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Habeas Corpus-Use of the Writ in Missouri State Courts to Challenge Prison Conditions

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insurer-insured privilege extension of the attorney-client privilege, is clearly unsound.

State ex rel. Cain v. Barker extends the attorney-client privilege to include statements transmitted from insured to insurer where there is an insurer-insured relationship at the time of the statements. The extension is designed to protect the policy holder, whose defense is conducted by an attorney selected by his insurer, and to encourage full disclosure to the insurer. Both reasons are sound and desirable in terms of public policy. In view of the distinction between the attorney-client privilege and the physician-patient privilege, however, it would seem the court may have to reconsider its dicta involving waiver should it be faced with a case in which it is argued that the attorney-client privilege has been waived merely because the plaintiff bringing a lawsuit is the one claiming the privilege. To hold to the *Cain* dicta would bring about the anomalous result of excluding all clients who wish to bring an action from the benefits of the privilege of confidentiality in communications with their attorneys.

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HABEAS CORPUS—USE OF THE WRIT IN MISSOURI STATE COURTS TO CHALLENGE PRISON CONDITIONS

McIntosh v. Haynes[1]

McIntosh was incarcerated in the Missouri State Penitentiary in Jefferson City to serve a six-year term for a 1974 conviction of armed robbery. While serving the sentence, McIntosh filed an original petition for a writ of habeas corpus with the Missouri Supreme Court.[2] He alleged that the penitentiary building in which he slept was rat-infested and that confinement in that building constituted cruel and unusual punishment in violation of the constitutions of Missouri and the United States.[3] McIntosh and

1. 545 S.W.2d 647 (Mo. En Banc 1977).

2. Section 532.030, RSMo 1969 requires that the petition for writ of habeas corpus be filed initially in the circuit court of the county in which the petitioner is restrained of his liberty. If the application for writ is refused by that court, the prisoner may make successive applications to courts of superior jurisdiction. § 532.040, RSMo 1969; *In re* Breck, 252 Mo. 302, 158 S.W. 843 (1913). In *McIntosh* the court noted that the original supreme court jurisdiction in this case was unusual, and that future petitions should be filed in the appropriate circuit court. 545 S.W.2d at 653.

3. U.S. CONST. amend. VIII; MO. CONST. art. I, § 21.

two other occupants of the same building had been bitten by rats during December, 1975, and January, 1976, and were forced to undergo a fourteen-shot anti-rabies vaccination program.

The writ of habeas corpus was issued and respondent Haynes, Director of the Division of Corrections, filed his return, requesting dismissal of the writ and remand of the prisoner.[4] Haynes argued that McIntosh's petition should be dismissed because habeas corpus relief was limited to challenging the *cause* of confinement, as opposed to the *conditions* of confinement. Haynes argued that the writ should be dismissed because the only available remedy under habeas corpus was release from confinement. McIntosh admitted he was incarcerated legally and requested only a change in the conditions of his confinement.[5] Therefore, Haynes reasoned, habeas corpus was an improper remedy.

The Missouri Supreme Court held that "a prisoner is entitled to utilize habeas corpus to secure relief from inhumane conditions constituting cruel and unusual punishment even though the detention itself is legal."[6] The court said that a summary dismissal of habeas corpus in all instances where conditions of confinement are challenged would be improper. With this procedural problem solved, the court held on the merits that McIntosh had failed to prove cruel and unusual punishment. (The court emphasized the Division of Corrections' subsequent vermin extermination efforts which apparently had remedied the condition.) The writ was dismissed and McIntosh was remanded to custody. This note first will consider briefly the underpinnings of the *McIntosh* decision. It then will explore the effect of the decision upon a prisoner's remedies for inhumane conditions of confinement and discuss the limited breadth of the habeas corpus expansion by the Missouri court.

The writ of habeas corpus is the process of testing the authority of one who deprives another of his liberty. It is designed to provide a person whose liberty is restrained an immediate hearing to inquire into and deter-

4. A brief description of the habeas corpus procedure as set out in Chapter 532 of the Missouri Revised Statutes and rule 91 of the Missouri Rules of Civil Procedure may be helpful. The aggrieved prisoner files a petition under oath in the proper court. In the petition, the prisoner states the illegal aspects of his confinement. *See* note 2 *supra*. The court then grants the writ unless the allegations fail to state a claim on which the prisoner can be granted relief. The writ is directed to the officer in charge of the prisoner. This officer files a return, stating the reason for the confinement, and the prisoner is turned over to the custody of the court. The court hears testimony at a hearing and disposes of the prisoner "as the case shall require." The prisoner is discharged, bailed, or otherwise relieved if the court finds in his favor. Otherwise, he is remanded to the custody of the prison official. Administrative action at any stage which cures the objectionable condition may cause the writ to be quashed. 545 S.W.2d at 653.

