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Structuring Correctional Decision Making: A Traditional Proposal†

W. Anthony Fitch* and Julian Tepper**

Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness.

* * *

A startlingly high proportion of all official discretionary action pertaining to administration of justice is illegal or of doubtful legality.¹

Historically, the development of the law governing crime and punishment has evinced a continuing tug of war between certainty and flexibility. The need for both is obvious. On the one hand, the citizenry needs to know the types of conduct which will subject it to governmental intervention, and the government needs to know the kinds of intervention which are violative of individual rights. On the other hand, the mechanisms which implement and enforce the law must allow for the exercise of judgment necessary to "adjust" the law and, thereby, avoid a diminution in the consent of the people to be governed.

In one sense, the criminal justice system is a system of flexibility. The various agents of the government—police, prosecution, courts, and cor-

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1. K. DAVIS, DISCRETIONARY JUSTICE, A PRELIMINARY INQUIRY 3, 12 (1971 ed.) [hereinafter cited as DAVIS].

rections—have almost unlimited discretion, statutory provisions notwithstanding, in choosing whether or not to arrest, prosecute, convict, imprison, or release from prison. While such discretion, no doubt, often serves to enhance traditional notions of justice, it has other, less desirable results, not the least of which is the obvious and lingering discriminatory application of the law on the bases of wealth and race.

It is almost axiomatic that a governmental agency is allowed as much discretion as it can handle; that is, until it abuses such discretion so often or so flagrantly that, in a final sense of despair, another branch of the government cuts it off.

As we will demonstrate below, the penal agencies have been provided with unbridled discretion by the legislatures which have created them. There are many reasons for this, not the least of which Fletcher Knebel has defined as the second rule of politics: namely, that a politician must do whatever is necessary to get re-elected. (Knebel's first rule, of course, is that the second takes precedence over all others.)

Discretion is nothing less than uncontrolled power. Whether or not power becomes abusive or corrupt depends upon the relationship between the entity which possesses and the persons who are subject to such power. No one could convincingly assert that the penal system's concern for the future welfare ("success") of its clients at all resembles that of the parent for the child. Whether or not this disparity has anything of significance to tell us, each passing day has produced additional evidence sufficient now to convince most of us that penal agencies have not chosen to exercise their discretionary powers in a manner calculated to protect the health and welfare of persons entrusted to their care.

One final introductory observation: The public, more than ever aware of the failure of the criminal justice system to "correct" the future behavior of offenders, has begun to focus upon and locate much of the blame within the penal system. The extent to which this may or may not be valid is a proper subject for analysis. However, the penal system's lack of measurable utility in terms of crime prevention must significantly weigh upon any consideration of whether or not we wish to continue the latitude which we have granted it, a latitude which has resulted in the degradation and, in many cases, the destruction of the prison inmate.

To better understand the dynamics of discretion, we have examined the legislative schemes of the federal and District of Columbia governments and of twelve states: California, Florida, Illinois, Massachusetts, Michigan, Minnesota, New Jersey, New York, Pennsylvania, Texas, Vermont, and Washington. Chief among selection factors was the conclusion that these jurisdictions are leaders in either or both correctional innovation and legislative productivity.

Not unexpectedly, we found virtual legislative abdication in favor of almost total administrative discretion. Modestly, we set forth a traditional corrective approach: subject the administrative agency to appropriate and recognized administrative procedures.

I. *An Overview of Correctional Legislation*

A. *General Authority*

Each of the statutes reviewed delegates to the department of corrections or to the director of the department general authority over the supervision and management of the state's correctional system. Except for the requirement that rules and orders be kept in writing and by implication, collected in one corpus for use and reference, the provisions that follow are typical.

The Department shall make and enforce all such general rules, regulations, and orders for the government and discipline of the penitentiary as it may deem expedient, and may, from time to time, alter and amend the same; and in making such rules and regulations it shall, in connection with the Governor, adopt such as in its judgment, while being consistent with the discipline of the penitentiary, shall best conduce to the reformation of the convicts

The Department of Public Safety shall exercise a general supervision over the government, discipline and police regulations of the penitentiary, in accordance with the orders, rules and regulations established by it Such rules and orders shall be in writing and shall be kept by the Department for that purpose, and shall be subject to alteration or amendment by the Department.²

Policy matters such as "government," "discipline," "reformation," and "police regulations of the penitentiary"—inevitably the concern of any prison administration—are set forth in the most general terms, without standards, criteria, or guidelines for the substantive content of the system's regulations which must implement them. This vagueness and generality might present no problem if there were additional provisions dealing with management of the institution and its inmates to fill the void.

2. CAL. PENAL CODE §§ 5058, 6104, 6204, 6252 (West 1970); FLA. STAT. ANN. §§ 944.09, 944.14, 945.21 (1973); MASS. GEN. LAWS ANN. ch. 27, § 1 (Supp. 1973); MICH. COMP. LAWS ANN. § 791.206 (1968); N.Y. CORREC. LAW § 112.157 (McKinney 1968) *as amended*, (Supp. 1973); N.J. STAT. ANN. § 30:1-12 (1964); PA. STAT. ANN. tit. 61, § 301 (1964); TEXAS PENAL CODE art. 6166j (1970); VT. STAT. ANN. tit. 28, § 102(c) (Supp. 1972); WASH. REV. CODE ANN. §§ 72.08.102, 72.08.120, 72.12.170, 72.13.170 (Supp. 1972); STATE DEPARTMENT OF CORRECTIONS ACT § 3(d) (1971) (Advisory Committee Intergovernmental Relations) [hereinafter cited as STATE DEPARTMENT ACT]; Standard Act for State Correctional Services § 6 (1966) (National Council on Crime and Delinquency, with the American Correctional Association) [hereinafter cited as State Correctional Services Act]; MODEL PENAL CODE § 401.2(e) (1962).

B. Treatment of Prisoners

Several statutes have equally general provisions regarding the basic conditions under which prisoners may be incarcerated. Parts of the Massachusetts and Washington Codes are representative of the older provisions. Section 32 of the Massachusetts Code provides that prisoners shall be treated with the "kindness which [they] . . . merit;"³ a statute from the State of Washington dating from 1891 provides that prisoners shall be given a "bed of straw or other suitable material . . . and shall be supplied with garments of coarse, substantial material of distinctive manufacture"⁴ Other codes require that all prisoners or certain groups of prisoners (such as those segregated or isolated for disciplinary reasons) be housed in facilities with adequate lights, ventilation, and sanitary equipment.⁵ Conspicuously absent are directives for or controls over the day-to-day administration of conditions in correctional institutions. The recent flood of judicial decisions finding living conditions in institutions or sections thereof to be far below minimum constitutional levels underscores the inefficacy of current statutes.⁶

C. Discipline

It has already been pointed out that nearly every statute includes "discipline" among the matters which departments and/or directors are authorized to regulate.⁷ The Washington statute is unique in providing that "the discipline imposed [in the state reformatory, as opposed to the state penitentiary] shall be reformatory in character."⁸ Nor surprisingly, the Washington Code provides no further guidance as to how disciplinary measures should be imposed to reform or rehabilitate inmates. Yet this is an issue which is basic to the role of correctional institutions and the means by which their purpose or purposes should be achieved. Past correctional failures amply demonstrate that no one, including correctional authorities, has all, if any, of the answers.

3. MASS. GEN. LAWS ANN. ch. 127, § 32 (1966).

4. WASH. REV. CODE ANN. § 72.08.100 (1962).

5. MASS. GEN. LAWS ANN. ch. 127, § 401 (1966); N.Y. CORRECTION LAW § 137 (6) (McKinney Supp. 1973); PA. STAT. ANN. tit. 61, § 101 (1964).

6. Wright v. McMann, 387 F.2d 519 (2nd Cir. 1967), *aff'd*, 460 F.2d 126 (2nd Cir. 1972); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966); Holt v. Sarner, 300 F. Supp. 825 (E.D. Ark. 1969), 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); Jones v. Mitzger, 456 F.2d 854 (6th Cir. 1972); Hamilton v. Lore, 328 F. Supp. 1182 (E.D. Ark. 1971); Wayne County Jail Inmates v. Wayne County Board of Commissioners, C.A. No. 173-217 (Wayne County Cir. Ct., Mich. 1971); Bryant v. Hendrick, 208 A.2d 110 (1971); Inmates of the Boys Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972); Jones v. Wittenberg, 323 F. Supp. 93, 330 F. Supp. 707 (N.D. Ohio 1971) *aff'd sub nom.*

7. See text accompanying note 2 *supra*.

8. WASH. REV. CODE ANN. § 72.12.070 (1962).

Such issues as the appropriate type and degree of disciplinary sanctions require and deserve input from every party interested in or affected by correctional practices.

Only one of the state statutes surveyed has any provisions to govern the aspect of disciplinary practices which most concern inmates and others in the prisoner rights/prison reform movement—the *process* by which infractions and sanctions are decided.⁹ Inmates, their representatives and spokesmen have taken the essentially conservative position that many of the abuses which they have alleged can be prevented through the establishment and observance of the basic attributes of procedural due process—notice, impartial disciplinary hearing boards, confrontation and cross-examination of accusers and adverse witnesses, assistance and representation. At the very least, much of the prisoner litigation of the past few years could have been avoided if legislatures had either specified disciplinary hearing procedures¹⁰ or required their correctional departments to establish hearing procedures encompassing these basic protections.

