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PROCEDURAL DUE PROCESS AND THE CONVICTED PRISONER

INTRODUCTION

Due process has not always been a right which convicted prisoners could claim. Public disdain for "convicts," and judicial abstention from interference with prison administration, have both been so firmly engrained in American culture that not until the 1960's did the phrase "prisoners' rights" come into vogue.[1] The traditional socio-legal policy that a convicted person forfeits substantially all his rights at the prison gates[2] is at present being swiftly eroded. The Supreme Court has recently declared that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."[3] Although the proscription against cruel and unusual punishment contained in the eighth amendment has been instrumental in contributing to this new policy,[4] the major force behind the change is the due process clause of the fifth and fourteenth amendments.[5]

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1. *See generally* M. HERMANN & M. HAFT, PRISONERS' RIGHTS SOURCEBOOK (1973); Jacob, *Prison Discipline and Inmate Rights*, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 227 (1970); Plotkin, *Recent Developments in the Law of Prisoners' Rights*, 11 CRIM. L. BULL. 405 (1975); Stephens, *The Burger Court: New Dimensions in Criminal Justice*, 60 GEO. L.J. 249 (1971); *Special Report, The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970); Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962): Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

2. *See* Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871), holding that "[the convicted felon] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State."

3. Wolff v. McDonnell, 418 U.S. 539, 555-56 (1973). In another case the Court said that "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution." Procunier v. Martinez, 416 U.S. 396, 405 (1973).

4. *See* Furman v. Georgia, 408 U.S. 238 (1972) (unconstitutionality of certain death penalty statutes); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (entire prison held violative of the eighth amendment when the conditions of confinement were so base as to be contemptuous).

Two enlightening articles on the subject are Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 186-208 (1970), and Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969).

5. The plethora of literature on due process in the prison setting points out the trend in case law. *See generally* Hermann, Schwartz, Kolleeny, Campana & Harvey, *Due Process in Prison Disciplinary Proceedings: Meyers v. Alldredge*, 29 GUILD PRAC. 79 (1972); Millemann, *Prison Disciplinary Hearings and Procedural Due Process—The Requirement of a Full Administrative Hearing*, 31 MD. L. REV. 27 (1971); Tobriner & Cohen, *How Much Process is "Due"? Parolees and Prisoners*, 25 HASTINGS

Basic to an understanding of the newly recognized procedural rights of convicted prisoners is some background on the constitutional doctrine of due process in general. The express language of the fifth and fourteenth amendments to the United States Constitution[6] protects the individual from governmental action depriving him of life, liberty, or property without due process of law. This phrase has been interpreted to have as its purpose the protection of the individual from arbitrary or capricious governmental action.[7] The opportunity to be heard at a fair and impartial hearing is a precondition to the deprivation of a protected liberty or property interest.[8] However, not every case of government impairment of private interests is protected by procedural safeguards.[9] Whether procedural formalities are required depends on the magnitude of the interest being affected by the state.

Whether a given interest is of sufficient magnitude to be given due process protection is a troublesome question for the courts. One line of cases holds that the test is whether the individual will be "condemned to suffer grievous loss,"[10] while another view "reject[s] at the outset the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause."[11] In any event, when due process is found to be applicable, certain proce-

L.J. 801 (1974); Wick, *Procedural Due Process in Prison Disciplinary Hearings: The Case for Specific Constitutional Requirements,* 18 S.D.L. REV. 309 (1973); Note, *Due Process at In-Prison Disciplinary Proceedings,* 50 CHI.-KENT. L. REV. 498 (1973); Note, *Backwash Benefits for Second Class Citizens: Prisoners' First Amendment and Procedural Due Process Rights,* 46 COLUM. L. REV. 377 (1975); Note, *The Evolving Right of Due Process at Prison Disciplinary Hearings,* 42 FORDHAM L. REV. 878 (1974); Comment, *The Fourteenth Amendment and Prisons: A New Look at Due Process for Prisoners,* 26 HASTINGS L.J. 1277 (1975); Comment, *Federal Court Intervention in State Prison Internal Disciplinary Hearings to Guarantee Fourteenth Amendment Procedural Due Process,* 17 WAYNE L. REV. 931 (1971).

6. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. *See also* U.S. CONST. amend. V.

7. Dent v. West Virginia, 129 U.S. 114, 124 (1889).

8. Grannis v. Ordean, 234 U.S. 385, 394 (1914). More recent Supreme Court cases using this language are Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

9. The nature of the individual's interest must come within the contemplation of the "liberty or property" language of the due process clause. Fuentes v. Shevin, 407 U.S. 67, 84 (1972).

10. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), *quoted in* Goldberg v. Kelly, 397 U.S. 254, 263 (1970) *and* Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

11. Meachum v. Fano, 96 S. Ct. 2532, 2538 (1976).

dural safeguards, the requirements of which vary according to the factual situation, will be required to insure that the fact finding process upon which the governmental action is predicated is a fair one.[12]

If due process is to have any meaning behind prison walls, it must serve to protect the prisoner from an arbitrary determination that he deserves major punishment for having violated a prison rule when such a determination is based upon a factual finding of guilt. That proposition is now undisputed,[13] but it is quite another thing to find agreement on what punishment or other change in circumstances of confinement should be considered serious enough to warrant procedural protections. In the constitutional sense, the crucial distinction between grievous and non-grievous deprivations of rights or privileges is one of degree and not of kind. The determining factor is the nature of the interest involved, rather than its weight.[14]

The purpose of this comment is to identify those interests of convicted persons which are protected from arbitrary infringement, and to describe, when applicable, the specific dictates of due process.

PAROLE AND PROBATION

The purpose of parole is to enable the individual to return to society as a constructive citizen as soon as possible. To be eligible for parole, the prisoner must have served a statutorily prescribed minimum portion of his sentence. Once the prisoner becomes eligible, a parole board must determine within its discretion, whether he is ready to reintegrate himself into society.[15]

12. A recent case explaining the due process formula is Mathews v. Eldridge, 424 U.S. 319 (1976), which dealt with the withdrawal of disability benefits under the Social Security Act:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors; first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 903.

13. Wolff v. McDonnell, 418 U.S. 539 (1974).

14. Meachum v. Fano, 96 S. Ct. 2532, 2538 (1976); Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).

15. Morrissey v. Brewer, 408 U.S. 471, 477 (1972). Background on the purpose of parole can be found in the following sources: Cohen, *Due Process, Equal Protection and State Parole Revocation Proceedings*, 42 COLUM. L. REV. 197 (1970); Note, *Parole Revocation in the Federal System*, 56 GEO. L.J. 705 (1968); Note, *Implications of Morrissey v. Brewer for Prison Disciplinary Hearings in Indiana*, 49 IND. L.J. 306 (1974); Note, *Parole: A Critique of Its Legal Foundations and Conditions*, 38 N.Y.U.L. REV. 702 (1963); Note, *Observations on the Administration of Parole*, 79 YALE L.J. 698 (1970).

The conditional liberty granted to a parolee belongs to that class of rights and privileges the termination of which constitutes grievous loss.[16]

Society also has an interest in the status of the parolee. He has been convicted of a crime justifying extensive restrictions on his liberty. Release on parole creates a risk that other crimes will be committed. The conditions of parole prohibit certain behavior that might increase this risk, and also provide the parole officer an opportunity to monitor and advise the parolee. If in fact the parolee fails to abide by the conditions of his parole, society has a great interest in being able to return him to prison without affording the full panoply of rights due a defendant in a criminal proceeding.[17] The decision to revoke must include a consideration of whether the parolee in fact violated the conditions of parole, and, whether a return to prison is the best measure for the protection of society and for rehabilitative interests of the parolee.

