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Constitutional Law: Procedural Due Process in a Prison Disciplinary Proceeding

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In addition, the state would benefit from the same transaction test. The criminal trial dockets would be less congested, and the expense of repeated utilization of the state's resources to try one defendant would be reduced. A defendant should not be compelled to "run the gantlet"[59] of repeated prosecutions for every offense that does not qualify as lesser included or meet the rigid requisites of the same evidence test. Justice demands that the same transaction test be adopted.

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CONSTITUTIONAL LAW: PROCEDURAL DUE PROCESS IN A PRISON DISCIPLINARY PROCEEDING

Sands v. Wainright, 357 F. Supp. 1062 (1973)

Plaintiff, an inmate at the Florida State Prison at Raiford, was charged in a prison disciplinary proceeding with "assault on other inmates" and "creating a racial disturbance."[1] After being placed in punitive segregation for an indefinite period and losing 120 days of gain time[2] he sought declaratory relief alleging that the disciplinary proceeding had denied him procedural due process.[3] The state contended federal judicial review of state prison discipline and administration was limited to proceedings that were unreasonable, arbitrary, capricious, or in some way prohibited.[4] Since imposing punitive or administrative segregation for violating prison rules was not per se prohibited[5] and because the present disciplinary proceedings were reasonable, this was not a proper case for such intervention.[6] The United States District Court for the

59. Ashe v. Swenson, 397 U.S. 436, 459 (1970).

1. 357 F. Supp. 1062, 1071 (1973).
2. *Id.* at 1073.
3. *Id.* at 1068.
4. Brief for Respondent at 2, Sands v. Wainwright, 357 F. Supp. 1062 (1973) [hereinafter cited at Brief for Respondent].
5. Brief for Respondent at 2; Ford v. Board of Managers of New Jersey State Prison, 407 F.2d 937, 940 (3d Cir. 1969); Krist v. Smith, 309 F. Supp. 497, 499-500 (S.D. Ga. 1970), *aff'd*, 439 F.2d 146 (5th Cir. 1971).
6. Brief for Respondent at 3-4.

Middle District of Florida HELD, prior to his placement in punitive[7] or administrative segregation[8] or to loss of gain time, an inmate must be given a hearing that meets procedural due process standards appropriate to the nature of his loss.[9] The court delineated specific hearing procedures[10] and enjoined the enforcement of plaintiff's loss of 120 days gain time.[11]

Based on the premise that lawful incarceration withdraws or limits many rights and privileges,[12] the courts traditionally have followed a policy of non-interference with state prison administration in general and prison discipline in particular.[13] Only gross violation of fundamental rights would overcome this restraint.[14] Recently this view has eroded to the point that many courts now believe "a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."[15] The Supreme Court has recognized that state regulations conflicting with constitutional rights of prisoners other than liberty itself may be invalidated.[16] Although courts have required procedural due process in the prison context,[17]

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7. Punitive segregation is any and all types of solitary confinement whether part-time or full-time, which are accompanied by regular or special rations, the loss of gain time, the loss of visiting privileges, and any other loss of a substantial privilege that is normally afforded to an inmate confined in administrative segregation. 357 F. Supp. at 1078.

8. Administrative segregation is any and all types of solitary confinement that result in a significant loss to the affected inmate of privileges he would enjoy if assigned to general population in the institution. *Id.* at 1077.

9. *Id.* at 1082.

10. *Id.* at 1083-91.

11. *Id.* at 1096.

12. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871). "A convicted felon . . . has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State." *Id. See also* Price v. Johnston, 334 U.S. 266, 285 (1948).

13. Hirschkop & Milleman, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795, 812 (1969) [hereinafter cited as Hirschkop].

14. McCloskey v. Maryland, 337 F.2d 72, 74 (4th Cir. 1964). "Courts usually justify this non-interference on the basis of separation of powers — administration of prisons viewed as an executive function . . . cost — improved penal procedures are expensive and courts cannot appropriate funds; or fear that judicial lack of expertise in penology will create disciplinary problems." Hirschkop, *supra* note 13, at 812 n.92. *See generally* Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal To Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

15. Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944).

