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Prisoners—Enforcing Prisoners' Rights

The rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected.\(^1\)

Chief Justice Burger has declared, "The problem of what we should do with those who are found guilty of criminal acts . . . is one of mankind's large, unresolved, and largely neglected problems."\(^2\) Joining him, the Legal Counsel to the Federal Bureau of Prisons believes, "The treatment and rights of a convicted prisoner are the paramount issue in correctional law."\(^3\) Finally, a leading authority on correctional law admits that no "serious attempt at critical research into the field of prisoners' rights has ever been made."\(^4\) This note attempts to survey what appears to be a gradually dawning awareness that the life of the law does not stop at stone walls.

**SECTION I. HANDS-OFF CONCEPTS**

The departure point for the law of prisoners' rights is the judge-made concept that courts should keep their hands off the prison system. One of the earliest phrasings of what is commonly called the "hands-off doctrine" appears in *Platek v. Aderhold.*\(^5\) There, a prisoner sought his freedom through writ of habeas corpus on the ground that prison officials had unjustly revoked his parole. Included in the petition was the prisoner's alternative request that the warden send petitioner's civilian clothes home to his wife. The habeas petition—immaterial to this discussion—was refused on the merits. However, the court refused the second request with these words: "The prison system of the United States is under the control of the Attorney General and Superintendent of Prisons, and not of the District Court. The court has no power to interfere with the conduct of the prison or its discipline . . . ."\(^6\)

Since *Platek,* courts have offered numerous variants of the hands-off "doctrine," viz., "It is not within the province of the courts. . . ."; "courts have no supervisory jurisdiction over the con-

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5. 73 F.2d 173 (5th Cir. 1934).
6. Id. at 175.
duct of the various [penal] institutions. . . .

"a court does not have power . . . to superintend. . . ."

"it is not [the court's] province to supervise prison discipline. . . ."

and "courts do not have the power and it is not their function or responsibility [to judge prison discipline]. . . ."

Though diverse in language, these expressions seem uniform in one respect: all invoke a rule of law demanding exclusion of prison life from the court's consideration. However, the courts have failed to obey this self-made mandate, and the so-called hands-off "doctrine" consequently seems to be little more than a hollow incantation.

The bench has repeatedly recited the hands-off formula, but then has proceeded to dispose of a prisoner's petition on other grounds, usually after considering the case's merits. In addition, some courts have chosen to restate the hands-off formula in such a way that they are able to examine the merits of the prisoner's petition before them. When these courts refuse relief on the case's merits, blame for their refusal often goes to the existence of a hands-off "doctrine." Thus, whether hands-off is recited and then ignored, or simply restated, the notion of a "doctrine" lives on.

A typical case of this sort is Childs v. Pegelow. Here, the judges restated the hands-off formula so that it appeared to preclude their considering prisoners' petitions "except in extreme cases" (meaning here deprivation of constitutional rights). The court then denied the sought-for relief (an order allowing prisoners unrestricted practice of Black Muslimism). Thus, the court had simply invoked a rule of law, created an exception, and then denied relief on the basis of this exception: a standard appellate procedure. However, the result of this decision, and others like it, is that in failing to meet the standard of the court's freshly created exception, the frustrated prisoner considers himself once again blocked by the "rule."

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8 Rosheisen v. Steele, 193 F.2d 273, 278 (8th Cir. 1951).
9 Sturm v. McGrath, 177 F.2d 472, 473 (10th Cir. 1949).
10 Numer v. Miller, 165 F.2d 986, 987 (9th Cir. 1948).
14 Id.
Why is this result important to the law of prisoners’ rights? For the simple but critical reason that most of the court’s information on the state of the law of prisoners’ comes from briefs drafted by prisoners themselves—persons not generally aware of the subtleties of judicial construction, nor of the inclination of appellate courts to doctrinize a legal fiction.

To both prisoner and lawyer alike, however, the point of the Pegelow case and its fellows is that the court has simply not followed the dictates of the hands-off “doctrine.” To the contrary, by deliberately delving into the petition’s merits, the court has controverted the mandate that they keep their hands off! However, as some courts continue paying lip service to the hands-off formula—and citing each other as “precedent”—the phantom hands-off “doctrine” assumes the appearance of reality.

