PRISONERS—DUE PROCESS—INMATES TRANSFERRED TO OUT-OF-STATE PRISONS ARE ENTITLED TO PROCEDURAL SAFEGUARDS—*Gomes v. Travisono*, 353 F. Supp. 457 (D.R.I. 1973).

Late in the evening of November 18, 1971, eleven inmates of the Rhode Island Adult Correctional Institution were taken from their cells. Some were "stripped" to their underwear; some were "handcuffed, shackled, and chained."[1] One by one they were taken from the prison, placed in state police cars and delivered individually to institutions in Kansas, Georgia, Illinois, and Maine.[2] They had been given no prior notice, nor were they afforded a hearing or advised of the reasons for the transfers.[3]

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1 Gomes v. Travisono, 353 F. Supp. 457, 461 (D.R.I. 1973). The defendants appealed this decision and the plaintiffs cross-appealed. Oral arguments were heard before the Court of Appeals for the First Circuit on September 7, 1973.

2 *Id.* at 461-62. In the fall of 1971, the Rhode Island Adult Correctional Institution [hereinafter the A.C.I.] was experiencing serious tension between inmates, guards, and prison administrators. Tempers were short and racial tension was high in the wake of the Attica uprising of September, 1971. The young, inexperienced guards at A.C.I., as well as the inmates, were affected by the tragedy of Attica. Racial confrontations and hostility increased when the blueprints and materials for the making of a bomb were discovered in the prison. Late in October, 1971, the guards staged a strike to protest what they considered the lax security and weak disciplinary measures imposed upon inmates.

An inmate organization, the Afro-American Society, had as a goal, the purpose of promoting compliance with the prison regulations. The Society had also been created to aid black inmates in gaining educational advantages and to assist in finding post-release employment for its members.

Because the Society believed that there were prison conditions which needed to be remedied, Dennis Gomes, Frederick Taylor, and Richard Harris, officers of the organization, met with Warden Howard on November 8, 1971. After discussing prisoners' grievances for several hours, the group scheduled another meeting for the following week. Prompted by their concern that the Warden would fail to keep the appointment, the leaders of the Society drafted a letter to him. The letter was never delivered because it was considered too aggressive. Instead, the Society decided that all further actions would be discussed in future conferences with the Warden. *Id.* at 460.

Warden Howard had taken several days off, and upon his return to the A.C.I., he was told a variety of stories about an alleged Afro-American Society plot to cause serious disruptions within the prison. The scheme was to be triggered by the presentation of "impossible demands," and according to some versions of the plan, several inmates would attempt an escape. In order to ascertain the details of the alleged plot, the Warden attempted to obtain eavesdropping equipment. These devices could not be obtained. However, a guard who served as an advisor to the Society testified that he had never heard of any plot by the group to disrupt the prison. He also believed that he was in a position to know if such a plan existed. *Id.* at 460-61.

On November 17, 1971, after several meetings with other prison officials, the decision to transfer the prisoners was made. Although Warden Howard testified that a variety of factors contribute to a decision to transfer, a sociologist who had become friendly with the Warden testified that "the momentum of the situation led the Warden to go along with the transfers." *Id.* at 461.

3 *Id.* at 459. The A.C.I. administration is authorized to summarily transfer a prisoner

At each of the receiving institutions, the inmates were confronted with similar adverse conditions. The transferred prisoners lived in isolated cells,[4] and generally were offered little or no opportunity to participate in rehabilitation programs at the receiving institutions.[5] Of the eleven inmates transferred, three were denied parole while at the receiving institution,[6] and others, who were parties in pending legal proceedings were forced to accept postponements of their trials.[7]

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to an out-of-state institution by the New England Interstate Corrections Compact, R.I. GEN. LAWS ANN. § 13-11-1 *et seq.* (1969) and R.I. GEN. LAWS ANN. § 13-12-1 (Supp. 1972). The Corrections Compact, § 13-11-1 *et seq.*, governs transfer of prisoners among the member states, while § 13-12-1 authorizes Rhode Island officials to transfer prisoners into the federal corrections system when adequate facilities are unavailable in the state. The use of interstate compacts as statutory authority for out-of-state prisoner transfers is quite common. SOUTH CAROLINA DEP'T OF CORRECTIONS, THE EMERGING RIGHTS OF THE CONFINED 184 (1972) [hereinafter cited as THE EMERGING RIGHTS OF THE CONFINED]. The federal government is empowered to receive state prisoners by virtue of 18 U.S.C. § 5003 (1970), which provides that the Attorney General may contract with state and territorial officials for the detention and custody of state prisoners. See footnotes 86 & 87 *infra*.

The importance of transfer litigation is also demonstrated by the large number of prisoners affected. In 1970, for example, all transfers from state and federal prisons reached 100,337. Transfers from federal prisons numbered 10,414, while transfers from state institutions totalled 89,498. U.S. DEP'T OF JUSTICE, BUREAU OF PRISONS, NAT'L PRISONER STATISTICS BULL. No. 47, PRISONERS IN STATE AND FEDERAL INSTITUTIONS FOR ADULT FELONS 6 (1972).

4 353 F. Supp. at 462-63. These cells are used for what is known as administrative segregation, which is similar to punitive segregation or solitary confinement. For cases based on the theory that solitary confinement is cruel and unusual punishment, see Wright v. McMann, 387 F.2d 519, 521-22 (2d Cir. 1967); Holt v. Sarver, 309 F. Supp. 362, 378 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Hancock v. Avery, 301 F. Supp. 786, 791-92 (M.D. Tenn. 1969); Jordan v. Fitzharris, 257 F. Supp. 674, 680-82 (N.D. Cal. 1966).

