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FILE NO. S-414

CRIMINAL LAW:
Hours of Prison Inspection and Visitation

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Honorable Lawrence Johnson
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Champaign County
Courthouse
Urbana, Illinois 61801

Dear Mr. Johnson:

I have your recent letter in which you state:

"The Sheriff of Champaign County has posed a question concerning visitation by members of the public through the County jail facilities. The hours of visitation would be between the hours of 9 A.M. and 5 P.M. conceivably 7 days per week. The persons touring the jail facilities would be members of the general public in the company of a duly deputized member of the Sheriff's Office.

Specifically, the question on which I am requesting your opinion is:

> Would it, in your opinion, violate any rights of the inmates of the Champaign County Jail if members of the general public were permitted tours of the jail facilities in the company of a Deputy Sheriff between the hours of 9 A.M. and 5 P.M. Monday through Sunday?"

It is my opinion that the regulation of hours of public visitation and inspection of a jail rests with the administrator of the jail, so long as such regulation is promulgated within the scope of his authority, and adequately protects the fundamental rights retained by the prisoners.

Although the precise question regarding the extensive hours of public visitation proposed has never before arisen, whether a sheriff has the authority to make such a regulation may be determined from an examination of the balance to be struck between his authority as warden or administrator, and the basic rights of inmates.

Illinois law provides that, "The Sheriff of each County in this State shall be the warden of the jail of the County, and have the custody of all prisoners in the jail, except when otherwise provided in the "County Department of Corrections Act" "(Ill. Rev. Stats. Ch. 75, par. 2), and "The warden of the jail shall receive and confine in such jail, until discharged by due course of law, all persons who are committed to such jail by any competent authority." (Ill. Rev. Stats. Ch. 75, par. 4). (Note: The "County Department of Corrections Act" above referred to applies only to Cook County.)

Administration of the County jail is also subject to the regulations of the State Department of Corrections regarding minimum standards for the conditions of such institutions, Ill. Rev. Stats. Ch. 127, par 55a 1(5). However, no such regulations speak directly to the question here involved.

It is stated in 50 C.J., Prisons, Sec. 27, that:

> "The powers and duties of a jailer or of a warden, or a sheriff acting as such, are those defined by Statute and limited as prescribed by law; and are considered as ministerial, public duties. Among other duties imposed are the duty to receive and keep prisoners; the duty to preserve the health of the prisoners, and a fortiori to preserve their lives; the duty to supply food and board to the prisoners; and the duty to keep the jail clean and sanitary."

These general requirements are provided for by the Illinois law, Ill. Rev. Stats. Ch. 75, par. 11 through 22.

> "The duty of an officer in executing the mandate of a judicial order in the nature of a commitment is purely ministerial and his power with respect thereto is limited and restricted to compliance with its terms. [Citing Whalen v. Cristell, 161 Kan. 747, 173 P. 2d 252.] The standard of care owed by a law enforcement officer to a prisoner placed in his care and custody is to keep the prisoner safe and free from harm, to render him medical aid when necessary, and to treat him humanely and refrain from oppressing him. [Citing Thomas v. Williams, 105 Ga. App. 321, 124 S.E. 2d 409.] He has no power to increase the severity of the punishment assessed by the Court except as provided by law. [Citing Howard v. State, 28 Ariz. 433, 237 p. 203, 40 A.L.R. 1275.]" 60 Am. Jur. 2d, Penal and Correctional Institutions, Sec. 9.

> "A jailer, or like prisoner official, is vested with a certain amount of discretion with regard to the safe-keeping and security of his prisoners; and, within reasonable limitations and restrictions, he has power to inflict punishment on his prisoners...", but "Cruel or excessive punishments should not be administered;..." 50 C.J., Prisons, Sec. 39.

> "Where a sheriff has the statutory duty to set reasonable regulations for the operation of a jail and the conduct of its prisoners, a rule restricting visits to certain week days and limiting visitors to members of a prisoner's family is reasonable and not an infringement upon any constitutional right. [Citing Robinson v. State, 198 Kan. 543, 426 P. 2d 95.]...
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> "However, while reasonable rules prohibiting visitations or communications are proper, an absolute isolation of those incarcerated in a penal institution by a ban on communication with the outside population is an unreasonable exercise of a warden's discretion. [Citing Davis v. Superior Court of Marin County, 175 Cal. App. 2d 8, 345 P. 2d 513.]" 60 Am. Jur. 2d, Penal and Correctional Institutions, Sec. 60.

That unlimited visitation might well be as objectionable as absolutely prohibited visitation is self-evident.

