

Assignment:

1. Please read the following background on levels of incarceration, etc.:

- Bureau of Justice Statistics on the [prevalence of incarceration](#) (📄)
- Materials on [prisoners and demographics](#) (numbers and race) (📄)
- Schlanger, [The difference between jails and prisons](#) (📄)

2. Primarily, we'll begin our discussion of correctional administrator's discretion which will continue throughout the course. I'm assigning four cases, not so much for the doctrinal approach, which we'll discuss again more substantively, but to canvass their views of discretion:

- Complete discretion: *Cooper v. Pate*, [324 F.2d 165](#) (7th Cir. 1963) (subsequently rev'd, [378 U.S. 546](#) (1964)).
- Lots of discretion: *Turner v. Safely* (U.S. 1987), pp. 505-513 (in the casebook)
- Some discretion: *Johnson v. California* (U.S. 2005), pp. 667-679.
- Very little discretion: *Jackson v. Bishop* (8th Cir. 1968), pp. 811-815.

1. The prevalence of incarceration:

A. The decline into the 1970s; turn around, then up and up. Currently, without the federal government we'd be at a plateau.

B. Changing racial makeup. Currently, whites are a minority. But this varies by system. Some systems are nearly all minority; others nearly all white; others mixed.

C. Changing gender – but much less. Women are 13-14% of those arrested; say 10-12% of those in jail (increase from 9 to 12% nationwide since 1990); 6-8% of those in prison (5.7% in 1990; now 7%).

2. Difference between jails and prisons:

Note: different doctrinal hook.

3. Discretion:

Cooper v. Pate in the 7th Circuit.

Stateville – tough prison in Joliet; Chicago inmates. Lots of Black Muslims (now lots of gangs).
(Panopticon)

Cooper is a serious leader. Prisons are extremely suspicious of black Muslims. Why?

- 1) Correctional staff are racist.
- 2) Suspicious of any non-Christian religion.
- 3) There really is a thread of anti-white racism in black Muslim ideology.
- 4) Problems with religion in general – it creates need for differential treatment, which is hard.

Cooper wants: A koran, two language dictionaries, Arabic and Swahili

Court: Pate can do what he wants.

In the U.S. Supreme Court, Cooper is represented by two distinguished civil rights lawyers. Court rules without reasoning: “Taking as true the allegations of the complaint, as they must be on a motion to dismiss, the complaint stated a cause of action and it was error to dismiss it.”

Quite a bit of discretion:

Turner v. Safely (U.S. 1987), pp. 505-513 (in the casebook) (O’Connor)

Class action for injunctive relief and damages, here in Missouri.

Questions:

- 1) Do inmates have a first amendment right to write to non-family inmates?
- 2) Can prison restrict the right to marry to those expecting a child?

We know it’s O’Connor because it’s about the level of scrutiny, a classic O’Connor approach.

What’s the issue for the prison authorities?

- 1) First Amendment
 - a) contraband
 - b) code
 - c) coordinated conduct (revealing who’s in pc, etc.)
- 2) Marriage restriction
 - a) They think it’s fake, because there’s no sex.
 - b) “love triangles”
 - c) bad choices of husbands/distraction

So standard: “When a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” (p. 507)

Objective must be “legitimate and neutral,” and in 1st Am. context, content neutral (or viewpoint neutral anyway).

Alternative avenues available to inmates

Penological cost to prison of accommodation.

Availability of alternatives to prison.

Why? Deference to correctional administrators, because of the “intractable” nature of the problems, and just because.

They uphold the correspondence ban, strike down the marriage ban.

Some discretion:

Johnson v. California (U.S. 2005), pp. 667-679 (O’Connor, J.)

Racial segregation of new inmates in reception centers: Chinese, Japanese, Northern California Hispanic, Southern California Hispanic, etc.

Issue: Strict scrutiny or Turner standard.

Interest of prison:

- a) Avoid racial tension based on discontent with celling
- b) Avoid in-cell violence

Court: Strict scrutiny. Equal protection is not inconsistent with good correctional practice. [This is bootstrapping.] Remand for consideration of particularized showing.

Stevens: No remand necessary; judgment for the plaintiff.

Thomas/Scalia: Turner is the standard; there are perfectly good reasons to pay attention to race here.

Very little discretion:

Jackson v. Bishop (8th Cir. 1968), pp. 811-815. (Blackmun, circuit judge)

Famous case: leading case on corporal punishment in prison.

Use of the strap as a punishment.

District court: Corporal punishment must be less discretionary: rules, not excessive, notice, etc.

State interest:

- a) Obedience
- b) Work incentive
- c) absence of other methods of discipline (segregation, denial of privileges)

Court of Appeals:

Rules are not enough: they can be (and often are) ignored,

the results can be sadistic and terrible;

inability to draw the line between ok whipping and not ok whipping.

Anyway, whipping has terrible effects; engenders bitterness and hatred.