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THE IMPACT OF ENTITLEMENT ANALYSIS: DUE PROCESS IN CORRECTIONAL ADMINISTRATIVE HEARINGS*

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State and federal courts have significantly expanded the scope of constitutional due process protections to which prisoners are entitled. One impetus to this development is the growing awareness that arbitrary deprivation of prisoners' and parolees' rights adversely affects a state's interest in the orderly administration of its correctional institutions and the rehabilitation of its inmates. Abandoning past doctrines, courts have embraced the principle that inmates' and parolees' constitutional rights cannot lawfully be diluted beyond the extent necessary for orderly prison administration.

Contemporary judicial decisions dealing with prisoners' and parolees' constitutional rights employ two major analytical models: "entitlement analysis" and "impact analysis." This article will use these models to analyze the due process protections afforded prisoners and parolees in the three most significant correctional administrative proceedings: parole revocation hearings, parole release hearings, and prison disciplinary proceedings. First, to gain a proper perspective of the issues involved, a brief history of the growth of the due process protections in the correctional setting will be presented. Next, an overall framework will be discussed to illustrate how the Supreme Court currently examines due process protection claims. Finally, a review and critical analysis of the current minimum due process requirements in each of the three proceedings will be presented along with suggestions for reform.

HISTORICAL VIEW

Prior to the 1960s, correctional litigation was characterized by what is now known as the "hands-off" doctrine.[1] Courts used this doctrine to avoid con-

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1. *See, e.g.*, Washington v. Haban, 287 F.2d 332, 334 (3d Cir. 1960); Ortega v. Ragen, 216 F.2d 561, 562 (5th Cir. 1954); Hiatt v. Compagna, 178 F.2d 42, 46 (5th Cir. 1949), *aff'd mem.*, 340 U.S. 880 (1950). *See generally* Note, *Parole Status and the Privilege Concept*, 1969 DUKE L.J. 139; Note, *Parole: A Critique of its Legal Foundations and Conditions*, 38 N.Y.U.L. REV. 702 (1963); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review*

sideration of prisoners' and parolees' complaints charging violation of their constitutional rights. In its earliest form, the hands-off policy reflected the theory that a prisoner is no more than a slave of the state.[2] The subsequent abandonment of the slave of the state rationale did not, however, end the prisoner's inability to assert his rights. Courts soon developed the concept that lawful state imprisonment necessarily resulted in a restriction of many privileges and rights due to the unique circumstances and considerations underlying the penal system.[3] This notion, under the labels of "legislative grace," "custody," "*parens patriae*," and "rights versus privilege,"[4] continued to effectively preclude judicial interference in the internal affairs of correctional systems. Absent a showing of exceptional circumstances,[5] a prisoner could not enforce the rights enjoyed by free citizens. The courts generally refused even to examine the merits of an inmate's complaint that he had been denied a constitutional right.[6]

The most important of the traditional justifications for judicial restraint was the "rights versus privilege" distinction, which provided that fifth and fourteenth amendment due process protections attached only to those interests which could be characterized as rights rather than privileges.[7] This distinction separates interests that are enforceable rights from privileges, which are grants from the state that are subject to withdrawal at the state's whim. By simply labeling all aspects of penal existence as privileges, courts were able to refuse consideration of complaints raised by inmates who were deprived of these privileges.

The demise of the hands-off doctrine led to an expansion of prisoners' rights in a variety of settings. Demanding that prison conditions comport with the first, eighth, and fourteenth amendments, courts have protected prisoners from racial discrimination,[8] constant danger of inmate assault,[9] excessive cor-

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the Complaints of Convicts, 72 YALE L.J. 506 (1963) [hereinafter cited as *Beyond the Ken of the Courts*].

2. Ruffin v. Commonwealth, 62 Va. (21 Grant) 790, 796 (1871).

3. Price v. Johnston, 334 U.S. 266, 285 (1948).

4. For a discussion of these older theories, *see generally* Note, *Procedural Due Process in Peno-Correctional Administration: Progression and Regression*, 45 ST. JOHNS L. REV. 468 (1971); *Beyond the Ken of the Courts*, *supra* note 1.

5. Federal courts have described the term "exceptional circumstances" in various ways. *See, e.g.*, Douglas v. Sigler, 386 F.2d 684, 688 (8th Cir. 1967) (extreme cases); Glenn v. Ciccone, 370 F.2d 361, 363 (8th Cir. 1966) (showing of cruel and unusual punishment); Lee v. Tahash, 352 F.2d 970, 971 (8th Cir. 1965) (extreme cases); Carey v. Settle, 351 F.2d 483, 485 (8th Cir. 1965) (only in a rare and exceptional situation); Roberts v. Pegelow, 313 F.2d 548, 550 (4th Cir. 1963) (vindictive, cruel or inhuman).

6. *See* Note, *Prisoner's Rights Under Section 1983*, 57 GEO. L.J. 1270, 1273-74 (1969).

7. The rights-privilege distinction in viewing claims of constitutional rights has now been thoroughly discredited. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 571 (1972); Graham v. Richardson, 403 U.S. 365, 374 (1971); Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969); Sherbert v. Verner, 374 U.S. 398, 404 (1963). *See generally* Van Alstyne, *The Demise of the Rights-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

8. Battle v. Anderson, 376 F. Supp. 402, 420-28 (E.D. Okla. 1974); Washington v. Lee, 263 F. Supp. 327, 333 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968).

