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LEGAL ASPECTS OF PRISON RIOTS

*Ira P. Robbins**

Introduction

Riots are a recurrent phenomenon in American prisons. In the 1950s and the early 1970s, major riots erupted in prisons across the country,¹ and many have occurred in the past several years.² Riots will continue to occur as long as the dominant function of prisons is the custodial confinement of inmates. As one commentator explains, "[T]he way to make a strong bomb is to build a strong perimeter and generate pressure inside. Similarly, riots occur where . . . pressures

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¹ Prison riots in the 1950s included disturbances at the Men's Prison in New York, in 1951; Trenton State Prison and Rahway Prison Farm, in 1951; Michigan State Penitentiary in 1952; Ohio State Penitentiary in 1952; and Lincoln Penitentiary, Nebraska, in 1955.

Prison riots in the early 1970s included disturbances at Folsom Prison, California, in 1970; San Quentin Prison, California, in 1970; the Manhattan House of Detention, New York, in 1970; and Florida State Prison, Raiford, Florida, in 1971; New York State Prison, Attica, New York, in 1971. For a discussion of the history of prison riots, see Garson, *Force Versus Restraint in Prison Riots*, 18 CRIME & DELINQUENCY 411 (1972). See generally AMERICAN CORRECTIONAL ASSOCIATION, RIOTS AND DISTURBANCES IN CORRECTIONAL INSTITUTIONS (1981); J. IRWIN, PRISONS IN TURMOIL 24-26 (1980).

² In February 1980, for example, a riot at the New Mexico Penitentiary in Santa Fe left thirty-six inmates dead and ninety inmates seriously injured. See OFFICE OF THE ATTORNEY GENERAL, REPORT OF THE ATTORNEY GENERAL ON FEBRUARY 2 AND 3, 1980 RIOT AT THE PENITENTIARY OF NEW MEXICO 1 (1980). A riot or disturbance erupted at prisons in eight states during the nine month period from October, 1980 to July, 1981. See *Prison Riots and Violence*, CORRECTIONS COMPENDIUM, December 1981, at 1, 4-7 (on file with the Harvard Civil Rights-Civil Liberties Law Review).

and demands are generated in the presence of strong custodial confinement."³

When such a bomb detonates and a prison riot erupts, a variety of demands are placed upon the legal system. The violence and lawlessness characteristic of prison riots often result in extensive property damage, personal injury, and death.⁴ Prison riots thus may trigger the operation of both the civil and the criminal justice systems, for prison riots may give rise to tort actions against the state by prisoners and by guards and to criminal actions against the rioting prisoners.

In addition, the legal system must resolve certain problems unique to the prison riot. To quell a riot, the state may grant amnesty to the prisoners or enter into agreements not to prosecute them for acts committed during the riot. The courts must decide whether a grant of amnesty or a settlement agreement should be given legal effect. Courts also may face first amendment claims involving the rioting prisoners' ability to communicate with the press and the press' access to the prison during the riot.

This Article will examine the legal issues generated by prison riots from the perspective of three of the actors in those riots: the lawyer, the prisoner, and the prison guard. Each actor obviously has differing, and often competing, concerns and desires. In seeking to resolve these concerns, however, each must confront obstacles springing from a matrix of four factors: the traditional attitude of the courts toward prisons, the lawless nature of the prison riot, the doctrines governing the legal status of prisoners, and the jurisdictional rules governing lawsuits against the state and its officials.

I. Prison Riots and the Attorney

When the Attica prison riot erupted in 1971, one of the first non-inmates to talk with the rioters was Herman Schwartz, an attorney and law professor. Schwartz, who specialized in the area of prisoners'

³ Fox, *Why Prisoners Riot*, 35:1 FED. PROB. 9, 10 (1971). This Article does not discuss the causes of prison riots directly, for there already is an extensive literature on the subject.

⁴ See generally NEW YORK STATE SPECIAL COMMISSION ON ATTICA, ATTICA: THE OFFICIAL REPORT (1972) [hereinafter cited as ATTICA: THE OFFICIAL REPORT]; REPORT OF THE ATTORNEY GENERAL, *supra* note 2; Garson, *supra* note 1.

rights and who earlier had represented Attica inmates in lawsuits challenging conditions of confinement at the prison, offered his assistance to state prison officials shortly after the riot began. The Commissioner of Corrections told Schwartz that the inmates had asked for him, and his offer of assistance was quickly accepted.⁵

During the next day, Schwartz entered the prison on five occasions to meet with the rioting prisoners.⁶ Among the demands they conveyed to him was an urgent one that they be permitted to negotiate through a committee of third parties. Attorney William Kunstler headed the list of individuals to serve on the committee.⁷ After meeting with Kunstler and the other members of the committee, the prisoners asked Kunstler to act as their lawyer. Kunstler agreed, and he actively participated in the fruitless negotiations that preceded the forceful recapture of Attica.⁸

As the events at Attica illustrate, self-selection, the desires of the inmates, and the needs of the state can combine to involve the lawyer in a prison riot. Lawyers with an interest in prisoners' rights may offer their services to inmates and officials during a prison riot.⁹ The rioting prisoners may turn to sympathetic attorneys for assistance because they feel that they can trust such attorneys to represent their position effectively. The state may believe either that productive negotiations

⁵ ATTICA: THE OFFICIAL REPORT, *supra* note 4, at 216. For a thorough discussion of the role played by attorneys during the Attica riot, see Schornhorst, *The Lawyer and the Terrorist: Another Ethical Dilemma*, 53 IND. L.J. 679, 691-96 (1978).

⁶ ATTICA: THE OFFICIAL REPORT, *supra* note 4, at 217-33; Schornhorst, *supra* note 5, at 692-93.

⁷ ATTICA: THE OFFICIAL REPORT, *supra* note 4, at 218; Schornhorst, *supra* note 5, at 692.

⁸ ATTICA: THE OFFICIAL REPORT, *supra* note 4, at 247; Schornhorst, *supra* note 5, at 694-96.

⁹ Two concerns might persuade a civic-minded attorney to risk involvement. First, the attorney may feel that because of his or her skills as a negotiator and because of the trust that the inmates may place in him or her, the attorney can advance negotiations between the inmates and the prison officials. See ATTICA: THE OFFICIAL REPORT, *supra* note 4, at 217. Second, an attorney versed in the area of prisoners' rights will recognize the prisoners' need for legal advice during and after the return of control of the prison to officials. The attorney will want to ensure both that the prisoners are not subject to unlawful retaliation and that proper legal procedures are followed during the state's investigation of the riot and in the event that the state seeks to impose criminal or administrative sanctions on the inmates. See Schornhorst, *supra* note 5, at 697.

through a third party are possible or at least that the appearance of legal negotiations may serve to calm the riot.¹⁰

The attorney who thus becomes involved in a prison riot faces problems that are not present in routine legal practice. On the one hand, the danger and unpredictability of the situation create unique practical problems which can limit the effectiveness of the attorney. On the other hand, the fact that prison riots involve illegal acts on the part of a large class of individuals presents the attorney with serious ethical problems. This section will analyze these problems by focusing on attorney involvement during the course of a prison riot, for it is at that time that the attorney's practical and ethical problems are most acute.

A. Practical Limitations on the Attorney's Involvement in a Prison Riot

The numerous roles in which an attorney might function during a prison riot divide into two broad categories: the attorney can act on behalf of the inmates or serve as a neutral mediator. In either capacity, he or she will discover that the danger of the setting, the highly charged adversarial relationship of the parties involved, and the difficulty of communication in such circumstances create pressures and difficulties that may undermine his or her effectiveness.

When acting on behalf of the rioting inmates—either as their representative during negotiations or as counsel seeking to protect their rights—the attorney may be unable to gain access to the prison. Even in the absence of a riot, access to prisons is limited; during a riot prison officials may deny access altogether. The prison officials may not want to provide the inmates with a potential hostage, or they may believe that complete isolation of the inmates will foster a feeling of helplessness which will lead to an end to the riot.¹¹

¹⁰ See Schornhorst, *supra* note 5, at 697. See also note 20 *infra*.

¹¹ See Schornhorst, *supra* note 5, at 694-96, 702. Schornhorst notes that on two occasions during the riot at Attica, William Kunstler delivered speeches to the inmates that indicated that the inmates might be successful in imposing their demands on the prison officials. Schornhorst does not suggest that Kunstler's actions influenced the subsequent events at Attica, but his analysis points out why prison officials may want to prevent inmate contact with attorneys who might in some manner encourage the prisoners' cause.

Yet gaining access during the riot likely will be crucial for an attorney acting on behalf of the inmates. He or she will be able to represent the interests of the inmates effectively in negotiations only if there is direct contact with the inmates, and the attorney may feel that if the inmates do not receive advice about their legal rights before returning control of the prison, violation of those rights during the post-riot period is more likely.¹² As one study notes, "[P]roblems of access can be exceptionally severe [in the post-disturbance period]. Prison officials can be expected to make every effort to thwart attempts to gain entry to the premises, including those by attorneys."¹³

Gaining access to the prison, though, may be only half of the battle. Because both rioters and prison officials want to act quickly in order to consolidate their positions or to force a retreat, the attorney faces severe time constraints as well. There rarely will be an opportunity for deliberation or thorough preparation. It may be particularly difficult to gather information from a large number of inmates in a short period of time.¹⁴

In addition, once inside the prison the attorney confronts two further difficulties: personal danger and lack of inmate cooperation. Even when present at the request of some of the prisoners, the attorney may be perceived by others as a part of the legal system that imprisons them.¹⁵ The attorney may be viewed as being more useful to them as a hostage than as a representative. Moreover, the inmates' general distrust of the legal system may inhibit them from cooperating with the attorney. For fear of reprisals, prisoners may be unwilling to

¹² See note 9 *supra*.

¹³ Hellerstein & Shapiro, *Prison Crisis Litigation: Problems and Suggestions*, 21 BUFFALO L. REV. 643, 646 (1972). Hellerstein and Shapiro cite the Attica riot as an example of the lengths to which prison officials will go to restrict access during the post-riot period. After the Attica riot, prison officials denied access to the prison to a group of lawyers and doctors, despite a court order that required their admission. *Id.* at 647 n.9. See N.Y. Times, Sept. 15, 1971, at 33, col. 2.

¹⁴ See Hellerstein & Shapiro, *supra* note 13, at 646.

¹⁵ At Attica, for example, Herman Schwartz indicated to the inmates that, because some of their demands were unrealistic, they should prepare more practical demands. According to the Official Report, "[T]he inmates were in no mood to hear a white lawyer tell them that their demands were impractical, and Schwartz was derided by the crowd." One of the other noninmates present at the time quickly defended Schwartz' record on prisoners' rights. ATTICA: THE OFFICIAL REPORT, *supra* note 4, at 218. See Schornhorst, *supra* note 5, at 692.

talk with the attorney during the riot or to testify in court following the riot.¹⁶ They may also fear that any statements they might make during the riot will be used against them in later criminal prosecutions arising out of it.¹⁷

These problems—access, time constraints, personal danger, and lack of inmate cooperation—render any activity on behalf of the inmates difficult. In particular, it will be extremely difficult to use litigation as a tool to protect the inmates' rights. Certainly the options for bringing litigation in the prison riot context are limited. It is true that the attorney may seek an injunction against unlawful conduct by prison officials during the course of the riot or in the post-riot period.¹⁸ Or the attorney can file a suit which challenges the prison conditions that gave rise to the riot.¹⁹ But the practical problems facing an attorney during the riot directly interfere with such litigation efforts. Even the most rapid injunctive relief may not come in time to prevent unlawful behavior. Moreover, the inability to gain access to the prison and the lack of inmate cooperation will in turn hinder the marshalling of information requisite for a successful lawsuit.