Several statutes contain one or two other provisions dealing with inmate discipline. The Massachusetts Code, for example, contains two sections establishing basic standards for the use of segregation and isolation units. Section 39 of the correctional chapter provides that inmates housed in segregation units—as a result of what prison authorities frequently call administrative segregation decisions—shall be furnished regular meals, fully furnished cells, limited recreational facilities, certain visits and communication between them and authorized officials, and periodic medical and psychiatric examinations.¹¹ For isolation units, section 40 requires light, ventilation, adequate sanitary facilities, and at least one full meal each day. Unlike other statutes, the section also establishes a 15-day maximum period of confinement in isolation for each offense.¹² Legislation such as this establishes minimum standards which should give the administrator guidance as to the state's policy toward the use of such easily abused sanctions of the institution

9. VT. STAT. ANN. tit. 28, §§ 852-53 (Supp. 1972); Cf. STATE DEPARTMENT ACT § 9(e); State Correctional Services Act 16 (both requiring the distribution of copies of the disciplinary rules to inmates); MODEL PENAL CODE § 304.7(2) (requiring notice and a hearing by a committee which renders an advisory, non-binding recommendation to the warden, and establishing a rudimentary schedule of sanctions based on the seriousness of the disciplinary infraction); and the Model Act for the Protection of the Rights of Prisoners § 4 (1972) (published rules, schedule of sanctions, and rights to counsel if loss of good time is possible).

10. W. Fitch & J. Tepper, *An Introduction to Prison Reform*, 5 CLEARINGHOUSE REV. 627 (1972) [hereinafter cited as Fitch & Tepper].

11. MASS. GEN. LAWS ANN. ch. 127, § 39 (1966); Cf. MODEL PENAL CODE § 304.7(3); and Model Act for the Protection of the Rights of Prisoners §§ 3(d), (e).

12. MASS. GEN. LAWS ANN. ch. 127, § 40 (1966); See also VT. STAT. ANN. tit. 28, § 853(a)(1) (Supp. 1972).

and provides helpful direction for the development of more detailed regulations. Nevertheless, although preferable to the complete absence of guidelines regarding the use of segregation and isolation which characterizes most correctional codes, even these two sections provide only limited guidance. They deal with some matters in great detail—for example, the limit of fifteen days on confinement in isolation—but establish no standards in other equally important areas—for example, when the isolation sanction may be utilized. More appropriate and more concise legislation could expressly state *general* standards to be implemented by specific rules and regulations established by the institution or department.

The second type of statute relating to the disciplining of prisoners is, to our knowledge, never subject to criticism for excessive specificity. Almost every statute and approximately two-thirds of all correctional codes¹³ surveyed authorize “good time,” “gain time,” “commutation of sentence,” or “reduction of sentence.”¹⁴ The purpose of such provisions is to stimulate good behavior within the institution or to deter misconduct. Under these sections a prisoner is credited with an additional number of days toward the completion of his sentence for each period of time (usually a month) in which he is not involved in an infraction of the institution’s disciplinary rules. The reduction schedule is usually established by statute¹⁵ and based upon either the length of the original sentence or the length of time for which the inmate has been imprisoned. Accrued good time may be forfeited or future good time withheld as a sanction;¹⁶ thus, such provisions are intimately related to the disciplinary system of each institution. Because good-time adjustments can substantially decrease or increase a prisoner’s sentence, good-time decisions occupy a central place in prison life. Here again, the importance of developing satisfactory regulations and standards for the administration of good-time decisions is underscored by the numerous recent decisions invalidating disciplinary sanctions—including loss of good-time—imposed through informal, unfair, or non-existent disciplinary procedures.¹⁷

13. Singleton v. Shafer, 313 F. Supp. 1094, 1096 (E.D. Pa. 1970).

14. CAL. PENAL CODE §§ 2920, 2923, 2924 (West 1970); FLA. STAT. ANN. §§ 947.27, expired (1973); ILL. REV. STAT. ch. 108, § 45 (Supp. 1973); MASS. GEN. LAWS ANN. ch. 127, 129 (1966); MICH. COMP. LAWS ANN. § 800.33 (1968); MINN. STAT. ANN. § 243.18 (1972); N.J. STAT. ANN. §§ 30:4-140 (1964); N.Y. CORREC. LAW §§ 803, 804 (McKinney 1968); TEX. PENAL CODE art. 6166 (1970); VT. STAT. ANN. tit. 28, § 811 (Supp. 1972); STATE DEPARTMENT ACT § 11(a); State Correctional Services Act § 19.

15. Some statutes delegate the establishment of the rate of reduction to the director. N.Y. CORREC. LAW §§ 803, 804 (McKinney 1968). ILL. REV. STAT. ch. 108, § 45 (1952).

16. See notes 14 and 15, *supra*.

17. See, e.g., Morris v. Trivisino, 310 F. Supp. 857 (D.R.I. 1970); Clutchette v.

D. Visitors

Correctional codes commonly provide for unrestricted visits by various state and federal officials to the state's correctional institutions for the purpose of inspecting conditions therein.¹⁸ A few statutes also authorize private, unmonitored conversations between such officials and inmates,¹⁹ and protect the right of prisoners to confer with attorneys,²⁰ although these rarely establish the right of private consultations.²¹ Other potential visitors are required to obtain permission from the superintendent of the institution or from some departmental office pursuant to rules and regulations established by the director.

The following persons shall be authorized to visit at pleasure all correctional facilities: The governor and lieutenant-governor, commissioner of general services, secretary of state, comptroller and attorney-general, members of the commission of correction, members of the legislature, judges of the court of appeals, supreme court and county judges, district attorneys and every minister of the gospel having charge of a congregation in the town wherein any such facility is situated. No other person not otherwise authorized by law shall be permitted to enter a correctional facility except by authority of the commissioner shall prescribe. The provisions of this section shall not apply to such portion of a correctional facility in which inmates under sentence of death are confined.²²

Such a statute, except for the failure to establish firmly the right of private attorney-client consultation, provides a minimally adequate foundation for the development by the institution of requisite visiting regulations. The legislature is properly not interested in the particular provisions and schedules made for visiting, although it would be preferable for the legislature to express a policy, for example, of the fullest possible visiting arrangements

Procurier, 328 F. Supp. 767 (N.D. Cal. 1971); *Landman v. Royster*, 353 F. Supp. 621 (Va. 1971).

18. FLA. STAT. ANN. § 944.23 (1973); ILL. REV. STAT. ch. 108, § 117 (Supp. 1973); MASS. GEN. LAWS ANN. ch. 127, § 36 (1966); MICH. COMP. LAWS ANN. §§ 800.19, 800.52 (1968); MINN. STAT. ANN. § 243.58 (1972); N.Y. CORREC. LAW § 146 (McKinney 1968); N.J. STAT. ANN. § 30:1-2(h) (1964); PA. STAT. ANN. tit. 61, §§ 53, 55 (1964); TEX. PENAL CODE art. 6166, § 2 (1970); *Cf.* MODEL PENAL CODE §§ 401.10, 401.11(5); Model Act for the Protection of the Rights of Prisoners § 7.

19. TEX. PENAL CODE art. 6166, § 2 (1970); Model Act for the Protection of the Rights of Prisoners 7, (by implication).

20. VT. STAT. ANN. tit. 28, § 804 (Supp. 1972).

21. *But see* MASS. GEN. LAWS ANN. ch. 127, § 36 (1970); Model Act for the Protection of the Rights of Prisoners § 7.

22. N.Y. CORREC. LAW § 146 (McKinney 1968); *see also* FLA. STAT. ANN. § 944.23 (1973); MINN. STAT. ANN. § 243.48 (1972); PA. STAT. ANN. tit. 61, § 53 (1964); MICH. COMP. LAWS ANN. §§ 800.52, 800.53 (1968); TEX. PENAL CODE art. 6166, § 2 (1970); STATE DEPARTMENT ACT § 9(c).

between inmates and their families and in favor of private visits for some or all classes of inmates.

E. Correspondence and Reading Material

Several statutes provide for the mailing of sealed letters from inmates to such state officials as the director of the department, the Attorney-General, the Governor, or members of the legislature.²³ Institutional regulations in other states have been amended to establish the same right.²⁴ Most statutes are silent as to other correspondence, both incoming and outgoing, and to incoming books, magazines, and newspapers.²⁵ Prison authorities have always censored mail with or without express authorization,²⁶ presumably under the statutory grant of general authority over institutional affairs. Other statutes expressly direct the department or institutional superintendents to establish regulations regarding mail and reading material.²⁷ At least one state, California, has a provision establishing certain minimal standards for the censoring of incoming material,²⁸ but whether they are being observed is unclear.²⁹ It would seem easy enough, as we have suggested elsewhere,³⁰ for legislatures to establish short, specific statutes comprehensively dealing with prison processing of mail and reading material. The importance of correspondence privileges to the exercise of other constitutional rights, the almost universal tendency of prison administrators to over-regulate correspondence, and the large number of court decisions protecting the First Amendment rights of correspondence against such over-regulation,³¹ also

23. CAL. PENAL CODE § 2600(2) (West 1970); MASS. GEN. LAWS ANN. ch. 127, § 87 (1966); VT. STAT. ANN. tit. 28, § 802(b) (Supp. 1972).

24. Federal Bureau of Prisons, Policy Statement No. 7300.2A (1967); Wisconsin Correctional Institute, Information Handbook, 5; Pennsylvania Bureau of Corrections, Administrative Directive #14, 1; Washington Department of Institutions, Office of Adult Corrections, Memorandum #70-5, 2.

25. An exception is PA. STAT. ANN. tit. 61, § 383 (1964) which authorizes the receipt of daily newspapers, subject to approval, for which no criteria are established.

26. A concise summary of prison mail censorship practices is provided by Singer, *Censorship of Prisoners' Mail and the Constitution*, 56 A.B.A.J. 1051, 1053 (1970).

27. FLA. STAT. ANN. § 945.21(j) (1973); VT. STAT. ANN. tit. 28, § 802 (Supp. 1972).

28. CAL. PENAL CODE § 2600(4) (West 1970).

29. Director's Rule 2402.12 of the California Department of Corrections provides only that inmates "may subscribe to newspapers and periodicals unless disapproved by the institution. These must come directly from the publisher." This grant of totally discretionary authority does not seem to adhere to the basic guidelines established by § 2600(4), n.28, *supra*.