9. Woodhous v. Virginia, 487 F.2d 889, 890 (4th Cir. 1973); Penn v. Oliver, 351 F. Supp.

poral punishment[10] and unjustifiable restrictions on the rights to practice religion, read, speak, and correspond.[11] Furthermore, the courts have prevented interference with prisoners' right to counsel and access to adequate legal materials.[12] The recent judicial recognition of prisoners' constitutional rights has also resulted in the extension of procedural due process safeguards to correctional system administrative hearings dealing with parole revocation, parole release, and prison discipline.[13]

PROCEDURAL DUE PROCESS MODEL

The traditional view of due process under the United States Constitution provides that an individual is entitled to due process protections whenever the government makes a decision based upon facts unique to the individual that has a substantial adverse impact upon that individual's life, liberty, or property.[14] Fundamental fairness, considered the touchstone of due process, requires that an individual be given an opportunity to be heard in order to reduce the risk of error in the government's decision-making process.[15] Deciding whether an individual is entitled to due process protections involves the resolution of two analytically distinct issues: whether the right to due process protections applies to the particular situation, and if so, exactly what procedures the circumstances require.[16] Thus, a court must initially ascertain whether the challenged governmental action adversely affects a life, liberty or property interest that is within the protective ambit of the due process clause. The right to due process protections is triggered by a finding that a protected interest is affected.[17]

1292, 1294 (E.D. Va. 1972); Holt v. Sarver, 300 F. Supp. 825, 828 (E.D. Ark. 1969).

10. Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968); Talley v. Stephens, 247 F. Supp. 683, 689 (E.D. Ark. 1965).

11. Cruz v. Beto, 405 U.S. 319, 322 (1972) (religion); Cooper v. Pate, 378 U.S. 546, 546 (1964) (religion); Brown v. Peyton, 437 F.2d 1228, 1231 (4th Cir. 1971) (state must show paramount state interest to justify depriving prisoner's religious rights); Jackson v. Godwin, 400 F.2d 529, 535 (5th Cir. 1968) (black prisoners have right to receive black-oriented publications in prison); Fortune Soc'y v. McGinnis, 319 F. Supp. 901, 905 (S.D.N.Y. 1970) (prison officials cannot deny prisoners access to newsletter absent a compelling state interest); Carothers v. Follette, 314 F. Supp. 1014, 1024 (S.D.N.Y. 1970) (prison officials must show justification to restrict prisoners' right of free expression through the mails).

12. Houghton v. Shafer, 392 U.S. 639, 640 (1968); *Ex parte* Hull, 312 U.S. 546, 549 (1941); Gilmore v. Lynch, 319 F. Supp. 105, 109 (N.D. Cal. 1970), *aff'd per curiam sub nom.*, Younger v. Gilmore, 404 U.S. 15 (1971).

13. See text accompanying notes 39 & 56 *infra*.

14. Losses inflicted by the state, imposed on the basis of unique facts, trigger the procedural safeguards of due process. The detrimental effects of legislative actions, made on the basis of group facts, do not invoke such protections. *Compare* Londoner v. City & County of Denver, 210 U.S. 373 (1908) *with* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915). Both types of decision-making are, of course, subject to the protections afforded by all other constitutional guarantees. *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §7.01 (1958).

15. Dent v. West Va., 129 U.S. 114, 123 (1889).

16. Morrissey v. Brewer, 408 U.S. 471, 481 (1971).

17. *See* Goldberg v. Kelly, 397 U.S. 254, 262 (1970). The Court in *Goldberg* recognized that whether procedural safeguards are required depends upon the impact on the individual of the state's action rather than on the rights—privilege theory, which it rejected. The Court

In deciding the second question concerning what protections are due, the court must balance the individual's interest in avoiding the loss inflicted by the state against the competing interest of the state in summary action.[18]

The threshold inquiry is of particular significance because the existence of the right to procedural safeguards is dependent on a finding that a protected interest is affected by the governmental action. Two major analytical models exist in contemporary judicial decisions regarding prisoners' and parolees' constitutional right to procedural safeguards. These models may best be described as "entitlement analysis" and "impact analysis."

The entitlement view of due process is based on the theory that requiring due process presupposes the existence of an independent legal right. In the absence of such an independently grounded legal right, the entitlement view provides no basis for invoking the fourteenth amendment's protections.[19] The crucial issue in applying entitlement analysis is to define the permissible sources of substantive rights which invoke constitutional protections. Entitlements triggering due process might be said to arise only under specific provisions of constitutions, statutes, administrative rules, and regulations. Under a broader view, entitlements could also be seen to emanate from the concept of fundamental or inalienable rights and protections. With the availability of this wide range of potential sources of rights, courts under the entitlement view could take either an expansive[20] or narrow[21] approach to the application of the fourteenth amendment. The Supreme Court appears to have taken the narrower approach in its recent decisions concerning due process in the correctional environment.[22]

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relied on Professor Charles Reich's now famous article, *The New Property*, 73 YALE L.J. 733 (1964), to find that the welfare benefits at issue were a statutory entitlement, or "property," of qualified recipients and, as such, could not be terminated without procedural guarantees against arbitrary decisions.

18. *See* Goldberg v. Kelly, 397 U.S. 254, 262-64 (1970).

