CONVICTS AND THE CONSTITUTION IN INDIANA

NILE STANTON*

I. INTRODUCTION

A decision of nearly landmark dimension, affecting Indiana corrections, has been rendered by the United States District Court for the Northern District of Indiana. In *Aikens v. Lash*[1], the federal court put an abrupt halt to various Department of Correction abuses of prisoners' constitutional rights.[2] The Indiana Department of Correction (DOC) has, in general, run roughshod over the rights of inmates and directly precipitated lengthy and costly litigation by stubbornly refusing to voluntarily acknowledge those rights. In view of *Aikens*, it should be clear to the DOC that, despite past omniscient presumptions to the contrary, its policies and procedures are not immune from judicial inquiry.[3]

II. THE AIKENS CASE

For the convenience of the parties and witnesses, and to make possible any court inspection of prison facilities or proceedings, the visitors lounge in the Administration Building of the Indiana State Prison was converted into a courtroom for the *Aikens* trial.

---

*Executive Director, Indianapolis Lawyers Commission. B.S., Ball State University, 1965; M.A., Ball State University, 1969; J.D., Indiana University, 1973. The views expressed herein are the author's and should not be construed as those of the Lawyers Commission.

[1]No. 72-S-129 (N.D. Ind., Jan. 23, 1974).

[2]In Cruz v. Beto, 405 U.S. 319, 321 (1972), the United States Supreme Court declared that "[f]ederal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons,' including prisoners."

[3]Until the last decade, courts generally refused to review prisoner allegations of mistreatment, *viz.* a "hands-off" doctrine was invoked to avert judicial eyes from the policies and practices used by prison administrators. *E.g.*, Stroud v. Swope, 187 F.2d 850 (9th Cir. 1951); Golub v. Krimsky, 185 F. Supp. 783 (S.D.N.Y. 1960); *see* J. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS § 4.2 (1973); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963). The doctrine was seriously eroded by Monroe v. Pape, 365 U.S. 167 (1961), which held that exhaustion of state remedies was not a condition precedent to federal jurisdiction to hear a claim brought under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), and completely dispelled by Cooper v. Pate, 378 U.S. 576 (1964). *See generally* Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 55 VA. L. REV. 841 (1971).

For ten long days, trial was held on four issues—the class[4] of inmates contended that (1) they were deprived of due process of law by disciplinary transfers from the Indiana Reformatory to the Indiana State Prison where, upon arrival, they were kept in seclusion for at least thirty days; (2) they were deprived of various constitutional rights when they were kept incarcerated in "I" Cellhouse Detention Unit (IDU) for more than sixty continuous days without adequate exercise and recreation, medical services, doctor-prescribed special diets, sanitary and nutritional food, opportunity and equipment for personal and environmental cleanliness, access to an adequate law library, and literature which did not pose a clear and present danger to prison security; (3) they were deprived of various constitutional rights when they were kept in the Deputy's Office Segregation Unit (D.O. Seclusion) for more than thirty continuous days with deprivations similar to, but more pronounced than, those in IDU; and (4) their rights under the first, sixth, and fourteenth amendments to the United States Constitution were infringed by the prison officials' practice of opening, reading, censoring, copying, stopping, and otherwise interfering with mail sent between prisoners and attorneys.[5] Obviously, more was at issue in *Aikens* than four simple and independent claims.

A. Censorship of Attorney-Inmate Mail

On October 22, 1973, at the close of all the evidence, one issue was summarily disposed of in favor of the plaintiffs: The court ordered that "attorney and client must have a free opportunity to communicate by mail and that opportunity must not be encumbered by the chilling effect of [censorship]."[6] The free flow of attorney-inmate mail was subjected to one narrow limitation. If prison authorities have "reasonable grounds" to believe that a piece of attorney-inmate mail contains contrabrand, then, and only then, may an official open that piece of mail. Even then, however, the opening must be made in the "immediate presence of

---

[4]The vast majority of "prison law" cases have been maintained as class actions pursuant to federal rule 23(a)(1), as was *Aikens*. Jurisdiction is normally invoked under 28 U.S.C. §§ 1331, 1343(3)-(4), 1361, 2201, 2202 (1970); and nearly all such litigation is based upon 42 U.S.C. §§ 1983-85 (1970), the Civil Rights Act of 1871. *See generally* Note, *Prisoners Rights Under Section 1983*, 57 GEO. L.J. 1270 (1969).

