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The Emergence of Correctional Law and the Awareness of the Rights of the Convicted

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THE TASKS OF PENOLOGY:

A SYMPOSIUM ON PRISONS AND CORRECTIONAL LAW (PART III)

"Revenge is a kind of wild justice, which the more man's nature runs to, the more ought law to weed it out. For as for the first wrong, it doth but offend the law, but the revenge of that wrong putteth the law out of office."

Francis Bacon

"We cannot tolerate an endless, self-defeating cycle of imprisonment, release, and reimprisonment which fails to alter undesirable attitudes and behavior. We must find ways to help the first offender avoid a continuing career of crime."

Lyndon B. Johnson

THE EMERGENCE OF CORRECTIONAL LAW AND THE AWARENESS OF THE RIGHTS OF THE CONVICTED

Eugene N. Barkin*

I. THE EMERGING FIELD

The administration of criminal justice consists of four major areas: the arrest and charge of the commission of the offense; the trial and appeal; the disposition after a verdict of guilty; and finally the implementation of the judgment. Criminal law has traditionally been treated lightly by most law schools, practicing lawyers, and even the bench. And the most neglected area of this neglected field of law has related to the disposition of the offender's case, *i.e.*, sentencing and his rights thereafter.

The elimination of the waste of human resources is perhaps the most significant task of the entire legal system devised for regulating man's behavior in our present day complex society. It is not even debatable that the whole machinery for maintaining law and order can in large part be evaluated by whether or not the sentence is appropriate and whether or not the judgment is appropriately administered. Despite this, of all the potent forces which could render effective service to this aspect of criminal justice, the legal profession has for the most part in the past remained silent. It is obvious that the lawyer, whose training, experience, and lifetime commitments grow out of the whole body of law, has one of the primary responsibilities in the field of corrections. The old concept that the role of counsel is completed when the litigation has ended is as valid as would be the concept that a surgeon should forget about his patient once the cutting and stitching has been completed. Likewise, a court which imposes terms of imprisonment, not knowing what kind of treatment and facilities await the defendant, is the same as a physician who prescribes not knowing the makeup or consequences of the drug.

Recently, the courts have been in the forefront in recognizing that the convicted are not shorn of all rights. As a consequence, more and more they are interpreting the statutory and constitutional requirements imposed on those officials who are charged with the responsibility of supervising or caring for the convicted, whether they be probation officers working in the community or institutional officials charged with responsibility during incarceration. Cases involving the rights of prisoners, probationers and parolees—a short time ago judicially ignored because the matters

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complained of were regarded as being solely within the purview of the administrators and not within the jurisdiction of the courts—are now being heard on the merits. There is now a clear obligation for the legal profession to keep abreast of this emerging field. There is a continuing responsibility to advise, to guide and to lend meaningful support in this phase of criminal justice both to the inmate and to the administrator.

And such a role is appropriate. The very nature of the lawyer's profession and training and experience, places him in the role of a community leader. Thus, he frequently is concerned with the problems of those who have gone astray, serving on parole boards, youth and adult commissions and, of course, influencing legislation. His work is interwoven with almost every activity of the correctional process, and if he is to fulfill its broad responsibilities to society, those obligations must be shouldered. The administration of justice has only begun when the limelight of publicity at the trial and appeal has been turned off and the convicted must make his amends to society.

It is therefore important that the law schools shoulder their obligation to prepare tomorrow's leaders by enlarging their criminal law courses beyond the traditional one year of criminal law. The law schools should not limit themselves to common law rights and wrongs and should include more than technical subjects such as taxation, patents and the like. In today's world, yesterday's curriculum is not enough. Fortunately, however, there have been some recent signs of stirring, apparently from a new awareness of the importance of sentencing and the correctional process.[1] There are a myriad of research projects, federally and privately funded. Some law schools are beginning to include in their curricula, courses dealing with criminology, post conviction matters, law and psychiatry, and the like. There is a greater rapport with the many legal aid offices and some schools are working directly with penal and correctional institutions.[2]

The awareness of the need has recently spread to some less academic corners of the legal arena and has provided the impetus

[1] Rubin, *The Law Schools and the Law of Sentencing and Correctional Treatment*, 43 TEXAS L. REV. 332 (1965).

[2] The Federal Bureau of Prisons, in conjunction with five law schools located near its institutions, has cooperated in starting legal aid projects for its inmates. The services include civil as well as criminal matters. It is felt that many times legal entanglements of a civil nature are sources of difficulty which hamper the inmate's adjustment and programming. It is expected that this program will be expanded to include more schools.

for some concrete proposals for change on a national level. Bills were introduced in both the Senate (S. 1288 by Senator Edward Kennedy), and the House of Representatives (H. R. 6071 by Representative Corman), which would establish an Academy of Criminal Justice to be an agency of the United States and to be located at selected law schools. In addition to the regular law school curriculum, specialized courses would be given Academy students covering, among other things, the biological, social, and economic conditions generating delinquency and crime; the sentencing functions; the administration of probation, parole and pardon; social work; methods of rehabilitation and interrelated problems of law, medicine, psychiatry, psychology, penology, and other areas relevant to the administration of criminal justice.

