Prisoners' Rights to Medical Care

Marvin Zalman
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INTRODUCTION

In the nineteenth century Western nations turned to imprisonment as the standard form of criminal punishment, replacing mutilation, corporal punishment, and banishment. Spurred by this reformist impulse, public opinion demanded that prisons meet some minimal levels of human necessity, if not human decency. At the end of the nineteenth and beginning of the twentieth centuries the scientific revolution reached the art of healing. As physicians became able to systematically heal the ills of the body, access to medical care joined the list of necessaries to be provided to prisoners. Moreover, improved medical care has arrived at a time marked by a fundamental shift in attitudes towards prisoners’ rights. No longer are prisoners said to be slaves of the state and entitled only to the rights granted them by the basic humanity and whims of their jailors. Instead, it is recognized today that the prisoner is confined for the protection of the public, and therefore “[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.”

This trend toward increased recognition of prisoners’ rights, including the right to medical care, is reflected not only in the statutes and tort law of most states, but also in the recent erosion of the “hands-off” doctrine. In its tersest legal formulation, “the hands-off doctrine represents a denial of jurisdiction over the subject matter of petitions from prisoners alleging some form of mistreatment or contesting some deprivation undergone during imprisonment.”

This lack of subject matter jurisdiction has no statutory basis but is instead a judge-made limitation. Underlying the doctrine is an assessment that the deprivations prisoners complain of are necessary conditions of imprisonment. A more important basis for the hands-off doctrine is a profound reluctance of the courts to interfere with prison administration. Part of this reluctance is the fear that judicial interference would create a flood of litigation and would destroy prison discipline.

The validity of the grounds for the hands-off doctrine has been reconsidered and courts have retreated from their former tendency to apply the doctrine strictly. Although the reluctance of the unlawful conduct does not end when the doors of a prison close behind him. True it is that a person sentenced to a period of confinement in a penal institution is necessarily deprived of many personal liberties. Yet there are certain rights [including the right to communicate to officers of the court or governmental officials] so necessary and essential to prevent the abuse of power and illegal conduct that not even a prison sentence can annul them.

CAL. PENAL CODE § 2650 (West 1970): “The person of a prisoner sentenced to imprisonment in the State prison is under the protection of the law, and any injury to his person, not authorized by law, is punishable in the same manner as if he were not convicted or sentenced.” N.Y. CIVIL RIGHTS LAW § 79-c (McKinney Supp. 1971) is identical to the California provision.

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

courts to interfere with internal prison matters is no longer as strong as it once was, there are still barriers to suits brought by prisoners. At the present time, “hands-off” is still the rule when routine prison administrative decisions are challenged. Yet the greater availability of certain remedies, primarily under federal habeas corpus and civil rights statutes, means definite exceptions have been carved from the hands-off rule.7

A major problem in understanding developments in this area of law is that the substantive content of rights has remained essentially unchanged but existing remedies have been applied to an increased number of fact situations presented by prisoners’ complaints. Expansion of remedies has not been the result of the abrogation of explicit jurisdictional barriers, but rather is due to an unfolding awareness that more of the facts of imprisonment complained of constitute justifiable claims under available remedies. No longer is senseless or irrational mistreatment regarded as a natural condition of imprisonment. The recognition that fewer privations are necessarily the prisoner’s lot has been accompanied by a gradual discrediting of the rationales supporting the hands-off doctrine. For example, the argument that courts will be flooded by prisoners’ suits has been rejected when the claim is made that a protected constitutional right has been seriously infringed.8 Also, it is now argued that statutes which create departments of corrections within the executive branch of government should not be regarded as precluding judicial review of administrative decisions by corrections officials.9 In administrative law terms, the recent erosion of the hands-off doctrine represents a belated move away from the nineteenth century position of unreviewability to a sounder position of “presumption of reviewability.”10 Just how far the courts have gone will be seen in the examination of cases later in this paper.

This article will examine the law of prisoners’ rights to medical care and will focus on the substantive and procedural rights of convicts in federal and state prisons. Cases dealing with prisoners in special facilities will not be considered. For the purposes of this article, “medical care” refers to the healing and alleviating of physical ailments, and to dental care. The right to psychiatric care and the right to rehabilitative treatment are not specifically considered. The conclusion will offer some suggestions for changes in law and in administrative practice which would result in better medical care for prisoners with a minimum of judicial interference in prison administration.

I. STATE LAW RELATING TO MEDICAL CARE OF PRISONERS

A. Substantive Rights

Not all state statutes which regulate prison affairs and the treatment of prisoners provide standards for medical care. The Michigan statute,11

7 REMINGTON at 826-51; THE PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 82-88 (1967) [hereinafter cited as TASK FORCE: CORRECTIONS].
8 See, e.g., the concurring opinion of Justice Harlan in Bivens v. Six Unknown Agents, 403 U.S. 388, 410-11 (1971), dismissing the argument that, because of limits on judicial resources, causes of action against federal officers for violation of fourth amendment rights should not be recognized.
9 See K. DAVIS, ADMINISTRATIVE LAW TEXT 500-10, 513-14 (3d ed. 1972), stating the modern view that unless judicial review is statutorily precluded, there is a presumption in favor of reviewability.
10 Id. at 510.
for example, describes in detail the duties of the prison physician, while in contrast the Texas statute makes no direct reference to the health of prisoners. Absent a statute, states rely on correctional administrators and medical officers to supply the complex of goods and services which amounts to adequate medical care. The best legislative approach would require the state corrections department or public health service to adopt and publish administrative rules specifying in detail the care prisoners should receive. In addition, an effective statute would provide an administrative procedure for enforcing those rules.

When called upon to redress prisoners' allegations of inadequate medical treatment, the courts have overwhelmingly adopted the position that the jailor owes prisoners a duty of ordinary and reasonable care for their health. This duty has sometimes been interpreted to mean prisoners must receive the kind of medical care that a reasonable person would secure for himself if he were free to do so. In *Piscano v. State* a New York

be required to labor so long as in the opinion of said physician such disability shall continue; and whenever said physician shall certify to the warden that such convict is sufficiently recovered as to be able to labor said convict shall be required to labor.

§ 800.17 The necessary medicines and other hospital stores for the use of the prisons shall be purchased as other prison stores, but with the advice of the physician and under the direction of the warden.

Ill. Rev. Stat. ch. 108, §32 (1971) is virtually identical to §800.15; § 33 is virtually identical to §800.16.

