A Review of Prisoners' Rights under the First, Fifth, and Eighth Amendments

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A Review of Prisoners' Rights Under the First, Fifth, and Eighth Amendments

I. INTRODUCTION

That it is constitutionally permissible for a state to imprison those convicted of a criminal offense, or those charged but not convicted who are detained awaiting trial, is not disputed. Problems, however, do arise when the Supreme Court must assess the extent of the constitutional rights retained by incarcerated individuals. Acutely aware of the competing interests—the state's duty to protect its citizens from criminal offenders and each individual's right to the constitutional guarantees—the Supreme Court has found it necessary to differentiate between the rights afforded to the "free" citizen and those retained by the inmate. Although confinement necessarily restricts many of the rights and privileges enjoyed by ordinary citizens, the Court has stated that "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime." Nevertheless, the prisoner's constitutional rights have been seriously redefined by the Supreme Court to accommodate the exigencies of prison life.

When prisoners' rights are in issue, special governmental concerns have been recognized as permitting the Court to vary the traditional tests for constitutional rights. For example, maintenance of order and discipline are major, if not vital, interests of prison administrators, and goals of rehabilitation and securing prisons against escape are additional problems unique to the prison setting. In striking a balance between the governmental interests and the individual's rights, the Supreme Court has applied the principle that "there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution." This comment proposes to survey the results of that "mutual accommodation" in the areas of first, fifth, and eighth amendment rights by reviewing several important opinions of
the Supreme Court, and outlining the scope of these constitutional guarantees retained throughout incarceration as interpreted by the lower federal courts.

Although the first amendment has long been regarded as one of the most safeguarded of rights, it has often had to yield to governmental interests in the prison context; accordingly, the scope of its reach has been severely redefined for those in prison. On the other hand, the due process clause, which assures protection from arbitrary governmental action, has more significance for the incarcerated individual, and has been given special attention by the Court. Despite the judicial deference shown to prison officials, the Court, in consistently protecting the inmate's legitimate liberty and property interests, has provided a limited check on the actions of such officials. Access to courts, a right which also flows from the fifth amendment, is another constitutional mandate of great importance to one confined in jail. Whether the purpose for seeking access to the court is to assert a claim for release or a challenge to prison regulations or conditions, the ability to make such a claim is a fundamental guarantee that cannot be infringed to any large extent. The eighth amendment's restriction on cruel and unusual punishment has been utilized to allow review of conditions of confinement within prisons. However, the high standard employed to find an eighth amendment violation may preclude effective redress for valid challenges that are not yet severe enough to constitute an offense to "human dignity." In appraising and analyzing the scope and extent of the "rights of inmates" in light of the above-stated constitutional considerations, this comment seeks to define the present position of both the Supreme Court and lower federal courts.

II. THE PRISONER AND THE FIRST AMENDMENT

In the years preceding the 1960's, the Supreme Court perceived the constitutional rights of prisoners as being beyond the scope of judicial review, and applied a "hands-off" doctrine that barred any consideration of prisoners' complaints. It was in the first amendment area

6. Cf. Bell v. Wolfish, 441 U.S. 520 (1979) (declining to extend the fourth amendment right of privacy to the prison context). In Wolfish, periodic unannounced room searches and body cavity searches were found not to constitute an unreasonable search or seizure or to violate any privacy rights of a prisoner. Id. at 558-60.

7. Likewise, the eighth amendment's proscription against "cruel and unusual punishment" is a vital "right" retained by one incarcerated. See, e.g., Hutto v. Finney, 437 U.S. 678 (1978) (Supreme Court found that certain conditions of confinement in punitive isolation cells constituted an unconstitutional form of punishment under eighth amendment standards).

that the Supreme Court initially decided to abandon this approach, which prevented constitutional review of prison administrative decisions. Although the change in attitude did not indicate that deference to officials in the administration of prison affairs was to be substantially changed or impaired, it was the first recognition by the Court that valid constitutional claims, even for those incarcerated, must be enforced by the judiciary.

It is also in the first amendment area that the wide divergence in constitutional standards is best illustrated, for the reach of the first amendment in the area of prisoners' rights does not even closely compare with the corresponding first amendment rights enjoyed by the majority of the population who comprise "free society." This disparity in regard to the first amendment freedoms at first appears shocking, since society generally holds the freedoms of speech, press and religion as three of the most valuable rights insured by the Constitution. But upon reflection, when the dissimilar cultural needs of the prisoner and the "free citizen" are compared, the difference is revealed to be less "chilling" than it first seems. Prison discipline requires a silencing of speech that may portend rioting or disorder; it must be conceded that inflammatory speech in prison invites a greater chance of "revolution" than does the same rhetoric outside the confines of a prison cell. The recognition of these realities has mandated the Court's obliqueness in the area.

Two early decisions, Cooper v. Pate and Cruz v. Beto, involved combined freedom of religion and equal protection challenges by inmates. By holding that these complaints stated a cause of action against dismissal, the Court prohibited special treatment by prison officials for certain religious groups and a denial of that same treatment for others. These decisions have also been cited by the Court for the general proposition that prisoners retain first amendment rights during incarceration.

Likewise, censorship of direct personal correspondence was found to be unconstitutional, as restricting the first amendment rights of free speech of both prisoners and their correspondents. In Procunier v.

10. See United States v. Robel, 389 U.S. 258 (1967), and NAACP v. Button, 371 U.S. 415 (1963), for decisions in which statutes with a "chilling" effect on speech were held to be invalid.
13. For a discussion of the equal protection emphasis of these first amendment claims, see Calhoun, supra note 8, at 237-42.
Martinez, under these dual interests, the Court held that censorship of prison mail is only permissible if it furthers an important or substantial governmental interest unrelated to the suppression of expression. In reaching that conclusion, the Court cautioned that the limitation of first amendment freedoms can be no greater than is necessary or essential to the protection of the particular governmental interest involved. Of course, it is clear that this standard is far below the exacting scrutiny traditionally required under a first amendment analysis. This reflects the latitude the Court feels must be reserved in administrators to secure their institutions. The Court did emphasize that a distinction in this regard must be made between valid goals of the prison system, and a mere desire to subdue complaints or criticisms by inmates of institutional policies, rules or officials. The latter prevention of inmate grievances will violate the first amendment under Martinez.

