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The Written Statement Requirement of Wolff v. McDonnell: An Argument for Factual Specificity

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THE WRITTEN STATEMENT REQUIREMENT OF WOLFF V. MCDONNELL: AN ARGUMENT FOR FACTUAL SPECIFICITY

INTRODUCTION

In Wolff v. McDonnell the Supreme Court held that the due process clause of the fourteenth amendment mandates that certain state prison disciplinary hearings observe procedural safeguards. Among these is the requirement that disciplined inmates receive "a written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action" (a "Wolff statement").

The Court left open the issue of how factually specific a Wolff statement must be. In particular, the decision failed to address whether a Wolff statement that merely incorporates the report of a prison employee by reference is sufficiently detailed to meet constitutional safeguards.

Part I of this Note discusses the evolution of the written statement

5. A Wolff statement that incorporates a report by reference merely refers to the report of a prison guard or other prison employee without noting the facts that formed the basis of the disciplining body's decision. See, e.g., Saenz v. Young, 811 F.2d 1172, 1173 (7th Cir. 1987) ("The reporting officer's written statement supports the finding of guilt that an attempt was made by Inmate Saenz to commit battery upon the [other] inmate."); Chavis v. Rowe, 643 F.2d 1281, 1283 (7th Cir.) ("We recognize and consider the resident's statement[,] however[,] we accept the reporting officer's charges.") (brackets in original), cert. denied, 454 U.S. 907 (1981); Hayes v. Walker, 555 F.2d 625, 631 (7th Cir.) ("The Committee's decision is based on the violation report as written and upon the report by the special investigator which during your absence was made part of the record."); cert. denied, 434 U.S. 959 (1977).
requirement and briefly outlines the kind of situation in which the issue left open in Wolff arises. Part II discusses the general concerns involved in defining the procedural due process rights of prison inmates. Part III analyzes the arguments for and against factual specificity in Wolff statements. This Note concludes that factually specific Wolff statements are constitutionally mandated, and that incorporation by reference, without more, violates the due process standard enunciated in Wolff.


The Seventh Circuit originally held that a Wolff statement must provide both the grounds for the decision and the essential facts upon which the disciplining body's inferences were based. See Hayes v. Walker, 555 F.2d 625, 633 (7th Cir.), cert. denied, 434 U.S. 959 (1977). Hayes was the first case to face the issue of the level of factual specificity required in a Wolff statement. Until Brown v. Frey, 807 F.2d 1407 (8th Cir. 1986), the Hayes standard was followed uniformly outside the Seventh Circuit. See, e.g., King v. Wells, 760 F.2d 89, 93-94 (6th Cir. 1985); Chavis v. Rowe, 643 F.2d 1281, 1286-87 (7th Cir.), cert. denied, 454 U.S. 907 (1981); Finney v. Arkansas Bd. of Correction, 505 F.2d 194, 208 (8th Cir. 1974); Dedrick v. Wallman, 61 F. Supp. 178, 183 (S.D. Iowa 1985); McCall-Bey v. Franzen, 585 F. Supp. 1295, 1298 (N.D. Ill. 1984); Ivey v. Wilson, 577 F. Supp. 169, 172-73 (W.D. Ky. 1983).

The Seventh Circuit seemed to expand the Hayes standard in Chavis v. Rowe, 643 F.2d 1281 (7th Cir.), cert. denied, 454 U.S. 907 (1981). Chavis implied that a Wolff statement must contain not only the facts relied on but also a listing of any exculpatory evidence and a clear indication of why the evidence was not believed. See id. at 1287; see also King v. Wells, 94 F.R.D. 675, 686 (E.D. Mich. 1982) (interpreting Chavis as requiring a Wolff statement to contain exculpatory evidence), aff'd in part, rev'd in part, 760 F.2d 89 (6th Cir. 1985); McCall-Bey v. Franzen, 585 F. Supp. 1295, 1298 (N.D. Ill. 1984) (requiring Wolff statements to indicate why exculpatory evidence was not believed).

The Seventh Circuit recently limited the holdings of Hayes and Chavis. See Saenz v. Young, 811 F.2d 1172, 1174 (7th Cir. 1987). Saenz holds that a Wolff statement incorporating a report by reference satisfies due process provided the violation that the inmate is being charged with is not “complex.” See id. The Saenz court cited Hayes, where the disciplined inmate was charged with conspiring to organize a prison mutiny, as an example of a case involving “complex charges.” Although the Saenz court also cited Chavis in its opinion, it did not explain why the charge involved in Chavis, stabbing a prison guard, was more “complex” than the charge that it was construing, attacking a fellow inmate. The Saenz court conceded that “it would [not] be prudent and acceptable for prison disciplinary committees to divide their cases into the simple and complex, and give reasons only for the latter” and recommended that Wolff statements be more specific in the future. See id.

The Sixth Circuit has rejected incorporation by reference, holding that Wolff statements must contain each fact relied on by the disciplining body. See King v. Wells, 760 F.2d 89, 93-94 (6th Cir. 1985).

The Eighth Circuit holds that the incorporation of a report by reference is sufficient to meet constitutional standards. See Brown v. Frey, 807 F.2d 1407, 1409-12 (8th Cir. 1986); see also Jensen v. Satran, 688 F.2d 76, 78 (8th Cir. 1982) (Wolff statement, although “sparse in content” is acceptable if it is “sufficient to inform [the disciplined inmate] of the evidence relied upon by the factfinders”), cert. denied, 460 U.S. 1007 (1983).
I. THE WRITTEN STATEMENT REQUIREMENT

A. The Evolution of the Standard

The written statement requirement that Wolff v. McDonnell applied to prison disciplinary hearings was first articulated in Morrissey v. Brewer. In Morrissey, two parolees claimed that revocation of their parole without a hearing violated their right to procedural due process. The Supreme Court noted that a parolee’s liberty is not complete but, rather, conditioned on the observance of parole restrictions. As a result of this limited liberty interest, a parolee is entitled to only limited due process protection when faced with the possibility of parole revocation.

