THE LAW OF PRISONERS' RIGHTS

A Summary for Masters

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THE LAW OF PRISONERS' RIGHTS

The law of prisoners' rights has undergone revolutionary change in recent years. The courts have abandoned their long-standing "hands off" attitude toward the administration of prison affairs and assumed an active role in remedying a wide variety of prison problems. While more recent Supreme Court cases have virtually halted this momentum, the principle that prisoners retain basic constitutional rights during their confinement is nonetheless well established.

Prisoners were long considered to be without legal rights. While some courts early in the 20th Century began to recognize that prisoners possessed some limited rights, most judges refused to intervene in the internal affairs of prisons unless there existed a potential for "death or serious bodily harm." 1/ This "hands off" attitude stemmed from the view that it was not the function of a court to intervene in the internal administration of prisons. Courts expressed the wish to avoid evaluating the daily discretionary decisions of correctional officials because such review inevitably would impair the ability of prison officials to carry out their mandated responsibilities.

This attitude changed in the mid and late 1960s. Courts recognized that there was no "iron curtain drawn between the Constitution and the prisons." 2/ Prisoners were entitled, therefore, to basic rights guaranteed by the Constitution.

Apart from this fundamental principle, however, debate has continued in the courts over the scope of those constitutional rights. Courts have not granted rights to prisoners equivalent to those enjoyed by free citizens. Instead, prisoners' constitutional rights have been limited by the very nature of the prison environment, and institutional concerns for security, order, and discipline have been weighed against prisoners' exercise of rights otherwise protected by the Constitution. Recognition of these latter rights by the courts has been further limited by the judiciary's continuing reluctance to interfere in the administration of prisons.

The results of this balancing process between individual rights and institutional concerns over the past decade are summarized in this chapter to provide a newly appointed master with an overview of the law of prisoners' rights. While much of the law in this area is made in appellate and trial courts of the federal judicial system, those decisions are far too numerous to discuss in detail here. That is also the case with state court decisions, which can be expected to play an increasingly important part in shaping future law governing the rights of prisoners. This overview instead concentrates almost exclusively on U.S. Supreme Court decisions.

SECTION 1983 AND FEDERAL HABEAS CORPUS

To date, prisoners' rights litigation has been conducted principally in the federal courts. This may be attributable to an attitude among some prisoners and their attorneys that federal judges are more likely to be receptive to prisoners' suits than are state judges and, in some forums, juries.

Federal courts, however, are courts of limited jurisdiction, and a prisoner must sue under a federal statute that enables the federal court to hear and decide the case. Most statutes conferring jurisdiction empower a trial court to entertain only those cases that arise under the federal Constitution, treaties, or federal substantive law. Thus, while prisoners confined in federal prisons, created and operated under federal law, have little difficulty invoking federal court jurisdiction, individuals in state institutions have more limited access to the federal courts. Among the statutes used by state prisoners to litigate their claims in federal court, two in particular are employed most frequently to assert prisoners' rights: the Federal Habeas Corpus statute and the Civil Rights Act of 1871.

The Federal Habeas Corpus Law

One major avenue of access to federal courts is the Federal Habeas Corpus Law, 28 U.S.C. section 2254 (1976). Habeas corpus permits a federal court to entertain an application for a writ of habeas corpus by a state prisoner if he is being held in custody in violation of the Constitution or laws of the United States.

For some time courts allowed prisoners to challenge not just the fact of their confinement but also the conditions of their confinement in a habeas corpus proceeding. A prison rule or condition "which serves to make . . . imprisonment more burdensome than the law allows or curtails /a prisoner's/ liberty to a greater extent than the law permits," could be attacked by using a petition for a writ of habeas corpus. 3/ In 1973 in Preiser v. Rodriguez, however, the Supreme Court seemed to narrow the use of habeas corpus even while holding that it is the sole remedy for state prisoners seeking an early or speedy release. 4/ The Court conceded that arguably a prisoner might make use of a habeas corpus petition to resist unconstitutional restraints, but it implied strongly that challenges to prison conditions should be brought under 42 U.S.C. section 1983, the Civil Rights Act. Cases following Preiser indicate that habeas corpus may be the proper remedy only when an inmate claims that adverse conditions of confinement justify an early release from confinement, rather than damages or injunctive relief.

A state prisoner filing a writ of habeas corpus, however, must exhaust state remedies before proceeding to a federal court or demonstrate that state remedies are either unavailable or

ineffective. To exhaust state remedies, a prisoner must present his claim to the state courts, thereby giving the state the first chance to remedy its own mistake or to rectify improper practices. As long as the state is given the initial opportunity to pass upon and correct alleged violations of its prisoners' rights, the exhaustion requirement will be satisfied. Nonetheless, the exhaustion requirement presents a significant hurdle for state prisoners, and a large percentage of habeas corpus actions are dismissed for failure to exhaust. Proper resort to state courts avoids dismissal but often is time-consuming. Consequently, prisoners seeking redress for unconstitutional conditions of confinement favor suits under the Civil Rights Act of 1871, which has no exhaustion requirement and provides a greater variety of relief.

