Journal of Criminal Law and Criminology

Volume 63 | Issue 2 Article 3

1972

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Marvin Zalman

THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE
Vol. 63, No. 2

Printed in U.S.A.

PRISONERS' RIGHTS TO MEDICAL CARE

MARVIN ZALMAN*

INTRODUCTION

In the nineteenth century Western nations turned to imprisonent as the standard form of criminal punishment, replacing mutilation, corporal punishment, and banishment. Spurred by this reformist impulse, public opinion demanded that prisons meet some minimal levels of human necessity, if not human decency. At the end of the nineteenth and beginning of the twentieth centuries the scientific revolution reached the art of healing. As physicians became able to systematically heal the ills of the body, access to medical care joined the list of necessaries to be provided to prisoners. Moreover, improved medical care has arrived at a time marked by a fundamental shift in attitudes towards prisoners' rights. No longer are prisoners said to be slaves of the state and entitled only to the rights granted them by the basic humanity and whims of their jailors.[1] Instead, it is recognized today that the prisoner is confined for the protection of the public, and therefore "[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." [2]

This trend toward increased recognition of prisoners' rights, including the right to medical care, is reflected not only in the statutes[3] and tort law[4] of most states, but also in the recent erosion of the "hands-off" doctrine. In its tersest legal formulation, "the hands-off doctrine represents a denial of jurisdiction over the subject matter of petitions from prisoners alleging some form of mistreatment or contesting some deprivation undergone during imprisonment." [5] This lack of subject matter jurisdiction has no statutory basis but is instead a judge-made limitation. Underlying the doctrine is an assessment that the deprivations prisoners complain of are necessary conditions of imprisonment. A more important basis for the hands-off doctrine is a profound reluctance by the courts to interfere with prison administration. Part of this reluctance is the fear that judicial interference would create a flood of litigation and would destroy prison discipline.[6]

The validity of the grounds for the hands-off doctrine has been reconsidered and courts have retreated from their former tendency to apply the doctrine strictly. Although the reluctance of the

* B. A., 1963, Cornell U.; J. D., 1966, Brooklyn Law School; M. A., 1971, School of Criminal Justice, S.U.N.Y. Albany. Assistant Professor of Criminal Justice, Michigan State University.

[1] *See* Ruffin v. Commonwealth, 62 Va. 1024, 1026, 21 Gratt. 790, 796 (1871), in which the court expresses such an attitude toward the prisoner:

> [D]uring his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State.

[2] Spicer v. Williamson, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926). Because the duty of care was one owed by the public, the court found that a sheriff or other officer could not be held personally liable for failure to provide medical attention. *See also* People *ex rel.* Brown v. Johnston, 9 N.Y.2d 482, 485, 174 N.E.2d 725, 726, 215 N.Y.S.2d 44, 45-46 (1961) ("An individual, once validly convicted and placed under the jurisdiction of the Department of Correction (Correction Law, § 6), is not to be divested of all rights and unalterably abandoned and forgotten by the remainder of society."); and Brabson v. Wilkins, 19 N.Y.2d 433, 439, 227 N.E.2d 383, 386, 280 N.Y.S.2d 561, 565 (1967) (Keating, J. dissenting: "The right of an individual to seek relief from illegal treatment or to complain about unlawful conduct does not end when the doors of a prison close behind him. True it is that a person sentenced to a period of confinement in a penal institution is necessarily deprived of many personal liberties. Yet there are certain rights [including the right to communicate to officers of the court or governmental officials] so necessary and essential to prevent the abuse of power and illegal conduct that not even a prison sentence can annul them.")

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

[3] See notes 11–12 *infra* and accompanying text.

[4] *See generally* Sneidman, *Prisoners and Medical Treatment: Their Rights and Remedies*, 4 CRIM. L. BULL. 450 (1968) [hereinafter cited as Sneidman, *Prisoners*].

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

[6] F. REMINGTON, D. NEWMAN, E. KIMBALL, M. MELLI & H. GOLDSTEIN, CRIMINAL JUSTICE ADMINISTRATION: MATERIALS AND CASES 826–27 (1969) [hereinafter cited as REMINGTON]; *Beyond the Ken* at 506–09.

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

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

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

I. State Law Relating to Medical Care of Prisoners

A. Substantive Rights

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

[7] Remington at 826–51; The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 82–88 (1967) [hereinafter cited as Task Force: Corrections].

[8] *See, e.g.*, the concurring opinion of Justice Harlan in Bivens v. Six Unknown Agents, 403 U.S. 388, 410–11 (1971), dismissing the argument that, because of limits on judicial resources, causes of action against federal officers for violation of fourth amendment rights should not be recognized.

[9] *See* K. Davis, Administrative Law Text 509–10, 513–14 (3d ed. 1972), stating the modern view that unless judicial review is statutorily precluded, there is a presumption in favor of reviewability.

[10] *Id.* at 510.

[11] The relevant Michigan statutes, Mich. Comp. Laws (1948), recite:

§ 800.15 It shall be the duty of the physician of the prison:

First, To attend at all times to the wants of sick convicts whether in the hospital, or in their cells, and to bestow upon them all necessary medical service;

Second, In company with the hall master, to examine weekly the cells of the convicts, for the purpose of ascertaining whether they are kept in a proper state of cleanliness and ventilation, and if they are not so kept to point out to said hall master the deficiencies, and report the same monthly to the board of such prison;

Third, To prescribe the diet of sick convicts, and his directions in relation thereto shall be strictly followed; and to be present at and superintend all corporal punishments which may be inflicted in the prison;

Fourth, To keep a daily record of all admissions to the hospital, and of cases treated in the cells or elsewhere, indicating the sex, color, nativity, age, occupation, habits of life, crime, period of entrance and discharge from the hospital, and disease;

Fifth, To make a yearly report to the board of the prison of the sanitary condition of the prison during the year, which report shall also contain a condensed statement of the information contained in his daily record;

Sixth, To make all such other reports as the board or warden may from time to time require.

§ 800.16 It shall be the duty of such physician, in case of any convict claiming to be unable to labor by means of sickness, to examine such convict; and if it is his opinion upon such examination that such convict is unable to labor, he shall immediately certify the same to the warden, and such convict shall thereupon be relieved from labor and admitted to the hospital, or placed in his cell or elsewhere, for medical treatment, as said physician shall direct, having a due regard for the safekeeping of such convict; and such convict shall not

for example, describes in detail the duties of the prison physician, while in contrast the Texas statute[12] makes no direct reference to the health of prisoners. Absent a statute, states rely on correctional administrators and medical officers to supply the complex of goods and services which amounts to adequate medical care. The best legislative approach would require the state corrections department or public health service to adopt and publish administrative rules specifying in detail the care prisoners should receive.[13] In addition, an effective statute would provide an administrative procedure for enforcing those rules.[14]

When called upon to redress prisoners' allegations of inadequate medical treatment, the courts have overwhelmingly adopted the position that the jailor owes prisoners a duty of ordinary and reasonable care for their health.[15] This duty has sometimes been interpreted to mean prisoners must receive the kind of medical care that a reasonable person would secure for himself if he were free to do so. In *Piscano v. State*[16] a New York appellate court found that the refusal of prison doctors to administer cortisone to a prisoner suffering from a painful back injury was based solely upon the budgetary determination that two dollars per day was too much to spend for this treatment. The court held that the trial court finding, that the state was not negligent, was unsupported by the evidence. In a criticism of the medical judgment of the prison doctor, the court articulated the rule that prison physicians owe the same duty of care to prisoners as private physicians owe to patients who are free to choose.[17] Having indicated its dissatisfaction with the doctor's failure to prescribe the proper treatment and the wardern's failure to remedy the mistreatment, the court remanded for a new trial on the question of negligence.

