ESTABLISHING THE RULE OF LAW IN PRISONS:

A MANUAL FOR PRISONERS' RIGHTS LITIGATION

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FOR MOST OF OUR HISTORY, the complaints of prisoners about conditions of life in prison were ignored by the courts. Judicial review was avoided under the "hands-off" doctrine.[2] The courts reasoned that the handling of persons convicted of a crime was a difficult task that required considerable expertise that they did not possess. Therefore, the courts deferred in all matters of treatment of prisoners to the presumed administrative expertise of prison officials.[3] This immunity from judicial scrutiny led to a tradition of lawlessness in the corrections phase of the criminal process. The elaborate constitutional protections afforded the accused before and during trial stopped at the point of sentencing. What happened to the convicted after sentencing was not a matter of judicial or, indeed, public concern.

Yet more than 95 percent of the inmates of the nation's prisons will return to society, either on parole or upon the expiration of their sentences.[4] The experience of these inmates while in prison will largely determine their chances of becoming productive and law-abiding citizens after release. Thus, what happens in prison is of critical importance not only to the relatively few offenders who are caught and convicted of crimes but also to the nation, which faces a general crisis of crime control. It is perhaps with all this in mind that Chief Justice Burger described the prison system as "the most neglected, the most crucial and probably the least understood phase of the administration of justice."[5]

This Article deals with the rights of prisoners while incarcerated. It is not concerned with sentencing, probation, parole,[6] or postrelease civil disabilities.[7]

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1. Landman v. Peyton, 370 F.2d 135, 140 (4th Cir. 1966).
2. Expression of the doctrine is found even in recent cases. *E.g.*, "We have consistently adhered to the so-called "hands-off" policy in matters of prison administration according to which we have said that the basic responsibility for the control and management of penal institutions, including the discipline, treatment, and care of those confined, lies with the responsible administrative agency and is not subject to judicial review unless exercised in such a manner as to constitute clear abuse or caprice upon the part of prison officials." Bethea v. Crouse, 417 F.2d 504, 505-06 (10th Cir. 1969). *See also* Starti v. Beto, 405 F.2d 858, 859 (5th Cir. 1969); Douglas v. Sigler, 386 F.2d 684, 68 (8th Cir. 1967). For a collection of judicial formulations of the doctrine see Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 Yale L.J. 506, 508 n.12 (1963). A more primitive judicial attitude toward prisoners was expressed by the Supreme Court of Virginia: "He [the convicted felon] 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).
3. Thorough analysis and criticism of the hands-off doctrine and its various formulations can be found in Note, *supra* note 2; Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. Pa L. Rev. 985 (1962).
4. *See generally* CALIFORNIA ASSEMBLY COMMITTEE ON CIVIL PROCEDURE, DETERRENT EFFECTS OF CRIMINAL SANCTIONS 32, 34 (May 1968).
5. Address by Chief Justice Burger, Centennial Convocation of the Association of the Bar of the City of New York, Feb. 17, 1970, in 25 RECORD OF N.Y.C.B.A. 14, 15 (Supp., March 1970).
6. A prisoner's most important legal problem is obtaining early release. Establishing a right to early and fair parole consideration and to procedural due process in the granting and revocation of parole is, however, beyond the scope of this Article. There are indications that courts may move away from the notion that parole is a matter of the "grace" and unfettered discretion of

The discussion concerns the internal prison problems most frequently raised and litigated by prisoners. First, the substantive issues will be discussed, with an outline of what the law is and, in some cases, what it should be. Then the question of federal jurisdiction and the proper standards of judicial review will be discussed, followed by suggestions for litigation strategy in prisoners' rights cases. Finally, appropriate judicial remedies for violations of prisoners rights will be considered. Because of the paucity of state statutes and cases establishing prisoners' rights, the focus of this Article is generally on federal constitutional rights and remedies for state prisoners, although most of the discussion applies to federal prisoners as well.

I. The Substantive Problems

The following discussion of the current state of the law is perhaps optimistic. In general, the most recent decisions are emphasized; these are the decisions that exhibit greater sensitivity to the underlying realities of prison life and consequently are more favorable to prisoners' contentions. No attempt is made to analyze older cases that are either factually distinguishable or so poorly reasoned as to be of no significant precedential value. Readers are cautioned, however, that there are many cases on the books parroting the "hands-off" slogan, and in practice these cases have to be confronted where relevant in particular jurisdictions. Readers are also cautioned that this area of the law is developing very rapidly: cases are continually being appealed and overruled, usually *sub silentio,* and new cases being brought and decided.[8]

A. Jail Conditions

JAILS ARE LOCAL short-term holding facilities designed to detain those awaiting trial and to house convicted misdemeanants—convicts sentenced to less than one year. Prisons are used to hold felons—convicts sentenced to a year or more. Jail inmates have many of the substantive problems dealt with in subsequent sections of this Article, but, perhaps because their confinement is of relatively short duration, they have rarely litigated those problems. Their suits have focused on the actual living conditions of jails rather than on some of the more complex legal questions that arise when offenders spend longer terms in prisons. Jail conditions are treated separately here primarily because (1) jail inmates awaiting trial theoretically enjoy the presumption of innocence and thus may have a claim to better treatment than convicts, and (2) unlike officials of long-term prisons, jailkeepers generally do not pretend that their detention facilities exist to rehabilitate those committed to their custody.

Conditions in short-term detention facilities are a national disgrace. Report after report of investigating commissions and grand juries disclose the existence of squalid, dehumanizing conditions in jails.[9] The public should by now be aware that jails are overcrowded; unsanitary; heavily populated with perpetrators of "victimless" crimes—drunks, prostitutes, and vagrants — with older offenders mingled with young first-timers, and with convicted criminals mixed with those awaiting trial but unable to make bail; staffed by underpaid and untrained jailers who cannot prevent—or who even participate in—assaults, homosexual attacks, and other forms of brutality; lacking in facilities, money, and personnel to provide decent medical care, adequate nutrition, minimal recreation activities,

correctional officials. *See, e.g.,* Braun v. Rhay, 416 F.2d 1066 (9th Cir. 1969); Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969); Hester v. Craven, Civil No. 70—832—F (C.D. Cal., Feb. 17, 1971); Mays v. Nelson, No. C—70 1029 AJZ (N.D. Cal., Feb. 16, 1971); Carothers v. Follette, 314 F.Supp. 1014 (S.D. N.Y. 1970) (unlawful denial of "good time" requires restoration and reference to first available parole board meeting); Ellhamer v. Wilson, 312 F.Supp. 1245 (N.D. Cal. 1969); *cf.* Mempa v. Rhay, 389 U.S. 128 (1967). *But see* Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970) (no right to procedural due process in parole grant hearing).

7. The irrationality of imposing civil disabilities on convicted persons, regardless of the crime or the forseeable effects of recidivism, is thoughtfully explored in Note, *Civil Disabilities of Felons,* 53 VA. L. REV. 403 (1967). A useful survey of all phases of corrections and the law is contained in F. Cohen, *The Legal Challenge to Corrections* (March 1969) (Consultant's Paper for the Joint Commission on Correctional Manpower and Training).
8. This Article is current as of Feb. 28, 1970.
9. *See, e.g.,* Bennett, *It's a Crime to Use the Jail,* in OF PRISONS AND JUSTICE, S. Doc. No. 70, 88th Cong., 2d Sess. 31-36 (1964). *See generally* Note, *Constitutional Limitations on the Conditions of Pretrial Detention,* 79 YALE L.J. 941 (1970).

or any educational or vocational propram.[10]

From a legal point of view, these conditions do not present sophisticated problems. It is nevertheless important to litigate the rights of jail inmates for two reasons. First, this part of the corrections system affects more people than any other; many innocent and unfortunate people spend time in jail and are exposed to conditions and people, including not only hardened criminals but also corrupt and brutal guards, that do not engender in the inmate a respect for the rule of law. Second, litigation on behalf of jail inmates presents an opportunity to compel the legislature or the public to devote attention and resources to the problem of alleviating the oppressive conditions. This is so because most of the problems in jails—*e.g.*, overcrowding, untrained staff and insufficient supervision, and inadequate medical care—can be solved by spending more money on jails. If the courts can be persuaded to rule that offenders cannot be imprisoned at all unless the inadequacies of the jail are remedied, the legislature and the public will undoubtedly spend more on jails.

There has been surprisingly little litigation of the rights of jail inmates. Perhaps the first significant case was *Inmates of the Cook County Jail v. Tierney*.[11] There Judge Julius Hoffman upheld a Civil Rights Act claim by jail inmates alleging (in a class action) that they were subjected to inadequate food, light, heat, sanitation, and medical care; lack of recreational facilities; lack of facilities for conferences with attorneys; lack of privacy; overcrowding; and exposure to beatings, sexual attacks, and other dangers resulting from an inadequate guard system. The case was settled on assurances by the defendant officials that they were effecting fundamental changes.

More recently, a federal court in New Mexico granted a preliminary injunction *releasing* jail inmates, almost all of whom were Indians, because of intolerable conditions at the Gallup jail.[12] Similar cases have been successful in ameliorating conditions in the jails of New Orleans[13] and Philadelphia.[14] Additional complaints broadly challenging jail conditions have recently been filed in New York,[15] Milwaukee,[16] Oakland,[17] and Little Rock,[18] and in the states of Connecticut[19] and Rhode Island.[20]

Several constitutional provisions are starting points for legal arguments against poor conditions in most jails. Suits filed on behalf of jail inmates who are awaiting trial, as opposed to those who are serving short-term sentences, should emphasize that these inmates enjoy the presumption of innocence and would ordinarily be at liberty if they had bail money.[21]

They should not be mingled with and treated as convicted criminals. Moreover, where the inmates have not yet had a preliminary hearing, it can be argued that any oppressive condition punishes them without trial in violation of the due process clause.[22] Intolerable jail conditions may also undermine the fifth amendment privilege against self-incrimination by creating pressures on the accused to plead guilty in order to be transferred to a state prison where conditions are more tolerable. Jail officials should bear a heavy burden of justifying restrictions and oppressive conditions imposed on untried inmates. In *Davis v. Lindsay*,[23] the

10. *See, e.g.*, authorities cited in note 9 *supra*.
11. No. 68 C. 504 (N.D. Ill., Aug. 22, 1968).
12. Curley v. Gonzales, Civil Nos. 8372, 8373 (D.N.M., Feb. 13, 1970).
13. Hamilton v. Schiro, No. 69—2443 (E.D. La., June 25, 1970).
14. Bryant v. Hendrick, 7 Crim. L. Rep. 2463 (Phila. Ct. C.P., Aug. 11, 1970).
15. Rhem v. McGrath, No. 70 Civil 3962 (S.D.N.Y., Sept. 10, 1970; Davis v. Lindsay, No. 70 Civil 7493 (S.D. N.Y., Nov. 4, 1970).
16. Inmates of Milwaukee County Jail v. Peterson, No. 70 Civil 545 (E.D. Wis., Sept. 29, 1970).
17. Brenneman v. Madigan, No. C—70—1911—AJZ (N.D. Cal., Sept. 8, 1970).
18. Hamilton v. Love, No. LR—70—C—201 (E.D. Ark., Sept. 30, 1970).
19. Seale v. MacDougal, Civil No. 14077 (D. Conn., Oct. 30, 1970).
20. Palmigiano v. Travisono, 317 F.Supp. 776 (D.R.I. 1970) (preliminary injunction).
21. *Cf.* Palmigiano v. Travisono, 317 F.Supp. 776 (D.R.I. 1970) (presumably innocent inmates awaiting trial entitled to restraining order eliminating censorship of correspondence); Tyler v. Ciccone, 299 F.Supp. 684 (W.D. Mo. 1969) (presumptively innocent inmates of federal medical center not subject to censorship rules regarding inmate manuscripts). *But see* Henry v. Ciccone, 315 F.Supp. 889 (W.D. Mo. 1970) (officials may inspect mail of unconvicted inmates).
22. *See* Jones v. Wittenberg, No. C 70—388 (N.D. Ohio, Feb. 17, 1971) (any hardship except that necessary for purpose of detention unconstitutional as to pretrial detention); Note, *supra* note 9, at 951.
23. No. 70 Civil 4793 (S.D.N.Y., Nov. 4, 1970).