Civil Rights Suits

The current version of the 1871 Civil Rights Act is codified as 42 U.S.C. section 1983. Section 1983 prohibits any person who acts under color of state law from depriving an individual of "any rights, privileges or immunities secured by the Constitution and laws" of the United States. Although the language of section 1983 is admirably simple, the prisoner filing suit must be aware of the three essential elements necessary to a cause of action under the section. First, the defendant must be a "person." Second, the defendant or defendants must have acted "under color of state law." Third, the right the prisoner claims must be one "secured by the Constitution and laws" of the United States.

The definition of the term "person" includes individuals, as well as corporations and other artificial entities, and some governmental bodies such as municipal corporations, cities, school districts, and city agencies. States, however, are not persons, and their governments, certain political subdivisions, and state agencies may not be sued under section 1983.

The requirement that the defendants acted under "color of state law" usually results in the "persons" sued being state officials, because the involvement of state officials provides the state action essential to a section 1983 action. It is unnecessary to show that the action of the defendants was authorized by state law. The Supreme Court has noted that the "/m/isuse of power, possessed by virtue of state law and made possible only because the wrong-doer is clothed with the authority of state law, is action taken 'under color of' state law." 5/

The "color of state law" element of a section 1983 claim rarely creates difficulty for state prisoners. As the Supreme Court has acknowledged:

> For state prisoners, eating, sleeping, dressing, washing, and playing are all done under the watchful eye of the State, and so the possibilities under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State. 6/

An issue more frequently litigated in recent years is whether the right asserted is one secured by the "Constitution and laws" of the United States. When a plaintiff claims a violation of a specific provision of the Constitution, such as the Eighth Amendment's prohibition against cruel and unusual punishment or First Amendment rights to freedom of expression or religion, there is no question about section 1983's applicability. Many recent cases, however, have claimed deprivations of liberty or property without due process of law in violation of the Fourteenth Amendment. Supreme Court cases have interpreted the meaning of the term "liberty" and noted that "liberty interests" protected by the due process clause have their genesis either in the Constitution or in state law. When neither the Constitution nor state law confers a reasonable expectation, section 1983 may not be employed to protect that expectation. Thus, the court has denied that a prisoner has a right not to be transferred from one prison to another unless state law provides that right. 7/ Inmates do not have liberty or property interests in particular jobs within the institution. Similarly, prisoners' tort claims for medical malpractice have been held not cognizable in a section 1983 action. Loss of a prisoner's personal goods through the failure of officials to follow established state procedures is the latest claim placed by the Court beyond the pale of the Fourteenth Amendment. 8/

If a prisoner properly states a cause of action under section 1983 and prevails at trial, the statute offers a wide range of remedies. The plaintiff may receive equitable relief in the form of an injunction. An injunction may be mandatory and require state officials to do a certain act such as provide adequate food, or it may be prohibitory and order the defendants to refrain from certain activities such as reading inmates' mail. Litigants also are entitled to declaratory relief whereby the Court declares that some policy or practice is unlawful. Additionally, a prevailing plaintiff may be entitled to recover his attorney's fees. Although this is not, properly speaking, a form of damages, the attorney's fee provision of 42 U.S.C. section 1988 does serve as a deterrent to prison administrators and encourages lawyers to undertake representation of meritorious claims. Section 1983 also affords litigants monetary relief or money damages. As states are not "persons," damages may not be recovered directly from the state. Damages may be recovered, however, from state officials.

Recent cases suggest that the Supreme Court desires to limit prisoners' use of section 1983 as a device for testing prison conditions. In addition, the recently enacted Rights of Institutionalized Persons Act permits federal courts to impose a 90-day exhaustion requirement if the defendant institution or department possesses an administrative complaint process that conforms with the standards contained in the act. Finally, lower courts have been struggling for years -- so far unsuccessfully -- to articulate some sort of rationale for requiring exhaustion when prisoners bring suit under section 1983. Despite all of the attacks and threats, however, the Civil Rights Act embodied in section 1983 remains the single most effective tool in prisoners' rights litigation.

PRISONERS' RIGHTS

While courts have concluded that basic constitutional rights follow individuals into prison, those rights have yet to be fully defined. Not only must they be evaluated in the unique context of a prison environment, such rights also must be balanced against interests in maintaining security, order, and discipline. The task of balancing and defining the scope of constitutional freedoms, therefore, remains largely unfinished.

Access to the Courts

Prisoners' right of access to the courts has been soundly established. This right requires that adequate legal assistance in the form of counsel, writ writers, or law libraries be made available to prisoners.

