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CRIMINAL LAW COMMENTS AND CASE NOTES

PRISON RESTRICTIONS—PRISONER RIGHTS

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The old retributive view of penology was to a large extent based upon the idea that a person convicted of a crime was an "outlaw" without legally protected rights. Gradually, however, as a result of nineteenth century humanitarian influences, corrective treatment, reform and rehabilitation came to be regarded as more desirable principles of penology. Along with this change in attitude came much needed reform in the treatment of prisoners initiated by the prison system administrators.[1]

Courts, on the other hand, concerned themselves mainly with protecting the rights of persons accused of a crime rather than with defining the rights of those already convicted. The determination of prisoner rights was generally left to the administrative discretion of prison officials.[2] The judicial basis for affording this wide administrative discretion was the belief that the courts were without power to supervise prison administration or interfere with the ordinary rules and regulations of penal institutions.[3] This "hands-off" doctrine continues to be applied by a majority of courts today, and may be given particular emphasis when federal courts are called upon to review complaints of state inmates.[4]

Generally, if a court adheres to the "hands-off" doctrine the allegations contained in a prisoner's petition will not be examined, and as a result, no inquiry will be made to determine whether the asserted claims warrant relief. Two related bases appear to underlie this doctrine. One is the separation of powers principle of government. It is argued that the judiciary should not interfere with the executive function of prison administration.[5] The second is the fear that judicial review of administrative decisions will seriously interfere with the ability of prison officials to carry out the objectives of the penal system.[6] As one commentator has pointed out, however, neither of these rationale constitutes a satisfactory basis for deny-

[1] Tappan, *The Legal Rights of Prisoners*, 293 ANNALS 99 (1954).

[2] *Id.*

[3] Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954); *In re* Taylor, 187 F.2d 852 (9th Cir.), *cert. denied*, 341 U.S. 955 (1951); Stroud v. Swope, 187 F.2d 850 (9th Cir.), *cert. denied*, 342 U.S. 829 (1951); Numer v. Miller, 165 F.2d 986 (9th Cir. 1948); Fussa v. Taylor, 168 F. Supp. 302 (M.D. Pa. 1958); Commonwealth *ex rel.* Smith v. Banmiller, 194 Pa. Super. 566, 168 A.2d 793 (1962); Cooke v. Tramburg, 43 N.J. 514, 205 A.2d 889 (1964).

[4] *See e.g.*, Walker v. Pate, 356 F.2d 502 (7th Cir.), *cert denied*, 384 U.S. 966 (1966), at 504 where the court said:

> In the event that inmates of state prisons within the Seventh Circuit persist in bringing actions in the federal courts in which the complaints are based upon various matters concerning the rules and regulations in effect in those prisons, and such matters are brought to this court on appeal, it is likely, in the ordinary case, that this court will dispose of the appeal either by a per curiam opinion or by an order.

[5] Powell v. Hunter, 172 F.2d 330, 331 (10th Cir. 1949).

[6] Sigmon v. United States, 110 F. Supp. 906 (W.D. Va. 1953); *See generally* cases cited in note 3 *supra*.

ing a prisoner judicial review of administrative action.[7] The mere delegation of authority to the executive does not immunize its acts from review by the judiciary. Furthermore, the detrimental effects of such review on the penal purposes of restraint, deterrence, and rehabilitation, or on the maintenance of an orderly prison, are much exaggerated—if not completely untenable.

During the past twenty-five years, a number of courts have recognized that the "hands-off" doctrine is not a satisfactory principle in prisoner litigation, and a trend has been noted away from it.[8] Perhaps the leading statement indicative of this trend was made in dictum by the Court of Appeals for the Sixth Circuit in *Coffin v. Reichard*.[9] The court stated: "A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."[10] If the courts are prepared to face the task of defining what rights are taken away by "necessary implication" rather than leave it wholly within the discretion of administrative officials, they will of necessity have to strike a balance between prisoner and prison interests. This comment will examine the rights that are ascribed to prisoners today and the practical problems encountered in managing a prison; additionally, some suggestions on how the conflicting interests might be partially resolved will be made. Three areas will be considered: freedom of speech, freedom of religious practice, and the right of access to the courts.

Freedom of Speech

The right of prisoners to communicate with the outside world, essentially through use of the mails and conversation with visitors, is subject to restrictions. Prison regulations usually provide for an approved mailing list consisting of the names of persons with whom a prisoner may correspond. In *Fussa v. Taylor*,[11] a prisoner received permission to write to his common law wife who was incarcerated at the state reformatory for female prisoners. Upon receipt at the state reformatory, the letter was confiscated and returned along with a note to the petitioner's warden. In the note, the reformatory superintendent stated that he found no constructive elements in the relationship of the two inmates and did not approve of their corresponding. As a result, petitioner's warden cancelled his mailing privilege with this woman. In upholding the action taken by the warden, the court held that such a restriction was an ordinary mail regulation within penitentiary rules, and being such, the court would not interfere with the administration of it.