30. Fitch & Tepper 627.

31. Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968); Wilkinson v. Skinner, 462 F.2d 690 (2d Cir. 1972); Smith v. Robbins, 454 F.2d 696 (1st Cir. 1972), *aff'g* 328 F. Supp. 162 (D. Me. 1971); Palmigiano v. Trivisono, 317 F. Supp. 776 (D. R.I. 1970); Sostre v. Otis, 330 F. Supp. 941 (S.D.N.Y. 1971); Fortune Society v. McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970); and cases cited therein.

argue for unusually high legislative specificity in this area. In the face of a legislative preference to continue to delegate generally, rather than to deal at the desirable level of specificity, even a broadly stated policy in favor of minimal restrictions on correspondence, together with a statutory requirement for the establishment of a hearing procedure for the review of any decisions to censor,³² would greatly improve the present situation of almost universally unfettered discretion. Faced with such legislative guidelines, a correctional department would almost certainly be forced to adopt minimally restrictive standards and fair procedures, especially if required to justify its proposed rules and regulations publicly.

F. Standards for Correctional Facilities

Some statutes surveyed for this article establish minimal requirements for jails, juvenile facilities, and other penal facilities under the jurisdiction of local units of government.³³ Alternatively, some states have authorized their departments of adult corrections or other bodies to establish standards which local facilities must meet and/or to license some systems or types of facilities.³⁴ The development and promulgation of such standards is too time-consuming and often too complicated and controversial for the legislative process; legislatures quite properly delegate such functions to more specialized and expert bodies.³⁵ In the area of licensing and establishing standards, the decisions of such bodies can nevertheless have the same substantial impact on both the local jurisdictions and the potential inmates or clients as legislative or judicial decisions. Both the difficulty and the importance of these decisions demand that local public officials, professionals in the correctional fields, and other interested parties participate in the development of the required standards. A recent California statute directing the State Board of Corrections to establish, and thereafter biennially review, minimum standards for local detention facilities provides a basically adequate model insofar as it requires the Board to "seek the advice of . . . the Department of Corrections, the Department of Youth Authority, local juvenile justice commission, local correction officials, experts in criminology and

32. *Cf.* *Sostre v. Otis*, 330 F. Supp. 941 (S.D.N.Y. 1971); WASH. REV. CODE ANN. § 72.08.380 (1962); *Guajardo v. McAdams*, C.A. No. 71-H-570, 72-H-64 (S.D. Tex., Sept. 25, 1971).

33. *E.g.*, FLA. STAT. ANN. §§ 950, 951 (1973); MASS. GEN. LAWS ANN. ch. 126, §§ 4, 5, 12, 16-39 (1966); *Cf.* MINN. STAT. ANN. §§ 241, 242 (1972).

34. CAL. PENAL CODE § 6030 (West 1970); N.Y. CORREC. LAW § 46.7-a (McKinney 1968); STATE DEPARTMENT ACT § 4(c)(2); State Correctional Services Act § 3 (3).

35. *Cf.* DAVIS 41, 46-50.

penology, and other interested persons."³⁶ A better provision would require such boards to conduct at least some public hearings and to publish proposed standards for comment, further public hearing or both. Such a procedure could easily be conducted under the rule-making procedures of most administrative procedure acts, utilizing the state's equivalent of the Federal Register to publish the standards in proposed and final form.³⁷

G. Classification

Most statutes now reflect the standard correctional theory of classifying inmates by some combination of age, sentence, offense, or likelihood of rehabilitation, for purposes of housing, work assignments, and other institutional programs. The Texas provision, contained in the section prescribing the director's general authority, is typical:

The manager, with the consent of the Texas Board of Corrections, shall have power . . . to make provisions for the separation and classification of prisoners according to sex, color, age, health, corrigibility, and character of offense"³⁸

36. CAL. PENAL CODE § 6030 (West 1970) reads:

Local detention facilities; establishment of standards

(a) The Board of Corrections . . . shall establish minimum standards . . . for local . . . detention facilities by July 1, 1972. The Board of Corrections shall review such standards biennially and make any appropriate revisions.

(b) The standards shall include, but not be limited to, the following: health and sanitary conditions, fire and life safety, security, rehabilitation programs, recreation, treatment of persons confined in local detention facilities, and personnel training.

(c) In establishing minimum standards, the Board of Corrections shall seek the advise of the following:

(1) For health and sanitary conditions:

The State Department of Public Health, physicians, psychiatrists, local public health officials and other interested persons.

(2) For fire and life safety:

The State Fire Marshal, local fire officials, and other interested persons.

(3) For security, rehabilitation programs, recreation, and treatment of persons confined in local detention facilities:

The Department of Corrections, the Department of the Youth Authority, local juvenile justice commissions, local correction officials, experts in criminology and penology, and other interested persons.

(4) For personnel training:

The Commission on Peace Officer Standards and Training, psychiatrists, experts in criminology and penology, the Department of Corrections, the Department of Youth Authority, local correctional officials, and other interested persons.

37. 44 U.S.C. §§ 1501-1511 (1970).

38. TEX. PENAL CODE art. 6166(j) (1970). See also, FLA. STAT. ANN. § 945.081 (1973); N.Y. CORREC. LAW § 70, 137 (McKinney Supp. 1973); WASH. REV. CODE ANN. § 72.13.160 (1962); MICH. COMP. LAWS ANN. § 791.264 (1968); VT. STAT. ANN. tit. 28, § 102(c) (Supp. 1972); State Department Act, § 7; State Correctional Services Act § 13.

This is the extent of the legislative guidance regarding classification in any of the statutes surveyed.

Now considered an essential first step in any rehabilitation process, classification at some level is and always has been the core of institutional management and, from the inmate's point of view, of institutional life. In this respect it occupies much the same position as that of institutional discipline. Indeed, the two are closely related; many of the same dispositions can be imposed in both the disciplinary and the classification process.³⁹ It is no coincidence that these two decision-making processes, although theoretically at opposite ends of the treatment-punishment continuum, are accorded equally vague and brief attention in the legislation and are, in our experience, the subject of equally intensive bitterness on the part of prisoners. Yet here again, it is unrealistic to expect the legislature to make complicated decisions regarding even basic classification categories, beyond perhaps the establishment of two or three basic types of institutions.⁴⁰ These decisions and the classification of particular inmates must be made by the correctional authorities just as decisions of an equally comprehensive and diverse nature are made, for example, by federal and local welfare officials. The former, of course, make their decisions pursuant to detailed, highly complicated but nevertheless publicly debated and published regulations adopted through the traditional administrative process.⁴¹ There is no reason why the similar correctional classification decisions cannot be made through similar procedures.

H. Transfers

One important aspect of the authority to classify is the authority to assign and re-assign prisoners to particular institutions or to various parts of institutions. Nearly every state and federal correctional code authorizes the director to "transfer persons confined in one state prison institution, or facility of the Department of Corrections to another."⁴² Such authority is clearly a necessary and proper adjunct of correctional administration. Nevertheless many inmates allege that the transfer power is abused; the records of

39. See *Morris v. Travisono*, 310 F. Supp. 857 (D. R.I. 1970).

40. The United States, for example, has established a separate correctional system for "youth offenders" aged 18-26, 18 U.S.C. §§ 5005-5026 (1970).

41. See 45 C.F.R., subtitle B.

42. CAL. PENAL CODE §§ 5080, 6127 (authority for transfer to Medical Correction Facility at Vacaville), 2049.2 (West 1970); FLA. STAT. ANN. § 945.09 (1973); ILL. REV. STAT. ch. 108, § 110 (Supp. 1973); MASS. GEN. LAWS ANN. ch. 127, §§ 97, 97A, 115 (1966); MICH. COMP. LAWS ANN. § 791.265 (1968); MINN. STAT. ANN. § 241.07 (1972); N.J. STAT. ANN. § 30:4-85 (1964); N.Y. CORREC. LAW. § 23 (McKinney Supp. 1973); PA. STAT. ANN. tit. 61, §§ 72, 933 (1964); VT. STAT. ANN. tit. 28, §§ 102(b), 702 (Supp. 1972); State Department Act § 6(a); State Correctional Services Act § 11.

some of our clients and correspondents seem to justify these allegations. The inmates charge that intra- and inter-institutional transfers are made on the basis of unspecified beliefs that the inmates have violated institutional regulations or present a threat to institutional security.⁴³ At the very least, transfers from one institution to another within a large state, or from one state system to another pursuant to interstate compacts, or between widely separated federal institutions, all constitute severe deprivations equal to the harshest disciplinary sanctions.

Two statutes among those surveyed have or had provisions which may or did protect inmates from apparently arbitrary transfers. The Pennsylvania Code authorizes transfers only upon the consent of a Court of Common Pleas, although the statute does not provide for a hearing on the transfer.⁴⁴ The Vermont Correctional Code formerly authorized the transfer of prisoners between the penitentiary and the house of corrections only with the inmate's consent; but this provision was repealed in 1972.⁴⁵ Each of these statutes may inconvenience or hamper prison administrators. A solution which would probably be more amenable to administrators and to inmates would be a statutory requirement that correctional systems develop an internal hearing procedure to be followed whenever the system proposes to transfer an inmate from one institution to another. The consent issue raised in the Vermont statute might be adequately dealt with by a provision that no inmate shall be transferred without his consent if the transfer is conditioned upon only a change in rehabilitation program or treatment program. Thus disciplinary and involuntary "administrative" transfers could be handled pursuant to identical procedures.

I. Furloughs, Work Release, Half-Way Houses

In recent years, correctional administrators and other students of the correctional field have stressed the need for a greater reliance on "community corrections."⁴⁶ Indeed, the theoretical benefits of work and educational release programs, furloughs for family visits and job-hunting, and half-way houses are already becoming accepted correctional dogma. If for no other reason than lack of experience with such programs, the new statutes authorizing temporary release are general in nature. For example, the New York statute provides that:

43. *Urbano v. McCorkle*, 334 F. Supp. 161 (D. N.J. 1971); *Barringer v. Kleindienst*, Civil No. 933-72 (D. D.C. 1972).

44. PA. STAT. ANN. tit. 61, § 72 (Supp. 1972).

45. VT. STAT. ANN. tit. 28, § 255 (1970), repealed in 1972.

46. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 165-171 (1967); Burdman, *Realism for Community Based Correctional Services*, 381 ANNALS 1 (Jan., 1969).

