MARCH 1995

Federal Probation

A JOURNAL OF CORRECTIONAL PHILOSOPHY AND PRACTICE

Published by the Administrative Office of the United States Courts

VOLUME LIX MARCH 1995 NUMBER 1

This Issue in Brief

Three Strikes and You're Out!: The Political Sentencing Game.—Recent sentencing initiatives which mandate life sentences for three-time convicted felons may appeal to the public, but will they address the realities of crime? Authors Peter J. Benekos and Alida V. Merlo focus on the latest spin on sentencing: "three strikes and you're out." Their article reviews the ideological and political context of recent sentencing reforms, examines "get-tough" sentencing legislation in three states, and considers the consequences of increasing sentencing severity.

Electronic Monitoring in the Southern District of Mississippi.—Although many criminal justice agencies now use electronic monitoring as an alternative to prison, some still hesitate to use it in supervising higher risk offenders. Author Darren Gowen explains how the U.S. probation office in the Southern District of Mississippi began its electronic monitoring program with limited expectations but successfully expanded it for use with higher risk offenders. He describes the district's first year of experience with electronic monitoring and discusses the selection criteria, the types of cases, the supervision model, and offender demographics.

Helping Pretrial Services Clients Find Jobs.—Many pretrial services clients lose their jobs because they are involved in criminal matters; many have been either unemployed or underemployed for a long time. Some are released by the court with a condition to seek and maintain employment. Author Jacqueline M. Peoples describes how the U.S. pretrial services office in the Northern District of California addressed the issue of unemployment among its clients by launching a special project to identify employers willing to hire them. She also explains how the district developed an employment resource manual to help clients find jobs or training programs.

Specialist Foster Family Care for Delinquent Youth.—Authors Burt Galaway, Richard W. Nutter, Joe Hudson, and Malcolm Hill contend that the current focus on treatment-oriented or specialist foster family care as a resource for emotionally or psychiatrically impaired children and youths may disguise its potential to serve delinquent youngsters. They report the results of a survey of 266 specialist foster family care programs in North America and the United Kingdom. Among their findings were that 43 percent of the programs admitted delinquent youths and that the delinquents were as likely to be successful in the programs as were nondelinquent youths.

United States Pretrial Services Supervision.—In June 1994 the Probation and Pretrial Services Division, Administrative Office of the United States

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The Supreme Court and Prisoners' Rights*

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AS SUBSTANTIVE areas of the law go, the law of prisoners' rights is still in its infancy. Until the 1960's, the courts largely stayed out of this area. The movement away from this abstention was led by the lower Federal courts. In the late 1960's, however, the United States Supreme Court began to involve itself as well. Since then, the Supreme Court has decided more than 30 cases dealing with the rights of the incarcerated. Surprisingly, there has been very little scholarly attention paid to the efforts of the Supreme Court *as a whole* in this area. This article attempts to fill in some of this gap in the literature on prisoners' rights. It examines the Supreme Court case law from two perspectives: chronologically and by major subject area.

A Chronological Perspective

Historically, the Supreme Court case law on prisoners' rights can be divided into three periods: 1) the Hands-Off Period (before 1964), 2) the Rights Period (1964-78), and 3) the Deference Period (1979-present).

The Hands-Off Period (before 1964)

Before the 1960's, courts (including the Supreme Court) did not involve themselves in the issue of prisoners' rights. Initially, this stance was the result of a legal approach that held that prisoners were slaves of the state. Upon conviction, criminals lost virtually all legal rights. Any rights they had were not the rights shared with other citizens, but those rights which the state chose to extend to them.

Ruffin v. *Commonwealth*[1] illustrates this approach. In rejecting Ruffin's contention that the Virginia Constitution required that he be tried in his home county for a crime he committed while in prison, the Virginia Court of Appeals indicated that

> [t]he bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead. Such men have some rights it is true, such as the law in its benignity accords to them, but not the rights of free men. They are the slaves of the State undergoing punishment for heinous crimes committed against the laws of the land.

In time, this convict-as-slave approach gave way to an abstention approach. The courts during this period recognized that prisoners did retain constitutional rights, but it was not the role of the courts to intervene to protect those rights. Instead, courts saw the legislative and executive branches as having responsibility for identifying and honoring the constitutional rights of inmates.

There are several reasons given typically to explain this abstention approach by the courts.[2] First, the courts perceived that to intervene in these matters would be to usurp the proper functions of the legislative and executive branches of government. Second, and somewhat related to the separation of powers concern just mentioned, was a belief by the courts that they lacked the expertise to become involved in these matters. Because of their lack of understanding of the operation of prisons, if courts took steps to protect prisoners' rights, they ran a great risk of interfering with the proper functioning of the institutions.

Third, most prisoners are housed in state prisons. If they sought protection of their rights in Federal courts, these courts felt that their intervention intruded upon the proper functioning of a Federal system of government. And last, most courts, although they seldom said so explicitly, seemed to fear that if they acted to protect prisoners' rights the courts would experience a flood of frivolous lawsuits from prisoners.

As with most of the generalizations that will be made about these historic periods in prisoners' rights, there are exceptions to the generalization that courts declined to intervene on behalf of prisoners during the hands-off period. For example, the Supreme Court held in 1941 that the states could not require inmates to submit formal legal documents to state officials for review and approval before filing those papers with the courts.[3] Nevertheless, such instances of judicial recognition of rights held by prisoners were isolated.

The Rights Period (1964-78).

In the early 1960's, lower Federal courts began moving away from the hands-off approach. They demonstrated an increasing willingness to identify rights of prisoners found in the Constitution and to protect those rights. This change in approach is attributed to several factors.[4]

First, prisoners, perhaps reflecting society as a whole at the time, became more militant and aggressive in asserting their rights. Second, the legal profession developed a cadre of "public interest lawyers" who were willing to take on these cases, either pro bono or with financial support from government and private foundation grants. Third, the judiciary as a whole seemed to become more responsive to the legal arguments advanced by politically disadvantaged groups.