19. *See, e.g.*, Bishop v. Wood, 426 U.S. 341 (1976) (public employment); Paul v. Davis, 424 U.S. 693 (1976) (impairment of reputation by police); Goss v. Lopez, 419 U.S. 565 (1975) (public education); Board of Regents v. Roth, 408 U.S. 564 (1972) (public employment); Bell v. Burson, 402 U.S. 535 (1971) (driver's license). *But see* Meachum v. Fano, 427 U.S. 215 (1976) (no entitlement invokiing procedural safeguards of inmates transferred from one prison to another). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 522-32 (1978); Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J. 89.

20. For example, the Court expanded the application of due process by taking a broad view of property in Fuentes v. Shevin, 407 U.S. 67 (1972), where the Court held due process protections were required before repossession of goods under a state replevin statute would be allowed. The decision emphasized the fact that the goods seized (a stove, bed, stereo, table, etc.) were not "necessities" was not a determinative factor. *Id.* at 88. Rather, the due process clause was interpreted to require a hearing before a property deprivation occurs through a repossession statute. *Id.* at 88-90. *See also* Goss v. Lopez, 419 U.S. 565 (1975) where the Court took a broad view of entitlement in holding due process applies to suspension from public schools.

21. For examples of the Court's use of a narrow entitlement analysis, see Codd v. Velger, 429 U.S. 624 (1977); Meachum v. Fano, 427 U.S. 215 (1976); Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693 (1976).

22. *See* Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1 (1979); Meachum v. Fano, 427 U.S. 215 (1976).

The impact view of due process is based on a concept of life, liberty, and property that encompasses substantive or core values of importance to the individual in the particular decisional context.[23] No single variable triggers due process protections; instead, the *effect* of the state action on the individual determines whether constitutional protections are needed. Rather than focusing on the existence of a formal legal entitlement, impact analysis examines whether the governmental action will result in a significant adverse impact on the individual. This adverse impact has been held by the Supreme Court to be sufficient to mandate procedural protection.[24]

Upon finding that an individual's interests are constitutionally protected, inquiry is directed to the question of what due process safeguards are required. In formulating procedural protections, the Supreme Court has rejected the notion that due process prescribes one set of inflexible procedures applicable to every conceivable situation.[25] The Court has stated that the procedures needed must be responsive to specific factual contexts because all situations requiring due process safeguards do not require the same kind of protection;[26] the objective of due process, to minimize error and reduce the danger of arbitrary governmental action, can be sufficiently attained through varying procedures tailored to a specific decisional environment.[27]

A balancing approach has long been an element in the formulation of procedural due process requirements in a given situation.[28] Nevertheless, guidelines for the determination of what process is due under this balancing approach have only recently been announced by the Supreme Court. The Court stated that:

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23. *See, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (aliens and deportation); Gibson v. Berryhill, 411 U.S. 564 (1973) (right to follow a chosen profession); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (probation revocation hearing); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation proceeding); Willner v. Committee on Character, 373 U.S. 96 (1963) (right to practice law); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (same); Bolling v. Sharpe, 347 U.S. 497 (1954) (racial segregation). *See generally* L. TRIBE, *supra* note 19, at 506-22; Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L.L. REV. 269 (1975); Comment, *Two Views of a Prisoner's Rights to Due Process: Meachum v. Fano*, 12 HARV. C.R.-C.L.L. REV. 405 (1977).

24. *See* Bounds v. Smith, 430 U.S. 817, 828 (1977) (law libraries or assistance from persons with legal training required in order to preserve inmates' "fundamental constitutional right" of access to courts); Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (*Morrissey*-type preliminary and final hearing required since probation revocation results in loss of liberty); Morrissey v. Brewer, 408 U.S. 471, 480-81 (1972) (termination of parole requires "some orderly process, however informal" since parolee's liberty interest is affected).

25. Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring).

26. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Hannah v. Larche, 363 U.S. 420, 442 (1960).

27. L. TRIBE, *supra* note 19, at 503. *See* Fuentes v. Shevin, 407 U.S. 67, 97 (1972).

28. Board of Regents v. Roth, 408 U.S. 564 (1972). *See generally* Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest-Balancing*, 88 HARV. L. REV. 1510, 1537 (1974).

> [The] identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[29]

Thus, the Court requires a weighing of the individual interest infringed, discounted by the probability that alternative procedures would be more likely to protect the interest, against the added cost or burden of such alternative procedures.[30]

Although this formula appears to emphasize the cost of protections, the Court has also indicated that while cost considerations are important, the cost of protecting a constitutional right cannot singularly justify its total denial.[31] Noting that procedural due process is not designed to promote governmental efficiency,[32] the Court has concluded that safeguards must be afforded to protectible interests "if that may be done without prohibitive cost."[33]

Thus, in addressing new claims for due process protections, the Court will first look for the existence of a protectible interest requiring procedural safeguards, employing either an entitlement or an impact analysis. Upon making such a finding, a balancing process will be employed by the Court to prescribe the safeguards necessary to protect the individual's life, liberty, or property interest threatened by the particular governmental action.

CORRECTIONAL ADMINISTRATIVE HEARINGS

Utilizing the model outlined above, the due process protections currently required in correctional administrative hearings will be analyzed in the context of the three settings considered to have the most significant effect on prisoners and parolees: parole revocation hearings, prison disciplinary proceedings and parole release hearings.

Parole Revocation Hearings

Parole is a temporal and spatial variation of imprisonment. Its function is to reintegrate individuals into society as constructive members as soon as they are able, without confining them for the full term of the original sentence. The essence of parole is release from prison before completion of the sentence, on the condition that the prisoner abide by certain rules during the balance of that sentence.[34] Nevertheless, parolees are still considered subject to the state's

29. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

30. L. TRIBE, *supra* note 19. *See also* Mashaw, *The Supreme Court's Due Process Calculus For Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

31. Bounds v. Smith, 430 U.S. 817, 825 (1977).

32. Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972).

