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Prisons—State Must Devise System Ensuring Indigent Prisoner's Meaningful Access to the Courts

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RECENT CASE

PRISONS—STATE MUST DEVISE SYSTEM ENSURING INDIGENT PRISONER'S MEANINGFUL ACCESS TO THE COURTS

Plaintiffs, prisoners at various California facilities, challenged certain state-wide rules and regulations of the California Department of Corrections governing inmate access to legal materials and to lay assistance in preparing writs and complaints.[1] Also challenged were certain procedures of the California State Law Library regarding circulation of legal materials to state prisoners.[2] The prisoners grounded their challenges on two basic rights: reasonable access to the courts and equal protection of the laws. The rules and regulations, the prisoners charged, were arbitrary, unreasonable, and denied an indigent prisoner and his "jailhouse lawyer" the legal resources necessary if access to the courts was to be meaningful. The state answered these claims with two alternative defenses: (1) access to legal materials is in the nature of a privilege, not a right, and may be dispensed or refused at the discretion of the government; (2) such rules and regula-

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1. The regulation provides:

There shall be established in each institution a standard set of basic codes and references which shall consist of and be limited to:

(1) The California Penal Code
(2) The California Welfare and Institutions Code
(3) The California Health and Safety Code
(4) The California Vehicle Code
(5) The United States and California Constitutions
(6) A recognized law dictionary (such as Black's)
(7) Witkin's California Criminal Procedures (Bender Moss Co.)
(8) Subscription to California Weekly Digest
(9) California Rules of Court
(10) Rules of United States Court of Appeals (Ninth Circuit)
(11) Rules of United States Supreme Court.

Gilmore v. Lynch, 319 F. Supp. 105, 107 n.2 (1970) [hereinafter cited as instant case].

In addition, Director's Transmittal Letter 26/66, to be read in conjunction with this regulation, provides that "all existing law books and references in inmate law libraries not consistent with this section are to be removed and destroyed." *Id.* at 107 n.2.

Director's Rule 2602, applicable to jailhouse lawyer activities, is also challenged, particularly one provision requiring that all legal papers remain in the possession of the inmate to whom they pertain. *Id.* at 107.

2. The state library had set up a restricted list of law books which could be loaned out to inmates. Only one copy of any particular set of books was available for inmate use (there are over 30,000 California prisoners) and in many instances that one copy was missing. Instant case at 107-08 n.4.

tions are constitutional because they further legitimate state interests: economy, standardization, prevention of jailhouse lawyer/inmate friction regarding services rendered, and, in the case of state library procedures, prevention of loss and mutilation of legal materials by inmate borrowers. *Held,* the Department of Corrections must devise a system which ensures that indigent prisoners can obtain a full and fair hearing by the judiciary. It is not necessary to declare the rule concerning possession of legal papers unconstitutional, nor enjoin state library procedures. *Gilmore v. Lynch,* 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd sub nom. Younger v. Gilmore,* 92 S. Ct. 250 (1971).

The traditional reluctance of the judiciary to intervene in prison affairs has been aptly termed the "hands-off doctrine." [3] The vitality which this doctrine once possessed is being constantly diminished, particularly in the federal courts.[4] The judiciary has been least reluctant to intervene when the prisoner has been denied access to the courts.[5] The cornerstone for this right of access was laid in 1941 by the Supreme Court in *Ex parte Hull.*[6] The *Hull* Court forbade prison officials to interfere with the habeas corpus petition of any prisoner. Since this case was decided there has been little doubt that a prisoner is entitled to relatively uninhibited access to the courts.[7]

The right of access to the courts is rendered meaningless, however, if a prisoner is incapable of making himself understood.

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3. The term "hands-off doctrine" was apparently first used in FRITCH, CIVIL RIGHTS OF FEDERAL PRISON INMATES 31 (1961) (document prepared for the Federal Bureau of Prisons). *See* Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts,* 72 YALE L.J. 506 (1963). *See also* Hirschkop & Millemann, *The Unconstitutionality of Prison Life,* 55 VA. L. REV. 795 (1969). According to Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied,* 348 U.S. 859 (1954): "Courts are without power to supervise . . . prison rules or regulations."

