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Criminal Law: Habeas Corpus vs. Prison Regulations: A Struggle in Constitutional Theory

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NOTES

HABEAS CORPUS VS. PRISON REGULATIONS A STRUGGLE IN CONSTITUTIONAL THEORY

> Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations of our penal system.[1]
> We think it is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined.[2]
> Habeas Corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty, and resort to it sometimes becomes necessary because of what is done to enforce laws for the punishment of crimes. The judicial proceedings under it do not inquire into the criminal act which is complained of but into the right to liberty notwithstanding the act.[3]

The foregoing is illustrative of the ever recurring problem facing those administering criminal justice. That is to say, a constitutionally sound yet workable method of striking a balance between (1) the post-conviction powers of a court of law, (2) prison regulations necessary to effect orderly prison management, and (3) the constitutionally guaranteed rights of convicted individuals. This article attempts to discuss the developments which have taken place in this area. Primary emphasis is in the areas of: (1) the expanded use of the federal writ of habeas corpus, (2) the development of the next of friend theory, (3) the use of prison regulations resulting in a direct denial of access to the courts, and (4) prison regulations making such access difficult but not impossible.

EXPANDED USE OF FEDERAL WRIT

Since its establishment in England in 1679, the writ of habaes corpus has been considered one of the bulwarks of personal freedom.[4] This

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[1] Price v. Johnston, 334 U.S. 266, 285 (1948).
[2] Stroud v. Swope, Warden, 187 F.2d 850, 859 (9th Cir. 1951).
[3] *Ex parte Tom Tong*, 108 U.S. 556 (1883).
[4] Blackstone describes the following common law versions of the *habeas corpus* writ:
(1) *Habeas corpus ad respondenum.* Issued "when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner, and charge him with this new action in the court above."
(2) *Habeas corpus ad satisfaciandum.* Issued "when a prisoner hath had judgment against him in an action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution."
(3) *Habeas corpus ad prosequendum, testificandum, deliberandum, etc.* Issued "when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the fact was committed."

remedy was so firmly imbedded in the traditions of American colonial justice that the framers of the United States Constitution expressly provided for the writ in that document.[5] Not only is the writ specifically included in the United States Constitution, but many states have seen fit to incorporate it into their constitutions[6] and statutes[7] as well.

The prerequisites for obtaining a writ of habeas corpus are quite similar both at the federal[8] and state[9] level. Frequently federal questions arise and are decided in state courts. In these cases the right to petition for the writ may initially arise in the state court[10] and ultimately be decided in a federal court. The state court in deciding a federal question will apply the federal law which governs the issue. In the event of an unfavorable decision at this level, the defendant may appeal within the state court system.[11] At any time prior to entry of a final state-court judgment (appeal opportunities having elapsed) a defendant may seek a state writ of

(4) *Habeas corpus ad faciendum et recipiendum.* This "issues out of any of the courts of Westminster Hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court; commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer, (whence the writ is frequently denominated an *habeas corpus cum causa*) to do and receive whatsoever the king's court shall consider in that behalf."
(5) *Habeas corpus ad subjiciendum.* The "great and efficacious writ," which is "directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum,* to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf." 3 Blackstones Commentaries 129-132; Chief Justice Marshall examines these writs in relation to the American judicial system in *Ex parte Bollman,* 4 Cranch 75, 97 (1807).

[5] The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it. U.S. CONST. Art. I, § 9.

[6] ILL. CONST. Art. I § 7; MICH. CONST. Art. I, § 2; WIS. CONST. Arts I, § 8.

[7] WIS. STAT. § 292 (1967).

[8] The writ of habeas corpus shall not extend to a prisoner unless. . . . (3) He is in custody of the United States; . . . . 28 U.S.C. § 2241 (1959).

[9] Every person restrained of his liberty, except by virtue of any competent tribunal of civil or criminal jurisdiction . . . WIS. STAT. § 292.02 (1967), may prosecute a writ of habeas corpus to obtain relief from such restraint. WIS. STAT. § 292.01 (1967).

[10] At common law and in the early developmental stages of the writ of habeas corpus in Wisconsin, judicial errors as distinguished from jurisdictional errors were not reached or considered by the writ of habeas corpus. *In re Milburn,* 59 Wis. 24, 17 N.W. 965 (1883). *See also ex rel.* Morgan v. Fischer, 238 Wis. 38, 298 N.W. 353 (1941); Larson v. State *ex rel.* Bennett, 221 Wis. 188, 266 N.W. 170 (1936). Recent decisions of the Wisconsin Supreme Court have enlarged the scope and purpose of the writ. Habeas corpus now lies to review violations of constitutional rights regardless of whether they are judicial or jurisdictional. State *ex rel.* Goodchild v. Burke 27 Wis. 2d 244, 133 N.W.2d 753 (1965); Wolke v. Fleming, 24 Wis. 2d 606, 129 N.W.2d 841 (1964); Babbit v. State, 23 Wis. 2d 446, 127 N.W.2d 405 (1964); State *el rel.* Burnett v. Burke, 22 Wis. 2d 486, 126 N.W.2d 91 (1964).

