Buffalo Law Review

Volume 22 | Number 1 Article 19

10-1-1972

Criminal Law—Court Orders Broad Relief to Inmates Throughout the Virginia Penal System Where Constitutional Rights Have Been Violated.

Arthur H. Ackerhalt

CRIMINAL LAW—COURT ORDERS BROAD RELIEF TO INMATES THROUGHOUT THE VIRGINIA PENAL SYSTEM WHERE CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED.

A class action was instituted by prisoners of the Virginia Penal System for injunctive relief against the supervisors of the state's correctional system. The court assumed jurisdiction under Title 28 U.S.C. sections 1343 (3), (4), 2201, and Title 42 U.S.C. sections 1981, 1983, and 1985.[1] The inmates based their grievances on the various penalties imposed, the reasons given for invoking these sanctions, and the adjudication process within the prison. Such punishment included removal to solitary confinement, where inmates had been chained,

---

1. The relevant texts of these statutes are as follows:

28 U.S.C. § 1343 (1970):

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> (3) To redress the deprivation under color of any State law . . . of any right . . . secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . . .

28 U.S.C. § 2201 (1970):

> In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal obligations of any interested party seeking such declaration . . . .

42 U.S.C. § 1981 (1970):

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .

42 U.S.C. § 1983 (1970):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

42 U.S.C. § 1985 (1970):

> . . . .
>
> (3) . . . in any case of conspiracy set forth in this section [(1) Preventing officer from performing his duties; (2) Obstructing justice; intimidating party, witness, or juror; (3) Depriving persons of rights or privileges], if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

tear gassed, kept nude, served bread and water, crowded into small cells, and deprived of mattresses for up to three days. In one instance, an inmate was struck with a tear gas gun and then chained to his cell for five days, without even being released to respond to the calls of nature. Inmates had been prohibited from conducting litigation, rendering legal assistance to other inmates, and writing to lawyers and public officials. In addition, inmates had been deprived of acquired "good time"[2] and were "padlocked" into their cells; mental defectives were confined in maximum security units. These penalties had been imposed, to a large extent, without the protections afforded by traditional notions of due process. No general regulations specified which offenses justified loss of "good time" or commitment to a solitary cell. Furthermore, prisoners had been penalized for vaguely defined offenses such as "misbehavior" and "agitation." At disciplinary proceedings prisoners were denied the assistance of counsel, the right to cross-examine adverse witnesses, and were not served with written notice of the charges against them. No findings of fact were made by the disciplinary committee nor could its ultimate decision be appealed; the committee at times included the accusing guard. Inmates had often been placed in solitary confinement by prison guards without even the pretense of a hearing. *Held*: the court finds as to each of these points a disregard of constitutional rights so basic as to violate fundamental conceptions of due process and humane treatment. Finding violations of the eighth amendment's prohibition against cruel and unusual punishment, Judge Merhige enjoined the bread and water diet, use of chains, handcuffs, tape, tear gas (except under special circumstances), any corporal punishment, stripping of inmates' clothing in the absence of a doctor's written consent, and the placing of more than one inmate in a solitary cell. In order to satisfy minimum due process standards where serious penalties—such as loss of "good time" and solitary confinement—may be imposed, the court ordered officials: (1) to provide prisoners with written notice of pending charges; (2) to provide a hearing conducted by an impartial tribunal at which the prisoner would have the right to cross-examine witnesses and to be represented by counsel; and (3) to provide a decision based solely upon evidence presented at the proceeding. Furthermore, the court, while

2. Ten days are credited against a prisoner's sentence for every twenty days served without a rule infraction, thus enabling him to be released sooner than his initial sentence would indicate. VA. CODE § 52-213 (Supp. 1970).

not ordering the creation of appellate review, insisted that any review provided must be restricted to the particular charge and the evidence presented below. In addition, the court enjoined interference with mail sent to courts, counsel, or public officials. It ordered release from solitary confinement or maximum security and the restoration of "good time" to all inmates who had been denied proceedings with minimum due process safeguards. However, the possibility remained that these penalties could be reinstated after such hearings had been conducted. Prison officials were also ordered to file a list of rules governing inmate conduct with the court, to promulgate these rules among the prison population, and to report any future applications of physical restraint or tear gas. *Landman v. Royster,* 333 F. Supp. 621 (E.D. Va. 1971).[3]

INTRODUCTION

For years, federal courts have shown considerable reluctance to interfere with the administrative process within state penal institutions.[4] This "hands-off" policy has been justified on the grounds that relief should first be sought in state courts[5] and that courts lack the expert knowledge of prison administrators, who should be granted broad discretion in executing their duties.[6] Moreover, it has been argued that "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[7] Nevertheless, within recent years federal courts have inquired into the administrative process where there is evidence that fundamental constitutional rights have been violated.[8] For example, the issue of religious freedom in

3. Hereinafter referred to as instant case.

4. "It clearly appears to be the general rule that, except in extreme cases, the courts will not interfere with the conduct of a prison, with the enforcement of its rules and regulations, or its discipline." Childs v. Pegelow, 321 F.2d 487, 489 (4th Cir. 1963). *Accord,* McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964); Roberts v. Pegelow, 313 F.2d 548 (4th Cir. 1963); Banning v. Looney, 213 F.2d 771 (10th Cir. 1954).

5. United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956), *cert. denied,* 353 U.S. 964 (1957).

6. "Courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations. . . . No authorities are needed to support those statements." Banning v. Looney, 213 F.2d 771 (10th Cir. 1954); *accord,* Powell v. Hunter, 172 F.2d 330 (10th Cir. 1949); Fussa v. Taylor, 168 F. Supp. 302 (M.D. Pa. 1958).