The Texas statutes dealing with all aspects of prison activity (Tex. Rev. Stat. Ann. art. 6166-6203g (1970)) occupy 70 pages in the code book while those dealing with Patriotism and the Flag occupy 64 pages. Of those 70 pages (including annotations) dealing with the operation of State prisons, eight are concerned with the lease of prison lands for oil and gas. The only sections which are even remotely concerned with the health of prisoners deal with food (art. 6166t), labor (art. 6203e) and reports of death (art. 6166z).

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See also New York Correction Law, §70 (2) (McKinney Supp. 1971): "... the department may establish and maintain any type of institution or program of treatment, not inconsistent with other provisions of law, but with due regard to: ... (c) The health and safety of every person in the custody of the department."; Pa. Stat. Ann. tit. 61, §§ 31, 81, 101, 111, 352, 372 (1964); Mass. Ann. Laws ch. 127, §§ 16, 17, 18, 117, 151 (1965); Cal. Penal Code §§ 2084, 2690 (West 1970).

**B. Procedural Remedies**

There are two broad categories of state court remedies for complaints of medical mistreatment. One remedy is the traditional suit in tort for personal injury. The other type of remedy is an action seeking relief of an injunctive nature against continuing wrongs. The injunctive suit has the potential for more far-reaching impact on the prison system, even though injunctive relief is granted, if at all, only when a serious violation of rights is shown.

**Tort Remedies.** Despite the fairly generous position of the courts in recognizing prisoners' substantive rights to necessaries such as medical care, procedures for enforcement of these rights are inadequate. In New York, for example, prisoners

17 *Id.* at 340, 188 N.Y.S.2d at 40. The medical standard of care is traditionally held to be the standard of care of the locality. Since state maximum security prisons are usually located in remote rural areas this rule could work to the disadvantage of a prisoner. However, because of today's more rapid dissemination of new medical knowledge the trend is toward abandonment of the locality rule. See Note, *An Evaluation of Changes in the Medical Standard of Care*, 23 Vand. L. Rev. 729, 733-741 (1970).

18 In at least three states the usual duty to provide reasonable medical care is qualified by the courts' refusal to provide tort remedies to prisoners. In Massachusetts early cases laid down a version of the hands off rule by providing that denials of medical care are actionable only on a showing of malice and not for negligence. Williams v. Adams, 85 Mass. (3 Allen) 171 (1871); *O'Hare v. Jones*, 161 Mass. 391, 37 N.E. 371 (1894). In Illinois the unavailability of a remedy is based on the theory that the statutory duty of a sheriff is quasi-judicial and therefore he cannot be sued for the mere negligent omission to provide care. *Bush v. Babb*, 23 Ill. App. 2d 285, 162 N.E.2d 394 (1959). Maryland has followed the approaches of Illinois and
are denied by statute their civil rights while in prison, including the right to sue. This statutory denial appears to be grounded in the common law doctrine of civil death. Even at common law, however, the civil death doctrine did not entirely preclude legal activity by imprisoned felons. The reason for the civil death doctrine was to protect the inmate's family, and courts have often refused to extend the doctrine to cases where its purpose does not apply. In accord with this general


The loss of civil rights is known as "civil death." N.Y. Civil Rights Law § 79 (McKinney Supp. 1971) provides:

A sentence of imprisonment in a state prison for any term less than for life or a sentence of imprison in a state prison for an indeterminate term, having a minimum of one day and a maximum of natural life, forfeits all the public offices, and suspends, during the term of the sentence, all the civil rights, and all private trusts, authority, or powers of, or held by, the person sentenced; but nothing herein contained shall be deemed to suspend the right or capacity of any of the following persons to institute an action or proceeding in a court or before a body or officer exercising judicial, quasi-judicial or administrative functions, with respect to matters other than those out of his arrest or detention:

a. A person sentenced to state prison for any term less than for life or a person sentenced to imprisonment in a state prison for an indeterminate term, having a minimum of one day and a maximum of his natural life, on whom sentence was imposed and the execution of the judgment suspended, while the execution of the judgment remains suspended;

b. A person sentenced to state prison for any term less than for life or a person sentenced to imprisonment in a state prison for an indeterminate term, having a minimum of one day and a maximum of his natural life, while he is released on parole, or after he has been discharged from parole;

c. A person sentenced to state prison for any term less than for life or a person sentenced to imprisonment in a state prison for a term less than for life or a person sentenced to imprisonment in a state prison for an indeterminate term, having a minimum of one day and a maximum of his natural life, while he is released on parole, or after he has been discharged from parole;

d. A person sentenced to state prison for any term less than for life or a person sentenced to imprisonment in a state prison for a term less than for life or a person sentenced to imprisonment in a state prison for an indeterminate term, having a minimum of one day and a maximum of his natural life, while he is released on parole, or after he has been discharged from parole;

In New York the right to sue is guaranteed in language reminiscent of Magna Carta: "Neither justice nor right should be sold to any person, nor denied, nor deferred; ..." N.Y. Civil Rights Law §10 (McKinney 1963).


See Garner v. Shurtleff Co., 23 App. Div. 2d 127, 129, 129, 129, 129, 129, 259 N.Y.2d 161, 162-63 (1963), indicating that the purpose of the doctrine is to protect the innocent wife or children of a prisoner. The civil death doctrine has been thought generally inapplicable for the additional reason that at common law, only prisoners convicted of a felony punishable by death were deemed civilly dead. Shapiro, supra note 21.

approach, the civil death restriction on lawsuits has been weakened by both legislatures and the courts.

Relief for Continuing Wrongs. The writ of habeas corpus is the method most often used by state prisoners seeking injunctive relief. State courts

In New York at the present time, suits may be maintained by defendants receiving suspended sentences, by parolees, and by defendants released under conditional parole or commutation. N.Y. Civil Rights Law §§9a, §79-a(3) (McKinney Supp. 1971); White v. State, 260 App. Div. 413, 23 N.Y.S.2d 526 (1940), aff'd, 285 N.Y. 728, 34 N.E.2d 896 (1941). Suits may also be brought under special enabling legislation. Comment, The Rights of Prisoners While Incarcerated, 15 BUFFALO L. REV. 397, 400 (1965). Prisoners may also defend actions brought against them. Garner v. Garber, 59 Misc.2d 29, 297 N.Y.S.2d 463 (1969); Lipschutz v. State, 192 Misc. 70, 78 N.Y.S.2d 731 (Ct. Cl. 1948). Suits may be brought by prisoners in regard to detention and county jails. Hill v. Gentry, 280 F.2d 88, (8th Cir. 1960); Bovles v. Haberman, 95 N.Y. 246 (1884). It should also be noted that a former prisoner may sue in his right of action is preserved by the tolling of the statute of limitations until his release. N.Y. CIVIL PRACTICE LAW AND RULES § 208 (McKinney 1972).

