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The Inadequacy of Prisoners' Rights to Provide Sufficient Protection for Those Confined in Penal Institutions

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Circuit in *Tyrone, Inc. v. Wilkinson.*[106] In order to achieve successful prosecutions against "peddlers and purveyors of smut and despicable vulgarity,"[107] it is not necessary to infringe upon rights guaranteed by the first amendment. A delicate procedure can be established whereby the rights of individuals are protected and the interest of society in controlling the dissemination of obscenity is maintained. Since dissemination of obscenity is not a crime of violence, some delay in the suppression of obscene material in order to protect individual rights is not an inordinate price to ask of society.

> Difficult and cumbersome are obscenity prosecutions. Impossible they are not. State officers should not conclude that the First Amendment throws an impenetrable mantle of protection over obscenity. The Constitution offers no protection to pornography without redeeming literary or artistic qualities. What the courts have done, clumsily perhaps, is to try to strike a balance between private and public rights—the right of an individual to free, legitimate expression, on the one hand, and, on the other, the right of the public to be free from that expression which is obscene.[108]

This balance should be achieved by rational legislative process rather than by random case-by-case judicial improvisation.

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> Judges spend their lives consigning their fellow creatures to prison; and when some whisper reaches them that prisons are horribly cruel and destructive places, and that no creature fit to live should be sent there, they only remark calmly that prisons are not meant to be comfortable, which is no doubt the consideration that reconciled Pontius Pilate to the practice of crucifixion.[1]

as amended VA. CODE ANN. § 18.1-236.4 (Supp. 1968). It is recommended that this statute serve as a guideline for states wishing to enact a specific procedure for an adversary hearing.

[106] 410 F.2d 639 (4th Cir. 1969).

[107] Rage Books, Inc. v. Leary, 301 F. Supp. 546, 549 (S.D.N.Y. 1969).

[108] Sokolic v. Ryan, 304 F. Supp. 213, 218 (S.D. Ga. 1969).

[1] G. SHAW, THE CRIME OF IMPRISONMENT 14 (1948). However, Shaw also said:

> When we get down to the poorest and most oppressed of our population,

The prison is not an institutional septic tank for societal waste; it is a structural part of a correctional system. "The idea of punishment as the law interprets it seems to be that inasmuch as a man has offended society, society must officially offend him."[2] Invariably this official act is that of incarceration. There exists a growing recognition that a convict is a human being capable of being returned to society as a productive citizen. This recognition has contributed to the view of the prisoner as one whose rights have been temporarily subjected to reasonable restrictions, but not altogether abolished.[3] Society's interest in the preservation of the dignity and self-respect of every human being can no longer tolerate the view that a convicted criminal "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 him. He is for the time being the slave of the State."[4] The purpose of this comment is to discuss certain basic rights of prisoners, sketch remedies for their enforcement, and evaluate the adequacy of the constitutional and physical protection that these rights and remedies in practicality afford to inmates.

THE RIGHTS

In 1965 the American correctional system handled nearly 2.5 million convicted persons, resulting in an average daily prison population of about

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> we find the conditions of their life so wretched that it would be impossible to conduct a prison humanely without making the lot of the criminal more eligible than that of many free citizens. If the prison does not underbid the slum in human misery, the slum will empty and the prison will fill.

Id. at 20.

The tragic irony of imprisonment is that it may well result in punishment far in excess of that intended or contemplated by the sentencing judge. This result arises from judicial ignorance of, but hopefully not apathy for, the harsh realities of prison life. In the fall of 1969, Mr. Lee Bounds, the Commissioner of Correction for the State of North Carolina, intimated in an interview with the writer at the Institute of Government in Chapel Hill, North Carolina, that the judges of North Carolina have not availed themselves of the opportunity to visit correctional institutions. In this regard, Dr. Karl Menninger in THE CRIME OF PUNISHMENT 73-74 (1968) made the following comment:

> If a doctor sends a man to a hospital to be treated, he goes to see whether the treatment is being carried on; but judges do not seem to believe in this principle. Judges rarely visit the institutions to which they are constantly committing their wards to be "treated." Whenever I have taken judges with me to visit prisons or closely examine prisoners, they have been far more shocked than I.

[2] K. MENNINGER, THE CRIME OF PUNISHMENT 71 (1968).

[3] *See* Note, *Judicial Intervention in Prison Administration*, WM. & MARY L. REV. 178, 181 (1967).

[4] Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

426,000 inmates who were incarcerated in approximately four hundred adult and three hundred juvenile penal institutions.[5] While lawful incarceration must necessarily limit many privileges and rights, a prisoner should not be stripped of any rights except as required for proper administration and discipline in the correctional institution in which he is placed. The "evolving standards of decency that mark the progress of a maturing society"[6] demand improved penal institutions. More and more often prison administrators are being called upon to justify repressive measures and unduly restrictive regulations.[7] Federal courts have begun to reject the venerable "hands-off" doctrine and to intervene in the administration of state and federal penal institutions in cases in which failure to exercise jurisdiction would unreasonably deprive inmates of constitutional rights.[8] Nevertheless,

[5] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 1, 4, 45-46 (1967).

[6] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[7] *See generally* Barkin, *The Emergence of Correctional Law and The Awareness of the Rights of the Convicted*, 45 NEB. L. REV. 669 (1966); Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969); Comment, *The Rights of Prisoners While Incarcerated*, 15 BUFFALO L. REV. 397 (1965); Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963); Note, *Prisoners' Rights Under Section 1983*, 57 GEO. L.J. 1270 (1969); Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962).

[8] The "hands-off" doctrine espoused by federal courts in the past can be stated in the following manner: inasmuch as Congress has placed control of the federal prison system under the Attorney General, and inasmuch as the control of a state prison system is vested in the Governor or his delegated representative, a federal court is powerless to intervene in the internal administration of this executive function even to protect prisoners from the deprivation of their constitutional rights. *See* United States *ex rel.* Morris v. Radio Station WENR, 209 F.2d 105 (7th Cir. 1954); Williams v. Steele, 194 F.2d 32 (8th Cir.), *cert. denied*, 344 U.S. 822 (1952); Garcia v. Steele, 193 F.2d 276 (8th Cir. 1951); *In re* Taylor, 187 F.2d 852 (9th Cir.), *cert. denied*, 341 U.S. 955 (1951) (all involving federal prisons). *See also* Jackson v. Goodwin, 400 F.2d 529 (5th Cir. 1968); Walker v. Blackwell, 360 F.2d 66 (5th Cir. 1966); Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966); Lawrence v. Blackwell, 298 F. Supp. 708 (N.D. Ga. 1969) (all involving state prisons).

The Supreme Court of the United States recently abolished the classical "hands-off" doctrine in Johnson v. Avery, 393 U.S. 483, 486 (1969), when it said:

> Tennessee urges, however, that the contested regulation in this case is justified as a part of the State's disciplinary administration of the prisons. There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene. It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with such rights, the regulations may be invalidated.

> [e]normous 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.[9]

And even though the "hands-off" doctrine is no longer viable, the requirement that administrative remedies be exhausted by federal inmates or that the aid of state courts first be sought by inmates incarcerated in state institutions may hamper the exercise of jurisdiction by federal courts.[10] Two observers of the American penal system have criticized these jurisdictional barriers: "Such reluctance to protect the constitutionally derived basic human rights of prisoners is an abdication of judicial responsibility that has operated to maintain or strengthen the status quo and isolate penal systems from public scrutiny."[11]

Religious Freedom

Freedom of religion, protected by the establishment and free-exercise clauses of the first amendment, has been invoked most often in the prison setting by the members of the Black Muslim sect of the Islam religion.[12] The case of *Howard v. Smyth*[13] is typical. 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 thereafater confined in a maximum-security cell. The prison officials stated that the existence of an organized, cohesive group of unidentified persons within the prison population represented a threat to prison security; Howard's confinement was necessary because he had

[9] TASK FORCE REPORT: CORRECTIONS, *supra* note 5, at 84.

[10] *See e.g.*, Hess v. Blackwell, 409 F.2d 362 (5th Cir. 1969); Kelley v. Dowd, 140 F.2d 81 (7th Cir.), *cert. denied*, 320 U.S. 786, *rehearing denied*, 321 U.S. 783, *cert. denied*, 322 U.S. 712 (1943).

[11] Hirshkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795, 812 (1969).

[12] *See generally* Note, *Suits by Black Muslim Prisoners to Enforce Religious Rights*, 20 RUTGERS L. REV. 528 (1966).

[13] 365 F.2d 428 (4th Cir. 1966), *cert. denied*, 385 U.S. 988 (1967). The case is discussed extensively in Note, *Constitutional Law—Prisons—Confinement to Maximum Security as an Abridgement of First Amendment Rights*, 45 N.C.L. REV. 535 (1967).

assumed leadership of the group. The Court of Appeals for the Fourth Circuit held that such action was an "arbitrary imposition of such serious disciplinary action where the assertedly offensive conduct bears so close a relationship to First Amendment freedoms."[14]

No court has ever questioned the right of a prisoner to adhere to a recognized religious belief,[15] but courts generally tolerate reasonable restrictions on the *practice* of religion in penal instiutions. Even a free man has no absolute legal right to engage in any religious practice that he desires.[16] Permiting Black Muslim prisoners to communicate by mail and to visit with ministers of their faith, subject to prison rules, has been held not to impose such a danger to prison security as to warrant the prison administration's refusal to permit such communications and visiting.[17] However, an inmate can be punished for disturbing other inmates through noisy religious discussion.[18] If it appears that a prisoner can obtain a balanced diet by voluntarily avoiding pork or food cooked in grease or lard, a prison is not required to provide a special diet for him even though his religious belief requires him to abstain from such foods,[19] nor do the members of a religious sect have the right to special dining hours.[20] A prisoner in temporary punitive solitary confinement has no absolute right to the exercise of his religious beliefs,[21] nor does an inmate confined to maximum security because of a history of his being a security risk have the right to attend Sunday worship services in the prison chapel.[22] A state prison system should not be allowed to interfere un-

[14] 365 F.2d at 431.