For the attorney who seeks to act as a neutral mediator between the prison officials and the inmates, the problems of access and time

¹⁶ See Hellerstein & Shapiro, *supra* note 13, at 660–61. Hellerstein and Shapiro caution that, when initiating lawsuits against prison officials, attorneys must warn every inmate about the possibility of reprisals if they testify: "Although courts are becoming increasingly sensitive to this danger [of unlawful reprisals], the inmate should also be apprised that he cannot be fully protected against all future harassment in retaliation." *Id.* at 660.

¹⁷ In light of the inmates' distrust of the legal system and the possibility that the attorney-client privilege does not apply to conversations about ongoing crime, the prisoners' fear is far from irrational. See notes 29–32 and accompanying text *infra*.

¹⁸ See Hellerstein & Shapiro, *supra* note 13, at 644. During the Attica riot, Herman Schwartz obtained a federal court injunction prohibiting any reprisals against inmates who participated in the riot. The inmates tore up the injunction, however, because it did not contain a seal and referred only to the first day of the riot. ATTICA: THE OFFICIAL REPORT, *supra* note 4, at 225–31. See Schornhorst, *supra* note 5, at 693. An injunction against unlawful conduct by prison officials during the post-riot period also was obtained in the Attica case. *Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971).

¹⁹ See Hellerstein & Shapiro, *supra* note 13, at 644. "Involvement of a court in the crisis as quickly as possible brings needed exposure of official conduct by requiring state officials to account for their actions in answering papers or by testimony at a public hearing." *Id.* at 645.

constraints may be diminished, but the difficulties arising from the threat of personal danger and the lack of inmate cooperation may be exacerbated. Prison officials who feel that negotiations are necessary or desirable will allow the attorney access to the prison, and they may be more willing to listen to the attorney's suggestion that the use of force should be delayed.²⁰ On the other hand, a neutral mediator must attempt to persuade the inmates to make concessions. The attorney thus may find himself or herself in personal danger, as the object of the inmates' hostile reaction to suggested concessions. And it is unlikely that the inmates will be willing to cooperate with an attorney who is proposing compromise.²¹

*B. Ethical and Legal Limitations
on the Attorney's Involvement in a Riot*

The attorney who is willing to face the numerous practical obstacles to involvement in a prison riot will turn around to confront three

²⁰ In several cases, negotiation has led to the peaceful termination of the riots. See Garson, *supra* note 1, at 414-15, 417-18. The Commission that investigated the Attica riot, however, concluded that prison officials should undertake negotiations only if control of the prison cannot be regained without the use of lethal force. The Commission also concluded that direct negotiations between the state and the inmates are preferable to negotiations through a third party. ATTICA: THE OFFICIAL REPORT, *supra* note 4, at 213. According to the Commission, the presence of third parties in the negotiation process at Attica may have heightened the mistrust between the inmates and the prison officials. *Id.* at 210.

The Attica commission did recognize, however, that negotiations are sometimes necessary and that the use of third parties may be required. *Id.* at 213. Moreover, one commentator who examined the Attica riot states that the law enforcement authorities believed that it was advantageous to allow the rioters to "proceed as if legal negotiations were involved. . . . [T]he Attica inmates would [not] trust the authorities with whom they were dealing, and to supply a foundation of trust the authorities invited (or at least welcomed) the intervention of lawyers." Schornhorst, *supra* note 5, at 697. The fostering of the perception that productive negotiations were attempted also might produce political benefits. One writer has argued that Mayor John V. Lindsay of New York, in dealing with several prison riots, "pleased the liberals by agreeing to meet with rioters, by granting reasonable (minor) reforms, and by not incurring fatalities in his ultimate policy of force, and he appealed to law-and-order voters by not agreeing to increasingly radical demands and by ending the riot through force rather than negotiations." Garson, *supra* note 1, at 419.

²¹ The threat of personal danger and the absence of inmate cooperation may be

equally difficult ethical and legal obstacles: involvement in illegal or improper conduct; withdrawal of the attorney-client privilege; and potential conflicts of interest. His or her confrontation of these problems is unavoidable, for they stem in a large part from two inherent aspects of prison riots. First, prison riots and many of the acts committed during such riots are illegal. Second, prison riots involve a large class of individuals who do not necessarily have identical interests. These ethical and legal problems may prevent an attorney from assuming an active role in the riot.

1. *Illegal or Improper Conduct*

Canon 7 of the ABA Code of Professional Responsibility and the Canon's disciplinary rules and ethical considerations govern the lawyer's role when the client's conduct may be illegal. According to Canon 7, "A Lawyer should represent a client zealously within the bounds of the law."²² Disciplinary Rule 7-102(A)(7) forbids a lawyer to "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."²³ Finally, Ethical Consideration 7-5 states that a lawyer who is acting as an adviser "may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct"²⁴

problems even when the attorney is accepted initially by both sides as a mediator. See notes 5 & 15 and accompanying text *supra*.

²² ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 7.

²³ *Id.* DR 7-102(A)(7). The penalty for violations of the rule may be disbarment. See, e.g., *In re Robert G. Mann*, 385 N.E.2d 1139 (Ind. 1979); *Attorney Grievance Comm'n v. Edwards*, 284 Md. 687, 399 A.2d 264 (1979).

The corresponding provision of the Proposed Final Draft of the Model Rules of Professional Conduct is Rule 1.2(d), which provides that "[a] lawyer shall not counsel or assist a client in conduct that the lawyer knows or reasonably should know is criminal or fraudulent" ABA COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, PROPOSED FINAL DRAFT OF THE MODEL RULES OF PROFESSIONAL CONDUCT (1981).

²⁴ ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-5. The ethical considerations under Canon 7 distinguish between the lawyer acting as advocate and the lawyer acting as adviser. Both roles appear to be defined in the context of pending or potential litigation. In the former role, the lawyer may urge any permissible construction of the law so long as there is a good faith basis for such a construction. In the latter role, the lawyer may give his or her professional opinion about the likely deci-

Because prison riots and many of the acts encompassed by them are illegal, the lawyer involved in a riot must decide which of the various roles he or she can play are consistent with the norms of Canon 7. As one commentator notes, the examples provided by the drafters of the Code of Professional Responsibility of attorney conduct that is improper under DR 7-102(A)(7) and EC 7-5 are inapplicable in the prison riot context.²⁵ The poles of clearly permissible and clearly impermissible behavior are easily defined. A lawyer who advises the rioting prisoners to release their hostages and to terminate the riot would be acting in accordance with Canon 7. A lawyer who becomes a participant in a prison riot would violate the norms of Canon 7.²⁶

But neither of these extremes represents the probable form of the attorney's involvement. The attorney will have little impact on the situation if he or she merely advises the inmates to end the riot, for the inmates will be reluctant to cooperate with such an attorney.²⁷ It is equally unlikely that an attorney will become an active participant in a riot. Hence it is the attorney who seeks to play a meaningful role who faces the most difficult ethical decisions.²⁸

The central issue for such a lawyer involves the interpretation of the term "counsel or assist" in DR 7-102(A) (7) and the meaning of the term "knowingly assist" in EC 7-5. Consider, for example, the attorney who represents the rioting inmates in negotiations with the prison

sion of the courts on the matter at hand. *See id.* EC 7-4, EC 7-5. Commentators have criticized these ethical considerations for failing to recognize that, as an adviser, the lawyer's role is broader than simply to give opinions about the likely outcome of litigation. The lawyer as adviser may also assist in planning and shaping future transactions and conduct. *See* AMERICAN BAR FOUNDATION, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY 283 (1979) [hereinafter cited as ABF ANNOTATED CODE]. For purposes of analyzing the lawyer's involvement in prison riots, a broad definition of the concept of adviser will be assumed. Thus, EC 7-5 will be interpreted as applying to a lawyer who acts as a representative of prisoners in negotiations or who informs them about their rights.

²⁵ Schornhorst, *supra* note 5, at 699. *See also* ABF ANNOTATED CODE, *supra* note 24, at 320-21.

²⁶ *See* Schornhorst, *supra* note 5, at 697, 699; *cf.* Attorney Grievance Comm'n v. Edwards, 284 Md. 687, 692, 399 A.2d 264, 267 (1979) (attorney who participated in conspiracy to commit storehouse break-in found to have violated DR 7-102(A)(7)).

²⁷ *See* Schornhorst, *supra* note 5, at 697-98; notes 15 & 21 and accompanying text *supra*.

²⁸ *See* Schornhorst, *supra* note 5, at 699.

officials. He or she may be in the position not only of conveying the prisoners' demands to the officials but also of evaluating and making recommendations about the state's proposals. Therefore, it may be argued that the attorney is counseling the inmates in illegal conduct or assisting the cause of the riot. If Canon 7 is read strictly, the attorney must either decline involvement in the riot or risk disciplinary sanctions.

2. *Withdrawal of the Attorney-Client Privilege and the Duty to Disclose*

For the attorney who does become involved in a prison riot, the criminal nature of prison riots generates two additional legal and ethical problems. First, under common law standards, the attorney-client privilege does not apply to communications regarding future criminal conduct by the client.²⁹ The future crime exception to the attorney-client privilege has been interpreted as extending to ongoing crimes as well.³⁰ Because the attorney-client privilege may not protect communications with rioting inmates, an attorney may hesitate to act on behalf of the inmates for fear that he or she may be required to testify against the inmates in criminal proceedings arising out of the riot.

Second, the attorney involved in a prison riot who learns of inmate plans to commit other crimes during the course of the riot may have an ethical duty to disclose that information. DR 4-101(C)(3) states that a lawyer may reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime."³¹ Although the language of the rule indicates that disclosure is permissive rather than mandatory, the ABA Standing Committee on Ethics and Professional Responsibility has indicated that if the client informs

²⁹ See, e.g., *Clark v. United States*, 289 U.S. 1, 15 (1933); *United States v. Shewfelt*, 455 F.2d 836, 840 (9th Cir. 1972); *Garner v. Wolfenbarger*, 430 F.2d 1093, 1102-03 (5th Cir. 1970). See generally Gardner, *The Crime of Fraud Exception to the Attorney-Client Privilege*, 47 A.B.A.J. 708 (1961); Comment, *The Failure of Situation-Oriented Professional Rules to Guide Conduct: Conflicting Responsibilities of the Criminal Defense Attorney Whose Client Commits or Intends to Commit Perjury*, 55 WASH. L. REV. 211 (1979); Note, *The Future Crime or Tort Exception to Communications Privileges*, 77 HARV. L. REV. 730 (1964).

³⁰ See, e.g., ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 155 (1936).

³¹ ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3).

the attorney of an intent to engage in future misconduct, the attorney is required to advise the client that he or she must either terminate representation of the client or disclose the client's intent.³² The attorney involved in a prison riot once again finds that the legal profession's ethical norms may prevent him or her from acting effectively on behalf of the inmates.

3. *Potential Conflicts of Interest*

An attorney who contemplates acting in a prison riot on behalf of the inmates must consider two types of conflicts of interest. First, because the attorney may be one of the few noninmates present during the riot, he or she may become a crucial witness to acts that could become the subject of criminal or civil litigation. DR 5-101(B) forbids an attorney from accepting "employment in contemplated or pending litigation" in which he or she will be a witness.³³ An attorney's involve-

³² ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1314 (1975). An earlier advisory opinion involving an army deserter indicated that the attorney who learns of a client's intent to commit a crime must both terminate representation and reveal information about the crime:

[I]f the fugitive comes to see a lawyer concerning his rights, the information given to the lawyer would be privileged. If, on the other hand, the fugitive comes to see the lawyer in order to secure advice as to how he can best remain a fugitive or a deserter in the future, then the lawyer is obliged:

- (a) To advise him to turn himself in; and
- (b) To refuse to represent him if he declines to do so; and
- (c) To advise him that the lawyer will reveal his whereabouts to the authorities if he persists in his illegal conduct and the matter is brought to his attention again by the client.

ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1141 (1970). The conflicting language of the two advisory opinions has not been reconciled. See ABF ANNOTATED CODE, *supra* note 24, at 178-79 (1979).

³³ ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B). The corresponding provision in the Proposed Final Draft of the Model Rules of Professional Conduct, *supra* note 23, is Rule 3.7:

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
 - (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or

ment in a prison riot is unlikely to be undertaken initially with a view toward litigation; therefore, DR 5-101(B) may not preclude the attorney from involvement at that early stage. But one who is familiar with prison riots will know that post-riot litigation is common and that the attorney is likely to be called to testify.³⁴

Even when the attorney knows that he or she will be a witness in post-riot litigation, the attorney may assume a role on behalf of the inmates if the conditions of DR 5-101(B)(4) are fulfilled. This rule allows an attorney to represent a client if the denial of representation would work a substantial hardship on the client "because of the distinctive value of the lawyer or his firm as counsel in the particular case" and if the client desires representation despite knowledge of the conflict of interest.³⁵ In the prison riot context, where the inmates may request the services of a specific attorney because of the trust that they place in him or her, DR 5-101(B)(4) may be especially apposite.

The second potential conflict of interest arises because a riot involves a large number of prisoners, at least some of whom are likely to be represented by the same attorney. DR 5-105(C) allows a lawyer to represent multiple clients only if "it is obvious that he can adequately represent the interest of each," and "each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment. . . ."³⁶ The interests of inmates who are involved in a prison riot may diverge in such a manner as to prevent adequate representation of a group of them by one attorney. Some of the prisoners may have conspired to cause the insurrection while others may have been drawn into the riot involuntarily. Additionally, culpability for specific criminal acts during

(3) disqualification of the lawyer would work substantial hardship on the client.

See also Drasanescu v. First Nat'l Bank of Hollywood, 502 F.2d 550 (5th Cir. 1974) (counsel removed from case because he was a material witness).

³⁴ The obvious solution for the attorney is to inform the inmates that he or she will act on their behalf during the prison riot but that they will have to find another attorney to represent them in any post-riot litigation. It is unlikely, however, that an attorney who makes such a disclaimer will receive a great deal of cooperation from the inmates. *See* notes 15 & 21 and accompanying text *supra*.

³⁵ ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101(B)(4).

³⁶ *Id.*

the riot may vary among the inmates. Even if there are no conflicts when the attorney initially becomes involved in the riot, they may arise during the course of the riot. An act of violence against a prison guard, for example, may cause a realignment of previously harmonious inmate interests.³⁷

C. Conclusion

Numerous practical, ethical, and legal problems limit an attorney's involvement in a prison riot. Yet there often are compelling reasons for an attorney to intervene in a riot; for example, the lawyer's involvement may be at the request of the state. Professor Schornhorst has recognized the ethical dilemma which an attorney faces when encouraged to intervene in a prison riot.³⁸ He proposes an alternative to Canon 7 to govern the lawyer's role during terrorist situations, including prison riots:

A lawyer may counsel and negotiate on behalf of a terrorist holding hostages so long as his or her efforts are directed to a peaceful resolution of the matter and so long as the lawyer does not intentionally, knowingly, or recklessly increase or prolong the danger to the hostages.³⁹

This guideline embodies the conclusions that emerge from an examination of the attorney's role in a prison riot. In many instances, attorneys may assume a meaningful role in a riot only if they are able to act *on behalf of* the prisoners. The rules that govern an attorney's conduct, however, may prevent him or her from assuming such a role. It must be recognized, therefore, that rules governing attorneys in other contexts are largely inapplicable in the prison riot situation because of its uniqueness.

³⁷ See generally Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Lawyer*, 62 MINN. L. REV. 119 (1978).

³⁸ Schornhorst, *supra* note 5, at 699.

³⁹ *Id.*

II. Prison Riots and the Inmates

Prison riots may generate several legal questions that involve the relationship between the state or its officials and prison inmates. This section of the Article will examine the following issues which are likely to arise in the prison riot context: (1) tort recovery for inmates killed or injured during a prison riot; (2) causes of action for violations of the prisoners' constitutional rights during a riot; (3) criminal prosecution of inmates involved in a riot; (4) amnesty for participants in a riot and the legal effect of agreements negotiated during a riot; and (5) prisoners' access to the media during a riot.

With the exception of the question of criminal prosecution of participants in prison riots, each of these issues may involve claims by the prisoners against the state or its officials. The prisoners thus may be requesting the courts to pass judgment on the actions of prison officials or to compel those officials to pursue a given course of behavior. In a tort action against the prison officials, for example, an inmate asks the court to declare that the prison officials acted wrongfully in responding to the disturbance as they did. Similarly, in bringing a claim under the first amendment an inmate requests that the court require prison officials to grant the inmates access to the media. In short, the inmates, through the various legal claims to be discussed in this section, seek to have the courts intervene in the relationship between the prison administration and the prisoners.

It is this interventionist role which the courts traditionally have shunned. Commonly known as the "hands-off" doctrine, this view was predicated upon the belief that the inmate was a "slave of the State"⁴⁰ who had no rights for the sovereign to violate. Although modern jurisprudence has repudiated this belief, the doctrine retains vitality in part because of the judiciary's natural reluctance to intervene in aspects of internal prison administration that appear to involve a high degree of expertise and discretion.⁴¹ Other reasons that are commonly

⁴⁰ *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871). See *Ex parte Pickens*, 101 F. Supp. 285 (D. Alaska 1951). Cf. U.S. Const. amend. XIII, § 1 (exempting convicts from the proscription against slavery and involuntary servitude).

⁴¹ See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 407 (1974); *Novak v. Beto*, 453 F.2d 661, 670 (5th Cir. 1971), *cert. denied*, 409 U.S. 968 (1972).

given for nonintervention are subversion of prison discipline,⁴² the potential flood of litigation,⁴³ fear of creating instability in prison management,⁴⁴ and conservation of the public fisc.⁴⁵ Moreover, cognizant of the principle of separation of powers, the courts even today view corrections primarily as a matter of executive concern.⁴⁶

The courts have been especially willing to defer to the judgment of prison officials in matters involving prison discipline and internal security.⁴⁷ This attitude recently has received the imprimatur of the Supreme Court in *Bell v. Wolfish*.⁴⁸ Emphasizing that the maintenance of institutional security and the preservation of internal order and discipline are "essential goals,"⁴⁹ the Court in *Wolfish* concluded that "[p]rison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."⁵⁰ As shall be seen below, it is this deferential approach which is the key to both official action in the prison riot context and the judicial response to that action.

⁴² See, e.g., *Ortega v. Ragen*, 216 F.2d 561 (7th Cir. 1954), cert. denied, 349 U.S. 940 (1955). See generally Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the Hands-Off Doctrine*, 1977 DET. C.L. REV. 795, 810-21.

⁴³ See generally Haas, *supra* note 42, at 821-29.

⁴⁴ See, e.g., Kaufman, *Prison: The Judge's Dilemma*, 41 FORDHAM L. REV. 495, 507 (1973).

⁴⁵ See generally Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 506-07 (1980); Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 725-26 & nn.71-72 (1978).

⁴⁶ See generally Robbins & Buser, *Punitive Conditions of Prison Confinement: An Analysis of Pugh v. Locke and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893 (1977). See also Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

⁴⁷ See, e.g., *Childs v. Pegelow*, 321 F.2d 487 (4th Cir. 1963); *Wilson v. Prasse*, 325 F. Supp. 9 (N.D. Pa. 1971). See also *Wright v. McMann*, 321 F. Supp. 127 (N.D.N.Y. 1970); *United States ex rel. Wakeley v. Pennsylvania*, 247 F. Supp. 7 (E.D. Pa. 1965).

⁴⁸ *Bell v. Wolfish*, 441 U.S. 520 (1979). See generally Robbins, *The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & CRIM. 211 (1980).

⁴⁹ *Bell v. Wolfish*, 441 U.S. at 546.

⁵⁰ *Id.* at 547. See also *St. Claire v. Cuyler*, 634 F.2d 109 (3d Cir. 1980) (restricting even preferred religious right in light of a perceived security need).

A. Tort Recovery

Because of numerous jurisdictional, substantive, and practical hurdles, inmates will find it difficult to recover damages for injuries incurred during a prison riot. For state prisoners, the doctrines of sovereign and official immunity may shield the state and the prison officials from liability. For federal prisoners, recovery under the Federal Tort Claims Act may be precluded because the injurious acts may fall within one of the exceptions to the Act. For both state and federal prisoners, presenting a *prima facie* tort case may prove difficult both because of the wide discretion granted prison officials in the prison riot context and because of the practical problems involved in marshaling favorable evidence.

1. State Law

The first jurisdictional obstacle a prisoner faces is the issue of his or her capacity to bring a lawsuit under state law. A small minority of states have statutes providing that prisoners be deemed civilly dead while they are incarcerated.⁵¹ Under such statutes, prisoners are unable to bring lawsuits for personal injuries.⁵² These statutes do not, however, prevent a prisoner's family from prosecuting a wrongful death action.

Once over this initial hurdle, the prisoner must locate a party against whom a tort action may be brought. The prisoner may seek damages from the state, the prison officials, or the prison guards. Because it is the prison guard who is likely to have injured the inmate, the guard appears to be the logical choice as defendant. For practical reasons, however, the guard may not be a good candidate for suit; he or she may not have the financial resources to provide full compensation.

⁵¹ *E.g.*, ALASKA STAT. §§ 11.05.070 & 11.05.080 (1970); IDAHO CODE §§ 18-310 to -311 (1979). A prisoner who is "civilly dead" is deemed to be dead as far as his or her civil rights are concerned. *See Quick v. Western Ry.*, 207 Ala. 376, 92 So. 608 (1922).

⁵² *See Hill v. Gentry*, 182 F. Supp. 500 (W.D. Mo.), *rev'd on other grounds*, 280 F.2d 88 (8th Cir. 1960). *See generally* Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970).

Accordingly, the inmate may turn to the state or to the prison officials as defendants with deeper pockets. But, for doctrinal reasons, they may not be amenable to suit. Unless it consents to be sued, a state is immune from tort liability under the doctrine of sovereign immunity.⁵³ A majority of states have consented to some degree, but the scope of that consent varies.⁵⁴ Some states have established courts of claims or claims commissions to handle tort claims against the state.⁵⁵ Others have consented, but with the explicit exception that they cannot be held liable for torts committed by their employees when the employees are acting in a discretionary capacity.⁵⁶

If sovereign immunity shields the state from liability, a prisoner may seek recovery from a prison official. However, the doctrine of executive immunity—a corollary of the doctrine of sovereign immunity—may protect the prison official. To preserve the freedom of public officials to act vigorously and independently, courts have held that public officials are immune from tort liability when acting in a discretionary, as opposed to a ministerial, capacity.⁵⁷ Discretionary acts involve the planning or policymaking aspect of the governmental process; ministerial acts involve the execution of policy. The line between the two is not a clear one,⁵⁸ and the liability of prison officials will depend on the law of the particular jurisdiction.

⁵³ See W. PROSSER, *THE LAW OF TORTS* § 131, at 975-77 (4th ed. 1971).

⁵⁴ See *id.* at 975, 984; Note, *Physical Security in Prison: Rights Without Remedies?*, 12 NEW ENGLAND L. REV. 269, 274 (1976).

⁵⁵ E.g., ARK. STAT. ANN. § 13-1401 (1979); CONN. GEN. STAT. § 4-142 (1981); ILL. REV. STAT. ch. 37, § 439.8 (Supp. 1980); KY. REV. STAT. §§ 44.070-.170 (1980); MICH. STAT. ANN. § 27A.6401-.6475 (1962); N.C. GEN. STAT. §§ 143-291 (Supp. 1979).