[5]Aikens v. Lash, No. 72-S-129, at 5-7 (N.D. Ind., Jan. 23, 1974).

[6]*Id.* at 8.

the inmate involved"[7] and the mail delivered over to the inmate promptly and without any reading, censoring, copying, or other interference.

Relying on the Seventh Circuit's decision in *Adams v. Carlson*,[8] the district court in *Aikens* found that there had been no showing that attorney-inmate mail had posed any threat to the order or security of the prison, and the court posited its bar to censorship on that finding. Had Warden Lash been able to prove that there had been intermittent, if not frequent, security threats created by attorney-inmate communications, the court would have very likely refrained from imposing such an insurmountable[9] bar to censorship.

It is true that attorney-inmate communications are closely related to the fundamental right of access to the courts.[10] And the *Aikens*-type bar will, perhaps, lead to a more candid discussion between inmates and attorneys of matters relating to convictions and prison abuses. Sixth amendment considerations, however, do not automatically require an *Aikens*-type prohibition.[11] The court

---

[7] *Id.* (original emphasis).

[8] 488 F.2d 619, 632 (7th Cir. 1973). "[P]rison authorities may not restrict the exercise of constitutional rights by those in their charge without showing a threat to the order or security of their institution."

[9] What constitutes "reasonable grounds" for prison officials to believe that attorney-inmate mail contains contraband? If a package activates the metal-detector or a dog trained to find drugs reacts to the smell of an item of mail, "reasonable grounds" would certainly exist. However, it is doubtful that a lesser indicia of the probable presence of contraband could meet any viable constitutional standard, such as the standard imposed by *Aikens*. *See* Marsh v. Moore, 325 F. Supp. 392 (D. Mass. 1971), in which the court enjoined censorship and opening of attorney-inmate mail since inspection for physical contraband could be accomplished with a fluoroscope, metal-detector, or by manual manipulation.

[10] *Ex parte* Hull, 312 U.S. 546 (1941), established that inmates have a fundamental right of unfettered access to the courts. As was noted in Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973):

> The judiciary . . . has not been content merely to keep free the lines of communication between the inmate, the courts, and agencies of correction. Whether as a vital concomitant of the prisoner's right to petition the bench or as a distinct requirement of his right to effective counsel guaranteed by the Sixth Amendment, a right of access by an inmate to counsel has been perceived . . . .

Id. at 630. *See* Smith v. Robbins, 454 F.2d 696 (1st Cir. 1972); J. PALMER, *supra* note 3, at §§ 3.2 to 3.3.1.

[11] *See, e.g.*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972), which held that prison officials could open and read

did not explain why it concluded that access to the courts was "chilled" by censoring or copying mail. Abuses of first and fourteenth amendment rights "chill" attorney-client dialogue,[12] and, although such abuses were not detailed in the *Aikens* decision, the DOC has such a distinct proclivity for such abuses[13] that the sweeping attorney-inmate right to correspond freely, and the concomitant onus placed upon prison officials, was certainly justified.

B. Disciplinary Transfers

Disciplinary transfers to the prison from the reformatory, made without benefit of prior due process hearings, were carefully scrutinized by the *Aikens* court.[14] Until mid-1972, no inmates were afforded any hearings on proposed disciplinary transfers.[15] After July 1, 1972, potential transferees were allowed two-stage hearings[16] until new DOC regulations became effective on August 27, 1973. Hearings were allowed pursuant to the new regulations, but neither these nor the earlier hearings afforded the full panoply of procedural due process guarantees.[17]

---

attorney-inmate mail but could not delete anything from such letters or refuse to forward them.