Looking at these cases from a different standpoint, another pattern emerges. So many courts have employed the Pegelow approach—tailoring the hands-off formula to the exigencies of the case before them—that the formula itself has been swallowed by its exceptions. A recent catalogue of this riddled state of the formula is found in Roberts v. Pepersack:

The rule that federal courts do not intervene in matters involving prison discipline is . . . subject to limitation. What is needed to overcome the prison discipline defense has been stated in various ways by federal courts: “deprivation of a constitutional right,” . . . “exceptional circumstances,” . . . if the acts of prison officials are not “reasonably necessary to effectuate the purpose of imprisonment,” . . . “violation of a legal right or an abuse of discretion by prison officials,” . . . “extreme circumstances,” . . . “only in rare and exceptional situations,” . . . [and in the case of] “unreasonable regulations.”

A study of the hands-off cases discussed above leads to the conclusion that insofar as “hands-off” remains a useful concept in this area of law, it should refer not to binding legal doctrine, but to an attitude of judges. The formula seems to represent a reluctance to extend protection to prisoners, rather than the court’s self-imposed

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16 Perhaps human nature prevails over legal doctrine in these cases; judges may first give way to curiosity by looking beneath the hands-off cloak, and then to an impulse to set right the undeniable wrongs their investigations often reveal.
16 Id. at 426.
inability to exercise its power. "Hands-off" is perhaps most accurately seen as a judicial posture, a sort of attitudinal inertia, that requires persuasion by the merits of a case to be overcome.

Belief in the delegation of responsibility for prisoners' welfare, plus the bench's long-standing respect for administrative discretion appears to underlie judges' reliance on the hands-off approach. A danger with both these views becomes apparent when applied to incarcerating persons deemed dangerous to society. For the tendency of prison officials is to justify their regulations by their duty to maintain custody, thereby hoping to render any and all suppressions of prisoners' rights self-validating and absolutely necessary. 19

However, though a court's hands-off tendencies be strong, its foundation on grounds of delegation and discretion has been subjected to vigorous attack. At least one federal court has conceded that "a mere grant of authority cannot be taken as a blanket waiver of responsibility in its execution. Numerous . . . agencies are vested with extensive administrative responsibility. But it does not follow that their actions are immune from judicial review." 20 Even where delegated authority has been statutorily labeled "final," the courts have not allowed themselves to be entirely precluded. 21 One court has, in fact, explicitly rejected the administrative-discretion argument, stating that "the State's right to detain a prisoner is entitled to no greater application than its correlative duty to protect him from unlawful and onerous treatment." 22

As the preceding suggests, the foundation of the hands-off approach has begun to crumble. As a result, many courts have sought aid in the bench's old friend the "reasonableness test." 23 In Fulwood v. Clemmer the court held that "a prisoner may not be unreasonably punished for the infraction of a rule . . .; [that] a punishment out of proportion to the violation may bring it within the bar against unreasonable punishments." 24 Another court in choosing the reasona-

20 Muniz v. United States, 305 F.2d 285 (2d Cir. 1962).
ness standard admitted it was searching for "some middle ground between these extremes [of prison tyranny and judicial takeover]."

SECTION II: HABEAS CORPUS AS REMEDY

Congress authorized federal courts to apply the writ of habeas corpus to federal prisoners in 1789 and extended the writ's coverage to state prisoners in 1867. Through decades of judicial construction, however, three barriers have arisen which deny federal and state prisoners habeas corpus relief. The first is that the only justiciable issue which may be considered is the legitimacy of confinement, not the mode or manner. The second is that the prisoner has failed to exhaust other available remedies. The third is that the only proper relief under habeas corpus is absolute release from prison. These restrictions on the habeas remedy will be discussed in order.

From the court's traditional restriction of habeas questions to matters of how the prisoner became incarcerated, it appears at the outset that a prisoner admitting the validity of his conviction is faced with a more difficult problem than the usual "writ-writer." Nevertheless, there is an area of prisoners' rights where the legitimacy-of-confinement barrier is weakening. This is chiefly where it is being overridden by an expanded concept of the power of the writ.

