Journal of Criminal Law and Criminology

Volume 60 | Issue 2 Article 3

1969

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Daniel J. Gallington

THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE
Vol. 60, No. 2
Printed in U.S.A.

PRISON DISCIPLINARY DECISIONS*

DANIEL J. GALLINGTON

The author, a Captain in the U.S. Air Force, is currently serving as Assistant Staff Judge Advocate, stationed in Middlesex, England. He is a member of the Illinois Bar, and has been certified by the U.S.A.F. as Trial and Defense Counsel. Before assuming his present position, Capt. Gallington was Assistant Legal Counsel for Southern Illinois Univ. (Carbondale) during 1967, and was associated with a Champaign, Ill. law firm.

The author received the B.S. degree (Finance) in 1964 and the J.D. degree in 1967 from the University of Illinois. He is a member of the American Bar Association, American Judicature Society, Illinois State Bar Association, and the newly formed United States Military Trial Lawyers Association.

This article analyzes current law and problems of judicial review of "internal disciplinary decisions" made by prison officials. The author discusses practical problems of the prisoners' access to the courts, surveys case law regarding the courts' determination whether or not to review the merits of such a disciplinary decision, and examines court decisions wherein such disciplinary decisions were reviewed on the merits and either condoned or condemned. The author reports an established trend toward increased judicial supervision of prison disciplinary decisions.

It is the purpose of this article to analyze the current law and problems of judicial review of decisions made by prison authorities to discipline lawfully incarcerated prisoners for violations of prison rules. The analysis will be divided into three parts:

I. The practical problems of the prisoners' access to the courts;
II. The determination by the court that it will review a disciplinary decision;
III. The determination by the court on the merits of whether or not the disciplinary decision was correct.

As will be seen, the courts have not until recently made these distinctions, but the practical result of the cases indicates an established trend toward increased judicial supervision of prison disciplinary decisions. This article will not deal with the often closely related problems of tort and criminal liability of prison authorities for their treatment of lawfully incarcerated prisoners, although these areas may furnish many useful analogies.[1]

* The views expressed herein are solely those of the author, and do not necessarily reflect the views of the U.S. Air Force or Department of Defense.

[1] *See* United States v. Muniz, 374 U.S. 150 (1963), holding that actions under the Federal Tort Claims Act could be maintained against the United States by federal prisoners to recover for personal injuries sustained during confinement in prison by reason of negligence of government employees; and Caldwell & Brodie, *Enforcement of the Criminal Civil Rights Statute, 18 U.S.C. Sec. 242, in Prison Brutality Cases*, 52 GEO. L.J. 706 (1964), for discussions of these areas.

THE PRACTICAL PROBLEMS OF PRISONERS' ACCESS TO THE COURTS

No discussion of judicial review of prison disciplinary decisions would be meaningful unless first placed in the context of the prison environment:

> "Lawful incarceration brings about the necessary withdrawal of many privileges and rights, a retraction justified by the considerations underlying our penal system." [2]

Although prisoners' use of the mails may be controlled and restricted by prison rule,[3] it seems clear that their correspondence with the courts cannot be so restricted: Prisoners retain an inviolate right to petition the courts.[4] To the prisoner without counsel, the *value* of his right to

[2] Price v. Johnson, 334 U.S. 266, 285 (1948).

[3] "Control of the mail to and from inmates is an essential adjunct of prison administration and the maintenance of order within the prison." McColskey v. Maryland, 337 F.2d 72, 77 (4th Cir. 1964).

[4] "... a right of access to the courts is one of the rights a prisoner clearly retains. It is a precious right, and its administratively unfettered exercise may be of incalculable importance in the protection of rights even more precious." Coleman v. Peyton, 362 F.2d 905, 907 (4th Cir. 1966). "The right and its exercise are adequately secured in the future, we think only if delivery to a prisoner of incoming matter from a court having jurisdiction to hear his complaint and the mailing of his communications to such court are delayed no longer than the necessities of sorting require. Further delay for other purposes, such as censorship seem both inappropriate and unnecessary." *Id.* at 907.

petition depends on his individual creativeness.[5] The problem of providing counsel for prisoners is a separate and perplexing one in itself, and therefore will be only incidentally treated herein.[6]

Another practical hurdle for the petitioning prisoner is his access to the legal material he needs to prepare a successful petition.[7] Prison authorities advance various reasons why inmates should not be permitted to possess legal materials.[8] Limitation is also imposed on the time and place of inmate legal research and preparation.[9] In short, the courts feel that prisons are not expected to furnish legal education for inmates so that they may then object to their confinement or treatment by petitioning the courts.[10] Even with these practical restrictions imposed on prison inmates, abuses of the "inviolate" right to petition the courts do occur.[11]

To compensate for the prisoner's regulated environment, his usual absence of qualified counsel and lack of legal sophistication, the courts have formulated special rules of pleading applicable to prisoner petitions that emphasize liberal construction.[12] This special "liberal pleading rule" has allowed courts to correct obvious legal blunders,[13] and even recast the prison petitioner's allegations to state entirely different claims than those initially held to be insufficient.[14] As will be seen, the courts may apply the "liberal pleading rule" technique to avoid questions of subject matter jurisdiction and the justiciability of questions involving the internal administration of prisons.[15]

The Determination by the Court That it Will Review A Prison Disciplinary Decision

Assuming the petitioning prisoner can overcome the practical disadvantages of his environment as outlined above, he must then convince the court that it should review the issues raised by his petition. This is the prisoner's most difficult task.

[5] *Compare* Coleman v. Peyton, *supra* note 4, where the court called the prisoner "... articulate and resourceful..." 362 F.2d at 905, *with* Fleming v. Klinger, 363 F.2d 378 (9th Cir. 1966), where the prisoner filed a "Demurrer to Appellee's Reply Brief" and the court said: "This is an admittedly inept appeal...".

[6] Consider, for example, the possible abuse of court appointed counsel as in Coleman v. Peyton, *supra* note 4, where the court appointed *four* successive attorneys to represent the prisoner—he found fault with all of them and discharged each because of an alleged "conspiracy" to "...deprive him of his rights." 362 F. 2d at 906. *See also* the discussion in Roberts v. Pepersack, 256 F. Supp. 415 (D.D. Md. 1966), where the court states that the appointment of counsel is a privilege and involves an exercise of the court's discretion, the court expressing fear of abuse of the privilege by prisoners. *Id.* at 435–37.

[7] In Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961), "... the court upheld regulations which forbade all legal materials in the cell, which allowed correspondence with courts, judges and attorneys, but prevented the retention of any correspondence from these sources that contained citations to legal authorities... Also, they were prevented from purchasing or receiving any legal material except from the publisher. Thus, no gifts of books were permissible." Roberts v. Pepersack, *supra* note 6, at 434.

[8] The "fire hazard" in prison cells, Carey v. Settle, 351 F.2d 483 (8th Cir. 1955); to prevent "jailhouse lawyers" who might "... exploit and dominate weaker prisoners of inferior intelligence." Hatfield v. Bailleaux, *supra* note 7, at 639. The latter reason seems more justified than the former: "Prior to the establishment of this 'writ room,' it appears that several prisoners, acting as 'jailhouse lawyers,' were charging for their service and advice, which necessarily, was more often than not, faulty." *Ex Parte* Wilson, 235 F. Supp. 988, 988–989 (E.D.S.C. 1964).

[9] A rule that no petitions could be mailed which were not prepared in the prison "writ room" was upheld in *Ex Parte* Wilson, *supra* note 8, at 989.

