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CONDITIONS OF CONFINEMENT:
THE CONSTITUTIONAL LIMITS ON THE
TREATMENT OF PRISONERS

John H. Sturc*

Widespread resort to the federal courts to establish the constitutional rights of prisoners was made possible by the Supreme Court's revival of the Civil Rights Act of 1871\(^1\) in *Monroe v. Pape.*\(^2\) Shortly thereafter, the Court extended the protection of the Act to a state prisoner challenging the conditions of his confinement, thereby enabling the prisoner to obtain injunctive relief from the unconstitutional actions of his captors.\(^8\)

Beginning with litigation by Black Muslims demanding the opportunity to worship in prison,\(^4\) federal courts have entertained a multitude of civil rights actions in the past decade, often pressed by legal aid and public defender organizations.\(^5\) The increasing involvement of the federal courts in the daily life of state and federal prisons has caused major developments in the prisoners' rights field.\(^6\) A variety of data evidences the impact. Correction-
al authorities in New York, Virginia and California have substantially modified their disciplinary procedures because of pending federal litigation. At least four states have entered into consent decrees establishing detailed rules and regulations for the conduct of prison discipline, and at least five other states and the United States Bureau of Prisons have inaugurated prison grievance programs with the hope of forestalling future complaints. Federal courts in Alabama, Arkansas, Louisiana, Mississippi, Oklahoma and Virginia have found conditions so deficient as to require massive injunctive relief and have maintained continuing scrutiny of these state correctional systems. Perhaps the best measure of the effect of federal litigation is the response of inmates themselves. While habeas corpus petitions challenging the legality of convictions have declined significantly over the past five years, civil rights complaints have grown to a point at which they comprise nearly 17 percent of all civil actions in the federal district courts.
Among the rights which have received protection in the federal courts are the inmate's right to free exercise of religion, correspondence, access to counsel and the courts, adequate health care and housing, freedom from inmate and guard assaults, participation in decisions which affect the life of the inmate, and freedom from cruel and unusual punishment. Because of the extensive literature on this subject, this article will be confined to a discussion of inmate participation in prison decisionmaking as guaranteed by the due process clause of the fourteenth amendment and substantive limitations on the treatment of inmates under the eighth amendment. These two areas appear to have the greatest impact on the daily life of the average inmate.

I. Federally Protected Rights of Prisoners

A. The Prisoner's Right to be Heard by Institutional Decisionmakers

An inmate confined in a "total institution", where all of his daily activities and perceptions are controlled by the correctional authorities, finds all aspects of his life regulated by committees of the prison staff, from his work and the type of cell in which he lives to the types of programs in which he can participate. Two administrative decisions are of particular importance within the prison: classification and discipline.

Upon arrival at most prisons, an inmate is held in an intake center where he is given a battery of educational and psychological tests and oriented to the rules and procedures of the institution. After a few weeks, he is brought before the classification committee, usually the highest decisionmaking body in the institution and composed of high ranking members of the prison staff.


12. For good, albeit dated, surveys, see Goldfarb & Singer; South Carolina Dep't of Corrections, supra note 6; S. Krantz, The Law of Corrections and Prisoners' Rights (1973).


14. The United States Court of Appeals for the First Circuit described the growing administrative control over an inmate's life in Palmigiano v. Baxter, 487 F.2d 1280 (1st Cir. 1973), vacated, 418 U.S. 908 (1974), in which it noted:

As the correctional facility adds new rehabilitative programs and activities, administrative discretion becomes broader. The correctional officer or administrator can, in some cases, decide upon various degrees of custody within the same category of classification; he can offer schooling, jobs, and training programs (or decide not to offer them); he can grant furloughs, work-release, school release, weekend release (or stop granting them); he can provide the inmate with an interesting and relatively lucrative job assignment or a poor one.
Conditions of Confinement

staff. Relying upon reports compiled during the orientation period concerning the inmate's background, his education, the type of crime he committed, and any prior institutional record, the committee usually speaks to the inmate for up to half an hour and then informs him of his security classification, his work assignment, and his treatment program (counseling and/or psychological or psychiatric treatment, if any). A prisoner can be reclassified at any time if his initial program is not satisfactory, and all inmates appear before the classification committee for review at intervals ranging from 90 days to one year. Classification committees also have the power to transfer an inmate from one institution to another, to grant furloughs, and to grant additional good time when allowed by state or federal law.

Apart from any effect these decisions may have on the inmate's rehabilitation, their impact on his daily life is profound. Jobs within the institution have different rates of pay and may or may not teach skills which will be useful outside the prison. Prisoners placed in higher degrees of custody are afforded fewer privileges and are unlikely to be allowed to leave the prison for employment, education, medical treatment, or family visits.

Despite the importance of the decision of the classification committee, the results of some studies suggest that these proceedings are superficial and very often based on inaccurate information. Heavy reliance is placed on the

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16. Different prisons and prison systems have varying levels of custody. California, for example, has five: maximum, close, medium, minimum, and camps. Stan. L. Rev. Note 1356 n.14.

17. The Texarkana Prison officials review the program of each inmate every 90 to 120 days. Sirico 1240. California officials review classifications every six to twelve months with lesser periods for those inmates held in segregation or maximum security. Stan. L. Rev. Note 1357. And the Massachusetts Correctional Institution at Concord reviews classifications at least once a year. Gifis 365.

18. See Sirico 1240-41. Good time is a statutory credit for a number of days off the inmate's maximum sentence for each month he observes prison rules and/or performs other meritorious actions, such as the donation of blood. Most states provide for statutory good time which can be forfeited for serious misconduct. Fitch & Tepper, Structuring Correctional Decision Making: A Traditional Proposal, 22 Cath. U.L. Rev. 774, 779 (1973). In the federal system, 18 U.S.C. § 4161 (1970) provides automatic good time for satisfactory behavior, and 18 U.S.C. § 4162 (1970) provides additional discretionary good time allowances for especially meritorious behavior.

19. See Gifis 376; Sirico 1233.

20. In his study, Sirico commented that "[t]reatment efforts . . . suffer from a lack
inmate’s central file, which is considered confidential and not open to the inmate for his inspection. The inmate’s input at the committee meeting is limited. In one study of the Massachusetts Correctional Institution at Concord (MCI, Concord), researchers found that the committee usually made up its mind before the inmate’s arrival. Observers have also posited that despite the rehabilitative rhetoric of classification, decisions are based as much upon the manpower needs and space resources of the institution as upon the inmate’s individual requirements. This is not to say, however, that classification is totally ineffective for rehabilitation purposes. Courts have generally accepted the need to establish a system of rewards to encourage desirable behavior, and several have ordered prison authorities to inaugurate classification systems in order to separate violent inmates from those who are more peaceful or vulnerable.

Next to classification, decisions regarding disciplinary action for violation of prison rules are of the greatest importance for inmates, and procedures for of means to measure the inmate’s positive improvement.” Sirico 1241. Gifis noted that “[t]he atmosphere of the hearing is more than informal; it appears a bit careless to an observer.” Gifis 368. Speaking more generally, Norval Morris has disparaged the predictive value of parole and prison decisions. N. Morris, The Future of Improvement 31-43 (1974).

21. Both Sirico and Gifis noted the importance of the file and of the comments of the inmate’s work supervisor. California policy requires that prior to the entry of any document “which may serve as the basis for a critical decision” into an inmate’s file, he be interviewed by a staff member and receive a copy of the interview summary. Cal. Dep’t of Corrections, Ad. Bull. No. 73/50, Oct. 23, 1973, at 2, quoted in STAN. L. REV. Note 1357 n.20. California inmates are not, however, allowed access to psychiatric or psychological evaluations or the cumulative case summary of the inmate. STAN. L. REV. Note 1357 n.20. Gifis speculates that files are not open to inmates because the files contain confidential information which could not be economically separated from non-confidential information. Gifis 364.

22. See Gifis 364-65.

23. Sirico found that the Texarkana treatment team “receives a weekly list of the institution's job vacancies and simply fills the work slots with new inmates. Since experienced inmates find food service and laundry detail unattractive, they snap up other employment openings and leave their old jobs to newcomers.” Sirico 1236. Practice at MCI, Concord is similar. Gifis 366. Many prisoners are dependent on inmate labor to perform maintenance functions. G. Sykes, The Society of Captives 26 (1958).


the imposition of disciplinary sanctions have been the subject of much litigation and comment. The extent of the problem is revealed by data from the nation's two largest prison populations. During 1973, the United States Bureau of Prisons, with a population of about 23,000 during fiscal year 1973, conducted approximately 19,000 disciplinary hearings; California prisons, with a population of 22,486 in 1973, held 20,490 hearings. Such figures reflect the number of formal hearings, but the number of occasions for the imposition of discipline is actually much higher since both systems encourage informal resolution of minor complaints.

Correctional authorities consider disciplinary proceedings to be of the highest importance both for the security of the prison and as a tool for aiding the rehabilitation process by helping "... to develop self-reliance, self-control, self-respect and self-discipline." Acts which constitute violations of disciplinary rules range from mere possession of instant coffee to murder. One study of federal prisons at Texarkana and Leavenworth indicated that the five most common violations presented to the disciplinary committee were fighting, possession of contraband materials, refusal to work, insolence toward a correctional officer or staff member, and presence in an unauthorized area. Similarly, a 1972 study of discipline at the Rhode Island Adult Correctional Institution found that trouble with a guard or other staff, fighting, and refusal to obey orders constituted 55 percent of all infractions.

29. The role of disciplinary proceedings in maintaining the security of the institution is described by the state of California in its brief in Wolff v. McDonnell, 418 U.S. 539 (1974): "The summary disposition of rules infractions is essential to the identification and isolation of potential problems. The major problem can be prevented by prompt and certain response to the minor infraction." California Brief 9. The position that summary punishment can have a deterrent effect draws some support from psychological studies. See, e.g., Singer, Psychological Studies of Punishment, 58 CALIF. L. REV. 405 (1970).
30. U.S. Brief 27. Similar sentiments were expressed by Massachusetts authorities. Gifis 402. Kraft has written that "... discipline, as viewed by correctional people, involves for them much more than merely the policing of inmate's activities. Correctional officers are also counselors, and their effectiveness as officers is measured largely by how effective they are in their role as a counselor." Kraft 25.
31. See Gifis 388.
32. Kraft 33-35.
Most prison administrations encourage the resolution of disciplinary infractions at the lowest possible level. Guards are usually allowed summary punitive powers such as confinement to the cell for a day or withdrawal of movie privileges for minor infractions.\textsuperscript{a} A breach of the criminal law (e.g., escape, assault on a guard, possession of drugs and weapons) may be referred to prosecutors, although the standards for such referrals are not precise.\textsuperscript{b} All other violations are adjudicated by prison disciplinary committees.

Types of punishment which can be imposed by the disciplinary board tend to fall into four basic categories: warning and reprimand, withdrawal of privileges, solitary confinement, and loss of accrued good time. In the federal system, extra work may be demanded of the inmate.\textsuperscript{c} Virtually all prison systems provide for confinement of an inmate in solitary quarters for various lengths of time and for the revocation of both accrued and pending good time,\textsuperscript{d} although these two penalties are usually reserved for serious offenses or petty offenses committed by chronic inmates.\textsuperscript{e} Solitary confinement is also imposed in varying forms and gradations.\textsuperscript{f} The most severe regime which has survived judicial scrutiny under the eighth amendment is in Texas, where an inmate may be confined for a period of up to 15 days in a cell without windows or light of any kind while being allowed to wear only a loose fitting gown.\textsuperscript{g}

\textsuperscript{a} See Kraft 26, 30. The policies of the Texas Department of Corrections are set forth in Novak v. Beto, 453 F.2d 661 (5th Cir. 1971), \textit{cert. denied}, 409 U.S. 968 (1972).

\textsuperscript{b} See Gifis 385; Kraft 49. In California, all felonies must be reported to the district attorney. \textit{STAN. L. REV.} Note 1361.

\textsuperscript{c} See Kraft 47.

\textsuperscript{d} Fitch & Tepper, \textit{supra} note 18, at 778-79.

\textsuperscript{e} The Rhode Island study found a strong correlation between the offenses of trouble with guards, fighting, refusal to obey orders and possession of alcohol and drugs and either segregation or loss of good time. Harvard Center for Criminal Justice, \textit{supra} note 33, at 217, Table 5. The findings of Gifis and Kraft are to the same effect. See Gifis 405-08; Kraft 33-37.

\textsuperscript{f} The least onerous confinement is “padlocking”, in which the offender is ordered to his cell for a few days except for short periods of time. Most punitive segregation requires that the inmate be removed from his regular cell and placed in a room with minimal furniture in a wing of the prison reserved for rule violators. Gifis 384-85.


\textsuperscript{g} Novak v. Beto, 453 F.2d 661, 665, 673 (5th Cir. 1971), \textit{cert. denied}, 409 U.S. 968 (1972).
Studies of prison discipline indicate that segregation and forfeiture of good
time are common punishments. A 1969 survey of MCI, Concord showed
that 55 percent of all charges investigated resulted in some time in segrega-
tion.\footnote{41} During a similar time span, 30 percent of all dispositions in Rhode
Island ended in some form of segregation and another 15 percent in the loss
of good time.\footnote{42} A survey of practices in the federal prisons at Texarkana and
Leavenworth indicated that segregation was imposed in 42 percent and 32
percent of all cases respectively, and good time was withheld in 51 percent
and 44 percent of all cases, respectively.\footnote{43} Regardless of the disciplinary
disposition, the report of the infraction becomes a part of the inmate’s
permanent file with serious collateral consequences. Because his record
before the disciplinary committee is considered indicative of the inmate’s
ability to adjust to life in the institution and his general level of antisocial
conduct, it is an important factor in determining his security classification,
prison employment, and his chances for furlough and parole.\footnote{44}

Disciplinary hearings themselves are a new phenomenon.\footnote{45} Summary
confinement and corporal punishment were imposed by lower echelon guards
in such states as Arkansas, Mississippi and Virginia until the 1970’s.\footnote{46} Such
hearings as existed were quite crude. For example, until 1969, inmates in
Massachusetts were not provided with any rules and regulations by which to
guide their conduct. A proceeding was initiated by the written report of a
correctional officer. The inmate in question was brought before the discipli-
nary board, where the chairman of the three-person committee read
the contents of the written report aloud. If the prisoner denied his guilt, he
had to persuade the committee of his innocence without the benefit of an
advocate, without confrontation and cross-examination of his accuser, and
without the ability to call witnesses on his own behalf.\footnote{47}

\begin{itemize}
\item \footnote{41} Gifis 408. In Massachusetts, forfeiture of three days good time follows automatically
for each day spent in isolation. \textit{Id.} at 384.
\item \footnote{42} Harvard Center for Criminal Justice, \textit{supra} note 33, at 216.
\item \footnote{43} Kraft 37.
\item \footnote{44} Gifis 385; Kraft 40.
\item \footnote{45} “Until recently, discipline was frequently meted out in a prompt and arbitrary
fashion, at the location of the infraction or after the offender received a \textit{pro forma} ‘write
up.’” \textit{U.S. Brief} 5a.
\item \footnote{46} See Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), \textit{aff’d}, 442 F.2d 304 (8th
\item \footnote{47} Gifis 390. The system in Pennsylvania, described in United States \textit{ex rel.} Jones v.
Rundle, 358 F. Supp. 939, 942 (E.D. Pa. 1973), is substantially the same.
\end{itemize}
Disciplinary proceedings began to change form rapidly after inmate success in early due process cases such as *Morris v. Travisono*,48 *Sostre v. Rockefeller*,49 *Bundy v. Cannon*,50 *Cluchette v. Procurnier*,51 and *Landman v. Royster*.52 The United States Bureau of Prisons, which had inaugurated disciplinary hearings in 1954 and substantially revised its policies in 1971 and 1972,58 now uses a two-tiered disciplinary system. For lesser violations, an officer writes a misconduct report which is referred to the Adjustment Committee. A staff investigator interviews witnesses and presents the accused inmate with written notification of the charges against him. The matter is then brought before the Adjustment Committee, which meets at least three times a week. The Committee advises the inmate of the charges and asks him for his account of the incident. It may call witnesses on its own motion or on the request of the inmate, but it does not allow cross-examination or disclose all of the evidence compiled by the investigation. Upon reaching a decision, the Committee must make written findings of fact and an explanation of its disposition. The inmate receives a written summary of these findings, but the summary may not include the substance of confidential information relied upon by the Committee.54 Sanctions available to the Committee include changing the inmate's job or housing, withholding privileges, or imposing segregation.