5. Although the prisoner's petition contained language which made it appear that the prisoner was seeking discharge from his confinement, the court said it was "clear . . . that petitioner does not seek discharge from the department of corrections but only from being confined in a place infested with rats." 545 S.W.2d at 648.

6. *Id.* at 652.

mine the legality of the detention.[7] Generally, a prisoner utilizes habeas corpus to challenge some defect in the arrest or trial proceedings.[8] He also may employ habeas corpus to challenge the jurisdiction of the sentencing court or the sentencing procedure. In each of the above situations release from custody is the desired remedy.

Traditionally, Missouri courts have refused to examine the conditions of a prisoner's confinement (where the relief would be something other than release) through the habeas corpus procedure.[9] Habeas corpus petitions in Missouri state courts which sought review of prison conditions were dismissed for failure to state a claim upon which relief could be granted—habeas relief was not available unless the cause of confinement was challenged.[10] A prisoner dissatisfied with the conditions of his confinement theoretically could gain relief at the state level through injunction, writs of prohibition or mandamus, declaratory judgment, or through the state administrative procedure act.[11]

In *McIntosh*, however, the court apparently recognized the practical ineffectiveness and procedural delay involved in these mechanisms.[12] The

7. 39 C.J.S. *Habeas Corpus* § 2 (1976).

8. It should be noted that in Missouri most post-conviction review for prisoners is received through MO. R. CRIM. P. 27.26. Prisoners in Missouri employ rule 27.26, in lieu of habeas corpus, to challenge improper search and seizure, unlawfully coerced confessions or guilty pleas, inadequacy or denial of counsel, unfairness of trial, etc. Few states have provisions comparable to Missouri's rule 27.26. Habeas corpus is used to challenge the above defects in the trial proceedings in most states. In Missouri, rule 27.26 is not available except to challenge defects in the trial proceedings. The prisoner, if he has been convicted lawfully, must employ habeas corpus to challenge conditions in his confinement.

9. Wilwording v. Swenson, 439 F.2d 1331 (8th Cir.), *rev'd on other grounds*, 404 U.S. 249 (1971); Cavallaro v. Swenson, 439 F.2d 1337 (8th Cir. 1971).

10. *Id.*

11. Wilwording v. Swenson, 404 U.S. 249 (1971). The possible remedies in federal court and state administrative remedies will be discussed *infra*.

12. The court recognized the "time-consuming procedures involved in a declaratory judgment action . . . ." 545 S.W.2d at 653. The court indicated this delay would not afford an inmate "reasonable relief from . . . confinement prior to being severely injured by rats." *Id.* The court did not mention any other possible state remedies, but cited Wilwording v. Swenson, 404 U.S. 249 (1971). The Supreme Court pointed out in that case that possible mandamus and injunction actions were of only speculative value, and that there appeared to be no Missouri cases in which a prisoner had utilized these remedies successfully in challenging prison conditions.

Courts in almost every jurisdiction have refused to give injunctive relief, perhaps motivated by a desire to avoid the supervision problems of the equitable decree. R. GOLDFARB & L. SINGER, AFTER CONVICTION 450 (1973). Like an injunction, a writ of mandamus could provide speedy relief. However, it generally has not been helpful to prisoners, largely because it is restricted to the ministerial (non-discretionary) acts of government officials. § 529.010, RSMo 1969. Most prison rules and practices involve discretion, thus they are beyond mandamus jurisdiction. Section 222.010, RSMo 1969 states that a convict's civil rights are suspended while in prison. This has worked to reduce further the availability of a prisoner's non-habeas corpus remedies. For further discussion of an inmate's judicial remedies, see R. GOLDFARB & L. SINGER, *supra* at 433-88.

writ of habeas corpus, through its provisions for speedy hearing and determination,[13] gives a prisoner an opportunity to protest at the state level allegedly inhumane conditions of confinement. The *McIntosh* court found no statutory bar to the expansion of habeas corpus relief and recognized the favored position which the "great writ" has maintained.[14] Following the lead of some recent decisions in other states and the federal courts,[15] the court decided that a prisoner could employ habeas corpus to challenge the *conditions*, as well as the *cause* of his confinement. Upon a finding that the existing conditions are so inhumane as to constitute cruel and unusual punishment, the court may order whatever relief is appropriate and necessary to cure the defects in the prisoner's confinement.[16]