[15] This statement must be qualified; for some time courts denied that Black Muslims were members of a religion. In the case of *In re* Ferguson, 55 Cal. 2d 663, 361 P.2d 417, 12 Cal. Rptr. 753, *cert. denied*, 368 U.S. 864 (1961), a correctional officer confiscated Muslim literature, which he called "trash." The court held that the inmate was not a member of a religious group and that Black Muslims had no right to assemble and to discuss their beliefs. But in Long v. Parker, 390 F.2d 816 (3d Cir. 1968) the court held that Black Muslims, as members of a religion protected by the first amendment, have a right to assert their belief.

[16] Reynolds v. United States, 98 U.S. 145 (1878) (antipolygamy laws sustained against claims of interference with Mormon beliefs); Lawson v. Commonwealth, 164 S.W.2d 972 (Ky. 1942) (use of poisonous snakes in religious ceremonies prohibited). See McBride v. McCorkle, 44 N.J. Super. 468, 130 A.2d 881 (App. Div. 1957), for a comparison of the religious rights of the free man to those of an inmate.

[17] Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967).

[18] Evans v. Ciccone, 377 F.2d 4 (8th Cir. 1967).

[19] Abernathy v. Cunningham, 393 F.2d 775, 778 (4th Cir. 1968).

[20] Childs v. Pegelow, 321 F.2d 487 (4th Cir. 1963).

[21] Belk v. Mitchell, 294 F. Supp. 800 (W.D.N.C. 1968).

[22] Sharp v. Sigler, 408 F.2d 966 (8th Cir. 1969).

reasonably with an inmate's study of the Bible[23] or to deprive one of his Koran.[24] In *Peek v. Ciccone*,[25] a federal district court upheld the right of a prisoner who claimed to have undergone an experience revealing to him that he was the reincarnation of Jesus Christ to communicate this fact to the Pope.

A major problem in regard to the religious freedom of Black Muslim inmates was raised in *Long v. Parker*.[26] Can the administrators of a penal institution, to achieve security and control over the inmates, properly confiscate Black Muslim literature alleged to be racially inflammatory and to advocate violence? Black Muslim services were required to be held in a small room instead of in the chapel. The Muslims were the only religious group whose members were identified by a list that the prison administration maintained. Inmates not on the list were not allowed to attend the Muslim services. Muslim inmates were forbidden to receive a weekly newspaper *Muhammad Speaks* and a book by Elijah Muhammad entitled *The Message of the Blackman.* Both of these publications were deemed highly inflammatory by prison officials, who decided that the writings were not legitimate Islamic literature. The federal district court in *Long* upheld the actions of the prison administration.[27] Responding to the Muslim inmates' request for a chaplain, the court held that a prison has no duty to supply a chaplain for every religious sect.[28] The district court also upheld the refusal of prison officials to allow the Muslims to correspond with Elijah Muhammad since he was an ex-convict and his writings were considered inflammatory and detrimental to the goal of rehabilitation.[29]

The Court of Appeals for the Third Circuit vacated part of the decision of the district court and held that "mere antipathy caused by statements derogatory of and offensive to the white race is not sufficient

[23] *See* Kelly v. Dowd, 140 F.2d 81 (7th Cir.), *cert. denied*, 320 U.S. 786 (1944) (dictum).

[24] Burns v. Swenson, 288 F. Supp. 4 (W.D. Mo. 1968).

[25] 288 F. Supp. 329 (W.D. Mo. 1968).

[26] 390 F.2d 816 (3d Cir. 1968). An action to enjoin the warden from interference with religious freedom was begun in Long v. Parker, 235 F. Supp. 246 (M.D. Pa. 1964), *aff'd*, 351 F.2d 950 (3d Cir. 1965), *vacated*, 384 U.S. 32 (1966). Meanwhile, the petitioner brought a second suit based on the same facts and praying for substantially the same relief in Long v. Katzenback, 258 F. Supp. 89 (M.D. Pa. 1966). The Third Circuit Court of Appeals consolidated these two cases and rendered the opinion discussed in the text.

[27] Long v. Katzenback, 258 F. Supp. 89 (M.D. Pa. 1966).

[28] *Id.* at 93.

[29] *Id.* at 94.

to justify suppression of religious literature in a prison, nor is mere speculation that such statements may ignite racial or religious riots in the prison."[30] The court went on to say that in order to justify prohibition of religious literature, prison officials must prove that it creates a *clear and present danger* to prison security and a substantial interference with the orderly functioning of the institution.[31]

Freedom of Speech, Expression, and Communication

In any part of society, free speech is not an absolute right;[32] but, within the confines of a prison, freedom of speech is limited almost to the point of extinction. There exists no *right* for inmates to communicate with other members of the prison population; speech, correspondence, or other communication between inmates can be completely prohibited as a reasonable security precaution.[33] It is doubtful, however, that the inmate can be arbitrarily cut off from all access to the outside world.[34] Although some courts have gone so far as to say that there is no constitutional right to use of the mails by an inmate,[35] most hold that control over an inmate's mail is basically an administrative function[36] and that prison security and the goal of rehabilitation warrant the exercise of censorship if prison officials desire.[37]

The administrative burden of censoring every piece of correspondence may justify limiting the number of persons with whom an inmate may correspond and the number of letters each inmate may send or receive.[38]

[30] Long v. Parker, 390 F.2d 816, 822 (3d Cir. 1968).

[31] *Id.* at 822. *See also* Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969).

[32] *E.g.*, Schenck v. United States, 249 U.S. 470 (1919) (advocacy of crime or revolution); Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911) (statements causing boycott in restraint of trade).

[33] *See generally* Vida v. Cage, 385 F.2d 408 (6th Cir. 1967); McClosky v. Maryland, 337 F.2d 72 (4th Cir. 1964); Foster v. Jacob, 297 F. Supp. 299 (C.D. Cal. 1969). *See also* Comment, *The Right of Expression in Prison*, 40 S. CAL. L. REV. 407 (1967).

[34] *See* Dayton v. McGranery, 201 F.2d 711 (D.C. Cir. 1953). *See also* cases cited in notes 52-63 *infra*.

[35] Ortega v. Ragen, 216 F.2d 561 (7th Cir. 1954); Medlock v. Burke, 285 F. Supp. 67 (E.D. Wis. 1968).

[36] *E.g.*, Pope v. Daggett, 350 F.2d 296 (10th Cir. 1965), *vacated*, 384 U.S. 33, *rehearing denied*, 384 U.S. 1027 (1966).

[37] *See* Adams v. Ellis, 197 F.2d 483 (5th Cir. 1952); Petition of Smigelski, 185 F. Supp. 283 (D.N.J. 1960); Green v. Maine, 113 F. Supp. 253 (D. Me. 1953); Gerrish v. Maine, 89 F. Supp. 244 (D. Me. 1950).

[38] *See* Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965); McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964); Ortega v. Ragen, 216 F.2d 561 (7th Cir. 1954); Desmond v. Blackwell, 235 F. Supp. 246 (M.D. Pa. 1964).

Prison authorities may also limit the purpose of the correspondence; for example, prisoners are generally prohibited from engaging in any business activities while incarcerated.[39] Since the prison system is entitled to control mail, the mere withholding of a letter from a prisoner as a means of disciplinary punishment is not a violation of any federally protected right.[40]

Prison authorities are even permitted, for rehabilitative reasons, to designate the persons with whom an inmate may communicate. In *Fussa v. Taylor*[41] the court upheld a restriction imposed on a particular inmate that prevented him from writing his common-law wife, who was an inmate at a woman's reformatory. The court found that the restriction had a rational relationship to the legitimate purpose of the prison in rehabilitating the inmate. In *Numer v. Miller*[42] the court denied a prisoner's request that he be allowed to continue an English usage correspondence course. He had been prohibited from taking it by the warden, who found that the inmate intended upon his release to write a book exposing the savageness of the prison authorities, whom he characterized as a "sadistic group in charge of the brutality department."[43] The court found, amazingly, that there existed no rehabilitative purpose in the inmate's continuing to study English usage and that the warden could ban the activity by refusing to permit the student to mail or receive items pertaining to the course. In *Labat v. McKeithen*,[44] correspondence between a Negro on death row in a Louisiana state prison and a white woman in Sweden was disallowed by the warden. The court upheld the warden's authority: "If the state has the right to deprive him of his very life, through execution for the commission of a capital offense, then certainly it has the right, as a part of the ultimate punishment, to deprive him of other privileges along the way to the final reckoning. . . ."[45]

It is unwise to restrain unduly intra-institutional expression, communication, and some degree of social contact between inmates; these

[39] *See* Stroud v. Swope, 187 F.2d 850 (9th Cir. 1951). However, some states allow correspondence by mail *only* for business purposes. *See* Krupnick v. Crouse, 366 F.2d 851 (10th Cir. 1966), in which the court upheld the refusal by Kansas state prison officials to mail an inmate's letter because it had no business purpose.

[40] Ortega v. Ragen, 216 F.2d 561 (7th Cir. 1954).