⁵⁶ E.g., ALASKA STAT. § 09.50.250 (Supp. 1971); NEV. REV. STAT. § 41.032 (1979). See notes 57-58 and accompanying text *infra*.

⁵⁷ See generally Comment, *Prisoners' Rights: Personal Security*, 42 U. COLO. L. REV. 305 (1970). But the immunity is more likely to be qualified than absolute. See generally Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110 (1981).

⁵⁸ See *Ham v. Los Angeles County*, 46 Cal. App. 148, 162, 189 P. 462, 468 (1920) ("[I]t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail."). Compare *Upchurch v. State*, 51 Hawaii 150, 454 P.2d 112 (1969) (adoption of rules and regulations governing prison security and acts pursuant to such rules and regulations within discretionary function of prison authority) with *Smith v. Miller*, 241 Iowa 625, 40 N.W.2d 597 (1950) (sheriff person-

Assuming the amenability of the state or its officials to a tort lawsuit, there are two substantive theories upon which the inmate can ground recovery. First, if the injury occurred because of the wrongful acts of prison guards, the inmate may invoke the doctrine of respondeat superior to impute liability to the state or the prison officials.⁵⁹ Second, if the inmate is injured by a prison guard or another inmate, the inmate may argue that the prison officials violated their duty under the common law or a state statute to ensure the physical security of inmates.⁶⁰ In turn, the inmate may seek to impute liability to the state under the doctrine of respondeat superior for the prison officials' violation of their duty of care.⁶¹

Under either theory, however, the requisite showing that the prison officials or the prison guards acted wrongfully may prove difficult. As one commentator has explained, "[T]he state has not only a right but a duty to use all suitable means to enforce and maintain discipline in state prisons."⁶² Thus, the standard of care during a prison riot

ally liable for negligent or wrongful acts that result in injury or death of prisoners). See generally R. GOLDFARB & L. SINGER, *AFTER CONVICTION* 439-42 (1973). See also notes 82-85 and accompanying text *infra*.

⁵⁹ Under the doctrine of respondeat superior, the state or the prison officials are liable for the wrongful acts of the prison guards if the prison guards were acting within the scope of their authority and if the state or its officials could have reasonably foreseen, and thus prevented, the wrongful acts. See, e.g., *Parker v. State*, 282 So. 2d 483, 486 (La. 1973). See generally Comment, *supra* note 57, at 318. In the prison riot context, a prison guard who is directed to use force would be acting within the scope of his or her authority. In light of the often chaotic nature of prison riots, however, it may prove difficult to demonstrate that the state or its officials could have foreseen that the guard would act wrongfully. Imputation of liability to the state may prove to be especially difficult. "The further removed the defendant is from the wrongdoer, the more tenuous is his control over the wrongdoer's acts and, consequently, the less likely it is that the requirements of respondeat superior will be met." *Id.* at 319.

⁶⁰ At common law, prison officials have a duty to exercise reasonable care to protect the inmates within their custody. See, e.g., *Brown v. United States*, 486 F.2d 284, 287 (8th Cir. 1973). See generally Note, *State Liability to Innocent Prisoners in Prison Uprisings*, 29 WASH. & LEE L. REV. 119 (1972); Plotkin, *Surviving Justice: Prisoners' Rights to be Free from Physical Assault*, 23 CLEV. ST. L. REV. 387 (1974). Many states have augmented this common law duty by imposing specific statutory duties on prison officials. See, e.g., CAL. PENAL CODE §§ 2650-2655 (West 1970); DEL. CODE ANN. tit. 11, § 6517 (1979).

⁶¹ See note 59 *supra*.

⁶² Note, *supra* note 60, at 125.

may be low, and the use of force warranted.⁶³ In fact, consistent with their traditional deferential attitude toward prisons,⁶⁴ courts have been reluctant to impose tort liability on the state or its officials for fear that such restrictions might prevent or delay prison officials from taking the steps necessary to quell a prison riot.⁶⁵ Instead, the courts have indicated that prison officials have a wide range of discretion in determining how to respond to a disturbance.⁶⁶

An inmate who does present a *prima facie* tort case nevertheless may be barred from recovery if the state or the prison officials make a showing of contributory negligence or assumption of risk.⁶⁷ If the plaintiff was an active participant in the prison riot, these defenses may be particularly apposite. One court has defined contributory negligence on the part of a prisoner as "conduct which amounts to a breach of duty to protect one's self—conduct that falls below a societal standard."⁶⁸ The state or the prison officials thus may claim that a participant in a riot did not act to protect himself or herself. They also may claim that the inmate who participated in a riot assumed the risk of injury. This latter defense is available when the plaintiff voluntarily encountered a known or foreseeable danger.⁶⁹ The use of force during a prison riot perhaps is foreseeable, for prison officials have used force to quell prison riots on numerous occasions.⁷⁰ Thus, an inmate who chooses to participate in a prison riot arguably assumes the risk of incurring an injury during the riot.

Several practical obstacles compound the difficulty of prosecuting a tort suit in the prison riot context. First, because outsiders are unlikely to be present during the riot, the lawsuit usually pits the testimony of inmates against that of prison officials and prison guards. Given the relative status of the witnesses, the testimony of the latter

⁶³ See *Roberts v. Pegelow*, 318 F.2d 548 (4th Cir. 1963).

⁶⁴ See text accompanying notes 40–50 *supra*.

⁶⁵ See *Wilson v. Prasse*, 325 F. Supp. 9 (W.D. Pa. 1971). See generally Note, *supra* note 60, at 127.

⁶⁶ See, e.g., *Collins v. Schoonfield*, 363 F. Supp. 1152 (D. Md. 1973).

⁶⁷ See, e.g., *Webber v. Omaha*, 190 Neb. 678, 211 N.W.2d 911 (1973); *Burdick v. State*, 206 Misc. 839, 135 N.Y.S.2d 548 (1954), *aff'd without opinion*, 286 A.D. 988, 144 N.Y.S.2d 740 (1955).

⁶⁸ *Breaux v. State*, 326 So. 2d 481, 484 (La. 1976).

⁶⁹ See W. PROSSER, *supra* note 53, § 68.

⁷⁰ See generally Garson, *supra* note 1.

two groups is likely to receive greater weight. Furthermore, the prisoner may encounter difficulty in obtaining witnesses. Prison guards are unlikely to give testimony favorable to inmates, and sympathetic inmate witnesses may not cooperate because "they have little to gain personally and much to lose by way of retribution."⁷¹ Finally, it may be difficult for an inmate, who loses little or no income as a result of his injury, to establish damages.⁷²

2. Federal Law

The major avenue of recovery for inmates injured during a riot at a federal prison is the Federal Tort Claims Act (FTCA),⁷³ under which the United States has waived its sovereign immunity from tort liability.⁷⁴ Rejecting a variety of arguments, including the contention that application of the statute to prisoners' tort claims would undermine prison discipline, the Supreme Court held in *United States v. Muniz*⁷⁵ that federal prisoners' tort claims were cognizable under the FTCA.

Recovery under the Act, however, is far from certain. In the first place, the Act carves out several exceptions. One is that the United States is not liable for intentional torts.⁷⁶ Prior to 1974, it was clear that a federal prisoner could not recover under the Act for injuries that resulted from an assault by a prison official.⁷⁷ In 1974 the FTCA was

⁷¹ See Note, Logue v. United States: *Prisoner Tort Recovery*, 41 UMKC L. REV. 308, 310 (1972).

⁷² See *id.*

⁷³ 28 U.S.C. §§ 1436(b), 2671-2680 (1976). The FTCA provides in pertinent part: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . ." *Id.* § 2674.

⁷⁴ See, e.g., *Richards v. United States*, 369 U.S. 1, 6 (1962); *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957).

⁷⁵ 374 U.S. 150 (1963).

⁷⁶ 28 U.S.C. § 2680(h) (1976) provides that the United States shall not be liable for "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights."

⁷⁷ See, e.g., *Samurine v. United States*, 287 F. Supp. 913 (D. Conn. 1967), *aff'd*, 399 F.2d 60 (2d Cir. 1968).

amended to provide that the United States would be liable for certain intentional torts if they were committed by federal investigative or law enforcement officials.⁷⁸ The statute defines federal law enforcement officers as individuals "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."⁷⁹ Federal prison wardens execute searches,⁸⁰ and employees of the Federal Bureau of Prisons are empowered to make arrests.⁸¹ The language of the statute thus supports an argument that the United States should be liable for intentional torts committed by prison wardens and prison guards. However, no court has decided whether the 1974 amendment applies in the prison context.

A second exception to the FTCA provides that the United States shall not be liable for negligent acts or omissions committed by federal employees in the course of performing discretionary functions, whether or not that discretion is abused.⁸² Confusion and uncertainty characterize judicial and academic attempts to define the scope of the

⁷⁸ The 1974 amendment added the following proviso to 28 U.S.C. § 2680(h):

That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

Pub. L. No. 93-253, 88 Stat. 50 (1974) (codified in 28 U.S.C. § 2680(h) (1976)).

⁷⁹ 28 U.S.C. § 2680(h) (1976).

⁸⁰ See *Stroud v. United States*, 251 U.S. 15 (1919); *Hayes v. United States*, 367 F.2d 216 (10th Cir. 1966).

⁸¹ 18 U.S.C. § 3050 (1976).

⁸² 28 U.S.C. § 2680(a) (1976). The exception states that the FTCA shall not apply to

[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused.

discretionary function exception.⁸³ Nevertheless, it is probable that a prison official's decision about the best manner in which to respond to a prison riot would be held to fall within it.⁸⁴ It is arguable, however, that the acts undertaken by prison guards to implement that decision do not fall within the exception.⁸⁵

If a prisoner's tort claim does not fall within the intentional tort or discretionary function exceptions to the FTCA, the inmate then must demonstrate that the prison officials or the prison guards acted wrongfully. The FTCA waives the sovereign immunity of the United States, but it does not provide the substantive rule of decision for tort suits against the federal government. According to the Act, the "United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances."⁸⁶ The import of this provision for prisoners' tort claims is not clear. In *Muniz*, the Court stated that the duty of care owed to federal prisoners is fixed by federal statute regardless of state law providing that there be no such duty.⁸⁷ The Court also indicated, however, that the determination whether that duty is violated depends upon the tort law of the state in which the injury to the prisoner occurred.⁸⁸ A federal prisoner thus may encounter the same substantive difficulties in prosecuting a tort suit as his or her state counterpart.⁸⁹

In fact, the courts have been reluctant to grant recovery to prisoners under the FTCA, whether applying the relevant state law or interpreting independently the federal statutory duty of care. One court has indicated both that the conduct of prison officials must be judged "under the circumstances" and that an inmate who instigates trouble with other inmates cannot recover for the resulting injuries.⁹⁰

⁸³ For a discussion of the uncertainty surrounding the discretionary function exception, see Reynolds, *The Discretionary Function Exception to the Federal Tort Claims Act*, 57 GEO. L.J. 81 (1968). See also notes 57-58 and accompanying text *supra*.

⁸⁴ See *Garza v. United States*, 413 F. Supp. 23 (W.D. Okla. 1975).

⁸⁵ See *Cohen v. United States*, 252 F. Supp. 679 (N.D. Ga. 1966), *rev'd on other grounds*, 389 F.2d 689 (5th Cir. 1967). See generally Reynolds, *supra* note 83.

⁸⁶ 28 U.S.C. § 2674 (1976).

⁸⁷ 374 U.S. at 164-65.

⁸⁸ *Id.* at 153.

⁸⁹ See text accompanying notes 59-70 *supra*.

⁹⁰ *Johnson v. United States*, 258 F. Supp. 372, 376-77 (E.D. Va. 1966).