The commissioner shall promulgate rules and regulations consistent with the provisions of this article for the administration of temporary release programs, and shall appoint or cause to be appointed a temporary release committee for each institution.⁴⁷

Yet admission to, arrangements for supervision during, and revocation of assignment to these programs raise the same issues found in any correctional situation. Indeed some of the issues are even more difficult because of the added circumstance that a substantial degree of liberty, approaching that of parolees, is the net effect of these programs. Thus, disciplinary sanctions can result in an even greater loss of freedom than those imposed on inmates within an institution. Yet administrators of such programs are usually authorized to remove participants from the program without any prior hearing procedure, even in systems that otherwise accord relatively substantial procedural safeguards in institutional disciplinary actions.

The need for adequate rulemaking procedures as well as adequate substantive content of those rules is as critical from the community's point of view as from the inmates'. Proposals to establish furlough programs, work release programs and especially half-way houses often raise considerable community interest, usually in the form of fear and opposition. Regardless of our personal opinion of these reactions, we have no doubt that the community at large and especially potentially affected neighborhoods should be informed of and involved in the planning of community corrections programs. The administrative rule-making process, particularly where hearings are used, again seems appropriate for this purpose.

J. Parole

In many respects the temporary release programs constitute preliminary or truncated parole situations. Like the parolee, the inmate's life and program revolves around the community; unlike the parolee, he must return to either the correctional institution or to his half-way house every night, instead of periodically reporting to a parole officer. Indeed the various temporary release programs, pursuant either to statutory direction or departmental policy, are frequently used as an intermediate step to prepare the inmate for life in the community as a parolee.

Most correctional statutes either include or are accompanied by acts governing the granting, conditions, and revocation of parole. The acts commonly provide for some type of brief hearing or interview between the pa-

47. N.Y. CORREC. LAW § 852 (McKinney Supp. 1973); *Cf.* N.Y. CORREC. LAW § 632 (McKinney Supp. 1973); MINN. STAT. ANN. § 241.3 (1972); N.J. STAT. ANN. §§ 30:4-91, 3j; 30:4-91, 6j (1964); VT. STAT. ANN. tit. 28, §§ 102, 753 (Supp. 1972); STATE DEPARTMENT ACT, §§ 9(d), 10(d); MODEL PENAL CODE § 304.9.

rolee and a parole board or commission before parole may be granted,⁴⁸ but this is by no means universal. We believe that there are strong constitutional and operational arguments for the conduct of full hearings, including the participation of counsel prior to the granting or denying of parole. But there is definitely more than one side to this issue.⁴⁹ Whether these important questions are best decided at the legislative or administrative level is a close question. Regardless of the final resolution of the merits of the substantive question, it is one deserving input from various concerned parties rather than merely the paroling authorities who, under most statutes, are authorized to establish their own rules.⁵⁰ It is also customary for parole boards to grant or deny parole without announcing the reason for those decisions⁵¹ and to base those decisions on unpublished and probably non-existent standards and criteria.⁵² Corrections and criminology authorities know far too little to be able to accurately predict parolee behavior.⁵³ This, however, is not less, but more reason for a parole board to articulate the factors it utilizes, and for participation by others in the process of developing relevant criteria.

Parole boards have equally sweeping authority in establishing the conditions by which parolees must abide, although several recent court decisions have begun to expose and probably restrain some of the abuses.⁵⁴ It is likely that other unfair, unrealistic, and even unconstitutional conditions would not be established were the general parole conditions and the range of possible specific conditions adopted only after public discussion.

Many of the issues in the parole revocation process have recently been resolved by the United States Supreme Court in *Morrissey v. Brewer*,⁵⁵ where

48. FLA. STAT. ANN. § 947.17 (1973) (hearing at discretion of parole commission); MASS. GEN. LAWS ANN. ch. 127, § 134 (1966); MICH. COMP. LAWS ANN. §§ 791.234, 791.235 (1968); N.Y. CORREC. LAW § 214 (McKinney 1968); VT. STAT. ANN. tit. 28, § 502 (Supp. 1972); Cf. MINN. STAT. ANN. §§ 243.05, 243.06 (1972); N.J. STAT. ANN. § 30.4-123.18 (1964).

49. Serd, *A. Parole Apologia*, 18 AM. U.L. REV. 98 (1968); Note, *Due Process: The Right to Counsel in Parole Release Hearings*, 54 IOWA L. REV. 497 (1968).

50. CAL. PENAL CODE § 5076.1 (West 1970); ILL. REV. STAT. ch. 108, § 204 (Supp. 1973); MICH. COMP. LAWS ANN. § 791.233 (1968); N.J. STAT. ANN. § 30.4-123.6 (1964); N.Y. CORREC. LAW § 6-c (McKinney Supp. 1973); PA. STAT. ANN. tit. 61 §§ 301, 331.22, 331.23 (1964); VT. STAT. ANN. tit. 28, § 503 (Supp. 1972); WASH. REV. CODE ANN. § 9.95.150 (Supp. 1972). See DAVIS, note 110 *infra*.

51. See *Monks v. New Jersey State Parole Board*, 58 N.J. 238, 277 A.2d 193 (1971); see DAVIS, note 110, *infra*.

52. See DAVIS, note 110 *infra*.

53. It is the authors' understanding that the United States Parole Board is now participating in a major study of parole prediction factors.

54. *Sobell v. Reed*, 327 F. Supp. 1294 (S.D.N.Y. 1971); *Hyland v. Procnier*, 311 F. Supp. 749 (N.D. Cal. 1970); *People v. Dominquez*, 256 Cal. App. 2d 623, 64 Cal. Rptr. 290 (1967).

55. 408 U.S. 471 (1972).

the Court found that due process of law encompasses substantial procedural rights in the parole revocation process. The only important revocation issue left unresolved by the Court is the question of the right to representation by counsel in such proceedings. If anything, the Court's decision resulted in a more complicated, two-stage hearing process than probably would have resulted from any kind of rule-making procedure followed by the adoption of a rational revocation proceeding; such an administrative process may well have avoided the adjudication in *Morrissey*. Similar litigation is likely to be the ultimate resolution of the granting and condition issues if the past neglect, intransigence, sloppiness or paranoia similar to that exhibited by the paroling authority in *Morrissey* are not corrected in the immediate future,⁵⁶ an event which does not seem very likely thus far.

K. *The Federal Statute*

The statute governing the United States Bureau of Prisons is shorter and more general than the typical state statute.

The control and management of Federal penal and correctional institutions . . . [is] vested in the Attorney General who shall promulgate rules for the government thereof. . . .

The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their rehabilitation, and reformation.⁵⁷

The Attorney General is authorized to appoint a Director of the Bureau of Prisons,⁵⁸ and the Bureau is charged with the management and regulation of the federal penal system under the Attorney General's direction.⁵⁹ The statute contains a classification section which is probably as specific as can be found anywhere,⁶⁰ establishes work release programs, community treatment facilities, and furloughs,⁶¹ and authorizes the Attorney General "at

56. Cf. *Holland v. Oliver*, 350 F. Supp. 485, 487 (E.D. Va., 1972): ". . . [T]his Court does not act as a prison review agency and cannot upset those decisions of prison boards which have followed all procedures required by the due process clause unless they are arbitrary or capricious."

57. 18 U.S.C. § 4001 (1970).

58. 18 U.S.C. § 4041 (1970).

59. 18 U.S.C. § 4042 (1970).

60. 18 U.S.C. § 4081 provides:

The Federal penal and correctional institutions shall be so planned and limited in size as to facilitate the development of an integrated system which will assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment of the persons committed to such institutions.

61. 18 U.S.C. § 4082 (1970).

any time to transfer a person from one place of confinement to another."⁶² Good time is allowed to all prisoners,⁶³ and a prisoner may earn additional good time for work within his institution and for "exceptionally meritorious service."⁶⁴ The statute contains the standard provisions regarding parole release, conditions, and revocation,⁶⁵ and is silent on the treatment and disciplining of prisoners, visits, and correspondence.

L. *The District of Columbia Statute*

The District of Columbia Department of Corrections

under the general direction and supervision of the Commissioners of the District of Columbia shall have charge of the management and regulation of [several institutions] . . . and be responsible for the safekeeping, care, protection, instruction, and discipline of all persons committed to such institution. The Department of Corrections with the approval of the Commissioners shall have power to promulgate rules and regulations for the government of such institutions and to establish and conduct industries, farms, and other activities, to classify the inmates, and to provide for their proper treatment, care, rehabilitation, and reformation.⁶⁶

Work release programs⁶⁷ and good time deductions⁶⁸ are authorized, and a District of Columbia Board of Parole⁶⁹ is established. The United States Attorney General is authorized to transfer prisoners in D.C. institutions to other federal facilities,⁷⁰ a process which is usually initiated by the D.C. Department of Corrections.⁷¹ Like the Federal statute, the D.C. Code does not address the treatment and disciplining of prisoners, visits, or correspondence.

II. *Meeting the Problem of Statutory Vagueness*

The foregoing survey and discussion demonstrate, we believe, that the statutes governing correctional endeavors in this country are extremely vague. This holds true even though the survey focused on jurisdictions generally considered leaders in the overall legislative process in terms of resources (annual

62. 18 U.S.C. § 4082 (1970).

63. 18 U.S.C. § 4161 (1970).

64. 18 U.S.C. § 4162 (1970).

65. 18 U.S.C. §§ 4201-4210 (1970).

66. D.C. CODE ANN. § 24-442 (1967) *as amended* D.C. CODE ANN. § 24-442 (Supp. V, 1972).

67. D.C. CODE ANN. § 24-461 (1967).

68. D.C. CODE ANN. § 24-405 (1967).

69. D.C. CODE ANN. §§ 24-201(a) to 208 (1967).

70. D.C. CODE ANN. § 24-425 (1967); 18 U.S.C. § 4082(b) (1970).

71. *See, e.g.,* Barringer v. Kleindienst, Civil No. 933-72 (D.D.C. 1972).

sessions, committee staffs and other research assistance, legislative drafting services, etc.) and legislative product. The image that repeatedly emerges is a void, a *tabula rasa*; the legislatures have provided correctional administrators almost no guidance on the various management and program issues which they must resolve every day. More fundamentally, the various legislatures have rarely established at even the crudest levels (deterrence, rehabilitation, preventive confinement, or punishment; education, work, or job-training) the basic thrusts of the system. The best that can be said of the statutes is that they are a potpourri of ideas, fears, fads, prejudices, guesses, bewilderment, despair and unconcern.