7. Price v. Johnston, 334 U.S. 266, 285 (1948).

8. "The hands-off doctrine operates reasonably to the extent that it prevents judicial review of deprivations which are necessary or reasonable concomitants of im-

prison has been highlighted by a series of cases in which Black Muslims have challenged infringements upon their religious practices.[9] Administrators have often justified the need for restraints upon such activities either by arguing that Black Muslims are a violent group who threaten the security of the institution or by simply failing to recognize these individuals as adherents to a "bona fide" religion.[10] While courts have sanctioned some Muslim practices, others have been prohibited under the theory that a "compelling state interest" was thought to be imperiled.[11] Because of the courts' tendency to uphold any regulations that seem vaguely related to the preservation of order and discipline in the prison, the burden of proving lack of justification for official action is usually placed upon the prisoner.[12]

---

prisonment. Deprivations of reasonable medical care and of reasonable access to the courts are not among such concomitants, however." Edwards v. Duncan, 355 F.2d 993, 994 (4th Cir. 1966). *See also* Johnson v. Avery, 393 U.S. 483 (1969) (legal assistance in achieving access to a federal forum); Lee v. Washington, 390 U.S. 333 (1968) (racial segregation); Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971) (religious freedom); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970) (freedom of speech and due process safeguards).

9. Cooper v. Pate, 378 U.S. 546 (1964); Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971); Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961); Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961); Rowland v. Sigler, 327 F. Supp. 821 (D. Neb.), *aff'd sub nom.* Rowland v. Jones, 452 F.2d 1005 (8th Cir. 1971); Sa Marion v. McGinnis, 253 F. Supp. 738 (W.D.N.Y. 1966).

In the instant case, one inmate while washing the exposed parts of his body, as required by the Black Muslim faith, was discovered by a guard. After refusing to obey the latter's order to stop, the prisoner was committed to solitary confinement. He was also told not to proselytize his beliefs with more than one or two others at a time and was threatened to be transferred from the prison camp if he continued to engage in this type of activity. Though the court did not "explicitly" enjoin such practices, it would seem from the spirit of the case that it meant to include them within its injunctive relief. Instant case at 641-42.

10. As of September, 1971, the Attica Correctional Facility provided no minister or meeting place for Black Muslims. Moreover, "[w]hile important Christian and Jewish holidays were observed . . . the Islamic holy month of Ramadan . . . was not recognized. Muslim inmates were required to attend meals, although their religion forbade them to eat." ATTICA, THE OFFICIAL REPORT OF THE NEW YORK STATE COMMISSION ON ATTICA 73-74 (1972). *See In re* Fergusen, 55 Cal.2d 663, 361 P.2d 417, 12 Cal. Rep. 753, *cert. denied,* 368 U.S. 864 (1961).

11. See cases cited in *supra* note 9. In *Rowland,* prison officials failed to sustain the burden of proving that a "compelling state interest" would be promoted by preventing an inmate from receiving a Black Muslim newspaper. They were allowed, however, to forbid the wearing of a medallion because of its possible use as a weapon.

12. "If a tractable inmate is subjected to cruel and unusual punishment or if his exercise of a constitutional right is denied *without semblance of justification arising out of the necessity to preserve order and discipline within the prison,* he may have a right of judicial review." McCloskey v. Maryland, 337 F.2d 72, 74 (4th Cir. 1964) (emphasis added).

CRUEL AND UNUSUAL PUNISHMENT

When prison authorities have imposed penalties deemed to violate the prohibitions of the eighth amendment, courts have intervened in the administrative process.[13] The first problem that arises, however, is to define which punishments are "cruel and unusual." While the amendment was originally intended to forbid only the barbaric methods of torture which were once so fashionable in England,[14] courts in this century have recognized that it should reflect current conceptions of humane treatment.[15] As with other constitutional principles, the eighth amendment "must be capable of wider application than the mischief which gave it birth."[16] Consequently, in *Weems v. United States*,[17] the Supreme Court extended the amendment to punishments that involved an element of brutality but were impermissibly disproportionate to the offense. This wider interpretation was subsequently limited by the Court[18] until its decision in *Trop v. Dulles*,[19] where it was held that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[20] Following such enlightened standards, the imposition of loss of citizenship on those found guilty of desertion from the military was considered "penal" in nature and held to be "cruel and unusual" punishment. More recently, the amendment's scope was further expanded to proscribe the punishment of an individual for maintaining the "status" of a narcotics addict.[21]

The lower federal courts have very gradually begun to adopt the broader interpretation of "cruel and unusual" punishment set forth in the later Supreme Court decisions. In doing so, they have increasingly frowned upon the use of corporal punishment as a disciplinary measure in prison. In *Jackson v. Bishop*,[22] the use of a strap to disci-

13. *See, e.g.*, Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Wright v. McMann, 321 F. Supp. 127 (N.D.N.Y. 1970).

14. *In re* Kemmler, 136 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130 (1878).

15. Weems v. United States, 217 U.S. 349 (1910).

16. *Id.* at 373.

17. 217 U.S. 349 (1910).

18. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (it was not "cruel and unusual" to execute an inmate in the electric chair after the first attempt failed); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (the Court preferred to find that the sexual sterilization of habitual criminals was a denial of equal protection, rather than to decide the issue under the eighth amendment).

19. 356 U.S. 86 (1958).

20. *Id.* at 101.