However, when faced with the issue of first amendment access by the press to prisons and prisoner, the Supreme Court, in Pell v. Procunier and Saxbe v. Washington Post Co., framed the constitutional test in terms of the prison inmate's retaining those first amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. This language not only restates the balance of interests utilized by the Court in the past, but its tenor also appears to be more restrictive in depicting those interests possessed by inmates. Under the standard outlined in Pell and Saxbe, a prison regulation prohibiting inmate participation in face-to-face communication with the news media was held constitutionally allowable. Even more recently, the press was determined to have no right of access to jails beyond that of ordinary citizens. Although the media's role to provide information to the public regarding conditions of confinement is thereby affected, the restriction was justified by the goals which would prevent disruption of jail operations.

16. Id. at 413.
20. Id. at 827-28. This situation was likened to a time, place, and manner regulation which permits a reasonable restriction on communicative activity where significant government interests exist. Id. at 826. Further, security considerations and related administrative problems permit officials wide latitude so long as "reasonable and effective means of communication" remain open and no content discrimination exists. Id.
21. Houchins v. KQED, Inc., 438 U.S. 1 (1978). Houchins, however, was an action brought by the news media. Therefore, although the decision affects those in prison, it is not really a "prisoners' rights" case.
Finally, a prison regulation which prohibited prisoners soliciting fellow inmates to join a self-denominated organizational “union,” was found to be a valid limitation of first amendment rights. In *Jones v. North Carolina Prisoners' Labor Union, Inc.*, the Court reasoned that the ban on inmate solicitation and group meetings was rationally related to the reasonable, indeed to the central, objective of prison administration. Freedom of speech rights must give way to penal goals, where the potential for disruption is inherent in the discussions espoused. In addition, although the Court found associational rights more implicated by the ban than those of free speech, it nonetheless held that the constitutional guarantees do not outweigh the reasonable considerations involved in management of the prison. The *Jones* decision defined the scope of associational rights which belong to inmates, when the Court noted that not only are they curtailed by confinement in relation to union activity, but that officials, in their discretion, may so act whenever group meetings or activities possess the likelihood of disruption to prison order and stability, or otherwise interfere with the legitimate penological objectives of the prison environment.

The leeway granted to prison authorities in the “free speech” area is quite extensive, since it appears that the Court is willing to defer to officials upon a showing of any valid penal interest. Similarly, controls permitted on media access certainly inhibit the permissible extent of discussion of conditions or confinement. The only effective, basically unrestricted means to voice prisoner grievances under the first amendment, then, are through correspondence, as well as during the limited visitation periods. Although the harshness of this consequence appears to conflict with the basic concepts underlying the constitutional guarantees, the justifications articulated by the Court cannot be lightly discounted. Group meetings or discussions with the media accent the plight of confinement and may well result in uprisings in protestation; preventing these occurrences is a necessity if effective control in the penal institution is to be maintained. But too strict a maintenance program can result in the needless silencing of valid speech, and prison authorities can become the “final word” as to what may be said. The check mechanism has not been placed with the courts in this instance, but has been left inside the prison. Additionally, the possibility of un-

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23. *Id.* at 129.
24. *Id.* at 129-30. A prohibition against bulk mailing for the Union was upheld as a reasonable limitation, since other avenues of communication remained open, and according to the Court's reasoning, the ban only barely affected free speech values. *Id.* Likewise, the no-solicitation rule was found to be not only reasonable, but necessary, due to the fact that officials were otherwise entitled to control organized union activity and legitimately to prohibit it. *Id.* at 131-32.
needed restraint of religious freedom is also left within the purview of the prison administration, even though it does not necessarily pose the same problems as does unrestricted speech. In affording prison officials such wide latitude and deference, the Supreme Court has effectively denied prisoners judicial review of valid first amendment claims; indirectly, the Court has possibly limited the more valued right of access to the courts, for even if an inmate can have access to court he still must have a right to assert when he gets there.

III. THE PRISONER AND THE FIFTH AMENDMENT

Absent a more specific guarantee of the Constitution as a basis for asserted rights of prisoners, the due process clause of the fifth and fourteenth amendments has often been utilized by the Supreme Court. The rationale may well be that procedural due process protections and access to the courts are among those "rights" which may have inherently greater significance for those behind prison walls. Certainly, provisions for safeguards from arbitrary governmental action during custodial proceedings are all the more important when no other outlet is available for protestations. These concerns are weighed by the Court against administrative convenience and safety problems on the part of government officials. The resulting deference to officials in this context is tempered by the extent of possible loss of liberty which may be occasioned by the procedure involved.

A. Procedural Due Process

Certain minimum procedures have always been mandated by the Constitution as a requirement to be followed before any deprivation of life, liberty or property interests. When dealing in the prison setting, however, this procedure is one step removed, as the individual involved has already been denied liberty rights through procedures leading up to his valid incarceration. Therefore, considerations as to procedures required in the confines of prison are approached on a different level. For example, in Wolff v. McDonnell, the Court extended procedural constitutional protections to convicted prisoners during disciplinary

25. See Calhoun, supra note 8, at 227. See also Bell v. Wolfish, 441 U.S. 520, 530-32 (1979), where the court disagreed with the lower court's reliance on the "presumption of innocence" standard as the source of pretrial detainee's substantive rights regarding conditions of confinement. In Wolfish, the Court employed an analysis based upon deprivation of detainee's liberty without due process of law as required by the fifth amendment.