Another institution outside the law school which is affirmatively encountering the problems of correctional law is the American Law Institute, whose draft of the Model Code of Criminal Law devotes a portion to "Organization of Correction." The Institute proposes to consider not only the law defining criminal behavior but also the law governing the treatment of criminals.[3]

The courts, both state and federal, have demonstrated a new interest in areas of sentencing and probation. The Judicial Conference of the United States for instance has authorized the creation of a permanent committee to "make a broad study of the federal probation system and to assume the additional responsibility for organizing and conducting the institutes and joint councils of judges and others on sentencing in criminal cases."[4] Many federal sentencing institutes have been held and the reports of their proceedings are carried in the Federal Rules Decisions. Recognizing the need to understand what happens to the defendant, the recent institutes are usually held near a federal correctional institution to enable the judges to spend some time at those institutions and to allow the correctional authorities to demonstrate procedures of classification, parole, and the like.

Although some correctional administrators may disagree with me, I think, both as a lawyer and as one who works for a correctional system, that this newfound interest of the leaders of the bench and bar is all to the good. Too frequently the anti-authority attitude of the offender has been nurtured by a realization that often the law and those in charge of administering it have paid little heed not only to prisoners' needs but indeed to their rights. This new public concern, hopefully, should mitigate the difficult

[3] MODEL PENAL CODE §§ 301.1-06.6 (Proposed Official Draft, 1962).

[4] 28 U.S.C. § 334 (1964).

tasks of correctional workers in trying to turn some lives to productivity and usefulness.

To speak in general terms of the way things are progressing does not really explain what the field is about, what its presuppositions are or what its place is in the area of criminal justice. I should like, therefore, to discuss briefly a few specific illustrative problems in this area, in the hope that some clarification of the former discussion will result.

It should be kept in mind that I will deal generally with cases decided by federal, rather than state courts. The necessity of containing the discussion largely within the federal judicial system arises not only from this writer's familiarity with the federal laws and courts (and, correlatively, his lack of particular familiarity with the variations inherent in state statutes), but also from the fact that, as a general rule, the federal laws and procedures are often readily adopted as guidelines by the several states in the promulgation, invocation, and administration of their criminal and correctional laws.

Although the treatment and rights of a convicted prisoner are the paramount issue in correctional law, it should be briefly noted that the problems which pervade this field arise and take place in pre- as well as post-conviction settings. For example, the inequities of the bail system are well recognized. Their reform to the point where excessive bail and inequality of treatment are abolished would benefit the rehabilitative process within an institution in that the resentment against the law or society that such bail practices engender would be eliminated.[5] Other pre-conviction processes that must properly fall within the sphere of criminal rather than correctional law also affect the post-conviction treatment of offenders. It is not difficult to understand how the resentment born of an unfair trial, a denial of counsel, a lengthy pre-arraignment period, a coerced confession, or a disparate sentence, can affect the entire fabric of the correctional law process.

Turning now to perhaps the primary problems of correctional law as a distinct legal area, I should like to examine a number of the more common problems which traditionally have been regarded as within the purview of the administrator. No matter what may be the humanitarian procedure or conditions under which one is committed, imprisonment necessarily entails a loss of real freedom and a loss of rights enjoyed by a large majority of our citizenry. However, while the loss of any unalienable rights in

[5] The Congress recently recognized this with the enactment of the Bail Reform Act of 1966, 18 U.S.C.A. §§ 3146-52 (1966).

society at large is immediately labeled unconstitutional, the loss of many rights in an institutional setting were at one time blithely accepted as a necessary condition of discipline, security, or rehabilitation, albeit not legally required. But now the widely growing concern for the rights of the accused is being reflected in a new interest in the treatment of the convicted. No longer is he regarded as the "slave of the state" as it was expressed by a court some years ago. And the entrance of that concern has meant the exit of the virtual immunity from judicial review of the administrator's regulations, decisions, and acts. While it is true that most courts continue to pay lip service to the old doctrine that except in extreme cases, the courts may not interfere with the conduct of a prison, its regulations and their enforcement, or its discipline, what constitutes a sufficient reason for a judicial review today is a far cry from what it was just a few short years ago.

II. NEW CONCEPTS OF PRISONER RIGHTS

While lawful incarceration must necessarily withdraw or limit many privileges and rights,[6] a prisoner should not be stripped of any rights other than those which would be detrimental to the administration and discipline of the institution or the program established for him. And more and more the administrators are being called upon to justify repressive measures.

A. Correspondence

Certain areas of administration have become especially susceptible to attack. One is the right of institutional officials to intervene in certain types of correspondence. There is no question but that prison authorities have the right to examine and censor mail passing to or from the prison.[7] It is just as clear, however, that there can be no interference with an inmate's access to the courts. To put it the way a federal judge in Philadelphia recently expressed it: "For although prison mail may be censored, regulations or restrictions that effectively preclude an inmate from communicating with courts cannot be tolerated."[8] Access to courts must mean at least that the letter or the writ must be physically

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[6] Price v. Johnston, 334 U.S. 266, 285 (1948).

[7] Ortega v. Ragen, 216 F.2d 561 (7th Cir. 1954), *cert. denied*, 349 U.S. 940 (1955); United States *ex rel.* Vraniak v. Randolph, 161 F. Supp. 553 (E.D. Ill. 1958), *aff'd*, 261 F.2d 234 (7th Cir. 1958), *cert. denied*, 359 U.S. 949 (1959).