21. Robinson v. California, 370 U.S. 660 (1962).

22. 404 F.2d 571 (8th Cir. 1968).

pline an inmate was held violative of the eighth amendment.[23] In addition, living conditions within prisons have been held subject to the amendment's prohibitions. The Second Circuit in *Wright v. McMann*[24] considered it "cruel and unusual" to place a naked inmate in a cell for a substantial period of time, exposed to the cold winter temperature, and deprived of such articles as soap and toilet paper.[25] In fact, one recent case held that

> confinement itself within a given institution may amount to a cruel and unusual punishment prohibited by the Constitution where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people even though a particular inmate may never personally be subject to any disciplinary actions.[26]

This court thus chose to depart from the original notion that in order for punishment to be "cruel and unusual," it must be "specifically" directed at an individual.[27] In *Sostre v. McGinnis*,[28] the Second Circuit refused to find that extended time in solitary confinement "by itself" amounted to a constitutional violation. At the same time, other courts have chosen to ignore the fact that the scope of the eighth amendment has been expanded far beyond the outright prohibition of physical torture.[29]

Why have the courts been so slow in adhering to the concept of a dynamic eighth amendment? The problem lies in the standards which the courts have been applying in the absence of any specific guidelines emanating from the Supreme Court. Basically, they have

---

23. This method of punishment has also been criticized in AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS 417 (3d ed. 1966).

24. 387 F.2d 519 (2d Cir. 1967).

25. *See also* Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971); Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969), *aff'd*, 435 F.2d 1255 (3d Cir. 1970); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969).

The court in the instant case indicated that it may be the cumulative effect of such deprivations which ultimately violates the eighth amendment. It chose not to enjoin the denial of bedding in the absence of a finding that sanitary conditions were also inadequate. "If the cell is otherwise clean, and well heated, and the prisoner keeps his clothing, it [denial of bedding] should not be detrimental." Instant case at 649.

26. Holt v. Sarver, 309 F. Supp. 362, 372-73 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

27. In the cases cited in *supra* note 25, living conditions amounting to cruel and unusual punishment were directed at specific individuals rather than at the general prison population.

28. 442 F.2d 178 (2d Cir. 1971).

29. Roberts v. Peppersack, 256 F. Supp. 415 (D. Md. 1966); Ruark v. Schooley, 211 F. Supp. 921 (D. Colo. 1962).

been following one or more of the three possible approaches suggested by Justice Goldberg in *Rudolph v. Alabama.*[30] Utilizing this tripartite approach, the courts might inquire whether evolving notions of decency, which are universally accepted, are violated by a particular penalty,[31] whether the punishment fits the crime,[32] or whether accepted penological objectives could be as easily effectuated by less harsh means.[33] The first two tests, however, are excessively subjective and are not conducive to an expanding interpretation of "cruel and unusual" punishment. Many courts have not yet rid themselves of the ingrained conception of an eighth amendment which prohibits only the most deplorable acts of barbarism. It is therefore not surprising that "in a judge's opinion" a particular abuse is not "shocking to the general conscience" or "disproportionate" to the offense.

Is a judicial tribunal really competent to gauge what in fact shocks the "universal community?" Even assuming an affirmative answer, one must still contend with a second weakness inherent in this standard. Does one really wish to treat an inmate in accordance with "present" notions of decency? Past practices such as burning and disembowling people alive may not have been "shocking" to those who lived during the Spanish Inquisition. It is only now that people in their "civilized wisdom" condemn such inhumane punishment. Will not future generations similarly consider many of our accepted practices as violative of the eighth amendment? To allow public opinion to guide our treatment of prisoners is not only a difficult standard to apply, but also sanctions the continuation of many severe acts of inmate mistreatment. Since there is no way to determine what future public opinion will consider to be "shocking to the general conscience" nor how far in the future to look before stopping to choose a standard, it would be best

30. 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari).

31. *See* Trop v. Dulles, 356 U.S. 86 (1958); Weems v. United States, 217 U.S. 349 (1910).

32. *See* Weems v. United States, 217 U.S. 349 (1910). *See also* Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970) (imposition of the death penalty on a convicted rapist who had not endangered the life of his victim was "cruel and unusual" punishment); Wright v. McMann, 321 F. Supp. 127 (N.D.N.Y. 1970). The use of this standard is supported by the American Correctional Association. It reasons that punishment disproportionate to the offense increases the chances that the inmate will continue to be a disciplinary problem and return to crime after release. AMERICAN CORRECTIONAL ASSOCIATION STANDARDS 417 (1966). In Packer, *Making the Punishment Fit the Crime,* 77 HARV. L. REV. 1071 (1964), the author attacks the constitutional authority for this approach. He argues that the decision in *Weems* was based on a "combination" of excessiveness and severity of physical punishment.

33. *See* Robinson v. California, 370 U.S. 660, 677 (1962) (Douglas, J., concurring).

to discard this approach along with the highly subjective second test. Instead, courts should seek to determine *whether accepted penological objectives could be as easily effectuated by less harsh means.* This standard has the advantage of requiring more objective criteria. Instead of ascertaining the values of the community, the court may inquire into the effect of proposed methods of treatment. If it finds that a legitimate end (such as rehabilitation or security) is being achieved, the court would then have to determine whether less severe methods could also be utilized. Courts which have denied relief in the past might very well have decided differently had they been compelled to adhere to this approach. For example, in *Sostre v. McGinnis*[34] the Second Circuit emphasized its belief that an extended period of time in solitary confinement was not sufficiently barbaric to constitute an eighth amendment violation. It was also satisfied that the punishment was "motivated" by reasons of security. The court, however, never questioned whether such severe treatment would in fact achieve that end, nor did it consider whether less drastic alternatives could have been employed. A firm commitment by the Supreme Court for such an approach would help to eliminate judicial tendencies to inhibit the expansion of the eighth amendment.

Due Process

The desire to refrain from interfering with the prison disciplinary system has led some federal courts to deny relief when inmates have been deprived of certain procedural due process safeguards. These courts have considered various safeguards to be "privileges" granted by the state rather than constitutionally protected rights.[35] Thus in *Powell v. Hunter,*[36] loss of statutory "good time" was considered merely the denial of a "privilege," not entitling the prisoner to relief.