court reasoned that the isolation of Angela Davis in a New York jail deprived her of equal protection because, "as a pretrial detainee whom the law presumes innocent," isolation was unnecessary to ensure her appearance at trial and was thus unjustified. Since the only legitimate purpose of pretrial detention or bail is to ensure the accused's presence at trial,[24] as opposed to imposition of punishment before trial, any condition of confinement which is not inherent in the very nature of short-term detention and is not reasonably and necessarily related to security cannot be justified. To hold otherwise would sanction invidious discrimination against those who, because of poverty, are unable to provide bail, thus raising "considerable problems for the equal administration of the law."[25]

A recent federal district court decision holding the entire Arkansas prison system to be unconstitutional provides by analogy good authority for another form of constitutional attack on jail conditions. In *Holt v. Sarver*,[26] the court found that the living conditions in the Arkansas prisons constituted cruel and unusual punishment within the meaning of the eighth amendment. Judge Henley's opinion emphasized the following four significant factors also prevalent in most jails, that made the system unconstitutional: (1) the trusty system, which places power in the hands of favored prisoners rather than paid and trained correctional officers; (2) inadequate supervision of dormitories, leaving the inmates vulnerable to homosexual attacks, stabbings, etc.; (3) squalid conditions in isolation cells to which any prisoner could be summarily relegated; and (4) the lack of any meaningful rehabilitation program.[27] Judge Henley also noted the conditions of poor sanitation that prevailed at the Arkansas prison farms, the inadequate clothing furnished prisoners, and the failure to furnish adequate medical care. Explicitly threatening to enjoin any imprisonment in Arkansas, he ordered the prison officials to file a plan for remedying the deficiencies as well as interim reports of the progress in meeting minimal standards of decency. This kind of approach seems equally suited to dealing with oppressive jail conditions.[28]

B. Access to Courts

I. Censorship, Delay, and Confiscation of Legal Pleadings and Correspondence

The first major inroad into the hands-off doctrine came in the area of access to the courts. In 1941 the Supreme Court held that prison officials may not screen prisoners' writs of habeas corpus to ascertain whether they meet the prisons' standards.[29] This case laid the basis for the now established principle that prisoners have a due process right of access to the courts that may not be unreasonably impeded by prison officials. Thus, prison officials may not confiscate or delay legal proceedings or correspondence addressed to the courts,[30] nor may they punish inmates for bringing suits against the prison administration.[31]

A related problem is the censorship of communications to judges or other public officials to whom prisoners may address appeals for assistance. While

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24. *See* Jones v. Wittenberg. No. C 70—388 (N.D. Ohio, Feb. 17, 1971); *cf.* Stack v. Boyle, 342 U.S. 1, 5 (1951).
25. *Cf.* Baintly v. United States, 82 Sup. Ct. 11, 13, 7 L. Ed. 2d 9, 11 (1961) (Douglas, J., in chambers). *See also* Williams v. Illinois, 399 U.S. 235 (1970); *In re* Antazo, 3 Cal. 3d 100 (1970); Foote, *The Coming Constitutional Crisis in Bail*, 113 U. Pa. L. Rev. 959, 1125 (1965); Note, *supra* note 9, at 947 n. 52.
26. 309 F.Supp. Ark. 1970).
27. The absence of rehabilitative opportunities is a consideration that has more force in context of long-term imprisonment than in the short-term jail situation. Generally speaking, prisons are supposed to rehabilitate offenders while jails are merely detention facilities. However, even if jails are not required to provide educational, vocational, counselling, and other rehabilitative services, at least they should provide alternatives to the complete idleness that prevails in most jails. That is, jails should provide adequate recreational and work opportunities to occupy the time of the inmates.
28. *See* Note, *supra* note 9, at 941-42, 954.
29. *Ex parte* Hull, 312 U.S. 546 (1941).
30. *See* Sigafus v. Brown, 416 F.2d 105 (7th Cir. 1969); Smartt v. Avery, 370 F.2d 788, 790 (6th Cir. 1967); Landman v. Peyton, 370 F.2d 135, 137 n.1 (4th Cir. 1966); DeWitt v. Pail, 66 F.2d 682, 685 (9th Cir. 1966); McCloskey v. Maryland, 337 F.2d 72, 74 (4th Cir. 1964).
31. *See*, Sostre v. McGinnis, No. 35038 (2d Cir., Feb. 24, 1971); United States *ex rel* Cleggett v. Pate, 229 F. Supp. 818, 822 (N.D. Ill. 1964). In *Gaulden v. Procunier*, No. C—70—1990—ACW (N.D. Cal., Sept. 29, 1970), *Brenneman v. Madigan*, No. C—70—1911—AJZ (N.D. Cal., Sept. 8, 1970), and *Smith v. Carberry*, No. C—70—1244—LHB (N.D. Cal., June 12, 1970), the prisoner-plaintiffs obtained restraining orders at the outset of the litigation enjoining official reprisals for bringing the action. In *Gaulden* the court subsequently granted a preliminary injunction extending the protection for the pendency of the action (order of Oct. 28, 1970).

some prison systems permit such communications to go out in sealed envelopes,[32] others censor all outgoing communications.[33] Where censorship is practiced, any communications that are critical of the prison administration are likely to be read by the officials, delayed, copied, and often not permitted to leave the prison. But prison officials have no legitimate interest in blocking communications from prisoners to judges or other public officials. Only the recipients of prisoner letters should be permitted "to determine whether the contents warrant their intervention and not the very person whose jurisdiction and conduct are being questioned."[34] Clearly, prisoners cannot be disciplined for statements made in communications to a court.[35] Two courts have enjoined prison officials from even reading any correspondence from a prisoner to a court.[36] But the Second Circuit *en banc* recently held that although the officials may not delete, withhold, or refuse to mail communications to courts — even where the communications are irrelevant to the prisoner's case, false, or malicious — the officials may open and read all incoming and outgoing correspondence and may delete, withhold, or refuse to mail communications where the prisoner's "sole motivating purpose" is to communicate about "restricted matters," and it can thus "be demonstrated that a prisoner has clearly abused his rights of access" to the courts.[37] The court's holding, however, lumped together correspondence with judges, public officials, and attorneys. The court reasoned that a prisoner might abuse his right of access to the courts by using such correspondence as a pretext for transmitting "contraband" or engaging in some unlawful scheme. This reasoning is not persuasive, at least as to correspondence with courts and public officials. The likelihood that responsible judicial or executive officers will traffic in contraband or illegally plot with prisoners seems exceedingly slim and certainly does not outweigh the prisoner's interest in unfettered communication with them.

Correspondence with attorneys and legal service organizations should also be free from censorship, since prison officials have no legitimate concern with attorney-client correspondence or attempts by prisoners to interest attorneys or legal services organizations in their cases.[38] However, prison officials argue that censorship of correspondence with attorneys is necessary because some correspondents could impersonate attorneys or use an attorney's stationery while carrying on illicit business with the prisoner. Also, prison officials claim that some attorneys are unscrupulous and will assist prisoners in carrying on criminal enterprises while incarcerated. The slender possibility of some impropriety, however, simply does not justify a blanket policy of censorship of all correspondence between prisoners and attorneys.[39] Prison officials can easily ascertain whether addressees of prison correspondence are really members of the Bar. Attorney visits are ordinarily confidential; there is no reason why communication by mail should not be equally privileged. Permitting unlimited inspection of correspondence by prison officials, especially

32. In federal prisons, inmates are permitted to send sealed, uncensored letters to any judge, attorney general, senator, or similar official. *See* Federal Bureau of Prisons, Policy Statement 7300.2A (Dec. 28, 1967); Barkin, *Impact of Changing Law Upon Prison Policy*, 42 PRISON J. 3, 15 (1969); Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795, 826 n.165 (1969).
33. *See, e.g.*, TEXAS DEPARTMENT OF CORRECTIONS, RULES AND REGULATIONS 12—14 (1968); NEW YORK STATE DEPARTMENT OF CORRECTIONS, INMATE'S RULE BOOK 14 (1961).
34. Brabson v. Wilkins, 19 N.Y.2. 433, 439, 227 N.E.2d 561, 564 (1967) (Keating, J., dissenting); *accord*, Sostre v. Rockefeller, 312 F.Supp. 863 (S.D.N.Y. 1970). *rev'd in part sub nom.* Sostre v. McGinnis (2d Cir., Feb. 24, 1971); Wright v. McMann, No. 66 CV 77 (N.D.N.Y., July 31, 1970); Palmigiano v. Travisono, 317 F.Supp. 776 (D.R.I. 1970).
35. Palmigiano v. Travisono, 317 F.Supp. 776 (D.R.I. 1970); Carothers v. Follette, 314 F.Supp. 1014 (S.D. N.Y. 1970).
36. *See* cases cited in note 35 *supra*.
37. Sostre v. McGinnis, No. 35038 (2d Cir., Feb. 24, 1971) (slip. op., at 1677-79).
38. Some prisons have banned inmates from corresponding with lawyers or legal assistance agencies such as the American Civil Liberties Union on the ground that the attorneys did not yet represent the prisoners, but courts have properly replied that access to the courts includes a reasonable opportunity to interest attorneys in taking the prisoner's case. Nolan v. Scafati, 430 F.2d 548 (1st Cir. 190); McCloskey v. Maryland, 337 F.2d 72, 74 (4th Cir. 1964); Candelaria v. Mancusi, Civ. 1970 —491 (W.D.N.Y., Jan. 7, 1971); Glenn v. Wilkinson, 309 F. Supp. 411, 417 n.6 (W.D. Mo. 1970); *cf. In re* Ferguson, 55 al. 2d 663, 667-68, 361 P.2d 417, 424-25, 12 Cal. Rptr. 753, 760-61 (1961). *But see* Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970) (officials may place reasonable restrictions on correspondence with A.C.L.U.). In McDonough v. Director, 429 F.2d 1189 (4th Cir. 190), the court held that a prisoner must be permitted to write *Playboy* magazine in an effort to raise funds for his defense but stipulated that his letters must not be critical of the administration.

where the officials themselves are potential defendants in a prisoner's suit, makes abuses far too easy. At the very most, prison officials should be permitted to open correspondence coming into the prison (but not going out) to check for contraband.[40] Officials may thus serve any legitimate penal interest without censoring all correspondence and thereby destroying the attorney-client privilege and restricting free expression, the right to petition for redress of grievances, and free access to the courts.

2. The Jailhouse Lawyers

Many prisoners are deeply involved in bringing legal attacks against their convictions or sentences. One prisoner has well expressed a philosophical basis for this preoccupation: "It is not unusual, then, in a subculture created by criminal law, wherein prisoners exist as creatures of the law, that they should use the law to try to reclaim their previously enjoyed status in society."[41] But the states generally do not provide counsel in postconviction proceedings, at least until a court determines that the pleading requires an evidentiary hearing. Prisoners have no assistance or very limited preliminary assistance in ascertaining whether they have possible grounds for a collateral attack on their conviction or sentence and in drafting pleadings sufficiently directing the court's attention to valid claims. Because of the lack of officially provided legal assistance in postconviction proceedings, prisoners naturally resort to self-help.

In 1969 the Supreme Court held in *Johnson v. Avery*[42] that unless prison officials provide reasonable legal assistance to inmates they may not validly enforce a regulation barring inmates from helping each other with legal work. The decision followed lower court holdings striking down similar regulations in Florida[43] and at the federal prison in Atlanta, Georgia.[44] The Supreme Court explicitly rejected the argument that inmate legal assistance must be banned because "jailhouse lawyers" would interfere with prison discipline.[45] Moreover, the Court condemned the regulation against legal assistance without any showing that the jailhouse lawyer involved was competent to give sound legal advice or confined his services to persons who actually needed them and without a showing that any particular prisoner had actually been denied needed assistance.[46] While the Court rested its decision on a due process right of unimpeded access to the courts, it noted that the district court had also relied on the federal habeas corpus statute,[47] which, the Court said, apparently contemplates that habeas corpus applications may be prepared by laymen acting on behalf of the petitioners.[48]

Following the *Johnson* decision, lower courts have struck down regulations against legal assistance in Alabama,[49] Arizona,[50] California,[51] and New York.[52]

39. *See* authorities cited in note 34 *supra; cf.* Coleman v. Peyton, 362 F.2d 905, 907 (4th Cir.), *cert. denied*, 385 U.S. 905 (1966); Hymes v. Dickson, 232 F. Supp. 796 (N.D. Cal. 1964). Clearly unjustified is the former practice in New York and probably elsewhere of excising matters in prisoner-attorney correspondence not directly related to the validity of incarceration or the prisoner's treatment while imprisoned. *Sostre v. McGinnis*, No. 35038 (2d Cir., Feb. 24, 1971), held that excision is permissible only in special circumstances where the officials can demonstrate a need to block some unlawful scheme. *See* text accompanying note 37 *supra*. The court in *Sostre* also held that the officials have a right to open and read attorney-prisoner correspondence. In *Wright v. McMann*, No. 66 CV 77 (N.D.N.Y., July 31, 1970), Judge Foley found that: "There is no support for the fears that unhampered lawyer-prisoner correspondence may endanger security." *See also* Payne v. Whitmore, No. C—70 2727 ACW (N.D. Cal., Jan. 14, 1971); Palmigiano v. Travisono, 317 F.Supp. 776 (D.R.I. 1970) (officials may not open or read attorney-client correspondence).