The Morrissey decision identified the minimum procedural safeguards that must be met in order to revoke parole. Among these is a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

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9. See id. at 474. Originally, the state did not claim that a hearing had been held before the petitioners’ parole was revoked. See id. at 475. When the case reached the Supreme Court, however, the state argued that the petitioners had in fact received hearings. See id. Because this claim was made only in the government’s brief and not contained in the record, the Court would not consider it. See id. at 476-77.
10. See id. at 479. The Court stated that, although a parolee was often described as being “in custody,” see id. at 483, the state, in granting parole, had given him the freedom to do many of the things that non-convicted persons could do. See id. at 482. Consequently, the Court concluded that the parolee had been granted a liberty interest that “include[d] many of the core values of unqualified liberty.” See id. For a general discussion of the state created liberty interests of convicts see L. Tribe, American Constitutional Law § 10-9, at 516-19, § 10-10, at 522-27, §§ 10-11 to -14, at 527-43; Herman, The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court, 59 N.Y.U. L. Rev. 482 (1964); The Supreme Court, 1975 Term, 90 Harv. L. Rev. 1, 86-102 (1976); infra note 36.
11. See Morrissey v. Brewer, 408 U.S. 471, 480 (1972). A year after the Morrissey decision the Court held that parole revocation and probation revocation were “constitutionally indistinguishable” and, therefore, the procedural safeguards outlined in Morrissey adhered equally to a probation revocation decision. See Gangnon v. Scarpelli, 411 U.S. 778, 782 & n.3 (1973).
12. The Court held that due process required a prompt and informal inquiry conducted by an impartial hearing officer near the place of the alleged parole violation or arrest of the parolee to determine if there were reasonable grounds to believe that the parolee had violated his parole conditions. See Morrissey v. Brewer, 408 U.S. 471, 485 (1972). The parolee should receive prior notice of the inquiry, have the opportunity to present relevant information, and, absent security problems, question adverse informants. See id. at 486-87. The hearing officer should review the evidence on probable cause and state the reasons for holding the parolee until the parole board’s decision. See id. at 487.
The revocation hearing also was required to be conducted within a reasonable time after the parolee’s arrest. See id. at 488. Regarding this hearing, the Court stated that the minimum due process requirements were:

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

The lower courts that have addressed the issue hold that the written statement required in Morrissey must be factually specific. The Supreme Court recently has implied as much. Wolff v. McDonnell, decided two years after Morrissey, involved the rights of the incarcerated rather than the paroled. In Wolff, inmates claimed that disciplinary actions taken in the Nebraska prison system violated their procedural due process rights. The Supreme Court stated

Id. at 489.
13. Id.

15. See Black v. Romano, 471 U.S. 606, 613-14 (1985). In Black v. Romano the Court stated that "[t]he written statement required by Gagnon and Morrissey helps to insure accurate factfinding with respect to any alleged violation and provides an adequate basis for review to determine if the decision rests on permissible grounds supported by the evidence." Id. Although the Court has never ruled on the exact quantum of evidence needed in the record in order for a court to uphold a parole revocation on review, some evidence clearly is required. See Superintendent v. Hill, 472 U.S. 445, 455 (1985) (citing Douglas v. Buder, 412 U.S. 430, 432 (1973)); Bearden v. Georgia, 461 U.S. 660, 666 n.7 (1983) (citing same). At the very least, a reviewing court would have to determine if the parolee had in fact violated his parole conditions. The written statement required in Morrissey could provide this information only if it were fact specific.

17. See id. at 542-43. The inmates made three allegations: that disciplinary proceedings violated due process; that the inmate legal assistance program did not meet constitutional safeguards; and that the regulations governing the inspection of correspondence between inmates and their attorneys were unconstitutionally restrictive. See id. The disciplinary action challenged was the revocation or withholding of "good-time credits." Id. at 546, 571 n.19. Good-time credits are a common penological device whereby an inmate can shorten his prison sentence by accumulating credits for good behavior. See id. at 547, 557; Superintendent v. Hill, 472 U.S. 445, 447 (1985); see, e.g., 18 U.S.C. §§ 4161, 4162 (1982); 28 C.F.R. §§ 523.1 to .17 (1986); Mass. Gen. Laws Ann. ch. 127 § 129 (LCP 1981); Neb. Rev. Stat. § 83-1,107 (1986). The disciplinary procedures that the inmates challenged, and that the Court found to be constitutionally inadequate, consisted of a preliminary conference in which the inmate was informed of the charges against him and
that the disciplinary action complained of implicated legitimate liberty interests held by the inmates and, therefore, required that they be afforded certain due process protections. The Court held, however, that the level of protection required under *Morrissey* for parole revocation does not adhere in prison disciplinary actions. This is because the liberty interest at stake for inmates faced with disciplinary action is less than that of parolees faced with imprisonment by revocation of their parole.

