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Prison Disciplinary Hearings and Procedural Due Process - the Requirement of a Full Administrative Hearing

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PRISON DISCIPLINARY HEARINGS AND PROCEDURAL DUE PROCESS — THE REQUIREMENT OF A FULL ADMINISTRATIVE HEARING

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The administration of state prisons traditionally has been considered an executive function lying beyond judicial scrutiny in all except the most extreme cases of administrative abuse. The right of state penal administrators to mete out punishment for inmate misconduct has been regarded as plenary and, until recently, has gone virtually unchallenged by the judiciary.[1] Federal courts in New York[2] and Maryland[3] have recently critically re-examined the constitutional validity of summary punishment of prison inmates for alleged misconduct and have reached conclusions which, to varying degrees, reject the tradition of automatic judicial deference to decisions of prison administrators. These decisions hold that prison administrators must observe basic procedural requirements before imposing substantial punishment upon inmates for infraction of prison rules. This article, utilizing two of these recent decisions as models, analyzes the effects of the imposition of a fourteenth amendment due process requirement on the administration of prison discipline.[4]

I. THE FACTUAL SETTINGS

The facts of *Sostre v. Rockefeller* and *Bundy v. Cannon* are similar in that inmates of a state penal system were punished for alleged misconduct by being transferred to maximum security quarters. In both cases the decision to punish was made without there having been an administrative hearing conducted according to procedures embodying principles of due process. Since a basic understanding of the particularized facts in these cases is essential for an appreciation of the extent of freedom at stake and the necessity for observing procedural due process in the conduct of prison disciplinary proceedings, the facts surrounding the cases are set forth in some detail below.

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1. *See* note 43 *infra* and accompanying text.

2. Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *aff'd in part, rev'd in part sub nom.*, Sostre v. McGinnis, No. 35038 (2d Cir., Feb. 24, 1971).

3. Bundy v. Cannon, Nos. 70-486-T, 70-1363-T (D. Md., Mar. 2, 1971) (citing only to the interim opinion).

4. U.S. CONST. amend. XIV, § 1.

A. Sostre v. Rockefeller

On March 18, 1968, Martin Sostre was sentenced to serve a lengthy prison term in the New York correctional system.[5] As a former inmate of that system, Sostre, an outspoken Black Muslim and accomplished "jailhouse lawyer," had initiated federal civil rights litigation which resulted in an expanded recognition and protection of religious freedom for Black Muslims in jail and in an abolition of the harshest conditions then existing in solitary confinement cells.[6] Thus, Sostre was returning, on March 18, 1968, to a penal system which would probably receive him with apprehension and some hostility.

This was, in fact, the response of the state correctional authorities. Upon sentencing, Sostre was immediately conveyed to Attica Prison (Attica, New York) where he was secluded overnight in an uninhabited cell block. The next day he was summarily transferred to Green Haven Prison (Green Haven, New York) where he was held in solitary confinement. After several days in these restricted quarters, he was released into Green Haven's general prison population where he was entitled to the same privileges enjoyed by other inmates.[7] A few months later, however, Sostre was again transferred to solitary confinement (described by prison officials as "punitive segregation") where he remained for over one year. During this lengthy period of confinement, Sostre remained in his cell for twenty-four hours a day in almost complete isolation from other inmates.[8] He was placed on a restricted diet, permitted to shower and shave with hot water only once weekly, refused permission to work, and denied other important privileges afforded to other prisoners.[9] In addition, he was denied 124 and ⅓ days of "good time" credit while confined in these quarters.[10] This lengthy punitive confinement was justified by prison officials on several grounds: (1) his refusal, despite warnings, to discontinue rendering legal advice and assistance to fellow inmates;[11] (2) his statement in a letter to his sister that he would "be out

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5. He was sentenced by the Supreme Court of New York, Erie County, to thirty to forty years imprisonment for selling narcotics, to be followed by consecutive one-year and thirty-day sentences for contempt of court. 312 F. Supp. at 866.

6. *Id.*

7. *Id.* at 866–67.

8. *Id.* at 868. Sostre refused a daily exercise privilege (one hour in a small enclosed yard) since the granting of it would have been conditioned upon submission to a daily "strip frisk" in which the person searched, after having been rendered completely naked, is subjected to a rectal examination. For four of the thirteen months of Sostre's confinement, there was one other inmate incarcerated in the same group of cells.

9. *Id.* He was denied second portions of food and desserts, was refused access to the prison library, and was not allowed to read newspapers, watch movies or participate in educational and training programs.

10. *Id.* "Good time" is time credited to an inmate for good conduct and/or satisfactory employment performance. It serves to advance the time of an inmate's parole hearing and ultimate release by decreasing the amount of time left to serve. *See* note 63 *infra.*

11. A search of Sostre's cell on June 25, 1968, disclosed a letter from a court to another inmate (it was later shown that Sostre was translating this letter into Spanish for the other inmate) and revealed that Sostre was lending legal materials to other inmates. *Id.* at 867–69.

soon";[12] and (3) his refusal to answer questions about R.N.A. (Republic of New Africa), an organization referred to by him in a letter to his attorney.[13]

Not only was the punishment of Sostre severe; it was also summary. Prior to his punitive confinement, Sostre received neither written notice of the charges against him nor an administrative hearing to determine his guilt or innocence. Although he discussed his allegedly improper conduct with the warden, there was no record made of these conversations; and the warden's decision to punish him was not reduced to writing. Consequently, there existed no written record of either the reasons for Sostre's punishment or the findings of fact upon which it was based.[14]

After having been confined for one year under these conditions, Sostre filed suit in federal court, alleging that such confinement was unconstitutional and that, therefore, he was entitled to both damages and injunctive relief under the Civil Rights Act of 1871.[15] He alleged, *inter alia,* that his confinement in punitive segregation under the conditions described[16] constituted such cruel and unusual punishment as to have been proscribed by the eighth[17] and fourteenth[18] amendments and that the failure to provide him with either notice of the charges against him or an administrative hearing prior to punishment denied

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12. The letter stated:

> As for me, there is no doubt in my mind whatsoever that I will be out soon, either by having my appeal reversed in the courts or by being liberated by the Universal Forces of Liberation. The fact that the militarists of this country are being defeated in Viet Nam and are already engaged with an escalating rebellion in this country by the oppressed Afro-American people and their white allies are sure signs that the power structure is on its way out. They are now in their last days and soon they won't be able to oppress anybody because they themselves will be before the People's courts to be punished for their crimes against humanity as were the German war criminals at Nuremberg.

Id. at 867. All mail from Sostre to his friends, relatives and attorney was censored. The warden of the institution excised all portions of correspondence to his attorney which he believed were not directly related to Sostre's immediate case.

13. The warden of Green Haven Prison stated that his concern over the statement in Sostre's letter to his sister prompted him to ask Sostre what he meant by a reference to R.N.A. in the letter to his attorney. *Id.* at 867.

14. *Id.* at 868.

15. 42 U.S.C. § 1983 (1964) provides, in pertinent part, that "[e]very person who, under color of any statute, . . . regulation [or] custom . . . of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law [or] suit in equity. . . ." Because, unlike the situation in which a person is seeking a writ of habeas corpus, there is no requirement that one suing pursuant to section 1983 must exhaust state remedies [Houghton v. Shafer, 392 U.S. 639 (1968); Damico v. California, 389 U.S. 416 (1967); McNeese v. Board of Education, 373 U.S. 668 (1963); Monroe v. Pape, 365 U.S. 167 (1961)], this statute has become a well utilized vehicle for contesting the constitutionality of the treatment of inmates by prison administrators. *See* Johnson v. Avery, 393 U.S. 483 (1969); Lee v. Washington, 390 U.S. 333 (1967); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969); Jacob, *Prison Discipline and Inmate Rights,* 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 227, 255 (1970).

16. *See* notes 8–9 *supra* and accompanying text.

17. U.S. CONST. amend. VIII provides, in part, that "[e]xcessive bail shall not be required, . . . nor cruel and unusual punishments inflicted." This prohibition is made applicable to the states by operation of the fourteenth amendment. *See* Robinson v. California, 370 U.S. 660 (1962).

18. U.S. CONST. amend. XIV, § 1.

him his liberty in a manner which was contrary to due process of law in violation of the fourteenth amendment.[19]

On July 2, 1969, Judge Constance Baker Motley issued a temporary restraining order requiring prison officials to release Sostre from solitary confinement and to return him to the general prison population pending a hearing and final decision on his suit.[20] After a subsequent full evidentiary hearing, Judge Motley rendered a wide-sweeping decision in which she held the treatment of Sostre by prison officials to have been unconstitutional and in which she found that Sostre was punished, not because of a serious or even a minor infraction of the prison rules, but in fact because of "his legal and Black Muslim activities during his 1952-1964 incarceration, because of his threat to file a law suit against the Warden to secure his right to unrestricted correspondence with his attorney and to aid his codefendant . . . and because he is, unquestionably, a black militant who persists in writing and expressing his militant and radical ideas in prison."[21] Specifically, Judge Motley held that Sostre's treatment violated the Constitution because, *inter alia*,[22] he had been confined in punitive segregation without first being given (1) notice (designating the prison rule violated) of the charges against him; (2) a hearing before an impartial official at which he was allowed to be represented by counsel or by a counsel-substitute, to cross-examine his accusers and to call witnesses in rebuttal; and (3) a written record of the hearing, containing the decision, supporting reasons and a statement of the evidence upon which it was based.[23]

This decision was an unequivocal declaration that inmates of state penal institutions are protected by the Constitution from arbitrary treatment by prison administrators and that judicial restraint and deference to decisions of prison administrators are not appropriate when these administrative decisions infringe upon constitutionally protected freedoms. More specifically, Judge Motley's opinion offered

19. *Id.* The fourteenth amendment provides, in part, that "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

20. A preliminary injunction was subsequently issued. *See* Sostre v. Rockefeller, 309 F. Supp. 611 (S.D.N.Y. 1969). The day after his court-ordered release, Sostre was disciplined for "having dust on his cell bars" and on August 3, 1969, was again punished for possessing "inflammatory racist literature." 312 F. Supp. at 869. Judge Motley found that both punitive actions were unconstitutional, the former because it was taken against Sostre "in retaliation for his legal success" and the latter because it penalized Sostre for writing and expressing his ideas.

21. 312 F. Supp. at 869–70.

22. In addition, Judge Motley held that Sostre had been treated unconstitutionally because (1) he had been confined in punitive segregation for a period of time disproportionate to the gravity of the "offenses" which he allegedly committed, contrary to the requirements of the eighth amendment [*see* Weems v. United States, 217 U.S. 349 (1910)]; (2) he had been subjected to conditions and forms of restraint which were inconsistent with "evolving standards of decency that mark the progress of a maturing society" [312 F. Supp. at 871, *quoting* Trop v. Dulles, 356 U.S. 86, 101 (1958)]; (3) he had been punished for expressing political and religious ideas, which punishment violated his first amendment freedom of speech as guaranteed against state infringement by the fourteenth amendment (312 F. Supp. at 876); and (4) he had been denied both a free and unencumbered access to the courts and the effective assistance of counsel by the prison's censorship of the mail which he sent to his attorney, which denials were in violation of the sixth amendment as protected from state infringement by the fourteenth amendment. *Id.* at 873.