However, prisoners must sometimes bear procedural burdens greater than those borne by free litigants. In tort actions brought against the state, any claim must be filed within ninety days "unless the claimant shall make a written notice of intention to file a claim . . . in which event the claim shall be filed within two years after the accrual of such claim." N.Y. COURT OF CLAIMS ACT § 10(3) (McKinney 1963). But since an injured prisoner's right to file a claim while in prison is suspended, his only procedure is to file a notice of intention within ninety days, and to present the claim itself within two years after the disability is removed. The result is that a prisoner suing the state must file two notices of his tort claim while free citizens need file only one. See Federman v. State, 173 Misc. 830, 19 N.Y.S.2d 325 (Ct. Cl. 1940); Baroness v. State, 153 Misc. 212, 274 N.Y.S.2d 522 (Ct. Cl. 1934). The prisoner may also be relegated to a long wait before he is released and can present his claim to a court.

In some situations however, prisoners' disabilities may not necessarily bind substituted parties. Garner v. Schulte Co., 23 App. Div. 2d 127, 259 N.Y.S.2d 161 (1965) is an example. The wife of a state prisoner filed a claim in his name for recovery of workmen's compensation, contending that since her husband was serving a life sentence, he was civilly dead. The court reversed the denial of the claim by the Workman's Compensation Board, holding that the prisoner's wife could recover as if her husband were actually dead, so long as the claim were prosecuted in the wife's name. While the decision is based on the civil death doctrine, the court managed to limit the doctrine to its historical purpose while permitting a substituted party to recover even though the prisoner could not. One commentator has suggested that because Garner allows an action to be brought by a substituted party, it undermines the theory and practice of the civil death statute. Comment, The Rights of Prisoners While Incarcerated, 15 BUFFALO L. REV. 397, 404 (1965).

Other available remedies are Article 78 proceedings, i.e., proceedings in the nature of certiorari, mandamus, and prohibition. N.Y. CIVIL PRACTICE LAW AND RULES §§7801-06 (McKinney 1963).
have taken three distinct approaches in ruling on prisoners' habeas corpus petitions. First, they have denied relief, not on the merits, but because of the self-imposed jurisdictional barrier of the hands-off doctrine, or because of one of the traditional limitations of habeas corpus: administrative remedies have not been exhausted, or habeas relief is limited to total release only and is not available to challenge the form of confinement when the prisoner is lawfully in custody.

A second class of state courts grant habeas corpus relief where the prisoner can show that this treatment, or the lack of it, amounts to cruel and unusual punishment. In these cases the rule is still that the courts will not interfere in ordinary prison administration unless a prisoner's allegations contain "inexcusable and shocking" facts which go beyond matters of prison discipline.

A third approach to habeas corpus would apparently allow relief where only an administrative decision is challenged, even if no constitutional question is raised. This liberal approach was suggested by the New York Court of Appeals in People ex rel. Brown v. Johnson. There a prisoner applied for habeas corpus to challenge his transfer from a prison to a hospital for the criminally insane. The court held that the writ was improperly denied because the appellate court failed to inquire whether petitioner's removal could be "uncontrolled and arbitrary." The teaching of the Johnson opinion is that habeas corpus cannot be used to challenge the final judgment of a competent court but it is available to challenge "any restraint in excess of that permitted by the judgment or constitutional guarantees." Petitioner's transfer to challenge habeas corpus need not present constitutional questions. If taken at face value, this language in Johnson could heavily involve New York courts in prison affairs.


29 See generally Beyond the Ken at 508-12 and the cases collected therein.


31 See, e.g., Oblivier v. Brady, 185 Md. 341, 44 A.2d 807, 808-12 (1944); Johnson v. Zerbst, 304 U.S. 458, 465-68 (1938) (indicating habeas corpus may not be used as a writ of error, but only as a challenge to a judgment which is void, because, for example, imposed by a court without jurisdiction).


34 See generally Beyond the Ken at 508-12 and the cases collected therein.

35 Application of Dunn, 150 Neb. 669, 35 N.W.2d 673, 677 (1949). (The proper function of habeas corpus is to challenge the validity of the judgment, sentence and commitment).


37 Application of Dunn, 150 Neb. 669, 35 N.W.2d 673, 677 (1949). (The proper function of habeas corpus is to challenge the validity of the judgment, sentence and commitment).

absence of a truly effective administrative remedy, the liberal New York approach would seem to be most consistent with justice, but it appears fanciful to hope that other states will follow its lead when most do not yet consider even cruel and unusual punishment issues raised by application for habeas corpus.

II. LAW RELATING TO MEDICAL CARE OF FEDERAL PRISONERS

A. Substantive Rights

In the federal law as in state law the primary duty to provide medical care to prisoners is statutorily vested in the executive branch of the government. The Attorney General of the United States stands at the pinnacle of the federal prison hierarchy and is charged with "control and management of Federal penal and correctional institutions." Under him the Bureau of Prisons is given the rather vague and general direction to "provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States. . ." The law also provides that various officers of the Public Health Service may be detailed to the Department of Justice "for the purpose of supervising and furnishing medical, psychiatric, and other technical and scientific services to the Federal penal and correctional institutions." Aside from actions for personal injuries arising from negligence when the standard of care is the same as that of a free citizen, the federal prisoner must show more than that he received inadequate medical care. Relief may be granted if a prisoner can show that he was denied medical treatment in such a way as to amount to cruelty and unusual punishment. It has been suggested that cruel and unusual punishment results from an intentional denial of needed medical treatment, or from "reckless disregard, callous inattention, or gross negligence." Even if arbitrary and capricious conduct on the part of prison officials is charged, it appears petitioner must also allege that medical care was administered as punishment. Under these rules the following have been held not to constitute cruel and unusual punishment: allowing nonmedical personnel to treat a prisoner, either with or without the prisoner's consent; administering a drug by force, as a "last resort"; confinement and segregation for more than two years when imposed not for disciplinary control but as an administrative control for the protection of inmates; and striking a prisoner when the beating is part of a justified attempt to search the prisoner.

classification of prisoners and in (2) the custody of prisoners properly classified."


