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STATE LIABILITY TO INNOCENT PRISONERS IN PRISON UPRISINGS

The growing number of prison uprisings¹ emphasizes the question of the extent to which a state may use force to quell mass prison revolts without becoming liable for the injuries and deaths thus caused. Although various individuals may be injured or killed in the course of restoring order, the state's liability for injuries to and deaths of prisoners not involved in the uprising is of particular interest as there would appear to be a more substantial likelihood of liability.²

THE RIGHT OF PRISONERS TO SUE

Historically the concept denoting the extreme limitation of a prisoner's rights was encompassed by the phrase "civil death."³ A felon sentenced for life was deemed legally dead; the commencement of his prison term caused the convict's debts to be paid and his estate administered and distributed.⁴ Having lost all his civil rights and attained the legal status of one naturally dead, he was incapable of bringing suit in his own name in any court for any future action that may have arisen.⁵ Although many

¹The following are the major disturbances in the wave of prison violence since 1968: Attica State Prison, N.Y., Sept. 1971; San Quentin Prison, Cal., Aug. 1971; Florida State Prison, Raiford, Feb. 1971; State Reformatory, Pendleton, Ind., Sept. 1969; Ohio State Penitentiary, Aug. 1968; Raleigh Prison, N.C., Apr. 1968; Oregon State Penitentiary, May 1968. U.S. NEWS & WORLD REPORT, Sept. 27, 1971 at 20; see NEWSWEEK, Sept. 27, 1971 at 38.

²Innocent prisoners are more likely to recover than ones who promoted or participated in the uprising as they caused no wrong, had no intent to disrupt or overthrow authority and were injured merely by circumstance as innocent bystanders. Prison guards injured or killed are often precluded from suing the state as they are covered by workmen's compensation. E.g., N.Y. WORKMEN'S COMP. LAW §§ 2, 3, 11 (McKinney 1965); N.Y. CORREC. LAW § 472 (McKinney 1968). Even though the militia may be called upon to aid in the suppression of the uprising, states have not been held liable for injuries sustained by their militia while in active service. See *United States v. Muniz*, 374 U.S. 150, 159 (1963); *Feres v. United States*, 340 U.S. 135, 142 (1950).

³Civilly dead is the state of a person who, although possessing natural life, has lost all his civil rights and as to them is considered dead. *Quick v. Western Ry.*, 207 Ala. 376, 92 So. 608 (1922); *Avery v. Everett*, 110 N.Y. 317, 18 N.E. 148 (1888); Annot., 139 A.L.R. 1309 (1942); Comment, *Civil Death in Alabama*, 8 ALA. L. REV. 62 (1955).

⁴*Sullivan v. Prudential Ins. Co. of America*, 131 Me. 228, 160 A. 777 (1932). The court took the extreme position that the prisoner's contracts and relations to persons and things are affected in all respects as if he were dead. *Contra*, *Coffee v. Haynes*, 124 Cal. 561, 57 P. 482 (1899). Here civil death was not equated with physical death as the prisoner could own property and be a witness.

⁵*Sullivan v. Prudential Ins. Co. of America*, 131 Me. 228, 160 A. 777 (1932); *Quick v. Western Ry.*, 207 Ala. 376, 92 So. 608 (1922); see *Coffee v. Haynes*, 124 Cal. 561, 57 P. 482 (1899).

states have retained the idea of civil death for those serving a life sentence,⁶ the trend is away from the medieval concept of strict civil death as the courts often liberally construe recent statutory exceptions.⁷ Thus it is generally no longer held that the prisoner forfeits his property or loses his power to contract; what does remain of civil death, however, includes the prevention of a prisoner from bringing an action in court.⁸

For those prisoners serving less than a life sentence, some states provide merely for the suspension of civil rights while the prisoner remains incarcerated.⁹ After this disability is removed¹⁰ the prisoner may assert his rights by commencing an action for a cause that may have accrued during his imprisonment.¹¹ This suspended right to sue, however, may still be subject to some limitations. New York, for example, will only allow actions for accidental injuries as opposed to matters arising out of the

⁶*E.g.*, ARIZ. REV. STAT. ANN. § 13-1653 (1956); IDAHO CODE ANN. § 18-311 (1947); MO. ANN. STAT. § 222.010 (1962); MONT. REV. CODES ANN. § 94-4721 (Repl. Vol. 1969); N.D. CENT. CODE § 12-06-27 (1960); OKLA. STAT. ANN. c. 21, § 66 (1958); UTAH CODE ANN. § 76-1-37 (1953).

