising that some cases refer to both as solitary confinement. This confinement in solitary is a commonly used disciplinary technique and its validity is repeatedly upheld.[1] It has also been upheld as a valid administrative technique to allow time for classification of new inmates,[2] to maintain order in the prison,[3] or to protect the inmate.[4]

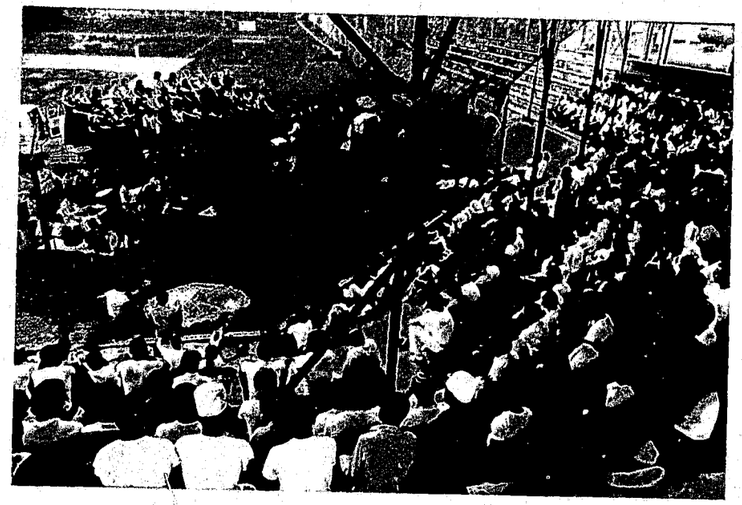
Prisoners have challenged placement in solitary confinement as cruel and unusual punishment. The deprivation of outside contacts and other psychological damages together with the physical deprivations attributable to isolation have not caused courts to call isolation cruel and unusual punishment *per se*.[5] Instead, courts have examined the duration of confinement, the extent of deprivations, and any special characteristics of the inmate which place him in a group entitled to special protection to determine whether a particular confinement in isolation is cruel and unusual punishment.[6] For adults, however, the conditions must be barbarous or the punishment disproportionate to the offense[7] for the proscription against cruel and unusual punishment to apply.

Confinement for five days in a cold, dark, filthy strip cell has been found barbarous.[8] For less severe deprivations the length of confinement becomes important. A period of eighty-three days isolation is long enough to tip the scales against conditions somewhat less secure than those already condemned.[9] In *Poindexter v. Woodson*[10] emphasis was placed on physical deprivations, lack of food, hygiene, clothing and bedding. In *Berch v. Stahl*,[11] however, the court concerned itself not only with physical deprivations but also with the psychological deprivations associated with a lack of privacy and sensory deprivations. The order is noteworthy because it sets precise limits on each of three types of solitary and rules that confinement beyond such a period is cruel and unusual punishment. Confinement in the "box," a 5x7 foot metal cell, has been limited to twenty-four hours. Confinement in a solid-door cell with a steel bunk, a toilet and a basin for fifteen days has been allowed; and confinement in a 4x10 foot barred-door cell with a bunk, toilet and a basin has been allowed for thirty days. In *Finney v. Arkansas*[12] the circuit court required that prisoners placed in punitive isolation not be "deprived of basic necessities including light, heat, ventilation, sanitation, clothing and a proper diet."

While punishment in solitary confinement may be cruel and unusual if it is disproportionate to the offense, courts have been reluctant to interfere with the legitimate purpose of rehabilitation served by a system of rewards and punishments. Solitary confinement has been upheld for participation in a general work stoppage,[13] for refusal to work,[14] and, until a proper hearing, for suspicion of participation in an assault upon a guard.[15]

In *Wolff v. McDonnell*[16] the Supreme Court required the procedural safeguards of notice of the charges, a written record of the evidence, and the reasons for the decision whenever good time is taken from an inmate. Although not requiring it, the Court noted that the use of the same procedures when solitary confinement is a possibility is a realistic approach and that "minimal procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction."[17] It is likely that the safeguards required in solitary confinement cases will be identical to those required in loss of good time cases and, conversely, that the right to counsel, the rights to cross-examine and confront witnesses, the rights to call witnesses and present documentary evidence, and the right to have wholly impartial finders of fact are not required.[18] It is still barely possible that incarceration in punitive isolation for brief periods could be attended by fewer procedural safeguards,[19] but the amount of time saved by truncated proceedings could well be lost in one lawsuit.

Administrative segregation is a useful administrative tool. Inmates understandably view segregation as punishment and often protest its imposition. Nevertheless, in periods of high tension, suspected or potential troublemakers may be confined in administrative segregation. When the crisis is over, the inmate must be released or put through disciplinary



proceedings.[20] Crisis conditions may justifiably lead even to converting an entire section of a prison to segregation classification.[21] Wide latitude is given prison officials in determining when an emergency exists.[22]

Inmates who have been sexually assaulted may be placed involuntarily in segregation for treatment and protection.[23] Persons who have had attempts made on their lives may also be confined there.[24] But there is the contention that such a course of action punishes a person for being in danger and excuses prison officials for failing to provide safety in a less restrictive atmosphere.[25]

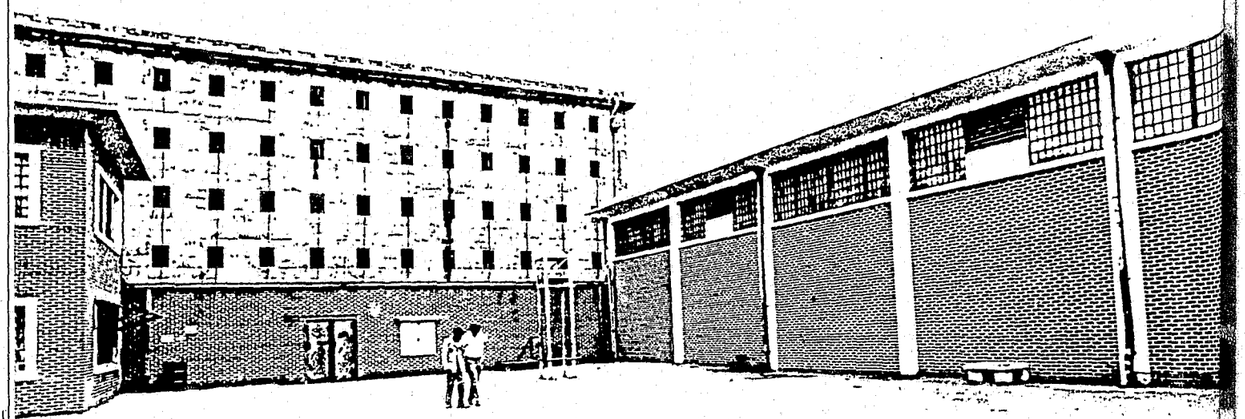
Administrative segregation of new prisoners to allow time for their classification is also appropriate.[26]

Whether procedural due process is required for non-emergency consignment to administrative segregation is debated. Some courts have held that no particular procedures are required.[27] Clearly the better view was followed in *Cousins v. Oliver*.[28] That court emphasized the difficulty of distinguishing punitive isolation and administrative segregation. Unless the two are substantially different in the number and kinds of privileges allowed, the procedural safeguards attached ought to be identical.[29]

Once an inmate requests[30] or is assigned[31] to administrative segregation, he is subject to the reduction in privileges attendant to the confinement there. Prison administrators need not make distinctions between the various categories of prisoners in segregation.

FOOTNOTES

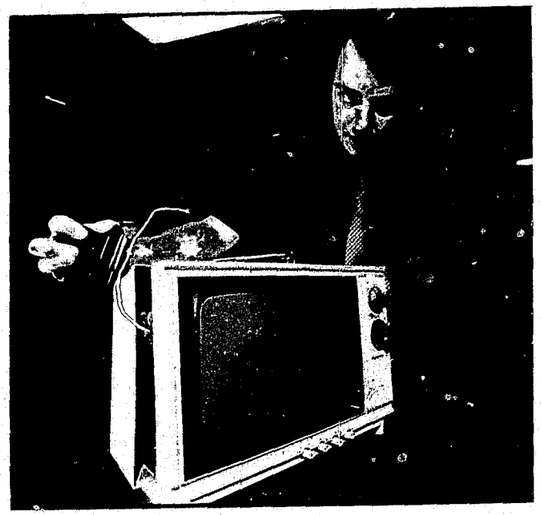
1. *E.g., Berch v. Stahl*, 373 F. Supp. 412 (W.D. N.C. 1974); *Daughtery v Carlson*, 372 F Supp. 1320 (E.D. Ill. 1974); *Johnson v. Anderson*, 370 F. Supp. 1373 (D. Del. 1974).
2. *Gomes v. Travisono*, 353 F. Supp. 457 (D. R.I. 1973); *modified* 490 F.2d 1209 (1st Cir. 1974), *cert. denied* ___ U.S. ___, 94 S. Ct. 3200.
3. *Christman v. Skinner*, 468 F.2d 733 (2d Cir. 1972).
4. *Breeden v. Jackson*, 457 F.2d 578 (4th Cir. 1972).
5. *Berch v. Stanl*, 373 F. Supp. 412 (W.D. N.C. 1974).
6. *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1353 (D. R.I. 1972).
7. *See Furman v. Georgia*, 408 U.S. 238 (1972).
8. *LaReau v. MacDougall*, 473 F.2d 974 (2d Cir. 1972), *cert. denied* 414 U.S. 878.
9. *Osborn v. Manson*, 359 F. Supp. 1107 (D. Conn. 1973).
10. 357 F. Supp. 443 (D. Kan. 1973).
11. 373 F. Supp. 412 (W.D. N.C. 1974). *See also Campise v. Hamilton*, 382 F. Supp. 172 (S.D. Tex. 1974).
12. 505 F.2d 196, 208 (8th Cir. 1974).
13. *Adams v. Carlson*, 488 F.2d 619 (7th Cir. 1973).
14. *Laaman v. Hancock*, 351 F. Supp. 1265 (D. N.H. 1972).
15. *Johnson v. Anderson*, 370 F. Supp. 1373 (D. Del. 1974).
16. 418 U.S. 539 (1974).
17. *Id.*, at fn. 19.
18. For a fuller discussion, *see* Section 8.
19. 418 U.S. 539 at fn. 9. *See also Collins v. Hancock*, 354 F. Supp. 1253 (D. N.H. 1973); *Christman v. Skinner*, 468 F.2d 733 (2d Cir. 1972).
20. *Allen v. Nelson*, 354 F. Supp. 505 (N.D. Cal. 1973); *In re Hutchinson*, 23 Cal. App.3d 337, 100 Cal. Rptr. 124 (1972).
21. *Johnson v. Anderson*, 370 F. Supp. 1373 (D. Del. 1974).
22. *Hiott v. Vitek*, 497 F.2d 598 (1st Cir. 1974).
23. *Perez v. Turner*, 462 F.2d 1056 (10th Cir. 1972), *cert. denied* 410 U.S. 944.
24. *Deaton v. Britton*, 355 F. Supp. 597 (D. Kan. 1973).
25. *Breeden v. Jackson*, 457 F.2d 578, 581-82 (4th Cir. 1972) (dissenting opinion).
26. *Gomes v. Travisono*, 353 F. Supp. 457 (D. R.I. 1973). This aspect of the case was not discussed in 490 F.2d 1209 (1st Cir. 1974) which modified the district court decision.
27. *Christman v. Skinner*, 468 F.2d 733 (2d Cir. 1972); *Swinton v. State*, 261 S.C. 372, 200 S.E.2d 77 (1973); *Johnson v. Anderson*, 370 F. Supp. 1373 (D. Del. 1974).
28. 369 F. Supp. 553 (E.D. Va. 1974).
29. *See* text accompanying fn. 16-19 *supra*.
30. *Rook v. Cupp*, ___ Or. App. ___, 521 P.2d 10 (1974).
31. *Breeden v. Jackson*, 457 F.2d 578 (4th Cir. 1972).



Section 10

Administrative Investigations and Interrogations

To some extent the fourth amendment prohibition against unreasonable search and seizure and the fifth amendment prohibition against compulsory self-incrimination survive incarceration. Recent Supreme Court cases have narrowed the scope of protection from searches afforded prisoners. Additionally, the retreat from the full impact of the exclusionary rule is leading to the use of more evidence and statements that have been taken in violation of constitutional rights.



Search and Seizure

In *Robinson v. United States*[1] and *Gustafson v. Florida*[2] the Supreme Court held that the fact of custodial arrest gives rise to the authority to search the person under arrest, and in *United States v. Edwards*[3] the Court allowed a seizure of an arrestee's clothes "with or without probable cause."[4] These cases are significant in analyzing any search of a convicted prisoner as well because they establish that a search can be reasonable even if there is no probable cause to believe the search will reveal evidence of a crime. Since the warrant requirement is also eliminated by these cases, all custodial searches will presumably be declared reasonable except those which " 'violate the dictates of reason either because of their number or their manner of perpetration.' "[5]

The lower courts have been converging on this position in a number of different ways. A survey of these cases may be helpful because courts are likely to continue analyzing cases in these ways and because the cases access the critical question of what searches are reasonable under the circumstances of incarceration.

The tenth circuit has upheld extensive searches, including body cavity searches prior to transportation to a court hearing, as a reasonable incident of incarceration provided the search is not used for the purpose of humiliating the person searched.[6] Another court allowed the seizure of a shoe from a jail cell for the purpose of matching it with footprints at the scene of a crime.[7] Others have held that the need for security and discipline justify warrantless searches of prison cells[8] and that emergency conditions during a general prison lock-up may also justify searches without a warrant.[9] While seizures of evidence of a crime or contraband have been upheld, a cause of action under the Civil Rights Act has been maintained when a guard seized cigarettes from an inmate's cell.[10]

The state courts have generally reached the conclusion that searches incident to arrest are reasonable. Thus, codeine found in the pocket of a man arrested for reckless driving[11] and LSD found in the wallet of a man arrested for being intoxicated[12] were admitted into evidence. Hawaii, however, acting under its state constitutional provision, found that a matron, although having the authority to exclude harmful materials from the prison, had no authority to search inside a tissue handed her by the defendant for the seconals contained in it.[13]

Recent cases have similar application to parolees. The parolee may be less protected than the ordinary citizen in one of three ways. First, as a condition of parole, he may be required to sign a waiver permitting a search by parole officers at any time. If he does so, evidence found in such a search may be used against him.[14] Second, the search of a parolee may be reasonable when, under the same circumstances, the search of a citizen would be unreasonable. The parole officer, in the exercise of his supervisory powers, is allowed to act on less information than a neutral and detached magistrate would be. But the officer must have some valid reason for such a search.[15] Third, evidence of a crime seized from a parolee might be used, not as part of a criminal trial, but rather in a parole revocation hearing. In such a setting, some courts have ruled that the exclusionary rule has no application and that evidence obtained in violation of the constitution may be introduced.[16] While such an approach leaves no effective deterrent to harassment of parolees, recent actions of the Burger Court reinforce those decisions. *Morrissey v. Brewer*[17] characterized the parole revocation hearing as something less than a criminal trial. This characterization, when coupled with the statement in *United States v. Calandra*[18] that the need for the exclusionary rule is strongest "where the Government's unlawful conduct would result in imposition of a criminal sanction," will lead many courts to the conclusion that evidence obtained by an unlawful search may be used in a parole revocation hearing.

Other rehabilitative programs, such as work release and narcotics treatment programs, create persons with a status similar to that of parolees. Some protection is afforded under the fourth amendment,[19] but what is reasonable is determined by the circumstances. A person in a halfway house[20] or a drug rehabilitation program,[21] for example, may be searched with less than probable cause.

The rehabilitative nature of these programs, with their need for constant and detailed supervision, are cited to show that particular searches are reasonable. However, military necessity for control of drug abuse has been held not to justify searches on less than probable cause absent a showing that drug use by G.I.'s is significantly different from that of civilians.[22]

Administrative searches of employees and visitors may also be justified on less than probable cause. In one case a strip search of a prison employee without a warrant was justified by a reasonable suspicion that the employee was carrying contraband.[23] But another court barred a strip search of a former inmate who was visiting the prison to prepare for an upcoming trial absent a "real suspicion" that he was carrying contraband.[24]

Interrogations

The privilege against self-incrimination survives incarceration. Indeed, the privilege flourishes in prison because of the recognition that the conditions of confinement[25] or the actions of prison guards[26] may well coerce confessions. It is now well settled that *Miranda*[27] warnings must be given prior to incustody interrogation when the focus of an investigation is on the person being investigated. Recent problems have centered around the questions of who must give these warnings and of whether statements made at disciplinary hearings may be used against an inmate in a criminal trial.

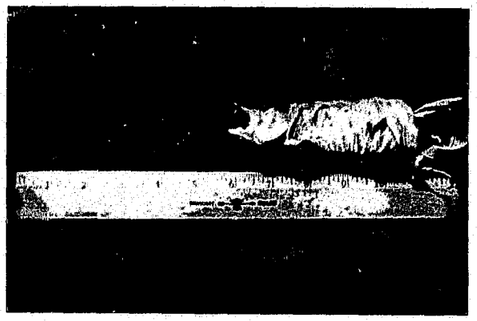
First, it should be noted that the erosion of the exclusionary rule's fifth amendment branch is as severe as that of the fourth amendment. *Michigan v. Tucker*[28] is merely the latest of those Supreme Court cases increasing the utility of illegally obtained confessions. The lesson has not been lost on lower courts. The Texas Court of Criminal Appeals has allowed the use of illegally gained confessions at parole revocation hearings.[29] Other courts may be expected to adopt similar reasoning to allow such statements at disciplinary hearings. Such a step does not appear unlikely since the Supreme Court in *Wolff v. McDonnell*[30] accorded fewer procedural protections to persons at a disciplinary hearing than to persons at a parole revocation hearing.

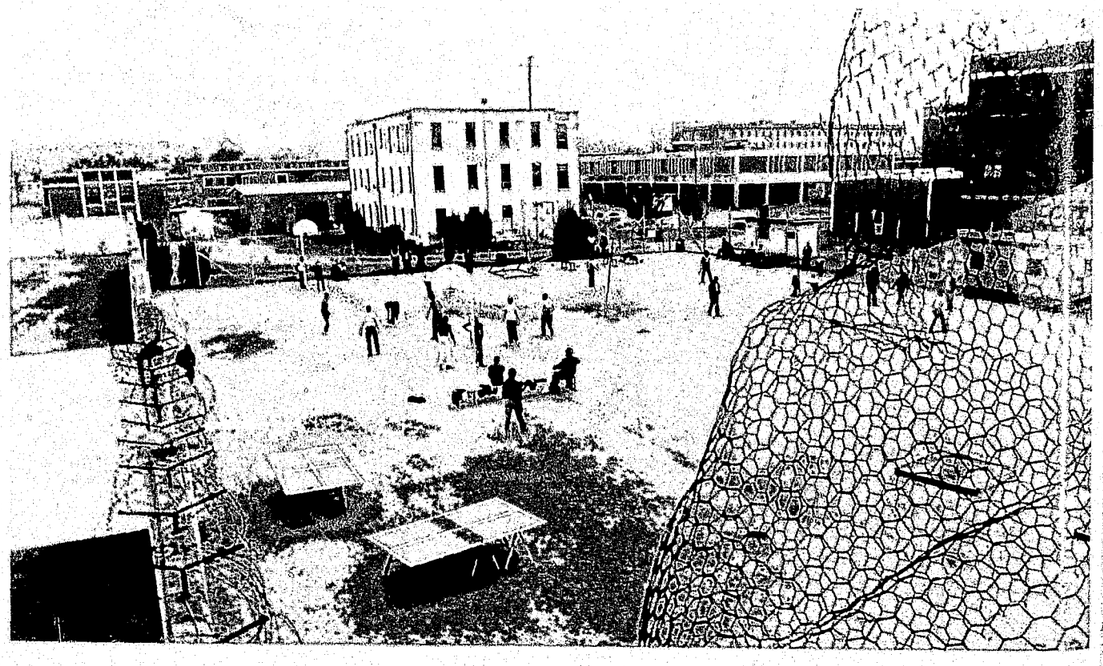
Miranda may be avoided in other ways as well. Statements made to probation or parole officers have been admitted into evidence, despite the lack of proper warnings, on the basis that the parolee is not in custody,[31] and conversations with government informers in the prison have not been declared excludable when the defendant could not show that the government initiated the contact and affirmatively sought out the information.[32]

The prisoner accused of a disciplinary infraction which is also a criminal offense faces a dilemma. He must either fail to defend himself in the disciplinary proceeding or he must run the risk of having statements made at the hearing used against him at a later criminal trial. Counsel, while not offering a solution to the dilemma, should at least make the prisoner aware of the risk. The first circuit, prior to *Wolff*, had required counsel at disciplinary hearings.[33] Although *Wolff* held there was no right to counsel at a disciplinary hearing, another safeguard mandated by the first circuit protects accused prisoners. The court required use immunity for any statement made at the disciplinary hearing.[34] On remand for reconsideration in light of *Wolff*, the court reversed its ruling that counsel was required and that use immunity was required, but suggested that, in light of *Miranda*, appointment of counsel would best protect the inmates' rights.[35] Appointment of counsel, coupled with use immunity, would relieve administrators of the responsibility of explaining the consequences of testifying at the disciplinary hearing while allowing the inmate to defend himself in the hearing without jeopardizing his chances for success at the more serious trial on the criminal charge.

