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Prisoners' Rights: Due Process and Transfers to Mental Institutions

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PRISONERS' RIGHTS: DUE PROCESS AND TRANSFERS TO MENTAL INSTITUTIONS

Vitek v. Jones, 100 S. Ct. 1254 (1980)*

Appellee Jones was convicted of robbery and sentenced to a term of three to nine years at a Nebraska state prison.[1] Pursuant to a Nebraska correctional statute,[2] appellee was involuntarily transferred to the security unit of a state mental institution[3] without notice or opportunity to oppose the transfer.[4] Appellee subsequently intervened in a civil rights action[5] charging that the statute deprived him of a liability interest in violation of the due process clause[6] of the

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1. 100 S. Ct. 1254, 1259 (1980). The 22-year old prisoner was sentenced to the Nebraska Penal and Correctional Complex on May 31, 1974. *Id.*

2. NEB. REV. STAT. §83-180 (Reissue 1976) provides in part:

"(1) When a physician designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical disease or defect, or when a physician or psychologist designated by the director finds that a pesron committed to the department suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available."

"(2) When the physician or psychologist designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical or mental disease or defect which in his opinion cannot be properly treated in any facility or institution in the Department of Public Institutions, the director may arrange for his transfer for treatment to a hospital or psychiatric facility outside the department."

3. After serving part of his sentence, appellee Jones was transferred to the penitentiary hospital. Two days later he was put in solitary confinement at the prison's adjustment center. While in solitary confinement appellee set fire to his mattress and seriously burned himself. He was sent to the burn unit of a private hospital and on his release was transferred to the Lincoln Regional Center, a state mental institution. 100 S. Ct. at 1259. It is not clear whether Jones was transferred involuntarily. When his examining psychiatrist asked him whether he wanted to be transferred, Jones said he did, but was offered no independent advice. It is also not clear whether he was able to knowingly consent to his transfer. Miller v. Vitek, 437 F. Supp. 569, 571 n.3 (D. Neb. 1977).

4. 100 S. Ct. at 1259.

5. The civil rights action was brought pursuant to 42 U.S.C. §1983. The suit was originally brought as a class action by Charles Miller on behalf of all persons confined in the Lincoln Regional Center Mental Facility. Miller v. Vitek, 437 F. Supp. at 571. The class action was later decertified and Jones and two others were joined as individual plaintiff-intervenors. *Id.* at 571 n.1. The District Court subsequently dismissed the claims of all intervenors except Jones. 100 S. Ct. at 1259 & n.3.

6. U.S. CONST. amend. XIV, §1. The due process clause provides in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." What due process of law embraces "varies with the subject-matter and the necessities of the situation." Moyer v. Peabody, 212 U.S. 78, 84 (1909). However, due process has typically required some sort of notice and hearing before a person can be deprived of liberty or property. Boddie v. Connecticut, 401 U.S. 371, 377-78 (1971).

fourteenth amendment.[7] The three-judge district court[8] declared the statute unconstitutional as applied to appellee, holding that appellee was entitled to certain minimum due process protections before transfer.[9] On appeal, the Supreme Court affirmed and HELD, the due process clause requires that prison officials follow prescribed minimum procedures before transferring prisoners to mental institutions.[10]

Traditionally, federal courts had maintained a policy of not intervening in state prison procedures.[11] The civil rights movement of the 1960s fostered

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7. 100 S. Ct. at 1259.

8. The three-judge district court was convened pursuant to 28 U.S.C. §2281, prior to its repeal by Pub. L. No. 94-381, 90 Stat. 1119. 100 S. Ct. at 1259 n.4.

9. The procedures prescribed by the district court were:

"A. Written notice to the prisoner that a transfer to a mental hospital is being considered;

"B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;

"C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination;

"D. An independent decisionmaker;

"E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;

"F. Availability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and

"G. Effective and timely notice of all the foregoing rights."

Id. at 1264.

10. 100 S. Ct. at 1262. After the district court judgment in Miller v. Vitek, 437 F. Supp. 569 (D. Neb. 1977), state prison administrators appealed to the United States Supreme Court, during which time appellee was granted a limited parole to receive treatment at a veterans hospital. In light of this, the Supreme Court remanded the case to the district court for consideration of mootness. Vitek v. Miller, 436 U.S. 407 (1978). The district court found that the case was not moot because Jones was still threatened with transfer to a state mental institution, and reinstated its judgment. Meanwhile, Jones violated his parole and was returned to the prison complex. On appeal, the Supreme Court agreed that the case was not moot inasmuch as Jones remained subject to the transfer procedures he challenged. 100 S. Ct. at 1260 n.5.

Chief Justice Burger and Justices Stewart and Rehnquist dissented on the ground that the case was moot since appellee was returned to the state prison. *Id.* at 1267-68. Justice Blackmun dissented on the ground of ripeness because the challenged procedures had not been reapplied against appellee. *Id.* at 1269.

11. The judiciary's non-intervention policy stems from three interrelated theories. First, society has historically demanded retribution from its prisoners, and expects them to receive harsh treatment. In Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871), the court stated: "[The prisoner] 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." *See* Price v. Johnston, 334 U.S. 266, 285 (1948). *But see* Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945). For further discussion of retribution—slave of state theory see Comment, *The Convict's Voice—The Fourteenth Amendment and the New Right to Establish Rights*, 58 IOWA L. REV. 1323, 1325 (1973).

Second, the judiciary is reluctant to interfere with prison objectives or internal regulations.

judicial acceptance of prisoners' rights action, although courts were still reluctant to review professional decisions concerning the mental health of prisoners.[12] The leading exception to judicial avoidance of mental health litigation was *Baxstrom v. Herold*.[13] In Baxstrom, an inmate nearing the end of his prison term was certified insane by a prison physician, transferred to a state mental hospital, and civilly committed under a New York correctional statute.[14] The Court held that the equal protection clause of the fourteenth amendment required that a prisoner at the end of his prison term be furnished the same commitment safeguards made available to non-prisoners.[15]

Courts feel they lack the expertise to supervise state prison systems. Burns v. Swenson, 430 F.2d 771, 775-76 (8th Cir. 1970), *cert. denied*, 404 U.S. 1062 (1972); Long v. Parker, 390 F.2d 816, 820 (3d Cir. 1968); Banning v. Looney, 213 F.2d 771, 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954). *See generally* Note, *Judicial Intervention in Prison Administration*, 9 WM. & MARY L. REV. 178 (1967).