B. Procedural Remedies

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

Tort Remedies. Despite the fairly generous position of the courts in recognizing prisoners' substantive rights to necessaries such as medical care, procedures for enforcement of these rights are inadequate.[18] In New York, for example, prisoners

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

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

ILL. REV. STAT. ch. 108, §32 (1971) is virtually identical to §800.15; § 33 is virtually identical to §800.16.

[12] The Texas statutes dealing with all aspects of prison activity (TEX. REV. STAT. ANN. art. 6166–6203g (1970)) occupy 70 pages in the code book while those dealing with Patriotism and the Flag occupy 64 pages. Of those 70 pages (including annotations) dealing with the operation of State prisons, eight are concerned with the lease of prison lands for oil and gas. The only sections which are even remotely concerned with the health of prisoners deal with food (art. 6166t), labor (art. 6166x), an emergency section to renovate a prison (art. 6203), the establishment of a psychopathic hospital (art. 6203e) and reports of death (art. 6166z).

See also NEW YORK CORRECTION LAW, §70 (2) (McKinney Supp. 1971): "... the department may establish and maintain any type of institution or program of treatment, not inconsistent with other provisions of law, but with due regard to: ... (c) The health and safety of every person in the custody of the department."; PA. STAT. ANN. tit. 61, §§ 31, 81, 101, 111, 352, 372 (1964); MASS. ANN. LAWS ch. 127, §§ 16, 17, 18, 117, 151 (1965); CAL. PENAL CODE §§ 2084, 2690 (West 1970).

[13] *See, e.g.*, MASS. ANN. LAWS ch. 124, §1(b) (1965); N.Y. CORRECTION LAW §46 (7-a) (McKinney 1968).

[14] *See* text accompanying notes 141–47 *infra*.

[15] *See* Sneidman, *Prisoners* at 453–56 and the cases collected therein.

[16] 8 App. Div. 2d 335, 188 N.Y.S.2d 35 (1959).

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

[18] In at least three states the usual duty to provide reasonable medical care is qualified by the courts' refusal to provide tort remedies to prisoners. In Massachusetts early cases laid down a version of the hands off rule by providing that denials of medical care are actionable only on a showing of malice and not for negligence. Williams v. Adams, 85 Mass. (3 Allen) 171 (1871); O'Hare v. Jones, 161 Mass. 391, 37 N.E. 371 (1894). In Illinois the unavailability of a remedy is based on the theory that the statutory duty of a sheriff is quasi-judicial and therefore he cannot be sued for the mere negligent omission to provide care. Bush v. Babb, 23 Ill. App. 2d 285, 162 N.E.2d 594 (1959). Maryland has followed the approaches of Illinois and

are denied by statute their civil rights while in prison,[19] including the right to sue.[20] This statutory denial appears to be grounded in the common law doctrine of civil death.[21] Even at common law, however, the civil death doctrine did not entirely preclude legal activity by imprisoned felons.[22] The reason for the civil death doctrine was to protect the inmate's family, and courts have often refused to extend the doctrine to cases where its purpose does not apply.[23] In accord with this general approach, the civil death restriction on lawsuits has been weakened by both legislatures and the courts.[24]

Relief for Continuing Wrongs. The writ of habeas corpus is the method most often used by state prisoners seeking injunctive relief.[25] State courts

Massachusetts, State v. Ferling, 151 A.2d 137 (Md. 1959); Carder v. Steiner, 225 Md. 271, 170 A.2d 220 (1961). *See generally* Sneidman, *Prisoners* at 453.

[19] The loss of civil rights is known as "civil death." N.Y. CIVIL RIGHTS LAW § 79 (McKinney Supp. 1971) provides:

> A sentence of imprisonment in a state prison for any term less than for life or a sentence of imprisonment in a state prison for an indeterminate term, having a minimum of one day and a maximum of natural life, forfeits all the public offices, and suspends, during the term of the sentence, all the civil rights, and all private trusts, authority, or powers of, or held by, the person sentenced; but nothing herein contained shall be deemed to suspend the right or capacity of any of the following persons to institute an action or proceeding in a court or before a body or officer exercising judicial, quasi-judicial or administrative functions, with respect to matters other than those out of his arrest or detention:
>
> a. A person sentenced to state prison for any term less than for life or a person sentenced to imprisonment in a state prison for an indeterminate term, having a minimum of one day and a maximum of his natural life, on whom sentence was imposed and the execution of the judgment suspended, while the execution of the judgment remains suspended;
>
> b. A person sentenced to state prison for any term less than for life or a person sentenced to imprisonment in a state prison for an indeterminate term, having a minimum of one day and a maximum of his natural life, while he is released on parole, or after he has been discharged from parole.

[20] Burns v. City of New York, 21 App. Div. 2d 767, 250 N.Y.S.2d 680 (1964); Harrell v. State, 17 Misc.2d 950, 188 N.Y.S. 683. (Ct. Cl. 1959); *Saxe v. Peck*, 139 App. Div. 419, 124 N.Y.S. 14 (1910).

In New York the right to sue is guaranteed in language reminiscent of Magna Carta: "Neither justice nor right should be sold to any person, nor denied, nor deferred; . . ." N.Y. CIVIL RIGHTS LAW §10 (McKinney 1948).

[21] Shapiro v. Equitable Life Assur. Soc'y, 182 Misc. 678, 45 N.Y.S.2d 717 (Sup. Ct. 1943), *aff'd*, 268 App. Div. 854, 50 N.Y.S.2d 846 (1944), *aff'd*, 294 N.Y. 743, 61 N.E.2d 745 (1945). The trial court criticized the civil death statute as "relic of a medieval fiction". 182 Misc. at 680, 45 N.Y.S. 2d at 719.

[22] Platner v. Sherwood, 6 Johns. Ch. R.-118 (1822).

[23] *See* Garner v. Shulte Co., 23 App. Div. 2d 127, 129, 259 N.Y.S.2d 161, 162–63 (1965), indicating that the purpose of the doctrine is to protect the innocent wife or children of a prisoner. The civil death doctrine has been thought generally inapplicable for the additional reason that at common law, only prisoners convicted of a felony punishable by death were deemed civilly dead. *Shapiro, supra* note 21.

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

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

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

[25] Other available remedies are Article 78 proceedings, *i.e.*, proceedings in the nature of certiorari, mandamus, and prohibition. N.Y. CIVIL PRACTICE LAW AND RULES §§7801–06 (McKinney 1963).

have taken three distinct approaches in ruling on prisoners' habeas corpus petitions. First, they have denied relief,[26] not on the merits, but because of the self-imposed jurisdictional barrier of the hands-off doctrine, or because of one of the traditional limitations of habeas corpus:[27] administrative remedies have not been exhausted,[28] or habeas relief is limited to total release only[29] and is not available to challenge the form of confinement when the prisoner is lawfully in custody.[30]

A second class of state courts grant habeas corpus relief where the prisoner can show that this treatment, or the lack of it, amounts to cruel and unusual punishment.[31] In these cases the rule is still that the courts will not interfere in ordinary prison administration unless a prisoner's allegations contain "inexcusable and shocking" facts which go beyond matters of prison discipline.[32]

A third approach to habeas corpus would apparently allow relief where only an administrative decision is challenged, even if no constitutional question is raised. This liberal approach was suggested by the New York Court of Appeals in *People ex rel. Brown v. Johnson*.[33] There a prisoner applied for habeas corpus to challenge his transfer from a prison to a hospital for the criminally insane. The court held that the writ was improperly denied because the appellate court failed to inquire whether petitioner's removal could been "uncontrolled and arbitrary." [34] The teaching of the *Johnson* opinion is that habeas corpus cannot be used to challenge the final judgment of a competent court but it is available to challenge "any *further* restraint *in excess* of that permited by the judgment or constitutional guarantees." [35] Petitioner's transfer to a hospital for the criminally insane would be a restraint in excess of that imposed by his conviction, and he was thus entitled to a hearing on his sanity. The court concluded its opinion with the dictum that when an excessive restraint is alleged, the writ of habeas corpus need not present constitutional questions.[36] If taken at face value, this language in *Johnson* could heavily involve New York courts in prison affairs.[37] In the