Prison rules may also specify what persons are allowed to visit the prisoner. In *Abamine v. Murphy*,[12] a prisoner in a maximum security jail was not allowed a visit from his wife who at that time was free on bail, awaiting trial on theft charges. A prison rule provided that any person who had been released from the jail could not visit an inmate within thirty days of such release. The prisoner contended that the rule was cruel and unusual punishment when applied to deny him the right of a visit from his wife. The court, after listing the security reasons given by the warden for the rule, held it to be a reasonable regulation and that the courts should not hamper officials by interfering with long established practices of a reasonable nature. Significantly, the court reached the issue of reasonableness rather than rely entirely, as in the *Fussa* case, upon administrative discretion.

It would appear that from a practical standpoint, approved mailing and visitor lists are necessary for several reasons. Since certain correspondents and visitors would be more likely to attempt to formulate escape plans, send or give the prisoner contraband or be partners in an illegal business, they must be kept from the approved lists. Ex-convicts, for example, may be inclined to give the prisoner information about the physical layout or routine of the jail. Also, there may be a likelihood that if an old business partner was involved with the prisoner in an illegal business he would try to obtain information concerning such business from the inmate during the latter's incarceration.

Prison approved mailing lists are also considered necessary because of censorship requirements. Mail censorship is justified by officials because it facilitates interception of escape plans, narcotics or any other contraband. In addition, censorship provides a means of assuring that inmates are not controlling or otherwise participating in an illegal

[7] For a full critique of the rationale behind the "hands-off" doctrine see Comment, *Beyond the Kin of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 Yale L.J. 506 (1963).

[8] Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. of Pa. L. Rev. 985 (1962).

[9] 143 F.2d 443 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945).

[10] *Id.* at 445.

[11] 168 F. Supp. 302 (M.D. Pa. 1958).

[12] 108 Cal. App.2d 294, 238 P.2d 606 (1951).

business or other scheme. Since censorship and confiscation of the mails are thus essential for effective prison management, the volume of mail to be screened must be kept within the capacity of a limited prison staff. This is accomplished by limiting the number of persons with whom a prisoner may correspond.

In dealing with mail censorship controversies, courts generally allow a high degree of discretion to prison officials,[13] as exemplified by the leading case of *Numer v. Miller*.[14] There the prisoner complained that his right of free speech had been abridged and that he was denied access to educational facilities which were afforded all other fellow inmates. The basis for petitioner's complaint was the warden's refusal to allow him to mail lesson sheets required of an English extension course. The prisoner's first assignment had been to state his reasons for taking the course; his response was that he intended upon his release to write a book which would expose the brutality of prison authorities. As a result of this answer the warden said the prisoner would not be allowed to continue with the course unless he changed his objectives. This the petitioner would not do so the privilege was taken away. The court refused to give any relief to the prisoner and stated that supervision of such disciplinary action was not within the province of the court. Furthermore, it said, a prisoner who abuses a privilege is not in a position to complain if that privilege is taken from him.

Although discretionary prison censorship and confiscation have been upheld in many other cases, courts will not permit either where the correspondence concerns only the prisoner's legal affairs and is addressed to the courts.[15] This freedom from censorship was further extended by the court in *Brabson v. Wilkins*[16] to legally related letters addressed to the prisoner's attorney or to the United States Attorney General.

Prisoners occasionally claim the right to communicate with the outside world through the publication of manuscripts written during incarceration or in furtherance of a legitimate business purpose. Generally, however, the courts do not recognize such a right. In *United States v. Maas*,[17] the court issued a preliminary injunction prohibiting the publication of a prisoner written manuscript. The court held that the manuscript did not conform with the policy of prison rules regulating such matters.

In *Stroud v. Swope*,[18] the issue was whether the petitioner was entitled to carry on business affairs regarding efforts to secure publication of books he had written while in prison. He claimed he had the right to reasonable correspondence in furtherance of his business enterprise. As in *Maas*, the court rejected the argument that it should decide the question of reasonableness, stating that the burden of supervision may not be imposed upon or assumed by the courts. Furthermore, the court reasoned, supervision of the treatment and discipline of prisoners is not a jucicial function; the role of the court is solely to deliver from imprisonment those who are illegally confined.

A major practical reason advanced for restricting correspondence in furtherance of a business interest is the fear of continued illegal activity under the guise of a legitimate business. Such correspondence may be a potential source of financial strength for corrupting guards and it would unreasonably increase the volume of mail subject to censorship. Regarding prisoner manuscripts, there is fear expressed by some that writing about past crimes or abusive treatment by prison officials may reinforce criminal behavior or increase resentment and make rehabilitation more difficult.[19]

Considering the various restrictions placed upon a prisoner's freedom of communication with the outside world, it is not surprising to find severe restraints placed upon speech between fellow inmates.[20] In *Fulwood v. Clemmer*,[21] Black Muslim inmates held a meeting in the prison recreation yard at which several members of the group preached racial Muslim doctrines in a sufficiently

[13] Courts have also upheld the monitoring of conversations between visitors and prisoners. *See e.g.* People v. Morgan, 197 Cal. App.2d 90, 16 Cal. Rptr. 838 (1961), *cert. denied*, 370 U.S. 965 (1962).

[14] 165 F.2d 986 (9th Cir. 1948).