If the charges are very serious, then the matter is referred to the Good Time Forfeiture Board.55 In practice, proceedings before the Adjustment Committee are quite informal.56 Proceedings before the Good Time Forfeiture Board are much more structured. If the inmate denies the charges against him, he is allowed the assistance of a staff member to aid in the preparation

53. See U.S. Brief 8a, 11a. Federal policies for inmate discipline other than the loss of good time may be found in Bureau of Prisons Policy Statement 74.005B, June 6, 1972, and for forfeiture of good time in Bureau of Prisons Policy Statement 7400.6A, Aug. 13, 1971.
55. U.S. Brief 16a-17a.
of a defense. The Board calls witnesses to testify rather than relying on the staff investigation alone. Although the Board may refuse to hear some defense witnesses if the testimony offered is repetitive or irrelevant, it must note the reason for the refusal on the record of the proceeding. The inmate is not permitted to cross-examine and may be prohibited from seeing confidential information. The Board makes a detailed record of the hearing, and makes findings of fact and recommendations which are then submitted to the chief executive officer of the institution for decision. Copies of the report are given to the inmate and sent to the Office of General Counsel and Review of the Bureau of Prisons.\textsuperscript{57}

In a survey of prison disciplinary practices conducted in early 1974, just prior to the Supreme Court decision of \textit{Wolff v. McDonnell},\textsuperscript{58} the systems responding to inquiries stated that they distributed written rules and regulations regarding conduct to the inmates and held hearings at which an accused could hear the evidence against him and make a statement on his own behalf. Ninety percent stated that they gave an inmate advance notice of the hearing, made some form of written record of the proceedings, and allowed some form of appeal. Relatively few institutions allowed cross-examination of adverse witnesses by the accused inmate or his representative, and fewer still allowed representation by retained counsel.\textsuperscript{59} The findings of the survey were not verified, however, and are of dubious accuracy.\textsuperscript{60}

\textbf{B. Wolff v. McDonnell—Due Process Rights}

Following the Supreme Court's holding in \textit{Goldberg v. Kelly}\textsuperscript{61} that due process rights under the fourteenth amendment attach to the termination of welfare benefits and the extension of this doctrine to parole\textsuperscript{62} and probation revocation proceedings,\textsuperscript{63} prison disciplinary proceedings were challenged across the nation; this led to a spate of district court decisions and seven circuit court holdings, many of them inconsistent.\textsuperscript{64} The Supreme

\textsuperscript{57} U.S. Brief 16a-20a. The constitutionality of the Good Time Forfeiture Board was upheld in Meyers v. Alldredge, 492 F.2d 296 (3d Cir. 1974).

\textsuperscript{58} 418 U.S. 539 (1974).

\textsuperscript{59} ABA RESOURCE CENTER ON CORRECTIONAL LAW AND LEGAL SERVICES, SURVEY OF PRISON DISCIPLINARY PRACTICES AND PROCEDURES 9-11 (1974).

\textsuperscript{60} Id. at 7.

\textsuperscript{61} 397 U.S. 254 (1970).


Court decided the issue in *Wolff v. McDonnell*, a suit seeking the restoration of good time lost in a disciplinary proceeding.

At the outset, the majority opinion by Justice White stated unequivocally that prisoners were protected by the due process clause. This protection attached to disciplinary hearings in which good time was forfeited because the Nebraska statutory scheme awarded good time credit as a right subject to revocation for major misconduct. Having been granted good time, the inmate acquired an interest in its preservation as a part of his liberty which could not be extinguished without some form of a hearing. In determining the weight to be given this interest, however, the Court was very restrictive, and concluded that it was less important than that of the probationer or parolee facing revocation of his conditional liberty. Conversely, the Court found the state’s interest in the preservation of internal security in the institution and in the rehabilitation of the inmate to be of the utmost gravity. It therefore refused to encase “...the disciplinary procedures in an inflexible constitutional straitjacket that would necessarily call for adversary proceedings typical of the criminal trial...”

The *Wolff* Court held that minimum due process requires an absolute right to written notice of the charges at least 24 hours in advance of the hearing so that the inmate can prepare his defense, as well as a “‘written statement by the factfinders as to the evidence relied on and reasons’ for the disciplinary action” in order to protect the inmate in subsequent transfer and parole decisions and to prevent arbitrary action. Sensitive evidence was allowed to be omitted from the record, but the Court noted that the record should reflect the fact of the deletion. Inmates were given the right to call witnesses and present documentary evidence on their own behalf, subject to limitations of time and institutional security, but no right to cross-examine

66. *Id.* at 557.
67. *Id.*
68. *Id.* at 561.
69. *Id.* at 563.
70. *Id.* at 564.
72. 418 U.S. at 565.
73. The Court supported this balancing by noting:

Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprimand or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence. Although we do not prescribe it, 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.

*Id.* at 566.
adverse witnesses because of the potential for reprisal against inmate-witnesses. An inmate does not have the right to counsel or counsel substitute unless he is illiterate or "the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case." In that event, he may have the assistance of a staff member or a "sufficiently competent inmate" selected by the authorities. Finally, the majority concluded that a disciplinary board composed of senior corrections personnel did not risk "such a hazard of arbitrary decisionmaking that it should be held violative of due process of law."

Wolff disappointed prisoners' rights advocates and has been bitterly criticized for failing to extend the same tests of fundamental liberties as are applied in other areas. Others dispute the Court's assumption that a full adversary hearing would undermine prison administration. Earlier circuit court opinions afforded inmates the right to cross-examine their accusers

74. Id. at 567-69.
75. Id. at 570. The Court declined to hold that "inmates have a right to either retained or appointed counsel in disciplinary proceedings." Id.
76. Id.
77. Id. at 571. The Adjustment Committee involved in Wolff was composed of the Associate Warden for Custody, the Correctional Industries Superintendent and the Reception Director. There was no allegation that any of the three had a personal involvement in the incident which led to McDonnell's appearance before the committee.

I regret that . . . the court failed to search more deeply into, and to deal more precisely with, what I consider the profound federal constitutional issues implicated in the prison system. . . . I appreciate the reasons why the courts have thought it wise to go slow until the implications of constitutional rulings in the field of corrections can be more clearly discerned. . . . But similar difficulty attends the development of constitutional doctrine in other areas. If it is determined ultimately that prisoners do indeed enjoy certain federal constitutional rights which are not being recognized by correctional officials, it will become clear that for an extended period the courts have failed to make the constitution a living document for many human beings.

Id. at 1231.
79. One district court doubted the substance of the intimidation argument. Murphy v. Wheaton, 381 F. Supp. 1252 (N.D. Ill. 1974). Noting that most prison incidents are observed by only a few persons, the court reasoned that an inmate could either infer the identity of the informant from the record or learn his name through the prison grapevine. "Protection against possible retaliation requires more than non-confrontation while its denial may well result in injustice." Id. at 1258.
and the right to a counsel substitute. Indeed, most expert recommendations regarding prison discipline have urged provision of a greater panoply of safeguards. Also, several prison systems allow inmates rights beyond those granted in Wolff.

II. DISCIPLINARY HEARINGS AFTER WOLFF

A. Sanctions Requiring Due Process

Wolff left as many issues regarding discipline unanswered as it attempted to resolve. First, it is not clear how far due process protections extend or whether the protections are fewer for lesser sanctions. In an oft-quoted footnote, the majority stated that the same protections should extend to proceedings which might lead to solitary confinement, but not to deprivation of lesser privileges. While earlier lower court decisions are in accord with

82. See, e.g., NATIONAL COUNCIL ON CRIME AND DELINQUENCY, A MODEL ACT FOR THE PROTECTION OF RIGHTS OF PRISONERS § 4 (1972). The Model Act, proposed by the National Council on Crime and Delinquency, calls for the right to be represented by counsel or counsel substitute chosen by the accused. See also CENTER FOR CRIMINAL JUSTICE, BOSTON UNIVERSITY SCHOOL OF LAW, MODEL RULES AND REGULATIONS ON PRISONERS' RIGHTS AND RESPONSIBILITIES (1973). The Model Rules and Regulations advocate a hearing board chaired by a person from outside the corrections system, the right to cross-examine adverse witnesses, representation by counsel substitute of the inmate's choice in all hearings and by counsel for major offenses, an appeal to the superintendent of the institution from the hearing board based on the evidence presented at the hearing, and limits on the use of confidential testimony.
83. See, e.g., Rules for the Treatment of Inmates in Delaware Correctional Institutions, Articles 24-26, reprinted in Johnson v. Anderson, 370 F. Supp. 1373, 1396-97 (D. Del. 1973), which provide for the right to cross-examine, to compel attendance of up to five witnesses, and to counsel or counsel substitute when the offense charged is also a violation of state criminal law.
84. 418 U.S. at 571-72 n.19. The Court analyzed the rights in question and stated: . . . it would be difficult for purposes of procedural due process to distinguish between the procedures that are required when good time is forfeited and those that must be extended when solitary confinement is at issue. The latter represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct. Here, as in the case of good time, these should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction. We do not suggest, however, that the procedures required by today's decision . . . would also be required for the imposition of lesser penalties such as the loss of privileges.
Id. See also the discussion of this footnote in Justice Marshall's dissent, 418 U.S. at 581 n.1 (Marshall, J., dissenting).
this line of demarcation,\textsuperscript{85} it presents an analytical difficulty since most disciplinary committees are empowered to withdraw good time, impose solitary confinement, and/or suspend privileges.\textsuperscript{86} Two courts have solved this problem by holding that the protections attach at any time that an inmate risks either solitary confinement or the loss of good time.\textsuperscript{87} Such an interpretation, however, would appear to make both the California and federal disciplinary procedures unconstitutional since both allow solitary confinement to be imposed without \textit{Wolff} safeguards.\textsuperscript{88} Second, while the segregation at issue in \textit{Wolff} was confinement in a punitive isolation cell with limited privileges, the Court did not reach the issue of different degrees of isolation.\textsuperscript{89} Inmates are often held in custody denominated "administrative" segregation, nominally for purposes of protection, but occasionally for purposes of punishment.\textsuperscript{90} Those lower courts which have reached the issue have unanimously held that when the confinement is for purposes of punishment, the label of the cell is irrelevant and due process rights attach.\textsuperscript{91}


\textsuperscript{86} See notes 48-57 \& accompanying text \textit{supra}.

\textsuperscript{87} Gates v. Collier, 501 F.2d 1291, 1318 (5th Cir. 1974); Murphy v. Wheaton, 381 F. Supp. 1252, 1255 (N.D. Ill. 1974).

\textsuperscript{88} The Bureau of Prisons' Adjustment Committee does not provide for counsel substitute in any form and severely limits the inmate's right to call witnesses. See notes 53-57 \& accompanying text \textit{supra}. California relies on the testimony elicited by an independent investigator rather than on pro se examination and cross-examination by the accused inmate. See Vanderet, \textit{Procedural Due Process in California Prisons: A Comparative [sic] Look at the New Directors}, 48 CAL. ST. B.J. 668, 674, 738 (1974).

\textsuperscript{89} See, e.g., Crafton v. Luttrell, 378 F. Supp. 521, 528-29 (M.D. Tenn. 1974).


B. Written Rules of Behavior

The need for written rules of conduct and specified penalties for infractions was not discussed by the Wolff court. Numerous courts, however, support the position that “the existence of some reasonably definite rule is a prerequisite to prison discipline of any substantial sort,” and required by the due process clause, despite the arguments of correctional administrators that such a requirement would leave them unable to punish unforeseen but clearly detrimental conduct.

C. Conduct of the Hearing

Because Wolff left many issues to the discretion of correctional personnel, litigation concerning the content of the hearing has continued, focusing on five problems: the right to call witnesses, confrontation and cross-examination of adverse witnesses, the right to lay counsel, the amount of detail in the permanent record, and the impartiality of the decisionmaker. The

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92. The Court noted that the Nebraska regulations state that “[t]he institution population will be kept informed through the orientation process and by written orders and memorandums [sic] as to the standards of conduct expected.” 418 U.S. at 548 n.8.

One district court expressed the opinion that “[p]risoners have a right to know the scope of punishment possible for infractions” and the lack of such guidelines could lead to equal protection problems. Collins v. Vitek, 375 F. Supp. 856, 862 (D.N.H. 1974). The Center for Criminal Justice’s proposed rules, see note 82 supra, endorse adoption of detailed schedules of rules and penalties with each inmate receiving a copy of such rules.


95. See Gifis 381.

96. While there is a variety of views concerning the listed facets of the hearing, no court has held that the due process clause requires an administrative appeal from the decision of the disciplinary board, and several have said that such an appeal is not required. See Gomes v. Travisono, 510 F.2d 537, 541 (1st Cir. 1974); Crafton v. Luttrell, 378 F. Supp. 521, 539 (M.D. Tenn. 1974); Pearson v. Townsend, 362 F. Supp. 207, 224 (D.S.C. 1973); United States ex rel. Jones v. Rundle, 358 F. Supp. 939, 947 (E.D. Pa. 1973); Sands v. Wainwright, 357 F. Supp. 1062, 1090 (M.D. Fla.), vacated
Ninth Circuit, in Workman v. Mitchell, held that a federal disciplinary board must hear the accused's witnesses unless it could show an "undue hazard," while in Murphy v. Wheaton, an Illinois district court held that an inmate is entitled to present at least four witnesses and any relevant documentary or tangible evidence in the absence of a showing of danger or irrelevance. In Taylor v. Schmidt, on the other hand, a Wisconsin district court held that a procedure under which the committee decides ex parte if the accused's witnesses are essential is constitutional under Wolff. 