[26] Phillips v. State, 133 So.2d 512 (Ala. 1961); Holman v. State *ex rel.* Eyman, 5 Ariz. App. 311, 426 P.2d 411 (1967); DeMoss v. Rhodes, 133 A.2d 918 (Del. Super. Ct. 1957); State v. Cubbage, 210 A.2d 555 (Del Super. Ct. 1965); Bennett v. Robbins, 243 A.2d 61 (Me. 1968); Edmondson v. Warden, 194 Md. 707, 69 A.2d 919 (1949); State *ex rel.* Renner v. Wright, 188 Md. 189, 51 A.2d 668 (1947); Lingo v. Hann, 161 Neb. 67, 71 N.W.2d 716 (1955); Rogers v. Warden, 84 Nev. 539, 445 P.2d 28 (1968); Newton v. Cupp, 465 P.2d 734 (Ore. App. 1970); State v. Mathewson, 477 P.2d 222 (Ore. App. 1970); Gibbs v. Gladden, 227 Ore. 102, 359 P.2d 540 (1961), *cert. denied*, 368 U.S. 862 (1961); Commonwealth *ex rel.* Hoffman v. Maroney, 203 Pa. Super. 303, 201 A.2d 263 (1964), *but see* Commonwealth *ex rel.* Stevens v. Myers, 419 Pa. 1, 213 A.2d 613 (1965); State *ex rel.* Jordan v. Bomar, 217 Tenn. 494, 398 S.W.2d 724 (1965).

[27] *See generally Beyond the Ken* at 508–12 and the cases collected therein.

[28] Commonwealth *ex rel.* Thompson v. Day, 182 Pa. Super. 644, 128 A. 2d 133 (1956).

[29] *See, e.g.*, Olewiler v. Brady, 185 Md. 341, 344–49, 44 A.2d 807, 808–12 (1945); Johnson v. Zerbst, 304 U.S. 458, 465–68 (1938) (indicating habeas corpus may not be used as a writ of error, but only as a challenge to a judgment which is void, because, for example, imposed by a court without jurisdiction).

If the habeas corpus remedy were not limited to total discharge but were equitable in nature, courts might be encouraged to consider habeas petitions raising other issues besides the question of jurisdiction of the convicting court. *See* Mahaffey v. State, 87 Idaho 228, 230–31, 392 P.2d 279, 280 (1964).

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

[31] *See generally* Sneidman, *Prisoners* at 461–63. California, followed by several other states has granted such relief. *In re* Riddle, 57 Cal.2d 848, 22 Cal. Rptr. 472, 372 P.2d 304 (1962), *cert. denied*, 371 U.S. 914 (1962); Mahaffey v. State, 87 Idaho 228, 392 P.2d 279 (1964); State *ex rel.* Cole v. Tahash, 269 Minn. 1, 129 N.W.2d 903 (1964); Best v. Page, 422 P.2d 210 (Okl. Cr. 1966); Hughes v. Turner, 14 Utah 2d 128, 378 P.2d 888 (1963), *cert. denied*, 374 U.S. 846 (1963).

[32] *See, e.g.*, Mahaffey v. State, 87 Idaho 228, 392 P.2d 279 (1964), where the habeas corpus petition alleged a prima facie case of cruel and unusual punishment. The court reversed denial of the writ and remanded. The court reasoned that Idaho statutes did not require that a prisoner be discharged if his petition is granted. Rather, Idaho courts may fashion a just remedy. The decision, however, might apply only to situations where habeas corpus is petitioner's sole remedy. The court, perhaps fearing a flood of petitions, cautioned that false allegations in application for habeas corpus would subject the petitioner to the risk of punishment for perjury.

[33] 9 N.Y.2d 482, 174 N.E.2d 725, 215 N.Y.S.2d 44 (1961).

[34] *Id.* at 484, 174 N.E.2d at 726, 215 N.Y.S.2d at 45. The Appellate Division denied the application for habeas corpus on the sole ground that habeas corpus is not available to challenge the place of confinement under a valid commitment.

[35] *Id.* at 485, 174 N.E.2d at 726, 215 N.Y.S.2d at 45.

[36] *Id.* at 486, 174 N.E.2d at 726–27, 215 N.Y.S.2d at 46.

[37] *See, e.g.*, People *ex rel.* LaBelle v. Harriman, 35 App. Div. 2d 13, 312 N.Y.S.2d 623 (1970) (granting petition which alleged denial of the right to a speedy trial and indicating habeas corpus may be used to obtain relief other than release from custody); Supreme Court *ex rel.* Cardona v. Singerman, 63 Misc.2d 509, 312 N.Y.S.2d 229 (Sup. Ct. 1970) (granting petition which alleged overlong detention in jail prior to transfer to a narcotics rehabilitation program and expressing "an obligation [under *Brown*] to protect a prisoner from unlawful or onerous treatment."); People *ex rel.* Berry

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

II. Law Relating to Medical Care of Federal Prisoners

A. Substantive Rights

In the federal law as in state law the primary duty to provide medical care to prisoners is statutorily vested in the executive branch of the government. The Attorney General of the United States stands at the pinnacle of the federal prison hierarchy and is charged with "control and management of Federal penal and correctional institutions." [38] Under him the Bureau of Prisons is given the rather vague and general direction to "provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States. . . ." [39] The law also provides that various officers of the Public Health Service may be detailed to the Department of Justice "for the purpose of supervising and furnishing medical, psychiatric, and other technical and scientific services to the Federal penal and correctional institutions." [40]

Aside from actions for personal injuries arising from negligence when the standard of care is the same as that of a free citizen,[41] the federal prisoner must show more than that he received inadequate medical care.[42] Relief may be granted if a prisoner can show that he was denied medical treatment in such a way as to amount to cruel and unusual punishment.[43] It has been suggested that cruel and unusual punishment results from an intentional denial of needed medical treatment, or from "reckless disregard, callous inattention, or gross negligence." [44] Even if arbitrary and capricious conduct on the part of prison officials is charged, it appears petitioner must also allege that medical care was administered as punishment.[45] Under these rules the following have been held *not* to constitute cruel and unusual punishment: allowing nonmedical personnel to treat a prisoner, either with or without the prisoner's consent;[46] administering a drug by force, as a "last resort";[47] confinement and segregation for more than two years when imposed not for disciplinary control but as an administrative control for the protection of inmates;[48] and striking a prisoner when the beating is part of a justified attempt to search the prisoner.[49]

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

[38] 18 U.S.C. §4001 (1964). *See also* Owens v. Alldridge, 311 F. Supp. 667, 669 (W.D. Okla. 1970): "The Attorney General, and not the courts, has the discretion as to what type of medical care is to be furnished a prisoner." *Accord*, Graham v. Willingham, 384 F. 2d 367 (10th Cir. 1967); Peek v. Ciccone, 288 F. Supp. 329, 337 (W.D. Mo. 1968).

[39] 18 U.S.C. § 4042 (2) (1964).

[40] 18 U.S.C. § 4005 (a) (1964).

[41] *See* Cohen v. United States, 252 F. Supp. 679, 688 (N.D. Ga. 1966), *rev'd on other grounds*, 389 F. 2d 689 (5th Cir. 1967): "[T]he government has a duty of protection and safekeeping. In the discharge of that duty the government must exercise ordinary care in (1) the classification of prisoners and in (2) the custody of prisoners properly classified."

[42] Owens v. Aldridge, 311 F. Supp. 667, 669 (W. D. Okla. 1970); Sanders v. United States, 438 F. 2d 918 (5th Cir. 1971); Murphey v. Surgeon General, 269 F. Supp. 227 (D. Kan. 1967).