[15] Spires v. Dowd, 271 F.2d 659 (7th Cir. 1959); United States *ex rel.* Vraniak v. Randolph, 161 F. Supp. 553 (E.D. Ill.), *aff'd*, 261 F.2d 234 (7th Cir. 1958), *cert. denied*, 359 U.S. 949 (1959); Brabson v. Wilkins, 45 Misc.2d 286, 256 N.Y.S.2d 693 (Sup. Ct. 1965).

[16] 45 Misc.2d 286, 256 N.Y.S.2d 693 (Sup. Ct. 1965).

[17] Civil Action No. 1219-'66, D.D.C., May 24, 1966.

[18] 187 F.2d 850 (9th Cir.), *cert. denied*, 342 U.S. 829 (1951).

[19] Note, *The right of Expression in Prison*, 40 S. CAL. L. REV. 407 (1967).

[20] A requirement of complete silence, however, such as in the "Auburn System" of penology which developed in New York in 1821, probably would be unconstitutional today as cruel and unusual punishment. *See* LEWIS, THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS 1776–1845, at 86–87 (1922).

[21] 206 F. Supp. 370 (D.D.C. 1962).

loud voice to be heard by other non-Muslim white and Negro inmates. The court held that the Black Muslim "preachers" could be punished for this because the language was offensive, insulting and disruptive enough to engender those feelings in non-Muslims which tend to menace order. The court's approach indicates that the basic reason for suppressing oral intercourse between inmates is the necessity of maintaining discipline, order, and security within the penal institution.

Although the practical reasons advanced for limiting a prisoner's absolute freedom of speech appear to deserve considerable weight, the value of free speech to prisoners must also be taken into account.[22] One of the values which has been advanced is the prisoner's need to have an outlet for expression. Since writing and speech are two of the few expressive outlets a confined person may practically be able to enjoy, stifling them may seriously affect the basic human desire and need of individual fulfillment. A second value of free speech is the role which it plays in affording society the opportunity to evaluate and judge how well prison administrators are discharging their function and duties. Furthermore, free speech may indicate prisoner attitude—the knowledge of which may be useful to prison officials in detecting potential security breaches early enough to prevent their actual occurrence. Prisoner attitude is also useful as an indicator of progress or problems in rehabilitation programs.

The difficult task which the courts face is balancing the values of prisoner free speech with prison administrative considerations. In doing so, one of the fundamental principles which should be observed is that any arbitrary or discriminatory rules or regulations are unconstitutional. It may be assumed that very few prison rules will fall into this category, so that on their face the purposes of the restrictions will appear valid. A court should not, however, cease inquiry at this point. It has been suggested that a regulation may still be invalid if a reasonable alternative which involves less deprivation of the prisoner's freedom of speech is available to accomplish the same purpose.[23] For example, a court may find that restricting all prisoner group discussion serves the purpose of maintaining prison security and discipline. Further inquiry may show, however, that reasonable alternatives are available to accomplish the same purpose; for instance, group discussions in a meeting room under guard supervision. Total deprivation would constitute an unnecessary and unreasonable, and unconstitutional, denial of the prisoners' rights.

It is suggested that prison officials should be required to show that not only a valid purpose for restraint exists, but also that such purpose is being accomplished with a minimum deprivation of free speech.

Consideration should also be given to allowing limited business correspondence. Any wealth derived in conducting an enterprise could be paid directly to the inmate's family or held until his release. In this way, the prisoner would not have the feared financial strength to corrupt prison guards. Furthermore, the volume of mail could simply be restricted within reasonable limits. It would seem that allowing the prisoner to carry on a legitimate business, publish books, or patent inventions[24] would reduce family hardships created by imprisonment and might have some rehabilatory effects on the inmate. Prohibiting all such activity may not be the most reasonable alternative.

Freedom of Religion

There has been a considerable amount of litigation in recent years concerning the prisoner's right to practice his religion. A large proportion of this has resulted from the growth of the Black Muslim faith, with its beliefs and practices radically different from those of Christianity or Judaism.

A distinction is drawn in the prison environment,[25] as in the outside world,[26] between freedom to believe, which is absolute, and freedom to exercise one's belief, which may be subject to certain limitations. These limitations are those necessary for the protection and security of the remainder of society, whether it be the prison society or the freemen's society.

In *McBride v. McCorkle*,[27] a Catholic prisoner confined in a segregated wing of the prison alleged that the warden's refusal to allow him, in the free exercise of his religious beliefs, to attend Mass with other Catholic prisoners for a period of two

[22] Note, *The Right of Expression in Prison*, *supra* note 19.

[23] *Id.*

[24] A prisoner was denied the right to obtain a patent on his invention during his incarceration in United States v. Ragan, 213 F.2d 294 (7th Cir.), *cert. denied*, 348 U.S. 846 (1954).

[25] Banks v. Havener, 234 F. Supp. 27 (E.D. Va. 1964); *In re* Ferguson, 55 Cal.2d 663, 361 P.2d 417, 12 Cal. Rptr. 753, *cert. denied*, 368 U.S. 864 (1962).

