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Due Process in Prison Disciplinary Proceedings

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DUE PROCESS IN PRISON DISCIPLINARY PROCEEDINGS†

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> When I was in prison, if a guard saw you do something wrong, he'd say, "Go to the hole, boy," and he'd let you out when he figured you'd learned your lesson.
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> One time they put me in the hole for swearing at a guard. He told me I wouldn't get out until I apologized to him. I was in the hole for nine months.[1]

Historically, one of the major concerns of prison administrators has been the enforcement of discipline within the inmate population. To maintain discipline, punishments have been employed which range from the denial of television privileges to whipping.[2] Naturally, the types of punishments employed have been of concern to inmates. As a result of this concern, some forms of punishment, such as whipping, have been held to be cruel and unusual.[3] Of equal concern to inmates has been the process by which such punishment is imposed. On this front also progress has been made. The above quote was made by an ex-inmate who served time in a state prison from 1967 to 1971.[4] At the time that the incident occurred, the guard had full authority to act as he did.[5] As the example illustrates, the implementation of discipline could be very arbitrary with no guarantee of notice and a hearing. The response of many inmates has been to challenge the prison officials' absolute discretion on the grounds of denial of procedural due process.

The judiciary long ago adopted a hands-off policy with regard to most aspects of prison administration,[6] including, of course, discipline. Beginning in the late 1960's and early 1970's, however, the courts began to do away with the hands-off policy and to grant remedies to inmates.[7] Between 1970 and 1973,

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[1] Statement made to the writer by an ex-inmate describing his state prison experience from 1967 to 1971.

[2] *See* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968), in which the whipping of prisoners was held to be unconstitutional.

[3] *Id.*

[4] See note 1 *supra*.

[5] Prior to the United States Supreme Court's 1974 decision in *Wolff v. McDonnell*, note 13 *infra*, most prisons had complete discretion in the imposition of disciplinary punishment.

[6] *See, e.g.*, Siegel v. Ragen, 88 F. Supp. 966, 999 (N.D. Ill. 1949).

[7] *See, e.g.*, Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970); Holt v. Sarver,

the United States Supreme Court decided three cases involving due process in administrative proceedings: *Goldberg v. Kelly*,[8] *Morrissey v. Brewer*,[9] and *Gagnon v. Scarpelli*.[10] The latter two decisions were corrections cases involving parole and probation revocation hearings. In each case, the Court held that some degree of due process was required.[11] Following the Supreme Court's lead, lower courts began to impose due process standards on prison disciplinary proceedings. The amount of due process required varied significantly from jurisdiction to jurisdiction.[12] In 1974, the Supreme Court agreed to hear *Wolff v. McDonnell*[13] to determine first, whether due process requirements applied to disciplinary proceedings, and if so, to determine how much process was due.

Wolff was a class action filed by inmates of the Nebraska Prison Complex in which they alleged, *inter alia*, that the prison's disciplinary procedures violated the due process clause of the fourteenth amendment.[14] The applicable Nebraska statute provided that serious misconduct could be punished by forfeiture of good-time credits or confinement in a disciplinary cell.[15] Minor violations were punishable only by deprivation of privileges.[16] The prison regulations established the following procedures for handling acts of serious misconduct:

> (a) the chief correction supervisor reviews the "write-ups" on the inmate by the officers of the Complex daily;

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309 F. Supp. 362 (E.D. Ark. 1970); and Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970).

[8] 397 U.S. 254 (1970).

[9] 408 U.S. 471 (1972).

[10] 411 U.S. 778 (1973).

[11] *Goldberg* required the following procedures prior to termination of public assistance payments: (1) timely and adequate notice of the charge; (2) an opportunity to be heard; (3) a right to confront and cross-examine adverse witnesses; (4) the right to retain an attorney; (5) an impartial decisionmaker; and (6) a statement of reasons for the determination and an indication of evidence relied upon. 397 U.S. at 267-71.

Morrissey required these standards at a parole revocation hearing: (1) written notice of the claimed violations of parole; (2) disclosure to the parolee of evidence against him; (3) opportunity to be heard and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing examiner specifically finds good cause for disallowing it); (5) a "neutral and detached" hearing body; and (6) a written statement by the factfinders as to the evidence relied upon and reasons for revoking parole. 408 U.S. at 489.

Gagnon extended the *Morrissey* standards to probation revocation hearings and added the requirement of the appointment of counsel when fundamental fairness so requires. 411 U.S. at 790.

[12] *See, e.g.*, Banks v. Norton, 346 F. Supp. 971, 919 (D. Conn. 1972), in which the court held that an inmate must receive only notice of the charge and be given a reasonable opportunity to be heard by an impartial board; and Clutchette v. Procunier, 328 F. Supp. 767, 782-84 (N.D. Cal. 1971), which required timely and adequate notice of the charge and the hearing, an opportunity to be heard, an opportunity to confront and cross-examine witnesses, an opportunity to retain counsel or counsel-substitute or to have counsel appointed, an impartial decision maker, and a written statement of the reasons for the decision and the evidence relied upon.

[13] 418 U.S. 539 (1974).

[14] 418 U.S. 539, 543 (1974).

[15] *Id.* at 546-47.

[16] *Id.* at 546.

> (b) the convict is called to a conference with the chief correction supervisor and the charging party;
> (c) following the conference, a conduct report is sent to the Adjustment Committee;
> (d) there follows a hearing before the Adjustment Committee and the report is read to the inmate and discussed;
> (e) if the inmate denies the charge he may ask questions of the party writing him up;
> (f) the Adjustment Committee can conduct additional investigations if it desires;
> (g) punishment is imposed.[17]

Acts of minor misconduct were either resolved informally by the inmate's supervisor or formally reported to the Adjustment Committee.[18] The district court rejected the due process claim,[19] but the court of appeals reversed and held that the requirements outlined in *Morrissey* and *Gagnon* should be followed.[20]

In its decision, the Supreme Court held that inmates have a liberty interest in statutory good-time credits,[21] and that some form of due process must be applied before an inmate can be deprived of those credits.[22] In a footnote, these procedural protections were extended to cases involving possible punitive segregation, but the Court did not reach the issue whether these safeguards would be required for the imposition of less severe penalties:

> Here, as in the case of good time, there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction. We do not suggest, however, that the procedures required by today's decision for the deprivation of good time would also be required for the imposition of lesser penalties such as the loss of privileges.[23]

Having held that inmates do possess a liberty interest, the Court next addressed the issue of what standards should be applied before that interest can be deprived.[24] In determining how much due process is required, the Court used a balancing test, weighing the inmate's liberty interest against the interests of the state prison system:

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[17] *Id.* at 552-53.
[18] *Id.* at 551-52.
[19] *Id.* at 543; 342 F. Supp. 616 (D. Neb. 1972).
[20] *Id.* at 544; 483 F.2d 1059 (8th Cir. 1973).
[21] Good time is time subtracted from an inmate's sentence for good behavior. It is a statutory creation, and in most jurisdictions it is computed on an escalating scale. For example, an inmate can earn five days of good time per month during the first year of incarceration, seven days per month the second year, etc.
[22] 418 U.S. 539, 557-58 (1974).
[23] *Id.* at 571 n.19.
[24] 418 U.S. at 558-72.