44 Id. at 337.


47 Habeas corpus did entitle petitioner to relief, however, in Darsey v. United States, 318 F. Supp. 1346 (W.D. Mo. 1970). Petitioner had been imprisoned in seventeen different federal institutions within eleven months. He alleged that this constant movement amounted to cruel and unusual punishment and the court agreed after only a " cursory review" of the evidence and testimony. Darsey is unusual because its fact are no more shocking than in other habeas corpus cases where the cruel and unusual punishment argument was rejected. For example, in Owens v. Aldridge, 311 F. Supp. 667 (W.D. Okla. 1970), petitioner made the conclusory allegation of cruel and unusual punishment. The court examined the facts and characterized the petition as alleging gross negligence or arbitrary and capricious conduct, both of which require an additional showing that the medical treatment received was administered as a punishment. In contrast, the Darsey court did not try to characterize petitioner's allegations.

v. McGrath, 61 Misc.2d 113, 305 N.Y.S.2d 305 (Sup. Ct. 1969) (denying petition which failed to establish a prima facie showing of cruel and unusual punishment, but indicating habeas corpus is available to a petitioner in custody pending trial who alleges cruel and unusual treatment under circumstances giving rise to an inference that the treatment will continue unless relief is granted). The court in McGrath saw the New York cases as effecting a "subtle expansion of the availability of the writ of habeas corpus." 61 Misc.2d at 115, 305 N.Y.S.2d at 306.


63 See Cohen v. United States, 252 F. Supp. 679, 688 (N.D. Ga. 1966), rev'd on other grounds, 389 F. 2d 689 (5th Cir. 1967). ["The government has a duty of protection and safekeeping. In the discharge of that duty the government must exercise ordinary care in (1) the
B. Procedural Remedies

Tort Remedy. The federal government was slow in abandoning the rule of sovereign immunity. When it finally did so in 1946, no specific language in the Federal Tort Claims Act precluded suits by prisoners in federal institutions. Several federal courts, however, construed the act as forbidding prisoner recoveries. In 1962, the Second Circuit broke with this view, holding in Winston v. United States and Munis v. United States that federal prisoners could sue under the Federal Tort Claims Act to recover for injuries received through the negligence of government employees. The Supreme Court affirmed both decisions in United States v. Munis. Chief Justice Warren, writing for the Court, found in the legislative history of the act a clear intent that prisoners’ claims be allowed. The opinion also dismissed the argument that the government would have to litigate frivolous cases and found no history of disciplinary problems in states which already allowed prisoners’ tort claims. The Court concluded by noting that the policy of the Federal Tort Claims Act, to provide relief to those who are injured by the negligence of government employees, should not be narrowed at a time when state courts were trying to abrogate sovereign immunity.

In addition to the Tort Claims Act, the Federal Prison Industries Corporation is empowered to pay out of the Prison Industries Fund “compensation to inmates or their dependents for injuries suffered in any industry or in any work activity in connection with the maintenance or operation of the institution where confined.” Such compensation is not to exceed the amounts provided in the Federal Employees Compensation Act, and recovery under this act precludes recovery under the Tort Claims Act.

Remedies for Continuing Wrongs. As discussed earlier, the principles regarding the substantive rights of federal prisoners to medical care do not differ substantially from those applied to state prisoners by federal courts. Similarly, the philosophy of the federal courts, that all prisoners must have reasonable access to courts to complain about continuing and serious medical wrongs, does not differ from the state court view. In an addendum to the opinion in Ramsey v. Ciccone Chief Judge Becker suggested that the available remedies for continuing wrongs to federal prisoners in medical care cases are habeas corpus, suit for injunction, suit for declaratory judgment, and suit for damages. He concluded that habeas corpus is the preferred remedy, largely because the writ is well adapted to quick resolution of inmates’ claims.

III. FEDERAL LAW IN STATE PRISONS

A. The Hands-Off Doctrine Amplified by Federalism

The extension of the Federal Tort Claims Act to federal prisoners was characterized as “merely a tidying up operation” after the larger legislative reform of overturning federal sovereign immunity. In the area of prisoners’ rights the greater struggle was yet to come. The overwhelming number of maximum security prisoners were in state institutions and federal courts almost unanimously denied them redress. The reluctance on the part of the federal courts to interfere was based not only on the hands-off doctrine but also on considerations of federalism. While there is some question as to the present status of the hands-off doctrine, there is broad agreement in the federal courts that the doctrine is not a bar where deprivations alleged are of constitutional dimension. Courts have not, however, satisfactorily resolved the ideological and practical questions.


Id. at 606.

Beyond the Ken at 506.

Id. at 508.

See text accompanying notes 5–7 supra.

In Younger v. Harris, 401 U.S. 37 (1971) a federal district court injunction prevented a Los Angeles district attorney from prosecuting Harris under California statutes. The Supreme Court reversed, finding the injunction was “a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances.” Id. at 41. The decision in Younger proscribes federal action...
that arise when a federal court issues orders to state prison officials or finds them liable in damages.

The most extensive federal court involvement with state prisons has been in Holt v. Sarver, where a class action brought on behalf of prisoners at various institutions in Arkansas resulted in a blanket injunction over two penal institutions. The district court's injunction ordered prison officials to "take the necessary steps to bring the operation of the prisons up to federal constitutional requirements..." The court granted prison officials time to correct violations of federal constitutional rights, but retained jurisdiction "to take such further steps as may be appropriate" to implement its injunction. This case represents the furthest reach of the federal courts into state prison affairs. More significantly, it may be the beginning of a trend. In enforcing and vindicating constitutional rights in this way, federal courts may incidentally strain harmonious relations between federal and state authorities. Until such time as prison systems act to prevent gross violations of basic rights, however, federal judges will have no other alternative consonant with their sworn duty.

B. Procedural Remedies

Habeas corpus. It has been asserted that "habeas corpus has been the device most commonly employed by prisoners seeking relief from denials of constitutional rights." This is probably no longer true for prisoners attacking violations of their rights involving internal prison matters. In addition to the hurdle of the hands-off doctrine, relief under habeas corpus always posed inherent difficulties for prisoners. First was the rule that the writ was available only to attack the validity of confinement, not the manner. Some courts, however, abandoned this rule after the decision of the Sixth Circuit in Coffin v. Reichard, which indicated that habeas corpus was available to attack "any unlawful restraint of personal liberty." Second, habeas corpus was refused unless the prisoner was entitled to absolute release. This has not been the one mechanism which federal courts might use to reduce their involvement in state prison affairs is the doctrine of abstention. However Judge Kaufman in Wright v. McMann, 387 F.2d 319 (2d Cir. 1967) rejected abstention, indicating that abstention would sacrifice an individual's right to federal adjudication, that the Supreme Court has favored only narrow use of the doctrine, and that the doctrine, although not dead, is least applicable in cases presenting civil rights questions.