[26] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[27] 44 N.J. Super. 468, 130 A.2d 881 (App. Div. 1957).

years was cruel and unusual punishment. A chaplain was available, however, to all segregated inmates such as the petitioner. The court, in denying any relief, said that the social interest of depriving petitioner the opportunity to attend Mass with the rest of the prison population is the necessity to preserve order and discipline in the prison. A prisoner is privileged to worship God to the extent his conduct in prison permits. The court went on to state that it was not for it to review the practical judgment of the authorities based on prison experience.

In a similar case, *United States ex rel. Cliggett v. Pate*,[28] a prisoner in the prison segregation unit was not allowed to worship with his fellow inmates in a corporate body. The court held this not to be discrimination against the prisoner's belief because for security reasons all those in segregation were equally denied such right.

Relief has also been denied a prisoner who was prevented from obtaining Bible study aids offered by the Watch Tower Society,[29] and similarly, no relief was given a prisoner who was forbidden to take an Arabic grammar book, for his religious education, into the prison recreation yard.[30] In both cases, the courts relied on the "hands-off" doctrine. Such actions, it was stated, were matters of prison discipline entrusted to prison officials.

When considering the religious freedom of Black Muslims, the first inquiry has been whether Muslim practices are recognized for legal purposes as constituting a "religion".[31] Although a few courts have denied them such status,[32] recognition is generally given to the existence of a Black Muslim religion.[33] In *Fulwood v. Clemmer*,[34] the court said that a religion calls for belief in a supreme being controlling the destiny of man and that the Black Muslims meet this test by their belief in Allah.

Before discussing to what extent Black Muslim religious practices may be prohibited, it may be useful to explore the administrative problems created by the doctrines of the religion itself.[35] Very basic to the Black Muslim religion is an inexorable hatred of the white race and the closely related doctrine of Negro race supremacy. As a manifestation of these teachings, some Muslim practitioners feel that in time the Negroes will have their own segregated section of the United States. The expression of these beliefs by spoken word, publications and actions may create an extremely volatile prison atmosphere. Friction may develop between Muslims and other white or non-Muslim Negro members of the prison community. This friction may in turn create the spark for a disturbance or even a full blown prison riot.

Because Negro prisoners often feel they are imprisoned by "white mans' justice," the Black Muslim religion breeds especially well in the prison environment and produces many Muslim leaders and ministers. A problem arises when incarcerated members of the Muslim faith claim the right to receive ministration from their leaders or ministers. Prison officials must decide how to resolve the conflict between the principle of equal treatment of religions, and prison rules prohibiting inmates from having any contact with former convicts who frequently fall within this classification.[36]

The basic issue confronting the courts is to what extent do the Black Muslims have a right to practice their religion. The answer to that question may be dependent, however, upon the answer to another: do Black Muslims have the same right to practice their religion at *all*, as do members of other faiths? The answers which courts have given to this latter question range from allowing the total deprivation of Muslims' religious privileges to holding invalid any deprivation of such privileges if given to other faiths.

Total deprivation is exemplified in the California case of *In re Ferguson*.[37] There a Black Muslim prisoner complained of religious discrimination.

[28] 229 F. Supp. 818 (1964).

[29] Kelly v. Dowd, 140 F.2d 81 (7th Cir. 1944).

[30] Wright v. Walkins, 26 Misc.2d 1090, 210 N.Y.S.2d 309 (Sup. Ct. 1961).

[31] The practices of Black Muslims have the appearance of a religion. The Muslims have their own bible, priests, temples, parochial schools, dietary laws, and are granted tax exemptions on an equal footing with other churches and parochial schools by state and municipal governments. Comment, *Black Muslims in Prison: of Muslim Rites and Constitutional Rights*, 62 COLUM. L. REV. 1488, 1490 (1962).

[32] *In re* Ferguson, 55 Cal.2d 663, 361 P.2d 417, 12 Cal. Rptr. 753, *cert. denied*, 368 U.S. 864 (1961).

[33] Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961), *appeal dismissed per stipulation*, 304 F.2d 670 (4th Cir. 1962) (without predjudice); Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961), *dismissed*, 212 F. Supp. 865 (N.D.N.Y. 1962), *dismissal aff'd*, 319 F.2d 844 (2d Cir. 1963); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962); Brown v. Mc Ginnis, 10 N.Y.2d 531, 180 N.E.2d 791, 225 N.Y.S.2d 497 (1962).

[34] 206 F. Supp. 370 (D.D.C. 1962).

[35] *See* LINCOLN, THE BLACK MUSLIMS IN AMERICA (1962).

[36] Note, *Suits by Black Muslim Prisoners to Enforce Religious Rights-Obstacles to a Hearing on the Merits*, 20 RUTGERS L. REV. 528 (1966).

[37] 55 Cal.2d 663, 361 P.2d 417, 12 Cal. Rptr. 753, *cert. denied*, 368 U.S. 864 (1961).

He alleged Muslims were not allowed a place of worship, religious meetings were broken up, purchase and possession of the Muslim Bible and other religious literature was prohibited and religious leaders were not allowed to visit the prisoners. The prison officials admitted to the discrimination but argued that prison discipline justified it. The court agreed saying that it was no abuse of discretionary power for officials to manage the prison system and to base restrictions on the potentially serious dangers to prison security which the Black Muslim practices involve.

