UNITED STATES PRISON LAW

SENTENCING TO PRISON, PRISON CONDITIONS, AND RELEASE—THE COURT DECISIONS

Selected and with Comments
By
Sol Rubin
Counsel Emeritus,
National Council on Crime
and Delinquency

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EDITOR'S NOTE

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CHAPTER 1

LIMITS ON STATE POWER IN PRISONS: THEORETICAL, REALISTIC

The cases in this volume, as in any other on prison law, tell the state of the law--at the moment--on the degree to which the state or the federal government, through departments of correction, wardens, and guards, may control prisoners. They also portray, quite well, the real conditions in prisons. What they reveal is that the theory of the law, that is, the statement of what the law "is," is in marked contrast to what prisons are. The divergence is great. Prison law is relatively humane, guided by constitutional provisions that prohibit cruel treatment and guarantee due process of law and equal treatment. Prisons in reality are quite different from this theoretical picture.

The cases necessarily reflect the realities of prison life, for they are, indeed, a response to those realities. It is the increasing recognition by the courts (by the law) of the cruelty and autocracy of prisons that brings forth declarations and requirements of humane treatment and fair procedures.

What do the cases reveal? Wolff v. McDonnell, a case in chapter 4 decided by the Supreme Court of the United States, notes: "Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace." Wright v. McMann, a United States Court of Appeals case in chapter 6 (citing a district court): "The association between men in correctional institutions is closer and more fraught with danger and psychological pressures than is almost any other kind of association between human beings." In human terms, every prisoner fears a stabbing or homosexual attack, at any time, unprotected by guards, or harassment or a variety of humiliating or destructive acts or orders of guards; or he is himself a prisoner who is an aggressor, who at any time may assault his fellow inmates or victimize them.

The latter kind of prisoner or guard may be psychologically disturbed or may be merely responding to prison life. Herbert S. Miller, a lawyer knowledgeable about prison life, writes: "Prisons destroy human individuality and arouse incredible bitterness. The inmate discovers that he must be tough to survive and violence becomes the proper mode for settling all disputes."--"The Lawyer's Hang-Up: Due Process Versus The Real Issue," 11 American Criminal Law Review 197, 204 (1972), supported by numerous citations.

These summary observations are representative not of a selective view of prisons, but of almost every view of prisons one encounters or seeks. The cases have been selected to best elucidate prison law, but they accurately reflect prison life. They correspond to the numerous studies, such as those made by and for the United States Commission on Civil Rights, e.g., Colorado Prison Study, by the Colorado Advisory Committee (September 1974). The judges have not sought education in this field, but could not escape it. After a week of hearings, Federal District Judge Luther L. Bohannon ordered the state of Oklahoma to stop mistreating inmates. He said, "I had no idea of the deep cruelty inmates were subjected to."--New York Times, March 18, 1974. (The case is Battle v. Anderson, 376 F. Supp. 402 (D.C. Okla. 1974).)

But law that is made in the appellate courts does not necessarily reflect this view. In this volume we see instances of appellate courts watering down controls that trial courts imposed, relying on the good will of administrators; and sometimes we see appellate courts do the opposite, recognizing the validity of claims that trial courts had dismissed as frivolous or otherwise sustaining the power of administrators. What evolution is to occur in prison law depends in large part on whether the view of prisons taken by the courts is a realistic one or a mythical one.

A Mythical View of Prisons

In chapter 1 of volume I we examined the myths underlying the policy of the courts of hands-off prison administration. With most courts no longer adhering to the hands-off policy, and with the Supreme Court of the United States having adopted a hands-on policy (Procunier v. Martinez, and comments thereon, in chapter 2, but cf. Stokes v. Bruce, in chapter 7), it is feasible to look at the decisions for an insight into the view of prisons taken by the courts. We can usually count on specific holdings to be reflective of this view. Such a scan could profitably be done for all or any courts. Here we limit ourselves to noting the views of the Supreme Court expressed in its decisions.

In Procunier v. Martinez (in chapter 2), the Court permits censorship, which other courts would not, with quite general criteria subject to interpretation by administrators. It says, "While the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation, the legitimate governmental interest in the order and security of penal institutions justifies the imposition of certain restraints on inmate correspondence."

In Wolff v. McDonnell, in chapter 4, the Court deals with procedure in determining violations of regulations by inmates and

assessing punishments. As noted in the comment--and as is evident in the case--its hands-on policy serves to reduce protections the Court of Appeals would have required. The basis for its doing so is the fairly novel view that the lesser requirements, that is, the greater authority for administrators, are protective of inmates, a view at variance with that of the inmates and of other courts, even courts that do not support heavy due process requirements.