> The deprivation of good time is unquestionably a matter of considerable importance. The State reserves it as a sanction for serious misconduct, and we should not unrealistically discount its significance.
>
> In striking the balance that the Due Process Clause demands, however, we think the major consideration militating against adopting the full range of procedures suggested by *Morrissey* for alleged parole violators is the very different stake the State has in the structure and content of the prison disciplinary hearing.
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> . . . The reality is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority and between inmates who are being disciplined and those who would charge or furnish evidence against them. Retaliation is much more than a theoretical possibility; and the basic and unavoidable task of providing reasonable safety for guards and inmates may be at stake, to say nothing of the impact of disciplinary confrontations and the resulting escalation of personal antagonism on the important aims of the correctional process.[25]

The result of this balancing of interests was a grant of minimum due process rights to inmates charged with disciplinary violations. Thus, while *Wolff* did not go as far as *Morrissey* and *Gagnon* did in the areas of parole and probation, it did create a starting point. The *Wolff* Court established three rights which are mandatory in all cases. First, the Court held that there is a right to a fair hearing.[26] Second, it required that the prisoner receive written notice of the charges at least twenty-four hours prior to the hearing.[27] Third, the Court mandated that following the hearing, the inmate must receive a "written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken."[28]

Wolff also established qualified, or limited, rights. The Court granted inmates the right during the hearing to present evidence in their defense in the form of witnesses and documentary evidence, "when permitting [them] to do so will not be unduly hazardous to institutional safety or correctional goals."[29] Similarly, the Court provided the right to representation by another inmate or a member of the staff, "[w]here an illiterate inmate is involved . . . , or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case. . . ."[30] In balancing the interests of the two parties, however, the Court

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[25] *Id.* at 561-62.

[26] *Id.* at 558.

[27] *Id.* at 564.

[28] *Id.* at 563.

[29] *Id.* at 566. Although leaving an interpretation of that test to later decisions, the Court recommended, without requiring, that the disciplinary committee "state its reasons for refusing to call a witness. . . ." *Id.*

[30] *Id.* at 570.

found that the state's interest in maintaining security militated against granting the right to retained or appointed counsel,[31] and the right to confrontation and cross-examination of adverse witnesses.[32] In the Court's view, if inmates were allowed to exercise these rights, "there would be considerable potential for havoc inside the prison walls."[33]

Finally, the Court addressed the question of an impartial factfinder. Even though the panel used by the Nebraska Prison Complex was composed of prison employees, the Court found that it was "sufficiently impartial to satisfy the due process clause."[34] Thus, while implying that some degree of impartiality must be met, the Court left the establishment of that standard for later decisions.

Wolff, thus, laid the groundwork for the implementation of due process in prison disciplinary hearings. The decision, however, left many questions unanswered. The Court's standards for when an inmate may present witnesses and what constitutes an impartial factfinder are vague. Also open to interpretation is when a prisoner may obtain the assistance of an inmate or staff representative. Finally, the issue of whether due process applies at all to the imposition of lesser penalties was not reached.

Other questions have been raised which *Wolff* failed to address either expressly or by implication.[35] These questions, and others, have been considered by both state and federal courts subsequent to the *Wolff* decision. Prison rules and regulations also have addressed these questions. Although *Wolff* established the minimum due process standards that the institutions must follow, the Court made it clear that the individual agencies have the discretion to go beyond these standards.[36] With regard to confrontation and cross-examination, for example, the Court did not make them mandatory, but instead stated that "[t]he better course at this time, . . . is to leave these matters to the

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[31] *Id.*

[32] *Id.* at 567-69.

[33] *Id.* at 567.

[34] *Id.* at 571.

[35] Some of those questions include:

(1) Do inmates have a right to be notified of what the institution's rules of conduct are?
(2) Does an inmate or his/her representative have the opportunity to investigate the charges and interview witnesses prior to the hearing?
(3) Does an inmate have the right to request the continuance of a hearing in order to prepare a defense?
(4) If the rule violation also constitutes a criminal violation, will the disciplinary hearing be stayed pending the outcome of the criminal prosecution and possible trial?
(5) If the hearing is not stayed pending the criminal investigation, does an inmate have a right to remain silent at the hearing?
(6) When and where does a disciplinary hearing take place?
(7) What is the standard of guilt?
(8) How soon after a hearing must an inmate receive a copy of the written statement?
(9) Does an inmate have the right to an administrative appeal?
(10) If an appeal is available, is an inmate's penalty stayed pending the outcome of the appeal?
(11) Do prisons provide the same procedural safeguards in cases involving lesser penalties?

[36] 418 U.S. at 569, 571-72.

sound discretion of the officials of state prisons."[37] The decision, thus, was left to prison administrators.

This article will explore the questions left unanswered by *Wolff* and how both the courts and the corrections agencies have responded to them. This will be done primarily through a review of both case law and established prison rules. To facilitate this examination, in 1980 a survey was made of prison disciplinary regulations in forty states, the District of Columbia and the Federal Bureau of Prisons.[38] Reference to the survey will be made throughout the article.[39] To avoid confusion, the forty-two regulations will be referred to as the "handbooks," with separate provisions within the handbooks referred to as rules or regulations.

The article first will discuss what constitutes prohibited conduct in prison and whether inmates have a right to notice of those prohibitions. Section two will explore the issue of when due process is required, with special emphasis on those cases which involve lesser penalties. The third section will discuss the impact of formal waivers and criminal convictions on disciplinary proceedings. In the fourth section, the stages of the disciplinary process which take place between the time that a violation occurs and a hearing is convened will be presented. To give a picture of what takes place at a disciplinary hearing, a typical hearing at the Lorton Correctional Complex will be described in the fifth section. The following section then will explore the due process issues which relate specifically to the hearings. Section VII will discuss the limits on the penalties which may be imposed on an inmate who is found guilty, and section VIII will explore the availability of administrative and judicial review of the hearings. The ninth section will discuss briefly the ability of the prison officials to avoid the *Wolff* standards by labelling the punishment as either a transfer or administrative segregation.

The final section will explore how *Wolff*, subsequent case law and the promulgation of administrative regulations have affected the imposition of punishment on prison inmates. It will be submitted that *Wolff* and the succeeding case law and prison regulations have gone a long way in restricting the discretion of prison guards to discipline inmates, and that both the courts and the corrections agencies have expanded the due process safeguards established by *Wolff*. It also will be submitted, however, that much of the change has been in form and not in substance, and that, although some of the discretion has been restricted, a great deal of arbitrariness and discretion still exists at the various levels of the disciplinary process.