An early example of this expanded concept (and also the reasonableness test discussed previously) is found in re Rider. There the court held that prison prohibition of visits by a prisoner's attorney, when related to the inmate's legal rights, may constitute an unreasonable burden on the prisoner's right of access to the courts. Likewise, courts have ruled that prison officials who restrict habeas petitions in order to save the court time or embarrassment (presum-

26 Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81.
28 See, e.g., Snow v. Roche, 143 F.2d 718 (9th Cir. 1944).
31 See, for example, the following statement: "[Habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their rights to be free from wrongful restraints upon their liberty," Jones v. Cunningham, 371 U.S. 236, 243 (1963).
33 See also Spires v. Down, 271 F.2d 659 (7th Cir. 1959); In re Chessman, 44 Cal. 2d 1, 279 P.2d 24 (1955).
ably from obscenity)\textsuperscript{34} are not exercising lawful authority; the consideration of such petitions must be left to the courts.\textsuperscript{35}

Furthermore, a recent Supreme Court decision\textsuperscript{36} in the prisoners’ rights area extends the court’s protection to prisoners lending assistance in drafting habeas writs for others. In this case the Supreme Court agreed with the lower court that “for all practical purposes, if such prisoners [seeking habeas] cannot have the assistance of a ‘jailhouse lawyer,’ their possibly valid constitutional claims will never be heard in any court.”\textsuperscript{37} The lower court had called petitioner’s incarceration in solitary confinement unlawful use of a “jail within a jail.”\textsuperscript{38}

The second barrier to a prisoner’s habeas relief is the operation of the exhaustion doctrine. The federal statute builds this doctrine into the habeas remedy with the words “application for writ . . . shall not be granted unless . . . applicant has exhausted the remedies available in the courts of the state. . . .”\textsuperscript{39} This doctrine has been generally considered the greatest single factor restricting the use of federal habeas by state prisoners.\textsuperscript{40} For instance, the United States Supreme Court once held that the exhaustion rule required a prisoner desiring redress for rights violated by prison officials to

\textsuperscript{34} Two prison wardens interviewed expressed concern over judges’ possible exposure to obscenity by inmates; the wardens justified their practice of censoring court-addressed mail on this ground, plus that of protecting the bench from being flooded with “lies about the prison.” Interviews by author with two West Virginia prison officials who wish to remain anonymous, May, 1970.
\textsuperscript{36} Id.
\textsuperscript{37} Id. at 487, quoting Johnson v. Avery, 252 F. Supp. 783, 784 (M.D. Tenn. 1966). The Supreme Court made the practical observation that “[i]n the case of all except those who are able to help themselves—usually a few old hands or exceptionally gifted prisoners—the prisoner [having to draft his own writ] is in effect denied access to the courts unless such help is available.” Johnson v. Avery, 393 U.S. 483, 488 (1969).
\textsuperscript{38} Johnson v. Avery, 252 F. Supp. 783, 787 (M.D. Tenn. 1966). The prisoner had been placed in solitary confinement by prison officials as punishment for writing another prisoner’s writ. The officials’ traditional argument in such instances is that the talented writ-writer will exact unreasonable payment from his “clients” in the form of money, homosexual favors, or political debts in the prisoners’ social system. See Johnson v. Avery, 393 U.S. 483, 499 (1969) (dissenting opinion). It is interesting to note that this “jail within a jail” concept lends support to the legitimacy-of-confinement criterion in this case, but in such manner as to grant relief to prisoners, instead of its customary effect of preventing it.
\textsuperscript{40} Comment, Constitutional Law—Enforcement of Prison Discipline and its Effect upon the Constitutional Rights of Those Imprisoned, 8 Vill. L. Rev. 379, 389 (1963).
first seek from his highest state court a writ of coram nobis—\(^{41}\) a procedure intended to correct errors at his trial! In other instances courts have held that a prisoner's alleged failure to make use of a Prisoners' Mail Box—\(\)theoretically a device for prisoners to send uninspected complaints directly to high correctional officials—\(\)is failure to exhaust an available remedy and is thereby grounds for denying habeas relief.\(^{42}\) As one court summarized the practice:\(^{43}\)

> "[T]he doctrine of exhaustion was being deformed to subject constitutional guarantees to the mercy of an adverse social climate. The salutory doctrine was being used to thwart justice, defeating its function as a valuable incident to the American judicial system."