Fourth, judges were often presented with cases that involved such horrible conditions of confinement that they cried out for some sort of remedial action.

And last, two developments in Federal law created a more favorable environment for prisoners' rights cases in the Federal courts. The first development involved interpretation of the Civil Rights Statute (42 U.S.C. Section 1983), a post-Civil War law. Lawsuits brought under this statute are commonly referred to as Section 1983 suits. Section 1983 permits a person whose rights under Federal law are violated by a person acting "under color of state law" to sue for damages or some sort of remedial order.

Before 1961, the accepted interpretation of Section 1983 was that a state official who acted in violation of state law was not acting "under color" of state law. In *Monroe* v. *Pape*,[5] the Supreme Court rejected this prior interpretation as being inconsistent with the desire of Congress to provide relief for persons whose constitutional rights were violated by state and local government officials, even when their actions were not officially approved. This change in the interpretation of Section 1983 enabled prisoners to file their suits complaining of rights violations in Federal courts, where it was generally thought that they would receive a more sympathetic hearing than in state courts.

The second development in Federal law concerned the Supreme Court's interpretation of the Due Process Clause of the 14th amendment, another post-Civil War provision. The Due Process Clause prohibits a *state* from depriving persons of life, liberty, or property without due process of law. Through a long process called Selective Incorporation that began in the 1920's and picked up a full head of steam in the 1960's, the Supreme Court ruled that the Due Process Clause "incorporated" most of the rights contained in the Bill of Rights into the 14th amendment.

This meant that state and local governments had to extend to persons under their jurisdiction most of the rights in the first 10 amendments to the Constitution, such as free speech, freedom of religion, right to counsel, right against self-incrimination, right against unreasonable searches and seizures, and many others. Thus, one's constitutional rights, the violation of which by state and local officials could result in a Section 1983 lawsuit, became more extensive.

In due course, the Supreme Court itself jumped on the prisoners' rights bandwagon, although somewhat inconspicuously at first. In three of its first four prisoners' rights cases, the Court issued per curiam decisions. These are unsigned decisions (i.e., no particular Justice is identified as the opinion's author) usually affirming the decision of the lower court without hearing oral argument and without explaining the Court's reasons for affirming.

In the first of these cases, *Cooper* v. *Pate*,[6] the Court held unanimously that a state prison inmate could bring a Section 1983 suit alleging that his freedom of religion was violated by the prison's refusal to permit him to purchase certain religious material. Four years later, *in Lee* v. *Washington*,[7] the Court again unanimously upheld a lower court's order to Alabama to desegregate its prisons and jails, although three Justices concurred in a brief opinion expressing their belief that the Court's decision should not be viewed as prohibiting corrections officials from taking racial tensions into account in their decisionmaking. Then in 1971, in *Younger* v. *Gilmore*,[8] the Court again unanimously upheld a lower court decision that required a prison to provide inmates an adequate law library.

Sandwiched in between *Lee* and *Younger* in 1969 was the Court's first full opinion venture into prisoners' rights, *Johnson* v. *Avery*.[9] Johnson was a "writ writer," an inmate who assisted other inmates in preparing legal papers challenging their convictions. He was disciplined by prison authorities for engaging in this activity. The Court held that, "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief,"[10] it could not constitutionally prohibit inmates from functioning as jailhouse lawyers. This case is important, not only because it was the Court's first prisoners' rights case in over 25 years with a full written opinion, but also because it ruled in favor of the inmate and thereby established the general tone of its cases during the Rights Period.

In two cases the Court upheld the first amendment rights of a prisoner. In *Cruz* v. *Beto* (1972),[11] the Court held that a prison could not prevent a Buddhist inmate from using the prison chapel, from corresponding with religious advisors, and from distributing religious materials to other inmates, if the prison permitted inmates of other faiths to engage in these same activities.

In *Procunier* v. *Martinez* (1974),[12] the Court found that prisons could not censor outgoing mail that was viewed by prison authorities as expressing "inflammatory" views, unduly complaining, or "otherwise inappropriate." These standards were too broad and failed to exclude only material that posed a legitimate threat to institutional iterests.

If mail was censored (under constitutionally acceptable standards), the inmate sending the mail has to be notified and given an opportunity to object to some official who was not involved in the original censorship decision. Although the Court based this holding on the first amendment rights of the correspondent outside the prison, its effect, of course, was to protect inmates as well.

In a Due Process case, the Court ruled in *Wolff* v. *McDonnell* (1974)[13] that inmates had a liberty interest

in good time credits.[14] Good time credits could not be denied without holding a hearing before which an accused inmate was given notice of the alleged infraction, at which the inmate was given the opportunity to call witnesses and present documentary evidence (unless allowing either would be "unduly hazardous to institutional safety or correctional goals"), and after which the prison would issue a written statement of the reasons for its action and the evidence relied upon in coming to its decision.

The Court issued several rulings upholding the right of inmates to access the courts. The Court ruled in *Wolff* that the *Avery* rule, protecting the status of writ writers when other provisions for legal assistance have not been made, applied to writ writers who were assisting other inmates in the preparation of Section 1983 suits (and was not limited to assisting with habeas corpus petitions).

In *Martinez*, the Court also struck down a prison rule that prohibited visits from employees (other than two licensed investigators) of lawyers who were representing inmates. The clear effect of this rule was to inhibit inmates' ability to access the courts because the rule made it more difficult for attorneys to communicate in person with their clients.

In 1977, in *Bounds* v. *Smith*,[15] the Court examined the adequacy of the law libraries established by North Carolina for its inmates. Although the Court upheld the adequacy of the libraries, it made it clear that the state was indeed required by the Constitution to establish law libraries to assist inmates in their efforts to petition the courts unless the state provided inmates with adequate assistance from persons trained in the law. And finally, in an eighth amendment case, *Hutto* v. *Finney* (1978),[16] the Court held that, given the harsh conditions of punitive isolation cells in the Arkansas prison system, inmates could not be placed constitutionally in those cells for more than 30 days.