⁷*In re Harrell*, 2 Cal. 3d 675, 470 P.2d 640, 658, 87 Cal. Rptr. 504 (1970). The court noted that civil death has been replaced with statutory provisions so that civil rights are limited only for legitimate penal objectives. CAL. PEN. CODE § 2600 (West 1970) provides in part for a prison bill of rights allowing the prisoner to inherit property, to correspond confidentially with his attorney, to own written material produced during imprisonment and to purchase, receive and read published writings. Civil death has been held not to denote absolute legal extinction of the person. *Grasso v. McDonough Power Equip., Inc.*, 264 Cal. App. 2d 597, 70 Cal. Rptr. 458 (1968). Kansas has repealed its statutes on civil death. Act of July 1, 1970, L. No. 1969, ch. 180, § 21-4701, *repealing* KAN. STAT. ANN. § 21-118 (1964). Courts have generally refused to invoke the doctrine of civil death absent clear provisions providing for the extinction of civil rights. *Annot.*, 139 A.L.R. 1311 (1942). *See Scott v. Scott*, 192 Ga. 370, 15 S.E.2d 416 (1941); *Federman v. State*, 173 Misc. 830, 19 N.Y.S.2d 325 (Ct. Cl. 1940).

⁸*Avery v. Everett*, 110 N.Y. 317, 18 N.E. 148 (1888); *Lynch v. Quinlan*, 65 Misc. 2d 236, 317 N.Y.S.2d 216 (Sup. Ct. 1970); *Comment, Civil Death in Alabama*, 8 ALA. L. REV. 62 (1955); *Legislation, Civil Death Statutes—Medieval Fiction in a Modern World*, 50 HARV. L. REV. 968 (1937).

⁹*E.g.*, CAL. PENAL CODE § 2600 (West 1970); IDAHO CODE ANN. § 18-310 (1947); MO. ANN. STAT. § 222.010 (1962); MONT. REV. CODES ANN. § 94-4720 (Repl. Vol. 1969); N.D. CENT. CODE § 12-06-27 (1960); OKLA. STAT. ANN. c. 21, § 65 (1958); ORE. REV. STAT. § 137.240 (1969); S.D. COMP. LAWS ANN. § 23-48-35 (1969); UTAH CODE ANN. § 76-1-36 (1953).

¹⁰The disability may be removed upon parole as well as on the completion of the sentence. *E.g.*, *Duffy v. State*, 197 Misc. 569, 94 N.Y.S.2d 757 (Ct. Cl. 1950). Apparently, a cause of action may not be brought at an earlier time by a prisoner's legal representative. *Hewson v. State*, 27 App. Div. 2d 358, 279 N.Y.S.2d 790 (Sup. Ct. 1967).

¹¹*E.g.*, IDAHO CODE ANN. §§ 5-230, 235 (1947); MONT. REV. CODES ANN. § 93-2703 (Repl. Vol. 1964); N.Y. CIV. PRAC. § 208 (McKinney 1963); N.Y. COURT OF CLAIMS ACT § 10(5) (McKinney 1963); N.D. CENT. CODE § 28-01-25 (1960); UTAH CODE ANN. § 78-12-36 (1953).

prisoner's arrest or detention.¹² Whether injuries sustained during the suppression of a prison revolt would be accidental and therefore suable or a matter of detention and therefore nonsuable has apparently not been decided. They may well be considered acts of detention as this category appears to include those functions the state may perform in its sovereign capacity.¹³

The prisoner's right to sue may be inferred, however, from such statutes as enacted by Arizona, Missouri and New York if the injuries sustained were the result of unauthorized or overzealous acts of prison officials.¹⁴ It seems that this right may be of little value, however, unless the innocent prisoner was deliberately beaten without provocation or was obviously injured by unauthorized methods. Both of these areas present difficult proof problems because of the complexities and confusion inherent in quelling prison riots. Consequently, with the only exception apparently being Hawaii where prisoners do not forfeit their right to bring suit,¹⁵ restrictions of some kind limit or hamper the prisoner's right to sue.

Although the constitutionality of statutes providing for the forfeiture of various civil rights has not often been questioned,¹⁶ where it was, in *Quick v. Western Railway*,¹⁷ the court said it appeared the legislature might impose inability to sue as punishment for a crime. More recently, in *Harrell v. State*,¹⁸ the statutory suspension of civil rights was held not to deprive a prisoner of his rights under the fourteenth amendment. Although the court did not indulge in even the slightest explanation, it may well be that the mere suspension of civil rights poses few constitutional problems where rights are not forfeited but merely delayed.

¹²N.Y. CIV. RIGHTS LAW §§ 79, 79-a(3) (McKinney Supp. 1971); see, e.g., *Broadus v. State*, 61 Misc. 2d 970, 307 N.Y.S.2d 479 (Ct. Cl. 1970); *Mathews v. State*, 13 Misc. 2d 298, 178 N.Y.S.2d 311 (Ct. Cl. 1957); *Grant v. State*, 192 Misc. 45, 77 N.Y.S.2d 756 (Ct. Cl. 1948).

¹³See note 32 *infra*.

¹⁴ARIZ. REV. STAT. ANN. § 13-1653 (1956); MO. ANN. STAT. § 222.020 (1962); N.Y. CIV. RIGHTS LAW § 79-c (McKinney Supp. 1971); cf. MISS. CODE ANN. § 7916 (1957).

¹⁵HAWAII REV. LAWS § 716-3 (Supp. 1970).

¹⁶Annot., 139 A.L.R. 1312-13 (1942).