Another court has denied recovery where an inmate was killed by fellow inmates the day after a disturbance at the prison.⁹¹ According to the court, the prison officials had followed "recognized" procedures in response to the disturbance, and they could not have prevented the unforeseeable incident which led to the inmate's death unless they had exercised more than ordinary care.⁹² No court has decided a case under the FTCA arising from a full-scale prison riot, but given the spontaneous and unpredictable nature of such riots, a successful prisoner tort suit appears to be unlikely.

B. Constitutional Causes of Action

Because of the numerous difficulties involved in obtaining tort relief, the inmate may turn to a constitutional cause of action to seek redress for wrongs suffered during a prison riot. A suit under 42 U.S.C. § 1983 or a direct cause of action under the eighth amendment may avoid many of the jurisdictional problems involved in a state tort suit. But such actions are not without their own jurisdictional and substantive difficulties.

For state prisoners who are aggrieved during a riot, section 1983 provides a cause of action to redress the inmates' federal constitutional or statutory rights.⁹³ Although states are immune from suit under section 1983,⁹⁴ both municipalities and other local government units—as well as "persons"—are amenable to suit.⁹⁵ A significant hurdle to a

⁹¹ *Garza v. United States*, 413 F. Supp. 23 (N.D. Ga. 1975).

⁹² *Id.* at 26.

⁹³ 42 U.S.C. § 1983 (1976) provides:

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.

⁹⁴ U.S. CONST. amend. XI. *See also* *Edelman v. Jordan*, 415 U.S. 651 (1974). Of course, a state may waive its immunity. *See* notes 53–56 and accompanying text *supra*.

⁹⁵ *See* *Monell v. Department of Social Serv.*, 436 U.S. 658 (1978). *See also* *Owen v. City of Independence*, 445 U.S. 622 (1980).

section 1983 damages claim, however, is the affirmative defense of official immunity,⁹⁶ which is analogous to executive immunity in tort litigation.⁹⁷ In order to defeat this defense, a prisoner must show either that the official knew or should have known that his or her action would violate the prisoner's constitutional rights or that the action complained of was done with malicious intent.⁹⁸ Because both showings are difficult, damage awards are rare. But injunctive relief is still a possibility.⁹⁹

Another potential obstacle is the doctrine of exhaustion of state administrative remedies. The Supreme Court has yet to rule directly on whether exhaustion is required.¹⁰⁰ Many lower courts, however, still require it, and prisoners in those jurisdictions will have to follow the appropriate procedures, absent futility or exceptional circumstances.¹⁰¹

To prosecute a section 1983 claim successfully, for either damages or injunctive relief, a prisoner must establish that his or her constitutional rights were violated. In the prison riot context, the eighth amendment prohibition against cruel and unusual punishment¹⁰² may

⁹⁶ See, e.g., *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

⁹⁷ See notes 57-58 and accompanying text *supra*.

⁹⁸ See, e.g., *Procunier v. Navarette*, 434 U.S. 555 (1978).

⁹⁹ See, e.g., *Brown v. United States*, 486 F.2d, 284, 288 (8th Cir. 1973).

¹⁰⁰ While the Court sidestepped the issue in its 1980 Term, see *Parratt v. Taylor*, 101 S.Ct. 1980 (1981); *Jenkins v. Brewer*, 654 F.2d 1106 (7th Cir.), *vacated and remanded*, 101 S.Ct. 1338 (1981), it has accepted certiorari in the 1981 Term. *Patsy v. Florida Int'l Univ.*, 102 S. Ct. 88 (1981), *granting cert. to* 634 F.2d 900 (5th Cir. 1981) (en banc). Even with an exhaustion requirement, however, section 1983 relief is not foreclosed; it is only delayed.

¹⁰¹ On administrative exhaustion under section 1983, see Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 LAW & SOC. ORD. 557; Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352 (1970); Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. CHI. L. REV. 537 (1974); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1264-74 (1977); Annot., 47 A.L.R. FED. 15 (1980).

¹⁰² The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The cruel and unusual punishment clause has been made applicable to the states via the fourteenth amendment. See *Robinson v. California*, 370 U.S. 660 (1962).

provide the basis for a section 1983 claim.¹⁰³ The use of force to quell a prison riot does not in itself, however, constitute a violation of the eighth amendment. Consistent with their traditional attitude toward prisons,¹⁰⁴ courts have tended to defer to prison officials' decisions to respond to a prison disturbance with force.¹⁰⁵ Moreover, federal courts have tended to view problems in state prisons as a matter of state concern.¹⁰⁶

At least one court, however, has determined that the use of force in the prison riot situation is not without limits under the eighth amendment. In *Inmates of Attica Correctional Facility v. Rockefeller*,¹⁰⁷ the prisoners sought an injunction prohibiting unlawful reprisals during the post-riot period. The court granted the preliminary injunction on the ground that the "barbarous conduct" of the prison guards "was wholly beyond any force needed to maintain order. It far exceeded what our society will tolerate on the part of officers of the law in custody of defenseless prisoners."¹⁰⁸ Significantly, though, the court went on to state that "[i]f the abusive conduct of the prison guards had represented a single or short-lived incident, unlikely to recur, or if other corrective measures had been taken to guarantee against repetition, injunctive relief might be denied, despite the heinous character of the conduct."¹⁰⁹ In effect, the court in *Inmates of Attica* established two requirements for receiving injunctive relief in the riot context. First, the conduct of the prison officials and the prison guards must be far in excess of that which is required to maintain security. Second, the conduct must be capable of repetition.

No reported case has awarded monetary damages to prisoners in a section 1983 suit arising from a prison disturbance. The court in

¹⁰³ See, e.g., *Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12 (2d Cir. 1971); *Collins v. Schoonfield*, 363 F. Supp. 1152 (D. Md. 1973); *Poindexter v. Woodson*, 357 F. Supp. 443 (D. Kan. 1973), *aff'd*, 510 F.2d 464 (10th Cir.), *cert. denied*, 423 U.S. 846 (1975); *Beishir v. Swenson*, 331 F. Supp. 1227 (E.D. Mo. 1971).

¹⁰⁴ See text accompanying notes 40-50 *supra*.

¹⁰⁵ See, e.g., *Collins v. Schoonfield*, 363 F. Supp. 1152 (D. Md. 1973); *Poindexter v. Woodson*, 357 F. Supp. 443 (D. Kan. 1973), *aff'd*, 510 F.2d 464 (10th Cir.), *cert. denied*, 423 U.S. 846 (1975); *Beishir v. Swenson*, 331 F. Supp. 1227 (E.D. Mo. 1971).

¹⁰⁶ See generally *Robbins & Buser*, *supra* note 46. See also Note, *supra* note 46.

¹⁰⁷ 453 F.2d 12 (2d Cir. 1971).

¹⁰⁸ *Id.* at 22.

¹⁰⁹ *Id.* at 23.

*Beishir v. Swenson*¹¹⁰ suggested, however, that damages would be appropriate if the inmates could demonstrate that the prison officials' conduct "shocked the conscience" or went beyond that which is necessary to achieve a legitimate penological objective. On the facts of the case, though, the court held that the use of fire hoses and mace to quell the disturbance and the placement of the inmates in seclusion cells did not violate the eighth amendment.¹¹¹

The difficulty of recovering damages presents a dilemma for the inmate who is aggrieved during a riot. Injunctive relief is available only if the injurious conduct might recur. But the use of force to quell a prison riot is a one-time occurrence. Therefore, without the availability of monetary damages, prisoners may have no direct remedy for the use of force during a prison riot even if that force is excessive.

A second avenue of relief for the violation of constitutional rights is a direct right of action under the Constitution. Injunctive relief is permissible in such an action,¹¹² and the Supreme Court recently held in *Carlson v. Green*¹¹³ that the Federal Tort Claims Act does not preclude an action for damages under the eighth amendment.¹¹⁴ It is likely, however, that the courts will be as reluctant to find eighth amendment violations in a direct cause of action as they have been to allow recovery in section 1983 suits.¹¹⁵

¹¹⁰ 331 F. Supp. 1227, 1234 (E.D. Mo. 1971).

¹¹¹ *Id.* at 1235.

¹¹² See, e.g., *Ex parte Young*, 209 U.S. 123 (1908). See generally Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1542 (1972); Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 524 & n.124 (1954); Note, *The Limits of Implied Constitutional Damages Actions: New Boundaries For Bivens*, 55 N.Y.U. L. REV. 1238, 1238 n.1 (1980).

¹¹³ 446 U.S. 14 (1980).

¹¹⁴ Prior to *Carlson*, lower courts had refused to recognize an eighth amendment damage remedy on the ground that the Federal Tort Claims Act provided the exclusive remedy for violations of the eighth amendment. See, e.g., *Torres v. Taylor*, 456 F. Supp. 951 (S.D.N.Y. 1978). The Supreme Court first recognized a damage remedy in direct constitutional actions in a suit under the fourth amendment. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Subsequently, damage remedies have been implied under other constitutional provisions. See, e.g., *Dellums v. Powell*, 566 F.2d 167, 194-95 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978) (first amendment); *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1977), *rev'd in part, aff'd in part on other grounds sub. nom Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979).

¹¹⁵ See text accompanying notes 102-09 *supra*. See also Note, *supra* note 112.

*C. Criminal Sanctions for Prison Riots**1. Federal Law*

Under federal law, "[W]hoever instigates, connives, willfully attempts to cause, assists, or conspires to cause" a mutiny or riot in a federal correctional institution can be imprisoned for as many as ten years.¹¹⁶ The federal inmate can be prosecuted for his or her involvement in the riot itself, as well as for crimes that he or she commits during the riot.¹¹⁷ Further, since courts generally have held that administrative punishment does not render a subsequent criminal proceeding violative of the fifth amendment prohibition against double jeopardy,¹¹⁸ administrative proceedings against a rioting prisoner do not preclude criminal prosecution.

The major unresolved issue in litigation under the federal prison riot statute is the degree of participation necessary to sustain a finding of criminal liability. The Tenth Circuit has held that the inclusion of the term "willfully" indicates that mere participation in the riot is not sufficient.¹¹⁹ Other courts, however, have adopted a broader view. In *United States v. Farries*,¹²⁰ for example, the Third Circuit reasoned that the use of the word "assists" in the statute indicates that anyone who participates in the riot falls within its reach.

The difficulty in distinguishing between principals and participants undercuts the validity of either interpretation. The Tenth Circuit's view is underinclusive because it imposes a high threshold of culpability. In contrast, the Third Circuit's interpretation is overinclusive because of the low threshold of culpability that it requires. A

¹¹⁶ 18 U.S.C. § 1792 (1976). Prisoners participating in a riot may also be prosecuted under 18 U.S.C. § 2, which subjects one who aids or abets in the commission of federal crimes to the same penalties as the principal. 18 U.S.C. § 2 (1976).

¹¹⁷ See, e.g., *United States v. Evans*, 542 F.2d 805 (10th Cir. 1976), *cert. denied*, 429 U.S. 1101 (1977) (inmate convicted of causing a riot under 18 U.S.C. § 1792 and of assault with intent to murder during riot at federal penitentiary).

¹¹⁸ See, e.g., *United States v. Acosta*, 495 F.2d 60 (10th Cir. 1974); *United States v. Stucky*, 441 F.2d 1104 (3d Cir.), *cert. denied*, 404 U.S. 841 (1971).

¹¹⁹ See, e.g., *United States v. Rogers*, 419 F.2d 1315 (10th Cir. 1969), *cited with approval in United States v. Bedwell*, 456 F.2d 448 (10th Cir. 1972).

¹²⁰ 459 F.2d 1057 (3d Cir.), *cert. denied*, 409 U.S. 1088 (1972). See also *United States v. Bryant*, 563 F.2d 1227 (5th Cir.), *cert. denied*, 435 U.S. 972 (1977).

possible intermediate position is to require that the state make a showing of criminal, but not specific, intent.¹²¹

There have been few reported cases under the federal prison riot statute perhaps because the government, rather than to proceed under the statute, prefers to seek conviction for discrete substantive offenses committed during the riot. Furthermore, federal prison officials may choose to employ administrative sanctions rather than initiate criminal prosecution. Administrative proceedings do not receive the same amount of publicity as criminal prosecutions nor are prisoners entitled to the same constitutional protections.¹²² Such proceedings thus allow federal prison officials greater flexibility in punishing participants in a riot.