Revocation Hearings

Balancing the interests of the individual and society, the Supreme Court held in *Morrissey v. Brewer*[18] that upon arrest of a parolee for violation of the conditions of his parole, due process requires a preliminary hearing to determine whether there exists probable cause that the conditions have been violated.[19] In addition, the parolee is entitled to a hearing before the parole board within a reasonable time after return to custody. This second hearing is on the ultimate decision to revoke rather than a mere determination of probable cause. At the second hearing, the parolee may show that he was not guilty of violating his parole, and may also show mitigating circumstances. The hearing must include the following due process requirements:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written

16. *See* note 10 *supra*.
17. Morrissey v. Brewer, 408 U.S. 471, 483 (1972).
18. *Id.*
19. The parolee is entitled to the following: a hearing before an impartial decision maker, notice of the charges, an opportunity to present evidence, the right to confrontation and cross-examination of adverse witnesses (unless there is a risk of harm to the informant), a written record of the evidence presented at the hearing, and a written statement of the reasons and evidence relied on by the decision maker. *Id.* at 485-87.

statement by the factfinders as to the evidence relied on and the reasons for revoking parole.[20]

One question left unanswered in *Morrissey* is whether a parolee is entitled to counsel at these hearings. The Supreme Court addressed the issue in *Gagnon v. Scarpelli*,[21] a case that involved the rights of an individual who alleged that his probation was revoked without a hearing of any sort. After recognizing that the competing interests between the individual and the government are the same in the context of probation revocation as they are in parole revocation decisions, the Court held that the *Morrissey* due process requirements must be met in the former as well as the latter.[22] In considering the right to counsel issue, Justice Powell, writing for the majority, stated that there is no constitutional right to counsel in all revocation hearings, but that the decision as to the need for counsel should be made on a case by case basis under the following guidelines:[23] if the probationer denies having violated the conditions of his liberty, or there are complex, difficult-to-present and substantially mitigating reasons making revocation inappropriate, then the right to counsel should presumptively attach. The decision-maker should consider whether the person seeking counsel is capable of effectively speaking for himself. If counsel is denied, the grounds for the denial must be stated in the record.[24]

One problem area in the interpretation of *Morrissey* involves the situation where an individual is on parole from a conviction of an offense, subsequently violates the conditions of parole by committing a separate offense, and is convicted and sentenced for the second offense. What are his due process rights regarding parole revocation from the first offense? The argument has been made that a prompt revocation hearing is not necessary because guilt of the second offense has been determined beyond a reasonable doubt.[25] Secondly, if the first offense is a federal one, and a prompt revocation hearing is held at which the parolee is found to have violated the conditions, a federal statute would cause the two sentences to be served concurrently,[26] a result which arguably interferes with the discretion of the parole board to

20. *Id.* at 489.
21. 411 U.S. 778 (1973).
22. *Id.* at 782.
23. *Id.* at 790-91.
24. *Id.* at 791.
25. Cleveland v. Ciccone, 517 F.2d 1082, 1087 (8th Cir. 1975).
26. 18 U.S.C. § 4205 (1970) provides:

A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the time he was sentenced to serve.

demand that the original sentence be served consecutively to the second sentence.[27] However, both of these arguments have been rejected in favor of the reasoning in *Morrissey* that a prompt revocation hearing may provide an opportunity to present mitigating circumstances favoring acquittal of the charges.[28]

Parole Release Hearings

Morrissey dealt with the applicability of due process to parole revocation situations. Some controversy has been generated as to whether a logical extension of the principles announced in *Morrissey* should encompass the application for parole release. Restated, the issue is whether a prisoner suffers "grievous loss" if he is arbitrarily denied parole release, and if so, what minimum procedures due process requires to insure fundamental fairness in the decision by the parole board in granting or denying parole.

In parole release proceedings, there is no present liberty at stake, but rather a "right to be considered for parole and the inchoate privilege of some earlier future release, if the parole board, in its discretion, concludes to grant it."[29] The privilege of release from restraint is not inconsequential. If the decision is to deny parole, but no factual premise supports it, the valuable features of conditional liberty otherwise gained will be postponed. A subsequent application for parole may be adversely affected because of a prior denial. Moreover, an arbitrary denial will likely have a debilitating effect on the prisoner's efforts toward rehabilitation.[30] The ultimate result of a negative decision

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27. Cleveland v. Ciccone, 517 F.2d 1082, 1087 (8th Cir. 1975).

28. *See id.*, where it was held that when a federal prisoner on parole is incarcerated in a second federal prison upon conviction of another offense which is also a violation of the conditions of his parole for the first offense, due process requires a reasonably prompt hearing on the parole violation which cannot be postponed until expiration of the intervening sentence. *See also* Cooper v. Lockhardt, 489 F.2d 308 (8th Cir. 1973) (due process requires a timely hearing for a parolee subsequently convicted and confined in another state); Gay v. United States Bd. of Parole, 394 F. Supp. 1374 (E.D. Va. 1975) (federally paroled prisoner in state jail for conviction of state offense and kept there on a federal detainer was entitled to prompt due process federal parole revocation hearing). *Accord*, Jones v. Johnston, 368 F. Supp. 571 (D.D.C. 1974); Sutherland v. District of Columbia Bd. of Parole, 366 F. Supp. 270 (D.D.C. 1973). *Contra*, Reese v. United States Bd. of Parole, 530 F.2d 231 (9th Cir. 1976); Gaddy v. Michael, 519 F.2d 669 (4th Cir. 1975); Small v. Britton, 500 F.2d 299 (10th Cir. 1974); Cook v. United States Att'y. Gen., 488 F.2d 667 (5th Cir. 1974), *cert. denied*, 419 U.S. 846 (1974); Burdette v. Nock, 480 F.2d 1010 (6th Cir. 1973).

29. Bradford v. Weinstein, 519 F.2d 728, 732 (4th Cir. 1974), *dismissed as moot*, 423 U.S. 147 (1975).

30. It is generally recognized that one of the factors in rehabilitation is the need to create the impression in the prisoner's mind that he was given a fair hearing. *In re* Gault, 387 U.S. 1 (1967). "[F]air treatment . . . will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." Morrissey v. Brewer, 408 U.S. 471, 484 (1972). Elsewhere it was said that

> the orderly care with which decisions are made by prison authority

on parole release is the continuation of incarceration. A recent series of cases have dealt with this problem.[31] The well considered consensus is that a prisoner does suffer grievous loss as a result of a parole board's decision to deny parole, and that due process is applicable.[32]

When due process is found to be applicable, a delineation of the specific requirements to fit the factual proceeding must be made. A balance of fairness must be struck between the prisoner's expectation of liberty and the interests of the state in the orderly administration of the parole system. A prisoner has a much greater stake in maintaining his conditional freedom once parole is granted than he does in securing parole in the first instance.[33] Consequently full *Morrissey-Gagnon* rights are not required in the latter situation, although the loss from arbitrary denial of parole is nevertheless sufficient to warrant some procedural safeguards. Thus, recent cases have held that the parole board must afford written standards and criteria governing the granting of parole,[34] a personal hearing before the board,[35] access to information upon which the board relies in reaching its decision,[36] and a written statement of reasons for denial of the application.[37]

> is intimately related to the level of respect with which prisoners regard that authority. There is nothing more corrosive to the fabric of a public institution such as a prison than a feeling among those whom it contains that they are being treated unfairly.

Palmigiano v. Baxter, 487 F.2d 1280, 1288 (1st Cir. 1973), *vacated and remanded,* 418 U.S. 908 (1974), *after remand,* 510 F.2d 534 (1974), *rev'd,* 425 U.S. 308 (1976).

31. Bradford v. Weinstein, 519 F.2d 728, 732 (4th Cir. 1974), *dismissed as moot,* 423 U.S. 147 (1975) (due process has application to parole eligibility proceedings in states which undertake to grant parole to certain prisoners before service of their full sentences); Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974); Franklin v. Shields, 399 F. Supp. 309 (W.D. Va. 1975), *cert. denied,* 423 U.S. 1037 (1975); Candarini v. Att'y Gen., 369 F. Supp. 1132 (E.D.N.Y. 1974); United States *ex rel.* Harrison v. Pace, 380 F. Supp. 107 (E.D. Pa. 1974); *In re* Sturm, 11 Cal. 3d 258, 521 P.2d 97, 113 Cal. Rptr. 361 (1974). *Contra,* Scarpa v. United States Bd. of Parole, 468 F.2d 31 (5th Cir. 1972), *rev'd en banc,* 477 F.2d 278 (1973), *vacated on other grounds,* 414 U.S. 809 (1973).

32. Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), *dismissed as moot,* 423 U.S. 147 (1975).

33. Morrissey v. Brewer, 408 U.S. 471, 482 n.8 (1972), *citing* United States *ex rel.* Bay v. Connecticut Bd. of Parole, 443 F.2d 1079, 1086 (2d Cir. 1971). *See also* Childs v. United States Bd. of Parole, 511 F.2d 1270, 1281 (D.C. Cir. 1974).

34. Franklin v. Shields, 399 F. Supp. 309 (W.D. Va. 1975), *cert. denied,* 423 U.S. 1037 (1975).

35. *Id. See also* Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), *dismissed as moot,* 423 U.S. 147 (1975) (decrying the unfairness of an ex parte parole application hearing).

36. Franklin v. Shields, 399 F. Supp. 309 (W.D. Va. 1975), *cert. denied,* 423 U.S. 1037 (1975); *accord,* Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974); Cooley v. Sigler, 381 F. Supp. 441 (D. Minn. 1974). *Contra,* Wiley v. United States Bd. of Parole, 380 F. Supp. 1194 (M.D. Pa. 1974); Barradali v. United States Bd. of Paroles, 362 F. Supp. 338 (M.D. Pa. 1973).

37. Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir.

In distinguishing the due process requirements of the parole release proceedings from those in the parole revocation proceedings, a recent district court case held that an applicant for parole is not entitled to call his own witnesses, to cross-examine adverse witnesses, or to be provided with counsel.[38] The interest of the parole board in conducting informal non-adversary proceedings, and the fiscal and administrative burden that such procedures would entail, are persuasive reasons for not requiring them. The parole release proceeding involves prediction of the future conduct of the inmate—there is no need for witnesses to testify to historical facts in dispute. Furthermore, the reasons for the right to counsel as announced in *Gagnon v. Scarpelli* are not present.[39]

LOSS OF GOOD TIME CREDITS AND SOLITARY CONFINEMENT

In *Wolff v. McDonnell*,[40] a state prisoner alleged that the method of revoking his good time credits[41] followed by prison authorities under state law violated his right to procedural due process. The district court in Nebraska rejected his claim, holding that due process was not applicable in correctional administration.[42] That decision was reversed by the Eighth Circuit Court of Appeals,[43] which held that the full due process requirements specified in *Morrissey* and *Gagnon* should be followed in prison disciplinary hearings. The Supreme Court did not en-

1974); Fisher v. Cahill, 474 F.2d 991 (3rd Cir. 1973); Monks v. New Jersey State Parole Bd., 58 N.J. 238, 277 A.2d 193 (1971); United States *ex rel.* Johnson v. Chairman, N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir. 1974), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974); Franklin v. Shields, 399 F. Supp. 309 (W.D. Pa. 1975), *cert. denied*, 423 U.S. 1037 (1975).

38. Franklin v. Shields, 399 F. Supp. 309 (W.D. Pa. 1975), *cert. denied*, 423 U.S. 1037 (1975).

39. *Id.* at 318 n.5. The court quoted Wiley v. United States Bd. of Parole, 380 F. Supp. 1194, 1200 (M.D. Pa. 1974), to distinguish parole release hearings and parole revocation hearings:

> [T]he parole release decision . . . is a prognostic determination with respect to one's suitability for parole and is based on a complex of tangible and intangible factors and involves the discretionary application of knowledge derived from such fields as psychology, criminology, sociology and penology. While the parole revocation proceeding basically is concerned with making a factual determination with respect to parole violation, parole decision-making centers on making a diagnostic and predictive determination with respect to whether the rehabilitation of the prisoner and the welfare of society generally would be best served by granting the inmate's conditional freedom rather than by his physical confinement.

40. 418 U.S. 539 (1974).

41. Good time credits are a reduction in the term of a prisoner, for parole purposes, which can be earned by good behavior and faithful performance of duties. NEB. REV. STATS. §§ 83-1, 107 (Supp. 1975).

42. 342 F. Supp. 616 (D. Neb. 1972). The court felt bound by precedents of the eighth circuit, namely, Morrissey v. Brewer, 443 F.2d 942 (8th Cir. 1971), *rev'd*, 408 U.S. 471 (1972), in holding that due process was not applicable in disciplinary proceedings.

43. 483 F.2d 1059 (8th Cir. 1973).

tirely agree. While holding that a prisoner's interest in the fairness of disciplinary proceedings was protected by the fourteenth amendment, the Court emphasized that such protection need not be as extensive as that required in parole and probation proceedings.[44] The Court reasoned that the interest of the state in the structure and content of disciplinary hearings militates against adoption of the *Morrissey-Gagnon* procedures. In disciplinary hearings, the state has a substantial interest in providing reasonable safety for guards and inmates. To allow adversary confrontations to the full extent of the *Morrissey-Gagnon* proceedings would be to exacerbate the already tempestuous atmosphere within many of the nation's prisons, creating a risk of retaliation by accused inmates against their accusers. This hazard is not so prevalent in parole or probation proceedings. Moreover, explained the Court, rehabilitation can best be achieved by maintaining flexible procedures to ascertain and sanction misconduct. To require full adversary hearings would defeat the purpose of swift and sure discipline for infractions.[45] An accommodation was ultimately reached between the competing interests of the prisoner and the prison system.[46]

Although the Court refused to "encas[e] the disciplinary procedures in an inflexible constitutional straitjacket,"[47] it did leave an avenue open for future propagation of prisoners' rights at disciplinary proceedings:

> Our conclusion that some but not all, of the procedures specified in Morrissey and [Gagnon v.] Scarpelli must accompany the deprivation of good time by state prison authorities is not graven in stone. As the nature of prison disciplinary process changes in future years, circumstances may then exist which will require further consideration and reflection by this Court.[48]

44. Wolff v. McDonnell, 418 U.S. 539, 560-61 (1974).
45. *Id.* at 563.
46. A prisoner faced with a disciplinary proceeding that may deprive him of good time credits or send him to solitary confinement is entitled to the following procedural rights: (a) 24 hour advance written notice of the charges; (b) a written statement by the factfinders as to the evidence relied on and the reasons for the disciplinary action, unless publication of certain items of evidence might create a personal or institutional safety hazard, in which case that evidence may be excluded (but the statement should indicate the fact of omission); (c) the right to call witnesses and present documentary evidence if there is no hazard to institutional safety or correctional goals ("it would be *useful* for the Committee to state its reason for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases" (emphasis added)); (d) no right to confrontation and cross-examination ("*at the present time*" (emphasis added)) unless granted by the discretion of prison officials; (e) no right to either retained or appointed counsel, but if the inmate is illiterate or the issue so complex that he cannot collect and present evidence adequately, he may have the help of another inmate or staff member; and (f) an impartial hearing body. *Id.* at 563-71.
47. *Id.* at 563.
48. *Id.* at 571-72.

The Right of Confrontation and Cross-Examination

Although the Court in *Wolff* conceded that "the right to present evidence is basic to a fair hearing,"[49] it concluded that the interests of the government prevailed to the extent that some procedural safeguards could be curtailed. In the interest of keeping the hearing within reasonable limits, the Court held that prison officials should be allowed discretion to refuse to call witnesses who might create a risk of reprisal or undermine authority and to limit access to other inmates for the purpose of collecting statements or compiling other evidence.[50] The Court suggested that it would be "useful" for prison officials to note in the written record their reasons for refusing to call particular witnesses, although such a procedure was not required.[51]

The Court was careful to distinguish between the limited right to call witnesses and other due process rights at disciplinary hearings. The majority held that confrontation and cross-examination were not constitutionally required because the use of such procedures would create a potential for havoc within the prison, make hearings unmanageable, and create a risk of reprisal among inmates and guards.[52] The ultimate decision as to whether confrontation and cross-examination would be permitted was left to the discretion of prison officials.

The wide latitude afforded to prison authorities in determining whether a prisoner faced with a disciplinary proceeding should be entitled to present evidence and call witnesses, to confront and cross-examine his accusers, and to have the aid of counsel (or substitute for counsel) was severely criticized by Justices Marshall and Douglas in their dissenting opinions.[53] They believed that a full hearing with all due process safeguards should be required in prison disciplinary proceedings involving substantial deprivations of liberty, and that a prisoner's rights should not be left to the unreviewable discretion of prison officials.