40. In federal prisons, letters from attorneys may be checked to see whether they contain contraband (drugs, knives, etc.), but their content is free from censorship. *See* Hirschkop & Milleman *supra* note 32, at 826. In California, prisoners may send sealed, uncensored letters to attorneys. Department of Corrections, Director's Rule D2404 (amended Aug. 5, 1970). The state of Washington recently abandoned the policy of reading prisoner mail of any kind, although incoming envelopes are opened to check for contraband. *See* Office of Adult Corrections, Memorandum No. 70—5 (Nov. 6, 1970).

41. Larsen, *A Prisoner Looks at Writ-Writing*, 56 Calif. L. Rev. 343, 347 (1968).

42. 393 U.S. 483 (1969).

43. Coonts v. Wainwright, 282 F.Supp. 893 (M.D. Fla. 1968), *aff'd*, 409 F.2d 1337 (5th Cir. (1969).

44. White v. Blackwell, 277 F.Supp. 211 (N.D. Ga. 1967).

45. 393 U.S. at 486.

46. *See id.*, at 501 (White, J., dissenting).

47. 28 U.S.C. § 2242 (1964).

48. *Id.* at 490 n.11, *See also* Coonts v. Wainwright, 282 F. Supp. 893, 895 (M.D. Fla. 1968), *aff'd*, 409 F.2d 1337 (5th Cir. 1969).

49. Beard v. Alabama Board of Corrections, 413 F.2d 455 (5th Cir. 1969).

50. Prewitt v. State, 69 Civ. 6818 (D. Ariz., May 14, 1969).

51. Gilmore v. Lynch, 319 F.Supp. 105 (N.D. Cal. 1970) (three-judge court); *In re* Harrell, 2 Cal. 3d 675, 470 P.2d 640, 87 Cal. Pptr. 504 (1970).

52. Wright v. McMann, No. 66 CV 77 (N.D.N.Y. July 31, 1970); Carothers v. Follette, 314 F.Supp. 1014 (S.D. N.Y. 1970). In *Sostre v. McGinnis*, No. 35038 (2d Cir., Feb. 24, 1971), the court held that although a New York prison could not prohibit inmate legal assistance, it could provide that a prisoner must apply to the warden for permission to help others and the prisoner was not entitled to an injunction unless he had been refused permission.

The only cases sustaining such regulations involved the federal medical center at Springfield, Missouri, where the officials provided an attorney and a program of supervised law student assistance for the inmate-patients,[53] and the Texas system, where the Department of Corrections hired two full-time attorneys and provided law student assistance.[54]

Most prisons seem to be able to accommodate themselves easily to permitting inmate legal assistance. For example, in Arizona the prison officials promulgated a rule permitting inmates to help each other with their legal work provided that no compensation be demanded or received and that the assistance not interfere with normal institutional activities,[55] California promulgated a similar rule after *Johnson*.[56] However, a regulation permitting inmate legal assistance at the discretion of the warden, where there are no standards for exercising that discretion, is invalid.[57]

The California Supreme Court recently considered a variation on the theme of *Johnson v. Avery*. Although the California authorities voluntarily changed their jailhouse lawyer rules shortly after the *Johnson* decision, they continued to prohibit inmates from possessing the legal papers of other inmates—allegedly to avoid "the withholding of legal papers to enforce remuneration or achieve other illicit objectives" and "situations conducive to violence."[58] The court reasoned, however, that the inmate "lawyer" obviously has need of his "client's" papers and that there are less restrictive means of attaining legitimate penal objectives, for abuses such as extortion are capable of direct control by disciplining the offender. The court invalidated the rule as overbroad and unreasonably restricting access to the courts.[89]

Some prisons seem determined to cling to the rule against inmate legal assistance. Prison officials argue that jailhouse lawyers never perform services gratuitously and always demand some form of compensation, whether it be cigarettes, food, sexual favors, or assistance in organizing an insurrection or escape. They also claim that jailhouse lawyers build up their own power structure and constitute a serious threat to prison order and discipline.[60] The same arguments were made and rejected in *Johnson*. Thus the prison officials' decision to maintain their rule barring inmate legal assistance will be, in one sense, beneficial to the prisoners; to save their rule, the officials must provide adequate noninmate legal services.[61] Aside from directly hiring lawyers to help prisoners,[62] the officials could arrange for a legal services program to maintain an office in a prison.[63] The energies of law students may also be utilized, although student assistance alone is not adequate.[64] Provision of noninmate legal services also means that outsiders will be introduced to the prison's inner sanctum, and any activity that adds greater public visibility to what goes on in prison will help to reduce abuses.

RELATED TO the provision of legal services is the adequacy of prison law libraries and legal materials made available to prisoners. A three-judge federal court recently struck down the regulation of the California Department of Corrections defining and limiting the contents

53. Ayers v. Ciccone, 303 F.Supp. 637 (W.D. Mo. 1969), *aff'd*, 431 F.2d 724 (8th Cir. 1970).
54. Novak v. Beto, No. 68—H—348 (S.D. Tex., Oct. 15, 1970), *appeal pending*, No. 31116 (5th Cir., filed Dec. 22, 1970).
55. *See* Prewitt v. State, 69 Civ. 6818 (D. Ariz., May 14, 1969).
56. *See* Gilmore v. Lynch, 319 F.Supp. 105, 107 n.3 (N.D. Cal. 1970), *cert. granted*, 39 U.SL.W. 3353 (Feb. 22, 1971).
57. *See* Carothers v. Follette, 314 F.Supp. 1014 (S.D.N.Y. 1970); *cf.* Sostre v. McGinnis, No. 35038 (2d Cir., Feb. 24, 1971).
58. *In re* Harrell, 2 Cal. 3rd 675, 687, 470 P.2d 640, 647, 87 Cal. Rptr. 504, 511 (1970).
59. *Id.* at 688, 40 P.2d at 648, 87 Cal Rptr. at 512. In *Sostre v. McGinnis*, No. 35038 (2d Cir., Feb. 24, 1971), the Court said that prohibiting sharing legal material was not unreasonable because it would not prevent a prisoner from recommending legal material to another, who could then obtain it from the prison officials, from an outside source, or, if approved by the officials, from a prisoner. This approach is not realistic for indigent prisoners in an institution with a grossly inadequate law library or none at all.
60. *See, e.g.*, Spector, *A Prison Librarian Looks at Writ-Writing*, 56 CALIF. L. REV. 365 (1968).
61. Texas, for example, insists on maintaining its jailhouse lawyer rule. Texas provides two full-time attorneys to help the prisoners with their postconviction proceedings, provides a "writ room" in each unit of the prison system where a modest law library is maintained and prisoners can work on their writs, furnishes forms of writs for state courts, distributes an inmate handbook covering most postconviction problems, and hires law students during the summer to help inmates with their legal problems. A federal court recently held that these alternatives are constitutionally adequate to serve the needs of the 13,000 inmates of the Texas Department of Corrections. *See* Novak v. Beto, No. 68—H—348 (S.D. Tex., Oct. 15, 1970), *appeal pending*, No. 31116 (5th Cir., filed Dec. 22, 1970).

of prison law libraries; the court found the authorized libraries would offer meager fare to a criminal lawyer.[65] Putting to rest the notion that an adequate opportunity for a prisoner to attack his conviction and sentence is a privilege rather than a right,[66] the court said that where regulations in any way infringe upon access to the courts, "the burden of justifying these regulations is especially heavy, comparable to the 'overwhelming state interest' required by *Shapiro v. Thompson* . . ."[67] The court rejected California's proposed justifications of economy and standardization in prison libraries and properly found unrealistic the state's argument that in postconviction proceedings a prisoner requires no legal expertise and need only state the facts of his case in order to gain a judicial hearing. The court responded that much more than recitation of simple "facts" is required to obtain relief by habeas corpus:

> A prisoner should know the rules concerning venue, jurisdiction, exhaustion of remedies, and proper parties respondent. He should know *which* facts are legally significant, and merit presentation to the Court, and which are irrelevant or confusing . . . 'Access to the courts,' then, is a larger concept than that put forward by the State. It encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him.[68]

This reasoning should be carried to its logical conclusion. It is not sufficient to offer prisoners law libraries, printed writ forms and other measures that merely facilitate self-help; what is required is counseling, drafting, and representation —in a word, legal services.[69]

C. *First Amendment Rights*

1. The Freedom of Religion

The Black Muslims have been largely responsible for establishing prisoners' constitutional rights to worship. Prison officials perceive a threat to their authority in the close unity of Muslims. Accordingly, officials in most prisons, at one time or another, have banned the practice of Islam or imposed tight restrictions on Muslims but not on other religious denominations. Because of the preferred rights involved, courts have been willing to abandon the hands-off doctrine, so most of the decisions have been favorable to the Muslims. The cases now establish that prisoners have rights to gather for corporate religious services,[70] to consult a minister of their faith,[71] to possess religious books like the *Koran* and *Message to the Blackman in America*,[72] to subscribe to religious literature, including *Muhammad Speaks*,[73] to wear unobtrusive religious medals and other symbols,[74] to have prepared a special diet required by their religion,[75] and to correspond with their spiritual leader.[76] None of these rights is absolute,

62. Lawyers employed by the prison system may not be trusted by the prisoners. *See* Barkin, *Impact of Changing Law Upon Prison Policy*, 48 Prison J. 3, 8 (1969). The Federal Bureau of Prisons therefore set up assistance programs under the auspices of law schools in no way connected with the Bureau. *Id.*
63. *See* Johnson v. Avery, 393 U.S. 483,495—96 (1969) (Douglas, J., concurring). *See also* Gilmore v. Lynch, 319 F.Supp. 105, 110—11 (N.D. Cal. 1970), *cert. granted*, 39 U.S.L.W. 3353 (Feb. 22, 1971).
64. *See* Ayers v. Ciccone, 303 F.Supp. 637 (W.D. Mo. 1969), *aff'd*, 431 F.2d 724 (8th Cir. 1970). For a comprehensive description of prison legal assistance programs see Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 Kan. L.Rev. 493 (1970).
65. *See* Gilmore v. Lynch, 319 F.Supp. 105, 110 (N.D. Cal. 1970), *cert. granted*, 39 U.S.L.W. 3353 (Feb 22, 1971). *Contra*, Fobinson v. Birzgalis, 311 F.Supp. 908 (W.D. Mich. 1970).
66. *Cf.* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).
67. 319 F.Supp. at 109.
68. *Id.* at 110 (emphasis in original).
69. Concerning the range and urgency of the needs for legal services see Jacobs & Sharma, *supra* note 64.
70. Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Long v. Parker, 390 F.2d 816 (3d Cir. 1968); Cooper v. Pate, 382 F.2d 518, 522 (7th Cir. 1967); Sostre v. McGinnis, 334 F.2d 906 (2d Cir. 1964); Northern v. Nelson, 315 F. Supp. 687 (N.D. Cal. 1970); Knuckles v. Prasse, 30 F.Supp. 1036 (E.D. Pa. 1969); Banks v. Havener, 234 F.Supp. 27 (E.D. Va. 1964); *cf* Sharp v. Sigler, 408 F.2d 966 (8th Cir. 1969); Glenn v. Wilkinson, 309 F.Supp. 411 (W.D. Mo. 1970).
71. Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Long v. Parker, 390 F.2d 816 (3d Cir. 1968); Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967); Sostre v. McGinnis, 334 F.2d 906 (2d Cir. 1694); Northern v. Nelson, 315 F.Supp. 687 (N.D. Sal. 1970).
72. Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Long v. Parker, 390 F.2d 816 (3rd Cir. 1968); Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967); Northern v. Nelson, 315 F.Supp. 687 (N.D. Cal. 1970). *Contra*, Abernathy v. Cunningham, 393 F.2d 775 (4th Cir. 1968).
73. Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Long v. Parker, 390 F.2d 816 (3d Cir. 1968); Northern v. Nelson, 315 F.Supp. 687 (N.D. Cal. 1970); *Contra*, Abernathy v. Cunningham, 393 F.2d 775 (4th Cir. 1968); Knuckles v. Prasse, 302 F.Supp. 1036 (E.D. Pa. 1969).
74. Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Long v. Parker, 390 F.2d 816 (3rd Cir. 1968); Fulwood v. Clemmer, 206 F.Supp. 370, 375 (D.D.C. 1962). *Contra*, Knuckles v. Prasse, 302 F.Supp. 1036 (E.D. Pa. 1969).
75. Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969); Long v. Parker, 390 F.2d 816 (3d Cir. 1968). *Contra*, Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Knuckles v. Prasse, 302 F.Supp. 1036 (E.D. Pa. 1969).
76. Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969).