5 353 F. Supp. at 462. The transferees were also denied free access to suitable work projects, and some inmates were assigned to programs that were "not consonant with their individual development." *Id.* In fact, in one case an inmate was denied access to these programs merely because he was an out-of-state transferee. Generally, transferred prisoners did not participate in group therapy sessions or educational programs at the receiving institution, their prison wages were reduced or withheld completely, and they were unable to draw from personal savings for several months. Additionally, prison officials did not permit personal belongings to be sent to them. *Id.*

6 *Id.* at 464. Although the board gives reasons for denying a prisoner's request for parole, it did not refer to the transfers as a reason for denial in any of the instant cases. *Id.* Judge Pettine, however, stated that the effect of a transfer on parole may "range from indirect to dramatic." *Id.* at 463. For an in-depth explanation of the parole system, see Comment, *The Parole System*, 120 U. PA. L. REV. 282 (1971).

7 353 F. Supp. at 470. Since prior to the *Gomes* decision there were no written regulations to guarantee the return of a prisoner to Rhode Island for legal proceedings, in practice a court order was required to insure the presence of a transferred inmate. Judge Pettine observed that inmates have been transferred

> just a few days before they were to stand trial; additionally, one inmate was transferred despite requests from the Attorney General's office that he be kept in Rhode Island for trial. At the time of the November 18 transfers, six of the

In December of 1971, Gomes, one of the eleven transferred prisoners, instituted a class action[8] against prison and state officials.[9] His cause of action was based on 42 U.S.C. § 1983,[10] and jurisdiction was

transferred inmates had federal or state charges pending against them and two had appeals pending.

Id. at 463.

8 *Id.* at 459. The action was commenced pursuant to FED. R. CIV. P. 23.

9 353 F. Supp. at 459. The suit was initially brought against John J. Affleck, the Director of the Department of Social and Rehabilitative Services and John Sharkey, Assistant Director for Corrections. Subsequently, Rhode Island reorganized its correctional facilities under a Department of Corrections, and Anthony P. Travisono became the new director. Pursuant to FED. R. CIV. P. 25(d), Travisono was automatically substituted as party defendant for Affleck. 353 F. Supp. at 459-60 n.1.

10 *Id.* at 459. 42 U.S.C. § 1983 (1970) provides:

> 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 proceeding for redress.

Section 1983, rather than habeas corpus proceedings, has been used by prisoners to bring civil rights actions against state corrections administrators in order to invoke federal jurisdiction and seek compensatory damages. *See* Landman v. Royster, 354 F. Supp. 1302, 1317 (E.D. Va. 1973) (under 42 U.S.C. § 1983, prison officials were held personally liable to prisoners for psychological and physical damage received through improper treatment).

The relationship between section 1983 and federal habeas corpus actions has been an unsettled area of the law in recent years. The need to clarify the basis of federal jurisdiction is demonstrated by the requirement that the litigant first exhaust state remedies when relief is sought under habeas corpus. 28 U.S.C. § 2254(b) (1970) provides:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

The appeal of section 1983 as an alternative basis for seeking relief is obvious since, unlike section 2254, a litigant is not required to first exhaust state remedies. The United States Supreme Court, however, in Preiser v. Rodriguez, 411 U.S. 475 (1973), has recently limited the availability of section 1983 in correctional controversies. In *Preiser*, the petitioners initiated an action under section 1983 seeking redress for their loss of good time credits as a result of correctional disciplinary proceedings. Restoration of the credits would have resulted in the petitioners' immediate release in each case. After reviewing the provisions of both Acts, the Court concluded that despite the broad language of section 1983, by enacting the federal habeas corpus statute, Congress provided a specific remedy for state prisoners who challenge their convictions and sentences on federal constitutional grounds. Consequently, the Court held that habeas corpus is the exclusive federal remedy when a state prisoner challenges not only the fact, but the duration of his confinement:

> In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983.

411 U.S. at 490. *See also* Gomez v. Miller, 341 F. Supp. 323 (S.D.N.Y. 1972), *aff'd mem.*, 412 U.S. 914 (1973).

founded on 28 U.S.C. § 1343.[11] In *Gomes v. Travisono*,[12] the federal district court for the district of Rhode Island entertained Gomes' claims for relief.

The plaintiffs' initial contention was that an involuntary transfer of a state prisoner to an out-of-state federal penitentiary constituted cruel and unusual punishment in violation of the eighth amendment.[13] Additionally, the inmates argued that an involuntary transfer without prior notice and hearing violated protected rights under the due process and equal protection clauses of the fourteenth amendment.[14] The plaintiffs also urged the court to find that the transferees' first, sixth, and fourteenth amendment rights had been contravened because there were no written rules to guarantee a transferred inmate free access to counsel and the courts.[15] Finally, the plaintiffs contended that the prison ad-

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11 353 F. Supp. at 459. 28 U.S.C. § 1343 (1970) provides in pertinent part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy . . . .

12 353 F. Supp. 457 (D.R.I. 1973).

13 *Id.* at 459. *See* Landman v. Royster, 333 F. Supp. 621, 646 (E.D. Va. 1971), in which the court stated that "[a] penalty may . . . violate the [cruel and unusual] clause even though it consists only of exposing an individual to a high probability of suffering grievous injury." *See generally* Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838 (1972).

The plaintiffs point out in their appellate brief that several states, by statute, have prohibited the involuntary transfer of prisoners to institutions outside the state. Consolidated Brief on Behalf of Plaintiffs, Appendix B at 7 n.12, Gomes v. Travisono, No. 73-1065 (1st Cir., filed Aug. 20, 1973) [hereinafter cited as Brief for Plaintiffs]. New Jersey is included in this group of jurisdictions by virtue of N.J. STAT. ANN. § 2A:67-6 (1952) which provides in part:

> For preventing illegal imprisonment of citizens of this state in prisons out of this state, no citizen of this state who is an inhabitant or resident thereof, shall be sent as a prisoner to any place whatsoever out of this state, for any crime or offense committed within this state, and every such imprisonment is hereby declared to be illegal.

14 353 F. Supp. at 459.