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[37] *Id.* at 569.

[38] The forty-two handbooks are on file with the author. Delaware, Kansas, New Jersey, New Mexico, New York, Ohio, South Dakota, Texas, Utah and Wyoming are not included in the survey because their regulations were not obtained.

[39] Some of the handbooks contain only the rules of disciplinary procedure and do not include a list of offenses or possible penalties. The discussion of offenses and penalties, therefore, will not reflect the practice in all forty-two jurisdictions included in the study.

To avoid confusion, the forty-two regulations will be referred to as the "handbooks," with separate provisions within the handbooks referred to as rules or regulations.

I. NOTICE AND DEFINITIONS OF PROHIBITED CONDUCT

As pointed out in the introduction, *Wolff* requires that an inmate receive twenty-four hours before a hearing written notice of any disciplinary charges brought against him.[40] There is a more fundamental notice issue, however, not addressed in the *Wolff* decision[41] which involves whether inmates have a right to be informed of the prison's rules of conduct before a violation ever is charged. The issue breaks down into two considerations: (1) whether the institution must promulgate written rules of conduct that must be made known to the prisoners; and (2) whether the language of the rules must be sufficiently specific as to warn inmates of what conduct is prohibited. The weight of authority indicates that both of these considerations must be met.

The issue whether inmates must have written notice of the institution's rules has its analogy in criminal law which prefers statutory as opposed to common law crimes. The leading case on the issue of providing notice to the public of what constitutes a crime is *McBoyle v. United States*[42] in which the Supreme Court held that "it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."[43] While the majority of jurisdictions still recognize common law crimes, the trend is toward their abolition and the requirement that all criminal laws be codified in statutes.[44] Even where common law crimes are recognized, furthermore, the laws are not "unwritten" but found in prior case law.[45]

Because of the emphasis on maintaining order, discipline and security, and because of the unequal relationship between the incarcerated and those employed to guard them, a stronger argument can be made for requiring prisons to promulgate written rules. These rules are necessary not only to promote discipline, but to prevent arbitrariness in punishment. By establishing a pre-existing standard of behavior, the question of what conduct is prohibited is not left to the total discretion of correctional officers.

Although the Supreme Court has never ruled on this issue, several lower courts have recognized the logic of this argument. The District Court for the Southern District of New York in *Newkirk v. Butler*[46] held that inmates have a right to be informed of the institution's rules and the sanctions for violating those rules.[47] Another case which addressed the question was *Landman v.*

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[40] 418 U.S. at 564.

[41] The Court in *Wolff* did not address the question of written rules of conduct because the state of Nebraska already had adopted rules regarding inmate behavior. *Id.* at 548 n.8.

[42] 283 U.S. 25 (1931).

[43] *Id.* at 27.

[44] W. LAFAVE AND A. SCOTT, CRIMINAL LAW 57 (1972).

[45] *Id.* at 57 n.3.

[46] 364 F. Supp. 497 (S.D.N.Y. 1973). Although the majority of cases in the article are post-*Wolff*, this section contains some pre-*Wolff* case law. Because *Wolff* did not address the issues raised in this section, these cases are still good law.

[47] 364 F. Supp. at 502-03.

> . . . [t]he touchstone is fundamental fairness: if the most elemental rules of

Royster[48] in which the District Court for the Eastern District of Virginia held that the rules "must . . . be distributed, posted, or otherwise made available in writing to inmates."[49] Additionally, in *Haller v. Oregon State Penitentiary, Corrections Division*,[50] the prisoner pled guilty to a charge of "attempting to use a telephone without authority."[51] Haller appealed to the Oregon Court of Appeals and argued that, even though the penitentiary had adopted written rules, there was no rule prohibiting use of a telephone without authority and that, therefore, he could not plead guilty to such a charge.[52] The court agreed, holding that the prisoner could not plead guilty to a non-existent rule.[53]

In *Barnes v. Government of the Virgin Islands*,[54] the District Court for the Virgin Islands went further than the holding in *Haller* and required that the prison must not only adopt written rules of conduct for the inmates, but must also inform each inmate of the content of those rules.[55] The Hearings Handbook of the Michigan Department of Corrections[56] agrees with this position. In section II, it lists three fundamental elements of due process, the first of which is "the right to know what behavior is expected and what will be punished, i.e.,

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fairness are violated, unwarranted by the exigencies of the situation, then the requisite due process has not been accorded. This assessment of fundamental fairness begins at the most basic level. Prisoners are entitled to know what the rules are, what actions will be met with sanctions.

Id.

[48] 333 F. Supp. 621 (E.D. Va. 1971).

[49] *Id.* at 656.

[50] 31 Or. App. 461, 570 P.2d 983 (1977).

[51] *Id.* at 464, 570 P.2d at 985.

[52] *Id.* at 464, 570 P.2d at 984-85.

[53] *Id.* at 464-65, 570 P.2d at 985.

If, as petitioner contends, there is no rule prohibiting using a telephone without proper authority, we would agree that there is substance to his argument that he could not plead guilty to violating a nonexistent rule. By analogy to the rule in criminal cases, this defect would not be waived by a plea of guilty and could be raised for the first time on appeal.

While "using a telephone without authority" may well be prohibited by some standing order of the penitentiary, there is nothing in the record to indicate or establish that any such standing order exists. Accordingly, . . . in the absence of proof of any such standing order we must reverse on the first charge.

Id.

[54] 415 F. Supp. 1218 (D.V.I. 1976).

[55] *Id.* at 1232. In its order, the court stated that:

The problem of prison discipline and internal security frequently becomes an area of constitutional concern. The Due Process and Equal Protection clauses protect prisoners against arbitrary, capricious, and unequal treatment. I find constitutional deficiencies in these areas as well.

The most serious of these arises from the simple fact that the prisoners are not given a copy of the institution's rules and regulations upon the admittance to the facility. They are dependent upon veteran prisoners and isolated posted notices if they wish to have any advance determination of their rights and responsibilities. Otherwise, they must wait until they have committed a violation before they are informed.

Id. at 1229.

[56] Penelope D. Clute, Hearings Administrator, Revised June, 1977. The Handbook currently is under revision and a new edition should be published in 1981.

the necessity of written rules."[57] Furthermore, the survey of prison regulations, as compiled in each jurisdiction's prison handbook, shows that thirty-three jurisdictions specifically require that the inmates be informed of the rules of conduct.[58] Some of the handbooks in the survey contain only the rules of procedure and do not include a list of offenses or penalties. It is possible that in those jurisdictions the prisons provide separate handbooks which inform the inmates of the rules of conduct, and that, therefore, the figure is higher than thirty-three.