To be considered in balancing the general regulatory authority of the sheriff as above set forth, in determining the propriety of a regulation such as the one in question, it is necessary to examine whether such a regulation might thereby infringe an inmate's rights of privacy and freedom from cruel and unusual punishment.

The term "right of privacy" was first used by Samuel Warren and Louis Brandeis (later, Justice Brandeis) in their famous article on the subject (4 Harvard Law Review 193.) This right, they said at 195, was "what Judge Cooley calls the right 'to be let alone.'" They traced the development of the right from the ancient rights to be free from injury, such as battery, through incorporeal modern

rights of life. The authors spoke, as have most of the subsequent cases, primarily in terms of publication as an intrusion upon a person's right to privacy. However, their thrust was broader: "...in whatever connection a man's life has ceased to be private,... to that extent the protection is to be withdrawn." (Id., at 215.) Conversely, it may be implied, that in whatever connection a man's life has not ceased to be private, to that extent the protection is to be maintained.

Still a definitive case in this area is the 1904 Georgia case, Pavesich v. New England Life Insurance Co. et al, 122 Ga. 190, 197. The language of that case is very instructive:

> "The right of privacy within certain limits is a right derived from natural law, recognized by the principals of municipal law, and guaranteed to persons in this State by the constitutions of the United States and of the State of Georgia, in those provisions which declare that no person shall be deprived of liberty except by due process of law."

The right of privacy has been established in Illinois. In the case of Eick v. Pork Dog Food Co., 347 Ill. App. 293 (1952), the Court referred favorably to the Warren and Brandeis article and the Pavesich decision, referred to above, and stated, at 295: "The right is now recognized by the great preponderance of authority throughout the country." In support of its holding that the unauthorized use of a person's picture in advertising a dog food was a violation of that person's right of privacy, the court cited Mr. Justice Holmes' statement that the common

law has a capacity to adapt to expending needs of relief, and, at 303: "that sometimes courts are called upon to grant redress in a case without precedent for injuries resulting from conduct which universal opinion in a state of civilized society would unhesitatingly condemn as indecent and outrageous."

Although holding that publication of material about the life of Nathan Leopold did not violate his right of privacy, the Illinois Supreme Court confirmed that a right of privacy exists in Illinois, as established by the Sich case, in Leopold v. Levin, 45 Ill. 2d 434 (1970). The court, at 439, outlined the test of determining whether a remediable invasion of a person's right of privacy had occurred: whether such invasion would "outrage the community's notions of decency."

The California Courts have held that no right of privacy exists in jail. People v. Ross, 46 Cal. Rptr. 41, 48, 236 Cal. App. 2 d 364 (1965); People v. Lopez, 32 Cal. Rptr. 424, 384 P. 2d 16 (1963). In those cases, the courts held that the obtaining and use of information by means of a hidden microphone in a jail cell was not an invasion of privacy.

However, the case most on point in this area is Tyler v. Ciccone, 299 F. Supp. 684 (1969). There the court held that an unconvicted person in prison, who was prohibited from preparing and mailing a manuscript from prison without censorship, and subject

to extensive restrictions, had infringed his right of freedom of speech, right against "unlawful seizure," and right to freedom from cruel and unusual punishment. The court stated, at 687: "Regulations of the type here challenged, to be valid as applied even to convicts, must be consistent with constitutional safeguards, authorized by statute, and relevant to the lawful functions and security of the prison." [Emphasis added.] The court went on to say, at 688:

> "Respondent's citation of Austin v. Harris (W.E.Mo.) 226 F. Supp. 304, to the effect that courts will not interfere with reasonable prison regulations because of the commitment of care, custody, control, and discipline of federal prisoners, exclusively to the Attorney General . . . is therefore inappropriate. That general principle is inapplicable in the case of an unconvicted inmate, where the courts remain under a duty to guard against the violation of federally protected constitutional and federal statutory rights beyond that which is necessarily imposed upon all citizens by the necessity of social living." [Emphasis added.]

The Tyler court equated the rights of an unconvicted person charged with a crime, to free speech, and to do business, with the same rights of all unconvicted citizens. That a constitutional right of privacy would likewise be so protected is readily apparent. It is therefore evident that, to be valid, a prison regulation must have a reasonable relation to the needs of the prison, and must not unreasonably restrict the constitutional rights of prisoners, particularly those being held prior to

conviction; and the language of Tyler would seem to apply at least to some extent even to convicts, despite the old common law view that a convicted felon was "civilly dead." (21 Am. Jr. 2d, Criminal Law, Sec. 626.)