FOOTNOTES

1. 414 U.S. 218 (1973).
2. 414 U.S. 260 (1973).
3. 415 U.S. 800 (1974).
4. *Id.*, at 804.
5. *Id.*, at fn. 9, *quoting from Charles v. United States*, 278 F.2d 386, 389 (9th Cir. 1960), *cert. denied* 364 U.S. 831.
6. *Daughtery v. Harris*, 476 F.2d 292 (10th Cir. 1973), *cert. denied* 414 U.S. 872 (1973).
7. *Commonwealth v. DiMarzo*, ___ Mass. ___, 308 N.E.2d 538 (1974); *see also United States v. Hitchcock*, 467 F.2d 1107 (1972), *cert. denied* 410 U.S. 916 (1973) (seizure of documentary evidence from penitentiary cell).
8. *United States v. Palmater*, 469 F.2d 273 (9th Cir. 1973).
9. *Hiolt v. Vitek*, 361 F. Supp. 1238 (D. N.H. 1973), *aff'd* 497 F.2d 598 (1st Cir. 1974).
10. *Schumate v. People of the State of New York*, 373 F. Supp. 166 (S.D. N.Y. 1974).
11. *Hughes v. State*, 291 So.2d 331 (Okla. Ct. Crim. App. May 21, 1974).
12. *State v. Dubay*, 313 A.2d 908 (Me. 1974).
13. *State v. Kaluna*, 520 P.2d 51 (Hawaii 1974).
14. *See, e.g., People v. Byrd*, 113 Cal. Rptr. 777 (1974).
15. *People v. Thompson*, ___ Misc. 2d ___, 353 N.Y.S. 2d 698 (1974) (valid reason found); *State v. Simms*, 10 Wash. App. 75, 516 P.2d 1088 (1974) (valid reason not found).
16. *See, e.g., State v. Kuhn*, 81 Wash.2d 1081, 503 P.2d 1061 (1972).
17. 408 U.S. 471 (1972).
18. 414 U.S. 338 (1974).
19. *See, e.g., Taylor v. State*, 289 So.2d 421 (Fla. App. 1974).
20. *State v. Williams*, 486 S.W.2d 468 (Mo. 1972).
21. *In re Bye*, 115 Cal. Rptr. 382, 524 P.2d 854.
22. *Committee for GI Rights v. Callaway*, 370 F. Supp. 934 (D. D.C. 1974).
23. *Gettleman v. Werner*, 377 F. Supp. 445 (W.D. Pa. 1974).
24. *Black v. Amico*, ___ F. Supp. ___, 16 Cr. L. Rptr. 2317.
25. *Rodgers v. Westbrook*, 362 F. Supp. 353 (E.D. Mo. 1973).
26. *Holland v. Connors*, 491 F.2d 539 (5th Cir. 1974).
27. *Miranda v. Arizona*, 384 U.S. 436 (1966).
28. 417 U.S. 433 (1974).
29. *Bustamonte v. State*, 493 S.W.2d 921 (Tex. Crim. App. 1973).
30. 418 U.S. 539 (1974).
31. *Kirven v. State*, 492 S.W.2d 468 (Tex. Crim. App. 1973); *State v. Gallager*, 36 Ohio App.2d 29, 65 Ohio 2d 17, 301 N.E.2d 888 (1973).
32. *United States ex rel. Irving v. Henderson*, 371 F. Supp. 1266 (S.D. N.Y. 1974).
33. *Palmigiano v. Baxter*, 487 F.2d 1280 (1st Cir. 1973), *vacated in light of* Wolff, 418 U.S. 908 (1974).
34. *Id. See also Fowler v. Vincent*, 366 F. Supp. 1224 (S.D. N.Y. 1973) and *Shimabuku v. Britton*, 357 F. Supp. 825 (D. Kan. 1973).
35. *Palmigiano v. Baxter*, ___ F.2d ___, 16 Cr. L. Rptr. 2295 (1st Cir. 1974).





Section 11

Inmate Safety

A prisoner has a right to be confined in a safe environment. The constitutional prohibition against cruel and unusual punishment and the law of negligence are the foundations for the litigation in this area. The cases have approached the problem of inmate safety from several perspectives. The prisoner has a right to a facility which meets minimum safety standards; and if he has a prison job, he must be given safe and proper tools and must not be exposed to unreasonable risk of harm. He also has a right to be free from assault by guards—unless it is necessary, because of his own conduct, to punish or to restrain—and free from assault by other inmates.

Unsafe Living or Working Conditions

The recent cases which require the facility to meet a certain level of safety are mostly suits brought by pre-trial detainees in city and county jails. But *Holt v. Sarver*[1] established that all are entitled to live in an environment which is not grossly unsafe. *Hamilton v. Landrieu*[2] illustrates the extent to which courts are willing to go once unsafe facilities are found. The prison in question was unsafe because of unsanitary conditions, overcrowding, the constant threat of fire, the lack of classification, and the lack of medical screening to prevent the spread of disease. The detailed order which provided that that jail be phased out by March 1, 1975, except as an orientation facility with a limit of two weeks confinement, required the prison to insure as much safety as possible. A renovation of the plumbing, installation of a fire detection system, institution of a classification system, and a medical examination upon entry were required.

Other cases have also included very specific orders to promote safety, with emphasis on requiring early security classification when confinement under maximum security conditions do not allow healthful exercise and visiting opportunities and the hiring of an adequate and trained staff.[3]

A prisoner confined to a prison and given a job can be required to work but he must be given the tools that he needs and he must not be exposed to undue danger.[4] The general law of negligence prevails; when the inmate has knowledge of a risk and is provided with tools to avoid the risk, the prison can be relieved of responsibility for accidents.[5] The prison can also require hard labor, even on a chain-gang;[6] however, the inmate's medical condition can prevent his being assigned to hard labor.[7]

Abuse by Supervisory Personnel

The prisoner, regardless of the type of facility, has a right to be free from mistreatment by his custodians. Because brutality, if it exists, is likely to be surreptitious, the most difficult task facing the inmate plaintiff is actual proof of mistreatment. Regardless of the difficulty of proof, however, the prison does have a duty to control the guards who are employed.[8] *Holt v. Hutto*[9] emphasized that the court will not allow the abuse of prisoners by guards and ordered an investigation of the inmates' charges. But even if an attack can be proven, three other problems are often faced by the prisoners who seek redress for abuse by guards: justification of the conduct as punishment or restraint may be pleaded, establishment of the identity of the particular guard who perpetrated the abuse may prove a substantial roadblock, and the inmate is unable to force the criminal prosecution of a guard.

The first of these problems exists because physical restraints are often used and are recognized as valid disciplinary tools when rationally used by a prison.[10] The use of the billy or of mace involves an individual officer's judgment in what is deemed by him to be an emergency. Thus, although courts speak in terms of requiring minimum force, they regularly defer to the officer's assessment of the need for the use of force.[11] The courts have, however, begun to take a closer look at the use of physical punishment of juveniles. *Morales v. Turman*[12] illustrates the trend. Guards attempted to justify the widespread use of physical beatings as a necessary disciplinary tool. The court recognized that physical punishment can serve corrective purposes but carefully circumscribed its use to situations in which life or property is in imminent and substantial danger. Only the amount of punishment reasonably necessary to control the situation is permissible.

The second problem is evident in *United States ex rel. Bracey v. Grenoble*.[13] In this case a district court found that excessive force had been used by guards in subduing a prisoner with a nightstick and pushing him downstairs. The defendant, who had been in charge of the guards, was held liable for the injuries. On appeal, the circuit court reversed[14] and held that the superior officer was not responsible when there was no evidence that he had been present, that he had seen the beating, nor that he had had knowledge of it. In *Howell v. Cataldi*[15] a diabetic plaintiff, who had been involved in a traffic accident and had appeared intoxicated because of a diabetic coma, claimed that he had been beaten at the stationhouse. His claim was defeated since neither he nor the other party to the wreck, who had allegedly witnessed the beating, was able to state with certainty which officer was involved. One prospective solution to the problem is found in *Diamond v. Thompson*,[16] which requires guards to wear name tags.

The prisoner who is unable to bring action against a particular guard is also unable to force a prosecutor to bring a criminal case. *Inmates of Attica Correctional Facility v. Rockefeller*[17] enjoined the extended and surreptitious brutality practiced by the guards as retaliation for the riots. A later suit was brought because, despite the fact that forty inmates were killed and four hundred wounded, no one had been prosecuted.[18] The court held that the decision to prosecute was totally within the discretion of the Attorney General.

Abuse by Inmate-Guards

An area of litigation which lies between the protection from inmates and the protection from guards is the protection from inmate-guards or trustees. The practice has often been condemned and ordered eliminated,[19] but this condemnation is not universal. In *George v. Sowers*[20] the court allowed the continued use of armed inmate-guards. In the absence of evidence of widespread brutality, evidence of extreme animosity, and the likelihood of personal grudges, the use of inmate-guards was considered insufficient to support an injunction.

Assault by Fellow Inmates

The inmate who is subjected to an assault by an inmate has the difficult problem of finding a duty on the part of prison officials. Without this duty his action will lie solely against the assaulting inmate, who will normally have no money to satisfy a judgment. The right of the prisoner to be free from assault is recognized, as in *Woodhous v. Virginia*,[21] in which the court held that a hearing was needed on cruel and unusual punishment when a prisoner alleged that he was not safe from violent attack and sexual assault. The court saw as crucial to his claim the pervasive risk of harm and the lack of reasonable care by officials.

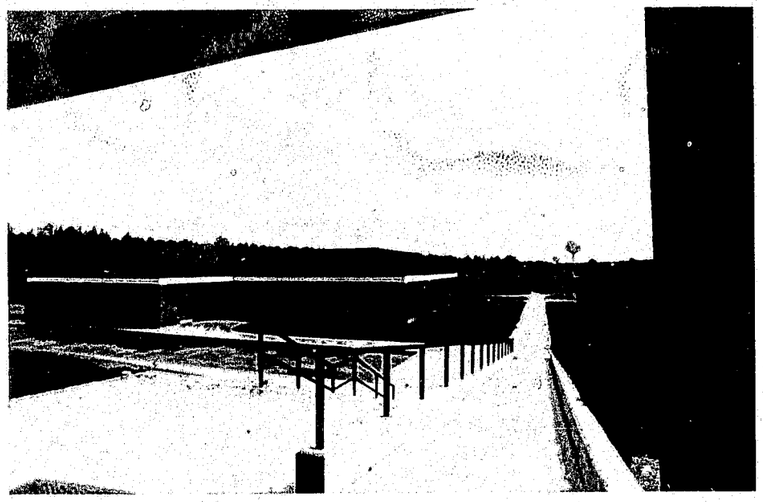
The problems faced by the prisoner are illustrated by the litigation surrounding the assault of Parker by Edmondson in a Louisiana prison.[22] One week prior to his release, Parker was knifed by Edmondson when Edmondson came through an unlocked door. The two were housed in the same unit even though the prison officials were aware that the breakup of a homosexual relationship had created friction between the two. Officials had had a conference with the two and allegedly thought that the two left as friends. The Supreme Court of Louisiana held that adequate steps had been taken to protect Parker. Parker then sued in federal court, alleging a violation of his civil rights. The circuit court reversed a dismissal of the suit, but held that Parker was collaterally estopped from the relitigation of the negligence issue and entered a summary judgment for the defendants. Prison officials were also held not to have sufficient notice of the likelihood of harm in *Nedd v. State Department of Institutions*[23] even though they knew of a prior attack by the same inmate on the plaintiff. The dissent argued that a duty arose when the prison exposed the plaintiff to a known risk from which he could flee.

In *James v. Wallace*,[24] Alabama prisoners alleged that inadequate screening of persons with emotional and behavioral disabilities led to inadequate protection against physical assault. The court held that proof of such circumstances might give rise to a claim under the eighth amendment. The fact that the prisoner faced with threats from other inmates can tell guards and hope for protection may not be sufficient to establish a duty on the part of officials to protect him. The only other alternative generally open is to request a transfer to a segregated unit. In *Schyska v. Shifflet*[25] an inmate alleged that the prison had a duty to keep him safe; the court, however, denied his claim because he could have requested a transfer to isolation, although such a transfer normally entails a vast reduction in privileges. Nor is the reduction in privileges cruel and unusual punishment if the transfer is requested.[26] Thus, a threatened inmate has the choice of facing danger on one hand or a reduction in privileges on the other. This dilemma is illustrated in *Breeden v. Jackson*.[27] The prisoner who requested a transfer was placed in segregation where mail was limited, exercise was severely restricted, and the menu was reduced. The court found no constitutional infringement. A dissenting opinion recognized that the inmate was being punished for being in danger and declared the restrictions cruel and unusual punishment. A district court in the same circuit has held that when the confinement is not punitive the inmate should not be deprived of his privileges.[28]

In addition to the right of the prisoner to request a transfer, the prison may also put an inmate into segregation if he is in danger.[29] Such a transfer must, however, meet the due process standards for solitary confinement.

FOOTNOTES

1. 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd* 442 F.2d 304 (8th Cir. 1971).
2. 351 F. Supp. 549 (E.D. La. 1972), the findings of facts were reported earlier *sub. nom. Hamilton v. Schiro*, 338 F. Supp. 1016 (E.D. La. 1972).
3. *Rhem v. Malcolm*, 371 F. Supp. 594 (S.D. N.Y. 1974), *aff'd in relevant part* 507 F.2d 333 (2d Cir. 1974); *Taylor v. Sterrett*, 344 F. Supp. 411 (N.D. Tex. 1972), *modified* 499 F.2d 367 (5th Cir. 1974).
4. *Howerton v. Mississippi County, Arkansas*, 361 F. Supp. 356 (E.D. Ark. 1973).
5. *Boyd v. Department of Corrections*, 292 So.2d 793 (La. App. 1974).
6. *McLamore v. State*, 257 S.C. 413, 186 S.E.2d 250 (1972), *cert. denied* 409 U.S. 934 (1972).
7. *See Campbell v. Beto*, 460 F.2d 765 (5th Cir. 1972).
8. *Diamond v. Thompson*, 363 F. Supp. 194 (E.D. Ark. 1973).
9. 363 F. Supp. 194 (E.D. Ark. 1973).
10. *See* the section on Disciplinary Methods *supra*.
11. *Poindexter v. Woodson*, 357 F. Supp. 443 (D. Kan. 1973).
12. 364 F. Supp. 166 (E.D. Tex. 1973). *See* 16 Cr. L. Rptr. 1050 (1974) for a later order in the same case.
13. 356 F. Supp. 673 (E.D. Pa. 1973).
14. 494 F.2d 566 (3rd Cir. 1974).
15. 464 F.2d 272 (3rd Cir. 1972).
16. 364 F. Supp. 659 (M.D. Ala. 1973).
17. 453 F.2d 12 (2nd Cir. 1971).
18. *Inmates of Attica v. Rockefeller*, 477 F.2d 375 (2nd Cir. 1973).
19. *Finney v. Arkansas*, 505 F.2d 194 (8th Cir. 1974); *Hamilton v. Landrieu*, 357 F. Supp 549 (E.D. La. 1972); *Taylor v. Sterrett*, 344 F. Supp. 411 (N.D. Tex. 1972), *aff'd in relevant part* 499 F.2d 367 (5th Cir. 1974); *Johnson v. Clark*, 365 F. Supp. 289 (E.D. Mo. 1973).
20. La. App. 268 So.2d 65 (1972).
21. 487 F.2d 889 (4th Cir. 1973).
22. *Parker v. State*, 282 So.2d 483 (La. 1972), *cert. denied* 73-597 42 U.S. L.W. 3352 (1973); *Parker v. McKeithen*, 488 F.2d 553 (5th Cir. 1974).
23. 281 So.2d 131 (La. 1973), *cert. denied* 415 U.S. 957.
24. 382 F. Supp. 1177 (M.D. Ala. 1974).
25. 364 F. Supp. 116 (N.D. Ill. 1973).
26. *Daughtery v. Carlson*, 372 F. Supp. 1320 (E.D. Ill. 1972).
27. 457 F.2d 578 (4th Cir. 1972).
28. *Landman v. Royster*, 354 F. Supp. 1292 (E.D. Va. 1973).
29. *Mason v. Brown*, 362 F. Supp. 518 (E.D. Va. 1973); *Perez v. Turner*, 462 F.2d 1056 (10th Cir. 1972).



Section 12

Facilities

Antiquated and poorly planned facilities are the bane of existence for progressive prison administrators. Several converging trends may require that the funds for new facilities be obtained. There is a developing belief in the right to a decent prison environment. Most of the cases in this area look to the physical safety, comfort and health of the inmate. Cell size, the adequacy of lighting and heating, hygiene and exercise facilities are examined. In addition to requiring bare creature comforts, some courts are increasingly emphasizing psychological well-being. These concerns may require such new facilities as new or different kinds of visiting rooms or cells which allow for privacy. As the rights to rehabilitation and treatment become increasingly recognized, a concomitant demand for more, newer or different facilities will be heard.

Holt v. Sarver[1] is the landmark case establishing the right to a minimal level of decency in the prison environment. That case found that confinement in the Arkansas prison system was cruel and unusual punishment. Indeed, *Finney v. Arkansas*,[2] a sequel to *Holt*, has found that conditions, although improved, are still unconstitutional. Cases subsequent to *Holt* requiring decent facilities have used the due process and equal protection clauses as well as the eighth amendment ban on cruel and unusual punishment as constitutional linchpins.

In spite of the growing trend, several factors urge judicial restraint. The difficulty in fashioning a remedy is one such restraint. Even when unconstitutional conditions are found, courts are reluctant to award money damages against administrators whose requests for funds to improve conditions have gone unanswered.[3] When equitable relief is sought, courts are reluctant to involve themselves in the business of running a prison. It is much easier, for example, to allow prison administrators to decide how many prisoners may be assigned to a cell or how much exercise must be allowed.[4] Courts are also aware that while they may enjoin the use of an old facility, they have not the authority to require the building of a new one.[5] With that realization and the additional unusual fact that no alternatives are available, finding a facility constitutionally unsuitable is a difficult task.

The reluctance to condemn facilities is most often overcome when the facility is used to house those entitled to special protection: the young, the mentally incompetent, and the unconvicted.

Juveniles are theoretically incarcerated only in their best interests, and the courts have not been reluctant to protect children's rights to adequate facilities. The comprehensive opinion in *Inmates of Boys' Training School v. Affleck*[6] illustrates the depth to which courts are inclined to look. The isolation facility for juveniles had boys in 6x8 foot cells with three solid walls and one wall of bars; the boys never went outside and never left the cell except to take showers, to get meal trays, and occasionally to watch television or go to school. Among other things, the court ordered sufficient room lighting, daily showers, and access to medical services, including a twenty-four-hour nursing service. The concern over the right to treatment in these juvenile cases will undoubtedly require, among other things, additional facilities. For example, the right to treatment has been said to be the right to "individualized care and treatment."[7] This individualized treatment is necessarily going to place demands on facilities.[8]

The state also has a special protective interest in confined mentally ill persons. The Supreme Court in *Jackson v. Indiana*[9] established that "at the very least due process requires that the nature and duration of commitment bear some reasonable relationship to the purpose for which the individual is committed." Thus, an unconvicted but dangerous individual has no place in a prison when his mental disorder is not susceptible to treatment there.[10] In addition, the facilities must be physically adequate. Good faith efforts by administrative personnel did not prevent the court in *Rozecki v. Gaughan*[11] from holding that being housed in the Massachusetts Correctional Institution Treatment Center with its grossly inadequate heating system was cruel and unusual punishment.

Pre-trial detainees also have some claim to special protection by the state. They are considered innocent under the law, and the sole reason for their confinement is to insure their presence at trial. Except for mobility, these detainees retain all rights of persons admitted to bail.[12] Confinement in facilities more restrictive than those occupied by convicts has been viewed as violative of the equal protection clause[13] and of the proscription against cruel and unusual punishment.[14] Pre-trial detainees are often confined in antiquated and overcrowded detention centers and city and county jails.[15]

Rhem v. Malcolm[16] is representative of the growing number of cases being brought by pre-trial detainees. In that case, detainees challenged confinement in the "Tombs," the Manhattan House of Detention. A consent decree was entered on the issues of overcrowding, unsanitary conditions and inadequate medical care. Additional claims of those confined were upheld at trial. Visiting facilities were found inadequate. Non-functional phones, a high noise level, and lack of opportunity for contact visits with families were among the ills cited. Excessive heat, excessive noise, and a lack of ventilation drew the court's opprobrium. The court even ordered the installation of clear glass to prevent psychological disorientation.

A like concern for the details of the prison environment was shown in *Inmates of Suffolk County Jail v. Eisenstadt*.[17] The court established a time table for the temporary improvement and the eventual phasing out by June 30, 1976, of the facility. Within thirty days officials were ordered to give physicals to all persons detained more than seven days and to all food handlers, to provide laundry service and clothing, to allow four hours out-of-cell time, and to expand opportunities for attorney's visits. Five months were allowed in which to eliminate double occupancy, provide for visits from children and friends, and provide daily access to unmonitored phones.[18]

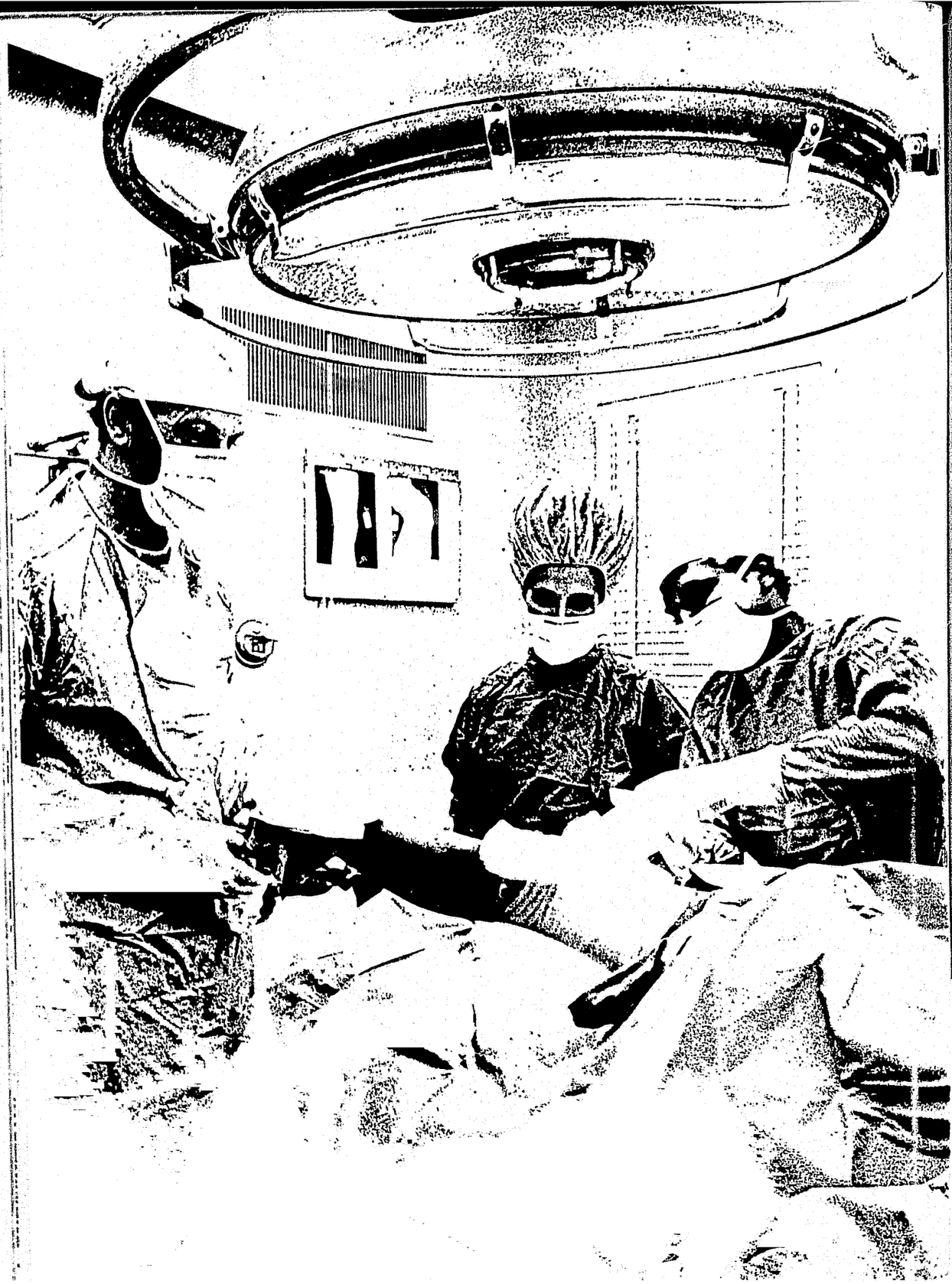
Attacks by inmates on general confinement are normally brought on eighth amendment cruel and unusual punishment grounds. These cases are becoming increasingly successful. For example, confinement at the Mississippi State Penitentiary at Parchman with its segregated, dilapidated housing units was declared cruel and unusual punishment,[19] and the sewage system was found to be inadequate and rat-infested. Among the relief ordered was emergency upgrading of water, electrical and sewage systems and long-range programs to renovate and reconstruct the physical plant. Similar attention to detail is shown in the court's order in *Hamilton v. Landrieu*.[20] The court required, among other things, repair of plumbing fixtures, installation of fire detection devices, installation of clear windows, and periodic safety inspections. In still another case, *Battle v. Anderson*,[21] abandonment of subterranean isolation facilities was ordered. Challenges to the power of the court to enter such detailed orders have been rebuffed.[22]