While these cases demonstrated a willingness by the Court to support the rights of prisoners, there were issues during the Rights Period on which inmates did not receive favorable rulings from the Court. In *Wolff*, the Court refused to extend the rights of counsel, confrontation, and cross-examination to the good time hearings that it required in that case. The Court also indicated that in adopting a rule that mail from attorneys could be opened by the prison in the presence of the inmate receiving the mail, the prison "had done all, and perhaps even more" than the Constitution requires.

In *Pell* v. *Procunier* (1974),[17] the Court upheld a California prison regulation which prohibited the press from interviewing *individual* inmates. However, it seemed important to the Court's decision that the press was permitted to visit and observe conditions in the prisons and to interview inmates at random.

In *Meachum* v. *Fano* (1976),[18] the Court held that inmates had no liberty interest under the Due Process Clause in avoiding transfer to another prison where conditions were harsher because such a transfer was "within the normal limits or range of custody" which the conviction authorizes the state to impose. What's more, it makes no difference whether the transfer is simply for administrative reasons, as in *Meachum*, or is for disciplinary reasons, as was the case in *Montanye* v. *Haymes*.[19]

In *Baxter* v. *Palmigiano*,[20] decided the same year as *Meachum* and *Montanye*, the Court held that an inmate's right against self-incrimination is not violated if the inmate's refusal to answer questions at a disciplinary hearing is held against him at the hearing. (Note, however, that inmates *do* have a constitutional right not to answer questions at the hearing that would tend to incriminate them, unless they are granted immunity for the statements they are compelled to give.) In *Baxter*, the Court also held that prisons do not have to give reasons for denying an inmate's request to call a witness at the disciplinary hearing, do not have to permit cross-examination of witnesses, and in making their disciplinary decisions may rely upon evidence not presented at the hearing.

Also in 1976, in *Estelle* v. *Gamble*,[21] the Court held that an inmate cannot prove that inadequate medical care by the prison is cruel and unusual punishment unless he can also prove that prison officials were deliberately indifferent to a serious medical need of the inmate. The next year, in *Jones* v. *N.C. Prisoners' Labor Union*,[22] the Court concluded that prisons may ban meetings of prisoners' unions, as well as prohibit the unions from soliciting members and from making bulk mailings to members.

It should be clear from a careful consideration of these cases decided during the Rights Period that the Court was not engaged in a prisoners' rights revolution. In many instances it decided that the rights of inmates had to give way to the legitimate needs of the prisons to maintain security, control inmate behavior, and attempt to rehabilitate inmates. Nevertheless, what is most remarkable about the Rights Period is the Court's willingness, first, to recognize that inmates retain constitutional rights and, second, to view those rights as being nearly as important as the legitimate needs of the prisons.

The Deference Period (1979-present)

The year 1979 was chosen to begin the period that I have labeled the Deference Period because that was the year the Supreme Court decided *Bell* v. *Wolfish*.[23] The Court resolved five issues in that case and ruled

against the inmates on all of them. It held that cells of 75 square feet that had been double-bunked were not so overcrowded as to constitute punishment under the Due Process Clause. It also upheld jail rules that: 1) permitted inmates to receive hardback books only if they came directly from the publisher, a bookstore, or a book club (publishers' only rule), 2) prohibited inmates from receiving packages from outside the jail, 3) prohibited inmates from observing shakedown searches of their cells, and 4) subjected inmates to visual body cavity searches after contact visits.

In ruling against the inmates, the Court set the tone for the Deference Period. During this period, inmates would lose on most prisoners' rights issues before the Court, which would stress the need to give deference to the expertise of corrections officials. The Court applauded the judicial trend away from the traditional hands-off approach and the willingness of courts to intervene where institutions were characterized by "deplorable conditions and draconian restrictions." However, the Court followed with this caution:

> But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable that those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution ... The wide range of "judgment calls" that meet constitutional ... requirements are confined to officials outside of the Judicial Branch of Government.[24]

In another overcrowding case in 1981, *Rhodes* v. *Chapman*,[25] the Court held that double-bunking was not unconstitutional per se and that double-bunking of cells of 63 square feet without a showing of specific harmful effects on inmates was not cruel and unusual punishment.[26] As in *Wolfish*, the Court admonished judges that they "cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution . . . ."

Several times during this period, the Court held that actions taken against inmates by corrections officials did not affect a liberty interest of inmates and were therefore not subject to the protections of the Due Process Clause. The Court held that an inmate had no liberty interest in: 1) a decision by the Board of Commutation as to whether to commute a life sentence, even though the Board granted 75 percent of all petitions for commutation from lifers and those lifers receiving commutation nearly always were paroled earlier than they would have been otherwise (*Connecticut Board of Pardons* v. *Dumschat*, 1981[27]); 2) the overturning of an early parole decision, even though the parole board changed its mind because of information it received about dishonesty on the part of the inmate (*Jago* v. *Van Curen*, 1981[28]); 3) a decision to transfer an inmate to a prison in another state (Olim v. *Wakinekona*, 1983[29]); and 4) a decision to exclude visitors because of alleged misconduct on their part (*Kentucky* v. *Thompson*, 1989[30]).

Even in two cases where the Court held that inmates had a liberty interest (*Greenholtz* v. *Nebraska Penal Inmates*, 1979,[31] and *Hewitt* v. *Helms*, 1983[32]), it was only because state law had specified conditions under which adverse action could be taken against inmates and provided that this action could be taken only when the specified conditions were found to exist. Greenholtz involved the decision whether to grant parole, and Hewitt involved whether to place an inmate in administrative segregation. In another important due process decision, the Court ruled in *Superintendent* v. *Hill* that a decision of a prison administrative body should be upheld when challenged in court if there is "some evidence" in the record to support the decision.[33]

The Court also ruled against inmates in two search cases during this period. In *Hudson* v. *Palmer*,[34] the Court held that the fourth amendment does not apply to cell searches (even a shakedown search with no reason to think contraband will be found) because inmates have no reasonable expectation of privacy in their cells. The Court also concluded that inmates have no due process right to observe shakedown searches of their cells (*Block* v. *Rutherford*, 1984[35]).