Although the Wolff Court was quite emphatic in its ruling that cross-examination of staff members was not required, most later cases have liberally interpreted this restriction. A majority of courts have ruled that the confrontation right may be denied only when its exercise would either subject the witness to a substantial risk of harm or pose a major risk to the security of the institution as a whole. If confrontation is denied, the disciplinary committee must make a notation of the reasons for denial in the record of the proceeding, explain the reasons for the decision to the accused, and summarize the confidential testimony "with sufficient detail to permit the inmate to rebut it intelligently." One circuit court warned that failure to

and remanded on other grounds, 491 F.2d 417 (5th Cir. 1973); Landman v. Royster, 333 F. Supp. 621, 653-54 (1971), enforced, 354 F. Supp. 1292, supplemented, 354 F. Supp. 1302 (E.D. Va. 1973). Sands and Landman state that if an appeal is allowed, the review must be only of the record presented in the hearing. Most systems do allow an appeal to the warden. ABA RESOURCE CENTER ON CORRECTIONAL LAW AND LEGAL SERVICES, supra note 59, at 130.

97. 502 F.2d 1201 (9th Cir. 1974).
100. Id. at 1257. The court found that "absent special circumstances" a disciplinary committee must allow a prisoner to call witnesses. Id.
102. Id. at 1225.
103. The Court characterized the reason for this holding, stating:
But in the current environment, where prison disruption remains a serious concern to administrators, we cannot ignore the desire and effort of many States . . . to avoid situations that may trigger deep emotions and that may scuttle the disciplinary process as a rehabilitative vehicle.
418 U.S. at 568.
comply with the above standards “will be deemed prima facie evidence of abuse of discretion.” Cross-examination rules are quite similar. One district court ruled that submission of written questions by the inmate and his staff advocate to the chairman of the disciplinary committee for use in the hearing was sufficient.

With regard to the availability of a counsel substitute, one district court held that such assistance must be provided when an inmate is denied the right to present witnesses on his own behalf for security reasons, while another has implied that staff advocates should be trained in “presenting facts by examination and cross-examination of witnesses, or by dissecting or offering complex documentary evidence.” Although Wolff left this issue largely to the discretion of prison administrators, the First Circuit has noted that most contested cases would in fact be sufficiently complex to require assistance under the Wolff standard; therefore, “wise administrative practice would suggest [assistance] in marginal cases, if not in all cases.”

Because it provides a basis for complaint to the federal court for violation of due process rights or for an arbitrary basis of decision, the requirement of a record of the disciplinary hearing is perhaps the most important of the Wolff guarantees. Pre-Wolff cases found that corrections authorities were not conscientious recordkeepers. Accordingly, one district court ordered installation of a tape recording system, and a recent opinion enjoined

111. Gomes v. Travisono, 510 F.2d 537, 541 (1st Cir. 1974).
112. See 418 U.S. at 564-65.
113. As one district court described the situation:
More often than not, the Offense and Disciplinary Action Report reveals only the notation of "guilty" or "not guilty," and the punishment imposed. This practice invites arbitrariness by failing to demonstrate that the decision reached was actually based upon evidence the prisoner had an opportunity to refute. Crafton v. Luttrell, 378 F. Supp. 521, 538 (M.D. Tenn. 1974).

111. Gomes v. Travisono, 510 F.2d 537, 541 (1st Cir. 1974).
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Wisconsin disciplinary proceedings until procedures were implemented which would result in a comprehensive record of the proceedings.\textsuperscript{110} Courts have shown an intention to strictly enforce this record requirement. For example, in a damage action contesting the discipline of a prisoner for possession of political literature, the Second Circuit upheld the district judge's refusal to credit testimony of officers which added reasons for the confinement to those listed on the contemporaneous record.\textsuperscript{118}

\textit{Wolff} supports the presence of corrections officers on the hearing board,\textsuperscript{117} but several courts have doubted the ability of correctional management to remain genuinely neutral when sitting in judgment of an inmate accused of misconduct by a guard.\textsuperscript{118} All courts passing on the issue have held that the presence of a witness to, or an investigator of, the underlying incident on the hearing board is a deprivation of due process.\textsuperscript{119}

\begin{itemize}
\item \textsuperscript{116} United States \textit{ex rel.} Larkins v. Oswald, 510 F.2d 583, 587 (2d Cir. 1975); \textit{cf.} Clutchette v. Procurnier, 510 F.2d 613, 616 (9th Cir.), \textit{cert. granted sub nom.} Enomo\textsuperscript{1}o v. Clutchette, 95 S. Ct. 2414 (1975). \textit{But cf.} Jordan v. Keve, 387 F. Supp. 765, 770 n.16 (D. Del. 1974).
\item \textsuperscript{117} All of the circuit courts that have considered the question agree. \textit{E.g.}, Clutchette v. Procurnier, 497 F.2d 809, 820 (9th Cir.), \textit{modified and remanded}, 510 F.2d 613 (9th Cir. 1974), \textit{cert. granted sub nom.} Enomo\textsuperscript{1}o v. Clutchette, 95 S. Ct. 2414 (1975). \textit{But cf.} Walker v. Hughes, 375 F. Supp. 708, 716 (E.D. Mich. 1974); Colligan v. United States, 349 F. Supp. 1233 (E.D. Mich. 1972). In \textit{Colligan}, the court stated that it would ban the accused inmate's caseworker, and anyone in a “superior-subordinate relationship” with the accuser, from the panel. \textit{Id.} at 1237.
\item \textsuperscript{118} The court in Taylor v. Schmidt, 380 F. Supp. 1222 (W.D. Wis. 1974), concluded that the complexity of personal and official relations among the senior officers on the disciplinary committee and the staff members filing misconduct reports on one side and the inmates on the other meant that “the committee is predisposed to believe that the conduct report is accurate unless the inmate shows otherwise.” \textit{Id.} at 1226. \textit{Accord}, Clutchette v. Procurnier, 497 F.2d 809 (9th Cir. 1974), \textit{modified and remanded}, 510 F.2d 613 (9th Cir.), \textit{cert. granted sub nom.} Enomo\textsuperscript{1}o v. Clutchette, 95 S. Ct. 2414 (1975); Sands v. Wainwright, 357 F. Supp. 1062, 1085 (M.D. Fla.), \textit{vacated and remanded on other grounds,} 491 F.2d 417 (5th Cir. 1973).
\end{itemize}
D. Miranda Rights in the Disciplinary Hearing

Possession of drugs, assault on inmates and guards, acts of homosexuality, and destruction of prison property are common infractions brought before disciplinary committees. All of these may also be criminally prosecuted. Since virtually all disciplinary hearings require a statement by the inmate on his own behalf in order to rebut the evidence of guilt or to mitigate the severity of punishment, the dilemma facing the accused inmate is severe indeed. Unanimous rulings that administrative punishment does not preclude subsequent criminal prosecution for the same offense exacerbates the problem. The Supreme Court's decision in Mathis v. United States applying the standards of Miranda v. Arizona to any custodial interrogation in which there is the "possibility [that the matter will] end up in criminal prosecution," would appear to include disciplinary proceedings, but the protection of warnings and the exclusionary rule may not be sufficient. Silence hinders the defense of the inmate before the disciplinary committee, and even if courts were to consider statements to the committee as being involuntary per se, the exclusionary rule no longer bars all use of a defendant's involuntary statements.

121. Thirty-five percent of all charges brought before the disciplinary committee in Rhode Island in 1972 were potential targets of criminal prosecution. Harvard Center for Criminal Justice, supra note 33, at 212. Of 174 cases in Massachusetts prisons which could have been sent to the district attorney from September 1971 to January 1972, only 21 were actually referred. CENTER FOR CRIMINAL JUSTICE, BOSTON UNIVERSITY SCHOOL OF LAW, supra note 82, at 116. Gifis found that "the [disciplinary] board is often used as a screening agency to recommend to the superintendent whether court action should be initiated." Gifis 401.
122. See pp. 49-51 supra.
126. 391 U.S. at 4.
128. Statements "volunteered" following the waiver of Miranda rights can be introduced, and statements made in the absence of warnings can be used for purposes of
Courts have utilized three different approaches to the *Miranda* problem, but none has proven fully satisfactory. The first decision to confront the issue, *Clutchette v. Procunier*, ordered California disciplinary boards to provide counsel to inmates "when the offense charged may be referred to the district attorney for prosecution . . . so as to maintain the integrity of the fifth amendment right to remain silent." Although the validity of this decision seems doubtful in light of *Wolff*, on rehearing the panel reaffirmed its earlier holding.

A second group of decisions criticized the *Clutchette* approach as ineffective since the mere presence of counsel would not remove the inherent pressure on the inmate to waive his *Miranda* rights, and concluded that regardless of the effect of the presence of counsel "it is simply intolerable that one constitutional right should have to be surrendered in order to assert another." Relying on cases concerning internal investigations of public employees, such as *Garrity v. New Jersey*, which have implied an immunity for statements of the accused to the authorities, these cases have held that such an immunity in the disciplinary hearing is the optimal solution.

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impeachment following the Supreme Court’s decision in *Harris v. New York*, 401 U.S. 222 (1971).


130. 328 F. Supp. at 779.

131. The *Wolff* Court viewed the presence of counsel as antithetical to the therapeutic goals of a disciplinary proceeding and also stated that provision of counsel would be impractical. 418 U.S. at 570.

132. "Nothing in *Wolff* suggests to us that our reasoning or our conclusion on this issue requires reconsideration, and we decline appellants’ request that we do so." 510 F.2d at 616.

133. *See Fowler v. Vincent*, 366 F. Supp. 1224, 1227 (S.D.N.Y. 1973); *Sands v. Wainwright*, 357 F. Supp. 1062, 1093 (M.D. Fla. 1973), vacated and remanded on other grounds, 491 F.2d 417 (5th Cir. 1973). A further problem concerns statements made to a staff advocate by the accused inmate since, as one court viewed the problem, "it is not clear that any privilege would preclude [their] use in subsequent criminal proceedings . . . either because they were ‘voluntarily’ made or for purposes of impeachment.” *Carter v. McGinnis*, 351 F. Supp. 787, 794 (W.D.N.Y. 1972).


136. *See Fowler v. Vincent*, 366 F. Supp. 1224 (S.D.N.Y. 1973), in which the court made the analogy and noted that "the loss of liberty [is] an even stronger compulsion than loss of employment, and thus the need for immunity may be correspondingly greater." *Id.* at 1228. The court also evaluated the effectiveness of the use of immunity,
The First Circuit initially adopted the immunity approach in *Palmigiano v. Baxter*, but on remand from the Supreme Court following *Wolff*, the panel retreated from its earlier position. Noting that prison officials had no inherent authority to immunize statements from later use in criminal proceedings and that stenographic transcripts were expensive, yet essential, if immunity were to be meaningful, the court found the solution impractical. Further, the court felt that blanket immunity “cheapens the Fifth Amendment,” and that although a prisoner might be placed in an awkward position by the disciplinary hearing pending prosecution, “not every adverse consequence which flows from remaining silent can be characterized as an unconstitutional penalty upon the exercise of the privilege against self-incrimination.” Hence, a third position was adopted: the inmate must be warned of his right to remain silent whenever prosecution is a “realistic possibility”; his silence must not be used against him; and “prison authorities should consider whether defense counsel, if requested, should not be let into the proceeding . . .”

E. Prehearing Confinement

In almost all serious cases, the offending inmate is taken to a segregation unit pending his hearing. Such an action involves a balance between “the

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137. 487 F.2d 1280 (1st Cir. 1973), vacated and remanded, 418 U.S. 908 (1974).
138. 510 F.2d 534, 536 (1st Cir.), cert. granted, 95 S. Ct. 2414 (1975).
139. 510 F.2d at 536.
140. *Id.*
141. *Id.* at 537; accord, Crafton v. Luttrell, 378 F. Supp. 521, 539 (M.D. Tenn. 1974). The proposed rules promulgated by the Boston University Center for Criminal Justice and the proposed standards suggested by the National Advisory Commission on Criminal Justice Standards and Goals each call for deferral of disciplinary action when the state intends to prosecute. CENTER FOR CRIMINAL JUSTICE, BOSTON UNIVERSITY SCHOOL OF LAW, supra note 82, Rule IVA-2; NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON CORRECTIONS, standard 2.11 (1973).
142. Gifis states that this is done in all cases at MCI, Concord. Gifis 385. The Rhode Island study found that lockups were ordered in over 50 percent of all cases surveyed. Harvard Center for Criminal Justice, supra note 33, at 206 n.68.
Conditions of Confinement

deprivation of basic human rights,"\textsuperscript{143} and the "safety and security of the prison and its general population,"\textsuperscript{144} with the legality of the detention depending on the gravity of the situation in the prison, the length of the confinement prior to the hearing, and the conditions of confinement. Reluctant to limit the discretion of administrators during potential emergencies, despite the potential for abuse, the most libertarian courts have limited the showing of necessity to "a good-faith determination that immediate action [was] necessary."\textsuperscript{145} In most cases, courts have required that hearings for confined inmates be held within 48 to 72 hours,\textsuperscript{146} and have urged that the confinement be such as to minimize the loss of privileges prior to a determination of guilt.\textsuperscript{147} When the prison is in turmoil, however, administrators are free to do virtually what they wish short of corporal punishment and reprisal.\textsuperscript{148} Similarly, the decision to order institution-wide "lockups,"

\begin{footnotesize}
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\item 143. United States ex rel. Neal v. Wolfe, 346 F. Supp. 569, 574 (E.D. Pa. 1972). The court included the phrase in this statement: "Maintenance of control and security may not be used to justify the deprivation of basic human rights unless in pursuance of valid objectives and provided that the rudiments of due process are first observed." \textit{Id.} at 574.
\item 144. United States ex rel. Walker v. Mancusi, 467 F.2d 51, 53 (2d Cir. 1972).
\item 145. Clutchette v. Procunier, 497 F.2d 809, 817 n.15 (9th Cir. 1974), \textit{modified and remanded}, 510 F.2d 613 (9th Cir.), \textit{cert. granted sub nom.} Enomoto v. Clutchette, 95 S. Ct. 2414 (1975). Judge Stapleton has written that "[t]he test . . . is one of reasonableness under all the circumstances of the case." Johnson v. Anderson, 370 F. Supp. 1373, 1380 (D. Del. 1974). One court would require a showing that the inmate's continued presence in the general prison population poses an actual threat to the security of the institution. Battle v. Anderson, 376 F. Supp. 402, 422 (E.D. Okla. 1974). The National Advisory Commission standards limit prehearing detention to instances in which "the head of the institution finds that [the accused inmate] constitutes a threat to other inmates, staff members or himself." \textit{NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, supra} note 141, Standard 2.12.
\end{itemize}
\end{footnotesize}
during which all inmates are confined to their cells, is vested in the sound discretion of the prison officials "when taken in response to a real threat to prison security and when limited to a reasonable period of time to allow for the cooling of inflamed passions on both sides."\textsuperscript{149} A federal court will intervene only on a showing that the lockup was ordered for the purpose of singling out an individual or group for punishment,\textsuperscript{150} or when the shutdown has continued for such an extended period that its continuation rises to the level of cruel and unusual punishment.\textsuperscript{151}