26. U.S. CONST. amend. V. states in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

27. 418 U.S. 539 (1974)
proceedings, based upon a liberty interest enjoyed by the prisoners under the fourteenth amendment. In this situation, minimum procedures required for an inmate facing disciplinary action include advance written notice of the alleged violation, as well as a written statement by fact finders as to evidence relied upon and reasons for which the action was taken. Moreover, the inmate must also be allowed time to prepare a defense after notification of the charges. The inmate can also call witnesses and present evidence at his hearing, so long as it is not "unduly hazardous to institutional safety or correctional goals." Of course, this last determination is left to the discretion of prison officials, with the suggestion by the Court that a reason for denial be furnished.

Loss of "good time" credits or confinement in a disciplinary cell can be the result of a finding of flagrant or serious misconduct. These alterations in the term and/or conditions of confinement are "liberty" interests which sufficiently justify recognition of certain minimum guidelines. These considerations most likely weighed heavily in the balance in Wolff, although the Court did concede that the full range of procedural protections were not available in the prison setting. The needs of the institution, for example, prevented a decision that inmates have a right to retained or appointed counsel for disciplinary proceedings.

The Supreme Court reaffirmed its denial of a right to counsel in

28. *Id.* at 563. Prior to Wolff, similar procedural protections had been afforded to parolees, in the form of an impartial preliminary hearing, before parole could be revoked. Morrissey v. Brewer, 408 U.S. 471 (1972). Correspondingly, in Gagnon v. Scarpelli, 411 U.S. 778 (1973), the minimum due process requirements of Morrissey, as well as the limited right to counsel, were held applicable to probation revocation proceedings.

29. Wolff v. McDonnell, 418 U.S. at 556-57. The interest involved in Wolff was a state-created right to good-time credit for unsatisfactory behavior while in prison. The sanction for major misconduct was a forfeiture of credits accumulated.

30. *Id.* at 563.

31. *Id.* at 566.

32. *Id.* at 566-67. In Baxter v. Palmigiano, 425 U.S. 308 (1976), the Court later emphasized that its suggestion that prison officials set forth the reason for denying a prisoner's right to call witnesses was only a suggestion, and did not rise to the level of a due process requirement. *Id.* at 321.

33. Wolff v. McDonnell, 418 U.S. at 557. Cf. Moody v. Daggett, 429 U.S. 78 (1976), where the Court found no liberty interest on the issuance of an unexecuted parole violation warrant against an inmate even though it may affect his parole eligibility and prison classification status. *Id.* at 85. The Court found no due process right to a hearing, since the prospect of future incarceration due to the warrant is uncertain, and further, because any conviction certainly would constitute a parole violation. *Id.* at 87-89.

34. Wolff v. McDonnell, 418 U.S. at 569-70. The rationale for disallowing counsel in disciplinary hearings is to prevent an adversary cost, which could reduce the correctional goal utility of the hearing process. *Id.*
disciplinary proceedings in *Baxter v. Palmigiano*, even though the charges involved conduct which was punishable as a crime under state law, and not merely loss of good time credits, as was involved in *Wolff*. The Court rationalized that since these hearings are not criminal proceedings, the introduction of an "adversarial cast" would unnecessarily impede institutional goals. The minimum due process procedures mandated by *Wolff* were not extended by *Baxter* in any other regard as well. The interest of the inmate recognized by the Court apparently only covers a "basic" right for those fundamentally essential procedures which are necessary to prevent abuse of discretion by officials. For example, due process does not prohibit an adverse inference from being drawn by an inmate's silence at his hearing. The only exception made concerns evidence which may be used to incriminate the inmate in future criminal proceedings. Further, the limited right to call witnesses and present evidence permitted by *Wolff* was narrowed by the Court, as confrontation and cross-examination were found not to be included in due process rights for disciplinary hearings.

Although *Wolff* and *Baxter* delineated procedures necessary for a disciplinary hearing, the Supreme Court held that no hearing is required before a prisoner is transferred from one prison to another. *Meachum v. Fano* involved a transfer to a prison where the conditions of confinement were substantially less favorable to the prisoner. A fact-finding hearing was not found to be required by the due process clause, since no "liberty" interest was infringed by transfers between institutions. After his conviction, a prisoner may constitutionally be

36. *Id.* at 315. The inmate in *Baxter* was charged with inciting a disturbance and disruption, which may have caused a riot. These charges could result in serious discipline, such as prolonged isolation. *Id.* at 312-13.
37. *Id.* at 320. Due process, rather than the fifth amendment privilege against self-incrimination, was used as the basis for the Court's consideration. *Id.* at 319. This is because disciplinary proceedings are not considered criminal actions, since the correctional process and other state interests involve more than a desire to convict the charged inmate. *Id.* at 318-19.
38. *Id.* at 316. This again supports the proposition that procedural guarantees are greater in the prison-hearing situation when the consequence may be an increase in the duration of confinement.
39. *Id.* at 321-22. See also note 31 and accompanying text *supra*.
40. 427 U.S. 215 (1976). The correctional institution involved was a state facility, and thus, the transfer at issue was intrastate.
41. *Id.* at 224-25. The Court recognized that the transfer between institutions may result in a "grievous loss" to the prisoner due to differences in conditions of confinement. Nonetheless, the Court concluded that the discretionary reasons that may occasion a transfer need not be justified by officials before transfer, since the transfer does not interfere with the duration, but only conditions of confinement, and thus no liberty interest is involved. *Id.* at 226-29.
Prisoners' Rights

1980  691

deprived of his liberty and confined by the state in its prison system in any of its prisons. In a companion case, Montanye v. Haymes, the Court likewise found no due process right to a hearing before transfer, even if the transfer resulted from disciplinary or punitive action by prison officials. Deference to prison authorities was not abandoned or restricted in favor of any interest claimed by inmates in this context. Although the resulting change in conditions of confinement due to the transfer may in fact be a "grievous loss" to the inmate, his interest still does not merit due process considerations, according to the Court. This reasoning is based upon the foreseeable burden which may be imposed upon the system, where transfers occur for a variety of administrative reasons. To require a hearing and justification for transfer was beyond what the Court felt was required in a situation where the fact of imprisonment remained the same, even though living accommodations may have been substantially affected. Obviously, the "comfort" aspect or interest claimed to be infringed by the inmates is not a condition of confinement in which the Court places great concern. In fact, the Supreme Court did not seem concerned that threats of such damages may be employed by officials as a coercive tactic.