This "right-privilege" distinction has often been applied to other administrative situations. In *Cafeteria & Restaurant Workers Union v. McElroy,*[37] the Supreme Court upheld the summary exclusion of a cook from employment at a naval gun factory after he was alleged to be a security risk. The Court explained that "[w]here it has been possible to characterize the private interest (perhaps in oversimplification)

34. 442 F.2d 178 (2d Cir. 1971).
35. Burns v. Swenson, 430 F.2d 771, 776 (8th Cir. 1970); Courtney v. Bishop, 409 F.2d 1185, 1188 (8th Cir. 1969).
36. 172 F.2d 330 (10th Cir. 1949).
37. 367 U.S. 886 (1961).

as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required."[38] Yet the practice of denying relief by labelling the particular deprivation as a "privilege" has been vigorously rejected when an individual has incurred a "substantial" loss. Thus in *Shapiro v. Thompson,*[39] the Supreme Court held that the statutory prohibition of public assistance benefits to residents of less than one year was a violation of the equal protection clause. The Court has also ruled that denial of a tax exemption to veterans who fail to take a loyalty oath contravenes the first amendment.[40] Moreover, when a South Carolina statute denied an individual unemployment compensation because of her refusal to accept Saturday employment, in violation of her religious beliefs, the Court stated that "[i]t is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[41] In *Goldberg v. Kelly,*[42] the Court also held that the termination of welfare payments to recipients who were denied notice and an adequate hearing violated their due process rights. This decision was reaffirmed in the recent case of *Morrissey v. Brewer,*[43] which required certain minimal due process procedures in parole revocation hearings. Logically, the "right-privilege" distinction should be equally invalid in the prison setting.[44]

Prior to the granting of procedural due process safeguards, courts must first determine what "process" is in fact "due." The Supreme Court has attempted to set forth general standards. In *Hannah v. Larche,*[45] it noted that due process is an "elusive" and "undefinable" concept. Factors to be considered are "[t]he nature of the alleged right involved, the nature of the proceeding, and the possible burden

38. *Id.* at 895.

39. 394 U.S. 618 (1969).

40. Speiser v. Randall, 357 U.S. 513 (1958).

41. Sherbert v. Verner, 374 U.S. 398, 404 (1963).

42. 397 U.S. 254 (1970). *See* Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970), *cert. denied,* 401 U.S. 1003 (1971); Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970).

43. 408 U.S. 471 (1972).

44. Writers too, have warned against use of this doctrine as a means of lending support to administrators' unbridled discretion. "Even though the privilege doctrine should not be condemned in all its applications, its use has generally been unfortunate in furthering the development of discretionary power that is inadequately confined, structured, and checked." K. DAVIS, DISCRETIONARY JUSTICE 176 (1971).

45. 363 U.S. 420 (1960).

on that proceeding."[46] Another relevant consideration was suggested in *Joint Anti-Fascist Refugee Committee v. McGrath*,[47] in which the Attorney General listed three organizations as Communist, without having granted any of them notice or the opportunity to be heard. Justice Frankfurter noted that "[t]his Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."[48] The Court has also reasoned that the requirement of procedural safeguards depends upon the nature of the governmental function involved and the private interest which it affects.[49] These last two tests were both applied in *Goldberg v. Kelly*. In addition to its finding that a denial of welfare payments causes an individual to suffer "grievous loss," the Court held that "the interest of the eligible . . . recipient of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens."[50]

When prison inmates could suffer "grievous loss" because substantial individual interests might be denied, courts have required minimum procedural safeguards.[51] Such protections include the right to adequate notice of the charges[52] and an opportunity to be heard by an impartial tribunal.[53] The courts, however, have been somewhat re-

46. *Id.* at 442.

47. 341 U.S. 123 (1951).

48. *Id.* at 168 (Frankfurter, J., concurring).

49. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

50. 397 U.S. 254, 266 (1970). *See also* Morrissey v. Brewer, 408 U.S. 471 (1972); Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971).

51. Nolan v. Scafati, 430 F.2d 548, 550 (1st Cir. 1970); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971) (the court defines "grievous loss" to include indefinite confinement in segregation, possible increase in a prisoner's sentence, forfeiture of earnings, isolated confinement for over ten days, and the possibility that an inmate may be referred to the district attorney for criminal prosecution); Meola v. Fitzpatrick, 322 F. Supp. 878 (D. Mass. 1971) (loss of "good time"); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970) (concerning loss of "good time" and solitary confinement).

52. Sostre v. McGinnis, 442 F.2d 178, 195 (2d Cir. 1971) (dictum); Clutchette v. Procunier, 328 F. Supp. 767, 782 (N.D. Cal. 1971); Bundy v. Cannon, 328 F. Supp. 165, 172 (D. Md. 1971); Meola v. Fitzpatrick, 322 F. Supp. 878, 885 (D. Mass. 1971); Carothers v. Follette, 314 F. Supp. 1014, 1028 (S.D.N.Y. 1970).