One practical problem is the difficulty of reviewing increasing numbers of applications for relief. See Wright v. McMann, 257 F. Supp. 739, 740 (N.D.N.Y. 1966); rev'd, 387 F.2d 519 (2d Cir. 1967); Gittlemacker v. Frasse, 428 F.2d 1, 2-3 (3d Cir. 1970). Another practical problem is that federal judges are uncomfortable and perhaps reluctant when asked to interfere in state prison affairs. See, e.g., Sostre v. McGinnis, 442 F.2d 178, 183-85, 205 (2d Cir. 1971); Wright v. McMann, 387 F.2d 519, 527 (2d Cir. 1967) (concurring opinion of Chief Judge Lumbard); Hall v. Wainwright, 441 F.2d 391 (5th Cir. 1971); Sawyer v. Sigler 445 F.2d 818, 819 (8th Cir. 1971); Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971); Morrissey v. Brewer, 443 F.2d 942, 951 (8th Cir. 1971); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1969).

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143 F.2d 443 (6th Cir. 1944). Petitioner had been returned to prison after he violated probation. He applied for a writ of habeas corpus, alleging that at the time he pled guilty he was incapable of discussing his case with his attorney, and that his confession was improbably obtained. The district judge refused to grant leave to file for the writ, but the Sixth Circuit reversed and remanded, finding petitioner's allegations were sufficient to require respondent to show cause why a writ should not issue. Petitioner had also filed another petition for habeas corpus with the Sixth Circuit, alleging that he suffered injury while in confinement. The court referred this second petition along with the original petition to the district court and, in an effort to guide the district judge, the court observed that petitioner would be entitled to a writ if his confinement was made "more burdensome" than the law allows. Id. at 445.

law since Peyton v. Rowe, where the Supreme Court held that the writ was available to a convicted prisoner, serving consecutive sentences, who petitioned for habeas corpus to attack the validity of his second sentence but did not challenge the correctness of his confinement under the first sentence. Peyton led to the fashioning of what amounts to equitable relief under the umbrella of habeas corpus.

Civil Rights Act. Although the same constitutional rights may be protected by both habeas corpus and the Civil Rights Act, an important difference between the two types of action is the requirement that state remedies be exhausted before a federal habeas corpus action can be brought. Even before Monroe v. Pape ended the exhaustion requirement for civil rights actions, the Civil Rights Act was interpreted so as to protect the rights secured to prisoners under the Constitution.

391 U.S. 54 (1968).

The Court stated, id. at 66-67:

But the statute does not deny the federal courts power to fashion appropriate relief other than an immediate release. . . . Thus, to the extent that McNally relied on the notion that immediate physical release was the only remedy under the federal writ of habeas corpus, it finds no support in the statute and has been rejected by this Court in subsequent decisions.

The importance of the habeas corpus remedy is reflected in the Court's decision in Johnson v. Avery, 393 U.S. 483 (1969). There the Court struck down a prison rule which forbade prisoners to assist fellow prisoners in preparing habeas corpus petitions. The Court's opinion reveals it will not tolerate impairment of a prisoner's federal right to petition for habeas corpus, even where the impairment is caused by a prison regulation which serves a valid administrative purpose. Id. at 486.


We see no sound basis for putting the constitutional rights protected by the writ on a higher plane than those cognizable under section 1983, particularly since there are instances where the same right might be asserted under either form of relief.


It is interesting to note that the three early cases granting relief cited in Beyond the Ken at 512 n.33, involve allegations of medical mistreatment: Coleman v. Johnson, 247 F.2d 273 (7th Cir. 1957); McCollum v. Mayfield, 130 F. Supp. 112 (N.D. Cal. 1955); Gordon v. Garrison, 77 F. Supp. 477 (E.D. Ill. 1949). Despite some hesitancy, the courts did allow actions under the act, at least where the deliberate failure to provide medical care was under the color of state law and was regarded as a deprivation of rights secured by the Constitution.

After Monroe, however, federal courts were flooded with civil rights actions of all kinds. Monroe is of singular importance because the Court, after an extensive review of legislative history, concluded that the remedy provided by the Civil Rights Act is "supplementary" to the state remedy, thus the state remedy need not be exhausted before federal relief is sought. The act "provided a remedy where state law was inadequate" and "provided for a federal remedy where the state remedy, though adequate in theory, was not available in practice." Federal courts have regulated the number of civil rights actions, however, by narrowly defining federal rights. Federal courts thus occupy a middle ground with respect to involvement in state prisons partly because of the judiciary's well-recognized reluctance to oversee the operations of prisons.

To be successful, a civil rights action must show that federal rights have been violated. The rights which have been invoked with the greatest effectiveness are the eighth amendment right to be free from cruel and unusual punishment, and the fourteenth amendment due process and equal protection clauses. Not every deprivation, however, reaches the magnitude of a constitutional violation. For example, the rule in the Second Circuit is that, to be actionable, a failure to provide medical care must "shock the conscience" or in some way exceed mere negligence. One might question a rule which relies on a "shocks the conscience" test, inasmuch as that test has been discredited in search and seizure and other areas of state administration of criminal justice. While McCollum v. Mayfield, 130 F. Supp. 112, 114 (D. Cal. 1955).

Shapo, Constitutional Tort at 278.


the test is outmoded for some purposes, it is consonant with the hands-off doctrine and gives needed latitude to prison administrators. The test is also consistent with the legislative history of the Civil Rights Act, which was aimed primarily at egregious violations of rights. Without question, most federal courts balance prisoners' rights against a policy in favor of prison administration, with the result that only "outrageous" violations of rights are likely to be remedied.

The fact that many civil rights complaints are submitted pro se by prisoners causes practical and procedural problems for federal courts. For example, the complaints may be so vague and conclusory they fail to allege constitutional deprivations with the necessary specificity. On the other hand, 

the complaint may be so long and complicated, and involve so many defendants, as to place a severe burden on the time and resources of the courts. The basic problem is one concerning legal aid to prisoners but is tangentially related to all other rights.