The transfer from a penal institution to a mental hospital was recently held to be a sufficient loss of liberty so as to require procedural due process protections. In Vitek v. Jones, the Supreme Court distinguished Meachum and Montanye, finding that while a conviction and imprisonment may extinguish the inmate's freedom from confinement, this does not extend to an ability by the state to classify the individual as mentally ill. Thus, although the state can confine an inmate in any of its prisons, when the transfer extends beyond the bounds of the penal system, such as to a mental hospital, the transfer requires the protections of the due process clause. The liberty interest identified by the Court in Vitek was not merely a state-created right.

42.  427 U.S. 236, 242 (1976). The inmate in Montanye alleged that his transfer was in retaliation for rendering legal assistance to fellow inmates, and seeking to petition the court for redress for grievances. Id. at 239. If true, these actions are constitutionally protected under the due process clause's protection of the rights of access to the courts. See Johnson v. Avery, 393 U.S. 483 (1969).

43.  See note 40 supra and accompanying text. See also Meachum v. Fano, 427 U.S. 215 (1976).

44.  100 S. Ct. 1254 (1980).

45.  Id. at 1264.

46.  Id. at 1261. Nebraska law provides for the transfer of a prisoner confined in any state penal institution when a designated physician or psychologist determines that he is mentally ill and cannot be properly treated in the penal facility. Neb. Rev. Stat. § 83-180(1) (1976). Further, upon expiration of the inmate's sentence, civil proceedings may be commenced if additional detaintment is felt to be necessary. Id. § 180(3).
but emanated from constitutional due process grounds. The right to a hearing after notice of the contemplated transfer, as well as a limited right to call witnesses, to confront and cross-examine adverse witnesses, and to have the benefit of an independent decisionmaker, were held to be minimum procedural requirements in such a situation.

The due process clause was utilized more recently by the Supreme Court, to define the rights of pretrial detainees during their confinement prior to trial. A pretrial detainee is that person charged with a crime and incarcerated, but not convicted. This distinction requires a different emphasis in discerning the scope of "rights" retained during confinement. For a detainee, the due process clause guarantees that he may not be punished when subjected to the restrictions and conditions of the facility. But noting that the corresponding governmental interests involved with a detainee are not significantly different from those present when dealing with a convicted inmate, the Court concluded that methods used to maintain order and discipline are no less necessary for the inmate not yet adjudged guilty. With these factors in mind, the Court in Bell v. Wolfish considered the challenged conditions of confinement under the standard of the right to be free from punishment. In this context, the distinction was made between prohibited punitive measures and permissible regulatory restraints. The Court enunciated a test which requires, absent a showing of intent to punish, a showing that the condition or restriction of confinement is not reasonably related to a legitimate government objective, but appears excessive. In the Court's view, the challenged practice of "double-bunking"—placing more than one inmate in a cell designed for one—did not constitute punishment under this test, and thus, did not violate due process. The legitimate interests in maintaining security and order, as well as the additional interest in ensuring the detainee's

47. 100 S. Ct. at 1263-64.
48. Id. at 1264. However, the state is not required to furnish counsel for inmates if they are not financially able to provide their own. Id. at 1263-64.
50. 441 U.S. at 535 n.16. After conviction, the appropriate standard to measure the challenged conditions of confinement is the eighth amendment, which permits punishment, but proscribes "cruel and unusual" punishment. Id. See also Hutto v. Finney, 437 U.S. 678 (1978).
51. Bell v. Wolfish, 441 U.S. at 535-36. Inmates at a state correctional center, who consisted mainly of pretrial detainees, challenged certain practices and restrictions employed at the facility. "Double-bunking," as well as prohibitions against receipt of packages, unannounced room searches and body cavity searches, were among the conditions of confinement challenged. Id. at 527.
52. Id. at 538-40.
Prisoners' Rights

presence at trial, are among the justifications for the restraint imposed, which will not ordinarily constitute punishment. It appears that as with convicted prisoners, "comforts" during the period of incarceration are not a major consideration of the Supreme Court in regard to conditions of confinement and rights of prisoners.

Procedural due process appears to be applied according to the extent of the deprivation which may occur. That is, whenever the possibility that the duration of confinement may be increased during the hearing or procedure, the Court is more willing to attach greater procedural protections. But the scope of these safeguards is reduced, and deference to officials increased, whenever the procedure involves less drastic consequences. Of course, since the liberty interest has a different meaning when dealing with one already deprived of certain liberty, the Court does not deem it necessary in either instance to accord the full procedural protections which are immediately provided the free citizen.

B. Access To The Courts

The inmate's right of access to the courts, derived from the due process clause, is probably the most "protected" of all the constitutional guarantees by the Supreme Court. The Court recognized early the necessity of unimpaired access to courts, when it ensured to prisoners the ability to file habeas corpus petitions. More recently, this right was extended by the Court to include the right to file complaints concerning violations of constitutional rights. Also, the right of inmates to seek judicial redress for their grievances encompasses far more than merely allowing an inmate to file a complaint in the proper court of law. Realistically, without professional representation or other aspects that involve access to the courts, such a guarantee may have little meaning.