[10] The following statements are typical: "Prisons are not intended, nor should they be permitted, to serve the purpose of providing inmates with information about methods of securing release therefrom." Roberts v. Pepersack, *supra* note 6, at 433; "... he has no due process right to spend his prison time or utilize prison facilities in an effort to discover a ground for overturning a presumptively valid judgment." Hatfield v. Bailleaux, *supra* note 7, at 641.

[11] *See, e.g.*, the two page footnote in Robert v. Pepersack, *supra* note 6, at 434–35, listing the citations of cases petitioned by prisoner Roberts during the previous decade, in both the federal and state courts.

[12] "Since the plaintiffs are inmates of a penal institution, the pleadings lack the legal niceties of the normal pleadings in this Court. Therefore the complaint will be given a reasonably liberal reading in ascertaining whether claims have been stated upon which relief could be granted." Long v. Katzenbach, 258 F. Supp. 89, 91 (M.D. Pa. 1966). "Interpreting the complaint broadly, as we must..." Wright v. McMann, 257 F. Supp. 739, 742 (N.D.N.Y. 1966). See also note 5 *supra*.

[13] "The traditional function of the writ of *habeas corpus* is to test the legality of the detention. It is inappropriate to the kind of injunctive relief these petitioners seek. Unlearned inmates of penal institutions, however, are usually ignorant of the legal niceties of the procedural rules in the courts. If one presents in his own behalf a petition which clearly merits some relief, he ought not to fail entirely because he misconceives the nature of the proceeding or mislabels his petition. If the petition substantively is one for injunctive relief, the court most certainly has a discretionary right to treat it as such, despite the fact that the untutored petitioner has mistakenly designated it as a petition for a writ of *habeas corpus*." Roberts v. Pegelow, 313 F.2d 548, 549–50 (4th Cir. 1963) (footnotes omitted).

[14] "At times, the court has even phrased the allegations in terms of constitutionally-guaranteed rights of which Roberts has perhaps never heard. Still, despite this extremely liberal interpretation, Roberts' complaint remains insufficient." Roberts v. Pepersack, *supra* note 6, at 436.

[15] *See* pp. 159 *infra*.

The "Hands Off" Doctrine and Its Exceptions

There can be no doubt that decisions by prison authorities to discipline lawfully incarcerated prisoners for prison rule violations are decisions involving the internal administration of prisons. In most states, and in the federal system, the responsibility for administration of the respective prison systems is delegated by statute to the executive branch of government.[16] These statutes delegate broad rule-making powers to the agencies charged with internal prison discipline.[17] The problem that continues to plague the courts, both state[18] and federal,[19] is the *scope* of delegation of power. The legal development of judicial review of prison disciplinary decisions originates with holdings based squarely on the concept of *complete* delegation. The case of *Williams v. Steele*[20] offers perhaps the clearest example:

> "Since the prison system of the United States is entrusted to the Bureau of Prisons under the discretion of the Attorney General ... the courts have no power to supervise the discipline of the prisons nor to interfere with their discipline, but only on *habeas corpus* to deliver from prison those who are illegally detained." [21]

Although the holding of the court in *Williams* was somewhat narrower than the above quotation would indicate,[22] this case seems to be the definitive beginning of the rule that because of complete delegation of prison administration to the executive, the courts have no power or jurisdiction to review the disciplinary decisions of the prison authorities. The most unusual feature in the history of the *Williams* rule is that while the courts have repeatedly recited it as if it were binding, they have seldom allowed it to preclude jurisdiction of the subject matter altogether, as the rule would seem to suggest. A recent example of this judicial lip-service to the *Williams* rule is *Heft v. Parker*,[23] in which a federal prisoner submitted a "Petition to Enjoin Cruel and Unusual Punishment," alleging a denial of proper diet while being held in a "punishment cell." Since the prisoner was at trial receiving adequate meals, he asked for an injunction against subjection to an improper diet in the future. The court framed the facts alleged as presenting an issue of the internal discipline of prisons, and mechanically applied the *Williams* rule.[24] Logically, the court needed no further grounds to dismiss the petition, but proceeded to justify the result on constitutional grounds.[25] The technique used in *Heft v. Parker* clearly indicates that the court was not following the *Williams* rule to the letter, even though the result of the case is the same as if the court had done so.

Much preferred to the *Heft v. Parker* approach are cases which restate or make exceptions to the *Williams* rule, frame the facts in terms of the restatement or exception, then grant or deny relief accordingly. Such a case is *Childs v. Pegelow*,[26] where Black Muslim petitioners alleged that they were being punished because the warden of their federal prison had not provided them special diets

[16] ILL. REV. STAT. ch. 108, §§ 10 & 16 (1965); 18 U.S.C. §§ 4001 & 4042 (1964).

[17] In Illinois, The Department of Public Safety; the federal prisons are administered by The Federal Bureau of Prisons. See statutes cited in note 16 *supra*.

[18] In George v. People, 167 Ill. 447, 47 N.E. 741 (1897), the court upheld the rule-making power of the prison commission and the disciplining of inmates for internal rule violations, stating that such rule-making was not an unpermitted exercise of judicial power.

[19] "The federal prison system is operated in *all* its aspects by the Attorney General, part of the executive branch of government, and *not* by the judiciary." *United States v. Marchese*, 341 F.2d 782, 789 (9th Cir. 1965) (emphasis added).

[20] 194 F.2d 32 (8th Cir. 1952).

[21] *Id.* at 34. When rehearing was petitioned in the *Williams* case, the court seemingly took the opportunity to state the rule as an absolute:

> The petition for rehearing implies that our opinion holds that there is no judicial remedy open to a person who has been legally convicted and committed for the commission of a crime and who is thereafter subjected to cruel and unusual punishment in violation of our Constitution. We do not consider our opinion susceptible to the construction, but in order that there be no question about it, we deem it desirable to say so in so many words.

Williams v. Steele, 194 F.2d 917 (8th Cir.), *cert. denied*, 334 U.S. 822 (1952).

[22] "The question involved is whether the writ of *habeas corpus* may be used for that purpose. We hold that it may not." Williams v. Steele, *supra* note 21, 194 F.2d at 917. Incidentally, this is still probably correct, since there are now more appropriate, recognized remedies available to obtain judicial review. *See* pp. 158 *infra*.

[23] 258 F. Supp. 507 (M.D. Pa. 1966).

[24] "... this case involves the internal discipline of a prison ... it is not the function of the courts to superintend the ... discipline of prisoners." Heft v. Parker, *supra* note 23 at 508.

[25] "Moreover, the mere allegation of an inadequate diet with accompanying loss of weight is certainly not enough to constitute cruel and unusual punishment. Finally, the prisoner states that he is being fed adequately at this time, rendering the case moot...." *Ibid.*

[26] 321 F.2d 487 (4th Cir. 1963), *cert. denied*, 376 U.S. 432 (1964).

and dining hours as he had allegedly agreed to do. The court stated the general rule to be that "except in *extreme* cases" the courts will not interfere with the internal discipline of prisons.[27] Next, the court defined "extreme cases" as those "petitions alleging deprivations of constitutionally and legally protected rights." [28] Then, after the court reviewed the facts as developed from the pleadings and hearing record, it was determined that an "extreme case" was not presented by the petitioners and therefore relief would be denied accordingly.[29] It should also be noted that the court in *Childs v. Pegelow* liberally construed the pleadings and the hearing record to amplify the existence of any possible "extreme case" that could be stated.[30]

There have been many exceptions made to the *Williams* rule since its pronouncement in 1952. Perhaps the most complete statement of the current status of the justiciability rule is as follows:

> "The rule that . . . courts do not intervene in matters involving prison discipline is . . . subject to limitation. What is needed to overcome the prison discipline defense has been stated in various ways . . . : 'deprivation of a constitutional right,' . . . 'exceptional circumstances,' . . . if the acts of prison officials are not 'reasonably necessary to effectuate the purpose of imprisonment,' . . . 'violation of a legal right or an abuse of discretion by prison officials,' . . . 'extreme' circumstances, . . . 'only in a rare and exceptional situation,' . . . 'unreasonable regulations' . . . .[31]

On the other hand, there still seems to be current authority[32] that would purport to follow the strict non-justiciability rule of the *Williams* case. However, a careful reading of these opinions reveals that the respective courts did not really apply the *Williams* rule absolutely; in each case there was a review of the facts and merely a decision that relief should be denied. Hence, these cases illustrate olny the same logical fallacy that appeared in *Heft v. Parker*.[33] That is, the courts applied the strict non-justiciability rule when they meant only to hold that the facts did not *justify* a judicial intervention into the particular disciplinary decision.

