NOTES AND COMMENTS

BEYOND THE KEN OF THE COURTS: A CRITIQUE OF JUDICIAL REFUSAL TO REVIEW THE COMPLAINTS OF CONVICTS

"Sed quis custodiet ipsos custodes"*  
Juvenal, Satires, vii, 347

From one point of view, the Second Circuit's holding in Winston v. United States¹ and its companion case, Muniz v. United States²—that a prisoner can sue the government to recover for injuries suffered while in prison under the Federal Tort Claims Act—is merely a tidying up operation, clearing out some rubble left by an atavistic judicial restriction on Congress' waiver of sovereign immunity. However, far more may be at stake in Winston and Muniz than a narrow holding under the Federal Tort Claims Act. For the Second Circuit, in departing from the unanimous precedent of numerous courts, has rejected a doctrine which has been almost solely responsible for the inefficacy of all modes of redress theoretically available to prisoners.³ That doctrine—henceforth labelled the "hands-off doctrine"—states that "courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations."⁴

The hands-off doctrine represents a denial of jurisdiction⁵ over the subject matter of petitions from prisoners alleging some form of mistreatment or contesting some deprivation undergone during imprisonment. Some, if not most of these alleged deprivations are a necessary and expected result of being an inmate of a penal institution.⁶ Mere confinement restricts freedom of movement.

*"But who will watch the keepers themselves?"
3. Even if Winston, Muniz or both are reversed, it seems likely that a trend which has been developing over the past decade or more will continue. Indeed, in two cases which have come down since Winston and Muniz, the courts have assumed a more radical and directly supervisory role in reviewing prison discipline on the merits than that displayed by the Second Circuit. In re Riddle, 22 Cal. Rptr. 472, 372 F.2d 304 (1962); and Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962). And prior to Winston, a steady trickle of cases marking the beginning of a trend away from the hands-off doctrine had come from state and federal courts. See generally Comment, Constitutional Rights of Prisoners: The Developing Law, 110 U. Pa. L. Rev. 985 (1962).
6. It has sometimes been phrased in these terms. See, e.g., Dayton v. Hunter, 176 F.2d 108 (10th Cir. 1949), cert. denied, 338 U.S. 888 (1950). For other formulations of the doctrine see note 12 infra.
7. The implications of this are discussed in detail at text accompanying notes 118-23 infra.

infra.
Confinement in an institution which must provide for the custody, maintenance, discipline, and rehabilitation of men who have violated legislative norms involves still greater forfeitures. And confinement in an institution which has been allotted limited resources to fulfill conflicting functions with imperfect knowledge, deficient facilities, and an inadequate staff will involve still further privation. To the extent that the hands-off doctrine prevents review of those deprivations which are inevitable concomitants of prison life, it would seem to be an efficient method of disposing of prisoners' complaints. And if all petitions from legally committed prisoners could be assumed to contest only those deprivations which are the necessary concomitant of confinement in a penal institution, then an examination of the allegations contained in such petitions would be an exercise in futility that is well avoided.

Prisoners, however, may suffer other kinds of deprivations which are not a necessary result of the institutional structure of prisons but rather are attributable to arbitrary and capricious decisions by prison officials or to unduly restrictive regulations. This other category of deprivations has also been held to be non-reviewable under the rubric of the hands-off doctrine. Although a few courts recently have departed from the doctrine, notably in situations where invasions of highly preferred interests such as religion were involved, a general attempt to sort out those deprivations which are a necessary consequence of prison life from those which are not has yet to occur. For the hands-off doctrine precludes an examination of even the allegations of a complaint and thus prevents a determination of whether the prisoner has presented a claim warranting relief. In relying upon the hands-off doctrine, all that a court in effect determines is that the complainant is a legally convicted prisoner. It then follows that his grievance is beyond the ken of judicial authority or competence. As a result, prisoners are left without enforceable rights.

A few courts have refused to allow this result; rather they have adopted a principle quite at odds with this consequence of the hands-off doctrine: "A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." On those occasions when courts have adopted this counter principle, they have either expressly or by implication rejected the hands-off doctrine. This is hardly surprising, for unless this counter-principle is to be anything more than a pious declaration, some form of judicial review and at times relief is indeed necessary.

Past commentaries on the civil rights of prisoners have addressed themselves primarily to a description of the traditional remedies available: habeas corpus, proceedings under the Federal Civil Rights Act, tort suits against either prison officials or the State. There is substantial agreement that these

8. See discussion of the implications of abandoning the hands-off doctrine at text accompanying notes 97-270 infra.
9. See discussion of deprivations of religious freedom at text accompanying notes 159-81 infra.
remedies have been of little practical utility. The courts' failure to grant relief with any degree of consistency cannot generally be attributed to the internal doctrinal limitations of the remedies. Rather, it appears to stem from a conviction held with virtual unanimity by the courts\(^\text{1}\) that it is beyond their power to review the internal management of the prison system.\(^\text{12}\) The reason underlying refusal to review the administrative decisions of prison officials is the underlying refusal to review the administrative decisions of prison officials is the underlying refusal to review the administrative decisions of prison officials is the underlying refusal to review the administrative decisions of prison officials is the


\(^{12}\) Banning v. Looney, 213 F.2d 771 (10th Cir.), cert. denied, 348 U.S. 859 (1954). Variants on this particular formulation of the hands-off doctrine include: "it is not within the province of the courts," In re Taylor, 187 F.2d 852, 853 (9th Cir.), cert. denied, 341 U.S. 955 (1951); "it is not the function of the courts," Stroud v. Swope, 187 F.2d 850, 851 (9th Cir.), cert. denied, 342 U.S. 829 (1951); "courts have no supervisory jurisdiction over the conduct of the various institutions," Garcia v. Steele, 193 F.2d 276, 278 (8th Cir. 1951); "a court does not have power . . . to superintend," Sturm v. McGrath, 177 F.2d 472, 473 (10th Cir. 1949); "a court has no power . . . to superintend," Dayton v. Hunter, 176 F.2d 108 (10th Cir. 1949), cert. denied, 388 U.S. 888 (1950); "it is not [the district court's] province to supervise prison discipline," Numer v. Miller, 165 F.2d 986, 987 (9th Cir. 1948); "courts do not have the power and it is not their function or responsibility," Curtis v. Jacques, 130 F. Supp. 920, 921 (W.D. Mich. 1954). For similar pronouncements from other federal courts see, e.g., United States ex rel. Collins v. Heinze, 219 F.2d 233 (9th Cir. 1955); Henson v. Welch, 199 F.2d 367 (4th Cir. 1952); Adams v. Ellis, 197 F.2d 483 (5th Cir. 1952); Williams v. Steele, 194 F.2d 32 (8th Cir. 1952); Powell v. Hunter, 172 F.2d 330 (10th Cir. 1949); Sarshik v. Sanford, 142 F.2d 676 (5th Cir. 1944); United States ex rel. Vranjak v. Randolph, 161 F. Supp. 553 (E.D. Ill. 1958); United States ex rel. Bowe v. Skeen, 107 F. Supp. 879 (N.D. W. Va. 1952); Peretz v. Humphrey, 86 F. Supp. 706 (M.D. Pa. 1949); and Feyerchak v. Hiatt, 7 F.R.D. 726 (M.D. Pa. 1948). This doctrine is by no means limited to federal courts and federal prisons but is uniformly adopted by state courts. See, e.g., Edmondson v. Warden of Maryland House of Detention, 194 Md. 707, 69 A.2d 919 (1949); State ex rel. Renner v. Wright, 188 Md. 189, 51 A.2d 668 (1947); Wetzel v. Wiggins, 226 Miss. 671, 84 So. 2d 795 (1956); Dunn v. Jones, 150 Neb. 669, 35 N.W.2d 673 (1949); People v. Collins, 200 N.Y.S.2d 919 (1960); Commonwealth ex rel. Smith v. Bammler, 194 Pa. Super. 566, 168 A.2d 793 (1962); and Commonwealth ex rel. Thompson v. Day, 182 Pa. Super. 644, 128 A.2d 133 (1956).

13. Commentators have not considered this to be the central problem. That is the thesis of this paper. But see Note, Habeas-Corpus—Coram Nobis—Remedies Available to Validly Sentenced Prisoners Who Are Mistreated by State Penal Authorities, 33 Neb. L. Rev. 434, 439 (1954), where this reason is referred to in passing as the courts' "favorite" excuse for denying relief. And the most recent commentary, Comment, Constitutional Rights of Prisoners: The Developing Law, 110 U. PA. L. Rev. 985, 986-87 (1962), observes:

[A] study of the cases involving alleged mistreatment indicates that the courts have been so influenced by the dogma of the independence of prison authorities that judicial intervention has been limited to the extreme situation. Some courts have even stated the dogma in language which suggests that the courts have no jurisdiction over these matters.
unquestioning acceptance by courts of the assertion repeatedly made that judicial review of such administrative decisions will subvert the authority of prison officials, the discipline of the prisons, and the efforts of prison administrators to accomplish the objectives of the system which is entrusted to their care and management. If this assertion is true, then the overwhelming body of case law in this area is probably correct in its refusal to pass on the merits of an inmate's claims. But if the truth of this proposition is questionable, or lacking in empirical substantiation, then there is a demonstrable need for the courts to reconsider the premise on which they have consistently relied in denying relief. This Comment will examine the hands-off doctrine by a consideration of (1) its effect upon the legal remedies of prisoners, (2) the rationales advanced to support it, and (3) the possible implications of abandoning it.

Available Remedies for Prisoners—Theoretical Limits and Practical Efficacy

Habeas Corpus: Courts are coming to view the Great Writ as a remedial writ with inherent flexibility and adaptability. As Judge Learned Hand pointed out:

We can find no more definite rule than that the writ is available, not only to determine points of jurisdiction, stricti juris, and constitutional questions; but whenever else resort to it is necessary to prevent a complete miscarriage of justice.  


These prisoners, of course, have been segregated from society because of their anti-social acts, and it is the responsibility of the Bureau of Prisons to provide for their proper government, treatment, care, rehabilitation and reformation. It is obvious, however, that these objectives can only be carried out in an atmosphere where the authority of the supervisory personnel is respected and discipline is firmly and fairly administered. But if prisoners are allowed access to the courts to test the wisdom of the decisions of the administrative personnel, this will undermine that authority by constantly subjecting these decisions to judicial reexamination.

Thus if appellant's assertion, that prison personnel were negligent in failing to provide adequate medical care affords him access to the courts under the Torts Claims Act, it is evident that the prison decisions, orders and conduct which constitute the basis for allegedly negligent supervision would be thrown open to judicial examination. Similar instances of alleged negligence are easy to envision—for example, negligence in requiring a prisoner to do heavy labor, negligence in ordering a prisoner into solitary confinement, negligence in providing inferior type cleaning equipment for kitchen work, negligence of a machine shop supervisor in permitting prisoners to use equipment without proper instruction or equipment in disrepair, negligence in not providing adequate or timely medical treatment, and negligence in not adequately searching the prisoners. Each of these events and many more would require the administrative regulation of prison discipline to yield to judicial scrutiny of the decisions of prison personnel, a condition which "would be prejudicial to the proper maintenance of discipline. Golub v. Krimsky, 188 F. Supp. 783, 784 (S.D.N.Y. 1960)."

15. United States ex rel. Kulick v. Kennedy, 157 F.2d 811, 813 (2d Cir. 1946), rev'd on other grounds, 332 U.S. 174 (1947) (habeas corpus cannot be used where direct appeal lies). See also Mr. Justice Rutledge's dissent, 332 U.S. at 188.
Three traditional limitations on the availability of the writ have prevented it from being an effective remedy for prisoners:

(1) the exhaustion of remedies rule;\(^{16}\) (2) the proposition that the only relief which can be granted under the writ is total release;\(^ {17}\) and (3) the restriction that the writ is only available to contest the legitimacy of one's confinement and is not available to test the legitimacy of the mode or manner of confinement.\(^ {18}\)

The exhaustion of remedies rule, while it imposes no limitation on the type of situation for which the writ may issue, constitutes a significant procedural barrier for prisoners seeking relief from the courts. Prisoners in the federal penal system will have to exhaust the remedies established by the Federal Bureau of Prisons before becoming eligible for the writ.\(^ {10}\) State prisoners must exhaust state administrative remedies (if such exist) to be eligible for the writ in state courts and must exhaust their remedies in the state courts before becoming eligible to petition a federal court for the writ.\(^ {20}\) This exhaustion of remedies rule is an extremely salutory one where adequate administrative remedies exist. But it should be noted that this rule tends to preclude successful use of federal habeas corpus by any person serving a short term in a state prison. Case studies of the instances where remedy under the writ has been granted by federal courts to state prisoners show that nearly all successful applicants were inmates convicted for serious crimes and serving long sentences.\(^ {21}\) If the only applicants most likely to become entitled to petition for the federal writ under the exhaustion of remedies rule are the most dangerous felons such as murderers or armed robbers, it is understandable that the courts which accept the second limitation—that the only remedy available is total release—would be unwilling to grant the writ.

The exhaustion of state remedies rule has been somewhat restricted by the statutory exception embodied in section 2254 of the Judicial Code which permits the federal courts to hear a habeas corpus petition from a state prisoner who has not exhausted his state remedies "when there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."\(^ {22}\) To the extent that adequate remedial safeguards are lacking for prisoners wishing to challenge deprivations, this provision fills a most important need. Thus, in United


17. See, e.g., Williams v. Steele, 194 F.2d 32 (8th Cir. 1952); Snow v. Roche, 143 F.2d 718 (9th Cir.), cert. denied, 323 U.S. 788 (1944); Note, Prisoners' Remedies for Mistreatment, supra note 16, at 805 n.22.

18. Ibid.


20. See note 16 supra.


States ex rel. Marcial v. Fay, this provision was used to grant relief where state remedies were not exhausted but the petitioner was without financial ability to proceed further.

Gradual inroads are also being made upon the courts’ insistence that habeas corpus may be used only to deliver an inmate from custody. In two recent cases, the writ was granted where the remedy was not release of the inmate, but rather his transfer to another institution. Coffin v. Reichard illustrates the most dramatic departure from the traditional limitation on remedy in habeas corpus proceedings. There the court adopted a broad construction of its statutory authority to use the writ “as law and justice require” and remanded the petitioner to prison with direction to the authorities to respect his civil rights.

With gradual erosion of the first two limitations taking place, the major obstacle remaining to use of the writ by prisoners as a means of challenging deprivations imposed during detention is the principle that the writ is only available to challenge the legality of the conviction. The primary impediment to eliminating this third limitation is the hands-off doctrine. Courts will not use habeas corpus to examine the mode of confinement since “it is not within the power of the courts to supervise the management of the prison system.”

Those cases which have utilized habeas corpus to review the mode or manner of confinement and to grant remedies other than release are cases which have rejected the hands-off doctrine and the considerations underlying it. Coffin v. Reichard, mentioned above for the unique remedy granted, also illustrates that courts can under habeas corpus review allegations of mistreatment in prison. Significantly, this is the case which enunciates the counter principle to the hands-off doctrine. And in a recent case where habeas corpus was granted to a prisoner transferred without notice or hearing from a state penitentiary to an institution for insane prisoners, the court explicitly rejected the considerations of administrative discretion which underlie the hands-off doctrine, stating that the “State’s right to detain a prisoner is entitled to no greater application than its correlative duty to protect him from unlawful and


24. See Justice Black’s statement in Dowd v. United States ex rel. Cook, 340 U.S. 205, 209-10 (1951) set in a more traditional habeas corpus context, wherein the petitioner was granted the intermediate remedy of a right of appeal rather than release:

There remains the question of the disposition to be made of this case. Fortunately, we are not confronted with the dilemma envisaged by the State of having to choose between ordering an absolute discharge of the prisoner and denying him all relief. The District Court has power in a habeas corpus proceeding to “dispose of the matter as law and justice require.”

25. 143 F.2d 443 (6th Cir. 1944).