15 *Id.* Although the opinion does not develop the plaintiffs' contention that transfers conducted without written rules violate prisoners' first amendment rights, on appeal, the plaintiffs argued that transfers in general result in a denial of protected activities:

> [Transferees] are denied a whole series of First Amendment related rights: to have visits from family and other outside contacts, to enjoy uncensored correspondence, to have ready access to elected officials through uncensored mail and fact [*sic*] to face discussions, to wear beards and long hair, as well as participate in whatever protected activity they may have been engaged in at the A.C.I.

Brief for Plaintiffs, *supra* note 13, at 58-60 (footnotes omitted).

The inmates' claim of unimpeded access to counsel and the courts was based on prior judicial recognition of these rights. Brief for Plaintiffs, *supra* note 13, at 48. *See* Cruz v. Beto, 405 U.S. 319 (1972); Smith v. Robbins, 454 F.2d 696 (1st Cir. 1972); Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971); Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970);

ministration's decision to transfer the inmates was "irrational, arbitrary, and capricious," and therefore in violation of the fourteenth amendment.[16]

Warden Francis J. Howard of the Rhode Island Adult Correctional Institution countered the plaintiffs' claims by arguing that prior notice and hearing would create security risks within the prison and would jeopardize the transfers. The Warden reasoned that the institution of the procedures advocated by the inmates had not been followed in the past, and if adopted, would make operation of the prison much more complex.[17]

After assessing these contentions, the trial court concluded that involuntary transfers did not constitute cruel and unusual punishment per se,[18] but as presently practiced by the A.C.I., such transfers deny prisoners their rights to equal protection, due process of law, and access to counsel and the courts. The court issued an injunction prohibiting further transfers pending compliance with minimal due process requirements, and ordered the return of all involuntarily transferred prisoners who were not afforded such protections.[19]

Although the judiciary is slowly beginning to accept the view that prisoners do not forfeit all their rights while incarcerated,[20] historically the courts have adhered to the "hands-off doctrine"[21] when confronted by a prisoner's claims against his correctional administrators.[22] The

Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971).

16 353 F. Supp. at 459.

17 *Id.* at 464-65.

18 *Id.* at 465.

19 *Id.* at 472-73.

20 Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985, 986 (1962). *See also* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) in which the court observed that

> a prisoner of the state does not lose all his civil rights during and because of his incarceration. In particular, he continues to be protected by the due process and equal protection clauses which follow him through the prison doors.

Id. at 576.

21 The origin of the term "hands-off doctrine" is noted in Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 181 & n.120 (1970). For an analysis of the results of judicial abstention, see Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

22 *See, e.g.*, Garcia v. Steele, 193 F.2d 276, 278 (8th Cir. 1951). In analyzing the sources of the "hands-off doctrine," one writer has observed that the doctrine rests on three theoretical bases:

> This judicial reluctance to interfere in internal prison affairs appears to be based on three distinct rationales: the theory of separation of powers; the lack of judicial expertise in penology; and the fear that intervention by the courts will subvert prison discipline.

courts have desired to avoid unnecessary interference with intra-prison affairs, and have thus tended to allow state correctional officials to remedy their own problems.[23] In declining to hear the constitutional claims of prisoners, courts in the past have often relied upon the United States Supreme Court's language in *Price v. Johnston*.[24] After protracted litigation, the petitioner in *Price* sought to personally argue an appeal from the trial court's fourth denial of his petition for habeas corpus. Reversing the Ninth Circuit, the Court held that the court of appeals had the discretionary power to produce the prisoner for oral argument.[25] The Court characterized the power as discretionary because prisoners have no absolute right to argue their own appeals or even to be present at appellate proceedings.[26] In reaching this conclusion, the Court observed:

> Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.[27]

Because of the unique facts and precise nature of the issues before the Court in *Price*, however, one commentator has written that

> [r]eliance on the Court's language by other courts as justification for judicial abstention has gone far beyond the narrow situation involved in the *Price* case.[28]

While the policy expressed in *Price* has afforded a basis for reiterating the states' exclusive right to maintain prison discipline and administration, courts have recently become increasingly sensitive to constitutionally protected rights in the corrections context.[29]

Although the Supreme Court has considered very few cases in the

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Goldfarb & Singer, *supra* note 21, at 181 (footnotes omitted). *See generally* Comment, *supra* note 21.

23 Comment, *supra* note 21, at 508-09.

24 334 U.S. 266 (1948).

25 *Id.* at 284.

26 *Id.* at 285.

27 *Id.*

28 Goldfarb & Singer, *supra* note 21, at 181.

29 *E.g.*, Haines v. Kerner, 404 U.S. 519 (1972), in which the Court reversed the dismissal of a prisoner's pro se complaint alleging a denial of due process safeguards prior to the imposition of disciplinary confinement. While declining to comment upon the scope of judicial inquiry into the administration of prisons, the Court held that the petitioner was at least entitled to present evidence to support his claims. *Id.* at 521. *Haines* has been viewed as a significant example of the abrogation of the "hands-off doctrine." THE EMERGING RIGHTS OF THE CONFINED, *supra* note 3, at 28. *See also* Gagnon v. Scarpelli, 411 U.S. 778 (1973); Comment, *The Growth of Procedural Due Process into a New Substance: An Expanding Protection for Personal Liberty and a "Specialized Type of Property . . . in Our Economic System,"* 66 NW. U.L. REV. 502, 520-21 (1971).

corrections field, two cases decided in the late 1960's "indicate that the correctional system is not immune from judicial scrutiny."[30] In *Mempa v. Rhay*,[31] the Court considered the right of the criminally convicted to the assistance of counsel in probation or deferred sentencing proceedings. Mempa had been placed on probation for two years after his conviction for "joyriding." However, after four months, his probation was revoked. At the revocation hearing he was not afforded the opportunity to confer with or be represented by counsel.[32] The Court in *Mempa* concluded "that a lawyer must be afforded at this proceeding whether it is labeled a revocation of probation or a deferred sentencing."[33] Thus, the Court evinced a willingness to extend the application of Bill of Rights protections beyond the limits of a criminal trial to include the rights of the convicted in probation revocation hearings.[34]

In *Johnson v. Avery*,[35] the Supreme Court was again called upon to resolve a corrections controversy. *Johnson* concerned a prisoner serving a life sentence, who was confined to a maximum security section of the prison for breaking a prison regulation. The regulation, which prohibited inmates from giving one another legal assistance, was violated by the petitioner when he aided another prisoner in drafting a writ. In response to the punishment, the petitioner filed a "motion for law books and a typewriter," in which he sought relief from his disciplinary confinement.[36] The Supreme Court treated the motion as a writ for habeas corpus and decided 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 such as that here in

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30 Goldfarb & Singer, *supra* note 21, at 184-85.