however, because the courts have said that, where the prison officials can make an affirmative showing that the religious sect in question abuses the right to gather and worship, reasonable limitations may be imposed.[77]

Most of the cases that involve discrimination against the Black Muslims have presented equal protection claims rather than pure first amendment problems. A recent exception, however, and a landmark case, is *Barnett v. Rodgers*,[78] decided in 1969 by the District of Columbia Circuit Court of Appeals. In *Barnett*, the court applied a stringent test to the refusal of prison officials to provide a pork-free diet for Muslims, holding that, where first amendment rights are involved, the state must show not merely a rational relationship to some governmental interest, but a compelling state interest in the regulation of a subject within the state's constitutional power to regulate. Moreover, the state must show that there is no alternative means of serving this interest that infringes less on first amendment rights.[79]

2. Censorship of Reading Material and Correspondence

Prison officials typically maintain an approved list of books and magazines that inmates are allowed to read or possess, although in some prisons determination of what reading matter is allowed is made on an ad hoc basis.[80] Aside from instances involving religious[81] or racial[82] discrimination, however, few cases have reached the courts involving the right of prison officials to censor reading material. In one case, Black Panther prisoners obtained an injunction permitting them to receive and read the Panther newspaper. Although the court characterized the paper as a "lurid, poorly edited and provocative political pamphlet," it held that the jail authorities could not, consistent with the first amendment, bar the Panthers from reading it.[83] Since most prisons do not have meaningful standards for approving or disapproving reading material, and since their rules are typically overbroad,[84] a first amendment challenge can be made on these grounds. The analysis in cases of this kind should be the same as that followed by the court in *Barnett*.[85] The rule ought to be that prisoners have a right to receive any publications except those that the prison can show pose a clear and present danger to security or involve some other compelling interest.[86] This was squarely held in *Fortune Society v. McGinnis*,[87] where the court enjoined the exclusion by New York prison officials of the newsletter published by an organization of former prisoners. Even though the newsletter was critical of prison authorities and even though it may not have been completely accurate, the court reasoned that banning the newsletter could be justified only by a compelling state interest and that the officials had failed to meet their burden of showing "a clear and present danger to prison discipline or security."

In *Sostre v. McGinnis*,[88] the Second Circuit held that a prisoner could not be punished for mere possession of "inflammatory" or "racist" literature. If the warden believed that the literature would "subvert prison discipline" and there was a risk that the prisoner would distribute

77. *See, e.g.*, Brown v. Peyton, No. 13797 (4th Cir., Feb. 3, 1971); Long v. Parker, 390 F.2d 816 (3d Cir. 1968); Cooper v. Pate, 382 F.2d 518, 522 (7th Cir. 1967).
78. 410 F.2d 995 (D.C. Cir. 1969).
79. *Id.* at 1000. The Fourth Circuit in *Brown v. Peyton*, No. 13797 (4th Cir., Feb. 3, 1971), also applied first amendment analysis to restriction of Muslim literature and held that prison officials could justify the restriction only upon a "convincing" evidentiary showing that a valid state interest compels it. The court purported to distinguish its prior decision in *Abernathy v. Cunningham*, 393 F.d 775 (4th Cir. 1968), on the ground that the exclusion of the same publications involved in *Brown* followed a full evidentiary hearing in *Abernathy*. The court served notice that it is not prepared to accept uncritically statements by officials without a factual basis for their decisions: "While the judgments of prison officials are entitled to considerable weight because they are based upon first-hand observance of the events of prison life and upon a certain expertise in the functions of a penal institution, prison officials are not judges. They are not charged by law and constitutional mandate with the responsibility for interpreting and applying constitutional provisions and they are not always disinterested persons in the resolution of prison problems. We do not denigrate their views but we cannot be absolutely bound by them (slip. op. at 8)."
80. New York's rule, for example, puts complete discretion in the warden: "Newspapers, magazines, and books approved by the Warden may be received by an inmate provided his behavior is good." New York State Department of Corrections, Inmate's Rule Book 14 (1961).
81. *See, e.g.*, Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969).
82. *See* Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968); Rivers v. Royster, 360 F.2d 592 (4th Cir. 1966).
83. Shakur v. McGrath, 69 Civ. 4493 (S.D.N.Y., Dec. 31, 1969).
84. *See* note 80 *supra*.
85. *See* text accompanying notes 78—79.

the material among other prisoners and presumably promote a disruption, the warden could control the situation by confiscating the literature, a less restrictive means than punishing the prisoner. The Court expressly left open whether the circumstances of such suppression of literature would have to satisfy the clear and present danger test.

In California, prisoners have a statutory right to receive all reading material accepted by the United States Post Office, except that the prison authorities may ban obscene matter, literature tending to incite violent crime and any matter concerning gambling or a lottery.[89] The California Supreme Court invalidated as inconsistent with this statute prison regulations banning materials deemed by officials to be not "conducive to rehabilitation" because they tended to incite crime:

> It may well be that even persons who have committed antisocial acts warranting their imprisonment may derive greater rehabilitative benefits from a relatively free access to the thoughts of all mankind as reflected in the published word than they would derive from a strictly controlled intellectual diet.[90]

This decision and the California statute might be used in other states to support an argument that censorship of reading materials is not required by any legitimate penal consideration, especially since the California prison system enjoys a reputation as perhaps the best in the nation.

As in the case of reading material, prisons maintain an approved list of correspondents for each inmate. The list is limited to persons having some "legitimate" relationship to the inmate.[91] The content of letters is also regulated, and institutional gossip or news, which may include a report of brutality, is banned.[92] Early legal attacks on such correspondence regulations were generally unsuccessful, but a few courts have recently taken a closer look at the justifications proffered by prison authorities. In one case, a Hungarian refugee obtained an injunction prohibiting officials from refusing to allow him to correspond in Hungarian with his only living relative, who could not write English.[93] The court's decision apparently rests on equal protection rather than first amendment grounds, since it noted that officials freely permitted English-speaking prisoners to correspond with relatives.

In *Carothers v. Follette*,[94] a prisoner was punished by deprivation of "good time" for criticizing prison officials in a letter to his parents.[95] The court held that the officials' action violated the prisoner's first amendment rights. Judge Mansfield's analysis is useful in any prison case involving freedom of expression. The court said that

> any prison regulation or practice which restricts the right of free expression that a prisoner would have enjoyed if he had not been imprisoned must be related both reasonably . . . and necessarily . . . to the advancement of some justifiable purpose of imprisonment . . . A prisoner could be punished only if he acted or threatened to act in a way that breached or constituted a clear and present danger of breaching the justifiable regulation.[96]

The court added that sanctions imposed against expression for the ostensible purpose of aiding the prisoner's rehabilitation were not supportable because rehabilitation is not "abject acceptance of all prison conditions, however unjustifiable." The court questioned whether rehabilitation of a prisoner is "advanced by deadening his initiative and concern for

86. *Cf.* Long v. Parker, 390 F.2d 816, 822 (3rd Cir. 1968) (religious reading matter).
87. 319 F.Supp. 901 (S.D.N.Y. 1970).
88. No. 35038 (2d Cir., Feb 24, 1971) (en banc).
89. CAL. PENAL CODE § 2600 (West 1968).
90. *In re* Harrell, 2 Cal. 3d 675, 703—04, 470 P.2d 640, 645, 87 Cal. Rptr. 504, 509 (1970).
91. The Texas Policy is probably representative. TEXAS DEPARTMENT OF CORRECTIONS, RULES AND REGULATIONS 12 (1968): "As many as five persons can be on an inmate's correspondence and visiting list. Selection of these persons should be restricted to members of the family unless the inmate has good reason to select others. All persons on the list are subject to approval . . . . Inmates may mail three letters a week."
92. Again, the Texas rule is typical. It states: "Inmates shall limit their letters to matters of personal interest to friends and relatives. Other inmates or institutional personnel shall not be discussed and the letters shall not carry any institutional gossip or rumors." *Id.* at 13.
93. United States *ex rel* Gabor v. Myers, 237 F.Supp. 852 (E.D. Pa. 1965). The decision has obvious application to the large number of Spanish-speaking inmates of America's prisons.
94. 314 F.Supp. 1014 (S.D.N.Y. 1970).
95. The letter for which the prisoner was punished made the following statements: "The prison system in New York stinks . . . The people in charge are not qualified . . . Half the employees did not get out of high school . . . This gang of political appointees . . . Hanky-panky with U.S. mail . . . Anything to obstruct legal work." *Id.* at 1021.
96. *Id.* at 1024 (citations omitted).

events within the prison itself."[97] The court enjoined the officials from disciplining the prisoner-plaintiff "because of statements in letters written to persons outside prison walls unless such letters present a clear and present danger of disrupting prison security or some other justifiable purpose of imprisonment."[98]

In *Palmigiano v. Travisono*,[99] another federal district court entered a temporary restraining order virtually eliminating censorship of outgoing correspondence and closely circumscribing the prison's right to inspect incoming matter.[100] The court essentially adopted the rationale of *Carothers* and *Barnett*,[101] and held that any restrictions on correspondence must be supported by a compelling state interest that cannot be served by less restrictive means and that any official action taken because of the content of correspondence must be dictated by a clear and present danger to prison security.[102]

3. Political Activities

THE EXTENT of constitutional protection for political expression in prison has not been definitively treated by the courts. This question is certain to be vigorously litigated in the years ahead because of the increasing number of draft resisters, antiwar protestors, revolutionaries, and other political prisoners who will not stop (and may even intensify) their activities because they are incarcerated. In fact, the recent wave of prison strikes and demonstrations has been accompanied not only by demands for better food and amenities but also by radical political rhetoric.[103]

Prisoners cannot constitutionally be punished for holding unpopular political beliefs. However, the asserted right to assemble in prison and to organize for political purposes presents difficult and novel questions. The very nature of imprisonment requires some restrictions on the right freely to assemble. Whether organization is permitted may depend on the purpose of the organization. Courts will not find constitutional protection for an organization that directly challenges the authority of the prison administration and seeks to overthrow it,[104] but if the organization simply seeks to speak out on public issues, including penal reform, it should be allowed.

