1-1-1974

Judicial Misconcepts and the Hidden Agenda in Prisoners' Rights Litigation

B. E. Bergesen III
William G. Hoerger

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview
Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol14/iss4/3
JUDICIAL MISCONCEPTIONS AND THE "HIDDEN AGENDA" IN PRISONERS' RIGHTS LITIGATION

B. E. Bergesen, III* and William G. Hoerger**

During the past five years, the tempo of prisoners' rights litigation has increased sharply.¹ As a result, a growing number of California attorneys have become familiar not only with the statutory and case law governing prisoners' rights, but also with the manner in which California prisons are operated. These attorneys also have become aware, through numerous court appearances, of the way in which state and federal judges perceive the world of prisoners, prison officials, and prisoners' rights litigation.

The thesis of this article is that the perception of the prison world by the California judiciary is, to a large extent, inaccurate. Essential misconceptions include, inter alia, assumptions that virtually all prisoners are by nature undeserving and untrustworthy; that all prison officials are humane and respectable public servants who make reliable witnesses in court; that most petitions filed by

---

¹ In California, this increase in activity can be traced in large part to the killing of three black inmates by a white Soledad guard on January 13, 1970, and the subsequent killing, days later, of another Soledad guard. See generally M. Yee, THE MELANCHOLY HISTORY OF SOLEDAD PRISON (1973) [hereinafter cited as Yee]. After the guard was killed, three black inmates, soon to be known as the Soledad Brothers, were charged with the killing. The activities surrounding this well-publicized case engendered a considerable ferment for prison reform. See, e.g., BLACK CAUCUS REPORT, TREATMENT OF PRISONERS AT CALIFORNIA TRAINING FACILITY AT SOLEDAD CENTRAL (1970) [hereinafter cited as BLACK CAUCUS REPORT]; G. JACKSON, SOLEDAD BROTHER (Bantam ed. 1970); MAXIMUM SECURITY (E. Pell ed. 1973). Significant litigation involving the defendants, apart from the criminal case itself, includes Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971), aff'd, 497 F.2d 809 (9th Cir. 1974) (due process safeguards required at disciplinary hearings) and Drumgo v. Superior Court, 8 Cal. 3d 930, 506 P.2d 1007, 106 Cal. Rptr. 631 (1973) (indigent criminal defendant has no right to select court-appointed counsel). The third defendant, inmate-author George Jackson, was killed by a guard at San Quentin on August 21, 1971, shortly before his co-defendants John Clutchette and Fleeta Drumgo, were tried and acquitted (in San Francisco Superior Court) of the Soledad guard's murder. See also Nolen v. Fitzharris, 450 F.2d 958 (1971) (damage action under the Civil Rights Act on behalf of survivors of three black inmates killed at Soledad in 1970).
prisoners are inherently without merit; that effective state remedies are in fact available to such petitioners; and that injunctive relief against a prison official constitutes an unwarranted intrusion into an area requiring a peculiar expertise which prison officials do, and courts do not, possess. The net result of these assumptions is an underlying judicial hostility to prisoners’ rights litigation which, in the authors’ view, plays a significant role in the outcome of most of these cases.

Historically, the American judiciary has been antagonistic to radical and liberal causes. Indeed, this conflict between the judiciary and radical litigants continues as a major theme in the legal and social history of this country. It can be traced from the days of Eugene Debs and Joe Hill, through the anti-labor injunctions of the 1920’s, the deportation of aliens and prosecution of labor pickets in the 1930’s, and the Communist scare of the early 1950’s, to the civil rights struggle of the 1960’s. To a certain extent, the unfavorable judicial treatment given to litigants on the left has resulted from a fair and often unavoidable application of laws enacted by a conservative legislature. Much of this treatment, however, has its origin in the personal, political and socio-economic views of a conservative judiciary, which is chosen through a political process structured to serve the interests of those in power and to preserve the status quo.²

The conflict between a conservative judiciary and liberal/radical litigants has been especially intense and visible during the 1960s and 1970s. This sharp increase in intensity and visibility has resulted largely from the convergence of (1) an extraordinary succession of left-wing causes, leaders and organizations during the 1960’s;³ (2) a marked increase in the number of ac-

2. See generally, Canon, Characteristics and Career Patterns of State Supreme Court Justices, 77 Case & Com. 27 (July-Aug. 1972); Smith, Equal Justice for All—Myth or Reality (unpublished paper on file at the Santa Clara Lawyer) (undated). See also San Francisco Chronicle, May 22, 1972, at 2, reporting on campaign activity in the election for Superior Court Judge between attorney Vincent Hallinan and incumbent Judge Carl H. Allen. Heading the Allen Committee was a senior partner in a large, conservative San Francisco law firm, who hosted 29 corporate executives “in financier Louis R. Lurie’s 18th floor Mark Hopkins Hotel suite.” Id. On the same day, Coretta King, Bobby Seale and “more than 500 persons paid $25 a plate at a noisy, cheering shishkebob dinner in Hallinan’s honor.” Id.

Unfortunately, there appear to be few if any in-depth studies of the political and socio-economic background of judges or the extent to which such backgrounds affect judicial decision-making. Nor are there detailed studies which reveal the manner in which attorneys are selected for appointment to the bench. Such studies might help to explain the resolution of prisoners’ petitions and other civil rights litigation by state and federal judges.

3. Clearly the two leading “movements” during this period were the civil rights movement and the anti-war movement, both of which emerged with great force to consume the energies and the attention of the people, the press, the gov-
tivist lawyers and legal organizations willing and able to represent such leaders and organizations; and (3) the utilization of the Civil Rights Act to vindicate constitutional rights—the so-called section 1983 suits, effectively launched in 1961 when the United States Supreme Court decided *Monroe v. Pape*. Thus, with government and the courts. Other major movements which emerged in the 1960's were those in support of farm workers and migrant laborers, conservation, welfare rights, women's rights, gay liberation, Indian rights and prisoners' rights. All of these movements, of course, trace their origins to organizations and individuals of earlier times: to the Abolitionists and later protagonists of civil rights; the Quakers and other pacifists; the Suffragettes; and the early labor movement. Yet it seems fair to say that the 1960's were unique insofar as these movements (i) were so numerous; (ii) attracted such large numbers of activists and such widespread coverage in the mass media; (iii) occurred contemporaneously, creating a dynamic interaction with each other; and (iv) made a real, if limited, impact upon the national consciousness, and upon the institutions and policies which were attacked.

4. With the advent of the Office of Economic Opportunity (OEO) Legal Services Program in 1965, substantial (albeit insufficient) organized professional attention finally was paid to the legal problems of the poor. One result of the OEO program was the establishment of a number of Legal Services National Research and Technical Assistance Centers such as the Center on Social Welfare Policy & Law, New York; the Migrant Action Program, Washington, D.C.; the National Consumer Law Center, Boston; and the Youth Law Center, Western States Project, San Francisco. See generally F. Marks, K. Leswing & B. Fortinsky, *The Lawyer, The Public, and Professional Responsibility* 41-64 (1972) [hereinafter cited as Marks]. However, these so-called “back-up centers”—which initiated and supported class action lawsuits designed to make significant changes in the law as it relates to the poor—have been opposed bitterly by conservative elements and at this writing are being largely eliminated pursuant to a compromise reached by former President Nixon and leaders of the United States Senate. San Francisco Chronicle, July 13, 1974, at 5. One private activist approach has been the recent development of “public interest law firms,” legal organizations which take an issue-oriented approach. Examples would include the Native American Rights Fund, Berkeley; the Center for the Study of Responsive Law, Washington, D.C.; and Public Advocates, Inc., San Francisco. There also exists an increasing number of private lawyers who consider themselves, and are considered by others, to be “public interest lawyers.” Marks, *supra* at 151-85; *The Relevant Lawyers* (A. Ginger ed. 1972). Other developments have included the emergence of issue-oriented legal communes, representing attempts by lawyers and para-professional legal workers to integrate professional roles with personal lives and community identity. Case-oriented law collectives have also evolved. These ad hoc legal defense and/or support organizations respond to labor and civil rights organizing efforts and the accompanying criminal prosecutions of activists (e.g., the Wounded Knee Legal Defense/Offense Committee, South Dakota). See generally 3 Guild Notes (1974). One index of the increase in activist lawyers has been the re-emergence in the past six years of the National Lawyers Guild. White, *Who Is The Guild?*, 3:1 Guild Notes 12 (January, 1974).


> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

For contemporary discussions of the *Monroe* case see generally Bickel, *The Su-
relatively little preparation the federal judiciary has been re-
required to shift a large part of its attention from the commercial 
and criminal cases which had theretofore constituted the bulk of 
its docket to a new type of claim and party litigant and often a 
new kind of attorney.6

Moreover the differences between litigating a commercial case 
and a civil rights case are substantial and pervasive. In commercial 
cases there are few material, ideological differences between the 
corporate litigants or between these litigants and the judges who 
preside over the cases. Such differences are usually pronounced, 
however, in section 1983 litigation, which typically aligns poor 
and/or minority group plaintiffs seeking to establish a constitu-
tional right against governmental officials seeking to defend the 
power of the state.

Compounding this deep-seated ideological conflict is the 
vague and open-ended nature of the constitutional standards to 
be applied in deciding civil rights cases. When a section 1983 
plaintiff invokes the first or the eighth amendment, or the due 
process or equal protection clause of the fourteenth amendment, 
he is usually asking a federal judge to determine whether or not 
a litigant is asserting a "preferred" or a "fundamental" right; 
whether a defendant government official must or can show that 
his actions promote a "compelling state interest" or are "rationally

6. The number of civil cases filed in United States District Courts increased 
from 58,293 in fiscal year 1961 to 98,560 in fiscal year 1973, a growth of 69.1 
percent. In fiscal year 1961, civil rights actions—exclusive of prisoners' petitions 
predicated on civil rights claims—accounted for 296 filings (0.5 percent of total 
civil filings), while in fiscal year 1973, such actions accounted for 7,679 filings 
(7.8 percent of total filings)—an increase of 2,494.3 percent in the number of 
filings.

The number of prisoner petitions climbed from 2,609 in fiscal year 1961 (4.5 
percent of total civil filings) to 17,218 in fiscal year 1973 (17.5 percent of 
civil filings), a growth of 559.9 percent. The increases in prisoner petitions by 
state prisoners during the same period were even more dramatic—1,143.4 percent. 
The available data for fiscal year 1961 show all prisoner petitions as motions to 
vacate sentence, (federal) parole board reviews or habeas corpus. The number 
of such petitions which actually challenged the conditions of confinement is not 
available. In fiscal year 1973, in addition to the above categories, federal prisoner 
files 1,053 petitions either seeking mandamus (639) or alleging violations of 
civil rights (414); state prisoners filed 4,899 petitions either seeking mandamus 
(725) or alleging violations of civil rights (4,174). These petitions, combined, 
equaled 34.6 percent of the total 17,281 prisoner petitions filed in 1973. Admin-
istrative Office of the United States Courts, Annual Report of the Di-
related" to the differentiation of one group from another; whether there is a "less onerous alternative" available to the state;\textsuperscript{7} or whether certain treatment "shocks the conscience" of the judge, or is either "greatly disproportionate" to the plaintiff's conduct or "goes beyond what is necessary to achieve" a legitimate penal aim.\textsuperscript{8} In addition, the judge often must determine whether the state action subjects a plaintiff to the sort of "grievous loss" that requires certain minimal "due process" safeguards.\textsuperscript{9} Finally, the

\textsuperscript{7} The foregoing standards are those which typically exist in cases decided under the equal protection clause of the fourteenth amendment (see generally Note, \textit{Developments in the Law—Equal Protection}, \textit{82 Harv. L. Rev.} 1065, 1087-1132 (1969)) and, to a lesser extent, in cases decided under the due process clause, e.g., Shelton v. Tucker, 364 U.S. 479 (1960). In addition, first amendment cases which include rights generally considered to be fundamental and "preferred," also utilize these standards. Dombrowski v. Pfister, 380 U.S. 479 (1965); Bates v. City of Little Rock, 361 U.S. 516 (1960). Thus many prisoners' rights cases, in which prisoner-plaintiffs have alleged violations of first or fourteenth amendment rights, have required judicial determinations with respect to whether or not these standards have been met. See, e.g., Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968); Carothers v. Follette, 314 F. Supp. 1014, 1023 (S.D.N.Y. 1970); Rowland v. Sigler, 327 F. Supp. 821, 824 (D. Neb.), \textit{aff'd}, 452 F.2d 1005 (8th Cir. 1971). But cf. Martinez v. Procurier, 354 F. Supp. 1092 (N.D. Cal. 1973), \textit{aff'd}, Procunier v. Martinez, 416 U.S. 396 (1974), in which the United States Supreme Court reserved the issue of the nature and the scope of first amendment rights possessed by state prisoners. See also Wolff v. McDonnell, 42 U.S.L.W. 5190, 5201 (U.S. June 26, 1974). In Pell v. Procunier, 42 U.S.L.W. 4998, 4999 (U.S. June 24, 1974), the Court held 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."

\textsuperscript{8} See generally the landmark opinion in Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966), relying on Weems v. United States, 217 U.S. 349 (1910), in which Judge Harris delineates three separate criteria whereby a punishment may be considered "cruel and unusual" under the eighth amendment. See also Novak v. Beto, 453 F.2d 661 (5th Cir. 1971), \textit{cert. denied sub nom.} Sellars v. Beto, 409 U.S. 968 (1972); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), \textit{cert. denied}, 404 U.S. 1049 (1971); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967). The United States Supreme Court, however, has not yet decided a case involving the application of the eighth amendment to the treatment afforded state prisoners. See Sellars v. Beto, 409 U.S. 968, 970 (1972) (denial of certiorari in eighth amendment case, with Justices Douglas, Brennan and Marshall dissenting).

\textsuperscript{9} In Goldberg v. Kelly, 397 U.S. 254 (1970), the United States Supreme Court held that the degree to which procedural due process must be afforded a person is influenced by the extent to which governmental action subjects him to suffer "grievous loss," and "depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication." \textit{Id.} at 262-63. In Clutchette v. Procunier, 328 F. Supp. 767, 780 (N.D. Cal. 1971), \textit{aff'd}, 497 F.2d 809 (9th Cir. 1974), the district court held that the transfer of a state prisoner to the maximum security section of the prison, with its attendant loss of privileges and the danger of an increased term of imprisonment, constitutes just such a grievous loss, and therefore must be surrounded by basic procedural due process safeguards. In affirming the district court, the Ninth Circuit held that any further impairment of a prisoner's "residuum of liberty" (which is not de minimus) necessarily constitutes the type of "grievous loss" which requires the application of due process safeguards. The severity of the impairment therefore goes to the nature of the safeguards, rather than to whether or not such safeguards are required. \textit{Id.} at 814-15. Subsequently, in Wolff v. McDonnell,
court can determine these safeguards only on a case by case basis, since due process "is flexible and calls for such procedural protections as the particular situation demands." Although all legal standards, whether legislative or judicial in nature, are susceptible to varying interpretations, most commercial and criminal cases involve standards of far greater precision and agreed upon meaning than those which are necessarily invoked by a section 1983 plaintiff.

