The Supreme Court and The Constitutional Rights of Prisoners: A Reappraisal

By EMILY CALHOUN*

Introduction

The Supreme Court of the United States has assured prisoners that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."[1] According to the Court, "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime."[2] The rather broad language used by the Court in its discussions of prisoners' constitutional rights, combined with a number of decisions defining the scope of those rights, once apparently indicated that the Court was willing to lend a sympathetic ear to prisoners with constitutional grievances.[3] Lower federal courts interpreted the Supreme Court's language and decisions as a mandate for general constitutional review of prison conditions, regulations, and practices.[4] But a review of the Court's most recent prisoners' rights decisions, as well as a reappraisal of its earlier opinions, reveals that the Court does not analyze the merits of prisoners' constitutional complaints consistently with

* Assistant Professor of Law, University of Georgia Law School.

1. Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).

2. *Id.* at 555. *See also* Meachum v. Fano, 427 U.S. 215, 225 (1976); and Jones v. North Carolina Prisoners' Labor Union, 45 U.S.L.W. 4820, 4825 (U.S. June 23, 1977) (Burger, J., concurring).

3. This article discusses the Supreme Court's attitude toward the constitutional rights of prisoners only with respect to the conditions of confinement. It does not discuss Court opinions pertaining to the procedural due process rights of individuals during a sentencing hearing (*e.g.*, Mempa v. Rhay, 389 U.S. 128 (1967); Specht v. Patterson, 386 U.S. 605 (1967); Williams v. New York, 337 U.S. 241 (1949)), or to pretrial detainment of mentally incompetent criminal defendants (*e.g.*, McNeil v. Patuxent Inst., 407 U.S. 245 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Baxstrom v. Herold, 383 U.S. 107 (1966)), or to conditions under which defendants are detained pending trial (*e.g.*, Jackson v. Indiana, 406 U.S. 715 (1972); Greenwood v. United States, 350 U.S. 366 (1956)).

4. For examples of lower court decisions that have protected the constitutional rights of prisoners, *see* Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (8th Cir. 1974); United States v. Kahane, 396 F. Supp. 687 (E.D.N.Y. 1975); Farmer v. Loving, 392 F. Supp. 27 (W.D. Va. 1975); Walker v. Hughes, 386 F. Supp. 32 (E.D. Mich. 1974); Teterud v. Gillman, 385 F. Supp. 153 (S.D. Iowa 1974); and James v. Wallace, 382 F. Supp. 1177 (M.D. Ala. 1974).

its statement that prisoners possess constitutional rights. While reiterating the principle that the Constitution protects prisoners, the Court has given the principle little substance. Its resolution of constitutional issues raised by prisoners usually entails extreme deference to the decisions of the prison officials accused of violating the constitutional rights of inmates. Through such deference, the Court has achieved a result that it could much more easily and candidly have achieved had it simply declared that prisoners are not entitled to constitutional protection. The Court has continued to profess, however, that the Constitution does protect prisoners, and under cover of that assertion, has permitted a hardy weed, the "hands-off"[5] approach, to creep back into the prison yard from which it ostensibly had been banished.

This article describes the current status of prisoners' constitutional rights according to the practice and theory of the Supreme Court. The conclusion drawn from that description is that the Court's analytical method in resolving prisoners' rights cases is inconsistent with its own stated proposition that the Constitution protects prisoners. In fact, the analytical method employed by the Court in past prisoners' rights decisions leaves prison inmates largely at the mercy of prison officials. A realistic appraisal of the Court's approach to the prisoners' rights issue indicates that the Court either should minimize the deference now given to prison officials or should acknowledge candidly that the Constitution is inapplicable to prisoners and then justify that position.

I. The Historical Setting

Not long ago the Supreme Court appeared to break with a judicial tradition that utilized a "hands-off" doctrine as a complete bar to consideration of the merits of prisoner complaints alleging a deprivation of constitutional rights. The hands-off approach was founded on the assumption that judicial review of administrative decisions of prison officials would subvert prison discipline and the efforts of prison administrators to accomplish penological objectives. Because the doctrine operated as a jurisdictional bar to prisoners' complaints, it enabled federal courts to avoid any constitutional review of prison administrative decisions.[6] In effect, this hands-off doctrine

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5. See text accompanying note 6 *infra*.

6. For a good description of the basis for and effect of the hands-off principle, *see* Note, *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). Justices Brennan and Marshall note the emergence of a new variety of the hands-off doctrine with dismay in their dissent in Jones v. North Carolina Prisoners' Union, 45 U.S.L.W. 4820, 4825 (U.S. June 23, 1977).

operated in the same fashion as would a straightforward judicial declaration that prisoners have no constitutional rights.[7]

The Supreme Court first indicated in 1964 that it might subject prison administrative decisions to the constraints of the Constitution. That year, in *Cooper v. Pate*,[8] the Court appeared to discard the hands-off principle. It reversed a federal district court's dismissal of a complaint alleging that prison officials had denied an inmate the right to purchase certain religious materials. The court of appeals affirmed the district court's dismissal, based on the then traditional idea that federal courts have no business supervising prison officials.[9] In reversing the lower courts, the Supreme Court cited two opinions of the Second and Fourth Circuit Courts of Appeals,[10] both of which had refused to accept an argument that prisoner complaints raising First Amendment issues should be dismissed. The Court appeared to approve of the refusal of the appellate courts to heed the admonition that it is not the business of the federal judiciary to supervise prisons.

In the seven years following *Cooper*, the Supreme Court rendered few opinions pertaining to the constitutional rights of prisoners, and in only two of these did the Court address itself to the merits of the complaints. In *Lee v. Washington*,[11] the Court held that the Fourteenth Amendment forbids racial segregation in state prisons. In *Johnson v. Avery*,[12] the Court held that a prison regulation forbidding inmates to assist one another in the preparation

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7. During the years in which this doctrine enjoyed prominence in the federal courts, the Supreme Court rendered only four decisions that might be characterized as giving consideration to the issue of prisoners' rights. Price v. Johnston, 334 U.S. 266 (1948) (appellate court allowed to decide whether or not to permit an inmate to argue his own case on appeal); Cochran v. Kansas, 316 U.S. 255 (1942) (obstruction of an inmate's appeal from a criminal conviction held to violate the equal protection clause of the Fourteenth Amendment); *Ex parte* Hull, 312 U.S. 546 (1941) (prison officials not allowed to require inmates to submit their petitions for writs of habeas corpus for preliminary institutional review and approval); Stroud v. United States, 251 U.S. 15 (1919) (seizure of an inmate's correspondence, with due process, held not to violate the guarantees of the Fourth and Fifth Amendments). *Stroud* reviewed the constitutionality of an administrative decision, but only when the issue was raised in the course of an administrative proceeding. The other three cases simply reviewed institutional restrictions in the course either of a habeas corpus proceeding or of a direct appeal from a criminal conviction. In none of these cases did the Court indicate that it would discard the hands-off approach and entertain inmates' civil rights suits against allegedly unconstitutional conditions of confinement.

8. 378 U.S. 546 (1964).

9. *See* Cooper v. Pate, 324 F.2d 165, 167 (7th Cir. 1963) (citing Stroud v. Swope, 187 F.2d 850, 851-52 (9th Cir. 1951) for the proposition that federal courts have no proper role in supervising prisons).

10. Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961); Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961).

11. 390 U.S. 333 (1968).

12. 393 U.S. 483 (1969).

of lawsuits was unconstitutional. The Supreme Court in the latter case simply protected the right of prison inmates to seek judicial redress for their grievances. It did not say anything about the constitutional merits of grievances regarding prison conditions. In *Lee*, the Court did not hold unconstitutional a condition related solely to incarceration; it simply said that it would give constitutional review to such conditions. The Court was careful to note that if integration were to result in problems for the institution, the Court would make "allowance for the necessities of prison security and discipline."[13] Thus, although both decisions represented an abandonment of the hands-off approach to judicial review of prisoner complaints, neither *Johnson* nor *Lee* indicated that the Court would routinely review prison administrative decisions that might interfere with prisoners' constitutional rights.[14]

It was not until 1973, in *Wolff v. McDonnell*,[15] that the Supreme Court considered the merits of a prisoner's constitutional challenge to an administrative decision affecting prison conditions and discipline. The Court stated that "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime."[16] Because of the breadth and nature of the restrictions the Court imposed on prison disciplinary proceedings in *Wolff*, it appeared that the Court was then ready to interfere substantially with prison conditions in order to protect inmates' constitutional rights.

II. The Supreme Court's Current Approach to Prisoners' Rights

Despite the general language of and hopes fostered by the *Wolff* decision,[17] the Supreme Court in *Wolff* can be said to have extended only

13. 390 U.S. at 334.

14. Other decisions after *Cooper* that did not dispose of cases on the merits were similarly limited in scope. *See, e.g.*, Haines v. Kerner, 404 U.S. 519 (1972) (prisoner entitled to an opportunity to introduce evidence corroborating his allegation that prison disciplinary procedures are unconstitutional); Wilwording v. Swenson, 404 U.S. 249 (1971) (lower court should not have dismissed a challenge to prison disciplinary procedures because that challenge was improperly labelled as a petition for writ of habeas corpus); Cruz v. Hauck, 404 U.S. 59 (1971) (lower court must consider the merits of a prisoner's complaint alleging infringement of First Amendment freedoms); Younger v. Gilmore, 404 U.S. 15 (1971) (affirming decision finding an unconstitutional interference by prison officials with an inmate's access to legal materials); Houghton v. Shafer, 392 U.S. 639 (1968) (inmate alleging a violation of his constitutional rights need not exhaust administrative remedies before lodging a civil rights suit in federal district court). *Younger* and *Houghton* merely re-emphasize the Court's willingness to protect an inmate's access to federal courts; *Haines*, *Cruz*, and *Wilwording* say federal courts should protect the constitutional rights of inmates but fail to analyze the extent of those rights vis-à-vis administrative strictures placed on those rights by prison officials.

