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DUE PROCESS SAFEGUARDS IN PRISON DISCIPLINARY PROCEEDINGS: THE APPLICATION OF THE GOLDBERG BALANCING TEST

I. INTRODUCTION

The Fourteenth Amendment to the Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[1] However, the Due Process Clause of the Fourteenth Amendment is a statement of a broad general principle; it does not codify the steps needed to satisfy due process in particular factual situations. Due process is a flexible concept that must be applied according to the weight of the interests of the parties involved.[2] Such a weighing process in itself does not quantify due process requirements for any given factual situation. The weight given to the interests of a party is determined instead by the values of the individuals who make up the tribunal applying the balancing test.[3] It is the goal of this note to interpret recent cases dealing with prison disciplinary proceedings in a manner that will illuminate the difficulties encountered in applying due process safeguards. In order for such a discussion to be meaningful, this note will first examine the general area of procedural due process in administrative decision making. This discussion will be followed by a theoretical analysis of those recent court decisions in administrative law that are relevant to due process requirements in prison administrative proceedings. The final section of this note will briefly discuss the due process requirements that must accompany the transfer of an inmate from one prison institution to another.

II. DUE PROCESS IN ADMINISTRATIVE LAW

A. Due Process in General

Administrative law is an area in which non-judicial control is exercised by a group of individuals responsible for formulating pol-

1. U.S. Const. amend. XIV, § 1:
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
2. Hannah v. Larche, 363 U.S. 420, 442 (1960).
3. *See* text accompanying notes 112 to 114 *infra*.

icies and making decisions for the purposes of carrying out a governmental function.[4] When such decision making tends to deprive persons of life, liberty, or property, the procedures involved must afford the parties due process of law. What due process may require varies with the factual situation involved.[5]

In administrative proceedings, due process often calls for a hearing prior to the rendering of a decision by the administrative body. A hearing is a "proceeding before a tribunal" which can be a trial-type hearing, an argument-type hearing, or a combination of trial and argument-hearing procedures.[6] In deciding what type of procedure is required, one must look to three factors: (1) whether legislative or adjudicative facts are involved; (2) when a hearing should be held; and, (3) what procedural safeguards will be used in the actual hearing process.[7]

1. *Legislative and Adjudicative Facts*

First, one must look at the significance of the terms legislative and adjudicative facts. Professor Kenneth Culp Davis indicates that adjudicative facts are those which should not be determined without giving the party who is being deprived of life, liberty, or property, a trial-type hearing. Adjudicative facts are those about which an individual is likely to have more knowledge than an administrator. They tend to answer the questions of who, what, why, when, and where.[8] Legislative facts, on the other hand, are those which go into the formulation of broad policy decisions made by an administrative organization. These facts do not lend themselves to observations by a single individual but are more concerned with a general body of information that can be formulated by research and argument-type hearings.[9]

Since prison disciplinary proceedings are a type of administrative decision making, an example of legislative and adjudicative facts in the prison setting may clarify this distinction. If an administrative unit within a prison makes a decision that inmates should not smoke while working in the kitchen because of the health hazards involved, such a decision is based on legislative facts. However, if an administrative disciplinary committee within a prison is determining whether a certain inmate was involved in a

4. K. DAVIS, ADMINISTRATIVE LAW TEXT § 1.01 (3d ed. 1972).
5. Hannah v. Larche, 363 U.S. 420, 442 (1960).
6. K. DAVIS, *supra* note 4, at § 7.01.
7. *See* K. DAVIS, *supra* note 4, at §§ 7.01 *et seq.*
8. K. DAVIS, *supra* note 4, at § 7.03.
9. An argument-type hearing is distinguished from a trial-type hearing in that the former involves a presentation of ideas and arguments while the latter involves a presentation of evidence. An argument-type hearing can take the form of a written brief, an oral argument, or a combination of the two. *Id.* at § 7.01.

fight, it must consider adjudicative facts. As previously mentioned, adjudicative facts generally call for a trial-type hearing. Professor Davis describes a trial type hearing as follows:

> A "trial" is a process by which parties present evidence, subject to cross examination and rebuttal, and the tribunal makes a determination on the record. The key to a trial is opportunity of each party to know and to meet the evidence and the argument on the other side. . . . The opportunity to meet the opposing evidence and argument includes opportunity to present evidence, to present written or oral argument or both, and to cross-examine opposing witnesses.[10]

It is quite apparent that the prison disciplinary proceeding described in the hypothetical situation involves a determination of adjudicative facts. If one assumes that the disciplinary proceeding is likely to deprive the inmate of life, liberty, or property, and that the inmate does not admit he was involved in a fight; then it necessarily follows that a trial-type hearing is a due process requirement. However, to take this over-simplistic view would be to ignore the qualifying factors involved in determining the standard of due process to be applied in a given situation.

The due process safeguard of a strict trial-type hearing to determine adjudicative facts is sometimes qualified by other circumstances. Under emergency situations or other important circumstances, administrative decisions may be made summarily, subject to a hearing within a reasonable time.[11] An overriding governmental interest is another factor that will at times limit an individual's right to a trial-type hearing.[12] In these instances, something less than a trial-type hearing will satisfy due process.[13]

2. *When Should a Hearing be Held?*

As a general rule, summary proceedings by a court, dealing with adjudicative facts affecting a Fourteenth Amendment right, can be made whenever the governmental interest in summary adjudication outweighs the recipient's interest in avoiding the loss. Generally, courts will allow summary proceedings when the action is only temporary[14] or when an emergency situation dictates that

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10. *Id.* at § 7.01.
11. Fahey v. Mallonee, 332 U.S. 245 (1947).
12. Cafeteria Workers Union v. McElroy, 367 U.S. 886 (1961). No hearing was required by due process when a short order cook was discharged from her job at a naval gun factory site because she was considered a "security risk."
13. The following two subsections will discuss the qualifying factors which may limit some of the elements of a trial-type hearing.
14. *See* Direct Realty Co. v. Porter, 157 F.2d 434 (Em. App. 1946). In that case, due process was not violated by a summary action because the complainant had an opportunity to protest the summary action and to show why he should be given an oral hear-

immediate action be taken.[15] A good example of a court ruling that immediate action is necessary is the case of *Fahey v. Mallonee*.[16] In *Fahey* the Supreme Court held that an agency acted properly in ordering a conservator to summarily take charge of a bank, without giving the incumbent officers a prior hearing. The court indicated that even though the issues called for a trial type hearing, the "delicate nature of the institution" involved demanded that summary action be taken pending a trial-type hearing.