Inmates also lost several first amendment issues during the Deference Period. In *Block*, the Court rejected an argument that pretrial detainees who were judged by jail officials to be low security risks and who had been in jail more than a month had a constitutional right to *contact* visits. The Court held that it was reasonable for the jail to ban contact visits to prevent contraband from being smuggled in.

In *Turner* v. *Safley* (1987),[36] the Court held that a prison rule which prohibited inmates from corresponding with inmates in other prisons was constitutional. The Court viewed this regulation as a reasonable way to protect prison security, since the correspondence that was banned could have been used to communicate escape plans or to encourage assaults on other inmates.

O'Lone v. *Shabazz* (1987)[37] dealt with the right of inmates to practice their religion. Shabazz was a Muslim who was not permitted to observe Jumu'ah services in the prison on Friday afternoons (the only time that Jumu'ah may be observed) because his security classification required him to be on a work detail outside the prison. The Court held that the prison did

not have to permit Shabazz to return to the prison for the service because that would have created a security risk. Nor did the prison have to allow Shabazz to stay in the prison all day Friday and then let him make up the work on Saturday because that would require additional prison resources. Thus, the prison's actions in denying Shabazz the opportunity to observe Jumu'ah were reasonable in light of the security and resources needs of the prison.

In *Thornburgh* v. *Abbott* (1989),[38] the Court dealt with the authority of prisons to exclude publications that are mailed to inmates. The rule at issue permitted wardens in Federal prisons to exclude publications (although only on an issue-by-issue basis) that they deemed to be "detrimental to the security, good order, or discipline of the institution, or . . . [that] might facilitate criminal activity." Publications could not be excluded because they expressed unpopular views or were religious, political, social, or sexual in nature.

The Court found that this regulation was reasonable in light of the prisons' need to maintain security. It distinguished this case from *Procunier* v. *Martinez*, where the Court had struck down a prison censorship regulation as too broad, on the basis that *Martinez* dealt with incoming mail and this case dealt with outgoing mail. The Court believed that outgoing mail posed greater threats to prison security.

In another case involving an individual right, the Court concluded in *Washington* v. *Harper* that a mentally ill inmate could, after a hearing, be treated with antipsychotic drugs against his will.[39] Although the Court found that the inmate did have a liberty interest in not being administered the drug, it also found that the policy of involuntary treatment is permissible because it is reasonably related to the prison's interest in controlling the violent behavior of such an inmate.

Inmates also lost three important eighth amendment issues. In *Whitley* v. *Albers* (1986),[40] an inmate sued a prison guard who had wounded him in the knee during an inmate uprising, alleging that the shooting was cruel and unusual punishment. The inmate alleged that he had not been involved in the uprising, had assured the prison security chief that he would protect from harm a guard that other inmates had taken hostage, and had made no threatening moves just before being shot.

The Court ruled that, in cruel and unusual punishment cases where the government action at issue is not part of the sentence awarded the prisoner, the prisoner must prove that prison officials acted wantonly. In the context of a prison disturbance, that means the inmate must show that officials acted "maliciously and sadistically for the very purpose of causing harm." In this case, according to the Court, the inmate had failed to allege facts from which such a state of mind could be inferred.

In *Wilson* v. *Seiter* (1991),[41] the Court again addressed the issue of the state of mind necessary to prove a violation of the Cruel and Unusual Punishment Clause in the prison context. This time, rather than dealing with a discreet act against an individual inmate, as had been the case in *Estelle* and *Whitley*, the Court dealt with allegations that the general conditions of confinement in an overcrowded prison were cruel and unusual punishment.

The Court concluded that general conditions of confinement are not part of the sentence awarded a convicted defendant. Therefore, it is necessary to prove that, in permitting overcrowded conditions to persist, prison officials acted wantonly, otherwise officials have not acted with intent to punish inmates. Where general conditions of confinement are at issue, inmates must show that prison officials acted with deliberate difference to some basic human need of the inmates.

The Court also clarified a point that lower courts had dealt with for some tune. Lower courts had frequently held that the totality of adverse conditions in an institution violated the eighth amendment. The Court rejected this approach. While it conceded that two or more conditions might have a "mutually enforcing effect," the eighth amendment has not been violated unless there is evidence that the effect has been to deprive inmates "of a single, identifiable human need such as food, warmth, or exercise." The Court indicated that interaction of conditions in this way "is a far cry from saying that all prison conditions are a seamless web for Eighth Amendment purposes."

Then in *Farmer* v. *Brennan* (1994),[42] the Court gave some definition to what it meant by deliberate indifference. After stating the fairly obvious, that deliberate indifference is something more than mere negligence but something less than a specific intent to cause harm to a particular inmate or inmates, the Court concluded that deliberate indifference means recklessness. The Court also recognized that while both civil (tort) law and criminal law utilize the concept of recklessness, their definitions are somewhat different. Tort law usually views recklessness as action "in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known." This is sometimes referred to as an objective approach to recklessness.

The criminal law, on the other hand, usually takes a subjective approach, requiring that an actor be aware of a disregarded risk. Thus, the difference between the two definitions is that tort law recklessness includes disregard of a risk of which an actor was unaware but should have been aware, while criminal law recklessness does not.

The Court decided that the subjective criminal law approach to recklessness is the one required by the eighth amendment. Although the Court went to some length to explain its reasoning for adopting this approach, in the final analysis it appears that the majority felt that it was simply fairer to hold prison officials responsible only for those risks of which they are actually aware.