As we have seen, the correctional system quite naturally, has filled the legislative void with its own policies, rules, standards and traditions. Frequently, these practices have been basically self-protective and violative of basic constitutional guarantees and counter-productive to the achievement of any correctional goals except humiliation, degradation and possibly punishment.

We have suggested in this article and elsewhere that some of the statutory ambiguity and vagueness can be reduced through legislative revision, and have developed models based on one set of assumptions;⁷² the technical aspects are not particularly difficult. Other issues are just not suitable for resolution by our legislatures for various reasons.⁷³ Many others fall somewhere in the middle of this "legislative reform possibility-impossibility" spectrum.

The traditional response to insufficient legislative guidance and uncontrolled administrative practices has been the establishment of standard procedures to which administrative agencies must adhere in the performance of their several basic functions.⁷⁴ We are not students of the administrative process, and we assume that the claims of the fundamental importance and benefits of administrative law and regulation are justified.⁷⁵ In-

72. Fitch & Tepper 627.

73. See note 35, *supra*.

74. 5 U.S.C. §§ 551-559, 701-706 (1970); see also legislative history cited in note 80 *infra*.

75. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1106 (1954):

There was more or less agreement as to the significance of the administrative process between those who hailed it and those who hated it. It was seen with hope by the one and with fear by the other as capable of working continually progressive modification [T]he administrative movement . . . has profoundly changed our society, a change which can be set down beside the English Reform Movement of the nineteenth century as one of the great historical jobs of law-making.

(Professor Jaffe goes on to discuss the problems as well as the benefits resulting from the administrative process).

deed, despite our limited expertise in this area, we venture to say that the major difficulty in fully implementing administrative law theory has been operational, not conceptual. The purposes of administrative procedure acts have been most completely realized when the affected agencies have felt confident enough to actually attempt to achieve them.⁷⁶ We do not delude ourselves that all correctional agencies—particularly in light of a history of general failure due in part, perhaps, to inadequate resources and all-too-frequent abuses—would welcome and support procedure aimed at openness, public input, structure, reviewability, and accountability.⁷⁷ Nevertheless, we take the very simple position that correctional agencies should be and are subject to the administrative procedure acts now operative in most jurisdictions.⁷⁸ We propose in the remainder of this article to explore the soundness and the implications of this hypothesis with respect to the United States Bureau of Prisons and the District of Columbia Department of Corrections, emphasizing the latter primarily because of our personal knowledge of the basic strength and potential of that department.

A. *The Federal Situation*

The Federal Administrative Procedure Act (APA) defines "agency" as:

. . . each authority of the Government of the United States, whether or not it is within or subject to review by another agency. . . .⁷⁹

Neither the Act, nor its legislative history specifies which administrative agencies are subject to the Act. The legislative history, however, contains language strongly indicating that the Act was intended to have the widest possible coverage.

The bill is meant to be operative "across the board" in accordance with its terms, or not at all. Where one agency has been able to demonstrate that it should be exempted, all like agencies have been exempted in general terms. (See section 2(a)) No agency has been favored by special treatment.

[The bill] is^o of course operative according to its terms even if

76. The disappointing inefficacy of the Freedom of Information Act, 5 U.S.C. § 552 (1970) is the most recent example. Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEXAS L. REV. 1261 (1970).

77. Nor are we unaware of the substantial criticism of various aspects of administrative law and theory. See, e.g., Jaffe, *supra*, n.75; Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970); Symposium, *Federal Regulatory Agencies: A Response to the Ash Report*, 57 VA. L. REV. 923 (1971). Current problems with the established administrative agencies do not seem relevant to an area lacking even the rudiments of standard administrative procedure.

78. See Robinson, note 77 *supra*.

79. 5 U.S.C. § 551(1) (1970).

it should cause some administrative inconvenience or changes in procedure.⁸⁰

On two occasions, the Supreme Court has addressed itself to specific situations involving the issue of the coverage of the Administrative Procedure Act. In *Wong Yang Sung v. McGrath*,⁸¹ section 5 of the Administrative Procedure Act,⁸² governing administrative adjudications, was held to "cover deportation proceedings conducted by the Immigration Service."⁸³ Relying heavily on legislative history and the Act's intent, the Court asserted that

The Administrative Procedure Act of June 11, 1946, *supra*, is a new, basic and comprehensive regulation of procedures in many agencies, more than a few of which can advance arguments that its generalities should not or do not include them. Determination of questions of its coverage may well be approached through consideration of its purposes as disclosed by its background.⁸⁴

A "background" factor which the Court particularly emphasized was the "multiplication of federal administrative agencies and expansion of their functions to include adjudications which have serious impact on private rights."⁸⁵ In *NLRB v. Wyman-Gordon Co.*,⁸⁶ the Court addressed the issue of the NLRB's refusal to abide by the rule-making provisions of the Act,⁸⁷ and held that a "rule" issued in a prior adjudicatory proceeding not in compliance with the APA section on rule-making was invalid. A plurality of the Court stated:

The rule-making provisions of that Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application [citations omitted]. They may not be avoided by the process of making rules in the course of adjudicatory proceedings. There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention.⁸⁸

Several lower federal courts have reached similar conclusions regarding administrative actions which the government contended were not required to accord with the provisions of the Administrative Procedure Act. In *Hotch v. United States*,⁸⁹ the U.S. Court of Appeals for the Ninth Circuit held that

80. H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946); 1958 U.S. Cong. & Adm. News, XXX.

81. 339 U.S. 33 (1950).

82. 5 U.S.C. § 554 (1970).

83. 339 U.S. at 51.

84. *Id.* at 36.

85. *Id.* at 36-37.

86. 394 U.S. 759 (1969).

87. K. DAVIS, ADMINISTRATIVE LAW TEXT 152, 153 (1972); K. DAVIS, ADMINISTRATIVE LAW TREATISE 6.13 (Supp. 1965).

88. 394 U.S. at 764.

89. 212 F.2d 280 (9th Cir. 1954).

the Department of the Interior was bound to comply with the APA in issuing a fishing regulation. Overturning Hotch's conviction for violation of the regulation, the court noted that all agency rules are required to be published in the Federal Register⁹⁰ and that any rule not so published is invalid.⁹¹ In *Marcello v. Ahrens*,⁹² the Court of Appeals for the Fifth Circuit held that certain deportation hearings which a statute established as the "sole and exclusive procedure for determining the deportability of an alien under this section"⁹³ were exempt from the Administrative Procedure Act because Section 7(a)⁹⁴ exempts provisions which are expressly provided for by other statutes.⁹⁵ The Supreme Court affirmed this decision,⁹⁶ ruling that "exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed in view of the statement in Section 12 of the Act that modifications must be express."⁹⁷ Similarly, in *Elof Hansson, Inc. v. United States*,⁹⁸ the U.S. Court of Customs found that the APA applied to the rule-making procedure by which the Secretary of the Treasury made certain findings under the Anti-Dumping Act of 1921.⁹⁹

Because of the growth of this branch of Government, Congress had become convinced that there should be a simple and standardized plan of administrative procedure. The Administrative Procedure Act was intended to put such a plan into effect. . . .

. . . It is evident from a reading of the legislative history of the Administrative Procedure Act that it was intended to apply generally to all administrative agencies and procedures, except where specific exemptions were made.¹⁰⁰

There are no cases dealing directly with the issue of the applicability of the APA to the Bureau of Prisons. However, the question of the Act's applicability to the United States Parole Board, conceptually and operationally a closely related office and also a part of the Department of Justice, has been touched upon in several cases. Early decisions such as *Hiatt v. Compagna*¹⁰¹ and *Moore v. Reid*¹⁰² have held that the Federal APA does not govern the

90. 44 U.S.C. §§ 1501-1510 (1970); 5 U.S.C. §§ 552, 553 (1970).

91. 212 F.2d at 281.

92. 212 F.2d 830 (5th Cir. 1954).

93. 8 U.S.C. § 1252(b)(4) (1970).

94. 5 U.S.C. § 556 (1970).

95. 212 F.2d at 836.

96. *Marcello v. Bonds*, 349 U.S. 302 (1955).

97. 349 U.S. at 310.

98. 178 F. Supp. 922 (Cust. Ct. 3rd Div. 1959).

99. 19 U.S.C. § 160 (1970).

100. 178 F. Supp. at 926.

101. 178 F.2d 42 (5th Cir. 1949), *aff'd. by an equally divided Court*, 340 U.S. 880 (1950), *rehearing denied*, 340 U.S. 907 (1950).

102. 142 F. Supp. 481 (D.D.C. 1956), *rev'd on other grounds*, 246 F.2d 654 (D.C. Cir. 1957).

grant, conditioning, modification or revocation of parole. An important recent case challenges this conclusion. In *Sobell v. Reed*,¹⁰³ the plaintiff contested the constitutionality of the parole board's refusal to allow him to travel to and participate in certain anti-war demonstrations.¹⁰⁴ Jurisdiction over the action was grounded upon the judicial review procedure of the Administrative Procedure Act:¹⁰⁵

But it is urged that the Board's action is outside the court's power of review. It would be surprising, and gravely questionable, if Congress had meant to confer such final authority upon *any* administrative agency, particularly one that makes no pretense to learning in constitutional law

There is jurisdiction and a "presumption of reviewability embodied in the Administrative Procedure Act" . . . [citation omitted]

Broadly speaking, agency action attacked on constitutional grounds "could be immune from judicial review, if ever, only by the plainest manifestation of congressional intent to that effect."¹⁰⁶

The United States Department of Justice—the parent agency of both the Bureau of Prisons and the Parole Board—publishes provisions and regulations regarding most of its divisions in Title 28 of the Code of Federal Regulations. Only three sections of that title relate to the Bureau of Prisons. One sub-part sets forth the general authority of the Director and the general function of the Bureau.¹⁰⁷ Two other sections deal with "Traffic in Contraband Articles in Federal Penal and Correctional Institutions"¹⁰⁸ and "Rewards for Capture of Escaped Federal Prisoners."¹⁰⁹

Despite the presumption of the Act's applicability, the lack of any specific exemption, and the practice of the rest of the Department of Justice, the Bureau of Prisons does not adhere to the Federal Administrative Procedure Act. The Bureau, however, like any large bureaucracy, needs to establish regulations for its governance. The development of a substantial body of rules known as Bureau of Prisons Policy Statements has been its response to this need. Since the promulgation of these Policy Statements accords neither with the Administrative Procedure Act nor with the Federal Register Act, the regulations are invalid. The implications of this conclusion are the same as those discussed below in regard to the District of Columbia Department of Corrections and the District of Columbia Administrative Procedure Act.