2. State Law

Several states have enacted statutes that prohibit inmate participation in prison riots.¹²³ In addition, some states have enacted statutes that prohibit the taking of hostages by inmates.¹²⁴ A prisoner may be convicted under either or both provisions.¹²⁵ Such statutes serve to supplement state criminal code provisions that the state may invoke to

¹²¹ See *United States v. Hill*, 526 F.2d 1019, 1026-27 (10th Cir.), *cert. denied*, 425 U.S. 940 (1976).

¹²² See *Montanye v. Haymes*, 427 U.S. 236 (1976); *Meachum v. Fano*, 427 U.S. 215 (1976).

¹²³ See, e.g., ALA. CODE § 14-11-11 (1975); COLO. REV. STAT. § 18-8-211 (Supp. 1980); CONN. GEN. STAT. §§ 53a-179b to -179c (1981); MO. ANN. STAT. § 216.460 (Vernon 1962); TENN. CODE ANN. § 41-724 (1975); WASH. REV. CODE § 9.94.010-.020 (1979). The Florida Corrections Code, for example, provides that: "Whoever instigates, contrives, willfully attempts to cause, assists, or conspires to cause any mutiny, riot, or strike in defiance of official orders, in any state correctional institution, shall be guilty of a felony of the second degree . . ." FLA. STAT. ANN. § 944.45 (West 1973).

¹²⁴ See, e.g., CAL. PENAL CODE § 4503 (West Supp. 1980); FLA. STAT. ANN. § 944.44 (West Supp. 1981); MASS. ANN. LAWS ch. 127, § 38A (Michie/Law. Co-op 1972). The Washington provision states: "Whenever any inmate of a state penal institution shall hold, or participate in holding, any person as a hostage, by force or violence, or the threat thereof, or shall prevent or participate in preventing an officer of such institution from carrying out his duties, by force or violence, or the threat thereof, he shall be guilty of a felony . . ." WASH. REV. CODE § 9.94.030 (1979).

¹²⁵ See, e.g., *State v. Davis*, 48 Wash. 2d 513, 294 P.2d 934 (1956) (offenses of prison rioting and holding hostages are distinct and carry separate penalties).

prosecute inmates for acts committed during the course of the riot. Prisoners have been convicted of murder,¹²⁶ kidnapping,¹²⁷ and false imprisonment,¹²⁸ as well as for participation in a riot¹²⁹ and for taking hostages during a riot.¹³⁰ But there have been few prosecutions under state prison riot or hostage-taking statutes. States, like the federal government, may often choose to seek conviction for specific criminal violations committed during the riot or to employ administrative sanctions against participants in a prison riot.

One serious constitutional question that is raised by the criminal prosecution of rioting prisoners concerns the imposition of the death penalty after a conviction for murder. At one time, at least two states had enacted statutes that prescribed a mandatory death sentence for convicts serving a life sentence who committed first degree murder.¹³¹ Underlying such statutes is the notion that only the threat of capital punishment will deter such prisoners from committing further crimes. The Supreme Court has reserved judgment on the constitutionality of a mandatory death penalty in such circumstances, indicating that "a prisoner serving a life sentence presents a unique problem that may justify such a law."¹³² At least one state court has found such a statute to be constitutional,¹³³ while other state courts have reached the opposite conclusion.¹³⁴

¹²⁶ See, e.g., *Johnson v. Alabama*, 335 So. 2d 663 (Ala. Crim. App. 1976); *People v. Stamps*, 52 Ill. App. 3d 320, 326, 367 N.E.2d 543, 548 (1977).

¹²⁷ See, e.g., *State v. Wooten*, 73 N.J. 317, 374 A.2d 1204 (1977).

¹²⁸ See, e.g., *id.*

¹²⁹ See, e.g., *Conte v. Cardwell*, 475 F.2d 698 (6th Cir. 1972), *cert. denied*, 414 U.S. 873 (1973) (denial of state prisoner's habeas corpus petition following conviction for participation in prison riot at the Ohio State Penitentiary); *State v. Greene*, 255 S.C. 548, 180 S.E.2d 179 (1971) (affirming conviction for violation of prison riot statute).

¹³⁰ See, e.g., *State v. Gann*, 254 Or. 549, 463 P.2d 570 (1969) (reversing and remanding on procedural grounds conviction for taking guards hostage in riot at Oregon State Penitentiary in violation of statute that prohibited such acts).

¹³¹ ALA. CODE § 13-11-2(a)(6) (1975) (repealed 1981); LA. REV. STAT. ANN. § 14.30(3) (1974) (repealed 1976).

¹³² *Roberts v. Louisiana*, 428 U.S. 325, 334 n.9 (1976). See *Woodson v. North Carolina*, 428 U.S. 280, 287 n.7, 292 n.25 (1976).

¹³³ *Harris v. State*, 352 So. 2d 479 (Ala. 1977). The court reasoned that the death penalty was the only effective punishment for a life term prisoner. *Id.* at 484-85.

¹³⁴ *State v. Cline*, — R.I. —, 397 A.2d 1309 (1979). Other courts have found similar statutes unconstitutional. See, e.g., *Graham v. Superior Court*, 98 Cal. App.

3. *Issues Common to Federal and State Criminal Cases*

An inmate charged under federal or state statutes may encounter practical problems in preparing a defense. Because most or all of the potential witnesses are likely to be incarcerated, lack of access to the witnesses and lack of cooperation from them may impede preparation of the defense. Moreover, the preservation of prison security might justify the imposition of restrictions that hinder defense preparation. In *United States v. Farries*,¹³⁵ for example, the defendants argued that their administrative segregation following participation in a prison disturbance prevented the adequate preparation of their cases.¹³⁶ The court of appeals rejected the argument on the ground that the district court "took every reasonable step consistent with prison security and witness safety to expedite the efforts of defense counsel and of the appellants to prepare and present whatever defense might be available."¹³⁷

Finally, inmates who are the subject of post-riot investigations that may lead to criminal prosecutions are entitled to certain constitutional protections. Courts have held that official investigators must issue the warnings required under *Miranda v. Arizona*¹³⁸ when questioning inmates about a disturbance, if the investigation may result in criminal prosecution.¹³⁹ However, the prisoner's right to constitutional protections during a post-riot investigation is "subject to such restric-

3d 880, 160 Cal. Rptr. 10 (1979) (California mandatory death penalty for life prisoners who commit assault is unconstitutional).

¹³⁵ 459 F.2d 1057 (3d Cir. 1972).

¹³⁶ See *id.* at 1062.

¹³⁷ *Id.* The district court took the following steps to allow the defense to prepare its case: (1) defense counsel were given the names of the inmates in the prison on the day of the disturbance; (2) defense counsel were allowed to interview any inmate; (3) the defendants were allowed to observe all of the inmates to point out any whom they wanted interviewed; (4) an announcement was made over the prison loudspeaker advising any inmate with information to convey to send a letter directly to the court; and (5) the defendants were allowed to confer together each evening during the trial. See *id.*

¹³⁸ 384 U.S. 436 (1966).

¹³⁹ See, e.g., *Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12, 21 (2d. Cir. 1971); *Blyden v. Hogan*, 320 F. Supp 513, 519 (S.D.N.Y. 1970).

tions as are reasonably and necessarily required in light of his incarceration pursuant to his prior conviction on other charges."¹⁴⁰

D. Amnesty and Negotiations

Amnesty from prosecution for crimes committed during a riot is typically one of the prisoners' demands in negotiating the settlement of a riot. Indeed, one of the major stumbling blocks to a peaceful settlement of the Attica prison riot was Governor Rockefeller's unwillingness to grant amnesty to those inmates who were involved in the disturbance.¹⁴¹ Rockefeller stated that as a matter of principle he would not grant amnesty even if he possessed the constitutional authority to do so.¹⁴²

The power of a governor to grant amnesty in state prison riots and the power of the President to do so in federal prison riots are matters of constitutional law. It is quite clear that prisoners who participate in a prison riot do not have a right to amnesty. As one court has stated in another context, "[T]hose who knowingly disobey a law must face the penalty for the violation. They have no right to amnesty."¹⁴³ This interpretation finds support in early Supreme Court decisions where the Court described amnesty and pardon as acts of mercy or grace.¹⁴⁴

The extent of the chief executive's authority to grant amnesty is not as clear. As does the United States Constitution, many state constitutions empower the chief executive to grant pardons.¹⁴⁵ The Supreme

¹⁴⁰ *Inmates of Attica*, 453 F.2d at 20.

¹⁴¹ See ATTICA: THE OFFICIAL REPORT, *supra* note 4, at 210-11, 325-36.

¹⁴² ATTICA: THE OFFICIAL REPORT, *supra* note 4, at 211. It is a commonly held belief that amnesty should not be granted because such a concession would encourage prisoners to riot. This rationale is similar to that which justifies a refusal to negotiate at all with rioting prisoners. See generally Garson, *supra* note 1.

¹⁴³ *Air Transp. Ass'n v. Professional Air Traffic Controllers Org.*, 313 F. Supp. 181, 187 (E.D.N.Y. 1970), *cert. denied*, 402 U.S. 915 (1971). One commentator has interpreted the holding in this case to mean that the judiciary is precluded from granting amnesty absent appropriate direction from either the legislature or the executive. Comment, *Amnesty: An Act of Grace*, 17 ST. LOUIS U.L.J. 501, 515 (1973).

¹⁴⁴ See, e.g., *Ex parte Wells*, 59 U.S. (19 How.) 307, 311 (1855); *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833).

¹⁴⁵ U.S. CONST. art. II, § 2. See, e.g., ILL. CONST. art. 5, § 12; IND. CONST. art. 5, § 17; KAN. CONST. art. 1, § 7; KY. CONST. § 77; OHIO CONST. art. III, § 11.

Court has indicated that the President's power to grant amnesty is implicit in the executive pardoning power,¹⁴⁶ and some state courts have followed this interpretation.¹⁴⁷ However, several state constitutions explicitly limit the pardoning power of the governor. In these states the governor may only exercise his power to pardon, to reprieve, or to commute sentences after conviction.¹⁴⁸ Such a limitation precludes a governor from granting amnesty to participants in a prison riot.

Constitutional provisions limiting the authority of the governor may not preclude the legislature from granting amnesty to the rioting prisoners, but a legislative grant of amnesty is difficult to obtain in the prison riot context, because the legislature will be unable to act as quickly as may be necessary. Furthermore, even when amnesty is granted properly by either the chief executive or the legislature, the courts may find the grant invalid for a number of reasons.¹⁴⁹ Thus, a grant of amnesty may be of little use to inmates when the state brings criminal charges against them.

Prisoners may bring suit to enforce an agreement negotiated during a prison riot, or they may use an agreement—such as a negotiated grant of amnesty—as the basis of their defense to criminal prosecutions stemming from the prison riot. The stated policy of many correctional systems is not to negotiate a settlement with rioting prisoners.¹⁵⁰ The rationale underlying this policy is to discourage riots and the taking of hostages by the rioting inmates. It has also been argued that negotiations will prevent the quick return to order that is necessary to

¹⁴⁶ See *Brown v. Walker*, 161 U.S. 591 (1896); *Knote v. United States*, 95 U.S. 149 (1877); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). These cases reject the idea that there is a distinction of constitutional significance between pardon and amnesty. They indicate that the differences between the two concepts do not justify the conclusion that because the Constitution uses the term pardon the Executive does not have the power to grant amnesty. But see *Burdick v. United States*, 236 U.S. 79 (1915).