Third, federal courts consider review of the federal prisons beyond their jurisdiction because of the separation of powers of the judicial and executive branches of government. Under 18 U.S.C. §4001, Congress specifically granted authority to administer prison systems, to the Attorney General; hence the judiciary is ill-disposed to adjudicate executive decisions. *See* Coppinger v. Townsend, 398 F.2d 392, 393 (10th Cir. 1968); United States v. Marchese, 341 F.2d 782, 789 (9th Cir.), *cert. denied*, 382 U.S. 817 (1965); Dayton v. McGranery, 201 F.2d 711, 712-13 (D.C. Cir. 1953); Dayton v. Hunter, 176 F.2d 108, 109 (10th Cir.), *cert. denied*, 338 U.S. 888 (1949). *See generally* Gallington, *Prison Disciplinary Decisions*, 60 J. CRIM. L.C. & P.S. 152 (1969); Note, *Criminal Law — Prisons — Prisoners Subject to Certain Serious Punishments Enjoy a Fourteenth Amendment Guarantee of a Hearing with Minimum Due Process Safeguards*, 50 TEX L. REV. 155 (1971).

For a comprehensive discussion of the three theories see Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963); 3 R. Sanders, H. Kerper, G. Killings & J. Watkins, PRISONERS' FIRST AMENDMENT RIGHTS WITHIN THE INSTITUTION (1971).

12. The Court's philosophical shift from its reluctance to adjudicate prisoners' rights stems not only from the liberal tone of the Warren Court, but from the racial unrest of the 1960s. New ideas about rehabilitation programs, incarceration, and the sociological roots of criminal behavior influenced the change. Also, the nature of the inmate population was altered when convicted Vietnam War draft resisters were jailed and they became increasingly vocal about poor prison conditions and prisoner treatment. Judges were hard-pressed to ignore the anger of the convicts when prison officials gave inadequate responses to charges of prison mistreatment. Judges were reluctant to interfere with mental hospitals, in part because the courts were more willing to supervise wardens than psychiatrists, and because asylum patients were less litigious than inmates. Rothman, *Decarcerating Prisoners and Patients*, 1 CIV. LIB. REV. 1 (1973), *reprinted in* 1 A. BRONSTEIN & P. HIRSCHKOP, PRISONERS' RIGHTS 1979 (1979).

13. 383 U.S. 107 (1966).

14. *Id.* at 108. In 1959, Baxstrom was convicted of second-degree assault and sentenced to a two and one-half to three year term. He was civilly committed on June 1, 1961, under §384 of the New York Correctional Law, McKinney's Consol. Laws, c. 43. *Id.* Until 1966, when *Baxstrom* was decided, prisoner Baxstrom involuntarily remained at Dannemora State Hospital for the Criminally Insane even though his original prison term had expired December 18, 1961. *Id.* at 109.

15. *Id.* at 114-15. Section 74 of the New York Mental Hygiene Law, under which citizens are civilly committed, provides for a *de novo* review by jury on the question of sanity. New York Mental Hygiene Law §74 (Consol.). Section 85 of the New York Mental Hygiene Law provides for a hearing to determine whether an individual was so mentally ill as to require retention by the Department of Corrections. *Id.* §85. The correctional law under which Bax-

While limited in scope, *Baxstrom* indicated the Supreme Court's willingness to allow prisoner access to the courts and endorsed an equal protection analysis.[16] Significantly, *Baxstrom* set no minimum commitment standards.[17] Lower courts expanded the *Baxstrom* rationale, broadly applying the equal protection approach to prisoners who were indefinitely transferred to mental institutions before reaching the end of their prison terms.[18]

Despite the common element of state-enforced incarceration, prisoners' rights and mental health case law of the 1970s developed independently.[19] Prisoners' rights actions shifted from the equal protection approach of *Baxstrom* to the due process-liberty interest[20] approach of *Morrissey v. Brewer*.[21]

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strom was committed provided neither of these procedures. The Supreme Court held that although equal protection does not require that the civilly and criminally insane be treated identically, there must be some reasonable purpose for making a distinction. The Court concluded that there was no reasonable purpose for distinguishing a prisoner at the end of his prison term from any other person for purposes of granting jury reviews to decide the issue of mental illness. 383 U.S. at 111. Consequently, Baxstrom was entitled to the due process procedures allowed for non-prisoners, yet the Court did not require the state to follow any specific procedures. *Id.* at 115. *See generally,* Comment, *Equal Protection and Commitment of the Insane in Wisconsin,* 50 MARQ. L. REV. 120 (1966). Perhaps *Baxstrom's* greatest impact was that 992 men at the Dannemora State Mental Hospital were removed to civil mental hospitals. Curiously, the transfers brought few ill effects, and after one year only seven inmates had to be returned to the hospital. The lower courts did not miss the obvious implications of the *Baxstrom* experiment, and judges were encouraged to question psychiatric evaluations. Rothman, *supra* note 12, at 46.

16. *See* 383 U.S. at 113.

17. See note 15 *supra*. The *Baxstrom* court might have established minimum standards on the ground that the prisoner was deprived of liberty without due process of law. However, there was a large body of case law disfavoring the due process approach for prison-to-hospital transfers. *E.g.,* Darey v. Sandritter, 355 F.2d 22, 23 (9th Cir. 1965); Higgins v. United States, 205 F.2d 650, 653 (9th Cir.), *cert. dismissed,* 346 U.S. 870 (1953); Wells v. Attorney General, 201 F.2d 556, 559 (10th Cir. 1953).