The *Wolff* court, however, did adopt *Morrissey*'s written statement requirement. *Wolff* held that inmates must receive "a 'written statement by the factfinders as to the evidence relied on and reasons' for the disciplinary action." There is one exception to this requirement: if institu-

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18. The Court held that, in providing a statutory right to good-time credits and conditioning their revocation on serious misconduct, the state had created a liberty interest implicating the due process clause. *See* Wolff v. McDonnell, 418 U.S. 539, 557 (1974). The nature of good-time credits is such that they invariably seem to create a liberty interest. *See* Prieser v. Rodriguez, 411 U.S. 475, 487-88 (1973); *supra* notes 17 & 36. Indeed, in litigation involving the loss of good-time credits the state generally concedes that it has created a liberty interest in granting them. *See*, e.g., Superintendent v. Hill, 472 U.S. 445, 453 (1985); Brown v. Frey, 807 F.2d 1407, 1410 (8th Cir. 1986); King v. Wells, 760 F.2d 89, 92 (6th Cir. 1985).

The *Wolff* Court also held that, because under Nebraska law the same procedures were employed when disciplinary confinement was imposed, the same due process protections required for the revocation of good-time credits would adhere to the imposition of disciplinary confinement. *See* Wolff, 418 U.S. at 571 n.19.


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<td>[the] touchstone of due process is protection of the individual against arbitrary action of government . . . . Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.</td>
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<td><em>Id.</em> at 558 (citation omitted). <em>See infra</em> note 36.</td>
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21. *See* Wolff v. McDonnell, 418 U.S. 539, 560-61 (1974); *see also* Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (discussing the liberty interests held by a parolee). The *Wolff* Court also observed that the potentially volatile nature of the prison environment gave the state a greater interest in maintaining flexibility of its procedures in the prison context than in the parole context. *See* Wolff, 418 U.S. at 561-62. It noted that prison is

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<td>a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who . . . may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life . . . Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting.</td>
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Wolff, 418 U.S. at 561-62; *see also* Superintendent v. Hill, 472 U.S. 445, 456 (1985) (prison disciplinary proceedings take place in "a highly charged atmosphere").

A Wolff statement serves two purposes. The first is to protect the inmate from the immediate consequences of an arbitrary decision. A Wolff statement is meant to ensure that the disciplining body acts fairly by making the basis of its decision readily reviewable by the public, state officials, and the courts.

The second purpose of a Wolff statement is to protect the inmate from "collateral consequences based on a misunderstanding of the nature of the original proceeding." For instance, a disciplinary action may result in a decision to transfer an inmate and is certain to influence his opportunity for parole. A written record ensures greater accuracy in this process by allowing the collateral decisionmaker to accord each disciplinary action its appropriate weight.

One question left open by the Wolff decision is how specific a Wolff statement serves two purposes. The first is to protect the inmate from the immediate consequences of an arbitrary decision. A Wolff statement is meant to ensure that the disciplining body acts fairly by making the basis of its decision readily reviewable by the public, state officials, and the courts.

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statement should be.\textsuperscript{30} This issue typically arises in the following situation. A disturbance occurs in prison. Prison personnel file written reports about the incident with the administration. On the basis of these reports, and perhaps other evidence, prison officials accuse an inmate of violating the institution's regulations and convene a disciplinary hearing.\textsuperscript{31} The purpose of this hearing is to determine whether the inmate actually has violated the rules and, if so, what action should be taken. If an inmate is found guilty, he must receive a Wolff statement from the disciplining body.\textsuperscript{32}

A constitutional problem arises when the Wolff statement contains nothing more than a statement that the inmate has been found guilty based on a prison employee's report.\textsuperscript{33} Presumably, the incriminating evidence on which the disciplining body based its decision is contained in the employee's report.\textsuperscript{34} To determine whether the incorporation of this report by reference satisfies due process requires a proper understanding of the concerns that guide any inquiry into the procedural due process rights of inmates.

\begin{itemize}
\item \textsuperscript{30} See \emph{supra} note 6 and accompanying text.
\item \textsuperscript{31} See, e.g., 28 C.F.R. § 541.17 (1986) (outlining procedures to be followed in federal inmate disciplinary hearings). Wolff requires that an inmate be given notice of the charges against him at least twenty-four hours before a disciplinary hearing is convened in order to provide him an opportunity to "marshal the facts in his defense and to clarify what the charges are . . . ." Wolff v. McDonnell, 418 U.S. 539, 564 (1974).
\item \textsuperscript{32} See \emph{id.} at 564-65.
\item \textsuperscript{33} For instance, the Wolff statement found to be adequate in Saenz v. Young, 811 F.2d 1172 (7th Cir. 1987) stated simply that "[the reporting officer's] written statement supports the finding of guilt that an attempt was made by Inmate Saenz to commit battery upon the [other] inmate." \emph{id.} at 1173. The Wolff statement found inadequate in Chavis v. Rowe, 643 F.2d 1281 (7th Cir.), \emph{cert. denied}, 454 U.S. 907 (1981), read, in its entirety: "We recognize and consider the resident['s] statement[,] however[,] we accept the reporting officer['s] charges." Id. at 1283 (brackets in original). The "reporting officer's charges" consisted of a report that stated no more than that an investigation had identified the inmate as the attacker of a prison guard. See \emph{id.} The Wolff statement found inadequate in Hayes v. Walker, 555 F.2d 625 (7th Cir.), \emph{cert. denied}, 434 U.S. 959 (1977), said only that "the Committee's decision is based on the violation report as written and upon the report by the special investigator which during your absence was made part of the record." Id. at 631.
\item \textsuperscript{34} See, e.g., Saenz v. Young, 811 F.2d 1172, 1174 (7th Cir. 1987) ("Here it is plain that the [disciplining body] relied on the reporting officer's [report]."); Brown v. Frey, 807 F.2d 1407, 1413 (8th Cir. 1986) ("[A]n examination of the reports makes it immediately apparent what statements in them were relied on by the board in making its decision."). But see, e.g., Chavis v. Rowe, 643 F.2d 1281, 1283 (7th Cir.) (report that was incorporated stated no more than that an investigation had identified the inmate as the attacker of a prison guard), \emph{cert. denied}, 454 U.S. 907 (1981).
\item An inmate sometimes receives a copy of the incorporated report. See, e.g., King v. Wells, 760 F.2d 89, 93 (6th Cir. 1985). In \emph{King}, where the court required factually specific Wolff statements, the disciplined inmate received a Wolff statement and a copy of the incorporated reports. The court held this to be inadequate because Wolff required the factually specific statement to be produced by the disciplining body, not a prison guard. See \emph{King}, 760 F.2d at 93. Providing an inmate with a copy of an incorporated report does not alleviate the inadequacies of incorporation by reference. See \emph{infra} note 59 and accompanying text.
\end{itemize}
II. The Guiding Concerns