Confinement at county work farms, even ones with facilities inferior to those found elsewhere, is not itself cruel and unusual punishment.[23] However, conditions at a camp can be deplorable enough to constitute cruel and unusual punishment.[24]

Administrators fortunate enough to obtain money from federal sources to build new facilities will have to take care to observe the National Environmental Protection Act. A detailed formal environmental impact statement must be made unless it is determined by the appropriate federal agency that the new facility is not one "significantly affecting the quality of the human environment." In determining whether a prison substantially affects the environment, the negative psychological effects of a prison as well as its physical effect on the environment should be considered. For example, the impact of programs, such as drug maintenance centers or work release programs on crime rates in the nearby community must be considered.[25]

FOOTNOTES

1. 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd* 442 F.2d 304 (8th Cir. 1971).
2. 505 F.2d 194 (8th Cir. 1974).
3. *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972) and 363 F. Supp. 1152 (D. Md. 1972).
4. *See, e.g., State v. McCray*, 267 Md. 111, 297 A.2d 265 (1972).
5. *See, e.g., Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676 (D. Mass. 1973), *aff'd* 494 F.2d 1196 (2d Cir. 1974).
6. 346 F. Supp. 1354 (D. R.I. 1972).
7. *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974), *cert. denied* 417 U.S. 976. *See also O___ H___ v. French*, 504 S.W.2d 269 (Ct. App. Mo. 1973).
8. *See Martarella v. Kelley*, 349 F. Supp. 575 (S.D. N.Y. 1972) *See also Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973), ___ F. Supp. ___, 16 Cr. L. Rptr. 1050 (E.D. Tex. 1974); *Cox v. Turley*, ___ F.2d ___, 16 Cr. L. Rptr. 2233 (6th Cir. 1974).
9. 406 U.S. 715, 738 (1972).
10. *Kesselbrenner v. Anonymous*, 33 N.Y.2d 161, 350 N.Y.S.2d 911, 305 N.E.2d 903 (1973).
11. 459 F.2d 6 (1st Cir. 1972).
12. *Brenneman v. Madigan*, 343 F. Supp. 128 (N.D. Cal. 1972).
13. *Conklin v. Hancock*, 334 F. Supp. 119 (D. N.H. 1971).
14. *Johnson v. Lark*, 365 F. Supp. 289 (E.D. Mo. 1973).
15. Comment 79 Yale L.J. 941 (1970).
16. 371 F. Supp. 594 (S.D. N.Y. 1974), *aff'd in relevant part*, 507 F.2d 333 (2d Cir. 1974).
17. 360 F. Supp. 676 (D. Mass. 1973), *aff'd* 494 F.2d 1196 (2d Cir. 1974).
18. For other cases with substantial orders, see *Brenneman v. Madigan*, 343 F. Supp. 128 (N.D. Cal. 1972); *Collins v. Schoonfield*, 363 F. Supp. 1152 (D. Md. 1973). *But see, e.g., Rodgers v. Westbrook*, 362 F. Supp. 353 (E.D. Miss. 1973).
19. *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd* 501 F.2d 291 (5th Cir. 1974).
20. 351 F. Supp. 549 (E.D. La. 1972). This was the order in *Hamilton v. Schiro*, 338 F. Supp. 1016 (E.D. La. 1970).
21. 376 F. Supp. 402 (E.D. Okla. 1974).
22. *See Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972), *affirming* 323 F. Supp. 93 (N.D. Ohio 1971). *See also Taylor v. Sterrett*, 344 F. Supp. 411 (N.D. Tex. 1972), *modified* 499 F.2d 367 (5th Cir. 1974) which used local statutory standards to require upgrading of facilities.
23. *McLamore v. State*, 257 S.C. 413, 186 S.E.2d 250 (1972), *cert. denied* 409 U.S. 934 (1972).
24. *Cf. Howerton v. Mississippi County, Arkansas*, 361 F. Supp. 356 (E.D. Ark. 1973) in which a consent order may have saved an adverse ruling.
25. *See Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972); *First National Bank v. Richardson*, 484 F.2d 1369 (7th Cir. 1973).



Section 13

Medical Treatment and Practices

Prisoners have a right to reasonable medical care.[1] This right has been protected by the common law duty of care and by statute, particularly § 1983.[2]

The lack of medical care, both preventive and remedial, has been an important factor in the findings that incarceration in certain facilities constitutes cruel and unusual punishment. In holding that incarceration under the conditions at the Mississippi State Penitentiary constituted cruel and unusual punishment, the district court pointed out the inadequacy of staff medical personnel, the failure to isolate inmates with contagious diseases and the general filthy conditions of the facilities.[3] Among the relief ordered was the employment of medical personnel and the upgrading of the hospital and its equipment. In *Rhem v. Malcolm*[4] the court concerned itself greatly with the mental health of pre-trial detainees at the "Tombs" in Manhattan. Excessive noise and heat, the lack of clear windows, inadequate periods for exercise, and the disallowance of contact visits were all found to be detrimental to the mental health of the detainees. In another case, a district court ordered daily access by incarcerated juveniles to medical facilities, including a twenty-four-hour nursing service.[5] Medical care at the Oklahoma State Penitentiary was found inadequate to meet the predictable health care needs because of deficiencies in professional staff, equipment and facilities.[6]

In *Newman v. Alabama*[7] only the adequacy of medical care was in issue. The court held that the deprivation of proper medical treatment constituted cruel and unusual punishment. Understaffing, poor administration, poor equipment and facilities, and the use of unqualified personnel all drew the court's condemnation. The cost of providing adequate care was considered no defense to the failure to provide it.

Not only do prisoners as a class have the right to adequate medical care but each individual prisoner also has such a right. The enforcement of this right, however, is difficult. Mere negligence in treatment of medical problems is insufficient to state a cause of action under §1983. The inmate must show that the treatment is so shocking as to constitute cruel and unusual punishment or a violation of due process[8] or a deliberate indifference by prison authorities to a request for essential medical treatment.[9] Once an inmate has been treated by a doctor, the courts do not generally consider whether different or further treatment is indicated.[10] Dispute over proper treatment is denominated a "difference of opinion over matters of medical judgment,"[11] and the claim dismissed. In one case,[12] for example, an inmate requested a specialist to examine whether he had cancer after the return of warts treated by the prison doctors. In spite of the fact that one doctor "appeared mystified by the post-treatment proliferation of the warts," the court found only a difference of opinion over matters of medical judgment. Similarly, a request for a specialist to examine a stab wound in *Santiago v. Sowers*[13] was denied as merely a difference in opinion as to the competence of the treating physicians. But a prisoner was allowed a furlough to be treated by his own dentist in a case brought under the Prisoner Rehabilitation Act.[14]

Denial of requests for different kinds of treatment does not rise to a claim.[15] Nor does the failure to cure a complaint—e.g., chronic headaches—state a cause of action.[16] Only such care as is essential need be given. Thus, testing blacks for sickle-cell anemia is not required according to one district court.[17]

Two recent cases reached different results on the question of whether an incorrect diagnosis by a physician gives rise to a constitutional claim under §1983. In one,[18] an inmate lost a testicle when the treating physician treated his testicular swelling as an infection and prescribed penicillin. It was later discovered, during an operation which saved his right testicle, that the inmate had lost his left testicle due to a condition known as tortion. The court held that no action under §1983 was stated absent evidence of abuse, mistreatment or denial of essential medical treatment. In the other case,[19] a rectal cancer was erroneously diagnosed as hemorrhoids. After a later correct diagnosis, a portion of the colon was removed. The inmate alleged that he was refused X-rays and other clinical tests after he declined a digital examination. The court of appeals reversed a lower court decision dismissing the §1983 action, holding that a claim of denial of essential treatment was stated.

Once a diagnosis is made, prison officials may not prevent the indicated treatment. If, for example, a certain diet is prescribed, prison officials must provide a nutritionally sufficient diet which does not harm the inmate.[20] In *Campbell v. Beto*[21] the circuit court reversed the dismissal of a complaint which alleged that prescribed medicine had not been given and that the doctor's order forbidding hard labor had been ignored.

North Carolina denies elective, non-essential medical care to "safekeepers" within the Department of Corrections but allows such care for prisoners whose terms are fixed. Safekeepers include persons awaiting trial and persons with pending appeals. The fourth circuit[22] found no denial of equal protection since the county pays for safekeepers. This was said to provide the rational distinction for the different treatment. Judge Butzner, in dissent, pointed out that this regulation penalizes an individual wishing to appeal a case.

The use of unwanted drugs to control behavior is increasing, and courts are beginning to require consent to a prescribed course of medical treatment. In *Knecht v. Gillman*[23] inmates were given a drug which induced vomiting as an "aversive stimulus" after violations of behavioral protocol. The court required that the drug be administered by a doctor or a nurse, that it be used only when individually authorized by a doctor, and that it be used only upon written consent of the inmate. An opinion by a Michigan circuit judge held that an inmate of a mental institution can not give an informed consent to experimental psychosurgery.[24] Although the case involved a mental patient, many of the factors which led the court to hold that a voluntary informed consent is not possible would be equally applicable to prisoners. Among the factors considered were the effects of institutionalization and the inherently unequal bargaining power of the keeper and kept.

An allegedly unwanted hemorrhoidectomy was the subject of litigation in *Runnels v. Rosendale*.[25] The court held that the right to be secure in the privacy of one's own body forbids nonconsensual operations absent overriding reasons of prison security. South Carolina, on the other hand, permitted doctors to amputate the leg of a mental patient over his protests. The court found that the inmate did not understand the nature of the threat to his life.[26]

Patient-inmates at Matteawan State Hospital brought suit complaining of treatment and conditions in isolation cells. Decisions on whether to place persons in isolation were made on a determination of "dangerousness." The doctors, of course, called this isolation treatment. On motion for a preliminary injunction,[27] the court ordered that extensive records be kept in every instance in which an isolation cell is used. The stated purpose is to insure that the decision to use the isolation cells is based on explicit criteria, is routinely reviewed, and is supplemented with treatment. The court declined, at this stage of the proceedings, to require *Wolff*-type safeguards because the state might, although it had not yet, persuade it that there is sufficient medical justification for failing to grant these safeguards.

In *Romero v. Schauer*[28] the court required the due process procedure outlined in *Wolff* prior to the transfer of dangerous mental patients to the state prisons. In addition, counsel, provided at no cost if necessary, must be allowed the patient. Since Colorado by statute guarantees psychiatric treatment to all mental patients, equal protection was denied patients housed in the prison when they were provided substantially inferior treatment. The court found not even a rational relationship between dangerousness and "treatability."

FOOTNOTES

1. *E.g., Battle v. Anderson*, 376 F. Supp. 402, 424 (E.D. Okla. 1974); *Campbell v. Beto*, 460 F.2d 1072 (5th Cir. 1972).
2. 42 U.S.C. §1983.
3. *Gates v. Collier*, 349 F. Supp. 881, 888 (N.D. Miss. 1972), *aff'd* 501 F.2d 1291 (5th Cir. 1974).
4. 371 F. Supp. 594 (S.D. N.Y. 1974), further order 377 F. Supp. 995 (S.D. N.Y. 1974), *aff'd* ___ F.2d ___ (2d Cir. No. 329, Nov. 8, 1974).
5. *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354 (D. R.I. 1972).
6. *Battle v. Anderson*, 376 F. Supp. 402 (E.D. Okla. 1974).
7. 349 F. Supp. 278 (M.D. Ala. 1972), *removed from en banc court to panel without published opinion* 503 F.2d 565 (5th Cir. 1974).
8. *See, e.g., Startz v. Cullen*, 468 F.2d 560 (2d Cir. 1972); *Sloan v. Zelker*, 362 F. Supp. 83 (S.D. N.Y. 1973).
9. *See, e.g., Page v. Sharpe*, 487 F.2d 567 (1st Cir. 1973). *See also Freeman v. Lockhart*, 503 F.2d 1016.
10. *See generally*, Note, 49 N.D. Lawyer 454 (1973).
11. *Corby v. Conboy*, 457 F.2d 251, 254 (2d Cir. 1972).
12. *Sloan v. Zelker*, 362 F. Supp. 83 (S.D. N.Y. 1973).
13. 347 F. Supp. 1055 (M.D. La. 1972).
14. *Bartling v. Ciccone*, 376 F. Supp. 200 (W.D. Mo. 1974).
15. *Mathis v. Pratt*, 375 F. Supp. 301 (N.D. Ill. 1974) (refused to prescribe thorizine).
16. *Campbell v. Patterson*, 377 F. Supp. 71 (S.D. N.Y. 1974).
17. *Ross v. Bounds*, 373 F. Supp. 450 (E.D. N.C. 1974).
18. *Cradle v. Superintendent*, 374 F. Supp. 435 (W.D. Va. 1973).
19. *Robinson v. Jordan*, 494 F.2d 793 (5th Cir. 1974). There was in addition a claim of racial prejudice in that the doctor had coupled his refusal of tests with insulting racial slurs, but apparently there was no claim that the prejudice rather than the wrong diagnosis led to the loss.
20. *Steward v. Henderson*, 364 F. Supp. 283 (N.D. Ga. 1973); *Startz v. Cullen*, 468 F.2d 560 (2d Cir. 1972).
21. 460 F.2d 765 (5th Cir. 1972).
22. *Kersch v. Bounds*, 501 F.2d 585 (4th Cir. 1974).
23. 488 F.2d 1136 (8th Cir. 1973).
24. *Kaimowitz v. Department of Mental Health*, Civ. Action No. 73-19434-AW (Cir. Ct. for Wayne Cty., Mich. 1973). Portions of the opinion are set out in S. Krantz, *The Law of Criminal Corrections and Prisoners' Rights* (West 1974 Supp.).
25. 499 F.2d 733 (9th Cir. 1974).
26. *In re Schneider* (June 25, 1973 S.C.) (unreported order).
27. *Negron v. Preiser*, 382 F. Supp. 535 (S.D. N.Y. 1974).
28. ___ F. Supp. ___, 16 Cr. L. Rptr. 2213 (D. Colo. 1974).

Section 14

Administrator's Liability

Actions by prisoners against prison administrators seek a variety of remedies including injunctive relief, declaratory relief, or release from confinement. The three most common vehicles for seeking monetary damages are Title 42 U.S.C. §1983, the Federal Tort Claim Act, and state tort law. These avenues are not mutually exclusive; the same incident may give rise to an action under §1983 and under state tort law.[1]

Prisoners in large numbers have sought recovery of damages under §1983. Although the recovery of substantial monetary damages is possible,[2] substantial requirements must first be met. A state prisoner must be able to show a deprivation of a constitutional right under the color of state law. The litigation has largely focused on which constitutional rights survive incarceration so that their deprivation states a cause of action. The right to be free from unreasonable searches and seizures, for example, survives in a much more limited way in light of the recent decisions by the Supreme Court.[3] These cases establish the principle that the search of a pre-trial detainee is reasonable when there is a custodial-arrest based cause. The evidence seized need not relate to the crime for which the detainee was arrested. For convicted persons, incarceration is unquestionably reasonable. The Court indicated that it did "not include that the warrant clause of the fourth amendment is never applicable to post-arrest seizures of the effects of an arrestee"[4] and reserved the question of custodial searches "which might 'violate the dictates of reason either because of their number or their manner of perpetration.'"[5] Thus, searches of con-

victed inmates are likely to be held reasonable absent extraordinary circumstances.

In contrast to the right to be free from searches and seizures, the prohibition against cruel and unusual punishment does survive incarceration. A variety of circumstances have been found to be cruel and unusual punishment. In *Dewey v. Lawson*[6] the plaintiff was a diabetic undergoing a reaction. His wife reported his condition and continued to call the police to check on him. Plaintiff was arrested for public drunkenness and spent four days in jail before he was found in a diabetic coma. The court found that this constituted cruel and unusual punishment despite the argument that it was only actionable on a state level as negligence. In *Howell v. Cataldi*[7] the intentional beating of the plaintiff by a guard was held to be cruel and unusual punishment. In *Landman v. Royster*[8] the conditions of confinement were held to be cruel and unusual punishment. These cases represent extreme factual abuses; with lesser abuses, the boundaries of the cruel and unusual clause have yet to be clearly defined.[9]

Another constitutional vehicle more appropriate for a single isolated incident resulting in harm than the cruel and unusual punishment ban is the constitutional guaranty of due process. For example, an action under § 1983 is said to lie for a challenge to a classification as a maximum security prisoner when there are procedural irregularities[10] or when the reasons for the classification given are utterly beyond the scope of the authority of the classifying authority.[11] Conduct which shocks the conscience violates due process.[12] This standard was used to hold that a cause of action was stated against officials by an inmate who had been stabbed by a fellow inmate with whom he had previously had a confrontation.[13] In *Johnson v. Glick*[14] the court found that a sudden and unprovoked attack by a guard would not lie comfortably within the cruel and unusual punishment clause, but was violation of due process when the force was applied for the sole purpose of causing harm. The court did refuse to hold the administrator liable in the absence of allegations that the incident was other than a single spontaneous event.

Even so, many assaults on inmates are found not to be a constitutional deprivation because the assault is considered reasonable under the circumstances. In an explosive situation, use of force and strong precautionary measures have been upheld.[15] Moreover, failure to request a transfer to isolation may defeat a claim based on a beating by a fellow inmate.[16] In an isolated incident in which an inmate gained access to a glass container and used it to cut the plaintiff, no federal right was invaded.[17] Also, jurisdiction under § 1983 was denied for lack of a constitutional claim in a case in which relatives of a deceased prisoner alleged the negligent supervision and lack of protection of the inmate while he performed his assigned task of cleaning the boiler with gasoline.[18]

Recent litigation has established that a § 1983 action can be maintained where a prisoner has been deprived of his personal property while incarcerated. Earlier cases had held that a deprivation of property does not present a claim under § 1983.[19] The decision of the Supreme Court in *Lynch v. Household Finance Corp.*[20] undercut the distinction between property rights and constitutional rights, however. Thereafter, courts have been allowing recovery for theft and confiscation of personal property by guards. The amount of property need not be large, nor need the property be valuable. In *Russell v. Bodner*[21] the confiscation of seven packs of cigarettes was held to state a cause of action. The fact pattern in *Schumate v. People of the State of New York*[22] is a common one. The plaintiff was transferred between two institutions and his personal property, mostly clothing and cigarettes, was never transferred to him. The court held that a cause of action was stated under § 1983.[23]

Once a constitutional basis for a claim under § 1983 is determined, the question of who is responsible for recovery must be answered. Two additional limitations on recovery remain: the party sued must be a "person" within the definition of the statute; and, unless *respondeat superior* applies, he must have some degree of personal involvement. The courts are divided as to whether *respondeat superior* applies. This doctrine would require that the master (the administrator) pay for the damages caused by his servant (guard or other prison employee). Some courts have explicitly rejected its application,[24] one has stated that its applicability is controlled by state law,[25] and another has held that the doctrine does apply.[26] The issue is not reached when the requisite degree of personal involvement is found, as in *Curtis v. Everette*,[27] in which the prison commissioner and superintendent would have been held liable if the inmate had shown they had reason to know an attack would be made on him. In *Roberts v. Williams*[2] the court did not have to consider the plaintiff's contention that *respondeat superior* applied because it found that the evidence showed that the superintendent of prisons was negligent in his failure to supervise and train a trusty whose gun discharged in the inmate's face.

Even so, a wide range of defenses are available to the prison administrator. Procedurally, he formerly had been allowed to challenge the validity of court action if an inmate had failed to exhaust administrative remedies.[29] But the Supreme Court in *Wolff v. McDonnell*[30] held that exhaustion was not required for § 1983 when money damages are claimed, even though exhaustion is required for *habeas corpus*.

A defense often used against inmates who are assaulted by fellow inmates or guards is the lack of prior warning to the administrator. This has repeatedly been held a valid defense to an action under § 1983.[31] However, the defense was considered void in *Parker v. State*,[32] in which the guards knew of threats on Parker's life and had talked to the inmates about the situation, an explosive one involving the break-up of a homosexual affair. The defense was broadly interpreted in *Bracey v. Grenoble*.[33] The plaintiff had proved that the supervisor had been present five seconds prior to a beating administered by guards. The court found no evidentiary basis for a finding of knowledge or acquiescence on the part of the supervisor and reversed a $2500 judgment of the lower court.

The administrator is also protected if he, in reasonable good faith, follows procedures which are currently valid.[34] A recent first circuit case underscored the necessity of keeping current on developments in prison law.[35] The complaint had alleged that a post-emergency lock-up deprived inmates of basic constitutional rights for an unreasonable length of time. The court agreed that an emergency does not continue indefinitely and that at some point continued lock-up might be a subterfuge for the denial of procedural rights. Nevertheless, the defense of good faith in continuing the lock-up was found valid upon a motion for summary judgment because the courts had not yet set standards of conduct. The court warned, however, that "we view this as an exceedingly rare kind of disposition, applicable only in an exceptional situation where, as here, a broad field of conduct has been singularly bereft of standards, some of which we hope we have now supplied." Clearly, the court believes that bad faith may be inferred from disregard of its guidelines.

