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JUDICIAL INTERVENTION IN PRISON ADMINISTRATION

INTRODUCTION

During the past few years, the public clamor which has attended new judicial interpretations of the rights of the accused has largely overshadowed a parallel trend in a related but less publicized field—the rights of the convicted.

Spectacular decisions like *Miranda*,¹ *Escobedo*,² and *Gideon v. Wainwright*³ have been accompanied by such a hue and cry both within and without the legal profession that the development of the law as it is applied to those who have passed beyond accusation to conviction, sentence, and imprisonment has received only moderate attention from the legal periodicals and none at all from the lay public.

Yet while the decisions relating to the rights of the accused are basically only an articulation and clarification of principles to which our legal system has always given recognition, the growing judicial interest in the rights of the convicted felon can only be described as a minor revolution in the law, for the courts are now entering an area which was formerly regarded as the sole province of the administrative branches of the government. This development is of more than theoretical or scholarly interest, because of its present and potential effects upon criminal law, penology, and our society as a whole.

THE AMERICAN PRISON SYSTEM

In order to appreciate the impact of this extension of judicial authority, it is necessary to consider the nature and scope of the task of the American prison administrator.

In 1965 the estimated 2.7 million serious offenses committed in this country resulted in an average daily prison population of 425,673 inmates.⁴ To house this convict population, there are presently some four hundred institutions in this country maintained solely for the imprison-

1. *Miranda v. Arizona*, 384 U.S. 436 (1966).

2. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

3. 372 U.S. 335 (1963).

4. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS, at 45 (1967).

ment of adult felons, and another three hundred-plus for the detention of juvenile offenders.⁵ The avowed purpose of these institutions is the isolation of the criminal for the protection of society while the wrongdoer "pays his debt to society" and is (theoretically) rehabilitated. These goals have proven difficult to attain. When appropriations, personnel, or facilities are inadequate, the historical view of the prison as a place of isolation and punishment prevails, and the rehabilitative function is subordinated to the grim necessity of keeping the felon safely separated from the outside world.

Consequently, the maximum security prison is traditionally a place of high walls, guard towers, and quasi-military discipline. Inmates are constantly watched, counted, and searched. There is no privacy, and the prisoners are necessarily treated by the staff as impersonal masses, to be numbered and marched from place to place with a minimum of fraternization. The inmate's communication with relatives and friends on the outside is heavily restricted and supervised. Punishment for minor infractions of prison regulations is swift and severe. Escape is rare and usually short-lived.⁶ The result is an artificial and involuntary micro-society, filled with stress and violence and unnatural relationships. The problems of operating a penal institution with an inadequate and usually underpaid staff in an outdated physical plant crowded (often to twice design capacity) with felons, many of them convicted for crimes of the most savage and brutal nature, can hardly be overemphasized. These internal stresses, coupled with the external pressures of politics and public opinion, make the job of the prison administrator one of the most difficult in the world.

PAST POLICY OF THE COURTS

The historical role of the prison as a place of punishment, and the admitted complexities of the penologist's task, have resulted in a deep reluctance on the part of the courts to review the decisions and actions of prison administrators. This policy of non-interference with the internal affairs of penal institutions has been generally referred to as the "hands-off" doctrine.⁷ The majority of courts adhering to this policy of non-interference with internal prison affairs have adopted the position that the courts are "without power to supervise prison administration or to

5. *Id.* at 4.

6. *Id.* at 46.

7. Apparently so christened in FRITCH, CIVIL RIGHTS OF PRISON INMATES 31 (1961) (Document prepared for the Federal Bureau of Prisons).

interfere with the ordinary prison rules or regulations.”⁸ This viewpoint has been justified by reference to the principle of separation of governmental powers, with the administration of prisons being thought to fall exclusively within the jurisdiction of the executive branch.⁹ The position derives additional weight from the language of the Federal Prisons and Prisoners Act,¹⁰ which specifically withdraws Federal prison administration from the province of the courts and places it under the Attorney General, and from numerous decisions declaring that the principles of federalism prevent federal courts from exercising supervision over state prisons.¹¹

Other courts, while not explicitly disclaiming jurisdiction in such cases, have reached the same result by adopting the premise that while the judiciary still retains the power to intervene, this power should be exercised infrequently and with the greatest discretion.