The Constitution provides that a person cannot be deprived of liberty without due process of law. In determining the level of process due an inmate facing the loss of a liberty interest, a balance must be struck between the liberty interest at stake and the legitimate penological interests of the state. Three primary concerns influence this balancing pro-

35. U.S. Const. amend. XIV § 1. The fourteenth amendment provides, in part, that "[n]o state . . . shall deprive any person of life, liberty, or property, without due process of law . . . ." Id.


However, if the state sets up a procedure that limits the discretion of the prison administration and conditions what happens to the inmate on the occurrence of certain events, then the state has created a liberty interest protected by the due process clause. See Olim v. Wakinekona, 461 U.S. 238, 249 (1983); Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981); Meachum v. Fano, 427 U.S. 215, 226-27 (1976); Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974); Wright v. Enomoto, 462 F. Supp. 397, 402-03 (N.D. Cal. 1976), aff'd, 434 U.S. 1052 (1978). In the Court's words, a State creates a protected liberty interest by placing substantive limitations on official discretion. An inmate must show 'that particularized standards or criteria guide the State's decisionmakers.' If the decisionmaker is not 'required to base its decisions on objective and defined criteria,' . . . the State has not created a constitutionally protected liberty interest.


cess. The first concern is the nature of the administrative decision being made. Specifically, the threshold question is whether the decision to re-
voke a liberty interest is premised on the occurrence of certain specified events. If so, the decisionmaking process generally should contain pro-
cedural safeguards, including the opportunity for an adversarial hearing. On the other hand, if the decision is based largely on predictions


39. Compare Vitek v. Jones, 445 U.S. 480, 489-91, 495 (1980) (decision to commit inmate to mental hospital requires procedural safeguards because it is based on an inquiry into inmate's mental health) and Wolff v. McDonnell, 418 U.S. 539, 563-67 (1974) (decision to discipline inmate requires due process protection because it is based on a determination of whether he is guilty of rules violations) with Olim v. Wakinekona, 461 U.S. 238, 249-50 (1983) (decision to transfer inmate requires no procedural protections because prison administration vested with unfettered discretion) and Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 15-16 (1979) (parole denial decision does not require due process protections because it is based on predictions rather than the sort of guilt determination ordinarily associated with an adversarial proceeding); cf. Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (decision to revoke parole triggers due process protection because it is based on the factual determination of whether the parolee violated parole conditions).

40. When the revocation of a liberty interest is premised on the occurrence of certain events, the operative question is whether these events occurred. See supra note 36; see also Wolff, at 558 (1974) ("Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and . . . due process . . . must be observed."). This determination requires the sort of factual inquiry associated with an adversarial proceeding. For instance, in Vitek v. Jones, 445 U.S. 480 (1980), state law provided that inmates could be committed to a mental hospital (and suffer a corresponding and severe loss of liberty) only if it was determined that they were mentally ill. See id. at 489-91. Due process required that this determination be made pursuant to an adversarial hearing. Id. at 490-91, 495. Similarly, in Wolff v. McDonnell, 418 U.S. 539 (1974), inmates could lose good-
time credits (a liberty interest) only if they violated prison rules. Id. at 547, 557. Therefore, when accused of rules violations, inmates had to be given a hearing and the opportu-

nity to marshal the facts in their defense. Id. at 557-58, 564. Cf. Morrissey v. Brewer, 408 U.S. 471, 483-84 (1972) (because decision to revoke parole is premised on a finding of violation of parole restrictions, a factual hearing is required before parole can be re-
voked).

In contrast, if a change in an inmate's status or environment is not conditioned on the occurrence of certain events but left to the discretion of prison administrators, then the question is not whether certain facts occurred but what course of action an administrator thinks is best. This sort of decision ordinarily is not associated with an adversarial, fact determining hearing. See, e.g., Olim v. Wakinekona, 461 U.S. 238, 249-50 (1983) (where prison administration possesses unfettered discretion in inmate transfer decision, there is no need for procedural protections); Hewitt v. Helms, 459 U.S. 460, 473-74 (1983) (be-
cause administrative segregation is discretionary, it does not require a hearing before im-
position); Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981) (because it is based more on predictions than objective facts, decision whether to commute sentence does not require procedural protections); Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 14-16 (1979) (because parole decision is largely discretionary, it does not require an adversarial fact finding hearing).
of future conduct or conditions—the type of decision ordinarily not associated with an adversarial factfinding proceeding—procedural safeguards are less relevant.\(^4\)

The second concern that influences the balancing process is the effect that the administrative decision may have on the inmate.\(^4\) This concern encompasses both the immediate harm that the inmate will suffer due to the loss of the liberty interest\(^4\) as well as the risk of subsequent and unjustified "collateral consequences"\(^4\) he may be exposed to as a result of the decision.\(^4\) The need for procedural safeguards increases as the potential for negative effects arising from the decision increases.\(^4\)

The third concern focuses on the interests of the state prison administration.\(^4\) All other factors being equal, the less burden that a procedural

