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The legislative decision to grant APA access to prisoners on policy issues while denying it for individual decisions is readily defensible

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The Administrative Procedure Act of 1974 (APA) provides an "impressive arsenal" of remedies against arbitrary action, state prison inmates challenging the Department of Corrections (DOC) find that much of their powder is wet. The first "prisoners' rights" case reported under the APA, Department of Offender Rehabilitation v. Jerry, 353 So.2d 1230 (Fla. 1st DCA 1977), cert. denied, 359 So.2d 1215 (Fla. 1978), announced a restrictive rule of standing for §120.56 rule challenges. This did Mr. Jerry no good, but the decision demonstrated that under the original language of the APA, prisoners were to enjoy the same rights as other persons.

The legislature responded to Jerry by excluding prisoners from the definition of "party" for purposes of §120.54(16) and §120.57 adjudicatory proceedings. It also permitted DOC to limit prisoners' participation in its own §120.54(3) rule-making proceedings to submission of written statements. But the 1978 amendments did not address §120.68 appeals from final agency action, and when an inmate challenged a "presumptive parole release date" fixed by the Florida Parole and Probation Commission, the First District Court of Appeal held that he was entitled to §120.68 review of the commission's order, even though the underlying proceeding was not itself governed by the APA.

The legislature responded again, this time specifying the APA proceedings that are available to prisoners, rather than those which are not. As Ch. 120 now stands, prisoners who meet requisite access criteria may participate in information-gathering proceedings regarding proposed rules, administrative proceedings to determine the validity of proposed rules, rulemaking initiatives, emergency rulemaking proceedings, and administrative proceedings to determine the validity of existing rules. They may also be parties in §120.68 appeals from those proceedings, but no others. Generally, then, inmates have significant APA rights to request, inform and challenge DOC rules, but no APA rights in adjudicatory proceedings that apply those rules (and statutes) to particular cases.

In matters of prison operations, the legislative decision to grant APA access to prisoners on policy issues while denying it for individual decisions is readily defensible. No persons are more closely regulated in their personal lives than are inmates. A list of daily decisions affecting substantial interests of each of them, from the time they rise to the time and circumstances of their sleep, would be nearly endless. Any effort to inform each of those decisions through §120.57 procedures would self-destruct. But there is no practical bar to prisoner participation in the processes by which policy is established, and from points of view of both rehabilitation and promoting development of sound DOC policies, there is much to recommend it.

Turner v. Safley

Although the court had assured state prison inmates many years earlier that the Constitution's fundamental guarantees extend to them, its effort to articulate a clear standard of review for challenges to prison regulations was deferred until last term. Turner v. Safley, 107 S.Ct. 2254 (1987), held that a regulation curtailing constitutionally protected rights of inmates is valid only if it is "reasonably related to legitimate penological interests." 107 S.Ct. at 2261. Although, at first blush, Safley appears to raise the threshold for a successful challenge to conditions of incarceration — it rejects the "strict scrutiny" applied by the court of appeals and the district court — both the criteria it announces and the detailed review it performs suggest the result may be quite the opposite. At the very least, the new rule of decision invites a dramatic increase in prisoners' rights litigation. And, in Florida, that litigation may spill into the APA rule-challenge mechanisms §120.54 and 120.56 provide.

The criteria enumerated by Safley as appropriate to the application of its standard are four: First, whether there is "a valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it; second, "whether there are alternative means of exercising the rights that remain open to prison inmates"; third, whether "accommodation of an asserted right will have a significant [and detrimental] "ripple effect" on fellow inmates, or on prison staff"; and fourth, whether there is an "absence of ready alternatives." These criteria indicate an effort to inject pragmatic concerns into the review process.

The difficulties courts encounter in formulating disparate sets of rights — one for free people and another for prisoners —
from a single constitutional text are illustrated by Safley itself. At issue were two regulations of the Missouri Division of Corrections, as applied at its Renz Correctional Institution. The first governed correspondence between inmates at different institutions, allowing it between members of the same immediate family on “legal matters,” but requiring a prior determination by each inmate’s “classification/treatment team” that other correspondence between inmates was “in the best interests of the parties involved.” This was applied at Renz to prohibit correspondence between inmates who were not family members.19

The second regulation prohibited an inmate’s marrying without permission of the prison superintendent, and required “compelling reasons” before permission could be granted. It was applied as a general ban on marriage, except in cases involving pregnancy or the birth of an illegitimate child.20 The district court and the court of appeals struck both regulations as unnecessarily broad. As to the marriage rule, all nine justices agreed with the lower courts, but, in a five-four split, the court reversed as to the correspondence rule.

