The Evolving Right of Due Process at Prison Disciplinary Hearings

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THE EVOLVING RIGHT OF DUE PROCESS AT
PRISON DISCIPLINARY HEARINGS

It may seem paradoxical that due process of law can be invoked by prison inmates against the disciplinary actions of prison authorities. What "grievous loss" to "life, liberty, or property" could be suffered beyond incarceration itself? Nonetheless, an increasing number of courts recently have considered the application of procedural due process safeguards to protect prisoners against deprivations threatened by the outcomes of prison disciplinary proceedings. The question in such cases is whether the inmate is threatened with a grievous loss to his liberty, and if he is, whether the prison administration has some greater interest which justifies summary procedure without resort to a hearing. If it is decided that the prisoner's interests outweigh those of the prison administration, the prisoner is entitled to a hearing. The issue then becomes the extent of the procedural safeguards which the prisoner should be afforded in meeting the charges against him.

The two recent Supreme Court decisions of Morrissey v. Brewer and Gagnon v. Scarpelli, which applied procedural due process to hearings related to, but outside of, the actual prison setting, have added impetus to the current trend. As to administrative hearings in general, due process requires that the court or administrative body rendering the decision have jurisdiction. Assuming the power of the tribunal to act, due process necessitates notice and an opportunity to be heard. Notice must be given in sufficient time "reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance." Therefore, notice requires more than merely inform-

2. 1 U.S. Const. amend. v; 5 U.S. Const. amend. xiv, § 1.

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ing the individual of the charges against him. It must permit him time to prepare his case so that he can more capably protect his interest.9

The requirement of the hearing itself breaks down into several elements. The individual has the right to present oral and documentary evidence in his own behalf,10 for this is the essence of the opportunity to be heard. If the adjudicative facts are in dispute, the party must also be able to present witnesses in his own behalf,11 and to cross-examine his accusers.12 This latter right is especially important where the adverse evidence consists "of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy."13 Should this right of cross-examination be denied, the evidence adduced from that testimony should not be relied upon in reaching a determination.14 In addition, an individual has a right to retain counsel,16 but an indigent's right to appointed counsel is unclear.16

The party also has a right to an impartial decision-maker.17 This requires that anyone who has played a part in the instigation of the charges have no voice in the ultimate determination.18 The basis of the decision should be set forth in a written statement by the decision-maker.19 This requirement informs a court of review that the evidence leading to the ultimate determination was adduced at the hearing, and not supplied secretly by an informant, unknown to the party.20

11. Id.
20. In Greene v. McElroy, 360 U.S. 474 (1959), the petitioner's security clearance was revoked on the basis of information received as a result of a secret government investigation. Id. at 479. The government, presenting no case, relied solely on the secretive reports, and the revocation was upheld by an administrative review board. Id. at 489-90. The Supreme Court reversed, finding that the administrative procedure was unauthorized, id. at 508, adding that "where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." Id. at 496.
These procedural safeguards provided at administrative hearings traditionally have been unavailable to prisoners at disciplinary hearings for two reasons. The first was the "hands-off" doctrine. This theory purported to recognize the strong governmental interest in orderly incarceration, and the superior ability of official expertise in handling prison situations, thus closing courthouse doors to review of prison procedures. The wall which thereby was erected between the courthouse and the jailhouse served to isolate the prisoner from society to a greater degree than his incarceration did.

The effect of the "hands-off" doctrine has diminished in recent years, thanks to an increasing recognition by commentators and prison officials of prisoners' rights. However, the greatest impetus of change has come from the judiciary. Several recent decisions of the Supreme Court have had the effect of guaranteeing prisoners easy access to judicial review. The increased access to the courts has been effectuated through either a writ of habeas corpus or a civil rights action which, until recently, were confused with each other because they often seemed to provide the same relief.


22. Palmer § 10.4.1; Goldberg Balancing Test, supra note 21, at 689; see, e.g., Christman v. Skinner, 468 F.2d 723, 725 (2d Cir. 1972); Burns v. Swenson, 430 F.2d 771, 779 (8th Cir. 1972), cert. denied, 404 U.S. 1062 (1972).


27. See Emerging Rights 30, 152.


31. The civil rights action provides a civil cause of action for the deprivation of any
The second obstacle to the recognition of the right to procedural due process in prison hearings was the difficulty in recognizing the prisoner's protected interest in liberty. If "liberty" means only freedom from bodily restraint, it is not a sine qua non of liberty, although it is, to be sure, its most basic attribute. Liberty can be great or small, depending on the amount of rights an individual enjoys. Conversely, if an individual possesses any rights at all, he must enjoy some quantum of liberty, however small, which is protected by the due process clause.