26. See cases cited in note 12 supra.


28. See note 25 supra.
onerous treatment." It seems clear that until the hands-off doctrine is discarded, there is little hope that habeas corpus will be an effective remedial writ for prisoners seeking either redress for or protection against deprivations suffered in prison.

Proceedings under the Federal Civil Rights Act: Sections 1983 and 1985(3) of the Federal Civil Rights Act enable persons deprived of certain rights to sue for civil damages or to obtain injunctive relief in the federal courts. Section 1983 applies where the alleged injury is caused by a person acting under color of any law, regulation or custom of any state or territory. Section 1985(3) applies to conspiracies to deprive persons of certain rights. The only rights protected by these provisions are rights secured by the Constitution or federal statutes against state or individual action. It is well established that unjustified violence by a state official amounting to denial of due process of law constitutes grounds for action under these provisions. In four cases, the courts have held that an allegation of mistreatment by a prison official stated a cause of action under the Civil Rights Act. And other recent cases involving allegations of differential treatment due to petitioner's religion further establish the potential scope and potency of this remedy for prisoners.

Despite the potential effectiveness of the Civil Rights Act indicated by such cases, there is a notable tendency on the part of courts to construe the substantive rights narrowly and to utilize two techniques for denying relief to inmates bringing actions under these provisions. First, the courts have declared in a number of cases involving allegations of such things as brutal mistreatment, unwarranted solitary confinement, censorship of mails, and prison mismanagement that because of considerations of federalism it is not the function of the federal courts to supervise the state penal systems. Thus, state prisoners must seek relief in the state courts, which courts also deny relief on the principle that it is not within their power to supervise prison administration.

32. See, e.g., Geach v. Moynahan, 207 F.2d 714 (7th Cir. 1953); Picking v. Penn. R.R., 151 F.2d 240 (3d Cir. 1945).
34. Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961); Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961).
35. See, e.g., Swanson v. McGuire, 188 F. Supp. 112 (N.D. Ill. 1960); United States ex rel. Atterbury v. Ragen, supra note 33; Siegel v. Ragen, supra note 33; see also cases cited in United States ex rel. Atterbury v. Ragen, supra.
36. See note 12 supra.
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ers, they have denied relief by drawing on the vast body of habeas corpus cases which declare that nearly all deprivations inflicted on prisoners are matters of internal prison management and not subject to review by the courts.\textsuperscript{37}

Tort actions:\textsuperscript{38} The efficacy of this remedy has been succinctly stated by one commentator:

\begin{quote}
...A tort action against responsible state officials is the principal form of legal redress. But this action affords only restricted relief: frequently statutes prevent convicts from suing; potential defendants are protected by the doctrines of sovereign immunity and administrative discretion; and recovery on the merits is difficult even when suit is possible.\textsuperscript{39}
\end{quote}

While actions against individual jailers have long been permitted,\textsuperscript{40} tort actions against the United States have been barred by the overwhelming body of precedent to the effect that the congressional waiver of sovereign immunity embodied in the Federal Tort Claims Act does not extend to prisoners.\textsuperscript{41} One of the principal reasons given for refusing to apply the Federal Tort Claims Act to federal prisoners is that permitting prisoners to bring such suits would have detrimental effects on discipline and would involve the courts in administration of the prison system.\textsuperscript{42} This is, of course, a rationale given for the hands-off doctrine.

Furthermore, even if the Federal Tort Claims Act is henceforth held to apply to prisoners, the power of the hands-off doctrine to curtail the effectiveness of the tort remedy has not been destroyed. The waiver of immunity contained in this act expressly excepts claims based on discretionary acts.\textsuperscript{43} Nearly every

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\item \textsuperscript{37} See, e.g., Wilson v. Dixon, 251 F.2d 338 (9th Cir. 1958); Adams v. Ellis, 197 F.2d 483 (5th Cir. 1952). See also note 35 supra. Cases cited therein rely on this second rationale also.
\item \textsuperscript{38} Disabilities stemming from sovereign immunity and civil death statutes lie outside the scope of this piece which deals with deprivations resulting from the actions and decisions of prison officials. However, for federal prisoners neither of these disabilities exists. See Note, Denial of Prisoners' Claims Under the Federal Tort Claims Act, 63 Yale L.J. 418 (1954).
\item \textsuperscript{39} Note, Prisoners' Remedies for Mistreatment, 59 Yale L.J. 800, 801 (1950).
\item \textsuperscript{40} See, e.g., Hill v. Gentry, 280 F.2d 88 (8th Cir. 1960), \textit{cert. denied}, 354 U.S. 875 (1960); State of Indiana \textit{ex rel.} Tyler v. Gobin, 94 Fed. 48 (C.C.D. Ind. 1899); Magenheim v. State \textit{ex rel.} Dalton, 120 Ind. App. 128, 90 N.E.2d 813 (1950); Smith v. Miller, 241 Iowa 623, 40 N.W.2d 597 (1950); O'Dell v. Godsell, 149 Neb. 261, 30 N.W.2d 905 (1948); Hixon v. Cupp, 5 Okla. 545, 49 P. 927 (1897); Kusah v. McCorkle, 100 Wash. 318, 170 Pac. 1023 (1918).
\item \textsuperscript{43} The issue of discretionary versus ministerial was not argued by the government in the \textit{Winston} and \textit{Muniz} cases, but it is easy to see how the following statement, which was directed toward the issue of extending the FTCA to prisoners, could be turned into an argument to demonstrate that the injury resulted from a discretionary and not a ministerial act:
\end{itemize}

In the Winston brief, we emphasized the deleterious effects upon prison discipline and, hence security, that would result if actions were allowed to be brought for pris-
decision or action by a prison official has been held to be a matter of internal prison management not subject to review by courts. Cases so holding may be used, albeit out of context, as precedent for dismissing many tort claims on the ground that they result from discretionary actions and thus are still barred by sovereign immunity. Thus, the applicability of the Federal Tort Claims Act and its state counterparts and the effectiveness of the tort remedy in general will in large part depend on the weight which the courts give to the hands-off doctrine and to the reasons advanced in support of it.

*Mandamus: In In the Matter of Brown v. McGinnis,* an inmate brought an action in the nature of mandamus to compel the Commissioner of Correction of New York to permit petitioner free exercise of his religion. The New York Court of Appeals reversed the lower court's dismissal of this proceeding and in effect directed the Commissioner to issue rules and regulations which would extend to the petitioner his religious rights subject to considerations of security and discipline. Here, as in proceedings under the Federal Civil Rights Act, the court began with the counter rule stated earlier, which places the presumption in favor of the retention of all the rights of an ordinary citizen:

Petitioner is entitled to the rights conferred upon him by the Constitution and section 610 of the Correction Law, subject to their limitations and reasonable rules and regulations of the Commissioner of Correction. At present, there is insufficient case law dealing with internal prison management under this remedy to provide a basis for evaluating its possible utility. Further, *Brown* is a case from which it is dangerous to generalize, because it arises under a specific statute guaranteeing some degree of religious freedom to prisoners. As with the other remedies, the scope of mandamus proceedings as an effective remedy for prisoners will depend on whether or not the courts are willing to abandon the hands-off doctrine.

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44. These cases stand only for the proposition, that the prison system is entrusted to the Attorney General (or equivalent state official) and therefore its management is a matter of administrative discretion over which the courts have no jurisdiction. These decisions have no logical bearing on the issue of discretionary versus ministerial once the courts do assume jurisdiction over the subject matter. For a discussion of considerations relevant to the issue of what is discretionary in this second sense, see text accompanying notes 219-27 infra.


46. See Chief Judge Desmond's concurring opinion making this point explicit. *Id.* at 536, 180 N.E.2d at 793, 225 N.Y.S.2d at 501.

47. *Id.* at 536, 180 N.E.2d at 793, 225 N.Y.S.2d at 501.
Critique of the Hands-off Doctrine

The Conferral of Authority Argument: In ruling that an inmate's complaint lies beyond the scope of judicial review, courts invariably advance a rationale based on a quasi-"separation of powers" argument. The formulation found in federal court opinions is almost always identical:

The prison system is under the administration of the Attorney General ... and not of the district courts. The court has no power to interfere with the conduct of the prison or its discipline.

A similar argument based on relevant state statutes is advanced by state courts. At this level of abstraction, the rationale seems somewhat circular: administrative decisions made by duly appointed authorities are not subject to judicial review because they are administrative decisions and are therefore not subject to judicial review. If there is one principle which emerges from a consideration of the instances where courts have considered the question whether the action of an official is unreviewable, it is that non-reviewability cannot be automatically inferred from the fact that authority has been delegated. Even where the delegation of authority is coupled with the legislative statement that all decisions are final, judicial review has not been held to be entirely precluded. Not only can it be said that delegation does not entail non-reviewability, but the contrary can be asserted in terms of a presumption in favor of reviewability:

The decisions of the past two or three decades fit reasonably well the idea of a presumption of reviewability that may be rebutted by affirmative indication of legislative intent in favor of unreviewability, or by some special reason for unreviewability growing out of the subject matter or the circumstances. Although the opinions have not expressly formulated the presumption, the Supreme Court, in absence of adequate rebuttal of the presumption, has in recent decades held reviewable [a variety of official determinations].

The one federal court that has expressly faced the question of whether delegation of authority for the management of the prison system necessarily involves immunity from review has explicitly rejected this rationale of the hands-off doctrine:

One point, however, the government presses here more assiduously than in Winston: that a damage action by a prisoner subjects to judicial

48. This justification of the hands-off doctrine is discussed first, even though it may seem like a make weight, because it appears consistently as the courts' articulated rationale. Presumably, there is a functional basis for the conferral but that is treated later in a separate discussion of the extent to which review would seriously endanger the fulfillment of penal objectives.

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

50. See note 12 supra.


52. 4 DAVIS § 28.07, at 31 (1958).
determination acts exclusively within the competence and authority of the
Bureau of Prisons, under the direction of the Attorney General . . . .

That section 53 does indeed charge the Bureau with "management and
regulation of all Federal penal and correctional institutions"; it imposes
the duty to "provide . . . for the safekeeping, care, and subsistence of
all persons charged with or convicted of offenses against the United States,
or held as witnesses or otherwise"; and to "provide for the protection,
instruction, and discipline of all persons charged with or convicted of
offenses against the United States."

But a mere grant of authority cannot be taken as a blanket waiver of
responsibility in its execution. Numerous federal agencies are vested with
extensive administrative responsibilities. But it does not follow that their
actions are immune from judicial review.54

In the particular context of prisoners' rights, the conferral argument appears
particularly weak when utilized to prevent continued supervision by the
judiciary of those very persons whom it has consigned to the prisons under
terms it has formulated.55

The Frustration of Penal Objectives Argument: Underlying the conferral
of authority rationale is the basic fear which impels the courts to refuse to
supervise the internal operations of the prisons, namely, that permitting
judicial review of administrative decisions would impair the ability of prison
officials to carry out the objectives of the penal system.56 An analysis of this
functional justification for the hands-off doctrine must begin by asking in
what way judicial review would interfere with the realization of certain goals.
The following discussion will attempt to set forth some of the possible effects
of judicial review on the effectuation of the traditional objectives of the penal
system: retribution, restraint, rehabilitation, and deterrence. The discussion
do not deal with the question of whether administrative review in some in-
stances would be preferable to judicial review. It is only concerned with the
contention that review per se would be deleterious.

1. Retribution: In our society, the retributive function of the criminal law,
while frequently disclaimed, finds effectuation in a number of ways, some
statutory57 and some administrative.58 It is difficult to tell how much of a

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54. Muniz v. United States, 305 F.2d 285, 286-87 (2d Cir. 1962), cert. granted, 31
55. This kind of follow-up responsibility has been acknowledged in a few instances by
N.Y.S.2d 44 (1961); United States v. Garcia, reprinted in DONNELLY, GOLDBEIN &
SCHWARTZ, CRIMINAL LAW 382-87 (1962) [hereinafter cited as DONNELLY ET
AL.]. See also Carter, The Offender Who Violates Both State and Federal Law, 26 F.R.D. 355, 358-
See also notes 12, 14 supra.
57. The statutory manifestations of retribution such as minimum terms for certain
offenses, civil death, loss of civil rights and capital punishment lie outside the scope of this
Comment.
58. See, e.g., statement of J. V. Bennett, Director, U.S. Bureau of Prisons:
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retributive component underlies the many deprivations imposed on prisoners in penal institutions upon which courts have refused to pass under the hands-off doctrine. Many of the deprivations undergone are justified in terms of administrative convenience and financial feasibility. However, the weight which is accorded to factors of administrative convenience and financial expediency is in no small measure a function of the retributive principle that a man who has violated a law is not entitled to as much of society's resources and consideration as the non-offender. Thus retribution may well lie behind the oft-quoted passage from *Price v. Johnston*:

Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.

Without a retributive principle implemented through assigning a lower priority to the needs of miscreants, a radically different result might follow. One might reason that those who violate the law are likely to need greater and more intensive care than other groups in society. To the extent that society has accepted a need criterion in funneling resources to those least able to cope with urban, industrial life—dependent children, the aged, and the unemployed—we might expect that but for the retributive concept of "moral desert," consistency with that need principle would imply its application to the criminal.

Most judges . . . send men and a few women to prison to be corrected, to be re-directed, to be rehabilitated—call it what you will. And they send them there as punishment and not primarily for punishment.

Bennett, Address before the American Law Institute, Washington, D.C., May 20, 1954, reprinted in DONELLY et al. 401. This statement reveals, as well as any, the ambivalence of our avowed correctional philosophy. For an even more overt indication see the statement from People v. Russell, 245 Ill. 268, 91 N.E. 1075 (1910), quoted with seeming approval in Siegel v. Ragen, 180 F.2d 785, 788 (7th Cir. 1950):

[The prisoner] has become an alien in his own country, and worse, for he can be restored only as a matter of grace, while an alien may acquire citizenship as a matter of right.


60. 334 U.S. 266 (1948).

61. Id. at 285.

62. Sykes points out that we have been notably unwilling to experiment with the old tradition of *Danegelt* (a form of tribute money paid to obtain the desistance of those who posed a menace to societal norms). *Sykes, THE SOCIETY OF CAPTIVES* 11 n.6 (1958) [hereinafter cited as Sykes].

63. This notion seems to have been adopted by Dession in his definition of "positive sanction," and his espousal of the principal that "where a situation . . . can be corrected by a positive sanction, such measure shall be preferred [to a negative or depriving sanction]."


64. One experimenter in the field of juvenile delinquency has achieved significant results by reversing the traditional flow of money from patient to therapist when therapy is initiated at the therapist's insistence rather than upon the patient's request. *N.Y. Times*, Aug. 5, 1962, § 1, p. 1, col. 2, p. 42, col. 1. This experiment was also described in an address
The aspect of retribution which most noticeably permeates prison life and shapes many of the administrative policies is the silent "doing-time" compact between society, the prisoner, and the prison officials. Under this compact, one is in jail to "pay one's debt to society" and the more submissively and quietly the debt is paid, the more quickly are retribution's demands satisfied. The many deprivations which are exacted in the name of administrative discretion might then be viewed as part of the repayment which society requires. To cause administrative inconvenience, to question the authority and judgment of those charged with exacting the eye for an eye might seem totally inconsistent with fulfillment of the retributive objectives of the penal system; therefore, it would appear that judicial review of discretionary decisions by prison officials could only interfere with the efficient exaction of retribution.

There is, however, one important aspect of the retributive doctrine which has important implications for the function of judicial review in the penal system. The very notion of "an eye for an eye and a tooth for a tooth" involves certain concepts of limitation, of just desert, which are best summed up in an object which both the Mikado and the warden of Sing-Sing share in common: "to let the punishment fit the crime." If each crime against the state brings into being a debt of a certain magnitude which the offender must then repay, the deprivation which he undergoes must be fixed to correspond with the debt. Sentences which are graded according to the seriousness of the offense are nothing but the price tags which society puts on certain kinds of actions. It follows that if we cannot permit convicts to go free without paying their "full debt to society," so too, it would be inequitable to exact from them a greater debt.