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41. See, e.g., Olim v. Wakinekona, 461 U.S. 238, 249-50 (1983) (because prison administration has unfettered discretion to transfer inmates, no procedural protections adhere to transfer decision); Hewitt v. Helms, 459 U.S. 460, 474 (1983) (because administrative segregation decision based on "purely subjective evaluation," "trial-type procedural safeguards" are not required); Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981) (because decision to commute sentence depends on predictions and subjective evaluations, procedural safeguards are not required); Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 9-10, 13 (1979) (because decision to grant parole depends on predictions and subjective evaluations, procedural safeguards are not required); Meachum v. Fano, 427 U.S. 215, 225 (1976) (because decision to transfer inmate is based on little more than "informed predictions," procedural protections are not required).\(^4\)


requirement places on prison administration, the more likely that a court will impose it.\textsuperscript{48}

\section*{III. Factly Specific \textit{Wolff} Statements are Constitutionally Mandated}

\subsection*{A. The Nature of Prison Disciplinary Proceedings}

A prison disciplinary hearing seeks to determine whether an inmate violated prison rules and, if so, to punish him for that violation.\textsuperscript{49} It gives the inmate the opportunity to defend himself against his accuser before an impartial factfinding body. In sum, it is an adversarial factfinding proceeding.\textsuperscript{50} The requirement that a decisionmaker produce a factually specific statement of evidence on which it relied in making its decision is common to such proceedings.\textsuperscript{51} Thus, the nature of prison

\begin{footnotesize}
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\item Compare Superintendent v. Hill, 472 U.S. 445, 455 (1985) (requiring disciplinary decision to be based on “modicum of evidence” will not create administrative burden) and Vitek v. Jones, 445 U.S. 480, 496 (1980) (interest of the state in avoiding disruption in prison proceedings does not outweigh the need for procedural safeguards in decision to transfer inmate to mental hospital) and Wolff v. McDonnell, 418 U.S. 539, 572 (1974) (procedural protections in prison disciplinary proceeding will not overburden prison administration) with Jago v. Van Curen, 454 U.S. 14, 19 (1981) (to hold that a mutual understanding between inmates and prison officials created a protected liberty interest would “severely restrict the necessary flexibility of prison administrators”) and Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 13 (1979) (need for flexibility in decision to grant parole weighs against court imposed procedural safeguards in parole decisions) and Baxter v. Palmigiano, 425 U.S. 308, 321-22 (1976) (ad-
\item ministrative burden inherent in the confrontation and cross-examination of adverse witnesses militates against allowing these practices in prison disciplinary proceedings); see also Hewitt v. Helms, 459 U.S. 460, 470 (1983) (“There are persuasive reasons why we should be loath to [apply procedural safeguards] to . . . the day-to-day administration of a prison system.”); Meachum v. Fano, 427 U.S. 215, 228-29 (1976) (due process clause should not dictate the day-to-day function of prisons); Ponte v. Real, 471 U.S. 491, 497-99 (1985) (requiring prison administration to give reasons at some point for denying inmate opportunity to call witnesses at disciplinary hearing does not create too great an administrative strain but requiring contemporaneous written reasons might).
\item See, e.g., Wolff v. McDonnell, 418 U.S. 539, 545-53 (1974) (discussing the disciplinary procedures in the Nebraska prison system); see supra notes 31-32 and accompanying text.
\item Of course, one of the reasons a procedural safeguard like the \textit{Wolff} statement is required in prison disciplinary hearings is the adversarial nature of those proceedings. See \textit{Wolff}, 418 U.S. at 557; supra notes 38-41 and accompanying text. The question to be addressed, however, is how stringent this procedural safeguard must be. The adversarial nature of prison disciplinary proceedings weighs in favor of the more stringent, factually specific interpretation of \textit{Wolff} statements. See infra note 51 and accompanying text.
\item See, e.g., Fed. R. Civ. P. 52(a) (civil trials); Fed. R. Crim. P. 23(c), 32(b)(1), 32(c)(3) (criminal trials); 9 C. Wright & A. Miller, Federal Practice and Procedure §§ 2571-82 (discussing Rule 52(a) and the need for factually specific statements of evidence); C. A. Wright, Law of Federal Courts 646 (4th ed. 1983) (same); 28 C.F.R. § 541.17(f)(2) & (g) (1986) (factually specific statement required in federal prison disciplinary decisions); supra notes 14-15 and accompanying text (specific factual statement required in parole revocation decision).
\end{itemize}
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disciplinary hearings weighs in favor of requiring specificity in *Wolff* statements.

**B. The Potential Effect of A Prison Disciplinary Proceeding**

1. Standard of Review

One of the dual purposes of the *Wolff* statement requirement is to ensure fairness in the disciplinary decision. Implicit in the concept of a fair decision is the notion that the decisionmaker has discovered the relevant facts and based his decision on them. In *Superintendent v. Hill* the Supreme Court closed one avenue by which the judiciary could ensure that a fair decision has taken place.

*Hill* held that a modicum of evidence, anywhere in the record, is all that is required to uphold a prison disciplinary decision on review. The *Hill* court stressed that reviewing courts should not delve into the record, assess the credibility of testimony, or weigh evidence. Rather, courts should merely look for any evidence in the record that supports the disciplinary decision. If fairness requires a weighing of the facts and the courts are not to do this weighing, then the disciplining body must. Consequently, there should be some safeguard to ensure that the disciplining body has performed this function.