A similar result upholding total deprivation of Muslim practice was reached by a United States District Court for the District of Kansas in *Jones v. Willingham*.[38] In that case, a Black Muslim inmate alleged that he was being deprived of religious privileges accorded adherents of other religious faiths—the right to assemble for worship, to receive religious instruction, and to receive Muslim literature. After discussing the Black Muslim doctrines and the disciplinary problems created by them the court concluded that the warden's actions based upon his observations and prison experience were not arbitrary, capricious or unlawful. The court also noted that the warden "... not only was fully justified in imposing on the plaintiff and others professing Muslim beliefs the restrictions of which the plaintiff now complains, but it was his duty to so act."[39]

Other courts appear to take a middle position by allowing partial deprivation of Black Muslim's privileges. In *Cooke v. Tramburg*,[40] the New Jersey Supreme Court upheld the Board of Managers' prohibition of Muslim religious services. The court held such a restraint to be reasonable in light of the disciplinary problems which such an assembly of Muslims might create. Although relief was thus denied with regard to this one privilege deprivation, the court took cognizance of the fact that Black Muslims were allowed other liberties in the exercise of their religious beliefs. Purchase and possession of their Qu'ran was permitted; they were permitted to gather in the exercise yard up to six in number to discuss their religion; and they could readily communicate with Muslim ministers.

In *Childs v. Pegelow*,[41] another case of partial deprivation, Muslim prisoners sought to compel the warden to recognize their special fasting practices during the month of Ramadan. The warden had agreed to comply with their dietary restrictions and to serve their meals before sunrise and after sunset. The prisoners complained, however, that in carrying out this agreement prison officials did not determine sunset by the traditional Muslim manner.[42] The complaint was dismissed as not presenting a justiciable issue. The court said that the petitioner was merely seeking to enforce an agreement of special privilege, not a constitutionally or legally protected right. The granting of such a privilege was clearly a routine matter of internal prison administration with which the court would not interfere. The reference to "special privilege" might infer that "ordinary" religious privileges would be afforded different treatment by this court. There was no indication by the court that all Muslim privileges may lawfully be denied but only that those of a "special" or "peculiar" nature could be so treated.

A third position regarding the equal rights of Black Muslims is taken by other courts. These courts hold any deprivation of religious privileges invalid if it appears that corresponding privileges are given other faiths. Cases in this category are generally based on either of two rationale. One is that if prison administrators promulgate rules of religious non-discrimination, the court will require the prison personnel to adhere to them. The second rationale is based upon equal protection of the law, and is independent of the existence of administrative rules or proclamations.

The first of these rationale was the basis for two District of Columbia cases. In *Fulwood v. Clemmer*,[43] Black Muslim prisoners complained of not being given facilities and rights on an equal basis with members of other religions. The court held that to allow some religious groups to hold services at public expense while denying that right to Black Muslims, was religious discrimination in violation of an order of the prison commissioners to make facilities available without regard to race or religion. Similarly, since the Department of Correction purchased religious medals for Catholics, Protestants, and Jews with public funds it was held that medals must also be made available

[38] 248 F. Supp. 791 (D. Kan. 1965).
[39] *Id.* at 794.
[40] 43 N.J. 514, 205 A.2d 889 (1964).
[41] 321 F.2d 487 (4th Cir. 1963), *cert. denied*, 376 U.S. 932 (1964).
[42] The Black Muslim method of determining daylight hours for fasting during the month of Ramadan is by inspection of a black and a white thread held in the air. If no difference can be detected the hours of darkness have commenced. The prison officials, instead of using this test, relied upon Naval Observatory time.
[43] 206 F. Supp. 370 (D.D.C. 1962).

to Muslims in order to comply with the commissioners' regulation.

In *Sewell v. Pegelow*,[44] prisoners professing the Black Muslim faith alleged that they were discriminated against solely because of their religious beliefs. They complained of being denied the right to wear religious medals, to communicate with religious advisors, to recite prayers, and to receive publications. The court held that the complaints stated enough to require a hearing, and remanded the case to the district court. A cause of action was stated because this was not an attack upon disciplinary measures nor bare conclusory allegations of a denial of constitutional rights; it was an extensively detailed specification of deprivations and hardships inflicted by personnel where there had been no apparent infraction of any prison rules. It was, therefore, unlike cases where the courts had declined to interfere because of disciplinary measures imposed under the authority of normal regulations of the institution. On a second appeal, the court dismissed the case after consideration of a letter from counsel for both parties which set forth the Policy Order of the District of Columbia Government Regarding Nondiscrimination, and which specified with particularity the rights Black Muslims were to have to enable them to practice their religion on an equal basis with members of other faiths.

The second basis for holding invalid any deprivation of Muslims' religious provileges—equal protection without regard to administrative action —is exemplified in *State ex rel. Tate v. Gubbage*.[45] In that case the court held it to be a denial of equal protection of the laws to deny Black Muslims equal facilities for religious services and to forbid them to wear religious medals on the same basis as other faiths. Significantly, the court rejected the argument that equal protection was qualified by the clear and present danger test; the right to equal protection was held to be "almost" an absolute right, although the exact significance of "almost" was not indicated.