In these Deference Period cases discussed so far, the inmates not only lost the case, but often the Court articulated a rule that seems to make it likely that inmates will have a difficult time winning prisoners' rights suits in the future as well.[43] Nevertheless, prisoners experienced a few successes during this period. For example, in the Due Process area, the Court concluded in *Vitek* v. *Jones* (1980)[44] that inmates have a liberty interest in the decision as to whether to transfer a prisoner to a mental hospital. Even if the state had not used mandatory language that prohibited such a transfer unless there is a finding that the inmate suffers from a mental illness which cannot be treated adequately in the prison, the Court found that the stigmatization of transfer to a mental hospital, coupled with the prospect of subjection to mandatory behavior modification, constitutes the kind of liberty deprivation that is protected by the Due Process Clause itself. We also saw earlier that the Court ruled that mentally ill inmates have a liberty interest in avoiding, involuntary treatment with antipsychotic drugs.[45]

Inmates also won two cases involving eighth amendment issues. In *Hudson* v. *McMillian* (1992), an inmate sued a guard who had beaten him and caused facial swelling, loosened teeth, a cracked dental plate, and minor bruises, but no permanent injury. The government argued that in order for a harm experienced from the use of excessive force to be sufficient to constitute cruel and unusual punishment, the force had to cause significant injury. The Court rejected this argument, finding that excessive use of force on inmates always violates contemporary standards of decency and therefore violates the eighth amendment.

The Court also concluded that the state of mind standard in all excessive force cases (and not just cases involving prison disturbances, as in *Whitley)* is the malice standard established in *Whitley*. While this can be seen as a loss for inmates, the Court did rule that the guard's use of force in this case was malicious.[46]

In *Helling* v. *McKinney* (1993),[47] McKinney complained that he had been placed involuntarily in a cell with another inmate who smoked five packs of cigarettes a day. McKinney contended that exposure to this smoke demonstrated deliberate indifference to his health. The prison argued that McKinney failed to meet the objective aspect of his eighth amendment claim because he failed to allege that he had suffered any harm. The Court held that cruel and unusual punishment could be demonstrated by proof of exposure to conditions that "pose an unreasonable risk of serious damage to [plaintiff's] future health." Thus, the harm that must be shown in an eighth amendment case can be either a present harm or an unreasonable risk of a future harm.

The final inmate victory during the Deference Period involved a first amendment issue. We saw earlier that the Court, in applying its rational basis test in *Safley*, upheld a prohibition on inmate correspondence with inmates in other prisons. However, it also concluded in that case that the prison's ban on inmate marriages was not reasonably related to penological interests. It viewed the marriage ban as an exaggerated response to the prison's concern for security and rehabilitation of inmates. This ruling was especially significant in light of the fact that a prison survey taken in 1978 indicated that most prisons did not permit inmate marriages.[48]

The Deference Period witnessed many triumphs for prisons. The common denominator in these cases is the Court's concern that prison officials be permitted to do their difficult jobs without undue interference from the courts. In other words, courts should generally defer to the judgment of corrections officials.

A Substantive Assessment of Supreme Court Law on Prisoners' Rights

How can we assess the current state of this expanding body of Supreme Court case law? The following discussion examines the four major substantive areas that have been addressed most frequently by the Court's cases: 1) right to access the courts, 2) individual rights, 3) due process issues, and 4) cruel and unusual punishment. The overall conclusion is that Supreme Court cases tend to favor inmates with respect to their right to access the courts and tend to favor the prisons in the other three areas.

Right to Access the Courts

It is in this area that the Court has been most protective of prisoners. The Court has made it clear that prisons must either provide inmates with an adequate law library or provide them adequate assistance from persons who have been legally trained.[49] If they opt to provide a law library, they must permit inmates to assist other inmates in the preparation of legal papers.[50] This assistance extends not only to preparation of writs of habeas corpus (attacking the legality of an inmate's conviction), but also includes preparation of civil rights actions (which would typically challenge some aspect of the inmate's conditions of confinement).[51]

If the prison opts to provide legal assistance to inmates rather than a law library, or if an inmate has engaged a lawyer, the institution must have reasonable regulations concerning visitation by employees of the lawyer. A rule that prohibits anyone employed by a lawyer (such as paralegals), other than two licensed investigators, from visiting the prisoner who has engaged the lawyer places an unconstitutional burden on a prisoner's right to access the courts.[52]

Of course, there are many unanswered questions about the right of inmates to access the courts. What restrictions can a prison place on inmates desiring to use a prison law library? What restrictions may be placed on opportunities for a writ writer to consult with the inmate that he is assisting? What is an *adequate* law library? Must institutions provide inmates with paper supplies and notary services?

These unanswered questions and dozens of others like them give the Court ample opportunity to limit the scope of the right of access to the courts. It is worth noting that the Court has not decided an issue in this area since 1977. It may be that the reason why the Court appears to be rather supportive of inmates' rights of access is because it did not address any issues in this area during the present Deference Period.

Individual Rights

The Court's initial efforts in this area suggested that it was going to be rather protective of inmates. In two of its first individual prisoners' rights cases, the Court indicated that members of "minority" religious groups, at least if the number of members is significant, must be permitted to engage in the same kinds of religious activities as members of other, more common religious groups[53] and that rules governing the censorship and withholding of mail from inmates to persons outside the prison would be subjected to close scrutiny by the Court.[54]

It is this latter holding and the Court's subsequent treatment of it that is of greatest significance in this area. Generally, when the Court identifies an individual right as particularly important (or "fundamental"), any actions taken by government which impinge upon that right are subjected to heightened scrutiny by the courts. This means that in deciding whether the government action is constitutional, the government will have to demonstrate that it had a compelling reason for doing what it did, that what it did was necessary in light of this compelling government need, and that government had available to it no means of carrying out its purpose that would have had less impact on the rights of individuals.