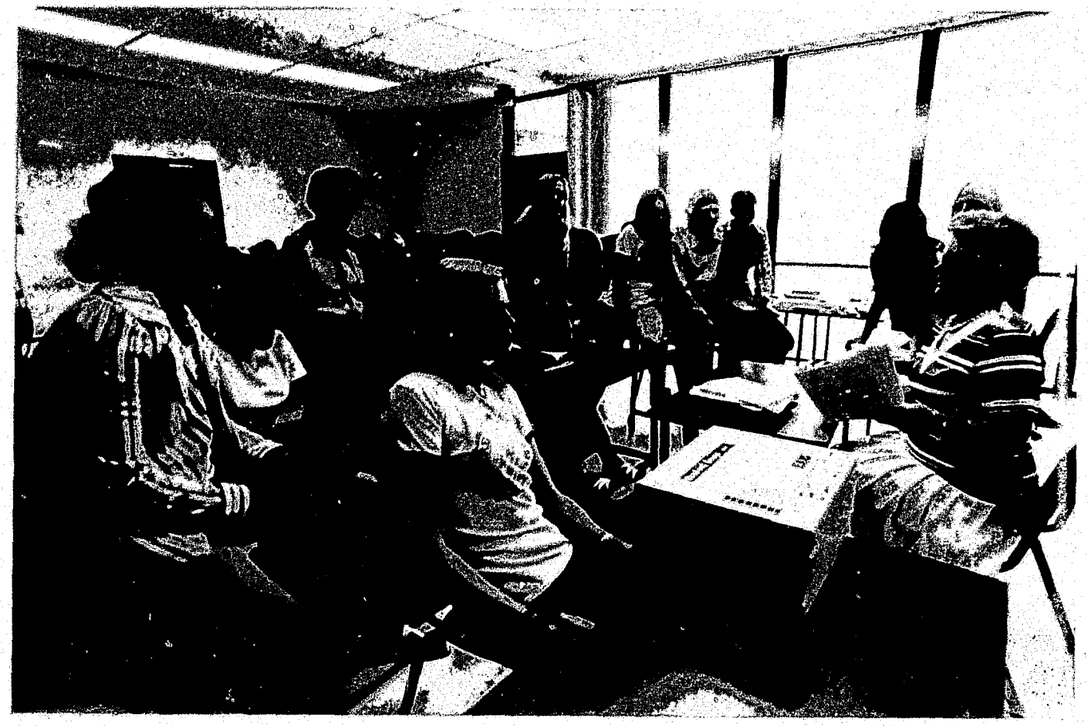
The doctrine of sovereign immunity may also serve as a defense in a § 1983 action. This defense adds little to those above, for immunity fails for an administrator in the absence of another valid defense. When the action is taken in good faith, or is within the scope of the administrator's authority or is otherwise reasonable, immunity serves as a bar to the action.[36]

If the incident fails to fall within the § 1983 requirements, a federal tort claim action or a state tort law action may exist. The foundations of both are the law of negligence and they stand largely unchanged by recent litigation.

The recent Supreme Court cases of *Logue v. United States*[37] and the decision of the eighth circuit in *Brown v. United States*[38] attempt to clarify the question of who can be sued. In *Logue*, the plaintiff's son killed himself while in the county jail awaiting transfer to a mental hospital because of a prior attempted suicide. The parents sued the county, the county jail personnel, and the federal deputy marshal in that area. Because contractors are excepted from Federal Tort Claim Act liability, the action against the county and the county personnel was dismissed. On remand from the Supreme Court, the court of appeals remanded to the district court for a further factual hearing as to the federal marshal's negligence.[39] In *Brown*, a federal prisoner was assaulted in a county jail while detained for trial. The court, on the basis of *Logue*, ruled that there could be no recovery against the jailer and the sheriff and none against the United States on imputed negligence, but that there could be a recovery if the federal government knew or should have known of the conditions of the jail. Thus, there is a duty on the part of federal officials to house its prisoners in safe facilities.

FOOTNOTES

1. *Parker v. State*, 261 La. 824, 282 So.2d 483 (1973); *Parker v. McKeithen*, 488 F.2d 553 (5th Cir. 1974).
2. *Landman v. Royster*, 354 F. Supp. 1302 (E.D. Va. 1973).
3. *Robinson v. United States*, 414 U.S. 218, 94 S. Ct. 467 (1973); *Gustafson v. Florida*, 414 U.S. 260, 94 S. Ct. 488 (1973); *United States v. Edwards*, 415 U.S. 800 (1974).
4. *United States v. Edwards*, 415 U.S. 800 (1974).
5. *Id.*
6. 489 F.2d 877 (10th Cir. 1974).
7. 464 F.2d 272 (2d Cir. 1972).
8. 354 F. Supp. 1302 (E.D. Va. 1973).
9. *Green v. Kent*, 369 F. Supp. 1124 (W.D. Va. 1974); *Perez v. Turner*, 462 F.2d 1056 (10th Cir. 1972), *cert. denied* 410 U.S. 944; *Haines v. Kerner*, 492 F.2d 937 (7th Cir. 1974).
10. *Palmigiano v. Mullen*, 491 F.2d 978 (1st Cir. 1974); *Gray v. Creamer*, 465 F.2d 199 (3rd Cir. 1972).
11. *Rochin v. United States*, 354 U.S. 165 (1952).
12. *Parker v. McKeithen*, 488 F.2d. 553 (5th Cir. 1974).
13. *See also Smart v. Lusk*, 373 F. Supp. 102 (E.D. Tenn. 1973), *aff'd* 492 F.2d 1244 (6th Cir. 1974); *Holland v. Connors*, 491 F.2d 539 (5th Cir. 1974).
14. 481 F.2d 1028 (2d Cir. 1973), *cert. denied* 414 U.S. 1033.
15. *Simmons v. Russell*, 352 F. Supp. 572 (M.D. Pa. 1972).
16. *Schyska v. Shifflet*, 364 F. Supp. 116 (N.D. Ill. 1973).
17. *Matthews v. Henderson*, 354 F. Supp. 22 (M.D. La. 1973).
18. *Glass v. Hamilton County*, 363 F. Supp. 241 (E.D. Tenn. 1973). *See also Williams v. United States*, 384 F. Supp. 579 (D. D.C. 1974).
19. *Elsen v. Eastman*, 421 F.2d 560 (2d Cir. 1969), *cert. denied* 400 U.S. 841.
20. 405 U.S. 538 (1972).
21. 480 F.2d 280 (3d Cir. 1973).
22. 373 F. Supp 1166 (S.D. N.Y. 1974).
23. *See also Hansen v. May*, 502 F.2d 728 (9th Cir. 1974); *Lathan v. Oswald*, 359 F. Supp. 85 (S.D. N.Y. 1973).
24. *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973), *cert. denied* 414 U.S. 1033.
25. *Tuley v. Heyd*, 482 F.2d 590 (5th Cir. 1973).
26. *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), *rev'd on other grounds*, 409 U.S. 418 (1973); *see also* Note, 6 Ind. L. Rev. 509 (1973).
27. 489 F.2d 516 (3d Cir. 1973) (dictum), *cert. denied*. No such allegation was made.
28. 456 F.2d 819 (5th Cir. 1972), *cert. denied* 404 U.S. 866. *But see Curtis v. Everette*, 489 F.2d 516 (3d Cir. 1973), *cert. denied*.
29. *See McCray v. Burrell*, 367 F. Supp. 1191 (D. Md. 1973).
30. 418 U.S. 539 (1974).
31. *Harris v. State*, 61 N.J. 585, 297 A.2d 561 (1972); *Brown v. United States*, 342 F. Supp. 987 (E.D. Ark. 1972), *modified* 486 F.2d 284 (8th Cir. 1973).
32. 282 So.2d 483 (La. 1972), *cert. denied* 414 U.S. 1093.
33. 494 F.2d 566 (3d Cir. 1974).
34. *United States ex rel. Bracey v. Rundle*, 368 F. Supp. 1186 (E.D. Pa. 1973); *Haines v. Kerner*, 492 F.2d 937 (7th Cir. 1974); *Skinner v. Spellman*, 480 F.2d 539 (4th Cir. 1973).
35. *Hiott v. Vitek*, 497 F.2d 598 (1st Cir. 1974).
36. *Poindexter v. Woodson*, 357 F. Supp. 443 (D. Kan. 1973).
37. 412 U.S. 521 (1973).
38. 486 F.2d 284 (8th Cir. 1973).
39. *Logue v. United States*, 488 F.2d 1090 (5th Cir. 1974).



Section 15

Rehabilitation

The Right to Treatment

In 1972, the United States Supreme Court stated that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[1] And in 1974, the Supreme Court enumerated "rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody" as one of the fundamental responsibilities of prison administrators.[2] Thus, one would expect that a constitutional right to rehabilitation, at least for those prisoners who will return to society, would emerge. Prisoners, however, are still finding the right to treatment elusive.[3] Mental patients and juveniles, exceptions to the rule, are winning the right to treatment in a growing number of cases.

Judicial support for a right to treatment for criminally committed but unconvicted mental patients started as recently as 1966.[4] The recent case of *Donaldson v. O'Connor*[5] sets out one major rationale supporting the right to treatment. An unconvicted person is said to be confined because he is in need of treatment. The state, having assumed the role of *parens patriae* and having eliminated the procedural safeguards attending a criminal trial, must then provide that needed treatment. The second major theory is that untreated patients are being cruelly and unusually punished for their status if they are subject to "detention for mere illness—without a curative program."[6] The statutory provisions setting up mental hospitals may also give rise to a duty to treat.[7] The Minnesota Hospitalization and Commitment Act provided that "every person hospitalized . . . under this section shall be entitled to receive proper care and treatment."[8] A district court held that this statute created a statutory right to treatment. In *Donaldson*, a substantial monetary judgment was affirmed not only

for failure to provide treatment but also because the patient was not allowed to enter available treatment programs.

Juveniles, like mentally ill unconvicted persons, have an emerging right to treatment. This right to treatment is said to follow from the nature of juvenile proceedings. The state claims the right to use procedures less protective of juvenile rights than those required in an adult criminal trial. As a *quid pro quo* in exercising this *parens patriae* control, the state must offer effective treatment to the juvenile it seeks to help.[9] The absence of a substantial program of rehabilitation has been a strong factor in many of the cases involving juvenile institutions and has resulted in detailed orders requiring extensive changes. For example, in *Inmates of Boys' Training School v. Affleck*[10] the absence of vocational and educational training contributed to findings that incarceration in Rhode Island juvenile institutions constituted cruel and unusual punishment.

Once the theoretical base for a right to treatment is laid, the question then becomes, "What is treatment?" Noting that there are at least forty methods of psychotherapy, one district court found the word "treatment" incapable of judicial definition and denied relief partially on that basis.[11] Other courts have not been so timid. A district court, in *Wyatt v. Stickney*,[12] issued a detailed order defining minimum constitutional standards in terms of such things as minimum staff, minimum privileges, minimum facilities, and individual treatment plans. Still other courts, while perhaps unable to define what adequate treatment might be, are nevertheless able to discern inadequate treatment. Thus, a claim that a patient warehoused in a mental institution was being given religious, recreational and milieu therapy was rejected by the fifth circuit.[13] This meant nothing more than that the patient was allowed to attend church and have recreation periods and was institutionalized. Similarly, the seventh circuit has recognized that treatment of juveniles is inadequate without an individualized program of treatment.[14] The definition of "adequate treatment" will vary with the individual in question.

Adults, unlike juveniles, have made little progress toward a right to treatment. There have been indications, however, that the absence of programs of rehabilitation can contribute to a finding that incarceration in a particular institution is cruel and unusual punishment.[15] Nevertheless, courts are continuing to hold that the denial of opportunities in and of itself does not constitute cruel and unusual punishment.

Alabama prisoners in the Holman Maximum Security Unit claimed that the failure to provide facilities, programs and personnel for treatment and rehabilitation constituted cruel and unusual punishment.[16] The court was unpersuaded that past cases denying such a constitutional right ought control since the eighth amendment reflects evolving standards of decency. The court recognized that rehabilitation is one of the primary purposes of incarceration, but held that since free citizens have no absolute right to rehabilitation services, surely convicted felons do not.

While the court found no absolute positive duty to provide rehabilitation services, it found a constitutional right to undertake such services absent a rational justification for curtailing the activity. Additionally, if the inmates are able to prove allegations that conditions in prison are so bad that they will become less able to adapt to society, then incarceration can amount to cruel and unusual punishment and relief might well include compelling provision of basic rehabilitative services and facilities. The court also held that if a state provides rehabilitative services to some inmates, it must justify the reasonableness of any denial to others. Among proper justifications would be the likelihood that an inmate might not benefit from the program.

Other recent cases have rejected claims of a general right to rehabilitation[17] and of the specific right to the rehabilitation opportunities provided by furloughs.[18]

Statutory Right to Treatment

Many cases finding a right to treatment for mental patients and juveniles are based at least in part on statutory provisions requiring care and treatment of such persons. One writer has suggested that the statutes creating and defining the duties of adult correctional institutions provide a similar basis for a right to treatment for adults.[19] If this view is to emerge, it will have to take into account two recent Supreme Court cases which indicate that specific programs of rehabilitation need not be open to all inmates and that inmates less likely to receive benefit may be wholly excluded from the programs.

The Federal Youth Corrections Act[20] and state acts patterned after it adopt for eligible youths "the concept of rehabilitation as opposed to retribution in the handling of youth offenders."[21] The act set up special institutions for youthful offenders to which they must be sentenced. 18 U.S.C. §5010(d) allows sentencing under adult penalty provisions only "if the court shall find that the youth offender will not benefit from treatment." Substantial litigation has been engendered over whether the statute leaves unbridled discretion to the sentencing judge or whether he must make an explicit finding that the youth will not derive benefit from treatment and explain his reasons. The Supreme Court in *Dorszynski v. United States*[22] decided that compliance with the Act was satisfied by any expression which made clear that the judge had considered the act and had found that no benefit would be derived from treatment. No reason for the finding had to be given. The Court said in effect that the Act created not a mandate from the Congress to treat youth offenders but another sentencing option for the judge.

In the other Supreme Court case, *Marshall v. United States*,[23] the legislative prerogative to select on the basis of the number of prior convictions the persons entitled to rehabilitative drug treatment was upheld. The Court found the exclusion from treatment under the Narcotics Addicts Rehabilitation Act of persons having two prior felony convictions rationally based on the legislative judgment that those persons are less likely to be rehabilitated.

These cases can be reconciled with a constitutional right to treatment by recognizing that such treatment, as in the juvenile cases, needs to be individualized.

Unwanted Treatment

Many of the cases involving the right to treatment also involve the right not to be treated, at least in certain ways. In *Inmates of Boys' Training School v. Affleck*,[24] the court found that the school's "carrot-and-stick program" could not reduce a boy's "privileges" to sub-minimal standards for living. Daily showers, bedding, clothing changes, and other such rights could not be considered a "privilege" to be bought with acceptable behavior.

The use of drugs to control behavior is increasing.[25] In *Knecht v. Gillman*[26] the court forbids the use of a vomit-inducing drug as a method of punishing bad behavior without proper medical supervision and without informed consent by juveniles volunteering for the treatment.

Recent assaults on the so-called "behavior modification" programs have been mounted. Perhaps the biggest blow has been dealt by the Law Enforcement Assistance Administration. A recent directive of that organization bans funding of programs which "involve any aspect of psychosurgery, behavior modification (*e.g.*, aversion therapy), chemotherapy, except as part of routine clinical care, and physical therapy of mental disorders."[27] Thus, a major source of funds for these experimental programs has dried up. Courts, too, have closely examined behavioral modification programs. In *Clonce v. Richardson*[28] the court looked at the Bureau of Prisons's project START (Special Treatment and Rehabilitation Training). Inmates who were disciplinary problems were involuntarily placed in the project. The inmates were allowed or denied privileges in accordance with the level which they achieved.

The initial or orientation level afforded few, if any, privileges. The district court held that an involuntary transfer to the program must be preceded by a hearing at which minimal due process is afforded. The court stated that the procedures mandated by *Wolff v. McDonnell*[29] were required whenever a major adverse change in conditions of a prisoner's confinement occurred.

In *Bell v. Wolff*,[30] a pre-trial detainee challenged a milder rehabilitative effort, namely the requirement that he work. The court found that the detainee had been subjected to involuntary servitude but denied an award of damages since the warden had in good faith believed that the plaintiff would rather work than remain idle. Convicted persons, on the other hand, may be forced to work.[31]

An illiterate inmate of the Arkansas Department of Corrections was unsuccessful in attacking another form of rehabilitation. Claiming the right to be ignorant, he protested compulsory school attendance. The court denied his claim on the grounds that a state may undertake to rehabilitate its convicts.[32]

FOOTNOTES

1. *Jackson v. Indiana*, 406 U.S. 715 (1972).
2. *Procunier v. Martinez*, 416 U.S. 396, 404 (1974).
3. Even if a right to rehabilitation were established, there would still be a substantial question of what proper treatment or rehabilitation is. *See, e.g.*, S. Rubin, *Law of Criminal Correction*, Ch. 18, § 16 (West, 1973); *Burnham v. Department of Public Health*, 349 F. Supp. 1335 (N.D. Ga. 1972).
4. *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966); *see generally*, Note, 60 Va. L. Rev. 864 at n. 78 (1974).
5. 493 F.2d 507 (5th Cir. 1974), *cert. granted* ___ U.S. ___, 95 S. Ct. 171.
6. *Martarella v. Kelley*, 349 F. Supp. 575, 599 (S.D. N.Y. 1972); quoted in *Welsch v. Likins*, 373 F. Supp. 487, 496 (D. Minn. 1974).
7. *See, e.g., Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966).
8. *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974).
9. *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974); *Martarella v. Kelley*, 349 F. Supp. 575 (S.D. N.Y. 1972); *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973); *M. v. M.*, 71 Misc.2d 396, 336 N.Y.S.2d 304 (1972).
10. 346 F. Supp. 1354 (D. R.I. 1972). *See also Morales, supra* n. 9.
11. *Burnham v. Department of Public Health*, 349 F. Supp. 1335 (N.D. Ga. 1972).
12. 344 F. Supp. 373 (M.D. Ala. 1972).
13. *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *cert. granted* ___ U.S. ___, 95 S. Ct. 171.
14. *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974).
15. *Finney v. Arkansas*, 505 F.2d 194 (8th Cir. 1974); *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd* 442 F.2d 304 (8th Cir. 1971); *Taylor v. Sterrett*, 344 F. Supp. 411 (N.D. Tex. 1972), *aff'd* 499 F.2d 367 (5th Cir. 1974).
16. *James v. Wallace*, 382 F. Supp. 1177 (M.D. Ala. 1974).
17. *Lunsford v. Reynolds*, 376 F. Supp. 526 (W.D. Va. 1974).
18. *Brooks v. Dunn*, 376 F. Supp. 976 (W.D. Va. 1974).
19. Hollen, Emerging Prisoners' Rights, 33 Ohio St. L. J. 1, 72 at n. 466-67 (1972).
20. 18 U.S.C. §5005 *et seq.*
21. *United States v. Kaylor*, 491 F.2d 1133, 1136 (2d Cir. 1974).
22. 418 U.S. 424 (1974).
23. 414 U.S. 417 (1974).
24. 346 F. Supp. 1354 (D. R.I. 1972).
25. *See generally*, Note 26 Stan. L. Rev. 1327 (1974).
26. 488 F.2d 1136 (8th Cir. 1973).
27. *See* 20 Crime and Delinquency 314 (1974).
28. 379 F. Supp. 338 (D.C.W. Mo. 1974).
29. 418 U.S. 539 (1974).
30. 496 F.2d 1252 (8th Cir. 1974).
31. *See, e.g., Howerton v. Mississippi County, Arkansas*, 361 F. Supp. 356 (E.D. Ark. 1973).
32. *Rutherford v. Hutto*, 377 F. Supp. 268 (E.D. Ark. 1974).

Section 16

Classification and Work Assignment

The courts state that they are generally reluctant to interfere in prison classification decisions. These important decisions determine the place of confinement, job assignment, custody, and privileges of an inmate. This hands-off policy is based on the belief that institutional placement in the nature of classification is peculiarly within the competence of prison officials, and courts therefore will not, in the absence of unusual circumstances, interfere.[1] This view is reinforced by recognition of the fact that not every error in the classification of state prisoners by a prison classification board gives rise to infringement of a constitutionally protected right. There is no federally protected right to a particular classification or to an error-free decision by state authorities.[2] In addition, not every adverse change in a prisoner's status is sufficiently grievous to amount to a constitutional deprivation.[3] It is readily apparent that the courts see themselves as permitting prison administrators a free hand in the classification of inmates. There have been, however, a number of recent cases investigating the fairness of the procedures for classification.[4]

Classification

The courts have recently ruled that the due process clause of the fourteenth amendment requires that state prison classification committees act without punitive intent and within their own regulations.[5] Proceedings before a prison classification committee for the purpose of determining a possible security reclassification must be non-punitive in nature. If such proceedings are punitive in fact, they will be tested against the same due process standards which are applicable to disciplinary proceedings.[6]

Prisoners are also protected in classification decisions by the equal protection clause of the fourteenth amendment. Equal protection in the prison classification context generally requires that those similarly situated be classified and treated similarly.[7] Of course, constitutional principles of equal protection do not preclude the state from drawing distinctions between different groups of individuals.[8] The state must show the reason for a particular classification[9] and show that the classification is necessary to further a legitimate state interest.[10] For example, the Supreme Court has held that a New York statute denying certain state prisoners "good time" credit for parole eligibility for the period of their city jail incarceration, whereas those released on bail prior to sentence receive the full allowance of "good time" credit for the entire period of their prison confinement, rationally promotes a legitimate state policy.[11] It offers prison officials an adequate opportunity to evaluate an inmates's conduct and his rehabilitative progress before he is eligible for parole. The classification does not violate equal protection even if the fostering of rehabilitation is not necessarily the primary legislative objective.[12]

Due process of law, in the form of procedural safeguards, also limits the discretion of prison officials in the classification of inmates. A minimal level of due process is required for any decision which may result in a marked changed in the status of an inmate's confinement and in his being deprived of amenities on which he has come to rely. This loss of amenities becomes a grievous loss for prisoners because of the restrictions over so many of their activities.[13] Whenever such a loss may result, a hearing is required.[14] It is clear that placement in administrative segregation[15] or the loss of good time[16] are grievous losses which require due process.