It should not be concluded that since the current exceptions to the strict non-justiciability rule of *Williams* have been stated,[34] there remains no problem of defining justiciability. There seem to be at *least* two reasons, one quite practical and the other theoretical, why problems remain. First of all, the courts obviously need to be apprised of the exceptions that have been made to the strict non-justiciability rule in order either to follow an established exception or create a new one. This is the key that will allow a court to initially intervene into a particular disciplinary decision. Perhaps lack of apprisal is to be explained by the corresponding lack of legal resource and sophistication of the average petitioning prisoner.[35] The prisoners themselves probably do not know that there has been a definite change of thinking in justiciability concepts. But to the prisoner *with* counsel, it would seem risky for the attorney to assume that the court would only pay lip service to the strict non-justiciability rule and that the result of the case would be the same, no matter what rule the court applies. It should also be remembered that the "liberal pleading rule" would not be applied to petitions prepared and filed by an attorney. Secondly, each time the court decides to make or follow an exception to the strict non-justiciability rule, it strikes a delicate balance between the enormously practical problems of internal prison discipline administration and the basic human rights

[27] *Id.* at 489. It is interesting to note that the court cited Williams v. Steele as authority for *their* statement of the rule!

[28] *Id.* at 490.

[29] The court held that the facts developed did " . . . not rise to the level of constitutional rights involving due process of law and equal protection of the laws such as those recognized and protected in the few cases where the courts have carved out exceptions to the accepted rule of non-interference with prison administration." *Ibid.*

[30] "[T]he facts appear to have been fully developed, notwithstanding the lack of counsel for petitioners, and support the conclusion . . . that the complaints were . . . unjustified." *Ibid.* See also Roberts v. Pegelow, *supra* note 13, at 550, where the court treated the petitions as asking injunctive relief though mislabeled "petitions for *habeas corpus*," and Long v. Katzenbach, *supra* note 12, where liberal construction by the court permitted statement of First Amendment claims; the court held no rights were violated and denied relief. *See generally* the discussion of the "liberal pleading rule" pp. 159-161 *supra*.

[31] Roberts v. Pepersack, 256 F. Supp. 415, 426 (D. Md. 1966).

[32] "[P]rison officials must have wide discretion in the promulgation of rules to govern the inmates, even to the point of denying basic constitutional rights." United States *ex rel.* Henson v. Myers, 224 F. Supp. 826, 827 (E.D. Pa. 1965). No romantic or sentimental view of constitutional rights . . . should induce a court to interfere with the necessary disciplinary regime established by the prison officials." Sostre v. McGinnis, 334 F.2d 906, 908 (2d Cir.), *cert. denied*, 379 U.S. 892 (1964).

[33] *Supra* note 23, at 508.

[34] Roberts v. Pepersack, *supra* note 31.

[35] *See* p. 161 *supra*, "The Practical Problems of Prisoners' Access to the Courts."

of prisoners.[36] Each intervention by the courts into the administration of prison discipline seems to be contrary to the clear meaning of the "exclusive" delegation of prison administration to the executive branch.[37] Only the astonishing recurrence of appalling disciplinary decisions by prison authorities demands this increased judicial supervision.[38]

As for the future of any non-justiciability rule, a New York federal district court may have struck a fatal blow.[39] In a prison religious freedom case, the court in effect ordered a complete judicial pre-emption of the "exclusive" delegation of prison administration to the executive branch.[40] It is too soon to tell what impact this technique, and the court's expanded concept of jurisdiction,[41] will have on the continued existence of a non-justiciability rule. The case may be too radical in its departure from even the current exceptions to the strict non-justiciability rule.[42] In any event, the case shows clearly the current judicial disfavor with the competency of prison administrative decisions and the strict non-justiciability rule.

Other Objections to Judicial Review of Prison Disciplinary Decisions

Assuming that a prisoner is able to present a "justiciable" prison disciplinary decision to the court, as discussed above, other objections can be raised to preclude him from obtaining judicial review.

Exhaustion of Administrative Remedies. In the federal prison system there is a method to channel prisoners' complaints up through the Bureau of Prisons. Called the "prisoner's mail box," [43] the unexercised existence of this administrative remedy has often been relied on by the defendant and the court to preclude judicial review on the merits of the prisoner's petition for relief.[44] When "good time" is forfeited for a prison rule violation,[45] the time may be restored by an administrative remedy established by statute.[46] Prisoner's complaints in the federal courts of illegal "good time" forfeitures

[36] Prison discipline is essential and certain rights *must* be curtailed in order to achieve it. But somewhere along the line there exists a still finer line that separates mere matters of discipline from arbitrary and capricious disregard of human rights. It is this line for which federal courts must diligently search while treading about in the twilight zone that separates interference with a state's autonomy in policing its own penal system from the enforcement of federally guaranteed rights.

United States *ex rel.* Wakeley v. Pennsylvania, 247 F. Supp. 7, 12 (E.D. Pa. 1965). The "twilight zone" described above has also been defined as a "vast no man's land" that lies "between the constitutional rights of a prisoner on the one hand, and the disciplinary rights of the authorities on the other hand." Beckett v. Kearney, 247 F. Supp. 415, 427 (N.D. Ga. 1965).

[37] ILL. REV. STAT. ch. 108, §§ 10 & 16 (1965).

[38] Pp. 161–164, *infra*, analyze the scope and substantive rules of the cases that review the merits of prison disciplinary decisions.

[39] SaMarion v. McGinnis, 253 F. Supp. 738 (W.D.N.Y. 1966).

[40] The Commissioner of Correction is directed to promulgate, put into effect, and file with the Clerk of this court, within thirty (30) days, a set of rules and regulations to govern the plaintiffs and others similarly situated in the practice of their religion. Those rules and regulations should fully recognize those rights which normally attend the belief in and practice of a religion in a state prison system, but the rules and regulations may limit and restrict the exercise and practice of those religious rights by Black Muslim inmates in such a manner or measure as is necessary to the protection and preservation of prison security, discipline or other legitimate prison interest.

Id. at 741.

[41] "[T]he court will continue to retain jurisdiction in this matter, will direct that the plaintiffs and their counsel be furnished with a copy of the Commissioner's rules and regulations, and will permit the plaintiffs at any time, on proper notice, to move for such other and further relief as may become necessary." *Id.* at 742.

[42] Roberts v. Pepersack, *supra* note 31.

[43] As stated in the Mail Regulations, Section g., rev. February 23, 1944: "The Prisoner's Mail Box in each institution is designed to provide any inmate the opportunity to write directly, without inspection by institutional authorities, to the Director of the Bureau of Prisons,... regarding any matter of importance to the individual, to the inmate group as a whole, or any matter of importance affecting the institution and its personnel or officials. The prisoner's mail box is open to all inmates regardless of their status."

Green v. United States, 283 F.2d 687, 688 (3d Cir. 1960).