The Supreme Court firmly established a prisoner's right of access to the courts in Johnson v. Avery, in which the Court invalidated a prison regulation prohibiting inmates from assisting fellow prisoners in preparing petitions for post-conviction relief. The Court ruled that the regulation conflicted with the right of habeas corpus since it inhibited the ability of unlawfully confined individuals to gain access to the courts to gain their freedom. Counsel typically are not appointed until after a court reviews a habeas corpus petition to determine if it is meritorious. Therefore, some form of legal assistance is necessary initially to prepare the complaint to ensure access to the courts. State interests in avoiding the disciplinary and security problems caused by "jailhouse lawyers" were held not to outweigh this right. Since the state had provided no reasonable alternative for assisting prisoners in preparing their petitions, the regulation was struck down by the Court. 9/

Johnson was extended in Wolff v. McDonnell to apply to inmates' preparation of section 1983 actions and other civil rights petitions. 10/ The Court also has held that an absolute ban on an attorney's use of law students or paraprofessionals to

interview his clients at the prison or even to obtain their signatures was an unconstitutional denial of an inmate's right of access to the courts where law students who were participating in law school programs providing legal assistance to prisoners could enter the prison. 11/

The Supreme Court's 1977 decision in Bounds v. Smith expanded the right of prisoners to meaningful access to the courts. The Court affirmed the principle that the "fundamental constitutional right to access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." 12/ Prisons can comply with this standard by various means other than providing prisoners with access to a law library, including the use of trained inmates as paralegals to assist prisoners in preparing legal documents, of law students in volunteer or clinical programs, of staff attorneys, or of other legal services plans. The programs chosen will be evaluated as a whole to determine whether it meets constitutional standards for access to the courts.

Freedom of Religion

Although the cases are not clear in this area, a prisoner's exercise of his or her religion is generally permissible as long as that exercise does not interfere unduly with legitimate penological objectives. Many cases have dealt with the religious needs of prisoners who do not practice a commonly accepted belief. Cruz v. Beto held that these prisoners must be given reasonable opportunity to pursue their beliefs in a way comparable to those who adhere to traditional religions. The Court noted that the exercise of a particular belief may be limited by the size or extent of demands of the group:

> We do not suggest, of course, that every religious sect or group within a prison -- however few in numbers -- must have identical facilities or personnel. A special chapel or 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. But reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty. 13/

Although no other prisoners' rights case involving freedom of religion has reached the Supreme Court, other federal courts have dealt often with cases raising such claims. Prisoners have

asserted their right to a religious diet, to wear religious apparel (such as prayer caps), to possess religious literature and artifacts, to observe religious holidays, and to receive proportionate funding for religious activities. Additionally, a number of cases have raised the difficult question of whether a particular belief is indeed religious.

When prisoners are successful in proving that the right they assert is founded on religious practice, the state cannot restrict that right unless its interest in maintaining order and discipline outweighs prisoners' First Amendment rights. Some courts have held further that where the practice of religious belief is completely excluded, prison officials must justify such barriers to the free exercise of religion by a compelling state interest.

Equal Protection

The Fourteenth Amendment to the Constitution forbids a state from denying any person equal protection of the laws. Courts hold that any classification of individuals that is based upon race denies an individual the equal protection of the laws unless the state can present a compelling reason to justify the classification. The courts have uniformly held that the segregation of prisoners on the basis of race constitutes a violation of the equal protection clause. 14/ There is a strong, almost irrebuttable, presumption against racial segregation in prisons, which seemingly could only be overcome by a temporary segregation where a clear and present danger of violence exists. A potential for violence, however, is not a sufficient reason to justify the permanent segregation of prisoners on the basis of race.

Freedom of Speech

The First Amendment forbids Congress from making any law that abridges the freedom of speech or of the press. This amendment is made applicable to the states through the due process clause of the Fourteenth Amendment. Freedom of speech is considered a preferred right; consequently, any government restriction of this right is subject to a heavy burden of justification. If a less restrictive alternative can achieve the same objective the restriction intends to accomplish, then the restriction is invalid.

Questions concerning the First Amendment rights of prisoners have been litigated frequently. To date, no definitive conclusions can be drawn respecting the law in this area. While prisoners possess some First Amendment rights, courts have recognized that the exercise of those rights must be evaluated and restricted by the environment in which they occur. Since prisoners must exercise their First Amendment rights in a correctional institution, the need for security, order, and discipline may legitimately be taken into account.

Mail. The initial prisoner freedom of speech cases reached the Supreme Court in 1974. Procunier v. Martinez addressed the legality of prison regulations governing the censoring of outgoing and incoming prisoner mail. Rather than analyze the issue in terms of prisoners' First Amendment rights, however, the Court focused on the right of free persons to communicate with inmates. This enabled the Court to apply traditional First Amendment standards rather than balance an inmate's free speech rights against prison interests, because the First Amendment rights at issue were those of free citizens, not prisoners.

On the basis of this analysis, the Court concluded that prison officials could censor prisoner mail only when an important or substantial government interest unrelated to the suppression of expression -- such as security, order, or rehabilitation -- was the basis for the rule. Further, the censorship must not be more restrictive than is necessary to accomplish the government's interest. In fixing the scope of the rule, however, considerable latitude should be given to a prison official's determination of what forms of speech need to be restricted in order to protect the government's interests. Under these standards, the Court held that the prison regulation censoring inflammatory, defamatory, or "otherwise inappropriate" views was more restrictive than necessary, gave too much discretion to prison authorities, and did not further the government interests in prison security, order, and rehabilitation. Therefore, the Court invalidated the regulation. 15/

The Court also ruled that the censoring of mail must be accompanied by certain procedural protections. The right to uncensored communication is part of the definition of "liberty" in the Fourteenth Amendment. Because that amendment prohibits the taking of life, liberty, or property without due process of law, censorship of outgoing or incoming mail requires that notice be given to an inmate of any rejection of a letter written by or addressed to him or her, as well as an opportunity to protest that decision to a prison official other than the censor. 16/