103. 327 F. Supp. 1294 (S.D. N.Y. 1971).

104. *Id.* at 1295-97.

105. 5 U.S.C. § 701 (1970).

106. 327 F. Supp. at 1301-02.

107. 28 C.F.R. §§ 0.95, 0.96.

108. 28 C.F.R. § 6.1.

109. 28 C.F.R. §§ 7.1-7.5.

Similarly, despite *Sobell* and the conclusion by Professor Davis that "the Administrative Procedure Act [is] clearly applicable to the board,"¹¹⁰ the Board continues to refuse to adhere to the APA. Indeed, at the present time, it is defending a suit which contends that the APA is applicable to its rule-making case-hearing procedures.¹¹¹

B. *The District of Columbia Situation*

The District of Columbia Administrative Procedure Act was enacted into law in late 1968.¹¹² Since that time there has been little litigation defining the scope of the Act.¹¹³ Nevertheless, analysis of the Administrative Procedure

110. DAVIS 126-29. Writing in 1969, Professor Davis is extremely critical of the Board and makes several recommendations which would all naturally ensue from adherence to the A.P.A.:

An outstanding example of completely unstructured discretionary power that can and should be at least partially structured is that of the United States Parole Board. . . .

The Board has never announced rules, standards, or guides. The most specific standard is the statutory provision, repeated by the board's regulations, that the board "may in its discretion" release a prisoner on parole if the board finds "a reasonable probability that such prisoner will live and remain at liberty without violating the laws" and that "such release is not incompatible with the welfare of society." The Board has never publicly stated any substantive principles that guide it in determining the probability that a prisoner will commit another crime or whether his release will be compatible with the welfare of society. The Board has not publicly listed the criteria that are considered. Nor has it even tried to state the characteristics of cases in which parole will obviously be granted or will obviously be denied. It has not indicated its position with respect to major patterns of cases that are most frequently recurring.

The board makes no attempt to involve principles through case-to-case adjudication.⁴⁷ It does not select specific cases raising basic questions of policy for especially intensive consideration with a view to creating a useful precedent. . . .

The Administrative Procedure Act, fully applicable to the board, provides: "Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial." Prisoners make written applications for parole. I think that the board's failure to state "grounds" for denying applications is a clear violation of the act. The board has been violating the act ever since it was enacted in 1946. [Some footnotes omitted]

Of course, for all I know, the board may have a highly developed system it keeps entirely secret. For instance, it could be especially skillful in handling the few well-publicized prisoners and in calculating political advantages and disadvantages of various moves. It could have policies that would not stand the light of day, such as extra caution in paroling a prisoner whose violation of parole would be widely publicized.

111. *Novak v. McCune* (Civil No. 421-72R (E.D. Va., 1972); *appeal pending sub nom.* U.S. Parole Board v. Merhige, No. 72-234 (4th Cir. 1972).

112. Pub. L. 90-614 § 2, 82 Stat. 1204 (Oct. 21, 1968), D.C. CODE ANN. §§ 1-1501 to 1510 (Supp. V, 1972).

113. See *Capitol Hill Restoration v. Zoning Commission*, 287 A.2d 101 (D.C. 1972);

Act, of the enabling statutes governing the District of Columbia Department of Corrections, of the legislative history of the Administrative Procedure Act, and of recent related developments in other jurisdictions persuades us that the Department of Corrections is subject to the D.C. Act.

The D.C. Administrative Procedure Act establishes "procedures to be observed by the Commissioner, the Council, and agencies of the District Government in the application of laws administered by them, except that this chapter shall supersede any such law and procedure to the extent of any conflict therewith."¹¹⁴ There is no specific indication in the D.C. APA or in the legislative history that the Department of Corrections is subject to the Act. One committee report states that "more than 93 administrative governmental agencies [are] operating in the District",¹¹⁵ but fails to list or otherwise identify any of the agencies to which it refers. The Act distinguishes between "subordinate agencies" and "independent agencies." A subordinate agency is

any officer, employee, office, department, division, board, commission, or other agency of the government of the District, other than an independent agency or the Commissioner or the Council, required by law or by the Commissioner or the Council to administer any law or any rule adopted under the authority of a law;¹¹⁶

An "independent agency" is defined as

any agency of the government of the District with respect to which the Commissioner and the Council are not authorized by law, other than this chapter, to establish administrative procedures, but does not include the several courts of the District and the District of Columbia Tax Court;¹¹⁷

Pursuant to D. C. Code Ann. § 24-442 (1967) the District of Columbia Department of Corrections is

. . . under the general direction and supervision of the Commissioners of the District of Columbia . . . The Department of Corrections with the approval of the Commissioners shall have power to promulgate rules and regulations for the government of such institutions.

. . .¹¹⁸

Junghans v. Department of Human Resources of the District of Columbia, 289 A.2d 17 (D.C. 1972).

114. D.C. CODE ANN. § 1-1501 (Supp. V, 1972).

115. H.R. Rep. No. 202, 90th Cong., 1st Sess., 1 (1967). *Cf.* S. Rep. No. 1581, 90th Cong., 2d Sess. (1968).

116. D.C. CODE ANN. § 1-1502(4) (Supp. V, 1972).

117. D.C. CODE ANN. § 1-1502(5) (Supp. V, 1972).

118. *See also*, D.C. CODE ANN. § 24-464 (1967):

The Commissioners of the District of Columbia are authorized to promulgate from time to time such rules and regulations as they deem necessary for the administration by the Department of Corrections of the work release program.

Thus, the Department of Corrections would appear to be a "subordinate agency" under the definition in the Administrative Procedure Act and the enabling statutes relating to its operations. Moreover, in *Fulwood v. Culmen* the United States District Court for the District of Columbia has described the status of the Director of the D.C. Department of Corrections as "operating under the Commissioners" and "being under the Commissioners."¹¹⁹ The Court held that the inmate petitioner had the right to seek redress of alleged religious discrimination pursuant to the procedures set forth in an order of the Commissioners which was applicable to "every official and employee under the supervision of the District Commissioners in any department, agency, or instrumentality"¹²⁰

Finally, the District of Columbia Reorganization Plan of 1967 provides that

[T]he following regulatory and other functions now vested in the Board of Commissioners of the District of Columbia are hereby transferred to the Council: . . .

(213) Rules and regulations for the government of institutions under D.C. Code, sec. 24-442;¹²¹

In the context of the later D.C. Administrative Procedure Act, these two developments, it seems fair to conclude, affirm that the Department of Corrections is a "subordinate agency" for the purposes of the D.C. APA.

Several developments in other states with administrative procedure acts not dissimilar from the D.C. APA lead to the same conclusion. The Governor of Oregon recently exempted that state's corrections division from the Oregon Administrative Procedures Act,¹²² which defines an "agency" in a manner similar to the D.C. APA.¹²³ Moreover, other definitions and provisions in the Oregon APA are similar to those in the District of Columbia Act.¹²⁴ In particular, the definition of the term "Rule" contains the following provisions:

"Rule" . . . does not include:

(a) Internal management directives, regulations or statements be-

119. *Fulwood v. Clemmer*, 206 F. Supp. 370, 372, 376 (D. D.C. 1962).

120. *Id.* at 376.

121. D.C. CODE ANN. § 1-402 (1967).

122. *In the Matter of the Application of the Corrections Division for an Exemption Pursuant to ORS 193.315(4)*, 1 PRISON L. RPTR. 356 (Sept. 6, 1972).

123. ORE. REV. STAT. § 183.310(1) (1971):

"Agency" means any state board, commission, department or division thereof, or officer authorized by law to make rules or to issue orders, except those in the legislative or judicial branches.

124. Compare ORE. REV. STAT. § 183.310(7) (1971) to D.C. CODE ANN. § 1-1502(6) (1972); ORE. REV. STAT. § 183.335(1) (1971) to D.C. CODE ANN. § 1-1505(a) (1972); ORE. REV. STAT. § 183.390 (1971) to D.C. CODE ANN. § 1-1505(b) (1972); ORE. REV. STAT. § 183.415 (1971) to D.C. CODE ANN. § 1-1509 (1972); and ORE. REV. STAT. § 183.480 (1971) to D.C. CODE ANN. § 1510 (1972).

tween agencies, or other officers or their employees, or within an agency¹²⁵

Despite this provision, the Oregon Act was assumed to apply to the Oregon Corrections Division, and the State had to resort to a statutory procedure in order to exempt certain aspects of the Division Operations.