Safley’s holding that the right to marry applies to prison inmates, 107 S.Ct. at 2265, overrules Department of Corrections v. Roseman, 390 So.2d 394 (Fla. 1st DCA 1980) (prisoners have no fundamental right to marry, and free persons have no fundamental right to marry prisoners). As interpreted by Holden v. Fla. Department of Corrections, 400 So.2d 142 (Fla. 1st DCA 1981), Roseman did not categorically deny prisoners the right to marry, but deferred to DOC assertions of adverse effects on inmate rehabilitation and prison security. Holden, 400 So.2d at 143-44. Safley admits limitations on the right of prisoners to marry, 107 S.Ct. at 2266, but not on paternistic or talismanic rationales. This suggests a need for individualized determinations that go beyond mere invocation of generalized rehabilitation and security concerns. DOC has a trilemma: Hold a hearing whenever an inmate requests permission to marry,21 and develop sound factual and policy bases22 for each denial; develop rules that are sufficiently detailed to apply the Safley criteria without additional fact-finding; or allow all marriages. DOC’s highly restrictive rule on inmate marriages23 has not yet been amended in response to Safley.

Broader Implications

Safley was given expansive application in Diaz v. Florida Department of Corrections, 519 So.2d 41 (Fla. 1st DCA 1988), appeal dismissed, 525 So.2d 877 (Fla. 1988), a challenge to a rule prescribing inmates’ access to information in DOC files24 and to the identical language of F.S. §945.10(2) (1985). Addressing the latter, the court found “no rational basis” for the blanket denial of access and, under the reasoning of Safley, declared the statute unconstitutional. 525 So.2d at 42. It is unclear, however, whether the court believed this result was compelled by Safley.

By its terms, Safley analysis applies to claims involving fundamental rights under the United States Constitution.25 No such claim is expressly identified in Diaz, and — unlike free speech and marriage — access to prison records has not been regarded as a fundamental right.26 Nothing in Safley suggests that its somewhat heightened level of scrutiny for prisoner claims is required in the absence of a fundamental right. Thus, rather than following Safley as binding precedent on a matter of federal constitutional law, it may be that the Diaz court adopted it as a useful test for gauging the validity of a statute curbing prisoner rights under the Florida Constitution.27 Whether the Safley standard applies as a matter of Florida law to all statutes and rules which curtail prisoner rights, or is limited to those implicating fundamental rights under the U.S. Constitution,28 it can be expected to see significant service in the key areas of the APA left open to prisoners, rule challenges. Despite its mixed message regarding the quantum of proof required to sustain a curtailment of fundamental rights, Safley clearly demands a reasonably close fit between the state’s “legitimate penological interests” and the means it selects to advance them. It also demands a balance between the state’s demonstrated need and the extent of the deprivation imposed.

The rule challenge procedures of §120.54 and 120.56 offer effective and economical29 means of invoking Safley review. Hearings are conducted in the manner of adjudicatory proceedings,30 enabling the parties to make whatever evidentiary record is appropriate for application of the Safley criteria to the policy in question. Of course, in the scope of administrative remedy available, there is an important difference between challenging a proposed rule and challenging an existing rule. While a hearing officer may determine claims of constitutional infirmity regarding the former, such claims as to the latter must await §120.68 judicial review.31 At least in §120.54 cases, the Safley standard is significantly more exacting than the “clearly erroneous”32 standard ordinarily applied to an agency’s construction of a statute it administers. In addition, once it is shown that a policy infringes upon a fundamental constitutional right, the burden shifts to DOC to prove justification,33 relieving the challenger of the usual burden34 of proving invalidity of a duly promulgated rule, by a preponderance of the evidence.

A Safley claim normally will be joined with a statutory invalidity claim, since a rule curtailing fundamental rights may also exceed DOC’s rulemaking authority, conflict with a statute, or be offensively vague, arbitrary or capricious.35 But the potency of §120.68 review, together with the economy of a §120.56 hearing, favor the APA procedure perhaps even in the absence of a statutory claim. Until the Diaz court held the statute unconstitutional, there was no colorable claim that could be determined in the underlying §120.56 rule challenge.36

The greatest bulk of daily regimentation of prison life is unaffected by Safley. But, at least when DOC proposes to adopt as rules state prison policy that conflicts with fundamental rights,37 the ready availability and economy of APA procedures suggest that they may become the preferred means of resolution, for prisoners and DOC alike.□

2 The standard has received much criticism, e.g., Dore, Access to Florida Administrative Proceedings, 13 FLA. L.S.Y. U.L. REV. 967 (1986).
3 FLA. LAWS CH. 78-28 (1978). But a Division of Administrative Hearings hearing officer subsequently granted intervenor status to a prisoner in a §120.57(1) proceeding initiated by his fiancee in an effort to secure permission to marry, and the reviewing court approved. Holden v. Fla. Dept. of Corrections, 400 So.2d 142, 143 (Fla. 1st D.C.A. 1981).