23. 312 F. Supp. at 872, *relying on* U.S. CONST. amend. XIV.

the most expansive definition and protection of inmates' rights of any decision ever rendered, a definition which was novel in at least three regards. It was a fundamental extension of the protection offered inmates by the eighth amendment's proscription of cruel and unusual punishment; prior to *Sostre,* federal courts had held unconstitutional the placing of prisoners in various "strip" cells (which were bare and unfurnished) or certain other places of solitary confinement, but the conditions of confinement condemned in those cases were substantially more barbaric than those suffered by Martin Sostre.[24] It was a firm statement that certain extensive and protective procedures must be followed before an inmate can be subjected to serious punishment by prison officials.[25] And it was the first time that monetary damages of either a compensatory or a punitive nature had been awarded to an inmate of a state penal institution for improper disciplinary treatment.[26]

The Second Circuit, in reviewing Judge Motley's decision, reversed in part and affirmed in part. While holding Sostre's treatment to have been unconstitutional, the court reversed the lower court's determination that Sostre's confinement constituted cruel and unusual punishment[27] and held that not all traditional procedural due process protections are required at every prison disciplinary proceeding.[28] The court did, however, acknowledge that severe punishment of inmates should only be "premised on facts rationally determined" and, in most cases, only after the prisoner has been "confronted with the accusation, informed of the evidence against him, and afforded a reasonable opportunity to explain his actions."[29]

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24. *See, e.g.,* Wright v. McMann, 387 F.2d 519 (2d Cir. 1967) (the court considered an inmate's allegations that for eleven days he had been confined, naked, in a filthy solitary confinement cell, with the windows opened wide despite sub-freezing temperatures, and that he had been denied the use of soap, toilet paper, a toothbrush and other hygienic implements; the court held that, if the allegations were correct, these conditions violated the eighth amendment's proscription of cruel and unusual punishment); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969) (the court condemned as cruel and unusual punishment the confinement of an inmate, nude, in an inadequately lighted and ventilated cell where he was forced to sleep on a concrete floor and was denied the means with which to maintain personal cleanliness); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966) (the court held unconstitutional the confinement of an inmate in a solitary "strip" cell which was devoid of furniture and which lacked proper lighting and ventilation; the inmate also had been denied health articles and had been required to eat the meager prison fare provided him in the stench and filth that surrounded him in his cell).

25. Several injunctions were issued against the defendants, the state commissioner of corrections and the wardens of the two New York State prisons involved, including an injunction against returning Sostre to punitive segregation for the charges previously brought and against punishing him in any other manner the result of which would be the loss of accrued "good time" or the inability to earn "good time" without providing full procedural safeguards. In addition, the court retained jurisdiction in order to give the defendants the opportunity to submit proposed rules and regulations governing future disciplinary charges and hearings. 312 F. Supp. at 884.

26. Inmates have, however, recovered money damages against penal officers for negligent supervision leading to personal injury. *See* Note, *Prisoners' Rights Under Section 1983,* 57 GEO. L.J. 1270 (1969).

27. Sostre v. McGinnis, No. 35038 at 26–28 (2d Cir., Feb. 24, 1971). *See* note 22 *supra.*

28. *Id.* at 36–37.

29. *Id.* at 37. The Second Circuit upheld Judge Motley's award of $25 compensatory damages for each day that Sostre spent in segregation (372 days), a total of $9,300. But the court reversed the $3,270 award of punitive damages, indicating that the deterrent impact of a punitive award would be minimal.

B. Bundy v. Cannon

In October, 1970, seventy-two inmates were transferred from the Maryland House of Correction, a medium security institution, to the punitive segregation quarters of the Maryland Penitentiary, a maximum security institution.[30] These inmates were transferred because of their alleged involvement in a work stoppage which occurred at the House of Correction during a three-day period in September and October, 1970. The origin of this work stoppage was dissatisfaction with medical conditions at the House of Correction and with the punishment of a few inmates who protested the lack of medical services to the Warden of the House of Correction. After the third day of this non-violent work stoppage, which involved most of the inmates at the House of Correction, correctional officials decided to transfer a large number of inmates to the Maryland Penitentiary. Two correctional officials, both captains of the security force at the House of Correction, were instructed to arrange for the compilation of a list of inmates to be transferred. The inmates whose names appeared upon this list were conveyed to the punitive quarters of the Maryland Penitentiary.

Within two or three days these inmates were brought before a disciplinary board (termed by Department of Corrections officials as an "Adjustment Committee") composed of one of the captains who had supervised the compilation of the transfer list, a classification supervisor at the House of Correction and a counselor at the House of Correction. Seventeen of the seventy-two inmates were accused of specific acts of misconduct while the other fifty-five were told by the Adjustment Committee that they were transferred because they were not "amenable to the program of security level of the Maryland House of Correction." In each of these latter fifty-five cases, the same form was duplicated with the exact same language in it. The procedures followed at the Adjustment Committee hearings were the same in all cases. The charge was read to the inmate or, in cases where there were no charges, the general reason for the transfer (absence of amenability to the security level of the House of Correction) was read to the inmate. The inmates were then allowed to respond and a decision was reached concerning appropriate disposition of the case.

The recommendation of the Adjustment Committee in the cases of the seventeen inmates charged with specific acts of misconduct was that these inmates should be indefinitely confined in the maximum security quarters of the Maryland Penitentiary, that five days of their "good time" should be forfeited, and that the Commissioner of the Department of Corrections should deprive each prisoner of one hun-

30. *Bundy v. Cannon* is a class action filed by eight inmates who were transferred from a minimum security correctional camp to the maximum security quarters of the Maryland Penitentiary for their alleged participation in a work-stoppage at the camp and by two inmates punished for allegedly forming an illegal prisoner group by lengthy confinement in the maximum security quarters of the Maryland Penitentiary. The facts related in the text are those of *Adams v. Cannon*. Because the process of administrative decision-making in *Adams* did not differ significantly from that employed in *Bundy* and because of the similarity of the legal issues and the facts involved, *Adams* and *Bundy* were consolidated for trial and decision.

dred additional days of "good time." These recommendations were approved by the Warden of the Maryland Penitentiary and subsequently, in the cases of revocation and forfeiture of "good time," by the Commissioner's Office. The recommendations of the Adjustment Committee in the cases of the fifty-five inmates allegedly transferred for "amenability" reasons were that these individuals be retained in the Maryland Penitentiary. These individuals subsequently were confined in the maximum security quarters of the Penitentiary. No "good time" was revoked or forfeited in these cases.

In none of the seventy-two cases heard by the Adjustment Committee did the inmate involved receive, prior to his hearing, notice of charges nor was he provided with representation at the hearing or allowed to present witnesses of his own or to cross-examine his accusers. The membership of the tribunal hearing these cases included one who had been intimately involved in the transfer process. Finally, no written findings of fact, summary of evidence, or conclusions of law were made by the tribunal.[31]

As in the decision of the New York district court in *Sostre,* the Maryland district court held that punishment imposed in this manner did not comport with the requirements of procedural due process. Judge Roszel C. Thomsen held specifically that these proceedings violated the fourteenth amendment because they were not preceded by written notice of charges and because the decision-making body lacked objectivity and impartiality in that it included one prison official who had initiated and pressed charges of misconduct. The court went on to find that certain suggested[32] procedures for disciplinary proceedings satisfy "minimum standards" of constitutionality where an inmate is charged with a major violation.[33] The suggested procedures would require that (1) inmates be given written notice of the charges against them prior to a hearing; (2) a hearing be held before an impartial tribunal in all cases which could result in the imposition of serious punishment; (3) inmates be allowed at such a hearing to present witnesses of their own, to cross-examine their accusers, and to be represented by another inmate or staff member; (4) a written report be made of the proceedings before the administrative tribunal including a summary of the evidence, the findings of fact, and a brief explanation of the reasons for the board's decision; (5) the determination of the disciplinary board be based on substantial evidence; and (6) the decision of the administrative tribunal be final except in cases where the inmate objects to the decision and takes an appeal, on the record, to the warden of the institution.[34]

31. Stipulation of Fact, *Bundy v. Cannon.*

32. These procedures were suggested by amicus curiae in *Bundy v. Cannon.*

33. A major violation is one for which the warden seeks punishment in excess of counseling, warning, reprimand, adjustment release (a form of "probation"), temporary loss of one or more privileges, loss or forfeiture of not more than five days "good time," and/or segregated confinement for a period of not more than fifteen days. *Id.* at 6.

34. *Id.* at 8–11. On May 26, 1971, shortly before this article went to press, Judge Thomsen rendered a final opinion and order reaffirming the interim opinion and decree. The final opinion, while granting declaratory relief, denied injunctive relief since the Division of Correction had, subsequent to the interim decree, adopted new policies governing the imposition of discipline. The new policies incorporated the

Besides acknowledging that observance of these procedures would satisfy minimal constitutional requirements, Judge Thomsen ordered that all plaintiffs in the *Bundy* case be recredited with their good time and returned to a medium- or minimum-security institution.[35]

II. THE TEST OF PROCEDURAL DUE PROCESS

It is in the requirement that procedural amenities be observed that the decision of the district court in *Sostre* was, and the decision in *Bundy* is, most important and novel. The test of the applicability and content of procedural due process can best be termed "contextual." The requisites of procedural due process do not exist in an inflexible and invariable form, but instead are defined in any given case by an ad hoc examination and analysis of several factors. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."[36]

Thus, in considering whether a hearing is constitutionally required before the government may act in a way injurious to private interests, and in determining the content and timing of such a required hearing, the following factors must be balanced:

(1) the nature of the particular governmental action involved;

(2) the interest of the private party which is placed in jeopardy by that governmental action; and

(3) the interest of the government in having a summary decision-making process.

While this balancing test is ultimately the appropriate standard for determining the applicability and content of procedural due proc-

provisions of the interim decree. In its final opinion, the court stated that the inclusion in its interim decree of specific and detailed procedures for disciplinary hearings suggested by amicus curiae in the case was premised in part upon the agreement of the parties that the procedures were practicable and upon the consent of counsel for the Division of Correction that those particular procedures be prescribed.

35. The order also required Department of Corrections officials to place notations in the records of plaintiffs forbidding future detrimental treatment based upon the incidents litigated in *Bundy*. *Id.*

36. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961). The Supreme Court has, on numerous occasions, stated this flexible standard for satisfying the requirements of procedural due process and listed relevant factors to be considered in determining whether this standard has been met. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970) ("The extent to which procedural due process must be afforded . . . is influenced by the extent to which [one] may be 'condemned to suffer grievous loss' [citation omitted] and depends upon whether the . . . interest in avoiding that loss outweighs the governmental interest in summary adjudication."); Hannah v. Larche, 363 U.S. 420, 442 (1960) ("The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account."); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring) ("The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished — these are some of the considerations that must enter into the judicial judgment.").

ess, it may well be that a threshold showing that governmental action, in the nature of "adjudication,"[37] threatens potential grievous injury to a private interest will presumptively invoke the traditional and rudimentary protections of procedural due process. Thus, in the case of an accused who is threatened by the state with substantial punishment following certain factual determinations, it might be initially presumed that several basic procedural standards must be observed. These protections, developed to prevent arbitrary decision-making, include prior notice of charges, a "trial type" hearing before an impartial tribunal at which the accused is able to confront his accusers, cross-examine opposing witnesses, present evidence (including the testimony of witnesses) and enjoy representation by counsel, and a written decision based upon the evidence produced at the hearing and containing findings of fact and reasons for the decision.[38] The government would, of course, be entitled to rebut this presumption by showing that the balance of factors renders some or all of these rudimentary procedural protections inappropriate in the particular factual setting.

Support for this "presumptive test" of procedural due process is found in pronouncements of the Supreme Court that one's right to a hearing before suffering substantial injury is implicitly recognized in the Constitution[39] and that, to satisfy this constitutional requirement, the hearing must be "meaningful."[40] Professor Davis states, "The true principle is that a party who has a sufficient interest or right at stake in a determination of governmental action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts, except in the rare circumstance when some other interest, such as national security, justifies an overriding of the interest in fair hearing."[41] It is submitted that Judge Motley's use of this "presumptive test" of procedural due process in the district court opinion in *Sostre* was correct in that it placed upon the state the burden of demonstrating that the failure to provide the procedures in

37. By "adjudicatory" action is meant the application of pre-existing policies or rules to particular factual determinations. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT, §§ 7.02–.04 (1959).

38. The Supreme Court in Goldberg v. Kelly, 397 U.S. 254 (1970) indicated that these are the basic components of procedural due process when no countervailing governmental interest is presented requiring omission of one or more of these ingredients. *Accord,* Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963).

39. *See, e.g.,* Goldberg v. Kelly, 397 U.S. 254 (1970); Greene v. McElroy, 360 U.S. 474, 496–97 (1959); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) ("[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.")

Placing upon the government the burden of showing why the "basic" right to full procedural due process is inappropriate finds support in traditional equal protection and due process arguments, which require the government to justify with "compelling reasons" the abridgment of basic rights. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969); Levy v. Louisiana, 391 U.S. 68 (1968); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942).