Of interest, also, are the methods of notification adopted. Many of the regulations are vague as to exactly how the inmates are notified. At least thirty regulations call for written notice, either by providing copies to each inmate or by posting the rules within the prison.[59] Other regulations provide for oral notice, using language such as "[i]nmates will be clearly informed of the rules and regulations which govern their activities. . . ."[60] At least four states give both written and oral notice.[61] Furthermore, seven states have specific provisions for assisting those inmates who are either illiterate or speak a language other than English.[62]

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[57] *Id.* at 2. In explaining the importance of written rules, the handbook states that:

> By defining the kinds of behavior which will be punished as misconduct we fulfill the first element of basic fairness: providing notice of what the rules are, what is expected.
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> The existence of a uniform list also assists staff in consistently identifying misconduct violations and properly charging them.
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> For these reasons, rules should be written for and posted in specific work areas, school assignments, housing units, and any other areas having specialized requirements which entail punishment if not followed.

Id.

[58] Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Oregon, Pennsylvania, South Carolina, Vermont, Virginia, Washington, West Virginia, Wisconsin, the District of Columbia, and the Federal Bureau of Prisons. See also note 39 *supra*.

[59] Alabama, Alaska, Arizona, Colorado, Connecticut, Florida, Georgia, Hawaii, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, North Dakota, Oregon, Pennsylvania, South Carolina, Vermont, Virginia, Washington, West Virginia, Wisconsin, District of Columbia, and the Federal Bureau of Prisons.

[60] Iowa State Penitentiary, Policy and Procedure Guidelines III-A-2, Discipline and Control of Inmates 1 (1977).

[61] Alaska, Florida, Nebraska and Pennsylvania.

[62] Colorado, Connecticut, Indiana, Maryland, Oregon, Washington and Wisconsin. On the federal level, inmates now have an opportunity to read the rules of the Federal Bureau of Prisons, but only if they have access to the Code of Federal Regulations. This limited right was established in Ramer v. Saxbe, 522 F.2d 695 (D.C. Cir. 1975), where federal inmates alleged that the disciplinary rules of the Federal Bureau of Prisons were not disclosed to them and that the Bureau had not published the rules pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 551 (1976). The Circuit Court for the District of Columbia held that "the Bureau of Prisons is, indeed, an 'agency' within the definition of the APA, 5 U.S.C. § 551, and that its rule making is subject to applicable requirements of that Act." 522 F.2d at 697. One of the requirements of the APA is that each agency "publish in the Federal Register for the guidance of the public . . . substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by

Assuming a prison must adopt written rules of conduct and the inmates must be informed of those rules, a problem still exists where the rules are drafted so vaguely that the inmates cannot reasonably be expected to know what behavior is being prohibited. In such a case, the inmates are at the same disadvantage as where there either are no rules or the inmates are not informed of their content. It is useful, again, to draw an analogy between prison disciplinary rules and criminal statutes. The due process clause of the fourteenth amendment requires a minimum degree of definiteness in the statutory prescription of criminal standards.[63] A statute which lacks such definiteness is said to be "void for vagueness"[64] in violation of what some courts refer to as "substantive due process."[65] A major problem in this area is trying to determine how much definiteness due process requires. In *Jordon v. DeGeorge*,[66] the Supreme Court stated that, "[i]mpossible standards of specificity are not required. . . . The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."[67] Given this test for criminal statutes and agency regulations outside the prison world, the question becomes whether prison regulations defining institutional offenses must comply with the same standard.

Landman v. Royster[68] was the first case that attempted to resolve the issue. In *Landman* the District Court for the Eastern District of Virginia stated that the purposes of fair warning and restraint on arbitrariness underlying the vagueness doctrine had been "ill-served" by the rules adopted by the Virginia prison authorities.[69] The inmates were not given fair warning of prohibited conduct by "such ill-defined offenses as 'misbehavior' and 'agitation'."[70] Such vague definitions can incorporate almost any type of behavior, thus allowing unfettered discretion in imposing punishment. Then the court listed eight reasons why the doctrine should apply in the prison context[71] and four reasons why it should not.[72] For example, the court found that application of the

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the agency; . . . ." 5 U.S.C. § 552(1)(D) (1976). As a result, the *Ramer* court held that the disciplinary rules of the Federal Bureau of Prisons must be published in the Code of Federal Regulations. Furthermore, § 541-11 of the Regulations provides that staff "shall advise each inmate in writing promptly after arrival at an institution of: . . . (d) Prohibited acts and disciplinary severity scale." 28 C.F.R. § 541-11 (1979).

[63] *See, e.g.*, Note, *Due Process Requirements of Definiteness in Statutes*, 62 HARV. L. REV. 77 (1948); McGautha v. California, 402 U.S. 183 (1971) (Brennan, J., dissenting).

[64] *Id.*

[65] *See, e.g.*, United States v. Insco, 496 F.2d 204 (5th Cir. 1974).

[66] 341 U.S. 223, *reh. denied*, 341 U.S. 956 (1951).

[67] *Id.* at 231-32.

[68] 333 F. Supp. 621 (E.D. Va. 1971).

[69] *Id.* at 654.

[70] *Id.* at 655.

[71] *Id.* The eight reasons were: to establish the limits of administrators' power; to contribute to rehabilitation; to promote equal treatment; to prevent delegation of legislative-type powers to lower officials; to decrease the need for judicial review; to easily establish clear rules as to expected behavior; to supply specificity from the academic sphere; and to satisfy due process requirements.

[72] *Id.* at 655-56. The four countervailing reasons were: all forms of misbehavior cannot

vagueness doctrine would have the beneficial effect of limiting administrators' power and preventing delegation of legislative-type powers to lower officials.[73] On the other hand, its application could undermine administrators' need for flexibility, and total authority.[74] From the inmates' vantage, the court pointed out that application of the doctrine would promote equal treatment and rehabilitation, without listing any disadvantages in applying the doctrine.[75] It settled the question by applying the doctrine but "relaxing the standard somewhat in deference to the state's legitimate needs."[76] The standard adopted by the court was that a rule must be "reasonably definite."[77] The court elaborated on the test by requiring that the regulations must offer "reasonable guidance to an inmate" and they must not leave "the administrator irresponsible to any standard."[78] Using that test, *Landman* held that rules which banned "misbehavior," "misconduct," and "agitation" were impermissibly vague.[79] "Insolence," "harassment" and "insubordination," however, satisfied the test.[80]

Several courts have followed the *Landman* decision. In *Meyers v. Alldredge*,[81] for example, the Third Circuit specifically adopted the *Landman* approach.[82] The inmates in *Meyers* were charged with "attempting to incite a work stoppage," and the court held that they had received sufficiently specific notice of what constituted a violation.[83] Similarly, in *Tate v. Kassulke*,[84] the District Court for the Middle District of Kentucky applied the *Landman* test in holding that a regulation forbidding "disturbances" "leaves the administrator irresponsible to a fair standard, and offers no reasonable guidance to an inmate."[85] In the same case, however, the court upheld bans on "possession or passing of contraband," "disrespect," "fighting" and "destruction of personal property."[86]

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be anticipated; flexibility is needed; total authority might be undermined; and inmates must ask permission before acting.