It should be noted that in the *Sewell* case, although the second appeal was dismissed on the basis of assurances contained in the administrative policy order, the court appeared ready even without such a policy order to hold invalid any deprivation of Muslim privileges if corresponding rights were given other faiths. It is probable, therefore, that the *Sewell* court would follow the *Cubbage* decision if a similar situation arose.

As seen by the preceding cases, courts have differed greatly in their solution to the Black Muslim religion problem. As in all other areas of prisoner's rights, however, arbitrary or discriminatory regulations based solely on a prisoner's religion and its teachings should not be permitted. Such discrimination was allowed by a lower court in *Cooper v. Pate*.[46] The prisoner alleged that because of religious discrimination he was not permitted to purchase a copy of the "Koran". The court upon taking judicial notice of certain social studies of the Black Muslim movement found the religion dangerous and threatening to prison security in general. As a result, relief was denied. The United States Supreme Court reversed in a per curiam opinion, stating that a cause of action was shown on the authority of the *Sewell* case.[47]

Perhaps the test framed by the court in *Brown v. McGinnis*[48] represents the most equitable balancing of interests when dealing with freedom to practice religion. In reply to the contention that restrictions on religious practices were valid merely because of the potential dangers inherent in the Muslim faith the court said: "Although potential dangers if realized may justify curtailment or withdrawal of petitioner's qualified rights, mere speculation . . . is insufficient . . . . "[49] There appears to be no valid reason to deny any religion equal protection of the laws, even if it is feared that its members might abuse its rights in the indefinite future. On the other hand, prison officials should not have to wait for a breach in discipline and order if such a breach is imminent and if it is practically speaking realized. It must be remembered that religious practice is not absolute but is always subject to the overriding interests of society. So long as officials have a reasonable basis for taking away the qualified privilege, this cannot be considered discriminatory nor violative of prisoners' constitutional rights.

[44] 291 F.2d 196 (4th Cir. 1961), *appeal dismissed per stipulation*, 304 F.2d 670 (4th Cir. 1962) (without prejudice).

[45] 210 A.2d 555 (Del. Super. Ct. 1965).

[46] 324 F.2d 165 (7th Cir. 1963), *rev'd per curiam*, 378 U.S. 546 (1964).

[47] Cooper v. Pate, 378 U.S. 546 (1964). This case may be distinguished from Jones v. Willingham, *Supra* Note 38, in that the latter case was based upon specific disciplinary problems within the warden's experience and not merely upon judicial notice in general.

[48] 10 N.Y.2d 531, 180 N.E.2d 791, 225 N.Y.S.2d 497 (1962).

[49] *Id.* at 793.

ACCESS TO THE COURTS

It has been stated: "A right of access to the courts is one of the rights a prisoner clearly retains." [50] A denial or undue restriction of reasonable access is a denial of due process.[51] As was indicated previously in connection with the prisoner's freedom of speech, mail addressed to the courts or to the United States Attorney General is not subject to prison censorship or confiscation.[52] In *Ex Parte Hull*,[53] where a prison official refused to mail an inmate's habeas corpus petition, the United States Supreme Court said:

> The state and its officials may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for the court alone to determine.[54]

In connection with the prisoner's right to mail his petition to the proper officials, it has also been held that prison officials may not punish inmates for making false statements of deprivations until there has been a court adjudication of the allegations on the merits.[55] To allow such punishment would be to permit prison officials, against whom the complaints are directed, to be the judge and jury as to the truth of the allegations.

There may be, however, certain limitations on a prisoner's right of access to the courts when his purpose is not to complain of an unlawful restriction of his rights. One such restiction is that an inmate may be denied the right to institute civil proceedings involving his affairs prior to conviction.[56] Another is that a prisoner may not be permitted to sue prison officials for damages during his incarceration arising out of alleged injuries due to mistreatment or prison negligence.[57]

Even though the prisoner has free access to the courts to complain of what he believes to be unlawful deprivations, exercising this right is often conditioned upon the means available to him to prepare the necessary papers. A number of difficulties involving this right to prepare have faced inmates in the past. The prison may be unable to provide many law books and delay may be encountered in the use of those it is able to provide.[58] For security reasons, a prisoner may only be allowed to obtain a limited supply of legal materials from approved sources,[59] may not be allowed to keep legal materials in his cell,[60] and in many instances is not permitted to receive help from another prisoner in preparing.[61] A prisoner may also be restrained in efforts to obtain the help of counsel even though he is financially capable of paying for such assistance.[62]

In recent years, however, greater recognition has been given to the fact that the right to prepare is basic to any realistic free access to the courts. In *Bailleaux v. Holmes*,[63] the court was aware that prison authorities must be able to maintain effective discipline, but it stated that "this end could not be achieved by stifling the study of law, where such study is necessary to the effective utilization of a basic right." [64] In that case, prisoners had alleged that they had to engage in their own legal work because they could not afford an attorney. On subsequent appeal, the decision was reversed, but the reason for reversal was the appellate court's finding that the prisoners *did* have reasonable access to the courts, and not a repudiation of the basic proposition quoted from the district court's opinion.