[11] Under Wisconsin's newly enacted Criminal Code which took effect July 1, 1970, a post-conviction remedy statute (WIS. STAT. § 274.06) is now in existence. This statute is a combination of 28 U.S.C. § 2255 and the Uniform Post

habeas corpus.[12] Upon a final determination of the issue in the state-court system the defendant may petition the United States Supreme Court either by direct appeal or certiorari. Prior to *Brown v. Allen*[13] an affirmance on appeal or a denial of certiorari would have finally determined the controversy. There was no way of collaterally attacking the state supreme court judgment.

Brown held that a state prisoner could seek and automatically obtain federal district court collateral review of the merits of any constitutional question which may have arisen in the state court system, even though such issue had been fully and fairly adjudicated. This review was to be obtained by petition for a federal writ of habeas corpus.

The expanded use of the writ and the expanded federal jurisdiction it entails have been the subject of much debate in legal circles. The controversy revolves primarily around the wisdom of federal interference with state administration of criminal justice and the devastating effect federal collateral review has on the time-honored principle of finality of judgments. The relatively recent United States Supreme Court cases of *Fay v. Noia*,[14] *Townsend v. Sain*,[15] and *Sander v. United States*[16] have re-examined and redefined the procedural aspects of federal habeas corpus jurisdiction. In each case the collateral review procedure established in *Brown* was upheld as being a necessary safeguard of constitutional rights. In 1966

Conviction Procedure Act.

The remedy is invoked by motion to the trial court and provides for appointment of counsel. All questions available to the prisoner must be raised in the initial motion.

Although WIS. STAT. § 292.03 (as amended July 1, 1970) which is Wisconsin's habeas corpus statute, merely states that a prisoner's application for a writ must contain a copy of any motion made pursuant to WIS. STAT. § 974.06 and the disposition of the writ, or state that no motion was made; it seems clear that WIS. STAT. § 974.06(8) makes this procedure a prerequisite for application for any writ (state or federal), unless the motion is inadequate or ineffective (*ie.* detention before trial).

The statute attempts to supplant state habeas corpus and makes resort to this post-conviction remedy procedure a prerequisite to gaining a federal writ of habeas corpus. It provides an excellent opportunity for state judges to correct court errors, thus lessening the necessity of federal interference.

The post-conviction remedy procedure as a prerequisite to gaining a federal writ has basis in Constitutional precedent under the exhaustion of state remedies theory. Fay v. Noia, 372 U.S. 391 (1963).

The procedure has also been held not to be an abridgment of the defendant's right to habeas corpus. *See* Stirone v. Markley, 345 F.2d 473 *cert. den.* 382 U.S. 829 (1965).

[12] In the very recent case of State *ex rel.* Schof v. Schubert, 45 Wis. 2d 644, 173 N.W.2d 673 (1970) the Wisconsin Supreme Court declared a portion of WIS. STAT. § 292.01(2) (1967) to be unconstitutional. The ground of attack was that a portion of the statute purported to deny inmates the right to habeas corpus to test the validity of their commitments.

[13] 344 U.S. 443 (1953).

[14] 372 U.S. 391 (1963). *See* note 11.

[15] 372 U.S. 293 (1963).

[16] 373 U.S. 1 (1963).

the federal habeas corpus statute was amended. The amendment did not result in a curtailment of habeas corpus. Rather, it served to establish fundamental guidelines for examination of the factual allegations in the petition[17] and to formulate a policy for the disposition of successive federal petitions.[18]

There are indications of continued use of the federal writ in its expanded capacity. This is evidenced by the steadily increasing number of petitions for federal writs over the past twenty years. No doubt this is in part due to the *Brown v. Allen*[19] decision and in no small measure to the ever-expanding limits of the Fourteenth Amendment.[20] Through the due process and equal protection clauses, the United States Supreme Court has guaranteed to the accused the right to counsel,[21] freedom from unreasonable search and seizure,[22] a privilege against self-incrimination,[23] freedom from undue trial and pre-trial publicity,[24] the right to a speedy trial[25], the right to a jury,[26] the right to confront his accuser[27] and freedom from cruel and unusual punishment.[28] This marked trend will undoubtedly continue until the individual states assume the task of safeguarding the constitutional rights of all their citizens not only by affording due process but by providing for an all-inclusive post-conviction review procedure.