It appeared from the Court's opinion in *Procunier* v. *Martinez* that it intended to take this approach, or one similar to it, in assessing the actions of prisons that adversely affected the individual rights of prisoners. In several later cases involving individual rights of prisoners, the Court ruled against the inmates without a very clear discussion of whether it was using a heightened scrutiny approach.

Then in 1987 in *Turner* v. *Safley*, the Court made it clear that it was *not* going to use a heightened scrutiny approach in individual rights cases. In its review of prison regulations prohibiting inmate marriages and inmate correspondence with inmates in other prisons, the Court reviewed all its prisoners' rights cases and concluded that these cases had used a rational basis test. The Court stated emphatically that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[55]

This approach is usually referred to as the rational basis test. It is a much easier standard for the government to satisfy than the heightened scrutiny approach. Under the rational basis test, the burden is shifted to the party whose rights have allegedly been violated to demonstrate that the government had no rational reason for doing what it did or that, if it did have a rational reason, what it did was not reasonably related to it.

In *Safley*, the Court also established four factors that should be considered in assessing the reasonableness of a prison regulation that impinges upon an individual right of an inmate: 1) whether there is a rational connection between the prison regulation and the legitimate governmental interest put forward to justify it, 2) whether an alternative means of exercising the right exists in spite of what the prison has done, 3) whether striking down the prison's action would have a significant ripple effect on fellow inmates or staff, and 4) whether there are ready alternatives available to the prison or whether the regulation appears instead to be "exaggerated response" to the problem it is intended to address.

The Court has utilized these four factors in determining the constitutionality of the two regulations at issue in *Safley*, the regulation in *Shabazz* that prevented Muslim inmates from participating in Jumu'ah, and the publishers-only regulation in *Thornburgh*. Although the Court did strike down the ban on inmate marriages, it upheld the other three regulations. More importantly, its application of the four *Safley* factors suggests that prisons should not experience great difficulty in satisfying them.

The right of inmates to be free from unreasonable searches and seizures is an individual right that is not affected directly by the rational basis test. However, the Court has engaged in a somewhat similar analysis by comparing the needs of prisons to maintain discipline and security with the interest of prisoners in

privacy and finding consistently that the prisoners' interests are outweighed by the prisons' interests. Thus, inmates have no reasonable expectation of privacy in their cells,[56] inmates who have had contact visits may be subjected to visual body cavity inspections even in the absence of any reason to think that the inspections will turn up evidence,[57] and inmates have no right to observe shakedown searches of their cells.[58] It seems apparent that when prisons take actions that adversely affect the individual rights of inmates, those actions will be upheld by the Court unless they are clearly unreasonable.

Due Process Issues

Of the four substantive areas with which Supreme Court prisoners' rights have dealt most frequently, it is in the area of Due Process rights that the Court has spoken with least clarity. The Due Process Clauses (in the 5th and 14th amendments) raise two basic questions: 1) When is a person entitled to due process of law? 2) When a person is so entitled, what process is due?

In the prison context, the answer to the first question has arisen in the context of actions taken against an inmate. Such actions include (but are certainly not limited to) loss of good time credits, a decision not to grant parole, transfer to a mental hospital, transfer to a less desirable prison, removal to solitary confinement, and denial of a visitor. Since these actions do not deprive an inmate of life or property, the question is whether the inmate has been deprived of a liberty interest in these situations.

The Court has indicated that prisoners acquire liberty interests from one of two sources: 1) the Constitution itself and 2) by creation of state law. The Court has been far from clear as to what kind of interest is a liberty interest protected by the Constitution itself. The Court has indicated that not every "change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient . . . ."[59] Instead, a liberty interest arises when the action taken by the prison is not "within the terms of confinement ordinarily contemplated by a prison sentence."[60]

Unfortunately, this phrase does not carry us very far toward a clear conception of when an inmate has a constitutionally protected liberty interest. What *is* clear is that there are very few such liberty interests. The Court has indicated that denial of a visit from a particular person,[61] granting of parole,[62] commutation of a life sentence,[63] transfer to a prison with less favorable conditions of confinement,[64] transfer to a prison in another state,[65] and transfer to administrative segregation[66] are not such liberty interests. The only liberty interest protected by the Due Process Clause and arising directly under the Constitution which the Court has found that inmates possess is an interest in not being transferred to a mental hospital.[67]

The second source of a liberty interest is by creation of state law. This kind of liberty interest is created when state law provides that a particular action may not be taken against an inmate (what the Court has called "mandatory language") unless certain conditions exist (what the Court has called "specific substantive predicates"). For example, if state law indicates that an inmate may not be placed in administrative segregation unless there is a demonstrated "need for control" or "the threat of a serious disturbance," then it has specified the conditions under which the transfer may occur and prohibited transfer for any other reasons.[68] Consequently, it has created a liberty interest. Determination of the existence of this kind of liberty interest will be very case specific, turning on the particular language used in a particular law or regulation.

In these Due Process cases, the inmate cannot argue that the Due Process Clause prohibits the prison from taking the action it took. Instead, his contention is that in taking this action, the prison failed to extend to him the procedural protections to which he was entitled. Consequently, if it is determined that a prison's action did intrude upon a liberty interest of an inmate, the next question concerns the procedural protections that an inmate is entitled to before this action may be taken. This is a very difficult question to answer because it depends on the severity of the possible consequences to the inmate. Generally, the more severe the action that is being contemplated by the prison, the greater protections that must be extended to the inmate.

The most basic protections are the right to be informed of the alleged basis for the contemplated action (e.g., the prison is considering depriving an inmate of good time credits for allegedly assaulting another inmate in the dining hall) and the right to be heard (i.e., present evidence on one's own behalf). Other possible protections include the rights to an administrative hearing, to be confronted by and cross-examine witnesses for the other side, to a written statement of the reasons for the action decided upon and the evidence relied upon in coming to that decision, and to be represented by counsel.