15. 418 U.S. 539 (1974).

16. *Id.* at 555.

17. *See, e.g.*, Meachum v. Fano, 96 S. Ct. 2532, 2538 (1976); Wolff v. McDonnell, 418 U.S. 539, 555, 556 (1974).

minimal protection to prisoners under the United States Constitution. Although the Court no longer defers absolutely to prison officials and government interests in order to avoid subversion of prison authority or discipline, it still defers to them significantly. The net effect of such deference is that the Court has merely transported the concerns that fostered the development of the hands-off doctrine from a focus on jurisdiction to a debate on the merits of prisoners' constitutional claims. Mr. Justice Powell's opinion, written for the majority of the Court in *Procunier v. Martinez*,[18] exemplifies this process:

> Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration. In part this policy is the product of various limitations on the scope of federal review of conditions in state penal institutions. More fundamentally, this attitude springs from complementary perceptions about the nature of the problems and efficacy of judicial intervention. Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.[19]

These words do not preface a dismissal of a prisoner's constitutional complaint; rather they precede a discussion of what should be done to resolve the merits of the complaint. They are a forceful reminder that, although the Supreme Court may have been persuaded to abandon some barriers to prisoner complaints,[20] the Court has yet to abandon a general deference to prison officials.

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18. 416 U.S. 396 (1974).

19. *Id.* at 404-05. *See also* Jones v. North Carolina Prisoners' Union, 45 U.S.L.W. 4820, 4822 (U.S. June 23, 1977).

20. The Court has retreated slightly in its removal of jurisdictional barriers. In Preiser v. Rodriguez, 411 U.S. 475 (1973), the Court decided that whenever a prisoner raises a constitutional claim necessitating relief that will alter either the fact or the duration of his confinement, the prisoner must assert his constitutional claim in a petition for a writ of habeas corpus. He may not raise his constitutional challenge in a civil rights suit under 42 U.S.C. § 1983 (1970). Prior to *Preiser*, it had been assumed that prisoners could challenge allegedly unconstitutional conditions of confinement under § 1983, even if the result of the challenge would be early release for the prisoner. Preiser v. Rodriguez, 411 U.S. at 500-01 (Brennan, J., dissenting). By demanding a petition for a writ of habeas corpus in certain situations instead of permitting suit under section 1983, the Court in effect requires prisoners to give state courts the first chance to resolve constitutional

It is not surprising that the Supreme Court continues to defer to prison officials' assessment of their institution's own interests; some weight should properly be given to interests asserted by the state. What is surprising is the extent of the deference that the Court accords the viewpoint of prison administrators, even when a prisoner asserts a "preferred" right, such as a right protected by the First Amendment. With few exception this extreme deference to government officials and their interests pervades every recent Supreme Court opinion evaluating the merits of requests by prisoners for protection of constitutional rights.[21] It manifests itself in the types of con-

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issues. The federal habeas corpus statute, 28 U.S.C. § 2255 (1970), permits a federal court to consider habeas corpus claims only after state courts have done so, but federal courts need not defer to state or administrative tribunals when suit is brought pursuant to 42 U.S.C. § 1983, for that section contains no statutory requirement that a prisoner exhaust state remedies before proceeding in federal court.

In Burrell v. McCray, 96 S. Ct. 2640 (1976), the Supreme Court had an excellent opportunity to impose a procedural rule of deference on suits under § 1983, and some of the language used in *Preiser* seemed to be persuasive authority for requiring exhaustion of state administrative remedies before prisoners would be allowed to bring suit under that statute. The Court declined, however, to impose such a rule and dismissed, as improvidently granted, a petition for writ of certiorari that raised the issue. Deference to the state judiciary in habeas corpus suits remains the key procedural restriction on direct prisoner access to federal courts for adjudication of constitutional claims.

Direct restrictions on access to the federal courts will not be discussed here. In the first place, those restrictions are relatively insignificant when compared to the limitations on successful litigation imposed by the Court's constitutional interpretation in prisoners' suits. In addition, numerous constitutional challenges do not pertain to the fact or duration of confinement and are, therefore, not covered by the *Preiser* opinion. Even those that do affect the fact or duration of confinement may be raised in a § 1983 suit that asks only for limited declaratory and monetary relief. Preiser v. Rodriguez, 411 U.S. 475, 494 (1973). *See also* Wolff v. McDonnell, 418 U.S. 539, 555 (1974).

The underlying rationale of the *Preiser* opinion, however, as opposed to its precise holding, should not be overlooked. Although the Court partially justified the holding in *Preiser* by its interpretation of the language and intent of the federal habeas corpus statute, it also relied on principles of comity. The Court noted: "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. . . . Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems. Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances." Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973). *See also* Stone v. Powell, 428 U.S. 433 (1976); Francis v. Henderson, 96 S. Ct. 1708 (1976); Estelle v. Williams, 96 S. Ct. 1691 (1976).

21. *See* Jones v. North Carolina Prisoners' Union, 45 U.S.L.W. 4820 (U.S. June 23, 1977); Bounds v. Smith, 97 S. Ct. 1491 (1977); Moody v. Daggett, 429 U.S. 78 (1976); Meachum v. Fano, 427 U.S. 215 (1976); Baxter v. Palmigiano, 96 S. Ct. 1551 (1976); Wolff v. McDonnell, 418 U.S. 539 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974); Procunier v. Martinez, 416

stitutional issues the Court chooses to resolve in prisoners' rights cases, in the Court's willingness to devise variations on traditional constitutional tests for use solely in the context of these cases, and in the way the Court applies these tests to particular fact situations. The Court in these decisions appears not only to disfavor substantive constitutional rights,[22] but also to protect prisoners' interests only insofar as the state acquiesces in or reveals that it has already recognized the interest.[23]

A. Avoidance of Substantive Constitutional Issues

In three cases the Supreme Court has expressly avoided the issue of prisoners' substantive constitutional rights. The most striking example is *Procunier v. Martinez*.[24] In spite of the fact that the case had been argued in the lower courts from the prisoner's perspective, the majority of the Court in *Martinez* declined to confront the issue of the extent to which the incarcerated still enjoy First Amendment rights.[25] When prisoners challenged prison censorship of inmate correspondence, the majority avoided the state's argument that "an inmate's rights with reference to social correspondence are something fundamentally different than those enjoyed by his free brother."[26] The Court chose instead to evaluate the constitutionality of the censorship practices in the context of the First Amendment rights of those with whom the prisoners corresponded, who were also affected by the censorship.[27]

In the more recent decision of *Montanye v. Haymes*,[28] the Supreme Court never confronted the substantive issue raised by a prisoner who al-

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U.S. 396 (1974); Johnson v. Avery, 393 U.S. 483 (1969). Two other Supreme Court decisions, although not dealing with constitutional rights of persons confined within a prison, will also be mentioned: Gagnon v. Scarpelli, 411 U.S. 778 (1973), and Morrissey v. Brewer, 408 U.S. 471 (1972).

22. The phrase "substantive constitutional rights" is used to denote those rights that do not derive implicitly from the due process and equal protection guarantees in the Fifth and Fourteenth Amendments.

23. Throughout this article, the term "state" is used in its broadest sense, to denote the political sovereign. Thus, the federal government may be referred to as the state.

24. 416 U.S. 396 (1974).

25. *Id.* at 408.

26. *Id.* at 409 (quoting from the appellant's brief).

27. *Compare* Justice Powell's majority opinion in *Martinez with* Pell v. Procunier, 417 U.S. 817, 835-36 (1974) (Powell, J., concurring in part and dissenting in part), and Saxbe v. Washington Post Co., 417 U.S. 843, 850-75 (Powell, J., dissenting). It should be noted here that in *Martinez* the Court was willing to recognize that prisoners possess First Amendment rights for the limited purpose of finding a "liberty" interest under the due process clause. 416 U.S. at 418. In addition, the Court refused to abstain from addressing the constitutional rights of free persons, as it was urged to do by the defendants. *Id.* at 400-04.

28. 96 S. Ct. 2543 (1976).

leged that he had been transferred from one prison to another in retaliation for circulating a petition among inmates, conduct that arguably is protected by the First Amendment.[29] The Court instead confined its discussion to consideration of whether the due process clause of the Fourteenth Amendment requires that prisoners be given some sort of procedural protection before they are transferred between penal institutions. As the dissenters noted, the Court reversed the judgment of the court of appeals because it disagreed with the analysis given the Fourteenth Amendment due process issue, but it did not explain why that judgment should not be upheld on First Amendment grounds.[30]

In one other case the Supreme Court refused to define not only the substantive First and Sixth Amendment rights of prisoners, but also their Fourteenth Amendment rights. In *Wolff v. McDonnell*,[31] the Court declined to confront directly an assertion that a prisoner's First, Sixth, and Fourteenth Amendment rights were infringed by a prison practice of opening mail between attorneys and inmates. The majority noted that the constitutional status of the rights asserted was far from clear and stated that it "need not decide, however, which, if any, of the asserted rights are operative here, for the question is whether, assuming some constitutional right is implicated, it is infringed by the procedure now found acceptable by the State."[32] The Court concluded that the procedure utilized by the state violated no constitutional rights.