If the foregoing observations are correct, it follows that a section 1983 action gives unusually wide latitude to a judge to draw upon his own ethical, political and socio-economic views in determining whether or not a constitutional violation has occurred, as well as the scope and nature of the relief to be ordered. Although such judicial discretion exists in virtually all civil rights litigation, it is the authors' contention that in prisoners' rights litigation—where prisoner-plaintiffs seek to enforce constitutional rights under section 1983—there is an additional obstacle which the litigants and their

42 U.S.L.W. 5190 (U.S. June 26, 1974), the United States Supreme Court agreed that the due process clause of the fourteenth amendment applies to prison disciplinary proceedings. However, the majority's analysis of countervailing considerations of prison security and fairness to the inmate led the court to strike the balance so as to require fewer procedural safeguards than were found necessary by the Clutchette court.


11. Although no statistics appear to be available, it seems likely that most section 1983 cases are tried to a judge rather than to a jury, probably because such suits usually seek an injunction or a declaratory judgment. Such relief, of course, is equitable in nature, and "[t]he flexible relief available in equity is an old story." Schonfeld v. Raftery, 271 F. Supp. 128, 148 (S.D.N.Y.), aff'd, 381 F.2d 446 (2d Cir. 1967). See generally Note, Receivership as a Remedy in Civil Rights Cases, 24 Rutgers L. Rev. 115 (1969). In fashioning such relief, it is the duty of a court to adopt a plan which will not only enjoin future misconduct by officials but also eliminate the discriminatory effects of past misconduct. See Louisiana v. United States, 380 U.S. 145, 154 (1965). With any such decree, effectiveness is the touchstone. For example, in an action attacking school segregation, the court made it clear that "[t]he only school desegregation plan that meets constitutional standards is one that works." United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 847 (5th Cir. 1966) (emphasis added). These principles are fully applicable to prisoners' rights litigation. E.g., Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970); Martinez v. Procurier, 354 F. Supp. 1092 (N.D. Cal. 1973), aff'd, Procunier v. Martinez, 416 U.S. 396 (1974); Clutchette v. Procurier, 328 F. Supp. 767, 780 (N.D. Cal. 1971). Thus, in one leading first amendment prison case, in which a mandatory injunction and a detailed decree were entered, the court observed that

[j]t may be said that no direct authority exists for the broad relief which the plaintiffs seek in the cases in chief. But one of the greatest attributes of the law is its flexibility, which allows it to be an instrument for social change and for the declaration and enforcement of the basic rights of all members of our society. Palmigiano v. Travisono, supra at 785.
attorneys usually must overcome if they are to prevail. This obstacle, which is rendered all the more difficult because it is generally an unspoken one, is the concept or "model" of prisons, prisoners and prison officials which most judges, in varying degrees, bring to prisoners' rights cases. As a practical matter, this unarticulated judicial model of the prison world often translates into a "hidden agenda" of issues and attitudes which rarely are touched upon in the written briefs or even in the presentation of evidence, but which may be determinative in the case against the plaintiff unless he can deal successfully with them during the course of the litigation.

In developing this concept of a judicial model of the prison world and the hidden agenda in prisoners' rights cases, this article will focus first upon the prison world and will attempt to articulate a few basic misconceptions which appear to be widely held by the judiciary. In the second half of the article, the focus will shift to the courtroom and to certain judicial views concerning the nature and effect of prisoners' rights litigation. In each instance, we will attempt to show that various aspects of the judicial model do not comport with certain fundamental realities of the prison world and of prison litigation. Finally, the article will suggest a few steps which might be taken by responsible participants in the judicial process who agree that the judicial model does to some extent exist and that parts of the model may be inaccurate.

Although most of the statements made in this article will be supported by citations to the usual published authorities, they will also reflect the extensive experience which many prisoners' rights attorneys have accumulated during the past four years. During this period, these attorneys have spent thousands of hours interviewing and representing literally thousands of California prisoners. They have communicated and dealt directly with prison officials at all levels, and they have litigated, in both the state and federal courts, the principal legal issues which have emerged in the prison area. The authors have found that the fundamental conclusions which have been reached by these attorneys, based upon their extensive exposure to the California prisons, are virtually identical. It is this common experience, then, as well as the more scholarly authorities cited throughout the article, which the authors wish to share with the legal community and, in particular, with the California judiciary. For, as the article will suggest, what is needed most in this area of the law is less reliance upon legal fictions, labels and presumptions of regularity, and more straight talk about what in fact happens, both in the prisons and in the courtrooms.
I. THE PRISON WORLD: JUDICIAL MISCONCEPTIONS OF PRISONERS AND PRISON OFFICIALS

A. The Judicial Model\(^\text{12}\)

In the eyes of the judiciary, defendant prison officials usually enter the legal arena clothed with three unspoken, yet powerful, presumptions. First, such defendants are presumed to be respectable and responsible public officials who, along with judges, constitute an integral part of the criminal justice system in America. From this presumption flows the implication that few, if any, such officials would inflict (or knowingly condone the infliction of) brutal or lawless treatment upon the prisoners committed to their custody.

The second presumption is that the classification of prison officials as administrator, "counselor," professional (e.g., doctor or chaplain), and guard provides a meaningful indicia of respectability, competence and honesty. The implication is that a prison doctor is entitled to the same respect as a private physician, and that an Associate Superintendent, dressed in a suit and tie and clothed with a dignified title, is more likely to tell the truth and less likely to condone brutal practices than is an uniformed guard.

The third presumption usually accorded prison officials by the judiciary is that since these officials are doing a job which is at once so specialized and so thankless, they should be "immune from the limelight that all public agencies ordinarily are subject to . . . ."\(^\text{13}\) This conviction often produces an abject deference to the supposed "expertise" of prison administrators.\(^\text{14}\) It also en-

\(^{12}\) The authors readily acknowledge that some individual judges hold views which do not comport, in whole or part, with the following "model." To that extent, then, it is somewhat misleading to speak in monolithic fashion about "the judiciary." Nevertheless, it is the authors' position that judicial adherence to most aspects of the so-called judicial model described in the article is widespread; and that there is, in short, an unusually broad consensus among judges on prisoners' rights issues. To the extent that judicial reaction to this type of case differs from such reaction to other types of cases, it differs in the direction of uniformity rather than diversity.


\(^{14}\) Two excellent examples of judicial abdication in the face of the supposed expertise possessed by prison officials may be found in Pell v. Procunier, 42 U.S.L.W. 4998 (U.S. June 24, 1974) and Wolff v. McDonnell, 42 U.S.L.W. 5190 (U.S. June 26, 1974). In Pell, the Court upheld a prison regulation which severely limited media interviews with inmates, in large part on the ground that visiting policies should be a result of "the Director's professional judgment" and the "judgment of the state corrections officials." The Court noted that the relevant considerations of rehabilitation and prison security are "peculiarly within the province and professional expertise of corrections officials." Pell v. Procunier, supra at 5000-01. In Wolff the Court held, inter alia, that inmates have no absolute constitutional right at disciplinary hearings to call witnesses or to confront and cross examine their accusers, largely upon its conclusion that affording such
JUDICIAL MISCONCEPTIONS

genders the notion that such officials are public servants whose choice of employment is due to altruistic motives and that “interference” by a court would not only be uninformed but would also smack of ingratitude.

These presumptions are enhanced by the fact that prison officials usually are represented in court by the California Attorney General’s office, even when those officials have been charged with having committed acts which are brutal or illegal. As a result, the respectability of the official is buttressed by the respectability of his attorney, which explains in large part the deference shown by a judge to defendant-prison officials in section 1983 cases.

This deference might mean little or nothing if the party opposing the prison official occupied a similar status in the judge’s mind. This is rarely the case, however, since all prisoner litigants enter the courtroom clothed—symbolically as well as literally—in the garb of a convicted felon. Although the conviction of a felony has long been grounds for impeaching a witness at trial,^15 the conclusions drawn by judges concerning the nature and identity of a prisoner/litigant often go far beyond a determination that his credibility is suspect. For example, the late Justice Peters once wrote that prisoners generally are

keen and ready, on the slightest pretext, or none at all, to harass and annoy the prison officials and to weaken their power and control. These prisoners include many violent and unscrupulous men who are ever alert to set law and order at defiance within or without the prison walls . . . .^16

---

Wolff v. McDonnell, supra at 5199. The Court further noted that

[many prison officials, on the spot and with the responsibility for the safety of inmates and staff, are reluctant to extend the unqualified right to call witnesses; and in our view, they must have the necessary discretion without being subject to unduly crippling constitutional impediments.

^15. CAL. EVID. CODE § 788 (West 1965) statutorily controls present California law. At common law, persons who had been convicted of infamous crimes were incompetent to testify at all. Note, 19 S. CAL. L. REV. 129 (1945). This disqualification was removed by statute in California in 1872. CAL. CIV. PRO. CODE § 1847 (West 1955) (repealed 1965). Conviction of a felony could be introduced for the purpose of impeaching the witness. Id. § 2051 (West 1955) (repealed as amended 1965). The admissibility of evidence in federal courts is generally controlled in civil cases by Fed. R. CIV. P. 43. Approved federal jury instructions in both criminal and civil cases provide for impeachment upon a showing that the witness has been convicted of a felony. Devitt & Blackmar, Federal Jury Practice and Instructions, §§ 12.06, 72.07 (2d ed. 1970).

This conclusory statement, in the nature of judicial notice, has been adopted by a number of courts in the course of resolving disputed issues of fact against a prisoner. Authored as it was by one of the most liberal and humane justices ever to sit on the California Supreme Court, it represents, in the authors' view, a description of the prisoner/litigant which has been accepted by a large majority of the judiciary.

Serious practical consequences flow from this judicial image of prison inmates. If it is believed that prisoners are by nature violent, it follows that strong measures—including confinement in the hole—are presumptively justified. If prisoners are by nature unscrupulous, it follows that they will not make trustworthy witnesses in court. In contrast, few judges are inclined to believe that responsible and humane prison officials would commit or condone illegal treatment, or that, when sworn as witnesses or affiants, they would testify falsely. In any event, since prisoners are men who, by definition, have broken the law and violated the rights of others, it follows that they probably deserve whatever treatment they receive—regardless of whether that treatment is brutal or debilitating, or whether it comports with state or federal law. Conversely, judgment in the prisoner's favor would reward the undeserving and embarrass and penalize beleaguered officials.

Thus it is not surprising to find that the state courts of California routinely resolve against state prisoners virtually all disputed issues of fact in habeas corpus cases challenging the conditions of a prisoner's confinement. Often this resolution is accomplished


18. In Weller v. Dickson, 314 F.2d 598 (9th Cir. 1963), the court remarked: Perhaps the best policy statement is in Higgins v. Steele, 195 F.2d 366, 369, (8th Cir. 1952), a habeas corpus case. "While it is important that no prisoner be denied justice because of his poverty, it is also important that the prison authorities, government counsel, and the courts be not harassed by patently repetitious, meritless, frivolous or malicious proceedings."

Id. at 602.

19. In Wright v. McMann, 321 F. Supp. 127, 132 (N.D.N.Y. 1970), the court noted that, [i]t does seem that the fate and nature of confinement for persons convicted of crime is of little concern to society in general. Many have been smug by rationalizing that if unpleasant problems arise in the prisons, the prisoners brought it on themselves and the less public notice the better.

20. See declarations filed as Exhibits E, F, G, and H in support of the petition for a writ of mandamus in Frias v. Superior Court, No. 23163 (Cal. Sup. Ct.). These declarations were executed by one of the authors and by law students at the
by an "informal" communication from the court, addressed either to the Attorney General or to the prison itself, requesting a response to the allegations contained in the habeas petition.\textsuperscript{21} Thereafter, the response is used as the basis for denying the prisoner's petition, even though neither the request nor the response was ever served on the prisoner-petitioner.\textsuperscript{22} In other cases such petitions are simply denied out of hand, even though many contain allegations which, if true, would entitle the petitioner to some relief.\textsuperscript{23} The practice of deciding in summary fashion nearly every such petition against the prisoner can be explained only by an overriding judicial belief that the word of a prison official is to be routinely accepted over that of the prisoner's, whenever they are in conflict.\textsuperscript{24}

B. \textit{A Contrary View}

In the authors' view, the foregoing model of prison officials and prisoners is inaccurate. There are few jobs which attract a lower caliber of employee than that of the prison guard. The pay is extremely low; job status is virtually nonexistent; working conditions are unpleasant and often dangerous; and promotional opportunities are severely limited. Requirements for becoming a guard in California are minimal, and the underlying selection process, which includes \textit{no} psychological testing, results in the hiring of new guards who merely are compatible with those already employed.\textsuperscript{25} Consequently the job of a prison guard is not one to

\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} See digest of habeas corpus conditions cases, filed as Exhibits J, K, L, and M with petitioner's memorandum of points and authorities in support of his petition for a writ of mandate in Frias v. Superior Court No. 23163 (Cal. Sup. Ct.).
\textsuperscript{24} As one appellate court has put it:

\textit{We will not substitute our views for the considered judgment of the professional staff of a prison. When called upon, we interpose our scrutiny but not our will where, as here, facts of substance are \textit{alleged} in support of the administrative action.}


\textsuperscript{25} As of January, 1973, the starting salary in the California Department of Corrections for the position of correctional officer was $753 monthly, with a max-
which people positively aspire, but rather one which is open to those who typically have few if any occupational alternatives.\textsuperscript{20}

Moreover, the problem of low-caliber guards is exacerbated by (1) the fact that most guards are rural whites, whereas almost half of the prisoners are urban blacks or browns;\textsuperscript{27} (2) the absolute

\begin{itemize}
\item \textsuperscript{20}A brief comparison of salaries and working conditions between correctional officers and police personnel is presented in \textit{Senate Select Comm. on Penal Institutions, Upgrading Correctional Manpower: A Report To The California Legislature}, pt. I, at 25-28 (Apr., 1972) [hereinafter cited as \textit{Nejedly Comm.}]. The State Personnel Board Bulletin's examination information and requirements do not include any psychological examination; and the absence of such a requirement was confirmed by one of the authors in a telephone conversation with Mr. George C. Jackson, Assistant Director, Personnel Division, California Department of Corrections (May 17, 1974). Prospective candidates apply directly to the institution at which the individual desires to work. At Deuel Vocational Institution, the applicant must complete written, oral and medical examinations, the names of eligible candidates are ranked on a list and, as openings occur, the top name on the list is selected. Ranking on the list is determined solely by the oral examination and an interview conducted by two institution officials plus a member of the local community, "[m]aybe a Law Enforcement Officer, Fire Chief, an employer in town," who is selected by one of the officials. Deposition of Robert M. Rees [then Associate Superintendent, Deuel Vocational Institution] on Nov. 15, 1971, Charles v. Patterson, No. C-71-1337 (N.D. Cal. 1974). The Nejedly Committee received testimony that no significant college recruiting is pursued by the Department of Corrections because of fear that college graduates may prove disruptive. \textit{Nejedly Comm.}, supra at 33. In \textit{S. Halleck, Psychiatry and The Dilemmas of Crime} 292 (1967) [hereinafter cited as \textit{Halleck}] the author notes that "[t]he correctional environment not only attracts conservative people, but it also tends to make them more rigid. Not enough creative people work for very long in a prison. 'Off-beat' people or eccentrics are not welcomed, nor do they desire to stay." \textit{Id.} at 298. \textit{See also} notes 26, 49 infra.