40. *See* Armstrong v. Manzo, 380 U.S. 545, 552 (1965); Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950).

41. K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.02, at 115 (1959).

question was not violative of due process. The state's failure to meet this burden justified Judge Motley's decision. In *Bundy* the court concluded that no proffered justification for summary decision-making required the omission of fundamental procedural safeguards.[42]

III. *Sostre* AND *Bundy* EVALUATED

A. The Traditional "Hands-Off" Approach

The traditional judicial response to inmate allegations of unconstitutional treatment has been to withhold relief in deference to the experience and expertise of prison administrators.[43] Exemplary of this studied noninvolvement[44] is the response of the Tenth Circuit Court of Appeals to an inmate assertion that he had been unfairly disciplined: "The discretion of the prison officials on matters purely of discipline, within their powers, is not open to review."[45]

This promiscuous judicial deference to prison administration acknowledged the plenary power of penal administrators to discipline as they saw fit. An attendant consequence of the denial of judicial review was the reinforcement of the prison community's isolation by insulating it from public awareness; the courts' refusal to consider the validity of prisoner complaints prevented the public from acquiring knowledge of prison conditions. Thus, the courts' failure to correct obvious faults in the discipline procedure itself hindered possible reform efforts by concerned segments of the public.

Erosion of the "hands-off" doctrine began with dicta contained in several decisions. In *Landman v. Peyton,*[46] for example, the Fourth Circuit Court of Appeals stated:

> Under our constitutional system, the payment which society exacts for transgression of the law does not include relegating the transgressor to arbitrary and capricious action. . . . [W]e cannot, without defaulting in our obligation, fail to emphasize the imperative duty resting upon higher officials to insure that lower

42. The court based this conclusion, in part, upon an agreement of the parties that the procedures adopted by the court were "practicable." Bundy v. Cannon at 6.

43. *See, e.g.,* McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964); Siegal v. Ragen, 180 F.2d 785, 788 (7th Cir. 1950); Roberts v. Peperseck, 256 F. Supp. 415 (D. Md. 1966); Ruark v. Schooley, 211 F. Supp. 921 (D. Colo. 1962).

44. The "hands-off" doctrine is not founded upon a claim by the federal courts of a lack of jurisdiction since 28 U.S.C. § 1343 clearly authorizes federal courts to hear claims of denial of constitutional rights and since 42 U.S.C. § 1983 provides a specific vehicle for obtaining redress for denials of constitutional rights which are made under color of law. *See* note 15 *supra.* Nor is the "hands-off" doctrine based upon the concepts of abstention or exhaustion of remedies since in almost no prison cases does there exist a statute the interpretation of which might negate the necessity of reaching the constitutional question and, as noted previously (*see* note 15 *supra*), exhaustion of state remedies is not required in order for one to bring suit under 42 U.S.C. § 1983. *See* Zwickler v. Koota, 389 U.S. 241 (1967). The doctrine is best described as a self-imposed limit on jurisdiction based upon respect for federal-state comity and on deference to the expertise of prison administrators.

45. Kostal v. Tinsley, 337 F.2d 845, 846 (10th Cir. 1964). *See* Douglas v. Sigler, 386 F.2d 684 (8th Cir. 1967); McCloskey v. Maryland, 337 F.2d 72, 74 (4th Cir. 1964) ("In the great mass of instances, however, the necessity for effective disciplinary controls is so impelling that judicial review of them is highly impractical and wholly unwarranted.").

46. 370 F.2d 135 (4th Cir. 1966), *cert. denied,* 388 U.S. 920 (1967).

> echelon custodial personnel are not permitted to arrogate to themselves the functions of their superiors. Where the lack of effective supervisory procedures exposes men to the capricious imposition of added punishment, due process and Eighth Amendment questions inevitably arise.[47]

Subsequently, in a decision holding unconstitutional racial segregation within prisons, it was stated that "it is well established that prisoners do not lose all their constitutional rights and that the Due Process and Equal Protection Clauses of the Fourteenth Amendment follow them into prison and protect them there from unconstitutional action on the part of prison authorities. . . ."[48]

Finally, the Supreme Court in *Johnson v. Avery*,[49] in holding unconstitutional a prison regulation which prohibited one inmate from giving legal assistance to another, stated that, while "discipline and administration of state detention facilities are state functions . . . , in instances where state regulations applicable to inmates of prison facilities conflict with [federal constitutional] rights, the regulations may be invalidated."[50]

These statements, although made in the context of cases not involving disciplinary questions, were irreconcilable with the earlier law that prison inmates were "chattels of the state" and undermined the principle that judicial review of disciplinary proceedings within a penal institution was "wholly unwarranted."[51] By recognizing that the Constitution's protections extend through prison walls, these decisions set the stage for the application of due process principles to prison discipline.

This application initially was made in *Morris v. Travisono*,[52] in which inmates challenged a wide range of prison practices, including the taking of summary disciplinary action. The court adopted, as an

47. 370 F.2d at 141.

48. Washington v. Lee, 263 F. Supp. 327, 331 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968). *Accord*, Talley v. Stephens, 247 F. Supp. 683, 689 (E.D. Ark. 1965). Similar statements were contained in Jackson v. Godwin, 400 F.2d 529, 532-33 (5th Cir. 1968), which invalidated certain restrictive correspondence regulations:

> Acceptance of the fact that incarceration, because of inherent administrative problems, may necessitate the withdrawal of many rights and privileges does *not* preclude recognition by the courts of a duty to protect the prisoner from unlawful and onerous treatment of a nature that, of itself, adds punitive measures to those legally meted out by the court. . . . [C]onstitutional safeguards are intended to protect the rights of *all* citizens, including prisoners, especially against official conduct which is arbitrary. . . .

(Emphasis added.) *See* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962).

49. 393 U.S. 483 (1969).

50. *Id.* at 486. The President's Commission on Law Enforcement and the Administration of Justice recognized the demise of the "hands-off" doctrine: "There are increasing signs that the courts are ready to abandon their traditional hands-off attitude. They have so far been particularly concerned with the procedures by which parole and probation are revoked. But recent cases suggest that the whole correctional area will be increasingly subject to judicial supervision." UNITED STATES PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE: CORRECTIONS 83 (1967) [hereinafter cited as PRESIDENT'S COMM'N ON CORRECTIONS].

51. McCloskey v. Maryland, 337 F.2d 72, 74 (4th Cir. 1964).

52. 310 F. Supp. 857 (D.R.I. 1970).

interim decree, newly devised standards which were approved by both plaintiffs and defendants and retained jurisdiction for eighteen months to evaluate their effectiveness. These rules required that the inmate be given notice of any charges which had been made against him, that an investigation of the charges be made by a superior officer, and that there be an administrative determination of "guilt" before the confinement of an inmate in maximum security quarters or the revocation of "good time."[53] District court decisions in *Sostre, Bundy* and in other recent cases[54] have dealt with the specifics of implementing these standards. However, the Second Circuit in *Sostre* appears to have taken a step backwards in this implemention process.[55]

B. The Nature of the Liberty at Stake

Before *Sostre* and *Bundy* can be evaluated, it is first necessary to examine the nature and quantum of liberty which is at stake in a disciplinary proceeding. Although incarceration in a penal institution is viewed by many merely as one facet of an inflexible dichotomy — one is either in or out of prison — it is clear that gradations of institutional freedom exist after the denial, by incarceration, of liberty in its "traditional" sense. These gradations are both inter- and intra-institutional. In Maryland, for example, institutional freedom reaches its ebb at the Maryland Penitentiary, a maximum security prison,[56] and is at its greatest extent at the various camp centers, which are marked by an absence of walls and of maximum security devices and practices.[57]

53. The standards further required that the administrative board be comprised of personnel from the prison's custody and treatment departments and that the officer reporting the alleged misconduct be disqualified from membership on the panel. The inmate is entitled to representation at the hearing by a prison employee and may present "information available to him," but he has no right to confront his accusers or to present witnesses in his own behalf. A record of the hearing must be made and the decision must be based upon substantial evidence. The warden may review the record and decision but may not increase punishment or reverse a finding of innocence. *Id.* at 871–74. *But cf.* Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970).

54. *See* Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970); Shone v. Maine, 406 F.2d 844 (1st Cir. 1969); Wright v. McMann, No. 66 Civ. 77 (N.D.N.Y., July 31, 1970); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970); Kritsky v. McGinnis, 313 F. Supp. 1247 (N.D.N.Y. 1970); Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970). *See* notes 111–15 *infra* and accompanying text for a discussion of these cases.

55. *See* notes 114–19 *infra* and accompanying text.

56. "The Maryland Penitentiary . . . is little better than a place to do time with a few positive treatment opportunities. The institution program is essentially industries-and-security oriented. The buildings are old and in poor state of maintenance. Limited space seriously impedes planning and expansion of programs. Recreation and general living space is inadequate, particularly when penitentiary inmates may live for decades within this small and crowded enclosure. There is no formal vocational training program. The development of any sophisticated plan for treatment would be an academic exercise in view of the almost complete lack of treatment facilities." THE COMMISSION TO STUDY THE CORRECTIONAL SYSTEM OF MARYLAND, MINORITY REPORT TO GOVERNOR SPIRO T. AGNEW 20 (1967) [hereinafter cited as MD. CORRECTIONAL COMM'N REP.]. Inter-institutional transfers of inmates for disciplinary reasons are made to the Penitentiary, which serves as a prison within a penal system. Maryland Department of Correctional Services, Policy Memorandum No. 21–68 (Jan. 17, 1968).

57. The camp centers (five in all) are recently constructed, modern facilities which have ample recreation areas. The vocational programs, including work-release programs, are superior to those offered at either the Penitentiary or the House of Correction (a medium security institution). Inmates at the camps have substantial contact with the communities in which the camps are located, and there are oppor-

The existence or absence of various privileges or rights hinges upon the situs of confinement. Thus, vocational and work-release programs are, for the most part, reserved for those in minimum security institutions.[58] Chances for parole increase radically as an inmate progresses through the chain of maximum-medium-minimum security institutions.[59] Since the penitentiary is an institution concerned almost exclusively with security, its purpose and nature are functionally distinct from those of the minimum security penal institutions, where emphasis is upon preparation for return to the outside world.[60] Intra-institutional liberty also exists in gradations. For example, in the Maryland Penitentiary the degrees of incarceration range from solitary isolation,[61] the most restrictive form of imprisonment, through confinement in "maximum security" quarters,[62] to the usual form of incarceration, confinement in the "general population."

In addition to forfeiting some or all of their institutional liberty, inmates adjudged guilty of misconduct are denied "good time" credit, which is a statutory device that shortens the length of time to be

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tunities for inmates to spend time outside the camp centers. The purpose of these camps is to prepare inmates for release rather than to maintain a high level of security. MD. CORRECTIONAL COMM'N REP. 62–66.

58. *See id.*

59. Conversation with David Mason, Chairman of the Maryland State Board of Parole. The fact that an inmate is confined in a minimum security institution is strong evidence that he has adjusted well to institutionalization, a factor of critical importance in assessing whether parole is appropriate. *Id.*

60. Prior to the decision in *Bundy,* the regulations governing punitive inter-institutional transfers, although requiring the Commissioner or Deputy Commissioner of Corrections to approve all transfers, did not provide for any hearing. As a practical matter, there was no institutionalized way for the reviewing party to challenge the decision to transfer. The transferring institution's warden thus both made the initial decision that a transfer was necessary and exercised a virtually unreviewable power to effect such a transfer. *See* Maryland Department of Correctional Services, Administrative Directive No. 12–70, 3–4 (June 1, 1970).

61. Confinement in isolation (known in the prison vernacular as the "hole") was, prior to a recently published policy memorandum, for a period of up to ten days. While so confined, an inmate is totally isolated from others in a small unfurnished room (rather than a cell), not allowed to exercise outside the cubicle, and denied visitation and other privileges. (This information was gathered by the author during a tour of the Maryland Penitentiary and from discussions with the former warden of that institution.) The new policy memorandum forbids the use of isolation cells for routine punishment and authorizes their utilization only for a brief "cooling-off" period. Maryland Department of Correctional Services, Administrative Directive No. 16–70 (August 10, 1970).