As Justice Douglas noted, the majority recognized the importance of the right to present evidence while at the same time leaving no means of enforcing it.[54] Justice Marshall stressed the

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49. *Id.* at 566. On other occasions the Court has recognized that the right to call witnesses in one's own defense is fundamental, Chambers v. Mississippi, 410 U.S. 284, 302 (1973), especially where one challenges the charges on the basis of incorrect factual premises, Goldberg v. Kelly, 397 U.S. 254, 268 (1970).

50. 418 U.S. at 566.

51. *Id.*

52. *Id.* at 567-68.

53. Justice Brennan joined with the dissent written by Justice Marshall, *id.* at 580. Justice Douglas wrote a separate opinion, *id.* at 593.

54. Justice Douglas commented that

while conceding that 'the right to present evidence is basic to a fair hearing,' . . . the Court again chooses to leave the matter to the dis-

argument that unless a prisoner has the right to call witnesses and present evidence, the prisoner cannot present an adequate defense other than his own word, which is often subject to a credibility problem.[55] He believed that the right to call witnesses could be limited, if at all, solely for the purpose of preventing undue delay or protecting confidential informants, but in all cases the reasons for the limitation should be written in the record.

In a case decided subsequent to *Wolff*, the Ninth Circuit Court of Appeals denounced the Supreme Court's refusal to prescribe a method for judging the soundness of the discretion exercised by prison officials in denying confrontation and cross-examination in a disciplinary hearing.[56] The appellate court set its own rule[57] to the effect that the prison authorities were required to provide written reasons for any denial of confrontation and cross-examination, the failure of which would constitute a prima facie abuse of discretion.

Unhappy with this unwarranted extension of *Wolff*, the Supreme Court hastily granted certiorari and reversed.[58] Without foreclosing the possibility that such a procedure might be sanctioned if limited to the right of a prisoner to call witnesses and present evidence on his own behalf at a disciplinary hearing, the Court expressed its opinion in no uncertain terms that the court of appeals had gone too far in its interpretation of what *Wolff* required with respect to confrontation and cross-examination. Because confrontation and cross-examination, in the Court's

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cretion of prison officials, who are not even required to state their reasons for refusing a prisoner his right to call a witness, although the Court finds that such a statement of reasons would be 'useful.' . . . Thus, although the Court acknowledges the prisoner's right, it appears to leave him with no means of enforcing it.

Id. at 597-98, (Douglas, J. dissenting).

55. *Id.* at 582-83 (Marshall & Brennan, JJ., dissenting). *See also* Clutchette v. Procunier, 497 F.2d 809, 818 (9th Cir. 1974), *on rehearing*, 510 F.2d 613, *rev'd sub nom.* Baxter v. Palmigiano, 425 U.S. 308 (1976), where the court took note of the unreliability of an accused inmate's self-proclaimed innocence of rule infractions.

56. Clutchette v. Procunier, 510 F.2d 613, 616 (9th Cir. 1974), *rev'd sub nom.* Baxter v. Palmigiano, 425 U.S. 308 (1976).

57. The appellate court's rule was as follows:

Whenever a prisoner requests and is denied the privilege of confrontation and cross-examination in a disciplinary proceeding in which a serious sanction can be imposed (excluding a proceeding for an infraction that is also a crime), the prison authorities must enter in the record of the proceeding and make available to the prisoner an explanation setting forth reasons not relating to the prevention of those ills about which the Supreme Court was concerned—reprisals, unmanageability, disruption, safety of prison personnel—will be deemed prima facie evidence of abuse of discretion that can be called to the attention of parole authorities and, under appropriate circumstances, of the courts as well.

Id. at 616.

58. Baxter v. Palmigiano, 425 U.S. 308 (1976).

view, create an inherent danger to the prison system, and because an adequately fair decision can be made without those rights, the Court deemed the constitutional need for written reasons for the denial of such rights analytically dissimilar to the need for accountability for the denial of the right to present evidence and call witnesses.[59]

Right to Counsel and the Privilege Against Self-Incrimination

Although the Court in *Wolff* held that an inmate had no right to counsel at disciplinary hearings, it also held that an inmate did have a right to have the help of another inmate or prison staff member in presenting his defense if the inmate was illiterate or the issue so complex that it would be beyond his singular ability to collect and present evidence adequately.[60] This conclusion may provide a satisfactory remedy in some circumstances, but two separate appellate courts, in later decisions, held that an unequivocal right to counsel should exist in those cases where the charges at the disciplinary hearing involve conduct punishable as a crime under state law.[61] Citing *Miranda v. Arizona*[62] and *Mathis v. United States*,[63] the appellate courts held that the possibility that inmates' statements at disciplinary hearings would be used in later state court prosecutions for the same conduct required a right to representation by counsel at disciplinary hearings.[64]

In *Baxter v. Palmigiano*[65] the Supreme Court again limited prisoners' rights, and reversed both cases. The Court held that *Miranda* and *Mathis* were inapposite to an analysis of the scope of the right to counsel in situations other than criminal prosecutions. Notwithstanding the fact that statements taken at disciplinary hearings might be used in a subsequent state criminal prosecution for the same conduct, the Court summarily concluded that inmates do not have a right to either retained or appointed counsel in a disciplinary hearing.[66]

What is even more striking about the decision in *Baxter*[67] is the Court's analysis of the fifth amendment privilege against

59. *Id.* at 322. The Court cited the passages in Wolff v. McDonnell, 418 U.S. 539, 567-68 (1974), relating to the potential hazard that confrontation and cross-examination pose to institutional interests in maintaining informal proceedings.
60. 418 U.S. at 570.
61. Clutchette v. Procunier, 510 F.2d 613 (9th Cir. 1974); Palmigiano v. Baxter, 510 F.2d 534 (1st Cir. 1974).
62. 384 U.S. 436 (1966).
63. 391 U.S. 1 (1968).
64. *See* note 61 *supra*.
65. 425 U.S. 308 (1976).
66. *Id.* at 315.
67. *Id.*

self-incrimination. The inmate involved had been advised at a disciplinary hearing that, although he was not compelled to testify, his silence would be used against him. The Court first reaffirmed, and then distinguished, its prior holdings that absent immunity, one cannot be compelled to testify against oneself if the evidence might be used for an incriminating purpose in a subsequent criminal proceeding.[68] These cases had invalidated state statutes under which persons who enjoyed the benefit of state employment or state contracts could be compelled to testify, without a protective grant of immunity from use of the testimony in criminal prosecutions, under a threat of automatic termination of employment or eligibility to contract with the state for failure to testify.

In *Baxter*,[69] however, no such adversity attached to the prisoner's mere refusal to testify. Under state law, prison disciplinary decisions had to be based on "substantial evidence,"[70] and an inmate electing to remain silent during the hearing was not in consequence thereof automatically found guilty of the prison infraction. In explaining the reasons why prison authorities, in disciplinary proceedings, are permitted to draw adverse inferences of guilt from the prisoner's refusal to testify about facts relevant to his case, the Court stated:

> It is thus undisputed that an inmate's silence in and of itself is insufficient to support an adverse decision by the Disciplinary Board. . . . Here, Palmigiano remained silent at the hearing in the face of evidence that incriminated him; and as far as this record reveals, his silence was given no more evidentiary value than was warranted by the facts surrounding his case. This does not smack of an invalid attempt by the State to compel testimony without granting immunity or to penalize the exercise of the privilege. The advice given inmates by the decisionmakers is merely a realistic reflection of the evidentiary significance of the choice to remain silent.[71]

The Court concluded that the fifth amendment does not prevent prison officials from drawing adverse inferences from the refusal of a prisoner to testify at a disciplinary hearing, where the silence alone does not establish guilt, but the inferences drawn therefrom add to substantial extrinsic evidence.[72]