33. Goss v. Lopez, 419 U.S. 565, 580 (1975) (emphasis added).

34. Morrissey v. Brewer, 408 U.S. 471, 480-82 (1972).

correctional system. The state has merely modified the conditions of confinement by allowing the parolee to return to society while continuing to enforce restrictions such as limitations on travel and certain other activities. Parole revocation is a termination by the state of this conditional release and a return of the parolee to full custody within a penal institution for the remainder of his sentence.

Before the 1972 decision in *Morrissey v. Brewer*,[35] courts held that parolees subject to parole revocation proceedings had no due process rights.[36] This view[37] was based on the premise that the grant of parole is an "act of grace" by the state.[38] Having magnanimously granted parole, the state could freely terminate it.

This view changed, however, when the *Morrissey* Court held that a parolee's constitutional right to due process is violated when his parole is revoked without a hearing that observes certain minimal due process requirements.[39] Factoring the due process claim into its current two-step approach,[40] the Court reached its holding by first finding an interest requiring procedural safeguards. The Court noted that a parolee's liberty, although conditional, includes many of the core values of unqualified liberty, the loss of which grievously affects the parolee.[41] Thus, the Court used impact analysis[42] to determine that a parolee has a significant interest in maintaining his conditional liberty and therefore is entitled to fourteenth amendment protection against the grievous loss or impact which would result from arbitrary parole revocation.

The state, on the other hand, has a substantial interest in being able to return the parolee to prison without the burden of a new criminal trial. However, this interest only arises when the parolee has in fact violated the conditions of his parole release; the government has no interest in revoking parole erroneously.[43] The state is also interested in restoring the parolee to a normal and useful life. Therefore, it has an interest in preventing erroneous revocation of parole and in treating the parolee facing revocation with basic fairness.

After finding that a constitutionally protected interest was at stake, the

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35. 408 U.S. 471 (1972).

36. *See, e.g.*, Morrissey v. Brewer, 443 F.2d 942, 952 (8th Cir. 1971), *rev'd*, 408 U.S. 471 (1972); Allen v. Perini, 424 F.2d 134 (6th Cir.), *cert. denied*, 400 U.S. 906 (1970); Eason v. Dickson, 390 F.2d 585 (9th Cir.), *cert. denied*. 392 U.S. 914 (1968); Rose v. Haskins, 388 F.2d 91 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968); Williams v. Dunbar, 377 F.2d 505 (9th Cir.), *cert. denied*, 389 U.S. 866 (1967); Hyser v. Reed, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963); Johnson v. Tinsley, 234 F. Supp. 866 (D. Colo.), *aff'd*, 337 F.2d 856 (10th Cir. 1964).

37. See notes 1-7 and accompanying text *supra*, for a discussion of the various theories underlying the hands-off approach of courts before the mid-1960's in viewing calls by prisoners and parolees for due process protections.

38. Escoe v. Zerbst, 295 U.S. 490, 492-93 (1935): "Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose."

39. 408 U.S. 471 (1972).

40. See notes 14-24 and accompanying text, *supra*.

41. 408 U.S. at 482.

42. See notes 23-24 and accompanying text, *supra*.

43. 408 U.S. at 484.

Court balanced[44] the competing interests of the parolee and the state to formulate the specific minimum safeguards needed. A two-stage revocation hearing process was required because certain preliminary questions should be answered soon after the arrest and detainment of the alleged parole violator. The first hearing should be a minimal inquiry designed to determine whether there is probable cause or reasonable grounds to believe the arrested parolee has violated the conditions of his parole.[45] This initial hearing should be held at or near the place of arrest or alleged parole violations, and as promptly as convenient after the arrest, while information is fresh and witnesses are readily available.

At this hearing the parolee facing revocation has a number of procedural rights: to receive written notice of the claimed parole violations; to hear the evidence against him; to be heard in person and to present witnesses and documentary evidence on his behalf; to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing such confrontation); to have the probable cause determination made by someone who is not directly involved in the case, but who need not be a judicial officer or lawyer; and to be given a written statement by the fact-finders of the evidence relied upon and the reasons for revoking parole.[46] The parolee also has the right to counsel if the hearing body finds that the parolee asserts a colorable claim of innocence.[47]

If requested by the parolee, a second hearing must be held on a timely basis following the initial hearing. This hearing must entail a final evaluation of any contested relevant facts and a determination of whether the facts warrant revocation of the parole status.[48] The hearing body must be neutral and detached, like a traditional parole board. Its members, as with the initial hearing, need not be judicial officers or lawyers.[49]

These required procedural safeguards evolve logically from the current due process model. An interest has been found that requires constitutional protection. Procedural safeguards have been formulated which attempt to equitably balance the competing interests involved. The requirements guard against the state being forced to have a full-scale criminal trial to revoke parolee status. The state is able to use an informal hearing device to make a decision concerning the alleged parole violations. On the other hand, the parolee is afforded certain basic rights designed to protect his liberty interest from arbitrary deprivation. He is provided rights designed to insure that both sides of contested issues are brought before the decision maker, thus minimizing the risk of an erroneous decision by the state regarding his parole status.