[8] United States *ex rel.* Wakeley v. Pennsylvania, 247 F. Supp. 7 (E.D. Pa. 1965).

delivered to the court.[9] It is very important that these legal documents not only be forwarded, but that they be forwarded expeditiously. I think the need for expeditious handling can best be demonstrated by two recent Supreme Court cases which were decided on the same day. In the federal system a person must appeal his conviction within ten days from the date of the judgment and the Supreme Court has held that this ten day period is mandatory and cannot be extended.[10] In the first case the defendant had retained a lawyer and the tenth day fell on a Saturday. On the ninth day, Friday, the attorney who was to file the notice of appeal left his office with a fever and went home to bed and stayed there until Sunday. Thus the notice was not filed until Monday morning. The Supreme Court held that notice was filed too late despite the fact that there was a clear intention to file notice of appeal, that the delay on the part of the attorney was unavoidable, that the client had no control over when the notice of appeal would be filed, and as a matter of fact apparently had no knowledge of the possibility that it would be filed late.[11] On the very same day the Court concluded that a prisoner's appeal was filed within the permissible time although the clerk received it fourteen days after the sentencing. The decision is based upon the following evidence: the date placed on the letter by the inmate, prompt forwarding would have meant delivery within the allowable period, there was evidence that mail at the time was not picked up every day, and there was no way to prove that the date placed on the letter was false.[12] The Court reached these two diverse conclusions despite the fact that in the first case the client was at least as blameless as was the inmate in the second case. As a matter of fact the proof showed that the inmate in the first case had actually attempted to mail the appeal within the allotted time. Incidentally one Justice was of the view that the prisoner's mail box acts as the clerk of the court of appeals and therefore when a document is put in the slot in the institution, it is received at the court. This again is to be contrasted with rules pertaining to a person in free society where it is necessary to get the required document to the court within the specified time. The need to expeditiously send or mail to the courts was underlined by a recent court of appeals statement that mail to courts should not be delayed longer than the time required to sort it and that even censorship

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[9] *Ex parte* Hull, 312 U.S. 546 (1941).

[10] United States v. Robinson, 361 U.S. 220 (1960); FED. R. CRIM. P. 37.

[11] Berman v. United States, 378 U.S. 530 (1964).

[12] Fallen v. United States, 378 U.S. 139 (1964). See also Caylor v. United States, 362 F.2d 689 (10th Cir. 1966).

was not to be tolerated.[13]

Handling correspondence with the prisoner's attorney has become a source of great concern. It is now a common contention that the prison authorities have no right to inspect mail passing between the attorney and client, because this correspondence is within the purview of the confidential attorney-client relationship and inspection of this mail breaches this relationship. It should be borne in mind that in order to come within the concept of this relationship, the attorney must be rendering legal advice. The mere fact that the correspondent is an attorney does not mean that the requisite relationship has been established. As a practical matter attorneys many times perform a variety of services for their clients which do not involve legal advice. They are business agents, public relations men, or just friends. It is most difficult for the administrator to ascertain intelligently in what capacity certain correspondence is carried on. But even where the attorney-client relationship is established, it seems obvious to me that the maintenance of the security of the institution requires that the administrators retain the right to open and inspect incoming and outgoing mail. Unfortunately, a small minority of the members of the bar are not above reproach, but perhaps more important is that it is a simple matter for anyone to have fictitious return addresses printed on envelopes or letterheads. If incoming correspondence with false return addresses could never be inspected, the consequences could be disastrous. At least one federal district court held that letters between prisoners and their attorneys are not exempt from inspection.[14] However, letters from attorneys should be given priority insofar as forwarding them is concerned. In a recent New York state case the court held that a warden overreached his authority when he intercepted communications addressed to the prisoner's attorney without notifying counsel of that fact.[15] And, despite administrative rules commonly to the contrary, the fact that the prisoner is making derogatory remarks about the administration is no reason to refuse to allow him to write to counsel. As a matter of fact this is precisely the situation where access to counsel may be most important.[16] The need for the administrator to be free of any appearance of repression is most important where he has some ostensible interest in disputing

[13] Coleman v. Peyton, 362 F.2d 905 (4th Cir. 1966).

[14] Bailleaux v. Holmes, 177 F. Supp. 361 (D. Ore. 1959); see also Green v. Maine, 113 F. Supp. 253 (S.D. Me. 1953); United States *ex rel.* Vraniak v. Randolph, 161 F. Supp. 553 (E.D. Ill. 1958), *aff'd*, 261 F.2d 234 (7th Cir. 1958), *cert. denied*, 359 U.S. 949 (1959).

[15] Brabson v. Wilkins, 45 Misc. 2d 286, 256 N.Y.S.2d 693 (Sup. Ct. 1965).

[16] Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962).

the validity of the inmate's complaint, since that situation affords a reasonable basis for the accusation of interference with access to counsel and the betrayal of the confidentiality of the attorney-client relationship.[17] Incidentally, the New York case also held that communications addressed to public officers in the executive branch of the federal and state governments, who are charged with enforcing the laws, including the federal Civil Rights Act, are in the nature of communications addressed to the courts themselves since these persons are officers of the court or public officers charged by the law with enforcing and administering the law.