An inmate in the Missouri prison system now has open two avenues of habeas corpus relief to challenge conditions of his confinement which may constitute cruel and unusual punishment. The prisoner first may apply for habeas corpus relief in the state court. If the decision there is unsatisfactory, the prisoner, upon satisfaction of the exhaustion of state remedies requirement, may petition for relief through a writ of habeas corpus in federal court.[17]

Where federal constitutional violations (such as cruel and unusual punishment) are claimed, federal courts are not bound by the state court determination of the federal legal issue—even if the state courts have

13. After petition by the inmate, the writ must be granted or denied by the court "without delay." § 532.060, RSMo 1969. If the writ is granted, the officer in charge of the confinement has twenty-four hours to file his return and produce the prisoner before the court. §§ 532.170, .200, RSMo 1969. A hearing must be held within five days of the filing of the return, unless the prisoner requests more time. § 532.310, RSMo 1969. A decision is made by the court after the hearing. § 532.360, RSMo 1969. The entire process can be completed in less than a week.

14. The court cited Harris v. Nelson, 394 U.S. 286, 290-91 (1969). "The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action."

15. See cases discussed in the majority opinion. 545 S.W.2d at 650-52.

16. Missouri statutes apparently allow the judge wide discretion in determining what relief is needed in a particular case. Section 532.010, RSMo 1969 says a writ of habeas corpus is available except when "such person can be neither discharged nor bailed, or *otherwise relieved* . . . ." (emphasis added). The last two words imply a broad range of possible relief, as does the final clause in § 532.360, RSMo 1969, which says that the judge, after the hearing, "shall dispose of the prisoner as the case shall require." The judge in a case such as *McIntosh v. Haynes* apparently could order whatever relief he deemed necessary to remedy the conditions.

17. *See* 28 U.S.C. § 2254 (b)-(c) (1970) (a state prisoner must exhaust all available state remedies before applying to the federal courts for habeas corpus). For discussions of satisfaction of this requirement, see Wilwording v. Swenson, 404 U.S. 249 (1971); H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1487-94, 1500-03 (2nd ed. 1973); Laubach, *Exhaustion of State Remedies as a Prerequisite to Federal Habeas Corpus: A Summary, 1966-1971,* 7 GONZ. L. REV. 34 (1971); Sofaer, *Federal Habeas Corpus for State Prisoners: The Isolation Principle,* 39 N.Y.U.L. REV. 78 (1964); Comment, *Developments in the Law—Federal Habeas Corpus,* 83 HARV. L. REV. 1038, 1093 (1970).

adjudicated the federal issue fully and fairly.[18] Federal courts often defer to the factual findings of state tribunals,[19] but even after a full hearing at the state level, a prisoner may attempt to gain relief from the very same conditions by convincing a federal court that the state court has misapplied the federal standard of constitutionality.[20] (Although this note is concerned with the habeas corpus remedy, the reader should note the distinct possibility of prisoner relief under 42 U.S.C. section 1983 (1970).[21] This provision,

18. Brown v. Allen, 344 U.S. 443 (1953).

> The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right.

Id. at 508 (Frankfurter, J., concurring). The Court in Fay v. Noia, 372 U.S. 391 (1963) reinforced this notion. Federal habeas corpus was seen as a procedure which provides a remedy for any restraint considered contrary to fundamental rights. *Id.* at 402.

19. In proper circumstances the federal court may hold its own evidentiary hearing when reviewing a state prisoner's claims. 28 U.S.C. § 2254(d) (1970). If the relevant facts have not been found in the state court, then the federal judge must hold an evidentiary hearing to determine the facts in the habeas corpus proceeding. If, however, the state courts previously have ascertained the facts, a problem arises as to the conditions which require the federal judge to permit relitigation of relevant facts. Townsend v. Sain, 372 U.S. 293, 313 (1963), set out criteria for relitigation at the federal level. The Court said that there should be relitigation only when there is some indication that the state processes have not dealt fairly or completely with the issues. *See* Comment, *Developments in the Law—Federal Habeas Corpus,* 83 HARV. L. REV. 1038, 1113 (1970).