Summary action is often taken by prison officials in prison disciplinary proceedings. Prison officials work in an atmosphere where riotous situations or great harm to inmates or guards may result if swift action is not taken to control the inmate population during emergency situations.[17] In the case of *Urbano v. McCorkle*,[18] the court held that due process safeguards were required whenever a prisoner was subject to administrative or punitive segregation. However, the court went on to say that:

> [I]n times of emergency situations, such process may be postponed and emergency action taken. But the prisoners affected should thereafter be afforded within a reasonable time the minimal due process that is stated above.[19]

There seems to be little conflict with the view that a prison administrative body or officer may summarily lock an inmate in segregation when a tense situation demands swift action to prevent further trouble.[20] However, difficulties may sometimes arise due to the prison administrator's concept of what represents a reasonable delay in providing a hearing after summary procedures have been taken.[21]

3. *What Procedural Safeguards Does Due Process Require?*

In discussing summary proceedings and the question of when

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ing. To require an oral hearing in every case, would be too burdensome upon the rent control board. *See also* Jordan v. American Eagle Fire Ins. Co., 169 F.2d 281 (D.C. Cir. 1948) (opportunity for *de novo* court review after summary action satisfies due process).

15. North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908). By statute, city officials were authorized to summarily destroy spoiled food. Such food amounted to a serious health hazard.

16. Fahey v. Mallonee, 332 U.S. 245 (1947).

17. Biagiarelli v. Sielaff, 349 F. Supp. 913 (W.D. Pa. 1972); Urbano v. McCorkle, 334 F. Supp. 161 (D.N.J. 1971).

18. Urbano v. McCorkle, 334 F. Supp. 161 (D.N.J. 1971).

19. *Id.* at 168.

20. Biagiarelli v. Sielaff, 349 F. Supp. 913 (W.D. Pa. 1972).

21. In Urbano v. McCorkle, 334 F. Supp. 161 (D.N.J. 1971), the court suggested that, if summary action is taken, the prisoners should be afforded due process within a reasonable time. This seems to suggest a delay of a few days at most. A somewhat different holding was reached in Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970), *cert. denied*, 404 U.S. 1062 (1972) where the court held that a hearing six months after confinement in segregation was not unreasonable. *Burns* appears to be a minority view.

a hearing is demanded by due process, a balancing of interests between the government and the party involved is the most important consideration. Likewise, when determining what aspects of a strict trial-type hearing are necessary, another balancing of interests takes place. The Supreme Court has described this balancing test in the following terms:

> "Due Process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.[22]

The first aspect of this balancing test, "the nature of the right involved,"[23] deals with determining whether the party subject to the administrative decision has a constitutionally protected right at stake. In order to require the procedural due process protection of a trial-type hearing, the individual must be ". . . subject to 'grievous loss' at the hands of the state or its instrumentalities."[24] Grievous loss has become an accepted standard for determining whether a constitutional right is subject to deprivation at the hands of an administrative decision-making body.[25] This standard ignores consideration of whether the individual's interest is something that was previously classified as a "privilege" rather than a "right."[26]

The courts, in many areas of law, have seen fit to reject the right-privilege doctrine.[27] This trend has been followed in federal courts in the area of prison disciplinary proceedings.[28] In the case of *Clutchette v. Procunier*,[29] the court stated that a prisoner doesn't have a vested right to determine the type of confinement he will

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22. Hannah v. Larche, 363 U.S. 420, 442 (1960).
23. *Id.*
24. Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971).
25. Goldberg v. Kelly, 397 U.S. 254 (1970).
26. *Id.*
27. K. DAVIS, *supra* note 4, at § 7.13. The right-privilege doctrine deals with the concept that a person with a sufficient right at stake deserves constitutional due process protection. However, a person whose interest is a mere privilege or gratuity does not receive constitutional protection.
28. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied sub nom.*, Oswald v. Sostre, 405 U.S. 978 (1972). "The exaction of segregated confinement was onerous indeed, and the distinction between a "right" and a "privilege" . . . is nowhere more meaningless than behind prison walls. The difficult question, as always, is what process was due." *Id.* at 196.
29. Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971).

have while in prison or to determine the general types of privileges that will be afforded to him. However, it is unrealistic to argue that because of these factors a prisoner's interests are only privileges or gratuities from the state and consequently deserve no constitutional due process protections.[30] "Any further restraints or deprivations in excess of that inherent in the sentence and in the normal structure of prison life should be subject to judicial scrutiny."[31] Such restraints or deprivations can adversely affect the inmate's length of sentence, the amount of pay he receives, and the freedoms that he enjoys within the prison setting.[32] When these deprivations take on the status of being a "grievous loss," the inmate must be afforded procedural due process protection.[33]

The second item mentioned by the *Hannah* court is "the nature of the proceeding."[34] For balancing purposes it can be assumed that all disciplinary proceedings deal with adjudicative facts that lend themselves to a trial-type hearing.

The third aspect of the balancing test is "the possible burden on that proceeding."[35] This takes into consideration the administrative difficulties involved in providing a trial-type hearing for each party who is subject to a decision that may cause "grievous loss." When the burden of providing such a hearing outweighs the interest of the party to be tried, something less than a trial-type hearing will satisfy the Fourteenth Amendment Due Process Clause.[36]

B. HEARING REQUIREMENTS OF THE FOURTEENTH AMENDMENT: PARTY SUBJECT TO "GRIEVOUS LOSS"

In the 1970 case of *Goldberg v. Kelly*,[37] the United States Supreme Court made a decision in a welfare termination suit which has been influential in many areas of administrative law[38] and has been extensively cited by federal courts in determining the proper due process safeguards to be applied in prison disciplinary proceedings.[39] Since the ramifications of this case are so important in administrative law in general, and in prison disciplinary proceed-

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30. *Id.* at 780.
31. *Id., quoting* Jackson v. Godwin, 400 F.2d 529, 535 (5th Cir. 1968).
32. Clutchette v. Procunier, 328 F. Supp. 767, 780 (N.D. Cal. 1971).
33. To a person not within a prison, such loss of rights may not seem too important. However, the court indicates that to a prisoner such rights are extremely important and that "proceedings [outside the walls of a prison] resulting in far less punitive consequences must be attendant with elements of due process." *Id.*
34. Hannah v. Larche, 363 U.S. 420, 442 (1960).
35. *Id.*
36. K. DAVIS, *supra* note 4, at § 7.16.
37. Goldberg v. Kelly, 397 U.S. 254 (1970).
38. Board of Regents v. Roth, 408 U.S. 564 (1972).
39. Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971); Krause v. Schmidt, 341 F. Supp. 1001 (W.D. Wis. 1972).

ings in particular, an extensive review of the *Goldberg* decision will be presented.