For example, in Johnson v. Avery, the Supreme Court struck down a prison regulation which prohibited "jailhouse lawyers" from assisting fellow inmates and held that inmates must be permitted to assist other prisoners in the preparation of claims for post-conviction relief. Recognizing that there is generally no obligation to furnish counsel until a petition for post-conviction relief evidences that viable issues are

53. Id. at 540. The Court noted that an "arbitrary or purposeless" restriction imposed by prison officials would support interference by federal courts in this regard. Id. at 539.
54. Ex parte Hull, 312 U.S. 546 (1941).
presented, the Court noted that the inmate must initially make such a showing absent legal assistance. 57 The otherwise valid considerations underlying such a restriction promulgated by government authorities, however, must give way in the absence of some reasonable alternative provided by the state to assure access to the courts. 58

Likewise, the Court held in *Procunier v. Martinez* 59 that a ban against the use of law students and other paraprofessionals "unjustifiably obstruct[s]" representation and other aspects of access, thereby violating due process guarantees. 60 Moreover, in *Bounds v. Smith*, 61 the Court used "meaningful access" to the courts as the "touchstone" in defining the right of access, and noted that the state had an affirmative obligation to guarantee such access. 62 To insure the fundamental constitutional right of access, the Court in *Bounds* "require[d] prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." 63

The Court has not gone so far as to guarantee assistance of jailhouse lawyers or law libraries as a basic element of the right of access, so as to mandate that these forms of assistance are always required. Rather, these "rights" are permitted only to the extent that meaningful alternatives are not available or provided. However, the Court has obviously recognized the importance of guaranteeing unhampered means for incarcerated individuals to vent their claims, whatever the grounds. This recognition probably encompasses the most valuable "right" retained while in prison, and best reflects the differing emphasis required when assessing the constitutional rights of prisoners.

IV. THE PRISONER AND THE EIGHTH AMENDMENT

The eighth amendment's prohibition against "cruel and unusual punishment" 64 as applied to the context of the prison has been the least

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57. *Id.* at 487.
58. *Id.* at 490. The Court pointed out several alternative programs utilized in some states, such as public defenders or law students assisting inmates, which would conceivably meet the "reasonable alternative" requirement, thereby permitting a valid bar on "jailhouse lawyers." *Id.* at 489-90.
60. *Id.* at 419.
62. *Id.* at 823.
63. *Id.* at 828. See also *Younger v. Gilmore*, 404 U.S. 15 (1971).
64. The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.
developed by the Supreme Court, but is the constitutional area most ripe for judicial pronouncement. The eighth amendment has been the vehicle by which inmates challenge the conditions of confinement to which they are subject.

A failure to provide medical care within a prison was the basis, in *Estelle v. Gamble*, for the Court to proscribe as unconstitutional certain conditions of confinement. Relying upon the obligation of the government to provide medical care for an incarcerated individual, who is otherwise unable to provide care for himself, the Court evaluated the measures challenged. The pain and suffering which may result from a denial of medical care were found to have no legitimate penological purpose, and to be "inconsistent with contemporary standards of decency." This eighth amendment standard was utilized by the *Gamble* Court to preclude "deliberate indifference to serious medical needs of prisoners," either by prison doctors or guards.

Although the Court extended the eighth amendment guarantees to the prison medical setting, the test employed does not reach the inadvertent failure to provide adequate medical care. That the *Gamble* court did not apply the usual administrative deference language in the eighth amendment context does not signal a broader intervention power in the federal courts when dealing with medical complaints. Rather, the combination of the "deliberate indifference" test with the eighth amendment's contemporary standards of human decency serve to pose a similar barrier in stating a claim for relief.

The Supreme Court more closely addressed actual conditions within the penal setting in *Hutto v. Finney*, in its consideration of confinement in punitive isolation. There, the Court noted that confinement in prison is a form of punishment subject to eighth amendment scrutiny. The duration of the confinement in isolation cells, as well as the condi-

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66. Punishments deemed to be grossly excessive for the crime involved have been treated by the Court under the eighth amendment, at least in the context of cases involving the death penalty. *E.g.*, Gregg v. Georgia, 428 U.S. 153 (1976). *Cf.* Rummel v. Estelle, 100 S. Ct. 1133 (1980) (upheld mandatory life sentence imposed under Texas recidivist statute in case in which the defendant had been convicted of three relatively minor felony offenses).
67. 429 U.S. at 103-04.
68. *Id.* at 103.
69. *Id.* at 104-05.
72. *Id.* at 685.
chitectures" which existed, were found to constitute cruel and unusual
punishment by the Court. Prisoners have used the eighth amendment
to challenge a variety of conditions of confinement," but the Supreme
Court has generally declined to directly consider these claims. However, the Court did address such a claim by pretrial detainees in Bell v. Wolfish. As previously discussed, the Supreme Court made a
distinction between detainees and convicted inmates as to the constitu-
tional standard to be applied. That is, detainees retain the right to be
free from punishment under the due process clause, while convicted in-
mates are only accorded the right to be free from cruel and unusual
punishment. However, the Wolfish opinion can provide some guidance
as to conditions which will not be held unconstitutional, since the stan-
dard for detainees in this area is higher than for an inmate who has
been adjudged guilty. Thus, if the Supreme Court has delineated cer-
tain conditions as not constituting punishment, an inmate is thereby
precluded from claiming that this same condition is cruel and unusual
as applied to him.
In addition to the challenge to "double-bunking," detainees in
Wolfish argued that certain other administrative practices constituted
"punishment" in violation of their due process rights. The Court
disposed of the due process claim in brief fashion, holding that prac-
tices such as body cavity searches and a ban on receipt of packages
were not unconstitutional. The Court further noted that for both
pretrial detainees and convicted inmates, there must be a showing of
exaggerated response to security considerations for such practices to
be found infirm. As the Court itself acknowledged, this is a heavy
burden that must be met before a claim can be heard in the future.