18. In United States *ex. rel.* Schuster v. Herold, 410 F.2d 1071 (2d Cir.), *cert. denied,* 396 U. S. 847 (1969), convict Roy Schuster was transferred from a state prison to the Dannemora State Mental Institution after claiming that prison officials were corrupt. *Id.* at 1073. Schuster was transferred on the recommendation of one prison physician and was given neither notice nor proper hearing. Relying on *Baxstrom,* the federal court held that Schuster's 27-year stay in Dannemora violated the equal protection clause of the fourteenth amendment because the state failed to provide substantially the same hospitalization standards for ordinary citizens and prisoners who had not reached the end of their sentences. *Id.* at 1083-84.

Schuster was instrumental in holding that hospitalization resulted in greater deprivation than imprisonment. See text accompanying note 56 *infra*. Also, the federal court noted that through transfer Schuster suffered a variety of hardships, indignities, and emotional and mental agonies that would in later cases be called "stigmatizing consequences." 410 F.2d 1078. See text accompanying notes 57-60. *infra. See generally* Comment, *Equal Protection and Prison-to-Hospital Transfers: United States ex rel. Schuster v. Herold,* 118 U. PA. L. REV. 410 (1970); Comment, *Constitutional Law—New York Procedure for Committment of Prisoners Who Become Mentally Ill While Serving Sentence Violates the Equal Protection Clause,* 38 FORDHAM L. REV. 323 (1969). *See also* Chesney v. Adams, 377 F. Supp. 887 (D. Conn. 1974), *aff'd sub nom.,* Chesney v. Manson, 508 F.2d 836 (2d Cir. 1975).

19. Rothman, *supra* note 12, at 43-45.

20. "Liberty" in its broadest sense has been regarded as an inalienable right permeating the fundamental precepts of humanity. D. SANDIFER & L. SCHEMAN, THE FOUNDATIONS OF

In *Morrissey*, the complainant's parole was revoked, allegedly without adequate notice or hearing.[22] The Court found implicit in the state's rehabilitative purpose for parole the expectation that parole would not be revoked unless release order conditions were violated.[23] The state's voluntary creation of this expectation granted the parolee an entitlement[24] to a liberty interest protected by the due process clause.[25] In selecting appropriate procedural protections, the Court examined the important nature of the liberty interest involved,[26] de-

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FREEDOM: THE INTERRELATIONSHIP BETWEEN DEMOCRACY AND HUMAN RIGHTS 44-46 (1966); R. STOREY, OUR UNALIENABLE RIGHTS 4-5 (1965).

However, in Meyer v. Nebraska, 262 U.S. 390 (1923), the Supreme Court noted that the due process liberty interest: "denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 399. The Supreme Court has expanded *Meyer*, finding other liberty interests in a variety of situations. *Cf.* Roe v. Wade, 410 U.S. 113 (1973) (women have liberty interest in seeking abortions under appropriate circumstances).

The Supreme Court has not thoroughly defined the scope of liberty involved in the new theory of statutory entitlements. See note 24 *infra*. In fact, the Court has not sufficiently explained why an entitlement constitutes a liberty interest triggering procedural protections at all. Note, *Statutory Entitlement and the Concept of Property*, 86 YALE L.J. 695, 699 (1977). For a possible explanation see Van Alstyne, *Cracks in the "New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 476-480 (1977).

The concept of liberty is also extensively treated in Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977); Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

21. 408 U.S. 471 (1972).

22. Morrissey's parole was revoked after the Iowa Board of Parole reviewed the parole officer's report charging Morrissey with parole violations. Morrissey apparently did not deny violating his parole conditions. *Id.* at 472-73. *See generally,* Note, *Implications of Morrissey v. Brewer for Prison Disciplinary Hearings in Indiana*, 49 IND. L.J. 306 (1974).

23. The *Morrissey* Court noted that "rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed." 408 U.S. at 477.

24. The entitlement theory was first advanced by Professor Charles Reich, who regarded certain governmental benefits, such as subsidies for farmers and social security, as essential property rights of entitlements rather than gratuitous charities. Reich, *The New Property*, 73 YALE L.J. 733, 737 (1964). The Supreme Court used Reich's postulates to theorize that a citizen might have a property interest in a statutorily-authorized benefit that would fall within the "property" language of the due process clause. Goldberg v. Kelly, 397 U.S. 254, 261-62 n.8 (1970) (statutory entitlement to welfare benefits constituted property rights). See Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J. 89 (1974).

Although the Court has used Reich's theory, the Court has not explicitly defined "statutory entitlement." However, one author has theorized that an entitlement exists when a statute sets forth conditions under which a governmental benefit must be granted, or sets forth the only conditions under which a benefit may be denied. Note, *supra* note 20, at 696. *See generally* Arnett v. Kennedy, 416 U.S. 134 (1974); Board of Regents v. Roth, 408 U.S. 564 (1972).

25. 408 U.S. at 482. Unlike most entitlement cases, the Court did not specifically examine the wording of the statute authorizing parole to find the state-created expectation. See note 24 *supra*.

26. "The question [of whether due process requirements apply to parole revocation] is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one

ciding that the parolee's conditional freedom of action was so closely akin to the freedom possessed by ordinary citizens as to warrant stringent safeguards.[27] The Court concluded that state action could not deprive a parolee of his entitlement to liberty without notice of his parole violation, a hearing before a neutral body including disclosure of state's evidence, personal presentation and cross-examination of witnesses, and a written statement of results by the decisionmaker.[28]

The *Morrissey* Court refused to decide whether appointment of legal counsel for indigent prisoners was required.[29] However, in a similar case the following year, the Supreme Court held that legal counsel was not necessary.[30] The Court reasoned that introduction of counsel would alter the nature of the proceedings from informal hearings to adversary trials.[31] Also, a quasi-judicial hearing body might be more likely to re-incarcerate, and the added state expense of providing counsel would be significant.[32]

Prisoners have also tried to apply the *Morrissey* procedures to state revocation of good-time credits which reduce prison sentences.[33] Unlike *Morrissey*, the Court in *Wolff v. McDonald*[34] closely examined the specific wording of the

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within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." 408 U.S. at 481.