Of course, letters to friends, business associates or anyone not concerned with enforcement activities are not afforded the same safeguards. In an old case involving the well-known Birdman of Alcatraz, the inmate demanded an order restraining the warden from unlawful interference with his business interests.[18] The court held that the prisoner was not entitled to carry on business affairs representing efforts to secure publication of a book or to engage in general business correspondence with outside parties to promote and further his interest. Just before Stroud died several years ago, he renewed the same complaints in the District Court for the Western District of Missouri stating that he wanted to have his old bird book revised and republished, and also wanted to send out a manuscript surreptitiously written some years before which purported to describe the federal prison system up to some twenty-five or thirty years previously. Stroud died before this case was decided, but the court had indicated pretty clearly it was having a good long hard look at Stroud's contentions and that it was impressed with the fact that many great works were written in prison. The court seemed to be of the opinion that unless the prison administrators could show that the publication of these writings would be detrimental to the security and administration of the institution, it would be inclined to order them to allow Stroud to attempt to have his manuscript published. After his death the manuscript was turned over to the administrator by the Bureau of Prisons.

A recent case[19] decided by the United States Court of Appeals for the Eighth Circuit involves an inmate in the Minnesota State

[17] The Federal Bureau of Prisons provides that mail to and from an attorney may be inspected but that matters within such relationship "are to be kept in strict confidence by the inspecting official." Bureau of Prisons policy statement, Access to legal reference materials and legal counsel and preparation of legal documents, Jan. 21, 1966.

[18] Stroud v. Swope, 187 F.2d 850 (9th Cir. 1951).

[19] Lee v. Tahash, 352 F.2d 950 (8th Cir. 1965).

Prison. The inmate sought a declaratory judgment and an injunction against the warden's enforcement of certain mailing regulations requiring the prisoner to make up a list of persons with whom he wished to carry on correspondence, and subjecting all letters to examination or censorship, with the exception that sealed communications could be sent to the Governor, Attorney General, Commissioner of Corrections and the warden.[20] Under the authority of these regulations, certain letters which the prisoner had attempted to have sent out were returned to him by the prison administrators. He claimed that he was entitled to maintain his action under the Civil Rights Act alleging a deprivation of constitutional rights and privileges. The district court granted the state's motion to dismiss declaring that the restrictions involved could not be held violative of any federal right either in their content, application, or enforcement. This court reiterated the doctrine that except in extreme cases, the court may not interfere with the conduct of a prison, and of course this could mean that the individual cannot write to anybody he pleases. It mentioned certain aspects of institutional treatment which would be within the purview of judicial review. Procedures which are of such character or consequence as to shock the general conscience, or which amount to cruel and unusual punishment would constitute an unlawful administration of a prison sentence. The court indicated an awareness that the measurement of fundamental fairness is tied to limits which a humane modern society imposes on the administration of penal systems.

The regulations involved in the *Tahash* case include no reference to a confidential relationship between attorney and client, and the court made no comment upon this question. Among other things, the inmate wrote through his attorney to the United States Senator from California asking for a page of material; he wanted to address inquiries to the Superintendent of Documents and others about obtaining various statutory sections; and he wanted to address a request to a federal district judge for legal service on how to set aside a state court conviction in California. The prison authorities said it would be appropriate to take up the matter with the lawyer listed as his attorney of record, especially with respect to copies of statutes and decisions.

The court held that under these circumstances, there is no denial of rights secured him by federal law, and access to the courts had in no way been denied him, as the filing of the suit in the Minnesota court clearly indicated. The court also held that

[20] These are not dissimilar to federal prison mail regulations.

prison regulations are not required to provide prisoners with time, correspondence privileges, materials or other facilities they desire for the special purpose of trying to find some way of attacking a presumptively valid judgment. In this case the several letters were returned to the inmate including one that he wanted to send to his attorney. He said that he should have an absolute right to communicate with an attorney anytime he saw fit. The court apparently looked at the letter to the attorney and concluded that nothing contained in it was or could be claimed to be a matter of confidential communication. This opinion does seem to indicate that a letter which is within the purview of the attorney-client relationship would at least have to be forwarded, although it need not be free of inspection.

There is authority and some reasonable basis for differentiation between attorney-client correspondence and attorneys' visits with their clients. The Supreme Court of the United States, in a case before it several years ago which arose from a New York jail practice, held that normally wire tapping of conversations in a penal institution is permissible for security reasons, but at the same time, by way of dictum, the Court indicated that the confidential attorney-client relationship must be respected.[21] There Justice Stewart did say "In prison, official surveillance had traditionally been the order of the day." But he went on to state: "Though it may be assumed that even in jail or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection, there is no claimed violation of any special relationship here." The Federal Bureau of Prisons does not subject attorneys' visits to auditory supervision. Thus, those contending for sealed attorney-prisoner correspondence might well ask, "If you do not listen to attorneys' conversations, why must you open written correspondence? Isn't it just as possible that improper material can be introduced in the former case as in the latter?" I think the difference is one of degree, rather than kind. It is feasible to reduce the possibilities of introduction or removal of contraband in the visiting situation because of visual supervision. Further, the visitor can at least be identified as the attorney of record. One cannot even be certain of that in written correspondence if the envelope may not be opened.

B. Legal Materials

Reasonable access to the courts logically includes permission for the inmate to acquire certain legal documents or books, and a

[21] Lanza v. New York, 370 U.S. 139, 143-44 (1962).

reasonable opportunity for him to study and prepare materials. This is especially true where the inmate is not represented by counsel. And this can still happen frequently because even in the federal system the Criminal Justice Act[22] does not cover many of these suits such as injunctions, mandamus, damage suits and the like. I previously referred to the *Bailleaux* case[23] in which the court found that attorneys' mail to prisoners was subject to inspection. In that same case the district court found that the prisoners were unduly hampered in their efforts to study law and prepare legal documents. The court of appeals reversed, holding that whether or not in a particular case access is reasonable depends upon the surrounding circumstances of the case.[24]

The court reasoned that the restrictions on those in punitive segregation are permissible because of the relatively short duration of the sanction, because it was imposed only for violation of the rules, and because it was not imposed indiscriminately against all inmates engaged in legal work. With respect to the general population there had been a liberalization of time and facilities of the library, so that there were no delays in excess of one day for those wanting to use such facilities. Further there was a substantial effectual increase in the prison library, since although prisoners in segregation do not have access to the law library, they are permitted to engage in legal research or preparation of legal documents in their cells for about seven hours a day, seven days a week.