The Second Circuit's recent decision in *Sostre v. McGinnis*,[105] dealt in part with political expression. The plaintiff was a black revolutionary who expressed radical beliefs in correspondence to his sister. He also collected the writings of various black nationalists and other revolutionaries. The prison officials seized the collection of writings in a search of Sostre's cell. Sostre refused to answer the warden's questions about the Republic of New Africa. The district court found that Sostre was punished for possessing political literature and for refusing to answer the questions. There was no evidence that Sostre was using the writings to organize other prisoners or to challenge the prison administration. The district court held that Sostre's constitutional rights had been violated, saying: "It is not a function of our prison system to make prisoners conform in their political thought and belief to ideas acceptable to their jailers."[106] The Court of Appeals affirmed, stating that, since prisoners

97. *Id.* at 1025. Indeed, unrestricted communication with the outside world and maintaining close family contact through free corresponence would seem to have obvious rehabilitative value.
98. *Id.* at 1030. In *Candelaria v. Mancusi*, Civil No. 1970—491 (W.D.N.Y., Jan. 7, 1971), the court entered a preliminary injunction against interception of prisoners' letters by prison officials where the interception was based on matters in the letters deemed untrue or critical of the prison.
99. 317 F.Supp. 776 (D.R.I. 1970).
100. Although the plaintiffs in *Palmigiano* were prisoners awaiting trial, the court's opinion considers censorship generally and its reasoning applies equally to all prisoners. Indeed, in the answer to a subsequent federal class action filed by Rhode Island convicted prisoners, prison officials stated that the order in *Palmigiano* "has been complied with without regard to whether an inmate is awaiting trial or is a convicted prisoner." Ross v. Affleck, Civil No. 4408 (D.R.I., filed Oct. 6, 1970).
101. *See* text accompanying notes 78—79 *supra*.
102. *See* Note, *The Right of Expression in Prison*, 40 S. CAL. L. REV. 407, 411 (1967). On the "compelling interest" test where prisoners' "preferred" rights are involved see *Jackson v. Godwin*, 400 F.2d 529, 541 (5th Cir. 1968); *Gilmore v. Lynch*, 319 F.Supp. 105 (N.D. Cal. 1970). *See generally* Singer, *Censorship of Prisoner's Mail and the Constitution*, 56 A.B.A.J. 1051 (1970).
103. *See, e.g.*, Mitford, *Kind and Usual Punishment in California*, ATLANTIC MONTHLY, Mar. 1971, at 52; N.Y. Times, Oct. 10, 1970, at 12, col. 2; San Francisco Sunday Examiner & Chronicle, Oct. 11, 1970, at 16, col. 1.
104. *See* Roberts v. Pepersack, 256 F. Supp. 415, 429 (D. Md. 1966) (prisoner "has no judicially enforceable right to advocate open defiance of authority within the prison walls.").
105. No. 35038, 2d Cir., Feb. 24, 1971.
106. Sostre v. Rockefeller, 312 F.Supp. 863, 876 (S.D.N.Y. 1970).

may not be punished for their beliefs, they may not be punished for the mere expression of those beliefs. The Court held that the officials should be enjoined from punishing the prisoner "for having literature in his possession and for setting forth his views orally or in writing, except for violation of reasonable regulations."[107] The Court did not, however, set forth general principles governing regulation of political expression in prison, and it vacated the district court's ruling that the officials submit proposed regulations for court approval.

Where the question is one of prohibiting political organization and expression by prisoners, the two-step analysis of *Barnett v. Rogers*[108] seems particularly appropriate. That is, prison officials should not be permitted to limit political activity unless there is a compelling state interest underlying the limitation and unless there is no less restrictive way of serving that interest. For example, a prison rule prohibiting all political activity without the approval of the warden should be held invalid. Officials might, under a narrower rule, validly prohibit picketing in the mess hall on a showing that this type of activity presents a clear and present danger of provoking serious disruptions, but the orderly circulation of written petitions in the cell blocks, for instance, should be protected.[109]

D. Medical Care

PRISONERS FREQUENTLY complain about the inadequacy of medical care and sometimes about the denial of medical care for improper reasons. Generally speaking, medical care in local jails is wholly insufficient; local governments simply do not devote sufficient resources to jails to support an adequate health program.[110] A systematic failure to provide for minimal health needs should amount to cruel and unusual punishment.[111] However, where the question is whether an individual prisoner has received proper medical treatment, the courts have held that no constitutional issue is raised unless the prisoner is denied needed medical care for some improper reason,[112] is forced to work by prison officials who know he is ill,[113] or has a very severe and obvious injury or illness that is deliberately overlooked by the officials.[114] Most courts have held that instances of simple negligence or medical malpractice do not give rise to a constitutional claim.[115] Some state statutes, however, may hold prison officials liable for failure to provide medical care that does not rise to constitutional dimensions.[116]

Constitutionally, the prison system should be held to a duty of reasonable care for all prisoners, which may be met by an adequate medical program. Instances of unintentional malpractice probably should not require the intervention of the federal courts acting in the constitutional sphere. It might be added that despite the frequency of complaints about medical care and the fact that many institutions do not have adequate

107. Sostre v. McGinnis, No. 35039 (2d Cir., Feb. 24, 1971) (slip op. at 1681, 1684—85).
108. 410 F.2d 995 (D.C. Cir. 1969); see text accompanying notes 78—79 *supra*. The clear and present danger test should also be applied to such prohibition. *See* Long v. Parker, 390 F.2d 816 (3d Cir. 1968); Fortune Society v. McGinnis, 319 F.Supp. 901 (S.D.N.Y. 1970); Carothers v. Follette, 314 F.Supp. 1014 (S.D.N.Y. 1970). In *Sostre v. McGinnis*, No. 35038 (2d Cir., Feb. 24, 1971),the Second Circuit left open the question whether the clear and present danger test applies to confiscation of "inflammatory" or "racist" material if the warden believes that its distribution to other prisoners would threaten prison security. Slip op. at 1681 n.48.
109. *See* Note, *supra* note 102, at 415.
110. *See* authorities cited in note 9 *supra*.
111. *Cf.* Jones v. Wittenberg, No. C 70—388 (N.D. Ohio, Feb. 17, 1971); Holt v. Sarver, 309 F.Supp. 362 (E.D. Ark. 1970); Curley v. Gonzales, Civil Nos. 8372, 8373 (D.N.M., Feb. 13, 1970); Inmates of Cook County Jail v. Tierney, No. 68 Civil 504 (N.D. Ill., Aug. 22, 1968). One federal district court recently stated that "When a state undertakes to imprison a person, thereby depriving him largely of his ability to seek and find medical treatment, it is incumbent upon the state to furnish at least a minimal amount of medical care for whatever conditions plague the prisoner." Sawyer v. Sigler, 8 Crim. L. Rep. 2317 (D. Neb., Dec. 23, 1970).
112. *See generally* Coppinger v. Townsend, 398 F.2d 392 (10th Cir. 1968); Ramsey v. Ciccone, 310 F.Supp. 600 (W.D. Mo. 1970).
113. *See* Talley v. Stephens, 247 F.Supp. 683, 687 (E.D. Ark. 1965).
114. *See* Redding v. Pate, 220 F.Supp. 124 (N.D. Ill. 1963); *cf.* Church v. Hegstrom, 416 F.2d 449 (2d Cir. 1969). Prison wardens are liable for the acts of their subordinates denying proper care even though they may not have either authorized or had personal knowledge of them. *See* Talley v. Stephens, 247 F.Supp. 683, 692 (E.D. Ark. 1965).
115. *See* United States *ex rel.* Hyde v. McGinnis, 429 F2d 864 (2d Cir. 1970); Gittlemacker v. Prasse, 428 F.2d 1, 6 (3d Cir. 1970); Church v. Hegstrom, 416 F.2d 449 (2d Cir. 1969); Owens v. Alldridge, 311 F.Supp. 667 (W.D. Okla. 1970).
116. *See, e.g.*, N.Y. CORREC. LAW § 46(5) (McKinney 1968); Pisacano v. State, 8 App. Div. 2d 335, 188 N.Y.S.2d 35 (1959); McCrossen v. State, 277 App. Div. 1160 (1950). Federal prisoners may sue for engligent medical care under the Federal Tort Claims Act —even though the litigation may interfere with prison discipline. *Cf.* United States v. Muniz, 374 U.S. 163 (1963).

health programs, it is an unfortunate truth that most prisoners probably receive better medical attention in prison than they ever would outside.

E. Racial Segregation

THE COURTS have held, without much analysis, that the desegregation holding of *Brown v. Board of Education*[117] applies to prisons,[118] thus rejecting the argument of prison officials that racial integration would create difficult problems threatening prison discipline. The courts have also held that prisons may not disadvantage racial minorities in other ways. For example, where the prison permits inmates to subscribe to a variety of white-oriented publications, it may not prohibit black prisoners from subscribing to black-oriented publications.[119]

Beneath these decisions lies a more profound problem. Instances of racial discrimination are part of the daily routine of most prisons, because racism in prison is even more exaggerated than in society at large. Racial minorities constitute a disproportionately large part of prison populations while most prison staffs remain overwhelmingly white.[120] In addition, because most prisons are located in remote rural areas and draw their staffs from the locality, staff members tend to have a rural orientation. This contrasts with the increasingly urban character of the inmate population. Thus, a predominantly white rural staff directs the lives of a large mass of urban minority prisoners. This situation is not only explosive,[121] but it interferes with the rehabilitative opportunities of the minority prisoners. The quality of contact with low-level personnel is a very significant factor influencing the inmate's overall prison experience.[122]

State officials are, of course, under a duty not to discriminate on the ground of race in employing prison personnel, but thus far attacks on racial hiring have not met with success in the courts. In *Sostre v. Rockefeller* the district court held that the prisoner had standing to challenge racial discrimination in hiring of prison personnel but concluded that the prisoner had not carried the burden of proving discrimination; statistics showing racial imbalance were not enough.[123] This result could be changed in subsequent cases. Such future challenges to racial employment in prisons should rely on precedents under title VII of the Civil Rights Act of 1964,[124] especially decisions indicating that a prima facie case is made out by a showing of gross disparity between the proportion of minority employees and their proportion in the population.[125]

F. Disciplinary Punishment

ASSUMING THE VALIDITY of a prison rule broken by an inmate, what limits, if any, are there on the kind and degree of punishment that the prison administra-

117. 347 U.S. 483 (1954).
118. Montgomery v. Oakley Training School, 426 F.2d 269 (5th Cir. 1970); Crum v. State Training School for Girls, 413 F.2d 1348 (5th Cir. 1969); Holt v. Sarver, 309 F.Supp. 362 (E.D. Ark. 1970); Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga. 1968); Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968).
119. Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968); Rivers v. Royster, 60 F.2d 592 (4th Cir. 1966).
120. For example, in New York the average for all state prisons is 48.8% nonwhite inmates, predominantly black and Puerto Rican, but the staffs are, on the average, about 5% nonwhite. In some large New York institutions with more than 50% nonwhite inmates, there is not a single black member of the staff. Letter to the author from John R. Crain, Deputy Commissioner of Correction, dated Sept. 29, 1969 (copy on file with the *Stanford Law Review*); Ethnic Survey by the New York State Depatment of Civil Service, submitted to the author by Mr. Cain on Oct. 27, 1969 (copy on file with the *Stanford Law Review*). This situation is common elsewhere and is perhaps most exaggerated in Washington, D.C., where at the Lorton Reformatory the population is about 90% black and the staff is overwhelmingly white. Mayor-Commissioner's Temporary Committee to Investigate Activities at the Lorton Correctional Complex, Report (Jan. 24, 1969).
121. The Lorton Committee found that this situation contributed to a tragic "guard riot" on November 18, 1968. Mayor-Commissioner's Temporary Committee to Investigate Activities at the Lorton Correctional Complex, *supra* note 120, at 38.
122. On personnel problems in corrections, see JOINT COMMISSION ON CORRECTIONAL MANPOWER AND TRAINING, A TIME TO ACT (1969); *id.*, DEVELOPING CORRECTIONAL ADMINISTRATORS (1969); *id.*, MANPOWER AND TRAINING IN CORRECTIONAL INSTITUTIONS (1969); *id.*, PERSPECTIVES ON CORRECTIONAL MANPOWER AND TRAINING (1970).
123. 312 F.Supp. 863, 877 (S.D.N.Y. 1970), *rev'd in part sub nom.* Sostre c. McGinnis, No. 35038 (2d Cir., Feb. 24, 1971). One case held that prisoners did not have standing to attack discrimination in employment of prison personnel. Wilson v. Kelley, 294 F.Supp. 1005 (N.D. Ga. 1968). The dissent in *Wilson* should be the law, however, by analogy to cases establishing that school children have standing to attack racial discrimination in the hiring of faculty. *See* Rogers v. Paul, 82 U.S. 198 (1965); Bradley v. School Board, 382 U.S. 103 (1965).
124. 42 U.S.C. § 2000e *et seq.* (1966).
125. *See, e.g.*, United States v. Sheet Metal Workers, Local 36, 416 F.2d 123, 127 n.7 (8th Cir. 1969); United States v. Hayes International Corp., 415 F.2d 1038 (5th Cir. 1969); *cf.* Turner v. Fouche, 396 U.S. 346 1970) (prima facie case of jury discrimination); Hawkins v. Town of Shaw, 39 U.S.L.W. 2431 (5th Cir., Jan. 28, 1971).

tion can inflict? Clearly, tortures and other inhuman measures are illegal under the eighth amendment.[126] Corporal punishment has also been held cruel and unusual.[127] But because punishments for prison infractions are so closely related to the maintenance of prison discipline, the courts have been reluctant to impose standards and subject administrative decisions to judicial review except in the most outrageous cases. But where officials are not held accountable to principles of law, abuses are certain to occur—and arbitrariness has reigned in prison discipline. Recent decisions provide some hope for the rule of law in this area, but the courts need to develop standards for the treatment of recalcitrant prisoners and for judicial review of the prison disciplinary process.