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68. Leftkowitz v. Turley, 414 U.S. 70 (1973); Sanitation Men v. Sanitation Comm'r, 392 U.S. 280 (1968); Gardner v. Broderick, 392 U.S. 273 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967).
69. 425 U.S. 308 (1976).
70. The Rhode Island laws explaining this evidentiary standard are discussed in Morris v. Travisono, 310 F. Supp. 857, 873 (D.R.I. 1970).
71. 425 U.S. 308, 317-18.
72. In a footnote, the Court cited an Inmate Disciplinary Report and a Supervisor's Investigation Report, which, along with miscellaneous supplementary reports made by the officials filing the original reports, comprised the necessary extrinsic evidence. *Id.* at 320 n.4. However, Justice Brennan's dissent explains that the conclusions of the majority

The opinion implicitly concedes that if the inmate's silence would have been the sole basis for the disciplinary action taken against him, then the privilege would have been violated. Indeed, there is a fine distinction between upholding the privilege when silence alone precipitates an adverse consequence, and denying the privilege when silence, together with what is characterized as "substantial evidence" of guilt, conjunctively operate to satisfy the Government's burden of proof. Mr. Justice Brennan forcefully dissented from the fine lines drawn by the majority on the ground that

> in sanctioning reliance on silence as probative of guilt of the disciplinary offense charged, the Court allows prison officials to make costly the exercise of the privilege, something *Garrity-Leftkowitz* condemned as prohibited by the Fifth Amendment. For it cannot be denied that the disciplinary penalty was imposed to some extent, if not solely, as a sanction for exercising the constitutional privilege. . . . That plainly violates the Fifth Amendment.[73]

It is submitted that, notwithstanding the various civil circumstances wherein silence in the face of an accusation is a relevant fact not protected by the privilege,[74] at least in cases in which a citizen risks a deprivation of liberty, the decision to remain silent should not in any way be probative of guilt, irrespective of the weight of extrinsic evidence.[75]

INSTITUTIONAL TRANSFER OF PRISONERS

Several lower federal courts have considered the procedural due process issue in cases involving the transfer of a prisoner to another prison. These cases arise in a variety of contexts, including transfers from state to federal prisons,[76] transfers between federal prisons,[77] transfers from one state prison to a prison in another state,[78] and intrastate transfers.[79] The issues

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may have been based on a false factual premise. "On the whole, the record inspires little confidence that [the inmate's] silence was not the sole basis for his disciplinary conviction." *Id.* at 322 n.6 (Brennan, J., dissenting).

73. *Id.* at 322.

74. The common classes of cases wherein the failure to assert a fact, when it would be natural to do so, constitutes an assertion of the nonexistence of the fact, are explained in 3A J. WIGMORE, EVIDENCE § 1042 (Chadbourn rev. ed. 1970), *noted in* Baxter v. Palmigiano, 425 U.S. 308, 319 n.3 (1976).

75. *Cf.* C. MCCORMICK, THE LAW OF EVIDENCE § 121 (2d ed. 1972).

76. Hoitt v. Vitek, 502 F.2d 1158 (1st Cir. 1974), *affirming* Laaman v. Vitek, 361 F. Supp. 1238 (D.N.H. 1973); Gomes v. Travisono, 490 F.2d 1209 (1st Cir. 1973), *vacated and remanded,* 418 U.S. 908 (1974), *aff'd and modified,* 510 F.2d 537 (1974); Capitan v. Cupp, 356 F. Supp. 302 (D. Or. 1972).

77. United States *ex rel.* Gereau v. Henderson, 526 F.2d 889 (5th Cir. 1976); Robbins v. Kleindienst, 383 F. Supp. 239 (D.D.C. 1974).

78. Newkirk v. Butler, 499 F.2d 1214 (2d Cir. 1974), *dismissed as moot sub nom.* Preiser v. Newkirk, 422 U.S. 395 (1975); Ault v. Holmes, 506

involve a determination of whether the prisoner suffers a grievous loss, and if so, whether due process requires provision for some kind of hearing. The cases have often turned on the motive for the transfer; however, as the following discussion will show, neither the motive nor the effect on the prisoner is determinative in the eyes of the Supreme Court.

Administrative Transfers

There are several cases from the federal appellate and district courts holding that transfers for nondisciplinary purposes should be classified as purely administrative and left to the exclusive discretion of prison officials.[80] In considering whether to make an administrative transfer, the decision maker will take into account such factors as overcrowding, health hazards, separation of prisoners with personality conflicts, the threat of collusive action to disrupt the prison, and the like, all of which involve discretionary judgment. Advocates of this view believe that discretion should be unbridled. "[A]lthough the dislocation suffered by a transferred prisoner may be burdensome, the need to avoid more general harm may outweigh his individual claim."[81]

The counter-argument is also backed by precedent.[82] The

F.2d 288 (6th Cir. 1974); Tai v. Thompson, 396 F. Supp. 196 (D. Hawaii 1975).

79. McLaughlin v. Hall, 520 F.2d 382 (1st Cir. 1975); Fano v. Meachum, 520 F.2d 374 (1st Cir. 1975), *rev'd*, 96 S. Ct. 2532 (1976); Carrol v. Sielaff, 514 F.2d 415 (7th Cir. 1975); Aikens v. Lash, 514 F.2d 55 (7th Cir. 1975), *vacated and remanded*, 425 U.S. 947 (1976); United States *ex rel.* Haymes v. Montanye, 505 F.2d 977 (2d Cir. 1974), *rev'd*, 96 S. Ct. 2543 (1976).

80. United States *ex rel.* Gereau v. Henderson, 526 F.2d 889 (5th Cir. 1976) (even though serious disadvantages may accompany administrative transfers, practical necessities of prison administration require that the decision remain within the sound discretion of prison authorities); Shields v. Hopper, 519 F.2d 1131 (5th Cir. 1975) (transfer to a prison beyond a distance of commuting range for the attorney of the inmate did not state a federal cause of action); Fajeriak v. McGinnis, 493 F.2d 468 (9th Cir. 1974) (administrative transfer from Alaska to the states was not *per se* unconstitutional without due process).

81. United States *ex rel.* Haymes v. Montanye, 505 F.2d 977, 980 (2d Cir. 1974), *rev'd*, 96 S. Ct. 2543 (1976).

82. Carlo v. Gunter, 520 F.2d 1293 (1st Cir. 1975) (administrative classification of inmates which resulted in a transfer to a different wing of the same prison, where the conditions of confinement were more stringent, constituted grievous loss so as to require due process); Gomes v. Travisono, 510 F.2d 537, 541 (1st Cir. 1974) (disadvantages to inmate are the same whether transfer is characterized as punitive, administrative, or rehabilitative); Newkirk v. Butler, 499 F.2d 1214 (2d Cir. 1974), *dismissed as moot sub nom.* Preiser v. Newkirk, 422 U.S. 395 (1975) (administrative transfer involving a substantial loss requires due process, but facts of each case will determine substantiality of loss); Park v. Thompson, 356 F. Supp. 783 (D. Hawaii 1973) (administrative state to federal transfer because of inadequate facilities involves grievous loss); Landman v. Royster, 333 F. Supp. 621, 645 (E.D. Va. 1971) (questioning distinction between deprivations constituting punishment and those presented as techniques for maintenance of control or security).

second circuit aptly verbalized what it thought to be the inherent fallacy in the proposition that the motive of prison officials for the transfer is conclusive on the issue of whether due process applies:

> Classification by label (e.g., as 'administrative' or 'disciplinary') may facilitate prison administration but it cannot be used as a substitute for due process. In our view appellees' position gives insufficient consideration to the very real loss that an inmate may suffer even when his transfer is not part of formal disciplinary proceedings and has no adverse parole consequences. It also overlooks the danger that a transfer, when based on rumor or 'confidential' information about an inmate's behaviour, past or planned, may be arbitrary and unjustified by the facts. These factors, the adverse consequences to the prisoner and the chance of error, are the principal elements to be considered in determining what process is due the transferred prisoner, rather than the label put on the transfer. Where the prisoner suffers substantial loss as a result of the transfer he is entitled to the basic elements of rudimentary due process, i.e., notice and an opportunity to be heard.[83]