Other prison rules upheld were that prisoners are not permitted to purchase law books, and that books and materials must be kept in the library. These rules are partly based upon the difficulty of examining incoming mail and packages for contraband. Enclosures from a primary source such as a publishing house required less scrutiny than if they were to come in secondhand.[25] This court held that it was not for the judiciary to decide whether the regulations were salutary or achieved the purposes for which

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[22] 18 U.S.C. 3006A (1964).

[23] Bailleaux v. Holmes, 177 F. Supp. 361 (D. Ore. 1959).

[24] Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961).

[25] The Federal Bureau of Prisons policy is to afford inmates reasonable access to legal materials and a reasonable opportunity to prepare legal papers. The inmates' program, however, is to continue without undue disruption except where there are imminent deadlines. Those in segregation are to be afforded the same opportunity as others. Those in punitive status are not allowed to prepare legal documents unless faced with a deadline, because of the short duration of this status. Bureau of Prisons policy statement, Access to legal reference materials and legal counsel and preparation of legal documents, Jan. 21, 1966.

they were written. So long as the purpose is not to hamper inmates in gaining access to the courts, and so long as the rules do not hamper them in fact, the court's inquiry is at an end. The court went on to say that the state has no obligation to provide library facilities and an opportunity for their use to enable an inmate to search for a legal loophole in the judgment or to perform services which only a lawyer is trained to perform.

In a recent Pennsylvania case an inmate in Graterford Correctional Institution also complained that he had been denied the use of law books, and had been prevented from acquiring legal materials from sources other than the issuing court, the Government Printing Office, and West Publishing Company. The Philadelphia District Court followed *Hatfield v. Bailleaux*.[26] That court pointed out that the plaintiff had access to three sources of legal materials and had been permitted to retain these materials in his cell while he prepared his legal action. His right of communication with the court had not been interfered with nor did he claim it had been. There is no law library at the Graterford institution, and this court also held that one was not necessary. Under these facts, the court ruled that the plaintiff had not been denied his access to the courts.[27] However, even if there is no denial of rights on an individual basis to a particular inmate, if it is shown that the complainant is given less access than other inmates, he has stated a complaint which is cognizable under the federal constitution, *i.e.*, the denial of equal protection under the law.

The prison administrators have traditionally fought any activity which would place one inmate in the debt of another for reasons which are obvious. Nothing could undermine the authority of the officials quicker than to have the weaker or more ignorant prisoners beholden to their stronger or more knowledgeable "colleagues." Consequently, an almost universal prison rule prohibits one inmate from drafting legal pleadings for another. But this rule was recently upset, probably because of the unusual factual situation giving rise to the suit.[28] In this case, the court found the petitioner had been kept in solitary confinement in a state penitentiary for eleven months for the sole reason that he violated this regulation. At the time he brought his suit such confinement continued and would continue for an indefinite period, to be terminated only on the order of the Commissioner of Correc-

[26] United States *ex rel.* Wakeley v. Pennsylvania, 247 F. Supp. 7, 13 (E.D. Pa. 1965).

[27] The federal system provides the most relevant volumes of United States Code Annotated. Policy statement, *supra* note 24.

[28] Johnson v. Avery, 252 F. Supp. 783 (M.D. Tenn. 1966).

tions. The state moved to dismiss on the ground that the inmate had not stated a cause of action. Thus, the facts alleged in the petition had to be taken by the court as true. It did not point to any reasonable alternatives available to the illiterate indigent inmates. The court pointed out that unless there is some reasonable alternative a "jail house lawyer" is the only way the illiterate could present his petition. Thus, if such prisoners cannot have the assistance of "jail house lawyers," their valid constitutional claims may never be heard, and as a consequence, the prison regulation clearly conflicts with the statutory right of prisoners to petition for the great writ. It issued an order to release the petitioner from segregation into general population. This amounted to ordering the authorities to transfer the inmate from one part of the institution to another, normally strictly an administrative function. The state is taking an appeal.

In another, even more recent case, a federal appeals court remanded to a district court with instructions to order prison officials to release the plaintiff from the maximum security ward and allow him to remain in general population as long as his conduct conforms to proper prison regulations.[29] In that case an inmate was held in maximum security for four years, apparently because he asked for religious services for himself and others of the Muslim faith but refused, upon demand, to provide a list of others for whom he spoke. Since maximum security status involved the loss of certain privileges and loss of consideration for parole, the protestations of the prison officials that this status was not punishment was brushed aside by the court. The court held there was no basis whatever for the imposition of this confinement especially where "the assertedly offensive conduct bears so close a relationship to first amendment freedoms."