¹⁷207 Ala. 376, 92 So. 608 (1922). The court admitted the unpopularity of the doctrine of civil death but noted that there was no forfeiture of estate or corruption of blood. Using an historical analysis, the sections of the Alabama Constitution in question were said never to have been intended for the benefit of persons civilly dead. The notion of the forfeiture of civil rights as punishment itself has declined, Comment, *Civil Death in Alabama*, 8 ALA. L. REV. 62 (1955). See also *State v. Duket*, 90 Wis. 272, 63 N.W. 83 (1895), where a statute was upheld which dissolved marriage upon the imposition of a life sentence; subsequent reversal of the sentence was held not to prevent the dissolution.

¹⁸17 Misc. 2d 950, 188 N.Y.S.2d 683 (Ct. Cl. 1959).

LIABILITY OF THE STATE

Even when the prisoner becomes entitled to bring a legal action, other problems arise since the state has traditionally been immune from all tort liability,¹⁹ although this immunity has been waived in varying degrees.²⁰ Ostensibly to effectuate such waivers some states have created claims commissions or courts of claims to handle actions against the state, but often have not provided specific guidelines, especially for tort actions, as to the exact situations in which the state may be held liable.²¹ The Illinois constitution, for example, forbids the state to be a defendant in either law or equity; yet its courts of claims may disburse funds for the state's wrongs using as a guideline the criteria that would have been employed had the state been a defendant.²² Notwithstanding the lack of specificity, these courts of claims were held valid in the face of a fourteenth amendment challenge to the effect that permitting tort actions against the state to be brought only in courts of claims was an unjustifiable classification.²³ Other states have avoided this confusion by clearly providing that they may be held generally liable, with the stated exception of torts committed by their employees.²⁴ This exception would therefore seem to preclude actions for injuries suffered at the hands of prison guards during the suppression of a prison riot.

¹⁹A summary of this policy included:

The immunity is said to rest upon public policy; the absurdity of a wrong committed by an entire people; the idea that whatever the state does must be lawful, which has replaced the king who can do no wrong; the very dubious theory that an agent of the state is always outside of the scope of his authority and employment when he commits any wrongful act; reluctance to divert public funds to compensate for private injuries; and the inconvenience and embarrassment which would descend upon the government if it should be subject to such liability.

W. PROSSER, *THE LAW OF TORTS* § 131 at 975 (4th ed. 1971).

²⁰To a greater or lesser extent all states have given consent to be sued or have granted permission for particular individuals to maintain suit. *Id.* at 975, 984.

²¹*E.g.*, ARK. STAT. ANN. § 13-1402 (1968); CONN. GEN. STAT. ANN. § 4-142 (1969); ILL. REV. STAT. c. 37, § 439.8 (Supp. 1970); KY. REV. STAT. ANN. §§ 44.070 et seq. (1969); MICH. STAT. ANN. § 27A.6419 (1962); N.C. GEN. STAT. §§ 143-291 (Supp. 1969); S.D. COMP. LAWS ANN. § 21-32-1 (1969); VT. STAT. ANN. tit. 32, § 931 (1970).

²²ILL. CONST. art. 4, § 26; ILL. REV. STAT. c. 37, § 439.8 (Supp. 1970).

²³*Edelen v. Hogsett*, 44 Ill. 2d 215, 254 N.E.2d 435 (1969). The court held the requirement of suitors to file claims against the State in one centrally located court "obviously sought to provide for the expeditious centralized handling of the numerous claims against the State" and therefore the classification of claimants resulting therefrom was not arbitrary, capricious or unreasonable. *Id.* at 439.

²⁴*E.g.*, ALASKA STAT. § 09.50.250 (Supp. 1971); DEL. CODE ANN. tit. 20, § 3115 (Supp. 1970); NEV. REV. STAT. § 41.031 (1967); ORE. REV. STAT. § 30-265 (1969).

Still other states have recognized that "[t]he immunity which the State enjoyed solely by reason of its status as a sovereign [has] been severely criticized as unjust and ill adapted to the facts of modern life,"²⁵ and have therefore waived substantially all immunity from liability.²⁶ To determine the extent of their liability, states having made such waivers place themselves on a par with individuals and corporations.²⁷ However, in matters in which no private citizen or corporation may engage, states often retain their immunity from suit.²⁸ More precisely, "the state would not be responsible for the tortious acts of its employees performed clearly as a governmental function requiring the exercise of discretion or judgment of a quasi-judicial nature."²⁹ Acts done or furnished for the general public

²⁵Weiss v. Fote, 7 N.Y.2d 579, 169 N.E.2d 63, 200 N.Y.S.2d 409, 415 (1960); accord, Willis v. Department of Conserv. & Econ. Dev., 55 N.J. 534, 264 A.2d 34 (1970).