To institute a state or federal habeas corpus proceeding, it is necessary for the prisoner to prepare a petition[29] stating an arguably meritorious claim. Some courts, including the Wisconsin Supreme Court, provide a standard form petition[30] to all prisoners who contact the court either by letter or hand drafted petition. The prisoner who

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[17] 28 U.S.C. § 2254, *as amended* (Nov. 2, 1966, Pub. L. 87-711 2).
[18] 28 U.S.C. § 2254, *as amended* (Nov. 2, 1966, Pub. L. 89-711 1).
[19] 344 U.S. 443 (1953).
[20] "[N]or shall any States deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
[21] Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California 372 U.S. 353 (1963).
[22] Evidence obtained by illegal search and seizure is inadmissible in state courts just as it was formerly inadmissible in federal courts. Mapp v. Ohio, 367 U.S. 643 (1961). Hearsay information was not sufficient to show probable cause for issuance of a search warrant. Spinnelli v. United States, 393 U.S. 410 (1969). In the absence of prior judicial authorization, the fruits of an electronic surveillance are inadmissible as evidence. Katz v. United States, 389 U.S. 347 (1967).
[23] Malloy v. Hogan, 378 U.S. 1 (1964). *See also* Leary v. United States, 395 U.S. 6; Griffin v. California, 380 U.S. 609 (1965).
[24] Sheppard v. Maxwell, 384 U.S. 333 (1966).
[25] Klopfer v. North Carolina, 386 U.S. 213 (1967).
[26] Duncan v. Louisiana, 391 U.S. 145 (1968).
[27] Pointer v. Texas, 380 U.S. 400 (1965).
[28] Robinson v. California, 370 U.S. 660 (1962).
[29] 28 U.S.C. § 2242 (1959); WIS. STAT. § 292.04 (1970).
[30] The standard form was developed by the Federal District Court for the Northern District of Illinois. *See* Application for Writs of Habeas Corpus and Post Conviction Review of Sentences in the United States Courts, 33 F.R.D. 363, 391, 393 (app. 2) (1963).

cannot afford an attorney must complete the ten-page questionnaire without assistance. If no form is provided he must draft the petition *pro se*. Not all inmates are capable of researching and drafting the necessary petition.[31] Many who do accomplish this task are unable to comprehend the complex elements inherent in a question of fundamental constitutional rights. Some of these individuals are not even able to recognize that a violation has taken place.

Recent interpretations of the Fourteenth Amendment make it clear that the illiterate and indigent, as well as the educated and wealthy, are entitled to share equally in the bounty of fundamental rights guaranteed to each individual by the United States Constitution. Often, however, in actual practice this goal is not achieved. The application procedure in obtaining a writ of habeas corpus is an excellent example.

THE DEVELOPMENT OF NEXT OF FRIEND

In Wisconsin, as in other state jurisdictions,[32] counsel will not be appointed for an indigent until after the Supreme Court reviews the petitioner's petition and determines his claim to be arguably meritorious.[33] The federal system parallels that of the states in that there is no right to have counsel appointed at the petition stage of a habeas corpus proceeding.[34] Fortunately, the Federal Judiciary Act provides a procedure by which a prisoner may seek the assist-

[31] One of the questions on the standard form petition is: "State concisely the grounds on which you base your allegation that you are being held in custody unlawfully." Wis. Sup. Ct., Petition for Order to Show Cause for Writ of Habeas Corpus by Person Serving Sentence, question 10, p. 3. In commenting on Petition of Anderson, Wis. Sup. Ct., April 23, 1964 (unreported), Fairchild, then a Wisconsin Supreme Court Justice, stated that the petition had been denied "because it merely set forth conclusions and did not state the necessary supporting facts." Fairchild, Post Conviction Rights and Remedies, 1965 WIS. L. REV. 52, 59 (1965).

The task of producing an acceptable petition becomes insurmountable if the prisoner lacks a fundamental grasp of the language. Studies indicate that prisoners as a group are substantially less educated than the rest of society. While one-half of one percent of the population is mentally defective, studies show almost three times as many prisoners suffer from mental deficiencies. For a thorough study of the educational and I.Q. level of prisoners in various states, *see* Note, Constitutional Law: Prison "No-Assistance" Regulations and the Jailhouse Lawyer, 1968 DUKE L. J. 343, n. 23, 24, 360 (1968).