I. Solitary Confinement, Punitive Segregation, and Maximum Security

The eighth amendment provides the constitutional basis for challenging solitary confinement. The courts have, in fact, outlawed the outrageous conditions, approaching those of a medieval dungeon, that prevail in some prison disciplinary cells.[128] Most of the cases have involved unconscionably unsanitary conditions in the cells, but the courts have not rested their decisions simply on that ground. Rather, they have considered the totality of the dehumanizing circumstances[129] and have condemned that totality as unconstitutional.

Sostre v. McGinnis[130] involved a more sophisticated problem. The district court held that confinement in the "punitive segregation" unit of a New York prison for more than 15 days constituted cruel and unusual punishment.[131] The plaintiff in *Sostre* had been confined to segregation for a year, until released by the district court's preliminary injunction. The Second Circuit Court of Appeals, sitting en banc, reversed the eighth amendment holding. The court pointed out that the precise conditions of Sostre's confinement raised it "several notches above those truly barbarous and inhuman conditions" previously condemned as cruel and unusual.[312] The court failed, however, to articulate a coherent eighth amendment analysis. Although prolonged segregation may be "counterproductive as a correctional measure and personally abhorrent," the court did not consider the punishment sufficiently "barbarous" or "shocking to the conscience." In a throwback to the hands-off doctrine, the court said federal judges lack expertise in this area and should be reluctant to interfere with the judgment of responsible officials. While the court's failure to put a durational limit on segregated confinement appears to have been strongly influenced by its view that the prisoner could at any time effect his own release by agreeing to abide by prison rules, it is regrettable that the court did not lay down more clear guidelines to govern a practice so widely used and abused in American prisons.

Confinement to solitary, segregation, the "hole," disciplinary isolation, maxi-

126. *Cf.* Robinson v. California, 370 U.S. 660, 675 (1962) (Douglas, J., concurring).

127. Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

128. *See* Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Hancock v. Avery, 301 F.Supp. 786 (M.D. Tenn. 1969); Holt v. Sarver, 300 F.Supp. 825 (E.D. Ark. 1969); Barnes v. Hocker, No. R—2071 (D. Nev., Sept. 5, 1969); Jordan v. Fitzharris, 257 F.Supp. 674 (N.D. Cal. 1966); *cf.* Brooks v. Florida, 389 U.S. 413, 415 (1967).

129. There were some differences among the particular circumstances involved in the cases cited in note 128 *supra*. For example, *Hancock* and *Jordan* involved cells without light, while in *Holt, Barnes,* and *Wright* the cells were lighted. In *Barnes,* the inmate slept on an iron bunk, while in *Jordan* he had a canvas mat, in Holt, he had a mattress, and in *Hancock* and *Wright* he slept on the floor. In *Brooks* the inmate's diet was pea and carrot soup three times a day; in *Hancock* he was fed three times daily, bread twice and one regular meal; in *Holt* he received a wholesome and sufficient but unappetizing diet; in *Barnest, Jordan,* and *Wright* the inmates apparently received the regular institution diet. In *Brooks* and *Holt* the cells were overcrowded, while *Jordan* and *Hancock* involved true solitary confinement. In all the cases inmates were deprived of the minimal comforts and institutional privileges that may make prison life tolerable for a flexible man.

130. No. 35038 (2d Cir., Feb. 24, 1971).

131. Sostre v. Rockefeller, 312 F.Supp. 863 (S.D.N.Y. 1970).

132. The court listed several factors leading to this conclusion: (1) the prisoner's diet, which was the same (except for desserts) as in the general prison population and consisted of 2800-3300 calories a day; (2) the availability of rudimentary implements of personal hygiene; (3) the opportunity for daily exercise in the open air; (4) opportunity to participate in group therapy and thereby effect release from segregation; (5) availability of reading matter from the prison library and unlimited access to legal materials, with adequate light for reading; and (6) the constant possibility of communication with other prisoners. Further, the court noted the absence of any testimony that solitary threatened the mental or physical health of the prisoner and said that a physician visited him every day. Sostre v. McGinnis, No. 35038 (2d Cir., Feb. 24, 1971) (slip op. at 1649—50, 1663—64).

mum security, or whatever term is used[133] has been the traditional means of controlling troublesome prisoners. Rather than exploring the reason for a recalcitrant prisoner's behavior, guards have simply removed the prisoner from the general prison population and isolated him in a completely restrictive environment. There is an increasing recognition, however, that this technique is both dangerous to the prisoner and self-defeating in terms of improving discipline. The American Correctional Association now candidly states: "Perhaps we have been too dependent on isolation or solitary confinement as the principal method of handling the violators of institutional rules. Isolation may bring short-term conformity for some, but brings increased disturbances and deeper grained hostility to more."[134]

CONFINEMENT TO punitive segregation or solitary confinement may be held to be cruel and unusual under three separate theories. First, the conditions may be so bad that, in themselves, they constitute cruel and unusual punishment.[135] Second, where the conditions are not per se cruel and unusual, the punishment may be unconstitutional because unnecessarily cruel in view of its purpose.[136] Assuming that some form of isolation of severely recalcitrant inmates is needed to maintain order in prison, the degree of punishment must not exceed that which is required to meet the need.[137] Proof of the inmate's case on this theory requires expert testimony from prison administrators or criminologists to the effect that particular conditions of isolation are unnecessary with respect to the purpose of isolation in general and that, in fact, cruel conditions may be futile and self-defeating and may interfere with the possibility of rehabilitation. In other words, there should be a showing that the defendant prison officials are using isolation procedures that are penologically unsound. This type of testimony has been offered by experts, including James V. Bennett, former Director of the Federal Bureau of Prisons, in a number of cases.[138] There are also some state and federal regulations governing conditions and privileges prevailing in segregated confinement, and reference to them supports a finding that more restrictive conditions are unnecessary. For example, recent New York regulations establish minimum standards for segregated confinement and provide for adequate clothing, bedding, hygiene, access to legal materials, recreation, correspondence, and visiting.[139] Federal policy also mandates relatively humane standards for segregated confinement.[140] Other prison officials will have difficulty maintaining that less hu-

133. The American Correctional Association uses the term "punitive segregation" as including solitary and other forms of isolation. AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS 413 (1966). True solitary confinement means that the prisoner is completely cut off from any human contact and usually involves some degree of sensory deprivation, *e.g.*, darkness, silence). It has long been recognized that solitary confinement cannot be considered a mere custodial matter and that it can cause mental illness, induce suicidal tendencies, and interfere with the possibility of rehabilitation. *See in re* Medley, 134 U.S. 160, 167—68 1890).

134. AMERICAN CORRECTIONAL ASSOCIATION, *supra* note 133, at 41.

135. *See* Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Hancock v. Avery, 301 F.Supp. 786 (M.D. Tenn. 1969); Holt v. Sarver, 300 F.Supp. 825 (E.D. Ark. 1969); Barnes v. Hocker, No. R—2071 (D. Nev. Sept. 5, 1969); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

136. A punishment may be considered cruel and unusual when, although applied in pursuit of a legitimate penal aim, it goes beyond what is necessary to achieve that aim. *See* Weems v. United States, 217 U.S. 349, 370 (1910). *See* Dearman v. Woodson, 429 F.2d 1288, 1290 (10th Cir. 1970); Hancock v. Avery, 301 F.Supp. 786, 791 (M.D. Tenn. 1969); Jordan v. Fitzharris, 257 F.Supp. 674, 679 (N.D. Cal. 1966). Squalid conditions can be remedied by prison officials by relatively modest clean-up campaigns. To be significant, a challenge to punitive segregation or solitary confinement as unconstitutional must go beyond the conditions themselves to the vices of the system of isolating "troublesome" inmates.

137. Although the courts may say that prison officials have some administrative discretion in dealing with inmates who are in fact disruptive, at least according to one court, "acceptance of the fact that incarceration, because of inherent administrative problems, may necessitate the withdrawal of many rights and privileges does not preclude recognition by the courts of a duty to protect the prisoner from unlawful and onerous treatment of a nature that, of iself adds punitive measures to those legally meted out by the court." Jackson v. Godwin, 400 F.2d 529, 532 (5th Cir. 1968). Thus, while prison officials are entitled to some administrative leeway, this "does not eliminate the need for reasons imperatively justifying the particular retraction of rights challenged at bar." Barnett v. Rodgers, 410 F.2d 995, 1000-01 (D.C. Cir. 1969).

138. *See e.g.*, Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Wright v. McMmann, No. 66 CV 77 (N.D. N.Y., July 31 1970), Holt v. Sarver, 309 F.Supp. 362 (E.D. Ark. 1970); Burns v. Swenson, 288 F.Supp. 4 (W.D. Mo. 1968), *rev'd on other grounds*, 430 F.2d 771 (8th Cir. 1970).

139. New York Department of Corrections, Regulations for Special Housing Units, pt. 301 (effective October 19, 1970). These regulations, promulgated ostensibly because of an amendment to the Correction Law, were undoubtedly with an eye on recent district court decisions. *See* Wright v. McMann, No. 67 CV 77 (N.D.N.Y., July 31, 1970); Carothers v. Follette, 314 F.Supp. 1014 (S.D.N.Y. 1970); Sostre v Rockefeller, F.Supp. 863 (S.D.N.Y 1970). In *Brown v. Peyton* No. 13797 (4th Cir., Feb. 3, 1971), the court said that practices in other states are of "substantial probative value" in ascertaining whether a particular restriction is necessary to some penal interest.

140. Federal Bureau of Prisons, Policy Statement 7400.5 (Nov. 28, 1966).

mane conditions are necessary to discipline in their prisons.

The third theory for determining that confinement in punitive segregation or solitary confinement is cruel and unusual rests on an argument from the particular facts of a case that such confinement is wholly disproportionate to the inmate's disciplinary offense. Thus, putting an inmate in the "hole" for talking in the mess hall or for any of a range of trivial offenses cannot be justified. The courts have said in a number of instances that excessive punishment is unconstitutional.[141] Isolation in its various forms should be reserved for serious disruptive conduct, such as assaults on guards and other prisoners, insurrection, and escape.

A legal challenge to disciplinary isolation as unconstitutional is a difficult task. Reliance on inmate testimony is not sufficient, and adequate discovery of prison rules, regulations, and disciplinary records is essential. Depositions of prison officials are extremely helpful to ascertain exactly what purposes the officials think are served by placing a man in disciplinary confinement. Again, expert testimony is a virtual necessity in order to persuade reluctant judges to rule in favor of the inmates against hardworking and underpaid public officials. Making the challenge, however, is important, because abuse of the quasi-judicial prison disciplinary system is one of the most significant elements in destroying a prisoner's faith in the rule of law.

2. Deprivation of "Good Time"

Prison Systems generally have a statutory scheme under which an inmate who does not get in trouble with prison authorities is permitted to earn a reduction of his sentence or early parole consideration. For example, in New York, an inmate may earn 10 days "good time" for each month served, thus potentially reducing his sentence by one-third.[142] Other jurisdictions have similar provisions.[143] Judges commonly take these reductions into consideration in fixing sentences. The legislative intent underlying these provisions is that prisoners will have a strong incentive not to misbehave while in prison. In practice, prison officials often use the granting or withholding of "good time" as an in terrorem device for ensuring subservient behavior.

Most prison systems use the deprivation of good time as a disciplinary sanction when inmates are "convicted" of breaking prison rules. Disciplinary decisions depriving an inmate of good time have the effect of prolonging the inmate's overall term of imprisonment, either by requiring him to serve more of his sentence or by depriving him of early parole consideration.