These decisions are only indicative of the trend. It is now clear that the administrator must run his institution as equitably as possible with the retention of just those controls as are reasonably necessary for the proper administration of his institution. If he does this, he may well avoid adverse and unduly restrictive judicial decisions. The recently promulgated Federal Bureau of Prisons policy statement previously referred to in the footnotes, attempts to define rights of access to counsel and legal materials and tries to balance the individual's legal rights with his program and security needs which sometimes appear to clash head-on. More important, I think that it contains the basic ele-

[29] Howard v. Smyth, 365 F.2d 428 (4th Cir. 1966). Petition for rehearing was denied Aug. 28, 1966 and petition for writ of certiorari is being prepared by the state attorney general's office.

ments of fair play while enabling us to retain the basic restrictions that we feel are necessary.

The establishment of legal aid programs with the law schools is a worthwhile program for all concerned, and can avoid adverse judicial decisions and at the same time render more meaningful service to the inmate. The efforts of the law students have generally been appreciated, and some tangible assistance has been given, but perhaps more important, the program has had a salutary psychological effect upon the inmates because for many it was the first time an "outsider" took some real interest in their problems. The law schools are most enthusiastic about the benefits derived by their students.

C. Religious Practices

Probably an even more difficult problem confronting the prison administrator today is what to do about demands which are being made upon them by comparatively small groups of inmates because of the claimed requirements of their religious beliefs. At the moment the litigation is pretty much centered upon the demands of the sect known as the Black Muslims. This group demands the right to be treated as a religion and from that flows the right to hold religious services and to be provided a place to meet, the right to certain diet, the right to have their own religious leaders come into the institution to lead services and so on, ad infinitum. Prison administrators have taken various views and approaches and there have been numerous court decisions with varied results. The typical administrators' approaches have been (1) "We decided that the Black Muslims are not a religion and they can't meet or receive any other treatment like a religion;" or (2) "It may well be a religion, but even if it is, in view of their background and teachings, if we give them what they want, trouble will result;" or (3) "We'll give them everything which is not disruptive to our institution."

The first approach, I think, is indefensible. Neither an administrator, nor anyone else including the courts, is possessed with such clairvoyance as to determine whether what a man professes to believe in is or is not a religion. Consequently, a court is virtually compelled to accept at face value the assertion that an organization is a religion if it has the trappings of a religion even though its activities are not exclusively religious.[30] At a recent conference for state wardens in the Midwest area I made a statement to this effect. One man asked whether the American Nazis

[30] Sostre v. McGinnes, 334 F.2d 906 (2d Cir. 1964).

or Ku Klux Klan would have to be regarded as a religion if it was so asserted by inmates who are members of these groups. I advised them that I felt in view of the well-known background and teachings of these organizations, a showing of practices and dogmas sounding of religion would have to be made, but once made, unless refuted, it would be difficult for the administrator to decide it was not a religion.

If the complaint is made that an inmate has been deprived of something or punished because of his religion, it is no answer to merely assert that the matters complained of are administrative decisions and not subject to review by the courts. An approach close to this was taken in a case where an inmate alleged that he was placed in solitary confinement because he insisted upon a particular translation of the Koran. The federal district court, after considering "accredited social studies of Muslims, police reports and reported Muslim difficulties elsewhere" dismissed the complaint under authority of the "broad discretion" rule. The court of appeals affirmed but the Supreme Court, taking the allegations as true, as they must in a motion to dismiss, held that the complaint stated a cause of action and that it was error to dismiss the case.[31]

Of course, anyone has a right to believe anything he chooses. But the guarantee of religious freedom is absolute only insofar as it refers to religious belief. The state, the Congress, or officials cannot interfere with religious beliefs, opinions or the conscience of the individual. This rule applies within the confines of a prison.

The practice of religion, however, is not an absolute freedom. It is restricted whenever its expression is contrary to the public good or whenever it presents a clear and present danger to the safety, morals, or general welfare of the community. This is demonstrated in Supreme Court cases involving activities of Jehovah's Witnesses,[32] or conscientious objectors,[33] or a Mormon practicing polygamy as an expression of his religious beliefs.[34] The situation prevailing in a penal institution is probably potentially more explosive than in other settings. Thus the necessity of restricting religious activities in prison, including the right to meet in a group for religious services, has been upheld by several appellate

[31] Cooper v. Pate, 324 F.2d 165 (7th Cir. 1963) *rev'd and remanded* 378 U.S. 546 (1964). See also Walker v. Blackwell, 360 F.2d 66 (5th Cir. 1966).

[32] Board of Educ. v. Barnette, 319 U.S. 624 (1943).

[33] Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934).

[34] Reynolds v. United States, 98 U.S. 145 (1878).

courts. But these cases had been decided after a full hearing where it was demonstrated just why granting the demands would be detrimental to the administration or security of the institution. Mere conclusory statements by the administrator are not enough. The reasonableness of the conclusion must be factually established. Evidence of the dangerous teachings of the group, past difficulties with them in a prison setting, and the nature of the institution involved are all relevant.[35] A federal court of appeals put it this way: "The problem . . . is not whether they should be permitted to have congregational services, a minister, religious literature, but rather, under what limitations protective of prison discipline they should be permitted these rights."[36] The federal system, after having prevailed in several lawsuits brought by Muslims,[37] has liberalized its policies. It has expanded the pastoral care available to all inmates, especially those of denominational groups, which require care beyond the facilities of the system. In this connection the administrators have taken an active role in seeking regular visits by Black Muslim ministers, and consequently services[38] are being conducted regularly by these ministers in an increasing number of institutions. Another significant change is allowing an inmate to change his religious affiliation. Previously it was felt that the prison environment was so unnatural and that such undue pressures could be placed upon inmates to change religious affiliation that it was best to compel an inmate to remain with his original religious preference while serving his sentence. It is now felt that administrators are not in a position to dictate what a man should believe, if he demonstrates a sincere desire for the change. To require him to remain with a religion which is not his choice is indefensible.