[32] *See e.g.*, Barker v. Ohio, 330 F.2d 594 (6th Cir. 1964); People v. Shipman, 62 Cal. 2d 226, 397 P.2d 993 (1965).

[33] The Wisconsin appointment of counsel procedure is based on WIS. STAT. § 957.26(3)(4) (1967). Douglas v. California, 372 U.S. 353 (1963) held that denial of counsel to an indigent during an appeal proceeding, which such individual has as a matter of right, is discrimination and violative of the Fourteenth Amendment.

In an article in the Wisconsin Law Review, Thomas E. Fairchild, then member of the Wisconsin Supreme Court, stated ". . . our court does not consider Douglas to require appointment [of counsel] as a matter of course whenever a writ of habeas corpus is being sought." Fairchild, Post Conviction Rights and Remedies, 1965 WIS. L. REV. 52, 56 (1965). *See also* Note, Wisconsin Criminal Procedure, 1966 WIS. L. REV. 430, 517, 518 (1966).

[34] *See e.g.* United States *ex rel.* Marshall v. Wilkins, 338 F.2d 404 (2nd Cir. 1964); Taylor v. Pegelow, 335 F.2d 147 (4th Cir. 1964).

ance of another to aid in the preparation of the petition for a federal writ of habeas corpus. It provides, "Application for a writ of habeas corpus shall be in writing signed and verified by the person whose relief it is intended *or by someone acting in his behalf.*"[35] (Emphasis added.) In addition, many state courts have recognized the next of friend petition by statute[36] and decision.[37]

Although the courts recognize the next of friend petition, only a few jurisdictions have initiated programs designed to provide assistance to prisoners in drafting these petitions.[38] As a result, indigent prisoners have only the prison "writ writer" upon whom to rely for aid in gaining recognition of their claim. Justice Douglas' dissent from the per curiam decision in *Hackin v. Arizona*[39] defends such nonlawyer participation in quasi-legal matters. Hackin, a layman, after an unsuccessful attempt to procure an attorney, represented an indigent prisoner at a habeas corpus hearing. Hackin was consequently convicted of a misdemeanor for practicing law without a license. Douglas pointed to the severe shortage of legal assistance afforded to the poor and uneducated.[40] To meet the urgent need, he argued for an expanded utilization of lay persons. Petitions for habeas corpus because of their factual nature, fall within the scope of work that a qualified layman can handle. An acceptable petition can be drafted by a person with no prior legal training. However before recognition is given, the courts require that several conditions be fulfilled.

In *United States ex rel Bryant v. Houston*[41] the writ petition was prepared by a next of friend. The writ was dismissed upon an order of the District Court for the Southern District of New York, and the order was affirmed in the Circuit Court of Appeals, Second Circuit. The dismissal was not the result of the petition having been prepared by someone other than the person in custody. The ground for dismissal was that nowhere in her petition did the next of friend state her identity, her relationship to the petitioner, that she was authorized to act on the petitioner's behalf or the reason the petitioner did not sign

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[35] 28 U.S.C. 2242 (1959).

[36] WIS. STAT. § 292.03 (1967) reads in part: "Application for such writ shall be by petition, signed either by the prisoner or by some person in his behalf . . ."

[37] *See e.g.*, Deeb v. Fabisinski, 111 Fla. 454, 152 So. 207 (1933); Nahl v. Delmore, 49 Wash. 2d 318, 301 P.2d 161 (1956).

[38] One state provides local lawyers who make periodic visits to the state prison to consult with prisoners on their habeas corpus petitions. Another state makes use of senior law students to aid prisoners. In several states the public defender program supplies attorneys to render assistance to prisoners in the drafting of their petitions. For a complete study of the free programs available to prisoners at the pre-appointment stage, *see* Note, Constitutional Law: Prison "No-Assistance" Regulations and the Jailhouse Lawyer. 1968 DUKE L. J. 343, 349 n. 27 (1968).

[39] 389 U.S. 143 (1967).

[40] *Id.* at 147.

[41] 273 F. 915 (C.A. 2d Cir. 1921).

and verify the complaint. The court nevertheless gave explicit recognition to next of friend procedure and outlined the requirements for its application.

> The practice of a next of friend applying for a writ is ancient and fully accepted. There are many instances and circumstances under which it may not be possible nor feasible that the detained person shall sign and verify the complaint. Inability to understand the English language or situation, particularly in the case of aliens, impossibility of access to the person, or mental incapacity are all illustrations of a proper use of the "next of friend" application.[42]

The dicta in *United States ex rel Bryant v. Huston*[43] was followed in *Collins v. Traeger*,[44] which upheld the next of friend procedure in the preparation of the habeas corpus petition. All that was alleged by the next of friend was that the petition was made on behalf of and at the request of the person held in custody.