\item \textsuperscript{27}In all California Department of Corrections facilities 46.5 percent of the inmates were Black or Chicano. In contrast, as of 1972, only 11.5 percent of all staff and 15.2 percent of the custody staff were either Black or Chicano. \textit{Nejedly Comm.}, supra note 25, at 33.
\end{itemize}
power which guards possess;\(^28\) (3) the sadistic personalities which the job often develops;\(^29\) (4) the lack of any meaningful training,\(^30\) and (5) the interchange of values between guards and prisoners which necessarily results from any such relationship.\(^31\) Thus it is not surprising to find that the combination of these facts has produced the same sort of complicity which exists in some police forces, where the worst officers are permitted to break the law—whether through brutality or corruption—because the best officers remain silent, lest they be thought disloyal to their comrades and ostracized or expelled from the organization.\(^32\)

---

\(^{28}\) In September, 1971, 62.9 percent of the inmates at Attica were Black or Puerto Rican; the staff included one black civilian teacher, no black correction officers and one Puerto Rican correction officer. ATTICA, supra note 26, at 24, 490. A major cause of this racial imbalance between prison staffs and populations lies in the policy of locating state prisons in remote, rural areas. Id. at 17, 80, 106-07; NEJEDLY COMM., supra note 25, at 32; cf. Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971), aff'd, 456 F.2d 854 (6th Cir. 1972).

\(^{29}\) Acton's classic proverb about the corrupting influence of absolute power is true of prison guards no less than of other men. In fact, prison guards may be more vulnerable to the corrupting influence of unchecked authority than most people. Landman v. Peyton, 370 F.2d 135, 140 (4th Cir. 1966), cert. denied, 385 U.S. 881 (1966), 392 U.S. 929 (1968), rehearing denied, 393 U.S. 900 (1968). See Jordan v. Fitzharris, 257 F. Supp. 674, 680 (N.D. Cal. 1966); J. Stocking, Problem Areas Contributing to Violence at San Quentin Prison I-3 (Memorandum to Task Force to Study Violence, California Department of Corrections) (Feb. 20, 1974) [hereinafter cited as Stocking Memorandum].

\(^{30}\) At most California institutions correctional officers are given five days of institutional orientation and are then expected to perform the multifarious tasks inherent in the position. CALIFORNIA DEPARTMENT OF CORRECTIONS, MANAGEMENT SURVEY 37 (1972) [hereinafter cited as MANAGEMENT SURVEY]. Between World War II and the late 1950's, New York State provided no formal training for prison guards. More than one-third of the officers at Attica at the time of the occupation in September, 1971, began their jobs during that earlier period. Guards who started after the 1950's were given two weeks' training. "Many found it useless." ATTICA, supra note 26, at 27.

\(^{31}\) Custodial personnel live with their charges in a climate of intimate tension; it would be surprising indeed if an exchange of standards and values did not take place between them. . . . Prison administrators too, perhaps understandably, may develop a self-protective instinct that manifests itself in a tendency to preserve and fall back on the written record of propriety, although it may not reflect reality. Landman v. Royster, 333 F. Supp. 621, 645 (E.D. Va. 1971).

\(^{32}\) U.S. NAT'L COMM. ON LAW OBSERVANCE AND ENFORCEMENT (Wickersham Commission), REPORT ON THE POLICE 130 (1931). Chevigny's study of police abuses in New York indicates that police often respond with brutality against persons whom they perceive to be defiant and whom they interpret as representing a challenge to their authority—although these same persons may have committed no offense at the time of police contact. The police officers' view is that they must maintain their authority against those who challenge it, in order to enforce the laws effectively. False criminal charges provide a justification for the officers' behavior and cover any later accusations of abuse. In the police "canon of ethics," the lying inherent in the arrest reports and subsequent testimony "is justified in the same way as the arrest: as a vindication of police authority . . . ." P. CHEVIGNY, POLICE POWER 141 (1969) [hereinafter cited as CHEVIGNY]; W. BROWN, THE POLICE AND CORRUPTION 19-24 (1967) (paper
However, the likelihood that prison guards may frequently engage in misconduct does not rest ultimately upon a showing that such men are, as a group, morally inferior. Instead, it is becoming increasingly clear that the intense psychological pressures which operate upon prison guards inevitably create a "pathology of power." As a recent study conducted by Professor Philip Zimbardo of Stanford University has dramatically shown, this "pathology" does not spare even the most normal or healthy persons. Professor Zimbardo constructed a simulated prison on the Stanford campus and then selected a group of twenty-one "normal, healthy males attending colleges throughout the United States" to participate in the experiment. These men were selected for their physical and emotional stability. On a random basis, half of the students were assigned to the role of "guard" and the other half to the role of "prisoner." Minimal instruction was given to each group concerning its respective role in the prison experiment. The experiment commenced with a surprise arrest (by the Palo Alto Police Department), processing and incarceration of the "prisoners" in the mock prison. The prison experiment was scheduled to last two weeks, but it had to be terminated at the end of six days because of the unexpectedly intense reactions on the part of both "prisoners" and "guards."

The details of the Zimbardo experiment, which are fascinating and have been reported elsewhere, will not be repeated here. For present purposes it is sufficient to note that within what was a surprisingly short period of time, we witnessed a sample of normal, healthy, American college stu-
dents fractionate into a group of prison guards who seemed to derive pleasure from insulting, threatening, humiliating and dehumanizing their peers—those who by chance selection had been assigned to the “prisoner” role.86

According to Zimbardo, the most dramatic and distressing result was “the ease with which sadistic behavior could be elicited in individuals who are not ‘sadistic types’. . . .”37

One conclusion drawn by Professor Zimbardo was that these negative, anti-social reactions were not the collective result of confining deviant personalities, but rather the result of the intensely pathological characteristics of the prison situation itself.

Being a guard carried with it social status within the prison, a group identity (when wearing the uniform), and above all, the freedom to exercise an unprecedented degree of control over the lives of other human beings. This control was invariably expressed in terms of sanctions, punishment, demands and with the threat of manifest physical power. There was no need for the guards to rationally justify a request as they do in their ordinary life and merely to make a demand was sufficient to have it carried out. Many of the guards showed in their behavior and revealed in post-experimental statements that this sense of power was exhilarating.

The use of power was self-aggrandising and self-perpetuating. The guard power, derived initially from an arbitrary label, was intensified whenever there was any perceived threat by the prisoners and this new level subsequently became the baseline from which further hostility and harassment would begin. The most hostile guards on each shift moved spontaneously into the leadership roles of giving orders and deciding on punishments. They became role models whose behavior was emulated by other members of the shift. Despite minimal contact between the three separate guard shifts and nearly 16 hours a day spent away from the prison, the absolute level of aggression as well as more subtle and “creative” forms of aggression manifested, increased in a spiralling function. Not to be tough and arrogant was to be seen as a sign of weakness by the guards and even those “good” guards who did not get as drawn into the power syndrome as the others respected the implicit norms of never contradicting or even interfering with an action of a more hostile guard on their shift.38

When the experiment was terminated prematurely, all of the remaining prisoners (some already had been released from the ex-

36. Zimbardo, supra note 33, at 89.
37. Id.
38. Id. at 93-94.
periment due to an extreme reaction to the experience) were delighted. "In contrast, most of the guards seemed to be distressed by the decision to stop the experiment and it appeared to us that they had become sufficiently involved in their roles so that they now enjoyed the extreme control and power which they exercised and were reluctant to give it up."30

Dr. Jerome G. Miller has expressed a similar view that brutality is necessarily inherent in the prison system itself.40 Testifying in federal district court in the case of Morales v. Turman,41 Dr. Miller expressed his opinion that brutality is common in institutionalized settings—that it is, in fact, the "hammer" that "holds the system together."42 At the same time, it was Dr. Miller's opinion that such brutality rarely comes to the attention of officials at the departmental levels and that even when officials were aware of institutions at which "there was a fair amount of brutality going on, we had to go to extraordinary lengths to find it, even though it was a common part and parcel of the daily operation of the institution."43 In further testimony Dr. Miller added:

At one of our detention centers, for instance, I had heard so many things from the youngsters about brutality there and could never get a handle on it from staff or anyone else as to whether it was happening, even from staff whom I very much trusted and I think would want to tell me the truth about it, and the only way we finally got a hold on it was by putting a Harvard student, a young junior at Harvard who looked 16 but was 20 or 21, putting him in as a kid for a few days and, of course, he found just unbelievable brutality in our own detention center under our own noses.44

Such brutality, in Dr. Miller's view, is able to exist only because of the closed and secretive nature of the prison system. In his experience, the simple act of opening up an institution and subjecting its officials to public scrutiny is often sufficient to uncover and eliminate a substantial amount of brutality. Dr. Miller agrees with Professor Zimbardo that brutality in prisons is not primarily the work of a few sadists, although such types do exist; rather, it results from the guards being caught up in a system that calls for sadistic behavior, a system "that calls forth not only from the inmates but from the staff the very worst impulses."45

39. Id. at 81.
40. Dr. Miller was Commissioner of the Massachusetts Department of Youth Services for 3½ years.
43. Id. at 3832.
44. Id. at 3895.
45. Id. at 3905. There exists additional evidence for the hypothesis that insti-
Regardless of the explanation, however, two indisputable facts emerge from any in-depth contact with the real world of California prisons: first, that prison guards do act illegally, and second, that they do so consistently. Such actions take many forms and range across the entire spectrum of prison life, including petty harassment (for example, the use of verbal abuse or racial epithets), serious deprivations (for example, the "loss" of a prisoner's property, including legal papers, during a cell change or a transfer to another prison, or the trashing of a prisoner's cell during a routine cell search), and the most severe harm imaginable (such as effecting the rescission of an already granted parole date by submitting a disciplinary report for a minor or imagined offense, excessive teargassing, physical or psychological brutality, or "setting up" a prisoner for injury at the hands of another inmate). It cannot be emphasized too strongly that such treatment is not unusual; rather, it occurs daily on a widespread scale, and this fact explains why prisoners' petitions are more likely than not to represent legitimate grievances.46

stitutions of the "kept" and the "keepers," which are not subject to public scrutiny, culminate in the brutalization of the former by the latter, even when the "kept" do not bear the stigma of criminal convictions. Harold Orlans found sadistic treatment of patients in mental hospitals by the nurses and other staff. Orlans, An American Death Camp, MASS SOCIETY IN CRISIS 614-26 (Rosenberg, Gerver & Howton eds. 1964). "In the asylum, it is a common experience that the incoming attendant is more humane in his dealings with inmates than are older attendants, and the longer he remains the more callous he becomes." Id. at 625. Perhaps the most chilling confirmation that this institutional setting evokes brutality from previously humane individuals lies in Orlans's account of the absorption of conscientious objectors (performing their alternative service during the Second World War as hospital attendants) into staff conspiracies to execute bothersome patients. Id. at n.1, and accompanying text. Most authorities seem to agree that the police role develops attitudes of authority-maintenance in new recruits rather than merely attracting individuals who already have such attitudes. CHEVIGNY, supra note 32, at 136-46. For example, a white professor of criminology, attached to a police force for purposes of scholarship, found himself reacting in an overly-aggressive manner to acts by youths and blacks which he perceived as challenging. "'The job of policeman creates and molds a man's entire personality,' he said, 'You become suspicious of the motives of people in general.'" NEWSWEEK, Nov. 19, 1973, at 104.

46. The foregoing paragraph—as well as other statements contained in this article—is based in large part upon one author's own experience in visiting various prisons throughout the state of California, upon the thousands of interviews and discussions which he and other attorneys have conducted with prisoners and ex-prisoners, and upon the countless letters written by prisoners concerning their first-hand experiences.

With respect to such experience, prisoners' attorneys are often asked whether they "actually believe all of the stories that prisoners tell them." The unspoken implication is that naïve attorneys are being misled by devious prisoners and, at first blush, this is somewhat persuasive. Yet in the end, the question misses the mark. For where, as here, such a large amount of consistent data has been accumulated, those who have access to it are in a position to draw certain reliable conclusions.

By way of analogy, a navigator who takes bearings upon different landmarks
But even if many guards are indeed of substandard caliber, or are widely affected by the "pathology of power," are they not held in check by responsible wardens and other top prison officials? Do not the "correctional counselors" employed by the prisons relate to inmates in a humane and helpful manner? And does not the presence of psychiatrists, chaplains and other professionals insure that all inmates receive an adequate amount of spiritual, mental and physical care? Both the public generally and judges in particular appear to believe that the presence of these staff members insures that inmates will receive safe and therapeutic treatment. Yet such a conclusion is entirely unwarranted, based as it is upon certain erroneous assumptions.

fixes his position at the point where those bearings intersect. Similarly, if different inmates at a particular prison tell an attorney that Lieutenant X is a particularly sadistic officer, if those inmates recount specific instances of brutal treatment by this officer, and if those instances are related (i) over a long period of time, (ii) by a wide variety of inmates (e.g., young and old, black and white), then that attorney has a fairly accurate notion (often far more accurate than the Lieutenant's superiors in the Department of Corrections) of what the officer is like. Or, if large numbers of inmates tell about a particular prison practice such as racial slurs by guards, or excessive teargassing in the hole, it is possible to discount a large percentage of such stories as untrue and yet conclude, almost unavoidably, that where there is so much smoke there must be a certain amount of fire. This was exactly the approach adopted by the California legislators whose interviews with inmates confined in Soledad's "O" Wing led to publication of the Black Caucus Report. Hearings on Corrections Before the Subcomm. No. 3 of the House Comm. on the Judiciary, 92d Cong., 1st Sess., ser. 15, pt. 2, at 252 (1971) [hereinafter cited as Hearings]. Their report stated that

[i]f even a small fraction of the reports recorded are accurate, the inmates' charges amount to a strong indictment of the prisons' employees (on all levels) as cruel, vindictive, dangerous men who should not be permitted to control the lives of the 2,800 men at Soledad.

Id. at 255.