20. In Stone v. Powell, 428 U.S. 465 (1976) the Supreme Court indicated that it may be backing off the principle of federal habeas corpus review of all constitutional claims, even those fully and fairly litigated by the state court:

> [w]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

Id. at 482. The Court claimed that its decision narrowed federal habeas corpus review only in fourth amendment search and seizure situations involving application of the exclusionary rule of evidence. However, the dissent foresaw further cutbacks in federal habeas corpus review. "Today's holding portends substantial evisceration of federal habeas corpus jurisdiction . . . ." *Id.* at 503. (Brennan, J., dissenting). It remains to be seen whether the *Stone* rationale will be expanded so as to curtail federal habeas corpus review of fully and fairly litigated prisoner claims of unconstitutional confinement. For justifications of federal review, see Comment, *Developments in the Law—Federal Habeas Corpus,* 83 HARV. L. REV. 1038, 1056-62 (1970).

21. 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.

42 U.S.C. § 1983 (1970).

part of the Civil Rights Act of 1871, is becoming an increasingly popular mechanism for redress of prisoner grievances.[22])

The *McIntosh* opinion expands a prisoner's remedies, but it places at least two limitations upon that expansion—an exhaustion of administrative remedies requirement and the adoption of an apparently narrow view of the type of prison conditions which will be proper for habeas corpus review. Each of these limitations will be considered.

Near the end of the *McIntosh* opinion the court states:

> Nor do we intend that habeas corpus should be resorted to where the conditions complained of can be remedied by administrative action.[23]

The court seems to be placing its own exhaustion of remedies limitation upon habeas corpus review. Where administrative appeal is available, the inmate would be required to seek relief at this level before being granted judicial intervention. This requirement would apply to almost all com-

22. A prisoner often has a choice between § 1983 and federal or state habeas corpus as a mechanism for challenging prison conditions and regulations. The prisoner's decision requires a consideration of types of relief as well as the procedural and time consequences. An action under § 1983 includes the possibility of class actions, broad equitable or legal relief, broad discovery procedures and circumvention of the exhaustion of state remedies requirement. Monroe v. Pape, 365 U.S. 167 (1961). However, a § 1983 action may not provide as speedy relief as a habeas corpus action in state court. Also, conditions of confinement which violate a state law or prison regulation, but do not result in the deprivation of a constitutional right or are not attributable to the conduct or omission of some person acting under color of law are not remediable under § 1983. In addition, notions of federalism or federal-state comity may persuade a federal court not to exercise equitable jurisdiction (*e.g.*, grant an injunction) in a matter of state or local concern, regardless of the abridgement of constitutional rights. *See* Rizzo v. Goode, 423 U.S. 362 (1976). Despite the above arguments, and because of the traditional reluctance of state courts to provide adequate review of prison conditions and the exhaustion of remedies requirement for federal habeas corpus, § 1983 actions in federal courts have become increasingly effective vehicles for judicial review. Only when the state remedy provides faster relief and state courts are receptive to prison complaints, should a prisoner opt for state habeas corpus.

For a discussion of § 1983 and other remedies, see R. GOLDFARB & L. SINGER, AFTER CONVICTION 443 (1973); Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation,* 23 STAN. L. REV. 473 (1971); Annot., 51 A.L.R.3d 111, 128 (1973). It should be noted that there is some confusion over whether § 1983 excuses exhaustion of state judicial and administrative remedies in every case or only in those cases where application for relief through state channels clearly would be futile. There has been some erosion of the "no exhaustion" rule, especially to the extent of requiring exhaustion of available administrative remedies, but the extent of this erosion is unclear at this time. *See* Comment, *Section 1983 Jurisdiction: A Reply,* 83 HARV. L. REV. 1352 (1970); Comment, *State Prisoners and the Exhaustion of Administrative Remedies: Section 1983 Jurisdiction and the Availability of Adequate State Remedies,* 7 SETON HALL L. REV. 366, 376 (1976); Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape,* 82 HARV. L. REV. 1486 (1969). If an exhaustion requriement is included in § 1983, this would put a severe blemish on the attractiveness of a § 1983 action to challenge prison conditions.

23. 545 S.W.2d at 654.

plaints against the Division of Corrections because that state-wide office has a grievance procedure[24] which is available for any condition affecting an inmate which he believes is "unjust, inequitable, a hindrance to effective operation, or creates a problem."[25] It is probable that many complaints, including the situation in *McIntosh*, could be resolved through the grievance procedure.