The Supreme Court has never expressly held that a prisoner is entitled to due process safeguards at a prison disciplinary proceeding, although a case is presently before it which may decide this issue. However, the Court has held, in *Morrissey v. Brewer*, that a parolee has a protected interest in his conditional liberty, so as to guarantee him procedural due process safeguards at a parole revocation hearing. In *Morrissey*, the petitioners were reincarcerated for alleged parole violations without the benefit of an administrative hearing. The Court ruled that before an alleged parole violator could be reincarcerated he was entitled to the following minimum protections:

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

constitutional right under the color of state law. The purpose of the writ of habeas corpus "is to enable those unlawfully incarcerated to obtain their freedom." *Johnson v. Avery*, 393 U.S. 483, 485 (1969); accord, *The Federalist* No. 84, at 512 (Mentor 1961) (A. Hamilton); *Palmer*, supra note 21, § 10.8. Where a prisoner seeks to compel a prison administration to release him from custody because the process, or lack of it, which led to his incarceration was outside the bounds of constitutionally guaranteed procedural fairness, the writ and the action are identical in the remedies they would provide. It is not surprising, therefore, that courts in the past have read the writ as a civil rights action. See, e.g., *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971) (per curiam).

The confusion was somewhat mitigated by the Supreme Court's decision in *Preiser v. Rodriguez*, 411 U.S. 475 (1973). There, the Court recognized that while a civil rights action covered problems relating to the duration of confinement, habeas corpus was the traditional remedy for such a wrong. Id. at 484-86, 489. Consequently, a prisoner cannot rely on the civil rights action to compel his release or shorten his sentence, but instead must seek a writ of habeas corpus. Id. at 500. This can be done only after meeting the "exhaustion requirement", 28 U.S.C. § 2254(b) (1970), of the federal habeas corpus statute.

32. In *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), the Supreme Court rejected such a narrow definition.


35. 408 U.S. 471 (1972).

36. Id. at 482.
board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.\textsuperscript{37}

The later case of \textit{Gagnon v. Scarpelli} \textsuperscript{38} found that a former prisoner on probation had an interest in his liberty,\textsuperscript{39} so as to guarantee him the \textit{Morrissey} safeguards at a probation revocation hearing.\textsuperscript{40} That case dealt mainly with the question of whether counsel was required at his hearing, and will be considered below.\textsuperscript{41}

\textit{Morrissey} recognized that a parolee had an interest in conditional liberty worthy of due process protection.\textsuperscript{42} So too, a growing number of courts have begun to recognize that a prisoner possesses rights and liberties while in prison, and that deprivation of these may constitute a sufficiently grievous loss to require some due process protection. Three types of deprivations which have come under increasing consideration are the revocation of good time credits, placement in punitive segregation,\textsuperscript{43} and interstate prison transfers.

Courts have recognized that the deprivation of good time credits constitutes a loss of liberty by extending the actual length of incarceration.\textsuperscript{44} Good time represents a reduction in the inmate's sentence by virtue of the statutory credit conferred upon him by the prison administration. Consequently, each time the prison administration takes back a day of good time, it extends the duration of his confinement one full day. He is, in effect, sentenced to an extra day of imprisonment for each day of good time that is revoked. Thus, any such loss\textsuperscript{45} is the requisite grievous loss necessary to invoke the safeguards of procedural due process. However, at least one court has taken a midway position between the two extremes by requiring a threshold number of days so sacrificed before the prisoner can avail himself of due process safeguards.\textsuperscript{46}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{37} Id. at 489. See also Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973).
\item \textsuperscript{38} 411 U.S. 778 (1973).
\item \textsuperscript{39} Id. at 782.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} See text accompanying notes 85-97 infra.
\item \textsuperscript{42} 408 U.S. at 480-82.
\item \textsuperscript{43} While some courts draw a distinction between punitive and administrative segregation, \textit{Emerging Rights}, supra note 21, at 116, the terms punitive segregation or isolation and solitary confinement are apparently synonymous. Id. at 118. But cf. Collins v. Hancock, 354 F. Supp. 1253, 1258 (D.N.H. 1973).
\item \textsuperscript{45} In \textit{Thomas v. Pate}, No. 71-1410, at 15 (7th Cir., Jan. 10, 1974), the court considered the number of days the prisoner spent in punitive segregation before reaching its determination of whether or not such placement constituted a grievous loss. However, the court made no such calculation with respect to the number of days of good time which the prisoner also lost. Thus, it would seem, at least in this court, that even one day's loss may be sufficiently grievous to invoke procedural safeguards.
\item \textsuperscript{46} In Collins v. Hancock, 354 F. Supp. 1253, 1258 (D.N.H. 1973), the court devised a
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Similarly, courts have recognized that confinement in punitive segregation deprives the inmate of liberty by restricting the small amount of freedom he still possesses.47 As in the case of good time, there is the possibility the inmate must suffer some threshold loss before his deprivation will be deemed grievous.48