Other decisions have established that incoming mail can be inspected for contraband and its contents read to detect escape attempts, etc. Prison officials may open appropriately marked attorney mail only in the presence of the prisoner in order to inspect for contraband, but may not read the materials. The Court also has suggested that it may be permissible to require an attorney to identify him or herself and the client to prison authorities to ensure that the letters to inmates actually come from bona fide members of the bar. 17/

Publications. Courts also have applied the standards set out by the Supreme Court to govern the censorship of prisoners' mail to prison regulations that restrict the right of prisoners to receive publications. Such regulations must be shown to further

a substantial government interest in security, order, or rehabilitation. The rules cannot be more restrictive than is necessary to accomplish that governmental interest.

Applying these standards, the lower courts have reached a wide variety of decisions. In general, courts have accorded substantial protection to political publications while permitting the exclusion of materials that are considered "obscene," or which pose a clear and present danger to prison security, order, or rehabilitation. Court decisions often vary depending upon the amount of discretion they accord to a prison official's determination that a possible threat of danger exists.

In 1977, the Supreme Court decided a case involving "bulk mail." The Court held in Jones v. North Carolina Prisoners' Union that prison officials could refuse to distribute packets of Prisoners' Labor Union publications that had been mailed in bulk. The Court upheld the action of the prison officials even though it was based on the defendant's disapproval of the content of the publications and bulk mailing privileges had been granted to Jaycees, Alcoholics Anonymous, and the Boy Scouts. The Court concluded that the prison officials' reasons for refusing to distribute the packets were not shown to be unreasonable. It noted that the right to receive mail was not implicated because only bulk mailing was at issue. Individual mailings to individual prisoners were not restricted by the state, but only by cost. 18/

In 1979, Bell v. Wolfish provided a test of the so-called "publisher-only" rule. Under that rule, the Federal Bureau of Prisons prohibited the receipt of hardback books unless they were mailed directly from publishers, book clubs, or bookstores. The Court held that this restriction on receipt of hardback books did not infringe the First Amendment rights of the imprisoned. The Court reasoned that the prohibition was made without regard to the content of the expression and was in response to an obvious security problem. 19/

Access to the press. Similar issues involving the right of prisoners to communicate with news reporters were raised in a 1974 Supreme Court case. In Pell v. Procunier, the Court held that a rule prohibiting media interviews with specific inmates did not violate either the First Amendment rights of the prisoners or of the news media. According to the Court, First Amendment rights are to be analyzed "in terms of the legitimate policies and goals of the correction system . . .," namely deterrence, security, and rehabilitation. The Court found that the prison's rule was rationally based on security interests in regulating the "entry of outsiders" who presumably would not aid in the rehabilitation of prisoners. 20/

Since the press could communicate with specific inmates by mail or through people in the prisoner's family who could visit inmates under prison regulations, the Court stressed that the regulation merely restricted one form of access to specific inmates and that adequate alternative means of communication were available. Therefore, the Court held that this complied with First Amendment standards and upheld the restrictions on the media's access to specific inmates.

Procedural Rights of Prisoners

Disciplinary proceedings. The due process clause of the Fifth and Fourteenth Amendments prohibits the deprivation of life, liberty, or property without due process of law. This clause guarantees that certain basic procedures and rules will be followed when a person's life, liberty, or property is in danger of being taken. Procedures may range from straightforward adversarial proceedings to informal hearings requiring little more than that the individual be given notice of the hearing and an opportunity to be heard.

In the area of prisoners' procedural rights, the Supreme Court has sought to limit the use of straightforward adversarial proceedings in prison disciplinary hearings. Instead, due to the Court's emphasis upon the closed, violent environment of correctional institutions, prisoners have been accorded limited procedural protections.

Wolff v. McDonnell exemplifies the Court's analysis in these cases. Under Nebraska law, prisoners received a certain reduction in their sentences for each month of good behavior. These "good time" credits could be forfeited when a prisoner was found guilty of "serious misconduct." This misconduct could also be punished by disciplinary confinement. Less serious misconduct was punished only by loss of privileges. The plaintiffs claimed that the procedures employed by the prison at disciplinary hearings involving serious misconduct violated the due process clause.

The Court ruled that prisoners facing a possible loss of good time or disciplinary confinement are entitled only to some procedural protections. These consist of "advance written notice of the claimed violation" of at least 24 hours, a written statement by the fact-finders stating the evidence relied upon and the "reasons for the disciplinary action taken," and the right "to call witnesses and present documentary evidence . . . when /it/ will not be unduly hazardous to institutional safety or correctional goals." The Court suggested, but did not require, that prison authorities state their reasons for denying a prisoner his right to call witnesses and present evidence. 21/

The Wolff procedural safeguards reflect the Supreme Court's concern that prison authorities be allowed flexibility in prison

proceedings to cope with potential security problems. The Court's conception of a prison as a "closed, tightly controlled environment" of convicted wrongdoers where tension between fellow inmates and guards is characteristic figures prominently in the Wolff decision. The Court denied prisoners the right to confront or cross-examine witnesses due to the fear that disclosure of an informer's identity to the prisoner would risk violent reprisal. This consequently would chill the disclosure of information to authorities and, in turn, undermine the disciplinary process.