27. *Id.* at 482. The Court noted that although the parolee's freedom was restricted, he was free to lead a life radically different from confinement in prison. *Id.*

28. *Id.* at 489. Although the parolee was given the right to cross-examine, the hearing officer could refuse to allow confrontation of witnesses if he found good cause. Further, the "neutral and detached" hearing body could be a traditional parole board and did not have to include judicial officers. The Court emphasized the informality of the inquiry, observing that evidence normally inadmissible at criminal trials might be allowed at revocation hearings. *Id.*

29. *Id.* In a concurring opinion, Justice Brennan advocated allowing the parolee to retain counsel to help delineate the issues, present arguments in an orderly way, help cross-examine, and generally safeguard the parolee's interests. *Id.* at 491. Justice Douglas, dissenting in part, advocated the mandatory appointment of legal counsel to see that relevant facts were brought out and irrelevant allegations discarded. *Id.* at 498. *See generally* Van Dyke, *Parole Revocation Hearings in California: The Right to Counsel,* 59 CAL. L. REV. 1215 (1971).

30. Gagnon v. Scarpelli, 411 U.S. 778 (1973). In *Gagnon*, the Supreme Court held that a probationer also had an entitlement to *Morrissey* procedures under the *Morrissey* liberty interest rationale. *Id.* at 781-82.

31. *Id.* at 787. The *Gagnon* Court argued that if the parolee or probationer were provided with counsel, the state would also use counsel. The attorneys would make the hearings adversary proceedings which might not foster the rehabilitative needs of the parolee or probationer. The Court in essence was applying the traditional "hands-off" rule of not interfering with prison procedures without good cause. See text accompanying note 11 *supra.*

Although Justice Powell, writing for the *Gagnon* majority, did not require counsel, he stated that counsel should be provided where the probationer claims he has not violated probation conditions or where he claims that his violation was justified and the reasons are difficult to present. 411 U.S. at 790.

32. *Id.* at 788. To illustrate the enormous expense involved in requiring counsel, the *Gagnon* Court noted that in the mid-1960s there were approximately 20,000 adult felony parole revocations and 108,000 adult probation revocations every year. *Id.* at 788 n.11.

33. *Id.* at 553. Good-time credits are a statutory method by which an inmate shortens his prison sentence based on good behavior. *See also* Boddie v. Weakley, 356 F.2d 242 (4th Cir. 1966) (prisoner released because of good-time remains under parole board supervision).

34. 418 U.S. 539 (1974).

applicable statute, finding a statutory entitlement to good-time credits forfeited only by serious prisoner misconduct.[35] Given the entitlement, the state had to observe minimum due process requirements to protect the prisoner's liberty interest in retaining his credits.[36] However, the Court refused to order the full panoply of rights granted in *Morrissey* because the nature of the prisoner's loss due to denial of good-time credits was not as grievous as the loss accompanying parole termination.[37] Generally, the Court relaxed the prisoner's right to confront and cross-examine witness and have a neutral hearing body.[38] The right to legal counsel was again denied although the Court noted that illiterate and uneducated prisoners should be provided with some staff assistance.[39]

Attempting to extend prisoners' liberty rights still further, Massachusetts state prisoners in *Meachum v. Fano*[40] alleged that transfer to another prison with less favorable conditions[41] deprived them of a protected interest. In denying the claim the court stated that an interest protected under the entitlements theory must derive from the language of state statutes or the United States Constitution.[42] Because corrections officials had complete statutory discretion to

35. NEB. REV. STAT. §83-1, 107 (Cum. Supp. 1972) provided for reduction of the prison term for "good behavior and faithful performance of duties, to be forfeited upon flagrant or serious misconduct."

36. See text accompanying notes 23-25 *supra*.

37. 418 U.S. at 560-61. The Court distinguished the parolee's situation from the prisoner's situation, in that a parolee suffers an immediate loss of freedom from parole revocation, but a prisoner may not suffer an immediate loss of liberty from revocation of good-time credits. Also, the Court differentiated the parole revocation hearing from the tightly-controlled prison disciplinary hearings. Allowing too much adversariness in such controlled hearings might produce retaliatory confrontations and personal antagonisms among inmates and prison officials. *Id.* at 562.

38. Since confrontation and cross-examination might lead to havoc in the prison system by pitting inmates against each other and encouraging inmates who fear testifying to suppress information confrontation rights were left to the state's discretion. *Id.* at 568-69. Further, the Court declined to rule that the Adjustment Committee conducting the hearings was not sufficiently impartial for due process purposes. The committee was made up of the Associate Warden Custody, the Correctional Industries Superintendent and the Reception Center Director. *Id.* at 571. For a discussion of the *Wolff* procedures, see Note, *The Fourteenth Amendment and Prisons: A New Look at Due Process For Prisoners*, 26 HASTINGS L.J. 1277 (1975).

39. The Supreme Court generally followed the *Gagnon* rationale in denying appointment of legal counsel. 418 U.S. at 569-70. See notes 30-31 *supra*. Moreover, the practical problem of acquiring sufficient numbers of attorneys for the hearings weighed in favor of denying council. Where an illiterate prisoner was involved or an issue was especially complex, however an inmate should be able to seek substitute aid from inmates, staff, etc. 418 U.S. at 570. See generally Comment, *Wolff v. McDonnell: The Handwriting on the Prison Wall*, 10 NEW ENGLAND L. REV. 509 (1974).

40. 427 U.S. 215 (1976).

41. *Id.* at 222. Respondent inmates were transferred from a medium to a maximum security prison after informants told prison officials that respondents were responsible for nine serious fires at the institution. Respondents were given individual hearings to refute the charges through retained counsel. The inmates were not given transcripts or summaries of the informants' reports. *Id.* at 216-18. *See also* Note, *Involuntary Interprison Transfers of State Prisoners after* Meachum v. Fano *and* Montayne v. Haymes, 37 OHIO ST. L.J. 845, 855-59 (1976).