Once a classification which will have adverse consequences on the inmate is contemplated, one court has required the following procedures prior to such classification: (1) ten days notice with reasons for the proposed designation and a brief description of the evidence supporting the classification; (2) a personal appearance; (3) the right within reasonable limits to call witnesses and present documents; (4) the right to confrontation and cross-examination only in unusual circumstances; (5) counsel or counsel substitute if the issues are complex or the gathering of evidence is difficult; (6) a written statement of findings; and (7) a review at several levels.[17]

When a reclassification hearing is mandated by the due process clause, different requirements have been laid down by the various courts which have considered the problem. Many requirements are, however, the same in all jurisdictions. Initially, it must be noted that a reclassification hearing is not a criminal trial;[18] therefore, many procedural safeguards are not required.[19] The court will inquire only as to whether minimal due process standards applicable under the circumstances of this kind of non-criminal proceedings have been met.[20] At such hearings, deference is paid to the expertise of the prison officials on substantive matters; nevertheless, certain procedural requirements tend to protect the inmate.[21]

The first of these procedures which assist the inmate is the requirement that he be given reasonable notice of the pendency of the reclassification proceeding. One court has required that the notice give some indication of the stimuli which prompted the action and a general indication of any adverse reports which are likely to be considered by prison officials.[22]

The inmate should be informed of the evidence against him and be offered a reasonable opportunity to explain his actions.[23] He should be allowed to present any additional facts and arguments which he considers relevant to the questions presented.[24] Some courts have also required that he be permitted to confront and cross-examine witnesses against him,[25] especially when the witnesses in question are subject to control by the prison authorities.[26] This requirement is unlikely to stand in view of *Wolff v. McDonnell*,[27] which holds that confrontation and cross-examination are not constitutionally required at a disciplinary hearing. The decision of the Court apparently did not come easily. The decision was hedged about with language implying that at a later date confrontation and cross-examination might become required. This language can probably be taken as a warning to develop procedures which allow for cross-examination except when some valid institutional policy militates against its use in a particular hearing. One such policy obviously would be the protection of informants. There is a very real need to keep the identity of an informant secret from the rest of the prison population; hence, the right of an inmate to deal with an informant at a classification hearing could be severely curtailed. The procedures outlined by one court could be followed. Neither the informants themselves nor their written statements need be produced at the hearing; instead, prison officials may act as "relays" of the information given them. However, to further insure the accuracy of the "relayed" information, the prison officials can be required to be sworn.[28]

Finally, one federal district court has held that a reclassification action taken by the committee without supporting facts which rationally lead to the new classification violates substantive due process.[29]

When there is reason to believe that an inmate has engaged in criminal conduct, a temporary change in security status pending disposition of the criminal matter is justified.[30] Inmate behavior which has already been the subject of criminal prosecution or institutional disciplinary action may also serve as a basis for independent security reclassification of the inmate.[31] Such proceedings involve no double jeopardy problems since reclassification proceedings involve an intra-prison security determination which is not penal in nature; it is not imposed by judicial sentence after trial and conviction in a court of law.[32]

A temporary security reclassification based on the pendency of criminal charges against a prison inmate must terminate when such charges are finally disposed of; the period of temporary reclassification must not be excessive. However, when an inmate initiates the delay, further temporary reclassification will not be considered excessive.[33] Reclassification action during the pendency of criminal action may be taken by prison officials without the necessity of the usual due process hearing; it is sufficient if prison officials determine, on the basis of investigative reports, that probable cause exists to suspect the inmate of criminal conduct.[34]

Reclassification is an improper cure for an inmate whose only malady is that he is a prolific writ-writer.[35] Nor may a person be permanently consigned to a segregation facility by the simple expedient of not reconsidering his classification. In such a case, if the adverse classification continues beyond a reasonable time, the inmate is entitled to a normal reclassification proceeding.[36]

When confinement is imposed on a particular inmate because of his own past conduct and the related activity of others, such confinement must be terminated when the causal activity has ended. For example, prison officials had confined in maximum security a prisoner who had demonstrated an ability to lead other inmates and who was filled with hostility and resentment toward the "white power structure" in the maximum security section of the prison. This confinement was held to be proper, even in the absence of overt misconduct, because of the tension which had been generated in the prison by the death of another inmate. However, continued confinement in the maximum security section beyond the period of tension was held to be improper.[37]

Prison officials may impose administrative segregation on an inmate whenever they determine that such an action would be in the inmate's own best interests. Even the inmate's desire to face the threatened harm rather than suffer the deprivations of segregation fails to stay the court's deferral to the good faith and experience of the administrator.[3]

Certain procedural barriers to attacking classification have been raised. Some courts have held that a state prisoner feels that he has been wrongfully classified, he must first exhaust any and all avenues of administrative appeal which may be available.[39] Only then may he go forward with a judicial appeal, at which time the specific issues raised are to be resolved by a balancing of the conflicting interests involved.[40] This procedural dodge may be circumvented in a federal suit under 42 U.S.C. §1983 by a simultaneous claim for money damages.[41]

The inmate then has the burden of showing, with convincing particularity, a constitutional deprivation caused by the determination of the classification committee. He can do so by showing that the determination was so arbitrary or capricious as to be devoid of due process, that the classification committee ignored its own regulations, or that officials reclassified a prisoner for reasons utterly beyond the scope of any legitimate authority granted to them. In order to then recover damages, the inmate must also show such a degree of neglect or malice or deliberate discrimination that the board members would be deprived of official immunity, which is granted for merely erroneous action.[42] Conversely, to establish that particular institutional classification committee actions are not arbitrary or capricious, it is sufficient that the prison officials present a record which shows that the actions taken are such as would reasonably be calculated to remedy the action involved.[43]

One court has faced the issue of what to do with an inmate's record which includes references to several administrative "convictions" which have been voided for lack of due process. If allowed to remain on the record, such actions would be reviewable by subsequent reclassification committees and the parole board. The court determined that expurgation of such entries would not be required, but that a statement that such convictions have been voided under a decision of a federal district court would be placed in the margin of the record.[44]

Work Assignment

The work classification of an inmate ordinarily does not present a justiciable federal question[45] because it is generally recognized that assignment of an inmate to a particular job,[46] to trustee status,[47] or to work release[48] is a decision which is left to the discretion of prison officials.

A prison inmate may be required to work; such a requirement does not constitute "involuntary servitude" within the meaning of the thirteenth amendment.[49] In one case, an inmate who, because of deeply held conscientious beliefs, refused to work in profit-making prison industries but who was willing to work in any other job capacity so long as the work did not involve a profit-making shop was permissibly placed in isolation for refusal to work.[50] Another court has found that there is no federally protected right not to work while a conviction is being appealed.[51] On the other hand, a prisoner does not have a right to work while in prison[52] or, if given work, to hold a particular job.[53] An inmate is entitled to relief if, but only if, his work assignment at the prison is decided arbitrarily or capriciously.[54]

When a classification committee contemplates a change of job assignments which presents no security classification change, no hearing is required, mainly because a prisoner subject to a lateral job transfer suffers no loss of rights, privileges or parole eligibility. However, the fact that a hearing is not required does not obviate the requirement that the classification committee act without arbitrariness or punitive intent.[55]

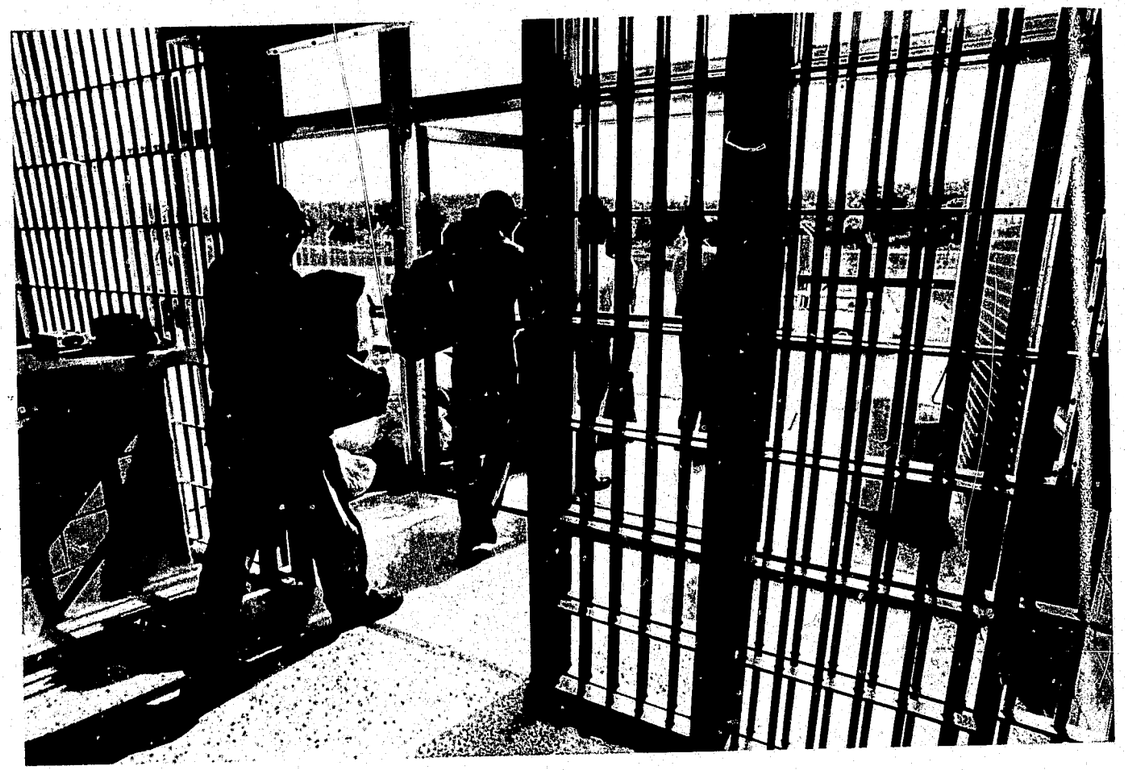
A poor institutional record during any previous period of incarceration justifies prison authorities in assigning an inmate to a work position which does not provide for the accrual of "good time."[56] This differentiation, which allows different amounts of "good time" to depend upon the type of work done, is a matter of prison administration which will be disturbed only if clearly arbitrary or capricious.[57] Thus, in a recent case, differentiation in "good time" allowances for farm labor and kitchen labor was not declared improper; and the prisoner, who worked on the prison farm, was not entitled to the more generous provision for "good time" allowed kitchen workers.[58]

Essentially, the same rules apply to pre-trial detainees, but there are a few significant differences. For example, a pre-trial detainee cannot be forced to work.[59] It is also unreasonable to classify pre-trial detainees with persons sentenced to jail following conviction.[60] Jail personnel may, of course, segregate detainees who cause disciplinary problems, but they must establish and apply appropriate (higher) standards for doing so.[61] In general, the pre-trial detainee's rights must be more fully respected than those of the convicted inmate.

FOOTNOTES

1. *Young v. Wainwright*, 449 F.2d 339 (5th Cir. 1971); *Brenneman v. Madigan*, 343 F. Supp. 128 (N.D. Cal 1972).
2. *Palmigiano v. Mullin*, 491 F.2d 978 (1st Cir. 1974).
3. *United States ex rel. Miller v. Twomey*, 479 F.2d 701 (7th Cir. 1973), *cert. denied* 414 U.S. 1146.

4. Much of the recent classification case law also applies to youthful offenders and state mental patients, although these individuals generally are more protected than is the prison inmate. *See generally United States v. Alsbrook*, 336 F. Supp. 973 (D. D.C. 1971); *People ex rel. Anonymous v. Waugh*, 351 N.Y.S.2d 594 (1974).
5. *Lloyd v. Oliver*, 368 F. Supp. 821 (E.D. Va. 1973); *Ferrell v. Huffman*, 350 F. Supp. 164 (E.D. Va. 1972).
6. *Cousins v. Oliver*, 369 F. Supp. 553 (E.D. Va. 1974); *Wesson v. Moore*, 365 F. Supp. 1262 (E.D. Va. 1973).
7. *Thomas Oil, Inc. v. Onsgaard*, ___ Minn. ___, 215 N.W.2d 793 (1974); *People v. Von Diezelski*, 78 Misc.2d 69, 355 N.Y.S.2d 556 (1974); *Boelon v. State*, ___ Tenn. ___, 506 S.W.2d 137 (1974).
8. *Henry v. Bander*, 213 Kan. 751, 518 P.2d 362 (1974).
9. *D'Amico v. Board of Medical Examiners*, 520 P.2d 10, 112 Cal. Rptr. 786 (1974); *People v. Von Diezelski*, 78 Misc.2d 69, 355 N.Y.S.2d 556 (1974).
10. *Weaver v. Kelton*, 357 F. Supp. 1106 (E.D. Tex. 1973); *Henry v. Bander*, 213 Kan. 751, 518 P.2d 362 (1974).
11. *McGinnis v. Royster*, 410 U.S. 263 (1973).
12. *Id.*
13. *Palmigiano v. Baxter*, 487 F.2d 1280 (1st Cir. 1973), *vacated for consideration in light of* Wolff, 94 S. Ct. 3200; *see also Nimmo v. Simpson*, 370 F. Supp. 103 (E.D. Va. 1974); *Lloyd v. Oliver*, 363 F. Supp. 821 (E.D. Va. 1973).
14. *Id.*
15. *Berch v. Stahl*, 373 F. Supp. 412 (W.D. N.C. 1974); *King v. Higgins*, 370 F. Supp. 1023 (D. Mass. 1974), *aff'd* 495 F.2d 815 (2d Cir. 1974); *Diamond v. Thompson*, 364 F. Supp. 659 (M.D. Ala. 1973); *Bowers v. Smith*, 353 F. Supp. 1339 (D. Vt. 1972).
16. *See generally Lathrop v. Brewer*, 340 F. Supp. 873 (S.D. Iowa 1972); *Foote v. Flood*, 44 A.D.2d 577, 353 N.Y.S.2d 229 (1974); *contra McGuffin v. Cowan*, ___ Ky. ___, 505 S.W.2d 773 (1974).
17. *Catalano v. United States*, 383 F. Supp. 346 (D. Conn. 1974).
18. *Nimmo v. Simpson*, 370 F. Supp. 103 (E.D. Va. 1974); *Almanza v. Oliver*, 368 F. Supp. 981 (E.D. Va. 1973).
19. *Almanza v. Oliver*, 368 F. Supp. 981 (E.D. Va. 1973); *Foote v. Flood*, 44 A.D.2d 577, 353 N.Y.S.2d 229 (1974); *cf., Wolff v. McDonnell*, 15 Cr. L. Rptr. 3304 (June 26, 1974).
20. *Wesson v. Moore*, 365 F. Supp. 1262 (E.D. Va. 1973).
21. *Nimmo v. Simpson*, 370 F. Supp. 103 (E.D. Va. 1974).
22. *Almanza v. Oliver*, 368 F. Supp. 981 (E.D. Va. 1973).
23. *Benfield v. Bounds*, 363 F. Supp. 160 (E.D. N.C. 1973); *Foote v. Flood*, 44 A.D.2d 577, 353 N.Y.S.2d 229 (1974).
24. *Cousins v. Oliver*, 369 F. Supp. 553 (E.D. Va. 1974).
25. *Nimmo v. Simpson*, 370 F. Supp. 103 (E.D. Va. 1974); *Almanza v. Oliver*, 368 F. Supp. 981 (E.D. Va. 1973).
26. *Wesson v. Moore*, 365 F. Supp. 1262 (E.D. Va. 1973).
27. 418 U.S. 539, 567-69 (1974).
28. *Nimmo v. Simpson*, 370 F. Supp. 103 (E.D. Va. 1974).
29. *Bowers, v. Smith*, 353 F. Supp. 1339 (D. Vt. 1972).
30. *Almanza v. Oliver*, 368 F. Supp. 981 (E.D. Va. 1973).
31. *Cousins v. Oliver*, 369 F. Supp. 553 (E.D. Va. 1974).
32. *Id.*; *Almanza v. Oliver*, 368 F. Supp. 981 (E.D. Va. 1973); *State v. Carroll*, 17 N.C. App. 691, 195 S.E.2d 306 (1973).
33. *Almanza v. Oliver*, 368 F. Supp. 981 (E.D. Va. 1973).
34. *Id.*
35. *Hooks v. Kelley*, 463 F.2d 1210 (5th Cir. 1972).
36. *See generally Almanza v. Oliver*, 368 F. Supp. 981 (E.D. Va. 1973); *Allen v. Nelson*, 354 F. Supp. 505 (N.D. Cal. 1973), *aff'd* 484 F.2d 960 (9th Cir. 1973).
37. *In re Hutchinson*, 23 Cal. App.3d 337, 100 Cal. Rptr. 124 (1972). *See also Bowers v. Smith*, 353 F. Supp. 1339 (D. Vt. 1972).
38. *Daughtery v. Carlson*, 372 F. Supp. 1320 (E.D. Ill. 1974).
39. *Marvin v. Pinto*, 463 F.2d 583 (3d Cir. 1972).
40. *Wesson v. Moore*, 365 F. Supp. 1262 (E.D. Va. 1973).
41. *Wolff v. McDonnell*, 418 U.S. 539, 553-55 (1974).
42. *Palmigiano v. Mullin*, 491 F.2d 978 (1st Cir. 1974); *Ferrell v. Huffman*, 350 F. Supp. 164 (E.D. Va. 1972); *see also* Section 14 *supra*.
43. *Wesson v. Moore*, 365 F. Supp. 1262 (E.D. Va. 1973).
44. *Daniels v. Brown*, 349 F. Supp. 1288 (E.D. Va. 1972).
45. *Cradle v. Superintendent*, 370 F. Supp. 79 (W.D. Va. 1974).
46. *Saunders v. Sumner*, 366 F. Supp. 217 (W.D. Va. 1973).
47. *Wesson v. Moore*, 365 F. Supp. 1262 (E.D. Va. 1973); *Ferrell v. Huffman*, 350 F. Supp. 164 (E.D. Va. 1972).
48. *Wagner v. Holmes*, 361 F. Supp. 895 (E.D. Ky. 1973).
49. *Banks v. Norton*, 346 F. Supp. 569 (D. Conn. 1972); *Wilkinson v. McManus*, ___ Minn. ___, 216 N.W.2d 265 (1974).
50. *Laaman v. Hancock*, 351 F. Supp. 1265 (D. N.H. 1972).
51. *Leahy v. Estelle*, 371 F. Supp. 951 (N.D. Tex. 1974).
52. *Cradle v. Superintendent*, 370 F. Supp. 79 (W.D. Va. 1974).
53. *Banks v. Norton*, 346 F. Supp. 569 (D. Conn. 1972).
54. *Beatham v. Manson*, 369 F. Supp. 783 (D. Conn. 1973).
55. *Lloyd v. Oliver*, 363 F. Supp. 821 (E.D. Va. 1973).
56. *Marvin v. Pinto*, 463 F.2d 583 (3d Cir. 1972).
57. *Ham v. North Carolina*, 471 F.2d 406 (4th Cir. 1973).
58. *Id.*
59. *Bell v. Wolff*, 496 U.S. 1252 (8th Cir. 1974); *Hamilton v. Love*, 358 F. Supp. 338 (E.D. Ark. 1973).
60. *Brenneman v. Madigan*, 343 F. Supp. 128 (N.D. Cal. 1972).
61. *Id.*



Section 17

Transfers

One should observe at the outset of any discussion of transfers that an inmate is not entitled to accommodation in any one prison institution as opposed to another.[1] Courts are becoming increasingly active in supervising transfers of inmates, but it is still universally recognized that confinement in one prison, rather than another, does not violate an inmate's constitutional rights.[2] The authority of prison officials to transfer an inmate is fully accepted by the courts, which do not recognize the existence of a "vested" right of a prisoner to remain in the same institution to which he was originally committed.[3]

The traditional hands-off doctrine which courts have long applied to the discretionary actions of prison administrators is still being utilized in the review of inmate transfers. One court has held that the state prisoners' rights, guaranteed by the due process clause of the fourteenth amendment, are not violated by transfer to other prisons without hearings or notices of the charges against them; the court stated that a state prisoner has no constitutional right to remain in any particular prison.[4]

The traditional approach is, however, coming under increasingly severe attack, perhaps because of the widespread use of "bus therapy"—*i.e.*, the transfer of "troublemakers." The recent Supreme Court decision in *Wolff v. McDonnell*[5] strongly indicates that, in the future, the court will require that certain minimal procedures be followed in most transfer decisions. While substantive decisions will continue to be reversed only when arbitrary and capricious, the *Wolff* case lends support to a previously discernible trend toward applying procedural due process safeguards to intrastate transfers of prisoners.

The recognition of due process procedures in the interstate transfer of inmates is even more pronounced. As an illustration of the trend, a New York court has held that *any* change in the place of imprisonment which serves to deprive a prisoner of his right to that type of incarceration which is deemed to be appropriate by the sentencing judge is *void* and that enforcement of such a void administrative act is a deprivation of due process.[6] The fourteenth amendment due process clause is the vehicle most fre-

quently utilized by the courts in assuring that transfer decisions are being made in accordance with the law.

It is generally agreed that the commissioner of corrections of any state has discretion in housing and transferring inmates.[7] However, courts are beginning to interfere in the exercise of this administrative discretion and are ordering the transfer of inmates. In a recent case, the Court of Appeals for the First Circuit held that a federal district court, which had determined that the quality of incarceration at a particular jail was so foul that it denied due process, had the authority to order the Massachusetts Commissioner of Corrections to transfer inmates to other institutions.[8] In so holding, the court rejected the contention that the Commissioner could not be ordered to make such transfers without a showing of unconstitutional conduct on his part.[9]

Even departmental regulations controlling transfers are being closely scrutinized. For example, one court has held that a comprehensive administrative program adopted by corrections officials should be given a reasonable opportunity to evolve procedures which would meet the needs of the prison system. However, the court required inclusion of some provision for adequate internal review of any denial of a transfer request.[10]

The constitutionality of a particular transfer is frequently challenged on eighth amendment cruel and unusual punishment grounds. Such attacks are generally unsuccessful. For example, one court has held that the transfer of an inmate from one prison to another was not cruel and unusual punishment even though the transfer prevented the inmate from seeing his family, who lived near the first prison.[11] Nonconsensual intrastate[12] and interstate[13] transfers do not violate the cruel and unusual punishment clause.

Transfers made for religious reasons are generally said to violate the first amendment freedom of religion clause. If the sole purpose of a transfer is to penalize state prisoners for certain unorthodox religious beliefs, the transfer is unconstitutional.[14]

Transfers are frequently challenged on the grounds that the gaining institution does not provide as comprehensive a rehabilitation program as does the transferring institution. It is well settled that the transferring prison authorities are under no obligation to inquire into the rehabilitative and treatment facilities of the gaining institution.[15] One court has ruled that the transfer of a reformatory inmate to an adult facility violates no rights to rehabilitative treatment *if similar treatment is available*,[16] but the "similar treatment" provision apparently does not apply to transfers from one adult facility to another. In a recent case, an inmate complained, after an interstate transfer, that the gaining institution did not provide for rehabilitative treatment; but the allegation, according to the court, did not state an actionable claim.[17] This holding was apparently based on the belief that rehabilitative treatment is not required by federal law.[18] It therefore seems clear that, unless the inmate is a juvenile being transferred to an adult correctional institution, the inmate need not be guaranteed rehabilitative treatment at the gaining institution for the transfer to be allowable.[19]

Transfers are most frequently, and most successfully, challenged on fourteenth amendment due process grounds. The interpretation which courts give the due process clause varies according to the facts of the case. Intrastate, interstate, federal-state, and emergency transfers have developed their own procedures.

Interstate Transfers

Whether any rights should be invoked when a prisoner is given an interstate transfer is said to depend upon whether the treatment inherent in the transfer process constitutes a "grievous loss."[20] The traditional view, still adhered to by some courts, is that a nonconsensual interstate transfer of a state prisoner presents no issue related to a federally protected right;[21] but the emerging view is that interstate transfers of prisoners without due process procedural protections are constitutionally invalid.[22]

With respect to interstate transfers, the requisite procedural safeguards must be afforded the inmate before transfer. An exception is made in those extraordinary situations in which a valid governmental interest is at stake and in which that interest justifies postponing the hearing until after the transfer.[23] Such transfers are not part of any criminal prosecution; it is therefore erroneous to believe that the full panoply of rights due a defendant in such a prosecution applies.[24] But most agree on a basic core of procedures for nonconsensual, non-emergency transfers, although some grant more procedural safeguards than others.