Although the courts are willing to permit this limited practice of law, regulations exist in both state[45] and federal prisons which prohibit prisoners from serving as next of friend for fellow prisoners or in any way assisting others in the preparation of petitions for post-conviction relief. Such regulations have been found to be constitutional when adjudicated at both the state and federal level.

The Supreme Court of California, in *Application of Chessman*,[46] upheld the right of a prison to deny a prisoner consultation with a certain attorney. The rationale for the refusal was that he was not the attorney of record for the inmate. The court's position was based upon two provisions in the California Penal Code which characterized an inmate serving a life sentence as civilly dead.[47] Any prisoner serving a term less than life has his civil rights suspended during incarceration.[48] The court determined that Chessman, who was serving a life sentence, was not claiming rights but special privileges. Denial of access to an attorney not of record was held to be entirely reasonable.

The federal courts have allowed similar prison practices. *Seigel v. Ragen*[49] upheld the action of the warden in abolishing a "legal department" established by a prisoner who had studied the law of habeas corpus extensively. The United States Court of Appeals, Seventh Cir-

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[42] *Id.* at 916.
[43] 273 F. 915 (C.A. 2nd Cir. 1921).
[44] 27 F.2d 842 (C.A. 9th Cir. 1928).
[45] A no-assistance rule, while unwritten, has been enforced in Wisconsin prisons. Note, Legal Services for Prison Inmates, 1967 WIS. L. REV. 514, 520, n. 17 (1967).
[46] 44 Cal. 2d 1, 279 P.2d 24 (1955).
[47] CAL. PEN. CODE, 2601 (West 1956).
[48] CAL. PEN. CODE, 2600 (West 1956).
[49] 180 F.2d 785 (7th Cir. 1950).

cuit declared that "[o]bviously the right to practice law or maintain a law department within the confines of a state penitentiary is not a right secured by the Constitution of the United States."[50]

In *Aust v. Harris*[51] a prisoner in his petition for habeas corpus claimed that he was punished for doing legal work in his cell and for exhibiting this work to other inmates. In response to the writ, the Medical Center for Federal Prisoners introduced its regulations which precluded inmates from serving each other as attorneys or assisting each other in the preparation of legal documents. The court found these regulations to be reasonable and in no way violative of any Constitutional rights of the inmates. "Except in exceptional circumstances not here present the Courts will not interfere with uniformly applied institutional regulations governing the times and places for preparing legal papers or governing inter-inmate traffic in legal information or materials."[52]

Judicial examination of these rules has been infrequent,[53] and often results are incongruous. A comparatively recent federal case bears testimony to this incongruity. In *Burnside v. Nebraska*,[54] a prisoner sought the aid of a fellow inmate in preparation of a brief and motion. Prison officials seized certain documents under authority of a prison regulation[55] which denied to prisoners the assistance of their fellow inmates in preparation of legal documents. After a hearing before the deputy warden the offending prisoner was given a ninety-day restriction and forfeited thirty days of earned good time.[56] At the hearing on an application for a writ of habeas corpus the warden amended the prison regulation to deny assistance of fellow prisoners in preparation of legal documents unless specific written permission is obtained from the warden. The presiding judge concluded that the former regulation under which the prisoner was punished could not stand. He found the regulation in its revised form to be reasonable on its face.

The judge refused to reinstate the prisoner's good time even though he found the regulation under which punishment was dispensed to be unreasonable and arbitrary.

> Because the rule as it existed at the time of the hearing herein was arbitrary and unreasonable, it is urged by counsel

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[50] *Id.* at 788.
[51] 266 F. Supp. 304 (W.D. Mo. 1964).
[52] *Id.* at 307.
[53] White v. Blockivell, 277 F. Supp. 211 (N.D. Ga. 1967); Arey v. Peyton, 378 F.2d 930 (4th Cir. 1967); Burnside v. Nebraska, 378 F.2d 915 (8th Cir. 1967); Wilson v. Dixon, 256 F.2d 536 (9th Cir. 1958); Seigel v. Ragen, 180 F.2d 785 (7th Cir. 1950).
[54] 378 F.2d 915 (8th Cir. 1967).
[55] "No inmate is permitted to assist another inmate in the preparation of legal documents." Burnside v. Nebraska, 378 F.2d 915, 916 (8th Cir. 1967).
[56] Accumulated good time reduces the length of the prisoner's sentence.

