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The Federal Courts and Prison Reform

PATRICK BAUDE*

One of the best-known of Tocqueville's observations about the United States is his comment that "[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one."¹ The ostensible occasion of Tocqueville's journey to the United States was to report to the French government on our penitentiaries. Chief Justice Burger might appreciate the irony that Tocqueville's prison report² nowhere mentioned a role for the courts in the reform or supervision of the penitentiaries. But the real object of the American journey, *Democracy in America*, has a few words on prison reform—words as apt now as then:

Alongside the new penitentiaries, built quickly in response to the public's desire, the old prisons remained. . . . These seemed to become more unhealthy and more corrupting at the same rate as the new ones became healthy and devoted to reform. This double effect is easily understood: the majority, preoccupied with the idea of founding a new establishment, had forgotten the already existing ones.³

Until recently the courts refrained from reviewing the decisions of prison authorities. Federal courts are now called upon to deal with issues ranging from whether prisoners can keep their cats⁴ to whether an entire system is unconstitutionally barbaric.⁵ The point of this comment is that the emphasis in substantive law now applied to prison suits is almost the reverse of what it should be, requiring the courts to entertain both silly cases and suits of such economic and social breadth that one despairs of any judicial solution,⁶ while leaving unredressed easily remedied claims which are not only strongly supportable in general constitutional theory but also hold at least some promise of the kind of reform courts can properly encourage.

The general history of prison reform has not been an illustration of the infinite perfectibility of human institutions. Imprisonment itself is conven-

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¹A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 248 (G. Lawrence trans. 1966).

²G. DE BEAUMONT & A. DE TOCQUEVILLE, *PENITENTIARY SYSTEM IN THE UNITED STATES* (1833).

³A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 231 (G. Lawrence trans. 1966).

⁴*Sparks v. Fuller*, 506 F.2d 1238 (1st Cir. 1974).

⁵*E.g.*, *Holt v. Sarver*, 442 F.2d 304 (8th Cir. 1971).

⁶See the thoughtful and not despairing defense of an active judicial role in systemic prison reform in *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1231-36, 1240-50 (1977).

tionally believed to have developed as a humane alternative to capital punishment or mutilation. Within the prison itself, solitary confinement was conceived as a remedy for the "cruelty and corruption endemic to the congregate plan."⁷ The result of solitary confinement as Bernard Shaw saw it: "[The prisoner] envies the unfortunate animals in the Zoo, watched daily by thousands of disinterested observers who never try to convert a tiger into a Quaker by solitary confinement. . . ."⁸ The indeterminate sentence—"intelligent, civilized, scientific"⁹ a few years ago—is now "the motif of Kafka's nightmares."¹⁰ The current reforming vogue is to advocate programs like "pretrial diversion" (a form of correction for the unconvicted) and "behavior modification," or to justify imprisonment either as the defensive warehousing of potential recidivists or as punishment for its own sake.

Until recently, the courts have played little part in the process of reform and consequently bear little responsibility for the way in which good intentions have too often worsened the situation. If for no other reason, recent decisions of the United States Supreme Court deserve credit for having abandoned the established ritual of explicitly rejecting the dictum of an 1871 Virginia court that the prisoner is "the slave of the State."¹¹ Regardless of what the right word is to accurately describe a prisoner's status,¹² the courts until about the last decade rarely entertained a suit challenging the nature of imprisonment. For the most part, the rejection of prisoners' claims was based not on the principle that prisoners lacked substantive rights so much as on varying principles of jurisdiction¹³ which gave the courts little role in the question.

Social and related juridical forces far larger than the problem of prisoners have by now substantially eroded the traditional doctrines barring federal court reaction to state actions inconsistent with currently received constitutional ideals. Remedies need not be exhausted,¹⁴ amounts need not be in controversy,¹⁵ textually demonstrable commitments to a coordinate branch of government have no penumbras,¹⁶ and so on. The resulting swell in federal

⁷D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* 87 (1971).

⁸G. B. SHAW, *THE CRIME OF IMPRISONMENT* 18 (1946).

⁹Menninger, *Verdict Guilty—Now What?* in *A PSYCHIATRIST'S WORLD* 757, 764 (1959).

¹⁰Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 15 (1972).

¹¹Ruffin v. Commonwealth, 20 Va. (21 Gratt.) 1024, 1026 (1871).