However, appearing right after the exhaustion formula in the federal habeas statute are words creating an exception to the formula's operation. The statute says a prisoner may apply for the writ despite failure to exhaust state remedies if "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."\(^{44}\)

Accordingly, four years after the coram-nobis decision,\(^{45}\) the United States Supreme Court emphasized the statute's latter words, declaring it unnecessary for a prisoner to seek both state habeas relief and state-court certiorari in order to redress violations of his rights by prison officials.\(^{46}\) This seeming switch to relaxing the exhaustion rule, however, should be seen in harmony with the court's gradual abandonment of the hands-off approach, its expanded concept of the power of habeas corpus (discussed above), and its more flexible view of available habeas remedies (to be discussed below).

The third obstacle to prisoners' use of habeas for protecting their rights is the court's frequently held notion that the only remedy available under habeas is absolute release of the prisoner from jail.\(^{47}\)

\(^{41}\) _Ex Parte Hawk_, 321 U.S. 114 (1944).

\(^{42}\) _Green v. United States_, 283 F.2d 687 (3d Cir. 1960).


\(^{45}\) _Ex Parte Hawk_, 321 U.S. 114 (1944).

\(^{46}\) _Wade v. Mayo_, 334 U.S. 672 (1948).

\(^{47}\) _Ex Parte Watkins_, 28 U.S. (3 Peters) 193 (1830); _Williams v. Steele_, 194 F.2d 32 (8th Cir. 1952); _Snow v. Roche_, 143 F.2d 718 (9th Cir. 1944), _cert denied_, 323 U.S. 788 (1944). It has been pointed out that because of the time-consuming requirements of the exhaustion rule, nearly all successful writ applicants have been long-term inmates. _Reitz, Federal Habeas Corpus:_
However, the federal statute reads merely that habeas remedies shall operate "as law and justice require."48

Recent decisions have adopted the more flexible approach this short phrase suggests.49 Judge Learned Hand has portrayed the attitude of courts using this approach: "We find no more definite rule than that the writ is available not only to determine points of jurisdiction, stricti juris, and constitutional questions; but wherever else resort to it is necessary to prevent a complete miscarriage of justice."50 The United States Supreme Court recently echoed this approach, saying it has "steadfastly insisted that there is no higher duty than to maintain [the habeas remedy] unimpaired."51

The leading case in the area of flexible habeas remedies is Coffin v. Reichard.52 There the court held a judge need not release the prisoner, but could either return him to prison with directions that his civil rights be respected, or transfer him to some other institution.53 Although this case has been hailed as declaring the "counter-principle to the hands-off doctrine,"54 since such "doctrine" is honored more in its breach than its observance,55 the case is better considered another example of an emerging hands-on trend towards enforcing prisoners' rights.56


By the time the writ-writer is sufficiently "exhausted" in the eyes of the law, however, he is often ironically confronted with the relief-equals-release construction, making judges loath to turn a now "dangerous long-termer" loose on society. Note, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 YALE L.J. 506, 510 (1963).

52 143 F.2d 443 (6th Cir. 1944).
53 Id. at 445. The court added that "When a man possesses a substantial right, the courts will be diligent in finding a way to protect it. The fact that a person is legally in prison does not prevent the use of habeas corpus proceedings to protect his other inherent rights." Id. It is of interest that at least once the Supreme Court, deeming itself bound by the relief-equals-release approach, yet wanting to censure unconstitutional treatment by prison officials, granted the prisoner "absolute release," but ordered that the attorney general be told the exact time of prisoner's release, so that he could be rearrested. See Medley, Petitioner, 134 U.S. 160, 174 (1890).
55 See text, supra, Section II.
56 See, e.g., In re Ferguson, 55 Cal. 2d 663, 361 P.2d 417, 12 Cal. Rptr. 753 (1961), cert denied, 368 U.S. 864 (1961). See also text and cases in sections III and IV infra.
SECTION III: COMMON LAW REMEDIES

The next few paragraphs concern enforcing prisoners' rights in that area of the law not graced with statutory specificity. The outcome of cases in this area rests largely on general common law principles. As might be anticipated, many of the decisions concern the reasonableness of prison regulations and officials' acts. Virtually all of them in the last analysis depend on the judge's "posture"—on whether personality, petitioner, or public opinion can persuade him to join the judicial hands-on trend.