73. The conditions within isolation cells were found to include a diet of "gruel"; over-
crowded and dirty cells; violence and vandalism; and a "lack of professionalism" by securi-
ty personnel. Id. at 687.
74. For a collection of cases dealing with eighth amendment challenges to prison con-
ditions, see Annot., 51 A.L.R. 3d 111 (1973).
75. In Burrell v. McCray, 426 U.S. 471 (1976), the Court reconsidered and dismissed
its grant of certiorari in a case involving a claim that prison conditions were unconstitu-
tional.
76. 441 U.S. 520 (1979).
77. See note 50 and accompanying text supra.
78. 441 U.S. 535 n.16.
79. See note 53 and accompanying text supra.
80. 441 U.S. at 560. Specifically, the prisoners alleged that improper searches and
restrictions on the purchase and receipt of personal items and books, among other things,
were constitutionally impermissible. Id. at 527.
81. The challenged conditions of confinement were also considered and found to be
constitutional under the first and fourth amendments. Id. at 544-60.
82. Id. at 560.
83. Id. at 560-62.
Although *Wolfish* appears to have limited the utility of the eighth amendment in regard to conditions of confinement, the continued prevalence of claims in this area suggests that the Supreme Court must eventually consider some of these other conditions to which prisons are subject. Maintenance of order and discipline, and administrative deference cannot be said to justify a myriad of other conditions which exist within prisons. Many of these other conditions have already been considered by the lower federal courts when adjudicating constitutional claims in the context of the prison setting.

V. THE RIGHTS OF PRISONERS AS APPLIED IN THE LOWER FEDERAL COURTS

The pronouncements of the Supreme Court in the area of prisoners' rights have been definitive insofar as they limit the remedial power of the federal courts to redress constitutional claims of inmates. However, because the Court has not foreclosed all review of constitutional grievances, the ultimate determination of whether to intervene primarily lies within the discretion of the lower courts. The scope of this discretion has of course been varied, but it does reveal that the courts are willing to protect inmates from arbitrary and unreasonable actions by prison administrators. This section of the comment will specifically review the issue of prisoners' rights as handled by the federal courts of appeals.

For example, a regulation banning any form of communication between prisoners confined in prison segregation units was found to be impermissible on first amendment grounds in *Rudolph v. Locke*. The Court of Appeals for the Third Circuit applied the *Pell* test to require the state to show how such a sweeping regulation can limit the ability to send and receive literature between inmates on the basis of legitimate penological objectives. The fact that segregation was voluntary was found to be an insufficient justification; instead, specific evidence of the necessity of the regulation for inmate safety must be demonstrated before this ban can withstand constitutional scrutiny.

84. 594 F.2d 1076, 1077 (3d Cir. 1977). For decisions holding mail censorship to be constitutionally infirm, see Crowe v. Leeke, 550 F.2d 187 (4th Cir. 1977), and Moore v. Ciccone, 459 F.2d 574 (8th Cir. 1972).

85. 594 F.2d at 1077.

86. *Id. at 1078. The court further noted that segregation is a necessary part of the state's obligation to protect prisoners, and therefore, inmates in segregation cannot be forced to choose between relinquishing constitutional rights or jeopardizing safety. *Id. The concept of prisoner protection by the government was similarly discussed by the Supreme Court in *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976). See note 67 and accompanying text supra.
Likewise, the Court of Appeals for the Seventh Circuit, in *French v. Heyne*, found a first amendment basis which would permit inmate solicitation of funds for educational and rehabilitation programs. Freedom of speech rights retained by inmates require that prison officials meet the *Martinez* standards before such a prohibition can be justified.

On the other hand, in *Pittman v. Hutto*, the Court of Appeals for the Fourth Circuit found censorship of an inmate magazine to be reasonable in light of prison officials' belief that publication of the disputed issue was potentially disruptive of prison order or stability. Deference to the decision of the prison board was similarly accorded by the Court of Appeals for the Eighth Circuit in *Carpenter v. South Dakota*, a case which involved a ban on receipt by prisoners of mail containing sexually explicit material. The court of appeals first noted that if the materials were not obscene, nonprisoners clearly would have a first amendment right to receive these publications. However, even though the court found that officials have the burden of establishing that the censorship is warranted, it then deferred to the board's conclusion of detriment to rehabilitation, and sustained the regulation.

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87. 547 F.2d 994 (7th Cir. 1976).
88. Id. at 1001. See also *Newman v. Alabama*, 559 F.2d 283, 291 (5th Cir. 1977), rev'd in part on other grounds sub nom. *Alabama v. Pugh*, 438 U.S. 781 (1978) (court found that the lack of a rehabilitation program was not "cruel and unusual punishment," but affirmed lower court's order requiring provision of reasonable recreational facilities).
89. 547 F.2d at 1002. See also notes 15-16 and accompanying text supra. Although the Supreme Court did find a first amendment freedom of speech right in *Martinez*, it later redefined the scope of that right in *Jones*, 433 U.S. 119, holding that solicitation rights under the first amendment were limited. See notes 23-24 and accompanying text supra. However, it does not appear that the *Jones* decision would compel a different result than that reached by the Seventh Circuit in *French*. See also *Buise v. Hudkins*, 584 F.2d 223, 230 (7th Cir. 1978), *cert. denied*, 440 U.S. 916 (1979). In *Buise*, the court found a first amendment right of association in a jailhouse lawyer who was transferred to another prison due to his "writ writing" activities. Absent the correctional necessity outlined in *Jones*, the transferred inmate's rights would be deemed violated. Id. at 230-31.
90. 594 F.2d 407 (4th Cir. 1979).
91. Id. at 411-12. The court of appeals in *Pittman* employed the Supreme Court's analysis in *Jones*, and distinguished *Martinez* on the grounds that the latter decision involved only censorship of personal mail. Id. at 410-11. The court decided that since distribution of the magazine involved mass mailing, the solicitation aspect of *Jones* would be controlling. Id.
93. Id. at 761.
94. Id. at 763. The pro se complaint was dismissed without a hearing or response by prison administrators. The Court in *Carpenter* relied on *Pell* and *Martinez* as permitting censorship in furtherance of the prison's interest in maintaining security, order, or rehabilitation. Id. at 761-62. Cf. *Rudolph v. Locke*, 594 F.2d 1076 (3d Cir. 1977) (found
In the fifth amendment procedural due process area, the Court of Appeals for the Fifth Circuit in *Hayes v. Walker*\(^95\) considered a prison disciplinary proceeding. The court found that the minimum requirements of *Wolff* were not met in regard to the denial of witnesses and a statement of reasons for disciplinary action.\(^96\) According to the court in *Hayes*, reasons for denial of the limited right to call witnesses is not mandated by *Wolff*, but some recorded basis is necessary to ensure that the decision was not arbitrary.\(^97\) Likewise, this reasoning requires an adequate statement as to evidence relied upon to support the action taken by the disciplinary board.\(^98\)