Similarly, the use of procedures applicable in a criminal trial would only "raise the level of confrontation between staff and inmate." Granting an inmate a right to counsel at a disciplinary hearing would be costly, cause delay, and turn the proceeding into a nakedly adversarial contest in which determining the prisoner's guilt would become more important than the use of the hearing as a tool in rehabilitation. Since, according to the Court, the presence of an attorney for the prisoner would undermine the use of a disciplinary hearing to rehabilitate, it held that considerations of rehabilitation, order, and discipline outweighed a prisoner's right to counsel. Where the inmate is illiterate or the case is complex, however, a prisoner is entitled to the assistance of a fellow inmate or a staff member. This assistant can be designated by the staff or can be one of the prisoner's own choosing. 22/

Baxter v. Palmigiano applied the Wolff standards even when the conduct at issue in the disciplinary proceeding might be the subject of criminal prosecution. Prisoners have no Fifth Amendment right to remain silent at a disciplinary hearing, and silence can be a factor in considering a prisoner's guilt as long as other evidence supports the finding of guilt. 23/

Transfers and classification. Prisoners are not entitled even to the limited Wolff procedural safeguards when they are classified or transferred to another prison. The decision to classify or transfer is part of the daily discretionary judgment left to prison administrators. The Court in Meachum v. Fano held that a transfer to a prison having "substantially less favorable conditions" did not require a fact-finding hearing prior to the transfer. The "liberty" interest in the due process clause does not apply in the case of a prison transfer because an inmate's liberty has already been restrained by conviction. Once he or she is convicted, the inmate is subject to confinement and the rules of the prison system so long as the conditions of his or her confinement do not themselves violate the Constitution. 24/

The Supreme Court also applied the Meachum rule in Montayne v. Haymes and refused to require the Wolff procedural safeguards even if a prisoner is transferred for disciplinary reasons. Since no state law or constitutional provision created a right to remain in a certain prison, the Court refused to interfere

in interprison, interstate transfers unless the confinement was not permitted by the sentence imposed or the conditions of confinement were unconstitutional. 25/ Thus, the Wolff procedural safeguards apparently apply only when there is a state-created right such as good time credits, or some restraint on a prisoner's liberty, for example, disciplinary confinement. The Court has not chosen to interfere in the discretionary judgments made by prison officials in cases where similar rights or restraints are not present.

Cruel and Unusual Punishment

The Eighth Amendment prohibits the infliction of cruel and unusual punishment. Beyond this broad prohibition, however, no definitive legal standard has been devised by the courts to interpret that clause. Consequently, the decisions and the standards applied may vary with the court in which an action is brought.

The Supreme Court has employed a variety of tests. The Eighth Amendment proscribes punishment that is incompatible with "the evolving standards of decency that mark the progress of a maturing society," 26/ or punishment that might "involve the unnecessary and wanton infliction of pain." 27/ In Estelle v. Gamble, the Court held the denial of medical care to be cruel and unusual punishment because it could amount to physical torture and, in any event, resulted in pain without any penological purpose. 28/ More recently in Rhodes v. Chapman, the Court added a new and negative perspective to the measurement of cruel and unusual punishment: "To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." 29/

Courts generally have applied the various Eighth Amendment tests to outlaw all forms of corporal punishment. Excessive use of force has been considered a violation of the Eighth Amendment, and guards and prison officials have been found liable for damages when use of force was found to be unjustified and not privileged. In addition, courts have gone beyond such obvious violations and recognized the psychological and physiological effects of certain forms of confinement. Disciplinary confinement that is of unknown duration or in which the inmate is subject to sensory deprivation can constitute cruel and unusual punishment under certain conditions. 30/

The major case in the area, Hutto v. Finney, upheld a District Court decision finding the conditions in the Arkansas prison system unconstitutional under the Eighth Amendment. The Supreme Court focused on "punitive isolation," which was a form of punishment for certain offenses at the prison. "Punitive isolation" consisted of confinement in a windowless, 8 x 10-foot cell, with 4 to 11 other prisoners, no furniture, and one toilet that could be flushed only from the outside, for an indefinite period of time on a diet of less than 1,000 calories per day.