²⁶E.g., ALA. CODE tit. 55, § 334 (Repl. Vol. 1960); HAWAII REV. LAWS § 662-2 (1968); IOWA CODE ANN. § 25A.4 (Supp. 1971); MINN. STAT. ANN. § 3.74 (Supp. 1971); N.Y. COURT OF CLAIMS ACT § 8 (McKinney 1963); WASH. REV. CODE § 4.92.010 (Supp. 1970); W. VA. CODE ANN. § 14-2-13 (Supp. 1971). The New York statute appears to be the most far-reaching:

The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the complaint complies with the limitations of this article. Nothing herein contained shall be construed to affect, alter or repeal any provision of the workmen's compensation law.

N.Y. COURT OF CLAIMS ACT § 8 (McKinney 1963). Caution must be exercised, however, to determine possible differences between these statutory provisions as enacted and their interpretation by local courts. Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U.L. REV. 1363, 1407-09 (1954).

²⁷E.g., HAWAII REV. LAWS § 662-2 (1968); IOWA CODE ANN. § 25A.4 (Supp. 1971); NEV. REV. STAT. § 41.031 (1967); N.Y. COURT OF CLAIMS ACT § 8 (McKinney 1963); N.C. GEN. STAT. § 143-291 (Supp. 1969); N.D. CENT. CODE ANN. § 32-12-02 (1960); R.I. GEN. LAWS ANN. § 9-31-1 (Supp. 1970). See Beale v. State, ___ Misc. ___, 46 N.Y.S.2d 824 (Ct. Cl. 1944). The court held the measure of the state's duty to inmates working in its institutional shops to be determined by the same standard of care imposed by the legislature upon its citizens employed by industry even though such standards may be higher than the situation would otherwise demand.

²⁸Reid & Sibell, Inc. v. Gilmore & Edwards Co., 134 Cal. App. 2d 60, 285 P.2d 364 (1955); Granger v. State, 14 App. Div. 2d 645, 218 N.Y.S.2d 742 (Sup. Ct. 1961); Newadony v. State, 276 App. Div. 59, 93 N.Y.S.2d 24 (Sup. Ct. 1949); Terrace Hotel Co. v. State, 46 Misc. 2d 174, 259 N.Y.S.2d 553 (Ct. Cl. 1965), *aff'd*, 26 App. Div. 2d 23, 270 N.Y.S.2d 460 (Sup. Ct. 1966); W. PROSSER, THE LAW OF TORTS § 131 at 979 (4th ed. 1971).

²⁹Gross v. State, 33 App. Div. 2d 868, 306 N.Y.S.2d 28, 30 (Sup. Ct. 1969). In addition the court mentioned that the state would have the same liability as an individual or corporation if the activity involved ministerial or nondiscretionary acts. *Id.* See Dalehite v. United States, 346 U.S. 15 (1953); Smith v. United States, 40 U.S.L.W. at 2132 (E.D. Mich. 1971); Brown v. City of Fairhope, 265 Ala. 596, 93 So. 2d 419 (1957).

good which usually produce no pecuniary profit or do not compete with private enterprise are considered governmental functions.³⁰

It would appear that the operation of a state prison and actions required to control discipline therein would be governmental functions, as the fundamental reason and purpose of such institutions have no counterpart in private enterprise. The operation of a jail by either a county or a municipality has been considered a governmental function and therefore immune from suit.³¹ Furthermore, matters requiring suppression of prison disturbances are clearly discretionary because of the variable fact situations involved. Based upon this rationale, one court has stated that the suppression of insurrections and the breaking up of riots are governmental functions, although in so deciding it was not specifically addressing the issue of prison revolts.³² Thus, as the quelling of prison riots may be characterized as governmental functions, it would seem that even states which have agreed to be sued in tort actions may argue successfully that the suppression of prison riots is still within the doctrine of sovereign immunity.

Such a conclusion necessitates a brief comment on the current status of this much-criticized doctrine.³³ One new approach is that a state whose constitution³⁴ permits the legislature to decide when and how the state is

³⁰Ramirez v. Ogden City, 3 Utah 2d 102, 279 P.2d 463 (1955); see Town of Stockbridge v. State Hwy. Bd., 125 Vt. 366, 216 A.2d 44 (1965). The court acknowledged that distinctions between governmental functions and proprietary operations are not clearly defined as there is not established rule; the reason for the distinctions is to avoid injustices which might result based on the governmental character of organizations.

³¹Grove v. County of San Joaquin, 156 Cal. App. 2d 808, 320 P.2d 161 (1958). *But cf.* Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957), where the court claimed that the city was held liable in the exercise of its governmental function because of the special duty it owed to the prisoner which was different from the duty owed to the general public. A widow was allowed to recover, therefore, for the wrongful death of her husband who died of smoke suffocation while left unattended and locked in jail.

³²Newiadony v. State, 276 App. Div. 59, 93 N.Y.S.2d 24 (Sup. Ct. 1949). The court decided that there was no responsibility for the acts of a sovereign in war, or the suppression of public disorders, or for the creation and development of the necessary instrumentalities of force to implement these functions. See Smith v. Cooper, 475 P.2d 78 (Ore. 1970), where it was indicated that the decisive reason why governmental functions should not be reviewed by a court or jury is precisely because such acts and decisions can cover the whole spectrum of governmental decisions such as the availability of funds, public acceptance, order of priority, etc.