In addition, attorneys who have interviewed numerous inmates over many years have had the opportunity to observe an inmate's demeanor, to acquaint themselves with his reputation, and to cross-examine him with regard to the details of his narrative. This is, of course, precisely the approach which a judge or a jury necessarily takes in assessing the credibility of a witness and in attempting to resolve contradictory testimony at trial. In short, the authors and their colleagues have, over the past few years, received so much consistent and specific information that they are able to reach many concrete conclusions as to what is in fact happening behind the walls of California's prisons. The reader, however, is also invited to review the proliferating number of books and other publications which deal with the same subject. See, e.g., BLACK CAUCUS REPORT, No. OF PRISONERS AT CALIFORNIA TRAINING FACILITY AT SOLEDAD CENTRAL, Report for the California Legislature (1970), reprinted in Hearings, supra at 252; ATTICA, supra note 26; INSIDE: PRISON AMERICAN STYLE (R. Minton ed. 1971); MAXIMUM SECURITY: LETTERS FROM CALIFORNIA PRISONERS (E. Pell ed. 1973); THE POLITICS OF PUNISHMENT (E. Wright ed. 1973); G. JACKSON, SOLEDAD BROTHER (1970); Hollander, The Adjustment Center: California's Prisons Within Prisons, 1 BLACK L.J. 152 (1971); M. YEE, THE MELANCHOLY HISTORY OF SOLEDAD PRISON (1973). In addition, numerous prisoners' rights cases confirm the harsh nature of day to day prison conditions. See note 8 supra.

47. For example, the Keldgord Report concludes that "[t]he medical care and attention given the average California prison inmate is unquestionably better
Despite their title, prison "counselors" do little of what is normally thought of as counseling. Usually, when one thinks of a high school counselor in career guidance, mental health, or the like, one imagines an adequately trained, experienced and sympathetic person whose job is to impart cogent and thoughtful advice to the troubled or inquiring person and to discuss the person's problems in a friendly, confidential manner. One assumes, of course, that such a counselor has in mind the best interest of the person seeking his advice, that he will not permit other personal loyalties to interfere with his obligation to his client, that he will maintain in strictest confidence whatever information he receives, and that he will not even consider using that information against the person who has confided in him.

In the prison world, however, few if any of these basic assumptions are warranted. Although counselors once were required to hold a college degree, an applicant may presently substitute for his last two years of college an equivalent period of service as a guard. In fact, a large number of counselors in California prisons are ex-guards. There is no psychological testing required for counselor applicants, and little initial or in-service training is provided to overcome the lack of qualifications which a new counselor may bring to the job. Apart from their limited experience, they have greater freedom to use information they have obtained in the custody of their clients. BOARD OF CORRECTIONS, CALIFORNIA CORRECTIONAL SYSTEM STUDY—FINAL REPORT—PRISON TASK FORCE REPORT 44 (1971) [hereinafter cited as KELDGORD REPORT]. California state judges appear to be particularly susceptible to this impression. See notes 20-24 and accompanying text supra; note 64 infra. The broader judicial "hands-off" approach to prison officials and professional staff is analyzed in Note, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 YALE L.J. 506 (1963).

48. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1964) defines "counseling" as "to give advice, to advise. To recommend as an act or course."

49. California State Personnel Board, Bulletin: California State Personnel Board Examination/Correctional Counselor I (Dec. 27, 1971). Correctional counselors at one time were required to have graduate degrees (such as Master of Social Welfare) or the equivalent. Now, however, very few have such preparation. . . . Already, the Department estimates that more than 40 percent of its counselors are not even college graduates. . . . [T]he Department [of Corrections] has felt pressure to make promotions available to the large number of correctional officers with no other place to go. NEJEDLY COMM., supra note 25, at 20.

50. The absence in the State Personnel Board's Bulletin, supra note 49, of a requirement for psychological examination was confirmed in a telephone conversation with Mr. George Jackson, supra note 25. Some counseling is done directly by guards and some inmates are counseled mainly by new guards, apparently as a staff training or indoctrination method. As the KELDGORD REPORT, supra note 47, at 20, dryly notes: "This probably has more value for the officers than it does for the inmates." The Department's own Management Survey Task Force reports that "large numbers of correctional officers [and] counselors . . . go about their tasks with little more than a cursory overview of the mechanics of their job." Management Survey, supra note 30, at 37.
ience or training, counselors operate under extreme time constraints. Despite heavy caseloads, counseling services operate under extreme time constraints. Despite heavy caseloads, counselors must (1) complete annual parole board reports for each prisoner, (2) sit on classification and disciplinary committees, and (3) otherwise engage in turning out the considerable paperwork necessary to keep the prison bureaucracy operating. Indeed, most prisoners are likely to go through an entire year without consulting with their counselors except to submit routine requests or to receive the results of their most recent appearance before the parole board. This situation is hardly conducive toward fostering a relationship of mutual trust and confidence usually associated with a counselor and his client.

51. Typically a counselor's caseload consists of hundreds of prisoners. "In several of the institutions, there are counselors who handle between three hundred and four hundred men each." KELDGORD REPORT, supra note 47, at 20.

52. "No ratio of counselors to prisoners will provide adequate counseling services in some [California] prisons, because work other than counseling, especially writing reports, is a major responsibility of the counselor's job." Id. at 22.

The meager rehabilitative staffs existing in prisons throughout the country today are regularly subordinated to the custodial staffs, not only in the organization of the institution's administration, but also in regard to its budget.


At Leavenworth Penitentiary, a maximum-custody institution housing 2,100 inmates, salaries for "correctional service" (not including administrative and clerical), in fiscal year 1973 totaled $3,142,000, while salaries for "case management professionals" totaled $196,000 (3.6% of total expenditures for salaries); for "education, religion, recreation"—$182,000 (3.3% of total salaries); and for medical and Public Health Service commissioned officers—$314,000 (5.8% of total salaries). Id. at 4. During fiscal year 1971, expenditures for academic, general vocational and physical training totaled 4.00 percent of the total budget and 5.03 percent of the budget for personal services. Salaries for supervision of inmates (correction officers) totaled 61.98 percent of the total budget and 77.92 percent of the budget for personal services. ATTICA, supra note 26, at 488.

53. The KELDGORD REPORT, supra note 47, at 21, generally favorable toward the Department, discusses California's well-known group-counseling programs as follows: "What became evident . . . was that such counseling programs tended mainly to serve institution management functions and readily became largely irrelevant to rehabilitation needs." During February 1974, a Department of Corrections Task Force to Study Violence obtained data at San Quentin through twenty inmate-staff teams comprised of over 250 persons. Discussions totaled some 1,125 man-hours. A preliminary report to the Task Force states, inter alia:

The general areas of complaint about the functioning of counselors deal with the small amount of time they spend with an inmate, the difficulty inmates have in getting to see counselors, and the tremendous power counselors are perceived to have in determining an inmate's chances for parole.

There was recognition that because of all the staff demands made on a counselor's time (e.g., clerking various committees) and because of his large caseload, that he cannot perform any real function in terms of helping or understanding inmates. Real resentment was expressed by several inmates at how little opportunity there was for their counselors
Nor do most prison doctors and chaplains occupy a dissimilar position, since they are not retained by the prisoner but are employed by the prison, and their work and lifestyles vary greatly from their counterparts in private practice. Thus the prison professional soon comes to view the prison system, rather than the individual prisoner, as his client. Such a distinction might not be harmful, were it not for the fact that there is frequently a serious conflict of interest between a particular prisoner (or the inmate population generally) and the prison system. These conflicts involve, for example, a psychiatrist's obligation to write numerous reports, including crucial reports to the parole board, which may to know anything about them except for what appears in their jackets.

One inmate noted that what counselors offer you when you first see them is fear. That is, they try to frighten you about what can happen at San Quentin.

Stocking Memorandum, supra note 28, at 7.

As a consequence, the ailing inmate may be refused treatment by the doctor. See, e.g., Pisacano v. State, 8 App. Div. 2d 335, 188 N.Y.S.2d 35 (1959). In addition, he may be denied access to the prison doctor (or other professional) either because the professional is unavailable, e.g., Newman v. State of Alabama, 349 F. Supp. 278, 281-82 (M.D. Ala. 1972); Assembly Select Comm. on Prison Reform and Rehabilitation, An Examination of California's Prison Hospitals 17, 31 (1972) [hereinafter cited as Karabian Comm.]; or because the custodial and administrative staff (and not infrequently, inmate Technicians) refuse to process the request or communicate it to the professional, e.g., Newman v. State of Alabama, supra at 281; Hearings, supra note 46, at 32-33, 134; Karabian Comm., supra at 16-17, 36, 43, 48; Attica, supra note 26, at 67. Further, the custodial and administrative staff may refuse to provide the inmate with the medication or treatment prescribed by the professional. See, e.g., Tolbert v. Eyeman, 435 F.2d 625 (9th Cir. 1970); Karabian Comm., supra at 42. See also, Developing Standards for Prisoners' Medical Care, 2 Prison L. Rptr. 3, 4-5 (1972).

Adequate medical equipment and facilities, trained aides and/or nurses, special diets, diagnostic and pharmaceutical facilities and corresponding personnel are some of the resources generally unavailable to prison doctors in California. Karabian Comm. supra note 54. At Attica, prison doctors conducted the daily sick call from behind a mesh screen. Attica, supra note 26, at 63. Furthermore, illness and injury frequently arise as a direct or indirect result of incarceration itself. See, e.g., S. Alexander, The Captive Patient: The Treatment of Health Problems in America Prisons, 6 Clearinghouse Rev. 16, 21-24 (1972). Another unique aspect of a doctor's working relationship with inmates, which should not be ignored, is the expansion of medical research on prisoner-subjects. See Mitford, supra note 26, at 138-68. The distinctions in psychiatric medicine between professionals on prison staffs and those in private practice are even more pronounced. Id. at 118-37.

Given the fact that dismissals of prison physicians for exposing brutality are almost as rare as dinosaurs, one might conclude that there is no great internal conflict and that, therefore, for all intents and purposes, the prison physician views the prison system itself as his client and the inmate-patients as incidental to the relationship. Murton, Prison Doctors, The Humanist 29 (May-June 1971) (emphasis added) [hereinafter cited as Murton].

The California Attorney General has ruled that a psychiatrist or psychologist employed or working on behalf of the Department of Corrections is not an inmate's personal physician. Since the inmate did not voluntarily seek diagnosis
cause the prisoner considerable harm; a demand that a doctor or psychiatrist turn over his file to a District Attorney or prison superintendent for use in conducting criminal prosecutions or prison disciplinary proceedings, or the use of testimony by the prison doctor to justify or conceal instances of brutality or inadequate medical treatment on the part of prison personnel. and treatment, and since it is understood by all parties that the psychologist or psychiatrist was employed to interview all inmates for purposes of providing summaries of interviews and diagnoses to institutional staffs and governmental agencies, no true physician-patient relationship arises. Confirmation of this institutional allegiance is most strikingly depicted in the recent history of the Patuxent Institution, in Maryland. The abuses of inmates by the professional staff are outlined in McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972); Mofford, supra note 26, at 108-14. An uncritical, narrative description of the Patuxent programs and of the statutory scheme under which the diagnostic programs function, appears in R. Goldfarb & L. Singer, After Conviction 98-108 (1973) [hereinafter cited as Goldfarb & Singer]. Even where the physician-patient relationship vis-à-vis the employer-prison or the inmate is not legally defined as in California, the psychiatrist confronts a practical dilemma in establishing an ethical position.

If he becomes nothing but an "institutional tranquilizer" whose main function is to keep the punishment process moving smoothly, he, in effect, prostitutes his medical skills. On the other hand, if he seeks refuge in ineffective and childish dissent, he not only denies reality but also fails to serve either his patient or the society.

Halleck, supra note 25, at 292.

57. One source of conflict between the prisoner and the system is the policy in some institutions of penalizing the inmate who requests—justifiably or not—professional examination and/or treatment. Newman v. State of Alabama, 349 F. Supp. 278, 284 (M.D. Ala. 1972); Gates v. Collier, 349 F. Supp. 881, 888 (N.D. Miss. 1972), aff'd, 489 F.2d 298 (5th Cir. 1973). A former resident psychiatrist at San Quentin has told of how prison psychiatrists often sat in on disciplinary hearings in which their findings were used to trap the prisoners into admissions that would result in reassignment to tougher custody status. Mofford, supra note 26, at 101-02. See McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972). "It was the consensus among psychiatrists that at least 50 percent of their time is required to write up Adult Authority Board reports. . . ." Karabian Comm., supra note 54, at 19; Department of Corrections Administrative Manual, Psychiatric Evaluation for Adult Authority (revised format 8/23/71 TL 7/71) (Aug. 23, 1971).

58. After Dr. Frank Rundle, then Chief Psychiatrist at the Correctional Training Facility at Soledad, testified on behalf of an inmate at a pre-trial hearing, he was barred by his immediate superior from contact with any inmate involved in any court proceeding. When another inmate-patient became a suspect in the death of a prison administrator, the assistant to the Superintendent ordered Dr. Rundle to turn over his psychiatric files on the suspect. When the psychiatrist refused, he was surrounded by guards and the reports were removed from his briefcase. Dr. Rundle was then fired for insubordination. The San Francisco Bay Guardian, June 22, 1972, at 4-5; Yee, supra note 1, at 175-86. Subsequently, it was officials of the California Correctional Officers Association who recruited, through promise of an early release date, an inmate who had formerly served as clerk to Dr. Rundle, and sent him, equipped with a concealed miniature radio transmitter, on a 72-hour pass to Dr. Rundle's home in an attempt to link the psychiatrist with the deaths of prison guards. San Francisco Bay Guardian, supra at 5-7.

59. See, e.g., Jordan v. Fitzharris, 257 F. Supp. 674, 682-83 (N.D. Cal. 1966). In another incident the chief physician at San Quentin Prison continued to deny
If the prison professional remains in this dual role for any substantial period of time, he quickly becomes institutionalized. This process of institutionalization is similar to that experienced by many military doctors and chaplains, who view themselves primarily as military officers, responsible to their superiors in the chain of command, and only secondarily responsible to their patients or penitents. Given the relatively low pay, low status and unpleasant working conditions which the job of a prison professional entails, the harsh custody mentality that pervades the

---

that an inmate had been shot by a guard—urging that the victim had been stabbed by another inmate—even after the guard admitted to his superiors that he had pulled the trigger. Yee, supra note 1, at 233. See also Murton, supra note 56, at 24-25.