The multi-level grievance procedure is highlighted by a potential final determination by a citizens' review committee consisting of individuals who are not associated with the institution.[26] On its face, the grievance procedure appears to be in line with modern processes in other states[27] and appears to provide an adequate initial review for aggrieved inmates. The practical operation of the procedure should be analyzed from time to time to insure that the procedure really does provide adequate protection. Particular attention should be paid to the time element so the procedure is not allowed to drag out indefinitely, entangling the inmate in administrative red tape.[28] It should be noted that the grievance procedure is available only to those incarcerated in state institutions. Prisoners in county or municipal facilities must rely upon a statutory plan of prison review.[29] This administrative appeal also should be analyzed in terms of effectiveness before the court elects to adhere rigidly to exhaustion of administrative remedies as a prerequisite for habeas corpus review.

In addition to the exhaustion requirement, the court in *McIntosh* limited its expansion of habeas corpus review by defining narrowly the substantive quality of complaints for which habeas corpus relief will be

24. The inmate grievance procedure, promulgated pursuant to §§ 216.020, .115, RSMo 1969, became effective only last year. The procedure is set out at MO. DIV. CORRECTIONS R. 101.120 (1976).

25. MO. DIV. CORRECTIONS R. 101.120 (1976).

26. *Id.* The inmate begins the complaint procedure with his caseworker and works through the grievance "team," the prison warden and the Director of the Division of Corrections. The director *may* refer the complaint to a citizens review committee which makes a recommendation, after which the director makes his determination. If this does not resolve the matter to the inmate's satisfaction, he may have it referred again to the citizens review committee which may make any resolution consistent with law and departmental policy. Thus the board apparently has only possible, not absolute, power to overrule the director's decision.

27. For a comparison, see Comment, *State Prisoners and the Exhaustion of Administrative Remedies: Section 1983 Jurisdiction and the Availability of Adequate State Remedies,* 7 SETON HALL L. REV. 366, 403-09 (1976).

28. MO. DIV. CORRECTIONS R. 101.120(5) (1976) sets out the time limits for each step of the procedure. A complaint which moves through each stage theoretically might not reach a final determination for more than two months after its initial filing.

29. Section 221.320, RSMo 1969 provides for a board of visitors which is to visit jails periodically and make yearly reports to the division of welfare on the conditions in jails. Presumably a prisoner with a complaint about a county jail would be required to appeal for relief to the person in charge of the jail and a member of the board of visitors before he could be said to have exhausted his administrative remedies.

proper. The decision plainly indicates that a writ of habeas corpus in state court will not be an appropriate mechanism to gain review of *all* prison conditions. The writ will be proper only in those situations where a prisoner alleges "*specific facts* which, if true, would constitute inhumane conditions constituting cruel and unusual punishment. . . ."[30] Recognizing that the day-to-day operations of penal and correctional institutions are under the auspices of the executive department, the court indicated it would not interfere with the discretion of administrators in "the conduct, management, and disciplinary control of this type of institution except in extreme cases."[31] Thus, in cases not involving "inhumane" conditions, an inmate's avenues for judicial relief apparently will be limited, as they were before *McIntosh*, to writs of habeas corpus in federal court, actions under section 1983, or the historically ineffective injunction, mandamus and declaratory judgment procedures in state courts.[32] The speedy relief that state habeas corpus could provide will not be available. Petitions in state court which do not allege "inhumane" conditions may, as before, be dismissed summarily.

Prisoner complaints can be divided into two categories: those where the prisoner is claiming cruel and unusual punishment in the strictest sense due to unsafe or unsanitary living conditions or physical abuse by the administrators or other inmates; and those which do not involve a threat to the health of the prisoner, *i.e.*, where the prisoner is claiming that certain regulations deny him his constitutional rights. In the latter category, the violation can constitute a form of cruel and unusual punishment or a direct violation of other constitutional provisions. However, the chief characteristic of this category is that no threat to the physical well-being of the inmate is involved.

The facts in *McIntosh* place it in the former category. The court's decision indicates a willingness to intervene judicially where prisons become severely overcrowded, unhealthy, or dangerous. The court apparently has refused to extend the scope of habeas corpus review to those situations where there is no threat to *physical* well-being. There are at least two factors which indicate this refusal. First, the court speaks repeatedly of "inhumane" conditions as the test for what constitutes a proper area for habeas corpus relief. It is doubtful that an abridgement of free speech or freedom of religion could be called "inhumane" so as to become a proper ground for habeas corpus review under the *McIntosh* guidelines. By the

30. 545 S.W.2d at 653 (emphasis in original).

31. *Id.* at 652-53.