In *Martinez*, *Montanye*, and *Wolff*, the Supreme Court was given the opportunity to resolve a dispute on the basis of several constitutional grounds. In each case, the Court consciously chose to resolve the dispute without delineating the scope of substantive constitutional rights of prisoners. In *Martinez*, the Court focused on the First Amendment rights of free persons rather than on those of the prisoners. The focus in *Wolff* was on the interests of prisoners, but the Court refused to specify whether or not the decision was based on a substantive constitutional right. In *Montanye*, the majority of the Court simply ignored the substantive First Amendment issue.[33]

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29. The Court described the inmate's § 1983 complaint as one that challenged the defendant's conduct on the grounds that it interfered with his right to petition the courts for redress of grievances and retaliated against him for exercising that right. *Id.* at 2545. The court of appeals did not construe the petition as raising a First Amendment issue. *See* Haymes v. Montanye, 505 F.2d 977 (2d Cir. 1974).

30. 96 S. Ct. at 2548 (Brennan, Marshall & Stevens, JJ., dissenting).

31. 418 U.S. 539 (1974).

32. *Id.* at 576.

33. For an example of the Supreme Court's avoidance of substantive constitutional issues, see Burrell v. McCray, 96 S. Ct. 2640 (1976). The Court had initially granted a writ of certiorari raising the issue of whether or not the court of appeals correctly found that prison officials had acted in violation of the Eighth Amendment prohibition against

B. The Procedural Protections of the Due Process Clause

Although in each of the three foregoing cases the Court avoided the substantive constitutional issue, it did address itself to the applicability to prisoners of the due process clause of the Fourteenth Amendment.[34] This appears to be one constitutional provision that the Court is willing to apply to prisoners.

One might once reasonably have believed that the Supreme Court would confront procedural constitutional questions under the due process clause and would protect prisoners from arbitrary government actions even if to do so would be to interfere substantially with prison administration. For example, in *Wolff v. McDonnell*,[35] *Morrissey v. Brewer*,[36] and *Gagnon v. Scarpelli*,[37] the Supreme Court extended considerable procedural protections to prisoners, parolees, and probationers deprived of good conduct credits, parole, and probation, respectively. In all three cases, the Court held that persons convicted of crimes enjoyed a liberty interest under the due process clause of the Fourteenth Amendment that was worthy of constitutional protection and, accordingly, imposed numerous procedural restrictions on state conduct.[38] In addition, although the Court avoided resolving

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cruel and unusual punishment. The Court then dismissed the writ as having been improvidently granted, without further explanation. Justices Brennan and Marshall concluded, in dissent, that "the Court is not pursuing our 'duty to avoid decision of constitutional issues' only where reason and principle justify doing so; rather, this is plainly an instance where 'avoidance becomes evasion.' " *Id.* at 2642. In another case, the Supreme Court also refused to reach the merits of a prisoner's claim that the parole release decision must be accompanied by procedural safeguards. Scott v. Kentucky Parole Bd., 429 U.S. 60 (1976). Instead, the Court returned the case to the lower court for determination of whether the issue had become moot. *See also* Bradford v. Weinstein, 423 U.S. 147 (1975).

In addition, one should note the dissenters' complaint in Bounds v. Smith, 97 S. Ct. 1491, 1501-04 (1977) that the majority failed to pinpoint a source of the constitutional right of access to the courts.

34. Where the federal government is concerned, of course, the applicable constitutional amendment is the Fifth, which, for due process purposes, is interpreted like the Fourteenth.

35. 418 U.S. 539 (1974).

36. 408 U.S. 471 (1972).

37. 411 U.S. 778 (1973).

38. Wolff v. McDonnell, 418 U.S. 539, 563-72 (1974), held that an inmate subject to disciplinary action is entitled to advance written notice, at least twenty-four hours to prepare a response, a written statement of the evidence on which the finder of fact relied and reasons for the disciplinary action, the right to call witnesses and present documentary evidence unless unduly hazardous to institutional goals, and a limited right to assistance in presentation of his case. Morrissey v. Brewer, 408 U.S. 471, 484-89 (1972), held that a parolee is entitled to a prelimary hearing by someone not directly involved in the case, written notice of the alleged violation, an opportunity to appear and present evidence in his own behalf, a limited right to confrontation of adverse witnesses, a statement of reasons for the preliminary findings, and a final hearing at which he must be given notice of

the issue of whether prisoners enjoyed First Amendment rights that would preclude censorship of their personal correspondence in *Procunier v. Martinez*,[39] it was willing to require that prison censorship or withholding of the delivery of a particular item of inmate correspondence be accompanied by procedural safeguards in order to protect the prisoners' rights.[40] The Court reasoned:

> The interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a "liberty" interest within the meaning of the Fourteenth Amendment even though qualified of necessity by the circumstances of imprisonment. As such, it is protected from arbitrary governmental invasion.[41]

The Court therefore required that prisoners and their correspondents be given notice and an opportunity to be heard in a neutral forum after the censorship of any mail.[42] On the basis of these decisions, one might have argued that the Court's interpretation of procedural constitutional issues signified a willingness to interfere with prison administration.

1. The Effect of the 1976 Decisions

Three recent decisions, however, have undermined the potential for judicial intercession in the administration of prisons. In *Meachum v. Fano*,[43] *Montanye v. Haymes*,[44] and *Moody v. Daggett*,[45] the Supreme Court, in an extreme gesture of deference to prison officials and interests, declared that the state is not restricted in regulating the rights enjoyed by inmates unless it first declares that the inmate has some vested interest in or expectation of enjoying those rights.

In *Meachum* and *Montanye*, prisoners argued that without due process protections they could not be transferred from one prison institution to another, either (1) for disciplinary reasons or (2) if the transfer resulted in a substantial change in the conditions of confinement. The prisoners' arguments appeared to be supportable in light of prior imposition of procedural

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the parole violation, disclosure of the evidence against him, an opportunity to appear and present evidence, a limited right to cross-examine witnesses, a neutral hearing officer, and a written statement of the evidence relied on and reasons for revoking parole. Gagnon v. Scarpelli, 411 U.S. 778, 782-91 (1973) held that a probationer is entitled to the *Morrissey* protections and a limited right to counsel.

39. 416 U.S. 396 (1974).

40. An inmate must be notified of the retention of a letter written by or to him, the author must be given an opportunity to protest that retention, and complaints must be considered by a prison official other than the one who originally withheld the letter. *Id.* at 418-19.

41. *Id.* at 418.

42. *Id.* at 418-19. See note 40 *supra*.

43. 427 U.S. 215 (1976).

44. 96 S. Ct. 2543 (1976).

45. 429 U.S. 78 (1976).

safeguards in *Morrissey*, *Gagnon*, and *Wolff*.[46] The Supreme Court held, however, that:

> [N]o Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events.[47]

The Court distinguished *Wolff* on the grounds that in that case the state had already granted prisoners a specific privilege of good time credits which, under state law, could not be taken away unless forfeited by the prisoner's conduct.[48] In fact, the Court went so far as to resurrect the principle underlying the old hands-off doctrine, stating the anticipated effect of imposing procedural restrictions on inmate transfers:

> [It] would place the [due process] Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges. . . . The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States.[49]

In *Moody*, the Court rejected the notion that every action having adverse consequences for federal prison inmates automatically activates a due process right. The Court stated that as long as Congress gives federal prison officials "full discretion to control [the] conditions of confinement," a prisoner has "no legitimate statutory or constitutional entitlement sufficient to invoke due process"[50] protections against the issuance, without execution, of a detainer warrant against him.

Meachum, *Montanye*, and *Moody*, considered in conjunction with *Procunier v. Martinez*,[51] indicate that unless the Supreme Court can identify a liberty or property interest rooted in state law or practice or in the Constitution, prisoners will not be guaranteed the procedural protections of the Fourteenth Amendment.[52] The Court's deference to the state's interest in

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46. See notes 35-37 and accompanying text *supra*.

47. Montanye v. Haymes, 96 S. Ct. 2543, 2547 (1976).

48. Meachum v. Fano, 427 U.S. 215, 225-27 (1976). *See* Wolff v. McDonnell, 418 U.S. 539, 557 (1974). The Court also presumably believed that Morrissey v. Brewer, 408 U.S. 471 (1972), was distinguishable on similar grounds, as it rejected the dissenting opinion of Justices Brennan, Marshall, and Stevens, who relied on *Morrissey*. 427 U.S. at 229-35.

49. *Id.* at 228-29.

50. Moody v. Daggett, 429 U.S. 78, 88 n.9 (1976).

51. 416 U.S. 396 (1974).

52. *Compare* these cases *with* Arciniega v. Freeman, 404 U.S. 4 (1971). In that case, an inmate whose parole had been revoked by the Federal Parole Board because of his association with other ex-convicts challenged the revocation. The Court conceded that the parole board has broad authority to set conditions under 18 U.S.C. § 4203(a) (1970), but held that because the board's own regulations required satisfactory evidence of a vio-

maintaining effective penal administration for purposes of identifying liberty and property interests thus undercuts what was thought to be a major constitutional limitation on arbitrary government action affecting the lives of prisoners.

2. Limitations on Due Process

The Court's definition of protectible liberty and property interests is not the only way in which it defers to state officials and governmental interests in applying the due process clause in the prison setting. Once the Court determines that a prisoner does have a liberty or property interest that is entitled to protection, the Court must then determine how much process is required. When a free person asserts a deprivation of liberty or property without due process of law, the Court balances the free person's interest in procedural protections against the interests of the state in not being unduly restricted by those procedures.[53] When a prisoner asserts a constitutional right to certain procedural protections, however, the Court often ignores the interests of the prisoner in having a particular procedure followed. In resolving a prisoner's due process claim, the Court tends to defer to the state and to balance one state interest against another.