60. A summary of testimony from inmates and former inmates, evaluating professional concern of California prison medical personnel appears in Karabian Comm., supra note 54, at 1, 14-17, 27-28, 30-31, 35-37, 41-44, 46-50, 54-56, 60-64. Nearly one year later a report by the California Department of Public Health on conditions at Folsom Prison not only confirmed the inmates' account but revealed that few, if any, steps had been taken to correct the discrepancies previously described by the Karabian Committee. The Sacramento Bee, May 12, 1973, at A-13. A former prison superintendent has described active participation by prison doctors in torture, as well as complicity in homicides. Murton, supra note 56, at 24-29; T. Murton & J. Hyams, Accomplices to the Crime 107-11 (1970) [hereinafter cited as Murton & Hyams]. A remarkable instance of testimony revealing the focus of a prison psychiatrist's loyalty to the prison system appears in a colloquy between the psychiatrist-witness and the court in Jordan v. Fitzharris, 257 F. Supp. 674, 682-83 (N.D. Cal. 1966).

Even healers of the soul display an alarming tendency to assume that Caesar has ascended to the right hand of the throne or has become, at least, the deity's press secretary. A mid-nineteenth century chaplain of the Ohio Penitentiary wrote, "Could we all be put on prison fare for the space of two or three generations, the world would ultimately be better for it." "It would be a salutary experience," he said,

should society change places with the prisoners . . . taking to itself the regularity and temperance and sobriety of a good prison . . . the prisoner has the advantage.

D. Rothman, Discovery of the Asylum 84-85 (1971), quoting from J. Finley, Memorials of Prison Life 41-42 (1851). Uncritical views of prisons apparently have not disappeared entirely among prison clergy during the past century, as indicated by the statement from the Reverend James P. Collins, president of the New York prison chaplains: "A strong courage of convictions is especially needed in light of the recent criticism of the Corrections profession by the media. We in Corrections today need a king-sized dose of courage and old-fashioned guts." Mitford, supra note 26, at 239, quoting from IV Grapevine (1972) (emphasis added).

61. One respected authority in psychiatric criminology, himself a former staff psychiatrist in the federal prison system, has noted that

[the psychiatrist's position in the prison setting has rarely been an esteemed one. He has usually found himself relegated to the role of agitator, ineffective do-gooder, barely tolerable eccentric or an accomplice to the goals of custody and punishment.

Halleck, supra note 25, at 282. He further observed that

other stresses for the prison psychiatrist include lack of status in his own profession, constant frustration and guilt as to his ability to alter the oppressive prison regime and, of course, the kinds of fears and temptations that anyone experiences in working with criminals.
prison world at all levels, and the skepticism and dislike for prisoners which prison professionals are apt to develop, it is no surprise that persons who remain in these positions soon begin to resemble their prison counterparts as much as or more than they resemble their professional counterparts. Yet it is doubtful that most judges understand the true nature and function of a prison professional, and as a result they tend to give substantial and often conclusive weight to a medical record or to the testimony of a prison doctor.

Id. at 299.

Twenty-four and one-half psychiatric positions are provided at California's seven major penal institutions housing approximately 9,400 inmates. However, of these psychiatrists, eleven are assigned to the California Medical Facility at Vacaville which contains about 1,400 inmates. Thirteen and one-half psychiatric positions cover roughly 8,000 inmates at the other six institutions which provide psychiatric services, resulting in a ratio of one psychiatrist to every 592 inmates; other institutions within the Department of Corrections have no psychiatric positions. KARABIAN COMM., supra note 54, at 18-19. The remaining institutions provide no psychiatric services to the balance of the Department's 20,000 inmates.


The Alabama Board of Corrections employed one clinical psychologist who worked one afternoon each week to diagnose and treat the almost 2,400 inmates within the Alabama penal system, who were believed to require psychological and psychiatric evaluation and treatment. There were no psychiatrists, social workers or counselors on the staff. Newman v. State of Alabama, 349 F. Supp. 278, 284 (M.D. Ala. 1972).

62. E.g., KARABIAN COMM., supra note 54, at 60-62; ATTICA, supra note 26, at 67-68.

63. See notes 59, 60 supra; Rundle, Medical Un-Care for Prisoners, 1 PRIS'RS RTS. NEWS (1972). Seymour Halleck, referring to the stresses on prison psychiatrists described earlier, note 57 supra, finds that very divergent reactions may ensue:

Three common and quite pernicious means of defending against anxiety in this situation are: (1) a tendency to withdraw from active involvement and work as little as possible; (2) an effort to become a messianic zealot (usually an ineffective one) who overidentifies with the inmate's needs; and (3) a tendency to overidentify with custody and to lose sight of one's obligation as a physician. Nevertheless, all of these reactions show the common characteristics of failing to serve the inmate professionally.

Halleck, supra note 25, at 299. Describing both guards and psychiatrists (within prisons) he concludes: "Most correctional workers are more frightened of their own impulses than they need to be. Most commonly they defend themselves by trying to lead as conforming and conventional lives as possible." Id. at 298.

64. See, e.g., In re Allison, 66 Cal. 2d 282, 286, 425 P.2d 193, 57 Cal. Rptr. 593, 599, cert. denied, 389 U.S. 876 (1967); cases cited in note 131, infra. The eagerness with which California state courts will deny relief on the basis of only a return consisting of the doctor's declaration, is typified in the following two proceedings before the Superior Court of Sacramento County. The complete transcripts of both proceedings are reproduced here:

1) THE CLERK: In the matter of the application of William W. Stabler for Writ of Habeas Corpus, Number 41104, order to show cause, further hearing.
Finally, one would not be justified in absolving high-ranking prison officials from responsibility for the brutal and arbitrary manner in which our prisons are operated. Few departmental or institutional officials have been appointed to their jobs from outside the correctional system. Most officials have, instead, worked their way up through the ranks, beginning usually as a guard or

THE COURT: The order to show cause is presently confined to the singular—or single, I should say, not singular—single issue of whether or not this defendant has been denied needed medical care and treatment in the County Jail facility, and the District Attorney has filed a supplemental return—or, rather, a supplement to the return consisting of the declaration of Dr. Harris, together with medical records, xeroxed copies of which are attached.

Do you submit it, Mr. Saraydarian?

MR. SARAYDARIAN [Deputy District Attorney, for Respondent]: Yes, your Honor.

THE COURT: Mr. Reed?

MR. REED [Assistant Public Defender, for Petitioner]: Your Honor, we would point out to the Court that the doctor simply states that—regarding the tooth, that there is a tooth filling that is missing and that no other emergency exists. Mr. Stabler informs me in fact that a tooth is broken off and he is in considerable pain from that, and the doctor does not state that he has given him any medication—or other medication for that. Mr. Stabler would request that he be allowed to receive treatment for the tooth, and further, that he be given further examination at the County Hospital regarding the wounds in the leg.

THE COURT: I don't think under the Business and Professions Code I have the right to write a prescription, do I, Mr. Reed?

MR. REED: Not that I'm aware of, your Honor.

THE COURT: Dr. Harris has filed his declaration, he is a licensed physician, he has examined the defendant and he has addressed his examination to the defendant's complaints. There is a veritable ream of medical records which I have looked over, even though I'm not a doctor, attached to this declaration, and I certainly can't say that this defendant has been denied any needed medical care and treatment in the County Jail. So, the order to show cause is denied, discharged and the petition is denied.

MR. SARAYDARIAN: Thank you, your Honor.


THE COURT: The District Attorney has filed a declaration by the treating physician in this case which I deem to be in proper form. Do you submit it on that basis, Mr. Saraydarian?

MR. SARAYDARIAN [Deputy District Attorney, for Respondent]: That's correct your Honor.

MR. DIAZ [Assistant Public Defender, for Petitioner]: We have nothing further to submit on the matter.

THE COURT: All right, I am satisfied from the declaration of the doctor and the documents which are attached that this petitioner has not been denied needed medical care and treatment and, in fact, has been given adequate medical care and treatment for his ailments. So, accordingly, the Order To Show Cause is discharged and the Petition is denied.

MR. SARAYDARIAN: Thank you, your Honor.


A traditional rule followed by the federal courts has been that, "[c]ourts should not inquire into the adequacy or sufficiency of medical care of state prison inmates unless there appears to be an abuse of the broad discretion which prison officials possess in this area." Newman v. State of Alabama, 349 F. Supp. 278, 280 (M.D. Ala. 1972) [citations omitted].
Thus they know from first hand experience what goes on in the hole, what sort of medical treatment is available to prisoners, and what sort of arbitrary and even brutal treatment is meted out every day to inmates confined in the institutions over which they preside. Certainly the sadistic practices which went on in the Arkansas and Mississippi prison systems were not unknown to the top prison officials of those states, nor was the Superintendent of Attica unaware of the oppressive conditions and practices which resulted in the bloody rebellion at that institution or of the brutal acts of retaliation which followed the retaking of the prison by armed troops.

Similarly, a federal district court recently found that the responsible officials at Soledad Prison had "abandoned elementary concepts of decency by permitting conditions to prevail of a shocking and debased nature." Another federal judge, upon making a personal inspection at the Santa Rita Jail (in Alameda County, California), concluded that the "shocking and debasing conditions which prevailed constituted cruel and unusual punishment for man or beast as a matter of law." Indeed, immediately following the August 21, 1971, killings at San Quentin, many inmates were bound hand and foot and forced to lie naked on the ground for six to seven hours, during which time they were verbally assaulted and physically abused; the California Director of Corrections was himself present during much of this time. Therefore, though much brutality and abuse occurs without a warden's express knowledge or approval, it is obvious that a significant amount of such conduct

66. Nor should it be overlooked that some of these officials have established formal policies of reprisals against inmates who complain of illness, even when the complaints are justified. Note 57 supra.
69. See generally Attica, supra note 26, at 106-08, 114-41.
70. Id. at 426-49; see Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 18-19 (2d Cir. 1971).
73. See Yee, supra note 1, at 228-33; see also San Francisco Chronicle, Aug. 23, 1971, at 1; San Francisco Examiner, Aug. 22, 1971, at 1, 28, col. 4; Aug. 23, 1971, at 1, 4, col. 3.
occurs either with his overt or tacit approval or as a result of his
desire not to know what is happening in the depths of his prison.

Despite the gravity of this situation, there is little hard data
on the subject of correctional personnel. Although commission
studies and task force reports proliferate, few in-depth studies
have been made of prison guards and “counselors.” Thus, little
is known of their interaction with prisoners and with each other;
still less of such phenomena as the “institutionalization” of prison
professionals.74

Rather than making unwarranted assumptions concerning the
nature of prisoners and prison officials, a judge’s time would be
better spent resolving contested issues of material fact on the basis
of evidentiary hearings held in open court, as the law requires.
In addition, scientific studies concerning the identity and perfor-
mance of prison personnel should be undertaken by one of the
many private or governmental organizations which presently spend
a considerable amount of money on projects designed to improve
the criminal justice system in America.75 As Jessica Mitford has
put it, “[t]he character and mentality of the keepers may be of
more importance in understanding prisons than the character and
mentality of the kept.”76

II. PRISONERS’ RIGHTS LITIGATION: THE HIDDEN AGENDA

Since most judges bring to the bench a preconceived notion
of the prison world similar to that just described, it is not surprising
to find that prisoners’ rights litigation is treated somewhat differ-
ently from other types of cases. The differences sometimes may
be subtle, but they are real.

Initially, one is struck by the sharp disparity between the
prison atmosphere, in which the events which become the subject
matter of prison litigation take place, and the insulated at-
mosphere of the courtroom. Inside the prison, and particularly
inside the hole, the atmosphere is stark. There is a constant as-
sault on the senses: cell doors slam, blaring music is mixed with
shouted obscenities, foul odors are pervasive, and, above all, the

74. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND
GOALS, CORRECTIONS, 352-53 (1973). Except for Professor Zimbardo’s research
(see text accompanying notes 34-39 supra) the only study seems to have been the
analysis by a psychology professor of the scores received in the statutorily-required
psychological evaluation of applicants for employment as correctional officers in
75. E.g., American Foundation Institute of Corrections; California Counsel
on Criminal Justice; Ford Foundation; Law Enforcement Assistance Administra-
tion, U.S. Department of Justice; National Council on Crime and Delinquency;
U.C.L.A. School of Law Program in Corrections Law.
76. MITFORD, supra note 26, at 8.
atmosphere is tense with fear. There is no respite, for it goes on unceasingly, both night and day. To the misfortune of anyone caught up in such a nightmare, there is no one to whom he may appeal for protection since the responsible administrators and professionals are for all practical purposes inaccessible to a prisoner. For a prisoner, the guard represents both the immediate and ultimate authority. Thus, when a guard abuses a prisoner with obscenities, racial epithets, tear gas, or brute force, or when he arbitrarily denies legitimate requests, the prisoner has no practical means to obtain redress. As a result, the prison staff frequently abuses its power in the most blatant manner, openly disdaining the unlikely possibility that the prisoner might be vindicated by an administrative official or a court of law. This is the picture which is imprinted sharply and, over the years, indelibly in the mind of the prisoner's lawyer in the course of interviewing prisoner clients. In addition, a prisoner's lawyer occasionally is subjected to a mild version of the same arbitrary and disdainful treatment which is visited routinely upon his clients.

Inside the courtroom, however, the atmosphere changes sharply: now there is a pervasive silence as counsel wait for the judge to leave his carpeted chambers and enter the wood paneled courtroom, where usually he finds no guards or prisoners, but rather, well-dressed and well-mannered attorneys for the contending parties. A Deputy Attorney General, representing the prison officials, speaks in reasonable tones, urging upon the court the good faith of his respectable clients. He reminds the court of the difficult task which such officials have in administering the prison and denies that they have performed the complained of actions. Alternatively, he suggests that any illegal action was in-

78. See Stocking Memorandum, supra note 28.
80. See, e.g., Hearings, supra note 46, at 73-75. See also note 104 infra. In another case, a superior court ordered that a deposition of an inmate be taken at San Quentin, whereupon counsel for the deposing party made the usual arrangements with the responsible prison officials. The arrangements, however, were not honored. When the attorney arrived at the prison, he was forced to wait for two hours and was told that the deposition could be taken only in the main visiting room (although the attorney's visiting room was vacant) with the deponent on the other side of a glass and screen enclosure, requiring the deponent, attorney and court reporter to bend over completely at the waist and yell through the wire mesh. The responsible prison officials refused even to tell him where their offices were. As a result, it was necessary to obtain a further court order directed to the prison officials, specifying such details as the type of room and the sitting position of the participants. See In re Johnson, No. A-8903 (L.A. Cty. Super. Ct.), affidavit of Armando M. Menocal, III, dated Oct. 31, 1974, order dated Oct. 11, 1974.
consequential, inadvertent or at least understandable under the circumstances. The prisoner’s attorney attempts, to the best of his ability, to evoke through his words the stark setting, the brutal acts, and the harsh reality, but in this he usually fails. His words remain somehow unconvincing in the face of earnest denials of the Attorney General, appear to bounce off the paneled walls, become absorbed by the thick carpets, and fall finally on disbeliefing ears. In short, the prisoner’s attorney is unable to recreate, in the peaceful oasis of the courtroom, the brutal reality of the prison. As a result, the judge cannot but help take with him mental images of the controversy which more closely resemble the atmosphere of the courtroom in which the allegations were debated than the atmosphere of the prison in which the events occurred.  