31 389 U.S. 128 (1967).

32 *Id.* at 130-31.

33 *Id.* at 137.

34 *See generally* Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View From Mempa v. Rhay*, 47 TEXAS L. REV. 1 (1968).

35 393 U.S. 483 (1969).

36 *Id.* at 484. Prisoners' claims to free access to the courts have had significant side effects:

> Although the complaints involving impediments on the right of access to court were generally related to prisoners' efforts to challenge their original convictions in traditional ways, recognition of the barriers which could be created by the actions of prison administrators led the courts for the first time to speak of an emerging new phenomenon—prisoners' rights. In addition, the right of access to court, although only partially protected assured inmates of some forum in which to present complaints, some of which eventually would be recognized as legitimate.

Goldfarb & Singer, *supra* note 21, at 183 (footnotes omitted).

> issue, barring inmates from furnishing such assistance to other prisoners.[37]

Commenting upon the combined impact of *Johnson* and *Mempa*, two authorities in the corrections field have concluded that "the Court may have provided added impetus to judicial review of prison regulations and administrative actions which affect constitutional rights."[38]

This prognosis has been proven accurate by the Supreme Court's decision in *Morrissey v. Brewer*.[39] *Morrissey* addressed the issue of whether a paroled prisoner has a right to a hearing prior to the revocation of his parole. According to the petitioners, the revocation of their paroles constituted a denial of due process since they were not afforded a hearing to respond to the parole officer's charges.[40] The Court, in recognizing Morrissey's claim, stated that even though the parolees were not guaranteed "the full panoply of rights" normally accorded a defendant in a criminal prosecution, the termination of a parolee's liberty involves a "grievous loss" which must be protected by due process safeguards.[41] Consequently, the state must provide "some orderly process, however informal,"[42] to assure that the finding of a parole violation is based on verified facts.[43]

Although the Supreme Court has limited its intrusion into correc-

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37 393 U.S. at 490 (footnote omitted).

38 Goldfarb & Singer, *supra* note 21, at 184-85.

39 408 U.S. 471 (1972).

40 *Id.* at 474.

41 *Id.* at 482.

42 *Id.*

43 *Id.* at 484. In order to determine the protection to be granted in *Morrissey*, the Court balanced the parolee's interest in liberty against the state's interest in retribution. The Court found that in many cases revocation of parole resulted in an increased sentence. *Id.* at 482. The Court, however, also recognized that the state has a legitimate interest in returning the parolee to confinement if he commits further anti-social acts or breaks the conditions of his parole:

> Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.

Id. at 483. Although the Court did not require a full adversary proceeding prior to the revocation of parole, the Court observed that "the State [had] no interest in 'revoking parole without some informal procedural guarantees." *Id.*

Prior to *Morrissey*, however, lower federal courts had applied specific procedural safeguards to prison disciplinary proceedings. In Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971), for example, the court held that *Miranda* warnings must be given, and counsel provided, in situations where violations of prison regulations can result in criminal charges, increased sentences, fines, forfeitures, or segregation from the general prison population. *Id.* at 777-78, 781. *See generally* Note, *Prisoners Subject to Certain Serious Punishments Enjoy a Fourteenth Amendment Guarantee of a Hearing with Minimum Due Process Safeguards*, 50 TEXAS L. REV. 155 (1971).

tional affairs, and has been guarded in its recognition of inmates' rights, decisions such as *Mempa*,[44] *Johnson*,[45] and *Morrissey*[46] have established a valuable foundation for the growing application of constitutional safeguards in the corrections context. In determining which rights extend to those convicted of crimes, the Supreme Court has relied on prior civil and administrative decisions which have greatly expanded traditional notions of due process protection.[47] In the civil area, for example, the Court has greatly broadened the scope of the liberty and property concepts embodied in the fourteenth amendment.[48] Consequently, it has held that notice and a hearing are required before the prejudgment garnishment of wages,[49] the termination of welfare bene-

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44 *See* notes 31-34 *supra* and accompanying text.

45 *See* notes 35-37 *supra* and accompanying text.

46 *See* notes 39-43 *supra* and accompanying text.

47 *See* Comment, *supra* note 29, at 502 n.3. In the past, the question of whether constitutional rights applied in a given situation often depended upon whether the interest infringed was termed a right or a privilege. *See, e.g.*, People v. Crane, 214 N.Y. 154, 108 N.E. 427, *aff'd*, 239 U.S. 195 (1915). The vitality of the rights-privileges distinction was questioned in succeeding years, and finally, in Graham v. Richardson, 403 U.S. 365 (1971), the Supreme Court expressly rejected the doctrine:

> [T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or a "privilege."

Id. at 374. *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). In Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951), Justice Frankfurter noted that procedural protections are dependent upon the extent to which an individual is "condemned to suffer a grievous loss." *Id.* at 168 (Frankfurter, J., concurring). Additionally, Fuentes v. Shevin, 407 U.S. 67 (1972), established that

> [a]ny significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.

Id. at 86.