Wolff v. McDonnell,[54] *Gagnon v. Scarpelli*,[55] and *Morrissey v. Brewer*[56] all demonstrate the Court's substitution of state interests for individual ones in determining the due process rights of prisoners. For example, the interests of the state in its penal system are commonly described as the deterrence of crime through isolation of the offender, discipline, institutional order and security, and rehabilitation.[57] In *Wolff*, *Gagnon*, and *Morrissey* the Court relied heavily on the state's interest in the rehabilitation of its prisoners in requiring the incorporation of certain protections into the procedures for discipline, probation revocation, and parole revocation. In *Morrissey*, the Court acknowledged that its decision to require procedural

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lation of parole conditions before parole could be revoked, the revocation in this case was improper. In Douglas v. Buder, 412 U.S. 430 (1973), a probationer challenged his probation revocation for failure to report any arrest to his probation officer without delay, as required by the conditions of his probation. The Supreme Court held that the record was so devoid of evidentiary support for the conclusions on which revocation was based that the due process clause was violated. In both *Arciniega* and *Douglas*, the Supreme Court restricted government's actions only insofar as those actions seemed to be inconsistent with rules and regulations the government itself had established.

53. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970).

54. 418 U.S. 539 (1974).

55. 411 U.S. 778 (1973).

56. 408 U.S. 471 (1972). *Morrissey* and *Gagnon* do not technically involve challenges to prison conditions or rules, but they were later relied on by the Court in *Wolff* in extending procedural protections to prisoners during disciplinary hearings.

57. *See* Pell v. Procunier, 417 U.S. 817, 822-23 (1974).

protections was based as much on the interests of society as on those of the prisoner:

> The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole given the breach of parole conditions. . . . And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.[58]

Thus, the Court's balancing of various state interests affects the measure of due process it will guarantee to prisoners.

In applying the due process clause, the Supreme Court defers to the state in one additional respect—in its consideration of administrative objectives. The Court has repeatedly, and in numerous situations, noted that procedural protections under the Constitution vary according to the nature of the governmental function involved as well as the private interest affected by government action.[59] In the prison context, the Court has stated that "there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application."[60] In attempting to accommodate due process principles to the penological objective of rehabilitation and the institutional need for security and internal order, the Supreme Court has been extremely deferential to prison officials. For example, the Court is willing to refuse rights of confrontation and cross-examination to prisoners accused of violating institutional rules. A prison disciplinary committee may even act against prisoners on the basis of facts brought to its attention after the conclusion of the disciplinary hearing.[61]

When two courts of appeals attempted to go beyond the minimal protections for disciplinary proceedings set forth in *Wolff v. McDonnell*,[62] the Supreme Court reversed them in a pointed decision.[63] The Court stated that the appellate courts' requirement of mandatory "confrontation and cross-examination, except where prison officials can justify their denial on one or more grounds that appeal to judges, effectively preempts the area that *Wolff* left to the sound descretion of prison officials."[64] In *Wolff* and in *Gagnon v.*

58. 408 U.S. at 484. *See also* Wolff v. McDonnell, 418 U.S. 539, 562-63 (1974); Gagnon v. Scarpelli, 411 U.S. 778, 785 (1973).

59. *See, e.g.*, Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

60. Wolff v. McDonnell, 418 U.S. 539, 556 (1974).

61. Baxter v. Palmigiano, 96 S. Ct. 1551, 1560 n.5 (1976).

62. 418 U.S. 539 (1974).

63. Baxter v. Palmigiano, 96 S. Ct. 1551 (1976).

64. *Id.* at 1560. The Court admits, moreover, that it is not deferring to prison regulations or practices that are concedely implementing legitimate government objections. As the Court said in *Wolff*: "The better course at this time, in a period where prison practices

Scarpelli,[65] the Court restricted the use of counsel in probation revocation and disciplinary proceedings primarily because it did not wish to transform what it considered to be a rehabilitative proceeding into an adversary proceeding.[66] The Court also gave weight to the state's argument in *Wolff* that the procedures governing disciplinary hearings could themselves be relevant to rehabilitation; they should therefore not be too inflexible because some prisoners might require swift punishment while others would be amenable to more leisurely hearings.[67]

With respect to the Supreme Court's analysis of prisoners' rights under the due process clause of the Fourteenth Amendment, one might argue that the Court subjects prisoners to a test no different from that applied to free persons and that it defers to the state no more than is usual in other due process cases. Under this argument, in every situation in which an individual, free or incarcerated, asserts a right to due process of law, the Supreme Court searches for a liberty or a property interest; but the Court recently has been reluctant to find such an interest in any context lacking some specific constitutional right or state-created expectation or privilege.[68] Notwithstanding this argument, one cannot ignore the fact that the adverse impact of the Court's due process analysis is greater for prisoners than for free persons. Free persons enjoy the protection of substantive constitutional rights from which a liberty or property interest may arise. But the Supreme Court has been parsimonious in meting out recognition of substantive constitutional rights for prisoners.[69] Consequently, as long as the Court avoids

are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons." 418 U.S. at 569. Yet in other contexts, the Court has refused to defer absolutely to the state in the latter's treatment of individuals. *See* O'Connor v. Donaldson, 422 U.S. 563, 575 (1975); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). *But see* Greenwood v. United States, 350 U.S. 366, 375-76 (1956).

65. 411 U.S. 778 (1973).

66. 418 U.S. at 570; 411 U.S. at 787-88. *See also* Baxter v. Palmigiano, 96 S. Ct. 1551, 1556 (1976).

67. Wolff v. McDonnell, 418 U.S. 539, 562-63 (1974). *See also* McGinnis v. Royster, 410 U.S. 263 (1973), in which the Court deferred to the state's assertion of a connection between rehabilitation and the granting of good time credits, and upheld the denial of good time credits to persons incarcerated before sentencing because of an inability to post bail. In DeVeau v. Braisted, 363 U.S. 144 (1960), the Court held that a law prohibiting persons convicted of felonies from holding office in any waterfront labor organization was not unconstitutional. The Court stated that, "[d]uly mindful as we are of the promising record of rehabilitation by ex-felons, and of the emphasis on rehabilitation by modern penological efforts, it is not for this Court to substitute its judgment" for that of the legislature. *Id.* at 158. Similarly, in Marshall v. United States, 414 U.S. 417 (1974), when a convicted person asserted that he ought to be committed to rehabilitative incarceration rather than to prison, the Supreme Court deferred to the prior decision of Congress to commit only narcotics addicts with less than two prior felony convictions to a rehabilitative commitment in lieu of penal incarceration.

68. *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976).

69. See text accompanying notes 24-33 *supra*.

defining prisoners' substantive constitutional rights and leaves to the state the identification of protectible liberty and property interests, prisoners have, for all practical purposes, no due process guarantees beyond those the state affords them.[70]

C. The First Amendment

1. The Court's First Amendment Test

One substantive constitutional right the Court has purportedly defined for prisoners is that grounded on the First Amendment. The Court rarely defers significantly to government conduct that restricts First Amendment rights. Nonetheless, when prisoners are involved, the Court defers to the state, just as it does when applying the due process clause. It does so by adopting a constitutional test that avoids the exacting scrutiny required under traditional First Amendment analysis, as well as by substituting society's interests for those of the prisoner in rendering First Amendment review. In fact, in the First Amendment cases, one can discern an equal protection emphasis that, by definition, results in judicial deference to customary prison practices.

Although the Court refused to reach the First Amendment issue in *Procunier v. Martinez*[71] and *Montanye v. Haymes*,[72] it finally did so in *Pell v. Procunier*[73] and *Jones v. North Carolina Prisoners' Union*.[74] *Pell* involved a challenge to prison restrictions on face-to-face interviews between journalists and specifically designated prisoners. The Court upheld the right of prison officials to restrict such interviews, notwithstanding the fact that prisoners' First Amendment rights were correspondingly limited. In *Jones*, the Court upheld a prison prohibition on solicitation of union membership. The most important aspect of the *Pell* and *Jones* decisions is not that the Court refused to rule in favor of prisoners on the merits of the constitutional claim, but rather the process of analysis used in resolving the First Amendment issue.

It is difficult to determine by what standard the Court measured prisoners' First Amendment rights in *Pell*. Nowhere in the opinion does the Court

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70. Not all state-defined interests that a prisoner can expect to enjoy are necessarily protected by the Constitution. In Baxter v. Palmigiano, 96 S. Ct. 1551, 1560 (1976), the Court stated that lesser penalties imposed by prison officials may not trigger the due process clause. *See also* Wolff v. McDonnell, 418 U.S. 539, 594 (1974) (Douglas, J., dissenting in part and concurring in the result in part).

71. 416 U.S. 396 (1974).

72. 96 S. Ct. 2543 (1976). See text accompanying notes 24-33 *supra*.

73. 417 U.S. 817 (1974).