³³W. PROSSER, THE LAW OF TORTS § 131 at 984 (4th ed. 1971); see note 25 *supra*.

³⁴*E.g.*, ARIZ. CONST. art. IV, Pt. 2, § 18; CAL. CONST. art. XX, § 6; FLA. CONST. art. X, § 13; IND. CONST. art. IV, § 24; KY. CONST. § 231; LA. CONST. art. III, § 35; MICH. CONST. art. IX, § 22; NEB. CONST. art. V, § 22; NEV. CONST. art. IV, § 22; N.D. CONST. art. I, § 22; OHIO CONST. art. I, § 16; ORE. CONST. art. IV, § 24; PA. CONST. art. I, § 11; S.C. CONST. art. XVII, § 2; S.D. CONST. art. III, § 27; TENN. CONST. art. I, § 17; WASH. CONST. art. II, § 26; WIS. CONST. art. IV, § 27; WYO. CONST. art. I, § 8.

to be held liable has thereby waived its governmental immunity and is subject to tort actions generally.³⁵ This would seem to indicate a change from the theory that immunity is granted to the state unless consent to be sued is given³⁶ to a theory that immunity must be affirmatively asserted.

Recently an Ohio court in *Krause v. State*,³⁷ a case arising out of the highly controversial Kent State shootings, took a bolder approach and held sovereign immunity unconstitutional based upon the view that the doctrine establishes two categories of claimants without having a foundation in reasonableness.³⁸ The court indicated that although the idea of governmental immunity is to protect the state, in actuality it only protects the wrongful acts of men, and further that if this allows the government to irresponsibly kill or maim with impunity the most elemental notions of due process of law would be violated.³⁹ The court concluded by observing that as compensation is paid for the taking of property the state should also compensate for the taking of life.⁴⁰ Although *Krause* has not yet run its course in the appellate process, it may well indicate a trend toward the final dissolution of governmental immunity.

OBTAINING JUDICIAL ACTION

If the prisoner has a right to sue and if the state may be held liable, it then becomes important to examine the probable action courts will take in cases which arise out of prison uprisings. To provide guidance for the determination of the alleged injustice, it would seem that the courts would first turn to the statutory powers granted prison officials to compare acts performed with acts permitted. It appears to be axiomatic that the state has not only a right but a duty⁴¹ to use all suitable means to enforce and maintain discipline in state prisons.⁴² To implement this duty, prison

³⁵*State v. Williams*, 12 Ariz. App. 498, 472 P.2d 109 (1970).

³⁶*Faber v. State*, 143 Colo. 240, 353 P.2d 609 (1960); *Lewis v. State*, 96 N.Y. 71 (1884).

³⁷*Krause v. State*, No. 30880 (Ct. App. Ohio, Sept. 30, 1971).

³⁸*Id.* at 2. The two categories mentioned by the court were those offended by state action and those offended by private action.

³⁹*Id.* at 7.

⁴⁰*Id.* at 14, citing *Fowler v. City of Cleveland*, 100 Ohio St. 158, 176, 126 N.E. 72, 78 (1919). Although the court quotes dicta from *Fowler*, that case had been overruled. *Aldrich v. City of Youngstown*, 106 Ohio St. 342, 140 N.E. 164 (1922).

⁴¹*Martin v. Gathright*, 279 F. Supp. 485 (W.D. Va. 1967).

⁴²*E.g.*, N.Y. CORREC. LAW § 137(5) (McKinney Supp. 1971); *United States v. Pennsylvania*, 247 F. Supp. 7 (E.D. Pa. 1965). The court claimed that discipline is indispensable to the orderly operation of a state penal institution and certain rights must be curtailed to achieve it. See *Wright v. McMann*, 321 F. Supp. 127, 132 (N.D.N.Y. 1970), where it was held that security has been and should be a paramount objective in maximum security prisons.

officials have been granted wide discretion⁴³ and many states have made it a felony for prisoners to instigate riots⁴⁴ or take hostages.⁴⁵ This determination may grant additional powers to prison officials in situations where the riots are part of a convict's effort to escape confinement because it might then be argued that deadly force could be used if that reasonably seemed the only means to frustrate the escape efforts.⁴⁶ Contrasted with these granted and implied powers is the common law duty of a custodian to take proper care of his prisoner.⁴⁷

Possibly because of this wide range of available powers, courts have been reluctant to interfere with the management and control of disciplinary problems. An additional reason is that the correctional institutions are deemed to be under the control of the executive branch of government.⁴⁸ One court expressed its hesitancy by stating that

[a] long series of violent prison riots [has] taught the courts that we should be hesitant in injecting hampering restrictions upon those who are charged with maintaining order in what is often an explosive situation.⁴⁹

⁴³*Childs v. Pegelow*, 321 F.2d 487 (4th Cir. 1963); *Roberts v. Pegelow*, 313 F.2d 548 (4th Cir. 1963); *Wilson v. Prasse*, 325 F. Supp. 9 (W.D. Pa. 1971). The traditional view of an official's discretion is demonstrated by one court where it stated that

[t]he acts described seem to be authorized by statute, if, in the opinion of the warden, it was deemed necessary in order to produce entire submission or obedience of the convict.