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by Dr. Donald Cook, Professional Service Staff, Nat. Inst. of Mental Health (now Research Director, Basic Systems, Inc.):

With the recognition that referrals to clinics were not picking up the delinquency prone population, the various programs of "reaching out" began to develop . . . . In other words, the therapist, not the patient, is the supplicant in recruitment . . . . That is the technique developed by Charles Slack at Harvard for recruiting his target individuals: he pays them. I want merely to point out that this step is a logical development of the "reaching out" trend, and to suggest that much of the furor which his work has brought forth springs from the clear reversal of the flow of money and its implications for conventional professional status patterns. For where referral reverses its direction and becomes recruitment, the norms of a private practice profession can no longer apply.


66. Id. at 56.

67. The most persuasive presentation of this position is to be found in C. S. Lewis, The Humanitarian Theory of Punishment, 6 Res. Judicatae 224 (1953), reprinted in DONNELLY, ET AL. 499 (1962).

68. Cook, From 7 A.M. to 10 P.M. at Sing Sing, N.Y. Times, March 4, 1962, § 6 (Magazine), pp. 40-41.
privation than their offense warrants. Presumably, it is this reasoning which in part underlies the proscription of cruel and unusual punishment, and similarly it is this reasoning which should compel limited judicial review of the mode of imprisonment. Under the retributive doctrine, the limits of sentences are fixed by the legislature and the specific deprivations are set by the courts with what might be termed an expectation of "reasonable deprivation." Deviation from this standard of customary deprivation means that society is exacting a more (or less) serious penalty than the offense warrants. Thus, it seems reasonable to provide some form of review to insure that the customary level of deprivation upon which the sentence's length was predicated is maintained. And this in turn will require judicial supervision of the penal system at certain critical points. First, if a man were sentenced to a minimum security prison or rehabilitative center for a certain number of years and shortly after confinement was then transferred without cause to a maximum security prison where the deprivation was much more severe or if the prisoner consigned to prison was, without any procedure for administrative review or right of appeal, sent to a mental institution, courts acting in furtherance of the retributive principle should intervene. Such deprivations seem in excess of that upon which the sentence was predicated. Such was the reasoning of the New York Court of Appeals in People ex rel. Brown v. Johnston where the petitioner was transferred from the penitentiary to the state institution for insane prisoners:

... [I]t seems quite obvious that any further restraint in excess of that permitted by the judgment or constitutional guarantees should be subject to inquiry.


70. This is less obviously so of the cruel and unusual punishment part of the amendment than of the "excessive bail" and "excessive fines" portion. Conceivably the cruel and unusual punishment clause could act as a limit on the principle of paying one's full debt to society where the crime itself was "cruel and unusual." Nonetheless, the context established by the amendment as a whole indicates that the principle of punishment commensurate with crime underlies the "cruel and unusual" clause as well. And indeed such a construction appears to have been given the phrase in Robinson v. California, U.S. —, 82 S. Ct. 1417 (1962). See especially Mr. Justice Douglas, concurring at 1425: "A punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual punishment.'"


72. Within limits prescribed by the legislature, courts have the power to designate the type of institution to which a prisoner is sent. See, e.g., Banghart v. Swope, 175 F.2d 442 (9th Cir. 1949); People v. Santanello, 1 App. Div. 2d 891, 149 N.Y.S.2d 329 (1956); Ex parte Neighbors, 85 Okla. Crim. 183, 187 P.2d 276 (1947). The machinery for presentence investigations in the federal courts which can be used to determine the most suitable type of institution is provided by Fed. R. Crim. P. 32.


74. Id. at 485, 174 N.E.2d at 726, 215 N.Y.S.2d at 45.
The right to contest any increase in deprivation over that originally deemed adequate thus appears to be an important corollary of the retributive system. Unless proper administrative procedures are provided, the courts should intervene, rather than abstain, in order to assure the realization of the objective of retribution. Other unforeseeable and extreme deprivations should similarly be given administrative or judicial remedy if equitable retribution is to be exacted.75 To deny a prisoner any recovery for injuries resulting from the unlawful actions of prison authorities would similarly appear to be a refusal to recompense an exaction of payment in excess of the debt owed. To effectuate the doctrine of retribution, some form of remedy must be provided—whether administrative or judicial—and some means of review and hearing must be given to a prisoner's assertion that the remedy is non-existent or inadequate.76 Such, it would appear, are the minimal mandates imposed on the prison system by the canons of retribution.

2. Restraint. Prison officials have generally assigned high priority to the objective of restraint, which includes both custody and internal discipline.77 Objections to judicial review of internal prison policy have focused on the detrimental effect on custody and discipline which would result from conferring on inmates the power to challenge authority by appeal to the courts.

Some critics of the penal system contend that the precautions taken in prisons to prevent escapes and maintain discipline indicate a paranoid preoccupation with the possibility of disorder or escapes.78 However, it seems unlikely that courts are going to meddle with an assignment of priorities which so mirrors society's intense fear of escapees and society's desire to forget about the existence of certain human beings during the period of their "banishment."79 Because the warden of an institution has no way of predicting with any degree of accuracy which of all his prisoners is the one which will attempt an escape, it is not surprising that the prison officials have chosen the course of treating all inmates as if they were serious threats to the task of custody; stringent security measures are imposed on the entire inmate population with

75. The courts have declared that an inmate does not "assume the risk" of employment in prison and therefore "assumption of risk" is no defense to a suit brought for industrial injuries by an inmate. Melton v. State, 198 Misc. 654, 99 N.Y.S.2d 737 (Ct. Cl. 1950), appeal dismissed, 108 N.Y.S.2d 967 (1951); Revelant v. State, 165 Misc. 798, 300 N.Y.S. 1186 (Ct. Cl. 1937). It is submitted that all prison accidents are a species of industrial accident and that the no "assumption of risk" rationale should apply to all prison accidents whether incurred during "work" or during another equally mandatory activity or routine. See text accompanying notes 214-27 infra.

76. Conceivably, the right could comprehend access to law books, time to draw up petitions and all the ancillary rights necessary to guarantee access to the courts. Alleged infringement of these "rights of preparation" could also be subjected to judicial scrutiny. See discussion accompanying notes 258-68 infra.

77. Sykes 18, 21.

78. Id. at 19, 25.

79. The intensity of our unconscious fear and hostility is at least partially explained in Freud, On War, Sex, and Neurosis 272 (1947), reprinted in Donnelly, et al. 347.
the full realization that much of the effort may be unnecessary. To the extent that foolproof custody is accepted as a primary goal of penal institutions, it is no wonder that courts are willing to give a \textit{carte blanche} to prison administrators. However, it is important to keep in mind that less than twenty five percent of men in prison must be confined to maximum security prisons. Even if the security-oriented regulations of a prison should not be tampered with by the courts, it does not necessarily follow that some form of review of the classification or reclassification of an inmate should not be available.

With regard to internal security-oriented regulations, it is important to note that the argument addressed to the courts and adopted by them in their hands-off doctrine is not an argument in defense of the merits of each security regulation. Rather, the contention is that the courts should not even pass on the merits of a prison regulation because the internal operations of the prison are not subject to judicial review. The objection is not formulated in terms of a fear that the court will hold a regulation deemed essential to be void; rather, it is asserted that the mere assumption of jurisdiction over the subject matter will of itself undermine prison authority and thwart the authorities' efforts to fulfill the task of custody. By what process would this subversion take place? The two most obvious possibilities are these: (1) that prisoners, knowing that they hold this threat within their power, will be emboldened to violate rules and to subject the authorities to every conceivable form of dilatory harassment; (2) that a guard, knowing that his discretionary decisions will ultimately be reviewable by a judge (who may or may not be sympathetic) will

80. Searching cells for contraband material; repeatedly counting all inmates to insure that each man is in his appointed place; censoring mail for evidence of escape plans; inspecting bars, windows, gratings, and other possible escape routes—all are obvious precautions. The custodians, however, do not stop with these, for they have found to their bitter knowledge that in a maximum security prison the most innocent-appearing activity may be a symptom of a major breach in the institution's defenses. Pepper stolen from the mess-hall may be used as a weapon, to be thrown in the eyes of a guard during a bid for freedom. A prisoner growing a moustache may be acquiring a disguise to help him elude the police once he has gotten on the other side of the wall. Extra electrical fixtures in a cell can cause a blown fuse in a moment of crisis. A fresh coat of paint in a cell may be used by an industrious prisoner to cover up his handiwork when he has cut the bars and replaced the filings with putty.

All of these seemingly innocent acts and many more like them are prohibited, therefore, by the regulations of the prison. If it is argued that such security measures are based on relatively rare events, the officials can only agree. They will add, however, that prisoners are ingenious in devising ways to escape and it is the duty of the officials to prevent escapes from occurring.

... To the prison officials, then, the guards on the wall form the last line of the institution's defenses, not the first, and they fight their battle at the center of their position rather than at its perimeter.

Sykes 21, 19.

81. Scudder, \textit{The Open Institution}, 293 Annals 79 (May 1954). At Chino, one of the first things told a new inmate by the staff is how easy it is to escape. \textit{Id.} at 82. See also Sykes 19.

hesitate to act with the decisiveness and flexibility which is necessary to maintain order in prison. Underlying these possibilities is the more basic fear, to be discussed separately, that courts, because they lack understanding and sympathy for the problem, will invalidate acts and regulations which prison officials deem essential to restraint.

It seems doubtful that abandonment of the hands-off doctrine would encourage prisoners to defy the authorities. The chance of ultimate success in the courts is not likely to serve as an immediate enough corrective to change a prisoner’s mind as to the wisdom of immediate compliance with regulations. If redress comes only after weeks or months of disciplinary action, a prisoner will still think twice before violating a regulation, even one he believes may be invalid. Further, although the Supreme Court has never ruled on whether a prisoner contesting the legitimacy of the mode of his confinement can engage in defiance of prison authority, it was held in Poulos v. New Hampshire that the unlawfulness of the denial of a permit could not be used as a defense for the unlawful act of holding public religious services in a park without a license. Similarly, in Nelson v. United States, the court held that even though a prisoner had been illegally imprisoned, this was no defense for his misconduct in prison. If the rule that one must contest unlawful official acts through proper channels rather than through defiance applies to Jehovah's Witnesses and to a prisoner illegally detained, a fortiori, it applies to prisoners who are contesting the manner of their imprisonment and not its legitimacy.

A similar line of reasoning applies to the “vacillating guard” alternative. Individual guards have long been amenable to suits by prisoners for certain kinds of misconduct and it is difficult to see how reviewability of all actions will have a graver effect on their decisiveness than the threat of personal liability has had. And for reasons stated above, the guard can continue to act on the assumption that the regulation he carries out and the orders he gives must be obeyed, whether or not they are ultimately approved by the court.

Underlying the contention that reviewability in and of itself will prove detrimental is the unarticulated fear that courts will approach problems of prison administration with little familiarity and less sympathy for the extraordinary difficulties which daily beset the prison staff. The hands-off doctrine thus may be viewed as an implicit recognition by the courts of their institutional incapacity to pass judgment on complex matters of prison administration. This position is not compelling for a number of reasons.

83. It is at least possible to suppose that reviewability, rather than increasing the problems of custody, will decrease them if inmates are given assurance that ultimately their petitions will receive consideration on the merits. As Sykes has pointed out,

... the custodians’ task of maintaining order within the prison is acerbated by the conditions of life which it is their duty to impose on their captives.

Sykes 22.

84. 345 U.S. 395 (1953).

85. 208 F.2d 211 (10th Cir. 1953); see also People v. Whipple, 100 Cal. App. 261, 279 Pac. 1008 (1929) (alleged unsanitary conditions and brutal mistreatment by prison camp custodian held not to justify prisoner's escape).

86. See note 40 supra.
First, it should not be assumed that courts will necessarily prove hostile and deficient in understanding. The widespread acceptance of the hands-off doctrine provides ample demonstration that the courts are highly sensitive to the problems of prison administration, are keenly aware of their own lack of expertise, and thus probably will act with great restraint in passing upon actions by prison administrators which appear to be reasonable exercises of discretion. While the standards to be developed by the courts will be discussed later, it is most likely that courts will insist that regulations and decisions be only a reasonable means and not the best possible means to accomplish a given end. Thus, judges will not be attempting, through review, to second guess prison officials on how best to run the system. In many instances, a judge, in deciding upon the reasonableness of an official’s actions, will be able to use the prison’s regulations as a guide for judging whether, according to the prison’s own standards, the action was a permissible one.

Further, without some form of review (and absent legislative creation of administrative review, this is equivalent to saying “without judicial review”), all regulations directed toward custody must be considered as self-validating and as absolutely necessary. If this is so, then the counter principle enunciated in Coffin v. Reichard—that a prisoner retains all rights except those taken from him expressly or by necessary implication of law—becomes a hollow guarantee indeed.

Moreover, the claim that every given regulation or practice is absolutely indispensable to maintaining order and discipline should be regarded with some degree of skepticism. There is substantial agreement among informed observers of the prison system that discipline is actually maintained by a complex set of informal relationships between the prison staff and the “inmate society.” Discipline, or the semblance thereof, is achieved by trading full enforcement for the cooperation of the inmate leaders. The further question then arises how are the courts to know when a given action or regulation, while apparently unreasonable, is not in actuality an integral part of the extra-official system of maintaining order. (Where a functional basis for the practice or regulation exists, no such problem arises as the courts will not strike it down.) If no compelling justification for the practice or regulation can be given other than that it is useful as an implement of potential harassment and as a source of bargaining strength for guards in their dealings with inmates,

87. See, e.g., the court’s handling of use of force for disciplinary purposes in In re Riddle, 57 Cal. 2d 848, 22 Cal. Rptr 472, 372 P.2d 304 (1962).

88. See, e.g., Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961) where the court in holding contested prison regulations to be reasonable dismissed the contention that less restrictive regulations could easily have been utilized by prison officials:

The fact, if it be a fact, that access [to the courts] could have been further facilitated without impairing effective prison administration is likewise immaterial.

Id. at 640.

89. Sykes 45-62, 120-29; Yablonsky, supra note 65; Weinberg, Aspects of the Prison Social Structure, 47 AmER. J. Soc. 717 (1942); McCorcle & Korn, Resocialization Within Walls, 293 ANNALS 88 (May 1954); Clemmex, The Prison Community (1940).
the courts would not be acting amiss in striking it down. Not only would harassment thereby be alleviated but prison administrators would be aided in assessing the effects of their regulations and in evaluating them on the basis of their functional value. Further, to the extent that prison regulations are supposed to teach a man to live in conformity with society's norms, the sporadic and discretionary enforcement of an unreasonable regulation is likely to breed contempt of the law.  

Finally, it should be pointed out that these objections to the hands-off doctrine are not necessarily coupled with the proposition that courts are the institution best suited to review prison administration. It is only suggested that in the absence of any suitable means of review some form of review is desirable. And if courts operate, even poorly, in a review capacity, this may prove an incentive to the creation of more appropriate review mechanisms.  

3. Rehabilitation. Given recidivism rates which reach to sixty per cent and more, it is subject to debate whether prisons serve a rehabilitative function at all and whether, to the extent such a function is served, it is by accident or design. Lack of educational, recreational, therapeutic, and vocational training facilities mean that to the extent such a function is served, a significant contribution is, or at least can be, made by the custodial staff who, by enforcing the rule of prison law, prepare inmates for a law-abiding life upon release. Such has been the contention of at least one warden:

Custody is frequently dismissed as a rather sordid and punitive operation, consisting chiefly of keeping inmates perpetually locked, counted, and controlled. Almost as if in opposition to this, treatment and welfare are described as attempts to introduce freedom and dignity into custody's restrictive, punitive context by the provision of recreation, education, and counselling. This traditional contrast, disfigured by bias and half-truth, misses the central reality of the inmate's life in prison...  

The evaluation [of the institution's contribution] must rather be made in terms of how the prison authorities are affecting the total social climate, how successful they are in enabling the less hostile persons to advance themselves, how successfully they are protecting these people from intimidation or exploitation by the more anti-social inmates, how effectively they curb and frustrate the lying, swindling, and covert violence which is always under the surface of the inmate social world.