In a second related development, a California Superior Court faced the question of

whether or not the Administrative Procedure Act, Government Code Section 11371 et. seq. applies to the rules and regulations of the Director of Corrections and the Adult Authority. This Court has concluded that the answer is in the affirmative.¹²⁶

The court expressly rejected the State's arguments that the legislature intended to exclude the department from the provisions of the Act, that "the Director is not 'implementing, interpreting, or making specific the law enforced or administered by it' within the meaning of Government Code Section 11371(b) defining 'regulation' when he is discharging his statutory mandate to administer the prisons" and, finally, that the department's rules and regulations constitute the "internal management" of the prison system which is exempted by Section 11371(b).¹²⁷ In response to the first argument, the court ruled that the provision in California's Penal Code¹²⁸ authorizing the Director to prescribe and change rules and regulations "at his pleasure" was not inconsistent with the Administrative Procedure Act. "The Director may prescribe rules and change them as long as he complies with the procedural requirements of the Act and not be statutorily inconsistent. They are statutorily reconcilable."¹²⁹ The court summarily dismissed the state's second argument, and in response to the third, held that many of the Director's actions implement laws which "do not concern internal management . . . but . . . have a decided impact upon prisoners, parolee population and society in general."¹³⁰

Although the action by the Governor of Oregon expressly exempting the Corrections Division from the Oregon Administrative Procedure Act and the

125. ORE. REV. STAT. § 183.310(7) (1971). See text accompanying notes 28-31 *infra*.

126. American Friends Services Committee v. Procnier, No. 219108 (Sacramento Cty., Calif. Sup. Ct., June 30, 1972), 1 PRISON L. RPTR. 249.

127. 1 PRISON L. RPTR. 249. Section 11371 provides as follows:

(b) "regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure except one which relates only to the internal management of the State agencies.

128. CAL. PENAL CODE § 5058 (West 1970).

129. 1 PRISON L. RPTR. 249.

130. *Id.*

decision in *American Friends Service Committee v. Procnier* support the proposition that such acts are applicable to correctional agencies, both also raise the issue of the desirability of subjecting corrections departments to administrative procedure acts. The resolution of this issue depends largely on the practicability of conformity by such departments to standard administrative procedures. At least two departments are already statutorily required to adhere to the administrative procedure acts of their respective states. In Pennsylvania, applicable statutes classify the Boards of Trustees of various state institutions, which share institutional rule-making authority with the Commissioner of Corrections, as "departmental administrative boards, commissions or offices."¹³¹ Under Pennsylvania's recent "Documents Law,"¹³² all "agencies", a term which includes "any departmental administrative board or commission,"¹³³ must give public notice of and request written comments on the proposed adoption or change of administrative regulations,¹³⁴ must review and consider all submitted written comments,¹³⁵ and may conduct public hearings.¹³⁶ Pursuant to these provisions, the office of the Pennsylvania Commissioner of Corrections publishes all institutional rules in the Pennsylvania Bulletin.¹³⁷ The department, however, avoids the statutory requirement of notice of the adoption of proposed rules¹³⁸ by stating that the "regulations must become effective immediately and that notice . . . is impractical . . ." ¹³⁹ Unlike the Pennsylvania statute, the Florida corrections code requires the regulations of the Corrections Division to be adopted pursuant to the State's Administrative Procedure Act.¹⁴⁰ It appears that the Florida Corrections Division, like Pennsylvania's, avoids the statutory rule-making procedure by declaring an emergency in every instance of the adoption of new rules, a gambit which allows the new rules to take effect immediately.¹⁴¹ Thus there has not been, to this date, any real

131. PA. STAT. ANN. tit. 71, § 62 (1962).

132. PA. STAT. ANN. tit. 45, §§ 1101-1611 (Supp. 1972).

133. PA. STAT. ANN. tit. 45, § 1102(3) (Supp. 1972).

134. PA. STAT. ANN. tit. 45, § 1201 (Supp. 1972).

135. PA. STAT. ANN. tit. 45, § 1202 (Supp. 1972).

136. *Id.*

137. *See, e.g.*, 1 Pa. Bulletin 1655 (Pa. B. Doc. No. 71-1614) (August 14, 1971); 1 Pa. Bulletin 1951 (Pa. B. Doc. No. 71-1964) (October 9, 1971); 1 Pa. Bulletin 2017 (Pa. B. Doc. No. 71-2040) (October 23, 1971); 2 Pa. Bulletin 60 (Pa. B. Doc. No. 72-111) (January 15, 1972); 2 Pa. Bulletin 1771 (Pa. B. Doc. No. 72-1880) (September 23, 1972).

138. PA. STAT. ANN. tit. 45, §§ 1201, 1202 (Supp. 1972).

139. *See* note 137 *supra*.

140. FLA. STAT. ANN. § 945.21(2) (1973).

141. *See, e.g.*, Fla. Department of Health and Rehabilitative Services, Certification of Administrative Rules Filed with the Secretary of State (Pursuant to Chapter 120, Florida Statutes), Rules 10B-0.29 through 10B-0.36; Rules 10B-0.44 through 10B-0.51; Rules 10B-0.37 through 10B-0.43; Rules 10B-0.22 through 10B-0.28; Rules 10B-0.12 through 10B-0.21; Rules 10B-0.68 through 10B-0.86.

experience by which to evaluate the benefits or problems caused by correctional agency adherence to administrative procedure acts. The most that can be said is that correctional agencies have not demonstrated any reason for exemption from such acts.

The Mayor-Commissioner of the District of Columbia recently issued an amendment to the Organization Order governing the Department of Corrections which raises, but fails to resolve, the question of the applicability of the D.C. APA to the Department. The controlling Organization Order formerly authorized the Director of the Department:

. . . [w]ith the approval of the District of Columbia Council . . . to promulgate rules and regulations for administering the institutions and facilities of the Department. . . .¹⁴²

The Commissioner's Order of November 7, 1972, amended this provision, as follows:

The Director shall have power to promulgate rules and regulations for administering the institutions and facilities of the Department, subject to such approval by the District of Columbia Council as required by Sections 402(213) and 402(426) of Reorganization Plan No. 3 of 1967.¹⁴³

This provision at least acknowledges the issue of the D.C. APA's applicability but otherwise appears to be a conscious effort to avoid its resolution.

Recognition of the applicability of administrative procedure acts to correctional agencies should have a substantial impact on their decision-making processes and on the content of those decisions. Examination of the D.C. Act provides a good example of what might be expected.

Like the federal APA,¹⁴⁴ the D.C. Act requires publication in the District of Columbia Register of "the full text of all rules filed in the office of the Commissioner. . . ."¹⁴⁵ Since October 21, 1969, agencies subject to the Administrative Procedure Act must file every newly adopted rule in the office of the Commissioner.¹⁴⁶ No rule becomes effective until it is published by his office in the D.C. Register.¹⁴⁷ In addition, D.C. Code Ann. § 1-1506(a) (Supp. V, 1972) required each agency to file with the Commissioner, by November 21, 1969, a copy of all of its rules in force on October 21, 1969. Although the statute is not perfectly clear, it does not appear that the failure of any agency to file or publish its pre-October 21, 1969 rules

142. Government of the District of Columbia, Commissioner's Order No. 67-94 (December 26, 1967).

143. Government of the District of Columbia, Commissioner's Order No. 72-265 (November 7, 1972).

144. 5 U.S.C. §§ 552, 553 (1967).

145. D.C. CODE ANN. § 1-1504(a) (Supp. V, 1972).

146. D.C. CODE ANN. § 1-1506(a) (Supp. V, 1972).

147. D.C. CODE ANN. § 1-1506(c) (Supp. V, 1972).

invalidates those rules. The provision in subsection (c) that "no such rule shall come effective until after its publication in the District of Columbia Register . . ." applies only to newly adopted rules referred to in subsection (c) and not existing rules referred to in subsection (a).

The D.C. Register contains no rules adopted or followed by the District of Columbia Department of Corrections. Yet, since the fall of 1969 the Department and its institutions have adopted regulations governing such crucial correctional matters as the disciplining of prisoners,¹⁴⁸ the censoring of residents' mail¹⁴⁹ and the use of the maximum security, solitary confinement and isolation.¹⁵⁰ Each of these departmental orders is presumably invalid.¹⁵¹

This conclusion has serious implications for the entire range of the Department's activities, but two examples from the area of the disciplining of residents who have allegedly violated institutional rules of conduct will serve to illustrate. First, since all of the disciplinary actions which the Department's various institutions have taken on the basis of its regulations are invalid, the department is unauthorized to continue any disciplinary sanctions, such as segregation, which are at this moment in force, except to the extent that it can "re-try" those residents who have been disciplined pursuant to new disciplinary regulations validly adopted as discussed below. Moreover, the affected inmates are entitled to have these proceedings expunged from their institutional records, including those which are forwarded to the District of Columbia Parole Board and those which are maintained at the institution and are now affecting the resident's classification for such matters as housing and institutional programs and privileges.

Second, the Department has no authority to continue to discipline residents until its regulations are validly adopted. This particular issue should not cause a great deal of trouble since

. . . if, in an emergency, as determined by the Commissioner or Council or an independent agency, the adoption of a rule is necessary for the immediate preservation of the public peace, health, safety, welfare, or morals, the Commissioner or Council or such independent agency may adopt such rules as may be necessary in the circumstances, and such rule may become effective immediately. Any such emergency rule shall forthwith be published and filed in the manner prescribed in section 1-1506. No such rule shall re-

148. District of Columbia Department of Corrections, Departmental Order 5300.6 (May 17, 1971).

149. District of Columbia Department of Corrections, Lorton Correctional Complex, Superintendent's Order 1200 (May 5, 1971).

150. See note 148, *supra*.

151. Cf. *Junghans v. Dept. of Human Resources of the District of Columbia*, 289 A.2d 17, 25, 27 (D.C. 1972).

main in effect longer than one hundred and twenty days after the date of its adoption.¹⁵²

Prior to the adoption, amendment, or repeal of a rule by any subordinate agency,¹⁵³ the D.C. Council must publish notice of the intended action in the Register at least thirty days before the proposed effective date "so as to afford interested persons opportunity to submit data and views either orally or in writing, as may be specified in such notice."¹⁵⁴ Moreover, any interested person¹⁵⁵ may petition the Council for the promulgation, amendment, or appeal of any rule by a subordinate agency, and the Council must prescribe a general procedure for the "submission, consideration, and disposition" of such requests.¹⁵⁶ The D.C. APA also authorizes the Council or any agency to issue at its discretion and upon petition of any interested person "a declaratory order with respect to the applicability of any rule or statute enforceable by them or by it, to terminate a controversy (other than a contested case) or to remove uncertainty." A declaratory order is binding between the agency and the petitioner. Each agency must "prescribe by rule the form for such petitions and the procedure for their submission, consideration and disposition." A declaratory order is subject to the same judicial review as contested cases, but the refusal of the agency to issue a declaratory order is not reviewable.¹⁵⁷

The rule-making and declaratory order sections of the D.C. APA are central to the concept and purpose of any administrative procedure act and to the importance of bringing the D.C. Department of Corrections into conformity with the local Act. The comments of the Third Circuit in *Texaco, Inc. v. Federal Power Commission*,¹⁵⁸ regarding the intended effect of the corresponding rule-making provision in the Federal APA, are universally applicable:

[The rule making provision] was enacted to give the public an opportunity to participate in the rule-making process. It also enables the agency promulgating the rules to educate itself before

152. D.C. CODE ANN. § 1-1505(c) (Supp. V, 1972).

153. A "rule" is defined in D.C. CODE ANN. § 1-1502(b) (1970) as: . . . "[T]he whole or any part of any Commissioner's, Council's, or agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of the Commissioner. . . ."