The meaning of the term "cruel and unusual punishment", contained in the Eighth Amendment to the United States Constitution, like the "right of privacy", has never been precisely defined, but is a constantly developing concept. Weems v. United States, 217 U. S. 349. The Weems court, in interpreting the term "cruel and unusual punishment", expressed the belief, at 367, "that it is a precept of justice that punishment for crime should be graduated and proportioned to offense." The impossibility, in the court's estimation, of proportioning the penalty to the offense, under the statute there in question, required an overturning of that statute.

> "'Conviction' means a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict of finding of guilty of an offense rendered by legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury." Ill. Rev. Stats., Ch. 38, par. 205.
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> "Upon conviction, the court shall determine and impose the penalty in the manner and subject to the limitations imposed in this Section." Ill. Rev. Stats., Ch. 38, par. 1-7(d).
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> "The ideal sentence is one that adequately punishes the offender for his misconduct . . ." I.L.P., Ch. 38, Punishment.

> "To constitute a 'punishment' or 'penalty' there must be a deprivation of property or some right, such as the enjoyment of liberty. State v. Cowen, 3 N.W. 2d 176, 179, 231 Iowa 1117." 35 A Words and Phrases, Permanent Edition, Punishment.

It is clear from the above, that the law in Illinois requires that a person be deprived of his constitutional rights only through due process of law. Deprivation of a person's rights is a punishment, which can be done only upon conviction by a duly constituted court of law, and then only in proportion to the offense. For the administrator of a prison, by regulation, to further deprive inmates of constitutional rights, particularly if applied uniformly to all inmates, and not proportioned to any offense that any given inmate may have committed, would be to exceed the scope of his authority; and would be invalid, except to the extent that such regulation was necessary and reasonable for the proper safe-keeping of the prison and prisoners in his custody.

> "When, therefore, the superintendent of the prison receives the commitment, which is his only authority for detaining any man within that prison, he may only do what that commitment orders him, to wit, 'receive and safely keep' the defendant for the time specified therein. If, without legal justification, he does more than is necessary to so safely keep him, he is violating the law just as much as he is in releasing him before the expiration of his minimum term of sentence unless he has been legally pardoned. On the other hand, he not only may but must do what is necessary to 'safely keep' the prisoner."

> Howard v. State, 28 Ariz. 433, 237 P. 203, 40 A.L.R. 1275, 1277.
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> " . . . the provision of our bill of rights is, 'all penalties shall be proportioned to the nature of the offense.' The provision is directed to the law-making power, which alone can determine what acts shall be regarded as criminal and how they shall be punished." People v. Elliott, 272 Ill. 592, 599.

In Illinois, punishment imposed upon an inmate of a prison can only be done as provided for by the law; and as we have seen, the power of an administrator to punish inmates of his prison extends only to the extent required for appropriate discipline, and otherwise reasonably necessary to safe-guard and maintain reasonable order and safety within the prison and among the prisoners.

The keeper of a prison, to whom prisoners have been entrusted, can clearly be held personally liable for injuries sustained by such a prisoner resulting from negligent treatment or excessive punishment imposed by such keeper or jailor in excess of his authority. In Re Birdsong, 39 Fed. 599 (1899); Thomas v. Williams, Ga. App. 321, 124, S.E. 2d 409 (1962).

In conclusion, it is clear that a balance must be struck. On the one hand, a sheriff must have sufficient power in regulating his jail to permit him to carry forth his duties, including the safe-guarding and discipline of prisoners, and provision of

reasonable hours of visitation. However, at the point that subjection of prisoners to constant public view exceeds the bounds of bearing a reasonable relationship to a necessary or reasonable mode of operation of the jail, a court might find that such a regulation constitutes an unusual punishment, not imposed by due process of law, constituting an invasion of a prisoner's right of privacy. In such a case, the sheriff could be held personally responsible. It is impossible to determine precisely whether the proposed regulation-----which would permit public inspection between the hours of 9 A.M. and 5 P.M., Monday through Sunday-----is reasonably related to the necessary administration of the jail; nor, on the other hand, is it clear that such a regulation would violate any constitutional rights of the inmates of the prison. Such a determination could only be made by a court on a case-by-case basis. However, were such a regulation instituted, without provision being made for segregation of a prisoner from inspection upon his request, or some other reasonable means of protecting the prisoner's rights, such a regulation could be open to objection on these grounds. It is impossible to say that a court might not find no violation of a prisoner's rights by such a regulation. However, particularly in the case of an unconvicted inmate, in view of courts' recent tendencies to expand the civil rights of citizens, it is my opinion that unless careful provision is made to protect the rights of inmates, a

regulation such as the one proposed would very probably constitute an invasion of an inmate's right of privacy.

Very truly yours,

A T T O R N E Y G E N E R A L