[12]Fox, *The First Amendment Rights of Prisoners*, 63 J. CRIM. L.C. & P.S. 162, 171-80 (1972). *See generally* Note, *Prison Mail Censorship and the First Amendment*, 81 YALE L.J. 87 (1971).

[13]For example, an attorney wrote to an inmate at the Indiana State Prison and in that letter made remarks which were critical of a certain federal district court judge. A prison official opened that letter, made photocopies of it, and mailed it to several persons, including the federal judge who had been criticized. Receipt of the photocopied attorney-inmate letter was testified to by that judge at the *Aikens* trial.

[14]No. 72-S-129, at 8-17.

[15]*Id.* at 8.

[16]*Id.* at 9.

[17]In the two-stage hearing, potential transferees would first appear before the reformatory's Conduct Adjustment Board (CAB); and, if the CAB recommended transfer, a hearing was held before the Classification Committee. Although a prisoner could object to the proposed transfer, he could neither present witnesses in his behalf nor cross-examine his accusers, and he could not have assistance of counsel or a lay advocate. *Id.*

The new regulations also failed to allow the above procedural safeguards. *Id.* Although these regulations specifically sanctioned "transfer to another institution" upon conviction of a major violation, the DOC euphemistically stated that such transfers were not "disciplinary action." Indiana Department of Correction, Regulation 2-04, "Adult Authority Policy Regarding Institutional Discipline," Aug. 27, 1973 (mimeograph). "At the conclusion of

With respect to disciplinary transfers, the threshold question was whether inmates suffered grievous losses as a result of the transfers. For, if a practice can inflict such a loss upon any citizen,[18] that practice must comport with certain standards of procedural fairness.[19] The *Aikens* court found that each transferee was in fact subjected to a "grievous loss"[20] and, therefore, balanced the interests of the state with those of the prisoners to ascertain what process was due.[21] Carefully extracting appropriate legal principles from two recent Seventh Circuit decisions, *Adams v. Carlson*[22] and *United States ex rel. Miller v. Twomey*,[23] and prudently taking into consideration recent United States Supreme Court rulings,[24] the *Aikens* court—after making an exception for

---

any disciplinary action, . . . an inmate may be reviewed . . . to determine if any change in assignment is appropriate. This process shall not be considered a disciplinary action or a punishment." *Id.* at 7. The Aikens court found the difference "wholly one of semantics. By whatever name they [the disciplinary transfers] are called, the loss to the prisoner is equally grievous." No. 72-S-129, at 8.

[18]*See* Cruz v. Beto, 405 U.S. 319, 321 (1972).

[19]*See* Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

[20]No. 72-S-129, at 12, 15-16. The "grievous loss" was the "prolonged segregated confinement" at the prison to which each disciplinary transferee was subjected. The *Aikens* court also took cognizance of the fact that the parole board took records of disciplinary transfers into account in making its decision as to whether parole should be granted. *Id.* at 11. *See* United States *ex rel.* Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973), which interpreted Morrissey v. Brewer, 408 U.S. 471 (1972), to require "that due process precede any substantial deprivation of the liberty of persons in custody." 479 F.2d at 713.

[21]No. 72-S-129, at 12-13. The state's interests were to have effective prison administration, to maintain legitimate prison functions, such as custody, and, most importantly, to obtain rehabilitation of the prisoners.

[22]488 F.2d 619 (7th Cir. 1973). "What a prisoner suffers upon segregation . . . differs from what he suffered upon conviction by shades of degree, not of kind. That the prisoner is convicted by an administrative prison board instead of a court makes no significant difference." *Id.* at 627.

[23]479 F.2d 701, 713 (7th Cir. 1973).

[24]Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

emergency situations[25]—set forth "minimal due process standards"[26] to be applied to all disciplinary transfers.