This judicial policy of non-intervention, even when grounded upon principles of power separation and/or federalism, undoubtedly has its roots in the history and nature of the prison system. Many courts, feeling that they lack the necessary expertise to understand the realities and necessities of prison operation, are hesitant to take any action which might interfere with the orderly operation of powder-keg prisons, or which might somehow compromise the ability of the prison officials to accomplish the goals of the penal system. Furthermore, a natural corollary of the historical development of the penal system as a means of punishment and deterrence has been the popular view of the prisoner as a person who has forfeited a substantial portion of his civil and human

8. *Banning v. Looney*, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954). *See also Siegel v. Ragen*, 180 F.2d 785 (7th Cir. 1950); *Sostre v. McGinnis*, 334 F.2d 906 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964); *Oregon ex rel. Sherwood v. Gladden*, 240 F.2d 910 (9th Cir. 1957); *Ortega v. Ragen*, 216 F.2d 561 (7th Cir. 1954); *Hatfield v. Bailleaux*, 290 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961); *State ex rel. Renner v. Wright*, 188 Md. 189, 51 A.2d 668 (1947); *Dunn v. Jones*, 150 Neb. 669, 35 N.W.2d 673 (1949); *Commonwealth ex rel. Smith v. Banmiller*, 194 Pa. Super. 566, 168 A.2d 793 (1962); *People v. Collins*, 200 N.Y.S.2d 919 (1960).

9. *See, e.g., Powell v. Hunter*, 172 F.2d 330 (10th Cir. 1949), wherein it was said: The prison system is under the administration of the Attorney General . . . and not of the district courts. The court has no power to interfere with the conduct of the prison or its discipline. *Id.* at 331.

See also Tabor v. Hardwick, 224 F.2d 526 (5th Cir.), *cert. denied*, 350 U.S. 971 (1955); *Childs v. Pegelov*, 321 F.2d 487 (4th Cir. 1963), *cert. denied*, 376 U.S. 932 (1964); *Dayton v. McGreener*, 201 F.2d 711 (D.C. Cir. 1953).

10. 18 U.S.C. § 4001 (1964).

11. *See, e.g., United States ex rel. Atterbury v. Ragen*, 237 F.2d 953 (7th Cir. 1956), *cert. denied*, 353 U.S. 964 (1957), and cases cited therein.

rights.¹² While the severity of this viewpoint has moderated since the early days of the prison system, it is still apparent both in public sentiment and judicial opinion.¹³

As a result of these various factors, prison officials have been permitted broad authority within the walls of their own institutions.¹⁴ Regrettably, this discretion has occasionally been abused, and the prison scandals and penitentiary riots of the past thirty years indicate that the provisions made for administrative and judicial review and remedy of prisoner complaints have been less than adequate.

THE PRESENT TREND

The increasing concern of the courts over the protection of individual rights, as manifested by the new emphasis on the rights of the accused, has also been reflected in a new willingness of the judiciary to undertake judicial review of the internal operations of American prisons and to define the rights retained by the convicted felon. This trend has been facilitated by a gradual shift of emphasis in penal philosophy. As early as 1870, the date of the formation of the American Prison Association, reformation, rather than punishment, was seen as the ultimate goal of penology.¹⁵ The growing recognition of the convict as a human being, capable (in some cases, at least) of being returned to society as a functioning, productive citizen, has contributed to the new view of the prisoner as a man whose rights have been temporarily restricted but by no means abolished.¹⁶ As early as 1944, a Federal court declared that

12. "(The prisoner) has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State." *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871).

13. See *Price v. Johnston*, 334 U.S. 266, 285 (1948).

14. "Enormous discretion is left to correctional administrators to define the conditions of imprisonment. They determine the way in which the offender will live for the term of imprisonment; how he is fed and clothed; whether he sleeps in a cell or a dormitory; whether he spends his days locked up or in relative freedom; what opportunity he has for work, education, or recreation. They regulate his access to the outside world by defining mailing and visiting privileges. They define rules of conduct and the penalties for violation of such rules . . . Traditionally, few external controls have been imposed on correctional decisions in this area." TASK FORCE REPORT: CORRECTIONS, *supra* note 4, at 84.

15. For the development of this movement, and its effects, see H. BARNES AND N. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* (3d ed. 1959).

16. "A first tenet of our governmental, religious, and ethical tradition is the intrinsic worth of every individual no matter how degenerate. It is a radical departure from that tradition to accept for a defined class of persons, even criminals, a regime in

"a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."¹⁷ At that time, the principle expressed was contrary to the weight of the case law. Today, however, it has become obvious that more and more courts, even while occasionally paying lip-service to the hands-off doctrine, are adopting the view that the convict remains entitled to the basic constitutional guarantees, and that delegation of prison authority to the administrative branch does not preclude judicial review of the manner in which that authority is exercised.¹⁸ The courts today are becoming increasingly insistent that prison administrators be able to justify repressive measures employed in prison operation, and where administrative review is inadequate or ineffective, many courts will now readily assume jurisdiction over prisoner complaints.¹⁹

AREAS OF JUDICIAL INTERVENTION

This judicial interest has not been confined to any specific aspect of prison operation. The courts now appear ready to enter any and every phase of prison administration in order to safeguard the rights of the individual convict, and the diversity of issues already adjudicated reveals this new omnipresence.