> that the good time should be reinstated. While the court has some doubts on the matter, it concludes otherwise and believes that petitioner should have made a request of the Deputy Warden or Warden before violating the prison rules. Had a request for assistance been made and denied, the court might then have felt constrained to set aside the forfeiture of good time. The fact is that prison rules are made to be observed and prisoners cannot take the rules in their own hands. The court will at all times protect their constitutional rights and might see fit in the future to grant relief against arbitrary or unwarranted action."[57]

Johnson v. Avery,[58] recently decided by the United States Supreme Court, has resolved much of the conflict in the area of prison regulations denying assistance in preparation of the petitions for writs of habeas corpus. Johnson, an inmate in the Tennessee State Penitentiary, and a self-styled "jailhouse lawyer", was placed in solitary confinement for violating a prison regulation forbidding prisoners from assisting one another in the application for writs of habeas corpus. The regulation reads in part: "No inmate will advise, assist or otherwise contract to aid another, either with or without fees, to prepare Writs or other legal matters. . . . Inmates are forbidden to set themselves up as practitioners for the purpose of promoting a business of writing Writs."[59]

The Federal District Court for the Middle District of Tennessee construed Johnson's motion for a typewriter and lawbooks as a petition for habeas corpus and ordered Johnson released from solitary confinement.[60] The court held the prison regulation void as an interference with illiterate and indigent prisoners' right to federal habeas corpus. The Eighth Circuit Court of Appeals reversed.[61] On certiorari, stressing the important function of habeas corpus and the court's duty to maintain the writ unimpared, the United States Supreme Court held that a state could not enforce a non-assistance rule unless the state provided some alternative means of assisting those prisoners who are poorly educated or illiterate.

The Court in *Johnson* was not oblivious to the disciplinary problems generated by writ writers,[62] nor did it ignore the fact that such writers frequently spawn frivolous claims and draft petitions so unskilled as to be a burden on the courts.[63] Acknowledging the

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[57] Burnside v. Nebraska, 378 F.2d 915, 917 (8th Cir. 1967).
[58] 393 U.S. 483 (1969).
[59] *Id.* at 484.
[60] Johnson v. Avery, 252 F. Supp. 783 (M.D. Tenn. 1966). Petition was based on 28 U.S.C. § 1343(3) and the 1964 Civil Rights Act.
[61] Johnson v. Avery, 382 F.2d 353 (6th Cir. 1967).
[62] "It is indisputable that prison 'writ writers' like petitioner are some times a menace to prison discipline and that their petitions are often so unskillful as to be a burden on the courts which receive them." Johnson v. Avery, 393 U.S. 483, 488 (1969). *See e.g.* Spector, A Prison Librarian Looks at Writ-Writing, 56 CALIF. L. REV. 365 (1968); 58 MICH. L. REV. 1233 (1960).

present appointment of counsel practice and the fact that prisons accommodate a high percentage of inmates who are illiterate or whose intelligence is limited,[64] the Court stated that to deny these prisoners the only help available is to effectively deny them their Constitutional right to habeas corpus.[65] The decision requires prison officials to permit such assistance in the absence of alternative means but emphasized that reasonable regulation of the practice will be allowed.[66]

Beyond the area of non-assistance, the courts have generally taken a somewhat more predictable course of action. Where prison regulations have denied access to the courts completely, the courts have stricken them. If, however, the rules have merely made access to the courts more difficult, they have been upheld.

DIRECT DENIAL OF ACCESS TO THE COURTS

In *Ex parte Hull*[67] a prisoner prepared a petition for habeas corpus and requested that a prison official notarize it. The official not only refused to do so, but in addition refused to mail it. The inmate then attempted delivery to his father for mailing outside the prison. A guard confiscated his petition. Petitioner prepared another one which he managed to have his father file. This petition set out his various efforts to file and the confiscation of his earlier petition.

At the application hearing the warden claimed justification for his action in a prison regulation which required submission and favorable action by the institutional welfare office before the petition could be filed. The United States Supreme Court had no trouble finding the regulation invalid as a denial of the right of a state prisoner to access to a federal court.[68]

The question of the right of access of a state prisoner to a state court was considered in *White v. Ragen*.[69] The state supreme court refused to allow the filing of a petition for habeas corpus. The court gave no reasons for its decision. They required no answer from the respondent (warden) from which issues might have been framed for determination at the hearing. The United States Supreme Court reviewed the petition, found violations of the prisoner's Constitutional rights as framed by his petition, and determined some court

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[63] See Habeas Corpus and Post Conviction Review, Report of the Committee on Habeas Corpus, 33 F.R.D. 363, 384, 385, 410, 411 (1963).
[64] *See* authorities cited, *supra* note 30.
[65] Johnson v. Avery, 393 U.S. 483, 489 (1969).
[66] *Id.* at 490.
[67] 312 U.S. 546 (1940).
[68] "Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine. *Ex parte Hull*, 312 U.S. 546, 549 (1940).
[69] 324 U.S. 760 (1944).

corrective process should be afforded. Because the state court afforded no relief, the federal district court opened its doors to the petitioner.