62. Maximum security quarters are used for the severe punishment of inmates who violate prison rules. Inmates so punished are locked in a single cell for twenty-four hours a day except for brief exercise periods (ten to fifteen minutes two or three times weekly) and weekly showers. Other denials of liberty include (1) exclusion from standard recreational activities (movies, television viewing, etc.), (2) restriction of library privileges, (3) refusal of permission to participate in vocational and educational programs, (4) refusal of permission to work, (5) limitation of visitation privileges, and (6) restriction of socialization opportunities. *See* Affidavit of inmate of Maryland Penitentiary, "sentenced" to maximum security for one year, on file at the office of the MARYLAND LAW REVIEW. There is a thirty-day time limit on the use of this form of punitive confinement for inmates whose misconduct presented no "serious danger and threat to the security of the institution and the inmates," but there is only a requirement that the punishment be reviewed every thirty days in cases of those guilty of serious infractions. Maryland Department of Correctional Services, Administrative Directive No. 12–70 (June 1, 1970). Such confinement is similar to that imposed upon Martin Sostre.

served[63] and expedites a prisoner's consideration for parole.[64] Insofar as the accumulation of "good time" advances a prisoner's release date, it can be said to represent "traditional" liberty — freedom from incarceration.

Thus, there is a significant quantum of institutional and traditional liberty to which every inmate is entitled while incarcerated.[65] Disciplinary decisions directly deny both institutional liberty and traditional liberty (when "good time" is forfeited) and result indirectly in a denial of traditional liberty insofar as they are the reasons for the postponement or refusal of parole and the inability to earn "good time."[66] It is this quantum of liberty which deserves protection by the fourteenth amendment's requirement that liberty should not be denied except by due process of law.

C. *The Interest of the State*

Prison administrators raise several arguments in response to suggestions that an adversarial administrative hearing is required prior to the imposition of punishment. They contend that summary *ex parte* action is necessary in many instances to deter conduct that, in the restricted atmosphere of a prison community, may explode into a large scale disturbance or violence. The *ex parte* nature of these proceedings is also defended on the grounds that (1) there is no "right" to "good time" or to maximum institutional freedom; (2) the imposition of discipline is not truly adversarial in nature but merely a component part of the rehabilitative and therapeutic scheme of incarceration; and (3) the requirement of an adversarial hearing prior to punishment would greatly complicate administrative problems, result in an additional expenditure of public funds, and constitute a security risk. An analysis of these proffered justifications follows.

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63. MD. ANN. CODE art. 27, §§ 700(b)-(d) (1971) authorize five days a month diminution of sentence for inmates "not guilty of a violation of the discipline or . . . rules" of the institution and an additional five days monthly for inmates who excel in their employment or maintain satisfactory progress in educational and training courses. Section 700(e) requires the forfeiture of that "good time" which is earned in the month in which an inmate violates prison rules or exercises a lack of fidelity or care in the performance of his work or in his educational and vocational training. Section 700(e) also empowers the Department of Corrections to deduct "a portion or all" of an inmate's "good time" as punishment for any of the above-mentioned delinquencies.

64. An inmate is eligible for parole consideration after he has served one-fourth of his sentence, MD. ANN. CODE art. 41, § 122(a) (Supp. 1970), except in a limited number of cases. For example, persons with life sentences must serve fifteen years. *Id.* § 122(b). The accrual of "good time," by decreasing the length of the sentence, advances the time for parole consideration.

65. The extent of liberty which is forfeited when "good time" is revoked can be very substantial, resulting in years of additional confinement. *See, e.g., Bundy v. Cannon* (punitive transfer of inmates from minimum security to maximum security institution accompanied by forfeiture of "good time" of from seventy-eight days to over one year and, in three cases, by denials of parole). *See also* Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795, 831 (1969).

66. Throughout this article, the focus will be on disciplinary action denying the three most substantial quanta of institutional liberty: (1) "good time" credit, (2) freedom from maximum security confinement within an institution, and (3) freedom from confinement in a maximum security institution. General references to serious disciplinary actions or substantial denials of prison liberty should be understood to refer to deprivations of one or more of these quanta of liberty.

1. "Good Time" and Maximum Institutional Freedom as Privileges

Prison administrators are on constitutionally unsound ground when they argue that, because "good time," parole, and other forms of institutional freedom are bestowed upon inmates not as a matter of constitutional right but as privileges accorded by the legislature,[67] procedural due process need not be observed when these freedoms are forfeited or withdrawn. The test of whether procedural due process protections must be given one's interest in a gratuity is not whether that interest constitutes an established right to the gratuity but whether one's interest in "avoiding [its] loss outweighs the governmental interest in summary adjudication."[68] Just as a failure to afford recipients of public assistance a hearing prior to termination of benefits cannot be justified by an argument that "public assistance benefits are 'a "privilege" and not a "right," ' "[69] a failure to conform to the requirements of procedural due process when denying maximum institutional freedoms may not be based solely upon their designation as "privileges." Like welfare payments, tax exemptions,[70] unemployment compensation,[71] wrongful death benefits,[72] the right to reside in public housing,[73] and the right to pursue a profession,[74] "good time" and parole are conditional statutory entitlements. The determination of facts triggering, directly or indirectly,[75] the forfeiture of accrued "good time" or the postponement or denial of parole may not be made arbitrarily merely because the interests involved are labelled "privileges."[76] The Second Circuit in *Sostre* recognized that a state "may not avoid the rigors of due process by labeling an action which has serious and onerous consequences as a withdrawal of a 'privilege' rather than a 'right.' " The court went on to add that the "distinction between

67. *See, e.g.*, Douglas v. Sigler, 386 F.2d 684, 687 (8th Cir. 1967) ("The diminution of sentence rests on legislative grace and not constitutional right.").
68. Goldberg v. Kelly, 397 U.S. 254, 263 (1970).
69. *Id.* at 262, *quoting* Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969).
70. Speiser v. Randall, 357 U.S. 513, 519–20 (1958).
71. Sherbert v. Verner, 374 U.S. 398 (1963).
72. Levy v. Louisiana, 391 U.S. 68 (1968).
73. Thorpe v. Housing Authority, 386 U.S. 670 (1967); Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970).
74. Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1967).
75. Because the punishment of an inmate by confinement in maximum security quarters has the consequential effect of impeding his accumulation of "good time" (since the inmate cannot work or participate in educational programs, *see* note 62 *supra*), it is clear that, even if minimum security "freedom" be regarded as a privilege, an observance of procedural due process would be required in any determination that this freedom is to be forfeited. However, an inmate's interest in minimum security confinement in and of itself should be protected by procedural due process; while, as in the case of public employment, there may be no statutory right to it, the granting of it can not be conditioned upon relinquishment of constitutional rights. *See* Keyishian v. Board of Regents, 385 U.S. 589, 605–06 (1967); Slochower v. Board of Higher Education, 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183 (1952).
76. *See* United States *ex rel.* Campbell v. Pate, 401 F.2d 55 (7th Cir. 1968) (a postponement of parole consideration is a denial of liberty, which liberty deserves constitutional protection); Rodriguez v. McGinnis, 307 F. Supp. 627 (N.D.N.Y. 1969). *But cf.* Murphy v. Turner, 426 F.2d 422, 423 (10th Cir. 1970) (a hearing revoking parole need not be adversarial since "parole has been recognized as a grace . . . wherein clemency is awarded for humanitarian reasons").

a 'right' and a 'privilege' — or between 'liberty' and a 'privilege' for that matter — is nowhere more meaningless than behind prison walls."[77]

2. Disciplinary Proceedings as Therapy

Another proffered justification for denying inmates an adversarial determination of guilt prior to the taking of disciplinary action is that the injection of the adversarial process into prison disciplinary proceedings destroys the basically therapeutic nature of those proceedings.[78] The premise of this argument is that the prison staff can best determine an inmate's needs if it can function free from the pressures of an adversarial proceeding.

A threshold criticism of this argument is that in most cases the person imposing prison discipline is neither a psychologist nor a psychiatrist nor one trained in related fields of knowledge. It is generally the case that, as in *Sostre,* the warden of the institution or a multiple-member panel of custodial personnel (those in charge of prison security) and classification personnel (counselors) determines what disciplinary action is appropriate.[79] Very rarely do classification personnel have extensive psychological training,[80] and the educational requirements for custodial personnel are themselves minimal.[81] The therapeutic model of disciplinary proceedings is, therefore, a fiction.

In addition, the punishments imposed are hardly in the nature of therapy in any meaningful sense. Confinement under the conditions heretofore described[82] and extension of the length of confinement in institutions which lack programs for rehabilitation[83] can hardly be considered therapeutic. Indeed, the usual result of such therapy is more frustration and despair. Penological experts recognize this: "the routine use of severe disciplinary measures usually serves to embitter inmates rather than deter them. . . . It is good disciplinary practice to be cautious in the imposition of penalties which remove the possible incentive for future good behavior. [Speaking, in the latter regard, of the revocation of good time.]"[84]

77. Sostre v. McGinnis, No. 35038, at 32 (2d Cir., Feb. 24, 1971).

78. *See, e.g.,* Menechino v. Oswald, 7 CRIM. L. REP. 2430 (2d Cir. 1970) (the initial parole consideration need not be adversarial since parole hearings are part of the rehabilitative process); Alvarez v. Turner, 422 F.2d 214, 217 (10th Cir. 1970) (parole revocation hearing need not be adversarial since "the decision to revoke parole is prognostic").

79. This was the case in Maryland prior to *Bundy.* This panel, comprised of the assistant superintendent of treatment, a classification counselor, and a senior correctional officer, determined whether the inmate committed the infraction and, if so, the appropriate punishment. Maryland Department of Correctional Services, Administrative Directive No. 12-70 (June 1, 1970).

80. In Maryland, as of 1967, psychiatric services in the correctional system were virtually non-existent. MD. CORRECTIONAL COMM'N REP. 14, 20-21. Very recently, a staff of psychologists instituted a special ten-cell therapy unit in the Maryland Penitentiary which provides therapy and counseling for a small number of inmates. *See* The Evening Sun (Baltimore), Dec. 7, 1970, § C, at 1.

81. In Maryland there is no educational requirement beyond that of having a high school degree. (This information was obtained by the author as a result of a conversation with officials of the Maryland penal system.)

82. *See* notes 61-62 *supra.*

83. *See* note 56 *supra.*

84. AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS 411-12 (1966).

Because the corrective measure imposed is incarceration under harsh conditions, the determination to take such a measure is one of punishment rather than of therapy. As such, traditional adversarial procedural protections are particularly appropriate.[85]

A more fundamental infirmity in the therapeutic rationale for disregarding procedural safeguards at prison disciplinary proceedings is suggested by an examination of the legal principles governing the juvenile process and the commitment of persons to hospitals for the mentally ill. In re *Gault*[86] established that the invocation of *parens patriae* does not justify an arbitrary restraint of a child's liberty. The Court in *Gault* rejected the contention that the good will and compassion of juvenile authorities were adequate substitutes for procedural safeguards: "It is of no constitutional consequence — and of limited practical meaning — that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time."[87] Similarly, the psychiatrist-patient relationship does not preclude judicial protection of personal liberty for mental patients. Hospitals for the mentally ill have no license to disregard the requirements of procedural due process[88]

85. *See* Mempa v. Rhay, 389 U.S. 128 (1967); Specht v. Patterson, 386 U.S. 605 (1967). In *Specht* petitioner was convicted, under a Colorado statute which provided for a maximum sentence of ten years, of the crime of taking indecent liberties. He was sentenced to an indeterminate sentence, however, under a separate "sex offender" statute which allowed the imposition of such a sentence if the defendant "constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." *Id.* at 607. This sentencing was done without a prior hearing to determine his status as a sex offender. The Supreme Court held that this procedure violated due process since "the invocation of the Sex Offenders Act means the making of a new charge leading to criminal punishment" and involves the litigation of a new and "distinct issue," thus requiring the rudiments of procedural due process. *Id.* at 610. It is the fact that new and distinct issues are involved in prison disciplinary proceedings that requires compliance with procedural due process.