1. *The Factual Situation*

The issue in *Goldberg* was whether the state could terminate public assistance payments to a welfare recipient without providing a prior hearing.[40] At the time the suit was filed, financial assistance to an individual could be terminated without any type of prior notice or hearing. After the filing of the suit, the state and city adopted procedures which would have provided the recipient with notice and hearing prior to termination of benefits. The plaintiffs then attacked these newly adopted procedures as being unsatisfactory under the Due Process Clause of the Fourteenth Amendment. The order promulgated by the New York City Department of Social Services can be summarized as follows: (1) the caseworker has an informal discussion with the recipient; (2) the caseworker, if he feels that termination is warranted, recommends this procedure to a unit supervisor; (3) if the supervisor agrees, he notifies the recipient of the reason for termination and further notifies him that within seven days he can request review; (4) the recipient can provide a written statement of why he feels that termination is not warranted; (5) if the reviewing official affirms the termination, the recipient is informed by letter of the termination; (6) a post-termination hearing can be requested before an independent state hearing officer at which time the recipient can personally appear, offer oral evidence, cross-examine witnesses, and have a record made of the decision; and, (7) a recipient may seek judicial review of an unfavorable decision after the hearing.[41]

There was no dispute in *Goldberg* over whether adjudicative facts were present; such facts are inherent in termination proceedings. In addition, the parties had no dispute over the type of hearing that due process required; both agreed that at some time a full trial-type hearing would have to be held. The real dispute, then, was whether the recipient could be proceeded against in a summary type manner under the rules promulgated by the New York City Department of Social Services. This issue involved a balancing of the government's interest in summary proceedings against the recipient's interest in avoiding the loss. The Supreme Court formulated the main issue as follows: "Whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing *before* the termination of benefits."[42]

40. Goldberg v. Kelly, 397 U.S. 254 (1970).
41. *Id.* at 258-60.
42. *Id.* at 260.

2. *The Reasoning of the Court*

The Supreme Court began by discussing the District Court's holding that "a pre-termination evidentiary hearing" was necessary to satisfy due process in the area of welfare termination even though a post-termination "fair hearing" would be held later. [43] The court went on to say that:

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be *'condemned to suffer grievous loss'* and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria Restaurant Workers Union v. McElroy,* 367 U.S. 886, 895 (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.'[44]

The Court next discussed the fact "that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing."[45] However the balancing process in this case tipped the weight of the scales toward the welfare recipient. The Court emphasized that a major consideration in the balancing process in this factual situation was that when a welfare recipient's assistance is terminated, "his situation becomes immediately desperate," because he "lacks [the] independent resources" necessary to live on while he awaits the decision in the post-termination evidentiary hearing.[46] The Supreme Court therefore agreed with the District Court that a pre-termination evidentiary hearing was needed and further agreed that such a hearing "need not take the form of a judicial or quasi-judicial trial."[47]

3. *Due Process Requirements*

The Court acknowledged that since a pre-termination hearing was to be followed by a "full administrative review," and since "welfare authorities and recipients have an interest in relatively speedy resolution," a full trial-type hearing was not a constitutional requirement at a pre-termination hearing. The Court went on to

43. *Id.* at 261.
44. *Id.* at 262-63 (emphasis added).
45. *Id.* at 263.
46. *Id.* at 264.
47. *Id.* at 266.

explain that the due process requirements which were minimal for this particular case were "molded to the particular parties involved and the particular interests represented."[48]

The Court listed the following elements of "rudimentary due process," in *Goldberg*: (1) "timely and adequate notice detailing the reasons for a proposed termination must be given to the recipient;" (2) opportunity must be given to present an oral statement and to confront and cross-examine witnesses; (3) "recipient must be allowed to retain an attorney" who may help in the recipient's presentation at the oral hearing; (4) the decision made must be based "on the legal rules and evidence adduced at the hearing" and the "decision maker should state the reasons for his determination and indicate the evidence he relied on;" and, (5) the decision should be made by an impartial decision-maker.[49]

In analyzing *Goldberg v. Kelly*,[50] Professor Davis questions whether the Supreme Court, though stating that a full judicial hearing was not required, did not in fact require just such a judicial-type hearing. He indicates that the only items that the Court did not mention were "a verbatim transcript and testimony under oath."[51]

III. DUE PROCESS IN PRISON DISCIPLINARY PROCEEDINGS

The traditional role of courts in dealing with prison affairs has been one of self-imposed restraint—the so-called "hands off" doctrine.[52] This doctrine was partially based on the theory that the management of prisons was the responsibility of the executive branch and was not to be interfered with by the judiciary.[53] Other explanations suggested for the "hands off" approach are that: (1) embarrassment to high officials may be caused by showing the public the real conditions within a prison; (2) courts lack expertise in

48. These considerations justify the limitation of the pre-termination hearing to minimum procedural safeguards, adapted to the particular characteristics of welfare recipients, and to the limited nature of the controversies to be resolved. We wish to add that we, no less than the dissenters, recognize the importance of not imposing upon the States or the Federal Government in this developing field of law any procedural requirements beyond those demanded by rudimentary due process.

Id. at 267.

49. *Id.* at 268-71.

50. Goldberg v. Kelly, 397 U.S. 254 (1970).

51. K. DAVIS, *supra* note 4, at § 7.07, at 170.

52. For a general discussion of this doctrine see Kraft, *Prison Disciplinary Practices and Procedures: Is Due Process Provided?* 47 N.D. L. REV. 1, 11-14 (1970); Note, *Decency and Fairness: An Emerging Judicial Role In Prison Reform*, 57 VA. L. REV. 841 (1971).

53. The Petitioner and other inmates of penal institutions should realize that the penal and correctional institutions are under the control and responsibility of the executive branch of the government and that courts will not interfere with the conduct, management and disciplinary control of this type of institution except in extreme cases.