32. In Wilwording v. Swenson, 404 U.S. 249 (1971), the Supreme Court said that if state remedies were of only speculative effectiveness, then a prisoner need not exhaust all state remedies before pursuing federal habeas corpus. Since *McIntosh v. Haynes* does not appear to improve an inmate's state-court remedies in situations not involving inhumane treatment, the *Wilwording* rationale probably is still applicable to these situations, and a prisoner could gain relief through federal habeas corpus without complete exhaustion of injunction, mandamus, and other state remedies which are of questionable effectiveness.

"inhumane" limitation, the court must be contemplating those prison conditions which pose a threat of physical harm to the inmate. A condition which merely infringes upon personal liberty probably should not be considered "inhumane" within the meaning of *McIntosh.*

The second factor which indicates the court's reluctance to expand habeas corpus to all prisoner complaints is evidenced by a comparison of the *McIntosh* opinion to an earlier majority opinion[33] in the same case. That opinion was withdrawn and the unanimous decision involved here was substituted. In the earlier opinion the court said habeas corpus relief should be availabe whenever an individual is "restrained of his liberty to a greater degree than authorized by law."[34] This broad phrase invited expansion of habeas corpus review to situations not involving physical mistreatment. The holding in the new opinion, *i.e.*, that habeas corpus may be utilized "to secure relief for inhumane conditions constituting cruel and unusual punishment,"[35] is more narrow and apparently indicates a desire on the part of the court to foreclose expansion of the habeas corpus remedy, at least for the present.

By limiting its expansion of habeas corpus, the Missouri court demonstrated a reluctance to follow a recent trend in some jurisdictions where the concept of cruel and unusual punishment has been expanded to include all unreasonable or unjustifiable deprivations of prisoners' rights. These courts have recognized that a prisoner should retain all rights of a normal citizen except those necessary for the administration of the correctional institution. The courts have employed habeas corpus or actions under section 1983 to review situations involving deprivation of personal liberties. For example, regulations and practices which inhibit religious freedom,[36] require mail censorship or visitor limitations,[37] violate the right to counsel or access to the courts,[38] eliminate procedural due process

33. McIntosh v. Haynes, No. 59477 (Mo. En Banc, Dec. 30, 1976).

34. *Id.* This also is the wording of the statutory provision for habeas corpus. § 532.010, RSMo 1969. In the second *McIntosh* opinion, the court does not mention this phrase and opts for more narrow language.

35. 545 S.W.2d at 652.

36. *See, e.g.,* Cooper v. Pate, 378 U.S. 546 (1964); Richey v. Wilkins, 335 F.2d 1 (2d Cir. 1964); Glenn v. Wilkinson, 309 F. Supp. 411 (W.D. Mo. 1970); Peek v. Ciccone, 288 F. Supp. 329 (W.D. Mo. 1968); Burns v. Swenson, 288 F. Supp. 4 (W.D. Mo. 1968), *modified,* 300 F. Supp. 759 (W.D. Mo. 1969), *aff'd,* 430 F.2d 771 (8th Cir. 1970), *cert. denied,* 404 U.S. 1062 (1972); State v. Richardson, 130 N.J. Super. 63, 324 A.2d 914 (1974); SaMarion v. McGinnis, 35 App. Div. 684, 314 N.Y.S.2d 715 (1970).

37. *See, e.g.,* Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971); Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974); Martinez v. Procunier, 354 F. Supp. 1092 (N.D. Cal. 1973), *aff'd,* 416 U.S. 396 (1974); Morales v. Schmidt, 340 F. Supp. 544 (W.D. Wis. 1972), *rev'd on other grounds,* 489 F.2d 1335 (7th Cir. 1973), *judgment vacated,* 494 F.2d 85 (7th Cir. 1974); State *ex rel.* Thomas v. State, 55 Wis. 2d 343, 198 N.W.2d 675 (1972).