The *Wolff* statement is meant to be such a safeguard. Requiring a
disciplining body to note the facts on which it has relied ensures that it has gone through the often difficult process of weighing evidence to uncover the truth.\textsuperscript{58} As one court observed, "[i]t is impossible to state the facts relied upon without having discovered the facts."\textsuperscript{59}

go through the decision-making process: to pick and choose among conflicting facts . . . . Decision-making is difficult and may be unconsciously avoided unless done in a fixed way."\textit{Meeks}, 95 Wis. 2d at 124-25, 289 N.W.2d at 363.

58. \textit{State ex rel. Meeks v. Gagnon}, 95 Wis. 2d 115, 124-25, 289 N.W.2d 357, 363 (Ct. App. 1980). The magnitude of harm that can arise if a disciplining body does not follow this procedure is exemplified in Chavis v. Rowe, 643 F.2d 1281 (7th Cir.), \textit{cert. denied}, 454 U.S. 907 (1981). In \textit{Chavis} a prison guard had been stabbed while escorting a group of inmates. Chavis, one of the group, was accused of the stabbing. A hearing was held and Chavis was cleared. After that, a second officer filed a report saying no more than that "[t]hrough investigation [Chavis had] been identified as having stabbed [the wounded officer]." \textit{Id.} at 1283. Unknown to Chavis, the wounded officer's own report and a witness's polygraph testimony tended to exonerate him. \textit{Id.} at 1283-84. Nevertheless, Chavis was found guilty and punished. \textit{Id.} at 1283. The \textit{Wolff} statement that he received merely stated that the disciplining body believed the second officer's report. Chavis went through two administrative prison appeals before finally being cleared of the stabbing. He then brought an action in federal court alleging violation of his constitutional rights. \textit{See id.} at 1284.

The \textit{Chavis} court stated that the case before it was one that exemplified why factually specific \textit{Wolff} statements were necessary to achieve \textit{Wolff}'s goal of ensuring fair decisions. The \textit{Chavis} court noted that, by the time Chavis was exonerated, he "had spent five months in segregation. Had the [disciplining body] made detailed findings to begin with, Chavis may never have been sent to segregation, or, the [reviewing body] may have been compelled to reverse the [disciplining body's] decision upon its first review." \textit{Id.} at 1287.

59. \textit{Meeks}, 95 Wis. 2d at 126, 289 N.W.2d at 364. This notion helps justify the position taken in the Sixth Circuit, that furnishing an inmate a copy of a report that has been incorporated into a \textit{Wolff} statement by reference is not sufficient to meet minimum due process requirements. \textit{See King v. Wells}, 760 F.2d 89, 93-94 (6th Cir. 1985). Merely furnishing the inmate with a copy of the report relied on may well inform him of the evidence against him. It does not, however, assure that the disciplining body weighed the evidence, considered conflicting testimony, and made the well-considered determination necessary to meet \textit{Wolff}'s fairness requirement.

2. Collateral Consequences

A second purpose of the Wolff statement requirement is to protect inmates from unjust collateral consequences that may result from a misunderstanding of prison disciplinary records.\(^60\) For instance, such a misunderstanding may lead to a subsequent erroneous decision to transfer an inmate or deny him parole.\(^61\) Those in favor of incorporation argue that a collateral reviewing body may look at the whole record of a disciplinary proceeding, thus precluding any danger of unjust collateral consequences.\(^62\)

There are two problems with this position. First, collateral reviewing bodies generally do not delve into the record.\(^63\) Second, a collateral deci-

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61. Id.; see also Vitek v. Jones, 445 U.S. 480, 496 (1980) (there is an "inherent risk" of error in an inmate transfer decision); Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 15 (1979) (inmate's prison behavior record generally is a critical factor in the decision of whether to grant him parole); Meachum v. Fano, 427 U.S. 215, 228 (1976) ("[A]n inmate's conduct . . . may often be a major factor in the decision . . . to transfer him . . ."); infra note 63 (discussing the potential for misunderstanding an inmate's prison disciplinary record when making a parole determination).

62. See Saenz v. Young, 811 F.2d 1172, 1174 (7th Cir. 1987); Brown v. Frey, 807 F.2d 1407, 1412 (8th Cir. 1986). As the Frey court put it, a Wolff statement that incorporates a report by reference "guarantees that a reviewing body can fairly and accurately assess . . . the nature of the incident or the propriety of the proceeding . . . [The disciplining body] has committed itself to certain evidence, and a review based on established facts is available." Id. at 1414.

63. The situation regarding parole provides a good example. Although the procedures used in making a parole decision and the basis on which these decisions are made rarely are articulated in administrative rules or statutes, see N. Cohen & J. Gobert, The Law of Probation and Parole 93 (1983), an inmate's prison behavior record generally is a critical factor in the decision of whether to grant him parole. See Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 15 (1979) (inmate's prison behavior record is "critical" in a parole determination); 18 U.S.C. §§ 4165, 4206 (violation of prison rules reduces good-time credits held); 28 C.F.R. § 2.6 (1986) (loss of good-time credits taken into consideration in federal parole decision); id. at § 2.12(d), 2.14(a)(2)(iii), (b)(4)(i) (disciplinary record affects parole release decision); see also Dye v. United States Parole Comm'n, 558 F.2d 1376, 1378 (10th Cir. 1977) (loss of good-time credits "is an indication that a prisoner has violated the rules of the institution to a serious degree").