[41] 168 F. Supp. 302 (M.D. Pa. 1958).

[42] 165 F.2d 986 (9th Cir. 1948).

[43] *Id.*

[44] 243 F. Supp. 662 (E.D. La. 1965).

[45] *Id.* at 666.

practices are an integral part of the development of ideas, of mental exploration, and of the affirmation of one's self and therefore are beneficial to the goals of rehabilitation. The power to realize one's potentiality to function as a human being often begins through self-expression.[46] "In prison this value is accentuated by the diminished number of outlets for expression of feelings and desires."[47] Inmates often find ways to channel their self-expression while incarcerated. In the past five years, nearly 1.2 million dollars-worth of paintings, sculptures and other works of art have been sold by prisons in the United States; 128 of the 747 prisons have art programs in which nearly seven thousand prisoners take part, and many of the inmates actually receive the money from the sales.[48] Other inmates have turned to writing. The public often fails to realize that many literary works of art are produced behind prison walls. For example, John Bunyan's *Pilgrims' Progress*; Oscar Wilde's *Ballad of Reading Gaol*; Jan Valtin's *Out of Night*; and Caryl Chessman's *Cell 2455, Trial By Ordeal*, and *Face of Justice* all were produced in prison cells.[49]

Generally these methods of self-expression are a beneficial part of the rehabilitative process; therefore the question is seldom raised whether inmates have a constitutionally protected right to engage in such activities free from unreasonable prison interference. In *United States v. Maas*,[50] the court upheld the decision of the United States Attorney General not to permit Joseph Valachi, a former member of the Cosa Nostra, to publish his manuscript describing the existence of a national system of organized crime because the Attorney General felt that publication would not assist in law enforcement. However, the Attorney General was simply enforcing a term of an agreement previously signed by Valachi that publication was at the government's discretion.

In *Payne v. District of Columbia*,[51] a prisoner's wife petitioned the court to require the prison authorities to allow her to make conjugal visits to see her husband. The court denied the request. It is doubtful that any court would allow conjugal visitations based purely on the right

[46] *See* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879 (1963).

[47] Comment, *The Right of Expression in Prison*, 40 S. CAL. L. REV. 407, 408 (1967).

[48] Durham Sun, Jan. 4, 1970, § A, at 2, col. 4.

[49] Comment, *The Right of Expression in Prison, supra* note 47, at 421 n.68.

[50] 371 F.2d 348 (D.C. Cir. 1966).

[51] 253 F.2d 867 (D.C. Cir. 1958).

to freedom of expression although such visits are hardly devoid of rehabilitative benefit.

Access to the Courts

"Reasonable access to the courts is . . . a right, being guaranteed as against state action by the due process clause of the fourteenth amendment."[52] The right of access is so valuable that "its administratively unfettered exercise may be of incalculable importance in the protection of rights even more precious."[53] Neither warden, guard, nor any other prison authority may impair an inmate's access to the courts or deny him a reasonable opportunity to communicate with his attorney to challenge his conviction or punishment.[54]

A prisoner's right to access to the courts is secured only if the delivery of mail to or from an official of the court (as distinguished from an attorney) is delayed no longer than sorting dictates. Censorship of this category of mail is unnecessary and inappropriate.[55] In *Talley v. Stephens*[56] prison authorities, under the guise of moral censorship, acquired the practice of screening petitions to the courts and refusing to mail those deemed to contain obscene, abusive, or otherwise objectionable allegations and statements. The court found this practice improper and noted that courts were quite able to protect themselves from any improper matters without the help of prison authorities. The facts found by the court also indicated that prison authorities often undertook certain actions[57] in reprisal for an inmate's attempt to acquire access to the judiciary to present a grievance. Chastising the prison administration, the court said that guaranteed access to the judicial process is "hardly actual and adequate if its exercise is likely to produce reprisals, physical or other-

[52] Hatfield v. Bailleaux, 290 F.2d 632, 636 (9th Cir. 1961), *cert. denied*, 368 U.S. 862 (1961). As authority for its statement, the court cited *Ex parte* Hull, 312 U.S. 546, 549 (1941) and White v. Ragen, 324 U.S. 760, 762 (1945). As indicated by the court, federal prisoners' access to the courts is guaranteed by the due process clause of the fifth amendment.

[53] Coleman v. Peyton, 362 F.2d 905, 907 (4th Cir.), *cert. denied*, 385 U.S. 905 (1966).

[54] Their inclination to do so has been labeled a "conspiracy of silence." Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795, 824 (1969). See Blanks v. Cunningham, 409 F.2d 220 (4th Cir. 1969) (per curiam).

[55] Coleman v. Peyton, 362 F.2d 905 (4th Cir.), *cert. denied*, 385 U.S. 905 (1966).

[56] 247 F. Supp. 683 (E.D. Ark. 1965).

[57] *Id.* at 690. These actions included beatings by trustees and guards and the discharging of shotguns at inmates in a near-miss fashion.

wise, from Penitentiary personnel."[58] Similarly, the court in *Coonts v. Wainwright*[59] held that state prison officials may not punish inmates for seeking relief from a federal court; to do so, the court reasoned, would frustrate the ancient writ of habeas corpus and deny all appeal from an unlawful commitment.[60]

Access to the courts does not mean any court but to the appropriate one, and in that sense to the official of the court designated to receive such petitions. Thus an inmate is not entitled to send materials directly to a judge because the clerk of the court is the proper person to receive petitions.[61]

The rule abhorring interference with an inmate's access to the courts does not apply so rigidly to an inmate's communication with his attorney. Although the prison is not allowed to obstruct attorney-inmate communication, it may inspect mailed communications and make auditory supervision.[62] However, it would seem that the confidential attorney-client relationship must be preserved and protected and the contents of the communications held in the strictest of confidence.[63]

The Right to Prepare Legal Material

"Although neither the states nor the federal government may be obligated to provide law libraries for their inmates or to permit them to convert their cells into libraries, some opportunities of access to such materials should be deemed an integral part of access to the courts."[64] Undeniably, the right to prepare one's legal argument is an integral part of the right to communicate with the courts.[65] Less obvious is the duty of the prison system in this regard. An inmate has no right to practice law within the confines of a penitentiary,[66] and the state is not required to

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[58] *Id.*

[59] 282 F. Supp. 893 (M.D. Fla.), *aff'd per curiam*, 409 F.2d 1337 (5th Cir. 1968).

[60] In Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961), the court implied that the right to seek relief from the judiciary exists even when the prisoner is in solitary confinement if such confinement is not temporary or for only a short period.

[61] Spires v. Dowd, 271 F.2d 659 (7th Cir. 1960).

[62] *See* Stroud v. United States, 251 U.S. 151 (1919); Cox v. Crouse, 376 F.2d 824 (10th Cir.), *cert. denied*, 389 U.S. 865 (1967).

[63] *But see* Cox v. Crouse, 376 F.2d 824 (10th Cir. 1967).

[64] Comment, *Constitutional Rights of Prisoners: The Developing Law*, 111 U. PA. L. REV. 985, 993 (1962). *But see* Barber v. Page, 239 F. Supp. 265 (E.D. Okla. 1965).

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

[66] Siegel v. Ragen, 180 F.2d 785 (7th Cir.), *cert. denied*, 339 U.S. 990, *rehearing denied*, 340 U.S. 847 (1950).

furnish its inmates lawbooks[67] although it cannot deny access to such materials through channels reasonably utilized by inmates.[68]

Prison authorities may make rules reasonably restricting preparation. In *Ex parte Wilson*[69] the court upheld a prison regulation requiring that all legal papers be prepared in a special "writ room," which had a typewriter, paper, and legal references. A similar restriction was sustained in *Hatfield v. Bailleaux*.[70] In that case, the prison authorities restricted preparation of legal documents by the general prison population to the prison library, which was open approximately thirty hours per week. Inmates were required to make an advance appointment and were limited to a three-hour stay for each visit. The court found that at the date of trial eleven persons were allowed to use the library at one time and that the maximum delay for library privileges seldom exceeded a day; these restrictions, it was decided, imposed no undue restraint on access to the courts.

In *Lockhart v. Prasse*[71] a prison regulation provided that the contents of all packages sent prisoners must be new and must be mailed directly from the store where purchased. This regulation frustrated an indigent inmate's attempt to purchase used law books to aid him in asserting the illegality of his conviction. The court upheld the regulation because it was not completely prohibitive; new books could still be bought, at least in theory, by indigents. Prison rules prohibiting the unauthorized lending of books have also been upheld,[72] as have rules restricting the number of books and papers a prisoner is allowed to retain in his cell at one time.[73]

An issue recently raised by inmates is their right to obtain legal assistance from other prisoners more experienced and competent in the art of "writ writing." In *DeWitt v. Pail*[74] the court indicated that prison authorities could prohibit assistance by other prisoners in legal matters so long as an inmate's access to the courts was not unreasonably hampered. Later cases have gone much further in holding such regula-

[67] Barber v. Page, 239 F. Supp. 265 (E.D. Okla. 1965).
[68] *See, e.g.*, Lockhart v. Prasse, 250 F. Supp. 529 (E.D. Pa. 1965).
[69] 242 F. Supp. 537 (E.D.S.C. 1965). *See also* Brown v. South Carolina, 286 F. Supp. 998 (E.D.S.C. 1968).
[70] 290 F.2d 632 (9th Cir. 1961).
[71] 250 F. Supp. 529 (E.D. Pa. 1965).
[72] United States *ex rel.* Duronio v. Russell, 256 F. Supp. 479 (M.D. Pa. 1966).
[73] Carey v. Settle, 351 F.2d 483 (8th Cir. 1965) (rule of 5 books per cell upheld); Parks v. Ciccone, 281 F. Supp. 805 (W.D. Mo. 1968).
[74] 366 F.2d 682 (9th Cir. 1966).