The efficient custodian now emerges from the role of restrictor and becomes the one who safeguards inmate welfare.  

Assuming for the time being that the custodial regime of a prison provides a major element in the correctional experience of inmates, does it follow that the custodian qua therapist can do no wrong? And assuming that he might deviate from his role of therapist, should there not be means whereby such deviation can be brought to light, the practice corrected, and any in-
If the custodian can play a supportive role in the correctional process, does it not follow that the regulations imposed for custodial purposes should be consistent with correctional objectives so far as possible? This does not necessarily mean that courts will, in accordance with the dictates of a correctional philosophy, require prison officials to employ the least depriving alternative in achieving a certain end. However, a correctional philosophy would certainly support the need already mandated under a retributive philosophy for review of arbitrary and extreme deprivations which bear no reasonable relation to the purpose for which they are allegedly imposed. And, in order to decide which deprivations under either a correctional or a retributive view are so extreme as to warrant relief, all petitions will at least have to be considered.

Furthermore, the availability or nonavailability of a review mechanism perceived as impartial may have important rehabilitative implications in confirming or altering the inmate's view of society. The negative implications of denying review, thereby confirming the inmate's conception of a pervasively hostile unreceptive environment, have already been noted by one court:

An individual, once validly convicted and placed under the jurisdiction of the Department of Correction . . ., is not to be divested of all rights and unalterably abandoned and forgotten by the remainder of society. If these situations were placed without the ambit of the writ's protection, we would thereby encourage the unrestricted, arbitrary and unlawful treatment of prisoners, and eventually discourage prisoners from co-operating in their rehabilitation.93

Beyond this negative possibility, it is possible to speculate that some positive gains might result from the process of seeking review of grievances.94 Thus,

92. See Yablonsky, supra note 65, and McCleery, op. cit. supra note 90, for a discussion of the long range institutional and educational implications of making guards an integral part of the rehabilitative process.


94. The process of petitioning the courts, and being granted or denied relief, could serve as a useful point of departure for the inmate, with the aid of the therapeutic staff, to gain perspective on himself. With help, the prisoner might come to some realization that his objection to specific prison conditions really stemmed from far deeper personal frustrations and needs. Thus the complaint, as an attempt by the prisoner to shift the blame for his situation to his environment, may provide an opportunity for exploring his own faulty modes of perception.

McCorlde & Korn's summarization of the principles of therapeutic treatment offers a useful framework within which to view the voicing of grievances through legal channels. In summarizing basic therapeutic principles they point out that a person must somehow be brought to an awareness that his difficulties are related to motives and patterns of perception within himself . . . .

... [a]ssistance towards understanding comes about through some relationship with the therapist (or therapeutic situation) in which the individual actually attempts to make his faulty modes of perception and behavior work.

McCorlde & Korn, supra note 89, at 96-97 (emphasis added).

If we view the process of seeking review of administrative decisions as a "therapeutic situation," then the rehabilitative potential of what might be called "gripe petitions" begins
for example, time spent reading law books, learning of constitutional guarantees, or becoming aware of the method provided by society whereby one effectuates one's desires and protects one's rights may provide a highly valuable educational experience for the prisoner.95

4. Deterrence. It does not appear to be seriously maintained that the court's position on the reviewability of prison officials' decisions will have any effect on the deterrent impact which fear of undergoing incarceration has on potential wrongdoers. In any event, such a contention would be too speculative to compel retaining the hands-off doctrine.96

There is, however, one sense in which it may be said that abandonment of the hands-off doctrine is consistent with the deterrent aim of the criminal law. To the extent that such review may provide an impetus for penal reform, it is possible that recidivism rates would be lowered. And the greater the visibility given to the penal system's needs and shortcomings, the more likely it is that society will come to appreciate the false economy of its niggardly allowance for the treatment of criminals.

GUIDELINES FOR JUDICIAL REVIEW OF THE PRISON SYSTEM

The foregoing discussion has attempted to demonstrate that the rationales customarily invoked to support the application of the hands-off doctrine to all kinds of alleged deprivations are untenable. It remains to inquire what consequences may follow if the courts abandon the hands-off doctrine and determine on the basis of the allegations in each case if judicial relief is warranted. While prediction is a risky business, some of the approaches which courts may take to the problem of prison administration are indicated in existing case law. First, courts will probably view the prison as an administrative agency as did the New Jersey court in McBride v. McCorkle.97 Speaking of the reviewability of disciplinary measures taken by a warden which allegedly deprived a prisoner of freedom of worship, it stated:

We have, then, a final decision or action by a state administrative agency within the meaning of . . . [the statute providing for judicial review of

to emerge. At bottom, these petitions are merely one of the repeated and futile efforts in which the inmate engages to avoid admitting that his present plight is the product of his own faulty values and modes of perception. As McCorkle & Korn point out "Repeated demonstration of [the] failure [of these faulty modes of perception and behavior] may be necessary before he is able to abandon them." Id. at 97. The process of testing those faulty modes of perception by appeal to an admittedly impartial body outside the immediate prison system could conceivably make an important contribution in helping an inmate to abandon his former beliefs. Cf. Perl, Therapeutic Use of Certain Defects of the Usual Prison, 47 J. CRI M. L., C. & P.S. 58 (1956).

95. Apparently, the Warden at Dannemor feels this to be so. Clark, Federal Procedural Reform and States' Rights; to a more Perfect Union, 40 TEX. L. REV. 211, 218-19 (1962).

96. See the discussion of the deterrent effect of capital punishment in SELIN, THE DEATH PENALTY 15-79 (1959). If death has no ascertainable deterrent effect distinguishable from that of imprisonment, a distinction between modes of imprisonment is likely to have, if possible, even less deterrent impact.

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final decisions by state administrative agencies], and so proceed to discuss the merits.98

Second, viewing the prison as an administrative agency, the customary rule of exhaustion of administrative remedies will probably be applied.99 Third, the more adequate the remedies and review procedures provided, the greater the presumption of validity which should—and probably will—attend the decision of the reviewing authorities.100

If the courts were to attribute a higher presumption of reasonableness to the decisions of a prison administrator where they had been passed on by an independent and informed reviewing board, this would certainly provide a desirable stimulus for adopting adequate reviewing procedures. The events which transpired in New York after the Court of Appeals ruling in People ex rel. Brown v. Johnston101 are illustrative of the impetus toward administrative reform that a court’s insistence on adequate remedial mechanisms can create. The court ruled, contrary to prevailing case law, that transfer of an inmate from a prison to an institution for the criminally insane without provision for notice and hearing was unconstitutional.102 It gave short shrift to the argument of administrative discretion and prison discipline:

Although the availability of the writ of habeas corpus for this purpose may be a source of administrative inconvenience, it is not justification for a denial. It is well here to repeat that “the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected.”103

Immediately following this decision, the court was so flooded with habeas corpus petitions from the institution for the criminally insane that it had to hold separate sessions at the institution.104 In reaction to this, the Correction Department submitted a bill to prevent transfers of inmates to hospitals or institutions for the insane without appropriate hearings. This bill was supported by both the Attorney General and the Correction Department, and has now been enacted.105

98. Id. at 476, 130 A.2d at 885.
99. See generally 3 DAVIS §§ 20.01-20.10.
100. The Federal Bureau of Prisons has established a prisoner’s mail box through which the prisoner may send uncensored mail from the federal penitentiary in which he is confined to his Congressman, Senator and to the director of the Federal Bureau of Prisons. Officials at the Bureau read these complaints and make such dispositions as they deem fit by remanding the matter to the warden with appropriate instructions. Lowe v. Hiatt, 77 F. Supp. 303, 305 (M.D. Pa. 1948).


102. However the scope of this holding has been sharply limited by People ex rel. Harris v. LaVallee, 16 App. Div. 2d 990, 229 N.Y.S.2d 321 (1962).
104. The Journal is indebted to Mr. Ephraim London, attorney for the prisoner-appellant in People ex rel. Brown v. Johnston, supra note 101, for the description of the events which followed the Court of Appeals decision.
It is not to be supposed that courts will ever formulate a rule of law that says "The extent and adequacy of provisions for administrative review of decisions by prison administrators will determine the extent to which such decisions shall be accorded a presumption of reasonableness." Rather it is suggested that such a sliding scale will be (and is) the net effect of utilization by the courts of such traditional criteria for review of administrative decisions as opportunity to be heard, separation of adjudicatory and prosecutory functions, and bias.

Lack of opportunity to be heard has already been used as the basis for overturning an administrative decision involving a prisoner. And the courts, in situations where it seems appropriate, may couple this with further requirements such as the right to counsel, the right to receive advance notice of the nature of the issue to be decided, the right to full and effective dissemination of all pertinent rules and sanctions, adequate opportunity for preparation and access to resources necessary to contest effectively a decision which will result in a deprivation.

While imposition of formal safeguards is the most obvious way in which a court can supervise (and change) a correctional system which is lacking in satisfactory administrative remedies, the standard of bias represents potentially the most flexible criterion for altering the strength of the presumption of reasonableness which attends the acts and decisions of prison officials. While direct pecuniary interest in the decision is the clearest grounds for disqualifying an administrative official and overturning his decision, other types of personal involvement have been held to constitute bias:

Somewhat more subtle than direct pecuniary interests are interests of other kinds that may be thought to come within the ancient injunction

106. See generally 1 Davis §§ 7.01-7.20.
107. See generally 2 Davis §§ 12.01-12.06.
108. See generally 2 Davis §§ 13.01-13.11.
110. The felt compulsion to impose such checks will—and should—lessen as the State provides other, and more functionally suited, remedial mechanisms. A court, one may suspect, will tend to require safeguards drawn from the advocacy system, a system concerned with the ascertainment of guilt or innocence, liability or non-liability. These safeguards (and such a criterion as separation of prosecutory and adjudicatory functions) may seem ill-suited to a system interested in rehabilitation and more concerned with perceiving the whole person and predicting the course of his future conduct than with merely ascertaining his culpability or non-culpability at a time past. See Note, Freedom and Rehabilitation in Parole Revocation Hearings, 72 Yale L.J. 368 (1962). Such formal safeguards drawn from an advocate system seems more appropriate to a situation where society is concerned with ascertaining guilt than to a therapeutically oriented correctional system. However, to the extent that the lack of more functionally suited administrative remedies within the penal system is the product of retributive sentiments, then the imposition of advocacy safeguards drawn from a retributive context is appropriate. To the extent that such safeguards are inappropriate, they will force a clarification of objectives, a redesigning of remedial procedures in line with those objectives, and a reallocation of resources consonant with the changed priority that the revaluation brings.
111. See discussion at text accompanying notes 258-68 infra.
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that "no man shall be a judge in his own cause." ... Here we have ... what may be a basic distinction: to have opinions about issues of policy does not disqualify, but actively to align oneself with one side in a particular cause to be adjudicated may disqualify, even in absence of a combination of judging with prosecuting or accusing.\(^{112}\)

Thus, the mere existence of a review procedure should not determine the degree of deference to be accorded its decisions. A court should not overlook the extent to which the review mechanism may be incapable of truly policing the system because of an interest in vindicating the judgment and bolstering the authority of the official whose action it is reviewing. Where the reviewing body is accountable to an authority altogether different from the body charged with the actual administration of the prison system, its decisions are more likely to reflect that impartiality to which the greatest weight should be accorded. Thus, recognition by the courts of the ego involvement of prison officials in covering up abuses, coupled with an awareness of the community of interest among prison employees and the relationship of personal advancement to continual vindication in all conflicts with inmates, may lead courts to utilize the degree of bias present in order to define the intensity of review and the strength of the presumption of reasonableness to be accorded an official's action or decision.

On one end of the continuum will be, for example, the prison guard who inflicted the injury and to whom vindication is all important.\(^{113}\) His judgment as to the reasonableness of his actions is entitled to least weight. On the other end of the continuum might stand the reasoned decision by a court-appointed referee or a board composed of highly qualified, disinterested persons whose function is to review and assess the entire prison system with an eye to continual change and improvement.\(^{114}\) Somewhere in between is the judgment of the prison warden who is interested in maintaining the morale of his staff by approving the actions of his guards but who also presumably is anxious to run a "model prison" and at least desires to avoid extreme repercussions such as widespread violence, vandalism, or riots.\(^{115}\)

\(^{112}\) 2 DAVIS § 12.03 at 159.

\(^{113}\) See In re Jones, 22 Cal. Rptr. 478, 372 P.2d 310 (1962) for a sample of the conflicting accounts of alleged prison brutality given by inmates and guards. The court felt the inmates' testimony to be impeachable because they were convicted felons, but appears to have relied most heavily on statements of the prison doctor and two members of the Adult Authority parole board in deciding whose story to believe.

\(^{114}\) See In re Riddle, 22 Cal. Rptr. 472, 372 P.2d 304 (1962), where the court says of the referee's findings:

These findings are all supported by substantial evidence. But even though they are so supported they are not binding on this court. They are, however, entitled to great weight.

22 Cal. Rptr. at 474, 372 P.2d at 306.

\(^{115}\) See Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962) discussed in text accompanying notes 132-37, 179-81 infra. There a reasonableness test was applied to all contested deprivations with the result that the court deferred to the warden's judgment on certain points and overturned it on others.
Where the administrative procedures provided are deemed adequate the courts are likely to respect the appealed-from decision unless it is capricious or arbitrary. Where, however, the mechanism is less than adequate, the court will have two choices. First, it may reverse the decision for lack of proper remedial safeguards. Or second, it can choose to review on the merits. Because of the inadequacy of remedial safeguards, or because of the absence of any administrative record setting out the facts and the grounds for the administrative decision, the decision below is not entitled to the deference which the “capricious or arbitrary” test\textsuperscript{116} accords to administrative expertise; rather the courts are likely to apply a more stringent standard, one closer to the time-honored “reasonableness test.”

\textit{The Reasonableness Test—A Problem of Judicial Administration and Definition.} Giving content to “reasonableness” in the prison context will involve two distinct problems, one largely administrative, the other definitional.

It is not unlikely that abandonment of the hands-off doctrine will result in an increased number of petitions from prisoners alleging some form of mistreatment. Some of these petitions will be contesting deprivations which are so clearly reasonable that the court can dismiss the petition on the basis of the allegations. On the other hand, many petitions will be framed in such a manner that the complaint, if true, would present a claim for which relief would be warranted. It is to be expected that prisoners will present their claims so as to avoid dismissals through a mere reading of the allegations; this will present the courts with certain administrative problems. The courts will have to find some way of informing themselves of the extent to which there is evidence to substantiate the factual basis of the claims asserted. Obviously, it would be better if a court had before it a full administrative record which incorporated findings of fact and a reasoned disposition of the complaint such as, for instance, a file of correspondence between the Federal Bureau of Prisons and the warden of a penitentiary concerning a complaint which had come to the Bureau through the prisoner’s mail box. In the absence of such a record, it is unlikely that a formal trial with its attendant inconvenience and expense will result from every petition. Neither the courts nor the prisons will tolerate the demands on time or facilities that would result from calling the inmate petitioner and his witnesses, the guard and his witnesses, the prison doctor and the prison warden to testify concerning each complaint where there is a disputed issue of fact. It is far more likely that courts will appoint a referee who will take evidence and make findings of fact. Regardless of how the evidence is gathered, the result of abandoning the hands-off doctrine will doubtless be a multitude of petitions alleging mistreatment. To the extent that such petitions contain arguable issues of law and substantial conflicts in evidence,

\textsuperscript{116} See, e.g., Cole v. Manning, 125 S.E.2d 621, 625 (S.C. 1962). However, on issues of fact, the courts will apply the “substantial evidence on the record considered as a whole” test. Universal Camera Corp. v. NLRB, 340 U.S. 474, 485 (1951). (Italics and footnote omitted.) \textit{In re} Riddle, 22 Cal. Rptr. 472, 372 P.2d 304 (1962), applies the latter formula to a determination by an impartial referee that a guard did not abuse his discretion in using force. See also \textit{In re} Jones, 22 Cal. Rptr. 478, 372 P.2d 310 (1962).
the extra burden placed on the judiciary must be borne if prisoners' rights are to be vindicated. However, where the allegations involved are clearly frivolous, or where evidence to corroborate the inmate's assertions is altogether lacking, the imposition of sanctions on prisoners for raising frivolous issues should somewhat alleviate the problem.\textsuperscript{117}

The definitional problems resulting from an application of the reasonableness standard are as difficult as the administrative ones. Defining "reasonableness" in the prison context will involve not only the normal difficulties inherent in such a flexible standard but also will require a sophisticated appreciation of the extent to which the prison system mediates between the often contradictory goals of the criminal law and constantly is forced into compromises by limited resources. Courts, in testing prison regulations and the actions of officials by a standard of reasonableness, will have to start distinguishing those actions and regulations which stem so directly from the structure of penal institutions and the allocation of resources to the prison system as to be deprivations imposed "by necessary implication . . . [of] law"\textsuperscript{118} and therefore virtually \textit{per se} reasonable, from those actions and regulations which could be condemned by a court without forcing a radical reconstitution of the present system. To the extent that penal statutes and sentences are predicated on some assumed minimal level of deprivation, such deprivations clearly result "from necessary implication of law."