Stiltner v. Rhay[70] found denial of access of a state prisoner to a state court to be a direct violation of the commands of the Due Process clause of the Fourteenth Amendment. The court held deprivation of the right of access to the courts is actionable under the Civil Rights Act.[71] If the right of access is not firmly protected the other constitutional rights are merely meaningless phraseology.

The Equal Protection clause of the Fourteenth Amendment has also been employed in cases where prison regulations impose restrictions upon the right of access. The petitioner in *Dowd v. United States ex rel. Cook*[72] was convicted of murder and sentenced to life imprisonment. He was immediately confined in the state penitentiary. Under state law the petitioner was granted six months in which to appeal. He prepared the proper appeal papers, but the warden, acting pursuant to prison regulations, frustrated his attempts to file in the state supreme court. After his appeal period had run, the ban on sending papers from the prison was lifted. The petitioner filed a delayed appeal which was denied. He subsequently filed for a federal writ of habeas corpus.

The federal district court held there was a violation of the equal protection of the law which the state could not remedy, and the federal appellate court affirmed. The United States Supreme Court restated the violation of the Fourteenth Amendment but remanded to the state court. Although the court recognized that the denial of access was a Constitutional violation it felt an adequate remedy would be access to the state court on appeal.

In *Smith v. Bennet*,[74] an indigent prisoner forwarded his petition for a state writ of habeas corpus questioning the validity of his arrest. The clerk refused to docket the petition without the payment of a $4 filing fee.[75] The petitioner's appeal to the state supreme court was denied. The United States Supreme Court denied appeal but treated the papers as a petition for certiorari, which was granted. The court had no difficulty in finding a viola-

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[70] 322 F.2d 314 (9th Cir. 1963).
[71] 42 U.S.C. § 1983 (1959). *See also* Note, Constitutional Rights of Prisoners: The Developing Law, 110 U. PA. L. REV. 985, 987 (1962).
[72] 340 U.S. 206 (1951).
[73] The United States Supreme Court, however, recognized the power of the District Court in a habeas corpus proceeding under 28 U.S.C. § 2243 to dispose of the matter as law and justice require.
[74] 365 U.S. 708 (1961).
[75] IOWA CODE ANN. (Cum. Supp. 1960) § 606.15 provides in part that "the clerk of the district court shall charge and collect . . . (f) filing any petition . . . and docketing the same, four dollars."

tion of the equal protection of laws guaranteed to the petitioner by the Fourteenth Amendment. "There is no rational basis for assuming that indigents' motion for leave to appeal will be less meritorious than those of other defendants. ... The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law."[76]

The respondent (warden) in *United States ex rel. Bongeorno v. Ragen*[77] claimed that a federal writ of habeas corpus was inappropriate because all state remedies, including appellate remedies in the state courts and the United States Supreme Court, had not been exhausted. The federal district court allowed the petition on the ground that the prison warden had denied permission to send the petition for more than two years.

RESTRICTIONS MAKING ACCESS MORE DIFFICULT

Direct access to the courts has been protected as a federal right. Prison regulations, however, which are concerned with rights that are ancillary to the right of access have often been found not to be protected. The federal courts have been hesitant to interfere with the administration of state penal institutions unless a prisoner's Constitutional rights have clearly been violated.

Application of Chessman[78] indicated that prisoners have the right to prompt and timely access to the mails for the purpose of transmitting statements of fact which attempt to show any ground for relief. Nonetheless, the court decided that prisoners have no enforceable right to engage in legal research. The federal district court in *Oregon ex rel. Sherwood v. Gladden*[79] admonished a petitioner with the following reasoning:

> If the petitioner were given an opportunity to study some law, one of the things he would learn would be that a petition for habeas corpus properly contains allegations of fact alone, and that legal arguments are not a proper part thereof.[80]

Are Constitutionally guaranteed rights so fundamentally evident that persons without prior legal training can recognize possible violations? Are not factual allegations confined to some extent by legal theory?