Douglas v.Sigler, 386 F.2d 684, 688 (1967); *See* Kraft, *supra* note 56, at 12.

the area of prison management to formulate workable solutions to the prison problems; (3) legislatures are unwilling to allocate monies needed to make necessary improvements; and, (4) courts do not wish to hamstring the work of prison administrators in running the prison.[54]

This judicial attitude of self-restraint began to erode in certain areas of prison administrative policy during the late 1960's.[55] Courts began to recognize that although a prisoner necessarily loses many privileges when he is incarcerated, he does not lose all his constitutional rights. The protections of the Constitution and the Fourteenth Amendment specifically follow prisoners into prison and "protect them from unconstitutional action on the part of prison authorities carried out under color of law."[56] The Supreme Court's decision in *Johnson v. Avery*[57] was a major step in reinforcing this new judicial attitude. The Court in *Johnson* struck down a prison rule which prohibited an inmate from giving legal assistance to another inmate. The Court stated:

> [D]iscipline and administration of state detention facilities are state functions . . . , [however] in instances where state regulations applicable to inmates of prison facilities conflict with [constitutional] rights, the regulations may be invalidated.[58]

This new judicial attitude has also made its way into the area of prison disciplinary proceedings. Many, if not all, federal courts are now willing to establish minimum due process requirements when previous safeguards are found to be inadequate to satisfy the Fourteenth Amendment.[59]

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54. Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform,* 57 VA. L. REV. 841, 844-46 ((1971).

55. Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966), *cert. denied,* 388 U.S. 920 (1967); Millemann, *Prison Disciplinary Hearings and Procedural Due Process—The Requirement Of A Full Administrative Hearing,* 31 MD. L. REV. 27, 36-37 (1971).

56. Fortune Society v. McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970).

57. Johnson v. Avery, 393 U.S. 483 (1969).

58. *Id.* at 486, *cited* in Millman, *supra* note 55, at 37.

59. Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971); Krause v. Schmidt, 341 F. Supp. 1001 (W.D. Wis. 1972). Some federal courts are willing to promulgate rules that must be put into effect or to order rules put into effect that have been negotiated by the prison officials and the inmates. Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970). Other federal courts, retaining a small segment of the "hands off" doctrine, refuse to promulgate rules which must be put into use by the prison officials. These courts achieve a similar result, however, by simply specifying minimum procedures that due process requires under the factual situation. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied sub nom.,* Oswald v. Sostre, 405 U.S. 978 (1972). Judges lack expertise in the area of prison administration, and even if they didn't, it wouldn't "qualify us *as a federal court* to command state officials to shun a policy that they have decided is suitable because to us the choice may seem unsound or *personally* repugnant." *Id.* at 191. In at least one Federal court, the traditional "hands off" approach may still be around. In Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970), *cert. denied,* 404 U.S. 1062 (1972), the court refused to hold that a six month delay in granting a hearing on confinement in segregation was unconstitutional. The court, however, took notice of the fact that new rules were now being used in the prison and that such a lengthy delay would not likely happen in the future.

Judicial review is available in state prison disciplinary proceedings when an individual states a cause of action showing that he has been deprived, under color of law, of a right, privilege or immunity "secured by the Constitution or law" of the United States.[60] In determining whether Fourteenth Amendment due process rights have been violated in such cases, the court must look to whether the individual will be subject to "grievous loss" if he is found guilty of violating a prison rule.[61] "Grievous loss," then, is the key to a court's willingness to find that a trial-type proceeding is necessary to provide due process in a given disciplinary proceeding.[62] In the prison disciplinary cases discussed hereafter, the court has in each instance ruled that the prisoner is subject to "grievous loss" under the *Goldberg* definition.[63] In most instances, this has amounted to a loss of good time and/or placement in segregation for punitive or administrative purposes. Therefore, the determination that will be analyzed in these cases is not whether a potential for "grievous loss" is present, but rather what procedural safeguards are required by the Fourteenth Amendment after the possibility of "grievous loss" has been found to exist.

It should be noted at the outset that some states have voluntarily promulgated rules to meet the minimum procedural due process requirements established by the courts for prison disciplinary proceedings.[64] However, in many other cases, courts have merely stated that the present due process safeguards are inadequate and that new rules should be devised by the state.[65]

A. *Goldberg* SAFEGUARDS APPLIED TO PRISONS

One of the first major cases in the area of judicial review

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60. 42 U.S.C. § 1983 (1970):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

61. Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *rev'd. in part sub nom.*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied sub nom.*, Oswald v. Sostre, 405 U.S. 978 (1972). The typical case has been that the inmate has already suffered "grievous loss" by the time he brings the action. The purpose of the action, then, is to prevent further "grievous loss' or to recover money damages or both.

62. Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971). The due process procedures mentioned in the case are necessary elements of a prison disciplinary proceeding in which an inmate can be confined to solitary confinement, lose good time, be transferred to maximum security confinement, or be placed in padlock confinement for over ten days. The court also mentioned that less due process protection was necessary when a minor fine or punishment was possible. *Id.* at 654.

63. Goldberg v. Kelly, 397 U.S. 254 (1970).

64. Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971). The court said that there was no need to promulgate rules within their court order since Maryland had already adopted an adequate set of procedural due process rules. *Id.* at 174.

65. Inmates v. Mullaney, 12 CRIM. L. RPTR. 2379 (D. Me. Jan. 4, 1973). The court's order included a set of newly-adopted procedural rules which satisfied due process requirements.

of prison disciplinary proceedings was *Sostre v. Rockefeller.*[66] It dealt with an inmate who remained in segregation for more than a year and who lost 124-1/3 days of good time during his stay in segregation. This punishment was given to Sostre because he refused to stop practicing law in the institution, refused to answer questions about an organization known as the Republic of North Africa, and refused to answer questions about a letter written to his sister in which he said he would soon be leaving the institution.[67] The court found that segregation for over 15 days was unconstitutional in itself and that because segregation was imposed a hearing should have been held that provided the following safeguards to the accused:

> (1) written notice of the charges against him . . . which designated the prison rule violated;
> (2) a hearing before an impartial official at which he had a right to cross-examine his accusers and call witnesses in rebuttal;
> (3) a written record of the hearing, decision, reasons therefore and evidence relied upon; and
> (4) retain counsel or a counsel substitute.[68]

Without mentioning the balancing test posed by *Goldberg* the Court said:

> Very recently, the Supreme Court reiterated the firmly established due process principle that where governmental action may seriously injure an individual, and the reasonableness of that action depends on fact findings, the evidence, used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. The individual must also have the right to retain counsel. The decision-maker's conclusion must rest solely on the legal rules and evidence adduced at the hearing. In this connection, the decision-maker should state the reasons for his determination and indicate the evidence upon which he relied. Finally, in such cases, the high court ruled, an impartial decision-maker is essential.[69]

In *Sostre v. McGinnis,*[70] the Circuit Court reversed the parts

66. Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *rev'd. in part sub nom.,* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied sub nom.,* Oswald v. Sostre, 405 U.S. 978 (1972).
67. *Id.* at 867-68.
68. *Id.* at 872.
69. *Id.*
70. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *Rev'g in part sub nom.,* Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *cert. denied sub nom.,* Oswald v. Sostre, 405 U.S. 978 (1972).