53. Clutchette v. Procunier, 328 F. Supp. 767, 784 (N.D. Cal. 1971); Bundy v. Cannon, 328 F. Supp. 165, 172 (D. Md. 1971); Carothers v. Follette, 314 F. Supp. 1014, 1028 (S.D.N.Y. 1970); Kritsky v. McGinnis, 313 F. Supp. 1247, 1250 (N.D.N.Y. 1970).

luctant to provide the remaining procedural guarantees which are common in the normal trial setting. Recently, in *Sostre v. McGinnis*,[54] the Second Circuit refused to extend the requirements of procedural due process in the belief that a prison disciplinary proceeding is less adversarial and complex than the usual criminal trial. Yet a prisoner who is accused of a particular violation and faces the prospect of serious punishment is certainly strongly motivated to defend his interests. Where loss of "good time" may result, his very freedom is at stake. Opposing him are administrators who are highly conscious of the need to maintain prison security. Where is there lack of adversity? In addition, when "simple" questions of fact are presented, can an attorney's role be considered negligible? One of the essential functions of counsel is his ability to cross-examine witnesses in order to reveal what truth, if any, supports the testimony. Recent decisions (including the instant case) are now recognizing the need to provide inmates with all of the procedural safeguards mandated by the fourteenth amendment. Thus they require that prisoners be provided with the rights of cross-examination[55] and representation by counsel.[56]

Included within the scope of "due process" is the requirement that laws be sufficiently clear and understandable. Vague rules prevent an individual from receiving "fair warning" that a particular act is forbidden and carries with it a corresponding penalty.[57] Thus the Supreme Court has held that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."[58] Moreover, the Court has often expressed the fear that "vague" laws could be applied to

54. 442 F.2d 178 (2d Cir. 1971).

55. Clutchette v. Procunier, 328 F. Supp. 767, 783 (N.D. Cal. 1971). *See also* Caulder v. Durham Housing Authority, 433 F.2d 998, 1004 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971); Escalera v. New York City Housing Authority, 425 F.2d 853, 862 (2d Cir. 1970).

56. Nolan v. Scafati, 430 F.2d 548, 551 (1st Cir. 1970). The court in the instant case required only "retained" counsel. Thus, it followed Bearden v. South Carolina, 443 F.2d 1090 (4th Cir. 1971), which held that indigent parolees would receive free counsel only if it were in the interests of fairness. For a recent case which requires "appointed" counsel if an inmate is charged with a violation which is also punishable by state authorities, see Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971).

57. Palmer v. City of Euclid, 402 U.S. 544 (1971); Bouie v. City of Columbia, 378 U.S. 347 (1964); Original Fayette County Civic & Welfare League, Inc. v. Ellington, 309 F. Supp. 89 (W.D. Tenn. 1971).

58. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

include legally protected activities.[59] This apprehension increases when one considers the possible "chilling" effect such statutes may have on the exercise of one's constitutional rights. An individual may certainly hesitate before conducting legal activity if he has no way of ascertaining whether his actions will be caught in the web of some ambiguously written rule. Furthermore, "vague" laws may be applied arbitrarily if courts and juries have no way of interpreting them with certainty, thus denying an individual his "due process" guarantees.[60]

Within a prison setting, the "vagueness" problem becomes even more acute. The "fair warning" aspect of "due process" is more vulnerable to abuse in such institutions than in the outside community. Beyond the prison walls, criminal acts are often known by the offender to be prohibited by virtue of the moral sanctions attached to them by society. When this behavior is proscribed by vaguely written statutes, the presumption that one knows the law must, of necessity, collapse. Yet it could be argued that the community's moral disapproval of such actions gives an individual "fair warning" to refrain from conduct of this sort. In prison, however, many rules and regulations forbid those activities which are ordinarily permitted in the outside world. Reasons of efficiency and security often replace those of moral origin. An inmate under these circumstances can neither be presumed to know a law that is incomprehensibly vague, nor can he obtain "fair warning" from the nature of the act itself. Consequently, some courts have expressed an awareness of the problem of vague standards and arbitrary treat-

59. "This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307 (1964). *Accord,* Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Stromberg v. California, 283 U.S. 359 (1931). *See* Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969); Original Fayette County Civic & Welfare League, Inc. v. Ellington, 309 F. Supp. 89 (W.D. Tenn. 1971).

60. Original Fayette County Civic & Welfare League, Inc. v. Ellington, 309 F. Supp. 89 (W.D. Tenn. 1971).

61. In Landman v. Peyton, 370 F.2d 135, 140 (4th Cir.), *cert. denied,* 385 U.S. 881 (1966), it was noted that guards often are the source of such abuses. "[P]rison guards may be more vulnerable to the corrupting influence of unchecked authority than most people. It is well known that prisons are operated on minimum budgets and that poor salaries and working conditions make it difficult to attract high calibre personnel." Morris v. Travisono, 310 F. Supp. 857, 861 (D.R.I. 1970) noted that "[w]hile the court has decided to place this grievance [lack of a clearly defined code of inmate conduct] beyond the reach of this case, it is one which should be given serious consideration." *See also* ATTICA, THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA 74 (1972): "The rules at Attica were poorly communicated, often petty, senseless, or repressive and they were selectively enforced." Moreover, "[i]nmates often learned the rules only after they broke them."

ment of prisoners.[61] In *Talley v. Stephens,*[62] the district court required "fair warning" where corporal punishment might be inflicted. In recognition of this serious problem, the American Correctional Association has recommended that standards for dealing with inmates should include notice to the inmates of the rules of prison conduct and consequences of violation.[63]

Another area of major concern to those confined within our penal institutions is their ability to seek post-judicial relief. It is now well settled that inmates have a right to obtain access to the courts free of administrative restrictions.[64] The Supreme Court has defined this right to include the provision of legal assistance to prisoners. In *Johnson v. Avery,* it held that "unless and until the state provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation . . . barring inmates from furnishing such assistance to other prisoners."[65] It was therefore not surprising that the court in the instant case issued injunctive relief to stop certain restrictions placed upon this right.[66] Of more significance, however, was its recognition that administrative restraints may assume various forms, including the "transfer" of inmates to other institutions. Courts have generally considered the transfer of inmates to be an administrative function which should more properly be left to the discretion of prison officials.[67] Yet the effect of penalizing a prisoner, by sending him to a higher security institution after he has begun to seek post-judicial relief, may be just as severe as an outright prohibition of the necessary legal materials and assistance.