In the rush to process applications for parole, however, the fine points of a situation that has resulted in the disciplining of a parole applicant may not be taken into account. For instance, a recent government report found that a federal inmate's case file (containing convictions, probation report, prison file, etc.) was not seen by parole examiners until immediately before a parole hearing, generally was reviewed for less than twenty minutes, and then usually was seen by only one of the two examiners required to vote on the parole decision. See U.S. General Accounting Office, Report to the Honorable Sam Nunn on Federal Parole Practices 24, 25, 51 (July 16, 1982). The report also found that errors in parole decisions were made 53% of the time and that only 6% of those errors were corrected through the administrative appeals process. See id. at 51; see also Vitek v. Jones, 445 U.S. 480, 496 (1980) ("inherent risk" of error in an inmate transfer decision); State ex rel. Meeks v. Gagnon, 95 Wis. 2d 115, 127-28, 289 N.W.2d 357, 363 (Ct. App. 1980) (because parole boards generally do not look into facts behind disciplinary decision, Wolff statements that are not factually specific are likely to lead parole boards to make erroneous conclusions about the circumstances surrounding such a decision).
sion based on an erroneous understanding of an inmate's record of prison conduct will rarely be subject to independent review. Therefore, incorporation by reference does not adequately protect inmates from unjust collateral consequences arising from prison disciplinary action. On the other hand, a factually specific Wolff statement helps to ensure that a collateral reviewing body bases its decision on a more accurate understanding of inmates' disciplinary records, thereby diminishing any concern over the lack of future opportunities for review.

C. The Administrative Burden

Wolff statements must contain "the evidence relied on" in making the disciplinary decision. Disciplining bodies that issue Wolff statements that merely incorporate reports by reference are stating that those reports are the items of "evidence" on which their decisions are based. Requiring these disciplining bodies to mention the relevant facts in those items of "evidence" would be only slightly more burdensome than incorporation by reference.

In addition, a factually specific Wolff statement does not create any greater problems in prison administration than one that is factually vague. Inmates receive Wolff statements after the disciplining body has made its decision, thus reducing the risk that a requirement of factual specificity could be used to disrupt the disciplinary hearing itself.

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64. Collateral decisions (like the decision to transfer an inmate or deny him parole) are predictive in nature. See supra note 36. Thus, these decisions ordinarily do not trigger the due process clause, precluding review by the courts. See id.


66. See Saenz v. Young, 811 F.2d 1172, 1174 (7th Cir. 1987); Brown v. Frey, 807 F.2d 1407, 1412 (8th Cir. 1986); Wells v. Israel, 629 F. Supp. 498, 505 (E.D. Wis. 1986). The Frey court stated that "Wolff requires, in part, that the written statement contain the 'evidence relied on' (emphasis in original). The reports referenced in the adjustment board's written statement undoubtedly qualify as 'evidence' ...." Frey, 807 F.2d at 1413 (citation omitted).


68. See Brown v. Frey, 807 F.2d 1407, 1412 (8th Cir. 1986) (requirement of factually specific Wolff statements might be "susceptible to manipulation" by inmates).

69. See Wolff, 418 U.S. at 566. The written statement requirement's lack of disruptive potential sharply separates it from other procedural safeguards that the Supreme Court chose not to adopt for prison disciplinary proceedings. For instance, the Court refused to require that an inmate be allowed to call witnesses at disciplinary hearings because the requirement has an "obvious potential for disruption." Wolff, 418 U.S. at 566; accord Ponte v. Real, 471 U.S. 491, 497-98 (1985). The Court also refused to hold that an inmate has a right to confront and cross-examine witnesses against him because "[p]roceedings would inevitably be longer and tend to unmanageability." Wolff, 418 U.S. at 567; accord Baxter v. Palmigiano, 425 U.S. 308, 321 (1976). Similarly, the right to counsel in prison disciplinary proceedings has not been recognized, partially due to the
Also, if the disclosure of any particular item of information endangers personal or institutional safety, it can be excluded from a Wolff statement at the disciplining body's discretion.70

Moreover, there is a great penological benefit in providing inmates with factually specific Wolff statements. Prison discipline is meant, in part, to serve a rehabilitative function.71 When inmates are told exactly what they did to bring on punishment they are more likely to be successful in their efforts to modify their behavior.72 In addition, by forcing a disciplining body to weigh the facts, a factually specific Wolff statement promotes fairness in disciplinary decisions.73 This appearance of fairness and consistency is likely to lead to a less hostile prison environment. This result both alleviates administrative burdens and promotes rehabilitation.74
D. The Supreme Court has Implied That a Wolff Statement Must be Factually Specific

The Supreme Court has implied that Wolff statements should be factually specific. For instance, in Wolff itself, the Court stated that there may "be occasions when personal or institutional safety is so implicated that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission." If the incorporation of a report by reference constitutes "evidence" sufficient to satisfy the written statement requirement, then this exception is superfluous. Indeed, the exception is meaningful only if a Wolff statement is ordinarily required to be factually specific. It would then signify that relevant facts could be excluded from the Wolff statement only if disclosure might endanger personal or institutional safety.

The Supreme Court gave further guidance as to the proper interpretation of "evidence" in Superintendent v. Hill. In Hill, the Court held that "some evidence" is required to appear in the record in order for a reviewing court to uphold a decision to discipline an inmate. The Court said that this evidentiary requirement would not place any new burdens on prison administration because "the written statement mandated by Wolff [already] requires a disciplinary board to explain the evidence relied upon." It is significant that the Court used the term "explain" rather than "list." Those in favor of incorporation by reference argue that a report incorporated by reference is no less an item of
evidence than a specifically identified fact. They would argue, for instance, that the statement "the disciplinary board believes the officer's report on the incident" is, for the purposes of fulfilling the requirements of a Wolff statement, equivalent to "the inmate was found with a knife." However, the latter example can be viewed as self-explanatory evidence for a disciplinary decision. The former can not. Thus, in noting that a Wolff statement must explain the evidence on which the decisionmaker relied, the Hill decision implies that a Wolff statement is to be factually specific.