42. 427 U.S. at 226. See note 24 *supra*.

transfer prisoners regardless of prisoner perference, the Court found no entitlement to not be transferred.[43] Further, the mere adverse effects of a change in conditions of confinement[44] did not implicate any other interest within the "liberty" language of the due process clause.[45]

The liberty interest approach utilized in prisoners' rights cases was also applied to involuntary civil commitment controversies.[46] In the landmark decision *O'Connor v. Donaldson*,[47] the plaintiff was confined in a Florida state mental hospital for medical treatment and kept in custody for fifteen years.[48]

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43. 427 U.S. at 228-29. MASS. GEN. LAWS ANN. ch. 127, §97 (West 1974) provided that "a commissioner may transfer any sentenced prisoner from one correctional institution" to another whether or not the prisoner had misbehaved. Some lower courts had distinguished disciplinary transfers from purely administrative transfers, holdiing that minimum procedures must accompany the disciplinary transfers. *See, e.g.*, Aikens v. Lash, 514 F.2d 55 (7th Cir. 1975), *modified*, 547 F.2d 372 (1976); Stone v. Egeler, 506 F.2d 287 (6th Cir. 1974). However, other courts made no distinction between the types of transfers. *See, e.g.*, Hillen v. Director of Dept. of Social Services & Housing, 455 F.2d 510, 511 (9th Cir.), *cert. denied*, 409 U.S. 989 (1972). In *Meachum*'s companion case, Montayne v. Haymes, 427 U.S. 236 (1976), the Supreme Court made no distinction between transferring a prisoner for punitive reasons and transferring him for administrative convenience. The *Meachum* Court did not consider whether respondents were entitled to special procedures because their transfer was a punishment. In any case, the prisoners had no statutory expectation of not being transferred, hence no due process entitlement existed. *Id.* at 242-43.

44. The Court in Montayne said as long as the inmate's conditions of confinement are in accord with his sentence and do not otherwise violate the Constitution, the due process clause does not trigger judicial scrutiny of the prisoner's incarceration. 427 U.S. at 242. See text accompanying notes 59 & 60 *infra*.

45. *Id.* In deciding whether the respondent's transfer to maximum security prisons implicated a due process liberty interest, the *Meachum* Court first looked to the nature of the interest involved and whether the prisoner was subjected to conditions not within the scope of his sentence. *Id.* at 224. The Court concluded that prisoner transfers were part of the conditions of imprisonment and implied that the nature of transferring prisoners did not infringe upon any liberty interest traditionally protected by the due process clause. *Id.* at 224-25. See note 20 *supra*. The Court then found there was no entitlement to preventing transfer and concluded no liberty right existed. *Id.* at 228-29. See text accompanying notes 42-43 *supra*.

In an outraged dissent, Justice Stevens criticized the majority's conceptual framework of liberty. Stevens claimed the majority recognized no liberty interest at all unless it had its roots in the Court's interpretation of Constitution or state law. Justice Stevens rejected this narrow view of liberty, stating that the liberty interest which the due process clause protects was a broader right not limited by the Bill of Rights or the sovereign states. See note 20 *supra*. Rather, liberty was one of the cardinal, inalienable rights with which all people are endowed by their Creator. *Id.* at 229-30. Notice, however, that the majority was referring to a liberty interest stemming from a potential entitlement, whereas the dissent was referring to a historic concept of liberty distinct from the entitlements doctrine. See notes 82-86 and accompanying text, *infra*.

46. *See, e.g.*, Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); *In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972). *But see* Humphrey v. Cady, 405 U.S. 504 (1972) (involuntary commitment is a massive curtailment of liberty).

47. 422 U.S. 563 (1975).

48. In 1957, plaintiff Donaldson was committed on the petition of his father and after a brief hearing before a judge. Donaldson was subsequently taken to the Florida State Hospital at Chattahoochee and diagnosed as a paranoid schizophrenic. The committing judge told Donaldson he was being committed "for a few weeks" to "take some of this new medication" after which the judge was certain plaintiff would be released. Donaldson was not released

Frequent requests for plaintiff's release were denied, although the patient was neither dangerous nor receiving curative care.[49] A unanimous Court held that the fundamental right to liberty prohibited the state from confining a nondangerous person capable of surviving safely in freedom.[50] The Court apparently equated his liberty interest with a broadly conceived freedom from unnecessary restraint, rather than the narrower *Meachum* interest drawn solely from specific statutory or constitutional language.[51]

The instant case meshed the converging rationales of the prisoners' rights and involuntary hospitalization decisions. The Court found an objective statutory expectation that a prisoner would not be transferred to a mental hospital without a showing of mental disease or defect.[52] Relying on *Morrissey* and *Wolff*, the Court stated that appellee's expectation entitled appellee to a liberty interest protected by due process procedures.[53] The Court distinguished *Meachum* from the instant case, noting that the prisoners in *Meachum* had no such statutory expectation of not being transferred.[54]

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until after suit was instituted in 1971. *Id.* at 564-65. *See generally* Comment, O'Connor v. Donaldson: *A Right to Liberty for the Nondangerous Mentally Ill*, 3 OHIO N. U. L. REV. 550 (1975).

49. Donaldson, 50 years old at the time of commitment, wrote letters to the press and to public officials in an effort to obtain his release. He also brought 15 separate petitions for a writ of habeas corpus in the state and federal courts. Comment, O'Connor v. Donaldson: *Involuntary Civil Commitment and The Right to Treatment*, 7 COLUM. HUMAN RIGHTS L. REV. 573, 576 (1975). Further, representatives from Helping Hands, a half-way house for mental patients, offered to give Donaldson closer attention than the hospital could provide, yet Superintendent O'Conner refused to release Donaldson to their care. 422 U.S. at 568-69.