Tort Claims. Tort actions by prisoners against individual guards and officials have been permitted for some time.²⁰ But prior to 1962, the great majority of courts had held that the Federal Tort Claims Act²¹ and its waiver of sovereign immunity were not intended by Congress to extend to prisoners.²² Further, the exception of discretionary (versus

which their right to liberty is determined by officials wholly unaccountable in the exercise of their power and through processes which deprive them of an opportunity to be heard on the matters of fact and policy which are relevant to the decisions made." Kadish, "*Legal Norm and Discretion in the Police and Sentencing Processes*," 75 HARV. L. REV. 904, 923 (1962), quoted in TASK FORCE REPORT: CORRECTIONS, *supra* note 4 at 83.

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

18. "... a mere grant of authority cannot be taken as a blanket waiver of responsibility in its execution. Numerous federal agencies are vested with extensive administrative responsibilities. But it does not follow that their actions are immune from judicial review." *Muniz v. United States*, 305 F.2d 285, 287 (2d Cir. 1962), *aff'd*, 374 U.S. 150 (1963).

19. TASK FORCE REPORT: CORRECTIONS, *supra* note 4, at 84.

20. See, e.g., *Hill v. Gentry*, 280 F.2d 88 (8th Cir.), *cert. denied*, 364 U.S. 875 (1960). However, other civil suits (i.e., against persons "on the outside") have been prohibited. See, e.g., *Tabor v. Hardwick*, *supra* note 9.

21. 28 U.S.C. §§ 1346(d); 2671-80 (1964).

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

ministerial) acts from the effects of the Tort Claims Act provided an additional barrier to the successful prosecution of such suits by convict plaintiffs. In 1962-1963, two landmark cases removed this restriction.²³ Since then, more than 80 suits have been filed under the Tort Claims Act by inmates of Federal prisons, for injuries suffered while in custody.²⁴

Medical Treatment. Traditionally, courts have declined to hear convict complaints of inadequate or incompetent medical care in prison.²⁵ A number of recent decisions, however, have declared that such complaints do state a cause of action, and are consequently reviewable by the courts.²⁶

Correspondence. A particularly sensitive area has been the debate over the right of prison staffs to restrict and censor prisoner mail. Such restrictions have traditionally been regarded as necessary to prevent transmittal of contraband, formulation of escape plots, and other illegal activity. These regulations have generally been upheld as non-reviewable administrative provisions.²⁷ Recent decisions, while not abrogating such restrictions entirely, have made it clear that such rules must not be arbitrary,²⁸ and must not interfere with prisoner communication with the courts,²⁹ or with attorneys.³⁰ Prohibitions on unrestricted correspondence with friends, or in furtherance of the prisoner's business enterprises, or other communications not related to the prisoner's legal efforts, have been upheld.³¹

Legal Advice and Materials. Closely related to the problem of general correspondence is the frequent demand by prisoners for access to the courts, legal advice, and legal texts and materials. As already noted, the

23. *Muniz v. United States*, *supra* note 18; *Winston v. United States*, 305 F.2d 253 (2d Cir. 1962), *aff'd*, 374 U.S. 150 (1963).

24. In one such case, underworld figure Mickey Cohen, suing for an injury inflicted by another inmate, received a judgment against the United States for \$110,000. *Cohen v. United States*, 252 F.Supp. 679 (N.D. Ga. 1966).

25. *See, e.g., Haynes v. Harris*, 344 F.2d 463 (8th Cir. 1965).

26. *See, e.g., Redding v. Pate*, 220 F.Supp. 124 (N.D. Ill. 1963); *Hirons v. Director, Patuxent Institution*, 351 F.2d 613 (4th Cir. 1965).

27. *See, e.g., Dayton v. Hunter*, 176 F.2d 108 (10th Cir.), *cert. denied*, 338 U.S. 888 (1949); *Ortega v. Ragen*, *supra* note 8.

28. *Dayton v. McGrenery*, *supra* note 9.

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

30. *Fulwood v. Clemmer*, 206 F.Supp. 370 (D.D.C. 1962); *Brabson v. Wilkins*, 45 Misc. 2d 286, 256 N.Y.S.2d 693 (Supp. Ct. 1965), *modified* 267 N.Y.S.2d 580 (App. Div. 1966).