48 *See, e.g.*, Bell v. Burson, 402 U.S. 535 (1971), in which the petitioner, following his involvement in an accident, claimed that Georgia's Motor Vehicle Safety Responsibility Act denied him due process of law by failing to afford a hearing on the issue of liability before the suspension of his driver's license and registration. The statute, GA. CODE ANN. § 92A-601 *et seq.* (1958), provided, *inter alia*, that the Director of Public Safety shall suspend the license and registration of the owner or operator of any motor vehicle involved in an accident unless the owner or operator can give proof of financial responsibility. In holding that under the statutory scheme the state may not deprive an individual of his driver's license without providing a forum to resolve the question of probability of liability, the Court said:

> Once licenses are issued, as in the petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.

402 U.S. at 539. *See generally* Comment, *supra* note 29.

49 Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). *See generally* Note, *Some*

fits,[50] or even the impeachment of an individual's personal reputation.[51] Thus, relying upon the expanding scope of liberty and property articulated in civil contexts, the Court in *Morrissey* was able to view the petitioner's interest in parole as a cognizable right under the fourteenth amendment despite the state's claim that parole is merely a qualified freedom:

> We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty . . . . By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.[52]

The expanding application of procedural due process in criminal and civil proceedings, however, has been slow to reach those already convicted of crimes. In correctional administrative proceedings, attempts to relax the hands-off doctrine have met with judicial resistance.[53] The courts' guarded expansion of prisoners' rights is demonstrated in the 1971 case of *Sostre v. McGinnis*.[54] The plaintiff in *Sostre*, an accomplished jailhouse lawyer, was placed in punitive segregation for an indefinite period pursuant to usual prison practice.[55] Alleging that this confinement constituted cruel and unusual punishment, and amounted to a denial of due process,[56] Sostre instituted a civil rights action under section 1983. The district court granted sweeping relief

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Implications of Sniadach, 70 COLUM. L. REV. 942 (1970); Note, *Garnishment of Wages Prior to Judgment Is a Denial of Due Process: The Sniadach Case and Its Implications for Related Areas of the Law*, 68 MICH. L. REV. 986 (1970).

50 Goldberg v. Kelly, 397 U.S. 254 (1970). *See generally* Comment, *supra* note 29.

51 Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

52 Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

53 *See* THE EMERGING RIGHTS OF THE CONFINED, *supra* note 3, at 28-33.

54 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049, 405 U.S. 978 (1972). *See also* Gagnon v. Scarpelli, 411 U.S. 778 (1973); Haines v. Kerner, 404 U.S. 519 (1972); Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972); Hahn v. Burke, 430 F.2d 100 (7th Cir. 1970); United States *ex rel.* Robinson v. Mancusi, 340 F. Supp. 662 (W.D.N.Y. 1972); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970).

55 442 F.2d at 187. Sostre was confined under the statutory authority of N.Y. CORREC. LAW § 140 (McKinney 1968) which provides in part:

> If in the opinion of the warden of such prison it shall be deemed necessary, in any case, to inflict unusual punishment in order to produce the entire submission or obedience of any prisoner, it shall be the duty of such warden to confine such prisoner immediately in a cell, upon a short allowance, and to retain him therein until he shall be reduced to submission and obedience.

Because Sostre refused to either participate in group therapy or abide by the rules of the prison, thereby demonstrating his submission, he ultimately spent one year and eight days in punitive segregation. *Id.* at 185, 187.

56 Sostre v. Rockefeller, 312 F. Supp. 863, 870-71 (S.D.N.Y. 1970).

by enjoining the defendants from returning the plaintiff to solitary confinement without first instituting detailed procedural safeguards,[57] and by awarding Sostre compensatory and punitive damages.[58] Although the Second Circuit reversed that portion of the district court's decision requiring that "trial type" due process safeguards be afforded to a prisoner threatened with a loss of good time credit, it did not wish to be understood as sanctioning arbitrary administration of prison discipline.[59] In reaching this conclusion, the court pointed out that

> [w]e would not lightly condone the absence of such basic safeguards against arbitrariness as adequate notice, an opportunity for the prisoner to reply to charges lodged against him, and a reasonable investigation into the relevant facts—at least in cases of substantial discipline.[60]

The hardships which resulted from Sostre's segregation are often quite similar to those suffered by an inmate who is transferred to an out-of-state prison. Immediately following their arrival at the receiving institution, transferred inmates are often isolated from the general prison population in cells normally used for disciplinary segregation. When they are finally released from segregated confinement, the prisoners are frequently placed in unsuitable work programs.[61] A further parallel can be drawn between involuntary transfers and solitary confinement, since both measures are often administered for disciplinary purposes.[62]

Some of the long term disadvantages suffered by a transferred prisoner were examined by the court in the early case of *Keliher v. Mitchell*.[63] Keliher was a federal prisoner who was confined in a Massachu-

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[57] *Id.* at 884. The district court enjoined the defendants from placing the plaintiff in punitive segregation or denying him good time credits without:

> 1) Giving him, in advance of a hearing, a written copy of any charges made against him, citing the written rule or regulation which it is charged he has violated;
>
> 2) Granting him a recorded hearing before a disinterested official where he will be entitled to cross-examine his accusers and to call witnesses on his own behalf;
>
> 3) Granting him the right to retain counsel or to appoint a counsel substitute;
>
> 4) Giving him, in writing, the decision of the hearing officer in which is briefly set forth the evidence upon which it is based, the reasons for the decision, and the legal basis for the punishment imposed.

Id.

[58] *Id.* at 885-86.

[59] 442 F.2d at 203.

[60] *Id.*

[61] *See, e.g., Gomes*, 353 F. Supp. at 462. For a discussion of hardships suffered by the transferees in *Gomes*, see note 5 *supra*.

[62] *See* THE EMERGING RIGHTS OF THE CONFINED, *supra* note 21, at 110-11.