In addition to the mistaken impressions under which judges in prisoners’ rights litigation often operate, there are at least three specific concepts which federal judges frequently adopt in approaching prisoners’ rights litigation. First, there is the prevailing notion that by its very nature a prisoner’s complaint is likely to be so without merit as to be “frivolous or malicious” within the meaning of 28 U.S.C. § 1915(d).  

Second, there is the belief that state remedies—whether administrative or judicial—are available to the prisoner and are more appropriate than federal remedies. Third, there is the notion that to grant relief in general—and injunctive relief in particular—would constitute a dangerous and unwarranted intrusion into management of state prisons. These three concepts, which comprise a large part of the so-called hidden agenda of prisoners’ rights litigation, will now be examined.

A. The “Frivolous” Nature of Prison Litigation

The notion that most prisoners’ rights suits are likely to be without merit no doubt derives largely from the judicial model of prisoners and prison officials described above. This viewpoint is buttressed by a similar apprehension that prisoners either have, or believe they have, nothing to lose and much to gain from filing spurious lawsuits. Thus, it is not uncommon for a court to note that such suits may be filed in federal court in forma pauperis; that a prisoner-plaintiff has an abundance of time in which to conjure up such lawsuits, and nothing to lose if his claim is rejected; and that such suits may well provide a welcome trip to the courtroom.

81. One method to peel away this insulation may be to transfer hearings and trials to the prison which is in issue. Some advantages and disadvantages of this procedure are mentioned in Aikens v. Lash, 371 F. Supp. 482, 484-85 (N.D. Ind. 1974).

This view recently was articulated by Mr. Justice Rehnquist, when he noted that it would be quite consistent with the intent of the framers of the fourteenth amendment, many of whom would doubtless be surprised to know that convicts come within its ambit, to treat prisoner claims at the other end of the spectrum from claims of racial discrimination. For example, Justice Rehnquist would subject complaints filed by prisoners to a less strict standard of dismissal than other civil complaints, and would not require the District Court to inflexibly apply this general principle to the complaint of every inmate, who is in many respects in a different litigating posture than persons who are unconfined. The inmate stands to gain something and lose nothing from a complaint stating facts that he is unable to prove. Though he may be denied legal relief, he will nonetheless have obtained a short sabbatical in the nearest federal courthouse. To expand the availability of such courtroom appearances by requiring the District Courts to construe every inmate's complaint under the liberal rule of Conley v. Gibson deprives those courts of the latitude necessary to process this ever-increasing species of complaint. Other federal judges from time to time have expressed similar concerns. Although there may be enough substance to this view so that it should not be dismissed out of hand, the model advanced by Powell, J., concurring), aff'd, Martinez v. Procurier, 354 F. Supp. 1092 (N.D. Cal. 1973). Price v. Johnston, 159 F.2d 234, 237 (9th Cir. 1947), rev'd 334 U.S. 266 (1948) (petition for writ of habeas corpus challenging conviction); Rodriguez v. McGinnis, 456 F.2d 79, 86 (2d Cir. 1972) (Lumbard, J., dissenting), rev'd sub nom. Preiser v. Rodriguez, 411 U.S. 475 (1973). Judge Lumbard shares Justice Rehnquist's misgivings (concerning the framers of the fourteenth amendment) with regard to the authors of section 1983:

If the federal courts must hear these suits and resolve factual issues, it is a clear invitation to state prisoners to frame complaints of alleged mistreatment so that they will, at the least, be afforded some vacation from the tedium of prison life. It could hardly have been the intention of Congress in enacting § 1983 that it would be the means whereby state prisoners would place state authorities on trial for the manner in which they were cared for and disciplined in state prisons.

Id. For a contrary view, see Ziegler & Hermann, The Invisible Litigant: An Inside View of Pro Se Actions in Federal Courts, 47 N.Y.U.L. REV. 159, 163 n.13 (1972) [hereinafter cited as Ziegler & Hermann].
Justice Rehnquist badly misrepresents the actual situation. Undoubtedly, prisoners do have more time than most people in which to prepare and file petitions, and also more reason to do so, in view of the oppressive conditions under which they live. It is equally true that prisoners' petitions are filed routinely without prepayment of fees, and that few court sanctions—other than denial of the legal relief sought—are ever imposed for the filing of a complaint which lacks merit. Yet to limit one's image of prisoners' rights litigation to these considerations is to adopt an incomplete and distorted view of the subject, much as the blind man who, upon feeling the elephant's tail, mistook the part for the whole.

To begin with, in forma pauperis cases are now filed in federal court by a multitude of plaintiffs whose complaints have nothing to do with prison conditions. Yet no substantial segment of the bench or bar has suggested that permission to file without prepayment of fees be discontinued simply because indigent plaintiffs have "nothing to lose" in the event their suits lack merit. Indeed, many landmark decisions have been handed down in cases which were presented in forma pauperis at all stages of the litigation.


88. See generally the variety of cases reported in the Poverty Law Reporter (Commerce Clearing House, Inc.) or in the Clearinghouse Review (published by the National Clearinghouse of Legal Services, 500 North Michigan Avenue, Chicago, Illinois 60616, pursuant to a grant from the Office of Economic Opportunity). Cases filed in federal court without prepayment of fees are, of course, expressly authorized by 28 U.S.C. § 1915. But even where state courts are involved, some statutes which required indigents to pay filing fees have been held unconstitutional. See, e.g., Boddie v. Connecticut, 401 U.S. 371 (1971) (divorce action); Smith v. Bennett, 365 U.S. 708 (1961) (habeas corpus).


What actually troubles the judiciary, therefore, is not the in forma pauperis aspect of prisoners' petitions but rather the facts that the petitions are filed pro se and that there are so many of them. According to one study, 95 percent of pro se petitions submitted to the federal courts are filed by state prisoners attacking either their conviction or the conditions of their confinement. Thus, a prisoner-petitioner labors under three handicaps in seeking relief from a court: the fact that he is a prisoner, the fact that his petition has not been drafted by a lawyer, and the fact that his petition is but one of hundreds of a similar nature.

In the authors' view, the severity of these handicaps is unwarranted. It is clear that indigent plaintiffs in other areas of the law, such as civil rights, housing, or welfare, have had for several years at least some (although by no means enough) established legal organizations which have filed and presented their in forma pauperis cases. Prisoners, on the other hand, have had very few such organizations. Therefore, the fact that a prisoner's claim is filed pro se does not indicate that it has been considered and rejected by trained counsel; to the contrary, a number of recent petitions which were initially filed pro se in the Northern District of California have been successful after the court appointed counsel to represent the indigent plaintiff. Further, it has become evident that most dismissals of California prisoners' pro se petitions are unwarranted. It is clear that indigent plaintiffs in other areas of the law, such as civil rights, housing, or welfare, have had for several years at least some (although by no means enough) established legal organizations which have filed and presented their in forma pauperis cases. Prisoners, on the other hand, have had very few such organizations. Therefore, the fact that a prisoner's claim is filed pro se does not indicate that it has been considered and rejected by trained counsel; to the contrary, a number of recent petitions which were initially filed pro se in the Northern District of California have been successful after the court appointed counsel to represent the indigent plaintiff. Further, it has become evident that most dismissals of California prisoners' pro se petitions are unwarranted. It is clear that indigent plaintiffs in other areas of the law, such as civil rights, housing, or welfare, have had for several years at least some (although by no means enough) established legal organizations which have filed and presented their in forma pauperis cases. Prisoners, on the other hand, have had very few such organizations. Therefore, the fact that a prisoner's claim is filed pro se does not indicate that it has been considered and rejected by trained counsel; to the contrary, a number of recent petitions which were initially filed pro se in the Northern District of California have been successful after the court appointed counsel to represent the indigent plaintiff. Further, it has become evident that most dismissals of California prisoners' pro se petitions are unwarranted. It is clear that indigent plaintiffs in other areas of the law, such as civil rights, housing, or welfare, have had for several years at least some (although by no means enough) established legal organizations which have filed and presented their in forma pauperis cases. Prisoners, on the other hand, have had very few such organizations. Therefore, the fact that a prisoner's claim is filed pro se does not indicate that it has been considered and rejected by trained counsel; to the contrary, a number of recent petitions which were initially filed pro se in the Northern District of California have been successful after the court appointed counsel to represent the indigent plaintiff. Further, it has become evident that most dismissals of California prisoners' pro se petitions are unwarranted. It is clear that indigent plaintiffs in other areas of the law, such as civil rights, housing, or welfare, have had for several years at least some (although by no means enough) established legal organizations which have filed and presented their in forma pauperis cases. Prisoners, on the other hand, have had very few such organizations. Therefore, the fact that a prisoner's claim is filed pro se does not indicate that it has been considered and rejected by trained counsel; to the contrary, a number of recent petitions which were initially filed pro se in the Northern District of California have been successful after the court appointed counsel to represent the indigent plaintiff. Further, it has become evident that most dismissals of California prisoners' pro se petitions are unwarranted.
petitions are the result of the state judiciary's routine practice of denying all such petitions out of hand, regardless of the actual merits of the petition. In the authors' view, the popular judicial assumption that prisoners' pro se petitions lack merit operates as a self-fulfilling prophecy which precludes determining whether or not there is any basis to the assumption.

Even more specious, however, is the belief that the filing of a federal lawsuit entitles a prisoner to "a short sabbatical in the nearest Federal courthouse." Most prisoners' rights lawsuits are disposed of merely by the granting of a motion to dismiss, a motion for summary judgment in favor of the defendant prison officials, or a preliminary injunction. Even in the unusual cases where extensive prisoner testimony is taken, the hearings often are held at the prison itself. Although no statistics are available on this point, it is the authors' belief that in only a minute percentage of section 1983 cases do prisoner-plaintiffs or prisoner-witnesses obtain even a brief appearance, much less a "short sabbatical," in the nearest federal courthouse.

97. See notes 20-24 and accompanying text supra.
98. Numerous books, law review articles, and periodicals collect the recent cases in which the misconduct of prison officials has resulted in a court order granting relief to prisoner-plaintiffs. Solely by way of example, see generally Turner, Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation, 23 STAN. L. REV. 473 (1971) [hereinafter cited as Turner]; Hirschkop & Millemann, The Unconstitutionality of Prison Life, 55 VA. L. REV. 795 (1969); Goldfarb & Singer, supra note 56; Hermann & Haft, Prisoners Rights Sourcebook (1973); Prison Law Rptr., published by the Administration of Criminal Justice and Prison Reform Committee of the Young Lawyers Section of the American Bar Association. See also note 96 supra.
100. See Ziegler & Hermann, supra note 86, at 200-02; notes 20-24 and accompanying text supra.
102. For example, at Clinton Prison in New York State a state trial court holds a regularly scheduled motion session once each month "to hear applications for writs of habeas corpus or other proceedings regarding detention or confinement." Wright v. McMann, 321 F. Supp. 127, 130 (N.D.N.Y. 1970), cert. denied, 409 U.S. 885 (1972) (emphasis added). See also Jordan v. Fitzharris, 257 F. Supp. 674, 678 (N.D. Cal. 1966), in which testimony of certain inmate witnesses was taken at Soledad Prison upon the request of the state. See also Aikens v. Lash, 371 F. Supp. 482 (N.D. Ind. 1974), in which the court responded to plaintiffs' subpoena to produce numerous plaintiffs and inmate witnesses in court by holding the trial in the Administration Building at the Indiana State Prison.
103. "When a plaintiff in a civil rights suit is confined in a state prison at
Finally, an accurate understanding of prison litigation compels the conclusion that the Department of Corrections, in conjunction with the Office of the Attorney General, is responsible for much of the litigation presently pending in the federal courts. The traditional account depicts the litigious prisoner, aided and abetted by a supposed host of "radical" attorneys,\textsuperscript{104} responsible for proliferating prison litigation. In fact, however, there are only a few attorneys in California who are willing and able to represent prisoners in federal court without fee. As a result, thousands of requests for legal assistance from prisoners are rejected annually, either by commercial attorneys who do not handle prisoners' cases or by those few attorneys who do but whose time constraints allow them to work on only a small fraction of these cases. Significantly, the inability of these lawyers to accept most of the cases brought to their attention insures that they file and prosecute only those suits which they believe to be important and meritorious.

By comparison, the Department of Corrections has automatic access to the Attorney General's office, which will provide experienced counsel to represent any prison official who has been named as a defendant in section 1983 litigation. In the authors' experience, the Attorney General's office exercises little, if any, restraint upon such litigation by way of successfully urging the Department to settle a case out of court or to forego an appeal where the record is weak and a judgment in the plaintiff's favor is just. Instead, the inclination of the Department, under its present director, is to litigate every suit, oppose every motion, resist all discovery, appeal every adverse decision, and implement every unfavorable decision in as narrow and grudging a fashion as pos-

the time of a hearing, he has no right to appear personally." Potter v. McCall, 433 F.2d 1087, 1088 (9th Cir. 1970).

104. Prison administrators and the Attorney General apparently found little objectionable about prisoners' attorneys so long as the latter challenged their clients' convictions or other forms of commitment. But as prisoners have increasingly challenged the conditions of their confinement and the "real parties in interest" have become the prison administrators rather than the judiciary, both the administrators and the Attorney General have attempted to discredit counsel through the characterization of the latter as "radical." See Hearings, supra note 46, at 10-11, 14-15, 18, 125 (Statement of Raymond K. Procunier); Id. at 49 (Statement of James W. Park); Id. at 58, 63, 143-44 (Statement of Moe Camacho, past President of the California Correctional Officers Association); Nelson and Park, Wardens and Attorneys, 78 Case & Com. 37 (Jan.-Feb. 1973); San Francisco Chronicle, July 22, 1971, at 1, col. 5 (wherein San Quentin Associate Warden James Park, referring to the death of a guard, was reported as stating:

You can lay some of the blame for this at the doorstep of some of these radical attorneys who come in here and encourage the men [inmates] to do this sort of thing, . . . They're not doing the convicts a favor; they just come here and shoot their mouths off and then go home to their suburban swimming pools.);

See also Wright v. Procunier, Civil No. C-73-1422 SAW (N.D. Cal. 1974), Defendants' Response to Motion for Protective Order at 5, 7-8, filed on May 14, 1974.
sible—a course of action made possible by the ready availability of numerous Deputy Attorneys General. Thus, it is the Director who, to paraphrase Mr. Justice Rehnquist’s remarks, “stands to gain something and lose nothing” from defending an unconstitutional regulation or a course of illegal misconduct on the part of prison officials; for, “though he may be denied legal relief, he will nonetheless have obtained” a short respite from being subjected to an onerous order which requires him to produce documents, establish a law library, or provide due process safeguards at disciplinary hearings. Iironically, therefore, it is not the indigent prisoners and their pro bono counsel who most often engage in prosecuting unmeritorious lawsuits.