[43] Owens v. Aldridge, 311 F. Supp. 667, 669 (W.D. Okla. 1970). *See also* the other cases cited in note 42, *supra*, and the addendum to the opinion of Chief Judge Becker in Ramsey v. Ciccone, 310 F. Supp. 600, 604–05 (W.D. Mo. 1970).

[44] Ramsey v. Ciccone, 310 F. Supp. 600, 605 (W.D.M. 1970).

[45] Owens v. Alldridge, 311 F. Supp. 667, 669 (W.D. Okla. 1970).

[46] Peek v. Ciccone, 288 F. Supp. 329 (W.D. Mo. 1968).

[47] *Id.* at 337.

[48] Graham v. Willingham, 384 F. 2d 367 (10th Cir. 1967); *accord*, United States *ex rel.* Keen v. Mazurkeiwicz, 306 F. Supp. 483 (E.D. Pa. 1969).

[49] Konigsberg v. Ciccone, 285 F. Supp. 585, 591–92 (W.D. Mo. 1968), *aff'd*, 417 F.2d 161 (8th Cir. 1969).

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

B. Procedural Remedies

Tort Remedy. The federal government was slow in abandoning the rule of sovereign immunity. When it finally did so in 1946, no specific language in the Federal Tort Claims Act[50] precluded suits by prisoners in federal institutions. Several federal courts, however, construed the act as forbidding prisoner recoveries.[51] In 1962, the Second Circuit broke with this view, holding in *Winston v. United States*[52] and *Muniz v. United States*[53] that federal prisoners could sue under the Federal Tort Claims Act to recover for injuries received through the negligence of government employees. The Supreme Court affirmed both decisions in *United States v. Muniz.*[54] Chief Justice Warren, writing for the Court, found in the legislative history of the act a clear intent that prisoners' claims be allowed. The opinion also dismissed the argument that the government would have to litigate frivolous cases and found no history of disciplinary problems in states which already allowed prisoners' tort claims.[55] The Court concluded by noting that the policy of the Federal Tort Claims Act, to provide relief to those who are injured by the negligence of government employees, should not be narrowed at a time when state courts were trying to abrogate sovereign immunity.[56]

In addition to the Tort Claims Act, the Federal Prison Industries Corporation is empowered to pay out of the Prison Industries Fund "compensation to inmates or their dependents for injuries suffered in any industry or in any work activity in connection with the maintenance or operation of the institution where confined." [57] Such compensation is not to exceed the amounts provied in the Federal Employees Compensation Act,[58] and recovery under this act precludes recovery under the Tort Claims Act.[59]

Remedies for Continuing Wrongs. As discussed earlier, the principles regarding the substantive rights of federal prisoners to medical care do not differ substantially from those applied to state prisoners by federal courts. Similarly, the philosophy of the federal courts, that all prisoners must have reasonable access to courts to complain about continuing and serious medical wrongs, does not differ from the state court view. In an addendum to the opinion in *Ramsey* v. *Ciccone*[60] Chief Judge Becker suggested that the available remedies for continuing wrongs to federal prisoners in medical care cases are habeas corpus, suit for injunction, suit for declaratory judgment, and suit for damages. He concluded that habeas corpus is the preferred remedy,[61] largely because the writ is well adapted to quick resolution of inmates' claims.

III. Federal Law in State Prisons

A. The Hands-Off Doctrine Amplified by Federalism

The extension of the Federal Tort Claims Act to federal prisoners was characterized as "merely a tidying up operation" [62] after the larger legislative reform of overturning federal sovereign immunity. In the area of prisoners' rights the greater struggle was yet to come. The overwhelming number of maximum security prisoners were in state institutions and federal courts almost unanimously denied them redress.[63] The reluctance on the part of the federal courts to interfere was based not only on the hands-off doctrine[64] but also on considerations of federalism. While there is some question as to the present status of the hands-off doctrine, there is broad agreement in the federal courts that the doctrine is not a bar where deprivations alleged are of constitutional dimension. Courts have not, however, satisfactorily resolved the ideological[65] and practical[66] questions

It was apparently satisfied petitioner had been "mistreated" and had suffered "unnecessary hardship." Although the court found that it could not release petitioner from confinement, it recognized that "in circumstances involving continuing cruel and unusual punishment, ... the Court is empowered to fashion appropriate equitable relief ..." 318 F. Supp. at 1348.

[50] 28 U.S.C. §§ 1346(b), 2671–2680 (1964).

[51] Lack v. United States, 262 F.2d 167 (8th Cir. 1958); Jones v. United States, 249 F.2d 864 (7th Cir. 1957).

[52] 305 F.2d 253 (2d Cir. 1962).

[53] 305 F.2d 285 (2d Cir. 1962).

[54] 374 U.S. 150 (1963).

[55] *Id.* at 163.

[56] *Id.* at 164–66. Actions under the federal act are still limited. The government is not liable for negligence arising out of discretionary acts, nor for the intentional torts of its employees. *Id.* at 163.

[57] 18 U.S.C. § 4126 (1964).

[58] *Id.*

[59] United States v. Demko, 385 U.S. 149 (1966).

[60] 310 F. Supp. 600, 604 (W.D. Mo. 1970).

[61] *Id.* at 606.

[62] *Beyond the Ken* at 506.

[63] *Id.* at 508.

[64] *See* text accompanying notes 5–7 *supra.*

[65] In Younger v. Harris, 401 U.S. 37 (1971) a federal district court injunction prevented a Los Angeles district attorney from prosecuting Harris under California statutes. The Supreme Court reversed, finding the injunction was "a violation of the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." *Id.* at 41. The decision in *Younger* proscribes federal action

that arise when a federal court issues orders to state prison officials or finds them liable in damages.

The most extensive federal court involvement with state prisons has been in *Holt* v. *Sarver*,[67] where a class action brought on behalf of prisoners at various institutions in Arkansas resulted in a blanket injunction over two penal institutions. The district court's injunction ordered prison officials to "take the necessary steps to bring the operation of the prisons up to federal constitutional requirements. . . ." [68] The court granted prison officials time to correct violations of federal constitutional rights, but retained jurisdiction "to take such further steps as may be appropriate" to implement its injunction.[69] This case represents the furthest reach of the federal courts into state prison affairs. More significantly, it may be the beginning of a trend.[70] In enforcing and vindicating constitutional rights in this way, federal courts may incidentally strain harmonious relations between federal and state authorities. Until such time as prison systems act to prevent gross violations of basic rights, however, federal judges will have no other alternative consonant with their sworn duty.[71]

B. Procedural Remedies

Habeas corpus. It has been asserted that "habeas corpus has been the device most commonly employed by prisoners seeking relief from denials of constitutional rights." [72] This is probably no longer true for prisoners attacking violations of their rights involving internal prison matters. In addition to the hurdle of the hands-off doctrine, relief under habeas corpus always posed inherent difficulties for prisoners. First was the rule that the writ was available only to attack the validity of confinement, not the manner. Some courts, however, abandoned this rule after the decision of the Sixth Circuit in *Coffin v. Reichard*[73], which indicated that habeas corpus was available to attack "any unlawful restraint of personal liberty." [74] Second, habeas corpus was refused unless the prisoner was entitled to absolute release.[75] This has not been the

once a state prosecution has begun. However, no indication is given that the decision also applies to state administrative agencies. The agency situation is different because, unlike a state court which will quickly reach a judgment which may be reviewable in federal court, an administrative agency may continue its low visibility activity indefinitely. There is, therefore, less need to enjoin state court proceedings than agency proceedings. The *Younger* case, however, may indicate a shift in emphasis that will have an impact in all areas of federal-state litigation, limiting somewhat the permissible range of federal court involvement in state affairs.