The minima required by *Aikens* are these: 1) adequate and timely advance written notice that a transfer is contemplated, which notice must include a statement of the reason for the proposed transfer,[27] 2) an impartial hearing tribunal, which may consist of one or more institutional personnel but may not include the accuser, one who has investigated the case, or one who has been involved in the recommendation for transfer, 3) a fair opportunity for the inmate to explain his conduct, *i.e.*, to appear and speak in his own behalf,[28] 4) a fair opportunity to confront and cross examine adverse witnesses and to call witnesses in his own behalf,[29] 5) representation by a lay advocate,[30] 6) a written copy of a statement of findings of fact and conclusion, based on sub-

---

[25]

> In a true emergency situation, one wherein the general security of the institution is immediately threatened, a disciplinary transfer . . . may be allowed without a prior notice and hearing, provided, however, that where such emergency transfer is effected, the transferred inmate must be given a hearing within five days of the date of his arrival at the transferee institution . . . .

No. 72-S-129, at 16.

[26]*Id.* Minimal standards required by the Seventh Circuit in *Miller* for internal disciplinary hearings were much less exacting. *See* 479 F.2d at 718. However, the *Miller* court admonished that "in the end we may simply transplant the *Morrissey* requirements." *Id.* at 718 n.37.

[27]Notice must be given not less than two days before the hearing and must state the time and date of the hearing. No. 72-S-129, at 1 (N.D. Ind., Order of Feb. 8, 1974).

[28]This fundamental indicia of fairness was, shockingly, denied on occasion. *See* T. Crowder, Three Years in Solitary: Prison Letters of Thomas Crowder 29 (AFSC Pamphlet, Feb. 1973). Crowder was a named plaintiff in the *Aikens* case, and his pamphlet should be read by everyone concerned about Indiana prison practices and their impact upon inmates.

[29]Contrary to a requirement of *Miller*, 479 F.2d at 718, DOC policy did not allow any "fair opportunity" to call witnesses. Regulation 2-04, *supra* note 17, at 1-2. In *Adams*, the court of appeals observed that "a 'fair opportunity' can scarcely be said to exist if prison authorities were predisposed to deny any request for witnesses." 488 F.2d at 629 n.17.

[30]Warden Lash had allowed attorneys to represent inmates in internal disciplinary hearings, until new Regulation 2-04, *supra* note 17, at 1, was adopted.

stantial evidence, and, 7) administrative review by the Commissioner of Corrections or his designate. The court opined that these minimal safeguards were "reasonable and feasible and . . . would present no problems to the administration of the institutions involved."[31] The procedural requirements were made fully retroactive,[32] and the DOC was ordered to provide due process hearings within ten days to all prisoners who were in segregation at the state prison due to a disciplinary transfer.

Although most courts have not required due process hearings prior to disciplinary transfers,[33] the requirements imposed by *Aikens* were necessitated by the severe losses which transferees suffered. Therefore, it would not be improper for due process hearings to be disallowed if the losses were eliminated or made much less severe. For example, after the recently funded training-treatment programs[34] are in progress at the prison, reformatory officials could cease the hearings if, upon their arrival at the prison, inmates were not segregated and no record of the disciplinary transfer were presented to the parole board. If it is deemed necessary to subject a particular inmate to a "grievous loss" upon transfer, that inmate, of course, would be entitled to a timely *Aikens*-type hearing.

The portion of the *Aikens* decision which set forth the due process standards noted above immediately gave rise to some very important questions: Are the inmates who have been transferred from camps, work release, or study release programs back to the reformatory or prison entitled to *Aikens*-type hearings? Since the court noted that internal disciplinary proceedings normally result in the same types of deprivations as did disciplinary transfers, must the full panoply of *Aikens* due process rights also be afforded in the purely internal disciplinary proceedings? Both

---

[31]No. 72-S-129, at 17.

[32]*Id.*, *relying on* 488 F.2d at 625-29, in which the Seventh Circuit, in *Adams*, detailed why the *Miller* requirements were fully retroactive.