16. Johnson v. Avery, 393 U.S. 483 (1969). The Supreme Court struck down a statute that prohibited inmates from providing legal assistance to other inmates when no other legal assistance was provided by the state. Prior to and after the *Johnson* decision federal courts have honored prisoners' claims to numerous specific rights. *See, e.g.*, Cooper v. Pate, 378 U.S. 546 (1964) (right to receive certain religious publications); Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd per curiam sub nom.*, Younger v. Gilmore, 404 U.S. 15 (1971) (right to adequate prison legal library); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970) (right to be free from institutional censorship and interference with correspondence); Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968) (right to racial integration of prison facilities).

17. *See, e.g.*, Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972); Sostre v. McGinnis, 442 F.2d

few have delineated comprehensive and definitive standards to be adhered to by state prison administrators.[18]

The expansion of prisoners' rights has paralleled the enlarged application of procedural due process in administrative proceedings.[19] Courts have been more inclined to insure that before deprivation of an entitlement, whether termed a right or a privilege,[20] the party affected must be given notice and a meaningful opportunity to be heard.[21] In determining the extent of due process afforded, the recipient's interest in avoiding grievous loss is balanced against the governmental interest in summary adjudication.[22] Applying these principles to parole revocation hearings in *Morrisey v. Brewer*,[23] the Supreme Court held that the termination of the parolee's continued liberty was such a grievous loss that due process must apply. This decision and the Court's previous application of these principles to sentencing[24] establish a trend toward applying due process principles to post-conviction proceedings, which may substantially affect liberty or length of incarceration.[25] A logical extension of this

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178 (2d Cir. 1971), *rev'g in part sub nom.* Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970); Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970).

18. *See* Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971). Where punishment involved solitary confinement, loss of good time, or other serious internal sanctions the prisoner must be given written notice, a hearing before an impartial tribunal, the right to submit evidence, the right to confrontation and cross-examination, and the right to assistance of counsel substitute. In addition, the court struck down prison regulations that it characterized as too vague. Recently, Virginia prison officials were cited for contempt for violation of the injunction originally issued in this case for failing to implement the required due process procedures in the prison discipline system. Landman v. Royster, 354 F. Supp. 1292 (1973). The court ordered the prison officials to take immediate steps to insure that the terms of the injunction are carried out. *See also* Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971), *appeal docketed,* No. 71-2357 (9th Cir. Aug. 30, 1971). Where serious internal sanctions could be imposed a prisoner must be given detailed notice seven days before the hearing, an impartial factfinder, counsel or counsel substitute, the right to call and cross-examine witnesses, the right to a written decision, and the right to notice of appeal procedures where permitted. Where accused of an offense that could result in criminal penalties, a prisoner must be given *Miranda* warnings and counsel. *See generally* Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971).

19. *See* Note, *Criminal Law, Prisons — Prisoners Subject to Certain Serious Punishments Enjoy a Fourteenth Amendment Guarantee of a Hearing with Minimum Due Process Safeguards,* 50 TEXAS L. REV. 155 (1971).

20. Bell v. Burson, 402 U.S. 535, 539 (1971) (hearing before revocation of driver's license); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (hearing before withdrawal of welfare benefits); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (hearing before disqualification for unemployment compensation). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968).

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

22. *Id.*

23. 408 U.S. 471 (1972).

24. Mempa v. Rhay, 389 U.S. 128 (1967).

25. When the punishment imposed on the inmate is loss of gain time, he is in effect having his incarceration extended. 357 F. Supp. at 1082. Further, the disciplinary record has a direct effect on whether or not an inmate is granted parole. Cohen, *The Discovery of Prison Reform,* 21 BUFFALO L. REV. 855, 879-80 (1972) [hereinafter cited as Cohen].

trend would apply due process principles in prison disciplinary hearings, since they affect the length of incarceration.

Assessing the present disciplinary system the instant court found an inmate could be subjected to severe punishment[26] with minimal hearing procedures.[27] The court applied the balancing test to determine the necessary elements of a fair hearing in the prison discipline context.[28] When the punishment was placement in *punitive* segregation or loss of gain time[29] the court held an inmate must be given a hearing with the right to: (1) an impartial factfinder or decisionmaker,[30] (2) written notice of the name and number of the offenses charged and the facts on which the charges are based,[31] (3) an opportunity to present evidence and to call voluntary witnesses,[32] (4) confrontation and cross-examination,[33] (5) retain counsel or counsel substitute,[34] (6) a record of the proceedings briefly stating the reasons for the decision and the supporting evidence,[35] and (7) a decision based on substantial evidence adduced solely at the hearing.[36] No appellate procedure was required.[37] Where the punishment was *administrative* segregation the court delineated a less stringent hearing procedure requiring only a fair hearing at a meaningful time before an im-

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26. Administrative segregation, punitive segregation, loss of gain time. 357 F. Supp. at 1082.