Wightman v. Brush, 56 Hun. 647, 10 N.Y.S. 76 (1890).

⁴⁴*E.g.*, FLA. STAT. ANN. § 944.45 (Supp. 1971); TENN. CODE ANN. § 41-724 (Supp. 1970); WASH. REV. CODE § 9.94.020 (1957).

⁴⁵*E.g.*, CAL. PENAL CODE § 4503 (West 1970); FLA. STAT. ANN. § 944.44 (Supp. 1971); NEB. REV. STAT. § 28-743 (1965); PA. STAT. ANN. tit. 18, § 4723.1 (Supp. 1971); WASH. REV. CODE § 9.94.030 (1957).

⁴⁶R. PERKINS, CRIMINAL LAW ch. 10, § 3 (1969).

⁴⁷*Anderson v. Nosser*, 438 F.2d 183 (5th Cir. 1971); *Kusah v. McCorkle*, 100 Wash. 318, 170 P. 1023 (1918); *see Westbrook v. State*, 133 Ga. 578, 66 S.E. 788 (1909), where it was indicated by the court that the security of the prisoner remains his right, except as expressly provided by statute, and if it be unlawfully invaded, he may resist such unlawful invasion as if there had been no conviction.

⁴⁸*Douglas v. Sigler*, 386 F.2d 684 (8th Cir. 1967); *Roberts v. Pegelow*, 313 F.2d 548 (4th Cir. 1963).

⁴⁹*Wilson v. Prasse*, 325 F. Supp. 9, 12 (W.D. Pa. 1971). Further, it has been said that inmates should realize that the courts will not interfere with the conduct, management, and disciplinary control of penal and correction institutions except in extreme cases. *Douglas v. Sigler*, 386 F.2d 684 (8th Cir. 1967). One extreme of this attitude was expressed by the court in *Queen v. South Carolina Dep't of Correc.*:

It is doubtful that the goals of modern penology will be saved in a prison where the administration is handcuffed by judicial controls, and the prisoners . . . run the institution.

307 F. Supp. 841, 845 (D.S.C. 1970).

This policy is based on the fear that judicial scrutiny would undermine the authority and effectiveness of prison officials,⁵⁰ and is especially valid if the disciplinary action involves only routine security measures.⁵¹ The crux of the argument is that the severity of incidents requiring immediate and affirmative action should not be compounded because of delay or unwillingness resulting from fear of judicial reprimand.

From the state's point of view the court's hesitancy to condemn acts of prison officials would seem inherently sound and in keeping with old doctrines of sovereign immunity and the limitations of a prisoner's right to sue. To the prisoner, however, it presents another obstacle of public policy counter to his interests. To obtain favorable action the prisoner at least must demonstrate that a strong violation of the custodian's common law duty occurred or that the incident in question was far beyond the scope of routine security measures.

CONSTITUTIONAL CAUSES OF ACTION

To avoid the problems and questions raised by state statutes and their court interpretations, the prisoner might seek his remedy through assertion of constitutional rights. Even though he may have no state cause of action, a prisoner is still protected by due process and equal protection guarantees.⁵² The very judgment and sentence of a life term or less by the court confirms that the prisoner at least has a right to life⁵³ and thus to protection of his fundamental constitutional rights.⁵⁴ The court's task in this area is one of diligently searching for the distinctions between acts showing an arbitrary and capricious disregard of human rights and mere matters of discipline immune from federal interference.⁵⁵

⁵⁰Anderson v. Nossler, 438 F.2d 183, 189 (5th Cir. 1971).

⁵¹Queen v. South Carolina Dep't of Correc., 307 F. Supp. 841 (D.S.C. 1970); *cf.* State v. Boles, 5 Conn. Cir. 22, 240 A.2d 920, 922 (1967). The court in *Boles* admitted it would make every effort to uphold the validity of acts that would empower the mayor to impose a curfew as a means to help suppress riots.

⁵²Cooper v. Pate, 378 U.S. 546 (1964); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961); Fortune Soc'y v. McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970); *see* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); United States *ex rel.* Verde v. Case, 326 F. Supp. 701 (E.D. Pa. 1971).

⁵³Breed v. Atlanta, B. & C. R., 241 Ala. 640, 4 So. 2d 315 (1941).

⁵⁴Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Hester v. Craven, 322 F. Supp. 1256, 1262 (C.D. Cal. 1971); *see* United States *ex rel.* Shuster v. Herold, 410 F.2d 1071 (2d Cir. 1969).

⁵⁵United States *ex rel.* Wakeley v. Pennsylvania, 247 F. Supp. 7, 12 (E.D. Pa. 1965). The court described this task as treading about in the "twilight zone" that separates interference with a state's autonomy in policing its own penal system from the enforcement of federally guaranteed rights. *Id.* *See* Wilson v. Prasse, 325 F. Supp. 9 (W.D. Pa. 1971), where the court noted the conflict between constitutional rights and the need for the state to preserve order and prevent prison riots.