Many cases support the proposition that prison officials have a duty to make only reasonable prison rules and must enforce them in a reasonable manner. Thus, arbitrary restrictions of rights by a prison official have been deemed an abuse of discretion which the court will not tolerate. In such cases the relief the court most often grants is an injunction restraining the official from further such abuse. However, at least one federal court has required the prison superintendent to rewrite his prison's regulations and submit them for court approval—much as is done in the area of school plans for racial desegregation.

Another common law remedy is mandamus directed to the prison official, compelling him to guarantee petitioner's rights. One court even construed this request from a prisoner's petition for habeas, saying "It is the rule of federal courts that [habeas] applications when drawn by laymen will be given a most liberal interpretation."  

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57 This was the approach mentioned previously of courts that rejected the hands-off approach and sought rationality in their decisions by employing the reasonableness standard. See, for example, cases cited in notes 24 and 26, supra.
58 See text, Section I, supra.
61 Usually the prison warden is designated by the court as respondent.
63 See, e.g., State ex rel. Sherwood v. Gladden, 240 F.2d 910 (9th Cir. 1957).
64 Id, at 912, citing Thomas v. Teets, 205 F.2d 236, 238 (9th Cir. 1953).
One group of mandamus cases concerns prisoners' attempts to prevent officials from inspecting and censoring their mail.\(^6\) Of course, it is well known that First Amendment freedoms "are among the fundamental personal rights and liberties" protected by the United States Constitution.\(^6\) However, it appears in the court's use of the reasonableness standard for judging prison regulations, that little consideration is given to the nature of the right a regulation allegedly violates.\(^6\) Thus, in prisons First Amendment freedoms do not yet enjoy a preferred status, and prisoners' attempts to protect their mail through mandamus have been futile.\(^6\)

Prisoners have also submitted petitions to the court in the form of "complaints" which invoke the right to constitutional guarantees. A typical case is Nichols v. McGee,\(^6\) where a prisoner protested the racial segregation established by prison regulations. The court refused to apply the rationale of Brown v. Board of Education,\(^7\) accepting instead the prison's traditional justification that its regulations were necessary to maintain control of prisoners.\(^7\)

It may seem that the courts' infrequent granting of mandamus renders this remedy impractical. Nevertheless, mandamus remains at least a means of drawing matters to the court's attention. Especially in an area of the law changing as rapidly as is prisoners' rights, the need for courts to be apprised of prison life is crucial—courts cannot cure what they cannot see. As at least a potential remedy for enforcing prisoners' rights, mandamus should not be overlooked.

One seldom-used but effective remedy for enforcing prisoners' rights is based on the court's contempt power.\(^7\) The reasoning is that the only authority prison officials have for detaining prisoners is the mittimus issued the official by the court when the prisoner was sentenced. Thus, if the official departs from reasonably executing the authorized sentence, he is subject to contempt. Note, this approach


\(^{6}\) Lovell v. Griffin, 303 U.S. 444, 450 (1938).


\(^{6}\) See cases cited in note 65, supra.


\(^{7}\) 347 U.S. 483 (1954).


avoids the official's traditional defenses of delegated responsibility and administrative discretion by simply making him an *ex officio* officer of the court!

Still another common law concern is whether prisoners can recover for injuries received at the hands of prison officials. Of course, the prisoner's biggest hurdle in a suit against prison officials is the doctrine of sovereign immunity—government and its officers performing official duties are immune from civil suit unless government waives this immunity. Yet even where the government waives sovereign immunity, most jurisdictions do not yet allow prisoners' suits for assault or libel. Thus prisoner suits are effectively limited to those involving prison officials' negligence.

The main hurdle to recovering for negligent injury is the prisoner's having to prove that an official owed him a duty, the performance of which did not require the exercise of judgment. Nevertheless, prisoners have successfully cleared both hurdles—sovereign immunity and official judgment—and have been awarded compensation by the courts. "The law imposes the duty on a jailor to exercise reasonable and ordinary care and diligence to prevent unlawful injury to a prisoner placed in his custody . . . ."