Limited space here does not permit a thorough treatment of this subject. However, three important generalizations should be noted. First, the Court seems to feel generally that if a liberty interest has been affected, an inmate should have written notice, an opportunity to be heard, and a written statement of the action taken, the reasons for it, and the evidence relied upon.[69] Second, the prison has considerable discretion (in the interests of security) to prohibit confrontation

of the witnesses against the inmate.[70] Third, seldom will it be necessary to permit representation by legal counsel. However, the Court has displayed some sensitivity to the fact that many inmates may lack the intellectual and educational tools necessary to ensure that their side of an issue has been presented adequately. Therefore, it sometimes may be necessary to provide an educated, nonlawyer (probably a prison staff member) to assist the inmate in preparing his "case."[71]

The standards established by the Court in Due Process cases are unusually ambiguous and difficult to understand. Nevertheless, the Court has decided enough of these cases to allow a conclusion that the Court does not think inmates should win many of these cases.

Cruel and Unusual Punishment

The eighth amendment prohibits cruel and unusual punishments. The Court has decided three kinds of prisoners' rights cases involving this provision: 1) medical treatment cases, 2) use of force cases, and 3) conditions of confinement cases.

In medical treatment cases, the Court has held that an inmate complaining about inadequate medical treatment must prove that prison officials were deliberately indifferent to a serious medical need of the inmate.[72] This increases the burden on the inmate in that he must prove more than mere negligence, but, as we will see in the next case to be discussed, the Court could have required proof of an even more difficult standard.

In dealing with the use of force issue, the Court decided that in cases where prison officials are dealing with a prison disturbance, they often must make quick, life-or-death decisions and must be concerned not only about the safety of inmates but the safety of their own staff as well. Given the volatility of this kind of situation, the Court concluded that inmates alleging excessive force on the part of prison officials in this situation must prove that officials acted maliciously and sadistically with an intent to cause harm to the inmate.[73] Of course, this is (and was undoubtedly intended by the Court to be) a very difficult standard to meet.

The Court has also decided that this malice standard will apply in *all* use of force cases.[74] However, in also concluding that the malicious infliction of harm violates the eighth amendment regardless of the extent of the harm caused, the Court clearly came down on the side of inmates.[75] Thus, in medical treatment and use of force cases, the Court has straddled the fence between inmate and institutional interests. However, there has been no such equivocation in conditions cases. Here, the Court, with one exception, has developed a body of law that clearly favors prisons.

In two of its earliest conditions cases, the Court took the first important step in favor of prisons by holding that double-bunking cells that were intended to house one inmate is not always unconstitutional.[76] In both cases, it found that double-bunked cells which provided less square footage per inmate than called for by any of the correctional standards were nevertheless constitutional. Of course, in both cases, the institutions at issue were new, inmates were permitted considerable time out of their cells, and no specific harmful effects were shown to have been caused by the double-bunking.

The Court also decided in a later conditions case that inmates not only had to show that prison conditions had caused inmates to be deprived of some specific necessity of life, but also that prison officials had allowed these conditions to occur through deliberate indifference to their effects on inmates.[77] This case came as a surprise to many students of prisoners' rights law who thought that the requirement that inmates prove a particular state of mind on the part of prison officials in cruel and unusual punishment cases was limited to situations involving a specific act against a particular inmate or group of inmates.

There was also concern on the part of those who generally espoused greater legal protections for inmates that this decision made it virtually impossible for inmates to win most conditions cases because prison officials could argue successfully that they had tried to improve conditions, but the legislature failed to give them the money they needed to do it. Thus, they were not deliberately indifferent to the inmates' needs.[78]

The Court has provided inmates one significant victory in this area. It has held that inmates do not have to wait until they have actually suffered harm before they can prove that they have been subjected to cruel and unusual punishment. It is sufficient if inmates can show that actions or conditions expose them to an unreasonable risk of deprivation of one of life's necessities.[79]

Conclusion

Given the recent trend in the Supreme Court toward resolution of fewer cases each term of court, the Court has provided in the last 25 years a surprisingly large body of case law on prisoners' rights. This may be due to the fact that the legal foundation for such interpretation was not laid before the process of Selective Incorporation of the Bill of Rights, and most of that foundation was not in place until the 1960's. Thus, there is some irony in the fact that the liberal Due Process Revolution of the 1960's may have provided

the legal foundation for the conservative prisoners' rights decisions of the 1980's and '90's.

Will this conservative trend continue? Although I tend to think that it will, the evidence in favor of this conclusion is far from conclusive. Justices Scalia and Thomas provide two very consistent votes in favor of prisons. Even though he has not been on the Court long, Justice Thomas has voted very frequently with Justice Scalia on all issues before the Court, and Justice Scalia has never taken a pro-inmate position in a prisoners' rights case. Furthermore, the position taken in the opinions he has written or joined suggest that Justice Thomas is not likely to find a constitutional basis for providing significant protections to prisoners.

Chief Justice Rehnquist's opinion in *Wolfish* provided the rhetorical foundation for the Court's recent emphasis on deference to corrections officials, but he voted with the majority in the pro-inmate decisions in *McMillian* and *Helling*. Nevertheless, he has generally sided with prisons, and there is not much reason to think that this stance will change.

Justice O'Connor authored two of the most important pro-prison opinions, *Whitley* and *Safley*, but she also wrote the pro-inmate *McMillian* opinion. Overall, however, she has rather consistently voted in favor of the prison position. Thus, there appear to be four relatively solid pro-prison Justices on the present Court.

Justice Stevens has established an extensive track record in favor of inmates, but he is the only Justice on the present Court that can be counted on to take a pro-inmate position regularly. Justices Brennan and Marshall joined him consistently and Justice Blackmun often joined him as well, but they have all retired from the Court.