[44] "[A]ppellant has failed to exhaust his administrative remedies. Under the regulations promulgated by the Bureau of Prisons, there is available to all prisoners the right of the "Prisoner's Mail Box. This procedure sets up an effective means of review of actions of local prison authorities." *Ibid. See also* Lowe v. Hiatt, 77 F. Supp. 303 (M.D. Pa. 1948), where the "prisoner's mail box" defense was apparently first used.

[45] 18 U.S.C. § 4165 (1964), provides for forfeiture of "good time" upon rule violation by an inmate. Incidentally, the forfeiture of "good time" earned can make a substantial difference in the total time served in prison. 18 U.S.C. § 4164 (1964) provides for a reduction in the total term of sentence of from five to ten days, for each month served, depending on the length of sentence. Thus, with maximum "good time" earned, a prisoner would serve only seven and one-half years of a ten year sentence.

[46] 18 U.S.C. § 4166 (1964), allows restoration by the Attorney General upon recommendation from the Director of the Bureau of Prisons.

have been dismissed for failure to exhaust this administrative remedy.[47]

Although there are no cases on this subject in Illinois, the clear language of the delegation statutes establishes an administrative remedy for the prisoner's complaint.[48] Presumably, if an inmate of an Illinois prison sought judicial review of a prison disciplinary decision in an Illinois court, the court would insist on exhaustion of administrative remedies provided by the delegation statute as a condition precedent to relief.[49]

In both federal and state prison systems, it would be difficult to ascertain how effective these administrative remedies really are. It would at least seem certain that inmates and prison officials would have differing views of the administrative effectiveness. The sheer quantity of recent prisoner petitions in the courts as well as the recurrence of the same kinds of complaints tends to indicate that these remedies are not as effective as some courts have assumed.[50] It is the author's opinion that although these remedies were probably created to satisfy the requirements of due process within the exclusive delegation of prison administration to the executive branch, they no longer serve to practically guarantee the basic human rights of prisoners.

Seeking Review in the Wrong Court—Doctrines of Federal Abstention. There exists a general reluctance of the federal courts to hear the complaints of state prisoners. This reluctance was most clearly expressed in *Siegal v. Ragen*,[51] a Seventh Circuit case:

> "The Government of the United States is not concerned with, nor has it power to control or regulate the internal discipline of the penal institutions of its constituant states. All such powers are reserved to the individual states." [52]

The *Siegel* rule sounds as if it is a special application of the strict non-justiciability rule of *Williams v. Steele*[53] to *state* prisoners petitioning in the federal courts. It should be remembered that the *Williams* rule was applied to a petitioning *federal* prisoner by a federal court. As for the similarity of the rules, later interpretations of the *Siegel* rule are similar to the subsequent exceptions made to the *Williams* rule.[54] It is difficult to determine from the cases whether there is any substantive difference between the federal abstention doctrine of *Siegel* and the non-justiciability rule of *Williams*.[55] The answer may hinge on the procedure for raising the respective prisoners' complaints in the federal courts.[56] The state prisoner will ordinarily proceed under the federal Civil Rights Act of 1871.[57] The right of action granted thereunder is for "—the deprivation of any rights, privileges or immunities secured by the Constitution and laws." [58] Thus, it may be that the federal courts are equating the federal abstention rule with the failure of the state prisoner to state a cause of action under the Civil Rights Act of 1871. Stated affirmatively, the defense of federal abstention would seem overcome by a good cause of action under the Civil Rights Act. No case can be found that purposely attempts to draw this parallel, but there are indications that this may well be the test used by the federal courts hearing state prisoner complaints.

For example, In *Rivers v. Royster*,[59] a state prisoner brought a civil rights action to enjoin his warden to allow the prisoner to receive a nonsubversive Negro newspaper. The right to receive such newspapers was granted by state statute. The court dealt with the abstention defense and the civil rights cause of action with the same language: "The alleged discrimination involves a constitutional right which overides the court's reluctance to interfere with prison administration and discipline." [60]

[47] Smoake v. Willingham, 359 F.2d 386, 386-87 (10th Cir. 1966), and Cannon v. Willingham, 358 F.2d 719, 720 (10th Cir. 1966), both held that the district courts were "without jurisdiction" when this remedy had not been exhausted.

[48] ILL. REV. STAT. ch 108, §§ 10 & 16 (1965).

[49] In a case involving an Illinois state prisoner against his warden but in the federal court, it was said: "It does not appear that the plaintiffs have ever ... requested an inquiry into the misconduct of the defendant...." *Siegel v. Ragen*, 180 F. 2d 785, 788 (7th Cir.), *cert. denied*, 339 U.S. 990, *rehearing denied*, 340 U.S. 847 (1950).

[50] *See* p. 161 infra.

[51] 180 F.2d 785 (7th Cir. 1950).

[52] *Id.* at 788.

[53] 194 F.2d 32 (8th Cir. 1952), *supra* notes 20 & 21, discussed in text at 154 *supra*.

[54] "Except under exceptional circumstances, internal matters in state penitentiaries are the sole concern of the state and federal courts will not inquire concerning them." United States v. Ragen, 337 F.2d 425, 426 (7th Cir. 1964) (emphasis added). Notice the similarity to Roberts v. Pepersack, *supra* note 31.

[55] Both the *Williams* and the *Siegel* rules seem to be grounded on the traditional reluctance of the courts to intervene where they have limited power to supervise the enforcement of their decisions.

[56] *See generally pp.* 159 *infra*.

[57] 42 U.S.C. § 1983 (1964).

[58] *Ibid.*

[59] 360 F.2d 592 (4th Cir. 1966).

[60] *Id.* at 594.

Judge Clark of the Second Circuit more precisely defined the parallel that seems to exist between the federal abstention defense and the civil rights cause of action in *Pierce v. LaValle.*[61] In that case, state prisoners brought a civil rights action for religious persecution allegedly inflicted upon them. The court below dismissed the case because the issues should have been heard in the state court as they concerned only routine matters of state prison discipline. On appeal, Judge Clark reasoned:

> "A considerable body of authority . . . holds that a state prisoner complaining of improper prison treatment must seek relief in the state court. . . .
>
> . . . .
>
> In part, these decisions may be explained on the ground that they do not involve any violation of a constitutional right." [62]

This kind of analysis indicates that the court in *Pierce* considered a good cause of action under the Civil Rights Act as the only type of *state* prison discipline case that a federal court should hear, all others being matters for the state courts, the federal courts abstaining.[63] The reasoning of the *Pierce* decision was followed and refined somewhat in the recent case of *Wright v. McMann,*[64] where a petitioning state prisoner in the federal court under the Civil Rights Act was denied relief since there was no finding that a constitutional right had been violated and it appeared that the plaintiff had an available state court remedy.[65] The court in *Wright* went on to justify the decision on still another ground: "[N]o *exceptional circumstances* are shown in the complaint which would exempt this action from the general rule that federal courts will not interfere with the internal management of state prisons. . . ." [66]

This last justification in the *Wright* case seems to complete the reasoning of the federal courts when they are petitioned by state prisoners. It appears that if there is no claim stated under the Civil Rights Act there can be no "exceptional circumstances" which would justify the intervention of the federal court into state prison administration and the prisoner's remedy lies in the state court. Stating the conclusion another way, a good cause of action under the Civil Rights Act gives rise to an "exceptional circumstance" where the federal court will not abstain from state prison discipline cases and the petitioner need not pursue his state court remedy.[67] It should be noted, however, that by making the above conclusions the federal courts do not start with the assumption that they have no *power* to review the facts of the particular disciplinary decision complained of. Thus, the seemingly strict federal abstention rule of *Siegel v. Ragen*[68] has undergone a similar process of erosion as has the strict nonjusticiability rule of *Williams v. Steele.*[69] Hence, the *power* to review the facts of the particular disciplinary decision is assumed[70] while the question that determines the conclusions stated above is whether the facts alleged compel the federal court to take action in the case.[71]

Procedure and Remedies for Seeking Relief

Assuming the petitioning prisoner is able to present a case to the court which will enable the court to take some action, he must usually proceed under a theory that will facilitate the court's action. The remedies and procedures used by the prisoner will necessarily vary, depending on whether he is a state or federal prisoner and whether he petitions a state or federal court.