74. 45 U.S.L.W. 4820 (U.S. June 23, 1977).

employ the traditional First Amendment test used in *Martinez*, in which the interests of unincarcerated persons were at stake. In *Martinez*, the Court stated that a prison regulation infringing upon the First Amendment rights of free persons would be held constitutional only if it furthered "an important substantial governmental interest unrelated to the suppression of expression" and even then "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved."[75] In *Pell*, however, the closest the Supreme Court came to articulating a constitutional test for prisoners' First Amendment rights is its statement that "a prison inmate retains those First Amendment rights that are not *inconsistent* with his status as a prisoner or with the legitimate penological objectives of the corrections system."[76] That test was cited with approval in *Jones*.[77]

The *Pell-Jones* test is far different from that enunciated in *Martinez*, which, if applied to prisoners, would allow a prisoner's First Amendment rights to yield only in the face of a substantial government interest unrelated to the supression of expression, and even then only if the restriction were no greater than that necessary to achieve a legitimate government objective. The test of consistency with imprisonment enabled the Supreme Court to hold that prisoners' First Amendment rights are not violated by a regulation banning face-to-face interviews between inmates and the press when there are reasonable alternative means of communication with persons outside the prison.[78] The Court reached that conclusion in spite of the fact that it "would find the availability of such alternatives unimpressive if they were submitted as justification for governmental restriction of personal communication among members of the general public."[79]

The *Pell-Jones* test is a strange bedfellow for the First Amendment, which traditionally has been construed with little deference to governmental interests that conflict with the individual's freedom of expression.[80] In neither *Pell* nor *Jones* did the Supreme Court adopt a presumption against the constitutional validity of restrictions on an inmate's free speech, and the Court's consistency test imposed no heavy burden of justification on the government for its conduct.[81] Under *Pell* and *Jones*, any time a prisoner

75. 416 U.S. at 413.

76. 417 U.S. at 822 (emphasis added). *Compare Pell with* Procunier v. Martinez, 416 U.S. 396, 422 (1974) (Brennan and Marshall, JJ., concurring).

77. 45 U.S.L.W. at 4822, 4823.

78. 417 U.S. at 823. *See also* Jones v. North Carolina Prisoners' Union, 45 U.S.L.W. 4820, 4823 (U.S. June 23, 1977).

79. *Id.* at 825.

80. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 413 (1974).

81. In fact, in *Jones* the majority simply held the government to a mere rationality standard. 45 U.S.L.W. at 4823, 4824. In contrast, consider the heavy burden imposed on the government when the press challenges a prison ban on face-to-face interviews. *See* Pell v. Procunier, 417 U.S. 817, 832 (1974).

asserts a First Amendment right that is simply inconsistent or incompatible with a right or interest asserted by the government, the prisoner's right must yield.

2. Disregard of the Prisoner's Individual Interest in First Amendment Freedoms

The Supreme Court's deference to prison officials and government interests extends beyond the Court's substitution of the *Pell-Jones* standard for the traditional strict scrutiny of First Amendment analysis. In addition, in applying the consistency standard, the Court appears to deem the interests of the state or society as those that are dispositive of the First Amendment issue within the prison setting; the prisoner's individual interest in free speech is largely ignored. The Court simply identifies society's interest in a particular practice or procedure and then balances that state interest against a contrary state interest affected by the practice in order to arrive at a definition of prisoners' rights.

For example, Justice Stewart, in upholding the ban on inmate-press interviews in *Pell*, was careful to note that the regulation was not an attempt to conceal prison conditions from the public.[82] Presumably, if the regulation had been directed to this end, society's interests would have been adversely affected and Justice Stewart would have been more willing to hold the regulation unconstitutional. Thus, his analysis turns in large part on assessing the interests of the state or society, rather than those of the prisoner. Similarly, in *Procunier v. Martinez*,[83] Justices Brennan and Marshall objected to the reading of inmate mail not only because it violated prisoners' First Amendment rights, but also because it "chills the communication necessary to inform the public on this issue [and] is at odds with the most basic tenets of the guarantee of freedom of speech."[84]

The most telling examples of the inclination to ignore the prisoner's interest in First Amendment analysis are found in Justice Powell's separate opinions in *Pell*[85] and *Saxbe v. Washington Post*.[86] In *Pell*, the majority of the Court confronted the First Amendment issue it had avoided in *Martinez*, and although it ultimately rejected the prisoners' arguments, it did concede that prisoners retain First Amendment rights.[87] The Court was also asked, in *Pell* and in *Saxbe*, to decide the First Amendment issue of access by the press. As in the prisoners' challenge, the Court refused to declare unconstitutional the ban on face-to-face interviews with designated inmates on the

82. 417 U.S. at 830.
83. 416 U.S. 396 (1974).
84. *Id.* at 427.
85. 417 U.S. at 835-36 (Powell, J., concurring in part and dissenting in part).
86. 417 U.S. 843, 850-75 (1974) (Powell, J., dissenting).
87. 417 U.S. at 822.

basis of the First Amendment rights of the press. Justice Powell agreed with the majority in *Pell* that "inmates as individuals [do not] have a personal constitutional right to demand interviews with willing reporters."[88] He disagreed however, with the majority's position that the press does not possess a First Amendment right to have face-to-face interviews with inmates.

Justice Powell's position that the prison interview ban is unconstitutional as a violation of First Amendment rights of the press, but not those of prisoners, is understandable only if one recognizes that he ignores the individual interest in free speech that the First Amendment protects. In his *Saxbe* dissent, Justice Powell noted that the First Amendment protects two kinds of interests:

> There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way.[89]

In resolving a First Amendment issue, Justice Powell presumably would balance both of these interests against any government interest allegedly served by a restriction on free speech. The government interests in a ban on inmate-press interviews are related to "security considerations,"[90] which may possibly arise from severe disciplinary problems generated by the interviews.[91] These interests do not vary depending on whether the inmate or the press challenges the ban. Thus, for Justice Powell to reach different conclusions for inmates and the press regarding their challenges to the ban on interviews, he must attach a different weight to the First Amendment interests asserted by each. According to him, the First Amendment rights of the press are closely linked to society's interest in being informed of the affairs of government. That interest is obviously one to which Justice Powell attaches great weight;[92] however, he pays little attention either to the "individualistic values" of the First Amendment[93] or to the prisoner's interest in First Amendment rights, which serves largely the individual "human spirit" rather than "the polity."[94]

It is not unusual in First Amendment cases for the Supreme Court to be influenced by society's interest in being informed of the affairs of govern-

88. *Id.* at 835-36 (Powell, J., concurring in part and dissenting in part).

89. Saxbe v. Washington Post Co., 417 U.S. 843, 862 (1974) (Powell, J., dissenting) (quoting Z. CHAFFEE, FREE SPEECH IN THE UNITED STATES 33 (1954)).

90. Pell v. Procunier, 417 U.S. 817, 830 (1974).

91. *Id.* at 832.

92. Saxbe v. Washington Post Co., 417 U.S. 843, 861-63 (1974) (Powell, J., dissenting); Pell v. Procunier, 417 U.S. 817, 835-36 (1974) (Powell, J., concurring in part and dissenting in part).

93. Saxbe v. Washington Post Co., 417 U.S. 843, 862 (1974) (Powell, J., dissenting).

94. Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall & Brennan, JJ., concurring).

ment. After all, that is what some would call the central purpose of the First Amendment.[95] It is likewise not unusual for the Court to include a reference to the interests of society among its justifications for any decision. It *is* unusual, however, for justices in First Amendment cases to completely ignore the personal interest the speaker has in communication. Only Justices Brennan, Marshall, and Douglas have expressly acknowledged the individual interests that First Amendment freedoms involve for prisoners.[96]

3. The Equal Protection Emphasis

The Court appears to emphasize the equal protection aspects of First Amendment claims of prisoners. In so doing, the Court is reluctant to protect any inmate's First Amendment rights unless prison officials have already, in some way, extended that right to other inmates. Two relatively early Supreme Court opinions, *Cooper v. Pate*[97] and *Cruz v. Beto*,[98] suggest that the Court may only be willing to protect prisoners' First Amendment rights against unequal restrictions imposed by prison administrators. Although both of these decisions have been cited for the proposition that prisoners retain First Amendment rights during incarceration,[99] the opinions themselves are sufficiently ambiguous to be read as standing only for the proposition that prison officials must not deny First Amendment privileges in an unequal manner.

In *Cooper*, a prisoner alleged that because of his religious beliefs he was denied permission to purchase "religious publications and denied other privileges *enjoyed by other prisoners*."[100] The Supreme Court did not reach the merits of the First Amendment issue, but noted that the prisoner's complaint stated a cause of action and remanded the case for consideration of the merits of the complaint. The Court's opinion, at a minimum, could be construed as an affirmance of a prisoner's right not to be treated differently from other prisoners solely because of his religious beliefs.[101] The same is true of the Supreme Court's characterization of the complaint in *Cruz*. Although the Court in *Cruz* made some relatively broad statements about prisoners' constitutional rights, those statements did not necessarily relate to the merits of the complaint. They concerned the right of access to the courts,

95. *See, e.g.*, Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

96. Procunier v. Martinez, 416 U.S. 396, 422-23 (1974) (Brennan & Marshall, JJ., concurring); *id.* at 428 (Douglas, J., concurring in the judgment).

97. 378 U.S. 546 (1964).

98. 405 U.S. 319 (1972).

99. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 556 (1974); Procunier v. Martinez, 416 U.S. 396, 422 & n.1 (1974) (Marshall & Brennan, JJ., concurring).

100. 378 U.S. 546 (emphasis added).