[73] *Id.* at 655.

[74] *Id.* at 656.

[75] *Id.* at 655.

[76] *Id.* at 656.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] 492 F.2d 296 (3d Cir. 1974).

[82] *Id.* at 311.

[83] *Id.* at 310.

[84] 409 F. Supp. 651 (M.D. Ky. 1976).

[85] *Id.* at 659.

[86] *Id.* In Martinez v. Procunier, 354 F. Supp. 1092 (N.D. Cal. 1973), the district court found that the regulations used by the California Department of Corrections for censorship of outgoing mail were unconstitutionally vague and overbroad because they infringed upon the first amendment right of free speech. *Id.* at 1095-96. The court also found that the regulations were unconstitutional because they authorized punishment "without giving 'fair notice' of what is prohibited." *Id.* at 1097. The *Martinez* decision cited to *Landman*, *id.*, although "fair notice" is not the test used in that case, but rather is stated as one of the purposes behind the vagueness doc-

Unlike the courts adopting a relaxed standard of specificity, the New Hampshire District Court appears to have applied the strict standard used for criminal statutes. In *Laamon v. Helgemoe*,[87] the issue before the district court involved the prison policy of withdrawing or restricting inmates' visitation privileges for disciplinary purposes. The regulations stated in part that, "[t]he visiting privileges of an inmate may be suspended or revoked by the Warden because of the inmate's poor conduct or for other good reason."[88] Poor conduct, however, was not defined in the regulations.[89] In determining whether the regulation was subject to attack as being insufficiently specific, the court first established the standard to be applied. Drawing on criminal law cases, the court held that an inmate should not be held responsible for conduct that he did not reasonably understand to be prohibited.[90] Using this standard, the court struck down the regulation, noting that beyond the written rules of the prison or the criminal laws, it is impossible to determine what is meant by poor conduct.[91]

Under the *Landman* standard, the regulation need only be "reasonably definite," while *Laamon* requires that a "person of ordinary intelligence could reasonably understand exactly what behavior is proscribed." The *Landman* test seemingly is relatively easy for prison administrators to meet since it can be satisfied by regulations which ban such amorphous behavior as "insolence," "harassment" and "insubordination." The *Laamon* standard is apparently much stricter although the rule that the *Laamon* court struck down would have been overly vague even under the *Landman* test.[92] Furthermore, the regulation in *Laamon* was under attack because it involved the withdrawal or restriction of visitation privileges, which involve first amendment rights.[93] It is not known,

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trine. *Martinez* was affirmed by the Supreme Court but on other grounds. Procunier v. Martinez, 416 U.S. 396 (1974).

[87] 437 F. Supp. 269 (D.N.H. 1977).

[88] *Id.* at 298.

[89] *Id.* at 322.

[90] *Id.* at 321-22.

> A rule or regulation, the violation of which can result in disciplinary proceedings, must apprise inmates of the proscribed conduct. The usual rule is that a statute or regulation must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

Id.

[91] *Id.* at 322.

> No inmate could have a reasonable doubt that the violation of any written rule or regulation of the prison or of the criminal laws is "poor conduct." Beyond that, the rule is vague; no person of ordinary intelligence could reasonably understand exactly what behavior is proscribed as each enforcer will have his own idea as to exactly what conduct is "poor."

Id.

[92] The regulation struck down in *Laamon* was "poor conduct," 333 F. Supp. at 656, while in *Landman* the court found "misconduct" to be overly vague. 437 F. Supp. at 321-22.

[93] 437 F. Supp. at 321-22. The Court was aware of the First Amendment problems when it stated that:

therefore, whether the *Laamon* court, given a rule such as "insubordination" that is unconnected with a first amendment freedom, would come to a different result than the *Landman* court.

In sum, it is clear that in order to comply with the dictates of procedural due process prisons must meet two requirements before an inmate can be charged with a prison violation. First, the prison must establish written rules and it must notify the inmates of those rules. The regulations are not uniform, however, as to the methods of notification. Second, the rules must be sufficiently specific to warn the inmates of what conduct is prohibited, with the courts having adopted at least two tests for determining whether a rule is overly vague.

II. When Does Wolff Apply

As earlier discussed the *Wolff* decision held that due process is required before an inmate can either be deprived of good-time credits or be placed in solitary confinement.[94] With regard to good-time, the Court found that the inmate had a liberty interest in the right to a shortened sentence sufficient to impose minimum due process because "the State itself has not only provided a statutory right to good-time but also specified that it is to be forfeited only for serious misbehavior."[95] The Court also found a liberty interest when disciplinary confinement is at issue because the segregation "represents a major change in the conditions of confinement . . . normally imposed only when it is claimed and proved that there has been a major act of misconduct."[96]

The *Wolff* Court left undecided, however, whether these due process standards apply in a case in which the disciplinary panel may impose penalties less severe than the deprivation of good-time.[97] Similarly, the *Wolff* decision failed to specify whether its procedural protections extend to inmates who are placed in a form of punitive confinement less harsh than solitary isolation. This section will examine both the lower courts' and the prison systems' treatment of these questions.

A. *Minor Violations and Minor Penalties*

Most institutions establish separate classes of violations, with those characterized as minor violations punishable only by minor or lesser penalties.

> [T]he very presence of the regulation chills the exercise of plaintiff's constitutional rights of communication and association which . . . aggravates the vice of vagueness. . . .
>
> Visitation privileges may be curtailed as punishment for disciplinary infractions, but such restrictions may not be so great as to infringe upon the inmates' First Amendment rights to familial association and communication and Eighth Amendment right to be free of cruel and unusual punishment.

Id.

[94] See text and notes at notes 21-25 *supra*.

[95] 418 U.S. at 557.

[96] *Id.* at 571 n.19.

[97] *Id.*

The term "lesser penalty" refers to such minor punishments as oral or written reprimands, extra work duty and suspension of privileges. The type of privileges which may be suspended include watching television, use of athletic facilities and use of the library. The question unresolved by the *Wolff* Court is whether an inmate who has been charged with a minor violation for which he could receive only a minor penalty has the right to due process protection.

The Supreme Court had the opportunity to address the lesser penalties question subsequent to *Wolff*. In 1975, the Ninth Circuit Court of Appeals in *Clutchette v. Procunier*[98] held that minimum notice and a right to respond are required even when the maximum penalty is a temporary suspension of privileges.[99] In *Baxter v. Palmigiano*,[100] the Supreme Court reversed the Ninth Circuit, holding that the issue should not have been reached in that case. All of the named plaintiffs in *Baxter* had been charged with violations which were punishable by forfeiture of good-time, confinement in segregation, or any lesser penalty.[101] All of the inmates had received penalties consisting of suspension of privileges.[102] The Court held, however, that the issue of whether due process applies to lesser penalties could not be addressed unless the plaintiffs had been charged with violations for which punishment was restricted solely to minor penalties.[103] Therefore, although *Baxter* left the question of whether due process is required for the imposition of lesser penalties unanswered, it did establish that the *Wolff* standards are required wherever a major penalty potentially could be imposed.[104]

Thus, it is clear that the due process standards of *Wolff* refer only to those instances in which an inmate has been charged with a violation for which the penalty *may* be either loss of good-time or disciplinary confinement, or both. If the regulations distinguish between major and minor violations, and only minor penalties may be imposed for minor violations, the question whether an inmate has constitutional due process rights regarding those violations is an open question. At the present time, he has only those rights provided by the prison's regulations. It is, therefore, necessary to examine the handbooks in the

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[98] Clutchette v. Procunier, 497 F.2d 809, *modified*, 510 F.2d 613 (9th Cir. 1975).