The issue was finally confronted by the Supreme Court in *Meachum v. Fano*.[84] Six inmates of a state medium security prison had been transferred, for "classification purposes," to maximum security prisons following allegations that they planned and executed several prison fires and possessed contraband. The inmates had not been permitted to be present during the presentation of evidence against them, nor had they been given a written statement of the evidence or the reasons for the transfer. Both the district court and the court of appeals had held that the denial of due process voided the transfers.[85] The Supreme Court reversed.[86]

The Court began its analysis with the observation that a duly convicted state prisoner subjects himself to the rules and custody of a state prison system, which is constitutionally allowed to impose reasonable restraints. The decision by state authorities to assign a prisoner in the first instance to a particular prison is not reviewable by federal courts, regardless of any differences among the several institutions to which the prisoner might have been assigned. Indeed, "[t]he conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in *any* of its prisons."[87] By committing a crime, the prisoner subjects himself to the discretion of state officials

83. Newkirk v. Butler, 499 F.2d 1214, 1217 (2d Cir. 1974), *dismissed as moot sub nom.* Preiser v. Newkirk, 422 U.S. 395 (1975).
84. 96 S. Ct. 2532 (1976).
85. Meachum v. Fano, 520 F.2d 374 (1st Cir. 1975), *aff'g* 387 F. Supp. 644 (D. Mass. 1975).
86. 96 S. Ct. 2532 (1976).
87. *Id.* at 2538 (emphasis in original).

as to where he will serve his sentence; a prisoner has no right to judicial review of an administrative decision to transfer him from one institution to another within the state prison system. That life in the transferee prison was more disagreeable to the prisoner than what he was accustomed to before the transfer did not, in the Court's view, implicate a fourteenth amendment liberty interest.[88]

Lower courts had relied on *Wolff v. McDonnell*[89] for the proposition that a constitutionally cognizable right to procedural due process arose in all circumstances involving prison disciplinary proceedings causing a grievous loss to the prisoner. However, the Supreme Court distinguished *Wolff* by the fact that in that case a state statute, not the Constitution, guaranteed a right to good time credits which could only be forfeited for serious misconduct. Thus, the Court held that absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events, an inmate has no claim to whatever benefits he enjoyed at the transferor prison.

Disciplinary Transfers

Among the several alternative forms of harsh treatment that may be meted out by prison officials to reprimand, deter, or reform a recalcitrant prisoner, disciplinary transfers to far away prisons, often maintaining tighter security and substantially more adverse conditions, stand out as a popular measure. Some of the factors identified by the cases reviewing the effect of prisoner transfers are set out in the note.[90] At one point in time the majority of cases which confronted the issue agreed that, considering the totality of circumstances, once a prisoner was assigned to a certain institution for a reasonable period of time, he acquired a sufficient stake in maintaining the status quo so that he could not be transferred, without due process, for disciplinary reasons pertaining to his alleged misconduct.[91]

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88. *Id.*

89. 418 U.S. 539 (1974).

90. United States *ex rel.* Gereau v. Henderson, 526 F.2d 889 (5th Cir. 1976), summarized the various combinations of factors resulting in serious loss from a punitive transfer:

> [a]dverse effect on chances for parole, increased difficulty of visits from family and friends, the difficulties of adjustment to a new social environment, the temporary placement in 'administrative segregation' in the receiving institution, the interruption of vocational and rehabilitation programs, increased difficulty of communicating with counsel, lost records and personal belongings, the stigma resulting from placing the transfer on the prisoner's record. The emerging pattern is that transfers resulting from inmate prison conduct usually impose a serious loss on the transferred inmate.

Id. at 896. *Accord*, Gomes v. Travisono, 510 F.2d 537, 539 (1st Cir. 1974).

91. United States *ex rel.* Gereau v. Henderson, 526 F.2d 889 (5th Cir.

The Supreme Court had occasion to promulgate its view in *Montanye v. Haymes.*[92] Two days after an alleged violation of prison rules, a prisoner was summarily transferred, without a hearing, from one maximum security state prison to another several hundred miles away. The second circuit held that disciplinary transfers having substantial adverse impact on the prisoner called for procedural formalities.[93] The Supreme Court reversed,[94] relying on *Meachum v. Fano.*[95]

The Court reiterated its prior holding that a transfer, for whatever reason, need not comport with due process formalities as long as both the conditions and the degree of confinement at the transferee prison were within the permissible limits of the original sentence imposed on the prisoner. Under the law of the state where the inmate in this case was imprisoned,[96] he had no right to remain at a particular facility nor any justifiable expectation that he would not be transferred as long as he remained in good behavior. The state statutes imposed no conditions on the discretionary power of state officials to transfer inmates. Under these circumstances, the contentions that the transfer was punitive, and that the conditions at the transferee prison were more severe, became immaterial to the inquiry concerning the applicability of procedural due process.

The holdings of the transfer cases[97] are disturbing with respect to the Court's analysis of what is and is not a protected liberty interest. Apparently, if a liberty interest does not originate in the Constitution, or have its roots in state law, then it is not entitled to the shield of constitutional protection against governmental infringement.[98] To say that the absence of a state law guaranteeing no adverse change, without cause, in a prisoner's condition or location of confinement gives the government

1976); Fano v. Meachum, 520 F.2d 374 (1st Cir. 1975), *rev'd*, 96 S. Ct. 2532 (1976) (intrastate transfer from medium to maximum security prison); Aikens v. Lash, 514 F.2d 55 (7th Cir. 1975), *vacated and remanded*, 425 U.S. 947 (1976) (transfer from state reformatory to state prison); Newkirk v. Butler, 499 F.2d 1214 (2d Cir. 1975), *dismissed as moot sub nom.* Preiser v. Newkirk, 422 U.S. 395 (1975) (intrajurisdictional transfer from medium to maximum security prison); Stone v. Egeler, 506 F.2d 287 (6th Cir. 1974) (transfer to a maximum security facility is disciplinary in nature and results in substantial deprivations); United States *ex rel.* Haymes v. Montanye, 505 F.2d 977 (2d Cir. 1974), *rev'd*, Montanye v. Haymes, 96 S. Ct. 2543 (1976) (intrastate transfer; the hardship involved in the mere fact of transfer may be sufficient to render it punitive even though the facilities at the second prison are no more harsh than those at the first).

92. 96 S. Ct. 2543 (1976).
93. 505 F.2d 977 (2d Cir. 1974).
94. 96 S. Ct. 2543 (1976).
95. 96 S. Ct. 2532 (1976).
96. N.Y. CORR. LAW § 23(1) (McKinney 1975-76 Supp.).
97. Meachum v. Fano, 96 S. Ct. 2532 (1976); Montanye v. Haymes, 96 S. Ct. 2543 (1976).
98. Meachum v. Fano, 96 S. Ct. 2532, 2541 (1976) (Stevens, J., dissenting).

the right to effectuate a transfer involving extremely disparate conditions between one institution and another, is to ignore the "core values of unqualified liberty"[99] with which an individual is inherently endowed. Mr. Justice Stevens, in dissent to *Meachum v. Fano*, remarked that

> neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. . . .
>
> I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations.[100]

The difficulty which the transfer cases present is made all the more apparent when they are compared with *Wolff v. McDonnell*.[101] If the Court were to reason from the transfer cases back to *Wolff*, it would find that the state laws prohibiting the loss of good time credits or imposition of solitary confinement were the prisoner's only substantive rights protected by due process. Had the state not enacted such laws, it follows that the prison officials could have revoked the good time credits or imposed solitary confinement for any reason at all, no matter how arbitrary. Could the prisoner have been forced to serve his entire sentence in solitary confinement? Surely this would not be tolerated by the Supreme Court, as perhaps violating the eighth amendment ban against cruel and unusual punishment. Clearly the logic of *Meachum* and *Montanye* is not on the soundest of footings. It would be anomalous "both from a due process and an equal protection point of view, if the prison authorities could accomplish by transfer a procedure free punishment which they could not accomplish within their own walls."[102] Yet by ignoring the adverse effect on a prisoner which is so foreseeable in a disciplinary transfer accomplished without procedural formalities, the same has now been authorized by the Supreme Court.