\section*{F. Length of Confinement: A Requirement of Periodic Review}

As long as the imposition of the confinement does not contravene the eighth amendment,\textsuperscript{152} a prisoner may be kept in punitive isolation for an indefinite period of time.\textsuperscript{153} But such an inmate must be granted the right to periodic review hearings in an adversary setting in which he may contest the reasons for his continued confinement.\textsuperscript{154} The hearing must provide the same safeguards as a normal disciplinary hearing.\textsuperscript{155} Two district courts require written standards to judge the need for continued confinement,\textsuperscript{156} and another has ordered a prison disciplinary board to consider reports from the inmate's counselor in making its findings.\textsuperscript{157}

\begin{itemize}
\item \textsuperscript{151} See Battle v. Anderson, 376 F. Supp. 402, 410 (E.D. Okla. 1974). The court found that a 7½-month lockup was the result of the state's lack of personnel and consequent inability to control the prisons.
\item \textsuperscript{152} See pp. 73-84 \textit{infra}.
\item \textsuperscript{155} See cases cited note 154 \textit{infra}.
\item \textsuperscript{157} Crafton v. Luttrell, 378 F. Supp. 521, 533 (M.D. Tenn. 1974). The court also required that the inmate be allowed an informal weekly meeting with his counselor in which to present facts and circumstances in support of his release.
\end{itemize}
III. BEYOND Wolff: NONDISCIPLINARY DECISIONS

A. Procedural Due Process Considerations

As previously noted, an inmate's location, classification, job assignment, and treatment program may be of equal or greater importance than any question regarding discipline, particularly if he is "pulling his time" without significant confrontations with others. Although Wolff cut back on disciplinary safeguards endorsed by some lower courts, its explicit recognition of due process rights of the incarcerated added impetus to an already nascent movement toward the application of due process to other key decisions. Stitching together the Wolff majority's flat statement that due process does attach, the aforementioned footnote concerning the protections required for proceedings that might lead to solitary confinement, and such cautionary language as "[o]ur conclusion . . . is not graven in stone," some later courts have held that the Wolff requirements must be applied to all prison decisions which can result in a "grievous loss" to the inmate.

158. Just prior to the decision in Wolff, the Ninth Circuit Court of Appeals, quoting Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972), wrote:

"But, to determine whether due process requirements apply in the first place, we must look not to the ‘weight’ but to the nature of the interest at stake". . . .

[An]y prison disciplinary proceeding that impairs a prisoner's residuum of liberty or adversely affects his property interest (and which is not de minimus) condemns a prisoner "to suffer a grievous loss," as that term is now understood.


159. "There is no iron curtain drawn between the Constitution and the prisons of this country . . . . They [prisoners] may not be deprived of life, liberty or property without due process of law." 418 U.S. at 555-56.


160. See note 84 supra.

161. 418 U.S. at 572.

162. E.g., Clonce v. Richardson, 379 F. Supp. 338 (W.D. Mo. 1974), in which the court stated:

The Supreme Court's suggestion that "the better course at this time . . . is to
The extension has been based upon two divergent premises. The most common is that the Wolff guarantees protect an inmate who faces institutional discipline resulting in a major change in the conditions of confinement, whether loss of good time, segregation or transfer.\textsuperscript{163} A decision is disciplinary when based upon "specific prior conduct . . . notwithstanding the presence of elements of treatment, security or administrative necessity."\textsuperscript{164} Thus, under this view, decisions which may in fact adversely affect an inmate, such as a transfer or a change in jobs, but which are precipitated by neutral events, such as overcrowding or a change in the nature of the institution, may be made without a hearing.\textsuperscript{165}

Other courts have interpreted Wolff in a more expansive manner and apply its criteria to any change resulting in a "grievous loss," regardless of the reason for the decision.\textsuperscript{166} The disciplinary effect of the contemplated measure is one factor to be considered in assessing the level of protection to be provided, but not to the initial determination of whether due process applies.\textsuperscript{167} Some protection therefore applies to administrative segregation, non-punitive transfers, reclassification, and the loss of other privileges. The Supreme Court had an opportunity to resolve the split during the 1974-75 Term when it considered Preiser v. Newkirk,\textsuperscript{168} but the case was subsequently dismissed as moot.\textsuperscript{169}


\textsuperscript{166} E.g., Clutchette v. Procunier, 510 F.2d 613, 615 (9th Cir.), cert. granted sub nom. Enomoto v. Clutchette, 95 S. Ct. 2414 (1975); Gomes v. Travisono, 510 F.2d 537, 539 (1st Cir. 1974); cf. Alamanza v. Oliver, 368 F. Supp. 981 (E.D. Va. 1972).

\textsuperscript{167} See Clutchette v. Procunier, 510 F.2d 613, 615 (9th Cir.), cert. granted sub nom. Enomoto v. Clutchette, 95 S. Ct. 2414 (1975); Gomes v. Travisono, 510 F.2d 537, 539 (1st Cir. 1974).

\textsuperscript{168} 499 F.2d 1214 (2d Cir. 1974), vacated as moot, 95 S. Ct. 2330 (1975).

\textsuperscript{169} 95 S. Ct. 2330 (1975). Plaintiff Newkirk had been returned to a minimum security prison and was due to be paroled in July 1975. Since his complaint did not
As noted above, few courts have accepted the distinction between "administrative" and "punitive" segregation when imposed pursuant to a disciplinary proceeding. However, inmates who are not accused of crimes, such as the victims of attacks by other inmates, may also be involuntarily placed in segregation. No court has suggested that such an action is unconstitutional, but several have stated that the affected inmates must be allowed a hearing to determine the need for their confinement.

Although early authority stated that both interstate and intrastate transfers of inmates from one prison to another were in the sole discretion of prison officials, all recent opinions have taken a view to the contrary. Beginning with a decision by the First Circuit in *Gomes v. Travisono*, federal courts have unanimously held that a transfer of a punitive nature constitutes a grievous loss, since the change can affect the individual's life in a variety of ways.

request damages or class relief, the Court ruled that the matter was moot and did not fall within the class of controversies which are capable of repetition yet evade review. *Id.* at 2335.

170. See text accompanying note 90 supra.

171. See, e.g., CENTER FOR CRIMINAL JUSTICE, BOSTON UNIVERSITY SCHOOL OF LAW, supra note 82, Model Rule VI-6(a).


177. The court in Robbins *v.* Kleindienst, 383 F. Supp. 239 (D.D.C. 1974), described the impact of transferring an inmate, stating:

Such changes clearly may affect adversely, *inter alia*, an inmate's opportunity
Transfers may be either interstate or intrastate, or from a minimum or medium security institution to a maximum security penitentiary, and the character of the change has had an effect on the attitude of various courts. The clearest case has been the interstate transfer in which an inmate may be sent thousands of miles away either within the federal prison system, or by virtue of various interstate compacts. Transfers to institutions within the same state have posed greater difficulties, but most decisions hold that due process also applies whenever "the character of confinement is substantially changed, raising the inference that the transfer is punitive, rather than purely administrative."  

Whether a hearing should precede a nonpunitive transfer to a higher security institution is the present focus of controversy. The Second Circuit says that it need not when the basis of the transfer consists of facts "extrinsic" to the inmate's conduct, such as overcrowding. The First Circuit, however, has adhered to the opposite view because "the disadvantages to the inmate flowing from [a] . . . transfer are substantial, whether it be characterized as punitive, administrative, or rehabilitative . . . " Hence a hearing, however brief, is required for all transfers.

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180. United States ex rel. Haymes v. Montayne, 505 F.2d 977 (2d Cir. 1974). The court supported this distinction by stating that:

in such cases the . . . decision whether to transfer may not be advanced in any way by providing notice and a hearing to the transferee. Moreover, although the dislocation suffered by the transferred prisoner may be burdensome, the need to avoid more general harm may outweigh his individual claim.

Id. at 980.

181. Gomes v. Travisono, 510 F.2d 537, 541 (1st Cir. 1974).

182. Id. at 539. The court also indicated that the reasons for the transfer should be noted on the inmate's papers so as to ease his adjustment in the receiving institution. Id. at 541-42.
Whatever one's view, a hearing will not be required unless there is potentially significant harm to the inmate. A transfer within the same state to an institution of similar security classification is solely within administrative discretion. An inmate seeking to move from a maximum security institution to one with a lesser classification has no federal cause of action since he is seeking a benefit rather than avoidance of the loss of a vested entitlement.

The inmate facing a punitive transfer is entitled to the full panoply of Wolff rights, but in balancing the interests of the inmate and the institution, one could convincingly argue that the scale should tip more on the side of the inmate in the transfer case. Transferred inmates face all of the same hardships as those placed in solitary confinement, suffer a greater disruption in their personal lives, and undergo a permanent change in classification. Conversely, the use of transfers, particularly interstate transfers, is rare compared to other disciplinary measures, lowering the administrative burden on prison officials. Inmates should also be entitled to a hearing before a nonpunitive but still major transfer. At the same time, all courts have allowed officials the discretion to conduct emergency transfers when “the general security of the institution is immediately threatened,” such as


184. See Mueller v. Turcott, 501 F.2d 1016, 1017-18 (7th Cir. 1974). In Mueller, the plaintiff wished to transfer from maximum security to a lesser security institution to learn electronics. The officials' reasons for denial of the transfer, a need for close supervision and better medical facilities at the maximum security prison, were held to be rational. No hearing was required. Id. at 1017-18.


186. Punitive transfer usually follows a period in isolation. See, e.g., Aikens v. Lash, 371 F. Supp. 482 (N.D. Ind. 1973), modified, 514 F.2d 55 (7th Cir. 1975). The inmates are often held in isolation at the transferee prison pending reclassification regardless of the reason for the transfer since there is often a lag between the transfer of the inmate himself and the arrival of his institutional records. See Hoitt v. Vitek, 361 F. Supp. 1238, 1246-47 (D.N.H. 1973), aff'd, 497 F.2d 598 (1st Cir. 1974).


188. See Gomes v. Travisono, 490 F.2d 1209 (1st Cir. 1974) (requiring notice, a personal hearing before the decisionmaker, a reasonable opportunity to be heard, and a notation on the transfer papers as to the reasons for the transfer).

imminent threat of a prison uprising, fire, flood, or an epidemic.\(^9\)

Just as the transfer places a de facto badge of infamy on the affected inmate, some prison systems confer an official designation on some inmates who bear special attention. “Special offender” or “special case designation” are labels used to control the movement of incarcerated organized crime figures, “notorious persons,” and radicals.\(^{10}\) The consequences of this classification, however, may include prolonged solitary confinement,\(^{11}\) exclusion from social furloughs and release to halfway houses, and delayed parole.\(^{12}\) The designation therefore becomes another “grievous loss” to the inmate which he should be allowed to contest. The court which has most thoroughly examined this issue held that the United States Bureau of Prisons must provide the inmate in question significant procedural safeguards.\(^{13}\)

The constitutional status of routine classification proceedings, however, is very much in flux. On the one hand, courts have been moving toward a


Once an inmate has been transferred under such conditions, the courts have held that the inmate must be returned to the transferee prison for a hearing once the emergency has passed. Newkirk v. Butler, supra, at 1219 (return as soon as practicable); Kessler v. Cupp, 372 F. Supp. 76, 78 (D. Ore. 1973) (return within 30 days). Additionally, the authorities must bring the inmate to his home state for parole hearings and court appearance. Hoitt v. Vitek, supra, at 1254.

\(^{11}\) Such designations are used by both the federal and California systems. See Catalano v. United States, 383 F. Supp. 346 (D. Conn. 1974); Allen v. Nelson, 354 F. Supp. 505 (N.D. Cal. 1972), aff'd, 484 F.2d 960 (9th Cir. 1973). In both systems, the designation is marked on the prisoner's file and is present during all status considerations. The Bureau of Prison's Policy Statement 79.0047 (April 30, 1974), establishes eight categories of special offenders: nonfederal prisoners presently housed in federal prisons, members of organized crime, protection cases, custody risks, subversives, notorious individuals, persons who pose a danger to high government officials, and an offender who requires close supervision.

\(^{12}\) See Allen v. Nelson, 354 F. Supp. 505, 512-13 (N.D. Cal. 1972), aff'd, 484 F.2d 960 (9th Cir. 1973), in which the plaintiff Allen was confined in solitary for 18 months for being an “active, assaultive inmate,” a designation which blocked his return to the general population and of which he was unaware until he filed suit against the warden.


\(^{14}\) Id. at 352-53. The Catalano court held that the inmate was entitled to notice, a hearing, an opportunity to present witnesses and documentary evidence, full confrontation with the nature of the evidence before him, a limited right to counsel, a written finding in support of the classification and a right of appeal through the prison system to the Director of the Bureau of Prisons.

Such safeguards were deemed appropriate because of the potential harm to the inmate as balanced against the lesser security needs of the institution, since “special offender” designation is not imposed as an emergency measure.
requirement of a hearing before sending allegedly violent inmates into special maximum security custody or behavior modification programs. For example, in *Clonce v. Richardson*\(^{195}\) a federal district court considered the process of placing an individual in the now defunct federal Special Training and Rehabilitation Program (START).\(^{196}\) The court concluded that while the Bureau of Prisons had the power to place a man in such a program, the conditions of confinement represented such a major change, even from maximum security isolation in another prison, that a preconfinement hearing was required by the *Wolff* decision.\(^{197}\) Two earlier decisions regarding analogous programs reached the same conclusions.\(^{198}\)

Relying on *Clonce*, another district court stated in dictum that any major change in a prisoner's security classification should be preceded by an administrative hearing of some kind.\(^{199}\) Two circuit courts, however, have indicated that a hearing is not required in some situations.\(^{200}\) An interesting exception to this rule was developed in Virginia, where Judge Robert Merhige exercises extraordinary supervision over the local penal system. There, the authorities divide decisions between a punitive Adjustment Committee and the nonpunitive Institutional Classification Committee (ICC).\(^{201}\) In a series of decisions, Judge Merhige held that an inmate facing reclassification to a higher security status is entitled to an informal hearing before the ICC, preceded by notice containing a general indication of the adverse reports which will be considered.\(^{202}\)

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\(^{195}\) 379 F. Supp. 338 (W.D. Mo. 1974).