Another procedural remedy concerns the necessity of an evidentiary hearing in section 1983 cases. In the absence of an answer to the complaint or an evidentiary hearing, the facts must be construed in a light most favorable to plaintiffs. A section 1983 case may be dismissed without hearing if it fails to state a cause of action. But where the allegations are sufficiently serious, some determination of the underlying facts should be undertaken before judgment is rendered. Prisoners may therefore be tempted to include exaggerated facts in order to obtain an evidentiary hearing. The fear of great numbers of suits may not be justified but it is perceived as a problem. Too often this fear obscures the more accurate difficulty: the virtual unavailability of effective legal counsel and sound administrative remedies for prisoners. These should be available to every prisoner, not merely to those fortunate enough to be incarcerated in an enlightened institution or near an activist law school. Counsel would serve to draw more artful complaints and screen frivolous actions. Meanwhile the courts should be slow to dismiss complaints with serious allegations, even if they present farfetched statements of facts.

The problem of increasing numbers of prisoner complaints has led courts to fashion shorthand methods of ruling on them. One court pointed out that in medical care cases an examination of the prisoner's record may be dispositive of the case, especially where the allegation is denial of care by 1970). A related problem is that pro se complaints are often hard to fit into neat legal slots. Nevertheless, the courts are generally lenient in accepting such complaints despite the title affixed and classify the cases in a way most beneficial to the petitioner. See Willwording v. Swenson, 439 F.2d 1331, 1334 (8th Cir. rev'd on other grounds, 404 U.S. 249 (1971): "In this circuit we have accepted jurisdiction on complaints denominated as habeas corpus, writs of mandamus, and petition for physical examination as petitions for injunctive relief under the Civil Rights Statutes. . . ."


50 Hirons v. Director, Patuxent Institution, 351 F.2d 613, 614 (4th Cir. 1965).

51 See, e.g., United States ex rel. Lawrence v. Ragen 323 F.2d 410 (7th Cir. 1963).

52 Nolan v. Scafati, 430 F.2d 548, 550 (1st Cir. 1970).
a physician. Where such records contain no information on the subject matter of the complaint, an evidentiary hearing is called for.\footnote{Blanks v. Cunningham, 409 F.2d 220 (4th Cir. 1969).}

Another shorthand device is used by the Ninth Circuit, which does not allow the complainant to be present at the hearing of his case.\footnote{Id. at 221.} While this rule makes it easier to pass on complaints, it may be damaging to the complainant because he is usually a necessary witness. The same court has, however, specified a complainant’s procedural rights and they appear to ameliorate the absence of the right to be present at the hearing:

He is ... entitled to have: (1) process issued and served; (2) notice of any motion thereafter made by defendant or by the court to dismiss the complaint and the grounds therefore; (3) an opportunity to at least submit a written memorandum in opposition to such a motion; (4) in the event of dismissal, a statement of the grounds therefore; and (5) an opportunity to amend the complaint to overcome the deficiency unless it clearly appears from the complaint that the deficiency cannot be overcome by amendment.\footnote{Id. at 1088. See Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971).}

The Ninth Circuit’s procedural compromise between a full evidentiary hearing and summary dismissal of the complaint is similar to the “amplifying” procedure explained by the District of Columbia Circuit in United States v. Simpson.\footnote{433 F.2d 1087 (9th Cir. 1970).} The “amplifying” procedure may be used in cases where the petition’s allegations are too conclusory or general for the court to treat, but the court feels the complaint may have merit if it were artfully drawn.\footnote{Id. at 1088. See Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971).} In such cases the court issues an order and accompanies it with a memorandum to the prisoner telling him to file, in his own words, the specific facts and details of his grievance.\footnote{Id. at 166.} The Simpson court hinted that a complaint might be best amplified by appointing counsel to assist in the preparation of the petition.\footnote{Id. at 166 n.12.}

It is interesting—and perhaps significant—that these circuit courts have adopted different yet parallel approaches in an attempt to salvage meritorious complaints while relieving somewhat the burden of holding an evidentiary hearing. Yet these approaches are flawed because without adequate and expert legal assistance in the prison, courts will not be able to correctly separate the frivolous from the meritorious complaint.\footnote{Id. at 166.} This problem is central to the adequate provision and vindication of prisoners’ rights to medical care and will be examined thoroughly in the conclusion to this paper.

The class action, as seen in the Arkansas\footnote{Heckart v. Pate, 9 Cr. L. 2228 (N. D. Ill. 1971).} and Virginia\footnote{Jones v. Wittenberg, 323 F. Supp. 93, 99 (N. D. Ohio 1971).} cases, can effectively change conditions throughout a state prison system. Instead of affecting the rights of a single prisoner, one case can have dramatic impact on thousands of inmates. Two arguments are forwarded to defeat class action in civil rights suits. The first is the practical problem of giving notice to large numbers of inmates and parolees.\footnote{Id. at 1088. See Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971).} The second is that since a civil rights action is said to be available only in shocking or egregious cases, each prisoner’s case should be treated individually.\footnote{Id. at 221.} The latter argument carries more force when the action is brought for damages than when injunctive relief is sought. Neither argument, however, should deter a court from granting injunctive relief to a class when federal rights are violated through general conditions rather than through numerous individual incidents.\footnote{Landman v. Royster, 333 F. Supp. 621 (E. D. Va. 1971).}

C. Habeas Corpus and Civil Rights Actions Compared; Herein of Exhaustion of State Remedies

The distinction between habeas corpus and civil rights actions has become quite blurred. The language of some courts could indicate that there is no longer a distinction and that in any suit brought by state prisoners in federal court, the form of a
cause of action is interchangeable. The opinion of Judge Doyle in Edwards v. Schmidt113 recognized this apparent interchangeability and its important consequence that petitions will be characterized as civil rights actions to avoid the need for exhaustion of state remedies. This characterization is made on the correct assumption that a state prisoner must exhaust state remedies before a writ of habeas corpus will issue, but a prisoner seeking relief under the Civil Rights Act need not exhaust state remedies.114

It becomes essential, therefore, to differentiate between the habeas corpus and section 1983 categories, in order to prevent circumvention of the requirement in habeas corpus cases that state remedies be exhausted. Judge Doyle offered the distinction that some suits are "traditional habeas corpus suits" while others are "extraordinary prisoner suits."115 The former simply attacks the validity of the state court judgment. In the latter, the prisoner concedes that he is lawfully imprisoned, but claims he is deprived of a constitutional right which he is entitled even inside prison. Judge Doyle's approach, however, is not simply an attempt to fit cases into the two categories he suggests. Rather, it is an attempt to identify the issues with respect to which exhaustion of state remedies should be required.116