[63] 250 F. 904 (D. Mass. 1916).

setts state prison pursuant to an order issued by the district court. When the cost of maintaining the petitioner was raised by the state, Keliher was transferred to the federal prison at Leavenworth, Kansas.[64] The court found that the transfer was invalid, since Keliher could have been confined in any one of several federal institutions in the New England area. The court explained that

> [t]he transfer of a prisoner, having a wife and young child, from a prison near which they reside, and at which they can visit him, to a distant place of confinement, where they may well be unable to go, with the result that they may not see him for 10 or 12 years, obviously imposes on him an additional hardship . . . and additional peril.[65]

Later courts, however, have not been as sympathetic to the plight of the transferred prisoner, and have generally refused to even hear inmates' claims for relief.[66] When complaints were entertained, the courts usually reacted as did the First Circuit in *Rodriguez-Sandoval v. United States*,[67] a dispute which involved the claims of a Puerto Rican prisoner who had been transferred to the federal penitentiary at Atlanta. The defendant claimed that the transfer constituted cruel and unusual punishment because "sending convicts from Puerto Rico to Atlanta amounts to expatriation."[68] According to the court, however, the action taken by the Attorney General in transferring the prisoner was not arbitrary since overcrowded prison conditions in Puerto Rico made the transfer necessary. The court concluded that the transfer was executed according to federal authority, for the purpose of finding "suitable and appropriate" accommodations. Consequently, since the court believed that prisoners obviously "do not have a right to select their place of confinement,"[69] the transfer was found to be valid.

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64 *Id.* at 904-05.

65 *Id.* at 906.

66 *See, e.g.*, United States *ex rel.* Stuart v. Yeager, 293 F. Supp. 1079 (D.N.J. 1968), *aff'd per curiam*, 419 F.2d 126 (3d Cir. 1969), *cert. denied*, 397 U.S. 1055 (1970); Lewis v. Gladden, 230 F. Supp. 786 (D. Ore. 1964); Bell v. Warden of Maryland House of Correction, 207 Md. 618, 113 A.2d 482, *cert. denied*, 350 U.S. 852 (1955). The courts in these intrastate transfer cases found no constitutional issues involved. An out-of-state transfer case, Hillen v. Director of Dep't of Social Serv. and Housing, 455 F.2d 510 (9th Cir.), *cert. denied*, 409 U.S. 989 (1972), had similar results. *Hillen* involved a pro se complaint that challenged the legality of the plaintiff's transfer from Hawaii to California. The pro se nature of the briefs caused some question as to whether Hillen's transfer was non-consensual. Nonetheless, the Ninth Circuit found no constitutional questions raised by the complaint. Similar results were reached in Duncan v. Madigan, 278 F.2d 695 (9th Cir. 1960), *cert. denied*, 366 U.S. 919 (1961).

67 409 F.2d 529 (1st Cir. 1969).

68 *Id.* at 532.

69 *Id.*

The district court's resolution of the consolidated claims of 82 state prisoners in *Bundy v. Cannon*[70] provides an interesting paradox in the judicial attitude toward segregated confinement and administrative transfers from one institution to another. The plaintiffs in *Bundy* alleged that the hearings afforded them prior to their transfer from a lesser security facility in Maryland, to solitary confinement in the state penitentiary for their participation in a work stoppage, did not meet minimum constitutional standards. Relying on *Sostre*, the court agreed that before imposing punitive segregation, the state must guarantee prisoners fundamental procedural safeguards.[71] However, in light of the subsequent adoption of more stringent regulations by correction officials, the court declined to grant injunctive relief.[72] When addressing the issue of transfers to another prison, however, the court observed:

> A prisoner has no vested right to be assigned to or remain in a medium security or a minimum security institution. 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 those procedures.[73]

It was not until *Capitan v. Cupp*[74] that the denial of minimal due process protections to a transferred inmate was found to involve substantial constitutional questions. The plaintiff in *Capitan* was transferred from Oregon to the federal penitentiary at Leavenworth as a result of his alleged involvement in prison drug traffic. Capitan received no notice or hearing before his transfer. The federal district court recognized that Capitan suffered a "grievous loss" as a result of the transfer,

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70 328 F. Supp. 165 (D. Md. 1971). For an analysis of *Bundy* and *Sostre*, see Millemann, *Prison Disciplinary Hearings and Procedural Due Process—The Requirement of a Full Administrative Hearing*, 31 MD. L. REV. 27 (1971).

71 328 F. Supp. at 173.

72 *Id.* at 174. In analyzing the problem of basic procedural safeguards in prison disciplinary proceedings, the court observed that "[t]he difficult question, as always, is what process was due." *Id.* at 172. Discussing the requirements of due process in general, the court said:

> "The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account."

Id. (quoting from Hannah v. Larche, 363 U.S. 420, 442 (1960)). In the instant controversy, the court held that the procedures followed by the corrections officials did not meet basic constitutional standards because the inmates were not afforded adequate notice of the charges against them, were given no opportunity to question their accusers or call their own witnesses, and were denied the right to an impartial hearing. 328 F. Supp. at 172-73.

73 328 F. Supp. at 173.

74 356 F. Supp. 302 (D. Ore. 1972).

and thus concluded that the plaintiff was entitled to a hearing "either prior to or a reasonable time after his transfer."[75]

In deciding *Gomes*, the court substantially expanded the procedural safeguards required by *Capitan*. Relying on recent correctional decisions, including *Sostre*,[76] the *Gomes* court concluded that procedural due process rights attached to transfers because "substantial individual interests [were] at stake, [and thus] some assurances of elemental fairness [were] required."[77] The most significant interest at stake is the potential increase in the amount of time an inmate will be incarcerated as a result of the involuntary transfer.[78] Judge Pettine, in defining this interest, pointed out that through the decrease of parole and rehabilitative possibilities, a transfer "may well lead to a longer period of incarceration of the inmate than would otherwise be the case, [and therefore] more rigorous requirements are in order."[79]

After determining that procedural due process rights were required, the court proceeded to consider the specific safeguards it must apply.[80] Judge Pettine weighed the Warden's fears of threatened security and excessive administrative burdens against the prisoners' interest in rehabilitation and access to counsel and the courts.[81] The court con-

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75 *Id.* at 303.