Even where the right to study law and to have access to legal materials is recognized, a distinction may be drawn between the genuine need of such material in order to present a claim and access

[50] Coleman v. Peyton, 362 F.2d 905, 907 (4th Cir. 1966). *Accord*, *Ex Parte* Hull, 312 U.S. 546 (1941); Kirby v. Thomas, 336 F.2d 462 (6th Cir. 1964); Warfield v. Raymond, 195 Md. 711, 71 A.2d 870 (1950).

[51] Hymes v. Dickson, 232 F. Supp. 796 (N.D.Cal. 1964); Bailleaux v. Holmes, 177 F. Supp. 361 (D. Ore. 1959), *rev'd sub nom.*, Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), *cert. denied* 368 U.S. 862 (1961).

[52] *See* text accompanying notes 15 and 16 *supra*.

[53] 312 U.S. 546 (1941).

[54] *Id.* at 549.

[55] Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962); *In re* Riddle, 57 Cal.2d 848, 372 P.2d 304, 22 Cal. Rptr. 472 (1962).

[56] Harell v. State, 17 Misc.2d 950, 188 N.Y.S.2d 683 (Ct.Cl. 1959).

[57] Tabor v. Harwick, 224 F.2d 526 (5th Cir. 1955). It has been held, however, that a prisoner may sue under the Federal Civil Rights Act even if civil suits by prisoners are prohibited by the state. McCollum v. Mayfield, 130 F. Supp. 112 (N.D. Cal. 1955). *See generally* 21 AM. JUR.2d *Criminal Law* §621 (1965); 18 C. J. S. *Convicts* §7 (1939).

[58] Bailleaux v. Holmes, 177 F. Supp. 361 (D. Ore. 1959), *rev'd sub nom.*, Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961).

[59] *Id.* at 365.

[60] Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), *cert. denied*, 358 U.S. 862 (1961).

[61] Wilson v. Dixon, 251 F.2d 338 (9th Cir.), *cert. denied*, 358 U.S. 856 (1958).

[62] Bailleaux v. Holmes, 177 F. Supp. 361 (D. Ore. 1959), *rev'd sub nom.*, Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961).

[63] *Id.*

[64] *Id.* at 361.

merely to engage in a "fishing expedition." In *Roberts v. Pepersack*,[65] the court stated:

> The right to petition or correspond with the court does not include the right to be furnished with an extensive collection of legal materials. Such a collection will encourage "fishing expeditions" in which an inmate seeks out cases where the allegations may receive favorable consideration and adopts those allegations as his own.[66]

The court indicated that all a prisoner need do is set forth his allegations, even if not in terms of constitutional deprivations, and the court will frame them properly for him. Exactly how the distinction between "fishing expeditions" and genuine need is to be determined is not clear. It may depend upon whether the alleged right appears to have any reasonable foundation.

If a prisoner is able to obtain legal materials and is in the process of preparing his petition, he will usually desire to keep such materials in his cell in order to assemble the document ultimately to be transmitted to the court. In *In re Schoengarth*,[67] the court said that a prisoner has this right. It held that reasonable access to the courts includes the right of a prisoner to possess in his cell the legal materials which he desires to include in his petition while it is being put into a mailable form.

Merely having access to law books and other legal material, however, is not enough. Prisoners may need some form of personal assistance, but such assistance will usually be difficult to obtain. Allowing prisoners to help each other in preparing petitions is generally forbidden by prison regulations. In one federal district court case, however, such a state regulation was held invalid, and a prisoner was given the right to receive aid from a fellow inmate.[68] The court said that a state prison regulation forbidding prisoners from preparing habeas corpus petitions for other inmates interfered with the federal statutory right of prisoners, incapable of acting for themselves, to have someone act on their behalf.

The right of an inmate to consult with an attorney has also been recognized. In the case of *In re Allison*,[69] the court held a prisoner to have the right to consult privately with his counsel at reasonable times in preparation for trial and during the pendency of an appeal. As previously indicated, the prisoner has this same right of communication when carried on through the use of the mails.[70]

Probably the foremost practical problems to be considered when evaluating a prisoner's right of access to the courts is that of spurious claims and the amount of litigation which prisoners generate. An inmate may feel that he is entitled to contest every rule and regulation he dislikes. Moreover, because he is in prison he may have a substantial amount of time available in which to contrive various allegations of unlawful deprivations. The burden on the courts will be very great if they must hear every claim that a disgruntled prisoner thinks warrants relief. For these reasons courts are hesitant about enlarging the inmates means of research and preparation, and often rely upon the "fishing expedition" distinction in order to avoid doing so.

Furthermore, prisons are confronted with the problem that they are ordinarily unable financially to provide what prisoners would consider adequate legal research facilities. It must also be kept in mind that a person is not sent to prison to obtain a legal education, and as a consequence, cannot expect to have made available to him a complete set of even one state's statutes or decisions. Moreover, even if the prison were able and willing to provide research tools for their inmates, "jailhouse lawyers" might be created. Such prisoners might exchange legal advice or other legal services for favors from "client" inmates. In addition, such novices might be inclined to misconstrue the law and thus create disciplinary problems with those prisoners who were advised that they were being deprived of their legal rights.