tions invalid.[75] In *Johnson v. Avery*[76] the United States Supreme Court upheld the right of an inmate to acquire assistance from other prisoners who were more accomplished in asserting a legal cause. The Court pointed out that there was no higher duty of governmental authorities than that of maintaining the writ of habeas corpus unimpaired. Assistance can be reasonably regulated, the Court said, but not prohibited unless the state makes alternative[77] assistance available.[78] The Court had previously held that a state could not limit the availability of a writ to only those prisoners who could pay a four-dollars filing fee.[79]

The issue of the unauthorized practice of law has also been raised in some cases.[80] In theory, such an argument is misplaced. The rationale of prohibiting unauthorized practice is to protect the general public from unskilled and incompetent persons. A prison population with no professional legal assistance available has little to lose from accepting legal aid from anyone who offers it.[81]

Absence of Right to Counsel When Appearing Before Prison Disciplinary Boards

In *Nolan v. Scafati*,[82] apparently a case of first impression, a federal district court ruled that a state prisoner does not have a constitutional right to a lawyer when the prisoner appears before an internal disciplinary

[75] *See* Arey v. Peyton, 378 F.2d 930 (4th Cir. 1967); Coonts v. Wainwright, 282 F. Supp. 893 (M.D. Fla. 1968), *aff'd*, 409 F.2d 1337 (5th Cir. 1969); White v. Blackwell, 277 F. Supp. 211 (N.D. Ga. 1967).

[76] 393 U.S. 483 (1969).

[77] Mr. Justice Fortas' opinion for the Court referred to existing or future legal-aid programs for prisoners under the auspices of the following law schools: University of Pennsylvania, University of California at Los Angeles, University of Kansas, Cornell University, and Vanderbilt University. Harvard University Law School has recently organized such a program, as has the University of Arkansas. *See* 15 A.B.A. STUDENT LAWYER J., Feb. 1970, at 4, 31.

[78] For more recent decisions, see Wainwright v. Coonts, 409 F.2d 1337 (5th Cir. 1969); Putt v. Clark, 297 F. Supp. 27 (N.D. Ga. 1969). A problem disturbing many prison officials is that writ writers often demand repayment for their services. Establishment of such debts can lead to fighting and demands for homosexual favors. Comment, *The Problems of Modern Penology: Prison Life and Prisoners' Rights*, 54 IOWA L. REV. 671, 680 (1967).

[79] Smith v. Bennett, 365 U.S. 708 (1961), had previously held that a state cannot condition a writ of habeas corpus on payment of a fee.

[80] *See, e.g.*, Siegel v. Ragen, 180 F.2d 785, 788 (7th Cir. 1950); United States *ex rel.* Wakeley v. Pennsylvania, 247 F. Supp. 7 (E.D. Pa. 1965); Edmundson v. Harris, 239 F. Supp. 359 (W.D. Mo. 1965).

[81] *See generally* Note, *Prison "No Assistance" Regulations and the Jailhouse Lawyer*, 1968 DUKE L.J. 343; Note, 25 WASH. & LEE L. REV. 281 (1968).

[82] 306 F. Supp. 1 (D. Mass. 1969).

committee of the prison, nor does he have the right to cross-examine those who have given statements against him or to call witnesses in his own defense.[83] This decision appears to be in direct conflict with the spirit of the comments of Chief Justice of the United States Warren Burger in a recent speech before the National Association of Attorneys General. In his remarks, the Chief Justice urged the states to adopt simple, workable procedures that give every aggrieved prisoner a fair hearing.[84]

Freedom from Racial Discrimination

Before the United States Supreme Court in *Brown v. Board of Education*[85] decided that "separate but equal" is not in fact equal protection under the law, a petition asserting racial discrimination in prisons would most likely have been summarily dismissed as without merit. For example, in *United States ex rel. Morris v. Radio Station WENR*,[86] the court was not attentive to allegations by Negro inmates that they were denied the opportunity because of their race to audition as announcers for a radio program conducted by inmates. And in *Nichols v. McGee*,[87] decided almost five years after the decision in *Brown*, the theory of that case was rejected in the prison context.

As the impact of *Brown* began slowly to spread, however, courts became more receptive to prisoners' allegations of racial discrimination.[88] In *Lee v. Washington*[89] the Supreme Court incisively applied the rationale of *Brown* to prisons and invalidated Alabama statutes that required segregation of the races in prisons and jails. The court refused to accept the argument that security required such segregation. The federal courts have subsequently supplemented *Lee* to guarantee equal protection for racial minorities.[90] In *Rentfrow v. Carter*,[91] the court refused to allow

[83] The effect of this decision could be devastating to one sentenced to an indeterminant term, such as from one to ten years. If falsely accused of some criminal act or violation of a prison rule, or, what is more likely, framed by the "hard-core" inmates, he may be forced to serve the full ten years although the sentencing judge may have contemplated that the prisoner would serve the minimum term and be released.

[84] Durham Sun, Feb. 6, 1970, § A, at 10, cols. 1 & 2.

[85] 347 U.S. 483 (1954).

[86] 209 F.2d 105 (7th Cir. 1953).

[87] 169 F. Supp. 721 (N.D. Cal.), *appeal dismissed*, 361 U.S. 6 (1959).

[88] *See, e.g.*, Tilden v. Pate, 390 F.2d 614 (7th Cir. 1968); Rivers v. Royster, 360 F.2d 592 (4th Cir. 1966).

[89] 390 U.S. 333 (1968).

[90] *See, e.g.*, Beard v. Lee, 396 F.2d 749 (5th Cir. 1968).

[91] 296 F. Supp. 301 (N.D. Ga. 1968).

Georgia to utilize a "freedom-of-choice" plan in the desegregation of its penal institutions. In *Wilson v. Kelley*,[92] the court held that the right of prison authorities to take into account racial tension in maintaining security, discipline, and order in prisons exists normally only after outbreaks of violence due to such tension have occurred.

Right to Freedom from Maltreatment and Cruel and Unusual Punishments

Prison life can subject the inmate to inhumane treatment from two sources: (1) his keepers or (2) his fellow inmates. Treatment received during incarceration, whether through intent, apathy, or inadvertence, may be violative of an inmate's right under the eighth amendment to be free from cruel and unusual punishments. Regardless of intent or inadvertence, "[t]he obligation of a State to treat its convicts with decency and humanity is an absolute one and a federal court will not overlook a breach of that duty."[93] Even so, an inmate unlawfully imprisoned, or one imprisoned in unsanitary conditions and constantly subjected to brutal mistreatment, has no right to misbehave or to escape.[94] However, in *United States v. Grimes*[95] the Seventh Circuit Court of Appeals has taken the probably unique position that an inmate may protect himself or his fellow inmates from unwarranted maltreatment by prison authorities.

In that case, the defendant Grimes had intervened in an altercation in which two guards were beating an inmate with long flashlights. Grimes, though using only reasonable force to protect the life of the victim of the attack, was charged with assault on a correction officer, which is a misdemeanor under federal law. The trial court denied a request for an instruction to the jury that the use of reasonable force to protect a third party was a complete defense to the crime charged. The Court of Appeals reversed and remanded, holding that the use of reasonable force against a prison guard is justified if based on the reasonable belief that such force is necessary to protect another inmate from an unprovoked assault.[96]

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[92] 294 F. Supp. 1005, 1009 (N.D. Ga. 1968).

[93] Johnson v. Dye, 175 F.2d 250, 256 (3d Cir.), *rev'd per curiam on other grounds*, 338 U.S. 864, *rehearing denied*, 338 U.S. 896 (1949).

[94] *See* Nelson v. United States, 208 F.2d 211 (10th Cir. 1953); People v. Whipple, 100 Cal. App. 261, 279 P. 1008 (1929).

[95] 413 F.2d 1376 (7th Cir. 1969).

[96] The ramifications of the case are analyzed in Note, *Criminal Law—Justification for Assault—Defense of Protecting Third Person Held to Apply to Prison Inmates*, 44 N.Y.U.L. REV. 1034 (1969).

1. Intentional Maltreatment by Prison Authorities

"The central evil is the unreviewed . . . discretion granted to the poorly trained personnel who deal directly with prisoners . . . . Prison becomes a closed society in which the cruelest of inhumanities exist unexposed."[97] The physical abuse that courts will allow inmates to undergo has gradually lessened through the ages. Methods of punishment cited by Blackstone,[98] such as dragging the condemned to the place of execution, public disembowelment, public beheading, quartering and dissecting, or public cremation of a living victim, no longer are accepted.

In *Jackson v. Bishop*[99] the court took a step toward eliminating modern physical abuse of convicts by declaring that use of the strap for disciplinary measures is violative of an inmate's constitutional right to be free from the infliction of cruel and unusual punishment. At the Cummins and Tucker Prison units of the Arkansas Correctional System, regulations prescribed ten lashes for the offenses of homosexuality, agitation, insubordination, making or concealing weapons, refusal to work when certified to be medically able, and participating in or inciting a riot. The lashes were given by a prison official using a leather whip 3½ to 5½ feet in length, four inches wide, and one-fourth inch thick, with a twelve-inch wooden handle. The prisoner was forced to lie face down and the lashes were applied to his naked buttocks. The court found such whipping manifestly cruel and unusual to modern man and offensive to "contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess."[100]

In *State v. Mincher*,[101] decided fifty-three years before Jackson, the North Carolina Supreme Court upheld the conviction of a road-gang guard, who was not authorized by the county commissioners to administer corporal punishment, for giving a convict twenty lashes across his bare back. The majority opinion, however, recognized the right of the county commissioners to authorize such punishment. In his concurring opinion Chief Justice Clark, opposing all corporal punishment said:

> "Prior to the Constitution of 1868 corporal punishment was allowed, such as branding for manslaughter, cutting off ears for perjury, and

[97] Hirshkop & Millemann, *The Unconstitutionality of Prison Life, supra* note 11, at 811-12.