In *Mempa v. Rhay* the Court held that due process required the presence of counsel at probation revocation hearings since the time of deferred sentencing is a critical stage in a criminal case. The analysis of the Court, that a forfeiture of conditional liberty based upon factual determinations may not violate due process, is applicable to the revocation of "good time" and to the imposition of punishment which results in a denial of parole. *See* Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969) (applying *Mempa* to revocation of probation where a new sentence was not imposed); Hester v. Craven, 39 U.S.L.W. 2499 (C.D. Cal., Feb. 17, 1971) (a parolee has a right to a hearing, conducted according to traditional due process, before his sentence may be "redetermined" because of an alleged parole violation); Goolsby v. Gagnon, 39 U.S.L.W. 2470 (E.D. Wis., Feb. 9, 1971) (a parolee is entitled to counsel at a parole revocation hearing). *But see* Earnest v. Willingham, 406 F.2d 681 (10th Cir. 1969); Holder v. United States, 285 F. Supp. 380 (E.D. Tex. 1968).

86. 387 U.S. 1 (1967).

87. *Id.* at 27.

88. *See, e.g.*, Barry v. Hall, 98 F.2d 222 (D.C. Cir. 1938); *In re* Lambert, 134 Cal. 626, 66 P. 851 (1901); Petition of Rohrer, 353 Mass. 282, 230 N.E.2d 915 (1967). The above cases hold unconstitutional, as not following procedural due process, *ex parte* involuntary commitment to mental institutions. *See also* Baxstrom v. Herold, 383 U.S. 107 (1966) (requiring, on grounds of equal protection, that full procedural standards be observed before a state may confine a prisoner in an institution for the insane after the expiration of his sentence); United States *ex rel.* Schuster v. Herold, 410 F.2d 1071 (2d Cir. 1969) (requiring, again on grounds of equal protection, that a full adversarial hearing be held before a penal inmate may be transferred to a state institution for insane criminals).

nor may they deny or abridge the basic rights of their patients under the guise of therapy or treatment. This was the holding of *Covington v. Harris,*[89] in which the District of Columbia Circuit Court of Appeals reversed the lower district court's dismissal of a habeas corpus petition filed by a patient who challenged his continued confinement in maximum security quarters within a hospital for the mentally ill. The court recognized the primary responsibility of the hospital in making decisions affecting a patient's liberty and the narrow scope of judicial review of such decisions but stated that this does not detract from the principle that "additional restrictions beyond those necessarily entailed by hospitalization are as much in need of justification as any other deprivations of liberty; nor does [such recognition] preclude all judicial review of internal decisions."[90] The court explained the need for the imposition of constitutional strictures upon even beneficent or paternalistic institutions: "Not only the principle of judicial review, but the whole scheme of American government, reflects an institutionalized mistrust of any such unchecked and unbalanced power over essential liberties. That mistrust does not depend on an assumption of inveterate venality or incompetence on the part of men in power, be they Presidents, legislators, administrators, judges, or doctors."[91]

3. The Balance — Conservation of Financial and Administrative Resources and Maintenance of Security *versus* Traditional and Institutional Freedom

There can be no doubt that prison administrators have a deep interest in conserving their allotted funds while at the same time maintaining adequate security within their penal institutions. These two legitimate interests must be considered and together weighed against the inmate's interest in liberty before it is decided (1) whether *any* adversarial administrative hearing is required to determine proper disciplinary action and, if so, (2) what form the hearing should take and (3) at what point the hearing should take place.

It has been repeatedly held by the Supreme Court that fundamental constitutional rights may not be sacrificed in the interest of administrative and fiscal efficiency.[92] *Goldberg v. Kelly*[93] is a recent reaffirmation of this principle. The Court recognized that the requirement that a hearing be held prior to any termination of public assistance "doubtless involves some greater expense"[94] but explained:

> [T]he State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities. . . . Thus, the interest of the eligible recipient in uninterrupted receipt

89. 419 F.2d 617 (D.C. Cir. 1969).
90. *Id.* at 624.
91. *Id.* at 621.
92. *See, e.g.,* Harman v. Forssennius, 380 U.S. 528, 542 (1965); Carrington v. Rash, 380 U.S. 89, 96 (1965); Oyama v. California, 332 U.S. 633, 646–47 (1948).
93. 397 U.S. 254 (1970).
94. *Id.* at 266.

of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens.[95]

The right to personal liberty deserves no less weight when balanced against the need for conservation of state finances.[96] A recent decision of an Arkansas federal court granting sweeping relief to inmates of the Arkansas penal system contains an implicit recognition that the rights of inmates may not be sacrificed to conserve state funds and avoid administrative dislocation. *Holt v. Sarver*[97] declared unconstitutional virtually the entire range of institutional practices in Arkansas prisons because of their extraordinary contamination with brutal and arbitrary sanctions and procedures and because of the system's total lack of rehabilitative programs. The court acknowledged that "[i]t is obvious that money will be required to meet the constitutional deficiencies of the institution,"[98] but held that the cost of change did not justify the existence of prison conditions which offered "no legitimate rewards or incentives," but only "fear and apprehension" and "degrading surroundings."[99]

Allegations that a requirement of prior disciplinary hearings would threaten security measures within penal institutions raise the spectre of *Cafeteria & Restaurant Workers Union v. McElroy*[100] and related cases[101] and appear, upon cursory examination, to warrant concern. The argument in this regard is twofold. First, holding a hearing utilizes personnel and resources needed to maintain security. For example, if inmates are given the right to confront accusers, who are usually prison guards, then these guards must appear at hearings instead of performing security functions. This would necessitate significant diversion of security resources. Second, allowing inmates adversarial rights will erode the traditional inmate-staff relationship by placing inmates and staff on the same level for a brief period of time.

Neither of these contentions withstand scrutiny. The first contention, that security will be immediately jeopardized, is essentially another form of the conservation of resources argument. If additional

95. *Id.*

96. *See* Long v. Robinson, 316 F. Supp. 22 (D. Md. 1970), declaring unconstitutional the classification, for criminal law purposes, in Baltimore City of children of sixteen and seventeen years as adults when they were categorized as "juveniles" throughout the rest of the State — the court so held despite the facts that the cost to the State of Maryland would be measured in millions of dollars and that the decision would result in substantial administrative confusion.

97. 309 F. Supp. 362 (E.D. Ark. 1970).

98. *Id.* at 383.

99. *Id.* at 379.

100. 367 U.S. 886 (1961). The Court held that due process did not require that the Navy advise an employee working on a military installation of why she was excluded from that enclave or that it provide her with a hearing at which she could attempt to refute the grounds for her exclusion. The interest of the government in maintaining national security was held to outweigh the need to preserve the opportunity of one person "to work at one isolated and specific military installation." *Id.* at 896. *But see* the dissenting opinion of Justice Brennan for a different evaluation of the employee's interest. *Id.* at 901–02.

101. Knauff v. Shaughnessy, 338 U.S. 537 (1950); Bailey v. Richardson, 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam*, 341 U.S. 918 (1951).

personnel are necessary to render prison discipline constitutional *and* to maintain security, then they must be provided for in the budget.[102]

The second contention, that further intangible injury to prison security will result from making prior adversarial hearings mandatory, presumes a staff-inmate relationship that is fast becoming archaic. The President's Commission on Law Enforcement and the Administration of Justice casts severe doubt on the necessity of such a relationship when it states in its report that "the 'collaborative regime' advocated in this volume is one which seeks to maximize the participation of the offender in decisions which concern him, one which seeks to encourage self-respect and independence in preparing offenders for life in the community. It is inconsistent with these goals to treat offenders as if they have no rights, and are subject to the absolute authority of correctional officials."[103]

A recent decision of the United States Court of Appeals for the First Circuit lends some support to a rejection of the "intangible" security argument.[104] It vacated a lower court decision[105] that inmates did not have the right at disciplinary proceedings to cross-examine opposing witnesses, produce witnesses of their own, or be represented by counsel[106] since, in the words of the lower court, "[c]ross-examination of a superintendent, a guard, or a fellow prisoner would . . . tend to place the prisoner on a level with the prison official. Such equality is not appropriate in prison. And it is hardly likely that in the prison atmosphere discipline could be effectively maintained after an official has been cross-examined by a prisoner."[107]

The First Circuit directed that the district court determine on remand whether the punishment to be inflicted was such as to necessitate strong procedural protection for the one punished and, if so, to determine whether the procedures which were followed were sufficient to satisfy the demands of due process. The court stated, "While all the procedural safeguards provided citizens charged with a crime

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102. It is questionable whether the making of significant additional expenditures would in fact be necessary to assure procedural fairness. Indeed, the contrary might be true. If prison disciplinary boards included as a participating member a public citizen who lacked official ties to the penal system, prison employees would be able to spend more time performing security and rehabilitative functions; at the same time, procedural fairness would be better assured. Similarly, if law students were allowed to represent inmates at disciplinary hearings, then the time and energy of prison employees, who in accordance with the policies of the Maryland Department of Corrections now perform this function (*see* note 156 *infra* and accompanying text) could be conserved. In the long run, the guarantee of procedural fairness could result in the conservation of state funds. It is the opinion of many penal experts (*see* note 112 *infra*) that the fair and impartial treatment of inmates serves a positive rehabilitative function which might well reduce recidivism and thus prevent future expenditures of state funds.

103. PRESIDENT'S COMM'N ON CORRECTIONS 83.

104. Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970).

105. 306 F. Supp. 1 (D. Mass. 1969). Curiously, this decision was rendered as the result of the receipt of an inmate letter by Chief Judge Wyzanski and without a hearing or even a submission of pleadings and affidavits. *Id.* at 2.

106. The lower court did acknowledge that, prior to the imposition of serious penalties, prison authorities should "(1) advise the prisoner of the charge of misconduct, (2) inform the prisoner of the nature of the evidence against him, (3) afford the prisoner an opportunity to be heard in his own defense, and (4) reach its determination upon the basis of substantial evidence." *Id.* at 3.

107. *Id.* at 4.

obviously cannot and need not be provided to prison inmates charged with violation of a prison disciplinary rule, some assurances of elemental fairness are essential when substantial individual interests are at stake."[108]

The adoption by the Federal Bureau of Prisons and by several states of policies which incorporate procedures requiring an administrative hearing prior to the imposition of any serious punishment[109] is further evidence that the requirement of procedural fairness does not necessarily nor substantially hamper the maintenance of security and discipline. Federal courts frequently rely upon these policies and those of the American Correctional Association in setting standards for disciplinary proceedings.[110]

D. Sostre *and* Bundy *Evaluated*

It is the opinion of this author that the lower court in *Sostre* was correct in requiring that prison disciplinary proceedings incorporate traditional rudiments of procedural due process.[111] The nature of a disciplinary proceeding is adjudicatory and the interest at stake in

108. Nolan v. Scafati, 430 F.2d 548, 550 (1st Cir. 1970).

109. The federal rules require that, before the revocation of "good time," a hearing be held at which the inmate is given notice of the alleged infraction and afforded the opportunity to present a defense (but not witnesses). He is entitled to be represented by a prison official at the hearing and to appeal an adverse decision to the Director of the Bureau of Prisons. Federal Bureau of Prisons, Policy Statement: Withholding, Forfeiture, and Restoration of Good Time, No. 7400.6 (Dec. 1, 1966). Other states provide all or some of these procedural protections. *See* Jacob, *Prison Discipline and Inmate Rights,* 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 227, 242–43 (1970). *See* note 156 *infra* and accompanying text for a discussion of Maryland Department of Corrections policies as well as those of Missouri and Rhode Island. *See also* MODEL PENAL CODE § 304.7 (Proposed Official Draft 1962).

110. *See, e.g.,* Jackson v. Bishop, 404 F.2d 571, 575 (8th Cir. 1968); Wright v. McMann, 387 F.2d 519, 526 (2d Cir. 1967); Sostre v. Rockefeller, 312 F. Supp. 863, 889 (S.D.N.Y. 1970). *Compare* United States v. Jefferson County Bd. of Education, 380 F.2d 385, 390 (5th Cir. 1967) *with* Singleton v. Jackson Municipal Separate School Dist., 348 F.2d 729, 731 (5th Cir. 1965). This deference is warranted not only because of the judiciary's lack of detailed knowledge of prison conditions but also because a consideration of a particular practice's conformity to the standards of procedural due process necessarily includes an inquiry into "available alternatives to the procedure that was followed." Joint Anti-Fascists Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring opinion).