One criticism may be made, however, of the Court's balancing of the conflicting interests involved. Without comment, the Court noted in *Morrissey* that "sometimes revocation occurs when the parolee is accused of another crime;

44. See notes 28-30 and accompanying text, *supra*.
45. 408 U.S. at 486.
46. *Id.* at 489.
47. Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).
48. 408 U.S. at 488.
49. *Id.* at 489.

it is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State."[50] Here, the Court appears to sanction the practice of sending an individual to prison for a crime of which he has not been convicted. The parolee could be totally innocent of an alleged offense. Yet, he could be sent to prison for a crime of which he was never tried and convicted. The use of parole revocation to circumvent the rights due anybody accused of a crime should be condemned, not condoned, regardless of the interests involved.

The state certainly has an interest in preventing its parole revocation proceeding from becoming a prosecution in which the full panoply of rights due a criminal defendant must be afforded. Nevertheless, these rights should be afforded when the parole revocation is based upon an accusation of criminal conduct, rather than the violation of some non-criminal parole condition such as travel restriction. To allow parole revocation to substitute for a conviction in a criminal trial gives far too much weight to the state's interest in returning a parole violator to prison without a new criminal trial. This use of parole revocation ignores the parolee's right to be tried and convicted before being punished for a crime. Society also has a strong interest in assuring that only those properly convicted in a criminal trial are punished for their alleged criminal acts.

The procedural safeguards required for parole revocations based upon violations of a non-criminal conditions should be distinguished from those safeguards required for parole revocations founded purely on the accusation that the parolee has committed a criminal act. In the latter situation, the compelling interest of the parolee's right to be tried and convicted before being punished for a crime requires that he be afforded all of the rights due one accused of a criminal act.

Prison Disciplinary Proceedings

Prison disciplinary hearings involve a decision by the correctional facility administration as to whether an inmate has violated a prison rule or regulation. The disciplinary action that prison officials may take will vary with the particular jurisdiction's legislation on the matter. It will generally range from loss of privileges[51] for minor infractions to loss of "good-time" credit[52] or solitary confinement for serious misconduct.

Historically, courts would not hear prisoner complaints concerning prison regulations or disciplinary sanctions imposed for their violation absent a showing of exceptional circumstances.[53] Consistent with the hands-off doctrine regarding inmate constitutional rights,[54] courts refused to become involved in prison disciplinary procedures. Applying the separation of powers doctrine, the

50. *Id.* at 479.

51. Such privileges include access to recreational facilities, trustee status, and exercise period or "yard time."

52. Good-time credits are reductions of the prisoner's sentence awarded for good behavior and are subject to forfeiture as punishment for serious misconduct.

53. See note 5 *supra.*

54. For a discussion of the hands-off doctrine see notes 1-7 and accompanying text, *supra.*

courts reasoned that prison operation is an executive function and thus judicial interference was precluded.[55]

In *Wolf v. McDonell*,[56] however, the Supreme Court held that prisoners must be afforded due process safeguards in disciplinary hearings for serious misconduct involving the potential sanctions of loss of good-time credits[57] or imposition of solitary confinement.[58] Due process safeguards were not mandated for disciplinary hearings not involving serious misconduct. In *Meachum v. Fano*[59] the prisoner was subject to a disciplinary proceeding involving a transfer to a prison where conditions of confinement were substantially less favorable to the inmate than the existing facility. The Supreme Court held that there was no protectable interest involving due process safeguards unless such transfer was imposed for serious misconduct.

Thus, the Court has distinguished disciplinary hearings for serious misconduct[60] from those dealing with less serious infractions. The Court appears to be using an impact analysis because hearings for serious misconduct will have a more significant impact on the inmate. A closer reading of the decisions, however, reveals that the Court is neither clear nor consistent in the methodology it employs.[61]

The *Wolff* decision is ambiguous in its analysis of whether due process protections must be afforded. The Court apparently used both impact and entitlement analysis in finding that procedural safeguards are required in disciplinary hearings for serious misconduct. The decision employed an entitlement analysis to find that loss of good-time credits involves a constitutionally protected interest. The majority explicitly based its holding on a statutory entitlement[62] to such credits.[63]

The Court utilized the impact analysis approach to determine whether the solitary confinement sanction necessitated procedural protections. Because solitary confinement represented a major change in the conditions of confinement, minimum procedural safeguards were required to prevent arbitrary imposition of the sanction.[64] The Court recognized that the imposition of solitary confinement had a significant impact on the inmate. Constitutional safeguards were found necessary even though there was no entitlement to non-solitary confinement.

The *Wolff* decision thus employed both methods of procedural due process

55. R. SINGER & W. STATSKY, RIGHTS OF THE IMPRISONED: CASES, MATERIALS & DIRECTIONS 581 (1974).

56. 418 U.S. 539 (1974).

57. *Id.* at 555.

58. *Id.* at 571 n.19.

59. 427 U.S. 215, 216 (1976).

60. The Court does not, however, specify what it considers serious misconduct. It appears to leave this definition to each state's particular statutory scheme governing prison discipline. *See id.* at 228, 418 U.S. at 546-48.

61. 418 U.S. at 558-59.

62. *Id.* at 558.