Another type of "punitive transfer" is the shifting of "troublemakers" from one institution to another as a means of punishment. The court in the instant case considered only those transfers which were "motivated" by the desire to restrict legal activity, and did not address itself to the propriety of such actions when motivated by purely puni-

62. 247 F. Supp. 683 (E.D. Ark. 1965).

63. MANUAL OF CORRECTIONAL STANDARDS, *supra* note 23, at 266-68.

64. Johnson v. Avery, 393 U.S. 483 (1969); *Ex parte* Hull, 312 U.S. 546 (1941); Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970); Edwards v. Duncan, 355 F.2d 993, (4th Cir. 1966).

65. 393 U.S. 483, 490 (1969).

66. Instant case at 656-57.

67. *See* Lipscomb v. Stevens, 349 F.2d 997 (6th Cir. 1965), *cert. denied,* 382 U.S. 993 (1966); United States *ex rel.* Gallagher v. Daggett, 326 F. Supp. 387 (D. Minn. 1971); United States *ex rel.* Stuart v. Yeager, 293 F. Supp. 1079 (D.N.J. 1968), *aff'd,* 419 F.2d 126 (3d Cir. 1969), *cert. denied,* 397 U.S. 1855 (1970); Konigsberg v. Clarence, 285 F. Supp. 585 (W.D. Mo. 1968), *aff'd,* 417 F.2d 161 (8th Cir. 1969), *cert. denied,* 397 U.S. 963 (1970).

tive reasons. However, these practices are widespread and should also be subjected to judicial scrutiny. Whenever the effect of such transfers is to condemn a prisoner to suffer "grievous loss" by confining him in an institution where living conditions are much more oppressive and the distance from his family increased, should he not be afforded procedural due process safeguards? The courts, unfortunately, have not yet gone this far.[68]

RATIONALE

Though aware of the "hands-off" policy, the court in the instant case chose to assert an active role. It did so because constitutional rights were being undermined by prison authorities, who were unable to show that a valid penological end (such as rehabilitation) was being achieved. By placing unusual emphasis upon this particular standard, the court found a wide range of deprivations to be violative of the eighth amendment. The practice of serving meals lacking in adequate nutritional content has traditionally been considered to lie outside of the amendment's reach. One federal case has held that "the mere allegation of an inadequate diet with accompanying loss of weight is certainly not enough to constitute cruel and unusual punishment."[69] Nevertheless, the court in *Landman* enjoined the bread and water diet as an unnecessary infliction of pain that served no legitimate end and which totally contradicted the notion of maintaining respect for human dignity. The practice of removing inmates' clothing was also considered degrading. In order for this practice to be permitted, the court required that a doctor authorize in writing that no health problem would result and that there would be a substantial risk of self-injury if the prisoner were given garments. In addition, Judge Merhige enjoined the confinement of inmates in chains or handcuffs in their cells. He recognized that the only justification for such measures would be the prevention of self-inflicted harm and that less drastic means could be used to achieve

68. "The Division of Correction has the right to transfer prisoners from one institution to another, whether to a higher, equal or lower security status, for administrative, therapeutic, adjustment or other reason, without the need for a hearing under these procedures." Bundy v. Cannon, 328 F. Supp. 165, 173 (D. Md. 1971).

69. Heft v. Parker, 258 F. Supp. 507, 508 (M.D. Pa. 1966). *See* Novak v. Beto, 453 F.2d 661 (5th Cir. 1971); Belk v. Mitchell, 294 F. Supp. 800 (W.D.N.C. 1968). *But see* Abernathy v. Cunningham, 393 F.2d 775 (4th Cir. 1968) (the court denied relief because they believed that the prisoners were being served a "balanced ration"); Herrell v. Mancusi, Civil No. 70-540 (W.D.N.Y. 1970) (preliminary injunction restricting prison officials from providing a diet limited to bread and water in contravention of Department regulations).

this valid aim. Moreover, the eighth amendment was "extended" to forbid the use of tear gas to disable a man who poses no present danger. The Fourth Circuit had previously refused to prohibit this abuse.[70] While crowding inmates into a single cell has generally been enjoined only in conjunction with other deprivations,[71] the court also held overcrowding "by itself" to be "cruel and unusual" when serving only a vindictive purpose. Unfortunately, however, the court did not go as far as it might have to bar this particular practice. It implied that such an abuse would have been constitutional had it been caused by the lack of physical facilities necessary to alleviate overcrowding.

Where deprivations were deemed to be "substantial," the court ordered procedural due process safeguards to be instituted. Since the denial of constitutional rights was considered to be an inherent feature of the entire Virginia penal system, it distinguished the instant case from *Sostre v. McGinnis.*[72] Moreover, the court rejected the "right-privilege" distinction, and instead, chose to follow the example set in *Goldberg v. Kelly.*[73] The "grievous loss" suffered by inmates was weighed against any possible governmental interest. Denial of accrued "good time," placing an inmate in solitary or maximum security confinement, and "padlocking" a prisoner within his cell for more than ten days were found to be substantial individual deprivations.[74] When the court found that minimum due process safeguards would not impede legitimate prison functions, it ordered appropriate relief.[75]

70. *See* Landman v. Peyton, 370 F.2d 135 (4th Cir.), *cert. denied,* 385 U.S. 881 (1966).

71. Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971); Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969), *aff'd,* 435 F.2d 1255 (3d Cir. 1970).

72. According to Sostre v. McGinnis, 442 F.2d 178, 203 (2d Cir. 1971), "[c]onsideration of Sostre's case does not properly raise any question whether New York prisons regularly or systematically ignore minimal due process requirements . . . ."