\(^{196}\) Under this program, inmates from throughout the federal system who exhibited chronically aggressive and assaultive behavior were sent to Springfield, Missouri, where they were placed in a maximum security section with minimal privileges and were constantly monitored by program staff members. A prisoner could remain at this level for a period of a year but would be allowed increased privileges up to release into the general population as a reward for desirable behavior. *See id.* at 344-47.

\(^{197}\) *Id.* at 349-51. The court supported its decision by stating:

> Forced participation in S.T.A.R.T. was obviously designed to accomplish a modification of the participant's behavior and his general motivation. . . . A prisoner may not have a constitutional right to prevent such experimentation but procedures specifically designed and implemented to change a man's mind and therefore his behavior in a manner substantially different from the conditions to which a prisoner is subjected in segregation reflects a major change in the conditions of confinement.

*Id.* at 350.


\(^{200}\) Marnin v. Pinto, 463 F.2d 483, 586 (3d Cir. 1972); Young v. Wainwright, 449 F.2d 338, 339 (5th Cir. 1971). *See also McCray v. Sullivan*, 509 F.2d 1332, 1334 (5th Cir. 1975).


As for routine initial classifications of prisoners on their arrival at the institutions, one recent opinion ruled that when the decision was made by a neutral classification committee based upon objective material, the inmate did not have a right to a personal hearing unless the classification would have a direct bearing on his ability to earn good time.\footnote{203}

Other decisions affecting the inmate appear to be beyond the pale of interests requiring due process protection. Although the vast bulk of authority is to the contrary, the most recent opinion, \textit{Clutchette}, stated that due process was required before removal of such privileges as visitation rights, schooling, recreation and institutional employment.\footnote{204} Two district courts have stated that participants in work-release programs could not be summarily removed without a hearing.\footnote{205} However, most courts have found that ordinary prison jobs,\footnote{206} visitation rights,\footnote{207} attendance at a prison school,\footnote{208} allocation of other rehabilitative resources,\footnote{209} irregularities in prison pay,\footnote{210} and minor changes in cell block conditions\footnote{211} do not rise to

\footnotesize{Although the inmate is not given the right to representation, he should be allowed to present facts in support of his present classification, see Cousins v. Oliver, 369 F. Supp. 553, 557 (E.D. Va. 1974), to confront adverse witnesses whenever possible, see Jones v. Institutional Classification Comm., Field Unit No. 8, 374 F. Supp. 706, 711 (W.D. Va. 1974), and to have a decision based upon nonpunitive criteria, see Almanza v. Oliver, 368 F. Supp. 981, 984-85 (E.D. Va. 1973).

\textit{203. Jordon v. Keve}, 387 F. Supp. 765 (D. Del. 1974). The Delaware classification scheme in question was similar to those described in notes 15-25 and accompanying text supra. Although the \textit{Jordon} court recognized the inmate's interest in the initial classification, it found that the system was not adversarial and the court was therefore reluctant to inject due process formality into the system.

\textit{204. Clutchette v. Procunier}, 510 F.2d 613 (9th Cir.), \textit{cert. granted sub nom.} Eno-moto v. Clutchette, 95 S. Ct. 2414 (1975). The court thought that the loss of these facilities "can have as debilitating an effect on the amenability of a prisoner to rehabilitation as loss of some good-time credit or a period of isolation" and that therefore, before these privileges can be taken away, the inmate must receive notice, a statement of the reasons for the deprivation, and an opportunity to respond. 510 F.2d at 615.


\textit{211. O'Brien v. Moriarty}, 489 F.2d 941, 944 (1st Cir. 1974).}
the level of federally protected rights absent a showing of arbitrary and capricious conduct by prison officials. 212

B. Substantive Constitutional Rights: Conditions of Confinement

In arriving at procedural protections for prisoners under the due process clause of the fourteenth amendment, courts have had the benefit of ready analogies to other areas of the law. The notion of a “grievous loss” is now widely accepted, as is the process of balancing the interest of the individual in his life, liberty, or property against the needs of government. But discussion of the substantive constitutional right of a prisoner to decent treatment has suffered from the lack of comparable doctrine and guidance from the Supreme Court, resulting in a lack of coherent law. 213

Those standards that do exist have been drawn from the eighth amendment cruel and unusual punishment clause and the due process clause of the fourteenth amendment. The eighth amendment has been the subject of only four decisions of the Supreme Court, none of which related to prison conditions. 214 Three different formulae of the amendment’s proscription have been developed by the lower courts. The most common derives from the Rochin v. California 215 conception of “conduct that shocks the conscience,” 216 often termed a “barbarous act” by the lower courts. 217 A gloss on this formula was added by Chief Justice Warren’s statement in Trop v. Dulles, 218 that “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” 219 In a

212. See Beatham v. Manson, 369 F. Supp. 783 (D. Conn. 1973), in which the court described the underlying guarantee of protecting against arbitrary and capricious conduct, stating:

The basic substantive due process guarantee against arbitrary or capricious official action applies even where procedural due process does not, as where the “interest” at stake is not “protected,” or where the aggrieved party has been denied access to an as yet potential benefit, but has not been deprived of an interest in a benefit already acquired.

Id. at 791.


216. Id. at 172.


219. Id. at 101.
widely quoted opinion, then Judge Blackmun interpreted Trop as mandating a view of the amendment in the light of "broad and idealistic concepts of dignity, civilized standards, humanity, and decency ...."220

The second conception of the amendment’s prohibition is one of disproportionality between the cause of the confinement and its conditions, and is drawn from Weems v. United States221 and Justice Brennan’s concurring opinion in Furman v. Georgia.222 Solitary confinement is more closely scrutinized if it is "lengthy and arduous" and is "imposed for a comparatively trivial infraction . . . than equivalent punishment for major breaches of prison discipline" and, in applying the test, the judge must weigh the "particular form of solitary confinement" against "the goals and needs of the prison administration and inquire whether the deprivations imposed by that administration are related to some valid penal objective."223

Disproportionality enters into the third formula: a ban on punishment which is arbitrary or capricious or which is "beyond what is necessary to achieve a legitimate penal goal."224 The difficulty here is that the choice of legitimate penal goals is not supposed to be entrusted to the judiciary.225 Thus, Judge Kaufman has stated:

For a federal court, however, to place a punishment beyond the power of a state to impose on an inmate is a drastic interference with the state’s free political and administrative processes. . . . Even a lifetime of study in prison administration and several advanced degrees in the field would not qualify us as a federal court to command state officials to shun a policy that they have decided is suitable because to us the choice may seem unsound or personally repugnant. As judges we are obliged to school ourselves in such objective sources as historical usage, . . . practices in other jurisdictions, . . . and public opinion . . . before we may responsibly

221. 217 U.S. 349 (1910).
222. 408 U.S. 238, 257 (1972) (Brennan, J., concurring).
223. Johnson v. Anderson, 370 F. Supp. 1373, 1388 (D. Del. 1974). The court added in a footnote: "A corollary principle is that solitary confinement which is arbitrary, capricious or discriminatory . . . is cruel and unusual punishment." Id. at 1388 n.31.
exercise the power of judicial review to declare a punishment unconstitutional under the Eighth Amendment.\textsuperscript{226}

The quotation points up the bankruptcy of the eighth amendment analysis. Judge Kaufman's characterization of public opinion, historical usage, and practices in other jurisdictions as "objective" and of the data of criminologists as "subjective" is at least ironic.\textsuperscript{227}

None of the tests discussed above can be said to draw distinct lines. In many respects they are synonymous. "Barbarous" conduct ought to be grossly disproportionate punishment for the offense charged. So too arbitrary and capricious conduct by a prison administration is by definition without relation to a legitimate penal goal. The judgment that a particular practice is cruel and unusual is therefore ineluctably personal and subjective. As Judge Tuttle has frankly recognized, what may shock the conscience of one judge may sit lightly on another's sense of decency.\textsuperscript{228} Still, the amendment has been useful in ending harsh and aberrational practices which fall well below national standards, especially conditions in entire prison systems characterized by terror and brutality.\textsuperscript{229}

If the cruel and unusual punishment clause can best be applied to outmoded practices applied across the board, then the due process clause has been used to check individual excesses in which a prisoner is treated harshly or denied a benefit without substantial justification.\textsuperscript{230} The belief that even a prisoner should be protected from arbitrary and capricious conduct has formed the basis for judicial review of individual decisions in diverse areas of

\begin{enumerate}
\item \textsuperscript{227} The Sostre court recognized, but was not compelled by, the testimony of Mr. Sol Rubin, Counsel for the National Council on Crime and Delinquency, and of Dr. Seymour Halleck of the University of Wisconsin, that isolation for extended periods of time leads to mental disorientation. \textit{Id.} at 190.
\item \textsuperscript{228} \textit{See} Novak v. Beto, 453 F.2d 661, 672 (5th Cir. 1971), \textit{cert. denied}, 409 U.S. 968 (1972).
\item \textsuperscript{229} \textit{See} notes 304-24 \textit{infra}.
\item This line of reasoning was expressed in Johnson v. Glick, 481 F.2d 1028 (2d Cir.), \textit{cert. denied}, 414 U.S. 1033 (1973). Judge Friendly analyzed the unconstitutionality of a guard assault on an inmate:
\begin{quote}
The thread common to all these cases is that "punishment" has been deliberately administered for a penal or disciplinary purpose, with the apparent authorization of high prison officials . . . . In contrast, although a spontaneous attack by a guard is "cruel" and, we hope, "unusual," it does not fit any ordinary concept of "punishment."
\end{quote}
\textit{Id.} at 1032.
prison life.\textsuperscript{231} The test has been stated as a requirement that the state provide a rational justification for its actions,\textsuperscript{232} although this test is also open-ended since "a court makes a subjective determination after the particular event as to whether a prison official overstepped an unspecified line of permissible conduct."\textsuperscript{233}

The Fifth Circuit has taken a different approach, contrasting mistreatment which is inadvertent and occasional with incidents that are caused by continuing neglect of the needs of the inmates by prison authorities.\textsuperscript{234} Robert v. Williams\textsuperscript{235} involved a 15-year-old prisoner who was accidentally shot in the head by a shotgun blast from the weapon of an inmate trustee. Since this accident resulted from the negligent practice of entrusting dangerous weapons to untrained and unfit persons, the eighth amendment line was crossed. Clemmons v. Greggs\textsuperscript{236} provides a contrast. There two prison guards, faced with rioting inmates, who were, however, effectively locked in their cells, panicked and threw tear gas canisters into the enclosed cellblock and then failed to obtain assistance to ventilate the area for a half hour, leading to serious, but not permanent, injury to several prisoners. The court found that


\textsuperscript{233} Allen v. Nelson, 354 F. Supp. 505, 511 (N.D. Cal.), aff'd, 484 F.2d 960 (9th Cir. 1973).

\textsuperscript{234} See Roberts v. Williams, 456 F.2d 819 (5th Cir.), cert. denied, 404 U.S. 866 (1971), in which the court expressed its outlook by stating:

\begin{quote}
We see . . . cruelty in the sustained maintenance, over a period of time of a needlessly hazardous condition for . . . prisoners. We might say careless preparation of a single meal, producing food poisoning in the prisoners, was not cruel, but it might be so if the jailors [sic] negligently allowed the jail's only drinking water supply to become permanently infected with typhoid bacteria. The word punishment, too, implies a wrong in prison management, in contrast to the casual dereliction of a minor prison employee. Thus, in an Eighth Amendment case, if there were, as here, no conscious purpose to inflict suffering, we would look next for a callous indifference to it at the management level, in the sustained knowing maintenance of bad practices and customs.
\end{quote}

\textit{Id.} at 827.

\textsuperscript{235} 456 F.2d 819 (5th Cir.), cert. denied, 404 U.S. 866 (1971).

\textsuperscript{236} 509 F.2d 1338 (5th Cir. 1975).
the action was nonmalicious but in violation of written prison regulations on
the use of tear gas. In addition, the guards involved were disciplined by the
administration. Hence, no violation of the eighth amendment had oc-
curred.237

Given the difficulty in defining a general standard of substantive limits on
prisoner treatment, a more useful and concrete approach is to focus on
particular areas of judicial scrutiny: punishment, personal security, and
medical care.

**Punishment.** The earliest eighth amendment prison cases concerned the
use of corporal punishment and physical torture on inmates.238 Later cases
have enjoined reprisal beatings,239 the use of chemical agents such as mace
and tear gas as punishment,240 forceful administration of milk of magnesia,241
and the use of starvation diets as punishment.242 At the other

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237. *Id.* at 1340. Chief Judge Brown dissented on the ground that the court failed to
consider a potential due process violation as was found in *Johnson v. Glick*, 481 F.2d
1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). He felt that the failure of the guards
to come to the aid of the trapped prisoners for an extended period of time constituted a
separate constitutional offense. 509 F.2d at 1340-41 (Brown, C.J., dissenting).

238. *E.g.*, *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968). This decision banned
the use of whipping at the Arkansas prison farms.

239. *Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12 (2d Cir.

noted that:

> [W]ardens and other high-level officials at the Oklahoma State Peniten-
> tiary at McAlester have approved or acquiesced in the use of chemical
> agents as a purely punitive measure against inmates, including even inmates locked
> in their cells. . . . for such conduct as loud singing in cells, refusing to get
> haircuts or to shave, possession of contraband (such as instant coffee) in cells,
> destruction of state property (such as breaking plastic spoons), cursing an offi-
> cer, talking in a loud voice or yelling, screaming for a doctor and shaking or
> rattling cell doors.

*Id.* at 414. *See also* *Landman v. Royster*, 333 F. Supp. 621, 649 (E.D. Va. 1971), *en-

241. *Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974). The *Gates* court also
enjoined the following practices at the Parchman prison farm:

> . . . stripping inmates of their clothing, turning the fan on inmates while
> naked and wet, depriving inmates of mattresses, hygienic materials, and ade-
> quate food, handcuffing inmates to the fence and to cells for long periods of
time, shooting at and around inmates to keep them standing or moving, and
> forcing inmates to stand, sit or lie on crates, stumps, or otherwise awkward
> positions for prolonged periods.

*Id.* at 1306.

242. *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 207 (8th Cir. 1974);
extreme, relatively minor deprivations have been summarily dismissed, including verbal harassment, lack of recreational facilities, restrictions on hair length, and nonessential creature comforts.

If a practice approaches corporal punishment and poses a clear threat to the health of the inmate, then it is likely to be declared cruel and unusual. Much of the debate has centered around the use of solitary confinement as punishment for institutional violations, and specifically on the use of "strip cells" or "dark holes." Although some would condemn the use of all forms of punitive segregation as unrelated to a valid penal objective, use of solitary confinement is presently beyond challenge. Courts have refused to give credence to testimony of psychological hazards.