[66] One practical problem is the difficulty of reviewing increasing numbers of applications for relief. *See* Wright v. McMann, 257 F. Supp. 739, 740 (N.D.N.Y. 1966), *rev'd*, 387 F.2d 519 (2nd Cir. 1967); Gittlemacker v. Prasse, 428 F.2d 1, 2–3 (3d Cir. 1970). Another practical problem is that federal judges are uncomfortable and perhaps reluctant when asked to interfere in state prison affairs. *See, e.g.*, Sostre v. McGinnis, 442 F.2d 178, 183–85, 205 (2d Cir. 1971); Wright v. McMann, 387 F.2d 519, 527 (2d Cir. 1967) (concurring opinion of Chief Judge Lumbard); Hall v. Wainwright, 441 F.2d 391 (5th Cir. 1971); Sawyer v. Sigler 445 F.2d 818, 819 (8th Cir. 1971); Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971); Morrissey v. Brewer, 443 F.2d 942, 951 (8th Cir. 1971); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

[67] 442 F.2d 304 (8th Cir. 1971) (affirming the issuance of an injunction by the district court).

[68] *Id.* at 305. Included in the complaint were allegations, later proven, that defendants deprived prisoners of their right to be fed, housed and clothed without loss of life or health. Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969); Holt v. Sarver 309 F. Supp. 362 (E.D. Ark. 1969).

[69] 442 F. 2d at 305.

[70] A Virginia district court recently issued an injunction prohibiting disciplinary practices which were alleged to violate due process and humane treatment. The class action brought by the ACLU will affect 5700 state prisoners in 36 facilities in Virginia. The decision specifies minimum standards and orders sweeping management reforms. Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).

[71] One mechanism which federal courts might use to reduce their involvement in state prison affairs is the doctrine of abstention. However Judge Kaufman in Wright v. McMann, 387 F.2d 519, 524 (2d Cir. 1967) rejected abstention, indicating that abstention would sacrifice an individual's right to federal adjudication, that the Supreme Court has favored only narrow use of the doctrine, and that the doctrine, although not dead, is least applicable in cases presenting civil rights questions.

[72] Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U.PA.L.REV. 985, 1006 (1962) (hereinafter cited as *Developing Law*).

[73] 143 F.2d 443 (6th Cir. 1944). Petitioner had been returned to prison after he violated probation. He applied for a writ of habeas corpus, alleging that at the time he pled guilty he was incapable of discussing his case with his attorney, and that his confession was improperly obtained. The district judge refused to grant leave to file for the writ, but the Sixth Circuit reversed and remanded, finding petitioner's allegations were sufficient to require respondent to show cause why a writ should not issue. Petitioner had also filed another petition for habeas corpus with the Sixth Circuit, alleging that he suffered injuries while in confinement. The court referred this second petition along with the original petition to the district court and, in an effort to guide the district judge, the court observed that petitioner would be entitled to a writ if his confinement was made "more burdensome" than the law allows. *Id.* at 445.

[74] *Id.* at 445.

[75] *See Developing Law* at 1006-07; Comment, *The Inadequacy of Prisoners' Rights to Provide Sufficient Protection for Those Confined in Penal Institutions*, 48 N. C. L. REV. 847, 874 (1970).

law since *Peyton v. Rowe*,[76] where the Supreme Court held that the writ was available to a convicted prisoner, serving consecutive sentences, who petitioned for habeas corpus to attack the validity of his second sentence but did not challenge the correctness of his confinement under the first sentence. *Peyton* led to the fashioning of what amounts to equitable relief under the umbrella of habeas corpus.[77]

Civil Rights Act. Although the same constitutional rights may be protected by both habeas corpus and the Civil Rights Act,[78] an important difference between the two types of action is the requirement that state remedies be exhausted before a federal habeas corpus action can be brought.[79] Even before *Monroe v. Pape*[80] ended the exhaustion requirment for civil rights actions, the Civil Rights Act was interpreted so as to protect the rights secured to prisoners under the Constitution.[81] Despite some hesitancy, the courts did allow actions under the act, at least where the deliberate failure to provide medical care was under the color of state law and was regarded as a deprivation of rights secured by the Constitution.[82]

After *Monroe*, however, federal courts were flooded with civil rights actions of all kinds.[83] *Monroe* is of singular importance because the Court, after an extensive review of legislative history, concluded that the remedy provided by the Civil Rights Act is "supplementary" to the state remedy, thus the state remedy need not be exhausted before federal relief is sought. The act "provided a remedy where state law was inadequate" and "provide[d] a federal remedy where the state remedy, though adequate in theory, was not available in practice." [84] Federal courts have regulated the number of civil rights actions, however, by narrowly defining federal rights. Federal courts thus occupy a middle ground with respect to involvement in state prisons partly because of the judiciary's well-recognized reluctance to oversee the operations of prisons.[85]

To be successful, a civil rights action must show that federal rights have been violated. The rights which have been invoked with the greatest effectiveness are the eighth amendment right to be free from cruel and unusual punishment, and the fourteenth amendment due process and equal protection clauses.[86] Not every deprivation, however, reaches the magnitude of a constitutional violation. For example, the rule in the Second Circuit is that, to be actionable, a failure to provide medical care must "shock the conscience" or in some way exceed mere negligence.[87] One might question a rule which relies on a "shocks the conscience" test, inasmuch as that test has been discredited in search and seizure[88] and other areas of state administration of criminal justice.[89] While

[76] 391 U.S. 54 (1968).

[77] The Court stated, *id.* at 66–67:

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

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

[78] 42 U.S.C. §§ 1983, 1985 (3) (1964). *See* the opinion of Judge Coffin in Nolan v. Scafati, 430 F.2d 548, 551 (1st Cir. 1970):

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

[79] *See* Edwards v. Schmidt, 321 F. Supp. 68 (D. Wis. 1971).

[80] 365 U.S. 167 (1961). The Court held that fourth amendment violations by state officials constitute a deprivation of rights cognizable by the federal courts under the Civil Rights Act, § 1976, 42 U.S.C. § 1983 (1964). The broad interpretation put on the Act by the Court gives the case a significance far greater than its narrow holding. *See generally*, Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965) (Hereinafter cited, Shapo, *Constitutional Tort*).

[81] It is interesting to note that the three early cases granting relief cited in *Beyond the Ken* at 512 n.33, involve allegations of medical mistreatment: Coleman v. Johnson, 247 F.2d 273 (7th Cir. 1957); McCollum v. Mayfield, 130 F. Supp. 112 (N.D. Cal. 1955); Gordon v. Garrson, 77 F. Supp. 477 (E.D. Ill. 1948).

[82] McCollum v. Mayfield, 130 F. Supp. 112, 114 (D. Cal. 1955).

[83] Shapo, *Constitutional Tort* at 278.

[84] Monroe v. Pape, 365 U.S. 167, 173–74 (1961). *See* Note, *Prisoners' Rights Under Section 1983*, 57 GEO. L. J. 1270 (1969); Note, *42 U.S.C. Section 1983, An Emerging Vehicle of Post-Conviction Remedy for State Prisoners*, 22 U. FLA. L. REV. 596 (1970).

[85] *See* United States *ex rel.* Yaris v. Shaughnessy, 112 F. Supp. 143, 144 (S.D.N.Y. 1953).

[86] Note, *Prisoners' Rights Under Section 1983*, 57 GEO. L. J. 1270, 1281 (1969).

[87] Church v. Hegstrom, 416 F.2d 449, 451 (2d Cir. 1969).

[88] Mapp v. Ohio, 367 U.S. 643 (1961).