[33]*E.g.*, United States *ex rel.* Thomas v. Bookbinder, 330 F. Supp. 1125 (E.D. Pa. 1971); Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971). *But cf.* Matthews v. Hardy, 420 F.2d 607 (D.C. Cir. 1969), which required that numerous safeguards be afforded prior to transfer from a prison to a mental hospital.

[34]Reference is made to the $450,000 Law Enforcement Assistance Administration grant which will fund joint DOC - Ivy Technical College training programs.

questions must be answered "Yes."[35] Is it of any consequence that an inmate pleaded guilty to an offense which resulted in a grievous loss? No.[36] Other questions which arise from this portion of the judgment should also be liberally resolved in favor of the inmates unless an emergency situation exists or no important inmate right or interest is at stake.

C. Cruel and Unusual Punishment

Until the *Aikens* decision, the prison confined some inmates in "strip cells" in the maximum security segregation unit, D.O. Seclusion. These cells had a commode and a wash basin, but nothing else. There were no windows and no lights. There was no bed. Mattresses, when they were delivered at all, were given to inmates in the late afternoon and taken back each morning. Sometimes the inmates were taken out to shower and shave once a week, but at other times the interval between showers was several weeks. If the inmates got noisy, chemical mace was sprayed at them, and then the solid doors were closed to trap the gas with the inmates.[37] Several courts have found such treatment to be violative of the prohibition against cruel and unusual punishment.[38] *Aikens,* however, went far beyond a simple holding that "strip cell" abuses constituted legally impermissible conduct. For the

---

[35]A transfer from work release or study release to either the reformatory or prison results in a much more stringent type of custody. Indeed, such a transfer is quite analagous to a probationer's or parolee's becoming a prisoner; it is, therefore, of paramount importance that the releasee be afforded the same sorts of procedural safeguards to which probationers and parolees are entitled in revocation proceedings. *See* Russell v. Douthitt, 304 N.E.2d 793 (Ind. 1973), in which the Supreme Court of Indiana mandated that a "regular full-blown trial" be afforded prior to revocation of parole.

With respect to the internal prison disciplinary hearings, the *Aikens* guarantees must be afforded since the "grievous loss" at stake is precisely the same severe loss to which disciplinary transferees were subjected and since the state's interest remains constant. Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971). *See* J. PALMER, *supra* note 3, at ch. 7; Millemann, *Prison Disciplinary Hearings and Procedural Due Process—The Requirement of a Full Administrative Hearing,* 31 MD. L. REV. 27 (1971).

[36]Unless an inmate who pleaded guilty was properly advised of his rights and waived them, a finding of guilt was not proper since a waiver of constitutional rights cannot be presumed. *See* Boykin v. Alabama, 395 U.S. 238, 243 (1969); Brimhall v. State, 279 N.E.2d 557, 564 (Ind. 1972).

[37]No. 72-S-129, at 26. T. Crowder, *supra* note 28, at 27-28.

[38]*E.g.*, Knuckles v. Prasse, 435 F.2d 1255 (3d Cir. 1971), *aff'g* 302 F. Supp. 1036 (E.D. Pa. 1969); Hancock v. Avery, 301 F. Supp. 286 (M.D. Tenn. 1969); *see* J. PALMER, *supra* note 3, at § 4.3.2.

first time in the nation's history, the totality of conditions in an adult penal institution's maximum segregation unit were found to inflict cruel and unusual punishment.[39] Not only did *Aikens* condemn the prison's "strip cells"—the entire D.O. Seclusion was ordered closed within twenty days.

In past years, D.O. Seclusion was called "'Death Row." It was where prisoners were confined to await electrocution. The cells were relatively large. Cells had windows at the back, but these were sealed by solid metal plates which kept out fresh air and sunlight. In the small entryways between the iron-bar cell doors and solid-wood outer doors were single light bulbs. The cells were normally "hot and damp, as well as dingy and dark."[40] Most cells had cot-type beds. The flushing of commodes and sinks was controlled, in first floor cells, by guards outside the cells. These and other conditions led experts to conclude that D.O. Seclusion afforded the worst incidents to incarceration they had ever witnessed anywhere in the nation.[41] Yet, due to the infinite wisdom of some Indiana DOC officials about rehabilitative[42] processes, some prisoners were kept in D.O. Seclusion for years.