The Court says: "Disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authorities and between inmates who are being disciplined and those who would charge or furnish evidence against them. Retaliation is much more than a theoretical possibility; and the basic and unavoidable task of providing reasonable personal safety for guards and inmates may be at stake, to say nothing of the impact of disciplinary confrontations and the resulting escalation of personal antagonism on the important aims of the correctional process."

The implication is that evidence adduced will foster antagonism between inmate and inmate, and retaliation will be by inmate against inmate; but the experience is that retaliation is by guards, or inmates doing the bidding of guards. Or is the Court obscurely implying that open hearings, testing the credibility of guards who charge inmates with infractions, will bring retaliation by guards, and thus it protects inmates by restraining the openness of disciplinary hearings?

Keeping the hearing fairly autocratic seems to the Court to be consistent with the "disciplinary process as a tool to advance the rehabilitative goals of the institution." This occurs in its comments on behavior modification. It has a kindly view of discipline as a part of behavior modification, which it evaluates sympathetically, at least in generality. It is an appreciation of behavior modification that prisoners, other courts, and many other view with fear and horror. (The subject is dealt with in chapter 5, "Imposed Therapy," and passim in other cases, e.g., Sostre v. McGinnis, chapter 4, refusal to participate in group therapy punished by solitary confinement.)

The Court says: "It is pressed upon us that the proceedings to ascertain and sanction misconduct themselves play a major role in furthering the institutional goal of modifying the behavior and value systems of prison inmates sufficiently to permit them to live within the law when they are released. Inevitably there is a great range of personality and character among those who have transgressed the criminal law. Some are more amenable to suggestion and persuasion than others. Some may be incorrigible and would merely disrupt and exploit the disciplinary process for their own ends. With some, rehabilitation may be best achieved by simulating procedures of a free society to the maximum possible extent; but

with others, it may be essential that discipline be swift and sure.[14] [14. See generally, Bandora, Principles of Behavior Modification (1967); Krasner & Ullman, Research in Behavior Modification (1965); Skinner, Science and Human Behavior (1953).] In any event, it is argued, there would be great unwisdom in encasing the disciplinary procedures in an inflexible constitutional straitjacket that would necessarily call for adversary proceedings typical of the criminal trial, very likely raise the level of confrontation between staff and inmate and make more difficult the utilization of the disciplinary process as a tool to advance the rehabilitative goals of the institution."

The choice of citations is selective and reassuring, to the Court, but its unrealistic contrast to what occurs in prisons is not reassuring to prisoners, or to the hope of reform of prisons, or to the hope of peaceable, nonviolent prisons.

A Mythical View of Prison Administration

The Supreme Court's view of prisons, seen through its description of disciplinary punishments, behavior modification, and other observations, contains the implication that much power lies with the prisoners, rather than with administration, guards and other personnel. As one reads the cases that are contained in this (and the next) volume, or any other collection of cases on prison law, that hardly seems realistic. Prisoners have the "power" to stop work, or even to riot, but at a terrible cost to them, as we see in the cases. Even the Attica experience (Chapter 2), like other prison riots, was not an attempt on the part of prisoners to take over institutions and run them, but to convey to administrators and the public the pressing need for rather moderate reforms.

Somewhat the same concept is implicit in the Court's comparison of prison and parole in relation to the degree of due process afforded in the two settings. Until recently, until the Supreme Court's 1972 decision in Morrissey v. Brewer, which it cites in Wolff v. McDonnell, the prevailing law of parole was meager in the procedural due process it afforded parolees, principally on the ground that the parole board and officers were paternalistic, and hence that parole revocation was not an adversary situation; Hyser v. Reed, 318 F. 2d 225 (D.C. Cir.), certiorari denied 375 U.S. 957 (1963). This was reversed in Morrissey v. Brewer, in which the court amply justifies procedures applicable to an adversary proceeding. But, it says, the same should not apply in prison disciplinary proceedings, not because the proceedings are not adversary, but because prisons are places of great tension. The cultural and legal lag that prevailed from Hyser v. Reed to Morrissey v. Brewer is evident again, and again it is used to protect the autonomy of administration.

Courts vs. Administrators

Perhaps the legal situation will change when the Court, or other courts, recognizes that the autonomy of administration governs not only control of prisoners and their punishment, but governs their relationship to courts. As the cases in chapter 8 disclose, court orders are often defeated, diffused, or delayed, or all three. A study in California illuminates the methodology employed. Donald P. Baker, Randolph M. Blotsky, Keith M. Clemons, Michael L. Dillard, in their study "Judicial Intervention in Corrections: The California Experience--An Empirical Study," 20 University of California Law Rev. 452 (1973), asked administrators how they reacted to court orders governing prison practices.