of the holding in *Sostre v. Rockefeller*[71] that dealt with segregation as cruel and unusual punishment and with the requirements of due process. The court held that segregation was not, in itself, cruel and unusual punishment in violation of the Eighth Amendment. It further held that the due process requirements imposed by the lower court's ruling were not a constitutional necessity for every prison disciplinary proceeding in which a serious sanction may result.[72] In deciding the due process issue the court quoted the *Hannah v. Larke*[73] statement that requirements of due process in any given proceeding are dependent "upon a complexity of factors."[74] These factors include the interest of the party, the type of proceeding, and the burden that certain due process requirements will have upon the proceeding. The court then went on to balance the rights of the individual against the burden which requiring strict procedures would work upon the prison administration.[75] After applying this balancing test, the court concluded:

> We therefore find ourselves in disagreement with Judge Motley's conclusion that each of the procedural elements incorporated in her mandatory injunction are necessary constitutional ingredients of every proceeding resulting in serious discipline of a prisoner. . . . [W]e are not to be understood as disapproving the judgment of many courts that our constitutional scheme does not contemplate that society may commit lawbreakers to the capricious and arbitrary actions of prison officials. If substantial deprivations are to be visited upon a prisoner, it is wise that such action should at least be premised on facts rationally determined. . . . In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him, and afforded a reasonable opportunity to explain his actions. [citations omitted][76]

In *Clutchette v. Procunier*,[77] the court ruled that when prisoners were subject to certain punishments, such as an increase in sentence or indefinite confinement in segregation, procedural due process required all of the *Goldberg*-type safeguards. The court quoted

71. Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *rev'd in part sub nom.*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), 644 *cert. denied sub nom.*, Oswald v. Sostre, 405 U.S. 978 (1972).
72. Sostre v. McGinnis, 442 F.2d 178, 203 (2d Cir. 1971), *rev'g in part sub nom.*, Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *cert. denied sub nom.*, Oswald v. Sostre, 405 U.S. 978 (1972).
73. Hannah v. Larche, 363 U.S. 420 (1960).
74. *Id.* at 442.
75. Sostre v. McGinnis, 442 F.2d 178, 198 (2d Cir. 1971), *rev'g in part sub nom.*, Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *cert. denied sub nom.*, Oswald v. Sostre, 405 U.S. 978 (1972).
76. *Id.*
77. Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971).

the text from *Goldberg* which spoke of the need for a balancing test[78] and then stated in a footnote that *Sostre v. McGinnis*[79] was decided improperly because the Second Circuit Court made use of a balancing test:

> In *Sostre*, the Court of Appeals recognized that disciplinary punishment constituted "grievous loss" within the meaning of *Goldberg*. They framed their inquiry, however, into an analysis of what "process" is "due," and concluded that the requirements set out by the district court, [*Sostre v. Rockefeller*] which were similar to those set out here, were more than that required by the due process clause. In light of the quoted portion of *Goldberg*, in which the Supreme Court held that the requirements it was about to set out (requirements this court is now adopting as applicable to disciplinary hearings) did not extend "beyond those demanded by rudimentary due process," it is difficult to understand the conclusion that something less is constitutionally adequate.[80]

In *Krause v. Schmidt*[81] a federal district court in Wisconsin granted a preliminary injunction restoring the status quo after prisoners suffered "grievous loss" under hearing procedures which did not meet the standards set out in *Goldberg*. The court referred to *Clutchette*, where prison hearing procedures were held inadequate because they did not meet the minimum due process standards set out in *Goldberg*. The court stated that it would not decide whether the plaintiffs' hearings met the *Goldberg* requirements, but that such safeguards were necessary in prison disciplinary proceedings of that nature.[82] The court did not make use of *Goldberg's* balancing test, basing its decision on the following fallacious syllogism:

> *Goldberg* requires that all the minimal procedural safeguards be present at a hearing that could result in grievous loss. . . . [P]laintiffs are "subject to grievous loss;" . . . [therefore] they were entitled to a hearing providing the procedural minima enunciated in *Goldberg*. . . .[83]

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78. *Id.* "'[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.'"
Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (citation omitted).

79. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *rev'g in part sub nom.*, Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *cert. denied sub nom.*, Oswald v. Sostre, 405 U.S. 978 (1972).

80. Clutchette v. Procunier, 328 F. Supp. 767, 781-82 n.11 (N.D. Cal. 1971).

81. Krause v. Schmidt, 341 F. Supp. 1001 (W.D. Wis. 1972).

82. *Id.* at 1006. The relief sought was a preliminary injunction. The court granted the injunction but did not rule on the actual merits of the plaintiff's case.

83. *Id.*

B. AN ANALYSIS OF THE MISAPPLICATION OF *Goldberg*

All of the prison disciplinary cases cited in the last section dealt with situations in which the court held that a prisoner was subject to "grievous loss" as defined in *Goldberg*. The real issue then is: Did *Goldberg* establish minimum due process requirements which must be applied in all cases where an individual is subject to "grievous loss," or did *Goldberg* say that the requirements used in that case were the minimum due process safeguards required under the factual situation presented?

In order to show that *Goldberg* only established minimum standards, it is necessary to compare that case with prison disciplinary cases. Both *Goldberg* and the prison cases dealt with a decision which was to be made primarily upon adjudicative facts. In general, such facts call for a trial-type hearing to satisfy due process, unless countervailing interests allow something less. One such countervailing interest is a need for summary proceedings.[84]

In *Goldberg* the Supreme Court balanced the government's interest in summary proceedings against the individual's interest in avoiding loss due to summary action. However, a different issue is involved in prison disciplinary proceedings. In prison disciplinary proceedings, courts are willing to concede that the nature of the prison setting permits the use of summary proceedings in emergency situations if a hearing follows within a reasonable time.[85] *Goldberg* and the prison cases deal with different variables. The *Goldberg* case dealt only with a pre-termination hearing; a full trial-type "fair hearing" was a statutory requirement after benefits were terminated.[86] The prison disciplinary hearings involve a determination of what due process safeguards are necessary when making a *final* determination of the disciplinary matter before the administrative board.[87] To "directly" apply *Goldberg* to the prison disciplinary cases would be to say that due process requires a full trial-type hearing after the initial *Goldberg*-type hearing has been completed. This, of course, is an over-simplification of the interrelated nature of the balancing processes used in determining due process requirements. It does point out, however, that courts involved with reviewing prison disciplinary proceedings should not try to "directly" apply *Goldberg* to other factual situations without applying a balancing test to the specific facts before the court.