76 353 F. Supp. at 467. The court also relied on the following cases: Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972); Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970); United States *ex rel.* Robinson v. Mancusi, 340 F. Supp. 662 (W.D.N.Y. 1972); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971).

77 353 F. Supp. at 467.

78 *Id.* at 468. This potential danger was substantiated by an A.C.I. classification counsellor's opinion that "an out-of-state transfer of an inmate greatly reduces that inmate's probability of success before the parole board." *Id.* at 463.

79 *Id.* at 468. At this point in the opinion, the court limited its decision to the determination of those procedures which must be implemented prior to the transfer of prisoners in general. The court expressed no opinion on the further question of what protections must be afforded when the transfer also leads to criminal charges:

> Because the issue was not raised by the parties, this Court makes no ruling on what additional protections must be afforded where the charges which lead to transfer are also charges of violations of the criminal laws.

Id. at 468 n.5 (citing Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971)).

80 353 F. Supp. at 468-69.

81 *Id.* at 468. Additional burdens placed upon transferred inmates were mentioned by the court. The court reiterated the testimony of Joseph Cannon, an expert witness, who stated in substance that an "out-of-state transfer per se has a detrimental effect on the rehabilitation of an inmate." The transfer places the inmate "into a disorienting new environment" which can be "destructive of the positive reinforcement an inmate receives from family and friends." *Id.* at 464. He further observed that this disorientation is especially harmful to inmates, because they generally already suffer from adjustment problems. Brief for Plaintiffs, *supra* note 13, at 10.

The court also noted that the state, as well as the inmate, has an interest in meaningful rehabilitation:

cluded that the balancing process was obviously in favor of procedural safeguards.[82] A prisoner must be given written notice and a hearing before an impartial board. The hearing must include the right to call and cross-examine witnesses, as well as the opportunity for representation by a lay advocate. The inmate must also be provided with a written record of the proceedings, and any adverse determination must be subject to administrative review. Finally, prior to the hearing, the charge must be investigated by a superior officer to ascertain its merit.[83]

In addition to their constitutional attack upon existing A.C.I. procedures, the plaintiffs also contended that the transfers as practiced by the defendants were illegal in light of federal and state statutory law.[84] The plaintiffs based this contention upon the premise that the

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> The state has an interest in rehabilitating its prisoners so that, among other reasons, its citizens are spared the costs of further crime from these individuals.

353 F. Supp. at 468.

82 *Id.* at 468-69. The court balanced the competing interests of the parties, not to determine in the first instance whether to apply due process standards, but rather to determine "what forms of process are due." *Id.* at 468. In the court's view, the decision to invoke fourteenth amendment safeguards depends upon a determination of the nature of the interests infringed. To sustain this contention, the court relied on the Supreme Court's analysis of an alleged denial of procedural protections in Board of Regents v. Roth, 408 U.S. 564 (1972), where the Court said:

> [A] weighing processs [*sic*] has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake.

Id. at 570-71 (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)) (footnote omitted) (emphasis by the Court). *See also* Perry v. Sindermann, 408 U.S. 593 (1972).

83 353 F. Supp. at 472. In addition to these safeguards, the court's order provided:

> A. . . . .
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> In the event of an emergency situation resulting in transfer, the inmate must be returned to Rhode Island for the hearing and procedures outline [*sic*] above soon after the emergency has subsided; and
>
> B. Periodic review is made of the status of the transferred inmate and whether he should be returned to Rhode Island. The Court suggests review every three months; and
>
> C. Written regulations are promulgated which guarantee:
> a) the return of a transferred inmate to Rhode Island for all hearings before the parole board which will consider the subject of his parole;
> b) the return of a transferred inmate to Rhode Island for appearance in all court proceedings in Rhode Island in which he is involved; and
> c) the return of a transferred inmate to Rhode Island to confer with counsel in preparation for Rhode Island legal proceedings on affidavit of counsel that the presence of the inmate is necessary; and
>
> D. Prior to transfer (absent an emergency or compelling state interest), an investigation is made of the treatment or rehabilitative programs available in the receiving institution, or, in the case of transfers to a federal prison, of the receiving penal system. Defendants must provide the recipient institution with a statement of why Rhode Island's facilities are inadequate for the transferred inmate and what would be an appropriate treatment program and the reasons therefor.

Id. at 472-73.

84 *Id.* at 470.

statutes require that each transfer be conducted in the rehabilitative interest of the inmate involved.[85] To sustain this contention, the plaintiffs evidently relied upon the provisions of the New England Compact,[86] and the comparable federal statute.[87] After conceding that the statutory language requires that the transfers from the A.C.I. must be premised on a finding that the transfer is " 'necessary or desirable in order to provide adequate quarters and care or an appropriate program of rehabilitation or treatment,' "[88] the court held:

> What is proper, adequate, or appropriate treatment of an inmate and what is adequate care are not *entirely* unrelated to the security requirements of the A.C.I. or disciplinary sanctions against an inmate. While the emphasis in the statutes does appear to be that transfers be in the rehabilitative interests of the inmate, the statutory language is broad. Plaintiffs' argument that the past transfers are illegal as a matter of statutory law must fail.[89]

As an alternative basis for recognizing the prisoner's right to notice and a hearing, Judge Pettine relied on his prior decision in *Morris v. Travisono*.[90] In *Morris*, the court promulgated procedural safeguards similar to those required in *Gomes* for prisoners subjected to intraprison disciplinary proceedings at the Rhode Island A.C.I. Pursuant to the *Morris* rules, before an inmate can be downgraded to a stricter custodial classification, a procedure which includes the loss of privileges, or disciplined for the breach of prison regulations, he must be afforded detailed procedural protections. The most significant of these

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85 *Id.* at 471.