Loss of Privileges and Adverse Classifications

The small list of amenities available to inmates who remain on good behavior status is a vital source of psychological sustenance on which they can rely to escape the lugubrious mood that is so pervasive and compelling throughout a prison. To contend that prisoners should spend the length of their terms in

99. The Supreme Court used the quoted phrase in describing the liberty interest of a parolee in Morrissey v. Brewer, 408 U.S. 471, 482 (1972).
100. Meachum v. Fano, 96 S. Ct. 2532, 2541 (1976) (Stevens, J., dissenting).
101. 418 U.S. 539 (1974).
102. Gomes v. Travisono, 490 F.2d 1209, 1215 (1st Cir. 1973), *vacated and remanded*, 418 U.S. 908 (1974), *aff'd and modified*, 510 F.2d 537 (1974).

a barren vacuum devoid of any privileges is not in keeping with evolving standards of human decency.[103] The rehabilitative purpose is not served if the sole source of encouragement for the prisoner is the distant expectation of freedom that eventual termination of his sentence guarantees. Eligibility for prison benefits must be seen as a cherished goal. Social furloughs, releases to half-way houses, and opportunities for transfer or early parole are amenities which are "eagerly sought and received by inmates and obviously play a meaningful role in enhancing rehabilitation, reducing frustration, maintaining morale, and minimizing unrest in the prison setting."[104] Recognizing the need to protect the inmate's interest in being given a fair chance to earn these privileges, recent cases have held that administrative or disciplinary classifications which hinder or preclude eligibility for privileges create a grievous loss and cannot be enforced without due process.[105]

In *Cardaropoli v. Norton*,[106] an inmate's files were labelled "Special Offender"[107] on the basis of a report that he had been associated with several organized crime figures. The inmate was given no prior notice or opportunity to contest the facts of the report. As a consequence of the classification, his requests for furlough and eligibility for parole, among other benefits, were adversely affected. The court held that the changes in the conditions of imprisonment were of a substantial nature, and because of the need to insure that the underlying facts would be determined accurately, the basic elements of due process were required.[108]

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103. *See, e.g.*, Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973), *aff'd*, 494 F.2d 1196 (1st Cir. 1973), *cert. denied sub nom.* Hall v. Inmates of Suffolk County Jail, 419 U.S. 977 (1974).

104. Catalano v. United States, 383 F. Supp. 346, 351 (D. Conn. 1974).

105. Lokey v. Richardson, 527 F.2d 949 (9th Cir. 1975) (minimum custody classification); Cardaropoli v. Norton, 523 F.2d 990 (2d Cir. 1975) (special offender classification); Clutchette v. Procunier, 510 F.2d 613 (9th Cir. 1974), *rev'd on other grounds sub nom.* Baxter v. Palmigiano, 425 U.S. 308 (1976) (any loss of privileges); Stassi v. Hogan, 395 F. Supp. 141 (N.D. Ga. 1975) (special offender); Graham v. State Dep't of Corr., 392 F. Supp. 1262 (W.D.N.C. 1975) (demotion from "honor grade" status); Davenport v. Howard, 398 F. Supp. 376 (E.D. Va. 1974), *aff'd*, 520 F.2d 940 (4th Cir. 1975) (increase in security classification). *But see* Milburn v. Fogg, 393 F. Supp. 1164 (S.D.N.Y. 1975) (deprivation of commissary, hobby shop, visitation and recreational privileges does not entitle prisoner to full panoply of due process).

106. 523 F.2d 990 (2d Cir. 1975).

107. A "special offender" is one of a class of prisoners who requires greater case management supervision than the normal case. Eight broad categories merit the description in the federal system: non-federal prisoners; members of organized crime; protection cases; extreme custody risks; subversives; notorious individuals; persons who have threatened high government officials; and any other offender who requires especially close supervision. *Id.* at 992-93.

108. The court specified that due process should include the following: (a) 10 days notice, giving the reasons and describing the evidence; (b)

The ninth circuit has gone to the extent of requiring due process in "any plan establishing disciplinary procedures attending the withdrawal of privileges."[109] Without specifying what privileges are or are not covered by this broad guarantee, the court in *Clutchette v. Procunier*[110] held that notice, *i.e.*, a statement of the ground for removal of the privilege within a reasonable time before discipline is imposed, and an opportunity to respond must be provided. Mindful of the great deference given by the Supreme Court in *Wolff* to the discretion allowed prison officials, the court left to prison administrators the fashioning of appropriate plans to implement the law.

Based on these recent Supreme Court decisions,[111] it appears that the Court will be hesitant to hold that minimum due process is necessary when inmates are deprived of privileges unless state law grants the privilege. If this trend of limiting the applicability of due process continues, the next logical step for the Court may be to narrowly interpret *Wolff v. McDonnell*[112] to apply only to situations where a disciplinary proceeding could result in the loss of privileges which are granted by state law.

REMEDIES

The judicial remedies available to prisoners depend not only on the relief being sought, but also on the identity of the sovereign in whose custody the prisoner is confined. Where the prisoner is challenging the validity and present force of the legal process by which he is detained, his remedy is through habeas corpus.[113] Where he is challenging the conditions of confinement, the Civil Rights Act[114] is the appropriate remedy, but it

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personal appearance before an impartial hearing officer with no personal knowledge of the evidence; (c) the right to call witnesses and present evidence, (within the discretion of the authorities to curtail it); (d) the right to be informed of the evidence and the right to be given a reasonable time to defend; (e) the right to a written statement of the findings of the decision maker; and (f) if adversely classified, the right to administrative review. *Id.* at 996-97.

109. Clutchette v. Procunier, 510 F.2d 613, 615 (9th Cir. 1974), *rev'd sub nom.* Baxter v. Palmigiano, 425 U.S. 308 (1976).

110. Clutchette v. Procunier, 510 F.2d 613, 615 (9th Cir. 1974).

111. Montanye v. Haymes, 96 S. Ct. 2543 (1976); Meachum v. Fano, 96 S. Ct. 2532 (1976); Baxter v. Palmigiano, 425 U.S. 308 (1976).

112. 418 U.S. 539 (1974).

113. 28 U.S.C. §§ 2241-2254 (1970).

114. The Act provides as follows:

> 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.

42 U.S.C. § 1983 (1970).

is limited to state prisoners.[115] While both federal and state prisoners are entitled to petition for a writ of habeas corpus, the availability of this remedy to state prisoners is extremely limited. Under the express words of the statute,[116] as well as the Supreme Court's interpretation,[117] a state prisoner is required to exhaust state administrative and judicial remedies before a federal court will entertain jurisdiction.

A complaint filed under the Civil Rights Act may be read to claim habeas corpus relief, with the concomitant limitations. In *Preiser v. Rodriguez*,[118] state prisoners claimed that their procedural due process rights had been violated by prison officials who deprived them of good time credits. Seeking the restoration of such credits, the prisoners brought an action under the Civil Rights Act. By the time their complaints were filed in the district court, the relief sought would have resulted in immediate release. The Supreme Court held that because the prisoners were in effect challenging the very fact or duration of confinement, their sole federal remedy was by writ of habeas corpus, which could not be considered until remedies under state law had been exhausted.

The *Preiser* holding does not in any way limit the right of a state prisoner to seek damages for unconstitutional conditions of confinement under the Civil Rights Act, as distinguished from a challenge to the fact or duration of confinement.[119] The most noteworthy case interpreting *Preiser* was *Wolff v. McDonnell*,[120] in which the Court held that the validity of the procedures for depriving prisoners of good time credits could be considered in a civil rights suit, although restoration of the credits could only be sought through habeas corpus.[121] Other examples of the

115. The defendant must have been acting under color of state law, to be liable, under the express words of the statute. *Id.*

116. 28 U.S.C. § 2254(b) (1970) provides:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

117. *Ex parte* Hawk, 321 U.S. 114 (1944) (state judicial remedies must be exhausted); Preiser v. Rodriguez, 411 U.S. 475, 491 (1973) (state administrative remedies must be exhausted).

118. 411 U.S. 475 (1973).

119. *Id.* at 494, 498-99 (1973).

120. 418 U.S. 539 (1974).