[61] 293 F.2d 233 (2d Cir. 1961).

[62] *Id.* at 235.

[63] The court must still review the facts of the disciplinary decision in order to determine whether there is stated a good cause of action under the Civil Rights Act. This is the same process the federal courts have undertaken to make exceptions to the strict nonjusticiability rule of Williams v. Steele, *supra* note 53.

[64] 257 F. Supp. 737 (N.D.N.Y. 1966).

[65] "The decision here may rest on *either* or *both* of the following conclusions. (1) The complaint makes no sufficient showing of the denial of plaintiff's constitutional rights. (2) Plaintiff's remedy, if any, lies in the state courts." *Id.* at 745 (emphasis added).

[66] *Id.* at 747.

[67] The petitioner's rights are federal constitutional rights based upon the Civil Rights Act of 1871, 42 U.S.C. Sec. 1983; therefore, no exhaustion of state remedies is required. "It is no answer that the state has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."

Rivers v. Royster, *supra* note 59, at 594, *citing* Monroe v. Pape, 365 U.S. 167, 183 (1961).

[68] *Supra* note 52.

[69] *Supra* note 53.

[70] *See generally* Bell v. Hood, 327 U.S. 678 (1946), for the proposition that the federal courts have jurisdiction to determine if they have jurisdiction: "[T]he court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine the issues of fact arising in the controversy." *Id.* at 682.

[71] Pp. 161–164, *infra,* categorize the kinds of facts that need be alleged in attempting to get relief from a particular disciplinary decision.

Federal Prisoners Petitioning Federal Courts. The prevailing rule in the federal courts is that no review of prison disciplinary decisions can be obtained by the application for a writ of *habeas corpus*.[72] The reason given for the rule is that the writ is available only when the applicant is illegally detained and not to review a prison disciplinary action imposed on a legally incarcerated prisoner.[73] The "liberal pleading rule" adopted by the federal courts has allowed review on the merits, however, where it appeared that the prisoner had mislabeled his pleading.[74]

A federal prisoner cannot rely on the Civil Rights Act of 1871[75] as these remedies apply only to the deprivation of civil rights under color of law by a *"state or territory;"* hence, they do not furnish federal prisoners a remedy.[76] A new procedural device has been approved for federal prisoner use in the federal courts by the court in *Walker v. Blackwell*.[77] That case held in part, and the government apparently conceded, that a federal prisoner can proceed against his prison officials under the federal *mandamus* statute.[78] The court labeled the petitions as "actions in the nature of mandamus" even though the prisoners had labeled them "Motions for Mandatory Injunctions." It is difficult to determine from the case whether the court merely applied the "liberal pleading rule" or intended to allow a new federal prisoner procedural theory.[79] At any rate, the *scope* of the court's determination under the mandamus remedy seems as broad as under the traditional injunction proceeding.[80] It is too soon to determine the total impact of this decision on the federal courts and prison petitioners, but it should be noted that several other cases have proceeded on the mandamus theory.[81] These cases could represent an attempt to expand the scope of review that the federal courts exercise over federal prison disciplinary decisions, in that complaints not rising to constitutional dimension concerning disciplinary decisions could be brought under the broad language of the mandamus statute.[82] The statute certainly offers a procedural avenue to increased judicial supervision of federal prisons by the federal courts.

By far the majority of complaints asserted by federal prisoners in the federal courts are raised by injunction proceedings against a named prison official, usually the warden. The jurisdictional basis for these actions is seldom, if ever, made clear by the cases.[83] Characteristically, actions in federal courts are limited to those brought in strict compliance with jurisdictional requirements.[84] Although not noted by the courts that

[72] This rule reflects the narrow holding of Williams v. Steele, *supra* note 22.

[73] Roberts v. Pegelow, 313 F.2d 548, 549 (4th Cir. 1963).

[74] The "liberal pleading rule" would not apply, however, to save an attorney's mistaken remedy.

[75] 42 U.S.C. § 1983 (1964).

[76] Walker v. Blackwell, 360 F.2d 66, 67 (5th Cir. 1966).

[77] *Ibid.*

[78] 28 U.S.C. § 1361 (1964): "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

[79] A strong dissent criticized the remedy primarily because it was argued only as an afterthought on appeal, and had not been raised in the lower court. This would indicate that the majority seized upon the mandamus theory to save an otherwise defective petition, because they thought review was needed. Walker v. Blackwell, *supra* note 76, at 69–70.

[80] We conclude, therefore, that the district court should grant a hearing to these Appellants, each of whose petitions states a cause of action under 28 U.S.C. Sec. 1361. The judge can then determine if the prison officials have violated Appellants' right to possess their Muslim beliefs and if the rules and regulations imposed on these prisoners are reasonable and justifiable in the administration of a large prison population, maintenance of discipline, and control of any dangers and hazards presented.

Walker v. Blackwell, *supra* note 76, at 69.

[81] Both Graham v. Willingham, 265 F. Supp. 763 (D. Kan. 1967), and Long v. Katzenbach, 258 F. Supp. 89 (M.D. Pa. 1966), allowed the mandamus theory of relief without comment.

[82] *Supra* note 78. However, the cases proceeding under this section so far have involved constitutional complaints of prisoners.

[83] Jurisdiction for the federal district courts is defined by statute in 28 U.S.C. §§ 1331–61 (1964). Federal prisoner petitions for injunctive relief would not seem to meet the diversity of citizenship requirements of § 1331, or the $10,000 requirement of § 1332, even though these petitions typically involve a "federal question." The first three sub-sections of § 1343 were meant to give the district courts jurisdiction over actions commenceable under the Civil Rights Act of 1871, 42 U.S.C. § 1985 (1964), and hence are available for "state action" alone. The last subsection of § 1343 is of doubtful application as well, as it is meant to "... secure equitable ... relief under an Act of Congress providing for the protection of civil rights ...." Can a federal prisoner alleging a constitutional deprivation by a federal prison official use this sub-section? Are constitutional rights "Acts of Congress?"