Judge Doyle's description of section 1983 actions as "extraordinary prisoner suits" is consistent with the underlying purposes of the federal civil rights remedy as determined by the legislative history in Monroe v. Pape,117 in law review articles,118 and in the cases dealing with prisoner's rights to medical care.119 The rule is that in extraordinary prisoner suits, complaining of internal prison conditions, the proper remedy is a section 1983 action. It is in the light of this rule that the broad language of Judge Coffin in Nolan v. Scafati120 or the very liberal approach of Judge (now Mr. Justice) Blackmun in Jackson v. Bishop121 is to be understood. In contrast, where a prisoner launches a collateral attack on his conviction in state court he is in the area of "traditional habeas corpus suits" and the circumvention rule applies to require exhaustion of state remedies.122

The most recent treatment of this subject is a per curiam decision by the Supreme Court in Wilwording v. Swenson.123 Petitioners filed a writ of habeas corpus challenging living conditions and disciplinary measures in a state prison. Such a complaint, which does not attack the validity of the state court judgment, would be included in Judge Doyle's "extraordinary prisoner suit" category.124 The district court dismissed the complaint on the ground that, although state habeas relief had been exhausted, there remained several other forms of state relief which had not been tried.125 The Eighth Circuit affirmed126 but the Supreme Court reversed, stating two alternative grounds for reversal. The Court was of the opinion that "Section 2254 does not erect insuperable or successive barriers to the invocation of federal habeas corpus."127 First, the Court read the exhaustion requirement of section 2254 to mean only that the state should be given an initial opportunity to correct violations of prisoners' federal rights. Where the state courts failed to indicate an alternative procedure or had never granted a hearing on the facts, habeas petitioners need not exhaust all available remedies.128 Second, the Court construed petitioners' allegations as pleading a section 1983 cause of action "for deprivation of constitutional rights by prison officials," and therefore exhaustion was unnecessary.129 The Court concluded by citing with approval the language of Mr. Justice (then Judge) Blackmun in Jackson v. Bishop favoring a flexible approach in treating extraordinary prisoner suits as section 1983 actions.

IV. CONCLUSIONS AND RECOMMENDATIONS

A study of the cases indicates that adequate medical care cannot be systematically provided in large prisons. This observation is confirmed by economic and sociological studies. An unpublished paper by this author, comparing official statistics of New York's maximum security prisons with

113 321 F. Supp. 68 (W.D. Wis. 1971).
114 Id. at 69.
115 Id. at 70.
116 Id. at 73-74.
117 365 U.S. at 168-87.
118 See, e.g., Shapo, Constitutional Tort at 279-82.
119 See note 92 supra.
120 340 F.2d 548, 551 (1st Cir. 1970).
121 404 F.2d 571 (8th Cir. 1968).
124 See note 115 supra and accompanying text.
126 439 F.2d 1331 (8th Cir. 1971).
127 404 U.S. at 250.
128 Id.
129 Id. at 251.
130 404 F.2d 571 (8th Cir. 1968).
national figures, indicates that the per capita amount spent on medical care for all citizens is from five to eleven times the amount spent on prisoners, depending on how the figures are interpreted. New York budgeted one half of one per cent of total prison expenditures for medical care while Americans spend approximately six per cent of disposable income after taxes on personal health care goods and services. In the less tangible areas of medical care it has been found that patient involvement and the physician's personal attention has an influence on the quality of medical care. This aspect of medical care is rarely found in maximum security prisons. Its absence is understandable in the light of current sociological knowledge about total institutions. In human terms the totality and secretiveness of the large prison produces an iron law of contempt. In the repressive atmosphere and grinding routine of the prison, those in authority become hardened to the basic considerations of humanity expected in our society. Men who would be friendly, patient, and considerate without the walls become cold, curt, and hostile within. Shielded by secrecy they become calloused to the basic needs of prisoners. The point is not that the keepers are bad men but that ordinary men in a bad system cannot be good.

What can be done to remedy these evils? Feasible solutions lie in three broad areas: political, institutional, and legal.

A. Political Solutions

A political solution, in the form of a radically altered public attitude to criminal justice in general and prisons in particular, is both the most important and the least likely to occur. The figures from New York show that the public, or those who control the public purse, are not willing to spend as much on prisoners for medical care as is spent on the average citizen. Despite the rather elaborate prison medical facilities that exist in most states, the principle of "less eligibility" applies: the condition of the prisoner should not surpass that of the poorest-off employed citizen. If ever there was a fixed rule of a science of penology, this is it. I seriously doubt whether the demand for social welfare on the part of prisoners will be translated into money and programs in the foreseeable future. Hence, this solution is the most remote. However, there is something that lawyers can do in this regard. There is a growing recognition that despite the great moral and symbolic victories of the prisoners' rights cases which have assaulted the hands-off doctrine, their actual impact on the total system is limited. Sol Rubin reminds us that the foundation for correctional work is statutory, and it is there that the greatest impact can be made. Statutory changes can effectively convert what are now privileges into rights for the entire prison population, can narrow the range of discretion where abuses have been frequent, and can motivate rule-making and more effective administrative control.

B. Institutional Solutions

Any improvement in general prison conditions is bound to have some impact on the quality of medical care by reducing overcrowding, moving facilities closer to big cities and closer to a greater range of medical talent, and reducing prison populations and the number of people subject to prison medicine. Specific improvements in medical care are primarily the task of prison administrators and experts in the delivery of medical services. However, a few general observations can properly be made here. First, the state of knowledge concerning

H. Barnes & N. Teeters, New Horizons in Criminology: The American Crime Problem 962 (1943). One should observe however that Sidney and Beatrice Webb first applied this principle to paupers receiving charity.

In an interview Professor Herman Schwartz has remarked, "Tactically, it may be a mistake to press lawsuits..." although it is not his intention to refrain from pressing suits. Attica at 823.

prison medicine is poor. The last national survey of prison medicine was made in 1929.\textsuperscript{142} Publications since that time display either an unwitting blindness to the real problems of prison medicine\textsuperscript{143} or an undue emphasis on exotic medical problems which do not solve the problem of generally inadequate care.\textsuperscript{144} The recent interest in delivery of effective medical care to poor people should also focus on prison medicine and hopefully lead to studies which have an impact on improving overall medical care behind the walls.\textsuperscript{145}

Second, administrative changes may improve prison medicine by coordinating care efforts throughout a single prison system. Given the endemic lack of funds and personnel it is important to provide services efficiently and economically. In New York State since September, 1969, the medical services throughout the system have been under the control of a Medical Director, who is also the chief physician of a prison hospital. The post of medical director within a state’s department of corrections is an unusual administrative feature and has the potential of making the concerns of the prison doctor more accessible to the state prison bureaucracy and assuring minimum levels of medical care.\textsuperscript{146} Other states should study this approach.