Although prisoners are accorded the same protection of constitutional rights as are other individuals, the distinction between free citizens and those imprisoned must not be obscured.⁵⁶ Challenge to the established order is more easily accommodated in free society than in prisons where rehabilitation is governed by rules.⁵⁷ Within the prisons as well as in free society a "clear and present danger"⁵⁸ may justify curtailment of constitutional guarantees. The question then becomes whether the danger created in a prison uprising justifies the force used in its suppression. The answer may depend on the extent to which the force was disproportionate to the danger⁵⁹ and whether the force offends general standards of humanity and decency.⁶⁰

Under proper circumstances a prisoner has a right to sue under the eighth amendment of the United States Constitution.⁶¹ Although for many years the prohibition of cruel or unusual punishment was not held

⁵⁶*In re Harrell*, 2 Cal. 3d 675, 470 P.2d 640, 87 Cal. Rptr. 504 (1970). The court in *Knuckles v. Prasse*, 302 F. Supp. 1036 (E.D. Pa. 1969), *aff'd mem.*, 435 F.2d 1255 (3d Cir. 1970) stated that

a prison is not a private dwelling and a cell row is not a public highway. Thus plaintiffs' freedoms and rights must be analyzed in the realistic context of the prison situation where plaintiffs desire to exercise them.

Id. at 1047.

⁵⁷*Id.*; see *Roberts v. Peppersack*, 256 F. Supp. 415, 430 (D. Md. 1966), *cert. denied*, 389 U.S. 877 (1967).

⁵⁸*Thomas v. Collins*, 323 U.S. 516 (1945); *Schenck v. United States*, 249 U.S. 47 (1919); *United States v. Flynn*, 216 F.2d 354 (2d Cir. 1954); *Wilson v. Prasse*, 325 F. Supp. 9 (W.D. Pa. 1971). In *Wilson*, the jury was told that a clear and present danger of interference with prison discipline must exist before the prison regulations on the right to receive literature would be considered reasonable. The court in *Fortune Soc'y v. McGinnis* stated:

The state's power to impinge upon his constitutional rights is not without limitation. Only a compelling state interest centering about prison security, or a clear and present danger of a breach of prison discipline, or some substantial interference with orderly institutional administration can justify curtailment of a prisoner's constitutional rights.

319 F. Supp. 901, 904 (S.D.N.Y. 1970).

⁵⁹See generally *Shelton v. Tucker*, 364 U.S. 479 (1960), where the Court indicated that even though the governmental purpose may be legitimate and substantial, it cannot be pursued by means that broadly stifle personal liberties if the result can be more narrowly achieved. It has been said that punishment should be graduated and proportioned to the offense. *Weems v. United States*, 217 U.S. 349 (1910). The court in *Jackson v. Godwin*, 400 F.2d 529 (5th Cir. 1968), noted that to determine violations of constitutional rights the disproportion between the punishment and the crime is a factor to be considered.

⁶⁰*Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968); *Lollis v. New York State Dep't of Social Servs.*, 322 F. Supp. 473 (S.D.N.Y. 1970); see *Anderson v. Nosser*, 438 F.2d 183, 193 (5th Cir. 1971).

⁶¹The right to be free from cruel and unusual punishment may also be enforced under the Civil Rights Act of 1964, 42 U.S.C. § 1983 (1965). *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966).

applicable to the states,⁶² in 1910 the Supreme Court in *Weems v. United States* indicated that a state sentence could be cruel and unusual within the meaning of the eighth amendment.⁶³ Having made no precise distinctions between cruelty and unusualness, and seemingly not relying heavily on definitions of these terms,⁶⁴ the courts simply maintain that a factual showing of cruel and unusual punishment would be necessary to support judicial interference.⁶⁵

Punishment which does not exceed the limits fixed by statute will probably not be considered cruel or unusual.⁶⁶ Techniques, however, which are outside the bounds of traditional penalties would be constitutionally suspect.⁶⁷ When discipline is authorized by statute the question is whether the force used to suppress a prison revolt is within the ambit of traditional controls. One court stated that "it is clearly accepted that the [eighth] amendment prohibits certain hard core inhuman treatment."⁶⁸ This would include something intolerable to fundamental fairness, shocking to the general conscience⁶⁹ and raising up the "cry of horror" against

⁶²*O'Neil v. Vermont*, 144 U.S. 323 (1892). The dissenting opinion, however, forecasted the trend of applying the eighth amendment provision to the states. *Id.* at 370.

⁶³*Weems v. United States*, 217 U.S. 349 (1910). The case involved the Philippine Penal Code which was held to inflict cruel and unusual punishment by the provisions under which the falsification by a public official of a public document was punished by hard labor for twelve to twenty years and during his imprisonment the prisoner was forced to carry a chain which extended from his wrist to his ankle. *See also* *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968), where it was stated that there is no meaningful distinction drawn between punishment by statutory sentence and punishment for disciplinary purposes. The court also indicated that the eighth amendment was directly applicable to the states through the fourteenth amendment.