38. *See, e.g.,* Jenks v. Henys, 378 F.2d 334 (9th Cir. 1967); Lamar v. Kern, 349 F. Supp. 222 (S.D. Tex. 1972); Morales v. Turman, 326 F. Supp. 677 (E.D. Tex. 1971); Glenn v. Wilkinson, 309 F. Supp. 411 (W.D. Mo. 1970); Fulwood v. Clem-

protections in disciplinary proceedings,[39] promote racial discrimination,[40] or restrict the right to speak and read freely[41] have gained complete judicial review through these procedures. Courts have granted relief in many instances (even though no physical suffering or "inhumaneness" was involved[42]) by holding the prison rules or practices unconstitutional as cruel and unusual punishment.[43]

In instances where the infringement of personal liberties was necessary or inconsequential, these same courts have deferred to the judgment of prison administrators and have refused judicial relief or have limited the breadth of judicial review. For example, hair-length regulations, restrictions on the number of books a prisoner may keep in his cell, and restrictions on some free speech rights have been upheld as necessary to some penal or correctional purpose.[44] The line between situations which

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mer, 206 F. Supp. 370 (D.D.C. 1962); *In re* Jordan, 12 Cal. 3d 575, 526 P.2d 523, 116 Cal. Rptr. 371 (1974); Brabson v. Wilkins, 19 N.Y.2d 433, 227 N.E.2d 383 (1967).

39. *See, e.g.,* Capitan v. Cupp, 356 F. Supp. 302 (D. Ore. 1972); Stewart v. Jozwiak, 346 F. Supp. 1062 (E.D. Wis. 1972); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971), *modified*, 497 F.2d 809 (9th Cir. 1974); Meola v. Fitzpatrick, 322 F. Supp. 878 (D. Mass. 1971); Dixon v. Attorney General, 325 F. Supp. 966 (M.D. Pa. 1971).

40. *See, e,g,,* Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968); Rivers v. Royster, 360 F.2d 592 (4th Cir. 1966); Holt v. Sarver (*Holt II*), 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga.), *aff'd per curiam,* 393 U.S. 266 (1968).

41. *See, e.g.,* Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971); Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968); Rowland v. Sigler, 327 F. Supp. 821 (D. Neb.), *aff'd*, 452 F.2d 1005 (8th Cir. 1971); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970); Kritsky v. McGinnis, 313 F. Supp. 1247 (N.D.N.Y. 1970).

42. It has been settled for some time in federal courts that physical suffering by an inmate is not a prerequisite of an eighth amendment cruel and unusual punishment claim. Trop v. Dulles, 356 U.S. 86 (1958); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968). In *McIntosh* the Missouri court apparently has limited the cruel and unusual punishment concept to situations involving inhumane conditions or treatment, but it declined to give any specific test. 545 S.W.2d at 653.

43. The tests for cruel and unusual punishment are largely broad and vague. Courts forbid prison conditions which are so inherently cruel that they transcend elemental concepts of decency, Adams v. Pate, 445 F.2d 105 (7th Cir. 1971), or "[shock the] general conscience," Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965). In addition, when the prison discipline can be said to be disproportionate to the offense, or when the prison regulation is not justified sufficiently by legitimate penal purposes, or is unnecessarily arbitrary, some courts have declared the practice invalid as in violation of the eighth amendment. *See* Comment, *The Inadequacy of Prisoners' Rights to Provide Sufficient Protection for Those Confined in Penal Institutions,* 48 N.C.L. REV. 847, 870 (1970).

44. *See, e.g.*, Courtney v. Bishop, 409 F.2d 1185 (8th Cir.), *cert. denied,* 396 U.S. 915 (1969) (physical harm permissible to prevent rioting and destruction of property—chemical mace allowed if necessary in discretion of prison officials); Landman v. Peyton, 370 F.2d 135 (4th Cir.), *cert. denied*, 388 U.S. 920 (1966) (inmate's first amendment rights such as free speech may be limited severely because of the incendiary potential in the prison setting); Carey v. Settle, 351 F.2d 483 (8th Cir. 1965); Black v. Pryse, 315 F. Supp. 625 (D. Minn. 1970), *aff'd*, 444

are proper for judicial review and those which are deemed to be beyond the proper reach of the courts have been difficult to draw, particularly as the regulations become related more closely to daily prison administration.

The Missouri court apparently has decided not to attempt to draw that line. This is indicated by its decision that habeas corpus is appropriate only where "inhumane" conditions are alleged. This reluctance to intrude into an area of prison administration is reminiscent of the "hands off" doctrine[45]—a judicially-promulgated doctrine utilized by some courts to avoid review of any prison conditions. The courts simply denied jurisdiction or granted great deference to the discretion of prison officials. The doctrine was justified through theories that the judiciary lacked the necessary expertise in penology, that judicial intervention could disrupt prison discipline, that opening the courts to prisoner complaints could precipitate a flood of litigation, and that constitutional provisions for separation of powers should constrain the judicial branch from exercising any jurisdiction in a matter of executive and legislative concern.[46] Despite the almost uniform rejection of this doctrine by the courts, it is likely that at least some of these justifications motivated the Missouri court to limit the expansion of habeas corpus.