[89] *See, e.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1966).

the test is outmoded for some purposes, it is consonant with the hands-off doctrine and gives needed latitude to prison administrators. The test is also consistent with the legislative history of the Civil Rights Act, which was aimed primarily at egregious violations of rights.[90] Without question, most federal courts balance prisoners' rights against a policy in favor of prison administration, with the result that only "outrageous" [91] violations of rights are likely to be remedied.[92]

The fact that many civil rights complaints are submitted *pro se* by prisoners causes practical and procedural problems for federal courts. For example, the complaints may be so vague and conclusory they they fail to allege constitutional deprivations with the necessary specificity.[93] On the other hand, the complaint may be so long and complicated, and involve so many defendants, as to place a severe burden on the time and resources of the courts.[94] The basic problem is one concerning legal aid to prisoners but is tangentially related to all other rights.[95]

Another procedural remedy concerns the necessity of an evidentiary hearing in section 1983 cases. In the absence of an answer to the complaint or an evidentiary hearing, the facts must be construed in a light most favorable to plaintiffs.[96] A section 1983 case may be dismissed without hearing if it fails to state a cause of action.[97] But where the allegations are sufficiently serious, some determination of the underlying facts should be undertaken before judgment is rendered.[98] Prisoners may therefore be tempted to include exaggerated facts in order to obtain an evidentiary hearing. The fear of great numbers of suits may not be justified but it is perceived as a problem. Too often this fear obscures the more accurate difficulty: the virtual unavailability of effective legal counsel and sound administrative remedies for prisoners. These should be available to every prisoner, not merely to those fortunate enough to be incarcerated in an enlightened institution or near an activist law school. Counsel would serve to draw more artful complaints and screen frivolous actions. Meanwhile the courts should be slow to dismiss complaints with serious allegations, even if they present farfetched statements of facts.

The problem of increasing numbers of prisoner complaints has led courts to fashion shorthand methods of ruling on them. One court pointed out that in medical care cases an examination of the prisoner's record may be dispositive of the case, especially where the allegation is denial of care by

[90] *See generally*, Shapo, *Constitutional Tort* at 280–81.

[91] *Id.* at 305, discussing prisoners' rights cases in general: "If a test emerges from this group of cases, it may be described as an 'outrageousness' requirement."

[92] Similarly other federal circuits deny recovery unless the deprivation of rights is in some way extraordinary. In the Third Circuit an allegation of improper medical care alone "is legally insufficient to establish a denial of rights secured under the federal constitution or laws" and states a cause of action only when the treatment or lack of it is cruel and unusual. Fear v. Pennsylvania, 413 F.2d 88 (3rd Cir. 1969), *cert. denied*, 396 U.S. 935 (1969); Pennsylvania *ex rel.* Gatewood v. Hendrick, 368 F.2d 179 (3rd Cir. 1966), *cert. denied*, 386 U.S. 925 (1967). In the Fourth Circuit a denial of medical care which seriously endangers a prisoner's physical well-being raises an issue of cruel and unusual punishment and requires a hearing. Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966); Hirons v. Director, Patuxent Institution, 351 F.2d 613, (4th Cir. 1965). In the Fifth Circuit the test is one of abuse of discretion, and in a number of recent cases complaints as to the inadequacy of ordinary treatment have been held not to be abuses of discretion. Schack v. Florida, 391 F.2d 593 (5th Cir. 1968), *cert. denied*, 392 U.S. 916 (1968); Oakes v. Wainwright, 430 F.2d 241 (5th Cir. 1970); Haskew v. Wainwright, 429 F.2d 525 (5th Cir. 1970); Weaver v. Beto, 429 F.2d 505 (5th Cir. 1970). In the Seventh Circuit, a prisoner does not have a cognizable complaint under the Civil Rights Act unless he can show exceptional circumstances, such as the total denial of medical care. Coleman v. Johnson, 247 F.2d 273 (7th Cir. 1957). In Ninth Circuit cases, inadequate medical care or termination of medical care which does not seriously injure a prisoner does not state a cause of action under the Civil Rights Act. Snow v. Gladden, 388 F.2d 999 (9th Cir. 1964). However a refusal to care for histoplasmosis, a form of tuberculosis, was sufficient to entitle plaintiff to a hearing on his complaint. Riley v. Rhay, 407 F.2d 496 (9th Cir. 1969). Finally, in the Tenth Circuit, a "claim of total denial of medical care differs from a claim of inadequacy of medical care" and a "difference of opinion between the lay wishes of the patient and the professional diagnosis of the doctor" does not state a cause of action under the Civil Rights Act. Coppinger v. Townshend, 398 F.2d 392, 394 (10th Cir. 1968).

[93] *See* Gittlemacker v. Prasse, 428 F.2d 1, 6 (3d Cir. 1970). A related problem is that *pro se* complaints are often hard to fit into neat legal slots. Nevertheless, the courts are generally lenient in accepting such complaints despite the title affixed and classify the cases in a way most beneficial to the petitioner. *See* Wilwording v. Swenson, 439 F.2d 1331, 1334 (8th Cir. *rev'd on other grounds*, 404 U.S. 249 (1971): "In this circuit we have accepted jurisdiction on complaints denominated as habeas corpus, writs of mandamus, and petition for physical examination as petitions for injunctive relief under the Civil Rights Statutes. . . ."

[94] Roberts v. Barbosa, 227 F.Supp. 20 (S.D. Cal. 1964).

[95] *See* remarks of Brennan, J. in Wright v. McMann, 257 F. Supp. 739, 740 (N.D.N.Y. 1966).

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

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

[98] Nolan v. Scafati, 430 F.2d 548, 550 (1st Cir. 1970).

a physician.[99] Where such records contain no information on the subject matter of the complaint, an evidentiary hearing is called for.[100]

Another shorthand device is used by the Ninth Circuit, which does not allow the complainant to be present at the hearing of his case.[101] While this rule makes it easier to pass on complaints, it may be damaging to the complainant because he is usually a necessary witness. The same court has, however, specified a complainant's procedural rights and they appear to ameliorate the absence of the right to be present at the hearing:

> He is... entitled to have: (1) process issued and served; (2) notice of any motion thereafter made by defendant or by the court to dismiss the complaint and the grounds therefore; (3) an opportunity to at least submit a written memorandum in opposition to such a motion; (4) in the event of dismissal, a statement of the grounds therefore; and (5) an opportunity to amend the complaint to overcome the deficiency unless it clearly appears from the complaint that the deficiency cannot be overcome by amendment.[102]

The Ninth Circuit's procedural compromise between a full evidentiary hearing and summary dismissal of the complaint is similar to the "amplifying" procedure explained by the District of Columbia Circuit in *United States v. Simpson*.[103] The "amplifying" procedure may be used in cases where the petition's allegations are too conclusory or general for the court to treat, but the court feels the complaint may have merit if it were artfully drawn.[104] In such cases the court issues an order and accompanies it with a memorandum to the prisoner telling him to file, in his own words, the specific facts and details of his grievance.[105] The *Simpson* court hinted that a complaint might be best amplified by appointing counsel to assist in the preparation of the petition.[106]

It is interesting—and perhaps significant—that these circuit courts have adopted different yet parallel approaches in an attempt to salvage meritorious complaints while relieving somewhat the burden of holding an evidentiary hearing. Yet these approaches are flawed because without adequate and expert legal assistance in the prison, courts will not be able to correctly separate the frivolous from the meritorious complaint.[107] This problem is central to the adequate provision and vindication of prisoners' rights to medical care and will be examined thoroughly in the conclusion to this paper.