Examples of prisoners' successful suits against officials include: failing to keep the prison sanitary, confining prisoner with another who was violently insane, and many instances of negligent operation of prison workshops.

**SECTION IV: CIVIL RIGHTS ACTS**

The effect of criminal conviction upon one's civil status is not made clear by statutes of the various states; none of them attempts to define prisoner status in any inclusive manner. Some state statutes appear to visit "civil death" upon prisoners. Such statutes inspire occasional decisions to the effect that the status of prisoner inmates

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75 Ratliff v. Stanley, 224 Ky. 819, 821, 7 S.W.2d 230, 232 (1928).
77 Dunn v. Swanson, 217 N.C. 279, 7 S.E.2d 563 (1940).
80 See *e.g.*, *Cal. Penal Code § 2601* (West Supp. 1966; N.Y. Penal Law § 511 (McKinney 1967).
is outside the protection of society's laws.\textsuperscript{81} In fact, one rather severe summation of prisoner civil status proclaims a convicted felon "has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the state."\textsuperscript{82} Largely through Justice Department efforts, these judicial attitudes have changed. In the 1950's the Civil Rights Section of the Justice Department instituted actions on behalf of federal prisoners under the theory that inmates in federal prisons were being denied civil rights guaranteed under the Constitution. The Department's winning argument in a major prisoners' rights case\textsuperscript{83} pierced the heart of the slave-of-the-state concept. The argument was that the fourteenth amendment applies to all persons; even if a prisoner has been deprived of some privileges of "citizenship," he is still a "person."\textsuperscript{84} Furthermore, federal precedent had held that "due process of law and equal protection of the laws are guaranteed not only to citizens but to any person, and [the 1871] Civil Rights Act provides a remedy for deprivations of these rights."\textsuperscript{85}

How do civil rights statutes operate to enforce prisoners' rights? The Civil Rights Act of 1948\textsuperscript{86} attaches criminal penalties of a thousand dollars fine or one year's imprisonment or both for the violation of statutory provisions established by the Civil Rights Act of 1871.\textsuperscript{87} The 1871 Act—designed to guarantee Fourteenth Amendment Rights—makes state officials depriving any person of his civil rights under color of law "liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."\textsuperscript{88}

Following Justice Department advances on the criminal front of federal civil rights, substantial precedent has accumulated allowing prisoners themselves to sue prison officials under civil rights

\textsuperscript{81} Hill v. Gentry, 182 F. Supp. 500 (W.D. Mo. 1960).
\textsuperscript{82} Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).
\textsuperscript{83} United States v. Jones, 207 F.2d 785 (5th Cir. 1953).
\textsuperscript{88} Id.
The current status of prisoners' rights in general is summarized by the court in *United States v. Jackson.* Even though the petitioner was a convict, "he did not, on that account, cease to be an inhabitant of the State of Arkansas nor become divested of all rights protected under the Fourteenth Amendment." The court then repeated an earlier federal holding that "A convicted prisoner remains under the protection of the Fourteenth Amendment except as to those rights expressly or by necessary implication taken from him by law."

Moreover, prisoners seeking federal civil rights relief can no longer be stopped by operation of an exhaustion-of-remedies doctrine, such as has hampered their efforts in seeking federal habeas relief. Courts now generally hold that "the fact that state officers are violating state as well as federal laws does not exonerate them from penalties under the latter." Although prison officials have received criminal penalties for denying prisoners' rights, most relief sought under civil rights acts has been injunctive. Helpful to indigent prisoners in these actions is a federal statutory provision allowing them to bring civil rights suits at no cost to themselves.