[99] 510 F.2d at 615.

[100] 425 U.S. 308 (1976).

[101] *Id.* at 323.

[102] *Id.*

[103] *Id.*

[104] *Id.* The Fifth Circuit earlier had come to a similar conclusion by holding that where the prison regulations have not limited application of major penalties to major violations, the *Wolff* standards apply to all alleged acts of misconduct. Gates v. Collier, 501 F.2d 1291, 1318 (5th Cir. 1974). The court, in *Gates v. Collier*, stated that:

> [U]nder the new . . . regulations, prisoners can lose their statutory good-time credits and be subjected to solitary confinement for all misconduct violations . . . Therefore, we easily conclude that in the instant case since the disciplinary action *always potentially* involved some degree of loss of good time and/or solitary confinement, the minimum procedural requisites discussed in *Wolff* are required. (emphasis added)

Id. at 1318.

survey to see how the prison systems handle minor violations.

From the handbooks surveyed, there have been two general methods for dealing with minor violations. One of the responses has been to create a separate process, with fewer procedural safeguards, similar to that suggested by the Ninth Circuit.[105] The other method has been to allow the option of either informal imposition of minor penalties or referral of the matter to the formal disciplinary process.

Over half, or twenty-five, of the departments come within the first model and use a separate procedure for handling minor violations.[106] Typically, a different hearing body from that hearing major violations is established. Often a single hearing officer, rather than a panel, is used to hear minor violations.[107] In these proceedings an inmate, generally, is given the right only to notice of the charges and an opportunity to respond.[108] Some jurisdictions provide for a written decision with a copy to the inmate.[109] A typical example of the above model is that found in Hawaii:

> A minor rule violation . . . may be punished by a staff member designated by the facility administrator who did not make the charge against the inmate/ward. The staff member shall inform the inmate/ward that he is accused of committing a minor infraction, to which the individual must be given a brief opportunity to respond. . . .[110]

Some of the states in this category vary the standard approach by allowing an inmate to request a formal hearing either in lieu of or following an informal hearing. Connecticut and Nebraska are somewhat unique among the jurisdictions in the first category in that they provide a separate procedure for minor violations, but the inmate must consent to that procedure.[111] He is given the choice of either an informal hearing with the investigating officer and the charging officer or a formal disciplinary proceeding.[112] Arkansas, Massachusetts, Montana, Louisiana and Mississippi also allow the inmate to request a formal hearing, but only if he has been found guilty in the initial proceedings. This process is different from that in Nebraska in that an inmate ac-

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[105] Arizona, Arkansas, California, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Oregon, Virginia, West Virginia, Wisconsin and the Federal Bureau of Prisons have adopted some form of informal proceedings for handling minor violations.

[106] *Id.*

[107] *See, e.g.*, Virginia Department of Corrections, Division of Adult Services Guideline, Inmate Discipline, § VI.B.2.a.i. (1977).

[108] *See, e.g.*, Wisconsin Department of Health and Social Services, Division of Corrections, Discipline, § 303.75(2) (1980).

[109] *See, e.g.*, Nevada Department of Prisons, Code of Penal Discipline, at 9 (1978).

[110] Department of Social Services and Housing State of Hawaii, Rules and Regulations of the Corrections Division, § 200.210.004.

[111] Nebraska Department of Correctional Services, Disciplinary Rules, Rule 6(7) (1978), and Connecticut Department of Correction, Administrative Directives, § 41 (1979).

[112] *Id.*

cused of committing a minor violation does not have the option to request a formal disciplinary proceeding.[113] If he is found guilty, however, a rehearing before the major disciplinary panel is available.[114] Both of these procedures offer more protection to the inmates than does a single informal hearing, which is often *pro forma* in nature.[115] The procedure provided by the second group of states is even more advantageous because it provides inmates with two hearing opportunities, and because a hearing officer who knows that his findings of guilt may be reheard by another body may tend to be more fair and to impose lighter penalties to avoid rehearings. By not forcing inmates to select between an informal hearing and the more formal process, the procedure afforded by the second group of states also avoids the possibility of inmates being pressured to select the less advantageous option.

Nine of the handbooks surveyed do not offer the inmate a separate process for disposing of minor violations, but rather provide an option of choosing between an informal imposition of minor penalties without a hearing of any kind or a referral to a formal disciplinary process.[116] In four of these nine jurisdictions, the option whether to settle the matter informally or to request a formal hearing is left to the inmate.[117] In these states, when officers witness an infraction of the rules, they are empowered to notify the offending inmate and to propose a penalty. The inmate, however, may refuse to admit guilt, reject the proposed penalty, and request a formal disciplinary hearing.[118] Thus, in these states, the choice is between admitting guilt or having a formal hearing. This choice is preferable to the first method of merely providing an informal hearing for all minor violations. Because of their *pro forma* nature, informal hearings may offer little protection to inmates. Whereas under the option method, prisoners have the choice of a formal hearing, if they feel that more procedural protection is necessary.

In the other five jurisdictions,[119] either the charging officer or the supervising official who investigates the incident is given the option of imposing a minor penalty or of referring the matter to the formal disciplinary process.[120]

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[113] *See, e.g.*, Massachusetts Department of Correction, Code of Human Services Regulations, tit. 3, ch. IV, § 430-10(a).

[114] *Id.* at § 430-10(c).

[115] Even in the "formal" hearings which the author has observed where the accused has had the benefit of a student representative and witnesses, there is a tendency by the board to find the inmate guilty despite convincing evidence to the contrary because it is felt by the board members that the officer would not have written the report unless the inmate had done something wrong.

[116] Alaska, Colorado, Maine, Maryland, Missouri, Rhode Island, South Carolina, Tennessee and the District of Columbia.

[117] Colorado, Maryland, Missouri and Rhode Island.

[118] *See, e.g.*, Colorado Department of Corrections, Code of Penal Discipline, § V.C. (1979).

[119] Alaska, Maine, South Carolina, Tennessee and the District of Columbia.

[120] *See, e.g.*, District of Columbia Department of Corrections, Prison Disciplinary Procedures and Code of Prison Offenses, § 6(a) (1973).