B. The Existence of Viable State Remedies

In many cases, the California Attorney General will argue that the federal court should defer to state agencies and to state-

105. For example, the courts have held that in order to afford California prisoners their constitutional right of access to the courts, an adequate law library, containing specified codes, treatises, reporters and the like, must be provided them. See Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970), aff’d sub nom. Younger v. Gilmore, 404 U.S. 15 (1971). However, many institutions have responded by imposing extremely onerous regulations which, in practical effect, often preclude inmates from using the books in the law library. Perhaps, inspired by the saying that if the mountain will not come to the prophet, the prophet will go to the mountain, the Department appears to have struck the other side of the coin by asserting that if the law books cannot be kept from the inmate, the inmates can be kept from the law books. This has necessitated the filing of yet another section 1983 suit seeking to remedy this situation. See Gordon v. Fitzharris, Civil No. 48026 ACW (N.D. Cal.); Gordon v. Nelson, Civil No. 50775 ACW (N.D. Cal.). In In re Jordan, 7 Cal. 3d 930, 500 P.2d 873, 103 Cal. Rptr. 849 (1972), the California Supreme Court held that letters from attorneys to prisoners must be opened in the presence of the prisoner, and then only for the limited purpose of searching for contraband; the letter itself may not be read by prison staff. The Department of Corrections, however, took the position that legal documents which were enclosed with such a letter are not within the protection afforded by Jordan, and could be read by prison staff. This position required attorneys to return to the California Supreme Court to obtain a further ruling that such legal documents are in fact to be treated with confidentiality. In re Jordan, Crim. No. 17336 (California Supreme Court). For another instructive lesson in compliance with court orders, compare Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966) with Black Caucus Report, supra note 1. See also Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971), modified, 497 F.2d 809 (9th Cir. 1974), in which the injunction requiring San Quentin Prison to institute new disciplinary procedures was stayed for almost three years pending appeal, during which time the Department of Corrections instituted new procedures which fell far short of those mandated by Judge Zirpoli in Clutchette. Compare Director’s Rule DP 4501-4513 with Clutchette v. Procunier, supra. It has also been the author’s experience that the Attorney General, on behalf of the Department of Corrections, will oppose virtually all discovery motions filed under Fed. R. Civ. P. 33 (interrogatories) and Fed. R. Civ. P. 34 (production of documents), producing essential documents and answering relevant interrogatories only when ordered to do so by the court under Fed. R. Civ. P. 37.

created remedies before acting upon a prisoner's complaint. Such an argument—that a state should be permitted, at least in the first instance, to correct any abuses in its prison system—appears sensible and, on occasion, has found favor with federal judges. It has, however, one fatal defect: in California, there are no effective state remedies open to prisoners.

Most remedies for prisoner grievances utilize one of three procedures: (1) an inmate grievance and/or inspector-general procedure operated by the Department of Corrections; (2) an ombudsman system, whereby state officials responsible directly to the legislature are empowered to investigate grievances and to propose (or in some cases impose) appropriate solutions; or (3) litigation conducted in the state courts. Until recently there was no coordinated departmental system in California for allowing inmates to appeal from allegedly illegal conduct on the part of prison staff; instead, each institution adopted its own grievance procedures. In addition, all prisoners have had the right to address a sealed letter to the Director of Corrections. These options, however, afforded little meaningful relief to prisoners, whose complaint to higher authority—whether at the institutional


110. The Federal Judicial Center has recommended the statutory creation of a non-judicial federal institution charged exclusively with the task of investigating and assessing prisoner complaints of the denial of federal constitutional rights. The institution would have a staff of lawyers and investigators and a measure of subpoena and visitatorial powers. It would be charged to investigate complaints, make a response to them, and where possible, try to settle in-prison grievances by mediation. All petitions for collateral review or for redress of grievances concerning prison conditions from state or federal prisoners which could now be filed in a federal court would go initially to this new institution at the election of the prisoner or by referral to it at the discretion of the court. FEDERAL JUDICIAL CENTER, FEDERAL JUDICIAL CENTER REPORT ON THE STUDY GROUP ON THE CASE LOAD OF THE SUPREME COURT, 12-15 (1972). Other non-judicial mechanisms for the resolution of prisoners' grievances involve the formation of, and participation in negotiations by, a prisoners' union, or the formation of an institutionalized third party to mediate between prisoners and prison officials. See generally Bergesen, supra note 109, at 46-48, and authorities cited therein.

111. See Director's Rule DP-2404.
or departmental level—would usually be bucked back down to the person whose actions were the subject of the complaint, in order to obtain his version of the incident. This version would then be given conclusive weight in rejecting the prisoner's complaint.

Recently, however, the Department of Corrections has instituted an elaborate procedure for administratively processing prisoners' complaints in a uniform manner throughout the prison system.112 Putting to one side the likelihood that the system was designed largely for the purpose of persuading federal courts to refrain from deciding prisoners' rights cases,113 it is our view that such a system, even if implemented in good faith by those at the top level of the Department, is doomed to failure. For example, hard evidence of misconduct by the prison staff is often difficult to discover.114 Often such evidence can be uncovered only by persons who have a greater interest in doing so than institutional or departmental personnel. Such personnel are naturally inclined to disbelieve allegations by prisoners and accept the word of fellow prison officials. They may also attempt to cover up for a colleague who has made a mistake in order to protect him (and the state) from civil or criminal liability. Thus the outcome is likely to be similar to the internal investigations typically conducted by big city police departments, which numerous studies have found to be essentially worthless.115

With the possible exception of law enforcement, other governmental agencies are not given this total discretion to police themselves, free from the restraints imposed by the legislature, a regulatory body, or some system of judicial review.116 At the very least,

112. See Administrative Bulletin No. 73/49 (Oct. 17, 1973), issued by the California Director of Corrections, and attachment thereto.

113. See, e.g., Wright v. Procunier, Civil No. C-73-1422 SAW (N.D. Cal.), in which Administrative Bulletin 73/49, supra note 112, was appended as Exhibit A to defendants' motion to dismiss, in support of defendants' argument that before filing a section 1983 action an inmate should first be required to appeal "through the institution to which he is assigned, and then to an appeals board in Sacramento, California." Wright v. Procunier, supra, Defendants' Motion to Dismiss, dated Feb. 6, 1974, at 4.

114. See text accompanying notes 43-44 supra.


116. Chief Judge Coffin, in an articulate, sensitive evaluation of the extent to which courts should impose due process safeguards, has written:

Time has proved, however, that blind adherence to correctional officials does no real service to them. Judicial concern with procedural regularity has a direct bearing upon the maintenance of institutional order; the orderly care with which decisions are made by the prison authority is intimately related to the level of respect with which prisoners regard that authority. There is nothing more corrosive to the fabric of a whole institution such as a prison than a feeling among those whom it contains that they are being treated unfairly.

Control over official discretion within prison walls is vital for other reasons. Most decision-making of correctional personnel is less visible
the Department of Corrections should be required to publish detailed statistics, and make public all of its supporting documents, showing the number and nature of inmate appeals which result in relief to the inmate and, where appropriate, result in disciplinary proceedings against the offending staff member.\footnote{117} Until such data is forthcoming, the Department is not justified in asking courts, prisoners or the public to believe that its appeals mechanism is more than window dressing designed to enhance the Department's reputation and, more importantly, to keep the courts at bay.

Attempts to strengthen the prisoners' appeal process have thus far been unsuccessful. The California Legislature has twice passed a bill creating the position of Correctional Ombudsman,\footnote{119} to be filled by a person directly responsible to the legislature. The ombudsman would have had a staff of approximately thirteen deputies and the power to conduct investigations, issue subpoenas, hold hearings, and make detailed findings and recommendations to the legislature, the governor and the public. In each instance, however, Governor Reagan vetoed the legislation, which had been vigorously opposed by the Department of Corrections. Yet it is obvious that such an outside presence is indispensable if legitimate inmate grievances are to be identified, documented and remedied.\footnote{119}

Finally, there is the persistent notion that if a real injustice does occur, the state courts are always available to provide a remedy.\footnote{120} However, one of the authors has shown in a previous law review article that this is simply not the case, at least in San Joaquin County, where the Deuel Vocational Institution is located.\footnote{121}

\begin{footnotes}
\footnotetext[117]{Palmigiano v. Baxter, 487 F.2d 1280, 1283-84 (1st Cir. 1973).}
\footnotetext[118]{See MANAGEMENT SURVEY, supra note 30, at 9.}
\footnotetext[119]{The bill passed both houses of the California Legislature in 1971 as Cal. A.B. 1181 and in 1972 as Cal. A.B. 5.}
\footnotetext[120]{A psychiatric counselor with the Department of Corrections has recently recommended the creation of an ombudsman position which would guarantee confidentiality to the complaining inmate. Stocking Memorandum, supra note 28, at 4.}
\footnotetext[121]{See e.g., Dorado v. Kerr, 454 F.2d 892, 898 (9th Cir.), cert. denied, 409 U.S. 934 (1972); Morrissey v. Brewer, 443 F.2d 942, 950 (8th Cir. 1971), rev'd on other grounds, 408 U.S. 471 (1972).}
\end{footnotes}
In addition, a recently completed study shows that the state courts with jurisdiction over the other three main California prisons also refuse to give meaningful hearings to prisoners complaining about the conditions of their confinement. Thus it is clear that although in theory habeas corpus lies to redress legitimate prisoner grievances, the state courts of California are closed to prisoners who seek judicial vindication of their statutory and constitutional rights.

C. The Unwarranted Intrusion of Injunctive Relief

Frequently one hears judges express their strong reluctance to interfere with the administration of the state prisons. Evidently they believe that an order which enjoins brutality, inadequate medical treatment, or illegal censorship will enmesh the court deeply in the affairs of the institution, thereby committing the court to a task for which it possesses insufficient time or expertise, and subjecting prison administrators to an unwarranted degree of judicial interference which would, as a practical matter, undermine their authority and render them impotent to carry out their assigned tasks.

This view overlooks certain crucial observations which, in combination, paint a very different picture. Initially, the principal problem with American prisons is the absolute power which prison staffs possess over the prisoners under their control. That power

---

122. See notes 20-24 and accompanying text supra.
123. Courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations. Neither have we power to inquire with respect to the prisoner's detention in the Lewisburg Prison. No authorities are needed to support these statements. Banning v. Looney, 213 F.2d 771 (10th Cir. 1954). See also, Weller v. Dickson, 314 F.2d 598, 602 (9th Cir. 1963) (Duniway, J., concurring); In re Henderson, 25 Cal. App. 3d 68, 77, 101 Cal. Rptr. 479, 485 (1972). This avoidance of judicial review has traditionally been known as the "hands-off" doctrine. Turner, supra note 98, at 473 n.1.
124. "This is the central evil in prisons . . . the unreviewed administrative discretion granted to poorly trained personnel who deal directly with prisoners." Hirschkop & Millemann, The Unconstitutionality of Prison Life, 55 Va. L. Rev. 795, 811-12 (1969). See also Greenberg & Stender, The Prison as a Lawless Agency, 21 Buffalo L. Rev. 799 (1972). The dismay of a veteran attorney, previously inexperienced in prisoners' rights litigation, over the absence of any adherence by prison staffs to the rule of law, is voiced in the statement of Edwin T. Caldwell, Hearings, supra note 46, at 76. Indications that this lawlessness continues unabated subsequent to legislative and judicial attempts to restrain prison administrators appear in Little v. Cherry, No. LR-71-C-89, 3 Prison L. Reptr. 70 (E.D. Ark. 1972); Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972); In re Hutchinson, 23 Cal. App. 3d 337, 100 Cal. Rptr. 124 (1972) (Declaration of Frank L. Rundle at 9). See also MITFORD, supra note 26, at 262-66. The Honorable Richard Kelly, Judge, Sixth Judicial Circuit Court of Florida testified: I would like to say one thing this committee should consider: that one of the astounding facts about prison is this; that they are probably the
is, of course, a direct and inevitable consequence of the psychological dynamics of the prison situation and the absence of any effective restraints on the part of the legislature, the judiciary, or higher officials in the executive branch. Yet despite this enormous, largely unchecked power, there are, at present, very few injunctions in effect at any California prison. Therefore, fears of excessive judicial intrusion or administrative impotence would appear to be somewhat premature.

Second, there is a distinction between those prisoners' rights petitions which simply attack certain prison regulations and those which allege that prison officials are refusing to follow the appropriate rules. For example, a petition may attack only the constitutionality of the Department's censorship regulations or of San Quentin's disciplinary procedures. In such cases, there are generally no issues of fact to be resolved and no difficult problems which require fashioning appropriate equitable relief. The issue of constitutionality vel non is resolved as a matter of law, and, if resolved against the prison authorities, the court simply requires the prison officials to adopt a valid new regulation.

But what if prison officials simply decide to disobey a particular statute or regulation which they find offensive? In such a case, the prisoner's only safeguard lies in the willingness of a federal court to receive evidence, to make findings of fact and conclusions of law, and, if the prisoner-plaintiff proves his case, to fashion appropriate injunctive relief. Conversely, the refusal of a court to issue an injunction—based upon some notion of "interfering" with the administration of the prison—is "to say to a prisoner-plaintiff that although his constitutional claim may be valid, the courts will allow the defendant officials to deprive him of it." In the authors' view, official lawlessness in California prisons is widespread, due largely to the absence of any effective legal

most lawless place in our society . . . . [T]his is a dominating factor every place, that they are lawless. . . .


125. To the best of the author's knowledge, the only injunction presently in effect at institutions operated by the Department of Corrections is the one in Charles v. Patterson, No. C-71-1337 (N.D. Cal. 1974), which affects only Deuel Vocational Institute. In most cases, a decision against the prison authorities simply results in the adoption of new regulations which the authorities can then proceed to enforce as they see fit. See, e.g., Martinez v. Procunier, 354 F. Supp. 1092 (N.D. Cal. 1973); In re Jordan, 7 Cal. 3d 930, 500 P.2d 873, 103 Cal. Rptr. 849 (1972).


restraints on the absolute power possessed by prison officials. Ideally, such restraints might be imposed by a collective bargaining arrangement between prisoners and prison staff; by an ombudsman responsible to the legislature; or by an independent, third party serving as a mediator between the prisoners and the Department. However, none of these methods for overseeing actions of prison officials presently exists in California, nor are any likely to be instituted in the near future. Therefore, the federal courts should not be deterred by the spectre of a network of cumbersome, intrusive, unjust and unnecessary injunctions, binding the hands of prison administrators. For the fact of the matter is not that there are too many injunctions presently in effect, but that there are far too few.

CONCLUSION

The thesis of this article is that most judges have unrealistic views of the prison world and that this impression significantly affects their conduct of prisoners' rights litigation. This distorted view, if it does in fact exist, will be remedied only if a substantial number of judges—who, by their professional background, socioeconomic position and judicial status, have little occasion to come in contact with the prison world—make a conscious effort to experience at first hand the operation of a major prison.