27. "(1) An inmate confined in administrative segregation status is not necessarily afforded a hearing, notice or any other rights . . . . (3) An inmate charged with an offense in a disciplinary report is afforded a hearing before a disciplinary committee, is there given an opportunity to enter a plea of guilty or not guilty, and is there given an opportunity to state his case." *Id.* at 1077.

28. *Id.*

29. FLA. STAT. §944.27 (1971) provides for deductions of gain time from the sentences of every inmate. Deductions are made from the term of an inmate's sentence when no misconduct has been charged against his record during a stated period. Other forms of gain time are provided in 2 FLA. ADMIN. CODE ch. 10 B-4 (1971) [hereinafter cited as ADMINISTRATIVE RULES]. FLA. STAT. §944.28 (1971) provides the procedures for the forfeiture of gain time. *See generally* Note, *Prisoners' Gain Time: Incentive, Deterrent, or Ritual Response*, 21 U. FLA. L. REV. 103 (1968).

30. 357 F. Supp. at 1084.

31. *Id.* at 1086.

32. *Id.* at 1087.

33. *Id.* at 1088.

34. *Id.* at 1089.

35. *Id.*

36. *Id.*

37. The court does, however, require that the review by higher officials, which Florida does provide, must be based on the entire record. *Id.* at 1090. Authorities suggest that some form of external review is necessary to check the unlimited discretion of prison officials and to insure that the procedures provided are applied. Kraft, *Prison Disciplinary Practices and Procedures: Is Due Process Provided?*, 47 N.D.L. REV. 9, 72-74 (1970). A study by the Harvard Center for Criminal Justice suggested that citizens' advisory commissions, special masters, or all-purpose ombudsmen serve as the final reviewing authority. *Criminology, Judicial Intervention in Prison Discipline Proceedings*, 63 J. CRIM. L.C. & P.S. 200, 221-22 (1972) [hereinafter cited as Harvard Study]. *See also* Tibbles, *Ombudsmen for American Prisons*, 48 N.D.L. REV. 383 (1972). Another solution might be found by applying the Florida Administrative Procedure Act, FLA. STAT. ch. 120 (1971), which provides for judicial review. *See* note 54 *infra* and accompanying text.

partial officer of the prison with the inmate informed of the reasons for his confinement.[38]

The instant court recognized that rehabilitation is the primary goal of the penal system[39] and that fundamentally fair treatment of inmates is likely to promote such rehabilitation.[40] The effect of fair hearing procedures is defeated where vague and arbitrary rules[41] "breed contempt of the law rather than respect for . . . it."[42] Therefore, to strengthen the fundamental fairness of the discipline system the court required that rules of proscribed conduct and penalties for their violation be written and communicated to those required to conform.[43] As an additional safeguard of the fair hearing requirement the court insured that statements made in prison defense cannot be used against the declarant in a later criminal prosecution.[44]

The instant case is not only the first Florida decision of comprehensive scope in this area, but it represents one of the most comprehensive yet decided by any court.[45] Importantly, it seeks to define the limits of due process in the prison context,[46] provides clear guidelines for prison administrators, and considers the possible repercussions outside the prison.

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38. 357 F. Supp. at 1092. This officer must have the authority to reverse the decision to place the inmate in administrative segregation. *Id.*

39. *Id.* at 1096. *See generally* Comment, *A Jam in the Revolving Door: A Prisoner's Right to Rehabilitation*, 60 GEO. L.J. 225 (1971). The Division of Corrections espouses this goal. Florida Division of Corrections-Inmate Treatment Directive No. 5, at 1 (1972) [hereinafter cited as Inmate Treatment Directive].

40. 357 F. Supp. at 1096. *See* Millemann, *Prison Disciplinary Hearings and Procedural Due Process — The Requirement of a Full Administrative Hearing*, 31 MD. L. REV. 27 (1971).