[84] The federal courts are courts of *limited jurisdiction:* "The presumption is that the court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists." WRIGHT, FEDERAL COURTS § 7 (1963). The court is even obliged to dismiss cases for want of jurisdiction on its own motion. Mansfield, C. & L.M. Ry. v. Swan, 111 U.S. 379 (1884).

hear these cases, jurisdiction is probably founded on some theory of the federal "all writs" statute.[85] The jurisdiction could be based on other theories, however. It could be surmized that federal prisoners at least have the same injunctive remedy against their keepers as do state prisoners who petition the federal courts under the Civil Rights Act. The right of federal prisoners to bring an injunction may be nothing more than a practical manifestation of the "inviolate" right of prisoners to petition the court,[86] even though it has no express statutory jurisdictional authorization. Finally, the federal courts, in allowing federal prisoners to petition for injunctions, may be exercising some form of "supervisory control" over an essentially federal domain—the federal prison system.[87] Whatever the basis of jurisdiction, a federal prisoner can clearly petition for an injunction against a federal prison official for deprivation of constitutional rights due to a prison disciplinary decision.[88]

State Prisoners Petitioning Federal Courts. As with the federal prisoner, the state prisoner cannot generally seek review of a prison disciplinary decision by a federal writ of *habeas corpus*.[89] An important exception to this rule, however, seems to be developing in the federal courts for the solitary confinement situation. In *Johnson v. Avery*,[90] a state prisoner petitioned the federal court to be released from solitary confinement.[91] The court ordered his release by *habeas corpus*. The defendant custodian objected to such release on the grounds that since the prisoner could not be released from total confinement, *habeas corpus* was improper. The court reasoned that:

> "[T]he relief sought in the present case is, in fact, to release the petitioner from custody—from the very real custody of solitary confinement which is, in a sense, a jail within a jail.
>
> . . . .
>
> [E]ven though the petitioner is lawfully confined in the penitentiary, he has a right not to have confinement made more burdensome by being placed for an indefinite period in solitary confinement for violating a prison regulation . . . ." [92]

One problem facing a state prisoner in solitary confinement who attempts to utilize the federal *habeas corpus* remedy to rejoin the rest of the prison population, is the requirement that state court remedies be exhausted before application for the federal writ is made.[93] The court in *Johnson*, however, liberally construed this requirement, and it is apparent that the judge took judicial notice of the inadequate remedies available for the petitioner in the state courts.[94]

By far the most popular remedy used to obtain judicial review of state prison disciplinary decisions in the federal courts is an action under the federal Civil Rights Act of 1871.[95] Inmates of

[85] 28 U.S.C. § 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Note, however, that this statute does not *expand* the statutory jurisdiction of the district courts.

[86] *Supra* note 4.

[87] Similar to the concept of "protective jurisdiction" that the federal courts exert over labor-management relations. *See* Textile Workers Union v. Lincoln Mills 353 U.S. 448 (1957); WRIGHT, FEDERAL COURTS 20 (1963).

[88] *See* Childs v. Pegelow 321 F.2d 487 (4th Cir. 1963) (injunction sought to enforce mealtime and diet agreement for Black Muslim inmates); Roberts v. Pegelow, 313 F.2d 548 (4th Cir. 1963) (petition construed as request for an injunction to cease interference with religious practices); Heft v. Parker, 258 F. Supp. 507 (M.D. Pa. 1966) (prisoner filed "Petition to Enjoin Cruel and Unusual Punishment").

[89] This is because the legality of the incarceration is not challenged; only the punishment for breach of prison discipline.

[90] 252 F. Supp. 783 (M.D. Tenn. 1966).

[91] The petitioner alleged that he had been placed in solitary confinement because he had helped other prisoners prepare writs of *habeas corpus* in violation of a prison regulation. The court held the regulation invalid as interfering with the right of state prisoners to the federal *habeas corpus* remedy granted in 28 U.S.C. § 2242 (1964). *Ibid.*

[92] *Id.* at 785. The court merely more broadly defined "confinement" or "detention" to allow its action to fit within the traditional definition of *habeas corpus*. Another recent case accomplishes the same result, but does not indicate what remedy the petitioner used. In *Howard v. Smyth*, 365 F.2d 428 (4th Cir. 1966), the court ordered the release of the petitioner from solitary confinement so that he could rejoin the rest of the prison population on the "jail within a jail" theory. The petitioner had spent four years in solitary confinement for prison rule violations.

[93] 28 U.S.C. § 2254 (1964), requires exhaustion or absence of state remedies before application for federal *habeas corpus*.

[94] "It is not clear whether the petitioner has presented his claim of illegal confinement under maximum security to the state courts, but in any event under present state rulings the *habeas corpus* remedy in Tennessee would not be adequate to reach this question on its merits." Johnson v. Avery, *supra* note 90, at 784.

[95] 42 U.S.C. § 1983 (1964). This statute enables the state prisoner to maintain "... an action at law, suit in equity, or other proper proceeding for redress," for "... the deprivation of any rights, privileges, or immunities secured by the Constitution and laws ...." Jurisdiction to hear these cases is granted to the district courts by 28 U.S.C. § 1343 (1964).

state prisons are within the protection of this Act, and may institute actions under it.[96] The majority of state prisoner actions under the Act are petitions for injunctive relief, while some of the complaints ask for damages. There has been much judicial criticism of the damage aspect of the remedy because of its possible abuses when used in bad faith.[97] Other possibilities exist for abuse when state prisoners utilized the Civil Rights Act. Unlike federal *habeas corpus*, no exhaustion of state court remedies is required in order to maintain an action.[98] Also, if the state prisoner can successfully petition to proceed *in forma pauperis*,[99] he may maintain the action at no cost to him. To assure that good faith claims *can* be brought under the Civil Rights Act by the indigent prisoner, however, the cost of possible abuse seems justifiable.

State Prisoners Petitioning State Courts. Because the state prisoner need not exhaust his state court remedies before he petitions the federal courts under the Civil Rights Act,[100] the state court remedies seem to be of little practical value to the state prisoner. Indeed, there seem to be no reported cases in Illinois where a state prisoner has attempted to seek judicial review of a prison disciplinary decision. It can be concluded that the extremely broad relief available under federal *habeas corpus* for solitary confinement situations and Civil Rights Act[101] for constitutional deprivations, has practically pre-empted the state remedial need and few have developed. Presumably, however, an Illinois prisoner could seek an injunction or mandamus in the circuit court to seek review. The Illinois delegation statutes seem to confer clear non-discretionary duties on the Department of Public Safety that should be enforceable by mandamus.[102]

Federal Prisoners Petitioning State Courts. There seem to be no cases reported where a federal prisoner has attempted to seek judicial review of a prison disciplinary decision in a state court. Presumably, the same considerations that seem to give the federal courts "protective jurisdiction" over the federal prison system would pre-empt the state courts from exerting any jurisdiction in this area of "federal domain."[103]

Comparison of Remedies Available to Federal and State Prisoners. The conclusion seems inescapable, however incongruous, that today's state prisoner has greater opportunity to petition the federal courts for judicial review of a particular prison disciplinary decision than does his federal counterpart. The state prisoner's remedial advantage is simply a result of the greater attention that state prison disciplinary cases have received in the federal courts. As will be seen,[104] remedies are created and allowed largely by the compelling nature of the facts involved in a particular disciplinary decision. The numerous state cases requiring federal judicial review would seem a clear mandate to state prison administrators to assure provident judgment at the primary level of prison disciplinary decisions.

The Determination by the Court on the Merits of Whether or Not the Disciplinary Decision Was Correct

As has been suggested above, it is often difficult to determine the method that a court employs to reach its result in a particular prison disciplinary case. Each case presents its own conceptual questions: Is the non-justiciability doctrine a fixed rule of law, or does its application vary with the facts of each case? Is the requirement for exhaustion of administrative remedies merely another way to say the case is non-justiciable? Is the federal abstention doctrine yet another way to state the non-justiciability rule? Is there any difference between the "exceptional case" justify-

[96] *See* Stiltner v. Rhay, 322 F.2d 314, 316 (9th Cir. 1963); Weller v. Dickson, 314 F.2d 598, 601 (9th Cir. 1963).

[97] *See* Roberts v. Barbosa, 227 F. Supp. 20 (S.D. Cal. 1964), where the plaintiff state prisoner, in a fifty-page complaint prepared at public expense, sought damages of $2.5 million dollars against all the judges, jurors, witnesses, jailers and others who had anything to do with his imprisonment—forty-four defendants in all! The complaint was dismissed; the court said "The plaintiff's complaint is frivolous and downright malicious." 227 F. Supp. at 26. *See also* the recent case of Cullum v. Dep't of Corrections, 267 F. Supp. 524 (N.D. Cal. 1967), also seeking $2.5 million dollars in damages by a state prisoner. The complaint was similarly dismissed.