They found that "prison administrators generally feel some antagonism towards judicial intervention. If administrators have antagonism toward the source of the change or are opposed to the changes themselves, they can do much to hinder implementation." Several administrators said: "in most instances, latitude exists for interpretation of court orders within which the prison officials can frustrate the court's intentions," and illustrations are given. One administrator noted: "much of the prison staff will almost automatically try to undermine a court-originated change," and thus can cause any new policy to fail.

The authors note that the orders in the oft-cited landmark case of Jordan v. Fitzharris (chapter 4) were undermined. When the suit was filed, the Department of Correction took some action to partially correct the conditions that had been complained of. The result was that the court gave relief in a form that left to the department the determination of how best to correct the offensive conditions existing. Specific relief was limited to the changes that the department had already made. The department anticipates changes the courts may require, and (the authors providing illustrations) "the Department has strenuously resisted many such changes."

They asked the administrators to respond to the following statement: "Court orders and injunctions are usually not effective in accomplishing the changes intended by the judge even though they do result in some changes." Forty percent of administrators agreed, forty-three percent disagreed, seventeen percent were undecided.

Nor is this a response to a wholesale court assault on administrative autonomy. The authors point out: "The most common judicial response is rejection of the petition on its face. Only a minority of the judges interviewed made informal inquiries into an inmate's complaint. Such inquiry typically involved a telephone call by the judge to the institution asking the superintendent to look into the matter," and typically the judge would then deny the petition, although the inmate might get some relief. If not rejected on its face,

the judge usually referred the complaint to an investigating agency, the district attorney, or the attorney general. One case has held it a violation of separation of governmental powers to do so; Reaves v. Superior Court, 22 Cal. App. 3d 587, 97 Cal. Rptr. 866 (3rd Dist. 1971).

What Limits on State Power?

Examining in this volume the limits on state power in prison, summarizing in advance as we have already done, the indications are clear. One: There are few restraints in legislation. As we said in volume I, in the preface to the series, the statutes give power to administration, with few limits. Such events as the Attica riot and its repression (chapter 2) and similar occurrences elsewhere bring hardly any response from the legislatures, and then principally in additional appropriations to bolster the system as it exists. The appendix, "A Model Act to Provide for Minimum Standards for the Protection of Rights of Prisoners," is, as it states, a minimal statement of restraints on state power. Nowhere have state legislatures undertaken to pass comparable statutes, although an occasional item (e.g., restraints on corporal punishment) have been enacted. That is, legislative limits on the power of administrators over prisons and prisoners is almost the least possible.

Two: The courts now entertain prisoner complaints, but the hands-off policy is by no means in the discard; and as we see (particularly in chapter 8 and the comments in this chapter), the hands-on policy of appellate courts often serves as much to restrain trial court limits on administration as to protect prisoners.

Three: As noted in the preface to the series, in volume I, the greatest power lies in the administrators of prisons and other prison personnel. The California study noted above is probably typical of administrative attitudes in most state prison systems. It deals with the administrative attitude toward courts and with the administrative attitude toward management of prisons and prisoners. The attitude is, briefly, one of resentment of limits on administrative power; and where courts attempt to set such limits, applying the Constitution, their efforts are frustrated to a major extent.

Four: Prisons are places of violence, as noted above, and as the experience of the cases reveals. Again turning to the Supreme Court of the United States in Wolff v. McDonnell, the Court says: "Prison disciplinary proceedings . . . take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have repeatedly employed illegal and often violent means to attain their ends. They may have little regard for the safety of others

or their property or for the rules designed to provide an orderly and reasonably safe prison life. Although there are very many varieties of prisons with different degrees of security, we must realize that in many of them the inmates are closely supervised and their activities controlled around the clock. Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace."

The Court says this to stamp such people as not worthy of much due process of law. But whether or not that logic has any validity, the fact is that the violence of the prisons comes not from the previous nature of the people who become prisoners, but from the system itself. For one example (the cases amply supply more) --nowhere outside of prison does the prevalence of homosexual rapes and the violence surrounding the sexual atmosphere even faintly compare with their incidence in prison.

The consequence is that the violent life inside prisons and the violence of riots to protest the conditions, is bound to continue, unless a change occurs in our enumerated factors--legislation imposing limits, courts succeeding more than they have thus far in applying the constitution to prisons, administration striving for prisons less violent than they are today.

But this volume, entitled as it is, State Power and Its Limits, does not portray the entire picture of prison law in the cases. Volume III takes another side, dwelling not on the problems of state power but on the rights of prisoners, a side of the law that is also developing. Perhaps it provides a path, or suggestions of a path, toward change.