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84. *See* text accompanying notes 14 to 21 *supra*.
85. Biagiarelli v. Sielaff, 349 F. Supp. 913 (W.D. Pa. 1972); Urbano v. McCorkle, 334 F. Supp. 161 (D.N.J. 1971).
86. Goldberg v. Kelly, 397 U.S. 254, 261 (1970).
87. The administrative hearing by a prison disciplinary board is a final hearing. This is true whether or not it is held before the inmate is punished or within a reasonable time thereafter.

Goldberg was clearly limited to its particular facts. After going through several balancing considerations, the Court stated:

> These considerations justify the limitation of the pre-termination hearing to minimum-procedural safeguards, adapted to the particular characteristics of welfare recipients, and to the limited nature of the controversies to be resolved. We wish to add that we, no less than the dissenters, recognize the importance of not imposing upon the States or the Federal Government in this developing field of law any procedural requirements beyond those demanded by rudimentary due process.[88]

In *Clutchette*,[89] *Krause*,[90] and the first *Sostre*[91] case, the courts assumed that the words "rudimentary due process" referred to a conceptual due process guarantee that would be present whenever someone was subject to "grievous loss." If such loss was present, the *Goldberg* due process safeguards would automatically attach. There are two major reasons why this analysis is unwarranted: (1) the *Goldberg* court limited its decision to the exact factual situation before it; and (2) due process does not always require *Goldberg*-type protections.

In *Goldberg*, the Supreme Court ruled that certain "minimum procedural safeguards" were necessary due to the "particular characteristics of welfare recipients" and "the limited nature of the controversy to be resolved."[92] The Court also stated that it was dealing with "rudimentary due process" in a "developing area of law." The Court was referring to the relatively new area of state and federal welfare law.[93] It is unrealistic to argue that the words "rudimentary due process" refer to anything other than "rudimentary due process" under the particular facts of *Goldberg*. The words do not apply to every situation in which a person may be "condemned to suffer grievous loss."

Due process does not always require *Goldberg*-type protections. The *Goldberg* Court stated that:

> [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function

88. Goldberg v. Kelly, 397 U.S. 254, 267 (1970).
89. Cluchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971).
90. Krause v. Schmidt, 341 F. Supp. 1001 (W.D. Wis. 1972).
91. Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *rev'd in part sub nom.*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied sub nom.*, Oswald v. Sostre, 405 U.S. 978 (1972).
92. Goldberg v. Kelly, 397 U.S. 254, 267 (1970).
93. *Id.*

> involved, as well as the private interest that has been affected by governmental action.[94]

If the concept were adopted that the Fourteenth Amendment required *Goldberg*-type standards as "rudimentary due process" in every case, due process would no longer be a flexible tool. The only reason a court would have for using a balancing of interests test would be to determine if more than *Goldberg*-type safeguards were needed in a certain case. Under this theory, no circumstances could arise in which due process would demand *less* than a *Goldberg*-type hearing.[95]

C. WHAT DUE PROCESS REQUIRES

It should be emphasized that *Goldberg* has not been misapplied in all prison disciplinary cases.[96] In *Sostre v. McGinnis*,[97] the court correctly interpreted the *Goldberg* case and applied the balancing test to determine the procedure required by the Due Process Clause. This does not mean, however, that the court gave proper weight to all the factors that go into the balancing test.[98] Furthermore, it does not mean that the procedural safeguards set out in *Sostre v. McGinnis*[99] are the ones that should be adopted by every federal

94. *Id.* at 263.

95. This theory seems quite tenuous when one considers that some hearings require only some or none of the *Goldberg*-type hearing requirements. K. DAVIS, *supra* note 4, at § 7.16. Professor Davis explains that a trial-type hearing should usually be afforded to a party when adjudicative facts are in question. However, in some cases where the interest of the individual involved is classified as a privilege or where some other countervailing interest overrides the interest of the individual, something less than a trial-type hearing is required. *Id.* In prison cases, some courts feel that the interest of the individual prisoner in a trial-type hearing is overridden by the interests of the state in prison discipline and adminisration. *See generally* Cafeteria Workers Union v. McElroy, 367 U.S. 886 (1961) (national security interest overrides the interest of the individual in having a hearing); Alverez v. Turner, 422 F.2d 214 (10th Cir. 1970), *cert. denied sub nom.*, McDorman v. Turner, 399 U.S. 916 (1970) (due process not required for a prisoner seeking parole).

96. Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970). "We believe that such serious punishment should not be allowed to stand, at least until disciplinary procedures are adopted that will meet rudimentary standards of due process under conditions encountered." *Id.* at 1029.

97. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *rev'g in part sub nom.*, Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *cert. denied sub nom.*, Oswald v. Sostre, 405 U.S. 978 (1972).

98. The balancing test amounts to a weighing of the interest of the individual prisoner in avoiding the punishment against the weighing of the interests of the prison in avoiding trial-type hearings. The prisoner's interest is clearly that of avoiding a punishment which amounts to a deprivation of life, liberty, or property without due process of law. This interest is of course affected by the type of punishment being imposed and by the court's interpretation of what constitutional rights follow the prisoner into prison. On the other side of the balance, the prison administrator's interests in avoiding trial-type hearings is a matter of administrative feasibility. The prison administrators argue that such trial-type hearings will adversely affect prison control and security, the rehabilitative value of prison therapy, and the relationship which must be maintained between the prisoners and the custodial staff. For a discussion of balancing interests *see* Note, *Constitutional Law—Due Process Clause of Fourteenth Amendment May Require Elementary Procedural Safeguards For Prisoners in Administration of Prison Discipline*, 25 VAND. L. REV. 1079 (1972).

99. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *rev'g in part sub nom.*, Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *cert. denied sub nom.*, Oswald v. Sostre, 405 U.S. 978 (1972).

court. Until the United States Supreme Court decides a prison disciplinary case and promulgates general standards, federal courts will be responsible for formulating procedural due process safeguards by balancing the interests of the individual against the countervailing interests of the prison administration.[100]

In one recent case, *Sands v. Wainwright*,[101] a federal district court applied the balancing test and discussed the interests of prison administrative officials in placing someone in administrative or punitive segregation. The court stated that the prison officials had two major interests in taking such action: (1) an interest in a rehabilitative effect; and, (2) an interest in administrative convenience. After identifying these interests, the court balanced them against the interests of the individual in staying out of segregation. It considered the interest of a prisoner in staying out of segregation extremely important, amounting to avoidance of the most "wretched" punishment which could legally be imposed within a prison setting.[102] Beyond this, the court also explained that any prisoner in segregation was subject to loss of gain time, which in effect, extends his sentence.[103] The court went on to set the minimum due process safeguards for an administrative disciplinary hearing in which a prisoner would be subject to punitive or administrative segregation.