The remaining Justices—Kennedy, Souter, Ginsburg, and Breyer—have not been on the Court long enough to permit a confident prediction about which side they are likely to support. On criminal justice issues in general, Justice Kennedy has been conservative, and the best bet is that he will vote that way in prisoners' rights cases as well.

Justice Souter, on the other hand, is showing some signs of developing into a moderate, at least, and his few votes in prisoners' rights cases are consistent with that label. If Justices Ginsburg and Breyer live up to most expectations (based on their track record as Federal appellate court judges), they will likely be somewhat supportive of pro-inmate positions.

If all this speculation turns out to be accurate, we can expect to see many 5-4 prisoners' rights decisions decided in favor of prisons in the next several years. The Deference Period may be far from over.

NOTES

[1]62 Va. 790.

[2]See generally, Sheldon Krantz and Lynn Branham, *The Law of Sentencing, Corrections, and Prisoners' Rights* (West Publishing, 1991, 4th ed.), pp. 364-66.

[3]*Ex Parte Hull*, 61 S.Ct. 640.

[4]See generally, Krantz and Branham, pp. 266-69, and Michael Mushlin, *Rights of Prisoners* (Shepard's/McGraw-Hill, 1994, 2nd ed.), pp. 9-11.

[5]365 U.S. 167.

[6]84 S.Ct. 1733.

[7]88 S.Ct. 994.

[8]92 S.Ct. 250.

[9]89 S.Ct. 747.

[10]*Id.*, p. 751.

[11]92 S.Ct. 1079.

[12]94 S.Ct. 1800.

[13]94 S.Ct. 2963.

[14]The significance of the "liberty interest" issue is that if the Court finds that action taken by corrections authorities impinges upon a liberty interest, then the action must be preceded by a hearing, as well as some other procedural protections related to the hearing. These additional procedural protections vary with the nature of the liberty interest at issue.

[15]97 S.Ct. 1491.

[16]98 S.Ct. 2565.

[17]94 S.Ct. 2800.

[18]96 S.Ct. 2532.

[19]96 S.Ct. 2543 (1976).

[20]96 S.Ct. 1551.

[21]97 S.Ct. 285.

[22]97 S.Ct. 2532.

[23]99 S.Ct. 1861.

[24]*Id.*, p. 562.

[25]101 S.Ct. 2392.

[26]*Wolfish* also involved an overcrowding claim, but there the issue was raised by pretrial detainees. Pretrial detainees are not protected by the Cruel and Unusual Punishment Clause, which extends only to those persons convicted of a crime.

[27]101 S.Ct. 2460.

[28]102 S.Ct. 31.

[29]103 S.Ct. 1741.

[30]109 S.Ct. 1904.

[31]99 S.Ct. 2100.

[32]103 S.Ct. 864.

[33]105 S.Ct. 2768 (1985).

[34]104 S.Ct. 3194 (1984).

[35]104 S.Ct. 3227. The same argument was made and ruled on in *Wolfish*, but the argument had been based on the fourth amendment, not the Due Process Clause.

[36]107 S.Ct. 2254.

[37]107 S.Ct. 2400.

[38]109 S.Ct. 1874.

[39]110 S.Ct. 1028 (1990).

[40]106 S.Ct. 1078.

[41]111 S.Ct. 2321.

[42]55 CrL 2156.

[43]Some commentators contend that there are some "victories" for inmates contained within these apparent losses. For example, John Boston, of the ACLU National Prison Project, argues that in *Seiter* the inmates won because the Court rejected the lower appellate court's conclusion that the state of mind required in conditions cases was the malice standard articulated by the Court in *Whitley*. Boston, "Highlights of Most Important Cases," *The National Prison Project Journal*, vol. 6, no. 3, Summer 1991, p. 4 (includes an extensive analysis of *Seiter*).

[44]100 S.Ct. 1254.

[45]*Washington* v. *Harper* (1990).

[46]In fact, it would seem that in any case where it is concluded that a guard's use of force was excessive, it would follow logically that the guard acted maliciously as well.

[47]113 S.Ct. 2475.

[48]Comment, "Prison Inmate Marriages: A Survey and a Proposal," 12 *University of Richmond Law Review* 443 (1978).

[49]*Johnson* v. *Avery*; *Bounds* v. *Smith*.

[50]*Johnson* v. *Avery*.

[51]*Wolff* v. *McDonnell*.

[52]*Procunier* v. *Martinez*.

[53]*Cruz* v. *Beto*.

[54]*Procunier* v. *Martinez*.

[55]*Turner* v. *Safley*, 107 S.Ct. 2254, p. 2261.

[56]*Hudson* v. *Palmer*.

[57]*Bell* v. *Wolfish*.

[58]*Block* v. *Rutherford*.

[59]*Meachum* v. *Fano*, 96 S.Ct. 2532, p. 2538.

[60]*Hewitt* v. *Helms*, 103 S.Ct. 864, p. 869.

[61]*Kentucky* v. *Thompson*.

[62]*Greenholtz* v. *Nebraska Penal Inmates*.

[63]*Connecticut Board of Pardons* v. *Dumschat*.

[64]*Meachum* v. *Fano*.

[65]*Olim* v. *Wakinekona*.

[66]*Hewitt* v. *Helms*.

[67]*Vitek* v. *Jones*.

[68]*Hewitt* v. *Helms*.

[69]See, for example, *Wolff* v. *McDonnell*, *Vitek* v. *Jones*, and *Hewitt* v. *Helms*.

[70]See, for example, *Wolff* v. *McDonnell*.

[71]*Id.*

[72]*Estelle* v. *Gamble*.

[73]*Whitley* v. *Albers*.

[74]*Hudson* v. *McMillian*.

[75]*Id.*

[76]*Bell* v. *Wolfish* and *Rhodes* v. *Chapman*.

[77]*Wilson* v. *Seiter*.

[78]See J. White's concurring opinion in *Wilson*, which for all intents and purposes is really a dissenting opinion.

[79]*Helling* v. *McKinney*.