The Supreme Court upheld the District Court's finding that this form of confinement constituted cruel and unusual punishment, as well as the lower court's remedy setting a limit on the number of prisoners who could be confined in a single cell for punitive isolation, ending the 1,000 calorie per day diet, and setting a 30-day limit on such confinement. The Court recognized that the duration and conditions of confinement are factors to be taken into account in determining whether a certain form of punishment violates the Eighth Amendment. Confinement in "punitive isolation" may be tolerable for a few days, noted the Court, but would be unconstitutional if extended over a longer period of time. Given the conditions in punitive isolation, the District Court's long experience with the case, and the inaction of prison officials in remedying the conditions, the Supreme Court found no reason to disturb the ruling of the District Court or its remedy. 31/

Hutto v. Finney is indicative of court decisions in similar Eighth Amendment challenges to prison conditions or discipline. Punishment is considered in relation to the alleged misconduct and cannot be excessive. Additionally, the punishment is evaluated in light of the present norms of society regarding decency and humanity. This leaves the decision primarily within the discretion of the trial court. Under these standards, courts have focused upon a wide range of prison conditions in finding violations of the Eighth Amendment including: the general physical and environmental conditions, particularly in the housing and food service areas, adequate heat, light, and ventilation; effective programs for insect and rodent control; sanitary food storage and trained food personnel; adequate toilets, showers, wash basins, and running water; minimum square footage for prisoner housing; adequate linens, bedding, and cleaning supplies; services of qualified sanitation and safety personnel; adequate medical and mental health care; and the adequacy of various recreational, vocational, and pre-release programs.

In the course of reviewing the District Court's finding in Hutto, the Supreme Court seemed to give tacit approval to an emerging "totality of conditions" theory articulated in the District Court's opinion:

> The court was entitled to consider the severity of . . ./past constitutional/ violations in assessing the constitutionality of conditions in the isolation cells. The court took note of the inmates' diet, the continued overcrowding, the rampant violence, the vandalized cells, and the "lack of professionalism and good judgment on the part of maximum security personnel...." The length of time each inmate spent in isolation was simply one consideration among many. We

> find no error in the court's conclusion that, taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment. (Emphasis added.) 32/

Following the original Hutto case, other courts began to look at prison conditions "as a whole," and a string of cases emerged condemning the "totality of conditions of confinement" as violative of the Eighth Amendment. 33/

The Supreme Court in 1981 seemed to approve this totality of conditions theory in Rhodes, where the majority indicated that conditions, "alone or in combination, may deprive inmates of the minimal civilized measures of life's necessities." 34/ The concurring opinion of Justice Brennen, who was joined by Justices Blackmun and Stevens, supports the theory more directly:

> The first aspect of judicial decision-making in this area is scrutiny of the actual conditions under challenge. It is important to recognize that various deficiencies in prison conditions "must be considered together...." The individual conditions exist in combination; each affects the other; and taken together they /may/ have a cumulative impact on the inmates."...Thus, a court considering an Eighth Amendment challenge to conditions of confinement must examine the totality of the circumstances. Even if no single condition of confinement would be unconstitutional in itself, "exposure to the cumulative effect of prison conditions may subject inmates to cruel and unusual punishment." (Citations omitted.) 35/

Still, not all federal appellate courts agree that the Supreme Court has endorsed the totality of conditions approach. The U. S. Court of Appeals for the Ninth Circuit twice has rejected the theory specifically, most recently in the aftermath of Rhodes:

> Courts may not find Eighth Amendment violations based on the "totality of conditions" at a prison....There is no Eighth Amendment violation if each of these basic needs is separately met. If a challenged condition does not deprive inmates of one of the basic Eighth Amendment requirements, it is immune from Eighth Amendment attack. A number of conditions, each of which satisfy /sic/ Eighth Amendment requirements, cannot in combination amount to an Eighth Amendment violation. 36/

It is too early to tell what the fate of this legal theory will be should it reach the Supreme Court for definitive resolution. The Ninth Circuit's seemingly inflexible position wilts a bit under careful scrutiny, for it concedes that: "Of course, each condition of confinement does not exist in isolation; the court must consider the effect of each condition in the context of the prison environment, especially when the ill-effects of particular conditions are exacerbated by other related conditions." 37/ This amplification is not incompatible with the totality of conditions approach taken by courts elsewhere around the country.

One other recent development requiring the Court's consideration of the applicability of the Eighth Amendment has been the growing practice of correctional systems, faced with a phenomenal population explosion, to resort to the double-celling of prisoners in order to house everyone. In 1979, the Court first pondered the problem in Bell v. Wolfish, but that case involved pretrial detainees and accordingly was decided on the basis of the Fifth, not the Eighth, Amendment, which applies only to convicted offenders legitimately subject to "punishments" imposed by government, whether local, state, or federal. 38/

On June 15, 1981, the Supreme Court decided that the double-celling of prisoners in the Southern Ohio Correctional Facility (Lucasville) did not amount to cruel and unusual punishment. Considering that the newly built Lucasville prison was in the words of the trial judge, "unquestionably a top-flight, first-class facility," the finding, concurred in by Justice Brennen, a staunch supporter of prisoners' rights, was not surprising. 39/ Some correctional administrators, executives, and legislators sought to embrace this finding as a form of blanket approval for double-celling everywhere. Given that overcrowding has become one of the most troubling issues in corrections, this response may be understandable.

The eventual impact of Rhodes on double-celling is unclear. Some courts have applied it rigidly, while others have recognized that the Rhodes decision involved a newly constructed, reasonably well-designed, modern prison, a comparative rarity on the American correctional scene. 40/ It is unlikely that Rhodes will be the last word on double-celling for very long.