86 R.I. GEN. LAWS ANN. § 13-11-2, art. IV(a) (1956) (Reenactment of 1969) provides:

> (a) Whenever the duly constituted authorities in a state party to this compact, and which has entered into a contract pursuant to article III, shall decide that confinement in, or transfer of an inmate to, an institution within the territory of another party state is necessary or desirable in order to provide adequate quarters and care or an appropriate program of rehabilitation or treatment, said officials may direct that the confinement be within an institution within the territory of said other party state, the receiving state to act in that regard solely as agent for the sending state.

87 The federal statute provides:

> (a) The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: *Provided*, That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.

18 U.S.C. § 5003(a) (1970).

88 353 F. Supp. at 471 (quoting from R.I. GEN. LAWS ANN. § 13-11-2, art. IV(a) (1969)).

89 353 F. Supp. at 471 (emphasis by the court).

90 310 F. Supp. 857 (D.R.I. 1970). See Goldfarb & Singer, *supra* note 21, at 298-301 for a discussion of the *Morris* rules and other transfer cases.

safeguards are the requirements of notice and a hearing before an impartial board.[91] Because many involuntary transfers are the result of similar violations of disciplinary regulations, the court concluded that equal protection dictates comparable safeguards for prisoners transferred to out-of-state institutions.[92]

The effect of the application of specific due process safeguards in *Morris*, as assessed by a recent study, may be useful in gauging the impact of the *Gomes* requirements.[93] Following an in-depth analysis, a Harvard study found that the A.C.I. inmates' response to the promulgation of the *Morris* rules was generally favorable.[94] Institution of the new procedures also resulted in objective changes within the prison.[95] It was also discovered, however, that the hearings and other procedures were not properly organized or administered. In some instances, hearings were ineffective in deterring the discretionary application of particular punishments.[96] The results of the *Gomes* rules may be similar to the effect of the *Morris* rules, but according to Judge Pettine, at least one certain result will be the severe restriction of the transfer of inmates involved in pending legal proceedings.[97]

The *Gomes* mandate for procedural due process in the administrative transfer of prisoners has already had an impact upon the courts. In *Park v. Thompson*,[98] for example, a female prisoner was transferred from her home state of Hawaii to a federal reformatory in Alderson, West Virginia, because Hawaii lacked sufficient rehabilitative facilities for women serving long term sentences. The court quoted *Gomes* extensively to underscore the hardships which result from a transfer over great distance, and the consequent need for protecting the basic rights

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91 310 F. Supp. at 870-71.

92 353 F. Supp. at 468.

93 Harvard Center for Criminal Justice, *Judicial Intervention in Prison Discipline*, 63 J. CRIM. L.C. & P.S. 200 (1972).

94 *Id.* at 222. The study indicated, however, that the positive inmate reaction may have merely been a response to judicial interest in the plight of the prisoners.

95 The changes observed by the research group included the following:

> Cases were dismissed where there were technical violations of the regulations, inmate witnesses were allowed in some cases, delays between charge and final hearing were minimized, and the extreme forms of punishment which instigated the imposition of the order were largely eliminated.

Id. (footnote omitted).

96 *Id.*

97 353 F. Supp. at 470.

98 356 F. Supp. 783 (D. Hawaii 1973). *See also* Heald v. Mullaney, Civil No. 13-23 (D. Me., Sept. 10, 1973); Ault v. Holmes, Civil No. 2399 (W.D. Ky., Aug. 20, 1973); Hoitt v. Vitek, Civil No. 73-55 (D.N.H., Aug. 1, 1973) (holding that prisoners' out-of-state transfers are invalid without an opportunity for a prior hearing).

of prisoners under such circumstances.[99] Based on recent transfer cases, the court concluded that by alleging an out-of-state transfer executed without procedural safeguards, the plaintiff stated a cause of action, which, if true, would entitle her to relief. Consequently, the court denied the defendant's motion to dismiss the complaint.[100]

The propagation of the *Gomes* rules represents a further step in incorporating the constitutional safeguards embodied in procedural due process into the administrative procedures of correctional institutions. Since the decision to involuntarily transfer a prisoner affects his personal liberty by prejudicing his opportunity for parole, the threat to prison security and administrative convenience must yield to adequate protection of fundamental rights. The states also have an interest in the widespread application of rules which reflect the recognition of basic procedural safeguards in the transfer context. By minimizing the potential of erroneous transfers resulting from summary proceedings, corrections officials can reduce potential litigation while assuring inmates that their rights are being protected. By injecting the appearance of fairness into the transfer process, the judicial assurance of uniform and equitable treatment will increase the likelihood of meaningful rehabilitation. From all points of view, the general adoption of the *Gomes* approach would represent a significant step in resolving the serious problems inherent in every transfer of a prisoner against his will.

Mary Ann Kenny

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99 356 F. Supp. at 789-91.

100 *Id.* at 793. In denying the defendant's motion to dismiss the complaint, the court relied upon "pertinent" statements and conclusions reached by other courts when confronted by constitutional claims of transferred prisoners. The court quoted with approval a preliminary injunction entered by another district court which prohibited the defendant corrections authorities from transferring prisoners to out-of-state institutions without first implementing procedural safeguards which included:

> (1) Adequate prior written notice of the charge or basis for the transfer to the prisoner and his counsel.
>
> (2) Assistance of counsel or a lay advocate of choice in connection with the hearing.
>
> (3) A hearing before an impartial tribunal making its determination on reliable and substantial evidence.
>
> (4) The right to present evidence and to cross-examine witnesses.
>
> (5) Minutes of the hearing kept and furnished prior to final decision.
>
> (6) Written findings of fact made and furnished.

Id. at 791 (citing Barrett v. Boone, Civil No. 73-81-C (D. Mass., Jan. 26, 1973)).