4. *See generally* J. CAMPBELL, J. SAHID, & D. STANG, LAW AND ORDER RECONSIDERED: REPORT OF THE TASK FORCE ON LAW AND LAW ENFORCEMENT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 639 (1970).

5. Comment, *Constitutional Rights of Prisoners: The Developing Law,* 110 U. PA. L. REV. 985, 987 (1962).

6. 312 U.S. 546 (1941).

7. *See, e.g.,* Sigafus v. Brown, 416 F.2d 105 (7th Cir. 1969); Smartt v. Avery, 370 F.2d 788, 790 (6th Cir. 1967); Landman v. Peyton, 370 F.2d 135, 137 n.1 (4th Cir. 1966); McCloskey v. Maryland, 337 F.2d 72, 74 (4th Cir. 1964). This right of access, however, is subject to innumerable restrictions. *See, e.g.,* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (mail can be censored if prisoner has "abused" his right of access); Harell v. State, 17 Misc. 2d 950, 188 N.Y.S.2d 683 (Ct. Cl. 1959) (no right to litigate pre-conviction civil matters).

Since there is normally little or no legal assistance provided by prison authorities, many inmates have been forced to seek aid from other, more knowledgeable, prisoners—a practice formerly forbidden by most prison authorities.[8] In its most important prisoners' rights decision in nearly twenty years the United States Supreme Court upheld this practice, provided the prison authorities had not furnished the inmates with a "reasonable alternative." [9] Thus, access to the courts, in order to be meaningfully exercised, has come to include the right to receive assistance from other prisoners.

By far the most important issue here, however, is the extent to which the indigent prisoner is entitled to access to legal materials. Without such access neither he nor his jailhouse lawyer has much chance of effectively utilizing the recognized right of access to the courts.[10] In the past, the judiciary has generally found that a prisoner has no *right* to engage in legal research; [11] if anything, access to legal materials was deemed a *privilege.*[12] Although the indigent has received special attention from the judiciary in recent years,[13] his right of access to legal materials while in prison has to this point been largely unrecognized.[14] While a few courts have

8. Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation,* 23 STAN. L. REV. 473, 481 (1971).

9. Johnson v. Avery, 393 U.S. 483 (1969). What a "reasonable alternative" consists of is open to conjecture. Ayers v. Ciccone, 303 F. Supp. 637 (W.D. Mo. 1969), *aff'd,* 431 F.2d 724 (8th Cir. 1970) indicates that *Johnson's* "reasonable alternative" must be an attorney or at least someone with extensive legal expertise. An interesting suggestion has been made by one writer that jailhouse lawyers be brought out into the open and given the stamp of legitimacy, an enlightened method of providing a "reasonable alternative" at a relatively low cost. *See* Wexler, *The Jailhouse Lawyer as a Paraprofessional: Problems and Prospects,* 7 CRIM. L. BULL. 139 (1971). Such a program is already in operation in at least one institution. *See* Note, *Constitutional Law: Prison "No Assistance" Regulations and the Jailhouse Lawyer,* 1968 DUKE L.J. 343.

10. Vogelman, *Prison Restrictions—Prisoner Rights,* 59 J. CRIM. L.C. & P.S. 386, 395 (1968); *cf.* Note, *Constitutional Rights of Prisoners: The Developing Law,* 110 U. PA. L. REV. 985, 992 (1962).

11. Cohen, *Reading Law in Prison,* 48 PRISON J. 21, 24 (1968); Krause, *A Lawyer Looks at Writ-Writing,* 56 CALIF. L. REV. 371, 375 (1968). *See, e.g.,* United States *ex rel.* Henson v. Myers, 244 F. Supp. 826 (E.D. Pa. 1965); People v. Superior Court, 44 Cal. 2d 1, 279 P.2d 24 (1955). An exception to the rule is *In re* Harrell, 2 Cal. 3d 675, 470 P.2d 640, 87 Cal. Rptr. 504 (1970), which withheld judgment on this question pending final disposition of the instant case.