41. ADMINISTRATIVE RULES, *supra* note 29, ch. 10 B-3.06(2), lists punishments that may be administered for violation of prison rules. There is no corresponding list of the misconducts to which these punishments apply. Thus, there is an unlimited amount of discretion placed in prison officials. Inmate Treatment Directive, *supra* note 41, at 11, does list the reasons for which an inmate may be placed in administrative segregation. Among those reasons is: "(H) other reasons," a term that the instant court found meaningless. 357 F. Supp. at 1082 n.58. For a discussion of the operation of similar rules in other prison systems and the problems thereby created, see Harvard Study, *supra* note 37, at 212-17. *See also* Kraft, *supra* note 37, at 21-50.

42. Jackson v. Godwin, 400 F.2d 529, 535 (5th Cir. 1968).

43. 357 F. Supp. at 1090-91. The court gives several bases for this decision: "First, prior notice of behavioral standards enhances the inmate's sense of fair play and thus contributes to rehabilitation; second, equal treatment of similar conduct of offending inmates by the prison authority will be more certain; third, clear rules may tend to decrease dissatisfaction with the disciplinary processes to such an extent that litigation may decrease." *Id. See* Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).

44. 357 F. Supp at 1093. Only one other court, the California court in Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971), *appeal docketed*, No. 71-2357 (9th Cir. Aug. 30, 1971), has dealt with the problem of being prosecuted after disciplinary proceedings. The court in that case chose to remedy it by requiring *Miranda* warnings and an absolute right to counsel. *Accord*, Carter v. McGinnis, 351 F. Supp. 787 (W.D.N.Y. 1972). *See generally* Turner & Daniel, *Miranda in Prison: The Dilemma of Prison Discipline and Intramural Crime*, 21 BUFFALO L. REV. 759 (1972).

45. 357 F. Supp. at 1094. *See* cases cited notes 16-18 *supra*.

46. The decision looks not only at the hearing but also to the rules upon which it is based.

In expanding procedural due process rights of prisoners, however, the court has limited its decision in several ways. By allowing counsel only to financially able inmates and affording counsel substitutes to other inmates, the court draws an unconstitutional line between rich and poor thus creating an equal protection problem.[47] Further, although recognizing the doubtful impartiality of prison officials, the court does not preclude their use on the disciplinary committee.[48] Most difficult to support is the court's distinction between punitive and administrative segregation and the extent of due process afforded. While the prisoner is subjected to more severe physical conditions and deprived of more privileges in punitive segregation than in administrative segregation, they are both forms of solitary confinement.[49] Authorities suggest that it is not the physical conditions and loss of other privileges but rather the mental anguish resulting from prolonged isolation from prison society that is the true punishment.[50] The distinction between the two forms of solitary confinement made here somewhat dilutes the comprehensive scope of the opinion and unjustly limits the number of prisoners actually benefited.

The necessity of judicial intervention in the instant case raises an interesting question of state law. The Florida Legislature has recognized the necessity of procedural safeguards for persons affected by its administrative agencies in the Administrative Procedure Act (APA).[51] The Act covers all agencies except those expressly excluded[52] and provides detailed hearing procedures.[53] Further,

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47. Argersinger v. Hamlin, 401 U.S. 908 (1972) (indigents right to court-appointed counsel in a misdemeanor trial); Cottle v. Wainwright, 338 F. Supp. 819 (M.D. Fla. 1972) (indigents right to court appointed counsel in a parole revocation proceeding). *See* Millemann, *supra* note 40, at 55-57.

48. 357 F. Supp. at 1085. Clearly, to insure that discipline proceedings are impartial a hearing officer should be required from outside the prison. *See* Bundy v. Cannon, 328 F. Supp. 165, 174 (D. Md. 1971).

49. 357 F. Supp. at 1073-74. *See* notes 7, 8 *supra*.

50. *See* Singer, *Confining Solitary Confinement: Constitutional Arguments for a "New Penology,"* 56 IOWA L. REV. 1251, 1273 (1971). *See generally* Note, *Solitary Confinement-Punishment Within the Letter of the Law, or Psychological Torture?*, 1972 WIS. L. REV. 223. Solitary confinement is the second most common form of punishment in prison today. Jacob, *Prison Discipline and Inmate Rights*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 227, 234 n.30 (1970).

51. The purpose of the act is "to establish minimum requirements for the adjudication of any party's legal rights, duties, privileges or immunities by state agencies." FLA. STAT. §120.20 (1971).