73. *See supra* note 50 and accompanying text.

74. Instant case at 654. The court in the instant case classified penalties into a "major" or a "minor" category. The major penalties mentioned in the text required minimum due process safeguards. The "minor" penalties (minor fines, loss of commissary rights, restriction of individual recreational privileges, or padlocking for less than ten days) required "oral" notice, an opportunity to be heard by an impartial tribunal, and a chance to cross-examine the complaining officer and to present testimony. The court also "recommended" that those inmates charged with "minor" violations be permitted to choose a lay advisor to represent them. *Id.*

75. *See* text at *supra* pp. 348-49. It is interesting to note that as the product of a six month study completed prior to the Attica incident, a City of New York subcommittee suggested procedural safeguards for those in jail which are substantially similar to the relief granted in the instant case. PRISON REFORM, REPORT, PROPOSED LEGISLATION AND RECOMMENDATIONS OF THE SUBCOMMITTEE OF PENAL AND JUDICIAL REFORM TO THE COMMITTEE ON PUBLIC SAFETY OF THE COUNCIL OF THE CITY OF NEW YORK B-12-13 (Oct. 16, 1971).

This judicial intervention in the state prison's administrative procedures was accomplished by way of the Civil Rights Act.[76] Use of this Act, however, may conflict with the policies governing jurisdictional requirements of the federal habeas corpus remedy.[77] In the instant case, the court easily assumed jurisdiction over eighth and fourteenth amendment violations and supplied valid reasons for the relief granted.

Addressing itself to a possible problem with respect to its power to determine the "good time" issue, the court reacted to the Second Circuit's decision in *Rodriguez v. McGinnis.*[78] In this decision, the court disallowed a claim of unconstitutional denial of "good time" on the ground that it should have been brought under the federal habeas corpus statute because it involved "release from custody." It followed the "circumvention rule":[79] one may not initiate action under the Civil Rights Act in order to avoid the exhaustion of state remedies required by the federal habeas corpus statute.[80] This exhaustion requirement means that an inmate in need of immediate relief must face the prospect of expensive and time-consuming litigation prior to reaching a federal forum. Subsequent to the decision in the instant case, however, the Second Circuit conducted an en banc rehearing and reversed itself.[81] This action was taken in response to the Supreme Court's recent decision in *Wilwording v. Swenson*[82] which held that a proceeding by inmates challening conditions of confinement, though cognizable under federal habeas corpus, might *also* be brought under the Civil Rights Act. The court in the instant case rendered its decision too early to have derived benefit from these subsequently decided cases. Nevertheless, it justified the inclusion of "good time" relief within its jurisdiction. Judge Merhige reasoned that prevailing precedent within the Fourth Circuit disapproves of utilizing habeas corpus where "good time" relief is sought. The court relied on *Roberts v. Pegelow*[83] which

76. 42 U.S.C. § 1983 (1971).
77. 28 U.S.C. § 2254 (1971).
78. 451 F.2d 730 (2d Cir. 1971), *rev'd on rehearing,* 456 F.2d 79 (2d Cir. 1972), *cert. granted sub nom.* Oswald v. Rodriguez, 407 U.S. 919 (1972).
79. This terminology is taken from Justice Doyle in his excellent discussion of the jurisdiction question in Edwards v. Schmidt, 321 F. Supp. 68 (W.D. Wis. 1971).
80. 28 U.S.C. § 2254(b). This exhaustion requirement is not a prerequisite to a civil rights action. Wilwording v. Swenson, 404 U.S. 249 (1971); Houghton v. Shafer, 392 U.S. 639 (1968); McNeese v. Board of Educ., 373 U.S. 668, 672 (1963); Monroe v. Pape, 365 U.S. 167 (1961).
81. Rodriguez v. McGinnis, 456 F.2d 79 (2d Cir. 1972).
82. 404 U.S. 249 (1971).
83. 313 F.2d 548 (4th Cir. 1963).

denied habeas corpus relief, stating that "[t]he traditional function of the writ of habeas corpus is to test the legality of detention."[84] From this statement, the court in *Landman* inferred that the Fourth Circuit has not extended the scope of habeas corpus beyond challenges to the "legality of a conviction" so as to include "good time" relief. It believed, however, that the Fourth Circuit would consider a civil rights action to be an acceptable alternative. The court further noted that while the scope of habeas corpus has broadened within recent years,[85] courts have also applied the Civil Rights Act to various claims of constitutional violations, including those related to "good time" forfeitures.[86] In addition, it recognized that the extension of one type of remedy does not necessarily require the automatic shrinkage of any other.[87] Furthermore, the court realized that it was not bound by the first *Rodriguez* decision. The "circumvention rule" upon which that decision was based has often been applied to situations where the "legality of conviction or sentencing" (including confinement pursuant to administrative authority) has been challenged.[88] Thus the initial *Rodriguez* decision could be viewed as an attempt to extend the rule, at least where the restoration of "good time" is sought. In the instant case, the court's rejection of this decision may then be viewed as a disapproval of expanding the "circumvention rule" beyond situations where the conviction process is under attack.

It is interesting to note that the court in the instant case could have reached the same conclusion on the "good time" issue merely by distinguishing itself from the first *Rodriguez* decision. In order to understand fully what the Second Circuit had held, one must first consider its prior decision in *Sostre v. McGinnis*.[89] The court restored to Sostre 124⅓ days "good time" while maintaining that it had jurisdiction under the Civil Rights Act. Since *Sostre* involved various claims of constitutional violations, the court found that the "ultimate object" of the action was not to obtain release from prison. Thus, the Second

84. *Id.* at 549.