245. E.g., Collins v. Haga, 373 F. Supp. 923 (W.D. Va. 1974). Although the inmates never win, hair length regulations cause much litigation. These regulations have been explained on grounds of health and identification. In Texas, however, prisoners sentenced to solitary are shaved bald upon returning to general population. Although this is a practice obviously designed as punishment, it has been upheld. See Novak v. Beto, 453 F.2d 661 (5th Cir. 1971), cert. denied, 409 U.S. 968 (1972).


247. See Finney v. Arkansas Bd. of Corrections, 505 F.2d 194 (8th Cir. 1974), in which the court described the line as one dividing privileges from "the basic necessities of human existence." Id. at 207.

248. The classic strip cell is a room with concrete or metal walls, no bedding, and no furnishings except for a "chinese toilet", which is a hole in the floor which can be flushed to remove human waste, but the flushing mechanism of which is usually outside of the cell. The cell has no windows and a double door, an interior barred door and a solid exterior door with a peephole that can be shut to exclude all light.


In Johnson v. Anderson, 370 F. Supp. 1373 (D. Del. 1974), the court expressed the rationale supporting the use of solitary confinement:

While aware that more subtle forms of punishment, psychological in nature, may also offend the Eighth Amendment's guarantee of civilized treatment, the courts have generally been more tolerant of the non-physical deprivations associated with solitary confinement. Accordingly, the isolation from companionship, severe restriction on intellectual stimulation and prolonged inactivity
adhering to the belief that “authorities must have some harsher measure to induce compliance with prison regulations.”\textsuperscript{250} Indeed, a scheme of indefinite segregation stretching into years has been upheld as long as conditions are not unhealthy, and the prisoner is allowed regular visits by a psychiatrist and periodic hearings regarding his confinement.\textsuperscript{251}

Whether confinement in solitary is cruel and unusual, therefore, rests upon a balance between the conditions of the cell and the length of confinement. Only a few practices are clearly forbidden: nudity,\textsuperscript{252} a complete lack of plumbing,\textsuperscript{253} a complete lack of exercise or opportunity to clean oneself,\textsuperscript{254} inadequate ventilation and heat,\textsuperscript{255} and overcrowding.\textsuperscript{256} A rough estimate is that lightless strip cell confinement will be tolerated for only 24 to at most 72 hours, while punitive isolation in a normal cell but without any amenities can last up to 30 days.\textsuperscript{257} Administrative segregation with some privileges was an inmate in solitary may often experience have generally escaped Eighth Amendment censure.

\textit{Id.} at 1387.


256. See White v. Commissioner of Ala. Bd. of Corrections, 470 F.2d 55, 56 (5th Cir. 1973).

257. The court in McCray v. Sullivan, 509 F.2d 1332, 1336 (5th Cir. 1975), held that placing seven prisoners in a 6' x 8' strip cell for a period of 21 days was cruel and unusual punishment.

258. See Gates v. Collier, 349 F. Supp. 881, 894 (N.D. Miss. 1972), aff'd, 501 F.2d 1, 1301, 1305 (5th Cir. 1974). The Gates court held that strip cell isolation of 48 to 72 hours was cruel and unusual, while the court in Kelly v. Brewer, 378 F. Supp. 447, 453 (S.D. Iowa 1974), found a period of four days to be the same. The court in LaReau v.
tolerated for up to two years for a prisoner implicated in a gambling ring, drug use, rioting, two homicides, threatening prisoners, possession of weapons and destroying his cell.\textsuperscript{259}

The doctrines of disproportionality and abuse of discretion are most important for judging the length of confinement. While “confirmed recalcitrants”\textsuperscript{260} will receive little sympathy, a prisoner confined to a strip cell for 21 days for refusal to sign a safety sheet has recovered for cruel and unusual punishment,\textsuperscript{261} and a warden was found liable for confining a prisoner whose only proven offense was a surly attitude.\textsuperscript{262} Careful scrutiny has been focused on prisoners who were confined for periods of 18 months\textsuperscript{263} and wrongly confined as escape risks.\textsuperscript{264} Judicial action has not always been entirely consistent, however. One court has upheld segregation of several inmates in part because the inmates were defiant and consistently harassing prison officials.\textsuperscript{265} Another court has held that although the prisoner was an “active aggressive inmate . . . [who had] no remorse for [his violent

MacDougall, 473 F.2d 974, 978 (2d Cir. 1972), cert. denied, 414 U.S. 878 (1973), found five days of such isolation to be cruel and unusual.

On the other hand, the court in Novak v. Beto, 453 F.2d 661, 668 (5th Cir. 1971), cert. denied, 409 U.S. 968 (1972), allowed strip cell isolation with sanitary conditions for up to 15 days although with a reduced diet, limited clothing, flush toilets, a drinking fountain, toilet paper, blanket but no mattress, pillow and sheets. The cells were cleaned at regular intervals. Other examples of acceptable punitive confinement may be found in Fife v. Crist, 380 F. Supp. 1005, 1010 (E.D. Pa. 1974), aff’d, 511 F.2d 1397 (3d Cir. 1975); Clements v. Turner, 364 F. Supp. 270, 274 (D. Utah 1973). The 30-day limit for a normal cell is taken from Crafton v. Luttrell, 378 F. Supp. 521, 528 (M.D. Tenn. 1974).

259. Royal v. Clark, 447 F.2d 501 (5th Cir. 1971); cf. Williams v. Wainwright, 350 F. Supp. 33 (M.D. Fla. 1972), in which strip cell use was limited to 10 hours.


262. United States ex rel. Larkins v. Oswald, 510 F.2d 583, 588 (2d Cir. 1975).

263. See Allen v. Nelson, 354 F. Supp. 505, 512 (N.D. Cal. 1973), aff’d, 484 F.2d 960 (9th Cir. 1973). Allen was confined in administrative segregation after he was charged with involvement in the death of a guard at the Soledad prison. The charges were later dismissed. Although Allen had refused to answer questions and was an alleged militant, the court concluded that without concrete evidence of “overt problem behavior” he could not be held out of the general population. Id. at 513.

264. See Bowers v. Smith, 353 F. Supp. 1339, 1346 (D. Vt. 1972). Plaintiff had escaped four times in four years and had been sentenced judicially and administratively for these crimes. During a general reorganization of the Vermont Prison, he was reclassified into maximum security as an escape risk even though he had not participated in the disturbances which precipitated the reorganization and had eschewed escape opportunities. The court found that the reclassification was arbitrary and capricious in the absence of fresh evidence.

segregation for administrative reasons was not warranted. Although two district courts have agreed that institutional punishment may be imposed only when it is necessary for the orderly administration of the prison and supported by sufficient facts, only a strong showing by the prisoner can overcome the presumption of regularity which supports the administration. Indeed, given the inability to demonstrate a rational relationship between prison itself and societal security in general, it would ask too much to demand such a showing between solitary confinement and prison security.

**Personal security of inmates.** Inevitable violence in the prison has been taken into account by courts deciding whether the actions of prison administrators fail to conform with eighth amendment or due process standards in assuring reasonable protection of inmates either from other inmates or from prison guards.

Although many charges of guard brutality are filed by prisoners, the standard for a constitutional tort is difficult to meet. A civil rights action under section 1983 must show more than simple assault and battery and even more than excessive use of force given the fact that prisoners are "not usually the most gentle or tractable of men and women." Force is justifiable when needed in self-defense, breaking up fights between inmates, com-


267. Gates v. Collier, 349 F. Supp. 881, 894 (N.D. Miss. 1972), aff'd, 501 F.2d 1291 (5th Cir. 1974); Allen v. Nelson, 354 F. Supp. 505, 512 (N.D. Cal.), aff'd, 484 F.2d 960 (9th Cir. 1973). In *Allen*, the court stated that the punishment must be supported by more than "Talismanic labels such as 'protection,' 'threat to security,' and the like." *Id.* at 512. Other cases supporting this position are: United States ex rel. Larkins v. Oswald, 510 F.2d 583 (2d Cir. 1975); United States ex rel. Haymes v. Montayne, 505 F.2d 977 (2d Cir. 1974), *cert. granted*, 95 S. Ct. 2676 (1975); O'Brien v. Moriarty, 489 F.2d 941, 944 (1st Cir. 1974); Adams v. Carlson, 488 F.2d 619, 635 (7th Cir. 1973); United States ex rel. Tyrrell v. Speaker, 471 F.2d 1197, 1202 (3d Cir. 1973); Crafton v. Luttrell, 378 F. Supp. 521, 532 (M.D. Tenn. 1974).


269. In Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973), Judge Friendly set forth the factors to be considered in determining if an alleged use of force constitutes a section 1983 violation:

[A] court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm . . . .

*Id.* at 1033.

Guard attacks have been held to violate both the due process clause, *id.* at 1032, and the eighth amendment, Jackson v. Allen, 376 F. Supp. 1393, 1397 (E.D. Ark. 1974).
pelling obedience to lawful orders, protecting state property, and recapturing escapees. In an emergency situation, virtually indiscriminate use of tear gas and fire hoses against confined inmates when lesser measures involved a significant risk to the lives of the guards has been upheld, but the same measures against a helpless inmate population were enjoined in one case and held cruel and unusual in another. Similarly, a prisoner who, while resisting confinement in a strip cell, was beaten on the hands with handcuffs, causing serious injury to his hands, was allowed to recover.

Prison officials have both a common law and a constitutional duty to protect inmates from attacks by other inmates. Both standards begin with the premise that "in a penal institution there is always the danger of riots or lesser disturbances, which may result in injuries to non-participants." Hence, reasonable risks must be taken and the tort duty is one of avoiding "unreasonable risk of injury" with "ordinary care" limited to what is "commensurate with the danger that is apparent or reasonably to be foreseen." To prove a constitutional violation, the inmate plaintiff must demonstrate an "egregious failure to provide security" to him after due warning of a threat to the authorities, or a failure to stop a continuing reign of terror in the prison. Cruel and unusual punishment has been

272. Id.
280. McCray v. Sullivan, 509 F.2d 1332, 1334 (5th Cir. 1975); Gates v. Collier, 501 F.2d 1291, 1307-09 (5th Cir. 1974); Landman v. Royster, 333 F. Supp. 621, 646-47 (E.D. Va. 1971). The relief ordered in Gates is illustrative of the possible remedies available: (1) classification of inmates by severity of offense; (2) reporting and prosecution of inmates accused of assault, isolation of inmates accused of assault; (3) rules prohibiting fighting and gambling; (4) procedures for confiscating inmate weapons; (5) elimination of trusties and an increased guard force; (6) an end to the barracks housing. 501 F.2d at 1309.
established when prisons have used armed inmate trusties to patrol the population,\textsuperscript{281} have not instituted classification systems to separate out violent persons,\textsuperscript{282} or have allowed open dormitories to go unpatrolled.\textsuperscript{288} Even in these situations, if prison administrators allow an inmate to have himself segregated from the rest of the population for self-protection and he fails to avail himself of that opportunity, despite the deprivation of solitary, then they may be immune from liability.\textsuperscript{284}

\textbf{Medical care.} The distinction between systematic and individual abuse shown in the area of inmate assaults carries over into the health care area. Perhaps because evidence of abuse is more readily verified, however, courts have shown considerably less sympathy for administrators called upon to examine the medical needs of prisoners. Although state prison officials possess broad discretion in determining the nature of treatment afforded prisoners,\textsuperscript{285} a failure to provide necessary medication will not go unremedied.\textsuperscript{286}

The most significant cases have been those in which a federal court has ordered a state prison to develop medical resources to meet the needs of the inmates.\textsuperscript{287} Systemic failure is shown when the prison facilities are "inadequate to meet predictable health care needs because of obvious and sustained

\begin{itemize}
\item \textsuperscript{282} James v. Wallace, 382 F. Supp. 1177, 1182 (M.D. Ala. 1974).
\item \textsuperscript{283} Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974).
\item \textsuperscript{285} \textit{See, e.g.,} Ross v. Bounds, 373 F. Supp. 450, 452-53 (E.D.N.C. 1974) (no constitutional right to be routinely examined for sickle cell anemia).
\item \textsuperscript{286} \textit{See, e.g.,} Newman v. Alabama, 503 F.2d 1320 (5th Cir. 1974), \textit{cert. denied}; 421 U.S. 948 (1975), in which the court stated that deference should be tendered only as to these necessary or essential concomitants of incarceration . . . . While limited mobility, for example, may be endemic to confinement, forcing inmates to endure severe infirmities without treatment for the duration of confinement is not. In conjunction with this reasoning, there has been a proliferation of decisions in which the fact that incarceration disables an inmate from procuring aid and creates total dependence upon the state for treatment has been seized upon as a justification for judicial scrutiny of prison medical practices. \textit{Id.} at 1329.
\end{itemize}
deficiencies in professional staff, facilities and equipment. The shortage amounts to "deliberate indifference" which violates the eighth and fourteenth amendments.

Individual relief for damages is more difficult to obtain. Although systemic medical malpractice constitutes a violation of constitutional rights, simple malpractice does not. One court has held that in order to recover, a plaintiff must demonstrate: "1. An acute physical condition; 2. The urgent need for medical care; 3. The failure or refusal to provide it; and 4. Tangible residual injury." Absurdly insufficient or blatantly inappropriate care has been held to be the equivalent of intentional mistreatment, as has deliberate indifference to and defiance of express instructions of doctors. Interestingly, one circuit has held that an inmate has a right to be free of nonconsensual surgery when not necessary to save his life or to further a "compelling interest of imprisonment or prison security."

Federal prisoners are governed by a different standard of care under 18 U.S.C. § 4042, which requires provision of "suitable" medical treatment. Several courts have ruled in favor of inmates seeking transfers or furloughs for better medical treatment when the Bureau of Prisons failed to demonstrate that it could provide the same level of medical care in the facility to which the inmate was assigned.

290. Mills v. Oliver, 367 F. Supp. 77 (E.D. Va. 1973), in which the court stated that "[a] prisoner has a constitutional right to reasonable medical treatment." Id. at 79.
295. Runnels v. Rosendale, 499 F.2d 733, 735 (9th Cir. 1974). What constitutes a compelling interest of imprisonment was left unanswered.
IV. RELIEF

Despite the existence of a panoply of rights, obtaining relief for the wronged inmate is difficult. Even the most sympathetic judges find prisoner suits vexing, and the number of complaints has increased so rapidly that individual attention to all of the cases is impossible.

A. Systemic relief

The pressures of individual suits and the obvious deficiencies of some prisons have led federal courts to engage in systemic relief to alleviate grievances. Following the lead of the United States District Court for the District of Rhode Island, several courts have encouraged attorneys for prisoners and for prison administrations to confer and develop a consent decree by which institutional practices will be modified. One court invited the Community Relations Service of the Department of Justice to act as a mediator, with beneficial results. In the course of litigation, several courts have conducted weeks of hearings, have appointed experts to inspect the facilities in question, and have moved the court to the prison itself for further hearings and inspections by the judge.