Many of the deprivations undergone by prisoners which in theory could be eliminated are the product of limitations in scientific knowledge and of the low priority which society has given the penal system in allocating resources. Restrictive parole criteria, undifferentiated treatment of all prisoners as potential escapees, over-assignment of prisoners to maximum security institutions, and prison terms imposed without regard to the period which therapy might reasonably require are direct products of our limited knowledge in the realm of therapeutic and predictive techniques. But they are also the product of retributive sentiments and a virtually paranoid fear of ex-convicts which caused one "scientific" study to weigh the loss to society caused by one recidivist at one hundred and the gain to society contributed by each non-recidivist as zero.\textsuperscript{119} The ambivalence of our commitment to the rehabilitative

\textsuperscript{117} See discussion in text accompanying notes 258-61 infra.

\textsuperscript{118} Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944). Such a distinction may be implicit in the following statement of Judge Sobeloff in Sewell v. Pegelow, 291 F.2d 196, 197 (4th Cir. 1961):

There is an extensive detailed specification of deprivations and hardships inflicted for no infraction of any rule, and solely because of what the appellants describe as their religion. Moreover, it is asserted . . . that the prison officials have suppressed their letters to the Commissioners of the District of Columbia setting forth their grievances in an effort to obtain relief administratively. In these circumstances the case is manifestly unlike those in which courts have declined to interfere because particular disciplinary measures were taken within the normal management of the institution.

\textit{Id.} at 197. (Emphasis added.)

goals of the criminal law leads to our funneling but minimal resources into the prison system. The result is a large number of institutionalized deprivations produced by obsolescent prison facilities, austerity budgets, underpaid and unqualified staff, token research efforts, and inadequate recreational, educational, and therapeutic facilities. The courts are likely to be most unwilling to afford relief from those deprivations which stem directly from the limited allocation of resources to penal institutions, since relief from these kinds of deprivations must generally come from legislatures. It is clear that courts can make inroads even on this necessary level of deprivation, both by suggesting legislative action and by insisting on certain minimal rights, the protection of which undoubtedly involves administrative inconvenience and greater expense. It may be argued that such inroads, no matter how minor, involve a usurpation of the legislative function, for it is clear that the recognition and extension of rights is expensive.

Nonetheless, within certain broad limits to be discussed shortly, a court must be prepared either to extend rights which result in greater costs to the penal system or to treat all deprivations as “necessary” or “reasonable per se” and therefore beyond reproach. A court, if it is determined not to tamper with resource allocation, must assume that any decision made by the prison authorities is always proper and reasonable. If courts are to review such decisions, new costs will necessarily be incurred in at least two ways. First, the time of judicial decision makers spent in co-administering the prison system must be considered as part of the cost to society of running that system. Second, to the extent that the remaking of those decisions results in the extension of new and costly rights, the result will be greater expense to society. For example, an extra hour of time to write habeas corpus petitions may involve more storage space, more library facilities, more supervision, more employees to screen mail, and less time available for revenue-producing labor. Thus, the test of whether a deprivation is “necessary” cannot be formulated solely in terms of whether abolishing the deprivation in question will result in reallocating resources.

Rather, in attempting to implement what was earlier referred to as the counter principle to the hands-off doctrine—that a prisoner retains all rights except those taken away from him either explicitly or by necessary implication of law—courts will have to consider whether a contested deprivation is so clearly the product of structural characteristics of the prison system as to appear necessary. The courts in attempting to decide how deeply a given depriva-
tion is rooted in structural aspects of prison society will want to consider not only how major a reallocation of resources would be necessary to remove the deprivation but also the extent to which that deprivation emanates from widely held cultural attitudes and from traditional arrangements which are deeply entrenched in certain modes of prison administration. Thus, a deprivation should be deemed to be imposed "by necessaryimplication of law," where its elimination will impose drastically greater expense on the system or will require a total reorganization of the system even if no greater resources are required. In making this inquiry, prison regulations, practices, avowed principles, and comparisons among institutions within the particular penal system under scrutiny may be useful to the court. Thus, for instance, deprivations resulting from common disciplinary and security oriented regulations, such as restrictions on visiting rights, possession of contraband, and limitations on freedom of movement would seem most clearly systemic.

To be sure, the difference between systemic deprivations which are deemed inevitable, customary, and irremediable and those deprivations which are either avoidable or compensable is by no means a clear cut one. Systemic considerations are likely to be present in all deprivations occurring within prisons. Thus, even in deprivations of religious freedom which courts seem most prone to treat as non-systemic and impermissible, systemic factors based on prison discipline, on the lack of facilities for religious worship, and on the likelihood that dissemination of religious doctrines will lead to disturbance, may and have arisen.  

The following discussion will attempt to indicate the kinds of allegations which the courts are likely to confront should they decide to review prisoners' claims on the merits. The quantity and variety of claims likely to be presented are, if past petitions are any indication, myriad in number for, as our penal system is presently constituted, incarceration entails regulation of the most minute phases of each inmate's life. With regulation go all pervasive deprivations, many of which have been and will be challenged in legal proceedings. The hands-off doctrine has, by and large, prevented any adjudication on the merits or any findings of fact as to the prisoner's assertions. Hence, the following case law profile of prisoner deprivations is principally a summary of the unproven allegations contained in the petitions of inmates. Chief among these are allegations involving 1) deprivations of freedom of movement; 2) of freedom of expression; 3) of religious freedom; 4) of sexual relations; 5) of security of the person; 6) of property, goods, and services; and 7) of effective

shift to prison officials, first, because it will not be difficult for the prisoner to concoct some reasonably plausible alternative arrangement which would have realized the same penal objectives but would not have resulted in the complained of deprivation, and second, under a familiar evidentiary principle, prison officials, having special expertise and being in sole control of the facts necessary to determine the issue, should be forced to come forward as only they are in a position to explain the relative necessity (or lack of it) for the depriving regulation. Cf. Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944).

122. See, e.g., McBride v. McCorkle, 44 N.J. Super. 468, 130 A.2d 881 (1957) ; see also discussion of deprivation of religious freedom at text accompanying notes 159-81 infra.
remedial safeguards. Within each of these categories of alleged deprivations the courts will have to sort out structural from non-structural deprivations.

Deciding which class the alleged deprivation falls in—structural or non-structural—will have to be done on a case by case basis with the result hinging on the particular facts. The courts will not be able to rule out a priori certain kinds of deprivations as exempt by nature from judicial scrutiny. For even though it is clear that in some of the aforementioned categories the bulk of situations will be plainly structural, there is always the possibility of extreme or wholly arbitrary deprivations which would make judicial relief appropriate.

In sorting out systemic or structural deprivations, certain situations requiring a prospective remedy can be handled by the courts in a way which may obviate the necessity of determining whether a given deprivation is justified by the needs of the prison system. For a court may order the appropriate official to issue regulations governing the case before it. Thus, where regulations already exist, or can be promulgated to govern a situation, the court may, as it has done in other situations, simply hold the prison officials to observance of their own regulations\textsuperscript{123}. In such a case it may be said that the regulations of the institution constitute an admission that the deprivation is not systemic in the sense of being a necessary result of the organization of the penal institution. Nonetheless, there will be instances where no such mechanical way of distinguishing between structural and non-structural exists and the courts will have to pass on the reasonableness of a regulation or the reasonableness of an official’s actions in a situation not governed by any regulation.

The kinds of situations likely to face the courts and the considerations which may persuade them to permit or proscribe a given deprivation will be dealt with under the above-mentioned categories of deprivations. The discussion of each of the categories will summarize those deprivations which have been alleged in reported cases. Because of the hands-off doctrine, there has been no need to decide whether these allegations involved structural or non-structural deprivations. But within each category there will be an attempt—admittedly tentative and highly speculative—to indicate how the courts may or should draw lines between systemic and non-systemic situations.

\textit{Deprivation of Freedom of Movement.} If a judgment can be drawn from the bare allegations found in reported cases, deprivation of freedom of movement is not completed when the inmate’s world becomes circumscribed by the guard walls of the prison.\textsuperscript{124} Physical movement may be still further restricted to a segregation wing for alleged misconduct and can be continued for years despite good behavior on the inmate’s part.\textsuperscript{125} There appears to be no limit on the potential restriction of physical movement, as illustrated by the case of the famed “Bird Man of Alcatraz” whose confinement in an isolation cell for life was ac-


\textsuperscript{124} Nor does it end when he issues forth from those confines as a parolee. See von Hentig, Degrees of Parole Violation and Graded Remedial Measures, 33 J. Crim. L., C. & P.S. 363 (1943).

\textsuperscript{125} McBride v. McCorkle, supra note 122.
cepted by the courts as within the range of administration discretion.\textsuperscript{126} Even in instances where restraints upon movement appear to have been prompted by consideration of an inmate's race or religion, the courts have not seen fit to intervene.\textsuperscript{127}

If there is any category of deprivation which most clearly appears to be structural, it is that of deprivation of freedom of movement which invariably accompanies conviction and sentence to a penal institution. Yet, even in this category, there may arise cases which will prompt courts to treat some deprivations as not justified by systemic considerations. The clearest of such cases where a court will not hesitate to grant relief is where a prisoner alleges that he has been improperly convicted and therefore is being detained illegally.\textsuperscript{128} Similarly, where detention persists beyond the period of sentence less deductions for good time earned, the courts feel no compunction about requiring release.\textsuperscript{129} The more difficult problem arises under this class of deprivations in situations where a prisoner is sent to isolation for no apparently justifiable reason \textsuperscript{130} or is disciplined for a questionable or illegitimate reason.\textsuperscript{131} Courts have, nevertheless, intervened in these situations, as, for in-

\begin{enumerate}
\item Stroud v. Johnston, 139 F.2d 171 (9th Cir. 1943).
\item United States \textit{ex rel.} Morris v. Radio Station WENR, 209 F.2d 105 (7th Cir. 1953); Nichols v. McGee, 169 F. Supp. 721 (N.D. Cal. 1959); \textit{In re} Ferguson, 55 Cal. 2d 663, 361 P.2d 417 (1961), \textit{cert. denied}, 368 U.S. 864 (1961). The onslaught of cases involving Black Muslims now reaching the courts may change this situation radically. See text accompanying notes \textsuperscript{162-81 infra}. The appeal to Negroes in prison of a militant religion preaching hatred of whites and the superiority of Negroes is likely to turn the issue of racial discrimination into one of religious discrimination where the courts have shown greater willingness to intervene. In Fulwood \textit{v. Clemmer}, 206 F. Supp. 370 (D.D.C. 1962), the court notes indirectly the potential of the Black Muslims religion as a means of giving the Negro the additional leverage of the first amendment.
\begin{enumerate}
\item Prison authorities have acknowledged that petitioner seems very devoted to his faith, and that it "is in some way related to increasing his status as a negro * * *" To him the main attraction of the Muslim faith is that it gave him something to associate himself with, something to uplift him from the degradation to which he had fallen. \textit{Id.} at 372. It is a matter of no small irony that the general rights of the prison population are likely to undergo radical improvement through the agitation of the Black Muslims. For this reason the historian may view recent developments in the realm of prisoners' rights as an illustration of the statement that "it is the evolving status of the Negro that has furnished the main theme for America's saga of equality." \textit{CAHN, THE PREDICAMENT OF DEMOCRATIC MAN} 125 (1961). And we may observe the phenomenon which that author has noted: "[I]n American experience what begins as a special privilege often becomes first a general privilege, then a general social right, and ultimately an individual legal right." \textit{Id.} at 124.
\item This is, of course, the traditional function of habeas corpus.
\item See, \textit{e.g.}, Application of Hughes, 372 P.2d 885 (Okla. Crim. App. 1962).
\item Sewell \textit{v. Pegelow}, 291 F.2d 196 (4th Cir. 1961) (isolation solely because of the religious faith of the petitioner).
\item \textit{In re} Riddle, 22 Cal. Rptr. 472, 372 P.2d 304 (1962) (prisoner disciplined for making "false" statements criticizing prison officials in his habeas corpus petition before court has passed on truth or falsity of those statements). \textit{Cf. In re Maddox}, 351 Mich. 358, 88 N.W.2d 470 (1959) (petitioner civilly committed to treatment center under sexual psychopath statute transferred to penitentiary in order "to make obdurate criminal sexual
stance, in *Fulwood v. Clemmer*,\textsuperscript{132} where the prisoner was removed from the general prison population and was detained in various forms of solitary confinement for a period of two years for having made inflammatory racist remarks to a group of fellow Black Muslims assembled within the hearing of other prisoners. One consequence of intervention in these situations is that a court may require that some form of hearing be provided for the inmate prior to imposition of such deprivations.\textsuperscript{133} Further, courts may on occasion be forced to inquire whether a prisoner actually committed the offense for which he is allegedly being disciplined,\textsuperscript{134} although the necessity for such an inquiry will be obviated where there has been a fact finding hearing at the prison level and there is therefore a record for a court to review. Once the fact issue is resolved by a finding that the offense actually was committed by the petitioner, a court must still decide whether the offense warrants that particular further deprivation of freedom of movement challenged by the inmate.

The principle which may come to govern in such cases is one stated in a concurrence by Mr. Justice Douglas in *Robinson v. California*:\textsuperscript{135} that the imposition of a deprivation bearing no reasonable relation to the offense constitutes both a denial of due process and a cruel and unusual punishment within the ambit of the eighth amendment.\textsuperscript{136} This principle, though enunciated in a case striking down a law making narcotic addiction a crime, was cited by the court in *Fulwood v. Clemmer*\textsuperscript{137} as the basis for requiring prison authori-

\textsuperscript{133} See text accompanying notes 109-11 supra.
\textsuperscript{134} See discussion of the problems involved in resolving disputed factual claims at text accompanying notes 116-17 supra and 258-61 infra. The clearest instance where such an inquiry is necessary is where the prisoner has been punished for making false accusations in his petition to the courts:

\ldots if, when a prisoner, as he must, submits his proposed petition to the prison officials for their perusal, and the petition charges the officials with misconduct, the prison officials can summarily decide that his charges are false and punish him for making them, there is a form of coercion that will very effectively prevent access to the courts. One of the very issues presented by that petition was whether such charges were true or false. Certainly, there is nothing wrong with a prison regulation prohibiting the making of false charges, but the prisoner should be allowed full access to the courts, and where the charges are contained in a court document the officials should await the determination of the courts. For this reason it was improper to make these charges and impose punishment before this court had acted.

\textsuperscript{135} 82 Sup. Ct. 1417 (1962).
\textsuperscript{136} Id. at 1425. The use of the cruel and unusual punishment clause is criticized in Comment, *Black Muslims in Prison, Of Constitutional Rights and Muslim Rites*, 62 Colum. L. Rev. 1488, 1494 n.27 (1962). The principle does not, as there suggested, rest wholly on the eighth amendment when applied to the prison context. It may equally well, if not more readily, be viewed as a denial of substantive due process.