85. Peyton v. Rowe, 391 U.S. 54 (1968).

86. United States *ex rel.* Campbell v. Pate, 401 F.2d 55 (7th Cir. 1968); Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971); Meola v. Fitzpatrick, 322 F. Supp. 878 (D. Mass. 1971); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970).

87. *See* Wilwording v. Swenson, 404 U.S. 249 (1971); Nolan v. Scafati, 430 F.2d 548, 551 (1st Cir. 1970).

88. Smartt v. Avery, 411 F.2d 408 (6th Cir. 1969); Johnson v. Walker, 317 F.2d 418 (5th Cir. 1963); Baker v. McGinnis, 286 F. Supp. 280 (S.D.N.Y. 1968); Davis v. Maryland, 248 F. Supp. 951 (D. Md. 1965).

89. 442 F.2d 178 (2d Cir. 1971).

Circuit stated that it was not deciding the question whether title 42 U.S.C. section 1983 would be appropriate for a claim based "solely" on an unconstitutional denial of "good time."[90] With *Sostre,* the court paved the way for its subsequent decision in the first *Rodriguez* case. Though it made no reference to its prior holding in *Sostre,* one may infer that it considered its present proceeding to focus "solely" on the "good time" question and believed that the "ultimate object" was release. In fact, the effect of the "good time" restoration was to entitle Rodriguez to "immediate" release. The court in the instant case could therefore have easily considered the facts to constitute a *Sostre* rather than a *Rodriguez* situation. As in *Sostre,* the "good time" issue was merely one of an assortment of constitutional attacks.

The "second" *Rodriguez* decision was also an interesting and somewhat perplexing case. Beginning with its decision in *Monroe v. Pape,*[91] the Supreme Court has held that the Civil Rights Act may preempt any existing state remedy. "The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[92] The state remedy in that case was the ability to seek "judicial" relief under the state's statutes and constitution. Its subsequent decisions reaffirmed the same principle.[93] Moreover, in *Houghton v. Shafer,*[94] the Court applied this principle when a "prisoner" was seeking relief. Nevertheless the Second Circuit apparently ignored these decisions when it decided the first *Rodriguez* case. It is true that *Houghton,* unlike *Rodriguez,* involved the exhaustion of "administrative" remedies. Yet in conjunction with the Court's prior decision in *Monroe,* the Second Circuit could have easily recognized the overlap of state "judicial" and federal remedies in a prison context. It simply chose not to do so. However, when *Wilwording v. Swenson*[95] was decided, the Second Circuit felt "compelled" to reverse its prior position. *Wilwording* explicitly held that a "prisoner" could resort to a section 1983 proceeding without having to initiate the state "federal habeas corpus" remedy. This case, however, involved a challenge to "conditions of confinement." It was "not" directed at an unconstitutional denial of "good time." Thus the Second Circuit could

90. *Id.* at 204 n.50.
91. 365 U.S. 167 (1961).
92. *Id.* at 183.
93. Houghton v. Shafer, 392 U.S. 639 (1968); McNeese v. Board of Educ., 373 U.S. 668 (1963).
94. 392 U.S. 639 (1968).
95. 404 U.S. 249 (1971).

have remained consistent to its policy of restricting an inmate's access to section 1983 by distinguishing *Wilwording*. After all, it somehow distinguished *Sostre* where "good time" was not the "sole" issue. Why did it not distinguish *Wilwording* where "good time" was not "an" issue at all? It would seem that the Supreme Court finally convinced the Second Circuit that the Civil Rights Act is supplementary to the state habeas corpus action, at least when the "legality of conviction" is not being challenged. The importance of the reaction to this latter Supreme Court decision cannot be stressed enough. To allow the "circumvention rule" to accompany the federal habeas corpus statute as it increases in scope would lead to very undesirable consequences. This statute provides relief to those "in custody in violation of the Constitution or laws or treaties of the United States."[96] Such broad language could conceivably be made to cover any infringement upon an inmate's federal rights. As the use of federal habeas corpus increases, access to title 42 of U.S.C. section 1983 would correspondingly decrease, and state prisoners would be hindered in seeking the protection of an Act presumably intended to include "all" citizens. However, by allowing exclusive use of habeas corpus in those areas where it traditionally has been applied and permitting an overlap of the federal and state remedies for such relief (including the restoration of "good time") to which habeas corpus has expanded, such adverse consequences could be avoided.

When the court in the instant case ordered prison authorities to file with it a list of rules concerning permissible standards of behavior to be followed by inmates and corresponding penalties for noncompliance, it granted a rather vital type of remedy. Courts generally face "individual" complaints and respond with appropriately narrow relief. When, however, a tribunal attempts to rectify conditions prevalent throughout an entire penal system in an action initiated by representatives of prisoners as a "class," broad remedies appear quite reasonable. Not only do inmates have the constitutional right of "fair warning," but vague rules accompanied by arbitrary treatment can only impede any existing attempt at rehabilitation. Though the court could be viewed as assuming an administrative function, the same is no less true when it is ordering prison officials to cease certain practices deemed to be "cruel and unusual" punishment or to adopt certain measures

96. 28 U.S.C. § 2254(a) (1970).

which will accord procedural due process. The point is that the administrators are not meeting their responsibilities:

> *The typical failure in our system that is correctable is not legislative delegation of broad discretionary power with vague standards; it is the procrastination of administrators in resorting to the rule-making power to replace vagueness with clarity.* All concerned should push administrators toward earlier and more diligent use of the rule-making power . . . reviewing courts should push.[97]

When prison officials fail to accord inmates their constitutional rights, court intervention becomes necessary. Society can ill afford a conclusion to the contrary.

ARTHUR H. ACKERHALT

97. K. DAVIS, *supra* note 44, at 56-57 (emphasis in original).