The class action, as seen in the Arkansas[108] and Virginia[109] cases, can effectively change conditions throughout a state prison system. Instead of affecting the rights of a single prisoner, one case can have dramatic impact on thousands of inmates. Two arguments are forwarded to defeat class action in civil rights suits. The first is the practical problem of giving notice to large numbers of inmates and parolees.[110] The second is that since a civil rights action is said to be available only in shocking or egregious cases, each prisoner's case should be treated individually.[111] The latter argument carries more force when the action is brought for damages than when injunctive relief is sought. Neither argument, however, should deter a court from granting injunctive relief to a class when federal rights are violated through general conditions rather than through numerous individual incidents [112]

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

The distinction between habeas corpus and civil rights actions has become quite blurred. The language of some courts could indicate that there is no longer a distinction and that in any suit brought by state prisoners in federal court, the form of a

[99] Blanks v. Cunningham, 409 F.2d 220 (4th Cir. 1969).
[100] *Id.* at 221.
[101] 433 F.2d 1087 (9th Cir. 1970).
[102] *Id.* at 1088. *See* Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971).
[103] 436 F.2d 162, 166–67 (D.C. Cir. 1970).
[104] *Id.* at 166.
[105] *Id.* at 166 n.12.
[106] *Id.* at 166–67.
[107] *Id.*
[108] Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Holt v. Sarver, 442 F.2d 304 (8th Cir. 1971) (use of strap amounts to cruel and unusual punishment regardless of any precautionary conditions which may by imposed; the court restrained use of corporal punishment throughout Arkansas prison system).
[109] Landman v. Royster, 333 F.Supp. 621 (E.D. Va. 1971).
[110] Heckart v. Pate, 9 Cr. L. 2228 (N.D. Ill. 1971). In Milwaukee v. Paterson, 51 F.R.D. 540 (E.D. Wis. 1970) the court pointed out that because many jail inmates have no permanent place of abode, notifying them of a class action would be difficult. This argument is of questionable validity because it would prevent a class action by some jail inmates merely because the poverty or life styles of others makes them hard to reach.
[111] Wright v. McMann, 321 F. Supp. 127, 137 (N.D. N.Y. 1970).
[112] Jones v. Wittenberg, 323 F. Supp. 93, 99 (N.D. Ohio 1971).

cause of action is interchangeable. The opinion of Judge Doyle in *Edwards v. Schmidt*[113] recognized this apparent interchangeability and its important consequence that petitions will be characterized as civil rights actions to avoid the need for exhaustion of state remedies. This characterization is made on the correct assumption that a state prisoner must exhaust state remedies before a writ of habeas corpus will issue, but a prisoner seeking relief under the Civil Rights Act need not exhaust state remedies.[114]

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

Judge Doyle's description of section 1983 actions as "extraordinary prisoner suits" is consistent with the underlying purposes of the federal civil rights remedy as determined by the legislative history in *Monroe v. Pape*,[117] in law review articles,[118] and in the cases dealing with prisoner's rights to medical care.[119] The rule is that in extraordinary prisoner suits, complaining of internal prison conditions, the proper remedy is a section 1983 action. It is in the light of this rule that the broad language of Judge Coffin in *Nolan v. Scafati*[120] or the very liberal approach of Judge (now Mr. Justice) Blackmun in *Jackson v. Bishop*[121] is to be understood. In contrast, where a prisoner launches a collateral attack on his conviction in state court he is in the area of "traditional habeas corpus suits" and the circumvention rule applies to require exhaustion of state remedies.[122]

The most recent treatment of this subject is a per curiam decision by the Supreme Court in *Wilwording v. Swenson*.[123] Petitioners filed a writ of habeas corpus challenging living conditions and disciplinary measures in a state prison. Such a complaint, which does not attack the validity of the state court judgment, would be included in Judge Doyle's "extraordinary prisoner suit" category.[124] The district court dismissed the complaint on the ground that, although state habeas relief had been exhausted, there remained several other forms of state relief which had not been tried.[125] The Eighth Circuit affirmed[126] but the Supreme Court reversed, stating two alternative grounds for reversal. The Court was of the opinion that "Section 2254 does not erect insuperable or successive barriers to the invocation of federal habeas corpus." [127] First, the Court read the exhaustion requirement of section 2254 to mean only that the state should be given an initial opportunity to correct violations of prisoners' federal rights. Where the state courts failed to indicate an alternative procedure or had never granted a hearing on the facts, habeas petitioners need not exhaust all available remedies.[128] Second, the Court construed petitioners' allegations as pleading a section 1983 cause of action "for deprivation of constitutional rights by prison officials," and therefore exhaustion was unnecessary.[129] The Court concluded by citing with approval the language of Mr. Justice (then Judge) Blackmun in *Jackson v. Bishop*[130] favoring a flexible approach in treating extraordinary prisoner suits as section 1983 actions.

IV. Conclusions and Recommendations

A study of the cases indicates that adequate medical care cannot be systematically provided in large prisons. This observation is confirmed by economic and sociological studies. An unpublished paper by this author, comparing official statistics of New York's maximum security prisons[131] with

[113] 321 F. Supp. 68 (W.D. Wis. 1971).
[114] *Id.* at 69.
[115] *Id.* at 70.
[116] *Id.* at 73–74.
[117] 365 U.S. at 168–87.
[118] *See, e.g.*, Shapo, *Constitutional Tort* at 279–82.
[119] *See* note 92 *supra*.
[120] 340 F.2d 548, 551 (1st Cir. 1970).
[121] 404 F.2d 571 (8th Cir. 1968).
[122] Edwards v. Schmidt, 321 F. Supp. 68, 70 (W.D. Wis. 1971).
[123] 404 U.S. 249 (1971).
[124] *See* note 115 *supra* and accompanying text.
[125] 331 F. Supp. 1188 (1969).
[126] 439 F.2d 1331 (8th Cir. 1971).
[127] 404 U.S. at 250.
[128] *Id.*
[129] *Id.* at 251.
[130] 404 F.2d 571 (8th Cir. 1968).
[131] New York Commission of Correction, Annual Report 60–61 (1965).

national figures,[132] indicates that the per capita amount spent on medical care for all citizens is from five to eleven times the amount spent on prisoners, depending on how the figures are interpreted. New York budgeted one half of one per cent of total prison expenditures for medical care while Americans spend approximately six per cent of disposable income after taxes on personal health care goods and services.[133] In the less tangible areas of medical care it has been found that patient involvement and the physician's personal attention has an influence on the quality of medical care.[134] This aspect of medical care is rarely found in maximum security prisons.[135] Its absence is understandable in the light of current sociological knowledge about total institutions.[136] In human terms the totality and secretiveness of the large prison produces an iron law of contempt. In the repressive atmosphere and grinding routine of the prison, those in authority become hardened to the basic considerations of humanity expected in our society. Men who would be friendly, patient, and considerate without the walls become cold, curt, and hostile within. Shielded by secrecy they become calloused to the basic needs of prisoners. The point is not that the keepers are bad men but that ordinary men in a bad system cannot be good.

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

A. Political Solutions

A political solution, in the form of a radically altered public attitude to criminal justice in general and prisons in particular, is both the most important and the least likely to occur.[137] The figures from New York show that the public, or those who control the public purse, are not willing to spend as much on prisoners for medical care as is spent on the average citizen. Despite the rather elaborate prison medical facilities that exist in most states, the principle of "less eligibility" applies: the condition of the prisoner should not surpass that of the poorest-off employed citizen.[138] If ever there was a fixed rule of a science of penology, this is it. I seriously doubt whether the demand for social welfare on the part of prisoners will be translated into money and programs in the forseeable future. Hence, this solution is the most remote. However, there is something that lawyers can do in this regard. There is a growing recognition that despite the great moral and symbolic victories of the prisoners' rights cases which have assaulted the hands-off doctrine, their actual impact on the total system is limited.[139] Sol Rubin reminds us that the foundation for correctional work is *statutory*, and it is there that the greatest impact can be made. Statutory changes can effectively convert what are now privileges into rights for the entire prison population, can narrow the range of discretion where abuses have been frequent, and can motivate rule-making and more effective administrative control.[140]

B. Institutional Solutions

Any improvement in general prison conditions is bound to have some impact on the quality of medical care by reducing overcrowding, moving facilities closer to big cities and closer to a greater range of medical talent, and reducing prison populations and the number of people subject to prison medicine.[141] Specific improvements in medical care are primarily the task of prison administrators and experts in the delivery of medical services. However, a few general observations can properly be made here. First, the state of knowledge concerning

[132] 33 SOCIAL SECURITY BULLETIN 5 (July 1970).