The fifth Circuit Court of Appeals acknowledged Donaldson's constitutional right to receive such medical treatment as would give him a reasonable opportunity to improve his mental condition. Donaldson v. O'Connor, 493 F.2d 507, 520 (5th Cir. 1977). Other federal courts have recognized a similar right to treatment upon confinement. *See, e.g.*, Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part, vacated in part*, 550 F.2d 1122 (8th Cir. 1977); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd. sub nom*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). The Supreme Court in *O'Connor* declined to decide whether dangerous mentally ill persons had a right to treatment or whether nondangerous persons could be confined for medical attention. 422 U.S. at 573. The right to treatment controversy is discussed in Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960); Schneider, *Civil Commitment of the Mentally Ill*, 58 A.B.A.J. 1059 (1972).

50. 422 U.S. at 573. Simply because a person is "mentally ill" does not mean the state may lock him up against his will if he is not dangerous and can live safely outside of a mental institution. *Id.* at 575. With this proviso, the Court left to the states the decision to determine whether, when and by what procedures a mentally ill person might be confined. *Id.* at 573. *See In re* Beverly, 342 So. 2d 481 (Fla. 1977) (upholding commitment procedures based on *O'Conner* analysis). *See generally*, Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1293-95 (1966).

51. "As we view it, this case raises a single, relatively simple, but nonetheless important question concerning every man's constitutional right to liberty." 422 U.S. at 573. The Supreme Court evidently was referring to the historic right to freedom protected by the due process clause, rather than the liberty interest triggered by the entitlements doctrine. See text accompanying note 85 *infra*.

52. 100 S. Ct. at 1262. See text accompanying notes 87-89 *infra*.

53. *Id.*

54. 100 S. Ct. at 1261-62. See text accompanying notes 42-43 *supra*. Justice White did not

The instant Court also found that regardless of statutory entitlement, the prisoner retained a general liberty interest to which procedural safeguards attached.[55] Citing *O'Connor*, the majority recognized that involuntary hospitalization of any individual resulted in a massive deprivation of liberty which outweighed the loss of freedom following imprisonment.[56] Additionally, involuntary hospitalization might cause adverse, stigmatizing consequences, particularly where the individual was subjected to behavior modification treatment.[57] Ordinary citizens could not be exposed to such consequences absent procedural safeguards, and a convicted felon likewise deserved due process protections.[58] Further, all felons retained a right to freedom from conditions outside the range of restrictions contemplated by a prison term.[59] Because involuntary hospitali-

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retreat from his majority opinion in *Meachum*. Justice White specifically found that the *Meachum* prisoners had no right to be free from transfer in the absence of an entitlement, but he did not decide whether prisoner transfers merited due process protections when there was an entitlement. 100 S. Ct. at 1261.

55. *Id.* at 1263.

56. *Id.* The *Wolff* court acknowledged that the loss of liberty resulting from parole revocation was greater than the loss attending denial of good-time credits. See text accompanying notes 34-37 *supra*. Justice White added that the loss of freedom associated with being in a mental institution was even greater than reincarceration or denial of good-time credits. 100 S. Ct. at 1264.

57. *Id.* The Court has recognized that being in a mental institution could have "stigmatizing" effects. In Addington v. Texas, 441 U.S. 418 (1979), Chief Justice Burger noted that involuntary commitment might have such a significant social impact on an individual that it is better for a mentally ill person to "go free" than to commit a sane person. *Id.* at 429. In Parham v. J.R., 442 U.S. 584 (1979) Justice Stewart, in a concurring opinion, recognized that institutionalized mental patients live in unnatural surroundings, are subject to intrusive treatment which may violate their right to bodily integrity, and are branded as sick and abnormal, often even after release. *Id.* at 626.

Inmates might also be adversely affected by compulsory mental health treatment. Particularly, inmates transferred to the Lincoln Regional Center frequently had to participate in behavior modification programs and take prescribed medicine. Miller v. Vitek, 437 F. Supp. 569, 572 (D. Neb. 1977). By acknowledging that compelled treatment might infringe upon protected liberty interests the instant court reflected the growing constitutional criticisms of forced drug therapy, conditioning, psychosurgery, and behavior control. *See also* Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973) (behavioral modification treatment which involved injecting mental patients with vomit-inducing drug as punishment for misbehavior constitutes cruel and unusual punishment). For critical discussions of compelled treatment see Note, *The Right Against Treatment: Behavior Medication and the Involuntarily Committed*, 23 CATH. U. L. REV. 774 (1974); Comment, *Forced Drug Modification of Involuntarily Committed Mental Patients*, 20 ST. LOUIS U. L.J. 100 (1975).

59. 100 S. Ct. at 1263. The Court's conclusion that convicted felons deserve the same treatment as ordinary citizens is reminiscent of the Court's equal protection approach in *Baxstrom*. See text accompanying notes 13-18 *supra*. The Court could have used the equal protection approach in the instant case. However, at the time appellee was transferred to the mental hospital, the Nebraska civil commitment statute was also constitutionally defective. Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975). Moreover, the Nebraska district court noted that even under an equal protection approach, the ultimate question of whether prisoners and non-prisoners should receive different treatment would involve weighing due process factors. Miller v. Vitek, 437 F. Supp. 569, 575 (D. Neb. 1977).