\textsuperscript{137} "A punishment out of proportion to the violation may bring it within the bar against unreasonable punishments." 206 F. Supp. 370, 379 (D.D.C. 1962). See text accompanying note 132 supra.
ties to cease from imposing a deprivation which exceeded the limits warranted by the gravity of the offense.

While deference to the discretionary actions of prison authorities is clearly necessary in the realm of discipline, the application of a rule requiring that the punishment be roughly commensurate with the seriousness of the offense may serve as an important check on prison abuses, and may come to be adopted, as it has been at Sing Sing,[138] as a principle guiding prison discipline. Such a rule is, to be sure, at odds with an important school of thought that one should fit the punishment to the criminal rather than to the crime. Nonetheless, it seems doubtful that courts will compel prison officials to devise post-conviction disciplinary sanctions according to the same principles which are applied in determining sentence upon conviction.[130] But such considerations as the prior prison misconduct of the inmate, the degree of dangerousness manifested by the act, and the extent of need for corrective or disciplinary treatment manifested are likely to enter a court's deliberations in determining whether an extreme deprivation of liberty is capricious or reasonable.[140]

Deprivation of Freedom of Expression. Forms of expression traditionally protected by the first amendment are subject to severe and even total curtailment in prison. Severe infringements on freedom of speech[141] and association[142] in prison have been upheld by the courts or ignored by them under the rubric of the hands-off doctrine. Notwithstanding the amnesty granted in particular instances after prison riots,[143] it is clear that the right to assemble and to petition for a redress of grievances[144] is not permitted in prison. The bulk of situations involving deprivation of expression which have come before the courts involve the inmate's alleged right to communicate freely with the outside world. It is customary to allow the inmate to write and to receive com-

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139. Such considerations include remorsefulness, extent of harm to victims, treatability, availability of treatment, and educational and criminal record. DONNELLY ET AL. 44-47.
140. The considerations appear to have played a part in Fulwood v. Clemmer, 205 F. Supp. 370 (D.D.C. 1962), and doubtless were of importance in State v. Carpenter, 231 N.C. 229, 56 S.E.2d 713 (1949).
141. The list of offenses for which prisoners may be punished in the Idaho State Prison includes: communication by signs, laughing and fooling, loud reading in cell, profanity, staring at visitors, talking in chapel, talking in dining room, talking at work, talking from cell to cell, talking in corridor. BARNES & TEETERS, NEW HORIZONS IN CRIMINOLOGY 605 (rev. ed. 1950). See also State v. Carpenter, supra note 140.
142. Although the opinions stated are those of a number of convicts, the letter is signed by only one, for there is a prison rule against group expressions or petitions of any sort.
A Letter from Martin [a prisoner writing to the prison authorities], DONNELLY ET AL. 211.
144. See note 142 supra; see also GOFFMAN, ASYLUMS 96-97 (1961) for an interesting interpretation of the "ceremonial function" filled by prison newspapers and even legal petitions.
Communications only from those persons on his approved mailing list. Furthermore, all communications, both sent and received, are subject to censorship and confiscation by the prison authorities. The broad principles of censorship and restricted mailing lists have been approved by the courts as a non-reviewable exercise of the discretion entrusted to prison authorities. And particular attempts to test the peripheries of these rules have uniformly resulted in upholding the actions of prison officials. Thus courts have deemed beyond the scope of their review a ruling which allowed an inmate to receive only those letters from his children which were written in their handwriting and not letters from them penned by their mother. The hands-off doctrine has also been used to sanction a warden's decision to exclude an alleged common law wife from the authorized mailing list on grounds that the relationship had no "constructive elements." Mail to the courts theoretically can not be treated in the same manner, but it can be delayed for a reasonable period of time. In another case involving the Bird Man, the court refused to review the contention that the warden's prohibition of correspondence in furtherance of the prisoner's business enterprise deprived him of his constitutional rights. And one of the leading cases on prison censorship, Numer v. Miller, sustained the confiscation of the first lesson sheet in a correspondence course in English, had written in his answer (which constituted the first assignment) that he wished ultimately to write a book exposing prison brutality. Cf. To the Rev. William Mason, Oct. 25, 1775, The Letters of Horace Walpole 469 (W. Hadley, ed. 1926) (Everyman's Library):
correspondence course which the inmate had been encouraged to take by prison authorities, on the usual grounds that this was a matter of prison management not subject to review by the court.

An examination of the Bureau of Prisons regulation on inmate correspondence may illustrate the kind of analysis in which courts may engage if the hands-off doctrine is abandoned. The regulation provides that correspondence may be permitted whenever it does not appear that rehabilitation will adversely be affected or that it will be detrimental to the well-being of the inmate or his correspondent.

However, correspondence on business matters is expressly prohibited except such as is necessary to enable the inmate to protect and husband the property and funds that were legitimately his at the time he entered the institution.154

Abandonment of the hands-off doctrine and implementation of its counterprinciple through the distinction between structural and non-structural deprivations is likely to bring no invalidation of any part of the regulation on the merits for severe restrictions on persons to whom one may correspond seem rooted in structural considerations. Permitting inmates to correspond without limitations would produce a volume of mail beyond the capacity of present prison staffs to censor, to screen for escape plans, and to search for contraband.155

The final portion of the regulation, that which prohibits business correspondence, most clearly approaches the arbitrary to the extent that it is in potential conflict with the first proposition that all correspondence which will not adversely affect rehabilitation should be permitted.156 One possible explanation for the no business correspondence section is that prison is not supposed to be an occasion to exploit one’s entrepreneurial skills. One can understand this rationale as applied to gamblers, racketeers, or drug peddlers who should be prevented from continuing their illegal activities while in prison. However, under a correctional philosophy, imprisonment is intended to be

Monsieur de Malesherbes, in the most simple and unaffected manner, gave me an account of his visitation of the Bastile, whence he released the prisoners, half of whom were mad with their misfortunes, and many of whom he could not find even the causes of their commitment. . . . This excellent magistrate, who made my tears run down my cheeks, added that what the prisoners complained of most was the want of pen and ink. He ordered it. The demons remonstrated and said that the prisoners would only make use of the pen to write memorials against the Ministers; he replied “Tant mieux.”

154. The text of this regulation is reprinted in the Circuit Court’s opinion in Stroud v. Swope, 187 F.2d 850, 851 n.1 (9th Cir. 1951).
156. The standards contained in the first portion saying that mail will not be permitted that will adversely affect the rehabilitation of the prisoner or the welfare of the recipient seem so vague as to provide almost no guide at all. And the paternalism involved in prohibiting letters where it is thought that the welfare of the recipient will be adversely affected seems unjustifiable to the extent that such protection would not be afforded the recipient from “detrimental correspondence” by other persons or by the same prisoner upon release.
"profitable" in the fullest sense of that word. To the extent that a legitimate business may enable the inmate to become less embittered or may permit him to ease the hardship of his imprisonment on his wife or children, such a prohibition appears clearly retributive in function.

In spite of this, it seems safe to predict that even if the hands-off doctrine is abandoned, the courts will not immediately invalidate the no business correspondence section of this regulation. For this regulation is rooted in what Sykes has termed "structural defects in the prison's system of power rather than individual inadequacies." These defects include:

- The lack of a sense of duty among those who are held captive, the obvious fallacies of coercion, the pathetic collection of rewards and punishments to induce compliance, the strong pressures toward the corruption of the guard in the form of friendship, reciprocity, and the transfer of duties into the hands of trusted inmates...

Given these structural defects, this regulation which bars business correspondence is an attempt to prevent an inmate from using his outside resources to gain individual leverage in a system all too prone to corruption. Viewed in terms of the structure of the prison society, this regulation must be considered as one more rehabilitation-defeating compromise forced on the system by limited resources and internally conflicting objectives.

**Deprivation of Religious Freedom.** At least four cases indicate that freedom of religion as normally known may permissibly be subjected to extensive curtailment by prison authorities. In one of them, *Kelly v. Dowd*, the court utilized the hands-off doctrine to deny relief to a claim of religious persecution where the prisoner had been prevented from securing Bible study helps circulated by the Watch Tower Society. The same reasoning was employed in *Wright v. Wilkins* where the prisoner complained of being denied permission to take an

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157. Courts may eventually take a dimmer view of the business correspondence prohibition though the general necessity of limiting the volume of mail will persist. To the extent that it is feared that such correspondence will lead to the acquisition of power within the prison society, that danger can be averted by simply prohibiting the enjoyment of such wealth. If it be argued that such a prohibition would be ineffective, then it should be observed that the business correspondence regulation is in effect only a prohibition on the acquisition and conservation of wealth by the poor since the rich can, under this argument, corrupt the system at will. At present, the business correspondence regulation gives no consideration at all to prisoners' interests while placing far too high a weight on assumptions about penal administration which seem questionable. To the extent that the real problem is one of sheer volume, a numerical limitation on the amount of correspondence would provide a solution which would allow the prisoner to choose for himself within limits how best to further his interests and concerns.

158. SYXES 61. (All italicized in original.)


160. 140 F.2d 81 (7th Cir. 1944).

Arabic grammar, allegedly needed for the prisoner’s religious education, into the recreation yard. In the other two cases, McBride v. McCorkle and In re Ferguson, the court, while denying relief, appears to have departed from the non-intervention doctrine in its strict form and to have held on the merits that the deprivations alleged were permissible exercises of administration discretion. And in five recent cases involving Black Muslims, the courts have stated that a complaint alleging infringement of religious rights presents a claim which the courts will review on the merits. Thus it would appear that the application of the hands-off doctrine to religious deprivations is highly uncertain and probably now stands as the minority position.

For this reason, the cases involving claims of religious prosecution serve to illustrate the way the courts may attempt to sort out structural from non-structural deprivations. Allegations involving denials of religious freedom would seem to provide the clearest example of a non-structural deprivation. But here again it should be reiterated that no category of deprivations can be approached as a priori structural or non-structural. Just as deprivation of freedom of movement involved the possibility of “non-structural” deprivation, so the entire gamut can—and has—been run in cases involving alleged denials of religious freedom.

One of the earlier religion cases, McBride v. McCorkle, provides an instance of infringement on religious freedom which was deemed by a court to be structural. In McBride, the prisoner claimed that he had been denied opportunity to receive communion at chapel services for over two years. The court in denying relief pointed out that the prisoner was prohibited from attending chapel services because he was in the segregation wing where no chapel was available and that it would be detrimental to prison discipline to allow the plaintiff to mingle with the general prison population. Moreover the petitioners plight was shared by thirty others and he had refused any alternative religious ministration. The court also noted that a chapel in the segregation wing was nearing completion, which graphically illustrates the point that structural deprivations can frequently be eliminated. Nonetheless, it can be assumed that the court would not have imposed on the prison system the duty of building an additional chapel in the segregation wing. However, had no substitute, such as individual communion, been available to the inmate the court might well have taken a different view.

Various kinds of religious deprivations have been presented in a series of cases involving allegations by Black Muslims of interference with their exercise of religious freedom. In a flurry of recent cases, the courts have had to

165. See note 162 supra.
166. See cases cited at note 164 supra; In re Ferguson, supra note 163.
deal with complaints alleging interference with religious freedom, discriminatory treatment, and punishment inflicted as the result of attempts to practice their religious faith. The courts' response to these complaints makes clear that the way in which the claimant seeks to exercise that freedom will affect whether denial of a particular mode of religious expression is deemed a structural or non-structural deprivation. In cases where Black Muslims have been singled out for differential treatment merely because of their faith, the courts have held that allegations of such discriminatory treatment stated a claim for which relief could be granted.\textsuperscript{167} Review of denials of religious freedom becomes more complex when the exercise of religious belief involves action. For systemic factors are clearly involved when the prisoner claims the right to hold prayer meetings;\textsuperscript{168} to communicate with counsel concerning infringement of religious liberties;\textsuperscript{169} to wear religious medals;\textsuperscript{170} to communicate freely with religious leaders and receive religious publications;\textsuperscript{171} to preach race hatred based upon a religious belief in Negro supremacy;\textsuperscript{172} and to resist the authority of white prison guards because of religiously formed racial beliefs.\textsuperscript{173}

Only one court has taken the position that Black Muslim prayer meetings may legitimately be prohibited:

in light of the potentially serious dangers to the established prison society presented by the Muslim beliefs and actions, it cannot be said that the present, suppressive approach by the Director of Corrections is an abuse of his discretionary power to manage our prison system.\textsuperscript{174}

Other courts have held that total religious suppression, prohibition of prayer meetings, or continual discriminatory treatment of this sect constitutes a denial of the constitutional guarantee contained in the first amendment.\textsuperscript{175} Their response to other allegations by Black Muslims of infringements on religious liberty has varied depending on the particular deprivation alleged and the particular relief requested.

In \textit{In the Matter of Brown v. McGinnis},\textsuperscript{176} where petitioner alleged that prison authorities would not permit the holding of religious services for Black Muslims, the New York Court of Appeals ordered the Commissioner of Prisons to promulgate such regulations as would secure those rights guaranteed by the Constitution in a manner consistent with considerations of prison ad-

\textsuperscript{167} Pierce v. LaVallee, \textit{supra} note 164; Sewell v. Pegelow, \textit{supra} note 164; Fulwood v. Clemmer, \textit{supra} note 164; \textit{In the Matter of Brown v. McGinnis}, \textit{supra} note 164.

\textsuperscript{168} See Pierce v. LaVallee, \textit{supra} note 164; \textit{In re Ferguson}, \textit{supra} note 163.

\textsuperscript{169} See Fulwood v. Clemmer, \textit{supra} note 164; \textit{In re Ferguson}, \textit{supra} note 163.

\textsuperscript{170} Fulwood v. Clemmer, \textit{supra} note 164.

\textsuperscript{171} \textit{Ibid.}, \textit{In the Matter of Brown v. McGinnis}, \textit{supra} note 164.

\textsuperscript{172} Fulwood v. Clemmer, \textit{supra} note 164; \textit{In re Ferguson}, \textit{supra} note 163.

\textsuperscript{173} \textit{In re Ferguson}, \textit{supra} note 163.

\textsuperscript{174} \textit{In re Ferguson}, 55 Cal. 2d at 673, 361 P.2d at 422. There is an indication of a retreat from this position in \textit{In re Jones}, \textit{supra} note 164.

\textsuperscript{175} See cases cited at note 164 \textit{supra}.

ministration and discipline. While this will not necessarily relieve the court of the ultimate responsibility of judging the reasonableness of the regulations promulgated, it will permit those persons most familiar with the particular institution to devise the most satisfactory accommodation of conflicting interests.

In *Pierce v. La Vallee* 177 and *Sewell v. Pegelow*, 178 two federal courts held that a petition alleging discriminatory treatment because of religion stated a cause of action entitling the Black Muslim plaintiffs to relief under the Federal Civil Rights Act. Segregation and discrimination merely because of belief cannot be justified by systemic considerations.

In the latest such case, *Fulwood v. Clemmer*, 179 the court dealt with a series of demands which demonstrates the range and variety of situations that may arise in the religious context. Relief was denied for two of the deprivations alleged because these were felt to derive from systemic considerations. Thus, the court approved a decision by prison officials to discipline the petitioner for inflammatory racial remarks made at a prayer meeting on a baseball field where many non-Muslims were within hearing range. Significantly it drew upon a non-prison case 180 involving the application of the first amendment to “fighting words” in ascertaining the first amendment rights of inmates. Similarly the court held that the refusal by prison officials to permit the plaintiff to correspond with the leader of his religious sect or to receive a newspaper containing a column by that leader was a proper exercise of administrative discretion. For reasons that have already been explored, deprivations resulting from the restrictions upon prisoner mail will tend to be treated as structural by the courts.