101. *See also* Cooper v. Pate, 324 F.2d 165, 166 (7th Cir. 1963).

which the district court presumably denied to Cruz when it refused to grant him a hearing on the merits of his complaint.[102] In addressing the merits of the case, the Court described the complaint as essentially alleging a denial of equal protection.[103] The per curiam opinion of the Court stressed the fact that Cruz claimed he was being denied a freedom to practice religion "comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts."[104] Thus, although Justices Marshall and Brennan cite *Cruz* as authority for the proposition that "a prisoner does not shed . . . basic First Amendment Rights at the prison gate,"[105] and a subsequent majority opinion cited *Cruz* in passing for the proposition that prisoners enjoy "substantial religious freedom,"[106] it is possible that the position taken by Justice Rehnquist in *Cruz* represents more clearly its significance: "Presumably prison officials are not obligated to provide facilities for any particular denominational services within a prison, although once they undertake to provide them for some they must make only such reasonable distinctions that they may survive analysis under the Equal Protection Clause."[107] Under both *Cooper* and *Cruz*, it is arguably unclear whether the Court will protect an inmate's First Amendment rights unless prison officials discriminate between different classes of inmates in allowing the exercise of those rights.[108]

In other First Amendment cases, the Court's equal protection emphasis is more subtle. It may arise simply because the Court, in deferring to the so-called "expertise" of prison officials,[109] entertains a presumption that the best and most reliable evidence of the inconsistency of a particular First Amendment right with institutional needs is the prison officials' failure to

102. The right of access language could also refer to one of the allegations in Cruz's complaint. *See* Cruz v. Beto, 445 F.2d 801, 802 (5th Cir. 1971).

103. 405 U.S. at 320.

104. *Id.* at 322. *See also* Cruz v. Beto, 445 F.2d 801, 802 (5th Cir. 1971). The only First Amendment claim raised by Cruz was his assertion that being deprived of newspapers and other reading materials infringed his First Amendment right to learn about national affairs. *Id.* The Supreme Court opinion did not even refer to this claim.

105. Procunier v. Martinez, 416 U.S. 396, 422 & n.1 (1974).

106. Wolff v. McDonnell, 418 U.S. 539, 556 (1974).

107. 405 U.S. at 324 (Rehnquist, J., dissenting). Although Justice Rehnquist made these remarks in a dissent in *Cruz*, they are descriptive of what he believes to be the assumption of the entire Court. There is no intimation that he and the other members of the Court disagree on this point.

108. Even an equal protection perspective does not guarantee protection for First Amendment rights, however. In Jones v. North Carolina Prisoners' Labor Union, Inc., 45 U.S.L.W. 4820 (U.S. June 23, 1977), the Supreme Court refused to hold unconstitutional prison regulations limiting mailing of union-related materials and meetings under the equal protection clause because prison regulations did not similarly restrict other prisoner organizations.

109. Wolff v. McDonnell, 418 U.S. 539, 600 (1974) (Douglas, J., dissenting in part and concurring in the result in part).

extend that right to any prison inmate.[110] That is, once prison officials extend a particular First Amendment right to any inmate, the Court may be persuaded that the privilege is compatible with institutional needs and objectives, and the Court may require the prison officials to justify any subsequent denial of the privilege to other inmates. If, however, prison officials consistently deny a particular privilege equally to all inmates, the Court will not be persuaded by other evidence that the privilege can feasibly be extended to inmates without sacrificing institutional objectives.

The heavy presumption that arises because of the Court's deference to the expertise of prison officials is suggested in the cases of *Pell v. Procunier*[111] and *Saxbe v. Washington Post Co.*[112] Both involved First Amendment challenges to prison restrictions in inmate-press interviews. In *Pell*, prisoners claimed the First Amendment right, while in *Saxbe* it was claimed by journalists. The Court in *Pell* stated that, "in the absence of substantial evidence in the record to indicate that the [prison] officials have exaggerated their response to these [institutional] considerations, courts should ordinarily defer to their expert judgment in such matters."[113] In regard to *Pell*, it is difficult to assess just what sort of evidence would amount to "substantial evidence" of an exaggerated response to institutional needs. In relation to *Saxbe*, however, where the Court also accorded great deference to the expertise of prison officials,[114] it is possible to evaluate the precise meaning of "substantial evidence."

It was argued in *Saxbe* that the United States Bureau of Prisons could not constitutionally adopt a sweeping ban on press interviews with specific prisoners, but must narrowly draft a selective policy that would preclude interviews only in those instances when they would create severe disciplinary problems.[115] The Director of the Bureau of Prisons objected that a

110. The willingness of the Court to defer to the expertise and discretion of prison administrators became undeniably apparent in Jones v. North Carolina Prisoners' Union, 45 U.S.L.W. 4820 (U.S. June 23, 1977), in which the Court repeatedly insisted on that deference. *Id.* at 4821-22, 4822, 4824, 4825.

111. 417 U.S. 817 (1974).

112. 417 U.S. 843 (1974).

113. 417 U.S. at 827.

114. The Court in *Saxbe* overturned a district court decree that prison officials could deny press interviews only if they found that a particular interview would lead to disciplinary problems. The Court reached this result by deferring to the "expert and professional judgment" of prison officials that "such a selective policy would spawn serious discipline and morale problems of its own by engendering hostility and resentment among inmates who were refused interview privileges granted to their fellows." 417 U.S. at 849.

Although the Court did not confront the issue of prisoners' rights in *Saxbe*, its analytical approach is relevant to this discussion. Presumably the Court would have weighed the evidence of the institutional need for a ban on press-inmate interviews from the same perspective had it been presented by prisoners in the companion case of *Pell*.

115. *Id.* at 844-45.

selective policy should not be required because " 'one of the very basic tenets of sound correctional administration' is 'to treat all inmates incarcerated in [the] institutions, as far as possible, equally.' "[116] The Supreme Court acknowledged that this "expert and professional judgment is, of course, entitled to great deference."[117] In spite of the fact that extensive evidence regarding the effect of the interview ban on prisoner-press communication[118] and the limited disciplinary problems engendered by such communications had been presented,[119] and in spite of the fact that the district court found from the evidence that "the remedy of no interview of any inmate is broader than is necessary to avoid the concededly real" disciplinary problems,[120] the Supreme Court appeared unwilling to recognize a First Amendment right as long as the impact of that denial was felt equally by all inmates. Thus, no amount of evidence was "substantial" enough to outweigh the presumption of consistency raised by the Board's refusal to extend the interview right to any inmate.

The Court avoided actually deciding the *Saxbe* case on the basis of the Bureau of Prison's opposition to an interview policy that would not treat all inmates equally. Instead, it decided that bans on face-to-face interviews between inmates and representatives of the news media did not violate the First Amendment because " '[n]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.' "[121] Even that analysis incorporates an equal protection perspective. As the dissenting justices noted, the Court justified the interview ban (and presumably could justify any restriction on First Amendment rights in the prison setting) simply because it had an equal impact upon all concerned.[122]

The major problem in this analysis is that, by definition, an equal protection approach gives prison officials the ultimate choice of what rights or privileges prisoners will enjoy. In applying an equal protection standard, the Court has only to determine whether the Constitution requires equal

116. *Id.* at 849. (quoting testimony of the Director of the Bureau of Prisons).

117. *Id.*

118. *Id.* at 853 n.4.

119. *Id.* at 866-69.

120. *Id.* at 868. Testimony from penal administrators in four jurisdictions having an "open-interview" policy was included. *Id.* at 869 n.15.

121. *Id.* at 849-50 (citing Pell v. Procunier, 417 U.S. 817, 834 (1974)).

122. 417 U.S. at 857 (Brennan, Marshall & Powell, JJ., dissenting). *See also* Pell v. Procunier, 417 U.S. 817, 839-42 (1974). The Supreme Court may soon elaborate on its decisions in *Pell* and *Saxbe*. Mr. Justice Rehnquist has granted a stay of an injunction giving the media greater access than is enjoyed by members of the general public to the jail of Alameda County, California. He perceives the issue in the case to be whether *Pell* and *Saxbe* require adherence to a "no greater access" standard, or whether such a standard is applicable only when prison officials have already afforded substantial press and public access to a prison. *See* Houchins v. KQED, Inc., 97 S. Ct. 773 (1977).

treatment of all prisoners once prison officials choose to give some prisoners a particular privilege; it does not have to decide whether the government is constitutionally required to extend to any inmate a particular First Amendment right that has been denied to all inmates.

To be sure, the First Amendment does depend, to some degree, on notions of equality.[123] The Court has not, however, generally substituted an equal protection analysis for traditional First Amendment tests.[124] Moreover, when the Court makes such a substitution in other contexts, the equal protection standard operates to protect the First Amendment rights of free persons in a way in which it cannot protect those of prisoners. For example, if restrictions on free speech are subjected to equal protection review, one can be almost certain that the free speech of unincarcerated persons will be broadly protected. That protection exists because the only way in which a government can suppress, for example, a dissident's political speech without denying equal protection is for it also to suppress the speech of all other political groups. Because the impact of an equally-applied prohibition of all political speech would be felt not only by dissidents but also by lawmakers and majority political groups, the principle of equality would be an effective check on the suppression of dissident political speech. If, however, the only constitutional restriction on prison regulations prohibiting dissident political speech among inmates is that all inmates be treated equally, the speech of politically dissident prisoners is likely to be curtailed. Prison officials who are told that they can prohibit the political speech of inmates as long as they do so with respect to all prisoners will have an incentive to withdraw the privilege of speech from *all* inmates in order to suppress that of the dissidents. Such a withdrawal would satisfy the equality concerns of the Supreme Court, would be permissible as long as the Court refused to define the substantive First Amendment rights of prisoners according to traditional tests, and, having no impact on the unincarcerated lawmakers, would not motivate them to refrain from suppressing political speech. An equal protection analysis would offer protection to prisoners only if the Court were to compare prisoners' First Amendment rights with those of free persons. Such a comparison is unlikely, given the fact that the Court has accepted a similar comparison in only a limited number of cases, none of which pertains directly to prison conditions.[125]

123. *See, e.g.*, Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975) [hereinafter cited as Karst]. *See also* Police Dep't v. Mosley, 408 U.S. 92 (1972).