¹⁴⁷ E.g., *Way v. Superior Court*, 74 Cal. App. 3d. 165, 141 Cal. Rptr. 383 (1977); *State v. Morris*, 55 Ohio St. 2d 101, 378 N.E.2d 708 (1978).

¹⁴⁸ See, e.g., ALA. CONST. art. V, § 124; COLO. CONST. art. 4, § 7; IDAHO CONST. art. 4, § 7; IOWA CONST. art. 4, § 16; N.Y. CONST. art. 4, § 4.

¹⁴⁹ See notes 150–63 and accompanying text *infra*.

¹⁵⁰ See, e.g., ATTICA: THE OFFICIAL REPORT, *supra* note 4, at 208–13; Garson, *supra* note 1, *passim*. See also note 20 *supra*.

prevent further personal injury and property damage.¹⁵¹ In fact, however, negotiations often have been undertaken in prison riots,¹⁵² and some commentators have argued that negotiations are preferable to the forceful suppression of riots because they may limit the loss of life and allow prisoners to air their grievances effectively.¹⁵³

If the inmates and the prison officials do enter into a settlement agreement, the issue becomes whether such an agreement is binding on either group. Although this issue apparently has not been litigated in the prison riot context, courts have employed principles of contract law to determine the validity of similar agreements between prisoners and correctional officers in nonriot situations.¹⁵⁴ This section will outline the contractual analysis that is likely to be applied to agreements negotiated during a prison riot.

There are two threshold issues. First, the court must determine whether the prisoners had the capacity to enter into the agreement when it was made. A small minority of jurisdictions still retain civil disability statutes that either explicitly or implicitly deny a convict the power to contract or to enforce a contractual agreement.¹⁵⁵ In these states, a negotiated agreement between prisoners and prison officials probably would not be enforceable. The second threshold issue is whether there was sufficient privity of contract. In most prison riots, an inmate committee serves as the negotiating team for all prisoners.¹⁵⁶

¹⁵¹ See ATTICA: THE OFFICIAL REPORT, *supra* note 4, at 208-13; Garson, *supra* note 1, *passim*.

¹⁵² A negotiated settlement was attempted unsuccessfully in the Attica riot. Negotiations were successful in bringing an end to a 1955 riot at the Wyoming State Penitentiary and to a 1968 disturbance at the Oregon State Penitentiary. In the Oregon riot, the State Corrections Administrator negotiated with the inmates who had taken 11 hostages and agreed to the inmates' demands for improved medical care, an elected inmate council, and a new warden. See Garson, *supra* note 1, at 417-19.

¹⁵³ See *id.* at 419-21.

¹⁵⁴ See generally Gutkin, *The Enforceability of Prisoner-Prison Official Agreements*, 7 MANITOBA L.J. 325 (1977).

¹⁵⁵ See, e.g., IDAHO CODE § 29-101 (1980). See generally Gutkin, *supra* note 154, at 326-27; Special Project, *supra* note 52, at 1021-35; notes 51-52 and accompanying text *supra*. See also Coffin v. Richard, 143 F.2d 443, 455 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945) (convict has no right to enter into and enforce a contract).

¹⁵⁶ See Gutkin, *supra* note 154, at 325-26, 328-29. A committee of inmates was used in the negotiations at Attica. Likewise, a committee of nonprison officials was used to carry the prisoners' demands to the prison administration during the negotiation process. See ATTICA: THE OFFICIAL REPORT, *supra* note 4, at 235-38, 239.

Under recognized contract principles, the prisoners who did not serve on the inmate committee would lack privity to the settlement agreement. Because the prisoners would be third-party beneficiaries to the agreement, however, they probably could sue to enforce it.¹⁵⁷

Beyond such preliminary considerations, the enforceability of a settlement agreement turns on the question of whether there is consideration supporting the agreement. Under well-established common law principles, a party who performs or promises to perform a prior legal obligation or who promises to refrain from doing something that he or she is not legally privileged to do has not incurred detriment. A contract based upon such an act or promise, therefore, is not binding for lack of consideration.¹⁵⁸ For example, if rioting prisoners agree to release their hostages or to return to their cells in return for concessions on the part of the prison administration, the prisoners are promising to perform an existing legal obligation.¹⁵⁹ Several courts have employed consideration analysis to invalidate agreements between prisoners and prison officials.¹⁶⁰

Even where there has been consideration, the courts have been unwilling to uphold agreements between prisoners and prison officials. For example, courts have indicated that they will not enforce agreements that are made under duress. This situation could arise in the prison riot context if prison officials were hostages at the time they signed the agreement.¹⁶¹ Moreover, courts have been particularly reluctant to uphold agreements which provide for amnesty or for immunity from prosecution for crimes arising out of the incident which gave rise to the negotiated agreement. They have found such agreements to be

¹⁵⁷ See J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 17-1 (2d ed. 1977).

¹⁵⁸ See *id.* § 4-7. See generally 1A A. CORBIN, *CONTRACTS* §§ 171-192 (1963).

¹⁵⁹ Under federal law and often under state law as well it is a crime to riot or to take hostages. See notes 116-40 and accompanying text *supra*.

¹⁶⁰ See, e.g., *United States v. Bridgeman*, 523 F.2d 1099 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 961 (1976); *United States v. Gorham*, 523 F.2d 1088 (D.C. Cir. 1975). Cf. *Peraish v. Wyrick*, 589 S.W.2d 74 (Mo. App. 1979) (prisoner's claim that he had contractual right to credit on his sentence for merit time rejected in part because prisoner's obedience to penitentiary rules was a preexisting legal duty).

¹⁶¹ *United States v. West*, 607 F.2d 300, 303-04 (9th Cir. 1979); *United States v. Bridgeman*, 523 F.2d 1099, 1110 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 961 (1976); *United States v. Gorham*, 523 F.2d 1088, 1097 (D.C. Cir. 1975).

invalid on two grounds: first, that prison officials lack constitutional authority to grant amnesty or immunity; and second, that agreements not to prosecute criminal offenses are contrary to public policy.¹⁶²

In short, it is unlikely that the courts will enforce any agreement negotiated during a prison riot. One might defend this result as necessary to ensure that prison officials are accorded wide latitude in their efforts to maintain security in the prison.¹⁶³ Furthermore, enforcement of such agreements might intimate that prison riots are a legitimate way to attempt to change prison conditions.

On the other hand, judicial refusal to enforce prisoner-prison official agreements discourages the use of peaceful means to settle prison riots. Moreover, judicial invalidation of bargains which are made in good faith, and on which the prisoners rely, may operate to deepen the prisoners' distrust of the legal system. Prison officials who wish to encourage peaceful settlements of riots and who wish to re-establish prison morale thus may be well-advised to comply voluntarily with settlement agreements.

E. First Amendment Implications

The news media play a vital role in disseminating information about prison conditions and inmate demands.¹⁶⁴ It nevertheless has been argued that media coverage may serve to prolong prison riots, to limit the effectiveness of official attempts to negotiate a settlement, and to disrupt prison security.¹⁶⁵ These competing values—the need to subject prisons to public scrutiny and the need to bring prison riots under control quickly—provoke two questions. First, do prison inmates have a first amendment right to have the media present in the

¹⁶² See, e.g., *United States v. Bridgeman*, 523 F.2d 1099 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 961 (1976); *United States v. Gorham*, 523 F.2d 1088 (D.C. Cir. 1975). In both decisions, the court found that the agreements were against public policy, and that the prison official lacked the power to grant amnesty. These factors, combined with duress and the lack of consideration, invalidated the agreements. See Gutkin, *supra* note 154, at 335. For a discussion of the power to grant amnesty under state and federal law, see notes 141-49 and accompanying text *supra*.

¹⁶³ See notes 47-50 and accompanying text *supra*.

¹⁶⁴ See ATTICA: THE OFFICIAL REPORT, *supra* note 4, at 213.

¹⁶⁵ See *id.*; Fox, *supra* note 3, at 11.

prison during and after a prison riot? Second, do the media have a special right of access to prisons?

In *Pell v. Procunier*,¹⁶⁶ the Supreme Court upheld a California Department of Corrections regulation that banned face-to-face interviews between members of the media and individual prisoners whom they specifically requested to interview. The Court dismissed the inmates' claim that the regulation violated their constitutional right to freedom of speech,¹⁶⁷ stating that a "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by considerations underlying our penal system."¹⁶⁸ According to the Court, a prison inmate retains those first amendment rights that are consistent with the inmate's status as a prisoner and the "legitimate penological objectives of the corrections system."¹⁶⁹

The Court based its holding on three factors. First, the prisoners had viable alternative means by which to communicate with the media.¹⁷⁰ Second, the regulation is content neutral.¹⁷¹ Third, the regulation was consistent with the legitimate goal of maintaining prison security.¹⁷² Thus, in order to challenge a restriction on access to the press as an infringement on their first amendment rights, prisoners must demonstrate that no alternative means of communication are available, that the prison regulation is not content neutral, or that officials acted unreasonably in light of legitimate penological interests.¹⁷³ This is a particularly high burden in view of the "unwillingness [of the Court] to consider First Amendment claims of prisoners absent extraordinary circumstances."¹⁷⁴

¹⁶⁶ 417 U.S. 817 (1974).

¹⁶⁷ See *id.* at 822-24.

¹⁶⁸ *Id.* at 822, quoting *Price v. Johnston*, 334-U.S. 266, 285 (1948).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 824-27. According to the Court, the inmates could write letters to the press or convey messages to the press through individuals permitted to visit them. *Id.*

¹⁷¹ *Id.* at 828.

¹⁷² *Id.* at 826-27.

¹⁷³ See Comment, *Bans on Interviews of Prisoners: Prisoner and Press Rights After Pell and Saxbe*, 9 U.S.F. L. REV. 718, 728-29 (1975). See generally Calhoun, *The First Amendment Rights of Prisoners*, in 2 PRISONERS' RIGHTS SOURCEBOOK: THEORY, LITIGATION, PRACTICE 43-65 (I. Robbins ed. 1980).

¹⁷⁴ Comment, *supra* note 173, at 729. The Supreme Court has invalidated regulations that allow censorship of prison inmates' mail by prison officials as violative of

In the prison riot context, the inmates might attempt to meet the burden by arguing that, given the need to communicate with the press quickly, there were no alternatives to immediate contact with the press. The state, however, has a readily available counterargument: the need to secure and to maintain order is particularly acute in the prison riot context.

The Supreme Court has also determined that the press does not have a special right of access to prisons. Although recognizing the important role that the media play in informing the public about prison conditions,¹⁷⁵ the Court has held that the press has no greater right of access to prisons than that enjoyed by the general public.¹⁷⁶ According to the Court, the first amendment protects the communication of information but does not guarantee that the press can receive information.¹⁷⁷

In *Pell*, the Court followed its traditional, deferential approach to prison administrators, accepting the prison officials' judgment about the degree of regulation that was necessary to maintain prison security.¹⁷⁸ Similarly, in one of the special access cases, the Court deferred to the legislature on the question of when prisons should be subject to public scrutiny.¹⁷⁹ In the prison riot context, judicial deference may be more pronounced. In *Burnham v. Oswald*,¹⁸⁰ for example, a federal judge upheld restrictions on media access to Attica inmates during the

the first amendment. *Procunier v. Martinez*, 416 U.S. 396 (1974). There the Court stated that such prison regulations would be valid (1) if "the regulation or practice . . . further[s] an important or substantial governmental interest," and (2) if the limitation is "no greater than is necessary or essential to the protection of the particular governmental interest involved." *Id.* at 413. Significantly, the Court did not use this standard in *Pell*. One might conclude that prison security is considered by the Court to be such an important governmental interest that, unless the regulation or practice operates to silence the inmate completely, it will be upheld.

¹⁷⁵ See *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978).