31. *See, e.g., Stroud v. Swope*, 187 F.2d 850 (9th Cir. 1951).

inmate may not be prevented from petitioning the courts.³² Nor may the prison officials frustrate the prisoner's efforts to communicate with the courts by delaying such correspondence (e.g., beyond an appeal deadline).³³ Communication with attorneys presents a more difficult question, for officials have the problem of determining who is in fact the prisoner's attorney, or if the prisoner is using an unscrupulous attorney as a channel of communication for illegal activities. Furthermore, the addressee of such correspondence may be a fictitious person, or one who is not an attorney at all. Nevertheless, it has been held that a prisoner may not be prevented from corresponding with his attorney,³⁴ although at least one court has held that such mail may be examined by authorities to determine whether it is genuine legal correspondence or illegal or prohibited activity.³⁵

The activities of the so-called "jailhouse lawyer"³⁶ have also been the subject of considerable litigation. Formerly, such unofficial legal assistance was severely proscribed,³⁷ but a 1966 case appears to moderate this position to permit reasonable access of other prisoners to the services of a legally talented inmate.³⁸

Access to legal texts and materials has also been a thorny question. The matter was once considered to be within the discretion of the prison authorities,³⁹ but it now appears that, while prisons are under no obligation to provide special facilities or equipment for legal research,⁴⁰ prisoners must be given a reasonable opportunity to pursue their legal

32. See note 29, *supra*.

33. *Fallen v. U.S.*, 378 U.S. 139 (1964). A contrary result was reached on a different set of facts in *Berman v. U.S.*, 378 U.S. 530 (1964).

34. See note 30, *supra*.

35. *Bailleaux v. Holmes*, 177 F. Supp. 361 (D. Ore. 1959). It is also interesting to note that in many state prisons (although not in the Federal prison system), conversations between prisoners and visiting attorneys are monitored. This practice was upheld in *Lanza v. New York*, 370 U.S. 139 (1962).

36. This term is usually applied to a prisoner who assists other prisoners in preparing petitions and other legal papers.

37. *Wilson v. Dixon*, 251 F.2d 338 (9th Cir.), *cert. denied*, 358 U.S. 856 (1958). See also *Hatfield v. Bailleaux*, *supra* note 8.

38. *Johnson v. Avery*, 252 F.Supp. 783 (M.D. Tenn. 1966), wherein the court observed that "[t]he present regulation [restraining the activities of 'jailhouse lawyers'] . . . has the practical effect of silencing forever any constitutional claims which many prisoners might have." *Id.* at 785.

39. *Wilson v. Dixon*, *supra* note 37; *Oregon ex rel. Sherwood v. Gladden*, *supra* note 8; *Grove v. Smyth*, 169 F.Supp. 852 (E.D. Va. 1958).

40. See, e.g., *United States ex rel. Wakeley v. Pennsylvania*, note 29, *supra*.

efforts.⁴¹ Restrictions which effectively prohibit a prisoner from gaining access to the courts have been judicially disapproved.⁴²

Habeas Corpus. This problem of prisoner access to the courts has given rise to a new judicial view of the function of the writ of habeas corpus. Such a proceeding was formerly regarded as appropriate only when the goal was the prisoner's immediate release from prison. The writ was considered to be a means of testing the legitimacy of the imprisonment itself, not the means or manner of it.⁴³ In addition, the writ was supposedly available only as a last resort, when all administrative remedies had been exhausted.⁴⁴

These barriers to the use of habeas corpus as a means of resolving internal prison problems first began to fall more than two decades ago.⁴⁷ As early as 1944, a writ was granted where the remedy sought was not total release, but transfer to another institution.⁴⁶ The court stated that "the fact that a person is legally in prison does not prevent the use of habeas corpus to protect his other inherent rights."⁴⁷ Since that time, a number of decisions have made it clear that the writ is no longer limited to the testing of the legality of the incarceration.⁴⁸ When a court has adopted this viewpoint, the exhaustion of remedies rule is easily satisfied or circumvented.⁴⁹

41. *Hatfield v. Bailleaux*, *supra* note 8. See also Federal Bureau of Prisons policy statement on access to legal materials, January 21, 1966.

42. See Judge Solomon's opinion in *Bailleaux v. Holmes*, *supra* note 35. This case was reversed in *Hatfield v. Bailleaux*, *supra* note 8, upon a different evaluation of the factual situation, and an intervening liberalization of prison policies.