Giving the guards this much discretion can make this procedure the least advantageous to prisoners. The District of Columbia regulation,[121] however, provides a safeguard for inmates. The regulation gives officers the authority to impose minor penalties for "petty" offenses, but it also states that there will be no written record.[122] The inmate does not have a report of the incident in his file and, thus, is not prejudiced by mistaken actions when his record is reviewed by the parole board or classification team. In those jurisdictions which do not forbid a written record, an inmate is at a severe disadvantage because not only do guards have the authority to summarily impose minor penalties, but the files will contain a record of the actions, and these records later will be reviewed by the parole board and the classification team.

It also is of interest to note that, in at least three of the five jurisdictions in which the officer has the option of formal or informal disposition of the violation, the regulations make no distinction between major or minor offenses.[123] The officer, therefore, may impose a minor penalty for a major act of misconduct. While inmates may benefit by avoiding the possibility of loss of good time or placement in segregation, this advantage is offset by the inclusion in their files of incidents of major misconduct against which they have been unable to defend.

Finally, one state appears to have adopted a hybrid of the methods already discussed. In Washington, the charging official has the authority to informally reprimand an inmate for a minor violation.[124] Alternatively, he may choose to file a disciplinary report. If a report is filed, the supervising official then has the option of informally imposing a minor penalty or of referring the matter to a formal hearing. If the inmate is dissatisfied with the decision of the supervising official, however, he can request a formal hearing. The Washington procedure offers inmates a number of safeguards and appears to be the most favorable method of dealing with minor violations. Its main disadvantage is that the charging officer has the authority to informally punish an inmate with no appeal from that decision. That disadvantage is slight, however, because the only punishment the officer can impose is a reprimand.

Thus, still unresolved seven years after *Wolff* is the question whether inmates have the right to constitutional due process with regard to alleged violations which carry only minor penalties. As a result, prison systems have been given complete discretion in dealing with such violations. They have responded with two general methods for handling minor offenses. One response has been to establish a separate process with fewer procedural safeguards. The other method has been to allow the option of either informal imposition of minor penalties or referral to the formal disciplinary process. As the discussion indi-

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[121] *Id.*

[122] *Id.*

[123] Maine, South Carolina and Tennessee.

[124] Washington Administrative Code, §§ 275-88-040 to 275-88-055 (1977).

cates, neither method is entirely satisfactory. Having examined the state of the law on lesser penalties, the following section will discuss the issues raised by the *Wolff* Court's holding that due process is required before the prison can place an inmate in solitary confinement.

B. *Punitive Segregation*

The *Wolff* decision required full due process before an inmate could be relegated to solitary confinement, but it left unresolved whether the due process required prior to the imposition of solitary confinement extends to all other forms of punitive segregation.[125] Several prisons have more than one form or degree of punitive confinement. For example, a prison may have an entire cellblock set aside just for inmates assigned to disciplinary segregation for the most serious violations. These cells typically contain only the bare necessities, such as a bunk and a toilet. For less serious violations, the prison may confine the inmate to his own cell and allow him to retain whatever personal effects are in the cell. Since the *Wolff* Court originally required due process protections because the imposition of solitary isolation represented a "major change in the conditions of confinement" the question remains whether less drastic forms of punitive segregation deserve the same procedural protections.

A 1977 Second Circuit decision, *McKinnon v. Patterson* offers one answer to this question.[126] *McKinnon* involved the New York prison system, which had three forms of punitive segregation. The inmate in that case had been confined to his own cell, which the prison referred to as "keeplock."[127] The state argued that, because keeplock was a less severe form of confinement than the other two types of punitive segregation, *Wolff* did not apply.[128] The Second Circuit rejected this contention and held that all three forms of punitive segregation in New York State prisons come within the *Wolff* language.[129] The court concluded that keeplock was "not significantly different from the other forms of punishment which we have held to constitute *substantial deprivation*."[130]

In accord with *McKinnon* is *Kelly v. Brewer*,[131] an Iowa case, where the accused was placed in segregation without any due process.[132] Prison officials argued that this confinement equalled administrative segregation, not punitive isolation, and that due process was not required.[133] The inmate contended, however, that the segregation came within the meaning of solitary confinement

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[125] 418 U.S. at 571 n.19.
[126] 568 F.2d 930 (2d Cir. 1977), *cert. denied*, 434 U.S. 1087 (1977).
[127] *Id.* at 936.
[128] *Id.* at 935-36.
[129] *Id.* at 937.
[130] *Id.* (emphasis added).
[131] 239 N.W.2d 109 (Iowa 1976).
[132] *Id.* at 111-12.
[133] *Id.* at 111-13, 116.

and that due process should therefore apply.[134] The Iowa court reasoned that the inmate had misstated the issue and that the real question was whether the segregation, whether or not solitary, had been for disciplinary purposes.[135] Finding that it had been punitive in nature, the court determined that it was "unnecessary for us to decide whether confinement was 'solitary imprisonment' within the meaning of the provision."[136]

Gates v. Collier[137] also used language that comports with *McKinnon*, indicating that all forms of punitive confinement come within the language of *Wolff*. Citing *Wolff*, the court stated that:

> It goes without saying that minimum procedural safeguards are an absolute necessity against arbitrary determination of any factual predicate for serious deprivation to an inmate, such as loss of good time credit, solitary confinement or *other significant changes of confinement detrimental to the inmate*, as distinguished from the imposition of lesser penalties like the loss of privileges.[138]

The holdings and the reasoning in *McKinnon*, *Kelly* and *Gates* appear correct. The analysis used by the Court was that due process must be followed where there is a "major change in the conditions of confinement."[139] Confinement to a cell twenty-four hours a day with no privileges, whether alone or with another inmate, is a major change in the conditions of confinement.

A related issue is whether the duration of confinement is relevant to when the *Wolff* standards must be followed. A brief period of disciplinary confinement arguably is not a major change in conditions requiring full due process. There is no indication in the *Wolff* opinion, however, that the duration of segregation is at all relevant.[140] As the Second Circuit stated in *McKinnon v. Patterson*,[141] "neither *Wolff* nor our own cases carve out exceptions depending on the duration of confinement."[142] Despite the absence of supporting language in *Wolff*, there are prison regulations which take the position that brief periods of confinement can be imposed without due process.[143]

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[134] *Id.* at 113.

[135] *Id.*

[136] *Id.* at 116.

[137] 454 F. Supp. 579 (N.D. Miss. 1978).

[138] *Id.* at 584 (emphasis added).

[139] 418 U.S. at 571 n.19.

[140] Footnote 19 does not distinguish between long and short periods of disciplinary confinement.

[141] 568 F.2d 930 (2d Cir. 1977), *cert. denied*, 434 U.S. 1087 (1977).

[142] *Id.* at 938.