¹²In a grammarian's triumph, the Michigan Constitution was amended in 1963, by moving a comma, to make it clear that prisoners were in "involuntary servitude" rather than "slavery." Article II, section 8 of the 1908 Michigan Constitution read: "Neither slavery nor involuntary servitude, unless for the punishment of crime, shall ever be tolerated in this State." Article I, section 9 of the 1963 Michigan Constitution reads: "Neither slavery, nor involuntary servitude unless. . . ."

¹³Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

¹⁴See *Monroe v. Pape*, 365 U.S. 167 (1961). *But see* *Eisen v. Eastman*, 421 F.2d 560 (2nd Cir. 1969), *cert. denied*, 400 U.S. 841 (1970).

¹⁵*Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

¹⁶See, e.g., *Powell v. McCormack*, 395 U.S. 486 (1969). See generally Henkin, *Is There a "Political Question" Doctrine?* 85 YALE L.J. 597 (1976).

cases has not escaped response; more recent Supreme Court decisions have, on doctrinal bases however questionable,¹⁷ limited the range of federal court remedies. A lawyer twenty years ago¹⁸ would have assumed that a tort committed against his client by the police had to be first unsatisfactorily litigated in state court. Today she learns that the constitution does not substantively protect such bagatelles as reputation.¹⁹ By the same token, a fourth amendment claim that twenty years ago did not exist²⁰ is now outside the scope of habeas corpus.²¹ But restrictions on the scope of relief in habeas corpus or on the power of federal courts to enjoin state-court prosecution²² keep people in prison without restricting the suits they bring while there. Indeed, one of the effects of the doctrine of *Preiser v. Rodriguez*²³ is that the more habeas corpus is restricted, the fewer are the cases in which a state prisoner must exhaust state-court remedies.

The result, in short, of the jurisdictional expansions of the nineteen-sixties and the substantive contractions of the seventies is that prisoners' suits, almost alone among public-interest litigation, continue to face few jurisdictional objections in federal court. Objections or not, there are few district judges who can easily face the impact on their dockets of a few thousand prisoners with time and unquestioned interest in lawsuits.²⁴ One recent case is illustrative. A prison guard stole seven packs of cigarettes from an inmate. *De minimis non curat lex* thought the district judge but the court of appeals could not, even had it wanted to, explain why the ownership of property, a right explicitly protected by the fourteenth amendment, was *de minimis*.²⁵ As Chief Justice Burger later put it in his report on the state of the judiciary:

Apart from being private property, cigarettes are a source of comfort to some people. When the district judge received the court of appeals' opinion, he plaintively asked if he could dispose of the whole lawsuit by sending the prisoner three dollars or seven packs of cigarettes.²⁶

The Chief Justice then suggested that the prisoner needs a remedy but that the remedy should be supplied by some agency other than a federal district

¹⁷See generally Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976).

¹⁸That is, before the Court's decision in *Monroe v. Pape*, 365 U.S. 167 (1961).

¹⁹*Paul v. Davis*, 424 U.S. 693 (1976).

²⁰That is, before the Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961).

²¹*Stone v. Powell*, 428 U.S. 465 (1976).

²²*E.g.*, *Younger v. Harris*, 401 U.S. 37 (1971).

²³411 U.S. 475 (1973). *Preiser* holds that state judicial remedies must be exhausted in a federal civil rights action under 42 U.S.C. § 1983 in those cases (and probably only those cases) which could also have been brought in habeas corpus. Limiting habeas corpus thus limits the duty to exhaust in a § 1983 action.

²⁴See Bailey, *The Realities of Prisoners' Cases Under 42 U.S.C. § 1983: A Statistical Survey in the Northern District of Illinois*, 6 LOY. CHI. L.J. 527 (1975). See generally ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1975 ANNUAL REPORT OF THE DIRECTOR 207 (Table 24).

²⁵*Russell v. Bodner*, 489 F.2d 280 (3rd Cir. 1973).

²⁶Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125 (1973).

court. Before *Lynch v. Household Finance Corp.*,²⁷ a district court could probably have dismissed such a case simply because three dollars was less than the ten thousand dollars required to involve the jurisdiction of a United States District Court. In a world where all resources, including the judiciary's, are limited, it makes sense to realize that even a whole carton of cigarettes may not be as important as the other claims of a typical federal docket.