12. *Cf.* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968).

13. *See, e.g.,* Gideon v. Wainwright, 372 U.S. 335 (1963) (free counsel for indigent defendants); Griffin v. Illinois, 351 U.S. 12 (1956) (state must provide adequate and effective appellate review for indigents).

14. Cohen, *supra* note 11, at 24. *See also* Comment, *supra* note 3, at 556.

gone so far as to hold that they do not have jurisdiction over such an issue,[15] most courts have conceded jurisdiction and have been willing to discuss the matter.

In *Bailleaux v. Holmes*,[16] a group of prisoners challenged several prison regulations which combined to severely limit their access to legal materials. The lower court granted injunctive relief, but the appellate court reversed the decision. In spite of its reversal, the appellate court conceded the prisoners' right of access to such materials.[17] It merely differed with the lower court as to whether the restrictions upon that access were reasonable. However, the *Bailleaux* court foresaw possible abuse of this right if prisoners were given unrestricted access.

> State authorities have no obligation under the federal Constitution to provide library facilities and an opportunity for their use to enable an inmate to search for *legal loopholes* in the judgment and sentence under which he is held, or to perform services which only a lawyer is trained to perform.[18]

Although the *Bailleaux* court's choice of language may be unique, other courts share its apprehension. *Roberts v. Pepersack*,[19] for instance, feared a similar abuse, although there it was labeled a "fishing expedition." The *Pepersack* court summed up what appears to be the prevailing judicial attitude when it stated: "Prisons are not intended, nor should they be permitted, to serve the purpose of providing inmates with information about methods of securing release therefrom." [20] This is not to say, however, that *all* courts are so callous. In *United States ex rel. Mayberry v. Prasse*,[21] for example, plaintiff-prisoner argued he was in need of certain court rules, books and legal opinions in order to properly prepare his pending appeal. He contended that refusal to provide him with

15. Cohen, *supra* note 11, at 24. *See, e.g.*, State *ex rel.* Sherwood v. Gladden, 240 F.2d 910 (9th Cir. 1957); Grove v. Smyth, 169 F. Supp. 852 (E.D. Va. 1958) (prison officials have exclusive jurisdiction; federal courts have no power whatsoever).

16. 177 F. Supp. 361 (D. Ore. 1959), *rev'd sub nom.* Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961).

17. "[A]ccess to the courts means the opportunity to *prepare* . . . whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty . . . ." 290 F.2d at 637 (emphasis added).

18. *Id.* at 640 (emphasis added).

19. 256 F. Supp. 415 (D. Md. 1966).

20. *Id.* at 433.

21. 225 F. Supp. 752 (E.D. Pa. 1963).

such materials denied him his right of access to the courts. The court agreed, although careful to limit its holding to the facts of the case.[22] As evidenced by the *Pepersack* decision, however, such judicial sympathy for the plight of the prisoner is rare. The decision in the instant case represents a bold reversal of this policy, for the district court ignored the history of general judicial reluctance to intervene and ultimately obtained approval of its actions from the United States Supreme Court.