52. FLA. STAT. §120.21 (1971). Definitions provide in part: "Agency means the governing body of any state board, commission or department, or state officer who constitutes the agency authorized by law to adjudicate any party's legal rights, duties, privileges or immunities *except* the legislature, courts, governor, and the department of revenue." (Emphasis added.) This definition has been broadly interpreted to define a county board of education as a state agency within the scope of the act when the board is proceeding in a disciplinary action against a student, Canney v. Board of Pub. Instruction, 222 So. 2d 803 (1st D.C.A. Fla. 1969); and when a board is conducting a hearing to determine question of suspension or dismissal of teachers, Board of Pub. Instruction v. Allen, 219 So. 2d 430 (Fla. 1968). A similar broad interpretation of the Act would make it applicable to the Division of Corrections when it is acting to discipline inmates.

it provides for judicial review of final orders entered by administrative agencies in the performance of these quasi-judicial functions.[54] The Division of Corrections, the state agency that establishes rules and procedures to be followed in all inmate disciplinary cases,[55] is not expressly excluded from the Florida Procedure Act. Since prison disciplinary hearings involve the adjudication of inmates' rights and privileges,[56] such proceedings ostensibly would be "administrative adjudication proceedings" under the terms of the Act.[57]

The Division of Corrections, however, has never been considered within the Florida APA.[58] Perhaps the failure to apply the Florida APA to the Division is based on the view that its functions are either quasi-executive[59] or judicial[60] and thereby outside the coverage of the Act. Prison disciplinary proceedings cannot be termed quasi-executive because, by definition, a quasi-executive function is a discretionary exercise of statutory power in which no rights and privileges are adjudicated.[61] Furthermore, rather than a judicial

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53. FLA. STAT. §120.22 (1971).

54. FLA. STAT. §120.28 (1971). *See* Bay Nat'l Bank & Trust Co. v. Dickinson, 229 So. 2d 302 (1st D.C.A. Fla. 1969). *See also* text accompanying note 35 *supra.*

55. FLA. STAT. §945.21 (1971) provides in part: "(1) The Division is authorized to adopt and promulgate regulations governing the administration of the correctional system and the operation of the Division. In addition to specific subjects otherwise provided for herein, regulations of the Division may relate to: (a) Conduct to be observed by prisoners; (b) Punishment of prisoners; (c) Gain time for good conduct of, release payments to, and release transportation of, inmates." *See* ADMINISTRATIVE RULES, *supra* note 29; Inmate Treatment Directive, *supra* note 39 and accompanying text; note 41 *supra* for a discussion of the present provisions of these rules.

56. *See* note 25 *supra.*

57. FLA. STAT. §120.22 (1971).

58. Although this question has never been judicially determined, the Florida supreme court in Nicholas v. Wainwright, 152 So. 2d 458 (Fla. 1963), implied that the APA had at least some applicability in the prison context. In *Nicholas* a prisoner petitioned for habeas corpus questioning the legality of his detention contending that his gain time had been illegally cancelled by the Deputy Director of the Board of Commissioners of State Institutions. FLA. STAT. §944.28 (1971) provides that an inmate may be released for good behavior prior to the termination of his sentence upon recommendation of the Director. The Deputy Director withheld his recommendation. The court denied the writ and held it was within the Deputy Director's power as a hearing officer under the APA, FLA. STAT. ch. 120 (1971), to withhold a recommendation for prisoner's release. The instant court makes an advised reference that prison disciplinary hearings must be conducted in accordance with circumstances of other administrative hearings. 357 F. Supp. at 1083. The Florida APA provides the available standard for agencies in conducting administrative hearings. This reference implies a consideration of its application by the court. Affirmed in a telephone conversation with Scott Lovejoy, Clerk for Judge Charles Scott, the judge in the instant case, on Feb. 20, 1973.

59. *See* Bay Nat'l Bank & Trust Co. v. Dickinson, 229 So. 2d 302, (1st D.C.A. Fla. 1969).

60. *See In re* Advisory Opinion to the Governor, 223 So. 2d 35, 39 (Fla. 1969), wherein the Florida supreme court advised the Governor that the Public Service Commission had judicial powers connected with the function of its office pursuant to FLA. CONST. art. V, §1, which provided that "judicial power of the State of Florida is vested in a supreme court . . . and such other courts . . . or commissions as the legislature may from time to time ordain and establish." Article V has since been amended to no longer allow judicial power to be vested in commissions or administrative agencies. *See* note 62 *infra* and accompanying text.