D. MINIMUM DUE PROCESS SAFEGUARDS: *Sands v. Wainwright*

1. *Impartial Tribunal*

It is not a requisite that members of the disciplinary committee be made up of individuals from outside the prison. However, persons involved in the disciplinary proceedings who were responsible for investigation, testifying or reviewing the decision, or who have personal knowledge, involvement, or interest in the outcome, should not be part of that board. No specific number of committee members was required, although the court did rule that a three member committee was "constitutionally permissible."[104]

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100. The Supreme Court has already given an indication that they do not want to review prison disciplinary cases involving due process rights. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *rev'g in part sub nom.*, Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *cert. denied sub nom.*, Oswald v. Sostre, 405 U.S. 978 (1972), Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970), *cert. denied*, 404 U.S. 1062 (1972).

101. Sands v. Wainwright, 12 CRIM. L. RPTR. 2376 (M.D. Fla. Jan. 5, 1973).

102. [E]xcept for the loss of life itself and except for the imposition of those conditions which would constitute cruel and unusual punishment in violation of the Eighth Amendment, confinement in punitive segregation is as loathsome and wretched as is legally permissible; there is nothing worse.

Id.

103. *Id.*

104. *Id.*

2. *Hearing*

The "right to be heard" implies that the individual will be given the chance to explain his conduct and offer evidence to support his contentions. This includes the right to call "voluntary witnesses to testify for him."[105] The "right to be heard" also implies the right to cross-examine and confront adverse witnesses.[106] The *Sands* court acknowledged the concern that some courts have expressed about allowing cross-examination of custodial officers or other inmates.[107] However, in view of the nature of the inmate's interest, such cross-examination and confrontation is a constitutional requirement.

3. *Counsel*

Some inmates are not capable of adequately representing themselves at a hearing. To take away the use of counsel in such cases would actually amount to denying a hearing. The *Sands* court concluded that, while no right to appointment of counsel is a constitutional necessity, an inmate must be allowed to retain an attorney or to have the assistance of voluntary counsel if he so desires.[108]

4. *Decision on the Record*

The decision must be based on evidence which is presented at the hearing and must be supported by substantial evidence. The decision-maker should briefly state the reasons for his decision and identify the evidence on which he relied.[109]

5. *Record*

A complete transcript of the proceedings is not required but some type of record should be kept which will demonstrate that all the procedural due process requirements have been met. The record of the proceedings should be kept "as a part of the inmate's record."[110]

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105. In so holding this court in no way limits the inherent power of the fact finder and decision maker . . . to restrict questions and answers to relevant matter, to preserve decorum and to limit repetition.

Id. at 2377.

106. Although cross-examination is generally a vital feature of the fact finding procedure in any tribunal, it is of fundamental importance in administrative proceedings wherein the ordinary rules of evidence are relaxed.

Id.

107. Courts have expressed the idea that cross-examination of custodial officers will cause a breakdown in the prisoner-guard relationship and will adversely affect security within the institution. Courts have also expressed concern for the safety of inmates who act as witnesses for the prison officials. *Id.*

108. *Id.*

109. *Id.*

110. The court suggested that a tape recording of the proceedings would satisfy the requirement of a record. *Id.*

6. *Appellate Review*

Under the present balancing test, there is no reason why appellate review should be considered a constitutional requirement. But, if prison regulations grant a review in an inmate disciplinary hearing, "the review must be strictly confined to the record."[111]

7. *Rules*

Due process requires that prison rules prohibit "reasonably specific" types of conduct and that the range of punishments be made in advance. These written rules should be adequately communicated to the inmates.[112]

The Second Circuit Court of Appeals came up with due process safeguards that are extremely different from the ones enunciated in the *Sands* case. It is difficult to explain the discrepancy in the holdings. However, possible explanations are offered by one or both of the following rationales: (1) The federal courts have not had sufficient time to properly analyze all of the factors which go into making a decision as to the safeguards required by due process in a prison disciplinary proceeding; and/or (2) the federal courts do not agree as to the amount of weight which should be given to the interests of the parties involved.[113]

Although an exacting formulation of constitutional due process requirements which could be applied in all federal jurisdictions for prison disciplinary hearings, cannot be concretely stated at this time, one conclusion seems quite definite: *Goldberg v. Kelly* requires that due process safeguards be formulated by balancing the interests of the individual against the "precise nature of the governmental function involved."[114]

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111. *Id.*

112. *Id.*

113. Case holdings in the federal district courts and the federal courts of appeal in the Second and Third Circuits indicate that due process in prison disciplinary hearings is satisfied by being notified of changes, being informed of the evidence, and being given an opportunity to explain one's conduct. *See* note 98 *supra;* Biagiarelli v. Silaff, 349 F. Supp. 913 (1972). Case holdings in federal courts in the First, Fourth, Seventh, and Ninth Circuits indicate that a *Goldberg*-type hearing (and sometimes more) is required by the Constitution. *See* Inmates v .Mullaney, 12 CRIM. L. RPTR. 2379 (D. Me. Jan. 4, 1973); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Krause v. Schmidt, 341 F. Supp. 1001 (1972); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971). Case holdings in the federal courts of the Eighth and Tenth Circuits indicate that prison disciplinary hearings do not require due process safeguards. *See* Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970); Kostal v. Tinsley, 337 F.2d 845 (1964). Case holdings within the federal district courts of the Fifth Circuit indicate that the courts are not sure what due process requirements are needed in a prison disciplinary hearings. *See* Sands v. Wainwright, 12 CRIM. L. RPTR. 2376 (M.D. Fla. Jan. 5, 1973) (*Goldberg*-type hearing reqquired by due process); Sinclair v. Henderson, 331 F. Supp. 1123 (E.D. La. 1971) (due process only required a set of rules governing inmate conduct, written notice of changes, and opportunity to be heard before impartial decision maker).