The court in the instant case abruptly dismissed the contention that access to legal materials is a privilege, not a right. The very fact that the government put forth an alternative argument implied that the government itself did not take the right-privilege distinction seriously. Nevertheless, the court was careful to point out that the state has the authority to restrict a prisoner's free exercise of certain rights, but warned that such authority was subject to limitation:

> [T]he basic test remains the same: the asserted interest of the State in enforcing its rule is balanced against the claimed right of the prisoner and the degree to which it has been infringed by the challenged rule. Most prison regulations reflect the clear exigencies of a penal situation and the courts are justifiably reluctant to question their wisdom . . . . Other rules, though, touch upon interests of which the judiciary is more solicitous, and the burden of justifying these regulations is especially heavy, comparable to the 'overwhelming state interest' required by Shapiro v. Thompson . . . .[23]

Thus, for the prisoners to prevail, it was necessary to establish that the challenged rules infringed upon their constitutional rights to such a degree that the state's justifications were inadequate and unreasonable as a matter of law.[24] The court then proceeded to take upon *itself* the task of measuring the effect of the rules upon the prisoners, a burden it had previously placed upon the prisoners. The court found that the approved legal sources available to the prisoners "would offer meager fare to a criminal lawyer,"[25] and rejected the government's argument that the inmate need only offer the facts of his case to state it adequately.

22. *Id.* at 754.

23. Instant case at 109. Shapiro v. Thompson, 394 U.S. 618, 634 (1969), forbade the classification of welfare applicants in the absence of a *compelling* governmental interest.

24. Instant case at 109.

25. *Id.* at 110.

The court pointed out that while a prisoner was denied the means by which he could competently state his points and authorities, the state suffered no such handicap when replying to the prisoner's claim.[26] The court analogized the prisoners' plight here with that in *Johnson v. Avery,* in which the United States Supreme Court explicitly recognized the relevance of legal expertise, without which an indigent prisoner's valid claims may never be heard.[27]

The attitude of the instant court, however, can be best summarized by quoting the court itself:

> Access to the courts . . . is a larger concept than that put forward by the State. It encompasses *all the means* a defendant or petitioner might require to get a fair hearing from the judiciary . . . .[28]

What these "means" consist of the court refrained from specifying, although it was not hesitant in making suggestions.[29] Whatever "means" the state decided to provide its prisoners, however, must first meet with judicial approval.

Finally, the court decided that it was not necessary to enjoin the procedures employed by the state library. If the state provided adequately for inmate legal needs, the activities of the state library would become superfluous. Similarly, the court refused to declare the rule regarding possession of legal papers unconstitutional. The court strongly suggested that if the prison authorities interpreted this rule so as to allow a "jailhouse lawyer" to *compose* such documents within his own cell, but not retain them when *completed,* such court action would be unnecessary.

From the prisoners' point of view the Supreme Court's af-

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26. *Id.*

27. "For all practical purposes, if illiterate and poorly educated prisoners cannot have the assistance of a 'jailhouse lawyer,' their possibly valid constitutional claims will never be heard in any court." *Id.,* quoting Johnson v. Avery, 393 U.S. 483, 487 (1969). It is interesting to note that another district court used *Johnson v. Avery* to justify holding that a state is not required to furnish a law library at its state hospital. Robinson v. Birzgalis, 311 F. Supp. 909 (W.D. Mich. 1970).

28. Instant case at 110 (emphasis added).

29. At one point the court carefully detailed what the state *had not* provided in its library (annotated codes, U.S. Reports, California Reports, U.S. Code, Rules of the Federal District Courts, U.S. Law Week, etc.). Presumably, if the state provided an adequate supply of these basic sources to its prison population, the court would be satisfied. The court suggested other possibilities such as a public defender, or law student aid; it made it clear, however, that the state was free to choose its own remedy, subject to judicial approval. *Id.*

firmance[30] without opinion of the lower court's decision in the instant case is a clear-cut victory. The prisoner has won the right to be provided with the means by which he can, at least theoretically, communicate with the courts in an effective manner. The benefit accrues not only to the prisoner, however. The court's task will be simpler in the future because the prisoner will now be able to speak the judge's "language," rather than the judge having to decipher that of the prisoner.[31] Presumably, meritorious claims, previously often unrecognized, will now receive the attention they deserve.[32]

Some stumbling blocks remain, of course. The major one, if an expanded library rather than outside assistance is the state's court-approved solution, will continue to be the prisoners' inadequate education and/or intelligence.[33] For these prisoners, the victory in the instant case is meaningless. No matter what library facilities are made available, some prisoners will simply be incapable of using them properly. The only way these inmates can be assured of obtaining a complete and fair hearing by the judiciary is to provide them with counsel.[34] Even if the inmate is not ignorant, a host of problems await him if he represents himself.[35] All of these problems could be solved to a great extent if

30. 92 S. Ct. 250 (1971).