111. Two other recent United States district court decisions, rendered prior to the Second Circuit opinion, adhere to Judge Motley's decision in *Sostre.* In Wright v. McMann, No. 66 Civ. 77 (N.D.N.Y., July 31, 1970), an inmate was summarily punished for refusing to fill out a required form. The court held that compliance with the requisites of procedural due process might have prevented punishment in this case since the inmate held a good-faith belief that signing the form would waive important rights and ordered prison officials to abide by the procedural requirements expressed in *Sostre.* In Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970), Judge Mansfield held that serious punishment (in this case confinement in maximum security) should not be imposed upon inmates "until disciplinary procedures are adopted that will meet rudimentary standards of due process. . . ." *Id.* at 1029. The court also stated:

> [D]espite the peculiar and difficult problems inherent in prison administration, we cannot accept defendants' contention that the essential elements of fundamental procedural fairness — advance notice of any serious charge and an opportunity to present evidence before a relatively objective tribunal — must be dispensed with entirely because . . . the administrative problems would be too burdensome. . . . Although a prisoner does not possess all of the rights of an ordinary citizen he is still entitled to procedural due process commensurate with the practical problems faced in prison life.

Id. at 1028 (citations omitted).

such a proceeding, personal liberty, is of the highest value. Neither institutional rehabilitation programs nor the maintenance of discipline and security are seriously threatened by the assurance of due process;[112] a governmental desire to conserve funds, while valid, must yield to the adequate protection of fundamental constitutional rights. For these reasons the author also expresses his complete agreement with the decision in *Bundy*.[113]

An evaluation of the Second Circuit decision in *Sostre* presents some difficulty. Initially, the court there recognized that an inmate may not be subjected to punishment for an infraction of prison rules except by due process of law. The court then grappled with what it termed the "difficult question" — "what process [is] due" — which it failed to answer.[114]

If the decision can be read as merely reaffirming the principle that severe punishment of prison inmates should only be "premised on facts rationally determined" and, in most cases, only after a hearing in which the prisoner is "confronted with the accusation, informed of the evidence against him, and afforded a reasonable opportunity to explain his actions,"[115] it is not substantially inconsistent with the district court's opinion in *Sostre* and the decision of the district court for Maryland in *Bundy*. However, the court disagreed with the proposition that "each of the procedural elements incorporated in [the lower court's] injunction are necessary constitutional ingredients of every proceeding resulting in serious discipline of a prisoner."[116]

If the court meant to imply that the elements of procedural due process enumerated by the lower court *are* necessary ingredients in *most* cases resulting in serious discipline of a prisoner, the author would acknowledge that this is a correct statement of law. However, if it is the holding of the Second Circuit that in cases of prison discipline which do *not* arise in emergency situations it is still constitutionally acceptable to seriously punish an inmate without guaranteeing him the right to rudimentary procedural protections, then it would

112. *See* Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968) (holding that no consideration of the state's interest in maintaining prison security or discipline sustains the constitutionality of racial segregation in prisons). Indeed, fair disciplinary procedures are of positive assistance in maintaining good security. "Denying offenders any chance to challenge arbitrary assertions of power by correctional officials" is inconsistent with "the need to instill [in the inmate] respect for and willingness to cooperate with society and to help the offender assume the role of a normal citizen." PRESIDENT'S COMM'N ON CORRECTIONS 82.

113. *See also* Shone v. Maine, 406 F.2d 844 (1st Cir. 1969), which provides persuasive authority for requiring compliance with procedural due process when transfers between "functionally distinct" institutions are effected. In *Shone* a juvenile offender was summarily transferred from a boys' training center to an adult correctional center. The court held that this was contrary to due process of law, even though there was no extension of the youth's sentence, because of the significant denial of institutional liberty which was involved. The court stated that procedural due process required a full adversarial hearing with representation of counsel prior to such a transfer. To the extent that minimum security and maximum security penal institutions are "functionally distinct" (*id.* at 848), the reasoning of *Shone* would require an administrative hearing prior to such inter-institutional transfers. Baxstrom v. Herold, 383 U.S. 107 (1966); Matthews v. Hardy, 420 F.2d 607 (D.C. Cir. 1969); United States *ex rel.* Schuster v. Herold, 410 F.2d 1071 (2d Cir. 1969).

114. Sostre v. McGinnis, No. 35038 at 32 (2d Cir., Feb. 24, 1971).

115. *Id.* at 37.

116. *Id.* at 36–37.

appear that the decision rests on unsound ground. The premises of the court's conclusion in this regard appear to be (1) that *Goldberg v. Kelly*[117] and related decisions[118] are distinguishable because prison disciplinary hearings, unlike administrative decisions to terminate welfare and evict tenants from public housing, are not adversary proceedings, do not call for the person involved to possess the degree of legal competence required in an adversary hearing, and do not deal with difficult questions of fact; (2) that the question of the procedure used at a disciplinary hearing is one involving problems of expertise and experience best resolved by prison administrators and is not one of constitutional law; and (3) that, while an inmate should be protected from arbitrary treatment, the use of traditional procedures (cross-examination, confrontation, and presentation of witnesses) is not essential to achieve such protection.

It is simply illogical to conclude that prison disciplinary proceedings are non-adversarial. The issue before the prison disciplinary board is: did the inmate do what he is alleged to have done and, if so. is it a violation of prison rules? In thus applying general prison policies — law — to a given set of facts to determine guilt, the disciplinary panel is performing a quasi-judicial function. It is anomalous to regard this quasi-judicial proceeding as "non-adversarial" while concluding that proceedings which may terminate welfare payments or evict tenants from public housing are adversarial and therefore demanding, in the latter cases, the complete observance of normal due process principles. There is no reason why factual determinations of inmate misconduct should be considered to be more easily made than determinations of criminal guilt, and there is certainly no reason why these factual determinations should be viewed as being simpler in nature than those determinations underlying decisions to terminate welfare assistance or to evict tenants from public housing.

As for the second premise, there can be no quarrel with the finding of the Second Circuit that prison administrators are the best judges of the procedures and techniques which most effectively serve the goals of rehabilitation and maintenance of security. There is, however, no logical relation between the court's acknowledgement of this accepted fact and its conclusion that prison administrators are at some liberty to disregard traditional requirements of procedural due process if, in their opinion, maintaining these protections would not aid in the achievement of these penalogical goals. The constitutional guarantee of due process is not *intended* to be used to help effectuate inmate rehabilitation. It is intended to insure that arbitrary decision-making and unwarranted punishment do not occur. Its central purpose is to protect one's life, liberty, and property. If, as a collateral matter, the injection of procedural due process into the practices of prison administration becomes a valuable rehabilitative device, that is merely a beneficial side effect. The issue of what procedures are essential to establish due process is one of constitutional law; and the expertise of prison administrators, while not completely irrelevant, is certainly

117. 397 U.S. 254 (1970).

118. *See, e.g.*, Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970).

not determinative. The forum for deciding constitutional questions is the judicial forum, and the best judge of the necessary ingredients of a quasi-judicial proceeding is a court of law.

Finally, if, as the Second Circuit concludes in *Sostre,* inmates are entitled to be free from punishment imposed through arbitrary decision-making, it is a virtually inescapable conclusion that it is the traditional protections of procedural due process which should be used to preserve this freedom, unless (as was *not* the case here) the protection of substantial state interests requires the omission of one or more elements of that due process. Hundreds of years of Anglo-Saxon jurisprudence have developed and tested the best techniques for discovering truth and insuring objective decision-making. These techniques include cross-examination, confrontation, and presentation of witnesses. It is an empty promise to guarantee fairness while omitting the tools necessary to accomplish that fairness. If there is no requirement of due process at a disciplinary hearing, then the proceeding would simply follow this scenario: inmate Jones comes before a disciplinary panel; inmate Jones is told that he has been accused of committing a certain act of misconduct; inmate Jones is asked what "his side of the story is"; and, in the overwhelming number of cases, inmate Jones is told that he is guilty.[119] Without vehicles for discovering truth and insuring objectivity, administrative proceedings become a sham and a means for legitimizing arbitrariness.

IV. THE COMPONENTS AND TIMING OF THE REQUIRED HEARING

Once it is established that the balance of interests requires a hearing, then well-accepted rudiments of procedural due process are necessary to the conduct of such a hearing unless one or more elements of that due process are held to be inappropriate because of an overwhelming governmental interest.[120] Thus, due process presumptively requires that

(1) prior specific notice of the charges be given to the accused;

(2) the accused be entitled to present evidence, including witnesses, in his behalf;

(3) the rights of confrontation and cross-examination be extended to the accused;

(4) the hearing be before an impartial tribunal;

119. This was the factual pattern of each of the underlying eighty-two cases in *Bundy v. Cannon.*

120. If a hearing is required, it must be fair, Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950), and it must be conducted in a "meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965). The function of a disciplinary hearing is to determine "who did what, where, when, how, why, with what motive or intent." K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.02, at 116 (1959). After this initial determination, existing policies are applied to decide if an infraction of prison rules has occurred and, if so, to impose appropriate punishment. Therefore, the nature of such a hearing clearly is adjudicatory, warranting imposition of full procedural protections. *See* Goldberg v. Kelly, 397 U.S. 254 (1970); Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963). *See also In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966); Simmons v. United States, 348 U.S. 397 (1959).

(5) the decision be based upon substantial evidence, be written, and include reference to the evidence relied upon and reasons for the decision; and

(6) the accused have the choice of representation by counsel or counsel-substitute at the hearing.[121]

While some of these standards had been judicially imposed upon prison disciplinary proceedings before *Sostre*,[122] the rights to legal representation, to present witnesses, to cross-examine opposing witnesses and to confront accusers and the requirement that disciplinary decisions be reduced to writing are given initial constitutional recognition and protection in that case. There is substantial support for the mandatory inclusion at disciplinary hearings of all these components, with the possible exception of a blanket right to representation by counsel.

A. The Right to Specific Notice of Charges and a Written Decision

Prison rules are, in many instances, extremely vague and uncertain. For example, inmates of the Maryland penal system may be punished for having a "disrespectful" attitude[123] and for using "vulgar" or "improper" langauge.[124] Moreover, written regulations specifically designating conduct considered to be infractions of prison rules were not, until very recently,[125] conspicuously posted or distributed to new inmates. The right to both specific notice of the charges and a written decision containing the evidence relied upon and the reasons for the decision takes on added significance when the exact nature of the conduct in question is either unknown or vaguely and generally described. In such a case specific notice not only informs the accused, perhaps for the first time, of his alleged conduct but also serves the accused with initial notice that such conduct is considered improper.[126] The court in *Bundy* invalidated the punitive transfer of the inmates in part because of the absence of written notice, commenting that "[w]ritten notice of charges in a substantial disciplinary proceeding is necessary to afford a prisoner the opportunity to prepare

121. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.02, at 115 (1959).

122. *See* Note, *Prisoners' Rights Under Section 1983*, 57 GEO. L.J. 1270, 1288 (1969) and cases cited therein. *See also* Nolan v. Scafati, 306 F. Supp. 1, 3 (D. Mass. 1969), *rev'd*, 430 F.2d 548 (1st Cir. 1970) (before punishment may be imposed an inmate must be given notice of alleged misconduct, as well as an opportunity to be heard and a decision based on substantial evidence).

123. Maryland Department of Corrections, Handbook for Inmates § 13, at 17 (1964).

124. *Id.* § 20, at 21.