16 See, e.g., Lee v. Washington, 390 U.S. 333 (1968) (right to be free from invidious racial discrimination); Johnson v. Avery, 393 U.S. 478 (1969) (right of petition); Proctor v. Martinez, 416 U.S. 396 (1974) ("Where a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.")

17 107 S.Ct. at 2262. The court also takes pains to disavow a "most restrictive alternative" test. Id. and id. at 2264.

18 Id. (citations omitted).

19 107 S.Ct. at 2258.

20 Id.

21 While §120.57 does not apply to prisoners, the protections of due process do. Wolff v. McDonnell, 418 U.S. 539 (1974).

22 See McDonald v. Dep’t of Bank. and Fin., 346 So.2d 569 (Fla. 1st D.C.A. 1977).


24 FLA. ADMIN. CODE R. 33-6.006(1).

25 The rights at issue in Safley were free speech and marriage. In O’Lone v. Shabazz, 107 S.Ct. 2400 (1987), the Court applied the Safley standard to the free exercise of religion.

26 Of course, due process may require access to particular information for specific purposes, but that does not appear to have been the Diaz claim.

27 The Diaz court found that denial of equal protection was an additional defect in §§445.10(2), adopting the rationale of Florida Institutiona l Legal Services, Inc. v. Florida Dept. of Corrections, 50 Fla. Supp. 97 (Fla. 2d Cir. Ct. 1980) (equal protection under Art. I, §2 of the Florida Constitution). 519 So.2d at 43 and n. 5.

28 The Constitution expressly allows states to deny persons convicted of crimes only two of the rights it guarantees: The right to be free from involuntary servitude, U.S. Const. amend. XIII and the right to vote, U.S. Const. amend. XIV, §2. The fourth amendment term “unreasonable” may also imply that prisoners have little security against searches and seizures, see Hudson v. Palmer, 468 U.S. 517 (1984) but the text of the Constitution is silent as to permissible limitations on prisoners’ entitlement to most constitutional rights.

29 The exercise of certain rights may fairly be said to be “inconsistent with [the] status [of] prisoner[s].” Peli v. Procurer, 417 U.S. 817, 822 (1974). However, unless a general deprivation of constitutional rights is part and parcel of prison punishment — and that plainly is not the modern view of the Court — a list derived by logic is short. Confinement necessarilycurtails rights to travel, and is inconsistent with the exercise of religion, free speech, assembly and petition outside, but not within, the prison walls. Conversely, the 8th amendment prohibi- tion against cruel and unusual punishments would be vacuous if it did not apply with full force to prisoners. This leaves a broad array of guarantees open to Safley analysis.

25 Compared to a trial in federal district court, an APA hearing conducted at the prison is more readily accessible to inmates and less burdensome to DOC officials.

20 FLA. STAT. §§120.54(4)(d) and 120.56(5) (1989).

21 See Dep’t. of Envtl. Reg. v. Leon County, 344 So.2d 297 (Fla. 1st D.C.A. 1977).

22 The determinants of statutory invalidity of rules are enumerated in §120.52(8). The principle that statutes are to be construed, if possible, to conform to constitutional norms requires hearing officers (and DOC) to apply those determinants in the light of Safley. The phrase does not mean that hearing officers can declare existing rules invalid on federal constitutional grounds. They cannot. Department of Admin. Div. of Personnel v. Department of Admin., Div. of Adm. Hearings, 326 So.2d 187 (Fla. 1st D.C.A. 1976). But they can apply §120.52(8) criteria to avoid a construction that would render an agency’s enabling statute unconstitutional.

23 Dep’t. of Prof. Reg. v. Durrani, 455 So.2d 515, 517 (Fla. 1st D.C.A. 1984) (emphasis and citations omitted).

24 This is not made express in Safley, but necessarily follows from the Court’s discussion of the evidence adduced by the state regarding its marriage rule, 107 S.Ct. at 2266. For a more explicit treatment of the burden in cases involving an intermediate level of scrutiny, see, e.g., Mississippi University for Women v. Hogan, 458 U.S. 718 (1982); Plyer v. Doe, 457 U.S. 202 (1982).

25 Dep’t. of Prof. Reg. v. Durrani, supra.

26 See also Key Haven Associated Indus. v. Bd. of Trustees, 427 So.2d 151 (Fla. 1982) (federal unconstitutionality of a statute may be raised initially on appeal of administrative order); Rice v. Department of Health & Rehabilitative Services, 366 So.2d 844, 848 (Fla. 1st D.C.A. 1980).

27 Including, perhaps, relatively unexplored rights under the Florida Constitution, see text at notes 24-27, supra.

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