Probably the most effective method by which a judge can begin to understand the impact of imprisonment on a human being is to experience for himself a brief, simulated period of incarceration in a state prison. A small number of judges have undergone such incarceration. In each case, the participating judges—many of whom had a reputation for meting out severe sentences—emerged from their experiences shaken, their preconceived notions of imprisonment having undergone a drastic change. Considering the sharp disparity between the concepts of prison life held by these judges immediately before and immediately after their mock incarceration, we wonder whether it is acceptable for the vast majority of judges to sentence criminal defendants and to preside over prisoners' rights litigation without first being ex-

129. See note 124 supra.
130. Local prison officials were, of course, aware of the true identities of their new "inmates." Therefore, it seems quite unlikely that certain steps were not taken to protect the conferees from both potentially "threatening" inmates and situations. Yet various judges and law enforcement officers remarked upon the previously unconceived (in their minds) horrors encountered in their prison experiences and compared them, unfavorably, with the treatment of animals. See generally National College of State Trial Judges, A Positive State Program—Crime and Corrections Workshop (undated); TIME, June 27, 1969, at 78; N.Y. Times, Sept. 14, 1969 (Magazine), at 56; NEWSWEEK, Nov. 23, 1970, at 34, 39; MITFORD, supra note 26, at 14-28.
posed to some form of incarceration. At the very least, it seems reasonable to require judges to make frequent unannounced visits to state penal institutions, where with the assistance of an experienced litigator and an articulate inmate, they might experience something more educational than the typical, well-orchestrated "guided tour."\textsuperscript{131}

Judges unable to accommodate themselves to forays behind the concrete and steel could at least increase their awareness of prison life by reading books and articles on the subject.\textsuperscript{132} They could also attend meetings of prisoner support groups where they could meet and speak with ex-convicts, prison organizers and members of prisoners' families.\textsuperscript{133} By undertaking these activities those entrusted with the serious responsibility of deciding cases involving the rights of prisoners might at least assure themselves

\textsuperscript{131} In England, all lay magistrates, before whom more than 98 percent of all criminal cases are tried, are required to visit at least one prison and one juvenile or adult detention center during the first year of their term in office. See Reichert, \textit{The Magistrates' Courts: Lay Cornerstone of English Justice}, 57 \textit{Judicature} 138 (1973). "The objects of visiting institutions are to stimulate the interest of the new Justice in penal treatment and to acquaint him with the nature of the punishment which he can inflict." The \textit{Training of Justices of the Peace in England and Wales}, Her Majesty's Stationery Office 2856, at 18 (1965). Similarly, "New York State's top judicial administrative board has announced a new rule requiring judges to visit prisons and other detention facilities at least once every four years." \textit{Time}, June 24, 1974, at 17.

In a recent civil rights action challenging conditions of confinement, the trial was transferred to the Visitor's Lounge of the Indiana State Prison. During the trial, the judge, accompanied by counsel for all parties plus his law clerk and a prison guide, made an "unannounced" inspection trip through the two segregation units in controversy. Aikens v. Lash, 371 F. Supp. 482, 485 (N.D. Ind. 1974). Another judge completed an unannounced inspection during the pendency of litigation in Brenneman v. Madigan, 343 F. Supp. 128, 132-33 (N.D. Cal. 1972). Testimony describing institutional reaction to, and preparation for, announced visits and inspections by a legislative investigative committee appears in \textit{Kara-\textsuperscript{bian Comm.}}, \textit{ supra} note 54. The choreography of the conducted prison tour is similar at nearly all prisons. Testimony of Dr. Jerome G. Miller on July 26, 1973, in Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974). The California Department of Corrections attempts to thwart unannounced visits or inspections of facilities, or the obtaining of confidential information from inmates, by legislators. See \textit{Hearings}, \textit{ supra} note 46, at 257; \textit{Black Caucus Report}, \textit{ supra} note 1.

\textsuperscript{132} See notes 46, 98 \textit{supra}. See also Goldfarb & Singer, \textit{ supra} note 56; \textit{Attica}, \textit{ supra} note 26. (An 80-minute color film version of \textit{Attica} is available through the Audio-Visual Department, A.B.A. Division of Communications, American Bar Center, 1155 East 60th Street, Chicago, Ill. 60637.); \textit{Hearings}, \textit{ supra} note 46; reports of legislative committees within the respective state of the judge's jurisdiction; \textit{National Advisory Commission on Criminal Justice Standards and Goals, Corrections} (1973); see also the \textit{Prison Law Rptr.}, which in addition to covering decisions, legislative developments, administrative news and pending litigation, regularly includes a bibliography.

\textsuperscript{133} It should be noted that the Director of the Department of Corrections periodically appears before, and addresses, state and federal judicial conferences. Telephone conversation by one of the authors with the Director's office, May 21, 1974.
that they are cognizant of the contending points of view on the subject, and that their decisions are not determined, however subtly, by preconceived ideas which may have no basis in fact.

Even those judges who make no effort to educate themselves on this subject could at least adopt strict courtroom standards designed to resolve contested issues of fact in a fair and impartial manner, based on the evidence adduced in open court rather than on hidden assumptions concerning the nature of the litigants. For example, judges should eliminate the practice of summarily denying prisoners' petitions on the assumption that they are probably without merit, and instead should adhere staunchly to those appellate court decisions which prohibit the dismissal of a complaint unless it does not state a claim upon which relief can be granted.\(^{134}\) Judges should also refrain from secretly requesting "informal" responses from prison officials or from giving conclusive weight to such responses when received.\(^{135}\) Instead, they should decide these cases — and the nature and scope of the relief to be granted — on the record before them, rather than on assumptions favoring one party or the other.\(^{136}\)


135. See text accompanying notes 20-24 supra; see, e.g., In re Henderson, 25 Cal. App. 3d 68, 101 Cal. Rptr. 479 (1972), where the court of appeal reaches findings of fact concerning the necessity for segregating prisoners solely upon the prison officials' affidavits contradicting the allegations of petitioners.

The California Supreme Court has established the rule that in a habeas corpus action attacking conditions of confinement, where the return to an order to show cause contradicts the petition in material respects, an evidentiary hearing should be held to resolve the conflicting factual allegations. In re Riddle, 57 Cal. 2d 848, 372 P.2d 304, 22 Cal. Rptr. 472 (1962); In re Jones, 57 Cal. 2d 860, 372 P.2d 310, 22 Cal. Rptr. 478 (1962). See Bergesen, supra note 109, at 8 n.94.

136. A series of Ninth Circuit rulings adverse to prisoners arising from pro se challenges to parole revocations is summarized in Bergesen at 36 n.234. The same circuit established that medical mistreatment of prisoners, even amounting to malpractice, was not actionable under the Civil Rights Act, unless the petitioner alleged certain exceptional circumstances. The court adopted this test in a footnote to a one-column opinion determining a pro se appeal. Stillner v. Rhay, 371 F.2d 420, 421 n.3 (9th Cir.), cert. denied, 387 U.S. 925, rehearing denied, 389 U.S. 964 (1967). The court has since ruled on at least three pro se petitions challenging medical treatment and dismissed—in opinions averaging one and one-half columns—all petitions on the basis of the dicta in the Stillner footnote. Shields v. Kunkel, 442 F.2d 409 (9th Cir. 1971); Mayfield v. Craven, 433 F.2d 873 (9th Cir. 1970); Smith v. Schneckloth, 414 F.2d 680 (9th Cir. 1969). More recently the court took advantage of another pro se appeal from a district court's dismissal of a civil rights action, to rule that the transfer of a Hawaiian inmate against his will to a California state prison pursuant to the Western Interstate Corrections Compact presented no constitutional issue worthy of trial. No authority was cited and the entire opinion barely exceeded one-half column, notwithstanding that the appellate court took time to instruct the district court that ex-
Responsibility in this area, however, is not limited to judges alone. For example, the Attorney General would do well to adopt a more discriminating position vis-à-vis his correctional clients, by urging (1) generous, rather than grudging, compliance with both the letter and the spirit of the law; (2) prompt termination of illegal conduct when violations of statutes or regulations are brought to his attention; (3) settlement of a lawsuit where the plaintiff's position is sound; (4) submission of forthright answers to discovery requests when made by plaintiffs under the Federal

haustion of state remedies was not necessary before commencing a civil rights action. Hillen v. Director of Dept. of Social Serv. & Housing, 455 F.2d 510 (9th Cir. 1972), cert. denied, 409 U.S. 989 (1972). Cf. Gomes v. Travisono, 490 F.2d 1209 (1st Cir. 1973).

A classic example of this same court's reliance upon the State Attorney General adequately to represent the pro se petitioner as well as the respondent state officials is found in Wheeler v. Procunier, N. 72-1523 (Sept. 16, 1974). An earlier, unreported opinion (9th Cir. Jan. 14, 1974) began by assuming that "a summary of the allegations in appellant's pleadings are fairly presented in appellee's brief." Id. at 1. The court then found that the complaint failed muster at the bar of pleading. ("No facts are alleged to support these general allegations . . . . We find that these allegations are conclusory and lack support of allegations of fact, and thus fail to state a claim upon which relief can be granted." Id.) In the authors' opinion, the "summary of allegations" in the Attorney General's brief bore as much resemblance to those urged in the petitioner's prose brief as the appellee's legal argument resembled the state of the law. Regardless, since a constitutional issue which the court of appeals had not previously determined was at bar, it is difficult to understand why the court did not consider that the assistance of counsel might be material to the development of the evidence and an evaluation of the state of the law in this case. More striking was the failure of the Attorney General—tracked precisely by the court in its subsequent opinion—to mention Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971), then on appeal before another panel of the same circuit. Clutchette, a test case, had been thoroughly briefed by several attorneys, and the district court, in a lengthy and well-considered opinion, had reached precisely the opposite result urged by the Attorney General. Instead, the Attorney General's brief relied upon authority which had subsequently been either overruled or expressly repudiated by the same courts: Agnew v. City of Compton, 239 F.2d 226 (9th Cir. 1956), cert. denied, 353 U.S. 959 (1957), overruled by Cohen v. Norris, 300 F.2d 24, 29 (9th Cir. 1962); Truitt v. State of Illinois, 278 F.2d 819 (7th Cir. 1960), cert. denied, 364 U.S. 866 (1960), repudiated in Monroe v. Pape, 365 U.S. 167 (1961), Joseph v. Rowlen, 402 F.2d 367, 369 (7th Cir. 1968), citing Cohen. Nevertheless, the Ninth Circuit relied upon the same authority to conclude that "the transfer of an inmate from one section of the prison to another does not of itself require formal proceedings, even if such transfer is from the general prison population to a segregated unit." Id. at 2. Cf. Palmigiano v. Baxter, 487 F.2d 1280 (1st Cir. 1973); Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972). A few weeks later, Clutchette was affirmed by another panel of the Ninth Circuit. 497 F.2d 809 (9th Cir. 1974).

Subsequently, petitioner obtained the services of a public-interest attorney and filed petitions for rehearing en banc. The panel shortly withdrew certain portions of the earlier opinion (including citations to overruled authority), and has now issued a second opinion granting the petition for rehearing, withdrawing the previous opinion entirely and reversing the district court. It should come as no surprise that the current opinion provides no explanation for the change in the court's reasoning, nor does it comment upon the propriety of the Attorney General's earlier brief.
Rules of Civil Procedure; and (5) a decision that no appeal be taken in cases where the district court’s decision in favor of an inmate was both sound and fair.

Finally, it is the clear obligation of lawyers who represent prisoners to expend every effort to educate the judiciary to the realities of prison life and prison litigation. Whether by thorough fact gathering, vigorous discovery, vivid testimonial evidence, or effective cross-examination, counsel for prisoners must constantly strive to overcome the judicial model of prisons and the hidden agenda of issues which are likely to be implanted in the mind of the judge. In some cases, an unannounced visit by the Court to a prison (at the behest of the counsel), or photographs taken under Rule 34,\textsuperscript{137} or the appointment of a magistrate to take testimony,\textsuperscript{138} might be effective ways in which to proceed. In appropriate cases prisoners’ lawyers should also seek attorney’s fees,\textsuperscript{139} as well as costs of suit\textsuperscript{140} and costs reasonably incurred in obtaining orders compelling discovery.\textsuperscript{141}


\textsuperscript{138} See 28 U.S.C. § 636(b) (1972). Cf. FED. R. CIV. P. 53(b). The federal appellate courts are split over the issue of whether section 636(b) authorizes magistrates to conduct evidentiary hearings referred to them by the district courts in habeas corpus cases. United States ex rel. Gonzalez v. Zelker, 477 F.2d 797 (2d Cir.), cert. denied, 414 U.S. 924 (1973); Parnell v. Wainwright, 464 F.2d 735 (5th Cir. 1972). The Fifth Circuit, however, has not explicitly ruled on this issue. Redd v. State of Louisiana ex rel. Henderson, 489 F.2d 766, 767 n.1 (5th Cir. 1973). One circuit has explicitly ruled, in a habeas corpus case, that section 636(b) does not authorize magistrates to hold evidentiary hearings. Wedding v. Wingo, 483 F.2d 1131, 1137 n.3 (6th Cir. 1973). The most thorough consideration of the issue is in Noorlander v. Ciccione, 489 F.2d 642 (8th Cir. 1973), which gives a qualified affirmative answer as to both the scope of authority conferred by the statute and the constitutionality thereof. The California Supreme Court, upon petitions for habeas corpus challenging conditions of confinement, has appointed referees to resolve through evidentiary hearings conflicting factual allegations when returns to orders to show cause contradict the petitions in material respects. In re Jones, 57 Cal. 2d 860, 372 P.2d 310, 22 Cal. Rptr. 478 (1962); In re Riddle, 57 Cal. 2d 848, 372 P.2d 304, 22 Cal. Rptr. 472 (1962).


\textsuperscript{140} See FED. R. CIV. P. 54.

\textsuperscript{141} See FED. R. CIV. P. 37(a)(4), which was changed in 1970 so that
In any event, it is important for a prisoner's lawyer to be as inventive and persistent as possible. Judicial preconceptions are not likely to be overcome without maximum effort on the part of the prisoner's counsel, nor are they likely to disappear overnight. Rather, the education of the judiciary to the realities of prison life must be a collective effort by all prison attorneys with the objective that, in due course, the judicial model of California prisons—and those in other states—may resemble more nearly the institutions themselves. Until then, all parties, including the judiciary, must be aware of the judicial model and the hidden agenda which operate so powerfully in cases involving the conditions of a prisoner's confinement.

"[t]he burden of persuasion is now on the losing party to avoid assessment of expenses and fees rather than, as formerly, on the winning party to obtain such an award." 8 Wright & Miller, Federal Practice and Procedure 798 (1970 ed.).