[98] *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CALIF. L. REV. 839, 862 n.115 (1969).

[99] 404 F.2d 571 (8th Cir. 1968).

[100] *Id.* at 579.

[101] 172 N.C. 895, 90 S.E. 429 (1916).

> whipping and setting in the stocks for larceny and other crimes; but in no case without verdict of a jury of twelve impartial men, rendered in open court, and the sentence of a judge. The advancing civilization of the age required that corporal punishment, even in such cases and with such safeguards, should be abolished . . . . This removed from our statute book all possibility of whipping or other corporal punishment, even by the verdict of a jury, with the guaranteed right of the benefit of counsel and the judgment of a court. Certainly it could not have been contemplated that whipping should be inflicted without a verdict, without a trial of any kind, and without the sentence of a court. Such punishment without a jury trial and judgment was unknown to the law even in the most barbarous days of the common law.[102]

The same court, speaking of flogging, said previously in *State v. Nipper*,[103] "That which degrades and embrutes a man cannot be either necessary or reasonable."[104] Faced with maltreatment of a prisoner in *State v. Carpenter*,[105] the court was forced to reverse the assault conviction of a prison official for error in the charge to the jury. The defendant was found to have subjected an inmate to cruel and unusual punishment by handcuffing him to the bars of his cell by his hands and ankles and leaving him to hang there for fifty or sixty hours without food and with only a few short rest periods.

Perhaps the most publicized[106] of prison abuses occurred in Arkansas' Tucker Prison Farm through the use of the "Tucker telephone," a fearsome means of communicating the superintendent's displeasure toward an inmate. The device, originated through the genius of Superintendent James Burton, consisted of an old-fashioned hand-crank telephone apparatus that was wired to the genitals and one of the big toes of a recalcitrant prisoner. As the crank was spun, the recipient of the message was shocked almost into a state of unconsciousness. Burton recently pleaded no contest to a charge that he violated prisoners' rights by administering cruel and unusual punishment.[107] Although he received the maximum sentence, the actual penalty was far more compassionate than that which he had himself dealt out: execution of his prison term was suspended. In ex-

[102] *Id.* at 900, 90 S.E. at 431 (concurring opinion).
[103] 166 N.C. 272, 81 S.E. 164 (1914).
[104] *Id.* at 275, 81 S.E. at 165.
[105] 231 N.C. 229, 56 S.E.2d 713 (1949).
[106] TIME, Feb. 2, 1970, at 10-11.
[107] *Id.* The charges were brought pursuant to 18 U.S.C. § 242 (1964).

planation of the lenient treatment, the federal judge said, "The court doesn't want to give you a death sentence, and quite frankly, Mr. Burton, the chances of your surviving that year would not be good. One or more of these persons or their friends with whom you have dealt in the past as inmates of the Arkansas penitentiary would kill you."[108]

Several recent cases have raised the issue whether solitary confinement is cruel and unusual. As a general proposition it is not per se cruel and unusual: courts tend instead to look at the conditions of the confinement.[109] Ninety-nine years in maximum-security confinement may amount to cruel and unusual treatment according to federal District Judge Miller, who in December, 1969, required the Tennessee prison authorities to come up with a plan incorporating "recreation, work, and exercise" for James Earl Ray, the convicted slayer of Dr. Martin Luther King.[110] The judge commented that "[e]nforced idleness can be cruel punishment, particularly when it is only to protect him from harm."[111]

Wright v. McMann[112] presented a situation in which a form of solitary confinement subjected an inmate to cruel and unusual punishment. The inmate was placed in what is termed in prison jargon a "strip cell." Denuded, he was exposed to bitter cold for thirty-three days, made to sleep on a cold concrete floor, forced to remain at military attention from 7:30 a.m. until 10:00 p.m., and deprived of the basic elements of hygiene such as soap, toilet paper, towels, and a toothbrush. The cell was filthy and the toilet and sink encrusted with slime, dirt and excremental residue. The windows of the cell were purposefully left open at night to admit the sub-freezing air. To the court, the case presented a horrible example of inhumanity to a fellow human being.[113]

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[108] *Id.* The case has not yet been formally reported.

[109] *See, e.g.*, Ford v. Board of Managers of N.J. State Prison, 407 F.2d 937 (3d Cir. 1969).

[110] Durham Sun, Dec. 30, 1969, § A, at 2, cols. 5 & 6.

[111] *Id.* at col. 6. An equally interesting question is whether the physical, mental, and psychological strain of an extended term of years on death row would constitute cruel and unusual punishment. Two Negroes recently released from Louisiana State Prison have spent more time on death row than any other American: sixteen years, two months, and two days. (The previous record of eleven years, ten months, and eight days was held by Carl Chessman, who was executed in California's gas chamber in 1960.) Their convictions had been to the United States Supreme Court four times and were finally reversed on the ground that Negroes were systematically excluded from the jury that convicted them of the rape of a white woman in 1950. Durham Sun, Dec. 30, 1969, § B, at 5, cols. 4 & 5.

[112] 387 F.2d 519 (2d Cir. 1967).

[113] The same feeling prompted Mr. Justice Douglas, concurring in Robinson v. California, 370 U.S. 660, 676 (1962) to exclaim, "The Eighth Amendment ex-

In *Landman v. Peyton*,[114] the Court of Appeals for the Fourth Circuit refused to find the solitary confinement imposed in that particular case unconstitutional. But Judge Sobeloff, writing for the majority, was careful to remind prison administrators that they are responsible for the actions of lower-echelon prison personnel and would be personally responsible for failure to inform themselves of abuses to inmates in solitary confinement.

2. The Prison Environment

Some judges in the District of Columbia will no longer send nonaggressive or defenseless criminals into the city's penal institutions because of the risk that such persons will become the victims of homosexual attacks, often by gangs of inmates.[115] In relating to news reporters that a juvenile was gang-raped by eight felons only a few weeks previously, one federal district court judge said, "I will put them (juveniles) on probation. I won't expose this type of young man to cruel and unusual punishment."[116]

In *Inmates of the Cook County Jail v. Tierney*,[117] federal District Court Judge Julius Hoffman denied motions to dismiss an unusual suit by inmates against the jail administration. Judge Hoffman said:

> The defendants are charged with having failed to maintain the County jail in a manner consonant with the Constitution and with other federal standards in that the plaintiffs and other members of their class have suffered from inadequate food, inadequate light and heat, a lack of recreation facilities, a lack of adequate facilities for conference with attorneys, lack of adequate sanitation facilities, a lack of adequate medical attention, a lack of privacy, an overcrowding, not to mention the danger of beatings, sexual assaults, burnings, and other forms of intimidation resulting from an inadequate guard system. It can no longer be doubted that such asserted debasing conditions as are described in the complaint would, if proven, constitute cruel and unusual punishment in violation of the Eighth Amendment.[118]

presses the revulsion of civilized man against barbarous acts—the 'cry of horror' against man's inhumanity to his fellow man." For a more recent case holding a similar confinement in a "strip cell" unconstitutional, see Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969).

[114] 370 F.2d 135 (4th Cir. 1966).

[115] Washington Post, May 4, 1969, § A, at 25, 31 cols. 1, 3.

[116] *Id.*, § A, at 31, col. 1.

[117] No. 68, C504 (N.D. Ill. 1968). The case, filed April 8, 1968, has never been formally reported.

[118] *Id.* Statement taken from transcript of the proceedings, Aug. 22, 1968, at 16-17.

The problem of sex, or, more correctly, the absence of any satisfying sexual relationships for prisoners, has been a constant problem for prison administrators:

> To confine a man apart from the female sex, in constant contact with other men, will produce what is known as deprivation homosexuality. This has been seen in prison camps, and men will become homosexual in their behavior, although they usually revert to heterosexuality on discharge when they can mix with women again. Such a thing happened, also, in the old sailing ships when men were away at sea for long voyages lasting perhaps a year or two at a time, and among cowboys of the Old West in America. Such deprivation at sea not only led to homosexual acts between the members of the crew, but to wild outbreaks of heterosexuality when the sailors managed to get ashore.[119]

There were approximately one thousand sexual assaults between inmates in federal prisons reported during 1961.[120] There is no reliable estimate of the number in state prison units although cases reporting such assaults are numerous.[121] In view of this tendency of prisoners to turn to homosexual activity, Philadelphia Judge Raymond Alexander recently urged his fellow members of the bench and bar to consider permitting conjugal visits as a means of restoring a measure of sexual normalcy to inmates. Sex in jail between husbands and wives, he said, "is desirable and would make a convict's future life worth living. Otherwise a prisoner won't be worth a damn. We'll be sending monsters out into the community."[122]

Arguably, the state has no right to punish a social deviant by imprisoning him in an environment in which he may in all probabilty become a homosexual.[123] Although voluntary homosexuality requires a degree of

[119] Allen, *Should We Allow Sex for Prisoners*, Sexology, Nov. 1969, at 17-20. Dr. Allen is a well known British psychiatrist and author of numerous textbooks on deviant sexual behavior.