61. Bay Nat'l Bank & Trust Co. v. Dickinson, 229 So. 2d 302, 306 (1st D.C.A. Fla. 1969).

function, this adjudication of rights must be viewed as quasi-judicial because judicial power may no longer be constitutionally vested in an administrative agency.[62] Therefore, if prison discipline proceedings are viewed as quasi-judicial, they fall squarely within the purview of the Florida APA.[63]

Although it may be argued that it is neither feasible nor practical to bring the prison system within the Act,[64] the Florida supreme court has discounted this argument in holding that fundamental constitutional rights may not be sacrificed in the interest of administrative and fiscal efficiency.[65] Courts are finding traditional reasons for non-interference in prison administration no longer justifiable[66] and are recognizing prisoners' rights[67] and expanding the application of procedural due process into post-conviction areas.[68]

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62. FLA. CONST. art. V, §1 *was amended* in 1973 to provide: "Commissions established by law, or administrative agencies may be granted quasi-judicial power in matters connected with the functions of their offices." Article V no longer allows judicial power to be vested in administrative agencies. Consequently, it is no longer possible for an agency to exercise a judicial function and thereby be excluded from coverage by the APA.

63. Bay Nat'l Bank & Trust Co. v. Dickinson, 229 So. 2d 302, 306 (1st D.C.A. Fla. 1969) (APA specifically applies to agencies in the exercise of quasi-judicial function).

64. Millemann, *supra* note 40, at 44-47. Prison administrators argue that it would complicate administrative procedures, greatly increase cost and constitute a security risk. Florida Corrections Director, Louis Wainwright, raised this argument in calling the Prisoner's Rights Bill an impossibility. Gainesville (Fla.) Sun, Jan. 24, 1973, §B at 8, col. 5. *See also* St. Petersburg (Fla.) Times, March 20, 1973, §B at 2, col. 1, where Attorney General Robert Shevin asserts that administrative havoc would result from implementation of the decision.

65. Goldberg v. Kelly, 397 U.S. 254, 266 (1970).

66. *See* notes 14-18 *supra* and accompanying text. Noting the judicial trend, similar traditional reasons can no longer justify the failure to apply the Administrative Procedure Act to the Division of Corrections. *See* Jacob, *supra* note 50, at 259-61. Authorities have recognized that court orders no matter how extensive are not as effective as legislation in assuring prisoners' rights. *See* Harvard Study, *supra* note 37, at 227-28. There is a significant need for adequate legislation in the corrections field. *See* Rubin, *Needed—New Legislation in Corrections*, 17 CRIME & DELINQUENCY 392 (1971). The APA provides an already enacted statute the application of which could fill part of the need for legislation in the prison area. Arguably, some modifications of the APA might be necessary in the prison context. The American Bar Association has proposed an amendment to the Federal Administrative Procedure Act, 5 U.S.C. 555 (1970), to provide for minimal standards for informal adjudications in accordance with the fair hearing notions of Goldberg v. Kelly, 397 U.S. 254 (1970). This would establish a two-level hearing procedure thereby making the APA more flexible. Prison discipline proceedings would fall within the second level. *The 12 ABA Recommendations for Improved Procedures for Federal Agencies*, 24 AD. L. REV. 371, 408-09 (1972). Professor Harold Levinson, of the University of Florida College of Law, would recommend that the Florida APA be similarly amended to provide more flexibility. Conversation with Professor Harold Levinson, at University of Florida, Feb. 20, 1973.

67. *See, e.g.*, Johnson v. Avery, 393 U.S. 483 (1969); Cooper v. Pate, 378 U.S. 546 (1964); Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971), *appeal docketed*, No. 71-2357 (9th Cir., Aug. 30, 1971); Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd per curiam sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971); Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968).

68. *See* notes 23, 24 *supra* and accompanying text.

While the instant case must face the appeal process,[69] it remains notable for recognizing the need for uniform prison discipline and general prison reform and for establishing such comprehensive guidelines. Nevertheless, to paraphrase the New York State Commission on Attica, dramatic innovation is necessary if this state is to take seriously its stated commitment to rehabilitation.[70] Although decisions such as the one in the instant case are the first step toward fulfilling that commitment,[71] the courts cannot bear the sole responsibility for prison reform. The legislature must respond with statutes establishing better procedures for the determination of prisoners' rights and make existing procedures applicable in the prison context.

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69. Gainesville (Fla.) Sun, Jan. 24, 1973, §B at 8.

70. ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA at xvi (1972).

71. Cohen, *supra* note 25, at 884.