121. *Id.* at 554. The relief sought was restoration of good time credits, that a plan be submitted by prison authorities detailing hearing procedures for the withholding and forfeiture of good time credits which complied with due process, and that damages be awarded for the deprivation of the prisoners' civil rights. The Court rejected the defendants' claim that the validity of the procedures for revoking good time credits could not be considered under a civil rights suit:

broad applicability of the Civil Rights Act to suits by state prisoners complaining of conditions relating to corporal punishment, punitive segregation, or other similar physical disciplinary measures are illustrated by litigation involving the first amendment rights to freedom of expression[122] and freedom of religion,[123] the eighth amendment right to freedom from cruel and unusual punishment[124] and the fourteenth amendment rights to equal protection[125] and due process.[126]

At one time the belief was prevalent among several district courts that exhaustion of state remedies was a prerequisite to suit under the Civil Rights Act.[127] Exhaustion was seen as the only way to alleviate the burden that prisoner complaint litigation imposed on the federal courts. Fully respecting this concern, subsequent cases in the appellate courts have nevertheless rejected this view.[128] Neither the language of the statute nor the interpretation given by the Supreme Court in a line of cases[129]

> The complaint in this case sought restoration of good-time credits, and the Court of Appeals correctly held this relief foreclosed under Preiser. But the complaint also sought damages; and Preiser expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings. 411 U.S., at 499, n.14, 93 S. Ct. 1827. Respondent's damage claim was therefore properly before the District Court and required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct. Such a declaratory judgment as a predicate to a damage award would not be barred by Preiser; and because under that case, only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations.

Id. at 554-55.

122. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied sub nom.* Sostre v. Oswald, 404 U.S. 1049 (1972); Sczerbaty v. Oswald, 341 F. Supp. 571 (S.D.N.Y. 1972); Carothers v. Follette, 314 F. Supp. 1014 (E.D.N.Y. 1970).

123. Cruz v. Beto, 405 U.S. 319 (1972); Weaver v. Pate, 390 F.2d 145 (7th Cir. 1968); Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967); Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961).

124. Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971), *supplementary opinion,* 354 F. Supp. 1302 (1973); Adams v. Pate, 445 F.2d 105 (7th Cir. 1971). *See also* note 4 *supra.*

125. Jones v. Wittenburg, 323 F. Supp. 93 (N.D. Ohio 1971), *supplementary opinion,* 330 F. Supp. 707, *aff'd,* 456 F.2d 854 (6th Cir. 1972).

126. *See* note 5 *supra.*

127. *See, e.g.,* Washington v. Baslow, 375 F. Supp. 1298 (D. Md. 1974); McCray v. Burrell, 367 F. Supp. 1191 (D. Md. 1973), *rev'd,* 516 F.2d 357 (4th Cir. 1975), *cert. granted,* 423 U.S. 923 (1975).

128. *See* Hardwick v. Ault, 517 F.2d 295, 297 (5th Cir. 1975) (quoting McCray v. Burrell, 516 F.2d 357, 360 (4th Cir. 1975)):

> [W]e are constrained to conclude that the holding that exhaustion is required may be reached only by either legislation conditioning resort to 42 U.S.C. § 1983 upon the exhaustion of available administrative remedies, or by the Supreme Court's re-examination and modification of its controlling adjudications on the subject.

Accord, Hiney v. Wilson, 520 F.2d 589 (2d Cir. 1975).

129. The seminal Supreme Court decision dealing with the exhaustion of state remedies prior to a civil rights suit is Monroe v. Pape, 365 U.S.

applying the statute can fairly be read to prevent federal court cognizance of a civil rights suit even if adequate state remedies exist but are not pursued.

CONCLUSION

It can now be said with certainty that the ramifications of a criminal conviction, although in part designed to "punish" those who have chosen to transgress the public law, are not so adverse as to wholly preclude judicial recognition of certain inviolable constitutional rights. One of the rights which remains undefiled subsequent to conviction is the right to due process of law. Forfeiture of the right to appropriate legal process which would insure fairness in any instance where the government seeks to jeopardize a recognized "liberty" interest is not an inevitable concomitant of a conviction of even the most heinous of crimes. Any major punishment imposed after sentencing cannot be countenanced without due process.

The balancing test used by the Supreme Court in determining first whether due process is applicable, and second, what safeguards are necessary, is a logical approach to accommodate the competing interests between the government and the individual. The greater the stake an individual has in maintaining his current status, the more protection will be provided against arbitrary deprivations. Thus a greater burden is placed on the gov-

167 (1961), where the Court, in holding that state judicial remedies need not be exhausted before suing in federal court to redress violations of the plaintiff's fourth amendment rights, expressed the view that "[i]t is no answer that the State has a law which if enforced would give relief. The federal remedy [42 U.S.C. § 1983] is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.* at 183. Subsequent decisions, in accord, include the following: McNeese v. Bd. of Educ., 373 U.S. 668 (1963) (no need to exhaust state administrative remedies in civil rights suit to enjoin racial segregation in public school); Damico v. California, 389 U.S. 416 (1967) (exhaustion of available administrative remedies not a prerequisite for exercise of federal jurisdiction under civil rights act); Houghton v. Shafer, 392 U.S. 639 (1968) (prisoner's civil rights suit alleging illegal prison restrictions not barred because neither inadequate state remedy nor exhaustion are required); Wilwording v. Swenson, 404 U.S. 249 (1971) (exhaustion of state remedies not required in suit by state prisoner attacking living conditions and disciplinary measures); Carter v. Stanton, 405 U.S. 669 (1972) (state administrative remedies need not be exhausted in civil rights suit by welfare recipient); Metcalf v. Swank, 406 U.S. 914 (1972) (same as *Carter*); Stiffel v. Thompson, 415 U.S. 452 (1974) (federal claim premised on civil rights act need not be preceded by exhaustion of either state judicial or administrative remedies, due to paramount role Congress has assigned to federal courts to protect constitutional rights); Preiser v. Rodriguez, 411 U.S. 475 (1973) (although exhaustion is required in suit by state prisoner challenging fact or duration of confinement, civil rights suit seeking damages for unlawful prison procedures could go forward without exhaustion); Wolff v. McDonnell, 418 U.S. 539 (1974) (civil rights suit by state prisoner for damages resulting from invalid procedures for revoking good time credits need not be preceded by exhaustion of state remedies).

ernment in showing good cause to revoke a parolee's liberty than is imposed in finding an inmate guilty of a prison rule infraction for which he must suffer the loss of privileges.[130]

The decisions recognizing and defining the attributes of due process in particular factual situations are laudable in so far as they outlaw procedures by which arbitrary determinations of fact leading to substantial adverse consequences are made. It cannot be doubted that the requirement of some kind of hearing before "liberties" can be denied is an affirmative advance in judicial attitudes toward prisoners. Persons convicted of crime are now guaranteed a right to notice and a hearing before being subjected to a revocation of parole[131] or probation,[132] or to a revocation of good time credits or the imposition of solitary confinement.[133] Except for these safeguards, however, there is some uncertainty as to the attitude of the Supreme Court. Particularly alarming to advocates of prisoners' rights is the statement in *Meachum v. Fano* that "we cannot agree that any change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause."[134] Although there is no longer an iron curtain drawn between the Constitution and correctional institutions, the Court's recent holdings[135] that the absence of a specific statute creating a right or justifiable expectation that no change in the conditions of confinement will occur without cause is certainly an opaque veil casting a dark shadow on future expansion of prisoners' rights. It cannot be denied that, in comparison to what rights were recognized only a decade ago, substantially more protection against arbitrary punishment exists today. Whether or not the policy of judicial concern will be amplified in the future, however, remains an unsettled question.

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130. *Compare* text accompanying notes 18-20 *with* text accompanying notes 110-121 *supra*.
131. Morrissey v. Brewer, 408 U.S. 471 (1972).
132. Gagnon v. Scarpelli, 411 U.S. 778 (1973).
133. Wolff v. McDonnell, 418 U.S. 539 (1974).
134. 96 S. Ct. 2532, 2538 (1976).
135. Montanye v. Haymes, 96 S. Ct. 2543 (1976); Meachum v. Fano, 96 S. Ct. 2532 (1976).