The *Aikens* court applied the cruel and unusual punishment test established in *Jackson v. Bishop*,[43] *i.e.*, whether the punishment in question offended "contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess."[44]

---

[39]No. 72-S-129, at 28.

[40]*Id.* at 25.

[41]One expert, testifying about D.O. Seclusion, opined:

> It is about the worst I have seen any place. It is a mess. It ought to be torn down. . . . I would tear it out as a question of public safety. A man that goes through that and then is put on the streets is a danger to the public. . . . D.O. Seclusion, as it is operating now, is not for men; it is for animals.

Id. at 27. Another expert witness, Lawrence A. Carpenter, testified:

> It is one of the worst units, if not the worst housing unit, I have ever seen in 30 years of prison work in visiting scores of prisons around this country. It could be called a "dungeon" except that it is not subterranean, but it might as well be subterranean because there is no daylight coming in there. . . .

Id. *See generally* T. Crowder, *supra* note 28.

[42]IND. CONST. art. 1, § 18: "The penal code shall be founded on the principles of reformation, and not of vindictive justice."

[43]404 F.2d 571 (8th Cir. 1968).

[44]*Id.* at 579.

And the Seventh Circuit standard, as enunciated in *United States ex rel. Miller v. Twomey*,[45] was considered: In *Miller*, it was opined that the eighth amendment could be violated either by "the intentional infliction of punishment which is cruel or by such callous indifference to the predictable consequences of substandard prison conditions that an official intent to inflict unwarranted harm may be inferred."[46] Utilizing these principles in *Aikens*, Judge Grant held that the "totality of conditions" in D.O. Seclusion violated the eighth amendment's prohibition against cruel and unusual punishment.[47] The *Aikens* court found conditions in D.O. Seclusion to be "shockingly inhumane" and "abhorrent to any efforts at rehabilitation" and to "threaten the sanity of the inmates . . . ."[48] As indicated earlier, Judge Grant ordered the segregation unit closed within twenty days.

D. The Law Library

In *Johnson v. Avery*,[49] a 1969 United States Supreme Court decision, it was held that if inmates are not provided with adequate legal services, prison officials cannot forbid a "jailhouse lawyer" from rendering legal assistance to other inmates. Two years later, in *Younger v. Gilmore*,[50] the Court greatly extrapolated from *Johnson* when it affirmed, per curiam, a lower court decision which held that it was a denial of access to the courts for states to restrict prison law libraries from having an adequate supply of useful law books. Subsequent cases have held that *Gilmore* must be construed to impose an affirmative obligation upon states to purchase and make readily available to inmates good prison law libraries.[51]

---

[45]479 F.2d 701 (7th Cir. 1973).

[46]*Id.* at 719-20. *See* Furman v. Georgia, 408 U.S. 238, 271-74 (1972) (Brennan, J., concurring).

[47]No. 72-S-129, at 28.

[48]*Id.* at 28-29. *See* W. Webb, Anatomy of a Prison Rebellion 6-9, Nov. 1973 (mimeograph) (on file in the *Indiana Law Review* office).

[49]393 U.S. 483 (1969), a decision criticized by Chief Justice Arterburn of the Supreme Court of Indiana in 17 RES GESTAE, Aug. 1973, at 10.

[50]404 U.S. 15 (1971), *aff'g per curiam.* Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970); *see* J. PALMER, *supra* note 3, at § 6.6.

[51]*E.g.*, Hooks v. Wainwright, 352 F. Supp. 163 (M.D. Fla. 1972); Morales v. Schmidt, 340 F. Supp. 544 (W.D. Wis. 1972).