[133] AMERICAN MEDICAL ASSOCIATION COMMISSION ON THE COST OF MEDICAL CARE, GENERAL REPORT 9 (1964).

[134] *Id.* at 53.

[135] A survey of Iowa state prisoners found that over half of the inmates interviewed or replying to a questionnaire felt that they were not receiving sufficient medical care, and nearly two-thirds would prefer a private physician at their own expense. Comment, *The Problems of Modern Penology: Prison Life and Prisoners' Rights*, 53 IOWA L. REV. 671, 687 (1967).

[136] *See* Goffman, *Characteristics of Total Institutions* (1960) reprinted in J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, PSYCHOANALYSIS, PSYCHIATRY AND THE LAW, 650–59 (1967).

[137] For one politician's pessimistic view, *see* the interview of New York Senator Dunne in *Attica: A Look at the Causes and the Future*, 7 CRIM. L. BULL. 824–28. (1971) (hereinafter cited as *Attica*).

[138] H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY: THE AMERICAN CRIME PROBLEM 962 (1943). One should observe however that Sidney and Beatrice Webb first applied this principle to paupers receiving charity.

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

[140] Rubin, *Needed—New Legislation in Correction*, 17 CRIME AND DELINQUENCY 392 (1971).

[141] *See generally*, R. CLARK, CRIME IN AMERICA 192–218 (1970); N. MORRIS & G. HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 110–44 (1969).

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

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

Third, the tenure of prison doctors, dentists, and nurses should be limited to a fixed period of five years. The iron law of contempt for inferiors is too powerful to leave the best-intentioned person unaffected. There is a real danger that the relatively sheltered position of a prison doctor will attract those seeking primarily a civil service sinecure, but there is a greater danger that the long exercise of power over the powerless will destroy those attributes of physicians which are necessary for quality medical care.[147]

C. *Legal Solutions*

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

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

[142] F. RECTOR, HEALTH AND MEDICAL SERVICE IN AMERICAN PRISONS AND REFORMATORIES (1929).

[143] Fuller, *Medical Services* in CONTEMPORARY CORRECTION 172 (P. Tappen ed. 1951).

[144] J. PLEASURE, A PILOT PROJECT FOR YOUNG OFFENDERS WITH EPILEPSY (1964); N. Y. DEPARTMENT OF CORRECTIONS, PLANS FOR THE AGED PRISONER IN THE YEARS AHEAD (1958); Kurtzberg, Safar & Mandell, *Plastic Surgery in Corrections* 33 FED. PROB. 44 (Sept. 1969); Velasco, Woolf & Broadbent, *Plastic and Reconstructive Surgery in a State Prison*, 66 ROCKY MT. MED. J. 40 (1967); Kurtzberg, Levin, Cavior & Lipton, *Psychologic Screening of Inmates Requesting Cosmetic Operations: A Preliminary Report*, 39 PLASTIC & RECONSTRUCTIVE SURGERY 387 (1967).

[145] THOMAS, Medical Systems SURVEY (unpublished report for the New York Department of Correctional Services, 1971.)

[146] I would like to thank Dr. James Bradley, New York State Department of Correction Medical Director, for his time and cooperation.

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

[148] H. BARNES & N. TEETERS, *supra* note 138, at 646.

[149] *Id.* at 660–62.

[150] E. JOHNSON, CRIME, CORRECTION AND SOCIETY, 515–41 (1964).

[151] Zald, *Power Balance and Staff Conflict in Correctional Institution*, in PRISON WITHIN SOCIETY: A READER IN PENOLOGY 397 (L. Hazelrigg ed. 1968); TASK FORCE: CORRECTIONS, at 47.

[152] *See, e.g.*, Rubin, *The Concept of Treatment in the Criminal Law*, 21 S. C. L. REV. 3 (1969).

[153] *Id.* at 15.

[154] J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 310 (2d ed. 1960).

public via the news media[155] this has a great, if indirect, impact on the improvement of prison medicine. The judicial recognition, enforcement, and even creation of procedural due process rights of prisoners has, perhaps, even greater potential.[156] At present, it is too easy for a legitimate demand for adequate care to be sidetracked by futile letter-writing to unheeding prison officials, or for custodial personnel to deprive prisoners of medical care by subverting medical orders.

It is widely recognized, however, that the present legal machinery is inadequate to handle the growing volume of prisoners' complaints or to effectuate across the board improvements. Indeed, one of the themes running through this paper has been the importance of effective legal representation to guarantee necessary services, and the present inability to provide those services. Two major innovations are the keys to the legal solution. The recent, dramatic involvement of lawyers and law students in prisoners' rights litigation[157] will create new strains on the courts in the short run. But this is preferable to the growth of jail house lawyering and prisoner writ-writing, since it will ultimately reduce the burden on courts by screening frivolous complaints, by producing uniform and precise complaints, and by facilitating informal settlements of grievances where possible.

The second innovation is the creation of independent hearing bodies with power to investigate complaints, conduct hearings, inspect facilities and take corrective actions, if any are required. There are three models: negotiation, the ombudsman, and the grievance commission. The negotiation model, either through regular meetings between prison officials and prisoners[158] or through prisoners' unions[159] is still in the speculative stage. If such a model could be implemented on a regular basis, it could provide a useful supplement to more formal means of grievance settlement while getting away from the abuses inherent when a single prisoner informally tries to make his complaints known to superiors. The negotiation model, however, would have to be supplemented by a more formal means of dispute settlement.

If the ombudsman or grievance commission be chosen, it is imperative that such a body be independent.[160] This is best insured by giving the body a statutory basis, to give it real power to investigate, and suficient funds for efficient and effective operation.[161] A commission or ombudsman should be guided by formal minimum rules which must be adhered to,[162] but beyond these formal rules there must lie the ideals which inform our best legal thinking. In prisoners' rights cases involving medical care the due process clause and the eighth amendment are most frequently invoked via the Civil Rights Act. To prisoners, as to most laymen, basic understanding of these provisions lies in their ethical correlates: fundamental fairness and human dignity.[163] These moral principles have been recognized and implemented by the courts. For an ombudsman to fail to implement them would be to destroy the momentum created by legal decisions in this area. Assuming that the abuses visited on prisoners will not be terminated solely by appeals to the goodwill of those who enter prison service, it is imperative that the legal profession play one of the leading roles in ending the isolation and secretiveness of prison life.

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

[156] *See, e.g.*, Cluchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971); Sinclair v. Henderson, 331 F. Supp. 1123 (E.D. La. 1971); Landman v. Royster, 333 F.Supp. 621 (E.D. Va. 1971).

[157] *See generally* Jacob & Sharma, *Justice After Trial: Prisoners' Needs for Legal Services in the Criminal Correctional Process*, 18 KAN. L. REV. 493 (1970).

[158] N.Y. Times, Dec. 19, 1971, at 33, col. 1. A more radical experiment, democracy, is being tried in Washington: Turner, *Democracy is Easing the Life of Inmates at Walla Walla Prison*, N.Y. Times, Oct. 18, 1971, at 24, col. 1.

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

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

[161] *See, e.g.*, Maryland Senate Bill 601 (1971) (to add new section 204 to MD. ANN. CODE art. 41).

[162] *See, e.g.*, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Resolution of 30 August 1955, *Standard Minimum Rules for the Treatment of Prisoners*, ST/SOA/SD/CG.2/WP.3, Annex.

[163] Trop v. Dulles, 356 U.S. 86, 100 (1956); *see* Note, *Revival of the Eighth Amendment Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996 (1966).