124. *See* Karst, *supra* note 123.

125. *See, e.g.*, Cochran v. Kansas, 316 U.S. 255 (1942), in which a prisoner alleged that prison officials prevented him from filing a petition with a court, which prejudiced his right of appeal. The Supreme Court said that if the allegations were true, a violation of the prisoner's equal protection rights had occurred because Kansas had re-

The Court's First Amendment analysis is as unsatisfactory for prisoners as its due process analysis. Because of the Court's reliance on a lenient constitutional test of consistency, its disregard of the individual interests protected by the First Amendment, and its use of an equal protection standard for First Amendment analysis in the prison setting, prison officials are left with the ultimate choice of what First Amendment rights prisoners may enjoy.

D. Access to the Courts

The inmate's right of access to the courts is another right that has been directly confronted by the Supreme Court. Since *Ex parte Hull*,[126] the right of access has been zealously guarded by the Court, but its exact source and scope were uncertain. In *Procunier v. Martinez*[127] and *Wolff v. McDonnell*,[128] however, the Court did pinpoint the due process clause as the source of the constitutional right of access to the courts.[129] The standard used by the Court to evaluate that right was simply that "[r]egulations and practices which unjustifiably obstruct the availability of professional representation or other aspects of the rights of access to the courts are invalid."[130] If there are "reasonable alternatives" to the particular legal avenue to the courts cut off by the challenged prison regulation, that regulation does not interfere with the right of access.[131] The test of unjustifiability and the reasonable alternatives analysis of *Martinez* and *Wolff* are comparable to the First Amendment analysis and test of consistency used in *Pell v. Procunier*[132] and *Jones v. North Carolina Prisoners' Union*.[133]

In addition, in both *Martinez* and *Wolff*, the Supreme Court approached the issue in the same manner in which it approaches prisoners' First

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fused him privileges of appeal that it afforded to persons not in prison. In several cases the Court has stated that persons charged with or convicted of crimes have the same right as other persons to procedural protections of the state before they can be civilly committed. *See, e.g.*, Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Baxstrom v. Herold, 383 U.S. 107 (1966).

126. 312 U.S. 546 (1941). In addition to *Hull* the Supreme Court in three other decisions has restricted state conduct on the ground that it has interfered with a constitutional right of access to the courts: Wolff v. McDonnell, 418 U.S. 539 (1974); Procunier v. Martinez, 416 U.S. 396 (1974); Johnson v. Avery, 393 U.S. 483 (1969). *See also* Cruz v. Beto, 405 U.S. 319 (1972).

127. 416 U.S. 396 (1974).

128. 418 U.S. 539 (1974).

129. The right of access could also be viewed as a First or Sixth Amendment right. *See* Wolff v. McDonnell, 418 U.S. 539, 575-76 (1974).

130. Procunier v. Martinez, 416 U.S. 396, 419 (1974).

131. 417 U.S. 817 (1974); 393 U.S. 483, 490 (1969). See text accompanying notes 75-81 *supra*.

132. 417 U.S. 817 (1974).

133. 45 U.S.L.W. 4820 (U.S. June 23, 1977).

Amendment rights: from an equal protection perspective. In *Martinez*, invalidating as unconstitutional a prison's absolute ban on interviews by persons other than licensed attorneys or private investigators, the Court emphasized the unequal impact of the rule on indigents.[134] The Court also noted that the state had made an irrational distinction between law students participating in law school assistance programs and law students employed by private practicing attorneys; the former could interview inmates, while the latter could not.[135] In *Wolff*, the Court expressed an equal protection concern for the class of indigent and illiterate inmates[136] when it directed the district court to determine whether a prison rule restricting inmate legal assistance complied with its holding in *Johnson v. Avery*.[137] In *Johnson*, an inmate had alleged that access of prisoners to the courts was obstructed by a regulation that prohibited prisoners from assisting one another in the preparation of petitions for writs of habeas corpus. All members of the Supreme Court, including the dissenters, emphasized the fact that the regulation effectively deprived one class of inmates, the illiterate and the indigent, of access to courts available to others.[138]

A recent Supreme Court majority of seven justices in *Bounds v. Smith*[139] held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[140] In reaffirming its per curiam decision in *Younger v. Gilmore*,[141] the Court emphasized that the right of access to the courts could be achieved by allowing the states to experiment with a variety of legal services for prisoners, including libraries, para-legal assistants, law student volunteers, or hiring of attorneys as full-time or part-time prison staff lawyers. The majority stressed that "a legal access program need not include any particular element we have discussed, and we encourage local experimentation."[142] The constitutional boundaries of such local experimentation, however, remain unclear.

134. 416 U.S. at 420. *See also* Younger v. Gilmore, 404 U.S. 15 (1971), *aff'g* Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970) (requiring state officials to provide indigent inmates with access to a reasonably adequate law library).

135. 416 U.S. at 421.

136. 418 U.S. at 579.

137. 393 U.S. 483 (1969).

138. *Id.* at 487. *Id.* at 493-98 (Douglas, J., concurring). In addition, see the emphasis in Bounds v. Smith, 97 S. Ct. 1491 (1977).

139. 45 U.S.L.W. 4411 (U.S. April 27, 1977).

140. *Id.* at 4414.

141. 404 U.S. 15 (1971).

142. 45 U.S.L.W. at 4415.

Implicit in the Court's right of access decisions is a deference to state interests[143] and expertise,[144] but not to the extent manifested in the Court's opinions respecting other constitutional rights. Perhaps that is because a prisoner's right of access to the courts is one about which the Supreme Court is particularly sensitive. In any event, the Court's protection of a right of access operates in the same manner that the Court's initial rejection of the jurisdictional hands-off doctrine operated: it in no way affords extensive recognition of substantive constitutional rights. In fact, as Justices Brennan and Marshall note in their dissent in *Jones v. North Carolina Prisoners' Union*, the zealous safeguarding of the right of access to the courts, coupled with the refusal to recognize other, substantive constitutional rights, leaves prisoners "ironically . . . with a right of access to the courts . . . but no substantive rights to assert once they get there."[145]

E. The Eighth Amendment

Perhaps it is premature to attempt a discussion of the Supreme Court's application of the Eighth Amendment to prison conditions. The Court has yet to consider the merits of a fully-adjudicated Eighth Amendment claim that prison conditions are unconstitutional.[146] In *Estelle v. Gamble*,[147] however, it recently undertook a discussion of the Eighth Amendment's applicability to prison conditions. Because of the nature of the Court's comments in the case, it is not unreasonable to speculate that whatever the Court eventually delineates as the precise scope of the Eighth Amendment, it will nevertheless accord substantial deference to prison officials and their interests.

In *Gamble*, the Court held that the Eighth Amendment's prohibition on cruel and unusual punishment is a restriction on the conditions under which a person may be incarcerated.[148] *Gamble* involved an alleged failure to

143. In Johnson v. Avery, 393 U.S. 483, 496-98 (1969) (Douglas, J., concurring), Justice Douglas mentioned the therapeutic value of inmate preparation of petitions alleging constitutional rights, and its role in expanding legal assistance to inmates. Rehabilitation is a societal interest.

144. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 420 (1974): "The extent to which that right [of access to the courts] is burdened by a particular regulation or practice must be weighed against the legitimate interests of penal administration and the proper regard that judges should give to the expertise and discretionary authority of correctional officials."

145. 45 U.S.L.W. at 4827.

146. In Burrell v. McCray, 96 S. Ct. 2640 (1976), the Court declined an opportunity to hold prison conditions unconstitutional. See notes 20 and 33 *supra*.

147. 429 U.S. 97 (1976). The discussion arose in a review of the lower court's dismissal of a complaint for failure to state a claim.

148. *Id.* at 102-06. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

provide medical care to a prisoner, a complaint far different from those involving sentencing; these are frequently the basis of Eighth Amendment challenges.[149] To the extent that the Court recognized the applicability of the Eighth Amendment to a denial of medical care, it might be argued that in *Gamble* the Court made a decision to broaden constitutional restrictions on prison conditions and practices. The *Gamble* decision, however, erects potential Eighth Amendment barriers to interference with prison administration. In the first place, the Court in *Gamble* applied the Eighth Amendment to a failure to provide medical care, stating "In the worst cases, such a failure may actually produce physical 'torture or a lingering death,' . . . the evils of most immediate concern to the drafters of the Amendment."[150] Thus, the Court extended the amendment to cover a situation in which a prisoner actually suffered physical pain. It said nothing about whether the amendment should be applied to restrict administrative decisions or prison conditions that cause, for example, severe emotional stress or strain rather than the physical torture that was of immediate concern to the drafters of the amendment.