Finally, some courts have recognized that an involuntary transfer of inmates from one prison to another works serious consequences amounting to grievous losses.49 One of the immediate deprivations faced upon transfer is placement in some form of segregation.50 Thus, the primary effect of transfer is confinement in punitive segregation. The more far-reaching effects include being cut off from family, friends, counsel, and the interruption of educational training, psychological therapy, and rehabilitation.51

Given the fact that the inmate has an interest in what liberty he does retain, the government may have strong counter-interests which may justify disciplinary action without a hearing. With respect to punitive segregation, it is generally accepted that the warden may summarily commit a prisoner or group of prisoners to more stringent conditions of confinement when it is necessary to maintain order within the prison.52 This “emergency” doctrine, which affords prison administrators broad summary powers in dealing with explosive prison conditions, should apply only for the duration of the emergency.53 The arguments of admin-

threshold loss table, requiring that at least 30 days of good time be lost before such punish-

ment would be considered severe. However, the court provided for minimal protection in the case of less severe punishments. Id. at 1259.

47. Id. at 1256-57. But see Wheeler v. Procunier, No. 72-1523, at 3 (9th Cir., Jan. 14, 1974).

48. In Thomas v. Pate, No. 71-1410, at 15 (7th Cir., Jan., 10, 1974), the court was faced with two situations involving punitive confinement of three and ten days. The court not only found these losses to be grievous, but even suggested that confinement for less than three days would also be grievous. Id. On the other hand, in Collins v. Hancock, 354 F. Supp. 1253, 1258 (D.N.H. 1973), the court said that a prisoner must be segregated for at least 15 days before his placement in punitive segregation will constitute the requisite loss. Cf. Braxton v. Carlson, 483 F.2d 933, 936 (3d Cir. 1973).


istrative efficiency which have been advanced against providing due process safeguards to inmates have been advanced in favor of the state in all types of administrative proceedings. These administrative reasons have been eyed unfavorably, with one court remarking that "the guarantees of the Bill of Rights cannot be ignored, evaded, or even blunted for the sake of administrative efficiency or because of fiscal deficiencies." Consequently, with respect to good time credits, it would seem that the government's interests do not outweigh the inmate's, and he must be afforded some amount of due process prior to revocation. Likewise, the possibility of enormous hardships faced by the prisoner when he is threatened with transfer, calls for due process protection. In dealing with punitive segregation, the government may have an interest in summary procedure during emergencies which outweighs the interest of the inmate. However, once the emergency is over, there seems to be no reason why an inmate about to be confined to punitive segregation should not first receive a hearing. Of course, it will fall upon the courts to prevent arbitrary action under the guise of a nonexistent emergency, and outside of a clear abuse of discretion by prison officials in handling what they deem to be an emergency, a court would be wise to respect the actions of those officials as necessary under potentially dangerous circumstances.

Once a determination is made that an inmate is entitled to a hearing prior to suffering any of the grievous losses suggested above, a balancing of interests will also determine the extent of procedural safeguards required. The guidelines of due process at administrative hearings, and the protections enumerated in Morrissey, serve as a framework for analyzing the specific due process protections at prison disciplinary hearings.

First, the inmate has an interest in receiving notice of the charges and evidence that prison officials may not use segregation as a form of punishment, but only as a preventative measure in times of emergency. Model Act § 3(d). Under this formulation, it would be possible to argue that, where there is no showing of a prison emergency, placement in punitive segregation is arbitrary per se, regardless of the procedures followed at the hearing.


58. See text accompanying notes 49-51 supra.


60. See text accompanying notes 6-20 supra.

61. See text accompanying note 37 supra.
against him. Notice which is given just hours before the hearing, or at the
hearing itself, is not notice at all, for, in order to be adequate, notice must
afford an individual the opportunity and knowledge necessary to prepare his
defense. Inasmuch as what is needed to prepare a defense will vary with the
nature of the charges, no general rule can be suggested as to the proper timing
of notice.