D. Medical Care

The ability of inmates to cause their keepers to answer responsively concerning charges of the inadequacy of the medical treatment is a new area of litigation. Historically the courts have shied away from hearing these cases on the merits on the ground that what is appropriate is a matter for the administrators and the doctors, and not the courts.[39] But even this previously untouchable

[35] Desmond v. Blackwell, 235 F. Supp. 246 (M.D. Pa. 1964); *In re* Ferguson, 55 Cal. 2d 663, 361 P.2d 417 (1961); Cooke v. Tramburg, 43 N.J. 514, 205 A.2d 889 (1964).

[36] Sostre v. McGinnes, 334 F.2d 906, 911 (2d Cir. 1964).

[37] Desmond v. Blackwell, 235 F. Supp. 246 (M.D. Pa. 1964).

[38] Bureau of Prisons Policy Memorandum 7300.4, April 6, 1966.

[39] Haynes v. Harris, 344 F.2d 463 (8th Cir. 1965); *Ex Parte* Barnard, 52

area is being delved into. In a case arising from an Illinois state penitentiary brought in the federal court as a violation of the Civil Rights Act, the prisoner claimed that he was receiving inadequate treatment, was never examined by prison doctors, and had been rebuked for abusing the privilege of sick call. The court held that the prisoner stated a claim under the Civil Rights Act, 17 Stat. 13 (1871), 42 U.S. C. § 1983 (1964), for intentional deprivation of essential medical care,[40] although it realized that the majority of cases would go the other way on the assumption that taking jurisdiction would constitute an unwarranted intrusion into the internal discipline of the state and penal institutions. Very recently a suit was brought by a prisoner in a Maryland institution to enjoin the prison authorities from refusing to administer appropriate medical and surgical treatment. The relief was summarily denied, but the court of appeals held that the allegations, since not denied, must be taken as true, and if he was not receiving appropriate medical attention, the prisoner did state a cause of action. Therefore, a full scale hearing on this complaint was ordered.[41] Subsequently one operation was performed, and at the hearing there was a dispute as to the feasibility of the second, five doctors testifying that the risk was high and the prognosis poor for another operation. Nonetheless the court appointed a prosthodontist for his diagnosis. At this writing no decision has been made by the trial court. The amazing aspect of this case is not the remand but the abundance of caution exercised by the trial court after the remand. It seems to me that the testimony elicited before it clearly indicated that the refusal of the administrators to allow a second operation was not arbitrary or capricious and that the right to judicial intervention had terminated.

In another suit the plaintiff sued various physicians and administrators individually seeking to proceed in forma pauperis[42] although no facts were proved to show any defendant responsible for the acts of alleged misconduct. The court refused to permit the action to be filed but required the state to make available all records which would show which persons made the decisions of which the plaintiff complained. It also approved the original suit filed and any suit against officials as individuals who were involved.[43]

F. Supp. 102 (E.D. Ill. 1943); Jones v. Pescor, 169 F.2d 853 (8th Cir. 1948).

40 Redding v. Pate, 220 F. Supp. 124 (N.D. Ill. 1963).

41 Hirons v. Director, Patuxent Institution, 351 F.2d 613 (4th Cir. 1965).

42 28 U.S.C. § 1915 (1964).

43 Hirons v. Maryland, Civil No. 17193, D. Md., *denied* Aug. 19, 1966.

E. PHYSICAL CONDITIONS

In another case of first impression, in an action brought for violation of an inmate's civil rights,[44] the federal court ruled that the conditions under which an inmate was confined in "strip cells" amounted to cruel and unusual punishment and enjoined the state authorities from confining him in such conditions.[45] It did not preclude the use of such cells under more favorable conditions. The court was virtually revolted by the conditions under which this inmate was forced to live and outlined the conditions in great detail. Again, like the Tennessee case, the grim facts resulted in a new inroad into the administrator's prerogatives.[46]

F. THE RIGHT TO SUE FOR INJURIES

Several years ago the Supreme Court of the United States struck another blow for the proposition that the rights of persons serving prison sentences should, as much as possible, approximate the rights of persons at liberty. The federal government in the Federal Tort Claims Act stripped itself of sovereign immunity where citizens were injured through the neglect of the government agents, but certain exceptions were spelled out in the legislation.[47] For a number of years it was practically hornbook law that a prisoner could not sue the United States under the Federal Tort Claims Act for injuries sustained during the confinement in a federal prison regardless of the circumstances surrounding the injury.[48] Eventually, however, the court of appeals for the second circuit, in two en banc five to four rulings, held to the contrary.[49] Thus, when this issue came before the Supreme Court, tradition and most appellate judges were on the side of the government; the only case to the contrary had been decided by the narrowest of margins. The Supreme Court, however, was not indecisive when it ruled unanimously that prisoners could sue under the Fed-

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44 28 U.S.C. § 1981, 1983 (1964).

45 Jordan v. Fitzharris, No. 44786, D. Calif. *denied* Sept. 6, 1966. 28 U.S.C. § 1331, 1343 (1964).

46 The Department of Corrections for California issued regulations six days later which would prevent the continuation of conditions which gave rise to this case. The Federal Bureau of Prisons has issued similar directives.