125. In February, 1971, a handbook for inmates containing rules and regulations governing conduct within the penal system was devised to replace one prepared in 1964 and is now being distributed. This is the first time that such notification has occurred in the last few years. Stipulations of Fact, *Bundy v. Cannon.*

126. Substantive due process questions are raised when inmates are punished for conduct that has not prior to the inmate's act been prohibited in writing [*see* Sostre v. Rockefeller, 312 F. Supp. 863, 871–72 (S.D.N.Y. 1970); Rodriguez v. McGinnis, 307 F. Supp. 627, 632 (N.D.N.Y. 1969)] or for conduct which is forbidden only in vague and uncertain terms. *See* Douglas v. Sigler, 386 F.2d 684, 686 (8th Cir. 1967), which implied that the "void-for-vagueness" doctrine would be applicable in invalidating vague prison rules. *But cf.* Estaban v. Central Missouri State College, 415 F.2d 1077 (8th Cir. 1969).

a defense."[127] Similarly, the Second Circuit in *Sostre* referred to adequate notice as a "basic safeguard" the absence of which could not be "lightly condoned."[128]

The harm caused by the vagueness of prison regulations in describing prohibited conduct is compounded when there is no written decision. The lack of a written decision undermines the inmate's right to appeal his decision to higher administrative authorities and to seek judicial review of adverse determinations since the reviewing body is unable to appreciate, with particularity, the nature of the conduct prohibited, the acts which the accused is found to have committed, and the evidence supporting a determination of guilt. The result has been complete deference to the decision of the lower administrative body, an attitude which reflects the traditional "hands-off" approach of the judiciary.

B. The Right to Confrontation and Cross-Examination

The right to confront and cross-examine opposing witnesses has been accepted as being appropriate and necessary "[i]n almost every setting where important decisions turn on questions of fact . . . ."[129] The availability of this right has not been confined to criminal cases (although it finds express constitutional recognition only in that context)[130] but has been guaranteed, by virtue of the fourteenth amendment's due process clause, to those who have substantial interests at

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127. *Bundy v. Cannon* at 4. Prior to the decision in *Bundy*, policies adopted by the Maryland Department of Corrections recognized that some procedural safeguards were necessary to prevent arbitrary decision-making. They required that the following procedures be observed when inmates were accused of serious misconduct:

(1) Any employee having knowledge of the violation was required to submit a written report of the offense to his supervisor.

(2) The written report was forwarded to the classification department of the institution (which department is responsible for the initial evaluation and classification of the inmate as well as for continuing his counseling).

(3) Within forty-eight hours of the alleged infraction, the inmate was brought before a three-man disciplinary board (referred to as the "adjustment team" in policy statements) for a hearing.

(4) This board, comprised of the assistant superintendent of treatment, a classification counselor and a senior correctional officer, determined guilt and punishment.

(5) At the hearing before the disciplinary board, the inmate was entitled to representation by another inmate or staff member and had the opportunity to "discuss his case."

(6) Punishment imposed could range from a warning or reprimand to the forfeiture of an inmate's "good time" and/or the placing of the inmate in punitive confinement.

(7) In all cases punishment imposed by the disciplinary tribunal had to be approved by the warden or the superintendent of the institution. Maryland Department of Correction Services, Administrative Directive No. 12–70 (June 1, 1970).

The policies did not require the making of a written report of the decision containing findings of fact and reasons for the result. Without these, administrative review was no more than a formality and was, therefore, an illegal delegation of power by the "reviewer" who, because of his total unfamiliarity with the case, allowed the only effective decision upon review to be made by the tribunal itself.

128. Sostre v. McGinnis, No. 35038 at 47 (2d Cir., Feb. 24, 1971).

129. Goldberg v. Kelly, 397 U.S. 254, 269 (1970). *See* K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 7.02, 7.05 (1959).

130. The sixth amendment to the United States Constitution provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. CONST. amend. VI.

stake in administrative decision-making.[131] Considering the significant quantum of personal liberty which is threatened,[132] the quasi-criminal nature of the disciplinary proceeding, the constructive and rehabilitative effect of a fair disciplinary hearing,[133] and the rather unique pressures and relationships existing in prisons,[134] it would seem that the requirement that prison disciplinary proceedings guarantee inmates the rights to confrontation and cross-examination is well-founded and logical, though novel.[135] This is so even though the introduction of these practices into prison administration might erode traditional inmate-staff relationships[136] and cause some administrative dislocation.[137] Significant denials of liberty based upon the unchallenged testimony of a faceless informer are simply not consistent with concepts of fundamental fairness and traditional notions of procedural due process. For the same reasons, and despite the same objections, inmates should be entitled to call witnesses in their behalf at disciplinary proceedings.[138] The require-

131. *See* Goldberg v. Kelly, 397 U.S. 254, 269 (1970); Willner v. Committee on Character & Fitness, 373 U.S. 96, 103–04 (1963); Greene v. McElroy, 360 U.S. 474, 496–97 (1959); I.C.C. v. Louisville & N.R.R., 227 U.S. 88, 93–94 (1913).

132. *See* notes 56–66 *supra* and accompanying text.

133. *See* note 112 *supra.*

134. James V. Bennett, former Director of the Federal Bureau of Prisons, explained that, while prison officials control the institutions, subtle manipulations of prison discipline can and do occur: "The prison society has its way of enforcing its rules. Gambling, for example, is illegal in federal prisons . . . welching on a bet, however, is a sin to be avenged by some subtle method, such as planting dope or a knife beneath the offender's bed and tipping off an officer." J. V. BENNETT, I CHOSE PRISON 28 (1970). Judicial recognition of the especially real possibility of misuse of authority by prison guards is contained in Landman v. Peyton, 370 F.2d 135, 140 (4th Cir. 1966):

> Acton's classic proverb about the corrupting influence of absolute power is true of prison guards no less than of other men. In fact, prison guards may be more vulnerable to the corrupting influence of unchecked authority than most people. It is well known that prisons are operated on minimum budgets and that poor salaries and working conditions make it difficult to attract high calibre personnel. Moreover, the "training" of the officers in methods of dealing with obstreperous prisoners is but a euphemism in most states.

It is in order to guard against reliance upon the testimony of individuals who, as in the examples above, "might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy" that we require confrontation and cross-examination. Greene v. McElroy, 360 U.S. 474, 496–97 (1959). While it is apparent that inmates called as witnesses at disciplinary hearings will be subject to the same institutional pressures as those described by Bennett, this should not constitute sufficient ground for denying inmates the right to produce witnesses, but should only be a factor for the tribunal to consider in determining credibility.

135. Neither the federal rules nor the prison regulations of any state recognize these as rights. *See* Jacob, *Prison Discipline and Inmate Rights,* 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 227, 242–44 (1970). However, James V. Bennett has stated that the federal practice is to recognize the existence of these rights in some cases. Hirschkop & Millemann, *The Unconstitutionality of Prison Life,* 55 VA. L. REV. 795, 834 (1969). An interim position between full recognition of an inmate's rights to confront and cross-examine and no recognition of these rights at all is the position expressed in Dixon v. Alabama State Bd. of Education, 294 F.2d 150 (5th Cir. 1961). The Fifth Circuit there held that a state school student could not be expelled without being allowed an administrative hearing and that he, although not entitled to directly confront, was entitled to know the names of adverse witnesses and the content of their testimony as well as to personally appear and call witnesses in his own behalf.

136. *See* notes 103–08 *supra* and accompanying text. It is apparent that traditional practices and accepted relationships must yield to constitutional obligations. *See, e.g.,* Brown v. Board of Education, 349 U.S. 294 (1950).

137. *See* notes 92–99 *supra* and accompanying text.

138. Once again, this is not a right presently recognized by the vast majority of state correctional systems or by the federal system. *See* Jacob, *Prison Discipline and Inmate Rights,* 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 227, 242–44 (1970).

ment of full procedural protection when new findings of fact are made to determine the appropriate sentencing of a convicted felon,[139] and before a person may be transferred from a juvenile to an adult penal institution,[140] be expelled from a state school,[141] be evicted from public housing,[142] be terminated as a welfare recipient,[143] or be denied the right to pursue a profession,[144] casts grave doubt on the constitutionality of policies and procedures of correctional systems which neither give inmates the right to confront and cross-examine accusers or opposing witnesses at disciplinary hearings[145] nor allow inmates the opportunity to present witnesses in their own behalf.[146]

The court is *Bundy* held that policies which provide for presentation of witnesses and cross-examination of accusers in cases where substantial discipline may be imposed "meet minimum standards of constitutional due process."[147] The Second Circuit, while failing to require that these essential rights be granted at disciplinary hearings, at least acknowledged that "an opportunity for the prisoner to reply to charges lodged against him" is one of the "basic safeguards against arbitrariness"[148] and concluded that "[i]n most cases it would probably be difficult to find an inquiry minimally fair and rational unless the the prisoner were confronted with the accusation . . . and afforded a reasonable opportunity to explain his actions."[149]

C. The Right to an Impartial Tribunal

It goes without argument that it is essential that an impartial tribunal preside at any constitutionally required hearing.[150] To be impartial a tribunal should be as nearly as possible free from interests which conflict with its obligation to fairly and objectively find facts and apply law. The *Bundy* court held that "[t]his principle is vio-

139. Specht v. Patterson, 386 U.S. 605 (1967).
140. Shone v. Maine, 406 F.2d 844 (1st Cir. 1969).
141. Dixon v. Alabama State Bd. of Education, 294 F.2d 150 (5th Cir. 1961). *See* note 136 *supra.*
142. Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970).
143. Goldberg v. Kelly, 397 U.S. 254 (1970).
144. Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963).
145. By "opposing witnesses" it is meant not only individuals who might testify against an individual at a disciplinary hearing but also any other person who might have supplied evidence affecting the decision.
146. This was the case in Maryland prior to *Bundy*. *See* Maryland Department of Corrections, Administrative Directive No. 12-70 (June 1, 1970).
147. *Bundy v. Cannon* at 6.
148. Sostre v. McGinnis, No. 35038 at 47 (2d Cir., Feb. 24, 1971).
149. *Id.* at 37. The court felt that the evidence as to whether a prisoner had violated a prison regulation would probably be "simpler, more precise, and more readily at hand" than evidence presented at various other types of administrative hearings and therefore concluded that the need for allowing cross-examination and the calling of witnesses was not as great. *Id.* at 34.
150. *See, e.g.,* Goldberg v. Kelly, 397 U.S. 254 (1970); *In re* Murchison, 349 U.S. 133, 136 (1955); Tumey v. Ohio, 273 U.S. 510 (1927). A recent decision, Taylor v. New York City Transit Authority, 309 F. Supp. 785 (E.D.N.Y. 1970), held that a requisite component of "quasi-judicial administrative adjudications" is an impartial tribunal. The court stated, "Confusion between the roles of judge and advocate has been rightly distrusted in English law since the Middle Ages. With possible exceptions not here relevant, the right to an impartial judge — one who has no interest in the outcome of a case before him and whose contact with the litigation does not suggest any reason for partiality — is required to meet minimum standards of due process." *Id.* at 788 (citation omitted).

lated when the same prison official assumes the dual responsibility of (1) initiating and pressing charges of misconduct, and (2) subsequently determining, as a member of an administrative body, whether misconduct has occurred and assessing appropriate punishment."[151] It was this same coalescence of functions that was condemned by the district court in *Sostre*.[152] While silent on this point, the Second Circuit did compare the relationship of a warden and an inmate to that of a parole board and a prospective parolee, commenting that this relationship "should not be viewed as adversarial in the same sense that a criminal trial is adversarial." This author has already expressed his opinion that this is a naive and unrealistic appraisal of a disciplinary proceeding.

To assure that the tribunal is completely impartial, it would be preferable if at least one member of the adjustment team was not an officer or employee of the penal system. With the proliferation of prison reform groups[153] and the increased public interest in corrections, reputable citizens could probably be encouraged to assume this responsibility. However, the decision in *Bundy* approving as constitutionally sufficient, in cases involving substantial punishment, a disciplinary tribunal not containing correctional officers, but rather comprised of an independent hearing officer, members of the treatment and counseling divisions and, if available, a psychologist, chaplain or teacher, provides assurance that the decision-maker will be impartial.