Upon observing that prisoners confined in IDU and D.O. Seclusion were refused access to any of the state prison's law books and that the "scanty" law library itself was "wholly inadequate,"[52] Judge Grant, in *Aikens*, followed recent guidance afforded by the Seventh Circuit[53] and held that the inmates' "right to access to adequate legal materials" had been "seriously infringed." Accordingly, on February 8, 1974, the *Aikens* court ordered the prison to "maintain a law library for prisoner use which shall contain current editions, having the latest available advance sheets, supplements, and pocket parts of [various legal materials]."[54] And it was directed that inmates in segregation be accorded access to the library and advised of its manner of operation.[55]

III. Conclusion

In the *Aikens* decision, Judge Grant left two issues unresolved, at least temporarily. The court ruled against plaintiffs on their various constitutional challenges against IDU segregation, but the court retained jurisdiction and indicated that it might review those challenges after the 1974 Indiana General Assembly had a chance to act on the problems.[56] Hope was expressed that "an aroused citizenry and an enlightened legislature" would recognize and act upon "the crying needs of our Indiana prison system."[57] Some of the gross abuses which the *Aikens* trial and decision brought to light could be prevented, or at least ameliorated, by providing the DOC with more staff—guards, doctors, psychiatrists, and counselors. But the General Assembly has not acted.

The other major issue left unresolved was that pertaining to censorship of literature. The court retained jurisdiction and will issue a supplementary decision on that point after the United States Court of Appeals for the Seventh Circuit renders an opinion

---

[52]No. 72-S-129, at 29.

[53]Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973):

> Along with the recognition of a prisoner's right of access to the courts has come the realization that a prisoner must have access to legal materials, particularly where he is unable to retain counsel and must petition the courts *pro se*.

Id. at 632. *See* Knell v. Bensinger, No. 72-1788, at 5 (7th Cir., Nov. 6, 1973).

[54]No. 72-S-129, at 3 (N.D. Ind., Order of Feb. 8, 1974).

[55]*Id.*

[56]No. 72-S-129, at 23-24.

[57]*Id.* at 24.

in a case which it has reheard en banc.[58] Censorship of literature at the state prison is not as serious as other problems, of course. The censorship practices are, however, rather silly. Literature which poses a "clear and present danger" to the operation of the prison should be prohibited, but what useful purpose is served by banning *Playboy*?[59] And what purpose was served by prohibiting Thomas Crowder from saving a copy of his pamphlet, which consists of letters that went out of the prison after being censored? Perhaps a new legal principle should be developed: Whenever state agents act sober and serious and under the guise of security while doing things which, in addition to being unneeded, are fickle and funny, but sometimes infuriating, and which action under such guise tends to elicit judicial chuckles, those state agents should not be allowed to exercise authority over other human beings. In a word, silliness should not be tolerated when it affects the constitutional rights of those who cannot, lawfully, escape the silliness.

The *Aikens* decision exorcized some cruel abuses. It demonstrated that too many Indiana citizens have for too long ignored what happens inside the walls of the state's penal institutions. And the decision was solidly based on established law. Hopefully, one *Aikens* will be enough. The DOC will survive the shame, and it should finally begin to take affirmative action to avoid more and to help those who are in its care.[60]

---

[58]Morales v. Schmidt, No. 72-1373 (7th Cir. 1973). *See* J. PALMER, *supra* note 3, at §§ 3.7-.9.

[59]The magazine is not barred from the Indiana Reformatory, which has a more liberal or, at least, a more consistently applied censorship standard and therefore has fewer problems about censorship.

[60]As one court suggested, "[O]ne function [of the penal system] is to try to rehabilitate the law breaker by convincing him of the validity of our legal system. There is little chance that such an objective will be achieved if prisoners are entrusted to those who likewise break the law by denying prisoners their basic constitutional rights." Sostre v. Rockefeller, 312 F. Supp. 863, 876 (S.D.N.Y. 1970), *rev'd in part sub nom.*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972).