63. The Court failed even to mention the impact analysis of *Morrissey* in discussing good time credits.

64. 418 U.S. at 571 n.19.

analysis without attempting to distinguish them. This confusion was aggravated because, although the *Wolff* majority based its holding upon the prisoner's statutory entitlement, the dissenters claimed that the majority actually adopted the "grievous loss" or impact analysis.[65]

The confusion may have been settled by the Court's decision two years later in *Meachum*, regarding the sanction of prison transfer for non-serious misconduct. The Court found no entitlement[66] in prison transfers triggering procedural safeguards. While explicitly reaffirming the *Wolff* view that an inmate is not stripped of his rights just because he is a prisoner,[67] the Court rejected the notion that any grievous loss by a person at the hands of the state was sufficient to trigger due process.[68] Thus, the Court appears to adopt a narrow statutory entitlement analysis in its approach to whether procedural safeguards are constitutionally required. It arguably left the door open for impact analysis where there is no particular statutory entitlement, but where the loss of the interest would perhaps be so grievous as to necessitate due process protections.

The Court's failure to affirmatively adopt and consistently apply one or the other of the methodologies results in confusion for both state officials and prisoners. Impact analysis is the most logical and consistent way to approach the initial due process question with respect to prison disciplinary proceedings. Under such an analysis, proceedings for serious misconduct, and their correspondingly more serious penalties, may be distinguished from hearings where less serious charges and sanctions are at issue. The prisoner is protected from arbitrarily imposed serious penalties, but the state is not burdened when it imposes less severe disciplinary sanctions which have a comparatively minor impact on the prisoner. Although the Court's recent decisions have yielded the same results, explicit adoption of impact analysis would provide a consistent approach to the problems and interests involved.

Regardless of the methodology employed, once it is determined that a protectible interest exists, the traditional balancing approach[69] has been used to formulate the due process procedures required in a prison disciplinary hearing. The inmate obviously has a strong desire to avoid arbitrary punishment for alleged misconduct. This must be weighed against the state's three primary interests: not encasing its prison disciplinary procedures in an inflexible constitutional straightjacket that would necessarily call for adversary proceedings typical of a criminal trial; having disciplinary proceedings which will not raise the level of confrontation between staff and inmates, and thus make more difficult the utilization of the disciplinary process as a tool to advance the rehabilitative goals of the institution; and maintaining an acceptable level of security and discipline, given the uniqueness of the prison environment and purpose.[70]

In balancing these interests, the *Wolff* Court delineated procedures neces-

65. *Id.* at 581 n.1 (Marshall, J., dissenting).
66. 427 U.S. at 216.
67. *Id.* at 225.
68. *Id.* at 224.
69. 418 U.S. at 562-63.
70. *Id.* at 563.

sary to afford minimum due process protections in disciplinary proceedings for serious misconduct. The prisoner facing such charges must be afforded the right to a hearing, the right to twenty-four hour advance notice of the charges against him, and the right to remain silent, although his employment of that right may be used against him. He also has a limited right to present documentary evidence and call witnesses, subject to prison officials' discretion to refuse to allow witnesses that may create a risk of reprisal or undermine institutional authority, and the right to a written statement by the factfinders as to the evidence relied upon and the reasons for any ensuing disciplinary action.[71] The Court said there is no right, however, to confront and cross-examine adverse witnesses,[72] nor a right to either retained or appointed counsel.[73]

These mandated procedures may be criticized in several respects for according too much weight to the state's interests and too little attention to a prisoner's vulnerability to summary disciplinary action. Certain modifications should be made to the existing required safeguards to lessen the chance of arbitrary or erroneous disciplinary decisions without increasing the burden on the state. Specifically, the requirement of twenty-four hour advance notice of charges against the prisoner should be extended to three to five days.[74] Twenty-four hours is simply not an adequate amount of time to fulfill the traditional constitutional function of notice as a due process protection.[75]

Effective protection of prisoners' rights does not necessitate counsel in all disciplinary proceedings. However, requiring adequate counsel-substitute[76] would help insure that all facts were appropriately presented to the factfinders[77] without unduly giving the proceeding an adversary cast, reducing the correctional utility of the hearing, delaying the proceeding, or imposing an administrative burden.[78] A related issue concerns proceedings in which the inmate faces charges that might be asserted later in a criminal prosecution. The right to counsel is imperative in such situations because the prisoner's statements in the disciplinary proceeding could be admitted as evidence in any resulting criminal trial.[79] It would appear that the reasoning behind the

71. *Id.* at 564-66. *See also* Baxter v. Palmigiano, 425 U.S. 308 (1976).

72. 418 U.S. at 567-68.

73. *Id.* at 570; Baxter v. Palmigiano, 425 U.S. 308, 314-15 (1976).

74. *See* MODEL RULES AND REGULATIONS ON PRISONERS' RIGHTS AND RESPONSIBILITIES 159 (1973). One district court held, prior to the *Wolff* decision, that due process required a seven day advance notice. Clutchette v. Procunier, 328 F. Supp. 767, 782 (N.D. Cal. 1971).

75. Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950).

76. Appropriate counsel-substitute might be a fellow inmate, someone from the prison's non-custodial staff, or law students.

77. Counsel-substitute is currently mandated only for illiterate prisoners or when the issues are so complex that it is "unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case." 418 U.S. at 570.

78. These were the reasons of the Court for denying a right to counsel in prison disciplinary hearings. *Id.*; Baxter v. Palmigiano, 425 U.S. 308, 314-15 (1976).

79. *See* Clutchette v. Procunier, 328 F. Supp. 767, 778 (N.D. Cal. 1971).

Miranda[80] decision is fully applicable where an inmate potentially faces criminal charges.

The prisoner's use of his fifth amendment[81] right to remain silent should not be used against him. Permitting a negative inference to be drawn from the inmate's exercise of that right allows the imposition of a substantial sanction on the inmate's exercise of the right to remain silent, undermining that constitutional protection.[82] It is difficult to fathom any exigencies of the correctional environment which warrant the effective negation of this fundamental constitutional guarantee.