Since deprivation of good time has an adverse effect on the convict's liberty, the best approach in attacking such deprivation involves due process arguments. While in the federal system rather elaborate procedures must be followed before an inmate's good time may be forfeited,[144] in most state systems few of the guarantees of procedural due process are pres-

141. "[A] prisoner may not be unreasonably punished for the infraction of a rule. A punishment out of proportion to the violation may bring it within the bar against unreasonable punishments." Fulwood v. Clemmer, 206 F.Supp. 370, 379 (D.D.C. 1962). *See also* Jackson v. Bishop, 404 F.2d 571, 577—78 (8th Cir. 1968); Wright v. McMann, No. 66 CV 77 (N.D. N.Y., July 31, 1970); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970); Sostre v. Rockefeller, 312 F.Supp. 863 (S.D.N.Y. 1970): Holt v. Sarver, 309 F.Supp. 361 (E.D. Ark 1970); Jordan v Fitzharris, 257 F.Supp. 674, 679 (N.D. Cal. 1966); United States *ex rel* Hancock v. Pate, 223 F.Supp. 202, 205 (N.D. Ill. 1963); *cf.* Robinson v. California, 370 U.S. 660, 676 (Douglas, J., concurring). *Contra*, Novak v. Beto, No. 68—H—348 (S.D. Tex., Oct. 15, 1970), *appeal pending*, No. 31116 (5th Cir., filed Dec. 22, 1970). This is in accord with the "precept of justice" that punishment for a crime should be graduated and not cruel and unusual under the disproportionality theory of the eighth amendment, stressing the seriousness of the offenses charged. The court expressed no opinion whether the punishment would be upheld if imposed for less serious offenses or for less than all the offenses with which the prisoner in *Sostre* was charged. Slip op. at 1665—66 & n.28. In fact, the charges against the prisoner involved no violence. The court's holding was probably influenced by its view that the lengthy segregation could have been terminated at any time if the prisoner agreed to abide by prison rules, a view that is at variance with the facts of life in most prisons.

142. *See* N.Y. Correc. Law § 230 (McKinney 1966).

143. *See, e.g.*, Tex. Rev. Civ. Stats. Ann. art. 6184*l* (1949) (up to 20 days per month served); 18 U.S.C. § 4161 (1959).

144. *See* Federal Bureau of Prisons, Policy Statement No. 7400.6 (December 1, 1966). The Policy Statement draws a distinction between forfeiture of good time already earned and withholding good time for the month in which the infraction occurs. Forfeiture is seen as a more severe measure, and consequently, an inmate is afforded greater procedural protections. For example, the inmate has a right to representation by a staff member, to confrontation and cross-examination of witnesses against him, to call witnesses on his behalf, to allocution, to a decision based on the evidence, to a written (although not verbatim) record of the hearing, and to review by higher authority. The former director of the Federal Bureau of Prisons has described these protections as "an essential ingredient to good discipline." Hirschkop & Millemane, *supra* note 32 at 831, 834.

ent in disciplinary proceedings. Deprivation of good time is usually handled in the same manner as any other punishment for a disciplinary offense.[145] Thus, decisions are commonly made by a single official, often a lower-echelon officer; there may be no prior notice to the inmate of the charge against him, and he may be charged with conduct that does not violate any specific rule of the institution; the inmate is frequently given a hearing before a tribunal including the officer accusing him of misconduct; the inmate does not have the right to confront or cross-examine any witnesses against him; the inmate may not have an opportunity to state his version of the facts or to call witnesses on his behalf; the inmate has no right to counsel; no record of the proceedings is made except perhaps a notation as to the charge and the punishment imposed; there is no requirement that the decision be based on substantial evidence or that the reasons for the decision be either entered in the record or given to the inmate; and there is no adequate channel for appeal from the decision.[146]

Very recently a few federal district courts have recognized that deprivation of good time has a substantial effect on the inmate's liberty and have therefore held that constitutionally adequate procedures must be followed before good time can be taken from an inmate.[147] The President's Commission on Law Enforcement and Administration of Justice has recommended that:

> Where such [disciplinary] charges may lead to a substantial loss of good time and a resultant increase in the actual length of imprisonment, the prisoner should be given reasonable notice of the charges, full opportunity to present evidence and to confront and cross-examine opposing witnesses, and the right to representation by counsel.[148]

In *Sostre v. McGinnis*,[149] the district court agreed, holding that good time cannot be taken unless the inmate is afforded the following: (1) prior written notice of the charges against him and the rule alleged to have been infringed; (2) a hearing before an impartial official with the right to cross-examine witnesses and call witnesses in his behalf; (3) a written record of the hearing and decision, including the reasons for the decision and the evidence relied upon; and (4) counsel or a counsel substitute.[150] The court of appeals reversed, holding that "all"

145. Also, inmates in segregation or disciplinary confinement are commonly barred from earning good time; they thus automatically lose good time as long as they are subjected to such confinement. New York's regulation was probably typical: "During any period of disciplinary confinement, time allowance against the minimum or maximum terms cannot be earned." 7 NYCRR § 60.6(c). This automatic bar was eliminated by a recently promulgated regulation. NEW YORK DEPARTMENT OF CORRECTION, REGULATIONS § 260.4 (Oct. 19, 1970). In practice, however, disciplinary confinement may still result in failure to earn good time.

146. This is a description of the disciplinary procedures that prevailed in New York. *See* Carothers v. Follette, 314 F.Supp. 1014 (S.D.N.Y. 1970); Sostre v. Rockefeller, 312 F.Supp. 863 (S.D.N.Y 1970), *rev'd in part sub nom.* Sostre v. McGinnis No. 35038 (2d Cir., Feb. 24, 1971). Modern correctional practice is to have a disciplinary committee, including treatment personnel, to hear and determine disciplinary cases. *See* AMERICAN CORRECTIONAL ASSOCIATION, *supra* note 133, at 410. Again, New York's procedures were deficient because, *inter alia*, all factfinding and decisionmaking were concentrated in one man, the deputy warden. The New York procedures were substantially revised on the eve of the oral argument of the appeal in *Sostre*. Appellant's Reply Brief, Sostre v. Rockefeller, No. 35038 (2d Cir., Feb. 24, 1971). Courts have hinted that disciplinary decisions should be in the hands of high-ranking and experienced personnel. *See* Landman v. Peyton, 370 F.2d 135, 139 (4th Cir. 1966); Jackson v. Bishop, 268 F.Supp. 804, 815—16 (E.D. Ark. 1967), *rev'd on other grounds*, 404 F.2d 571 (8th Cir. 1968).

147. *See* Carothers v. Follette, 314 F.Supp. 1014 (S.D. N.Y. 1970); Kritsky v. McGinnis, 313 F.Supp. 1247 (N.D.N.Y. 1970); Sostre v. Rockefeller, 312 F.Supp. 863 (S.D.N.Y. 1970), *rev'd in part sub nom.* Sostre v. McGinnis, No. 35038 (2d Cir., Feb. 24, 1971). Wright v. McMann, No. 67 CV 77 (N.D.N.Y., July 31, 1970); Morris v. Travisono, 310 F.Supp. 857 (D.R.I. 1970); Rodriguez v. McGinnis, 307 F.Supp. 627 (N.D.N.Y. 1969). Earlier decisions indicated that a prison administrative decision having the effect of postponing parole consideration could not be based on an unreliable factfinding procedure. United States *ex rel.* Campbell v. Pate, 401 F.2d 55, 57 (7th Cir. 1968); United States *ex rel.* Hancock v. Pate, 223 F.Supp. 202 (N.D. Ill. 1963).

148. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 86 (1967).

149. No. 35038 (2d Cir., Feb. 24, 1971).

150. Sostre v. Rockefeller, 312 F.Supp. 863, 872 (S.D.N.Y. 1970), *rev'd in part sub nom.* Sostre v. McGinnis, No. 35038 (2d Cir., Feb. 24, 1971). The court in *Carothers v. Follette*, 314 F.Supp. 1014, 1028 (S.D. N.Y. 1970), was unclear as to the precise elements required but said that due process requires at least "advance notice of any serious charge and an opportunity to present evidence before a relatively objective tribunal." In *Morris v. Travisono*, 310 F.Supp. 857 (D.R.I. 1970), the court approved a comprehensive set of procedural regulations, drafted jointly by the prison administration and the prisoners' attorneys, and retained jurisdiction to supervise the operation of the regulations. In *Nolan v. Scafati*, 306 F. Supp. 1 (D. Mass. 1969), *rev'd*, 430 F.2d 548 (1st Cir. 1970), Judge Wyzanski assumed that an inmate could not be put in solitary confinement without (1) notice of the charge against him; (2) disclosure of the nature of the evidence against him; (3) an opportunity to be heard in his own defense; and (4) a decision based on substantial evidence. However, the court held that an inmate was not entitled as a matter of procedural due process to the right to cross-examine witnesses against him, the right to call witnesses on his own behalf, or any attorney to represent him. The decision was reversed by the First Circuit and remanded for a hearing to "confront the admittedly difficult—and still largely unexplored—question whether the punishment here proposed or inflicted was sufficiently great to require procedural safeguards, and if it was, whether sufficient safeguards were provided." 430 F.2d at 550.

these "trial-type" protections are not constitutionally mandated in "every" prison disciplinary proceeding, even proceedings leading to loss of good time.[151] The court acknowledged that a prisoner facing a serious sanction is entitled to due process, but said that the question is "what process is due." The court never answered the question. In tones reminiscent of the hands-off doctrine, the Court declined to write constitutional rules of prison procedure and seemed influenced by the unsurprising fact that few prison systems had voluntarily adopted the formal safeguards ordered by the district court. The court also asserted, incorrectly it would seem, that disciplinary proceedings were not "adverserial." While it is true in *Sostre* there was no dispute as to the facts of the prisoner's alleged misconduct, it is common in prison disciplinary proceedings for the disciplinary "court" to require a plea of "guilty" or "not guilty" to a specific charge (that may even involve criminal conduct, such as an assault) and to adjudicate the charge on vigorously disputed facts — the avowed purpose of the proceeding is to ascertain guilt and impose punishment, and the interests of the prisoner and his accusers are clearly adverse. On the *Sostre* record — with an intelligent and articulate prisoner able to protect his own interests and no disputed facts — the court was perhaps justifiably reluctant to lay down a new code of procedure. The court went no further than to say that in serious disciplinary cases the facts should be "rationally determined" and that a prisoner should be given "adequate notice," an opportunity to reply to he charge and a "reasonable investigation into the relevant facts."

Whatever the procedure in lesser disciplinary matters, the withholding of good time should be viewed as an integral part of the criminal process, subject to fundamental requirements of procedural fairness.[152] Although the precise due process requirements may vary somewhat depending on the balance between seriousness of the punishment and the prison's need for speedy procedures, most of the traditional elements of procedural fairness should be afforded.[153] Furthermore, the deprivation of good time is one area of prison discipline where the officials clearly cannot justify summary procedures. There is simply no urgency about adjudicating whether an infraction warrants adjusting the prisoner's term of imprisonment.[154] Since the term was originally set by a judge, with all the procedural safeguards of a judicial proceeding, any adjustments should be made only pursuant to careful procedures.

3. Due Process in Disciplinary Proceedings

Finally, disciplinary actions in general may be attacked on due process grounds. As noted above, serious punishments are often meted out with scant regard for the fundamental fairness required by the due process clause. Inmates may be accused of misconduct that does not violate any prison rule. Also, the prison rules may be so broadly drawn that they are too vague, place too much unreviewable discretion in the officials, and do not adequately warn inmates of the kinds of conduct that may expose

151. No. 35038 (2d Cir., Feb. 24, 1971). The court did agree with the district court that Sostre's good time should be restored to him because he had been unlawfully punished for his beliefs. But the court left open whether in a future case based "solely" on loss of good time, the plaintiff would have to exhaust state remedies before invoking federal jurisdiction under 42 U.S.C. § 1983, in order to prevent circumvention of the habeas corpus exhaustion requirement, 28 U.S.C. § 2254(b). Slip op. at 1686 n.50. This caution may have been aimed at cases where restoration of good time would result in immediate release from custody. While such relief is more commonly associated with habeas, the mere possibility of release if a prison administrative decision is held unconstitutional does not implicate the habeas policy considerations of federal noninterference with state judicial decisions and criminal convictions.

152. *Cf.* Mempa v. Rhay, 389 U.S. 128 (1967) (due process required in postconviction sentencing proceedings). But it has been held that a prisoner who lost good time as an administrative punishment cannot maintain a double jeopardy defense to a subsequent criminal prosecution for the same act. United States v. Cordova, 414 F.2d 277 (5th Cir. 1969).

153. *Cf.* Goldberg v. Kelly, 397 U.S. 254 (1970); Jones v. Robinson, No. 24010 (D.C. Cir., Feb. 4, 1971).