Perhaps the outstanding contribution of the federal courts has been the exposure and regulation of those prisons which can be compared only with concentration camps. Aside from the infamous Arkansas Prison Farms, courts have found similar conditions in Virginia, Mississippi, Alabama, and Oklahoma. At the Parchman Prison Farms in Mississippi, the court encountered housing units which were unfit for human habitation, waste disposal systems which threatened widespread contagion, electrical wiring which posed an imminent fire hazard, and a complete lack of bathroom, kitchen and heating facilities; these conditions existed along with an utter inability of the prison management to protect prisoners and a total lack of rehabilitative programs. The Alabama Prison System provided almost no delivery of health


304. See Gates v. Collier, 501 F.2d 1291, 1300 (5th Cir. 1974).
care to prisoners.\textsuperscript{305} Indiana confined psychologically disturbed inmates in isolation blocks characterized by deafening noise and such a lack of personnel that inmates could be let out for showers only a few times a month.\textsuperscript{306} In Oklahoma, an eight-month lock-up resulted in vermin-infested cells, a complete lack of exercise, inadequate health care and a total absence of rehabilitative programs.\textsuperscript{307}

In such circumstances "the existence of constitutional infirmities deprives the prison deference rule of its indomitably insulating nature and dictates that the rule yield to the remedial power of a court."\textsuperscript{308} Courts have ordered both long and short range relief amounting to control of the state prison by the federal judge. Immediate relief has included the end of disciplinary practices found objectionable by the court,\textsuperscript{309} the end to armed prisoner trusts and corridor bosses,\textsuperscript{310} the closing of irreparable segregation

\begin{footnotesize}
\textsuperscript{305} See Aikens v. Lash, 371 F. Supp. 482, 493 (N.D. Ind. 1974), modified, 514 F.2d 55 (7th Cir. 1975).

The rationale for massive intervention was stated by the court in James v. Wallace, 382 F. Supp. 1177 (M.D. Ala. 1974):

Where conditions within a prison are such that the inmates incarcerated therein will inevitably and necessarily become more sociopathic and less able to adapt to conventional society as the result of their incarceration than they were prior thereto, cruel and unusual punishment is inflicted.

\textit{Id.} at 1181. Of course, if all prisons lead to more sociopathic behavior, a position not without its adherents, then all prisons inflict cruel and unusual punishment.

\textsuperscript{309} See, e.g., White v. Commissioner of Ala. Bd. of Corrections, 470 F.2d 55, 56 (5th Cir. 1972) (all inmates in solitary confinement must receive toilet paper, toilets must be flushed three times daily, showers allowed at least once a week); Battle v. Anderson, 376 F. Supp. 402, 432 (E.D. Okla. 1974) (dark cell confinement must not exceed an established maximum period); Osborn v. Manson, 359 F. Supp. 1107, 1111 (D. Conn. 1973) (one hour of exercise allowed per day); Gates v. Collier, 349 F. Supp. 881, 900 (N.D. Miss. 1972), aff'd, 501 F.2d 1291 (5th Cir. 1974) (inmates must receive 2,000 calories of food per day, normal institutional clothing, soap, eating utensils, toothbrushes, and shaving gear while in isolation; cells must be adequately heated, ventilated and maintained in sanitary condition; no confinement in a dark cell for more than 24 hours).

\end{footnotesize}
conditions of confinement and the immediate hiring of essential medical personnel and additional guards to ensure control of the prison. Long range relief has encompassed the institution of recreational and rehabilitative programs, the building of new facilities, and affirmative action hiring to increase the number of minority personnel in general and on decisionmaking bodies in particular. Once severe constitutional deficiencies are demonstrated, shortages of funds are not an excuse for inaction.

To enforce the ordered relief, courts have retained jurisdiction over individual cases for years have ordered defendants to maintain detailed records and to report all emergencies to the court, and have granted unlimited access to all prison records by plaintiffs' attorneys. In some instances, court-appointed monitors have been used and in others either contempt has been threatened or suspended fines imposed.


313. See, e.g., Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972), in which the court ordered an additional 110 guards to be hired on a civil service basis, with affirmative action recruitment of minority employees, as well as six clerks to maintain records, cooks, eight maintenance men, and interestingly, an experienced penologist to head the prison and an ombudsman to hear complaints.


322. See Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 214 (8th Cir. 1974); Gates v. Collier, 501 F.2d 1291, 1321 (5th Cir. 1974).


B. Individual relief

For a variety of reasons, both legal and practical, obtaining individual relief for prisoners claiming deprivation of civil rights is more difficult than systemic relief, and the performance of the courts has been less successful.

Jurisdiction and exhaustion of administrative remedies. The holding of the Supreme Court in Haines v. Kerner,325 that section 1983 complaints are to be read with liberality, has made entry into court quite easy, but the requirement that a state prisoner demonstrate a violation of a constitutional right in order to succeed means that a wrong which does not rise to the level of a constitutional claim will be dismissed. Some federal courts have taken jurisdiction on the basis of pendent jurisdiction326 or diversity of citizenship.327 For federal prisoners, jurisdiction must be based upon either a federal question,328 mandamus,329 or habeas corpus.330 The result is that they must demonstrate the exhaustion of administrative remedies, including the completion of the newly-established internal grievance procedure of the Bureau of Prisons,331 before they can file suit.332 The present consensus of opinion is that exhaustion of state remedies is not required under section 1983,333 but

333. See Wilwording v. Swenson, 404 U.S. 249 (1971); Willis v. Ciccone, 506 F.2d 1011, 1015 n.3 (8th Cir. 1974); Palmigiano v. Mullen, 491 F.2d 978, 979-80 (1st Cir. 1974); Johnson v. Glick, 481 F.2d 1028, 1030 n.1 (2d Cir.), cert. denied, 414 U.S. 1033.
there is a nascent and growing movement towards making exhaustion mandatory as a result of the increasing crush of prisoner suits and the expansion of grievance remedies.\footnote{334} 

**Injunctive relief.** Emergency relief is almost impossible to obtain. Such relief is authorized by one Second Circuit decision,\footnote{335} but judicial reluctance to interfere in times of emergency and the difficulty which a pro se litigant has in understanding the rules for preliminary relief make the barriers high.\footnote{336} Furthermore, the rapidity of many prison decisions makes injunctive relief impractical since by the time the prisoner reserves his day in court, he is likely to have waited many months.\footnote{337}

Once the litigant gets to court, he will find that the scope of review of prison decisions is narrow indeed. For disciplinary complaints, the general rule is that a federal court will only check the records to ascertain compliance with due process requirements and the presence of some rational reason for the decision.\footnote{338} Whether a violation of state administrative procedures which are not constitutionally required constitutes a violation of due process is not yet clear.\footnote{339} For nondisciplinary decisions to which a due process right

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\footnote{334}{Exhaustion of state administrative remedies was required in Marnin v. Pinto, 463 F.2d 583, 586 (3d Cir. 1972); Rocha v. Beto, 449 F.2d 741, 742 (5th Cir. 1971); Hyde v. Fitzberger, 365 F. Supp. 1021 (D. Md. 1973). The requirement of exhaustion was hinted at in Frazier v. Donelon, 381 F. Supp. 911, 913 (E.D. La. 1974), and in Butler v. Bensinger, 377 F. Supp. 870, 881 (N.D. Ill. 1974). The court in Palmigiano v. Mullen, 491 F.2d 978, 981 (1st Cir. 1974), stated that it might consider a failure to exhaust as a failure to mitigate damages.}

\footnote{335}{Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971).}


\footnote{337}{See, e.g., Preiser v. Newkirk, 421 U.S. 948 (1975).}

\footnote{338}{The Eighth Circuit, in Willis v. Ciccone, 506 F.2d 1011 (8th Cir. 1974), described the district court's function as follows: The district court should simply determine whether the decision was supported by some facts. The sole and only issue of constitutional substance is whether there exists any evidence at all, that is, whether there is any basis in fact to support the action taken by the prison officials . . . .}

\footnote{Id. at 1018. With the definitive guidelines of minimal due process requirements now set forth in Wolff, the claims concerning denial of procedural due process in prison disciplinary hearings should disappear. Accord, Collins v. Vitek, 375 F. Supp. 856, 858 (D.N.H. 1974). But see United States ex rel. Haymes v. Montayne, 505 F.2d 977, 980 n.4 (2d Cir. 1974).}

does not attach, the only review will be for arbitrary and capricious action.840

Since disciplinary confinements will usually have ended by the time of trial, most prisoner suits regarding discipline will seek restoration of good time and damages. In Preiser v. Rodriguez,841 the Supreme Court ruled that suits seeking the restoration of good time were "in the heartland of habeas corpus" and therefore were to be treated as such rather than under section 1983, with the attendant requirement of exhaustion of state remedies.842 The policy justification for this action was one of federalism; comity dictated that states be given the first opportunity to correct their own errors. The following term, Wolff emasculated Preiser by holding that although injunctive relief for restoration of good time was precluded by Preiser, a prisoner could file suit under section 1983 for declaratory relief and damages, and use the successful judgment as collateral estoppel in state proceedings for the restoration of good time.843 One circuit court has circumvented the process entirely by taking the petition for injunctive relief as a pendent claim under state law.844 Further, Wolff held that due process requirements were not retroactive and that therefore pre-Wolff violations gave no right to expungement of records.846 Actions for damages are also precluded unless in violation of an authoritative and binding pre-Wolff lower court order.846 Two courts, however, have held that when the violation is egregious and in bad faith, expungement and perhaps damages are appropriate.847 Finally, one should note that a court will not usually order the restoration of good time, but will instead remand the case to a disciplinary committee for a new hearing.848

Injunctions are useful, however, to obtain discretionary health care. In several cases the failure of prison authorities to take steps to promote care, such as a furlough for dental work not available in the prison system,849 a

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842. Id.
843. 418 U.S. at 554-55.
845. 418 U.S. at 573-74.
transfer to a prison in a drier climate for a prisoner suffering from chronic rhinitis, and an absence of salt and fat free diets for heart patients were held to be arbitrary and unreasonable, and injunctive relief was granted.

Damages. Recovery for violation of a prisoner’s civil rights is rare. A survey of the federal reporters discloses a total of ten such cases reported in the last four years with a few more granting nominal damages or damages based upon state law in diversity cases. Federal prisoners may sue under the Federal Tort Claims Act, under which recovery for injuries incurred while in prison is somewhat more common than in section 1983 cases.

351. See Steward v. Henderson, 364 F. Supp. 283, 285 (N.D. Ga. 1973), in which the court stated that “[i]t borders on the cruel and unusual to instruct a man that he must not eat certain foods on peril of damaging his health and then provide him a menu where the only foods offered are the very ones proscribed.” But cf. Carlisle v. Scott, 357 F. Supp. 1284 (N.D. Ill. 1973).
Several legal obstacles stand in the way of the inmate seeking damages. First, the eleventh amendment bars recovery of money damages from a state government under section 1983,\(^{356}\) sewing up the deepest pocket available. Second, section 1983 liability is not coextensive with simple negligence; a plaintiff must show bad faith on the part of the individual defendant or such a degree of neglect or arbitrariness that the bad faith and malice of the defendant may be inferred.\(^{357}\) A corollary to this principle is that prison officials are not charged with knowing all of the recent constitutional decisions delineating the rights of prisoners. They need only show that they had a good faith belief that their actions were constitutional at the time in question.\(^{358}\)

Further difficulty is posed by the doctrine that a government superior is not liable for the acts of his subordinates unless he has personal knowledge.

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\(^{356}\) This is so because a state is not a “person” within the meaning of section 1983, Myer v. New Jersey, 460 F.2d 1253 (3d Cir. 1972); cf. Monroe v. Pape, 365 U.S. 167, 187-92 (1961), and because a state cannot be sued in federal court by its citizens or by citizens of foreign states by virtue of the eleventh amendment unless it so consents, see Fitts v. McGhee, 172 U.S. 516 (1899); Gambocz v. Sub-Committee on Claims of the Joint Legislative Appropriations Comm., New Jersey Legislature, 423 F.2d 674 (3d Cir. 1970) (per curiam). See also Pinon v. Wisconsin, 368 F. Supp. 608, 611 (E.D. Wis. 1973); Landman v. Royster, 354 F. Supp. 1302, 1315-16 (E.D. Va. 1973).

\(^{357}\) Palmigiano v. Mullen, 491 F.2d 978, 980 (1st Cir. 1974).


In Collins, supra, the court characterized the test as follows: “If a prison official acts in a reasonable good faith reliance on what was standard operating procedure in his prison, he is not required to respond personally in damages.” Id. at 1156. How far this doctrine extends depends largely on the predilections of the individual judge as to what is “reasonable.” Compare Wright v. McMann, 460 F.2d 126 (2d Cir.), cert. denied, 409 U.S. 885 (1972), and Roberts v. Williams, 456 F.2d 819 (5th Cir.), cert. denied, 404 U.S. 866 (1971), with Poindexter v. Woodson, supra. The “standard operating procedure” has been interpreted to include confinement in an institution under conditions which are later declared as cruel and unusual punishment. See Brown v. United States, 342 F. Supp. 987, 993 (E.D. Ark. 1972), aff'd in part and rev'd in part, 486 F.2d 284 (8th Cir. 1973). Conversely, an action taken in violation of then-existing prison policy is forbidden. See United States ex rel. Larkins v. Oswald, 510 F.2d 583, 589 (2d Cir. 1975).
A warden or other superior officer can only be held liable in damages if he had actual knowledge of the tortious conduct of his subordinates and acquiesced in them, or if the practice of the prison is so pervasive that his actual knowledge can be inferred. Another barrier is that the common law immunity for officials performing their duty also applies to civil rights actions. A plaintiff must therefore show that the individual defendant in question was performing a nondiscretionary function, that is, without policy justification, while committing the tortious act.

V. THE EFFECT OF FEDERAL INTERVENTION

The large and increasing number of inmate complaints precludes all but occasional trials of such lawsuits. Indeed, the number of claims rises if a


361. See United States ex rel. Larkins v. Oswald, 510 F.2d 583 (2d Cir. 1975) (inferred from state statutory responsibility); Patterson v. MacDougall, 506 F.2d 1, 4-5 (5th Cir. 1975); Wright v. McMann, 460 F.2d 126 (2d Cir.), cert. denied, 409 U.S. 885 (1972); Landman v. Royster, 354 F. Supp. 1302, 1316 (E.D. Va. 1973) (inferred from the facts of the case).


The Supreme Court's most recent pronouncement on the subject was made in Scheuer v. Rhodes, 416 U.S. 232 (1974), in which the Court stated:

... a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity ... for acts performed in the course of official conduct.