[120] Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 546 (1963).

[121] *See, e.g.*, Sweeney v. Woodall, 344 U.S. 86 (1952). A young Alabama Negro was allegedly forced to serve as a "gal-boy" or female for homosexual inmates. The Supreme Court refused to decide the merits because there was no showing that the inmate had exhausted his remedies in the state courts of Alabama. *See also* Muniz v. United States, 280 F. Supp. 542 (S.D.N.Y. 1968); Johnson v. United States, 258 F. Supp. 372 (E.D. Va. 1966).

[122] Allen, *Should We Allow Sex for Prisoners, supra* note 119, at 17.

[123] *See generally* Comment, *The Problem of Modern Penology: Prison Life and Prisoners' Rights*, 53 IOWA L. REV. 671, 698 (1968). Estimates of the number of inmates who engage in homosexual activities range as high as eighty per cent.

consent on the part of the participants, only the state can shoulder the blame for failing to protect an inmate from depraved sexual atrocities performed upon him by his fellow inmates. Such assaults are common in any prison; the North Carolina system is no exception.

> A case in point is the cruel indoctrination of a 17 year old boy into a North Carolina prison unit. Found guilty of a misdemeanor, the boy was committed to the misdemeanor section of a correctional unit. As a misdemeanant he was assigned to a 'dormitory,' rather than to an individual cell like a convicted felon . . . . Shortly after his arrival at the unit, when the lights were turned off in the dormitory he was brutally "raped" by a group of older homosexuals after being threatened with bodily harm if he made any noise and did not submit.[124]

The boy became a constant disciplinary problem so that he would be placed in solitary confinement and thus beyond the reach of the aggressors. However, his misbehavior prevented early parole. His attempts to avoid his aggressors being too often frustrated, he twice attempted suicide. To protect such individuals, North Carolina has developed an "I.C. Unit" to allow privacy and security.[125]

Muniz v. United States[126] is a recent case indicating the reluctance of the courts to require a warden to isolate inmates solely because of homosexual inclinations in order to protect other prisoners. An action was brought under the Federal Tort Claims Act[127] by an inmate who was

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[124] Ashman, *The "I.C. Unit" New Device to Provide Protection*, 32 POPULAR GOVERNMENT 5 (Apr. 1966). "I.C." stands for individual cell.

[125] *Id.* However, few of these units are now in existence, primarily because of the cost and a lack of legislative sympathy. See also Britt, *A Case to Illustrate the Need for Single Cells in Prison Correctional Programs*, 32 POPULAR GOVERNMENT 2 (Apr. 1966).

After a thorough investigation of the North Carolina prison system, a reporter for *The Charlotte Observer* recently wrote that

> [s]omewhere in North Carolina's prison system this week a boy will be raped—maybe once, possibly three or four times in one night by different men. Somewhere behind the bars an effeminate young man too weak or too scared to fight back will be auctioned as a homosexual partner . . . . The victim might be serving as little as 30 days for public drunkenness. He might be a high school student from a "good home" who stole a car. He might be a businessman who was a solid citizen until he stole some money in one moment of desperation.

Charlotte Observer, March 30-April 9, 1969 (Series Reprint) at 2. North Carolina Commissioner of Correction Bounds has admitted the accuracy of this report: "[I]f someone were to put me on the stand tomorrow and ask me if it were true, then I would have to say that I believe it is true." *Id.*

[126] 280 F. Supp. 542 (S.D.N.Y. 1968).

[127] 28 U.S.C. §§ 1346(d), 2671-80 (1964).

beaten by a group of eleven other convicts when he tried to protect a friend from homosexual attacks by a member of the gang. In an attempt to prove negligence on the part of prison officials, the inmate argued that prison authorities were under a duty to isolate known homosexuals for the protection of the general inmate population. Denying relief, the court said, "No authority has been discovered requiring a warden to isolate inmates solely because of their homosexual inclinations in order to protect other inmates or from fear of such unanticipated acts as occurred here, including the assaultive proclivities or acts of the other inmates."[128] In any custodial situation, however, the general rule is that the warden or jailer is under a duty to exercise reasonable care to insure the safety of his prisoners. He can be held accountable for tort damages for subjecting prisoners to dangers from other inmates of which he is or should be aware.[129]

An equal-protection argument by a prisoner seeking to impose a duty on prison officials to protect him from assaults would probably have less persuasive effect upon a court[130] than would a camplaint based upon the eighth amendment's prohibition against cruel and unusual punishments. In *Holt v. Sarver*[131] the court faced squarely the issue of the state's duty under the eighth amendment to protect inmates. At the Cummins Farm Unit of the Arkansas State Penitentiary, prisoners were placed in large barracks at night. The court said:

> Since the inmates sleep together in the barracks, an inmate has ready access to any other inmate sleeping in the same barracks. Many of the inmates have weapons of one sort of another . . . .

[128] Muniz v. United States, 280 F. Supp. 542, 547 (S.D.N.Y. 1968). In Johnson v. United States, 258 F. Supp. 372 (E.D. Va. 1966), the court rejected an ingenious attempt by a homosexual inmate to impose a duty upon penal institution authorities to protect him from the adverse effects of his own conduct. The inmate, who had a reputation for homosexual attacks on others, was beaten and stabbed by a gang of vindictive heterosexuals.

[129] *See, e.g.*, Glover v. Hazelwood, 387 S.W.2d 600 (Ky. 1964) (person jailed for drunkenness and placed in cell with convicted murderer); Julian v. State, 98 So.2d 284 (La. Ct. App. 1957) (inmate placed in cell with mentally deranged convict and slashed to death with knife that jailer had negligently failed to discover); Dunn v. Swanson, 217 N.C. 279, 7 S.E.2d 563 (1940) (weak prisoner locked in a cell with one violentlly insane); Taylor v. Slaughter, 171 Okla. 152, 42 P.2d 235 (1935) (jailer allowed "kangaroo court" of inmates to beat other inmates at will).

[130] *See* Williams v. Field, 416 F.2d 483 (9th Cir. 1969), in which the court held that the failure of a warden to protect a particular inmate from attack by a fellow inmate did not deprive the victim of equal protection of the laws.

[131] 300 F. Supp. 825 (E.D. Ark. 1969).

> At times deadly feuds arise between particular inmates, and if one of them can catch his enemy asleep it is easy to crawl over and stab him. Inmates who commit such assaults are known as "crawlers" and "creepers," and other inmates live in fear of them.
>
> . . . .
>
> The Court is of the view that if the State of Arkansas chooses to confine penitentiary inmates in barracks with other inmates, they ought at least to be able to fall asleep at night without fear of having their throats cut before morning, and that the State has failed to discharge a constitutional duty in failing to take steps to enable them to do so.[132]

The court gave the state corrections commissioner thirty days to set forth a plan to comply with constitutional requirements.

3. Medical Care

Serious deprivation of human rights occurs if prison officials fail to provide satisfactory medical care for inmates. The eighth amendment has been interpreted as imposing a duty to provide adequate medical care,[133] but prison officials are vested with wide discretion in determining the nature and character of medical treatment to be afforded prisoners.[134] In *Mayfield v. Craven*[135] the court held that medical personnel may be liable for improper nonmedical treatment of prisoners; for unjustifiable refusal to provide medical care; or for medical treatment that is so obviously inadequate as to amount to a refusal of urgently needed care or so obviously improper as to evidence a design to aggravate the prisoner's condition. The court went on to say that judges are not empowered to substitute their judgment for that of a licensed physician as to the propriety of a particular course of treatment afforded a prisoner-patient under his care. However, a prison physician may be sued in state courts for malpractice. In *Irwin v. Burson*[136] it was clearly indicated that the narrow test whereby federal judges refuse to substitute their judgment

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[132] *Id.* at 830-31.

[133] *See* Blanks v. Cunningham, 409 F.2d 220 (4th Cir. 1969); Riley v. Rhay, 407 F.2d 496 (9th Cir. 1969); Schack v. Florida, 391 F.2d 593 (5th Cir.), *cert. denied*, 392 U.S. 916 (1968); Snow v. Gladden, 338 F.2d 999 (9th Cir. 1964); Carter v. United States, 283 F.2d 200 (D.C. Cir. 1960); Coleman v. Johnston, 247 F.2d 273 (7th Cir. 1957); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966); McCollum v.Mayfield, 130 F. Supp. 112 (N.D. Cal. 1955); Gordon v. Garrison, 77 F. Supp. 477 (E.D. Ill. 1948).

[134] United States *ex rel.* Lawrence v. Ragen, 323 F.2d 410 (7th Cir. 1963).

[135] 299 F. Supp. 1111, 1113 (E.D. Cal. 1969).

[136] 389 F.2d 63 (5th Cir. 1967).

for that of prison physicians simply precludes the intervention of the federal courts, but that the inmate was free to pursue a tort suit in the state courts against the prison physician, who allegedly negligently exposed the prisoner to x-rays.