Three other deprivations were held to be impermissible. The first such deprivation has already been dealt with in the context of freedom of movement. The court held that even when an offense had been committed—that of proclaiming religiously derived racist doctrines in an inflammatory setting—the extended penalty imposed was too severe for reasons which shed light on where courts will draw the line in the religious context between systemic and non-systemic deprivations. First, the court may have felt that while the inflammatory words were not protected by the first amendment, the sanction imposed may have been too severe not only because it kept the petitioner in isolation apart from the general prison population, but also because it deprived the plaintiff, one of the Black Muslim leaders, of all opportunity to participate in prayer meetings or mingle with his co-religionists. Second, the sanction was excessive because it was not only imposed as punishment for the offense but for the additional improper “purpose of suppressing . . . the Muslim religion in the prison.” 181 The other two deprivations are particularly significant because the court, in condemning them, demonstrated the manner in which courts

177. 293 F.2d 233 (2d Cir. 1961).
178. 291 F.2d 196 (4th Cir. 1961).
181. 206 F. Supp. at 379.
will be able to utilize existing regulations and practices in deciding whether a particular deprivation is a necessary concomitant of imprisonment. The court condemned the denial of chapel facilities to Black Muslims on two separate grounds. Its principal ground was that such denial constituted a violation of a regulation of the Commissioners of the District of Columbia requiring public facilities to be made available to all persons without regard to race or religion. The second ground, while related, is somewhat different: the state not only allowed but encouraged and supported the holding of religious services in prison for other denominations. Thus, unlike the *McBride v. McCorkle* situation, the court believed that doing away with a discriminatory practice would not involve a major reallocation of resources to, or reorganization of, a system which had adequate facilities for holding services and which permitted and supported such services. Similarly, the court used this dual basis for holding illegal the confiscation and prohibition of Muslim religious medals. First, it held such discrimination violative of the Commissioner’s order prohibiting all discrimination on the basis of race or religion. But second, it seems to have been influenced by the extent to which prison practice sanctioned and indeed supplied such medals. Conceivably, all religious medallions could be barred on structural grounds (i.e., they could be turned into dangerous implements) but the court refused to allow the confiscation of one denomination’s medals on the grounds they were “symbolic of the Muslim doctrine of hate and tend to create in the prison community race tension and disruptive influences.” To the extent that identification with a minority religious group has throughout history been the source of persecution, the court (in the light of its decision that the Black Muslim faith was a bona fide religion) could not very well tolerate a prohibition against wearing religious identification on the grounds that mere identification incited hatred or tension.

**Deprivation of Sexual Relations.** Although the effects of sexual deprivation on individual prisoners and on the structure of the inmate society have been widely noted, apparently no prisoner has attempted to contest this particular
deprivation. Homosexual activity is grounds for disciplinary action within prison. No defense based on necessity, duress, self-defense, or provocation has yet reached the court in the form of a challenge to such disciplinary action. However, one wife has attempted, albeit unsuccessfully, to secure conjugal visits through court order. The deprivation of heterosexual relations is more extensive than mere confinement in an all male society for a period of certain duration. In many states, incarceration of the spouse constitutes grounds for divorce, thus making present deprivation more intense because the resumption of conjugal relations is ever in jeopardy. It seems relatively clear, if only from the absence of cases under the hands-off doctrine contesting these deprivations, that sexual deprivation is assumed by inmates and custodians alike to be a necessary concomitant of prison life. It also seems clear that courts will treat such deprivations as systemic. Experiments in other countries with family penal colonies, conjugal visiting in prison, and visits home by prisoners demonstrate that even this kind of deprivation is not one inherent in the structure of all penal institutions. In fact, such departures from what we deem to be a "necessary" deprivation illustrates the point that systemic deprivations may never be absolutely necessary but rather are likely to be, in large part, culturally determined. 

**Deprivation of Security of the Person.** Life in prison contains innumerable dangers against which the prisoner has been able to secure only partial and generally unsatisfactory protection. Injuries come from many sources: from

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It is only what is good in man
That wastes and withers there.


185. See Zemans & Cavan, supra note 182; SYKES 70.

186. If a prisoner can sue the government for injuries which were inflicted on him by other prisoners because of the negligence of a guard (and Muniz v. United States, 305 F.2d 285 (2d Cir. 1962), appears to make this possible), then a homosexual assault by one prisoner on another may, under certain circumstances, give rise to government liability. To the extent that the power structure of the inmate society as described by Sykes and others is built in part on a network of both consensual and forced homosexual relations, which are carried on with the tacit approval of the prison guards, the creation of liability for such assaults may lead to a radical restructuring of the inmate society. See authorities cited at note 182 supra.

187. SYKES 76-78; see also note 11 supra.
other prisoners,\textsuperscript{188} from guards,\textsuperscript{189} from disciplinary measures,\textsuperscript{190} from lack of adequate medical care,\textsuperscript{191} from defective machinery\textsuperscript{192} and from all the usual sources of injuries present in our everyday world.\textsuperscript{193} Injuries from all these sources have in varying degrees been held non-compensable under the hands-off doctrine.

Probably those injuries for which relief has been most difficult to obtain are disciplinary measures. Thus, solitary confinement with or without withdrawal of all privileges,\textsuperscript{194} "The Hole,"\textsuperscript{195} and bread and water for extended periods,\textsuperscript{196} have all been treated as non-reviewable exercises of the authority which Congress and state legislatures have vested in prison officials. Because of the absence of judicial review of such officials' actions, it is likely that a guard, wishing to take out a grudge against a prisoner, would not have to look far to find a pretext which would give his act the appearance of being a discretionary discharge of his official function.\textsuperscript{197} Further, the punishment actually inflicted may bear no relationship to the violation prompting it.

\textsuperscript{188} [T]here were approximately 1000 assaults (inmate on inmate) in federal prisons during 1961. 3 Bureau of Prisons (Dept. of Justice), Basic Data 49 (revised ed. Dec. 1961).


\textsuperscript{194} Mcelvine v. Brush, 142 U.S. 155 (1891); Williams v. Steele, 194 F.2d 32 (8th Cir. 1952).


\textsuperscript{196} State v. Doolittle, supra note 195.

\textsuperscript{197} See notes 189-90 supra.
viewable province of prison officials' discretion. To the extent that an individual has wrested a certain security from the inmate society in which he has won some degree of acceptance, any transfer means that the same perils must be encountered again. The prisoner can thus be subjected to increased dangers by a transfer from one cell block to another, from jail to a penitentiary, from a juvenile home to a prison, or from a penitentiary to an insane asylum.

Despite the application of the hands-off doctrine to these situations, deprivations of security of the person have generally been of greater concern to society and to the courts than many of the other deprivations which convicts endure. Thus, prison jailers have long been held liable for dereliction from duty where their negligence was sufficiently gross as to divest them of the discretionary immunity of officials. Prison authorities have generally been required to provide ordinary medical care for the sick and injured, although a few cases hold that failure to provide such care is discretionary and does not give rise to liability. And Congress and some states have established a form of workmen's compensation for injuries resulting from prison industry. To the extent that these evidence a concern for the physical well-being of prisoners, it is likely that courts will, upon abandonment of the hands-off doctrine, be particularly

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199. For a description of this process and its perils see Sykes 87-105; the gains derived from such an adjustment are summarized at id., 106-08.


203. See cases collected in Winston v. United States, 305 F.2d 253, 255 (2d Cir. 1962). However, regulations prohibiting the commencement of civil suits while in prison have seriously undermined the effectiveness of this remedy. Furthermore, even where the released prisoner is successful in obtaining a judgment, the potential earning power of one convicted of a crime is likely to limit sharply the size of an award. And given prison salaries, even small judgments are likely to be uncollectable.


prone to provide remedies for physical dangers or injuries to the person. To
be sure, the high incidence of inmate assaults may make physical insecurity
seem an inevitable concomitant of prison life. Nonetheless, it is likely that,
with the abandonment of the hands-off doctrine, the more extreme forms of
physical danger will increasingly be eliminated or alleviated. First, disciplinary
action involving excessive force, or punishment bearing no relation to the
offense will, as seen earlier, result in intervention by the courts. Particularly
where prison regulations prescribe general rules for discipline, it may be ex-
pected that courts will hold prison officials to these standards. And there
is at least one case where a court went still further and refused to condone
the punishment of handcuffing prisoners to the bars of their cells for extended
periods, although testimony clearly established that this mode of punishment
was specified in the regulations and was customarily inflicted for trivial of-
fenses in prison camps throughout the state.

Second, transfers to other institutions may call forth insistence by the courts
on a right to hearing, possibly to legal representation, and certainly, to noti-
fication to relatives. Most transfers, though, will probably continue to be
deemed matters of administrative discretion and only those involving a
sharp increase in deprivational level will be scrutinized by the court and some
formal showing of cause required for the transfer.

Third, and possibly most significant, abandonment of the hands-off doctrine
may result in major developments in the tort remedies available to prisoners.
At least two such developments have been presaged by the Second Circuit's
holdings in Winston v. United States and Muniz v. United States. First,
the waiver of sovereign immunity contained in the Federal Tort Claims Act
may be extended to prisoners. Until the Winston and Muniz cases, courts had
exempted prisoners from this waiver of immunity on grounds that Congress
could not have intended the Federal Tort Claims Act to apply in this realm,
even though prisons were not listed as one of the specific exceptions to the
waiver. Congressional intent on this issue is difficult to ascertain and has in part been inferred from the hands-off doctrine: Congress could not have

206. See WILKINSON, REPORT, PROTECTION AND CONTROL OF PRISONERS (1962) re-
207. See Gordon v. Garrison, 77 F. Supp. 477 (E.D. Ill. 1948); see also text accom-
panying notes 130-40 supra.
208. See cases cited at note 123 supra and accompanying text.
2d 44 (1961).
211. See note 198 supra.
212. 305 F.2d 253 (2d Cir. 1962), cert. granted, 31 U.S.L. Week 3183 (U.S. Dec. 4,
1962) (No. 464).
(No. 464).
214. A comprehensive list of prior cases was compiled by the dissent in Winston, supra
note 212, at 258.
215. See the learned, and most indecisive, debate on this subject carried on in the
majority's and dissent's opinions in Winston.
intended the courts to become involved in a realm where judicial supervision of and intervention in the administration of a prison would be extremely detrimental to discipline.216 If the courts abandon the hands-off doctrine, much of the basis for the argument from Congressional intent will go. And indeed, the Second Circuit, in holding that the Federal Torts Claims Act does apply to prisoners, explicitly rejected the hands-off doctrine217 and the argument based on detriment to discipline.218 Thus, it is likely that one of the consequences of abandonment of the hands-off doctrine is that waivers of sovereign immunity to tort action will now be construed as extending to prisons.

It is to be anticipated, once courts hold that the Federal Tort Claims Act extends to prisons, that most actions by prison officials will not be treated as coming under the exception contained in that act providing that “discretionary actions” cannot be the basis of tort suits against the government.219 The considerations which militated for the abrogation of sovereign immunity and the extension of the waiver to prisoners similarly indicate that the “discretionary” exception contained in the act should be construed narrowly. Thus, the rationales of risk spreading, deep pocket, enterprise liability and moral responsibility which have been advanced against sovereign immunity to tort suits similarly suggest that exceptions to that immunity should not be construed so broadly as effectively to nullify the waiver.220 The distinction between discretionary and non-discretionary (or ministerial) acts is not a very clear one and practically every action of a prison official could be termed discretionary in some degree:

It would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail.221

216. See the dissent’s discussion in Winston, supra note 212, at 276-82.
217. See portion of Muniz opinion reprinted at text accompanying note 54 supra.
218. The results on discipline could hardly be worse when the government is sued than when individual prison employees or officials are defendants. And since the latter class of suits, though possible for some time, seem to have brought neither a multiplicity of suits nor an impairment of prison discipline, the assertion that suits directly against the government would have these results is at best dubious. Winston v. United States, 305 F.2d 253 (2d Cir. 1962), cert. granted, 31 U.S.L. Week 3183 (U.S. Dec. 4, 1962) (No. 464).
  See also id. at 271-72 for a restatement of this point.
219. See note 43 supra for an indication of how the government will attempt to bring existing precedent to bear on this point. See also note 44 supra for a criticism of this attempt.
220. In construing the Federal Tort Claims Act the majority pointed out that it “had been instructed by the Supreme Court to give the Act a liberal construction consistent with the broad purpose underlying its enactment.” Winston v. United States, supra note 218, at 270. For a discussion of theories of risk distribution see Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 YALE L.J. 499 (1961); 2 HARPER & JAMES, THE LAW OF TORTS 759-64 (1956); CAHN, THE PREDICAMENT OF DEMOCRATIC MAN 45-73 (1961).
Since these categories are conclusory, it seems clear that other considerations will determine whether an act is classified as ministerial or discretionary. The smaller the sphere of official actions which are treated as discretionary for purposes of the Federal Torts Claims Act, the further this society will have gone within the tort context toward establishing a guarantee that the convicted criminal will not emerge from imprisonment in drastically worse condition than when he entered. And it hardly seems so radical to back that guarantee with the promise of a remedy in damages when mishaps occur. To the extent that our society espouses a rehabilitative principle, granting of such liability would also be consistent with the tenet that, under a correctional system, inmates should undergo the minimum possible deprivation necessary to their rehabilitation.\textsuperscript{222}

There is still another reason for construing the exception of "discretionary" narrowly so as to increase liability. This reason also suggests that the fault concept which is the basis of liability under the Federal Tort Claims Act may be too limited a one for such an institution as our penal system. But such reasoning, \textit{a fortiori}, is grounds for extending liability so far as the fault concept permits by construing narrowly the "discretionary" exception. This argument starts from the position that the prison is, in Goffman's term, a "total institution"\textsuperscript{223} and suggests that it may be most appropriate to view injuries occurring within the system as a species of industrial accident. Just as we have learned that a certain rate of injury is a necessary concomitant of industrial life and that it makes little sense to approach such injuries in terms of cause or negligence,\textsuperscript{224} so an attempt to pinpoint blame in the context of a total institution may be beside the point. And some form of strict enterprise liability may be more appropriate.

It is possible to argue, as the dissent did in \textit{Winston} and \textit{Muniz}, that a certain probability of injury necessarily attends imprisonment and that if this is to be remedied, it must be done by legislative action. The majority, however, took a contrary view. It decided to consider the Federal Tort Claims Act as a declaration by Congress that the entire cost of the risk of physical injury incurred in prison should not be borne by prisoners and that, at least where fault could be shown, the government rather than the individual prisoner should bear such costs. Having taken this position, they declined at this stage to treat the injury to the plaintiffs as resulting from discretionary actions.

The allegations in the \textit{Muniz} case indicate how narrowly the discretionary exemption to liability may be construed. Muniz alleged that he was injured by twelve prisoners who pursued him from one building, across an open space and into another penitentiary building. He further alleged that a guard, seeing this, locked him into this building with the twelve hostile inmates, rather than helping him or summoning aid and that the United States, because of the negligence

\begin{itemize}
\item \textsuperscript{222} See Professor George H. Dessioies Final Draft of the Code of Correction for Puerto Rico, 71 Yale L.J. 1054, 1117-18 (1962).
\item \textsuperscript{224} See Calabresi, \textit{supra} note 220; Harper & James, \textit{op. cit. supra} note 220.
\end{itemize}
COMPLAINTS OF CONVICTS

of this guard and because of its own failure to provide adequate supervision to assure the safety of inmates, should be liable for the injuries sustained. The sources of both the violence and the guard's actions may, however, be equally deep rooted. When twelve prisoners pursue, assault, injure, and blind a fellow prisoner, it is not inconceivable that the attack may relate either to the power structure of the inmate society or to the depth and range of hostilities to which prison situations are bound to give rise. When a guard declines to step in and prevent injury which is obviously imminent, numerous factors such as prison practices and regulations or the ratio of guards to prisoners may enter into such calculations as might be made at a moment of stress. However, even if the concept of fault may not seem automatically applicable or particularly relevant, doctrines of negligence and proximate cause have long been recognized as the vehicles for social policies concerning when and on whom liability should be imposed.