154. D.C. CODE ANN. § 1-1505(a) (Supp. V, 1972).

155. The Act does not define "interested person". There are no District of Columbia APA cases on this issue. D.C. CODE ANN. § 1-1502(9) (1970) provides that "person" includes "individuals . . . associations, and public or private organizations of any character other than the Commissioner, the Council, or an agency."

156. D.C. CODE ANN. § 1-1505(b) (Supp. V, 1972).

157. D.C. CODE ANN. § 1-1508 (Supp. V, 1972).

158. 412 F.2d 740 (3rd Cir. 1969).

establishing rules and procedures which have a substantial impact on those regulated.¹⁵⁹

It is now generally recognized that corrections has not received adequate public and governmental inspection, review, regulation, and analysis, not to mention support.¹⁶⁰ Indeed, the authors can clearly recall numerous lamentations by corrections personnel at all levels about the lack of public interest and support in the correctional function. Unfortunately the all-too-frequent response of many systems (although certainly not of the D.C. Department of Corrections) to the sharply increased concern of the public with corrections has been a paranoid and even bitter withdrawal from and resistance to the questions, criticisms, and advice of "outsiders." This traditional, self-protective bureaucratic reaction is particularly inappropriate in administrative agencies that process difficult human beings and that, to date, have not done so very successfully. Indeed such a reaction underscores the need for traditional administrative rule-making processes. In Washington, D.C., and similar areas with bar associations actively involved in community affairs, public participation in correctional rule-making should be of substantial scope and should result in thoughtful and significant input into the correctional system. It also goes without saying that the traditional administrative rule-making process offers a convenient means of involving inmates in the development of correctional programs and policies, a practice which is now recognized as having beneficial rehabilitative and organizational impact.¹⁶¹ Concentrated efforts in several correctional systems by active bar associations and other interested organizations are likely to have a substantial effect on the procedures and contents of the rules and regulations of correctional systems throughout the nation.

The D.C. APA also provides a more or less standard procedure for the second major aspect of administrative procedure, adjudication of "contested cases." A "contested case" is defined as

[A] proceeding before the Commissioner, the Council, or any agency in which the legal rights, duties, or privileges of specific parties are required by any law (other than this Act), or by constitutional right, to be determined after a hearing before the Commissioner or the Council or before an agency, but shall not include

159. *Id.* at 744.

160. Bagdikian, *Behind Bars*, *The Washington Post*, March 24, 1972, § A, at 26, col. 10:

Prisons are maintained by the public; and what goes on inside them is the public's business. They are most likely to be operated in the public interest if they are open, without more restriction than may be required for the public safety, to unshackled public scrutiny.

161. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS, 50 (1967).

(A) any matter subject to a subsequent trial of the law and the facts de novo in any court; . . . and (D) cases in which the Commissioner, Council, or an agency act as an agent for a court of the District¹⁶²

Section 1-1509 provides in any contested case for reasonable notice, for representation by counsel, for submission of "oral and documentary evidence," and for "such cross-examination as may be required for a full and true disclosure of the facts." The burden of proof is on the proponent of the order¹⁶³ but is not otherwise defined.¹⁶⁴ Agency decisions can be based only on the official record.¹⁶⁵

From the point of view of many inmates, the most important "contested cases" at the prison are the disciplinary hearings conducted in instances of alleged violations of prison conduct rules. These hearings constitute classic adjudications as the administrative law field defines them.¹⁶⁶ The nearly universal procedure consists of a hearing conducted by a panel of three to five institutional officials drawn from administrative, treatment and correctional personnel. This panel hears evidence in the presence of the accused inmate, sometimes allows the inmate to make a statement and reaches a decision, out of the inmate's presence, as to his guilt or innocence and, if guilty, the appropriate disposition.¹⁶⁷ The disciplinary sanctions imposed as a result of such hearings fall squarely within the definition of sanctions in the Administrative Procedure Act:

. . . the term "sanction" includes the whole or part of any Commissioner's or Council's or agency (A) prohibition, requirement, limitation, or other condition affecting the freedom of any person;¹⁶⁸ . . . (C) imposition of any form of penalty or fine;¹⁶⁹ (D) destruction, taking, seizure, or withholding of property;¹⁷⁰ (E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;¹⁷¹ . . . and (G) taking of other compulsory or restrictive action.¹⁷²

162. D.C. CODE ANN. § 1-1502(8) (Supp. V, 1972).

163. An "order" is defined as "the whole or any part of the final disposition." D.C. CODE ANN. § 1-1502(11) (Supp. V, 1972).

164. Nor are there any local cases dealing with this issue.

165. D.C. CODE ANN. § 1-1509(c) (Supp. V, 1972).

166. DAVIS 184: "Adjudication is the part of the administrative process that resembles a court's decision of a case."

167. AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS, 408-10 (1966).

168. *E.g.*, transfer to segregation or isolation; cancellation of furlough privileges, work release program, or half-way house assignment.

169. *E.g.*, loss of wages, loss of industrial or statutory good time, assessment for "destruction of governmental property."

170. *E.g.*, forfeiture of inmate's radio, seizure or destruction of clothes.

171. See note 169, *supra*.

172. See note 168, *supra*; D.C. CODE ANN. § 1-1502(16) (Supp. 1972). See also

Thus prison disciplinary hearings are arguably subject to the "contested case" provisions of the District of Columbia Administrative Procedure Act if these hearings are "required by any law . . . or by constitutional right."¹⁷³ After the past three years of intensive prisoner rights/prison reform litigation, there can be no doubt that a prisoner must be accorded at least a rudimentary hearing before being punished for alleged rule infractions. The only dispute now is over the extent to which various hearing procedures and safeguards must be provided in the prison context. Even *Sostre v. McGinnis*¹⁷⁴ an important case which is considered by many prisoners' rights advocates to be a major setback, held that under the due process clause of the fourteenth amendment a prisoner must at least be given notice of the charges against him, a hearing on the charges, and the opportunity to speak in his own defense.¹⁷⁵ Other cases have concluded that some or all prison disciplinary proceedings require such additional "trial-like" procedural safeguards as the right to be confronted by one's accuser, the ability to cross-examine one's accuser and other witnesses and to present one's own witnesses, and the right to legal representation or lay assistance.¹⁷⁶ And for the past year, the District of Columbia Jail, a unit of the D.C. Department of Corrections, has been under court order to provide "an immediate administrative hearing" to inmates accused of disciplinary infractions; at such hearings inmates are entitled to legal or lay representation.¹⁷⁷ Adherence to the contested case provisions of the D.C. A.P.A.¹⁷⁸ would have avoided at least the disciplinary procedures aspect of the *Campbell* litigation.¹⁷⁹

5 U.S.C. § 551(10) (1967).

173. D.C. CODE ANN. § 1-1502(8) (Supp. V, 1972).

174. 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972).

175. *Id.* at 198.

176. *See, e.g.*, cases cited in note 17, *supra*.

177. *Campbell v. Rodgers* (Civil No. 1462-71 pending, D. D.C.) Amended Consent Order, January 11, 1972.

In his Order partially exempting the Oregon Corrections Division from the Oregon Administrative Procedures Act, note 129-132 and accompanying text, *supra*, the Governor rules that the Division disciplinary proceedings need not adhere to the APA's contested case provisions if other, similar provisions, which the Order expressly detailed, were adopted. The Order did not exempt the adoption of "rules whose violation could result in major disciplinary sanctions" from the rule-making provisions of the State's APA.

178. *See* text accompanying notes 164-166, *supra*.

179. *See* *Goldsby v. Carnes*, Civ. No. 20122-1 (W.D. Mo. Jan. 3, 1973) where the defendants, city and jail officials agreed that in disciplinary proceedings:

Appeals from any final decision of the Director of Health and Welfare shall be to the Circuit Court of the Sixteenth Judicial Circuit in accordance with the provisions of the Missouri A.P.A., Chapter 536 of the Revised Statutes of the State of Missouri and Article V, Section 22 of the Missouri Constitution.

The authors were co-counsel for plaintiffs in this case.

III. Conclusion

There are, then, strong arguments for what would appear to be the obvious (in almost any situation but the closed and often irrational world that has been American corrections). The Federal and the District of Columbia Administrative Procedure Acts govern those jurisdictions' correctional agencies. The type of analysis made of the U.S. Administrative Procedure Act and the statutes relating to the United States Bureau of Prisons, and, in more detail, of the District of Columbia Administrative Procedure Act and the statutes relating to the D.C. Department of Corrections will, if repeated, result in the same conclusions regarding other correctional systems and the parole boards of the United States, the District of Columbia, and the several states. The ideal resolution of the question would be definitive actions by the legislatures setting forth whether standard administrative procedures apply to the various correctional functions. It is far more likely, unfortunately, that the legislatures will ignore or duck this particular issue as they have the entire correctional field, with the sad result that corrections—the authorities and the clients—will continue to be deprived of the important benefits of the American administrative process. We suspect that the best that can result from an article such as this will be yet another wave of litigation on top of the flood of prisoner rights/prison reform cases already inundating the courts. That is not a very happy prospect for anyone.