114. Goldberg v. Kelly, 397 U.S. 254 (1970).

IV. DUE PROCESS SAFEGUARDS APPLIED TO PRISON TRANSFERS

The traditional view of federal courts was that inmate transfers from one prison to another were outside the realm of court review.[115] While this traditional "hands-off" approach still finds support,[116] a new trend may be developing in which due process protections will be applied to inmate transfers where the inmate is subject to loss of a constitutionally protected interest.[117]

Gary v. Creamer[118] is an example of the traditional view that prison inmates do not have a "constitutional right to remain in any particular prison." In that case, several inmates who had been operating a prison newspaper were either placed in segregation or transferred to a different penal institution. The court held that due process safeguards were required before inmates could be placed in segregation.[119] The appeals court also stated that they would not set the standards themselves, but would remand the case to the district court to determine the necessary safeguards through the application of a balancing test. As for the inmates who were transferred to other institutions, the court dismissed their claim that due process was "guaranteed by the Sixth and Fourteenth Amendments." The court held "that a state prisoner has no constitutional right to remain in any particular prison."[120]

In the 1973 case of *Gomes v. Travisono*,[121] a federal district court ruled that certain due process procedures should be guaranteed before a state prisoner could be transferred to a distant out-of-state prison or before a state prisoner could be transferred to a distant federal prison.[122] The court identified certain deprivations that attended transfer of the prisoners from one institution to another: (1) these inmates were placed in administrative segregation from two to six weeks; (2) they were placed in "work assignments and programs" which were not in the best interests of their rehabilitative development; (3) they received more "stringent" mail censorship than other inmates; (4) they were unable to see counsel

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115. United States *ex rel.* Stuart v. Yeager, 293 F. Supp. 1079 (D.N.J. 1968). "Although the court feels great sympathy for the plight of petitioner, it believes that no constitutional right of petitioner is abridged by a transfer" from one state prison to another. *Id.* at 1081.

116. Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971).

117. Gomes v. Tranisono, 12 CRIM. L. RPTR. 2374 (D.R.I. Jan. 16, 1973). The new trend may indicate that federal courts are now more willing to look for "grievous loss" in a prison transfer. If such loss is found, then due process safeguards must be provided.

118. Gray v. Creamer, 465 F.2d 179 (3rd Cir. 1972).

119. The hearing must be held before the inmates are placed into segregation unless an emergency situation demands that the inmates be summarily confined to segregation. In such situations, a hearing must follow within a reasonable time. *Id.* at 185.

120. *Id.* at 187.

> A prisoner has no vested right to be assigned to or to remain in a medium security or minimum security institution. The Division of Correction has the right to transfer prisoners from one institution to another . . . without the need for a hearing under those procedures.

Bundy v. Cannon, 328 F. Supp. 165, 173 (D. Md. 1971).

due to the extreme distances from their attorney's offices (up to 1,500 miles); (5) they were treated with hostility by other prisoners because such prisoners thought the new inmates were "stool pigeons" transferred for their own protection; and, (6) these inmates, in general, were not allowed to take part in rehabilitative and education programs and psychological therapy sessions.[123]

Due to the serious nature of the deprivations that were worked upon these inmates, the court reasoned that Fourteenth Amendment procedural due process requirements had to be met. These requirements included written notice of the charges, an opportunity to present evidence, the assistance of lay counsel, a decision based on substantial evidence, trial by an impartial tribunal, and a record of the proceedings and findings.[124] It should be noted that these procedural safeguards were arrived at by application of a balancing test in which the interests of the parties were given the appropriate weight demanded by the Constitution.[125]

The *Gomes* case does not stand for the proposition that due process requirements are necessary in every prison transfer. It does, however, state that certain due process protections must be given to an inmate where the nature of the institutional transfer is such that he will be subject to the deprivation of a Fourteenth Amendment right to life, liberty or property. The type of due process safeguards required are determined by "weigh[ing] the interests of the parties."[126]

V. CONCLUSION

A court's determination of due process requirements applicable to a prison disciplinary hearing is a two step process. The first step in this procedure is the court's determination of whether or not the individual involved has suffered, or is subject to suffering, a deprivation of life, liberty, or property. If such deprivation does exist, the court must next determine the exact nature of the due process safeguards which will satisfy the Fourteenth Amendment. The court's decision, in this second step, is formulated by balancing the nature of the inmate's interest against the nature of the burden that a strict trial-type hearing will work upon the prison administration.

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121. Gomes v. Travisono, 12 CRIM. L. RPTR. 2374 (D.R.I. Jan. 16, 1973).
122. If an emergency situation dictated that an immediate transfer must be made without a hearing, then the inmate must be returned for a hearing within a reasonable time. *Id.* at 2376.
123. *Id.* at 2375.
124. *Id.*
125. "In the determination of what forms of process are due, it is appropriate to weigh the interests of the paries." *Id.*
126. *Id.*

The foregoing discussion has focused on the second part of this process.[127] It was the purpose of this note to point out the improper reasoning that has been used by some federal district courts in their determination of the essential due process safeguards. This improper reasoning has been based on a misapplication of principles that have been applied by the Supreme Court in *Goldberg v. Kelly*,[128] a case involving an administrative proceeding. The Supreme Court stated that certain elements of a trial-type hearing were necessary when a welfare recipient was subjected to "grievous loss" by a pre-termination hearing. The Court explained that the due process safeguards, applicable in *Goldberg*, were determined by balancing the interests of the parties involved and that such principles were only applicable to the factual situation before the Court.[129] Despite this explanation, some federal district courts have proceeded, without a balancing test, to require the exact procedural safeguards applied by the Court in *Goldberg*.[130] In some cases, this process may have provided procedural safeguards which would not have been granted if a balancing test had been used. However, some recent cases indicate that an application of the *Goldberg* balancing test to prison disciplinary proceedings will bring about trial-type procedures equal to, or beyond, those formulated in the *Goldberg* case.[131] Whether or not such a trend materializes, remains to be seen. In the mean time, it is important that federal district courts, when reviewing prison disciplinary cases, apply the balancing test enunciated in *Goldberg* rather than making a blanket application of the due process safeguards which were applicable only under the *Goldberg* factual situation.

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127. Most cases cited in this note were cases in which the court made a determination, in step one, that an individual was subject to a deprivation of a Fourteenth Amendment Constitutional right. If such deprivation was not found, the court would not have to require due process safeguards.
128. Goldberg v. Kelly, 397 U.S. 254 (1970).
129. *Id.*
130. Krause v. Schmidt, 341 F. Supp. 1001 (W.D. Wis. 1972); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971).
131. Sands v. Wainwright, 12 CRIM. L. RPTR. 2376 (M.D. Fla. Jan. 5, 1973); Gomes v. Travisono, 12 CRIM. L. RPTR. 2374 (D.R.I. Jan. 16, 1973).
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