However, according to the Court of Appeals for the Tenth Circuit in *Marchesani v. McCune*,\(^99\) classification as a “special offender” without a hearing was not beyond the wide latitude of officials absent a clear abuse of discretion.\(^100\) Similarly, another panel of the same court, in *Twyman v. Crisp*,\(^101\) determined that reclassification of an inmate from medium to maximum custody was “completely within the sphere of authority” of officials. A contrary result was reached by the Court of Appeals for the Seventh Circuit in *Buise v. Hudkins*,\(^102\) a case which involved a transfer between prisons. Despite the Supreme Court’s holdings in *Meachum* and *Montayne*,\(^103\) the *Buise* court found that a transfer was not permitted in retribution for the exercise of protected rights, such as that of a “writ writer.”\(^104\)

*Buise* also involved a separate consideration of access to the courts from the perspective of other inmates. The transfer of the prison’s “jailhouse lawyer” deprived the other inmates of their access to the courts, as no law library was available, nor was there other adequate...
legal assistance. Further, a ban similar to that reviewed in *Rudolph v. Locke*, which prohibited communication between inmates confined in segregation, was also viewed by the *Buise* court as an impermissible impairment of access to courts. In the absence of reasonable alternatives to ensure the meaningful access required by *Bounds*, the court noted that inmates in segregation may need assistance of other inmates to prepare legal papers. Thus, a regulation prohibiting inmate communication may impair effective access. However, restricted access to the prison law library in *Twyman v. Crisp* was not viewed as a denial of access rights. The appellate court noted that the petitioner-inmate's brief did not reveal that he was at all prejudiced by the limitation, and held that availability of a library is only one factor to be considered as bearing on access to the courts. However, the court did not enunciate the other factors which existed in the prison that ensured adequate legal assistance.

An eighth amendment challenge was considered by the Court of Appeals for the Fourth Circuit in *Kirby v. Blackledge*, where a "Chinese cell" was compared to the "Black Hole of Calcutta." Conditions such as this isolation cell, inadequate exercise, heating, and medical treatment were found sufficient to support a claim of cruel and usual punishment. Similarly, a claim which alleged failure to provide reasonable protection from violent inmates and impermissible privations while in protective segregation constituted deliberate deprivation of constitutional rights according to the Court of Appeals for the Seventh Circuit in *Little v. Walker*. The treatment received while in voluntary segregation, coupled with violent attacks and sexual assaults by other inmates, was found to be manifestly "inconsistent with contemporary standards of decency" by the court.

105. *Id.* at 228.
106. *See* note 84 and accompanying text *supra*.
107. 594 F.2d at 1078.
108. *See* notes 61 & 63 and accompanying text *supra*.
109. 594 F.2d at 1078.
110. 584 F.2d at 357. *See also* note 101 and accompanying text *supra*.
111. 584 F.2d at 357.
112. 530 F.2d 583 (4th Cir. 1976).
113. *Id.* at 586. This "strip" or cell contained no bedding, no light, and no toilet facilities, with the exception of a hole in the floor. *Id.*
114. *Id.* at 587.
115. 552 F.2d 193, 197 (7th Cir. 1976), *cert. denied*, 435 U.S. 932 (1977). *See also* *Woodhouse v. Virginia*, 487 F.2d 889 (4th Cir. 1973) (violence and sexual attacks by inmates constitutes "cruel and unusual punishment").
116. 552 F.2d at 197. To avoid violence-prone and "gang-affiliated" inmates, several inmates were transferred to "Segregation—Safekeeping." However, no distinction between disciplinary and protective segregatees was made by prison officials. Thus, protective segregatees were denied sanitary conditions, adequate medical care and food, and recrea-
Prisoners' Rights

The Court of Appeals for the Second Circuit, in *Johnson v. Glick,* considered a claim by a pretrial detainee alleging an unprovoked attack by a prison guard. The court in *Johnson* found that a spontaneous attack by a guard did not constitute "punishment" as applied to a detainee or convicted inmate, but that such undue force did deprive the detainee of liberty without due process of law. Although acknowledging that the occasional use of intentional force may be justified in the management of prisoners, the court stated that consideration must be given to the need for the force applied, the extent of injury, and the reason behind the use of the force.

Eighth amendment violations involving conditions of confinement and denial of medical care were found by the Court of Appeals for the Fourth Circuit in *McCray v. Burrell,* when an inmate was placed in a mental observation cell. The inmate in *McCray* was placed in isolated confinement without clothes or bedding after he was found to be mentally unstable, and a psychologist or psychiatrist was not contacted for two days. The court found impermissible eighth amendment violations, even though the confinement did not result from punishment, but was for mental observation. The court concluded that all confinement within prison is subject to the eighth amendment's restrictions, whether punitive or not.