[98] *Supra* note 67.

[99] 28 U.S.C. § 1915(a) (1964), provides that: "Any court of the United States may authorize the commencement . . . of any suit . . . without prepayment of fees . . . by a person who makes affidavit that he is unable to pay such costs . . . . Such affidavit shall state the nature of the action . . . and affiant's belief that he is entitled to redress." This statute would apply to *both* state and federal prisoners who petition the federal court.

[100] *Supra* note 67.

[101] The coverage under the federal Civil Rights Act is so complete that a denial of access to a state court remedy, if one were available, is a violation of the Act. Stiltner v. Rhay, *supra* note 96.

[102] Ill. Rev. Stat. ch 108, §§ 10 & 16 (1965).

[103] *Supra* note 87.

[104] *See* pp. 162–164 infra.

ing judicial review and a case stating a cause of action under the Civil Rights Act? Does non-justiciability have the same meaning as applied to state and federal prisoner petitions? Do the remedies provided by the federal courts give the same scope of review for a federal prisoner as they do for a state prisoner? It is believed that these questions are created by the desire of the courts to decide each case on the merits *before* satisfying their own requirements for "propriety of review." This kind of judicial technique leads to varying standards for any kind of judicial review of prison disciplinary decisions. Recognizing then, that the standards of justiciability which have been set up by the courts may be nothing more than judgments that no grounds for relief are stated, the forthcoming analysis is essentially factual. What kind of facts will persuade the court to act despite some "propriety of review" rule which, if strictly applied, would preclude review? It is believed that the most convenient way to present such a factual analysis is to classify cases according to the type of disciplinary punishment inflicted with correlation to the prison rule violated[105] as well as the remedy for judicial review. As a beginning point, the courts have recognized that the administration of any form of punishment for rule infraction is a delicate matter involving many interests.[106]

Corporal Punishment

> "Statutes in nine states expressly permit corporal punishment, usually attaching protections such as the presence of a physician or a lapse of time between the infraction and the punishment. Ten states prohibit whipping or striking." [107]

A recent example of judicial review of corporal punishment is *Talley v. Stephens*,[108] where corporal punishment was authorized in Arkansas by prison rule.[109] The prisoner alleged that he had been whipped some seventy times for insufficient work, and that this amounted to cruel and unusual punishment.[110] Stating that while corporal punishment was not per se unconstitutional, the court made it clear that its infliction must be "surrounded by appropriate safeguards." [111] The court held that the petitioner had stated a good cause of action under the Civil Rights Act, and enjoined further such corporal punishment because it was not "surrounded by appropriate safeguards" as required by the court.[112] Apparently, the injunction was ignored by the state prison authorities involved, for their actions were again brought into question by the same court as the result of an investigation into alleged atrocities in the state prisons.[113]

[105] Prison rules may certainly vary, but an example of a set of rules are those of the Iowa State Penitentiary: Altering clothing; bed not properly made; clothing not in proper order; communicating by signs; creating a disturbance; crookedness; defaming anything; dilatoriness; dirty cell or furnishings; disorderly cell; disobedience of orders; disturbance in cell house; fighting; grimacing; hands in pocket; hands or face not clean; hair not combed; having contraband on your person or in your cell; impertinence to visitors; insolence to officers; insolence to foreman; insolence to fellow-inmate; insolence at work; inattentive in line; inattentive in school; laughing and fooling; loud talking in cell; loud reading in cell; malicious mischief; neglect of study; not out of bed promptly; not wearing outside shirt; not properly out of cell when brake is drawn; out of place in shop or line; profanity; quarreling; refusal to obey; shirking; spitting on floor; staring at visitors; stealing; trading; talking in chapel; talking from cell to cell; talking in corridor; talking in line; throwing away food; vile language; wasting food; writing unauthorized letters. RUBIN, *et al.*, THE LAW OF CRIMINAL CORRECTION ch 8, § 14, n. 113 (1963).

[106] Punishment "must in many instances be summary, and ... administered to a convict for a violation of prison rules may differ quantitatively and qualitatively from the punishment prescribed by a criminal statute and imposed initially by a court following an individual's conviction of a crime." Talley v. Stephens, 247 F. Supp. 683, 686 (E.D. Ark. 1965).

[107] RUBIN, *et al.*, THE LAW OF CRIMINAL CORRECTION ch. 8, Sec. 14 (1963).

[108] *Supra* note 106.

[109] "... whenever in the judgement of the Superintendent it appears that such punishment is necessary to maintain prison discipline or to enforce respect for Penitentiary policies." *Supra* note 106, at 687–88.

[110] "The question is whether the use of the strap at the Arkansas Penitentiary is cruel and unusual punishment in the constitutional sense." *Supra* note 106, at 689.

[111] "It must not be excessive; it must be inflicted as dispassionately as possible and by reasonable people; and it must be applied in reference to recognizable standards whereby a convict may know what conduct on his part will cause him to be whipped and how much punishment given conduct may produce." *Supra* note 106, at 691.

[112] "As administered at the Penitentiary, that punishment consists of blows with a leather strap five feet in length, four inches wide, and about one-fourth inch thick, attached to a wooden handle or shaft about six inches long. Ordinarily, the punishment is inflicted by the Assistant Warden having in his charge the inmate to be punished. A prisoner who is to be whipped is required to lie down on the ground fully clothed, and the blows are inflicted on his buttocks." *Supra* note 106, at 687.

[113] Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. June 3, 1967). This case was the result of the Arkansas prison scandal uncovered late in 1966. The meticulous factual detail used by the court in *Jackson* describes a return to the Dark Ages in prison administration. The

Earlier cases have held that where whipping was specifically authorized by statute, and the manner of infliction was carefully controlled, any complaint for abuse was remedial only in the state courts, and that the alleged abuse did not amount to a denial of federally protected rights under the Civil Rights Act.[114] Thus, it would appear that the federal courts are primarily worried about the environment of corporal punishment, and will insist on either a statute or specific prison regulations to insure the constitutionality of its infliction.

Solitary Confinement

> "Solitary confinement is authorized by statute in about half the states. It is prohibited only in Louisiana, and is actually used in almost every prison. The statutes sometimes limit the amount of it that may be imposed and may require periodic examinations of the prisoner by a doctor." [115]

It has been repeatedly held by the federal courts that punishment by solitary confinement is constitutional, if reasonably inflicted and supervised.[116] Recent federal cases show that additional facts need be proved to raise a constitutional issue.[117] An astounding example of unconstitutional solitary confinement is the recent case of *Jordan v. Fitzharris*.[118] The facts in this case are hard to believe in an age of sophisticated penology. While the plaintiff was an inmate of a California state prison he was confined in a six-by-eight-foot "strip cell" used for prisoners who were allegedly "beyond the reach of ordinary controls and prison directives." The cell was constructed of solid concrete, with exception of a door made of bars and screen. The door could be covered to darken the cell by a metal flap. There were no furnishings in the cell, with the exception of a commode toilet that could not be flushed from inside the cell. Heat and ventilation were supplied by two small ducts located high on the rear wall of the cell. With the door flap down no light or air could be admitted to the cell; except for fifteen minutes a day the flap was closed and the plaintiff remained in total darkness. The commode was flushed two times a day by an outside guard. The plaintiff's complaint best describes life in the "strip cell." [119]

techniques used by the prison officials exceeded mere punishments and amounted to torture of the inmates. The methods included use of a "teeter board," a "crank telephone" shocking device, and whipping against the bare skin with a strap. The court again enjoined the use of these "punishments" under the Civil Rights Act. *Id.* at 815–16.