D. The Right to Retain Counsel or Counsel-Substitute

Johnson v. Avery[154] established the constitutional right of inmate "writ-writers" to render legal assistance to fellow prisoners. The decision was premised on the consideration that many inmates are illiterate and simply unable to adequately represent themselves, factors which require the extension of the *Johnson* holding to include the right to counsel-substitute at prison disciplinary proceedings. The decision by the district court in *Sostre* establishing the right of inmates to be represented by "counsel or counsel-substitute"[155] and that

151. *Bundy v. Cannon* at 4. Holding that an inmate of the New York penal system had been arbitrarily denied "good time," the court in Rodriquez v. McGinnis, 307 F. Supp. 627, 632 (N.D.N.Y. 1969) questioned the constitutionality of the imposition of discipline under procedures not insuring a separation of functions, stating: "I am not sure the disciplinary officer . . . can assume legally the investigative mantle and [then] become prosecutor, judge and jury, and . . . Appellate Court of review." Other penal systems are sensitive to this problem. For example, the policies of Missouri and Rhode Island explicitly exclude from membership on the disciplinary board any officer who initiated disciplinary charges or investigated such charges. *See* Morris v. Travisono, 310 F. Supp. 857, 872 (D.R.I. 1970); Missouri State Penitentiary, Personnel Information Pamphlet 3 (1967).

152. The punishment of Sostre was effected solely upon the decision of the warden of Green Haven Prison. *See* Sostre v. Rockefeller, 312 F. Supp. 863, 867–68 (S.D.N.Y. 1970).

153. In Maryland, the Prisoners' Aid Association and the St. Johns' Council are two of the more active groups.

154. 393 U.S. 484 (1968).

155. The representation could, in many cases, be provided by law students in Baltimore. The Baltimore Legal Aid Bureau, in conjunction with the University of Maryland School of Law, has for the past year supervised a group of law students

in *Bundy* approving policies providing for representation by "another inmate or a staff member" support such an application of *Johnson*.[156] The Second Circuit's apparent refusal to recognize the existence of a right to counsel-substitute at such hearings is based, once again, upon the court's conception of a disciplinary proceeding as being somehow less than an adversary proceeding.

The exclusion of counsel from such proceedings could, however, be based upon more persuasive reasoning. If such representation at these hearings may be retained by financially able inmates, indigent inmates arguably are entitled to appointed counsel under an extension of the *Griffin v. Illinois*[157] rationale. If a right to appointed counsel does exist, it is possible that legal resources are insufficient to implement it; one penal expert has estimated that over ninety percent of all inmates are indigent.[158] Also troublesome in rationalizing a right to representation at disciplinary hearings are decisions which exclude counsel from proceedings involved in *other* forms of administrative decision-making, such as hearings to determine whether parole should be revoked[159] or to determine whether students should be expelled from public schools.[160]

One logical and practical solution would be to allow the retention of counsel only at disciplinary hearings which concern charges of very

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who render legal assistance to inmates. These law students, as well as many others, would undoubtedly respond with enthusiasm and diligence if given the opportunity to represent inmates at disciplinary hearings.

156. Federal prisons allow an inmate charged with misconduct to have representation by a staff employee. United States Bureau of Prisons, Policy Statement: Withholding, Forfeiture, and Restoration of Good Time, No. 7400.6 (Dec. 1, 1966). A similar right is afforded prisoners in Missouri (in very serious cases only) and in Rhode Island. *See* Missouri State Penitentiary, Personnel Information Pamphlet: Rules and Procedures 4 (1967); Morris v. Travisono, 310 F. Supp. 857, 873 (D.R.I. 1970).

157. 351 U.S. 12 (1956). Although there is no constitutional right to appeal, if trial transcripts are provided to those inmates who can afford them for purposes of preparing for appeal, they cannot be denied to indigents. *See* Goldberg v. Kelly, 397 U.S. 254 (1970) (Black, J., dissenting) (the giving of an opportunity to have retained counsel at a hearing is likely to mean that it is necessary to allow indigents to have appointed counsel at such hearings); Earnest v. Willingham, 406 F.2d 681 (10th Cir. 1969) (if a parole board allows the use of retained counsel at a parole revocation hearing, it is required by the equal protection clause to have counsel appointed for those less financially fortunate). *See also* Gideon v. Wainwright, 372 U.S. 335 (1963).

158. Jacob, *Prison Discipline and Inmate Rights,* 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 227, 243–44 (1970).

159. Murphy v. Turner, 426 F.2d 422 (10th Cir. 1970); Alvarez v. Turner, 422 F.2d 214 (10th Cir. 1970).

160. In Madera v. Board of Education, 267 F. Supp. 356 (S.D.N.Y. 1967), Judge Motley held that procedural due process required that a public school student be allowed to be represented by retained counsel at a conference to determine whether he should be suspended from school. This decision was reversed by the Second Circuit. 386 F.2d 778 (1967), *cert. denied,* 390 U.S. 1028 (1968). *Accord,* Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967) (a student has no right to representation by retained counsel at an expulsion hearing). These cases are distinguishable from prison disciplinary hearings in that (1) the amount of personal liberty at stake in prison disciplinary proceedings (for example, months of additional incarceration) is entitled to greater protection than the privilege which is lost on suspension or expulsion from school and (2) inmates, as a class, are less able to assert and protect their rights, lacking the sophistication of college students and the parental protection enjoyed by younger students. *See* French v. Bashful, 303 F. Supp. 1333 (E.D. La. 1969) (holding that a student is entitled to representation by retained counsel at an expulsion hearing where the balance of sophistication favored the school).

serious misconduct while relying upon the legal community to provide free legal assistance to indigent inmates in this limited class of cases. This solution would be consistent with practical necessity and, by authorizing retention of counsel only in proceedings threatening substantial denials of liberty, would not conflict with decisions involving situations in which no constitutional right to counsel has been recognized.[161] *Goldberg v. Kelly*,[162] which authorized representation by counsel at hearings involving rights which arguably are of less importance than personal liberty, and *Mempa v. Rhay*,[163] which authorized representation by counsel at hearings involving a quantum of personal liberty arguably no greater than that at stake in prison disciplinary proceedings, are support for this solution.[164]

E. The Timing of the Hearing

While normally there is no question that any required administrative hearing must *precede* the governmental action to which it pertains,[165] in extraordinary situations summary governmental action may precede administrative decision-making.[166] In any case where an inmate's conduct poses a substantial and present threat to the safety of others, immediate restrictive confinement without the benefit of a prior hearing would be warranted. A hearing to determine the necessity of continued restrictive confinement should be held as soon thereafter as is possible. The revocation of "good time" or denial of parole should always be preceded by the required disciplinary hearing since their summary forfeiture serves no valid purpose.

By allowing the revocation of "good time" only after an administrative hearing has been conducted and by requiring such a hearing to be held within seventy-two hours of the alleged violation of prison rules (thereby minimizing the length of the period of restrictive confinement which an inmate may be forced to endure prior to an adjudication of guilt), the Maryland Division of Correction policies, adopted subsequent to *Bundy*, appear to have satisfactorily identified the procedures inherent in a maintenance of due process during the period following the alleged misconduct.[167]

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161. *See* notes 159–60 *supra* and accompanying text.

162. 397 U.S. 254 (1970).

163. 389 U.S. 128 (1967).

164. *See also* Williams v. Zuckert, 371 U.S. 534 (1963) (Douglas, J., dissenting from denial of certiorari); Maltez v. Nagle, 27 F.2d 835 (9th Cir. 1928) (counsel may be retained at deportation hearing).

165. *See* Goldberg v. Kelly, 397 U.S. 254, 263–66 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337, 339 (1969); Opp Cotton Mills v. Administrator, 312 U.S. 126, 152–53 (1941); Morgan v. United States, 304 U.S. 1, 25 (1938).

166. *See* F.P.C. v. Tennessee Gas Transmission Co., 371 U.S. 145 (1962); Fahey v. Mallonee, 332 U.S. 245 (1947); Yakus v. United States, 321 U.S. 414 (1944).

167. *Id.* The Missouri policies authorize the segregation of an inmate prior to a hearing only (1) when the reporting employee believes that the inmate's conduct threatens disorder or injury to himself or others and a supervisor approves of confinement or (2) when the reporting employee believes confinement is necessary to "avoid grave assault or serious disorder." Missouri State Penitentiary, Personnel Information Pamphlet 1-2 (1967). *See* Morris v. Travisono, 310 F. Supp. 857, 872 (D.R.I. 1970).

V. CONCLUSION

The recognition that a substantial degree of "prison freedom" exists and that this freedom must be protected from arbitrary abridgement is, in this author's opinion, a sound application of the principles of procedural due process and a necessary assertion of judicial authority. The applicability and content of procedural due process depends upon the context in which the right to due process is asserted. Relevant factors in making this determination are (1) the interests jeopardized by governmental action, (2) the interest of the state in summary action, and (3) the nature of the governmental proceeding. A consideration of these factors in the context of the administration of prison discipline supports a decision that maintenance of procedural due process is essential to the protection of institutional and traditional liberty; these procedures are vital instruments in the search for truth and are necessary vehicles for implementing the promise of basic fairness. Contentions by prison administrators that this quantum of liberty is a privilege and that its denial is, in some cases, therapeutic do not insulate prison disciplinary proceedings from having to conform to the requirements of due process. The need for conservation of physical and administrative resources is not a legitimate justification for a disregard of these requirements, nor does their observance significantly compromise the security function of penal institutions. To the extent that it does so, the substantial interest of inmates in retaining a maximum of institutional and traditional liberty is paramount.

Policies and practices of state correctional systems are constitutionally infirm insofar as they authorize the forfeiture of "good time," confinement of an inmate in maximum security quarters, and punitive inter-institutional transfers without

(1) requiring that the inmate receive written notice, in advance of any hearing, of specified misconduct;

(2) requiring that, except in emergency situations, punitive measures be taken only after a disciplinary hearing has been held;

(3) requiring that inmates be given the opportunity at such disciplinary hearings to confront accusers, to cross-examine opposition witnesses and to present rebuttal evidence, including the testimony of witnesses of their own;

(4) requiring that any decision of the disciplinary board be reduced to writing and contain reasons therefor and a statement of the evidence relied upon; and

(5) requiring the disqualification from participation on the disciplinary panel of any prison employee who initiated the charges against the inmate, was responsible for investigating these charges, or who is otherwise biased.

Judicial invalidation of procedures and practices authorizing *ex parte* punishment of inmates is especially appropriate, and broad deference to the status quo in the form of the "hands-off" doctrine is particularly inappropriate, because of the inherent expertise of the ju-

diciary in devising rules and procedures governing quasi-adjudicative decision-making. Whatever judicial sophistication is lacking toward the intricacies and unique problems of prison administration may be supplied by reference to repositories of expertise, such as the federal regulations, Report of the President's Commission on Law Enforcement and the Administration of Justice, and the standards of the American Correctional Association, although in the final analysis the question is one of constitutional law which precludes complete deference by the court to any source of expertise.

Judicial activism in this area is also warranted because of the powerless, disenfranchised status of inmates.[168] Inmates of state penal institutions have relied upon the federal judiciary to insure protection of their rights because this is the only arm of the government which is motivated by principle rather than by political necessity or expediency and which is concerned to a great degree with the protection of liberty.

Obviously, a reform of prison administrative practices to guarantee the employment of procedural due process is but one step toward effecting the large-scale penal reform which is so badly needed. It is a step, however, which both insures fundamental fairness and is, for the inmates concerned, rehabilitative. The language of Mr. Justice Frankfurter is apt:

> The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.[169]

This feeling that justice has been done is no less important to inmates of state penal systems. Only when disciplinary proceedings are fair must an inmate confront his own misconduct. From this introspection hopefully would come rehabilitation. For these reasons the Second Circuit's apparent rejection of parts of the procedural due process model formulated by the district court in *Sostre* is regrettable and, this author believes, constitutionally erroneous; the decision in *Bundy* is welcome and, indeed, long overdue.

168. In Hobson v. Hansen, 269 F. Supp. 401, 507-08 (D.D.C. 1967), *aff'd sub nom.*, 408 F.2d 175 (D.C. Cir. 1969), the court explained the reasons for its assumption of a more aggressive role when the rights of politically weak minorities are at stake:

> Judicial deference to [legislative] judgments is predicated in the confidence courts have that they are just resolutions of conflicting interests. This confidence is often misplaced when the vital interests of the poor and of racial minorities are involved. For these groups are not always assured of a full and fair hearing through the ordinary political processes . . . because of the abiding danger that the power structure . . . may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. These considerations impel a closer judicial surveillance and review of administrative judgments adversely affecting racial minorities, and the poor, than would otherwise be necessary.

169. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951) (concurring opinion).