Most courts require that the inmate be provided with written notice of the reasons for the transfer, a personal hearing, a reasonable opportunity to controvert the factual assertions in support of the transfer, and a decision by an unbiased fact-finder.[25] Some allow counsel or counsel substitute to represent the inmate and allow him to call and cross examine witnesses.[26] One court even permits the inmate to require the presence of certain witnesses.[27] Other procedural rights occasionally granted include a requirement that the decision be in writing, that a record of the hearing be made, and that administrative review be automatically provided.[28] Correctional staffs in jurisdictions which do not have a recent decision guiding their interstate transfer procedures would probably be wise to adopt the core procedures listed; their good faith effort to comply with minimal due process requirements should insure that any review of their interstate transfer decisions will bring favorable results.

Any interstate transfer must serve a legitimate state interest. For example, a transfer made solely as punishment for the valid exercise of a constitutional or statutory right is forbidden.[29] In addition, mere lack of a certain type of state facility, such as a long-term facility for women, may not justify a transfer out of state.[30]

The reason for a transfer to an out-of-state prison must be noted on an inmate's record so that unwarranted inferences will not unfairly diminish his opportunity for parole.[31] In addition, in order to minimize the detrimental effects of the transfer, courts are beginning to require the return of the inmate to the sending institution for his parole hearing.[32] The return requirement is based on the belief that the presence of the inmate at his parole hearing is important to his chances for release. Therefore, a transferred inmate should not be deprived of his opportunity to appear and speak in his own behalf.[33]

Intrastate Transfers

Similar developments are occurring in the consideration of intrastate transfers. The traditional hands-off approach, which holds that the intrastate transfer of an inmate without a hearing violates none of the inmate's constitutional rights, is still of considerable influence.[34] Under this same reasoning, the transfer of a pre-trial detainee from a county prison to a state prison for security reasons is acceptable.[35] This view maintains that it is not necessary to accord due process safeguards prior to intrastate transfers.[36] While courts holding this view frequently admit that a due process deprivation *may* result from an intrastate transfer, the magnitude of such deprivation is generally insufficient to warrant federal due process protection.[37] For example, the incidental deprivation of privileges, such as the loss of prison wages, has generally been held to violate no constitutionally protected rights of an inmate.[38]

The contrary view is, however, rapidly developing. Some courts question how a denial of due process can be justified on the ground that an inmate's transfer was intrastate rather than interstate.[39] Those who pose this question feel that whenever a prisoner suffers a substantial loss as a result of a transfer he is entitled to the basic elements of rudimentary due process.[40] Accordingly, procedural due process is said to come into play whenever a privilege theretofore granted to a prison inmate is to be revoked.[41] This view still requires specificity in the complaint, however, and a conclusory allegation that a transfer was harassing fails to state a cause of action.[42]

When an intrastate transfer is used and perceived as a disciplinary device, the courts are more uniform in demanding that due process procedures be observed; such transfers are frequently said to be constitutionally invalid.[43] Minimal due process is generally said to require that a prisoner subjected to a disciplinary transfer be given a written notice which sets forth the reasons for the transfer, a hearing before an impartial tribunal, and the opportunity to call defense witnesses and cross-examine adverse witnesses.[44] Some courts also require that the hearing board give the inmate a written copy of the findings of the board.[45] One court has even required that the inmate be allowed the assistance of a lay advocate, with the findings of the board subject to administrative review.[46] When the procedures resulting in any detrimental transfer fail to meet these standards, courts have held that the disciplinary decision of the board will be invalidated and the prisoner's record will be expunged of the adverse findings.[47] The decision of the Supreme Court in *Wolff v. McDonnell* will undoubtedly enforce the view that certain minimal procedures are required in this type of transfer. It is equally clear that requirements of cross-examination and assistance of counsel substitute in the proceedings will be eliminated.[48]

The Constitution requires due process safeguards whenever there is an intrastate transfer which results in an increase in the severity of the conditions of incarceration. Thus, it has been held that a transfer from a minimal security situation, such as a prison farm, to a maximum security installation requires full due process procedures regardless of the reason for the transfer.[49] The same rationale applies to any transfer which is punitive in intent.[50]

Juvenile Transfers

An intrastate transfer of a juvenile from a reformatory to an adult correctional facility is generally subject to full due process protection. It is well recognized that a transfer from a reformatory to an adult facility without a due process hearing states a cause of action.[51] A prior hearing is generally considered essential before an inmate may be transferred from a reformatory to a prison[52] because the transferred inmate is sure to suffer a substantial loss.[53] For example, the administrative transfer of a juvenile to an adult correctional institution with no control over the discretionary authority of the transferring officer violates the due process clause. Even if it can be determined that such a transfer is conducive to the welfare of the other inmates at the juvenile corrections institution, a hearing is still required.[54] This view is reinforced when a reformatory

inmate is subjected to a disciplinary transfer to an adult segregation facility.[55]

Whenever a federal youthful offender is transferred from a reformatory to a general prison, his case should be reviewed within two weeks after the transfer. A second evaluation should occur thirty days later, with subsequent evaluations at ninety-day intervals.[56]

On the other hand, if the transfer of a juvenile is made pursuant to a waiver, a hearing is not generally required. However, if the hearing waiver is subsequently revoked, at least one state requires that the inmate be returned to the reformatory for a hearing or for further juvenile incarceration.[57]

The Missouri courts have established a unique system to control the transfer of juveniles to adult correctional institutions.[58] A juvenile who is so transferred is not to be handled on the same basis as are the other inmates. Instead, he is permitted to be housed in the adult facility while receiving the benefits of a special program constructed around the particular needs of the juvenile. This special program is devised by representatives from both institutions and is subject to review before implementation by the juvenile and higher courts of the state. The program requires the furnishing of a special staff, a high ratio of staff to juvenile inmates, and a high degree of separation of the juvenile transferees from the general prison population. Such a program has been held to comply with all constitutional safeguards, so long as a hearing is still given prior to the transfer.[59]

State-Federal Transfers

Transfers from state to federal penal institutions present many of the same problems that are important in the evaluation of interstate transfers. Some courts utilize the hands-off approach by holding that transfer from a state to a federal penal institution without a hearing does not deprive the inmate of due process of law.[60] Other courts, recognizing that such a transfer radically transforms an inmate's life and subjects him to severe deprivations, state that the due process hearing must be held before the transfer.[61] If an individual has been transferred to a federal prison, some courts require that he be returned to the state prison for all parole hearings and any other legal proceedings which may affect his incarceration.[62]

When an individual is serving concurrent federal and state sentences in a federal prison, he may be transferred to a state institution without the federal government's losing jurisdiction over him. One court has held that even if the government had lost jurisdiction over the prisoner upon transfer, the prisoner could not complain about being returned to the federal prison once the state released him on parole, because the question was one of comity between governments and not a personal right of the prisoner.[63] This case demonstrates that whenever due process safeguards are met, the prisoner is firmly under the control of the federal-state penal system and a transfer between governments is fully permissible.

Emergency Transfers

The strong tendency to defer to officials in the area of prison security comes to the fore in emergencies. A transfer made in response to an emergency situation within the prison can be carried out without giving prior due process safeguards to the transferee.[64] An "emergency condition" justifying a transfer without a hearing has been defined as a condition which indicates a present or impending disturbance which might overtax the control capacity of the prison. Such a situation is said to create an overriding interest in prison authorities to act without delay in transferring the prisoner if in their judgment delay would endanger the inmate or others.[65]

As soon as possible after the transfer, the inmate is entitled to a due process hearing.[66] The inmate may be kept in isolation until the hearing if the situation which has led to the transfer so warrants,[67] but, in any case, the due process hearing must be held within five days after his arrival.[68] If an inmate has been given an emergency transfer without a hearing and then is returned to the transferring institution, he must be treated by prison authorities as if the transfer had not occurred.[69] If a permanent transfer is still contemplated after his return, a normal and complete due process hearing must be given.[70] All emergency transfers of whatever nature must, until finally settled, be frequently reviewed by officials of the transferring institution.[71]

Finally, transfers are occasionally challenged on medical and mental grounds. Whenever an inmate is transferred under a court order for medical or psychological reasons, there is no violation of his rights.[72] In addition, transfers directed toward improving medical treatment for one frequently in need of such treatment is constitutionally permissible.[73] Of course, the arbitrary and capricious standard applies to medical transfers. In one recent case it was determined that the most suitable medical treatment for an ill federal prisoner was to transfer him to a climate with low humidity, and a federal prison was available in such a climate. Therefore, a decision to transfer the inmate to a prison located in a climate of high humidity was held to be arbitrary and unreasonable and, therefore, invalid.[74]

Transfer of mental patients involves similar considerations. A recent Pennsylvania case illustrates the general approach taken toward such inmates. The court held that, if it is recommended by the director of the state mental illness treatment facility that an inmate be transferred from one minimum security facility to another or from a maximum to a minimum security facility, the "committing court" must approve the transfer. Under such circumstances no hearing is necessary. However, if the recommendation is that the inmate be transferred from a minimum to a maximum security institution, the state must show, at a full judicial hearing, the absolute necessity of such a transfer.[75]

It is readily apparent that the transfer of an inmate is an action which virtually all courts are willing to review. Several require quite comprehensive procedural due process in a transfer decision. This area of the law is evolving so rapidly that corrections officers, unless they have received recent judicial guidance, should review their transfer procedures with an eye toward updating them in light of recent judicial decisions. Documentation of sound reasons for the transfer will do much to prevent successful actions by disgruntled transferees.

FOOTNOTES

1. *United States ex rel. Tyrrell v. Speaker*, 471 F.2d 1197 (3d Cir. 1973), *cert. denied* 411 U.S. 921; *Stokes v. Institutional Board of Patuxent*, 357 F. Supp. 701 (D. Md. 1973).
2. *Williams v. Batton*, 342 F. Supp. 1110 (E.D. N.C. 1972).
3. *Patterson v. Walters*, 363 F. Supp. 486 (W.D. Pa. 1973); *Hiott v. Vitek*, 361 F. Supp. 1238 (D. N.H. 1973), *aff'd* 497 F.2d 598 (1st Cir. 1974).
4. *Gray v. Creamer*, 465 F.2d 179 (3d Cir. 1972).
5. 418 U.S. 539 (1974).
6. *People v. Jiminez*, 71 Misc.2d 867, 337 N.Y.S.2d 438 (1972).
7. *See, e.g., State v. Anonymous*, 30 Conn. Sup. 71, 300 A.2d 489 (1973).
8. *Inmates of Suffolk County Jail v. Eisenstadt*, 494 F.2d 1196 (1st Cir. 1974).
9. *Id.*
10. *People ex rel. Willis v. Department of Corrections*, 51 Ill.2d 382, 282 N.E.2d 716 (1972).
11. *Lindsay v. Mitchell*, 455 F.2d 917 (5th Cir. 1972).
12. *Poindexter v. Woodson*, 357 F. Supp. 443 (D. Kan. 1973).
13. *Ault v. Holmes*, 369 F. Supp. 288 (W.D. Ky. 1973); *Hiott v. Vitek*, 361 F. Supp. 1238 (D. N.H. 1973), *aff'd* 497 F.2d 598 (1st Cir. 1974).
14. *Fajerlak v. McGinnis*, 493 F.2d 468 (9th Cir. 1974).
15. *Gomes v. Travisono*, 490 F.2d 1209 (1st Cir. 1973), *vacated for reconsideration in light of* Wolff, ___ U.S. ___, 94 S. Ct. 3200, *modified* ___ F.2d ___, 16 Cr. L. Rptr. 2296 (1st Cir. 1974).
16. *People ex rel. Cromwell v. Warden*, 74 Misc.2d 642, 345 N.Y.S.2d 381 (1973).
17. *In re petition of Wilkins*, 160 Mont. 441, 503 P.2d 23 (1972).
18. *See Gomes v. Travisono*, 490 F.2d 1209 (1st Cir. 1973), *vacated for reconsideration in light of* Wolff, ___ U.S. ___, 94 S. Ct. 3200, *modified* ___ F.2d ___, 16 Cr. L. Rptr. 2296 (1st Cir. 1974).
19. *See* Section 15, *supra*.
20. *Gomes v. Travisono*, 490 F.2d 1209 (1st Cir. 1973), *vacated for reconsideration in light of* Wolff, ___ U.S. ___, 94 S. Ct. 3200, *modified* ___ F.2d ___, 16 Cr. L. Rptr. 2296 (1st Cir. 1974).
21. *Fajerlak v. McGinnis*, 493 F.2d 468 (9th Cir. 1974); *Hillen v. Director*, 455 F.2d 510 (9th Cir. 1972), *cert. denied* 409 U.S. 989.
22. *Preston v. Cowan*, 369 F. Supp. 14 (W.D. Ky. 1973); *see also Gomes v. Travisono*, 490 F.2d 1209 (1st Cir. 1973), *vacated for reconsideration in light of* Wolff, ___ U.S. ___, 94 S. Ct. 3200, *modified* ___ F.2d ___, 16 Cr. L. Rptr. 2296 (1st Cir. 1974); *Ault v. Holmes*, 369 F. Supp. 288 (W.D. Ky. 1973).
23. *Gomes v. Travisono*, 353 F. Supp. 457 (D. R.I. 1973), *modified* 490 F.2d 1209 (1st Cir. 1973).
24. *Croom v. Manson*, 367 F. Supp. 586 (D. Conn. 1973).
25. *Gomes v. Travisono*, 490 F.2d 1209 (1st Cir. 1973), *vacated for reconsideration in light of* Wolff, ___ U.S. ___, 94 S. Ct. 3200, *modified* ___ F.2d ___, 16 Cr. L. Rptr. 2296 (1st Cir. 1974); *Kessler v. Cupp*, 372 F. Supp. 76 (D. Ore. 1973); *Ault v. Holmes*, 369 F. Supp. 288 (W.D. Ky. 1973); *Croom v. Manson*, 367 F. Supp. 586 (D. Conn. 1973).
26. *Kessler v. Cupp*, 372 F. Supp. 76 (D. Ore. 1973); *Ault v. Holmes*, 369 F. Supp. 288 (W.D. Ky. 1973); *contra Gomes v. Travisono*, 490 F.2d 1209 (1st Cir. 1973), *vacated for reconsideration in light of* Wolff, ___ U.S. ___, 94 S. Ct. 3200, *modified* ___ F.2d ___, 16 Cr. L. Rptr. 2296 (1st Cir. 1974); *Croom v. Manson*, 367 F. Supp. 586 (D. Conn. 1973).
27. *Id.*
28. *Id.; Ault v. Holmes*, 369 F. Supp. 288 (W.D. Ky. 1973).
29. *Croom v. Manson*, 367 F. Supp. 586 (D. Conn. 1973).
30. *See Perk v. Thompson*, 356 F. Supp. 783 (D. Hawaii 1973).
31. *Gomes v. Travisono*, 490 F.2d 1209 (1st Cir. 1973), *vacated for reconsideration in light of* Wolff, ___ U.S. ___, 94 S. Ct. 3200, *modified* ___ F.2d ___, 16 Cr. L. Rptr. 2296 (1st Cir. 1974).
32. *Id.; Kessler v. Cupp*, 372 F. Supp. 76 (D. Ore. 1973).
33. *Id.*
34. *Wells v. McGinnis*, 344 F. Supp. 594 (S.D. N.Y. 1972); *Urbano v. McCorkle*, 344 F. Supp. 161 (D. N.J. 1971), *aff'd* 481 F.2d 1400 (3d Cir. 1973). *See also Schumate v. People*, 373 F. Supp. 1166 (S.D. N.Y. 1974).
35. *United States ex rel. Tyrrell v. Speaker*, 471 F.2d 1197 (3d Cir. 1973), *cert. denied* 411 U.S. 921.
36. *Benfield v. Bounds*, 363 F. Supp. 160 (E.D. N.C. 1973).
37. *Beatham v. Manson*, 369 F. Supp. 783 (D. Conn. 1973).
38. *Id.; Patterson v. Walters*, 363 F. Supp. 486 (W.D. Pa. 1973). *Contra United States ex rel. Motley v. Rundle*, 340 F. Supp. 807 (E.D. Pa. 1972), which allowed compensatory damages for lost wages that resulted from an interstate transfer.
39. *Newkirk v. Butler*, 499 F.2d 1214 (2d Cir. 1974).
40. *Id.*
41. *King v. Higgins*, 370 F. Supp. 1023 (D. Mass. 1974); *Sands v. Wainwright*, 357 F. Supp. 1062 (M.D. Fla. 1973), *vacated for failure to convene a three-judge court* 491 F.2d 417 (5th Cir. 1973), *cert. denied* ___ U.S. ___, 94 S. Ct. 2403 (1974).
42. *Newkirk v. Butler*, 364 F. Supp. 497 (S.D. N.Y. 1973), *aff'd* 499 F.2d 1214 (2d Cir. 1974).
43. *Id.; United States ex rel. Neal v. Wolfe*, 346 F. Supp. 569 (E.D. Pa. 1972).
44. *Aikens v. Lash*, 371 F. Supp. 482 (N.D. Ind. 1974); *Diamond v. Thompson*, 364 F. Supp. 659 (M.D. Ala. 1973); *United States ex rel. Neal v. Wolfe*, 346 F. Supp. 569 (E.D. Pa. 1972); *see also Croom v. Manson*, 367 F. Supp. 586 (D. Conn. 1973).
45. *Id.; Diamond v. Thompson*, 364 F. Supp. 659 (M.D. Ala. 1973). *But cf. Wetmore v. Smith*, 130 Vt. 618, 298 A.2d 567 (1972).
46. *Id.*
47. *King v. Higgins*, 370 F. Supp. 1023 (D. Mass. 1974).
48. *See, e.g., Newkirk v. Butler*, 499 F.2d 1214 (2d Cir. 1974).
49. *King v. Higgins*, 370 F. Supp. 1023 (D. Mass. 1974); *Diamond v. Thompson*, 364 F. Supp. 659 (M.D. Ala. 1973). *But cf. Braxton v. Carlson*, 483 F.2d 933 (3d Cir. 1973).
50. *United States ex rel. Neal v. Wolfe*, 346 F. Supp. 569 (E.D. Pa. 1972).
51. *Bryant v. Hardy*, 488 F.2d 72 (4th Cir. 1973). *See also Aikens v. Lash*, 371 F. Supp. 482 (N.D. Ind. 1974).
52. *White v. Gillman*, 360 F. Supp. 64 (S.D. Iowa 1973).
53. *Id.*
54. *Moore v. Haugh*, 341 F. Supp. 1263 (N.D. Iowa 1972), *aff'd* 409 U.S. 809.
55. *Aikens v. Lash*, 371 F. Supp. 482 (N.D. Ind. 1974).
56. *Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973).
57. *People ex rel. Cromwell v. Warden*, 74 Misc.2d 642, 345 N.Y.S.2d 381 (1973).
58. *O___ H___ v. French*, 504 S.W. 2d 269 (Mo. 1973).
59. *Id.*
60. *United States v. Eisenberg*, 469 F.2d 156 (8th Cir. 1972), *cert. denied* 410 U.S. 992.
61. *Hiott v. Vitek*, 361 F. Supp. 1238 (D. N.H. 1973), *aff'd* 497 F.2d 598 (1st Cir. 1974); *Capitan v. Cupp*, 356 F. Supp. 303 (D. Ore. 1972).
62. *Id.*
63. *Floyd v. Henderson*, 456 F.2d 1117 (5th Cir. 1972).
64. *See, e.g., Hiott v. Vitek*, 361 F. Supp. 1238 (D. N.H. 1973), *aff'd* 497 F.2d 598 (1st Cir. 1974).
65. *Gomes v. Travisono*, 490 F.2d 1209 (1st Cir. 1973), *vacated for reconsideration in light of* Wolff, ___ U.S. ___, 94 S. Ct. 3200, *modified* ___ F.2d ___, 16 Cr. L. Rptr. (1st Cir. 1974).
66. *Id.; King v. Higgins*, 370 F. Supp. 1023 (D. Mass. 1974).
67. *Cradle v. Superintendent*, 370 F. Supp. 79 (W.D. Va. 1974).
68. *Aikens v. Lash*, 371 F. Supp. 482 (N.D. Ind. 1974) (five days); *Diamond v. Thompson*, 364 F. Supp. 659 (M.D. Ala. 1973) (two days).
69. *Hiott v. Vitek*, 361 F. Supp. 1238 (D. N.H. 1973), *aff'd* 497 F.2d 598 (1st Cir. 1974).
70. *Id.; White v. Gillman*, 360 F. Supp. 64 (S.D. Iowa 1973).
71. *Gomes v. Travisono*, 353 F. Supp. 457 (D. R.I. 1973), *aff'd as to this portion sub silentio* 490 F.2d 1209 (1st Cir. 1973), *vacated for reconsideration in light of* Wolff, ___ U.S. ___, 94 S. Ct. 3200, *modified* ___ F.2d ___, 16 Cr. L. Rptr. 2296 (1st Cir. 1974).
72. *Patterson v. Walters*, 363 F. Supp. 486 (W.D. Pa. 1973).
73. *Shively v. White*, 351 F. Supp. 191 (W.D. Va. 1972).
74. *Ricketts v. Ciccone*, 371 F. Supp. 1249 (W.D. Mo. 1974).
75. *Commonwealth ex rel. DiEmile*, 449 Pa. 177, 295 A.2d 320 (1972).

Section 18

Detainers

The adverse effects of detainers have long been noted.[1] Article I of the Interstate Agreement on Detainers notes that detainers on untried indictments "produce uncertainties which obstruct programs of prisoner treatment and rehabilitation."[2] Prisoners suffering under the effects of detainers issued pursuant to outstanding warrants or indictments are becoming increasingly able to force either trial or dismissal of the underlying charge.

Statutory relief is by far the surest and most effective means for a person confined by a party to the Interstate Agreement when the detainer is from another party jurisdiction. The institution simply files at the inmate's request what has come to be known as a 180-day letter. This letter contains a request for trial on the charge and gives the place of confinement of the inmate. In addition, the custodian sends a certificate stating the term of confinement, the amount of time served and remaining, parole eligibility date, amount of earned good time, and any decision of the parole authority relating to the inmate.[3] By sending the request, the inmate waives extradition.[4] Within 180 days after the request is sent, the inmate must be brought to trial on the charges unless a continuance is granted in open court with either the prisoner or his counsel present.[5] Failure to try the case either within the initial 180 days or within the authorized period of extension results in dismissal of the charge with prejudice and removal of the detainer.[6] While the removal of the detainer is easily accomplished, the dismissal with prejudice will usually require further action on the inmate's part. While the appropriate court receives a copy of the 180-day letter, many do not automatically issue dismissal orders after the expiration of the allotted time. A follow-up request for an order of dismissal with prejudice by the inmate or an official helping him may well save difficulties caused by a new detainer on the same charges.