Medical Care

The denial of medical treatment to prisoners can constitute cruel and unusual punishment within the meaning of the Eighth Amendment under certain conditions. Additional pain or anguish resulting from the denial of medical treatment, or mere inadvertence or negligence in treatment by a doctor, does not constitute cruel and unusual punishment. The Constitution is violated only

where there is "deliberate indifference to serious medical needs of prisoners" on the part of doctors, prison guards, or prison authorities. The denial of medical treatment in this manner amounts to an "unnecessary and wanton infliction of pain." Under this standard, erroneous medical judgment and malpractice do not constitute cruel and unusual punishment. Those claims are cognizable in tort actions in state court, but not in a suit alleging a violation of the Eighth Amendment. In evaluating the acts of the defendants under the "deliberate indifference" standard, the focus must be upon deliberate acts or omissions, not mere inadvertence or negligence. 41/

At least one Court of Appeals has found a prison's entire health care system unconstitutional when inadequate facilities, deficiencies in staffing, and deficiencies in procedures made "unnecessary suffering inevitable." The U. S. Court of Appeals for the Second Circuit stated that a series of specific examples of denial or delay in medical treatment can be proof of a pattern of "deliberate indifference" in a prison's entire health care system" and constitute cruel and unusual punishment. 42/

The Fourth Amendment and the Right to Privacy

The Fourth Amendment protects against unreasonable searches and seizures. Prisoners generally have been considered to lack Fourth Amendment rights. Similarly, it is generally held that prisoners are not entitled to a right of privacy as recognized by recent Supreme Court decisions. 43/

The Supreme Court has not attempted to define precisely the degree of privacy available to prisoners or to determine under what circumstances the Fourth Amendment would be applicable in the prison environment. Rather, the two cases that have considered the issues have found no violation of Fourth Amendment rights.

In Lanza v. New York, the prisoner claimed that a conversation which he had with his brother during a visit had been intercepted illegally. Although the Fourth Amendment issue was not central to the case, the Court noted as follows:

> But to say that a public jail is the equivalent of a man's "house" or that it is a place where he can claim constitutional immunity from search and seizure of his person, his papers, or his effects, is at best a novel argument..../Without attempting either to define or to predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day. Though it may be assumed that even in a 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 such special relationship here. 44/

United States v. Edwards involved the seizure of clothing from an arrested inmate so that it could be subjected to a laboratory analysis. The Court held that the warrantless seizure was not a violation of the Fourth Amendment. The Court did intimate, however, that some Fourth Amendment restraints might exist in relation to searches incident to incarceration. 45/

Pretrial Detainees

Until recently, the Supreme Court had never addressed the questions surrounding the conditions of detention for those who have been accused, but not convicted, of a crime. Federal trial and appellate courts had considered cases involving pretrial detainees to be very different from those involving convicted prisoners. Indeed, some cases involved institutions holding both classes of prisoners, and different analyses were applied to judge a single practice as it applied to both classes. Several cases held that, because pretrial detainees had not been convicted, any condition of confinement having punitive characteristics was unlawful. This approach resulted in a strict appraisal of pretrial confinement.

In 1979, a pretrial detention case was decided by the Supreme Court. The Supreme Court reversed an appellate court's decision requiring that jail practices be justified by "compelling necessity." In that case, Bell v. Wolfish, the Court considered five challenged regulations and conditions. All the challenged regulations were upheld because they bore a rational relationship to the legitimate nonpunitive purposes of the correctional center. Thus, although the Court held that pretrial detainees have a right under the due process clause of the Fifth (or Fourteenth) Amendment not to be subjected to punitive practices, the Court required the plaintiffs to demonstrate that the correctional officials enacted the measures with punitive intent. If punitive intent could not be shown, and the restriction was reasonably related to a nonpunitive purpose such as institutional security, "operational concerns," or ensuring the presence of the pretrial detainee at trial, the restriction would be upheld even if it had punitive characteristics. 46/

Accordingly, the Court held that the correctional center's double-celling practices did not violate the rights of the detainees. Although keeping two prisoners in an "admittedly small sleeping space" for a long period of time might be unconstitutional, average stays of 60 days in such cells were not.

The Court also permitted two forms of searches: visual genital and anal searches after "contact" visits with outsiders and spot searches of cells in the absence of the occupants. The Court emphasized the government's interest in safeguarding institutional security and found that the challenged searches violated neither the due process clause nor the Fourth Amendment. Similarly, the Court upheld the institutional rule that detainees could receive hardback books only if they were sent directly from the publisher or from book clubs. That policy was found related to "an obvious security problem," and the Court concluded that it did not violate any First Amendment right because the rule operated in a neutral fashion without regard to content and inmates had access to reading material from other sources. Finally, the Court permitted the facility to prohibit receipt of all packages except at Christmas. The Court deferred to the administrative inconvenience of storing the food, as well as concerns about theft, gambling, and the "traditional file in the cake."