E. The Level of Protection Should Not be Diminished

It is undisputed that the written statement of evidence required under Morrissey v. Brewer for parole revocation must be factually specific. One argument in favor of allowing the incorporation of a report by reference in a Wolff statement is that an inmate's liberty interest in a disciplinary proceeding is not equal to that of a parolee in a parole revocation hearing. However, this argument fails to take account of one essential fact: this discrepancy was addressed in the formulation of the Wolff

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82. See supra note 66.
83. Baxter v. Palmigiano, 425 U.S. 308 (1976), also gives an indication of the Court's awareness that Wolff statements ought to be factually specific. In Baxter the Court said that

[due to the peculiar environment of the prison setting, it may be that certain facts relevant to the disciplinary determination do not come to light until after the formal hearing. It would be unduly restrictive to require that such facts be excluded from consideration . . . . In so stating, however, we in no way diminish our holding in Wolff that "there must be a 'written statement by the factfinder as to the evidence relied on and reasons' for the disciplinary action."

Id. at 322 n.5 (quoting Wolff v. McDonnell, 418 U.S. 539, 564-65 (1974) (quoting Morrissey v. Brewster, 408 U.S. 471, 489 (1972))) (emphasis added). A Wolff statement is meant to protect an inmate by giving him a documented basis for the decision to discipline him that he can use to defend his rights. See Wolff v. McDonnell, 418 U.S. 539, 565 (1974). The holding in Baxter applied to facts affecting the decision that surfaced after the hearing. Thus, the inmate was not apprised of these facts prior to or during the hearing. In stating that the use of these facts does not diminish the Wolff statement requirement, the Court implied that the Wolff statement is the natural vehicle for informing the inmate of these newly discovered facts. The only way that a Wolff statement can do this is if it is factually specific.

The Supreme Court's interpretation of the written statement required in Morrissey v. Brewer, 408 U.S. 471 (1972), for parole revocation decisions also lends some support to the view that Wolff statements should be interpreted as being fact specific. In Black v. Romano, 471 U.S. 606 (1985), the Court indicated that it considers the statement required in Morrissey to be factually specific. See id. at 613-14; supra note 15 and accompanying text. Since the statement required in Wolff is identical to that required in Morrissey, see supra notes 22-23 and accompanying text, it follows that Wolff statements should be factually specific.

84. 408 U.S. 471 (1972).
85. See supra notes 14-15 and accompanying text.
86. See Brown v. Frey, 807 F.2d 1407, 1410-11 (8th Cir. 1986); see also Wolff, 418 U.S. at 560-61 (discussing the difference between liberty interests held by a parolee and an inmate); Morrissey v. Brewer, 408 U.S. 471, 481-82 (1972) (discussing the liberty interest held by a parolee).
statement requirement. The Court in Wolff v. McDonnell\textsuperscript{87} refused to adopt all of the procedural safeguards enunciated in Morrissey v. Brewer\textsuperscript{88} precisely because inmates in a disciplinary proceeding have a more limited liberty interest at stake than parolees in a revocation hearing.\textsuperscript{89} This difference in the magnitude of liberty interests is reflected in the number of procedural safeguards retained by the Wolff decision, not in the level of protection afforded by any particular safeguard.\textsuperscript{90} One of the few safeguards that the Wolff Court chose to retain was the written statement requirement.\textsuperscript{91} The attendant degree of specificity of this retained procedural safeguard should not be diminished\textsuperscript{92} in order to account, a second time,\textsuperscript{93} for the difference in the liberty interests involved.

**CONCLUSION**

In determining the level of procedural protection due an inmate facing the loss of a liberty interest, the Supreme Court has looked to the nature of the decision affecting that liberty interest, the immediate and collateral effects the decision may have on the inmate, and the extent to which a proposed procedural safeguard will burden prison administration.

A disciplinary proceeding is an adversarial proceeding resulting in a factually determination of guilt. Furthermore, a disciplinary decision contains the danger of collateral harm. These factors suggest the need for greater procedural protections. A factually specific Wolff statement is more protective than one that merely incorporates a report by reference. In addition, the penological benefits resulting from a factually specific Wolff statement greatly outweigh the minimal administrative burden involved in producing it.

Therefore, the concerns that guide the courts in the area of inmates' procedural due process rights weigh in favor of a factually specific Wolff statement. Moreover, in light of the minimal evidentiary burden borne by the state in attempting to uphold a disciplinary decision on review and

\textsuperscript{87} 418 U.S. 539 (1974).
\textsuperscript{88} 408 U.S. 471 (1972). For a listing of the procedural safeguards enunciated in Morrissey, see supra note 12.
\textsuperscript{89} See Wolff v. McDonnell, 418 U.S. 539, 560-61 (1974); supra notes 20-21 and accompanying text; see also Morrissey v. Brewer, 408 U.S. 471, 481-82 (1972) (discussing the liberty interest held by a parolee).
\textsuperscript{90} Compare Morrissey v. Brewer, 408 U.S. 471, 482-84 (1972) (discussing the numerous procedural safeguards required in a parole revocation decision) and supra note 12 (same) with Wolff, 418 U.S. at 563-66 (retaining only two of the Morrissey standards).
\textsuperscript{92} Lower courts, and apparently the Supreme Court, interpret the written statement required in Morrissey to be fact specific. See supra notes 14-15 and accompanying text.
\textsuperscript{93} See supra note 90 and accompanying text.
the unreviewability of many "collateral" decisions, factual specificity represents the best method of ensuring that the purposes behind the *Wolff* statement requirement are fulfilled. Although the Supreme Court has never ruled on the issue, it has implied a requirement of factual specificity when speaking about the *Wolff* statement. This implication should be followed.

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