It is obvious that judicial intervention through habeas corpus in every aspect of prison life would be undesirable. Incarceration necessarily involves many restraints on personal liberties. Prison officials must be given wide discretion in operating penal and correctional facilities to meet the needs of both inmates and society. It also is obvious that judicial review should be available to a prisoner when conditions become so abhorrent as to place the inmate in danger of physical harm. The *McIntosh* decision is indicative of the Missouri court's willingness to intervene in these situations.

However, the holding in *McIntosh* apparently means that a prisoner whose individual rights are abridged unreasonably, but without physical suffering, will have no effective judicial remedy at the state level. It is evident that the court is attempting to strike a balance between the discretion of prison administrators and unconstitutional imperfections which

F.2d 218 (8th Cir. 1971) (hair-length regulation upheld because it is designed to prevent hygienic problems *and* concealment of weapons); Beishir v. Swenson, 331 F. Supp. 1224 (W.D. Mo. 1970); Parks v. Ciccone, 281 F. Supp. 805 (W.D. Mo. 1968) (prison officials may limit the number of books and magazines that a prisoner is allowed to keep in his cell); Roberts v. Pepersack, 256 F. Supp. 415 (D. Md. 1966), *cert. denied*, 389 U.S. 877 (1967).

45. For a history of the "hands off" doctrine, see Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963) (for cases espousing the doctrine, see *Id.* at 508 n.12); Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962).

46. For discussion of these justifications, see R. GOLDFARB & L. SINGER, AFTER CONVICTION 364 (1973); Millemann, *Protected Inmate Liberties: A Case for Judicial Responsibility*, 53 OR. L. REV. 29, 38-45 (1973); Comment, *Overcrowding in Prisons and Jails: Maryland Faces a Correctional Crisis*, 36 MD. L. REV. 182, 186 (1976).

must be cured by judicial intervention. This balance should not be struck so as to eliminate, as a practical matter, all state court review of prison regulations which unnecessarily deprive an inmate of his constitutional rights. A prisoner should not be forced to go to federal court to protect these rights, yet that appears to be the result of the *McIntosh* decision. Summary dismissal of state-court habeas corpus petitions not involving "inhumane" conditions now is permitted.

New and more liberal prison rules[47] and the modern grievance procedure discussed above may eliminate many prisoner complaints. However, deprivations of personal liberties may arise which cannot be justified by any legitimate penal purpose and cannot be resolved through the grievance procedure. In such situations judicial relief at the state level should be available—the possibility of increased litigation or separation of powers arguments to the contrary nontwithstanding. The possibility of increased litigation is not sufficient justification for an abrogation by the Missouri courts of their responsibility to protect citizens from unlawful deprivations of constitutional rights. Nor should the fact that prison administration is an executive function constrain the judicial branch from reviewing alleged deprivations of personal liberties. Federal courts should not be burdened with the judicial supervision of the rules and conditions in Missouri's prisons simply because the Missouri courts refuse to review certain prisoner complaints. A prisoner should not be forced to resort to federal habeas corpus or section 1983 remedies which may not possess the potential for prompt relief that is inherent in state habeas corpus.[48]

Certainly the review by the state court should include proper deference to the discretion of administrators, and a prisoner first should be required to pursue remedies within the prison system. However, where administrative remedies are ineffective, the prisoner should have an adequate judicial remedy. The existing state court procedures—mandamus, injunction, declaratory judgment—have proved inadequate; therefore, a further expansion of state habeas corpus is the most effective vehicle for providing an inmate with speedy judicial review. The state habeas corpus remedy should be expanded beyond *McIntosh*, as it has been in other jurisdictions, to provide a remedy for review of the unjustifiable restriction of *any* constitutional right of a prisoner, even though "inhumaneness" is not involved.

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47. In conjunction with the modern grievance procedure the Division of Corrections recently adopted a new set of rules governing inmate discipline, mail, telephone and visitor privileges, imposition of solitary confinement, and the like. MO. DIV. CORRECTIONS R. 104.010-.120 (1976). Through provisions for a hearing before disciplinary action is taken and through less rigid rules in other areas, the division may avoid many complaints which have arisen in other jurisdictions where the rules are more strict. Note that each of these rules may be challenged through the grievance procedure, but, like the grievance procedure, the rules are applicable only to state correctional facilities and not to those at the city and county level.

48. State and federal remedies are compared briefly in note 20 *supra*.