43. "Habeas corpus may not be used to secure judicial decision of any question which, even if determined in the prisoner's favor, could not result in his immediate release. The only relief authorized is the discharge of the prisoner, and that only if his detention is found to be unlawful. . . ." *United States ex rel. Binion v. United States Marshal*, 188 F. Supp. 905, 908 (D. Nev. 1960); *aff'd*, 292 F.2d 494 (9th Cir. 1961). The leading case on this point is *McNally v. Hill*, 293 U.S. 131 (1934). See also *Williams v. Steele*, 194 F.2d 32 (8th Cir. 1952); *Benjamin v. Hunter*, 176 F.2d 269 (10th Cir. 1949); *Snow v. Roche*, 143 F.2d 718 (9th Cir.), *cert. denied*, 323 U.S. 788 (1944).

44. *Johnson v. Dye*, 338 U.S. 864 (1949) (per curiam).

45. In effect, the decline of the hands-off doctrine began in this area of the law.

46. *Coffin v. Reichard*, note 17 *supra*.

47. *Id.* at 445.

48. *Johnson v. Avery*, *supra* note 38; *Ex parte Hull*, 312 U.S. 546 (1941); *United States ex rel. Westbrook v. Randolph*, 259 F.2d 215 (7th Cir. 1958); *Dowd v. Cook*, 340 U.S. 206 (1951); *Jones v. Cunningham*, 371 U.S. 236 (1963); *In re Ferguson*, 55 Cal. 2d 663, 361 P.2d 417 (1961) (dictum), *cert. denied*, 368 U.S. 864 (1961); *In re Chessman*, 44 Cal.2d 1, 279 P.2d 24 (1955).

49. The Federal habeas corpus statute (28 U.S.C. §§ 2241-54 (1964)) provides that the exhaustion of remedies rule does not apply where such remedies are unavailable or

Punishment. The task of keeping several thousand unruly convicts in a state of relative obedience to authority requires that a system of rewards and punishments be available to the prison administration.

Almost every correctional institution includes a special confinement unit for those who misbehave seriously after they are incarcerated. This "prison within a prison" usually is a place of solitary confinement, sometimes without bedding or toilet facilities, accompanied by reduced diet and limited access to reading materials or other diversions, and occasionally without any kind of light. Lesser penalties, such as extra work or denial of cigarettes, desserts, movies, or other small pleasures, are imposed for less serious infractions. In addition, many adult correctional systems automatically provide time off a sentence (good time) for each month of good behavior in the institution, and deny or withdraw this time if the inmates seriously misbehave. These, together with adverse parole recommendations, are the main traditional disciplinary tools in institutions.⁵⁰

Such disciplinary measures were once regarded as judicially un-touchable.⁵¹ Now, however, the slow demise of the hands-off doctrine has produced a number of prisoner suits protesting the application of these sanctions.⁵²

The use of solitary confinement (also called "maximum security" or "The Hole") has been the most frequent source of litigation, and such confinement has been ruled improper under the circumstances in several cases. The use of "strip cells" (bare cells without conveniences of any kind) resulted in an injunction against prison officials⁵³ and the issuance of regulations prohibiting the use of such cells in the state prison system.⁵⁴ In *Fulwood v. Clemmer*,⁵⁵ a Black Muslim prisoner was con-

where circumstances have rendered the available remedies ineffective or inadequate to protect the rights of the prisoner.

50. TASK FORCE REPORT: CORRECTIONS, *supra* note 4, at 50.

51. *Williams v. Steele*, *supra* note 43; *Snow v. Roche*, *supra* note 43; *State v. Doolittle*, 122 Conn. Supp. 32, 158 A.2d 858 (Super. Ct. 1960).

52. These suits have most frequently been based upon the language of the Eighth Amendment, which states that

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. CONST. amend. VIII.

53. *Jordan v. Fitzharris*, No. 44786, D. Calif., *denied* Sept. 6, 1966.

54. *Barkin, The Emergence of Correctional Law and the Awareness of the Rights of the Convicted*, 45 NEB. L. REV. 669, 686 (1966).