While the Court recognized that freedom from punishment is a right embraced by the concept of liberty protected by the due process clause, the analysis employed by the Court in Bell v. Wolfish differs little from that used in recent cases involving the rights of convicted persons. The state has an interest in detaining both the accused and the convicted. Detention, by its nature, necessitates the withdrawal of rights enjoyed by free citizens. In the case of convicted persons, however, punishment and deterrence join detention as a legitimate penological purpose. Bell v. Wolfish blurs the distinction between the convicted and the accused, and no apparent distinction exists once it is determined that a practice or policy has nonpunitive purposes. Thus, the Court will uphold a practice or policy which has not "conclusively been shown to be wrong. . . ." The opinion states that "courts should defer to the informed discretion of prison administrators because the realities of running a corrections institution are complex and difficult, courts are ill-equipped to deal with these problems and the management of these facilities is confided to the Executive and Legislative Branches, not to the Judicial Branch." 47/

Thus, we come full circle. Prior to the discovery and application of the Civil Rights Act to the rights of prisoners in the mid-1960s, the overwhelming concern of courts was the avoidance of interference with executive and legislative prerogatives. After nearly two decades of vigorous judicial activ-

ity, that concern is emerging again to limit review by the courts of prison problems. The majority in Rhodes warns ominously:

> . . ./C/ourts cannot assume that state legislatures and prisons officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system...." 48/

FOOTNOTES

1/ Siegal v. Ragen, 88 F. Supp. 996, 999 (N.D.Ill. 1949), aff'd, 180 F.2d 785 (7th Cir. 1950), cert. denied 399 U.S. 990 (1950).

2/ Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).

3/ Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944).

4/ Preiser v. Rodriguez, 411 U.S. 475, 500-01 (1973).

5/ United States v. Classic, 313 U.S. 299, 326 (1941), cited approvingly in Monroe v. Pape, 365 U.S. 167, 184 (1961).

6/ Preiser v. Rodriguez, 411 U.S. 475, 493 (1973).

7/ Meachum v. Fano, 427, U.S. 215 (1976); Montayne v. Haynes, 427 U.S. 236 (1976).

8/ Parratt v. Taylor, 451 U.S. 527 (1981).

9/ 393 U.S. 483 (1969).

10/ 418 U.S. 539, 579-80 (1974).

11/ Procunier v. Martinez, 416 U.S. 396, 421 (1974).

12/ Bounds v. Smith, 430 U.S. 817, 828 (1977).

13/ Cruz v. Beto, 405 U.S. 319, 322, n. 2 (1972).

14/ Lee v. Washington, 390 U.S. 333 (1968).

15/ Procunier v. Martinez, 416 U.S. 396, 408-414 (1974).

16/ Id., at 415-16.

17/ Wolff v. McDonnell, 418 U.S. 539, 576-7 (1974).

18/ Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 125-7 (1977).

19/ Bell v. Wolfish, 441 U.S. 520, 551-2 (1979).

20/ Pell v. Procunier, 417 U.S. 817, 822-8 (1974).

21/ Wolff v. McDonnell, at 566-67.

22/ Id., at 568-72.

23/ Baxter v. Palmigiano, 425 U.S. 308, 316 (1976).

24/ Meachum v. Fano, 427 U.S. 215 (1976).

25/ Montayne v. Haymes, 427 U.S. 236 (1976).

26/ Trop v. Dulles, 356 U.S. 86, 101 (1958).

27/ Gregg v. Georgia, 428 U.S. 153, 173 (1976).

28/ Estelle v. Gamble, 429 U.S. 97, 103 (1976).

29/ Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

30/ See, for example, Hardwick v. Ault, 447 F. Supp. 116, 125-7 (M.D.Ga. 1978); Bono v. Saxbe, 450 F. Supp. 934, 946 (E.D. Ill. 1978).

31/ Hutto v. Finney, 437 U.S. 678, 685-8 (1978).

32/ Id., at 687.

33/ The quoted language is from Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977). For a more recent discussion and application of the totality of conditions theory, see Dawson v. Kendrick, 527 F. Supp. 1252, 1285-6 (S.D.West Virginia 1981). The "original" Hutto case, in which the totality theory first surfaced was Holt v. Sarver, 309 F. Supp. 362, 372-73 (E.D.Ark. 1970), aff'd 442 F.2d 304 (8th Cir. 1971).

34/ Rhodes, op. cit., at 347.

35/ Id., at 362-3.

36/ Hoptowit v. Ray, 30 Cr.L.Rptr. 2451 (9th Cir. February 2, 1982). The earlier Ninth Circuit case was Wright v. Rushen, 642 F.2d 1129, 1133-4 (1981).

37/ Wright, at 1133.

38/ Bell v. Wolfish, 441 U.S. 520 (1979). The impact of this case on pretrial detainees is discussed below.

39/ Rhodes, op. cit., at 341

40/ An example of the former is Nelson v. Collins, ___ F.2d. ___ (4th Cir. 1981), and of the latter Smith v. Fairman, 30 Cr.L.Rptr. 2191 (C.D.Ill. November 3, 1981).

41/ Estelle v. Gamble, at 104-5.

42/ Todaro v. Ward, 565 F.2d 48, 52 (2nd Cir. 1977).

43/ The classic expression of the right to privacy occurred in Griswold v. Connecticut, 381 U.S. 479 (1965).

44/ Lanza v. New York, 370 U.S. 139, 143-4 (1962).

45/ 415 U.S. 800, 806-9 (1974).

46/ Bell v. Wolfish, at 535-40.

47/ Id., at 547, n. 29.

48/ Rhodes, at 352.

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