31. "Much of the judges' time is spent in trying to decipher and interpret the chaotic papers that come to them from prison inmates." Report of the Committee on Habeas Corpus, 33 F.R.D. 367, 384 (1963).

32. *See* Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Crminal-Correctional Process,* 18 KAN. L. REV. 493, 509 (1970).

33. *Cf.* Larsen, *A Prisoner Looks at Writ-Writing,* 56 CALIF. L. REV. 343, 352 (1968): "The uneducated writ-writer is not capable of intelligently analyzing the function of law in our society or of interpreting the court decisions construing the law."

34. *See* Jacob & Sharma, *supra* note 32, at 509.

35. Since the inmate will often grasp at any authority agreeable to his claim and correlatively reject anything contrary, the fruits of his research become distorted and he has little sense of what the law actually is. Accordingly, when what the inmate considers to be a strong and valid claim is ultimately rejected, he can not understand why and becomes even further embittered.

If he should utilize the services of a jailhouse lawyer he runs the risk of being deliberately mislead by an inmate whose sole purpose is to continue to receive payments from him. Even if the jailhouse lawyer is sincere, his legal expertise can normally not compare to that of a practicing attorney. Furthermore, any confidential information given to a jailhouse lawyer by an inmate may later come back to haunt him in the form of blackmail.

There are countless practical limitations simply because of his confinement which contribute to hamper the prisoner or his jailhouse lawyer. He can not make investigations or seek out witnesses for questioning. The hours in which the library can be utilized may be restricted. Important pages may have been removed from certain books by other

the inmate were provided with competent counsel, namely a licensed attorney. It is unfortunate that neither the district court nor the United States Supreme Court, which merely approved the lower court's decision, did not strongly suggest the providing of such counsel. Not doing so in the instant case will almost certainly result in another case coming before the Court involving that specific issue.

Nevertheless, if the prison administrators will conscientiously attempt to comply with the mandates of the Court's decision in the instant case the advantages will far outweigh the drawbacks. Unfortunately, a belief that such an attempt will be universally made is unrealistic at best. Almost every right the modern-day inmate enjoys has been achieved despite strong opposition by prison authorities. It is apparent that there still remain some administrators who believe that a prisoner is a "slave of the state." [36] Hopefully, these officials will realize that they have little to lose by cooperating in such prison reform. Providing inmates with the legal materials essential to prosecute their claims may have a substantial impact upon low prisoner morale. Many inmates who are unsuccessful in their litigation are forever embittered because they feel they were not given the opportunity to learn the "tricks of litigation" which others, wealthier or better educated than they, have used to win their freedom.[37] Possibly, the knowledge that every legal "trick" was available to them would ease the bitterness of defeat and make the prison authorities' task of controlling the prisoners that much easier. Here again, providing the inmates with competent counsel rather than merely an expanded law library would constitute even stronger

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inmates. In any case, the inmate is faced with constant frustrations in prosecuting his own claim.

One further problem which may not be evident to the inmate at the time is caused simply by the excessive amount of time which the inmate spends working on his case. Whatever worthwhile rehabilitative programs are available for his use during his free time may be totally neglected.

For a discussion of these and other problems, see Goldfarb & Singer, *Redressing Prisoners' Grievances,* 39 GEO. WASH. L. REV. 173 (1970); *Prison Writ-Writing: Three Essays,* 56 CALIF. L. REV. 342 (1968); Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation,* 23 STAN. L. REV. 473 (1971); Note, *Legal Services for Prison Inmates,* 1967 WIS. L. REV. 514, 521.

36. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 796 (1871). *See* Sostre v. McGinnis, 442 F.2d 178, 205 (2d Cir. 1971). *See also* Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970) for a judicial description of how callous prison authorities can be.

37. Cherry, *A Look at Prisoner Self-Representation,* 48 PRISON J. 28, 30 (1968).

proof of fair and equal treatment, since the man who cannot understand what is in a law library can take little comfort in knowing it is available to him.

Possibly a more important aspect of this decision, however, is that the prisoner now knows that the Burger Court is sympathetic to his problems. If, as it appears, the "hands-off doctrine" has been officially rejected in the area of access to legal materials, future infringements upon other rights may receive commensurate attention. A cautionary note should be added to this analysis, however, because of the Court's cryptic per curiam opinion. Why are there no dissenting or signed opinions? Why is there no discussion of the basic issues? Instead of spelling out exactly how it feels, the Court simply affirms the judgment of the district court. Surely, one of the Justices could have expanded upon the lower court's opinion. Chief Justice Burger, for example, has been a constant critic of the United States prison system; [38] yet, he did not take advantage of the opportunity to express his own ideas on the subject.

There are at least three possible explanations why the Court did not delve into the matter more deeply. First, the "hands-off doctrine" may not be as clearly rejected as the affirmance may imply. The Court may have refrained from explicitly delineating its viewpoint at this point in time in order to allow the prison authorities one more chance to correct their deficiencies. Perhaps the Court felt that a simple affirmance was sufficient to prod these authorities into affirmative action. The fact that the Supreme Court felt strongly enough to affirm the lower court's decision should indicate to prison officials that the Court is sympathetic to the prisoners' pleas and any laxity on the authorities' part will result in sterner action by the Court in the next prisoners' rights case.

Another possible explanation is that the Court simply does not feel ready to expand upon the lower court's decision until a "full" court is available to consider the issues. It should be noted that at the time this case was being considered both Justice Black and Justice Harlan had resigned from the Court and the vacancies

38. *See, e.g.*, Burger, *Paradoxes in the Administration of Criminal Justice*, 58 J. CRIM. L.C. & P.S. 428 (1967); *Burger Asks Prisons to Let Inmates 'Regulate Some Limited Part of Lives,'* N.Y. Times, Dec. 8, 1971, at 60, cols. 3-8; *Burger Assails U.S. Penal System*, N.Y. Times, Feb. 18, 1970, at 16, cols. 1-3.

created had not yet been filled. It is conceivable that the remaining members felt constrained to await a full complement of nine members and the next prisoners' rights case before explicitly delineating the Court's views. The current deluge of prisoners' rights litigation would enable the Court to do so whenever it chose.

Finally, perhaps the Attica tragedy cooled any ardor that the Court may have had for leading the way in prison reform.[39] Public attitudes toward prison reform were in turmoil during the weeks immediately preceding the Court's opinion and perhaps the Justices decided that they should take more time before appearing to undercut the authority of prison officials any more than had been done already. If this hypothesis is true, the Court's decision must be seen as a neutral, rather than an affirmative, act. Under these circumstances, the instant case represents nothing more than a holding action by the Court until the next such case arises.

In any event, the United States Supreme Court did affirm the lower court's opinion, although it left the strength of that affirmance on questionable ground. Until the Court decides either to overrule itself or to otherwise expand upon its views in other prisoners' rights cases, all lower courts are bound to follow its lead in compelling prison authorities to provide inmates with adequate legal resources. Whether the courts will have to do so depends upon the prison administrators themselves. If their actions are consistent with the principles espoused in the instant case, such court action will not be necessary. As prisoners' rights litigation has shown in the past, however, only after prisoners in state after state bring actions to compel the providing of such services, will the Court's apparent mandates become a reality.

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39. The prisoner revolt at Attica took place September 9-13, 1971. The Supreme Court handed down its decision in the instant case on November 8, 1971.