Deprivation of Property. Strictly speaking, the only property interests of which a prisoner is deprived are those interests which were enforceable prior to imprisonment and which he can no longer further protect because of commitment. While forfeiture of property by operation of law no longer attends conviction for a felony, it is evident that a going business or chose in action can perish from forced inaction as well as from confiscation. Courts have invoked the hands-off doctrine to uphold regulations which prevent a prisoner from engaging in the active management of his business. Although inmates have been permitted to protect certain property interests through duly appointed counsel against suits by creditors, wives, and other claimants, it is not clear that a prisoner in isolation has even this protection.

If the concept of property is broadened to include those goods and claims which can be acquired after imprisonment, the deprivation of property rights


226. The structural dimensions of this violence and the structural implications of creating liability for it were pointed out by the dissent, 305 F.2d 260 n.10. The dissent intimates that this injury was inflicted during an inmate riot of considerable dimensions. If, upon a trial of the facts, it appears that there was a riot, then the guard's actions would certainly seem more reasonable than if his disregarding of Muniz' plight and his locking of the doors occurred when there was substantial order in the rest of the prison. Muniz' complaint makes no mention of any riot and clearly this will be a contested issue of fact, if Muniz' right to sue under the Federal Tort Claims Act is sustained.


228. See, e.g., Pallas v. Misericordia Hospital, 291 N.Y. 692, 52 N.E.2d 590 (1943).

229. See, e.g., Stroud v. Swope, 187 F.2d 850 (9th Cir. 1951); Siegel v. Ragen, 180 F.2d 785 (7th Cir.), cert. den. 339 U.S. 990 (1950) (alleged confiscation of a typewriter).


231. See, e.g., Hatfield v. Bailleaux, 290 F.2d 632, 638 (9th Cir. 1961).
undergone by the inmate becomes far more extensive. The prisoner may be compelled to work but has no right to receive wages for that work. Wages which do accrue to him at prison-established rates can not be expended as he wishes even if the objects he wishes to purchase are not contraband. Those goods which he is allowed to purchase "with his own money" can be taken from him, and he can be either partially or totally denied their use. This is true not only of goods purchased but also of objects created by the prisoner "on his own time." Manuscripts and correspondence can be confiscated for the duration of a prisoner's term and the patenting of inventions prohibited. Administrative decisions imposing these and other deprivations of property have been deemed beyond the scope of judicial review.

Within this category of deprivations, it is particularly difficult to hazard a prediction on the effects of abandoning the hands-off doctrine. One thing, however, is relatively certain: prisoners will not be allowed to retain or enjoy unlimited (or even extensive) personal possessions while in prison. Whatever embitterment may result from deprivations of the innumerable personal luxuries which the general population enjoys, courts will show a marked deference to the decisions of prison officials restricting the amount and types of personal possessions enjoyed in prison. Many types of seemingly innocuous possessions in the hands of a determined and ingenious prisoner can become implements of assault and escape. Moreover, personal wealth held and enjoyed by an inmate will not only cause dissension among the prisoners but will provide a source of strength and authority within the inmate society and a means for corrupting the prison staff. Thus, approval by Judge Solomon in Bailleux v. Holmes of restrictions on the right of inmates to use private funds and on their right to keep law books in their cells is indicative of the attitude likely to prevail toward the retention and use of private property by inmates. Although the court in Bailleux v. Holmes was only concerned with one type of structural consideration—the disruption that would result from "prison lawyers" using their skills and law libraries to secure favors and goods from other prisoners—a recent Supreme Court decision, Lanza v. New York, indicates that none of the private property rights associated with life in the outside world are likely to have any relevance to prison life. Mr. Justice Stewart stated that the right of privacy can hardly obtain in prison, for

238. See text accompanying notes 157-58 supra.
By implication he approved a prison regulation reproduced in a footnote to the above statement which makes clear that prison security necessitates extreme restrictions on access to and possession of personal property:

Saws have been secreted in bananas, in the soles of shoes, under the peaks of caps, and drugs may be secreted in cap visors, under postage stamps on letters, in cigars and various other ways... Cells should be systematically searched for materials which would serve as a weapon or medium of self-destruction or escape. Razor blades are small and easily concealed.

Deprivation of Effective Remedial Safeguards. Even if we were to assume that all the foregoing deprivations would receive review on the merits, there would still remain another and perhaps most fundamental class of deprivations which impair or destroy a prisoner's ability to present an issue to the courts and press that issue to a successful conclusion. Foremost among such deprivations is the common prison policy sanctioned by courts under the hands-off doctrine that prohibits inmates from instituting civil proceedings. This policy clearly applies to actions involving the prisoner's affairs prior to conviction and to actions for damages against prison officials. It does not apply to habeas corpus petitions and probably does not apply to suits demanding injunctive relief for prison deprivations. This administrative counterpart of civil death statutes may work irremediable damage to the inmate's alleged cause of action. Even where the statute of limitations does not run, the passage of time increases problems of proof which are difficult for a convict to surmount even at the time a possible cause of action arises. The testimony of a convicted felon may be impeached as unreliable. If the witness is a fellow inmate still serving his sentence, the courts are reluctant to compel prison officials to permit him to testify in a civil proceeding. Fellow inmates, who are frequently the only witnesses, may be released or transferred, and therefore unobtainable. Even if their whereabouts can be ascertained, the passage of years will decrease the probative value of their testimony. Whether depositions will prove a satisfactory alternative will depend on the peculiarities of each case. If the case involves a tort action against a prison official, pressure by officials may have an effect upon the con-

241. Id. at 143.
242. Id. at 142 n.14.
243. See, e.g., Tabor v. Hardwick, 224 F.2d 526 (5th Cir. 1955).
tents of the depositions and the plaintiff will have no opportunity to elicit further information by direct examination.247

Prison policies pose numerous other obstacles to inmates attempting to present claims to the courts. Again courts have tended to permit these obstacles by treating them as matters of internal prison management not subject to review by the courts.248 The following is a partial list of the difficulties which beset an inmate in initiating a legal proceeding: a prison may possess very few law books;249 a prisoner may be permitted to use only a certain percentage of his funds to purchase law materials;250 a prison administrator may permissibly rule that legal materials can be obtained only from the publisher and not from relatives or friends,251 thus raising the cost prohibitively; a prisoner may not be allowed to keep for use in his cell those legal materials he has purchased;252 considerable delay in using the prison's law library may be encountered;253 a prisoner will normally not be permitted to obtain the help of another inmate in filling out a petition;254 restrictions on the selection of and communications with counsel may be imposed;255 prison officials may process court petitions and, while they do not have the right to pass on the validity of the complaint or delay its mailing unreasonably,256 there are indications that prison officials continue to screen out many petitions.257

Whereas it is fairly clear that abandonment of the hands-off doctrine will bring little change in present prison practices regarding deprivation of sexual relations and property, it is clear that courts proceeding without the hands-off doctrine will be prepared to impose far reaching demands on the prison system to remove the restrictions which impede or prevent a prisoner from contesting the legality of a deprivation.

247. See, e.g., the allegations of pressure by prison officials made in Siegel v. Ragen, 180 F.2d 785 (7th Cir.), cert. denied, 339 U.S. 990 (1950), and the demonstrated instances of such coercion in Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962); and In re Riddle, 22 Cal. Rptr. 472, 372 F.2d 304 (1962) (punishment for making false accusations in petitions to court before court had passed on such allegations).


250. Id. at 365.

251. Hatfield v. Bailleaux, 290 F.2d 632, 639 (9th Cir. 1961).


The first of such demands has already been made clear by two recent cases: courts will not permit prison officials to punish prisoners for making false statements in petitions to the court or other appropriate authorities until the merits of those petitions have been adjudged.\textsuperscript{258} Clearly the imposition of punishments for making statements which criticize prison authorities is hardly justified until the truth or falsity of those statements has been adjudged by someone other than the party criticized.

It remains to be seen whether, after this prohibition of punishment prior to adjudication becomes firmly entrenched in the law, the courts will hold that petitions containing reasonable (or at least fairly debatable) contentions cannot serve as a basis for punishment in prisons even if relief is denied by the courts on grounds that the alleged deprivation is a "structural," "necessary," or "reasonable one." It may be that any one with a colorable complaint should not be penalized for attempting to pursue it.\textsuperscript{259} A critical issue in prisoners' rights may thus come to be whether sanctions can be imposed for making allegations in petitions where the court denies relief. Where the allegation of mistreatment is clearly spurious, some form of sanction should be permitted to discourage both harassment and the resultant burdens placed upon the courts and prison officials.\textsuperscript{260} Where the petition states contested issues of fact and law where the resolution is by no means clear,\textsuperscript{261} these cases will take the greatest time. If no punishment is imposed for making such allegations when they are ultimately rejected by the court, the result will seem somewhat paradoxical: those complaints which can be decided on summary judgment or by a swift hearing will be most severely penalized though they work the least mischief—and those petitions which result in the greatest inconvenience, expense, and time will, even though unsuccessful, render the inmate immune to sanctions. Nonetheless, if prisoners are made to bear the risk of punishment as well as


\textsuperscript{259} The court's statement in In re Riddle quoted at note 134 \textit{supra} does not attempt to resolve the issue of what kind of allegation would be a false charge.

\textsuperscript{260} The court noted in In re Jones, 22 Cal. Rptr. 478, 372 P.2d 310 (1962), that the hearing "lasted nine days during which a transcript of over 800 pages was compiled." 22 Cal. Rptr. at 480, 372 P.2d at 312.

\textsuperscript{261} Such was the case in In re Riddle, \textit{supra} note 258. The following excerpt from the court's opinion presents the problem most vividly:

Petitioner makes much of the finding of the referee that "the \textit{amount} of force" used by correction officer Stanley in striking petitioner on the head with a baton "is questionable as being fully justifiable," and contends that that finding means that "Stanley used excessive force against him" ... The amount of force used cannot be measured by a micrometer, nor can it be considered separate and apart from the circumstances existing at the time ... The last blow had the desired effect. It is certainly too bad that Stanley hit him so hard. It is tragic that his skull was fractured. But Stanley, under the circumstance could not, reasonably, be expected to measure carefully the precise amount of force he should use.

22 Cal. Rptr. at 477-78, 372 P.2d at 309-10.

It would not seem altogether equitable to impose further deprivations for having protested this injury.
the risk of denial of relief for arguable claims, the result will be to undermine seriously the right of prisoners to obtain remedies for mistreatment. And it will impose on prisoners a duty of prescience which no lawyer would willingly accept.

The second development likely to take place is clearly presaged by Judge Solomon's opinion in Bailleaux v. Holmes. Prior cases had held that prisoner's access to legal materials was a matter within the peculiar competence and discretion of prison authorities because it had to be resolved in the larger contexts of use of free time and communication with the outside world. In rejecting those precedents, Judge Solomon analyzed the problem of availability of legal materials in the context of the "basic right" of access to the courts. The same subordination of administrative convenience to prisoner's rights which underlay the Black Muslim cases is evident in the following passage from Judge Solomon's opinion:

The Court appreciates the fact that prison authorities must maintain effective discipline, and must prevent unscrupulous prisoners from preying on the weak and ignorant. However, this end may not be achieved by stifling the study of law, where such study is necessary to the effective utilization of a basic right. This does not mean that the prison authorities are powerless to prevent the accumulation of massive legal libraries in the cells. Regulations can be designed to avoid the excessive storage of materials in cells without restricting the actual use of these materials in the cells when needed.

This decision was reversed in Hatfield v. Bailleaux, but the basis of the reversal appears to have been in the Court of Appeals' analysis of the facts. The appellate opinion was concerned primarily with demonstrating that the plaintiffs did, in fact, have adequate access to legal materials. The basic proposition in Judge Solomon's opinion—that the right of access to the court comprehends those preparatory steps necessary to utilize the right effectively—still stands.

Four other cases make clear that the basic "rights of preparation" may apply not only in instances where the legitimacy of the petitioner's confinement is contested but also in situations where one's treatment in prison is the basis of the petition:

264. 177 F. Supp. at 363.
265. 290 F.2d 632 (9th Cir. 1961).
266. Id. at 637-38. Between the time Judge Solomon issued his injunction and April 11, 1961, the date of the reversal, there appears to have been some liberalization in prison policies noted by the court in Hatfield v. Bailleaux, supra note 265, at 638-39.
It is manifest that the right of a prisoner to petition a court for redress of alleged illegal restraints on his liberty is unreasonably eroded if the prison authorities may be allowed to deny a prisoner the opportunity of procuring counsel so that his petition for writ of habeas corpus or other mode of redress always must be presented in propria persona. It must also be conceded that when a prisoner is writing to an attorney in an attempt to secure legal representation he must be allowed to set forth factual matters even though derogatory or critical of the prison authorities, since he must persuade the attorney receiving the letter that the writer's rights as a prisoner truly have been violated, so as to interest that attorney in the prisoner's alleged case against the prison authorities. Therefore, it is an abuse of discretion for prison regulations to be utilized so as to deny an inmate the opportunity to procure with reasonable promptness, or to communicate with in a reasonably prompt manner, a member of the Bar on matters relating to alleged violations of the prisoner's legal rights allegedly suffered as a direct result of incarceration, even though the letter to the attorney may be critical of the prison authorities. 268

Access to the courts is a right which clearly involves structural considerations. Yet it should be deemed "non-structural" on a rationale analogous to that involved in traditional habeas corpus proceedings. Just as it cannot be deemed a structural necessity for the prison system to prevent persons from testing the legality of their detention, so it should not be deemed necessary for the prison system to employ methods which prevent a prisoner from testing the legality of the imposition of other deprivations (albeit lesser ones). And given a system which permits free access to the courts for the former purpose, permitting challenges in the latter situation would not seem to work such radical changes in the structure. Those structural arrangements which stand in the way of an inquiry into the legality of official actions must yield to the basic need of society to inquire whether prison officials are discharging their functions properly. Unless the courts protect the channels of information which provide the basis of an informed judgment on the legality or illegality of a deprivation, it is useless for them to assert that they will or can decide such an issue on the merits.

Beyond protecting the basic rights of preparation to petition the courts and extending that right to petitions alleging mistreatment, it is difficult to predict what developments will occur in this category upon rejection of the hands-off doctrine. It is, for instance, unlikely that courts will overrule the administrative policy discussed in Tabor v. Hardwick 269 prohibiting convicts from commencing civil suits for damages while in prison. A convict probably gives up to a certain extent the freedom to be litigious. Nonetheless, in situations where administrative considerations result in the prohibition of tort suits against prison officials or the state, the courts may begin to contrive means whereby evidence available at the time of the event but unlikely to be unobtainable later can be preserved through depositions and photographs. Thus, one may see judicial innovations to alleviate those evidentiary problems which at present hamstring the prisoner's tort remedies.

268. In re Ferguson, supra note 267, 55 Cal. 2d at 677, 361 P.2d at 425.
269. 224 F.2d 526 (5th Cir. 1955).
Conclusion

Any discussion of standards is, of course, highly conjectural and premature. The first step, and that with which this Comment has been primarily concerned, is the rejection of the prevailing rule that "it is not the function of the courts to supervise the management of the prison system." If this doctrine is abandoned, then standards will obviously have to be worked out on a case by case, trial and error basis. The existing body of principles for review of administrative agencies will serve as a guide to the courts—and even if judicial intervention is, in some cases, ill considered, it may provide incentive for the creation of adequate mechanisms for administrative review which are now sorely lacking. Until the hands-off doctrine is abandoned, none of the existing remedies are likely to be effective. Barring a radical departure from the prevailing rule, prisoners will continue in much the same legal position as they were nearly half a century ago when Shaw penned this standing indictment of judicial abdication:

Judges spend their lives in consigning their fellow creatures to prison; and when some whisper reaches them that prisons are horribly cruel and destructive places, and that no creature fit to live should be sent there, they only remark calmly that prisons are not meant to be comfortable; which is no doubt the consideration that reconciled Pontius Pilate to the practice of crucifixion.270


The Journal expresses its appreciation to Mr. Ephraim London for bringing this passage to its attention.