55. *Fulwood v. Clemmer*, *supra* note 30.

fined in maximum security for making inflammatory racist statements.⁵⁶ Despite the threat which this prisoner represented to prison order and discipline, the court regarded the confinement as excessive punishment which fell within the meaning of the Eighth Amendment,⁵⁷ and ordered the prisoner returned to the general prison population.⁵⁸ Similarly, in *Howard v. Smyth*,⁵⁹ confinement of a Black Muslim prisoner to maximum security for an extended period was found to be excessive, and release to the general prison body was ordered.⁶⁰ Release was also ordered for a prisoner confined to maximum security in *Johnson v. Avery*.⁶¹

Transfer within the prison, between prisons, or from one type of institution to another is now regarded as subject to judicial review.⁶² Courts have also intervened in cases where prisoners were disciplined for filing lawsuits against prison officers,⁶³ and for making false allegations in a petition.⁶⁴

Judicial review of the discipline of prisoners is one of the most significant areas in which the hands-off doctrine has been rejected, because of the potential problems which such intervention creates for prison officials.⁶⁵

Religious Freedom. The most prolific source of prisoner litigation has been the effort of members of the Black Muslim sect to secure what they consider to be their religious rights. Muslim prisoners have demanded that they be provided with a place to hold their assemblies,⁶⁶ that speakers be allowed to deliver messages of racial hatred at such

56. The court found the statements to be "offensive, insulting, and disturbing to white inmates and to non-Muslim negroes and to engender those feelings which tend to menace order." *Id.* at 378.

57. See note 52, *supra*.

58. "A punishment out of proportion to the violation may bring it within the bar against unreasonable punishments." *Fulwood v. Clemmer*, *supra* note 30, at 379. See also Mr. Justice Douglas' concurring opinion in *Robinson v. California*, 370 U.S. 660, 668 (1962).

59. 365 F.2d 428 (4th Cir. 1966), *cert. denied*, 385 U.S. 988 (1967).

60. In *Howard v. Smyth*, the decision was grounded upon considerations of freedom of religion, rather than a claim of cruel and unusual punishment. See text accompanying notes 79-81 *infra*.

61. *Supra*, note 38.

62. See, e.g., *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 174 N.E.2d 725, 215 N.Y.S.2d 44 (1961).

63. *Cleggett v. Pate*, 229 F.Supp. 818 (N.D. Ill. 1964).

64. *In re Riddle*, 22 Cal. Rptr. 472, 372 P.2d 304 (1962).

65. See text accompanying notes 85-86, *infra*.

66. See *In re Ferguson*, *supra* note 48; *Pierce v. LaVallee*, 293 F.2d 233 (2d Cir. 1961).

meetings,⁶⁷ that Muslims be allowed free communication with sect leaders outside the prison,⁶⁸ that they be provided with a special diet or special dining hours required by their religion,⁶⁹ and that they be permitted to disobey white guards because of the Muslim belief in the superiority of the Negro race.⁷⁰ In one prison, Muslim inmates organized and operated their own system of "kangaroo courts" within the walls,⁷¹ and at the Federal prison at Leavenworth, Black Muslims assembled in the prison yard to undergo training by Muslim instructors in judo and karate, while other inmates were kept out of the area by Muslim "sentries."⁷²

All of these demands and activities have been justified as exercises of the religious freedom guaranteed by the First Amendment.⁷³ A number of courts have expressly recognized the Muslims as a religious sect,⁷⁴ and, while sometimes decided on other grounds (e.g., the Eighth Amendment), these cases have unfortunately presented the appearance of a direct conflict between the currently fashionable First Amendment and the practical requirements of prison security and discipline. In a few cases, the courts have found the requirements of prison operation to be reasonable, and have upheld the decisions of the prison authorities. In one case, prohibition of Muslim assemblies in the prison was upheld.⁷⁵ In another instance, the Court approved two administrative actions⁷⁶ but disapproved three others.⁷⁷ There have been a number of other cases in which Muslim demands were rejected.⁷⁸

In a disturbing number of decisions, however, the judgment of the

67. *Fulwood v. Clemmer*, *supra* note 30; *In re Ferguson*, *supra* note 48.

68. *Brown v. McGinnis*, 10 N.Y.2d 531, 180 N.E.2d 791, 225 N.Y.S.2d 497 (1962).

69. *Childs v. Pegelow*, 321 F.2d 487 (4th Cir. 1963), *cert. denied*, 376 U.S. 932 (1964).

70. *In re Ferguson*, *supra* note 48.

71. *Sostre v. McGinnis*, 334 F.2d 906 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964).

72. *Jones v. Willingham*, 248 F.Supp. 791 (D. Kans. 1965). For judicial comment on the violent and disruptive nature of the Black Muslim movement, see *Sostre v. McGinnis*, *supra* note 71.

73. "Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof . . ." U.S. CONST. amend. I.

74. *Fulwood v. Clemmer*, *supra* note 30; *Banks v. Havener*, 234 F.Supp. 27 (E.D. Va. 1964); *Bryant v. Wilkins*, 265 N.Y.S.2d 995 (App. Div. 1965).

75. *In re Ferguson*, *supra* note 48.