But more was at stake than the cigarettes. The complaint alleged that the guard had taken the cigarettes for the sole purpose of proving that inmates had absolutely no rights—"that his authority lay in the social positions."²⁸ The plaintiff alleged that the warden thereafter refused to respond to requests for administrative relief. The case is hardly trivial if what is at issue is the claim of a state official to be free of any law. Shaw again:

The school is a prison. The office and the factory are prisons. The home is a prison. . . . This imprisonment in the home, the school, the office, and the factory is kept up by browbeating, scolding, bullying, punishing, disbelief of the prisoner's statements and acceptance of those of the official, essentially as in a criminal prison.²⁹

One Supreme Court case in particular has opened the district courts to prison claims. *Haines v. Kerner* holds that the adequacy of a *pro se* complaint is to be judged by "less stringent standards than formal pleadings drafted by lawyers."³⁰ The Court repeated the familiar but usually ignored test of *Conley v. Gibson* which applies to all complaints, that they not be dismissed unless it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."³¹ Although it is a rare court which takes *Conley v. Gibson* seriously in an ordinary case, *pro se* prison litigants are to be treated differently.

For the most part, present prisoners' rights law proceeds from a humanitarian model which runs like this: (1) In the old days prisoners were slaves of the state; (2) such a condition is not tolerable in a sensitive modern society and therefore; (3) courts will review all the conditions of prison life, giving great deference to administrative judgments not obviously barbaric but also recognizing that economic scarcity is not a valid reason for making constitutional rights scarce. This model is implicit in the formula that the prisoner retains rights "not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."³² The formula leaves unanswered the question of what the status of a prisoner is and, whether, if retribution and deterrence (a "euphemism for Terrorism"³³) are

²⁷405 U.S. 538 (1972).

²⁸489 F.2d at 281.

²⁹G. B. SHAW, THE CRIME OF IMPRISONMENT 18-19 (1946).

³⁰404 U.S. 519, 520 (1972).

³¹355 U.S. 41, 45-46 (1957).

³²*Pell v. Procunier*, 417 U.S. 817, 822 (1974).

³³G. B. SHAW, THE CRIME OF IMPRISONMENT 118 (1946) (an obviously extravagant statement).

legitimate penological objectives—as they logically must be in light of the constitutionality of capital punishment—anything nasty is justified.

In an extraordinarily perceptive opinion, Judge Doyle carried the humanitarian paradigm to its conclusion before rejecting it. A prisoner sought to correspond with his sister-in-law to keep alive their adulterous relationship. In the United States it is generally assumed legitimate to deny inmates sexual relations with their spouses³⁴ and sexual correspondence with a sister-in-law should hardly fare better. Yet it is difficult to imagine a “penological” (rather than “punitive”) rationale for either deprivation. Reflection on the general model of judicial review in this context led the court to be “persuaded that the institution of prison probably must end.”³⁵ Rejection of the legitimacy of prison leads to skepticism of the “status of prisoner,” then to the “thesis . . . that those convicted of crime should continue to share with the general population the full latent protection of the Fourteenth Amendment,”³⁶ and finally to reversal by the court of appeals.³⁷

In a less striking way, three cases decided this term by the Supreme Court show the misplaced emphasis of the humanitarian model. In *Estelle v. Gamble*³⁸ the Court held that deliberate indifference to an inmate’s serious medical needs amounted to cruel and unusual punishment. Mere negligence “does not state a valid claim of medical mistreatment under the Eighth Amendment.”³⁹ The inmate’s complaint was *pro se* and not only artless but at several points “unclear.”⁴⁰ It would not be humane to require an unrepresented prisoner to state a civil rights complaint with elegance or even a direct simplicity too few lawyers attain. Nor can one deny the brutality of deliberately ignoring serious medical needs. Yet the practical impact of *Estelle* and *Haines* is that a prisoner who suffers serious malpractice but is unlikely to recognize or articulate the distinction between wanton and ordinary negligence will be able to maintain in federal court, without being able to win, a suit that could have succeeded as an ordinary state tort.⁴¹

In *Bounds v. Smith*,⁴² the Court reaffirmed an earlier summary holding that the states are required to provide meaningful assistance to prisoners preparing legal papers.⁴³ In the absence of professional legal help, mean-

³⁴Tarlton v. Clark, 441 F.2d 384 (5th Cir. 1971), cert. denied, 403 U.S. 934 (1971). But see Hopper, *The Conjugal Visit at Mississippi State Penitentiary*, 53 J. CRIM. L. & C. 340 (1962).

³⁵Morales v. Schmidt, 340 F. Supp. 544, 548 (W.D. Wis. 1972).

³⁶*Id.* at 549.

³⁷489 F.2d 1335 (7th Cir. 1973), modified on rehearing, 494 F.2d 85 (7th Cir. 1974).

³⁸429 U.S. 97 (1976).

³⁹*Id.* at 106.