Similarly, the Court may hesitate to subject prison conditions and administrative decisions to the traditional Eighth Amendment test of consistency with contemporary standards of human decency unless actual physical pain is involved. The Court traditionally employs an Eighth Amendment test of constitutionality that evaluates challenged punishments in light of "contemporary values"[151] and the "evolving standards of decency that mark the progress of a maturing society."[152] In *Gamble*, the Court did state that in less serious cases of failure to provide medical care, "denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose," and that the "infliction of such unnecessary suffering is inconsistent with contemporary standards of decency."[153] The Court was careful, however, to apply the test of contemporary values only when those values might be offended by the infliction of unnecessary physical pain. It did not hold that the Eighth Amendment would be violated by administrative practices that are objectionable merely because they serve no penological purpose or are offensive to contemporary standards of decency for some other reason. Thus, administrative decisions and prison conditions inflicting no unnecessary pain may be beyond the purview of the Eighth Amendment

149. A large number of opinions have dealt with the sentence itself; *see, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976) (death penalty); Trop v. Dulles, 356 U.S. 86 (1958) (forfeiture of citizenship). Others have dealt with the reasons for which an individual can be imprisoned. *See, e.g.*, Robinson v. California, 370 U.S. 660 (1962) (narcotics addiction).

150. 429 U.S. at 103 (citation omitted).

151. Gregg v. Georgia, 428 U.S. 153, 173 (1976).

152. Trop v. Dulles, 356 U.S. 86, 101 (1958).

153. 429 U.S. at 103 (citations omitted).

even if they conflict with contemporary standards of decency. In this event, the Eighth Amendment will afford little protection to prisoners. Moreover, by definition, a constitutional test based on contemporary standards of decency places few limitations on the treatment of prisoners. If the public tolerates any specific prison condition, the Court will likely refuse to alter that condition by judicial decision. In fact, in prior searches for contemporary standards of decency that are the basis of the Eighth Amendment test of constitutionality, the Court has relied on legislative approval as objective evidence of what punishments are consistent with those standards of decency.[154] Thus, in *Gamble* the Court found evidence of contemporary standards of decency in the fact that modern legislation and the common law imposed a duty on prison officials to give medical care to inmates not in a position to care for themselves.[155] As long as the Eighth Amendment's test of constitutionality depends on public acceptance of government practices, the amendment will afford prisoners only minimal protection against government actions.[156]

More significantly, the Court in *Gamble* placed a possible further limitation on the Eighth Amendment's applicability to prison conditions. The Court indicated that it would rely on the subjective intent of prison administrators in determining whether the Eighth Amendment has been violated. Over Justice Stevens' dissent,[157] the Court carefully limited its discussion of the Eighth Amendment's application in denials of medical treatment to instances of "deliberate indifference to serious medical needs of prison-

154. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 175 (1976), in which the Supreme Court stated that the "legislative judgment weighs heavily in ascertaining such standards," and was influenced by the fact that society, in re-enacting death penalty statutes after Furman v. Georgia, 408 U.S. 238 (1972), appeared to have endorsed the death penalty.

155. 429 U.S. at 103 n.8.

156. The Eighth Amendment would afford even less protection if the Court relied simply on prison practices, rather than legislative standards, as evidence of standards of decency. *See* Procunier v. Martinez, 416 U.S. 396 (1974). There the Court looked to the policies of the Federal Bureau of Prisons and the Association of State Correctional Administrators and stated that the practices "followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction." *Id.* at 412 n.13, 414 n.14. In Wolff v. McDonnell, 418 U.S. 539 (1974), the Supreme Court adverted to a survey of practices in prisons throughout the United States in order to justify both the limitations it placed on rights of cross-examination and confrontation and the guarantees it accorded to prisoners of written notice of disciplinary charges and a statement of evidence. *Id.* at 565 n.16, 567 n.18. The dissenters in *Wolff* described routine prison practices in support of their argument that there is no need for blanket refusals to permit confrontation in prison disciplinary hearings. *Id.* at 587-89 (Brennan & Marshall, JJ., concurring in part and dissenting in part). They also argued for a right of inmate assistance on the ground that forty-one states already provide a substitute counsel to inmates. *Id.* at 592.

157. 429 U.S. at 108.

ers."[158] If the Court refuses to interfere with prison conditions and administrative practices unless deliberate violations of the Eighth Amendment are established, it will minimize the potential impact of the amendment on prison conditions.

An argument has been made that the Eighth Amendment should be broadly interpreted to apply to administrative decisions and prison conditions that are now left to the discretion of prison officials, because those decisions and conditions have as great an impact on the convicted person as do statutory sentences subject to Eighth Amendment review.[159] The Court has, at least to a limited extent, reached that conclusion in *Gamble*. Its opinion gives no indication, however, that it will be receptive to broad interference with prison administration under Eighth Amendment standards. Rather, it appears that the Court will defer, as in other instances, to existing prison practices.

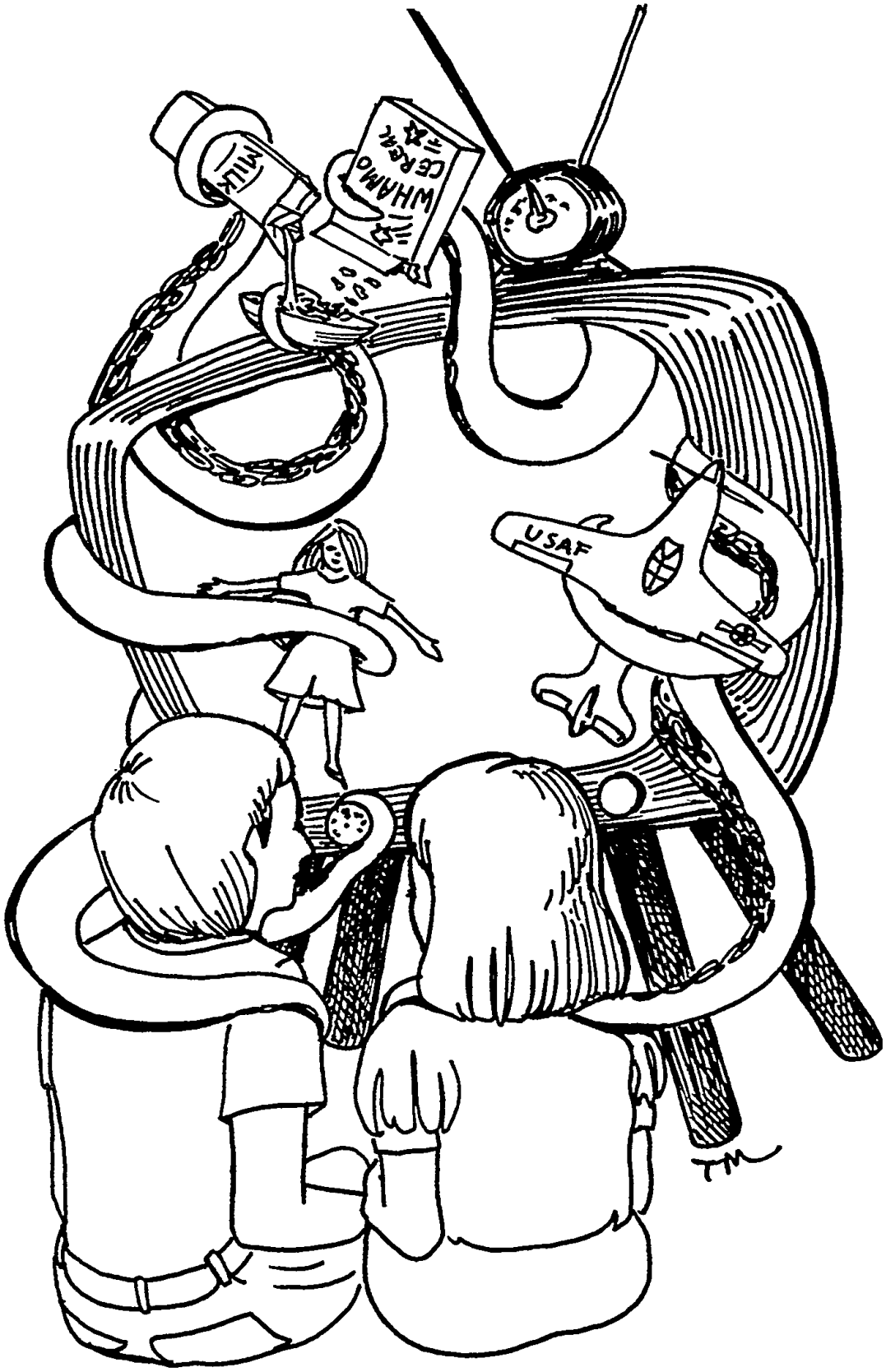
Conclusion

It should be apparent from the preceding description of the current status of prisoners' constitutional rights that the Supreme Court is reluctant to abandon the deference traditionally accorded to prison officials. Although the Court may have rejected the hands-off doctrine as a jurisdictional bar to prisoner complaints and may now profess that prisoners have constitutional rights, it still refuses to interfere with prison practices even when those practices threaten preferred constitutional rights. Regardless of the constitutional right for which a prisoner seeks judicial support, the Court will continue to defer to prison officials if it adheres to the analytical method utilized in its recent decisions. Unless the Court confronts and reassesses the wisdom of its analysis, it will continue to permit prisoners to be treated as "really little more than the slave described in the 19th century cases."[160]

158. *Id.* at 104.

159. For an expanded interpretation of the Eighth Amendment that would place restrictions on the discretionary authority given prison officials over prison conditions, see Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 856 (1972). *See also* Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (8th Cir. 1974); James v. Wallace, 382 F. Supp. 1177 (M.D. Ala. 1974).

160. Meachum v. Fano, 427 U.S. 215, 233 (1976) (Brennan, Marshall & Stevens, JJ., dissenting). *See also* Jones v. North Carolina Prisoners' Union, 45 U.S.L.W. 4820, 4825 (U.S. June 23, 1977) (Marshall & Brennan, JJ., dissenting).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