76. Prisoner disciplined for inflammatory racial statements; officials refused to permit prisoner to correspond with leaders of Black Muslim sect. *Fulwood v. Clemmer*, *supra* note 30.

77. Penalty imposed was too severe; chapel facilities were denied to Muslims; officials confiscated Muslim religious medals. *Id.*

78. See note 82 *infra*.

prison staff has been judicially disapproved, and relief granted to the prisoner. In *Howard v. Smyth*,⁷⁹ a Muslim prisoner sought release from maximum security confinement. The prison officials maintained that this confinement was not punishment, but merely segregation of the prisoner from the general inmate population in the interest of prison security.⁸⁰ The court bypassed the security question and ordered Howard released from maximum security, disapproving the "arbitrary imposition of such serious disciplinary action where the assertedly offensive conduct bears so close a relationship to First Amendment freedoms."⁸¹

Other courts have granted relief on similar grounds.⁸²

Summary. At present, therefore, it appears that a majority of courts are prepared to undertake judicial review of virtually every phase of prison administration. In an increasing percentage of the cases, the administrative decisions of the prison officials are being judicially reversed, and the rights of the prisoners are being constantly expanded.

EFFECTS OF JUDICIAL INTERVENTION

The severe difficulties which face the prison administrator in the accomplishment of his complex task of confinement and rehabilitation can only be further complicated by the new judicial interest in prisoner complaints. The eventual consequences to the effectiveness of the prison system are as yet largely a matter of speculation. Serious apprehensions have been expressed, and certain effects are already visible.

A commonly voiced fear is that the continuing concession of new rights to prisoners, coupled with the extension of the use of habeas corpus, will result in pandemonium not only in the prison itself but throughout the entire legal system. A flood of frivolous or spurious claims unleashed by an energetic inmate population could seriously clog an already overburdened court system, placing great strain on the time

79. *Supra* note 59.

80. Howard, a Black Muslim prisoner, met with prison staff members to demand that Muslim inmates be permitted to hold services in the prison. Howard refused to divulge the names of the prisoners whom he represented in making the demand. He was thereafter confined to maximum security. The prison officials stated that the existence of a cohesive group of unidentified prisoners within the prison represented a threat to security, and that Howard's confinement was made necessary by this consideration.

81. *Howard v. Smyth*, *supra* note 59 at 431.

82. For a detailed discussion of litigation by Black Muslims, see Note, *Suits by Black Muslim Prisoners to Enforce Religious Rights*, 20 *RUTGERS L. REV.* 528 (1966).

and resources of correctional personnel, attorneys, and judges.⁸³ To some extent, at least, this fear is already becoming a reality. In 1941, 134 Federal writs of habeas corpus were filed by state prisoners; in fiscal 1963, 1,692 petitions were filed; in fiscal 1964, 3,248 were filed; and in fiscal 1965, 4,845 were filed. More than 95 per cent of these applications were held to be without merit.⁸⁴

Perhaps even more serious is the potential effect of this trend on the ability of prison staffs to maintain order in the prisons. Many prisoners will undoubtedly become more interested in producing petitions and engaging in litigation than in participating in rehabilitation programs and vocational training. Other inmates, knowing that the prison officials are hampered by judicial restrictions on their disciplinary powers, will take advantage of the situation by engaging in hitherto illegal or proscribed activities within the prison. If the elaborate security rules made necessary by the near-impossible task of keeping several thousand ingenious felons where they do not wish to remain⁸⁵ are made subject to constant modification or abrogation by the courts, the ability of prison officials to prevent such activities will be seriously impaired.⁸⁶ A progressive decay of authority, with a corresponding increase in assaults, escapes, and riots, is greatly feared.⁸⁷

In particular, administrators fear the effects of the concessions made to the Black Muslim groups, whose cohesiveness, militancy, and power have been the subject of comment not only by prison officials but by the courts as well.⁸⁸

83. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS, at 84 (1967).

84. Defender Newsletter, Vol. III, No. 6, at 16 (1966).

85. For a description of the constant duel of wits carried on between the prison staff and enterprising inmates, see SYKES, *THE SOCIETY OF CAPTIVES* (1958).

86. For example, separation from the general prison population may be the only means by which the prison staff can prevent a violent or militant prisoner from causing serious disturbance in the prison community. When such isolation is characterized as "punishment" and countermanded by the courts, with the result that the agitator is returned to the general prison population, an undesirable and perhaps dangerous situation has been created.