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[76] Smith v. Bennett, 365 U.S. 708, 710-711 (1961) citing Burns v. Ohio, 360 U.S. 252, 257-258 (1959).
[77] 54 F. Supp. 973, (N.D. Ill. 1944) *aff'd.*, 146 F.2d 349 (7th Cir. 1945). *Cert. denied*, 325 U.S. 865 (1945).
[78] 44 Cal. 2d 1, 279 P.2d 24 (1955).
[79] 240 F.2d 910 (9th Cir. 1957).
[80] *Id.* at 912.

Hatfield v. Bailleaux[81] sets out many of the ancillary prison restrictions which the federal courts have held not to involve denial of reasonable access to the courts. Suit was commenced by seven inmates to enjoin the enforcement of certain prison regulations and to enjoin certain customs and usages that had arisen incident to these regulations. The federal district court granted the injunction sought. On appeal to the United States Court of Appeals the judgment was reversed and the cause remanded with directions to dismiss.

The court defined access to the courts as "the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty ... and to send and receive communications to and from judges, courts and lawyers concerning such matters."[82] All the surrounding circumstances were taken into consideration in determining whether reasonable access was afforded.

Prisoners who were confined to the isolation ward were not allowed to communicate with legal counsel or a judge of a court unless an action was already pending, and then only in the discretion of prison authorities. They were not allowed to study legal materials or prepare legal documents. The court held these restrictions to be reasonable, based on the relatively short period of the isolation coupled with its purposes as a punishment. The court found that isolation was not imposed to discriminate against those engaged in legal work nor was it arbitrarily imposed.

Members of the general prison population were prohibited from preparing or possessing legal materials in their cells, although they were allowed to keep and read non-legal materials. They were allowed to correspond and retain correspondence if no legal citations were contained therein. All legal study and materials were confined to the prison library which was open thirty hours a week by appointment for three hour periods. Inmates were prohibited from acquiring bound law books of any kind. Again the court upheld these regulations as non-violative of reasonable access to the courts. At the time of trial increased library facilities had ended a backlog[83] in library appointments. This was a possible factor in the determination that the regulations and the prison practices incident thereto were reasonable.

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[81] 290 F.2d 632 (9th Cir. 1961). *Cert. denied,* 368 U.S. 862 (1961).
[82] *Id.* at 637.
[83] Occasional delays of more than three or four days and up to seventeen days occurred between the time an appointment was sought and the time use of the facilities was actually obtained. *Id.* at 638.

Rationale for the regulations was centered primarily around the discouragement of jail-house lawyers.

> [I]f permitted to engage in such practice, aggressive inmates of superior intelligence exploit and dominate weaker prisoners of inferior intelligence. The practice also tends to develop a group of inmate leaders, which is discouraged in all institutions.[84]

Should these cogent administrative prison interests be held paramount to the interest of protecting fundamental Constitutional rights?

Hatfield explored many factors before reaching the conclusion that reasonable access to the courts had not been denied. Such detailed remarks which are in conflict with the basic principles underlying habeas corpus.

> State authorities have no obligation under the federal Constitution to provide library facilities and an opportunity for their use to enable an inmate to search for legal loopholes in the judgment and sentence under which he is held, or to perform services which only a lawyer is trained to perform. All inmates are presumed to be confined under valid judgments and sentences. If an inmate believes he has a meritorious reason for attacking his, he must be given an opportunity to do so. But he has not due process right to spend his prison time or utilize prison facilities in an effort to discover a ground for overturning a presumptively valid judgment.[85]

Are all prisoners seeking review by habeas corpus really attempting to circumvent justice through "loopholes"? Is it humanly possible for any prisoner to ever seek review by habeas corpus without some use of prison time or prison facilities? Is not due process, which guarantees prisoners access to the courts, retarded if a prisoner is forced to approach that court unprepared? Should the definition of due process expand once more to guarantee to prisoners not only a forum, but also words to employ when they reach that forum?

CONCLUSION

Courts are constantly defining and redefining the areas in which the writ of habeas corpus is available. Expanded use of this writ will force state courts to tighten and police their courtroom procedures.[86] Such policing will lessen the need for future state as well as federal writs. Policing, however, must not be restricted to court procedure. Prison regulations and practices which surround them

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[84] *Id.* at 639.
[85] *Id.* at 641.
[86] See WIS. STAT. § 974.06 (1967).

must be constantly scrutinized, even to the point of federal interference if necessary.

The definition of what constitutes the right to access to the courts must expand to encompass the peripheral areas of such access. The right to access is no right at all unless the petitioner has received every possible opportunity to reach the court prepared to logically present his grievances.

Reform is necessary to lighten the enormous administrative problems created by the tremendous influx of habeas corpus writs. Such reform should concentrate on a realistic state post-conviction procedure rather than on antiquated prison regulations which stifle fundamental Constitutional rights.

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