¹⁷⁶ See *id.*; *Saxbe v. Washington Post*, 417 U.S. 843, 850 (1974); *Pell v. Procunier*, 417 U.S. 817, 834 (1974).

¹⁷⁷ See, e.g., *Mills v. Alabama*, 384 U.S. 214 (1966); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Near v. Minnesota*, 283 U.S. 697 (1931).

¹⁷⁸ See *Pell v. Procunier*, 417 U.S. at 827; Comment, *supra* note 173, at 728-29.

¹⁷⁹ See *Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978) ("Whether the government should open penal institutions . . . is a question of policy which a legislative body might appropriately resolve one way or the other.").

¹⁸⁰ 333 F. Supp. 1128 (N.D.N.Y. 1971).

post-riot period. Noting that reasonable people might differ about whether the restrictions were necessary, the court concluded that "a federal court will not substitute its own judgment about what restrictions are required for the safety and security of the institution for that of the prison administrator unless a violation of constitutional rights is clear."¹⁸¹

In sum, the Supreme Court has been unwilling to provide an enforceable right to public scrutiny of prisons. In foreclosing this avenue of expression and its consequent relief of tensions and frustrations, the Court may have increased the odds that prison riots will occur. As one commentator has explained, the Court's decisions "may have the unfortunate effect of blocking a necessary and personal conduit for the expression of grievances, thereby making it more difficult to uncover legitimate sources of discontent before they grow beyond control."¹⁸²

IV. Prison Riots and the Guards

Prison guards are often injured in the course of prison riots. In the Attica prison riot, for example, thirty-three correctional employees were injured, and eleven correctional employees were killed.¹⁸³ A prison guard or a family member might bring a tort suit, but such a suit faces substantial obstacles. If the defendant is a prisoner, damages will be difficult to recover.¹⁸⁴ If the prison guard or a family member sues the government or its employees, the various problems of immunity that arise in suits against the state must be overcome.¹⁸⁵ In order to protect prison guards from the uncertainty of state tort suits, both federal and state statutes provide for some form of compensation for injuries which prison guards may incur.

¹⁸¹ *Id.* at 1131.

¹⁸² Comment, *Freedom of the Press—Prison Regulation Prohibiting Interviews Between Newsmen and Inmates Held Constitutional*, 60 CORNELL L. REV. 446, 465 (1975).

¹⁸³ See ATTICA: THE OFFICIAL REPORT, *supra* note 4, app. E & F.

¹⁸⁴ "The criminal offender's lack of financial resources often precludes recovery of damages" by victims for wrongful acts by the offender. Comment, *Victims' Suits Against Government Entities and Officials for Reckless Release*, 29 AM. U.L. REV. 595, 595 n.2 (1980).

¹⁸⁵ See notes 53-58 and accompanying text *supra*.

A. Recovery Under Federal Law

The most important federal statute for compensation of injured prison guards is the Federal Employees' Compensation Act (FECA),¹⁸⁶ which provides that the United States shall pay varying degrees of compensation¹⁸⁷ "for disability or death of an employee resulting from personal injury sustained while in the performance of his duty"¹⁸⁸ The statute covers any "officer or employee in any branch of the Government of the United States."¹⁸⁹ A federal correctional officer injured in a riot clearly would fall within the statute's scope.

However, two aspects of the FECA limit the amount of compensation that a prison guard may receive. First, an individual whose injury or death is compensable under the FECA is precluded from bringing suit and recovering from the United States for negligence under the Federal Tort Claims Act (FTCA),¹⁹⁰ even though recovery

¹⁸⁶ 5 U.S.C. §§ 8101-8193 (1976).

¹⁸⁷ The amount of compensation is a designated percentage, which varies according to the injury, of the employee's monthly pay. For example, if an employee is totally disabled by the injury, he or she will receive two-thirds of his or her monthly pay at the time of the injury. *See id.* § 8105. *See generally id.* § 8107.

¹⁸⁸ *Id.* § 8102(a). This section of the Act goes on to state that compensation by the United States is not allowed if the injury or death is "(1) caused by willful misconduct of the employee; (2) caused by the employee's intention to bring about injury or death to himself or another; or (3) proximately caused by the intoxication of the injured employee." *Id.* The FECA also authorizes (1) the payment or provision of medical services, *see id.* § 8103; (2) compensation for dependents of injured employees, *see id.* § 8110; and (3) special provisions for death by injury occurring during the performance of duty, *see id.* § 8133.

¹⁸⁹ *Id.* § 8101(1)(A).

¹⁹⁰ *See id.* § 8116(c) which provides in relevant part:

The liability of the United States . . . under this subchapter . . . with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States . . . to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action . . . or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. . . .

See generally Annot., 17 L.Ed.2d 929 (1967). *See also* notes 73-92 and accompanying text *supra*.

under the FTCA might be substantially higher than compensation under the FECA.¹⁹¹ The rationale for this rule, according to one court, is that employees in positions involving a high degree of physical risk should not be "relegated to a remedy in tort but rather [should] be protected by a well-defined system of compensation for the hazards of their employment."¹⁹² Second, if a federal employee successfully sues a third party for damages arising from injuries that are compensable under the FECA, the employee must refund to the United States a sizeable portion of any compensation received under the FECA and credit the amount of recovery from the third party against future compensation payable under the FECA.¹⁹³ A federal prison guard who is injured in a riot may prefer to accept guaranteed compensation under the FECA, rather than expend the time and money required to prosecute a tort suit.

B. Recovery Under State Law

Many states have statutory schemes that provide for compensation of state prison guards who are injured or killed in prison riots.¹⁹⁴ In several states, the worker's compensation statute covers prison

¹⁹¹ See, e.g., *Lewis v. United States*, 190 F.2d 22 (D.C. Cir. 1951); *Tredway v. District of Columbia*, 403 A.2d 732 (D.C. 1979).

¹⁹² *Lewis v. United States*, 190 F.2d 22, 24 (D.C. Cir. 1951). *Accord*, *Tredway v. District of Columbia*, 403 A.2d 732, 734 (D.C. 1979).

¹⁹³ See 5 U.S.C. § 8132 (1976) which provides in relevant part:

If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability in a person other than the United States to pay damages, and a beneficiary entitled to compensation from the United States for that injury or death receives money or other property in satisfaction of that liability as the result of suit or settlement by him or in his behalf, the beneficiary, after deducting therefrom the costs of suit and a reasonable attorney's fee, shall refund to the United States the amount of compensation paid by the United States and credit any surplus on future payments of compensation payable to him by the United States for the same injury. . . .

¹⁹⁴ See, e.g., CAL. GOV'T CODE §§ 21363.3-21363.6 (West 1980); N.M. STAT. ANN. §§ 52-1-3 & 52-1 to -3.1 (Cum. Supp. 1981); N.Y. WORK. COMP. LAW § 3, Group 15 (McKinney 1965). See generally Annot., 5 A.L.R.2d 415 (1949).

guards.¹⁹⁵ The courts in some of these jurisdictions have in turn held that injuries received at the hands of a fellow employee are within the purview of the worker's compensation statute.¹⁹⁶ Therefore, if a prison guard is injured by another guard during the course of a prison riot, he or she may recover under that statute.¹⁹⁷ Because some state courts also have permitted worker's compensation recovery for injuries received from a third party, a prison guard may receive compensation if he or she is injured by an inmate during a prison riot.¹⁹⁸

Several states have specific statutes that govern the compensation of correctional officers injured by inmates.¹⁹⁹ Pennsylvania, for example, provides that if a correctional officer is injured by an inmate, the officer shall be paid his or her full salary, as well as medical and hospital expenses, for the duration of the disability.²⁰⁰ If the injury results in the death of the officer, the survivors of the deceased shall receive fifty percent of the full salary of the deceased.²⁰¹

If an injury is compensable under the state worker's compensation statute the statutory remedy may be exclusive, with the possible exception in some jurisdictions for injuries that are intentionally inflicted by the state.²⁰² Similarly, in states with specific statutory pro-

¹⁹⁵ See, e.g., *Rendleman v. Industrial Accident Comm'n*, 242 Cal. App. 2d 32, 50 Cal. Rptr. 923 (1966); *Miller v. Hoyle*, 328 So. 2d 757 (La. Ct. App. 1976); *Selibolt v. County of Middlesex*, 366 Mass. 411, 319 N.E.2d 448 (1974); *Smith v. State*, 72 A.D.2d 937, 422 N.Y.S.2d 221 (1979); *Schanz v. Bureau of Corrections*, 52 Pa. Commw. Ct. 300, 415 A.2d 978 (1980).

¹⁹⁶ See, e.g., *Seymour v. Rivera Appliances Corp.*, 28 N.Y.2d 406, 322 N.Y.S.2d 243, 271 N.E.2d 224 (1971) (award of workmen's compensation will be maintained for injury from co-employee's assault as long as there is any nexus between the assault and the employment).

¹⁹⁷ See, e.g., *Smith v. State*, 72 A.D.2d 937, 422 N.Y.S.2d 221 (1979).

¹⁹⁸ See, e.g., *Miller v. Hoyle*, 328 So. 2d 757 (La. Ct. App. 1976) (widow of prison guard killed in riot received workers' compensation under Louisiana statute); *Selibolt v. County of Middlesex*, 366 Mass. 411, 319 N.E.2d 448 (1974) (prison guard injured in altercation with inmate received workers' compensation under Massachusetts statute).

¹⁹⁹ See, e.g., CAL. GOV'T CODE §§ 21363.3-21363.6 (West 1980); CONN. GEN. STAT. § 5-142 (1981); PENN. STAT. ANN. tit. 61, § 951 (Purdon 1964).

²⁰⁰ PENN. STAT. ANN. tit. 61, § 951 (Purdon 1964).

²⁰¹ *Id.*

²⁰² See, e.g., *Miller v. Hoyle*, 328 So. 2d 757 (La. Ct. App. 1976); *Smith v. State*, 72 A.D.2d 937, 422 N.Y.S.2d 221 (1979).

visions governing the compensation of prison guards, recovery under such provisions may be exclusive.²⁰³

The specific form of compensation for physical injuries incurred during a prison riot will depend on the statutory scheme of the jurisdiction, but some form of compensation is likely. More problematic is the question whether prison guards or their families may recover for injuries that are caused by the stress coincident with involvement in a riot. One state court has permitted recovery under worker's compensation for the suicide, following a nervous breakdown, of a correctional officer who was involved in an effort to quell a prison disturbance.²⁰⁴ Another state court has taken a more restrictive view, denying recovery where a corrections officer died from a heart attack suffered after a violent argument with a group of inmates. The court reasoned that the heart attack was not an "accident" within the meaning of the state compensation statute.²⁰⁵

Conclusion

A prison riot brings public attention—for better or for worse—to our penal institutions. Thus, greater heed should be paid to the causes of riots, for until we better understand what motivates individuals, the system that deals with riots is certain to be flawed. In the meantime, there exists a body of private and public law, surveyed in this Article, that can deal with the legal problems that riots engender. The law is far from perfect, and, in many cases, was not developed with either prisoners or prison riots in mind. While we search for the ultimate solution, however, the existing law must be made workable. Here, as elsewhere in the legal system, we shall simply have to feel our way.

²⁰³ See, e.g., PENN. STAT. ANN. tit. 61, § 951 (Purdon 1964). *But see* Department of Corrections v. Workers' Compensation Appeals Bd., 23 Cal. 3d 197, 152 Cal. Rptr. 345, 589 P.2d 583 (1979) (dependent of correctional officer may recover under both special death benefits statute and worker's compensation statute).

²⁰⁴ Fitzgibbon's Case, 374 Mass. 633, 373 N.E.2d 1174 (1978).

²⁰⁵ Jolly v. Kansas Pub. Employees Retirement Sys., 214 Kan. 200, 519 P.2d 1391 (1974).