4. Tests for Determining What Is Cruel and Unusual Punishment

In summary, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[137] The totality of all circumstances affecting a prisoner should be examined in light of one of the following three tests[138] developed by the courts: (1) Do the circumstances amount to treatment that shocks the conscience of the court and violates concepts of fairness and decency?[139] (2) Is the treatment disproportionate to the crime?[140] (3) Does the treatment go beyond that necessary to effect legitimate penal goals?[141] Convicts, after all, are sentenced to prison *as* punishment and not *for* additional punishment.[142]

Miscellaneous Rights

The internal administration of prison affairs is generally beyond the bounds of judicial review. Thus, the state has the power to classify and confiscate all personal property received by an inmate from the outside as contraband.[143] Prison authorities have the discretion to prevent state prisoners from converting a federal bond into cash and to regulate the amount of money that an inmate is allowed to have while incarcerated.[144] They may also regulate the number of letters each inmate may accumulate at any given time.[145] Likewise, the number of books or magazines that each inmate may possess can be regulated,[146] and receipt of out-of-state

[137] Trop v. Dulles, 356 U.S. 86, 100 (1958).

[138] *See,* Note, *Criminal Law—Cruel and Unusual Punishment—Court Adopts Federal Test,* 58 KY. L.J. 93 (1969).

[139] Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

[140] Weems v. United States, 217 U.S. 349 (1910).

[141] Robinson v. California, 370 U.S. 660 (1962).

[142] Britt, *A Case to Illustrate the Need for Single Cells in Prison Correctional Programs,* 32 POPULAR GOVERNMENT 2, 4 (Apr. 1966).

[143] Konigsberg v. Ciccone, 285 F. Supp. 585, 597 (W.D. Mo. 1968) (watch); Taylor v. Burke, 278 F. Supp. 868 (E.D. Wis. 1968) (family photo album).

[144] Aragon v. Wathen, 352 F.2d 77 (9th Cir. 1965).

[145] United States *ex rel.* Lee v. Illinois, 343 F.2d 120 (7th Cir. 1965).

[146] Carey v. Settle, 351 F.2d 483 (8th Cir. 1965) (five books per cell); Parks v. Ciccone, 281 F. Supp. 805 (W.D. Mo. 1968) (twenty-five paperbacks and/or magazines at one time).

newspapers can be prohibited.[147] An inmate does not have the right to own or use a typewriter,[148] or, in fact, any personal property.[149]

In *Wilson v. Kelley*[150] the court held in essence that an inmate has no right to be rehabilitated. The court said that the state has no absolute duty toward its inmates other than to exercise ordinary care for their protection and to keep them safe and free from harm and that humane efforts to rehabilitate should not be discouraged by requiring that every prisoner must be treated exactly alike. Furthermore, a prisoner has no right to remain in any particular prison unit and can be shuttled about in the discretion of prison authorities.[151]

Despite the adverse authority in *Wilson*, a complaint[152] was filed recently in the Court of Common Pleas, Richland County, South Carolina, by an inmate for himself and all other inmates similarly situated in county prison camps. The complaint alleges that the procedure whereby inmates are chosen to go to work camps, rather than to institutions of the State Department of Corrections that are equipped with a rehabilitative program of academics, recreation, sports, and social and vocational activities, is arbitrary and capricious and therefore constitutes a denial of equal protection. The petitioner, sentenced to nine years and assigned to a work camp, is destined to serve his penalty working South Carolina roads. He is making an assertion of a *right* to rehabilitative treatment. Final disposition of the case is pending.

While the right of a prisoner to receive treatment designed to rehabilitate him has not yet been established, it is fairly clear that a prisoner who is criminally insane is entitled to psychiatric treatment.[153]

There exists no right of prisoners to protest—even peacefully; inmates attempting to organize a collective demonstration against purported irregularities at a prison can be punished.[154]

The authority of prison administrators to select the "proper" visitors for inmates has been said to be unquestionable—even a wife can be ex-

[147] United States *ex rel.* Oakes v. Taylor, 274 F. Supp. 42 (E.D. Pa. 1967).
[148] Parks v. Ciccone, 281 F. Supp. 805 (W.D. Mo. 1968).
[149] Konigsberg v. Ciccone, 285 F. Supp. 585 (W.D. Mo. 1968); Taylor v. Burke, 278 F. Supp. 868 (E.D. Wis. 1968).
[150] 294 F. Supp. 1005 (N.D. Ga. 1968).
[151] United States *ex rel.* Stuart v. Yeager, 293 F. Supp. 1079 (D.N.J. 1968).
[152] McLamore v. Leeke, Court of Common Pleas, Richland County, South Carolina, petition filed September, 1969.
[153] Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966).
[154] Roberts v. Pepersack, 256 F. Supp. 415 (D. Md. 1966), *cert. denied*, 389 U.S. 877 (1967).

cluded.[155] Also, the visitation privileges of one on death row can be terminated.[156]

There is some recent authority that money can be taken from a prisoner's work fund to cover expenses incurred by the state in recapturing and returning him after his escape.[157] However, the North Carolina Supreme Court held over thirty years ago that the state could not recover such expenses from a prisoner.[158] The court said that recapturing escaped prisoners is a public duty required by law for which public funds have been appropriated.[159]

Some states have so-called "civil-death" statutes,[160] which generally declare a convict civilly dead so that he is deprived of a right to contract, to take or hold property, or to bring a civil action. In many states having such statutes, conviction of a felony and a lengthy sentence to prison automatically terminates the existence of the prisoner's marriage instead of merely being grounds for divorce.[161] In most states, even those that do not have civil-death statutes, a convicted felon faces the probability of temporary or permanent disenfranchisement.[162]

REMEDIES

"The existence of prisoner rights provides small solace unless they can be translated into reality."[163] When an inmate's rights have been unreasonably abused or altogether denied, the most crucial issue facing him is what remedy to pursue in redress of the wrong. The following discussion is devoted to remedies that a prisoner is most likely to pursue.[164]

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[155] Akamine v. Murphy, 108 Cal. App. 2d 294, 238 P.2d 606 (1951).

[156] Labat v. McKeithen, 361 F.2d 757 (5th Cir. 1966); United States *ex rel.* Raymond v. Rundle, 276 F. Supp. 637 (E.D. Pa. 1967).

[157] Sigler v. Lowrie, 404 F.2d 659 (8th Cir. 1968).

[158] See North Carolina State Hwy. and Pub. Works Comm'n. v. Cobb, 215 N.C. 556, 2 S.E.2d 565 (1939), in which the North Carolina Supreme Court held that the state could not recover from a prisoner expenses incurred in his recapture.

[159] *Id.* at 559, 2 S.E.2d at 567.

[160] For a detailed discussion of civil-death statutes, *see generally* Comment, *The Rights of Prisoners While Incarcerated*, 15 BUFFALO L. REV. 397 (1965).

[161] *See* Zizzo v. Zizzo, 41 Misc. 2d 928, 247 N.Y.S.2d 38 (Sup. Ct. 1964). *See also* Garner v. Schulte Co., 23 App. Div. 2d 127, 259 N.Y.S.2d 161 (1965).

[162] *See generally* Comment, *The Ex-Convict's Right to Vote*, 40 S. CAL. L. REV. 148 (1967). *See also* N.C. CONST. art. VI, § 2(3).

[163] Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985, 1004 (1962).

[164] The major focus of this comment is upon the rights of prisoners. The discussion of remedies will be far from dispositive. The reader should refer to the cases cited in the section on prisoners' rights to ascertain the remedies pursued.

The Federal Tort Claims and Prisoner Compensation Acts

Congress, through the Federal Tort Claims Act,[165] has eliminated the sovereign immunity of the United States from suit by anyone injured due to certain types of tortious conduct by a federal employee. Until 1963, courts had consistently refused to allow prisoners in federal penitentiaries to recover under the Act,[166], but in *United States v. Muniz*[167] the United States Supreme Court disapproved this judicial reluctance. Two cases[168] were brought by prisoners under the Act. The United States applied to the United States Supreme Court for writs of certiorari to contest adverse decisions by the Court of Appeals for the Second Circuit. The Court affirmed awards to both prisoners under the Act. Muniz was permitted to recover for injuries sustained when he was beaten by fellow inmates after being locked in a dormitory by a negligent guard during a prison riot. The other prisoner, Winston, was allowed to recover for loss of his vision caused by a brain tumor; he had constantly complained of headaches to the prison physician, who had negligently failed to take any action.

One of the highest recoveries by a prisoner under the Federal Tort Claims Act went to underworld figure Mickey Cohen, who received a 110,000-dollar judgment for injury inflicted on him by another inmate due to the negligence of federal prison authorities, who failed to take proper security precautions in confining the attacker, an extremely dangerous and violent inmate.[169]

The Prisoner Compensation Act of 1958[170] provides coverage similar to state workmen's compensation statutes for prisoners actually engaged in work in prison industry and maintenance who are injured on the job. In *United States v. Demko*[171] the Supreme Court held that recovery under this Act bars any further recovery under the Federal Tort Claims Act.

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[165] 28 U.S.C. §§ 1346(d), 2671-80 (1964).

[166] *See generally* Note, *Prisoner in Federal Penitentiary May Sue Under Federal Tort Claims Act*, 63 COLUM. L. REV. 144 (1963); Note, *Administrative Law: Torts: Federal Tort Claims Act: Prisoner Suits*, 48 CORNELL L.Q. 525 (1963); Note, *Federal Tort Claims Act—In General—Federal Prisoner May Sue United States for Injuries Resulting from Negligence of Prison Physician*, 76 HARV. L. REV. 413 (1962).

[167] 374 U.S. 150 (1963).

[168] Muniz v. United States, 305 F.2d 264 (2d Cir. 1962); Winston v. United States, 305 F.2d 253 (2d Cir. 1962).

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

[170] 18 U.S.C. § 4126 (1964).

[171] 385 U.S. 149 (1966).