It is not disputed that, at a hearing, the inmate should have the opportunity to
tell his side of the story. The controversy surrounds just how he will do this.
Does the opportunity to be heard mean merely the right to speak for
oneself? To some courts, it includes the right to call witnesses in one's own behalf, and
the right to cross-examine the accusers. It is true that an administrative hear-


64. Sands v. Wainwright, 357 F. Supp. 1062, 1086 (M.D. Fla. 1973), vacated & remanded on other grounds, No. 73-1192 (5th Cir., Dec. 26, 1973). See also text accompanying note 8 supra. A recent New York case has declared that proper notice includes supplying information as to what acts are prohibited, and hence, that every prisoner has a right to published rules of behavior as part of his right to due process. In re Jones, 171 N.Y.L.J., Jan. 11, 1974, at 17, col. 3 (Sup. Ct. 1974); accord, Center for Criminal Justice, Boston University School of Law, Model Rules and Regulations on Prisoners' Rights and Responsibilities 156-57 (1973).


ing is not meant to be a "fullblown" trial: its purpose is to determine facts without the rigors of a trial. Therefore, a procedure which takes the time of the hearing body without adding to the integrity of the fact-finding process should be eliminated. In short, the question is whether or not the aforementioned rights are necessary to a rational determination of the facts.

Time consumption is a problem which presents itself when dealing with the calling of witnesses. A more serious consideration weighing against the right to present witnesses is the fear that the involvement of other prisoners in the hearing may subject them to coercion by their fellow convicts. Nevertheless, the integrity of the fact-finding process can hardly be bolstered by the inability of an accused to present his side of the issue when the testimony of others is required. One court has suggested the compromise that, prior to the hearing, the factfinder be informed by the accused of the nature and content of the testimony to be offered by the accused's witnesses. If the trier of fact finds that the accused's interest in calling the witness outweighs the various interests advanced by the prison officials, the witness may be called.

Although the compromise is appealing, it seems to run counter to the spirit of Morrissey and Gagnon, which recognized this right to call witnesses in prison-related hearings. Morrissey did suggest a similar compromise with respect to the right to cross-examination, but not with respect to the inmate's right to call witnesses. Therefore, without some adequate interest advanced by the state, the prison administration should not be permitted to deny this recognized right. There is yet another approach which reaches the same conclusion. It has been suggested that an inmate retains all those rights he had on the outside except for those expressly taken away or those inconsistent with the condition of incarceration. In any non-penal administrative hearing, the individual would have the right to call his own witnesses. Thus, one court has concluded, the right to call one's own witnesses in a prison disciplinary hearing is a minimum constitutional requirement.

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71. Id., supra note 52, at 600.
72. Id., supra note 52, at 606.
73. Id.
75. 408 U.S. at 487.
DUE PROCESS AT PRISON HEARINGS

The right to cross-examine adverse witnesses is one of the most controversial areas concerning prison disciplinary procedures. Several courts have considered the right to cross-examine\(^7\) to be, in the circumstances at bar, as basic and unencumbered as the fundamental rights to notice and of an opportunity to be heard. A second approach would be to adopt the conditional right to cross-examination espoused by *Morrissey*, which provided that "if the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination."\(^7^9\) Alternatively stated, the hearing officer can deny the right to cross-examination when he finds "good cause."\(^8^0\) One compelling factor present in the prison situation which calls for a consideration of this approach is that it may be unwise to permit a prisoner to attack the credibility, and hence the integrity, of the very prison officials to whose sanctioning power he will be subject when the hearing is over.\(^8^1\) It is this need for protection which is the basis of "good cause" although, in this case, it is not the informant, but the cross-examiner, who requires the protection. Finally, several courts have denied any right to cross-examination.\(^8^2\)

It is submitted that the *Morrissey* guideline serves well in the prison setting, and its conditional right to cross-examination is a satisfactory solution. To deny any cross-examination is unwarranted, and too drastic, considering the absolute right to cross-examine which exists in administrative hearings outside of the prison context.\(^8^3\) A properly supervised conditional cross-examination would take into account the greater interests of the state in limiting the right to cross-examination at hearings inside prison,\(^8^4\) and would serve the inmate's interests as well—by guaranteeing him the right, when it is necessary, and by protecting him from possible reprisal when cross-examination is inappropriate.