One South Carolina prisoner has tried without suc-

cess to argue that the Interstate Agreement applies to his intrastate detainer. He sent a 180-day letter on an escape charge and was tried more than 180 days after that request. The court held that the Interstate Agreement did not apply. No consideration of whether such an application of the statute would amount to a denial of equal protection was undertaken.[7] The prisoner's only recourse was the less protective right to a speedy trial.

The Supreme Court has recently further explained the right to a speedy trial applicable to state prisoners. In *Barker v. Wingo*[8] the Court employed a four-factor test to balance the conduct of the government against that of the defendant. The length of the delay is the first factor. The Court recognized that delay tolerable for some crimes and under some circumstances would be intolerable for other crimes and under other circumstances. The second factor is the reasons assigned by the government for the delay. A delay to gain tactical advantage over the defendant is weighed more heavily against the government. Whether and how a defendant asserts his right to a speedy trial is the third factor. The Court emphasized "that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial,"[9] but rejected an absolute requirement of a demand. The final factor is prejudice to the defendant. While possible impairment of the ability to proceed at trial is the most important element of prejudice, the lack of such prejudice is not conclusive. The Supreme Court, in *Moore v. Arizona*,[10] held that an affirmative demonstration of prejudice at trial is not essential to a speedy trial claim; the court also has to consider the prejudicial effect of a detainer on prospects for parole and meaningful rehabilitation.

There are scores of lower court cases employing the *Barker* balancing test. These cases emphasize one factor or another in accordance with the court's view of the particular facts. For example, one court found that a fourteen-month delay in the case of a Pennsylvania murder defendant did not constitute a denial of the right to a speedy trial.[11] The court reasoned that the case was complex, that the dockets were crowded, and that everything did move at a deliberate pace. In another,[12] a twenty-eight-month delay between arrest and indictment was deemed "extraordinary" and heavily weighed because of its inextricable relationship to prejudice to the defendant. Failure to employ the balancing test leads to reversal. The second circuit, while "entirely sympathetic with the purposes the district judge sought to accomplish," reversed his order requiring that pre-trial detainees who had been detained more than six months be tried within forty-five days of written demand for trial.[13] The court rejected the attempt to alleviate calendar congestion with a single order and required resort, at least in cases involving state detainees, to a case-by-case analysis of the *Barker* factors.

One case, *Holt v. Moore*,[14] has attacked the detainer system frontally. The state of North Carolina conceded the adverse effects of the inmate's federal detainer. The court held that the detainer was improper on two grounds. The first somewhat tenuous ground was that the increase in punishment occasioned by the detainer violated the constitutional ban on double jeopardy. The more convincing ground was that procedural due process was not afforded the inmate. Harsher conditions of confinement were imposed on the presumptively innocent inmate without notice or opportunity to be heard. The court would require a procedurally adequate fact-finding process to discover the underlying factual basis for a detainer.

A detainer may be lodged pursuant to a parole violation warrant. The failure to proceed on these warrants causes inmates the same problems as the failure to proceed on untried charges. These detainers, too, are often used as the basis for denial of privileges and opportunities within the prison. Prompt disposal of these warrants are often to the distinct advantage of an inmate. The constitutional right to a speedy and public trial, because of its confinement to "criminal prosecutions," is probably inapplicable to parole revocation hearings.[15] The Supreme Court, however, in *Morrissey v. Brewer*,[16] requires a prompt preliminary hearing and a revocation hearing conducted reasonably soon after the parolee's arrest.

Problems arise, however, when the alleged parole violation stems from conviction in another state. It is often not convenient for the paroling state to conduct hearings on a violation which occurs in another state. For this reason some courts try to avoid the requirement of a prompt hearing. A Missouri court of appeals held that *Morrissey* procedures are inapplicable when there is an admitted parole violation. Here, the admission came in the form of a guilty plea.[17] In *Cook v. United States Attorney General*[18] the court said that a prompt revocation hearing was required but that it must be promptly held only after execution of the warrant and return to custody in the paroling state.[19] The service of an intervening sentence in no way encroaches upon due process rights. These arguments are rejected in *Cooper v. Lockhart*.[20] In a well-reasoned opinion the court points out that the real effect of the detainers amounts to custody. Moreover, not every violation of parole leads to a revocation and not every revocation would result in a consecutive sentence. Thus, substantial advantages in securing prompt disposition remain. The court suggested that prompt hearings could promote rehabilitative behavior and that states would be able to furnish each other with sufficient information to insure the protection of parolee's rights without incurring substantial expenses. The matter now stands with divided circuit courts and is ripe and important enough for determination by the Supreme Court.

Detainers which have as their underlying basis an unsatisfied sentence also cause prisoners substantial difficulties. A person who has a six-year sentence and a detainer from another jurisdiction based on a two-year sentence is often ineligible for programs open to inmates with sentences longer than eight years. One possible theoretical attack is suggested by a footnote in *Cooper*. The court notes: "The exact purpose of the detainer escapes us. Removing the prisoner from the opportunity of rehabilitation during the remainder of his sentence because he must ultimately serve out a sentence in another jurisdiction, makes little sense. The action must rest partially on the irrational premise that by the commission of another crime he is in less need of vocational rehabilitation [than] the felon who is serving time for his first offense."[21]

Since classification decisions must be based on supporting facts which rationally lead to the classification,[22] perhaps detainers which inhibit rehabilitation may be attacked on this basis.

One possible remedy is statutory. The Interstate Corrections Compact provides that a party state may assume custody of an inmate for another party state. The Compact could be used to have an inmate's total sentence served in one state and could thus eliminate detainer problems.

FOOTNOTES

1. *See Emerging Rights* 194-95.
2. Interstate Agreement on Detainers, Article I.
3. *Id.*, Article III(a).
4. *Id.*, Article III(b).
5. *Id.*, Article III(a).
6. *Id.*, Article V(c).
7. *State v. Monroe*, ___ S.C. ___, 204 S.E.2d 433 (1974).
8. 407 U.S. 514 (1972).
9. *Id.*, at 532.
10. 414 U.S. 25 (1973).
11. *United States ex rel. Stukes v. Shovlin*, 464 F.2d 1211 (3d Cir. 1972).
12. *United States v. Macino*, 486 F.2d 750 (7th Cir. 1973).
13. *Wallace v. Kern*, 499 F.2d 1345 (2d Cir. 1974)
14. 357 F. Supp. 1102 (W.D. N.C. 1973).
15. *See Cooper v. Lockhart*, 489 F.2d 308 (8th Cir. 1973); *but see Cook v. United States Attorney General*, 350 F. Supp. 707, 709 (E.D. Tex. 1972), *rev'd* 488 F.2d 667 (5th Cir. 1974).
16. 408 U.S. 471 (1972).
17. *State v. Gideon*, 510 S.W.2d 190 (Mo. App. 1974).
18. 488 F.2d 667 (1974).
19. *Accord, Small v. Britton*, 500 F.2d 299 (10th Cir. 1974)
20. 489 F.2d 308 (8th Cir. 1973).
21. *Cooper v. Lockhart*, 489 F.2d 308 at n. 14 (8th Cir. 1973) (dictum).
22. *See* Chapter 16.

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1 OF 2

Section 19

Parole

As in many other areas, the Supreme Court parole decisions are the most important recent developments in this area. *Morrissey v. Brewer*[1] sets out minimal procedures at two critical stages of the parole revocation proceedings. *Gagnon v. Scarpelli*[2] lays out rules concerning the necessity for counsel at parole revocation hearings. Although these cases deal only with parole revocation proceedings, they may have substantial impact on decisions in other courts which fail to accord even minimal due process to procedures in parole release hearings and in decisions evaluating parole conditions.

Release Decision

Near the date that an inmate becomes eligible for release on parole, most parole boards grant a hearing, at which the board decides whether he should be released. The eligibility date is usually set by statute; however, the decision to release is widely regarded as within the parole board's sole discretion. Unless the board abuses its discretion, most courts will not interfere with the board's decision to deny parole.[3]

Many inmates have challenged board decisions denying parole release, claiming that various due process procedures attach to the parole board's discretionary release powers. Most of these cases have involved questions of procedural regularity and the evidentiary basis for denial. Among the claims have been the right to reasons for denial, the right to confrontation and cross-examination, the right to compulsory process, and assistance of counsel at the release hearing.

Although some jurisdictions have recognized limited fourteenth amendment due process rights at parole release hearings, these courts are in a substantial minority. Most courts have held that due process does not apply to these proceedings.[4] In a recent Colorado case, inmates eligible for release on parole appeared before the parole board for consideration and in each case parole was denied. The inmates requested written reasons for the denial. The board, following its policy at the time, disclosed no reasons. Subsequently, the district court invalidated the board's policy and held that due process in some form attaches when an administrative body has discretionary power over an individual's liberty. The court reasoned that an inmate has a substantial interest in knowing the reason or reasons for denial of parole. The inmate's interest parallels that of the state. The board has an interest in assuring itself and society that the inmate can be rehabilitated and that the inmate's conduct conforms to the standards established by the board. An inmate has a right to know why his parole was denied so that he can attempt to conform his conduct in a proper and successful manner. Further, the administrative processes must conform to some orderly and fair scheme, however informal.[5]

The majority of courts, however, limit judicial review of parole board release decisions to a determination of whether the parole board has abused its discretion when denying parole. This view, which holds that due process does not apply at parole release proceedings, was recently set forth in a North Carolina court decision. The court held that disclosure of the board's reasons for denial are not constitutionally mandated and that a prisoner seeking release on parole possesses no right to confront and cross-examine his "accusers" or to have compulsory process for obtaining witnesses in his favor or to the assistance of counsel at parole release proceedings.[6]

The question of whether due process applies to a proceeding revolves around the type of interest sought to be protected. On the basis that "potential" as distinct from "existing" liberty is involved, courts have withheld due process protections from parole release proceedings. A recent comment approached the fourteenth amendment liberty concept in a different way and arrived at a different result: the eligibility hearing is viewed as more than a mere hope of freedom; it is a type of deferred sentencing. The decision to deny parole means that the prisoner will continue to serve his sentence until the next parole hearing, while the granting of parole sets a more concrete date, barring violations, for the prisoner's complete freedom. Since sentencing has been deemed to be part of the criminal proceeding to which due process rights are applied, it is logical to extend these rights to an analogous proceeding, the eligibility hearing.[7]

The Supreme Court, as yet, has not ruled on whether due process applies at parole release hearings, although the Court did grant *certiorari* in a case in which the question was presented. However, the Court remanded the case to the fifth circuit without deciding the due process question.[8]

Interpreting New York statutory law,[9] a New York district court found that a prisoner's parole interest implies procedural rights "that are real, and at a minimum entitle the prisoner to relief against demonstrable discrimination, or abuses of discretion, or the introduction into parole decision-making on illicit considerations." The court held that "the board must, however briefly, state the ultimate ground of its decision denying parole with sufficient particularity to enable the prisoner to understand how he is to regulate his conduct and to enable a reviewing court to determine whether inadmissible factors have influenced the decision and to determine whether discretion has been abused."[10]

Under New Jersey law, the Supreme Court of New Jersey invalidated a parole board rule which forbade the board to give reasons for its parole denials. The court reasoned that "fairness and rightness clearly dictate the granting of the prisoner's request for a statement of reasons. That course as a general matter would serve the acknowledged interests of procedural fairness and would also serve as a suitable and significant discipline on the Board's exercise of its wide powers. It would in no wise curb the Board's discretion on the grant or denial of parole, nor would it impair the scope and effect of its expertise."[11]

There is little doubt that a court would invalidate what it perceives as arbitrary and capricious actions of a parole board. However, where parole board decisions are concerned, this terminology is primarily used as a device to avoid the merits of the decision not to parole; therefore, the "arbitrary and capricious" language regularly appears in case dicta—*i.e.*, language not necessary to the decision in the case—without full discussion and offers little guidance as to what kind of parole board actions should be considered arbitrary and capricious.

An example of parole board action found procedurally arbitrary and capricious is found in an eighth circuit case in which an inmate alleged that the United States Board of Parole failed to follow its normal procedure while considering his parole. The court found that when considering the prisoner's parole release the board failed to have before it all the information required by applicable rules which had been promulgated by them. The court invalidated the order denying parole as arbitrary and ordered the board to grant a new hearing in accordance with the applicable rules.[12]

Courts only occasionally reach the merits and find actions substantially arbitrary and capricious. The decision of the parole board has to be clearly outrageous. In one such case, the seventh circuit was called upon to decide and did decide that a prisoner may not be denied parole on account of religious prejudice.[13]

Arbitrary and capricious actions are sometimes considered a violation of due process; however, most courts consider such actions an "abuse of discretion." The vagueness and the unsettled state of these concepts, when used in relation to parole board release decisions, is fully demonstrated in *Scarpa v. United States Board of Parole*,[14] in which a federal prisoner raised the question of abuse of discretion and denial of due process. The case illustrates the tension between the desire to have judgments of the parole board insulated from judicial scrutiny and the desire to avoid a decision which basically informs an inmate that he could never gain release on parole. Scarpa's attack was basically procedural, but a successful attack would have necessitated an investigation into the merits. He alleged that the United States Board of Parole, through its internal procedures and practices, denied him due process of law at his release proceedings and that the Board did not follow the applicable regulations which govern its internal procedures because it did not *fully* investigate all the information he submitted in his application for parole. Presumably, when considering his parole, the Board placed *controlling* emphasis on Scarpa's past criminal record.

While recognizing the importance of a full, fair hearing and consideration prior to a parole decision, the district court denied relief without an evidentiary hearing, stating that Scarpa's complaint did not allege a substantial deprivation of a full and fair hearing.[15] Additionally, the district court held that it was not improper for the Board to place controlling emphasis on Scarpa's previous criminal record in denying parole.[16]

The district court decision was reversed by a divided fifth circuit panel. A sixteen-member *en banc* court reversed the panel order and reinstated the decision of the district court, with four judges dissenting. The majority found that the procedures adopted by the parole board for determining whether to grant or deny parole were not manifestly unfair. The majority stated that the "Board's final determination may be based on any or all of the following: (1) length and seriousness of prior criminal record; (2) family history; (3) marital status; (4) vocational and professional skills; (5) education; (6) physical condition; (7) living habits in a free community; (8) behavior and progress while incarcerated."[17]

The court held that "the weight to be given Scarpa's criminal history is solely within the province of the Board's discretion in determining parole eligibility" and that the parole board is not required "to make a full-scale investigation of all the supportive facts used by the prisoner in applying for parole."[18] Also, the majority held that "it was not unreasonable for the Board to base their ultimate decision denying Scarpa's parole on his extensive past criminal record."[19]

On the constitutional question raised by Scarpa, the majority stated that due process does not attach at proceedings in which the parole board must evaluate the prisoner's record as a whole to determine whether he is a good risk for parole. The court stated that "in the absence of evidence of flagrant, unwarranted, or unauthorized action by the Board, it is not the function of the courts to review such proceedings."[20]

Judge Tuttle, dissenting, felt that the majority failed to meet the issues actually raised by Scarpa's complaint. He felt that "Scarpa's whole case . . . was based on his contention that the Board did not investigate *any* of the information submitted by him *at all*" [emphasis supplied]. Also, according to the complaint, the Board did not consider several factors but gave controlling emphasis to his criminal record. "To the contrary, . . . 'the consideration afforded the plaintiff for possible release was predicated solely upon plaintiff's past criminal record.'"[21]

The dissent perceived the issue as being "whether, when a defendant is given a maximum sentence coupled with the right to have consideration for parole at any time . . . and he is given a hearing before a parole examiner, the courts have any power to hear a complaint that he has been denied a hearing and will continue to be denied a hearing at which anything will be considered other than his past criminal record."[22]

Judge Tuttle felt that Scarpa's allegation that he had been denied due process would fit within the definition of "unlawful" and that the clear statement that the board failed to carry out its own prescribed procedures would be a sufficient allegation of arbitrary action.

Thus, at the present, while most courts, distinguishing the type of interest involved, hold that procedural due process does not apply at parole release proceedings, many courts consider that minimal due process does attach to such proceedings. If in the future courts adopt the view that parole release has become an "integral part" of the criminal justice system, then the procedures required by the Supreme Court in *Morrissey v. Brewer*[23] will be required in parole release hearings. Moreover, *Wolff v. McDonnell*[24] suggests that procedural due process must be accorded whenever a grievous loss is contemplated.

Conditions of Parole

Before his release a parolee is normally required to agree to various conditions which are broadly defined by statute or set by the parole board. Violation of these conditions can and frequently does result in the parolee's return to prison to serve out the remainder of his sentence.

Most conditions are imposed to protect the community or to promote the rehabilitation of the parolee. Others, such as those requiring submission to searches by parole officers, are designed to detect violations and to facilitate undisputed return of a parolee to prison should a violation occur.[25] Though conditions vary, they may include compulsory church attendance; abstinence from drugs, alcohol or extra-marital sexual relations; remaining within a given jurisdiction; and not associating with known convicts. A more recent widely adopted condition requires the frequent giving of urine samples to enable detection of narcotic use.[26]

It is unlikely that challenges to specific conditions will have great success. Because a state is not re-

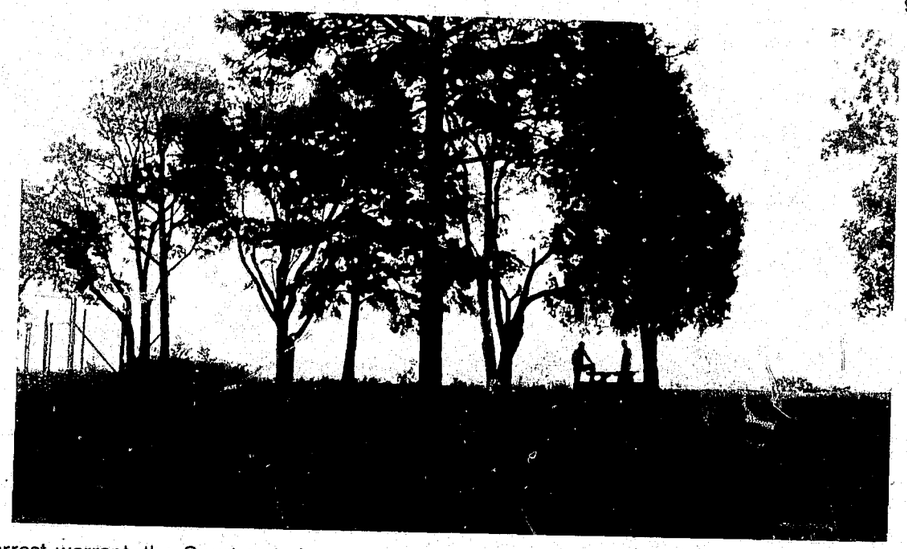
quired to grant parole, it is said that it may impose any conditions it wishes upon the granting of parole.[27] Further, the parolee "accepts" the conditions by signing the parole instrument or by entering upon parole.[28] In addition, the parolee, because of his status as convict on the streets, does not have the full measure of constitutional rights.[29] Nevertheless, challenges to specific conditions of parole are occasionally successful. When fundamental rights are impinged or when the conditions bear no reasonable relation to any purpose of parole, challenges have met with some success.

The question of a condition restricting a probationer's[30] freedom of expression was recently before the tenth circuit. A probationer sought relief from conditions of his probation under which the trial judge had forbidden him to speak, write, or circulate materials questioning the constitutionality of the tax laws or the Federal Reserve System with which the probationer had had a long history of personal disagreement. The court upheld the condition in part and voided it in part. The decision stated: "When the condition is examined in the abstract, namely speaking or writing about the constitutionality of the laws in question, it appears to prohibit conduct which is not *per se* harmful. To muzzle the appellant to this extent is on its face a violation of his first amendment freedom of expression. This is not to say that one on probation has all the rights of a citizen not on probation. He forfeits much of his freedom of action and even freedom of expression to the extent necessary to successful rehabilitation and protection of the public programs. We see no basis for criticizing a condition which prohibits the inducing of others to violate the law, and we hold the instant condition invalid only to the extent that it prohibits the expression of opinions as to invalidity or unconstitutionality of the laws in question. Insofar as it prohibits public speeches designated to urge or encourage others to violate the laws, the condition is valid."[31]

In an unusual decision a federal court granted summary judgment to a parolee who was a convicted atomic spy and an acknowledged Communist sympathizer, invalidating the refusal of the United States Board of Parole to permit him to participate in peace demonstrations and to address meetings of an alleged Communist organization. The board had justified its refusal to grant permission on the basis that these activities would not be in the public interest or be conducive to the parolee's rehabilitation, considering his offense. The court rejected these justifications and forbade the parole board to interfere with the parolee's exercise of first amendment rights except where necessary to safeguard against "specific, concretely described and highly likely dangers of misconduct by plaintiff himself."[32]

A similar decision invalidated the condition that a California parolee obtain permission from his parole officer prior to giving any public speech. The condition was disapproved on the dual basis that the inevitable scrutiny of the proposed content of the speeches abridged first amendment rights and that the condition was unrelated to any valid rehabilitative end.[33]

In 1971, the Supreme Court reversed a decision of the United States Board of Parole to revoke parole because of the parolee's association with other ex-convicts as part of his employment. Basing its decision on the board's failure to follow its own regulation requiring "satisfactory evidence" of a parole violation to justify an arrest warrant, the Court stated: "We do not believe that the parole condition restricting association was intended to apply to incidental contacts between ex-convicts in the course of work on a legitimate job for a common employer. Nor is such occupational association, standing alone, satisfactory evidence of non-business association violative of the parole restriction. To so assume would be to render a parolee vulnerable to imprisonment whenever his employer, willing to hire ex-convicts, hires more than one."[34]



The right to travel is sometimes called a fundamental right which is frequently sought to be restricted by conditions of parole or probation. As with conditions seeking to restrict a parolee's freedom of expression or association, some courts have required that the state show a compelling state interest in maintaining the restriction and that the condition be narrowly designed to serve that interest.[35]

Thus, it is apparent that the parole board or judge must avoid conditions which are unduly restrictive of the parolee's fundamental rights. However, due to the contractual nature of the release agreement and the general recognition that a parolee, regardless of agreement, has only restricted constitutional rights, the parolee is generally unsuccessful when attempting to enjoy the protection and related benefits of the constitutional prohibition against unreasonable search and seizure.