154. In *Kritsky v. McGinnis*, 313 F.Supp. 1247 (N.D.N.Y. 1970), the inmate was actually in segregation at the time of his "hearing" before the functionary who ordered forfeiture of a year and a half of good behavior credit. In these circumstances, where the prisoner could not possibly be threatening the security of the institution, the failure to afford a full hearing is insupportable. The court, following its earlier decision in *Rodriguez v. McGinnis*, 307 F.Supp. 627 (N.D. N.Y. 1969) ordered restoration of the good time. *Accord*, Wright v. McMann, No. 66 CV 77 (N.D.N.Y. July 31, 1970) (disciplinarians "really assume the function of a judge"). *Contra*, Sullivan v. Ciccone, 311 F.Supp. 456 (W.D. Mo. 1970) (loss of good time only suspension of a "privilege").

them to the risk of punishment.[155] There have been no cases explicitly holding that prison rules of conduct must not be overbroad; nevertheless, where the punishment to be inflicted is very serious, such as a sentence to solitary confinement or deprivation of good time, the discretion of prison officials should be circumscribed by traditional due process notions.[156] Even if the rigorous requirements of precision applicable to criminal laws do not fully apply in prison disciplinary proceedings, at the very least familiar rules governing decisions of administrative agencies should apply.[157] In other words, the prison administration should not be permitted to act in a standardless, arbitrary, or capricious way; it should be required to have valid rules that are fairly communicated to the persons who risk sanctions for violating them.[158]

Even where a prison maintains fair rules that are properly communicated to the inmate population, the disciplinary procedures must accord with procedural due process.[159] While it is not essential that a full-blown hearing precede the deprivation of movie privileges for some minor infraction, a "trial" for a serious offense punishable by solitary confinement or loss of good time should comport with traditional notions of procedural due process.[160]

Prison administrators claim they need summary proceedings to deal with highly volatile situations. But in fact there are relatively few major disciplinary matters that actually require emergency disposition. Where a prisoner is leading an insurrection, officials no doubt can amply justify emergency segregation.[161] But in the far more typical case of forfeiture of "good time" for "insubordination" or "refusal to work," there is no reason to dispense with a full and fair hearing.

Of course, the more elaborate the procedural safeguards, the more difficult it is for prison officials to mete out serious punishments. The prisoner's lawyer may therefore wish to press procedural due process claims where, for example, it is unlikely that the prisoner will prevail in attacking conditions of segregation as cruel and unusual. Just as the Supreme Court's procedural innovations have put a de facto halt to capital punishment, rigorous procedural standards in prison may result in a decreased use of serious disciplinary punishments.[162].

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155. *See, e.g.*, TEXAS DEP'T OF CORRECTIONS, RULES AND REGULATIONS 10 (1968): "Laziness. This includes refusing or failing to do work assigned and refusing or failing to obey orders and instructions." *See also* MAINE STATE PRISON, INFORMATION, RULES AND REGULATIONS FOR INMATES 42, 43 (undated) (making punishable "conduct . . . such as would descredit this institution").

156. *Cf.* Davis v. Lindsay, No. 70 Civ. 4793 (S.D.N.Y., Nov. 4, 1970). The court held that the isolation of Angela Davis in a New York City jail violated her rights under the equal protection clause. Although the isolation was not punitive in nature and was ostensibly for the prisoner's own protection from curious fellow inmates, the court rejected the officials' justification since they offered no proof of actual threats either of disruption or of danger to Miss Davis. *See also* Dabney v. Cunningham, 317 F.Supp. 57 (E.D. Va. 1970) (prisoner ordered released from punitive segregation because the officials made no showing of a factual basis to justify such confinement). *Accord*, Smoake v. Fritz, 70 Civ. 5103 (S.D.N.Y., Dec. 21, 1970); Carter v. McGinnis, Civ. No. 1970—539 (W.D.N.Y., Dec. 15, 1970) (isolation justified only "if substantial evidence indicates a danger to the security of the inmates or the facility").

157. *See generally* Jacob, *Prison Discipline and Inmate Rights*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 227 (1970); Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968).

158. *Cf.* Landman v. Peyton, 370 F.2d 135, 141 (4th Cir. 1966); Dabney v. Cunningham, 317 F.Supp. 57 (E.D. Va. 1970); Jackson v. Bishop, 268 F.Supp. 804, 815—16 (E.D. Ark. 1967), *rev'd on other grounds*, 404 F.2d 571 (8th Cir. 1968); Talley v. Stephens, 247 F. Supp. 683, 689 (E.D. Ark. 1965).

159. The strange notion of due process held by many prison administrators is illustrated by the following excerpt from the deposition of a New York deputy warden in a case where, charged with sole responsibility for discipline, he ordered the forfeiture of 100 days of the inmate's good time:
Q. At the disciplinary hearings, are inmates entitled to call witnesses in their behalf?
A. No.
Q. Are they entitled to cross examine guards?
A. No.
Q. Are they entitled to representation by anyone?
A. No.
Q. What record is made of the proceedings at a disciplinary hearing?
A. As you see here, on the disciplinary report, the punishment is noted. This desciplinary hearing is not a judicial hearing, it corresponds to, I believe, a potter familus [*sic*]. I could be wrong on the potter familus.
Q. Potter familus?
A. It is probably known at the authority figure, as meting out what is family punishment, or family discipline. This is not a judicial thing in the sense of a court of record, and there is no provision for it as a court of record, and there is no provision for it being held, yes, but not as a matter of a court of record, and this is an internal disciplinary thing, very much as a father and mother in the home who say, "Johnny, you have done so and so, and you are forbidden to do it, and therefore you will have to stay in your room."
Deposition of Perry J. DeLong, Jan. 10, 1969, at 39—41, *Visconti v. LaVallee*, No. 68 Civil 403 (N.D.N.Y., filed Nov. 1968).

160. See the discussion of procedural due process in text accompanying notes 136—41 *supra*. *Cf.* Shone v. Maine, 406 F.2d 844 (1st Cir. 1969), *vacated as moot*, 396 U.S. 6 (1969) (transfer to functionally distinct confinement requires judicial hearing).
Fair procedures are not antithetical to sound penal administration. Indeed, both the Missouri and Rhode Island prison systems recently adopted comprehensive rules and regulations affording accused inmates substantial procedural protections. *See* Missouri State Penitentiary Personnel Information Pamphlet (1967); Morris v. Travisono, 310 F.Supp. 857 (D.R.I. 1970).

G. Right to Rehabilitation

SINCE MORE than 95 percent of prison inmates will be returned to society either on parole or upon the expiration of their sentences,[163] prison officials acknowledge an obligation to attempt to rehabilitate prisoners and return them to constructive living. The *Manual of Correctional Standards* of the American Correctional Association states that the prison's "basic purpose" is "the rehabilitation of those sent there by society."[164] Many state statutes mandate that the state department of correction or prison officials provide an affirmative program of rehabilitation.[165] Despite this rhetoric and these statutory obligations, few prisons actually provide meaningful rehabilitative opportunities for their inmates. Rather, in most prisons educational and vocational training are grossly inadequate, and idleness is the rule. Also, programs of psychiatric and psychological counseling are understaffed or nonexistent.

The question here is whether prisoners have an enforceable right to access to meaningful rehabilitative programs. An analogy might be drawn to the rights of persons involuntarily committed to mental hospitals. There have been some indications that, where the reason for commitment is the need for treatment, the failure actually to provide treatment violates the inmate's constitutional rights.[166] The logical extension of this principle would require that, if rehabilitation is the primary purpose of imprisonment of adults, prisons must actually provide meaningful rehabilitative opportunities. A prison should be obliged to furnish an inmate with an opportunity to acquire at least a high school education, to gain job skills actually of value in the economy, to repair any medical defects he may have, and to benefit from psychiatric or psychological counselling if that is needed.

No case has held that a prisoner has a "right to rehabilitation." However, in *Holt v. Sarver*,[167] a federal district court held that the failure of the Arkansas prison system to provide any meaningful rehabilitative programs was one constitutionally significant factor bearing on the holding that the system was unconstitutional. The court reasoned that the deprivation of rehabilitative opportunities, together with the other oppressive conditions in the prison, constituted cruel and unusual punishment under the eighth amendment.[168] This decision may open the door to a challenge to prison systems that do not provide sufficient programs or resources to meet the rehabilitative needs of the inmates. In states with strong statutory requirements for affirmative rehabilitative programs, perhaps the challenge should be made on statutory, rather than federal constitutional grounds. The fact that imprisonment of offenders serves purposes other than rehabilitation (for example, isolation of the offender to protect society) militates against recognition of a constitutional right to be offered an affirmative rehabilitation program.[169] But the related problem of the denial of rehabilitative opportunities to individual inmates because of disciplinary or classification decisions of prison authorities does seem judicially tractable.

161. In *Burns v. Swenson*, 430 F2d 771 (8th Cir. 1970), the court said that although it might be "desirable" to hold a hearing before placing an inmate in maximum security, this may not always be practical, and emergencies may require segregation without a hearing. In *Burns*, the emergency was a killing with serious racial overtones. The court refused to find improper a six-month delay before any hearing was held, referring to "[e]xigent circumstances known only to the prison officials." *Id.* at 779. This failure to require an affirmative justification for such a delay is regrettable and the court's reasoning is wholly unpersuasive. Once the emergency subsides, a careful determination of the facts and any reasons for continued segregation is possible and, indeed, essential to fundamental fairness. It appears that the *Burns* court's unwillingness to require justification of the officials' action was strongly influenced by its own conclusion that the prisoner was dangerous and incorrigible and that no fair procedures could conceivably have resulted in any other outcome than segregation from the inmate population. *Id.* at 780—81. For a more sound judicial approach to a similar problem, in the context of a transfer of a mental patient to a maximum security ward see *Williams v. Robinson*, 432 F.2d 637 (D.C. Cir. 1970).
162. The very existence of the cruel and unusual punishment clause ought to preclude reliance on fair procedure alone to justify unduly harsh disciplinary measures. *Cf.* Goldberg v. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1802 (1970).
163. *See* note 4 *supra*.
164. AMERICAN CORRECTIONAL ASSOCIATION, *supra* note 132, at 421.
165. *See, e.g.*, TEX. REV. STATS. ANN. *art.* 6166a (1927); R.I. GEN. LAWS ANN. § 13—3—1 (1956).
166. *See* Covington v. Harris, 419 F.2d 617, 625 (D.C. Cir. 1966); *Symposium—The Right to Treatment*, 36 U. CHI. L. REV. 742 (1969).
167. 309 F.Supp. 362 (E.D. Ark. 1970).
168. The frustration of correctional and rehabilitative goals was one of the factors leading to the Eighth Circuit's conclusion that corporal punishment was cruel and unusual. Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968).
169. *See* Note, 84 HARV. L. REV. 456, 462 (1970).

For example, if an inmate is found guilty of some disciplinary infraction, he may be transferred to a maximum security unit where his participation in rehabilitative programs is severely curtailed.[170] Similarly, prison classification decisions have a decisive influence on whether an inmate has access to rehabilitative opportunities. If he is considered troublesome, he will be relegated to a maximum security classification where he will have limited educational, vocational, recreational, and other opportunities. Administrative decisions as to an inmate's work assignment or participation in the educational program will also determine whether he will have a chance to acquire skills needed for success on parole and subsequent to his release. Since all these matters have such an important impact on the inmate's present and future life, decisions denying access to rehabilitative opportunities should be made with scrupulous regard for procedural fairness. In other words, requirements of procedural due process should apply to these kinds of decisions as well as to disciplinary decisions imposing severe punishments.[171]

It is unlikely that the courts will review the rationality of individual classification decisions. Suits brought to challenge classification decision-making should be class actions and should concentrate on the decision-making procedures themselves. They should seek to establish minimal safeguards such as notice of a proposed detrimental change in classification, an opportunity to contest the factual basis for the decision, and an adequate means of administrative appeal from the decision.[172]

170. *See* text accompanying notes 130—33 *supra.*

171. *See* text accompanying notes 136—41 *supra. See also* Jacob, *Prison Discipline and Inmate Rights*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 227 (1970). In *Morris v. Travisono*, 310 F.Supp. 857 (D.R.I. 1970) the prisoners contended that placing certain prisoners in a "behavioral conditioning unit" (maximum security) in which there was no opportunity to participate in the prison's limited rehabilitative programs was unconstitutional because, *inter alia*, the classification decisions were made without procedural due process. The case was settled by a comprehensive consent decree providing the prisoners with significant procedural rights.

172. *Cf.* Edwards v. Duncan, 355 F.2d 993, 994—95 (4th Cir. 1966) (prisoners' claims are justifiable where there is no formal administrative apparatus to resolve alleged arbitrary action and no provision for impartial resolution of factual issues underlying the claims); Williams v. Robinson 432 F.2d 637 (D.C. Cir. 1970); Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970).