Whether or not the prisoner will be permitted to retain counsel, or to have counsel appointed if he is indigent, is yet another current problem facing the courts. The cases can be broken down into those that permit counsel,\(^8^5\) those

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79. 408 U.S. at 487.
80. Id. at 489; cf. McNeill v. Butz, 480 F.2d 314, 323 (4th Cir. 1973) (suggesting good cause is limited to danger to the informant).
81. Kaufman, supra note 21, at 509.
83. See note 12 supra and accompanying text.
84. Cf. notes 12-13 supra and accompanying text.
that permit only counsel substitute, and those that allow no representation at all. The analysis presented in Gagnon v. Scarpelli, a case concerned with probation revocation procedures, summarizes the arguments surrounding this issue. The Court emphasized that a hearing is a fact-finding process rather than an adversary proceeding. The presence of counsel would alter its nature, with the result being that "the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate rather than to continue non-punitive rehabilitation. Certainly, the decisionmaking process will be prolonged, and the financial cost to the State... will not be insubstantial." On the other hand, the Court continued, "[i]n some cases, these modifications... must be endured and the costs borne because... a disputed issue can fairly be represented only by a trained advocate." All other procedural guarantees become illusory, if, without counsel, a fair representation cannot be achieved. The Court said that a right to counsel exists at a parole or probation revocation hearing in two circumstances: first, if the alleged parole or probation violator has a colorable claim that he has not committed the alleged violation; and second, if there are mitigating circumstances which make revocation inappropriate, but which are difficult to present effectively without counsel.

In the first category, the Court has seemingly created an absolute right to counsel, for a hearing is a fact-finding process which becomes unnecessary when the alleged violator admits his guilt. Thus, anytime a hearing is held, it presupposes a disagreement as to the facts determinative of guilt or innocence. To say that the alleged violator has a right to counsel when he proclaims his innocence is really to say that whenever there is a need for a hearing, the individual factual controversy); In re Jones, 171 N.Y.L.J., Jan. 11, 1974, at 17, col. 4 (Sup. Ct. 1974). See also Model Act, supra note 26, § 4.


89. Id. at 787-88.

90. Id. at 788.

91. Id.

92. Id. at 790.

93. Id.

has the right to the assistance of counsel. A further problem with this requirement is that it calls for a preliminary determination by the hearing body of that which it is supposed to determine ultimately and only after all the facts are adduced. In other words, if it denies the alleged violator's request for counsel because it decides he has no colorable claim to his innocence despite a factual dispute, the body really has usurped the purpose of the hearing which is to determine the validity of that claim.

The second limiting factor goes to the sentencing function of the administrative body. Here, the alleged violator is entitled to counsel even if he admits the truth of the charges against him, provided that his violation can be justified or mitigated. However, the alleged violator may not know he has such a defense until a trained advocate has examined all the facts in his behalf. To deny an individual a right to an attorney because he has no such defense may be to deny him the opportunity of discovering that he, in fact, has such a defense.

The Gagnon Court also said that consideration should be given to the ability of the violator to speak for himself. Whether or not an individual can capably represent his interests, skilled representation is more effective; to deny an individual the best possible chance of defending his liberty would be a practice repugnant to our concepts of justice.

The final elements generally considered to be part of the due process safeguards are the rights to an impartial tribunal, and to a written statement of the evidence of the findings of fact, or one which sets forth the decision. Both have received general acceptance. In addition, some courts have con-

95. See 411 U.S. at 790.
96. Id. at 790-91.
97. See Jablonski, supra note 52, at 600.
102. See cases cited in notes 98-101 supra. Braxton v. Carlson, 483 F.2d 933, 941-42 (3d Cir. 1973), found that although written notice and written findings of fact are "desirable," they are not "constitutionally required."
sidered favorably a right to administrative appeal. One argument advanced in favor of the additional right is that, like the written decision, administrative review is a check of the rationality of the fact-finding process. On the other hand, it adds nothing to the process itself, and—in light of the free access to the courts and ready judicial review—would only be a duplicative deterrent to irrationality. The right to administrative appeal, thus, would appear to be unnecessary.

To recapitulate, due process of law requires that, before a prisoner be made to suffer a grievous loss, he must receive a hearing preceded by adequate notice of the charges and evidence against him. The notice, in order to be adequate, must permit the prisoner sufficient time to prepare his case. The prisoner must have the right to present evidence in his own behalf. This includes the right to call witnesses, since anything less would violate the mandates previously enunciated by the Court. The prisoner may have a conditional right of cross-examination, but that right must be absolute where adverse testimony puts him in jeopardy of loss of an interest. This is especially true where the inmate's liberty is at stake. The prisoner is entitled to counsel. The hearing itself presupposes a factual controversy, and justice requires that the prisoner have the opportunity to present the best possible case, utilizing the skills of a trained advocate towards that end. Lastly, the prisoner is entitled to an impartial tribunal which sets forth the basis of its decision in a written statement. These factors are inherent in the concept of due process.

Most importantly, there must be the realization that the Constitution follows the inmate into prison. He must be presumed to possess all the rights of a free man unless the state can show a sufficient interest for denying those rights. Thus, the burden must be cast upon the prison administration to justify the denial of a right, rather than upon the prisoner to demonstrate his entitlement to it.

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104. Jablonski 569.