Physical mistreatment by prison officials frequently results in relief being granted. Cases now hold that prison discipline may not

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90 235 F.2d 925 (8th Cir. 1956).
91 Id., at 929.
92 Id., citing United States v. Jones, 207 F.2d 785 (5th Cir. 1953); United States v. Walker, 216 F.2d 683 (5th Cir. 1954).
93 See text, Section II, supra, for discussion of exhaustion doctrine in connection with habeas corpus remedy. It has long been noted that federal courts once ducked a number of cases brought by prisoners under 42 U.S.C. § 1983 (1964) by calling the matter one of state court jurisdiction; then state courts would dismiss the case entirely by calling the matter one of executive jurisdiction, not judicial. Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review The Complaints of Convicts,* 72 YALE L.J. 506, 512 (1963).
94 United States v. Jones, 207 F. 2d 785, 786 (5th Cir. 1953); See also Rivers v. Royster, 360 F.2d 592 (4th Cir. 1966); Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961).
95 See, e.g., Apodaca v. United States, 188 F.2d 932 (10th Cir. 1951).
be excessive in severity or duration,"99 “shock general conscience,”100 be “intolerable to fundamental fairness,”101 or cruel according to present standards of decency.102 Such statements reflect the concept underlying the cruel and unusual punishment provision of the Constitution103—that the punishment must fit the crime, and any punishment beyond this ought not be allowed.104

Another type of frequently granted relief concerns prisoners’ medical care.105 Courts have held a prison’s failure to provide adequate medical care violates prisoners’ rights under the Fourteenth Amendment.106 It can even amount to cruel and unusual punishment.107

Still another area of successful civil rights application concerns freedom of religion. Of course, since the theory of civil rights rests ultimately in the Fourteenth—not the First—Amendment, court opinions in this area are based on equal protection grounds rather than freedom-of-religion. In 1961 two key cases in this area saw prisoners win injunctive relief against prison officials who had arbitrarily refused them practice of Black Muslimism.

From an overall survey of cases enforcing prisoners’ rights, it appears most successes have occurred in federal rather than state courts. If this means state judges still favor the hands-off stance, then state prisoners can now resort directly to federal courts under the civil rights statutes. In fact, state prisoners may even fare better than federal inmates under the Civil Rights Act of 1871. For technically the Act applies only to deprivations of rights under color of law of a “state or territory.”109 This could bar prisoners’ recovery

100 Id, at 679, citing Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965).
101 Id.
103 U. S. CONST. amend. VIII.
104 The Supreme Court has categorized cruel and unusual punishment into 1) that which would shock the general conscience under all circumstances; 2) that punishment which is disproportionate to the offense; and 3) that punishment going beyond what is necessary to achieve a legitimate penal aim. See Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966).
106 Id. The failure to provide medical facilities was held to violate the Fourteenth Amendment’s guarantee of freedom from deprivation of life or property.
108 Pierce v. La Valee, 293 F.2d 233 (2d Cir. 1961); Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961).
against federal officials in federal prisons. Nevertheless, courts have not allowed prisoners' rights to be disregarded in federal prisons merely by the verbal inadequacies of one statute. In *Walker v. Blackwell* the court invoked a federal mandamus statute, authorizing federal courts "to compel an officer . . . of the United States or any agency thereof to perform a duty owed . . . the plaintiff."" Prisoners were thereby ensured their right to religious practice in federal prisons.

**CONCLUSION**

In 1968 there were 426,000 prison inmates in the United States, serving their time at a cost of $1 billion a year. Before he became Chief Justice, Judge Warren E. Burger candidly portrayed their situation:

Having found the accused guilty, . . . we seem to lose our collective interest in him. In all but a few states we imprison this defendant in places where he will be a poorer human being when he comes out than when he went in—a person with little or no concern for law, . . . very often with a fixed hatred of authority and order, and he is mindlessly and aggressively determined to live by plundering and looting.

The President's Task Force on Corrections has stated that ignoring the effect of prison tyranny on the lives of prisoners would mean, "in effect, that our Nation would continue to avoid, rather than confront, one of its most critical social problems; that it would accept for the next generation a huge, if not immeasurable, burden of wasted and destructive lives." Enforcing prisoners' rights is a crucial step in the right direction. In the words of the Task Force, "decisive action . . . could make a difference that would really matter within our own time."

*Arthur W. Campbell*

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110 360 F.2d 66 (5th Cir. 1966).
112 6 AM. CRIM. L.Q. 133 (1968).
114 TASK FORCE ON CORRECTIONS, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, at 114 (1967).
115 *Id.*