59. 100 S. Ct. at 1263.

zation was not within the normal scope of prisoner confinement, appellee's residual liberty interest would be violated by arbitrary transfer.[60]

To determine what procedures were required, the instant Court balanced the grievous consequences of hospitalization against the state's interest in segregating the mentally ill.[61] The Court adopted the *Morrissey* procedures, with the added requirement that the prisoner receive timely notice of all his rights.[62] The prisoner must also receive written notice of the transfer, followed by a hearing at which incriminating state's evidence would be disclosed.[63] The prisoner may produce documentary evidence to refute the state's charges, and present, confront and cross-examine witnesses.[64] However, in the interest of avoiding disruption, the state was granted some discretion to limit the prisoner's right to question witnesses.[65] An independent, non-judicial decisionmaker must supervise the hearing and the factfinding body must prepare a written statement of reasons in the event of transfer.[66]

Contrary to prior decisions, four Justices of the instant Court majority agreed that appointment of legal counsel for indigents was mandatory.[67] The Supreme Court previously had recognized that while legal counsel was not required, the illiterate and uneducated should be granted some representation.[68] Similarly, a prisoner with potential mental disorders had an even greater need for legal counsel because he was less likely to understand and exercise his rights.[69] Although the four Justice plurality believed that legal assistance was compulsory, they modified their judgment without explanation to conform to Justice Powell's contradictory concurring opinion.[70]

Justice Powell conceded that competent representation must be provided because mental institution transfers were likely to involve complex factual disputes and the prisoner might be incapable of effectively speaking for him-

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60. *Id.* at 1264.

61. *Id.*

62. *Id.* at 1265. See text accompanying notes 67-70 *infra.*

63. 100 S. Ct. at 1264.

64. *Id.*

65. *Id.* The state may deny the prisoner permission to confront witnesses for good cause. *Id.*

66. *Id.* In a confusing bit of dicta, the instant Court provided for both a decisionmaker and a factfinder, without distinguishing the two. However, the Court was purportedly reaffirming *Morrissey*, which provided for a "neutral and detached hearing body" and a "written statement by the decisionmaker." See text accompanying note 28 *supra.* Clearly some sort of decisionmaker and impartial factfinding body are required, but the Court left the determination of the number and identity of hearing participants to the states. The hearing body need not contain a judicial officer, and the decisionmaker might be from within the hospital or prison administration. Miller v. Vitek, 437 F. Supp. 569, 574 (D. Neb. 1977), citing Doremus v. Farrell, 407 F. Supp. 509, 517 (D. Neb. 1975) (the examining or treating physician or psychologist should not be allowed to vote on the commitment decision).

67. Justices White, Brennan, Marshall and Stevens [hereinafter the plurality] required appointment of counsel. 100 S. Ct. at 1265. See text accompanying notes 29-31 & 39 *supra.*

68. See text accompanying note 39 *supra.*

69. 100 S. Ct. at 1265.

70. *Id.* In what appeared to be an uncomfortable bit of court politics, the plurality bowed to Justice Powell's opinion expressly denying compulsory appointment of legal counsel.

self.[71] However, such aid might be provided by a mental health professional or a competent layman rather than a licensed attorney.[72] Powell reasoned that because the issues were essentially medical in nature, legal representation was not necessary.[73] By analogy, because due process did not require a law-trained decisionmaker, due process also did not require counsel.[74] In effect, the state must provide a fair, informal procedure for transfer, with optional rather than mandatory appointment of legal counsel.[75]

The instant case cogently resolved a previously unsettled area in prisoners' rights and mental health law. For the first time, the Supreme Court definitively prescribed minimum procedures for a prisoner's transfer to a mental institution.[76] Moreover, the instant decision was consistent with the intrinsic reasoning of recent Supreme Court decisions. *Wolff*'s statutory entitlement theory[77] was analogously applied to the facts of the instant case, while *Meachum*'s denial of procedural protections for prisoner transfers[78] was distinguished on that Court's failure to find a state-created expectation.[79] Additionally, the instant Court utilized the *Morrissey* procedures[80] and left *O'Connor*'s assurance of a universal freedom from unjust restraint unqualified.[81]

Nonetheless, portions of the Court's underlying analysis may prove problematic. The instant Court categorized two distinct due process interests, one statutory and the other constitutional under the sweeping rubric "liberty."[82] First, the prisoner acquired a liberty interest when the state statutorily created the expectation of freedom from transfer except for mental illness.[83] In addition, the prisoner possessed a liberty interest forbidding unwarranted hospitali-

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71. *Id.* at 1266. Justice Powell was in effect reaffirming his majority opinion in Gagnon v. Scarpelli, 411 U.S. 778 (1973), where he stated that some representation should be provided where complex issues are at stake. See note 31 *supra*. Inasmuch as transfers to mental institutions involve complex medical issues, it follows that the prisoner should receive some assistance.

72. While Justice Powell preferred licensed psychiatrists or other mental health professionals to lawyers, his criteria for choosing prisoner assistance was that the person be competent, independent and free to act solely in the prisoner's best interest. Therefore a competent layman might in some cases act as the prisoner's adviser. 100 S. Ct. at 1267.

73. "The issues of civil commitment are 'essentially medical in nature' and . . . 'neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments.'" *Id.*, quoting *In re* Roger S., 19 Cal. 3d 921, 942, 569 P.2d 1286, 1299, 141 Cal. Rptr. 298, 311 (1977) (Clark, J., dissenting.)

74. 100 S. Ct. at 1267. Justice Powell did not explain why appointment of non-judicial advisers was ancillary to appointment of non-judicial decisionmakers.

75. *Id.*

76. See text accompanying notes 61-75 *supra*. For an excellent survey of previous law concerning transfers to mental institutions see Note, *Transfers of Prisoners to Mental Institutions*, 69 J. CRIM. L. & CRIMINOLOGY 337 (1978).

77. See text accompanying note 35 *supra*.

78. See text accompanying note 42-43 *supra*.

79. 100 S. Ct. at 1261-62.

80. See text accompanying note 28 *supra*.

81. See text accompanying note 50 *supra*.

82. See text accompanying notes 52 & 55 *supra*. *See also* Monaghan, *supra* note 20, at 408-20.

83. 100 S. Ct. at 1261.

zation which existed apart from any statutory entitlement.[84] The cryptic source of this constitutional interest appears to be two-fold. First, the instant Court noted that involuntary hospitalization stigmatized the person confined and involved massive restraints which violated the freedom from personal intrusion traditionally protected by the due process clause.[85] Despite appellee's conviction, his subjection to socially adverse consequences and behavior modification treatment deprived him of the historic liberty common to all persons. Second, the Court considered the residuum of liberty retained by all prisoners. Although a criminal conviction extinguished some rights to personal security, the transfer to a mental institution was so different from the confinement contemplated by a prison term as to violate a liberty interest unfettered by conviction.[86] The instant Court's use of the term "liberty" in such dissimilar contexts portends unnecessary confusion in identifying the sources of the prisoners' interests involved.