[114] Threatt v. North Carolina, 221 F. Supp. 858 (N.D.N.C. 1963).

[115] RUBIN *et al.*, THE LAW OF CRIMINAL CORRECTION ch. 8, § 14 (1963).

[116] When solitary confinement is imposed pursuant to a reasonable state statute directing and controlling it, and it cannot be shown that there is a violation of the state statute, no cause of action is stated under the Civil Rights Act. Wright v. McMann, 257 F. Supp. 739, 743 (N.D.N.Y. 1966). *See also* cases cited in Roberts v. Pepersack, 256 F. Supp. 415, 430 (D. Md. 1966).

[117] The following cases were held not to state a cause of action: Blythe v. Ellis, 194 F. Supp. 139 (S.D. Tex. 1961) (prisoner alleged he was placed in solitary confinement shortly after surgery in an "unclean and unhealthy" cell); Ruark v. Schooley, 211 F. Supp. 921 (D. Col. 1962) (prisoner alleged deprivation of food, water and toilet paper for fifty-two hours); Roberts v. Pepersack, 256 F. Supp. 415 (D. Md. 1966) (prisoner alleged twenty-seven hours in an isolation cell and sixteen days in "semi-segregation"); Labat v. McKeithen, 361 F.2d 757 (5th Cir. 1966) (all prisoners awaiting the death penalty were kept in solitary confinement until their execution). However, it has recently been recognized that a deprivation of essential medical care while the prisoner is in solitary confinement is actionable under the Civil Rights Act. United States v. Ragen, 337 F.2d 425, 426 (7th Cir. 1964). This rule is applied to federal prisons too, although not under the Civil Rights Act. Edwards v. Duncan, 355 F.2d 993, 994 (4th Cir. 1966).

[118] 257 F. Supp. 674 (N.D. Cal. 1966).

[119] During plaintiff's confinement in said strip cell, the strip cell was never cleaned. As a result of the continuous state of filth to which plaintiff was subjected, plaintiff was often nauseous and vomited, and the vomit was never cleaned from the plaintiff's cell. When the plaintiff was first brought to the strip cell, the floor and walls of the strip cell were covered with the bodily wastes of previous inhabitants of the strip cell... said strip cell had not been cleaned for at least thirty days before plaintiff was confined therein.
Plaintiff was forced to remain in said strip cell for twelve days without any means of cleaning his hands, body or teeth. No means was provided which could enable plaintiff to clean any part of his body at any time. Plaintiff was forced to handle and eat his food without even the semblance of cleanliness or any provision for sanitary conditions.
For the first eight days of plaintiff's confinement in said strip cell, plaintiff was not permitted clothing of any nature and was forced to remain in said strip cell absolutely naked. Thereafter, plaintiff was given a pair of rough overalls only.
Plaintiff was forced to remain in said strip cell with no place to sleep but upon the cold concrete floor of the strip cell, except that a stiff canvas mat approximately 4½ feet by 5½ feet was provided. Said mat was so stiff that it could not be folded to cover plaintiff without such conscious exertion by plaintiff that sleep was impossible. Plaintiff is six feet and one inch tall and could not be adequately covered by said stiff canvas mat even when holding said mat over himself. The strip cell was not heated

The plaintiff also alleged that the lower rank prison personnel had authority to confine the plaintiff in the strip cell for up to sixty days, and that he was in continual fear of such confinement. Deprivation of medical care was also alleged.[120] The plaintiff sustained his burden of proof, largely on his own testimony, for all of his allegations. The court called his testimony "clear and convincing," [121] and was so incensed with the prisoner's punishment that it almost ridiculed the meager defense put forth by the defendants.[122] The court was similarly sarcastic when dealing with the defense offered to the plaintiff's allegation of deprivation of medical care.[123]

Holding that the strip cell was cruel and unusual punishment,[124] the court permanently enjoined the defendant-superintendent from subjecting the plaintiff to such confinement as violative of the Civil Rights Act.[125] The court also defined the conditions of solitary confinement that are needed to satisfy the constitutional test of the Eighth Amendment:

> "It is perfectly apparent to this court that whether a man is confined in a strip cell, or in solitary confinement, he is entitled to receive the essentials of survival. The essentials of survival necessarily include the elements of water and food and requirements for basic sanitation." [126]

The test of the *Jordan* case, and cases decided since, have marked out fairly definite boundaries by which to review prison disciplinary decisions which impose solitary confinement.[127]

Conclusion

The problems of prison administration, especially the maintenance of internal discipline, are far more complex than the scope of this article. It is realized that the task of prison administration, by its very nature, cannot be overburdened by technicalities of "due process" in the same magnitude as the outside world. To do so would clearly defeat most concepts of criminal imprisonment. Imprisonment *is* punishment, and prisoners cannot expect, nor are they entitled to receive, the same methodical treatment by the law once they are lawfully incarcerated as they received during the proceedings leading to their initial incarceration. If we are to punish criminal offenders by imprisonment, we must, of necessity, surrender their management to those charged with that duty. Yet it is clear that our system of law does not give the prisoner up for lost; he is not the "end product" of the criminal law. There are times when the courts will not defer to the wisdom and judgment of the keeper, but to the end of enforcing that basic code of human rights, the Constitution. Such an intrusion into the stewardship of prisons is completely justified when the custodians have ignored that which no man can be denied. Prisons should not be permitted to operate independently of the external standard of judicial review. The lines of permissible conduct are difficult to draw, but yet are necessary to define the competing interests involved. This, however, is the traditional function of the courts: To resolve competing interests where the rights of man are affected. The establishment and guarantee of the fundemental rights of prisoners is but another continuing obligation of our jurisprudence.

during the time that the plaintiff was forced to remain there.

Id. at 677. Photographs of the "strip cell" are appended to the reported case.

[120] "Plaintiff has been denied adequate medical care prior to, during, and subsequent to said confinement in said strip cell, despite repeated oral and written requests for same made in good faith by or on behalf of plaintiff." *Id.* at 677–78.

[121] *Id.* at 678.

[122] "It is evident from . . . Jordan's testimony that he was required to eat the meager prison fare in the stench and filth that surrounded him, together with the accompanying odors that ordinarily permeated the cell. Absent the ordinary means of cleansing his hands preparatory to eating, it was suggested by the prison consulting psychiatrist . . . that he might very well use toilet paper for this purpose plus his small ration of water, being two cups a day." *Ibid.*

[123] "As evidence of the limited medical care provided, the official records demonstrate that [a doctor] came into the wing where the strip cells are located and spent eight minutes on one occasion and ten minutes on another occasion, thus servicing the one hundred and eight inmates." *Ibid.*

[124] The Eighth Amendment is applicable to the states through the due process clause of the fourteenth amendment, Robinson v. California, 370 U.S. 660 (1962); hence cruel and unusual punishment is a proper subject of relief by the Civil Rights Act.

[125] In so holding, the court once again expressed its astonishment at the punishment: "When, as it appears in the case at bar, the responsible prison authorities in the use of the strip cells have abandoned elemental concepts of decency by permitting conditions to prevail of shocking and debased nature, then the courts must intervene—to restore the primal rules of a civilized community in accord with the Constitution of the United States." Jordan v. Fitzharris, *supra* note 118, at 680.

[126] *Id.* at 682. This test was applied by the same court in a case subsequent to *Jordan*, but it was held that the facts alleged did not amount to unconstitutional solitary confinement. Cullum v. Dept. of Correction, 267 F. Supp. 524 (N.D. Cal. 1967).

[127] *See* Graham v. Willingham, 265 F. Supp. 763 (D. Kan 1967), where the court described in detail life in "the hole," yet determined that conditions were within the boundaries of constitutional requirements. *See also* note 126 *supra*.