Id. at 247-48.
prisoner wins an occasional suit. Recognizing this, the Freund Commission concluded that "... we are, in truth, fostering an illusion. What the prisoner really has access to is the necessarily fleeting attention of a judge or law clerk..."\textsuperscript{364} Judges have repeatedly written that they are unable to sort out frivolous claims from genuine ones. One court, historically sympathetic to prisoners, complained of "writs" protesting the removal of a pet cat, a failure to repair a toilet within three days, and the lack of a second set of clothes.\textsuperscript{366} Another plaintiff filed 36 different lawsuits in federal court in less than four years.\textsuperscript{366}

Exacerbating the problem of numbers is the lack of effective representation. Although recent decisions of the Supreme Court have increased the ability of prisoners to do legal research\textsuperscript{367} and thereby assist each other,\textsuperscript{388} the lack of counsel remains a pressing difficulty.\textsuperscript{369} Legal services are not capable of handling the flow and there is no provision in federal law for payment of counsel appointed to represent the indigent prisoner.\textsuperscript{370} Legal assistance programs using law students as counsel for prisoners have increased rapidly and are now extensive, but aside from the inherent problems of representation by inexperienced persons, many such programs are allowed to operate in the prison only by virtue of agreements with prison administrations that preclude lawsuits against the prison system itself and confine the student counsel role to parole hearings, disciplinary hearings, and collateral legal problems not affecting the prisoner's status within the system.\textsuperscript{371}

\textsuperscript{365} Sparks v. Fuller, 506 F.2d 1238 (1st Cir. 1974). For other examples of this attitude, see Morales v. Schmidt, 494 F.2d 85, 86 (7th Cir. 1974); Dreyer v. Jalet, 349 F. Supp. 452, 485 (S.D. Tex. 1972), aff'd per curiam, 479 F.2d 1044 (5th Cir. 1973); Kochie v. Norton, 343 F. Supp. 956, 957 (D. Conn. 1972).
\textsuperscript{370} See Ziegler & Hermann, supra note 336, at 194-95. The Criminal Justice Act §, 18 U.S.C. § 3006A(d)(2)-(3) (1970), provides $250 per case for habeas corpus petitions, absent unusual circumstances, but nothing at all for civil rights actions. By its decision in Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), the Supreme Court precluded recovery of attorney's fees from defendants under a nonstatutory private attorney general rationale. In a footnote to the opinion, Justice White specifically disapproved of circuit court decisions such as Souza v. Travisono, 512 F.2d 1137 (1st Cir. 1975), and Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974), which granted fees to prisoners' lawyers to reward them for their public service. 421 U.S. at 270 n.46.
\textsuperscript{371} See generally Cardielli & Finkelstein, Correctional Administrators Assess the Adequacy and Impact of Prison Legal Services Programs in the United States, 65 J. CRIM. L.C. & P.S. 91 (1974). An exception to the situation described in the text involves
A. The Rise of Administrative Remedies

To relieve their burden, courts have encouraged state governments to develop prisoner grievance procedures so that most complaints can be handled internally. If the matter cannot be satisfied at that level, then the courts hope that the record of the grievance system will provide an accurate basis for summary judgment in a federal court. Implicit in this encouragement, and explicit in one case, is the promise that once an adequate system is established, federal courts will require prisoner plaintiffs to complete this route before gaining entry to the federal forum.

Various prisoner grievance procedures have been inaugurated during the past four years. Largely inspired by Scandinavian ombudsmen systems, the first was formed in Maryland in 1971 and provides an institutional grievance officer in each prison, a five-person Inmate Grievance Commission, two of whose members are from outside the prison system, and an executive director to investigate complaints. The Commission is authorized to hold hearings and make recommendations to the state Secretary of Public Safety and Correctional Services who can either accept, modify, or reject the proposed order. An appeal of the secretary's order to the state courts is available. The archetypal system, however, is that of the Federal Bureau.
of Prisons,\footnote{378} in which complaints are filed with a prison employee who acts as a grievance officer. The inmate can then appeal his decision to the central office.\footnote{379} Other prisons have inmate advisory councils which make recommendations to the institutional or departmental authorities. Three states have prison ombudsmen who are independent of correctional authorities.\footnote{380} Several commentators have proposed the development of bargaining groups and adoption of procedures analogous to labor-management arbitration,\footnote{381} but none of the proposals have been implemented.\footnote{382}

To date there is little data on the progress of the grievance systems. Most of the literature has come from proponents, and is therefore not to be trusted fully.\footnote{383} In its first two years, the Maryland Commission received 923 complaints, held 318 hearings, and granted relief in 103 cases,\footnote{384} but no appeals from the Commission have been reported by the higher state courts. One source states that prisoner complaints in the District Court for the District of Maryland declined 66 percent between 1971 and 1973,\footnote{385} but the opinion of Judge Northrop in McCray \textit{v.} Burrell\footnote{386} belies this figure. Elsewhere, a recent article reports that grievance systems have had some success in reducing overall tensions, smoothing bureaucratic misunderstandings, and making some institutional changes.\footnote{387} The article also noted, however, that there exist some shortcomings. Most systems are poorly planned and characterized by a lack of communication, credibility problems, a shortage of input from the guards, and fear of reprisal by the inmates.\footnote{388} None of the systems allow appeal of disciplinary proceedings to grievance committees, and none repose decisionmaking power outside of the correctional bureaucracy.

History teaches us to be skeptical. Gresham Sykes reports of an inmate council elected by the prisoners to process complaints and to be consulted regarding all major nonemergency changes in the prison following the 1952 riots at the New Jersey State Prison at Rahway. Within months of its
inauguration, the council disintegrated and its leaders were transferred to other prisons. Given the lack of final decisionmaking authority in the recent grievance mechanisms, it would be unrealistic to believe that they can accomplish the goals the courts have envisioned. Those inmates who view the courts as a way of getting even with their captors are likely to continue to file harassing actions after exhausting the administrative remedy. Those issues on which there is a genuine policy impasse will not be capable of resolution through administrative complaint. The procedures may be of substantial help to individuals seeking explanations and as a source of information about institutional problems, but the history of the “hands off” era of judicial scrutiny of prison systems indicates that the veil of secrecy surrounding the prison cannot be successfully lifted without the assistance of “free world” personnel. To date, only the courts have provided an outside check on the prison.

B. Systemic Relief: Problems of Implementation

Although class relief for prison problems appears to be the most manageable method of bringing the Constitution to the nation's prisons, the available evidence indicates that correctional systems have been slow to change and have often flouted court decrees.

Discipline. Only two studies have been conducted since the development of disciplinary due process. Neither indicates fundamental change from the Gifs and Kraft studies. The most thorough study was that of the Rhode Island Adult Correctional Institution in 1972, following the Morris v. Travi sono consent decree. The report concluded that the notice of pending disciplinary charges given to inmates was inadequate and uninformative; investigation of the charges by superior correctional officials was superficial and often biased against the inmate; and classification counselors (social workers) who were charged with representing the inmate before the disciplinary board were unable to be vigorous advocates without compromising their institutional relationships and were therefore perceived as inadequate by the inmates. The Board itself, composed of senior institutional officials, rarely engaged in factfinding but usually accepted the testimony of the guards as

390. Singer & Keating, supra note 376, at 10. The authors state that outside, independent review is essential to an effective grievance procedure. The authors envision grievance systems as a complement to, rather than a substitute for, legal action in the courts.
true and proceeded to disposition. Review of the Board’s findings was inadequate. The study did find, however, that the extremes of punishment had diminished, that the hearings were held more promptly, and that the rules encouraged greater recognition of the rights of inmates in general.\textsuperscript{392}

A similar study was conducted at the Matsqui Institution, a medium security prison in British Columbia.\textsuperscript{393} Procedures for the Warden’s Court were similar to those at the Adult Correctional Institution. Inmates were to be given written notice of the charges against them and a summary of the evidence. This was to be followed by a hearing at which the inmate would have an opportunity to speak on his own behalf, and the right to call witnesses, present documentary evidence, and cross-examine adverse witnesses. The Warden’s Court was also composed of three members of the institution staff.\textsuperscript{394} As in Rhode Island, the inmates perceived the Warden’s Court to be a kangaroo court in which they could never win, even if innocent of the charges.\textsuperscript{395} The author of the study himself concluded that the proceedings were unfair, largely because of the biased nature of the panel.\textsuperscript{396} As for the hearings, he wrote that

\begin{quote}
four months’ observations of the operation of the proceedings suggest... the dominant features of the disciplinary proceedings were that there was a general presumption of guilt... a confusion of the issue of guilt or innocence and that of appropriate disposition; a reliance on informal discussion concerning these issues, much of it based on hearsay and rumor carried on out of the presence of the inmate accused, and a lack of concern for the uniformity of sentences for offenses of a similar nature.\textsuperscript{397}
\end{quote}

The author recommended the introduction of counsel and outside personnel for the factfinders of the Warden’s Court.\textsuperscript{398}

Total breakdowns in disciplinary proceedings have occurred elsewhere. In

\begin{quote}
\textsuperscript{392} Id. at 222.
\textsuperscript{393} Jackson, Justice Behind the Walls—A Study of the Disciplinary Process in a Canadian Penitentiary, 12 OSGOODE HALL L.J. 1 (1974). The study was based upon an analysis of records of all disciplinary cases from 1968 to 1972, personal observation of all sessions of the Warden’s Court from May to August 1972, and interviews with guards, staff and inmates. Id. at 3.
\textsuperscript{394} Id. at 30.
\textsuperscript{395} Id. at 36.
\textsuperscript{396} Id. at 36-37, 64, 103.
\textsuperscript{397} Id. at 31.
\textsuperscript{398} Id. at 64-70. Of course, it is entirely possible that it was exactly this type of flexibility that the Supreme Court wished to preserve in Wolff. Indeed, the Court’s emphasis on the rehabilitative role of disciplinary proceedings, the denigration of rules of evidence, such as the hearsay rule, and the acceptance of prison staff members as legitimate arbiters, indicates that this sort of result would be entirely acceptable.
\end{quote}
Landman v. Royster. Judge Merhige found that 13 months after his initial decree, prison administrators had failed to explain the order to subordinates and had been guilty of a “massive failure” to implement the decision. Following a series of disturbances at the Rhode Island Adult Correctional Institution in April 1973, the warden unilaterally suspended the Morris v. Travisono rules because they were unworkable and a “hassle all the way.” And four years after it assumed jurisdiction over the Tucker and Cummins Prison Farms in Arkansas, the Holt court found that the disciplinary committee established by its order was not working as intended.

Nondisciplinary decrees. Enforcement problems have not been confined to the disciplinary area. Two years after commencement of Gates v. Collier and a year after entry of the district court’s decree, guards at the Parchman prison went on a rampage, beating scores of inmates, many of whom were named plaintiffs in the Gates case, plaintiffs in other cases, or “writ writers.” A year after entry of its decree in Newman v. Alabama, the District Court for the Middle District of Alabama complained of widespread misunderstanding of the order by both inmates and guards, the former exploiting the victory by constantly threatening suit against the guards, the latter expressing resentment of the court by retaliation against the obstreperous inmates.

VI. CONCLUSION

Shocked by conditions and stimulated by the epidemic of prison violence most dramatically displayed by the Attica prison uprising of 1971, federal courts set out to establish at least minimal standards of living and of fairness.
in state and federal institutions. Beguiled by such simple standards as the
14 "Practical Proposals" of the Attica rebels,\textsuperscript{407} many judges probed deeply
into the life of the prison in an effort to reduce the risk of further violence.
In doing so, they operated on two basic assumptions. First, given traditional
procedural due process protections and the maintenance of minimum stand-
ards of living, inmates would believe that they had been treated fairly,
thereby promoting peace within the institution and facilitating reentry
into the larger society.\textsuperscript{408} Second, that "the retribution required by law to be
inflicted upon a convict had already . . . been pronounced by a trial court"
made further punishment by prison officials unjustified unless in furtherance
of other legitimate penal objectives.\textsuperscript{409}

Having begun the process of change, the momentum of succeeding
decisions by activist judges such as Motley, Pettine, Zirpoli, and Merhige led
some to the conclusion that the contemporary prison could not be reconciled
with the contemporary Constitution.\textsuperscript{410} Unable and unwilling to accept
together the precedents of the activists, more conservative members of the
judiciary beat a retreat.\textsuperscript{411} The results of the compromise have not been
encouraging. The evidence indicates that bastardized due process produces
results similar to those produced by no process whatsoever. Similarly,
minimal levels of decency toward prisoners may halt the isolated instances of
torture, but violence in prisons remains rampant, and prisoners are no
further along the road to rehabilitation than before.

On the other hand, substantial support exists for the proposition that no
level of due process or constitutional minima would still the voice of protest

\textsuperscript{407} The proposals included a minimum wage, religious freedom, an end to censor-
ship, parole reform, improved rehabilitation program, attitudinal changes among guards,
better food, better educational programs, medical care, an internal grievance procedure,
more recreational programs and facilities, and an end to punitive segregation. See H.
BADILLO & M. HAYNES, A BILL OF NO RIGHTS: ATTICA AND THE AMERICAN PRISON
SYSTEM 56 (1972).

\textsuperscript{408} See, e.g., Clutchette v. Procurier, 497 F.2d 809, 817 (1974), modified and re-
manded, 510 F.2d 613 (9th Cir.), cert. granted sub nom. Enomoto v. Clutchette, 95
S. Ct. 2414 (1975); Palmigiano v. Baxter, 487 F.2d 1280, 1283-84 (1st Cir. 1973).


\textsuperscript{410} See Morales v. Schmidt, 340 F. Supp. 544, 548-54 (W.D. Wis. 1972), rev'd, 489
F.2d 1335 (7th Cir. 1973).

\textsuperscript{411} See, e.g., the opinion of Judge Rosenn in Braxton v. Carlson, 483 F.2d 933 (3d
Cir. 1973), in which he wrote:

We are apprehensive of the volatile effect such adversarial proceedings could
have on internal prison control and stability. We fear that prisons, by their
very nature packed with intensive emotional problems, would be kept at a
perpetual boiling point by formal adversarial proceedings often involving
varying shades of minor infractions.

Id. at 941.
from the cell block. Prison riots have occurred as long as prisons have existed.\textsuperscript{412} Criminologists attribute such disturbances not only to the concrete complaints of the inmates, but also to the nature of prison society and to sudden shocks in the established order that lead to instability and rebellion.\textsuperscript{413} Further, one cannot help but feel that the notion of due process, a component of freedom, and the prison, the totalitarian world within an otherwise free society, are fundamentally incompatible, and attempts to import the former into the latter are doomed to failure. Such an intuition is confirmed by experience elsewhere. Despite short prison terms and comfortable conditions, prisoners in Scandinavia continue to agitate for prison reform.\textsuperscript{414} Indeed, one cannot help but conclude that a contented prisoner who did not chafe at his bonds would be less than normal.

Still, judicial intervention has been beneficial. The new interest in prisons on the part of lawyers and others is not likely to collapse quickly. Precedent holding prison officials accountable for their more egregious actions is firmly established, and prison life is more visible to the public than before.

\textsuperscript{412} See H. MATTICK, \textit{THE PROSAIC SOURCE OF PRISON VIOLENCE} 8 (1972).
\textsuperscript{413} See, e.g., id. at 8; G. SYKES, \textit{supra} note 389, at 120-29.