The generally accepted view, stated by California courts in 1974, is that standards relating to probable cause for search or arrest "have little relevance to correctional authorities and paroled prisoners. The parolee, although physically outside the walls, is still a prisoner; his apprehension, although outwardly resembling arrest, is simply a return to physical custody .... For the purpose of maintaining the restraints and social safeguards accompanying the parolee's status, the authorities may subject him, his home and his effects to such constant or occasional inspection or search as may seem advisable to them."[36]

In a recent opinion a court of appeals ruled that the fourth amendment exclusionary rule does not apply to parole revocation hearings; consequently, parole can be revoked on the basis of evidence that a parolee had been carrying a pistol obtained from him as a result of an illegal search by policemen. The court stated: "A parole revocation proceeding is not an adversarial proceeding .... A parole revocation proceeding is concerned not only with protecting society, but also, and most importantly, with rehabilitating and restoring to useful lives those placed in the custody of the Parole Board. To apply the exclusionary rule to parole revocation proceedings would tend to obstruct the parole system in accomplishing its remedial purposes."[37]

According to one appellate court, "a parolee is said to be entitled to some quantum of fourth amendment protection against 'unreasonable searches and seizures.' ... However, a search which would be 'unreasonable' if an ordinary citizen were involved, might be reasonable if directed against a parolee. It would be unrealistic to ignore the fact that parolees, as a class, pose a greater threat of criminal activity than do ordinary citizens."[38]

In view of the Supreme Court's recent decisions,[39] it seems likely that more courts will allow evidence in

parole revocation hearings that might not be allowed in ordinary trials.

In *Jennings v. State*[40] the defendant, an admitted narcotics addict convicted of robbery, was granted probation by the trial judge. Among the conditions of probation was the condition that the defendant obey all laws and not use or possess any narcotics or dangerous drugs unless prescribed. The probationer again came before the judge, this time on drug-related charges. The trial judge revoked his probation and the defendant appealed, urging that the imposition of an unreasonable condition followed by a revocation for a predictable failure to comply with such a condition was cruel and unusual punishment. Rejecting the appellant's contentions, the Supreme Court of Nevada stated: "The condition of probation which the appellant contends to be cruel and unusual punishment is nothing more than a requirement that he obey the laws of this State .... Requiring a convicted felon as a condition of his probation to obey the existing law is not cruel and unusual punishment proscribed by the United States Constitution and the Constitution of Nevada" [cites omitted]. Balancing the interest of the state and the appellant, the court held that the totality of circumstances required that probation be revoked.

In *Mansell v. Turner*[41] a concurring judge argued that there should be a relation between the condition (banishment) and the parolee's rehabilitation or society's protection. The majority, however, rejected such a "bold view," since a prisoner not wishing to comply with a condition need only reject parole.

This bold view was adopted recently in a case resting perhaps on its unusual facts. A parolee had acted as "informer" for the police and had "associated with persons engaged in criminal activity," both in violation of his parole. The Seventh Circuit Court of Appeals reversed the parole board's order to revoke parole. The court reasoned that "breach of parole conditions is a necessary but not sufficient grounds for revocation, for the board is required to determine whether the violator is still a good parole risk, and he may bring extenuating factors to the board's attention." Such extenuating factors were found to exist in that police officers had repeatedly told petitioner that acting as an informer was not a parole violation and that everything had been cleared with his parole officer. The appeals court held that Congress did not intend parole revocation for offenses induced by the government.[42]

In *Berrigan v. Sigler*,[43] Fathers Daniel and Philip Berrigan sought application of the fundamental rights doctrine and of the reasonable relationship test in their challenge to a condition of parole forbidding them to travel to North Vietnam. The right to travel, while part of a scheme of liberty, is not, in the court's view, a fundamental first amendment right. The court accepted the reasonable relationship test but found that the travel restriction was reasonably related to the ability of parole personnel to control and supervise parolees. A general ban for all parolees was considered acceptable because of the time and expense involved in examining each individual case.

Presently the majority of courts do not require that conditions of parole or probation relate to community protection or the rehabilitation of the offender or even that they be reasonable. Therefore, unless they are clearly violative of fundamental rights, challenged conditions will ordinarily stand. However, the theoretical bases upon which parole and probation conditions are built have recently been eroded.[44] With the recognition that due process has a place in the parole process, the day is not far away when courts will either choose or be forced to apply a standard of reasonableness to conditions of parole.

Proposed bills[45] in the House and Senate provide that the conditions of federal parole be reasonably related to the prisoner's previous criminal conduct and present situation, that liberty be deprived only where "necessary for the protection of public welfare," and that the conditions be sufficiently specific to serve as a guide to supervision and conduct.

Parole Revocation

Until recently courts have maintained a hands-off attitude toward parole and probation revocation proceedings. However, two recent Supreme Court decisions revolutionized this approach by bringing limited due process protections to these proceedings.[46]

The repudiation of due process rights at parole revocation proceedings had been justified under a right-privilege distinction which assumed that probation and parole are acts of grace whereby the state bestows a privilege, not a right which is subject to due process protections.[47]

Before *Morrissey v. Brewer*[48] extended due process to parole revocation proceedings, there were a host of Supreme Court decisions requiring fourteenth amendment due process protections in a variety of civil proceedings and there was *Mempa v. Rhay*,[49] which applied due process to a combined probation revocation and deferred sentencing. These protections were held applicable to prejudgment garnishments,[50] termination of welfare payments,[51] and divorce proceedings.[52] With the demise of the theoretical bases upon which due process rights had originally been denied, together with the application of due process to civil proceedings and a recognition that due process is not limited to vested property interests alone, the extension of procedural regularity to post-conviction proceedings was virtually undeniable. The final step was to provide the protection afforded general property interest to one whose interest is in maintaining his conditional liberty.[53]

This transition came in *Morrissey v. Brewer*,[54] in which the Supreme Court announced minimal due process protections for defendants in revocation proceedings. The decision employs a balancing-of-interest test to determine what procedural protections should be given an accused parole violator without imposing undue administrative burdens on the governmental body granting the hearing on the accusations.

Petitioner Morrissey had served one year on a charge of drawing false checks and had been paroled. Seven months later, authorities arrested and jailed petitioner for parole violations. The Iowa parole board revoked his parole on the basis of the parole officer's written report. The petitioner alleged that he received no hearing prior to the revocation. The issue raised in the case was whether the due process clause "requires that a State afford an individual some opportunity to be heard prior to revoking his parole."[55]

Discussing the role of parole in the penological system, the Court noted that parole had become an "integral part" of the system. The Court rejected the idea that constitutional rights turn on whether the government benefit involved is either a right or a privilege. Although it determined that parole revocation is not a part of the criminal prosecution and therefore a state need not provide the full panoply of rights due a criminal defendant, the Court did hold that termination of a parolee's conditioned liberty results in a "grievous loss" and falls under the protection of the due process clause. Chief Justice Burger, writing for the majority, stated that the revocation process must be orderly even though it might be considered informal when compared with a criminal prosecution.

The *Morrissey* opinion perceives two critical stages in the revocation process which require some procedural guarantees. The first stage is the arrest and preliminary hearing (hereafter referred to as a "preliminary") to determine whether probable cause exists to believe that there is a parole violation. The second stage is the final revocation proceedings. The preliminary does not have to be conducted by a judicial official, but it must be conducted by someone other than a parole officer who is personally involved with the parolee. Excluding the personally involved parole officer serves the dual purpose of avoiding both the potential prejudice and the conflicts of interest which might arise. Because there might be a significant time lapse between arrest and a final revocation decision and because the parolee may be arrested at a place distant from a state institution, due process requires the preliminary be conducted as soon after arrest as possible, while evidence and sources are readily available.

Certain procedural protections are afforded the parolee at the preliminary hearing stage. The parolee must receive notice of the hearing and the reasons for it. The notice must allege acts which constitute parole violations. At the preliminary, the parolee must have the opportunity to appear and speak in his defense; "he may bring letters, documents, or individuals who can give relevant information to the hearing officer."[56] The parolee may also request that persons who have provided information which supports the revocation action be questioned in his presence. This request should be granted unless the hearing officer determines that it would endanger the witness to have his identity exposed. The hearing officer has the duty to make a summary of the documents and responses which emerge at the preliminary. Based on the summary, the officer should determine whether there is probable cause to send the parolee before the Parole Board for a final revocation decision. Although the findings need not be formal, the officer must "state the reasons for his determination and indicate the evidence he relied on."[57]

If the parolee desires a final revocation hearing, the Court requires many of the same procedural protections at this hearing as are required at the preliminary stage. The revocation hearing, the second critical stage, during which contested facts are considered, results in a revocation determination. The parolee must be provided an opportunity to demonstrate, if he can, that he has not violated parole conditions, or, if he has violated his parole, that mitigating circumstances exist which suggest that the violation does not warrant revocation.

Noting that each state must write its own code of procedure, the Court set forth the minimum requirements of due process to be afforded the parolee: "(a) a written notice of the claimed violations of parole; (b) disclosure to the parolee of the evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, the members of which need not be judicial officers or lawyers; and (f) a written statement by the fact-finders as to the evidence relied on and the reasons for revoking parole."[58]

In setting forth the minimum procedural requirements for the revocation process, the Supreme Court cautioned that it had no intention of equating the proceeding with a criminal prosecution. The Court viewed the revocation process as "a narrow inquiry" and stated that "the process should be flexible enough to consider evidence including letters, affidavits, and other materials that would not be admissible in an adversary criminal trial."[59]

The procedure to be followed at the *Morrissey* preliminary is apparently clear enough that it does not require argument. No case has been found in which there is a dispute over whether proper procedures have been followed. What is disputed is the necessity in *all* instances of revocation of an independent preliminary proceeding. Put differently, the question raised by subsequent interpretations is whether *Morrissey* mandates a preliminary proceeding.

In *Richardson v. New York State Board of Parole*[60] the New York Supreme Court, interpreting *Morrissey*, held that a subsequent final revocation in accord with due process obviates the need for a preliminary, while the dissent argued that the preliminary was basic to the *Morrissey* decision. A New York parolee was arrested by his parole officer for violating the terms of his parole. He was sent to a state prison where a revocation hearing was to be held. Prior to the revocation hearing the parolee petitioned the New York Special Term Court, urging that he was due a preliminary hearing before final revocation. While the action was still pending and prior to a preliminary, the parole board revoked the petitioner's parole. Special Term vacated the revocation and directed the respondent parole board to hold a preliminary hearing.[61]

On appeal the New York Supreme Court reversed the Special Term order and dismissed the complaint. The majority found that "the revocation hearing is not made conditional on the preliminary hearing; and obviously unless the revocation hearing resulted in a determination that the violation which it was reasonable to believe had been committed had, in fact, been committed, there would be no grounds for revocation." It added: "It would follow that where there has been a revocation hearing at which it has been found in accord with due process that there has been a violation, a subsequent preliminary hearing is purely supererogatory, and its absence under these circumstances violates no right of the parolee. And this is precisely what the Supreme Court decided in *Morrissey*."[62]

The majority stated that they were not holding that the *Morrissey* preliminary may be dispensed with or evaded, but that "it may be, however, obviated if the Board proceeds immediately upon a final revocation hearing, as *Morrissey* provides that only where there is a time lag is a preliminary hearing an element of due process."[63]

It is quite apparent then that courts will divide on the question of whether preliminaries are necessary. In some jurisdictions a full revocation hearing will be said to cure any defects in the preliminary hearing. More convincing arguments can be made when the acts constituting the violation are criminal acts. The purposes of the *Morrissey* preliminary can be satisfied during the criminal procedures which attach to the new crime provided those procedures are promptly undertaken.

In *In re La Croix*[64] the state argued that the probable cause to charge with a crime satisfies the probable cause requirement under *Morrissey*. The court rejected the argument and held that the preliminary is a basic requirement which can not be eliminated even by conviction of another crime.

Shortly after the decision in *La Croix* a sister court made the following statement: "When a parolee is arrested and prosecuted on criminal charges, the criminal prosecution itself is adequate protection against the evils and dangers *Morrissey* was designed to protect against. An indictment or a preliminary in criminal prosecutions meets all the requirements of *Morrissey*. If the preliminary is waived and the parolee pleads guilty or is found guilty after trial, conviction of crime by a court under stringent standards of proof, stricter procedural requirements, and the antiseptic atmosphere of the court room afford the parolee far more protection than [does] the preliminary pronounced in *Morrissey*. If the parolee was convicted of a crime forming the basis of the revocation proceedings, there was obviously probable cause to hold him for a parole violation."[65]

One additional California court also retreated somewhat from the *Morrissey* criteria of two separate hearings for an accused violator. The court in *In re Law*[66] held that a preliminary prior to trial for an alleged felony satisfies the due process requirement of a preliminary pre-revocation proceeding, if the *Morrissey* precepts have been followed and if the parolee has had fair notice of the dual purpose of the hearing. Thus, the parolee was denied an opportunity to contend, in a local forum, that the findings of the preliminary prior to the felony trial was in error or that further evidence had arisen since that first proceeding. Although the Adult Authority (parole board) had the right to conduct a separate preliminary to establish probable cause, the decision to grant such a hearing is at the Authority's discretion.

There are dicta in *Law* which discuss, also, the possibility of treating a misdemeanor trial as a preliminary revocation proceeding. The court recognized two difficulties with this substitution: (1) the delay of the trial following arraignment, which might fail to conform to the *Morrissey* requirement for a prompt hearing, and (2) the generally inaccessible trial transcript which would deny an important record of the court's findings to both the parolee and the Authority. Therefore, a misdemeanor trial, it was held, could serve a dual purpose only following "proper notice or . . . agreement between the parolee and [the] Authority . . . in appropriate cases [which were] sufficiently inclusive of the probable cause hearing procedures mandated by *Morrissey*."[67]

Though subsequent criminal procedures would clearly serve the purpose of the *Morrissey* preliminary, this does not answer whether the Supreme Court meant to add to the burden of the criminal courts.

Morrissey does not say whether the parolee has a right to the assistance of counsel at the preliminary. However, the New York Court of Appeals reversed a lower court decision which had held that there is a conditional right to counsel at the preliminary.[68] A dissenting judge felt that an unconditional right to counsel would insure that the procedural guarantees of *Morrissey* are exercised in an effective manner. While such a holding would be salutary, it is extremely unlikely in view of *Gagnon v. Scarpelli*,[69] which does not require counsel at every revocation hearing.

Nor does *Morrissey* address the standards for the admissibility of evidence at the preliminary. But it is logical to assume that rules for the preliminary would be no stricter than those for the revocation hearing and thus that the use of unsworn testimony would be allowed.[70]

Two additional questions are whether an accused parole violator is entitled to freedom pending a final determination and whether he is entitled to credit for pre-determination jail time. Justice Douglas, in his partial dissent in *Morrissey*, addresses the first question by stating, "If a violation of a condition of parole is involved, rather than the commission of a new offense, there should not be an arrest of the parolee and return to a local jail."[71] The Western District of New York has found no constitutional right to bail pending parole revocation,[72] while the Eastern District found no authority either forbidding or denying bail.[73]

North Carolina v. Pearce[74] requires that time already served be credited against a sentence upon a new conviction for the same offense. It seems logical, therefore, to require credit against the sentence for pre-revocation jail time.[75]

The question of whether the right to counsel applies to parole revocation hearings was reserved by the Court in *Morrissey* and answered, albeit unsatisfactorily, in *Gagnon v. Scarpelli*.[76] The answer was that counsel is required when the circumstances are such that the outcome might depend on the use of skills which the parolee is unlikely to possess. In other circumstances—for example, if there has been an admission of a violation or of guilt—no counsel need be appointed. The parole authority must decide whether counsel is to be appointed on a case-by-case basis reminiscent of *Betts v. Brady*.[77]

The Supreme Court has found no all-encompassing right to counsel in parole revocation hearings. It has even reversed and remanded for reconsideration, in light of *Gagnon*, a decision giving indigents the right to counsel when a right to retain counsel is given.[78]

But if the Court is truly serious about requiring counsel in some instances, the instances suggested are ones which might not normally be recognized until the revocation hearing. For parole boards conscientiously trying to apply these standards, time and money might be saved by providing counsel in all cases. The failure to do so is certain to lead to litigation.[79]

FOOTNOTES

1. 408 U.S. 471 (1972).
2. 411 U.S. 778 (1973).
3. *United States Board of Parole v. Merhige*, 487 F.2d 25 (4th Cir. 1973); *Tarlton v. Clark*, 491 F.2d 384 (5th Cir. 1971).
4. *E.g., Menechino v. Oswald*, 430 F.2d 403 (2d Cir. 1970).
5. *Johnson v. Heggie*, 362 F. Supp. 851.
6. *Bradford v. Weinstein*, 357 F. Supp. 1127 (E.D. N.C. 1973).
7. Comment, 25 Hastings L. J. 602, 628 (1974).
8. *Scarpa v. United States Board of Parole*, 477 F.2d 278 (5th Cir. 1973), *vacated and remanded*, 414 U.S. 809.
9. *Johnson v. Chairman, New York State Board of Parole*, 363 F. Supp. 416 (1973), *aff'd* 500 F.2d 925 (2d Cir. 1974); *see also Cummings v. Regan*, 350 N.Y.S.2d 842 (1973).
10. *Johnson v. Chairman, New York State Board of Parole*, 363 F. Supp. 416 (E.D. N.Y. 1973), *aff'd* 500 F.2d 925 (2d Cir. 1974).
11. *Monks v. New Jersey State Parole Board*, 58 N.J. 238, 277 A.2d 193, 199 (1971). *Accord, Garafola v. Benson*, 505 F.2d 1212 (7th Cir. 1974). *See also Mower v. Britton*, 504 F.2d 396 (10th Cir. 1974); *cf. Cook v. Whiteside*, 505 F.2d 32 (5th Cir. 1974) (reserving the question).
12. *Burton v. Ciccone*, 484 F.2d 1322 (8th Cir. 1973).
13. *Ferries v. United States Board of Parole*, 484 F.2d 948 (7th Cir. 1973).
14. 477 F.2d 278 (5th Cir. 1973), *vacated* 414 U.S. 809 (for consideration of mootness).
15. *See* 477 F.2d at 280.
16. *Id.*
17. 477 F.2d at 281.
18. *Id.*
19. *Id.*
20. *Id.*, at 283.
21. *Id.*, at 285.
22. *Id.*
23. 408 U.S. 471. See text accompanying fn. 55-59 *infra*.
24. 418 U.S. 539 (1974).
25. *See Emerging Rights* 205.
26. Goldfarb, *After Conviction*.
27. *See, e.g., Ughbanks v. Armstrong*, 208 U.S. 481 (1908); *Rose v. Haskins*, 388 F.2d 91, 93 (6th Cir. 1968).
28. *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 161 (1833); *see* Note, 37 Brooklyn L. Rev. 550, 553 (1971).
29. *See People v. Hingerton*, 74 Misc.2d 1063, 346 N.Y.S.2d 915 (1973).
30. Although some distinctions between probationers and parolees could be drawn, the cases involving probation conditions are not likely to be different from those involving parole conditions within the same jurisdiction.
31. *Porth v. Templar*, 453 F.2d 330, 331 (10th Cir. 1971).
32. *Sobell v. Reed*, 327 F. Supp. 1294 (S.D. N.Y. 1971).
33. *Hyland v. Procunier*, 311 F. Supp. 749 (N.D. Cal. 1970).
34. *Accinlega v. Freeman*, 404 U.S. 4 (1971) (*per curiam*).
35. *E.g., McGregor v. Schmidt*, 358 F. Supp. 1131 (W.D. Wis. 1973); *but see Berrigan v. Sigler*, 499 F.2d 514 (D.C. Cir. 1974).
36. *People v. Hernandez*, 229 Cal. App.2d 143, 40 Cal. Rptr. 100 (1964), *cert. denied* 381 U.S. 953 (1965).
37. *United States ex rel. Sperling v. Fitzpatrick*, 326 F.2d 1161 (1970).
38. *United States ex rel. Randazzo v. Follette*, 418 F.2d 1319 at fn. 7 (2d Cir. 1969).
39. *See, e.g., United States v. Calandra*, 414 U.S. 338 (1974); *Michigan v. Tucker*, 417 U.S. 433 (1974).
40. 89 Nev. 297, 511 P.2d 1048 (1973).
41. 14 Utah 2d 352, 384 P.2d 394 (1963).
42. *Caton v. Smith*, 486 F.2d 733, 735 (7th Cir. 1973).
43. 499 F.2d 514, No. 73-1563 (D.C. Cir. 1974).
44. *See Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). *See* text accompanying fn. 48-53 *infra*.
45. H.R. 13118, 92d Cong. 2d Sess. § 4211 (1972); S. 3993, 92d Cong., 2d Sess. § 1202 (1972).
46. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).
47. *E.g., Escoe v. Zerbst*, 295 U.S. 490 (1935); *Ughbanks v. Armstrong*, 208 U.S. 481 (1908).
48. 408 U.S. 471 (1972).
49. 389 U.S. 128 (1967).
50. *Snaidach v. Family Finance Corporation*, 395 U.S. 337 (1969).
51. *Goldberg v. Kelly*, 397 U.S. 254 (1970).
52. *Boddie v. Connecticut*, 401 U.S. 371 (1971).
53. For a discussion of the historical development, *see* Note, 25 Hastings L.J. 602 (1974).
54. 408 U.S. 471 (1972).
55. *Id.*, at 473.
56. *Id.*, at 487.
57. *Id.*, at 488.
58. *Id.*, at 489.
59. *Id.*
60. 41 App. Div.2d 179, 341 N.Y.S.2d 825 (1973), *aff'd* 33 N.Y.2d 23, 347 N.Y.S. 178 (1973).
61. *Richardson v. New York State Board of Parole*, 71 Misc.2d 36, 335 N.Y.S.2d 764 (1972).
62. 341 N.Y.S.2d at 827.
63. *Id.*, at 827-28.
64. 108 Cal. Rptr. 93 (1973). The Supreme Court of California agreed but reversed on the harmless error doctrine, 115 Cal. Rptr. 344, 524 P.2d 816 (1974).
65. *In re Edge*, 33 Cal. App.3d 149, 108 Cal. Rptr. 757 (1973); *see also In re Scott*. 32 Cal. App.3d 21, 109 Cal. Rptr. 573 (1973).
66. 10 Cal. App.3d 21, 109 Cal. Rptr. 573, 513 P.2d 621 (1973).
67. 109 Cal. Rptr. at 577.
68. *People ex rel. Calloway v. Skinner*, 33 N.Y.S.2d 23, 300 N.E.2d 716 (1973).
69. 411 U.S. 788 (1973).
70. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972); *see People ex rel. Donohoe v. Partach*, 74 Misc.2d 555, 345 N.Y.S.2d 322 (1973).
71. *Morrissey v. Brewer*, 408 U.S. 471, 497 (1973) (partial dissenting opinion).
72. *United States ex rel. Mason v. Amico*, 360 F. Supp. 1344 (W.D. N.Y. 1973).
73. *United States v. Schrieber*, 367 F. Supp. 791 (E.D. N.Y. 1973).
74. 395 U.S. 711 (1969).
75. *But cf. White v. Gilligan*, 351 F. Supp. 1012 (S.D. Ohio 1972) which credited pre-sentence jail time against the maximum sentence but did not advance the parole eligibility date.
76. 411 U.S. 778 (1973).
77. 316 U.S. 455 (1942).
78. *Wainwright v. Cottle*, 414 U.S. 895 (1974).
79. *See generally*, Comment, 23 Cleveland State L. Rev. 151 (1974); *see also Rhodes v. Wainwright*, 378 F. Supp. 329 (M.D. Fla. 1974).

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