⁴⁰*Id.* at 100 n.5. As Mr. Justice Stevens pointed out in his dissent: “On the basis of Gamble’s handwritten complaint it is impossible to assess the quality of the medical attention he received. As the Court points out, even if what he alleges is true, the doctors may be guilty of nothing more than negligence. . . .” *Id.* at 110.

⁴¹A theory of pendent jurisdiction might give the federal court discretion (unlikely to be exercised) to hear the state claim.

⁴²97 S. Ct. 1491 (1977).

⁴³Younger v. Gilmore, 404 U.S. 15 (1971), *affg per curiam*, Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970).

ingful assistance requires a law library. Even though the inmate is held only to the standard of *Haines v. Kerner*, he or she should be able to research "such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant and types of relief available."⁴⁴

In *Jones v. North Carolina Prisoners' Labor Union*,⁴⁵ the Court upheld several related state regulations of a prison labor union. The union was an association of about 2000 prisoners in various institutions in North Carolina. The state permitted inmates to "belong", but not to solicit others to join. The union was not allowed to meet and prison officials refused to deliver bulk mail from the union. Both Mr. Justice Rehnquist, writing for the Court, and Mr. Justice Marshall, dissenting, accept the formal premise that "a prison inmate retains those First Amendment rights that are not inconsistent with his status. . . ."⁴⁶ For the majority, however, the key is "giving appropriate deference to the decisions of prison administrators"⁴⁷ and "it is enough to say that they have not been conclusively shown to be wrong."⁴⁸ For Mr. Justice Marshall the starting point is the first amendment, not the fact of imprisonment, and it follows that restrictions must "be supported by 'reasons imperatively justifying the particular deprivation.'"⁴⁹

These three cases together demonstrate the principle that prisoners have judicially protectible constitutional rights, including rights which require some financial support; at the same time, the Court in the prisoners' union case refused to recognize the one right which might have led to an actual change in the penitentiary. Whether the courts ought to be engines of social reform is too large a question for a comment like this one, but Mr. Justice Marshall's dissenting opinion in *Jones v. North Carolina Prisoners' Labor Union* addresses with the refreshing argument that courts know as much about prisons as they do about schools.⁵⁰

If, however, the courts are to play a part in the search for improved prisons they should do so by more than empty promises. To say that prisoners have constitutional rights, but that wardens have administrative discretion to restrict those rights, is a rhetorical device of scarcely more significance than a moved comma in the Michigan constitution. Yet it is unrealistic to expect the courts to be able in fact to review the number of prisoners' claims.

What is needed is not a formal standard validating the discretion of prison administrators, but rather procedural limitations that keep out of court those problems not amenable to genuine judicial review. One such principle would be the requirement of exhaustion of administrative remedies. The exhaustion requirement, coupled with the corollary that the remedies to be

⁴⁴97 S. Ct. 1491, 1497 (1977).

⁴⁵97 S. Ct. 2532 (1977).

⁴⁶*Id.* at 2538 (majority); *id.* at 2546 (dissent).

⁴⁷*Id.* at 2538.

⁴⁸*Id.* at 2543.

⁴⁹*Id.* at 2545-46.

⁵⁰*Id.* at 2546.

exhausted must be quick and effective, would hold out an incentive for the states to develop their own reforming processes. The bitter division among the Justices in *Burrell v. McCray*⁵¹ suggests that the Court is unable to find even a passably principled way of establishing an exhaustion requirement for some but not all 1983 actions. In *Burrell*, the Fourth Circuit held that administrative remedies need not be exhausted in a prisoner's 1983 suit, reversing the district court. The Supreme Court granted certiorari and then, after argument, dismissed the writ. Three justices dissented, two of them arguing that "impermissible violence is done the Rule of Four."⁵²

Another possibility is to retreat from the beguiling liberality of *Haines v. Kerner*. There are, as Chief Justice Burger has suggested, many administrative possibilities for dealing with prisoner petitions.⁵³ But the rules of civil procedure already reflect a refined system for identifying claims that should not be litigated. Modern procedural techniques of course no longer depend on the specificity of the complaint; but the reason for relaxing the requirement of specificity is to place greater reliance on discovery and other phases of the process before trial. An indigent unrepresented prisoner is not in a position to participate in the pretrial devices of a modern federal lawsuit. A prisoner who complains that he cannot urge his fellows to join an association designed to explore ways of ameliorating their lot deserves a better answer than that the warden knows better. If the price of that answer is that prisoners with medical problems have to litigate in state court, there are worse things.

⁵¹426 U.S. 471 (1976).

⁵²*Id.* at 473, 474 (Brennan, J., dissenting).

⁵³Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125 (1973).