47 28 U.S.C. §§ 1346(d); 2671-80 (1964).

48 James v. United States, 280 F.2d 428 (8th Cir. 1960), *cert. denied*, 364 U.S. 845 (1960); Lack v. United States, 262 F.2d 167 (8th Cir. 1958); Jones v. United States, 249 F.2d 864 (7th Cir. 1957).

49 Muniz v. United States, 305 F.2d 287, *affirming* 305 F.2d 285 (2d Cir. 1962); Winston v. United States, 305 F.2d 264, *affirming* 305 F.2d 253 (2d Cir. 1962).

eral Tort Claims Act.[50] Since then suits have been filed against the government by prisoners alleging medical malpractice, negligence resulting in injuries, and negligence enabling one prisoner to assault the plaintiff. About seventy-five or eighty such suits have been filed since the Supreme Court decision, virtually all requiring responsive replies. In several cases the prisoners have been able to obtain judgments. Perhaps the most notable one involves a vicious assault by an inmate, who was normally kept in segregation, upon a fellow prisoner, Mickey Cohen, who as a result was seriously injured. The attacker had escaped from the custody yard, found his way through the institution grounds, and struck Cohen on the head with an iron bar. Cohen received a verdict of some 110,000 dollars.[51] In another case the district court regretfully denied recovery after the evidence showed that in view of the present penal philosophy to permit prisoners as much freedom of movement within the prison as possible, there was no indication of negligence.[52] A petition for writ of certiorari has been filed in this case.

There is a provision under federal law to compensate prisoners who are injured while at work.[53] The amount of such an award is based upon the rates of the Federal Employees Compensation Act. In addition, all medical expenses relating to the injury are borne by the federal government.[54] Several inmates who were awarded injury compensation nevertheless sued under the Federal Tort Claims Act. The government took the position that the compensation is the exclusive remedy available on the theory that where Congress has authorized a remedy in the nature of workmen's compensation, that remedy is presumed to be exclusive.[55] The United States Court of Appeals for the Third Circuit rejected this argument and ruled that a prisoner was covered under the Federal Tort Claims Act even though he was receiving compensation, essentially because the compensation system was not sufficiently comprehensive.[56] On the other hand in an identical situation, the United States Court of Appeals for the Second Circuit

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[50] United States v. Muniz, 374 U.S. 150 (1963).

[51] Cohen v. United States, 252 F. Supp. 679 (N.D. Ga. 1966).

[52] Fleishour v. United States, 244 F. Supp. 762 (N.D. Ill. 1965), *aff'd*, 365 F.2d 126 (1966).

[53] 18 U.S.C. § 4126 (1964).

[54] 28 C.F.R. § 301 (1966).

[55] Patterson v. United States, 359 U.S. 495 (1959); Johansen v. United States, 343 U.S. 427 (1952).

[56] Demko v. United States, 350 F.2d 698 (3d Cir. 1965).

reached precisely the opposite result.[57] It is interesting to note that the Federal Employees Compensation Act,[58] which provides for benefits regardless of fault or contributory negligence, also precludes suit against the United States.[59] A similar conclusion was reached for the military.[60] This issue is to be argued before the Supreme Court in this term.

During the past session of Congress a bill was introduced which would bar prisoners from suing under the Tort Claims Act regardless of the circumstances.[61] This bill is retributive. It is unconscionable to bar a person of his right to seek recovery for injuries received because of the negligence of others solely because he is serving a term of imprisonment. Such a repressive law can only fortify the prisoner's resentment against society. This would be especially true where the inmate is placed in a situation where he cannot avoid the circumstances from which the accident resulted. An example is medical care. The prisoner has no opportunity to select his own doctor and if he suffers because of the negligence of the prison physician he should not be without a remedy. Similarly if he is required to expose himself to dangers without proper safeguards, his keepers should not be immunized from suit. The one type case which causes concern is the assault by one prisoner upon another. In the setting of a penal institution there is an inordinately large number of persons with minds bent toward violence living in close confinement and under unnatural circumstances. This results in many assaults within the walls. The only sure way to protect one inmate from another would be to keep all inmates locked up and in isolation. This approach, of course, is indefensible and would cause our correctional systems to revert to the dark ages. In order to develop programs which are best calculated to be of assistance to the inmates, it is necessary that a maximum amount of freedom be allowed. Consequently certain calculated risks must be taken to achieve this goal, and the government should not be placed in the position of the guarantor of all inmates' safety. It is true that negligence must still be proven to warrant recovery; however, the trip to court, with the opportunity to require prison officials to testify, is payment enough for some inmates who wish to harass prison officials. Yet, this is preferable to barring all inmates from suing since there are, of course, meritorious cases which should be heard.

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[57] Granade v. United States, 356 F.2d 837 (2d Cir. 1966).

[58] 5 U.S.C. §§ 751-93 (1964).

[59] Patterson v. United States, 359 U.S. 495 (1959).

[60] Feres v. United States, 340 U.S. 135 (1950).

[61] H. R. 16423, 89th Cong., 2d Sess. (1966).

III. CONCLUSION

Society has seen fit to deprive some 250,000 human beings of their freedom. The purpose of this brief discussion has been to promote awareness of the myriad of complex legal and human problems which shape the lives of these people who live in the shadows of great gray walls. The balance of rights retained and restraints imposed upon them will frequently determine whether their imprisonment will serve or disserve the society that has judged and bound them.