Third, the tenure of prison doctors, dentists, and nurses should be limited to a fixed period of five years. The iron law of contempt for inferiors is too powerful to leave the best-intentioned person unaffected. There is a real danger that the relationally sheltered position of a prison doctor will attract those seeking primarily a civil service treatively sheltered position of a prison doctor will

This means that the constant and effective provision of legal protection and remedies is not a frill but a necessary aspect of insuring that prisoners receive basic services. In specific terms this translates into judicial recognition of the substantive rights of prisoners. For example, a prime cause of poor medical care in prison is the secret nature of the institution. When a court holds that a prisoner has the right to make grievances known to the those attributes of physicians which are necessary for quality medical care.\textsuperscript{147}

C. Legal Solutions

Almost three decades ago the criminologists Barnes and Teeters surveyed the cruelty of the modern prison and, with some skepticism, looked forward to the “New Prison” and “New Penology,” which would diagnose and treat that prisoner rather than punish him.\textsuperscript{148} Among other things, the new prison would provide excellent medical care.\textsuperscript{149} On the other hand, the persistence of the old prison has been recognized and studied in detail.\textsuperscript{150} These divergent approaches, the treatment oriented and the custody oriented, have created ambivalent aims and personnel conflicts within the prison systems.\textsuperscript{151} Recently, a new current of thinking has undermined the faith in rehabilitation held by treatment oriented persons.\textsuperscript{152} The hard-won lesson learned by the most astute and humane persons concerned with rehabilitation in prisons is that treatment as a justification for imprisonment is wrong.\textsuperscript{153} The great value in this simple but philosophically profound insight is not that treatment efforts should be abandoned—indeed, they should not—but rather it enables us to see that prison is punishment and punishment is privation—an evil, a pain, a disvalue.\textsuperscript{154}

This suggestion is overly familiar to anyone who has ever been associated with the Peace Corps. It was put forward recently by a noted legal writer in a popular journal, Goldfarb, Why Don’t We Tear Down Our Prison, Look (July 27, 1971), at 45.

This suggests, for example, the power balance and staff conflict in correctional institutions. When a court holds that a prisoner has the right to make grievances known to the

142 F. Rector, Health and Medical Service in American Prisons and Reformatories (1929).
143 Fuller, Medical Services in Contemporary Correction 172 (P. Tappan ed. 1951).
145 Thomas, Medical Systems Survey (unpublished report for the New York Department of Correctional Services, 1971.)
146 I would like to thank Dr. James Bradley, New York State Department of Correction Medical Director, for his time and cooperation.
148 Id. at 15.
public via the news media; this has a great, if indirect, impact on the improvement of prison medicine. The judicial recognition, enforcement, and even creation of procedural due process rights of prisoners has, perhaps, even greater potential. At present, it is too easy for a legitimate demand for adequate care to be sidetracked by futile letter-writing to unheeding prison officials, or for custodial personnel to deprive prisoners of medical care by subverting medical orders.

It is widely recognized, however, that the present legal machinery is inadequate to handle the growing volume of prisoners' complaints or to effectuate across the board improvements. Indeed, one of the themes running through this paper has been the importance of effective legal representation to guarantee necessary services, and the present inability to provide those services. Two major innovations are the keys to the legal solution. The recent, dramatic involvement of lawyers and law students in prisoners' rights litigation will create new strains on the courts in the short run. But this is preferable to the growth of jail house lawyering and prisoner writing, since it will ultimately reduce the burden on courts by screening frivolous complaints, by producing uniform and precise complaints, and by facilitating informal settlements of grievances where possible.

The second innovation is the creation of independent hearing bodies with power to investigate complaints, conduct hearings, inspect facilities and take corrective actions, if any are required. There are three models: negotiation, the ombudsman, and the grievance commission. The negotiation model, either through regular meetings between prison officials and prisoners or through prisoners' unions is still in the speculative stage. If such a model could be implemented on a regular basis, it could provide a useful supplement to more formal means of grievance settlement while getting away from the abuses inherent when a single prisoner informally tries to make his complaints known to superiors. The negotiation model, however, would have to be supplemented by a more formal means of dispute settlement.

If the ombudsman or grievance commission be chosen, it is imperative that such a body be independent. This is best insured by giving the body a statutory basis, to give it real power to investigate, and sufficient funds for efficient and effective operation. A commission or ombudsman should be guided by formal minimum rules which must be adhered to, but beyond these formal rules there must lie the ideals which inform our best legal thinking. In prisoners' rights cases involving medical care the due process clause and the eighth amendment are most frequently invoked via the Civil Rights Act. To prisoners, as to most laymen, basic understanding of these provisions lies in their ethical correlates: fundamental fairness and human dignity. These moral principles have been recognized and implemented by the courts. For an ombudsman to fail to implement them would be to destroy the momentum created by legal decisions in this area. Assuming that the abuses visited on prisoners will not be terminated solely by appeals to the goodwill of those who enter prison service, it is imperative that the legal profession play one of the leading roles in ending the isolation and secretiveness of prison life.

The Philadelphia Prison Society recently announced that the first "outside" ombudsman (not a staff person or community agency representative) in the country had been appointed for Philadelphia's Holmesburg Prison. CORRECTIONS DIGEST, Nov. 3, 1971, at 6. This experiment, however, has foundered when the nation's first prison ombudsman, was quietly denied access to the prisons last month after only three weeks on the job. The prison board cited "disqualifying factors" which it refused to divulge. CORRECTIONS DIGEST, Feb. 9, 1972, at 10.

Note, Maryland Senate Bill 601 (1971) (to add new section 204 to Md. ANN. CODE art. 41).


166 The recent, dramatic involvement of lawyers and law students in prisoners' rights litigation was most frequently invoked via the Civil Rights Act. To prisoners, as to most laymen, basic understanding of these provisions lies in their ethical correlates: fundamental fairness and human dignity. These moral principles have been recognized and implemented by the courts. For an ombudsman to fail to implement them would be to destroy the momentum created by legal decisions in this area. Assuming that the abuses visited on prisoners will not be terminated solely by appeals to the goodwill of those who enter prison service, it is imperative that the legal profession play one of the leading roles in ending the isolation and secretiveness of prison life.

155 Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971).


158 Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971).

159 N.Y. Times, Feb. 8, 1972, at 1, col. 2.