87. ". . . [i]f prisoners are allowed access to the courts to test the wisdom of the decisions of administrative personnel, this will undermine that authority by constantly subjecting these decisions to judicial reexamination." Brief for the Appellee, pp. 5-6, *Winston v. United States*, 305 F.2d 253 (2d Cir. 1962).

". . . if the decisions affecting these most fundamental aspects of prison responsibility are subject to judicial review, then it is obvious that the result will be inimical to effective discipline and thus to the maintenance of security." Brief for the Appellee, pp. 3-4, *Muniz v. United States*, 305 F.2d 285 (2d Cir. 1962).

88. *Jones v. Willingham*, *supra* note 72.

Lastly, it is foreseen that the imposition of rigid, unrealistic requirements upon the prison system by courts inadequately informed as to the harsh realities of the penal society will discourage experimentation and innovation by penologists seeking to fulfill the higher objectives of the system.⁸⁹

Those who approve of the recent decisions point out that these predicted disasters are by no means inevitable. Despite the increase in prisoner petitions, it is believed probable by many observers that the courts for the most part will act with reason and restraint, granting petitions on an individual basis rather than making sweeping rulings which would destroy the power of prison administrators to govern their own institutions.⁹⁰ That the courts are not unaware of the problems of prison management has been demonstrated in cases such as *Nelson v. United States*,⁹¹ in which it was held that the fact that the prisoner was being held illegally was no defense for his defiance and misconduct while in prison.

It is also likely that the increased judicial pressure on prison administrators will lead to the establishment of more effective administrative channels for review of prisoner complaints, and more active administrative supervision of the policies and decisions of prison staffs. Such administrative mechanisms have until now been ineffective or lacking in many jurisdictions. Their creation would undoubtedly reduce the necessity for judicial supervision and reduce the intensity of whatever supervision remains.⁹²

It has been further argued that the awareness by the prisoners that they have not been totally abandoned to the arbitrary will of all-powerful jailers may have a beneficial effect in the rehabilitation process. It is said that the convict, by seeking his goals through legal, socially approved channels, instead of criminal activity, will undergo a revealing new experience which will contribute greatly to his rehabilitation as a law-abiding, productive member of society.⁹³ The validity of this last proposition will be difficult to evaluate, to say the least.

89. TASK FORCE REPORT: CORRECTIONS, *supra* note 83, at 83.

90. See *Fulwood v. Clemmer*, 206 F.Supp. 370 (D.D.C. 1962), where a test of reasonableness was applied with the result that the judgment of the prison officials was upheld in some respects and rejected in others.

91. 208 F.2d 211 (10th Cir. 1953).

92. See the case of *Landman v. Peyton*, 370 F.2d 135 (4th Cir. 1966), in which the court based its evaluation (and rejection) of the actions of Virginia State Penitentiary officials upon standards set forth in the Manual of Correctional Standards (1964), a publication of the American Correctional Association.

93. For a detailed treatment of these arguments, see generally Comment, *Beyond the*

CONCLUSION

Regardless of the accuracy of these various predictions, it is apparent that the entrance of the courts into the world of prison and prisoner is now an established fact. While it must not be supposed that all courts have concurred in this trend,⁹⁴ many have and most eventually will. Although it is generally agreed that some deprivation of individual rights is inevitable as long as the prison system exists, the gradual shift in emphasis from punishment to rehabilitation has brought with it the conviction that the felon is still a human being, albeit a rather poor specimen of the breed, and that he retains at least the basic rights enjoyed by all Americans. The temper of the times is definitely that "the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected,"⁹⁵ and certainly few if any would argue with this statement as a matter of principle.

But, as always, the danger lies in the application of worthy ideals to the exigencies of everyday life. It is doubtful that the goals of modern penology will be served in a prison where the administration is handcuffed by judicial controls, and the prisoners (armed with habeas corpus, mandamus, the Civil Rights Act, the Federal Tort Claims Act, and the First and Eighth Amendments) run the institution. In a country where the skyrocketing crime rate has become a national issue and law enforcement is having its own problems with judicially imposed restrictions, a breakdown of the prison system hardly seems desirable.

It is therefore to be hoped that penologists will prove flexible enough to adapt to the new requirements, and that jurists will continue to operate under the rule of reason and to exercise caution in their pronouncements.

It is already clear that the resolution of this problem short of chaos will require the utmost wisdom, perception, and restraint.

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Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 YALE L. J. 506 (1963).

94. See, e.g., *Cannon v. Willingham*, 358 F.2d 719 (10th Cir. 1966).

95. *People v. Gitlow*, 234 N.Y. 132, 158, 136 N.E. 317, 327 (1922) (dissenting opinion of Pound, J., in which Cardozo, J., concurred).