Habeas Corpus to Federal District Courts

The writ of habeas corpus[172] is the most commonly used of the traditional remedies in cases of alleged mistreatment of prisoners.[173] Until 1944, the writ was ordinarily refused unless the prisoner's application challenged the validity of his confinement instead of the manner.[174] Since then, the federal district courts have begun to follow *Coffin v. Reichard*,[175] in which the Court of Appeals for the Sixth Circuit said, "Any unlawful restraint of personal liberty may be inquired into on habeas corpus . . . . This rule applies although a person is in lawful custody. His conviction and incarceration deprive him only of such liberties as the law has ordained he shall suffer for his transgressions."[176]

In *Johnson v. Avery*[177] Mr. Justice Fortas, speaking for the Supreme Court, said in reference to the writ that "there is no higher duty to maintain it unimpaired."[178] However, the availability of the writ to prisoners apparently has begun to burden unduly the federal courts. Chief Justice Burger recently stated that prisoners' habeas corpus petitions to federal courts usually are without merit and have been "sand, if not gravel, in federal-state relationships."[179]

Provisions of Civil Rights Acts

Because of the hesitancy of states to prosecute their own prison authorities for atrocities, which incumbent state politicians would understandably prefer to keep quiet, the majority of prosecutions involving brutality to prisoners are brought under title 18, section 242, of the United States Code (the Civil Rights Act of 1948), which provides as follows:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitants of any State, Territory, or District to the deprivation of any rights, privileges, or immunities

[172] 28 U.S.C. § 2242 (1964) provides a simple procedure for application to federal district courts for the writ, the major condition being that the application must be in writing and verified.

[173] *See generally* Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962).

[174] *See generally*, Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960).

[175] 143 F.2d 443 (6th Cir. 1944).

[176] *Id.* at 445.

[177] 393 U.S. 483 (1969).

[178] *Id.* at 485, *quoting* Bowen v. Johnston, 306 U.S. 19, 26 (1939).

[179] Durham Sun, Feb. 6, 1970, § A, at 10, cols. 1&2.

> secured or protected by the Constitution or laws of the United States . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life."[180]

State prison authorities have been convicted under this section for willful physical mistreatment of prisoners, willful failure to protect prisoners from third persons, and willful extortion of prisoners' funds.[181]

Title 42, section 1983, of the Code (the Civil Rights Act of 1871)[182] provides a basis on which prisoners can recover civil damages from prison officials. The section reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[183]

Remedies in State Courts

Although prisoners seem hesitant to pursue remedies in state courts, habeas corpus, mandamus, and other traditional forms of relief are generally available.[184] Prison personnel guilty of intentional maltreatment or criminal negligence are subject to prosecution in state courts for violation of the state criminal code. Some jurisdictions allow inmates to assert

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[180] 18 U.S.C. § 242 (1964).

[181] For cases brought pursuant to this section *see, e.g.*, United States v. Jackson, 235 F.2d 925 (8th Cir. 1956); United States v. Jones, 207 F.2d 785 (5th Cir. 1953); Lynch v. United States, 189 F.2d 476 (5th Cir. 1951); United States v. Apodaca, 188 F.2d 932 (10th Cir. 1951); United States v. Walker, 121 F. Supp. 458 (N.D. Fla. 1954); Gordon v. Garrison, 77 F. Supp. 474 (E.D. Ill. 1948). See also Caldwell and Brodie, *Enforcement of the Criminal Civil Rights Statute, 18 U.S.C. Section 242, in Prison Brutality Cases*, 52 GEO. L.J. 706 (1964).

[182] 42 U.S.C. § 1983 (1964).

[183] *Id.* It should be noted that only a *person* and not a state can be sued under this section. For cases brought pursuant to this section *see, e.g.*, Abernathy v. Cunningham, 393 F.2d 775 (4th Cir. 1968); Irwin v. Burson, 389 F.2d 63 (5th Cir. 1967); Douglas v. Sigler, 386 F.2d 684 (8th Cir. 1967); Kent v. Prasse, 385 F.2d 406 (3d Cir. 1967); Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967); Negrich v. Hohn, 379 F.2d 213 (3d Cir. 1967); Brown v. Brown, 368 F.2d 992 (9th Cir. 1966); Medlock v. Burke, 285 F. Supp. 67 (E.D. Wis. 1968); Taylor v. Burke, 278 F. Supp. 868 (E.D. Wis. 1968); Jackson v. Bishop, 268 F. Supp. 868 (E.D. Ark. 1967).

[184] *See generally* Note, *A Prisoner's Right to Sue for Personal Injuries*, 41 TEMP. L.Q. 222 (1968).

civil claims under a state tort claims act.[185] For example, North Carolina has such an act,[186] which provides for a maximum recovery of fifteen thousand dollars. In *Gould v. North State Highway and Public Works Commission*,[187] the North Carolina Supreme Court upheld an award under the tort claims statute of three thousand dollars to the estate of a prisoner for her wrongful death, which was caused by a state employee who was acting within the scope of his employment. Unreasonable force used in subduing the female inmate had resulted in a neck injury causing her death. The holding of this case would seem to remove any doubt in regard to whether a prisoner could recover under the North Carolina act.

Inmates also have the alternative of bringing a civil action in the state courts of North Carolina against individual prison officials. In *State ex rel. Dunn v. Swanson*[188] a jailer and the sheriff's surety were held liable for the death of a prisoner who was placed in a cell with a violently insane man who killed the prisoner by beating him with a table leg torn from a table in the cell. In *State ex rel. West v. Ingle*[189] the complaint of a prisoner alleging that he was negligently slung from a garbage truck on which he was riding as his work assignment was found to state a cause of action against the driver, the superintendent of the prison farm, and the surety on their bonds. The North Carolina Supreme Court has also held that members of the state prison commission and the director of prisons are not immune from suit.[190]

CONCLUSION

The pressing problem in the correctional setting today is that of societal ignorance, apathy, and indifference to the deficiencies inherent in the nature of the existing prison system. Inmates are presently entitled

[185] With regard to suits under the tort claims statute in New York, see Green v. State, 278 N.Y. 15, 14 N.E.2d 833 (1938).

In a recent case, an inmate of the New York prison system, by what correctional officials termed a "tragic mistake," was confined to prison for thirty-four years for stealing candy worth five dollars as a boy of sixteen. The sentence was twenty-four years more than the maximum term for the crime. Now, at age 60, he is suing the State of New York for 115,000 dollars as partial compensation for "the lifetime he could never enjoy." Durham Sun, Dec. 23, 1969, § B, at 7, col. 1.

[186] N.C. GEN. STAT. § 143-291 (Supp. 1969). See also N.C. GEN. STAT. §§ 148-82 to -84 (1964) which compensate one wrongfully convicted of a felony.

[187] 245 N.C. 350, 95 S.E.2d 910 (1957). *See also* Ivey v. North Carolina Prison Dep't, 252 N.C. 615, 114 S.E.2d 812 (1960).

[188] 217 N.C. 279, 7 S.E.2d 563 (1940).

[189] 269 N.C. 447, 152 S.E.2d 476 (1967).

[190] Parr v. Garibaldi, 252 N.C. 803, 115 S.E.2d 18 (1960).

only to the skeletal remains of the state purse and most are thus destined to remain forever "dregs" of society in antiquated institutions that do little for criminals other than prepare them for a recidivist career.[191] Indeed, the cause of some American domestic turmoil could well be "years of neglect . . . for our system of correction."[192]

A fundamental right of all inmates, implied in the eighth amendment, is the preservation of individual dignity. The prevalence of sexual attack and other assaults by inmates on other prisoners emphasizes the failure of the state to preserve this right. The premise of this comment has been:

> If a man is going to be convicted of a crime and stripped of his liberty by society's law, then we must enable him to live in an environment where he can depend on the law to protect him—not in a lawless society where he survives only by breaking the law, where the law is fear.[193]

The duty of the state seems clear: it must either provide a safe environment for those whom it deems necessary to incarcerate, or else it must devise some alternative method to vindicate the public conscience when a criminal abuses the social order.[194] At present neither has been accomplished to any adequate degree.[195] It is highly unlikely that judicial inter-

[191] The idea was espoused in a speech by Chief Justice Warren Burger at the American Bar Association's annual meeting, Dallas, Texas, 1969. 14 AM. BAR. NEWS (Dec. 1969), at 1.

[192] Statement by President Segal, American Bar Association, in an address before the Oklahoma Bar Association, Oklahoma City, December 5, 1969. 14 AM. BAR NEWS (Dec. 1969), at 1.

[193] Charlotte Observer, *supra* note 125, at 24.

[194] Arguably only those who present a danger to the community or those commiting heinous crimes should be incarcerated. The public conscience could be reasonably satisfied by restricting a man's liberty (for example through parole or probation) rather than taking it away completely. This solution has an economic appeal as well. It costs 72 cents per day to supervise a parolee in North Carolina, but 5.68 dollars per day are required to confine an inmate in prison. An average annual saving of six million dollars would result by placing most prisoners on parole. In addition, the 3,300 parolees in North Carolina earned 6.4 million dollars in taxable income in 1968, and because they were employed, the state and counties saved 218,220 dollars in welfare payments to their dependents. *Id.* at 13. The savings that would result if only dangerous criminals were incarcerated could be employed to provide suitable facilities for those actually imprisoned.

[195] However, North Carolina Commissioner of Correction Bounds has added this degree of optimism:

> I am confident that an adequately informed public will not permit these conditions to continue. The widespread support required for the extirpation of evils rooted in an era of penological history which was characterized by step-chains, striped clothing, and brutal punishment arbitrarily administered by prison personnel unfit for the functions assigned to them, can be effected