The Court of Appeals for the Ninth Circuit, in *Spain v. Procunier,*

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117. 481 F.2d 1028 (2d Cir. 1973).
118. Id. at 1029-30. The detainee, who allegedly failed to follow instructions, was struck in the head by a prison guard, and then denied requested medical attention for several hours after the incident. Id.
119. Id. at 1032. The court in *Johnson* defined punishment as that which is "deliberately administered for a penal or disciplinary purpose, with the apparent authorization of . . . prison officials." Id.
120. Id.
121. Id. at 1033.
123. Id. at 365-67. The inmate was thus confined on two separate occasions. The bare cell in which he was confined had no sink, and he was not permitted to bathe or use articles of personal hygiene. The toilet was a hole in the floor. Id. at 367. He was given a mattress at night, which he tore open to sleep in, due to the cold. However, he was later disciplined for destroying the mattress. Id. at 366.
124. Id. at 367.
125. 600 F.2d 189 (9th Cir. 1979). See also Gregory v. Wyse, 512 F.2d 378 (10th Cir. 1975), where conditions of confinement for disciplinary inmates were not found to be unconstitutional.
assessed the eighth amendment as applied to inmates confined to adjustment centers for disciplinary reasons. In this context, the use of tear gas was not found to be impermissible, but the court restricted the use of mechanical restraints, such as neck chains, waist belts, and leg manacles. Further, outdoor exercise, although not a per se constitutional mandate, was found to be imperative "to the psychological and physical well-being of inmates."\textsuperscript{127}

Adequacy of medical care was considered by the Courts of Appeals for the Second and Fifth Circuits in \textit{Todaro v. Ward}\textsuperscript{128} and \textit{Newman v. Alabama}\textsuperscript{129} respectively. Both appellate courts found medical treatment to be constitutionally infirm because of improper attention by medical personnel, inexcusable delays in treatment, unsanitary conditions, and obsolete equipment.\textsuperscript{130} As the court in \textit{Newman} stated, "[w]hile it is not our function to expect or demand alchemy of prison officials, it is our role to ensure that the plight of inmates is not constitutionally forsaken."\textsuperscript{131} This pronouncement can be said to describe the general standard utilized by the lower federal courts in the area of prisoner rights. It is apparent that although the courts are aware of the need to preserve prisoners' constitutional rights, they do not intrude upon the discretion of prison officials absent a clear necessity to do so.

VI. Conclusion

With the Supreme Court's rejection of the prior "hands-off" approach utilized in the federal system, the Court did not attempt to provide constitutional rights to inmates anywhere near equal to those guaranteed to ordinary citizens; it was obvious that the Court recognized a prisoner's retention of certain constitutional rights and evidenced a willingness to interfere with prison authorities to safeguard these rights in instances where discretion was abused or power was excessively wielded by the officials.

In reality, then, the Supreme Court has not provided constitutional "rights" to prisoners, but has instructed the federal courts to act as

\textsuperscript{126} 600 F.2d at 196-98. In regard to the use of tear gas, the court premised its conclusion on the quantity of the substance used. That is, potentially dangerous amounts are only justified in extreme circumstances, but use of limited quantities for control methods does not violate "evolving standards of decency." \textit{Id.} at 196. Further, all the mechanical restraints mentioned were employed both inside and outside the prison. \textit{Id.} at 196. The court distinguished the restraints allowed on this basis. \textit{Id.} at 197-98.

\textsuperscript{127} \textit{Id.} at 199-200.

\textsuperscript{128} 565 F.2d 48 (2d Cir. 1977).

\textsuperscript{129} 503 F.2d 1320 (5th Cir. 1974), \textit{cert. denied}, 421 U.S. 948 (1975).

\textsuperscript{130} 565 F.2d at 50-52.

\textsuperscript{131} 503 F.2d at 1331-32.

\textsuperscript{132} \textit{Id.} at 1333.
Prisoners' Rights

overseers of conduct and actions within the prison. Such a "check" mechanism is not unreasonable, but the Supreme Court is less than honest when it refers to this policy as insuring to the prisoner the "normal" or "fundamental" constitutional rights. The standard for review employed by the Supreme Court merely outlines the level of supervision through which the federal courts may interfere with a state's administration of its prison system. Although these guidelines are posed within a framework of constitutional concepts, in actuality, the extent of protection they afford does not come close to the fundamental constitutional "guarantees" available to a free citizen.

Practically speaking, it is difficult to dispute the decisions of the Court, for it must be conceded that the stark realities of prison life do justify the Court's balancing of interests, as well as the great weight assigned to the maintenance of control within the interior of the prisons of this country. Yet, from a theoretical, "constitutional right" viewpoint, it is difficult to accept the pronouncements of the Court in the prison context. However justifiable the Court's reasoning may be, the Constitution itself does not provide the Court with any authority to extinguish, or even to diminish, the rights of the prisoner. Although the fifth amendment does enable the Court to deprive an individual of property, life, or liberty, provided that due process guarantees have been met, the Constitution itself is devoid of any provision which specifically permits the total or partial deprivation of the prisoner's other rights. Moreover, constitutional authority for distinguishing between the free citizen and the inmate cannot be inferred from the traditional common-law belief that prisoners were "slaves of the state." Absent true authority, the distinctions articulated by the Court must be carefully scrutinized to assure that the deprivations effected are necessary.

However, in approaching the problem, the Supreme Court has applied a balance of interest analysis, which, at least in the areas of first, fifth, and eighth amendment rights, seems to be weighted heavily on the side of penological interests. In this regard, it appears that deference to prison authorities without true necessity has become a stance which is more often exhibited in the Court's attitude. Such a position does not comport with our society's general concepts of constitutional justice and fairness. Proper balance will be maintained only if the deference afforded prison authorities is premised upon a true showing of need. This delicate situation warrants close monitoring by the federal courts to prevent prison administrators from misusing the wide latitude and discretion they yet retain, and from arbitrarily depriving inmates of their constitutional rights.

The limitations imposed by the Supreme Court on the constitutional rights of prisoners do, however, appear to be a workable framework
within which the federal courts may proceed. The balancing of governmental interests and those of individual prisoners should sufficiently permit a lower court to assess the merits of the challenged claim, and to reach a result which is warranted by a particular situation. Therefore, regardless of the sentiment that the Supreme Court has severely restricted the ability of an inmate to assert his constitutional rights, the lower courts can still largely exercise their "supervisory" powers with care and concern for the plight of the imprisoned individual.

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