The instant case followed precedent by arbitrarily creating an *ad hoc* entitlement out of a state statute without establishing guidelines for determining when a state had created such expectations.[87] The Court simply declared that the State, intentionally or not, had determined that no prisoner would be transferred unless appropriately pronounced mentally ill.[88] Quite the contrary, the state manifestly intended prisoners to be transferred to mental institutions whenever the prison administrators and physicians authorized the transfer under their own procedures.[89] The unclear exegesis of the Court's entitlement theory resulted in the creation of a right which the state did not know it had created and a liberty interest the state did not know it had the duty to protect.

An additional disturbing feature of the instant case is the plurality's evasive treatment of the legal counsel issue. The instant Court's emphasis on the demoralizing nature of mental institutions and the particular vulnerability of a prisoner threatened with transfer justified the plurality's advocacy of the legal

84. *Id.* at 1263. *Cf.* Sites v. McKenzie, 423 F. Supp. 1190 (N.D. W. Va. 1976) (statute authorizing transfer of prisoner to mental institution violates general liberty interest protected by due process and equal protection clauses).

85. The instant Court cited Ingraham v. Wright, 430 U.S. 651 (1977), which defined our historic liberties as at least that protection which Englishmen enjoyed against the power of the Crown under the Magna Carta. *Id.* at 672-73.

86. 100 S. Ct. at 1264. Although the instant Court did not forget that prisoners were human beings deserving of some rights, the Court recognized that a prisoner effectively waived many of his rights to freedom when he violated the law. Therefore it was necessary to consider what rights an inmate, rather than an ordinary citizen, retained given his prisoner status. For an overview of current rights of prisoners see Calhoun, *The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal*, 4 HASTINGS CONST. L.Q. 219 (1977).

87. See Note, *supra* note 20, at 696-700. *Compare* Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare recipients have property entitlement to welfare) *with* Board of Regents v. Roth, 408 U.S. 564 (1972) (state university teacher has no property entitlement to teaching position).

88. 100 S. Ct. at 1262.

89. In fact, the state argued that once a qualified person found that appellee was mentally ill any state-created interest which appellee thereby acquired was protected under §83-180(1) of the Nebraska Statutes. The instant Court found, however, that once the state grants the expectation against transfer, federal minimum due process standards supersede state procedures. *Id.*

counsel requirement.[90] Yet the plurality's peculiar acquiescence in Justice Powell's opinion undercut the Court's focus on the special needs of a mentally ill prisoner.

Although Justice Powell's opinion was consistent with previous decisions, it is not completely persuasive. Powell's preference for psychiatric rather than legal representation based upon the medical nature of the hearings was undermined by permitting competent laymen to act as adviser.[91] Moreover, the concurring opinion ignored the plurality's admonition that the prisoner might need special help in understanding his legal rights, as opposed to the intricacies of his medical condition.[92] Justice Powell also preferred exclusion of attorneys from hearings to prevent the intrusion of adversary qualities into administrative procedures.[93] However, the state was nevertheless free to appoint licensed attorneys at its discretion, and trail-like confrontation of witnesses and disclosure of evidence was still required.[94] Finally, it is not axiomatic that because due process does not require appointment of a judicial decisionmaker, due process also does not require a judicial adviser. The decisionmaker ensures an impartial medical hearing whereas the adviser's narrower concern is protecting the prisoner's legal and medical interests.[95] The disparate functions of the respective parties support the use of different criteria in selecting decisionmakers and advisers.

Indecision and ambiguity plague the Court's analysis.[96] Nevertheless, the

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90. 100 S. Ct. 1264. *Cf.* Heyford v. Parker, 396 F.2d 393, 397 (10th Cir. 1968) (failure to have counsel at every step of the commitment proceedings may result in arbitrary confinement and work an injustice); Lynch v. Baxley, 386 F. Supp. 378, 389 (M.D. Ala. 1974) (an involuntarily committed person has the right to effective assistance of counsel at all significant stages of the commitment process).

91. See text accompanying notes 72-73 *supra*. Justice Powell in effect gave the State virtually unlimited power to choose competent and independent assistance for prisoners from any sphere. 100 S. Ct. at 1266-67.

92. Justice Powell required the advisor to be free to act solely in the inmate's best interest. 100 S. Ct. at 1267. However, Justice Powell presumed that the prisoner's interests are served if his advisor can explain psychiatric issues. Surely the advisor's medical knowledge may be relevant, but the prisoner's best interests may also require an understanding of the procedural protections available to him.

93. See note 31 *supra*.

94. The hearings are already quasi-adversary because prisoners are entitled to call witnesses, present evidence, etc. Hence, introduction of legal counsel would only add to the adversary process. See Milleman, *Prison Disciplinary Hearings and Procedural Due Process—The Requirements of a Full Administrative Hearing*, 31 MD. L. REV. 27, 56 (1971).

95. The impartial tribunal should not have conflicting interests which interfere with its ability to objectively find facts and apply law or issue orders. Milleman, *supra* note 94, at 54. *Cf.* Taylor v. New York City Transit Auth., 309 F. Supp. 785, 788 (E.D.N.Y. 1970) (quasi-judicial administrative judgments require impartial adjudication).

Likewise, the advisor should be primarily concerned with the subjective needs of the prisoner and therefore should not be an impartial member of the proceedings. In fact, one author notes that when staff representatives are appointed as prisoner advisors, they are often unable to properly fulfill their function as advocates due to the conflict of interest. Wick, *Procedural Due Process in Prison Disciplinary Hearings: The Case for Specific Constitutional Requirements*, 18 S.D. L. REV. 309, 323 (1973).

96. The Court's confusing stand on the presence of counsel will be of little help to states