⁶⁴*Trop v. Dulles*, 356 U.S. 86, 100 n.32 (1958); *Hancock v. Avery*, 301 F. Supp. 786, 792 (M.D. Tenn. 1969); *see Weems v. United States*, 217 U.S. 349, 368 (1910).

⁶⁵*Jackson v. Bishop*, 404 F.2d 571, 577 (8th Cir. 1968); *Glenn v. Ciccone*, 370 F.2d 361, 363 (8th Cir. 1966); *see Carey v. Settle*, 351 F.2d 483, 485 (8th Cir. 1965).

⁶⁶*State v. Benton*, 276 N.C. 641, 174 S.E.2d 793, 805 (1970); *State v. Elliott*, 269 N.C. 683, 153 S.E.2d 330 (1967); *State v. Stewart*, 4 N.C. App. 249 166 S.E.2d 458 (1969).

⁶⁷*Trop v. Dulles*, 356 U.S. 86 (1958). The Court indicated that traditional penalties might include fines, imprisonment, and even execution depending on the enormity of the crime. *Id.* at 100.

⁶⁸*Anderson v. Nossner*, 438 F.2d 183, 191 (5th Cir. 1971). The court further stated that [t]he cruel and unusual punishment clause is a nonstatic, moral precept designed to curb treatment which offends contemporary standards of decency.

Id. at 190. The court implied that it is time for a change of attitude for "[w]e deal with human beings, not dumb, driven cattle." *Id.* at 193. *See Hancock v. Avery*, 301 F. Supp. 786, 791 (M.D. Tenn. 1969).

⁶⁹*In re Kemmler*, 136 U.S. 436, 446-47 (1890); *Carey v. Settle*, 351 F.2d 483 (8th Cir. 1965).

man's inhumanity to his fellow man.⁷⁰ Extreme maltreatment, the wanton infliction of pain and punishments of torture⁷¹ are matters beyond the protected scope of allowable disciplinary action and proper prison administration.⁷²

Although specific acts have been characterized as cruel or unusual, especially when the convict was singled out for such treatment, the situation of a prison uprising by its very nature involves more than the particular injured prisoner. Besides the actual amount of force employed and the injuries of individual prisoners, it would seem that the courts would be compelled to look at the entire insurrection to determine dangers involved to all the prisoners, hostages, townspeople and guards. The concept of human decency cannot be "defined in terms of approval or reproach uninfluenced by the subjective emotions and impulses of those who are required to apply it in the characterization of human conduct."⁷³ It may not be undesirable that for the protection of many a few must suffer. Moreover, because accidents and mistakes occur even with proper caution, the court may not be able to say that there is clear abuse of discretion or disproportionate use of force. It seems, therefore, that the necessity for delicately balancing variable fact and policy considerations precludes the clear deduction that wounding and killing innocent prisoners is a violation of constitutional rights. This, however, does not diminish the validity of the argument that a highly disproportionate amount of force, creating extremes which offend general standards of human decency, is beyond the scope of reasonable disciplinary controls sanctioned by the state.

The difficulties encountered by prisoners in their attempts to sue,

⁷⁰*Robinson v. State of California*, 370 U.S. 660, 676 (1962) (concurring opinion); *see O'Brien v. Olson*, 42 Cal. App. 2d 449, 109 P.2d 8 (1941), where the court made the distinction between the use of corporal punishment to suppress a threatened riot and the deliberate infliction of the corporate punishment for past offenses. *Id.* at 16.

⁷¹*Wilkerson v. Utah*, 99 U.S. 130 (1878); *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968).

⁷²*Sinclair v. Henderson*, 435 F.2d 125 (5th Cir. 1970); *Carey v. Settle*, 351 F.2d 483 (8th Cir. 1965). The following are specific examples where courts found cruel and unusual punishment: *Sinclair v. Henderson*, 435 F.2d 125 (5th Cir. 1970) (unsanitary facilities on the death row); *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) (use of the strap); *Wright v. McMann*, 321 F. Supp. 127 (N.D.N.Y. 1970) (certain conditions in the use of a strip cell); *Roberts v. Williams*, 302 F. Supp. 972 (N.D. Miss. 1969) (unprovoked, grossly negligent shooting of a minor prisoner convicted of petty larceny). Examples where the court did not find cruel and unusual punishment are, *Courtney v. Bishop*, 409 F.2d 1185 (8th Cir.), *cert. denied*, 396 U.S. 915 (1969) (placement in maximum security confinement); *Heft v. Parker*, 258 F. Supp. 507 (M.D. Pa. 1966) (inadequate diet); *Rudolph v. State*, 275 Ala. 115, 152 So. 2d 662, *cert. denied*, 375 U.S. 889 (1963), *cert. and stay of execution denied*, 377 U.S. 919 (1964) (death penalty for rape).

⁷³*Hall v. State*, 176 Md. 488, 5 A.2d 916, 918 (1939); *see Anderson v. Nosser*, 438 F.2d 183, 191 (5th Cir. 1971); *Jordan v. Fitzharris*, 257 F. Supp. 674, 680 (N.D. Cal. 1966).