As a safeguard against abuse of discretion, prison officials should be required to record their reasons for denying the accused inmate the right to call witnesses.[83] Although the Court has noted that such a procedure is preferable,[84] it has refused to make this a mandatory requirement.[85] Unless the committee puts its reasons in writing, a prisoner has virtually no means of proving an abuse of discretion in a habeas corpus suit. Without a written record before it, the reviewing court would have no means of knowing whether or not the prison disciplinary committee abused its discretionary powers.

Finally, the prisoner should be given a limited right of confrontation and cross-examination of adverse witnesses similar to that afforded parolees at a parole revocation hearing.[86] Prison officials would have the discretion to deny this right if there was a risk of reprisal or a threat to prison authority. A written record should be made of the reasons for denial of this right, as when the right to call witnesses is refused.[87]

The rights of a prisoner facing serious penalty for misconduct are not the same as those he has when he faces a less serious penalty, such as loss of privileges. No suggestion is made here that the above procedural safeguards should be afforded when an inmate faces charges of less than serious misconduct. But when the charges involve serious misconduct, the above procedures would enhance protection of the accused prisoner from arbitrary disciplinary action without significantly increasing the state's administrative burden or jeopardizing the tight discipline and control necessary in the prison environment.

Parole Release Hearings

Parole release is a decision by government officials, usually a parole board, that a prisoner is ready for conditional release from full-time custody so that he may begin his reintegration into society.[88] There is no constitutional right

80. Miranda v. Arizona, 384 U.S. 436, 469-70 (1966) (presence of counsel protects the accused's rights throughout the process of interrogation, reduces the possibility of coercion, and helps guarantee accuracy of statements offered by the prosecutor at trial).

81. U.S. CONST. amend. V.

82. Baxter v. Palmigiano, 425 U.S. 308, 325-36 (1976) (Brennan, J., dissenting).

83. 418 U.S. at 566.

84. *Id.*

85. Baxter v. Palmigiano, 425 U.S. 308, 320 (1976).

86. *See* 408 U.S. at 487.

87. See notes 83-85 and accompanying text, *supra*.

88. For a discussion of the status of a parolee see note 34 and accompanying text, *supra*.

to early release. A state may establish a parole release system, but it is not required to do so.[89] Nevertheless, consideration for parole is guaranteed by statute in virtually all jurisdictions.[90]

The procedures for determining an inmate's eligibility for parole release vary by jurisdiction. As may be expected, courts have traditionally refused to recognize any right of the prospective parolee to due process protections at his parole release hearing. This view was recently reaffirmed by the Supreme Court in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex.*[91] *Greenholtz* rejected the argument that a reasonable entitlement requiring due process protections was created whenever a state provided for the possibility of parole.[92]

In answering the question of whether a protectible interest exists in parole release hearings, the Court resorted to the narrow entitlement doctrine.[93] The Court reasoned that the Constitution only protects a present status or right. Because the conditional freedom afforded the prisoner by parole does not arise until after the parole release hearing, the Court found no constitutional entitlement. Without some statutory entitlement to early release, the inmate has merely a hope that the benefit of parole will be granted.[94] He is thus not entitled to constitutional protections where there exists only the mere possibility of parole release.

The Court dismissed *Morrissey* and its impact analysis[95] because of the distinctions it found between parole release and revocation.[96] Release involves potential freedom, while parole revocation involves existing freedom which is presently enjoyed.[97] Under an impact analysis, such a distinction is of questionable validity. Whether a prisoner or a parolee, an individual suffers a similar significant impact, loss of liberty in the future, from an adverse parole release or revocation decision. In addition, parole release is no longer an act of clemency granted a few exemplary prisoners. It is the primary rehabilitative measure that reintegrates inmates into society. Recent studies demonstrate the pervasive use of parole in our correctional system: fifty-four to seventy-five percent of all inmates are released from prison as parolees.[98] Thus, it is surely

89. Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 7 (1979).

90. *See* 18 U.S.C. §§4202, 4203(a) (1970). All the states have some form of parole statutes authorizing the discretionary release of prisoners. However, certain prisoners are never eligible for early release because of a mandatory sentencing scheme for certain egregious crimes. Newman, *Court Intervention in the Parole Process*, 36 ALB. L. REV. 257 (1972).

91. 442 U.S. 1 (1979).

92. *Id.* at 8-9.

93. See notes 19-22 and accompanying text, *supra.*

94. In *Greenholtz* the Court did, however, find such a statutory entitlement in the Nebraska Parole Statute at issue in the case. NEB. REV. STAT. §83-1,114 (1976). Looking to the particular statute's "unique structure and language," the decision found an expectation of parole "entitled to some measure of protection." 442 U.S. at 12. The Court relied upon Nebraska's statutory mandate that parole "shall" be granted absent a specific finding by the Parole Board that one of several designated reasons for denial is found. *Id.* at 11-12.

95. See notes 39-43 and accompanying text, *supra.*

96. 442 U.S. at 10.

97. *Id.*

98. *See* CITIZENS' INQUIRY ON PAROLE AND CRIMINAL JUSTICE, PRISON WITHOUT WALLS: RE-

an anomaly to find that such a potentially grievous loss as denial of parole is not entitled to due process protections.