Although these practical considerations advanced for some limitations on a prisoner's access to the courts cannot be ignored, it must be constantly kept in mind that the right of a prisoner to have his complaint heard is probably the most important of all his rights. Without free access to the courts, all other recognized prisoner rights have no effective means of protection. This was aptly stated by the court in *Coleman v. Peyton*.[71] It said "[Access to the courts] is a precious right, and its administratively unfettered exercise may be of incalculable importance in the protection of rights even more precious."[72]

[65] 256 F. Supp. 415 (D. Md. 1966).
[66] *Id.* at 433.
[67] 57 Cal. Rptr. 600, 425 P.2d 200 (Sup. Ct. 1967).
[68] Johnson v. Avery, 252 F. Supp. 783 (M.D. Tenn. 1966).
[69] 57 Cal. Rptr. 593, 425 P.2d 193 (Sup. Ct. 1967).
[70] *See* text accompanying note 16 *supra*.
[71] 362 F.2d 905 (4th Cir. 1966).
[72] *Id.* at 907.

While it is true that prisoners may bring spurious and unmerited claims before the court, this is a problem inherent in a free legal system. Many unfounded claims are also brought by citizens outside of jail, but it is not thought that as a result of this access to the legal process should be restricted. Similar reasoning may be applied to prisoners with equal validity. Closely related to this spurious claim problem is the familiar "flood of litigation" argument. An adequate response to it, however, was stated in *United States ex rel Marcial v. Fay*,[73] "We must not play fast and loose with basic constitutional rights in the interest of administrative efficiency." [74]

Even with a generally recognized right of access to the courts, it must be remembered that for indigent prisoners this right is meaningless without adequate means to engage in their own legal preparation. This does not mean that extensive legal resources should or must be furnished or that reasonable restrictions may not be placed on their use. What it does seem to require is that no restriction should be placed upon the means of preparation meant only to discourage or totally prevent petitioning the courts for relief. An example of such a restriction would be denying a prisoner the use of the prison library as a punishment for the exercise of a right he feels he has and wants to establish through adjudication. Any such restriction in the right of access to the courts cannot be considered a reasonable incident of punishment.

Providing an indigent prisoner with the means of preparation is not the only way, however, to preserve his right of access to the courts. An effective alternative would be to provide him with court appointed counsel. Since the complaining prisoner is not an accused in a criminal prosecution, but is rather the plaintiff in a civil action, it is clear he has no federal constitutional right to assigned counsel under the Sixth Amendment to the United States Constitution[75] or under similar state constitutional provisions.[76] But it is suggested that by giving an inmate such a right by statute or otherwise his need for an adequate means of self preparation would no longer exist, and the problems of the prison in providing those means would be solved.

Conclusion

Although the "hands-off" doctrine has not been abandoned, it is apparent from this brief survey of prisoners' rights that at least some of the courts are facing the difficult task of balancing the interests of inmates against the practical considerations involved in effectively operating a penal institution.[77] While such balancing may be considered by some to be a court invasion into prison administration, it must be remembered that, presumably, this interference will be only to the extent necessary to protect constitutional rights. The courts are capable of perceiving what regulations are reasonably necessary in a particular prison and should accept the responsibility of judicially defining what rights a prisoner retains when lawfully incarcerated rather than leave it to administrative discretion.

Some would probably argue, also, that judicial determination of prisoner complaints places too great a burden upon the courts because many of the allegations will turn out to be undeserving of relief. This argument is not without merit, but it does not justify leaving prisoners at the sole mercy of prison officials to fashion rules and regulations as they please.

A compromise solution may be to establish by statute some form of quasi-judicial or administrative review procedure where a complaining inmate could take his claim in the first instance. The courts would then merely serve in a appellate capacity in reviewing such agency's decisions when one party was unsatisfied with the resolution. To assure fair and impartial treatment of prisoners such an agency would preferably be an arm of the court and under its direction rather than under the auspices of the prison system. Hearings could be held in the various prisons at designated times in a "circuit riding" fashion. State agencies under state court supervision would travel to state penal institutions, and federal agencies under similar federal supervision would hear complaints of

[73] 247 F.2d 662, *cert. denied*, 355 U.S. 915 (2d Cir. 1957).

[74] *Id.* at 669.

[75] "In all criminal prosecution, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U. S. Const. amend. VI; Dorsey v. Gill, 148 F.2d 857 (D.C. Cir.), *cert. denied*, 325 U.S. 890 (1945).

[76] People *ex rel.* Ross v. Ragen, 391 Ill. 419, 63 N.E.2d 874 (1945).

[77] This need of balancing interests was recognized in United States *ex rel.* Yaris v. Shaughnessy, 112 F. Supp. 143 (N.D.N.Y. 1953) at 144 where the court said:

> It is hard to believe that persons . . . convicted of crime are at the mercy of the executive department and yet it is unthinkable that the judiciary should take over the operation of the . . . prisons. There must be some middle ground between these extremes.