Procedural safeguards would protect both the inmate and the state from arbitrary parole release decisions. The state has a significant interest in fair and accurate parole hearings that release inmates as soon as they are considered ready, a practice due process safeguards could help ensure. Parole is certainly cheaper than continued incarceration.[99] Even more important is the evidence that prolonged incarceration decreases the likelihood of a productive return to society.[100]

Where a protectible entitlement to parole is conferred by a particular statutory scheme, due process procedures must be formulated which balance the state's desire for speed and efficiency in processing parole applications with the inmate's interest in a fair and accurate decision regarding his suitability for early release. The Supreme Court in *Greenholtz* found such a statutory entitlement to parole[101] and formulated three procedural requirements for constitutional sufficiency. First, the inmate must have the opportunity to be heard at the parole release hearing.[102] Second, he must be provided adequate notice concerning the hearing.[103] Third, he must be given a statement of the reasons relied upon if parole is denied.[104] Requiring a formal hearing and a statement of the evidence relied upon in denying parole were rejected as not being constitutionally mandated. The Court determined these safeguards would do little, if anything, to minimize the risk of error in the release decision and would tend to convert the parole hearing into an adversary proceeding.[105]

Considering the benefits which accrue to the state from fair and accurate parole release decisions,[106] the Court has again given too much weight to the state's potential burden in deciding what procedural protections are required by due process. Parole boards can and should provide several procedures which would help ensure fair and accurate decisions without unduly impacting on administrative efficiency. Foremost among these is a requirement of advance notice of the day and time of the hearing. Without adequate notice of the proceeding, all other due process protections become meaningless. Prior notice

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PORT ON NEW YORK PAROLE (1975); Kastenmeier & Eglit, *Parole Release Decision-Making: Rehabilitation, Expertise, and the Demise of Mythology*, 22 AM. U.L. REV. 477, 481 (1973). *See also* 408 U.S. at 477.

99. Comment, *The Parole System*, 120 U. PA. L. REV. 282, 294 n.76 (1971).

100. Bixby, *A New Role for Parole Boards*, FED. PROBATION, June, 1970 at 24.

101. See note 96 *supra.*

102. See notes 71-73 and accompanying text, *supra.*

103. The dissent and concurrence in *Greenholtz* both vigorously disagreed with the majority's finding that the notice at issue in the case was constitutionally adequate. The method of notice informed the inmate in advance as to the month his parole hearing would be held, but did not inform him of the exact day and time of his hearing until the morning of that day. The result was only a few hours advance notice to the inmate. 442 U.S. at 22 (Marshall, J., dissenting); *id.* at 21 (Powell, J., concurring).

104. *Id.* at 14.

105. *Id.* at 15-16.

106. See notes 99-100 and accompanying text, *supra.*

should be at least three to five days rather than the few hours notice sanctioned by the Court as adequate.[107]

Additionally, the parole applicant should be given advance access to the information on which the parole board will rely in making its decision. He should also be afforded the opportunity to submit a written statement prior to the hearing and the opportunity at the hearing to explain or to rebut any adverse information. Such procedures would allow the inmate to efficiently present his side of the issues and to point out any discrepancies in the record.

As in prison disciplinary proceedings, counsel-substitutes should be mandated in parole release hearings whenever there are material fact discrepancies or whenever the issues involved are too complex to be effectively presented by the particular inmate.[108] Counsel-substitute's role could be limited to assisting in the presentation of complex information without turning the parole hearing into a full adversarial affair.

Finally, the inmate should be provided a list of the factors relied upon by the board in denying parole. This would allow the inmate to understand why he is not considered ready for conditional release and would help relieve the frustration that results from not knowing how to improve the chance for future parole. With such information, the prisoner could concentrate on those areas of rehabilitation which would best prepare him for reintegration into society.

By resorting to an unduly narrow entitlement analysis of the prisoner's interest in parole release hearings, the Supreme Court has found that no due process rights are constitutionally mandated at such proceedings unless the state grants a statutory right to parole release. When a statutory entitlement creates constitutional protections, the Court has set forth minimum procedures which give little consideration to the interests of both the parole applicant and the state. The additional safeguards suggested above would not appear to place any significant burden on the state, yet would greatly advance the goals of accurate factfinding and informal decisionmaking in parole release hearings.

Conclusion

In the current era of prison unrest and public concern over the correctional system, it is appropriate that courts have shown a willingness to recognize and protect the constitutional rights of prisoners and parolees. These individuals are among the least powerful segments of our society. Thus, the courts' rulings have done much to allow the due process clause of our Constitution to perform its intended function of guarding the vulnerable from unbridled and arbitrary governmental action. Yet, by adopting a narrow entitlement view in many of its recent decisions, the Supreme Court has required that prisoners have a statutory right to an interest before it may be constitutionally protected. Unfortunately, the Court has ignored the significant impact or grievous loss a prisoner may suffer from arbitrary governmental action regarding some interest of life, liberty or property which by chance is not anchored upon a specific statutory foundation. Such a view of due process protections places a large, un-

107. See note 74 *supra*.
108. See note 77 *supra*.

checked power in the legislature, and is contrary to the Court's clear constitutional mandate under the fourteenth amendment to oversee the use of state authority impinging upon such interests.

Even when an interest is found which requires constitutional protections, the Court has been primarily concerned with the state's additional burden in supplying procedural due process protections in correctional administrative hearings. Largely ignored are the benefits the state will derive from fair, accurate decisions in these proceedings that additional due process safeguards would help ensure. Hopefully, the legislatures will supply the requisite safeguards that the Court has said the Constitution cannot.