[143] New Hampshire (The only *Wolff* standard not provided for in minor hearings is the limited right to a representative. Up to seven days in segregation is permitted.), Oregon (Thomas Toombs, Deputy Administrator, Oregon Corrections Division, stated that a sanction of up to five days in segregation is not a major penalty in the judgment of the Corrections Division, and that the accused has the option to request a formal hearing. Letter of September 16, 1980. However, the accused is not provided with a waiver form which would guarantee a knowing and voluntary waiver. *See* § VI.G.2.a.), and South Carolina (up to three days in segregation).

In sum, the due process standards created by the Court in *Wolff* have not been extended to lesser penalties, although *Baxter* makes it clear that it is an issue yet to be reached. The prison systems have adopted two basic methods for handling minor penalties. Some have created less formal hearing procedures, while others allow the option of summary punishment or referral to the formal hearing process. The latter category is divided into those jurisdictions which give the option to the inmate and those which give it to the charging officer. Although the issue has been raised whether the form of segregation determines the need to comply with *Wolff*, the clear weight of authority is that all forms of disciplinary confinement require due process. Finally, despite the lack of clear authority, some jurisdictions have adopted the position that the duration of confinement determines whether it is a major or minor penalty.[144]

III. WAIVERS AND CRIMINAL CONVICTIONS

Having discussed the options available to correctional officials with regard to minor violations, the remainder of the article will be concerned with due process for major acts of misconduct. The introduction explained that the due process standards required by *Wolff v. McDonnell*[145] include advance written notice of the charges, a hearing, and a written statement of the evidence relied upon and the reasons for the disciplinary action taken.[146] The separate stages in that process will be discussed later in this article. This section, however, is concerned with the effect of two different, or alternate, forms of due process for the imposition of major penalties — formal waivers and criminal convictions.

Some prison systems have provisions that give inmates charged with major disciplinary violations the option of a formal hearing or of proceeding by waiver.[147] An example is a former Wisconsin regulation which stated:

The case law in support of this position, however, is not dispositive of the issue. In Jones v. Diamond, 594 F.2d 997 (5th Cir. 1979), the statement is merely *dictum*. A Mississippi county jail had used confinement in a padded cell for up to twenty-four hours as a form of punishment. The Fifth Circuit reasoned that an issue existed "whether the use of solitary confinement for such brief periods is such a deprivation of liberty that it must be preceded by the panoply of procedures mandated by *Wolff*." *Id.* at 1022. Because the cell had not been used in three years, however, the court held that the issue was moot. *Id.* The District Court for the Western District of Pennsylvania, in Owens-El v. Robinson, 442 F. Supp. 1368 (E.D. Pa. 1978), found that a fourteen day lockup did not come within *Wolff*. *Id.* It is unclear from the opinion, however, whether the court was distinguishing *Wolff* on the basis of the conditions of segregation, the duration, or both. It stated that "[w]hile the disciplinary hearings do not result in serious punishment such as loss of 'good time' credits or *solitary* confinement for a *substantial period of time*, they can result in depriving inmates of certain privileges or in segregating them from the general population for up to fourteen days (emphasis added)." *Id.* The court held that only notice and an opportunity to be heard were required. *Id.*

[144] *Wolff* also is clear in requiring due process before an inmate may lose good time. 418 U.S. at 557-58. Despite the Court's holding, two states in the survey allow loss of good time for minor violations: Mississippi (Mississippi permits the loss of up to five days); however, the state's disciplinary rules were drafted pursuant to a consent decree arrived at subsequent to *Wolff*.) and New Hampshire (it allows up to ten days).

[145] 418 U.S. 539 (1974).

[146] *Id.* at 558-64.

[147] Arizona, Colorado, Connecticut, Indiana, Louisiana, Maryland, Nebraska, New

> If the accused resident elects to proceed by waiver, the waiver form shall be completed and returned to the security office. In electing to proceed by waiver, the resident relinquishes rights to the assistance of an advocate, to cross examine through the hearing tribunal his accuser, and to call witnesses on his behalf. . . . The staff member who wrote the report need not be present.[148]

Thus, where a waiver is involved the inmate is still entitled to a hearing, but his rights at that hearing are sharply curtailed.

There is some concern that such a regulation could be abused by the prison system. Indeed, in *State ex rel. Klinke v. Wisconsin Department of Health and Social Services*,[149] the Wisconsin Supreme Court held that the quoted Wisconsin regulation had been abused and that the waiver was not knowing or voluntary[150] because the waiver form in use indicated only that the accused inmate was waiving his right to a formal hearing.[151] It did not stipulate the procedural rights associated with such a hearing that were being relinquished. The court also was concerned that the accused was not aware that a finding of guilt would result in a rescission of his parole date.[152] In a footnote, the court held that it was:

> a clearly inadequate waiver. No waiver can be *knowing or voluntary* where the accused is not informed or is misled as to the full range of consequences a finding of guilt entails. In addition, the waiver should have been clearer in explaining that Klinke was waiving all the rights listed on his notice of the charge, not solely the right to "demand a Formal Hearing."[153]

Where such waiver provisions are used, therefore, the prison officials must make sure that the accused's waiver is knowing and voluntary. This requirement means that the inmates must know exactly what rights they are waiving, and they must not be coerced into doing so.[154]

In addition to waivers, a second exception to *Wolff* exists. There are times when an inmate's conduct may result in his being charged with violating both a prison rule and a criminal statute. Some jurisdictions provide, either by statute or by regulation, that prison officials may impose punishment for violating the prison rule, without following the *Wolff* procedures, where the inmate already has been found guilty of the criminal violation.[155] In Florida, for example, the

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Hampshire, Minnesota, Oregon, Vermont, Washington, West Virginia, Wisconsin and the Federal Bureau of Prisons have waiver provisions.

[148] Wisconsin Department of Health and Social Services, Division of Corrections, Administrative Policies, Administration of Discipline, § 3.021(B)(3) (1977).

[149] 87 Wis. 2d 110, 273 N.W.2d 379 (1978).

[150] *Id.* at 120 n.6, 273 N.W.2d 384 n.6.

[151] *Id.* at 112, 273 N.W.2d at 384 n.6.

[152] *Id.*

[153] *Id.* at 120 n.6., 273 N.W.2d at 384 n.6 (emphasis added).

[154] Of the fifteen jurisdictions in the survey which have waiver provisions, only Nebraska and Wisconsin state that the waiver must be knowing and voluntary.

[155] *See, e.g.*, FLA. STAT. ANN. § 944.28(1) (West Supp. 1981).

legislature has provided that the Department of Corrections may forfeit all of an inmate's good time, without notice or hearing, after a conviction for escape.[156] The primary purpose of such rules is to avoid redundant proceedings. The standard of guilt in a criminal prosecution is proof beyond a reasonable doubt. Since that standard is generally higher than the one used by prison disciplinary committees,[157] the prison officials, therefore, do not need to conduct a disciplinary hearing to determine whether the inmate is guilty of escape within the definition of the institution's rules because the court already has found the inmate guilty of the offense beyond a reasonable doubt.

A different situation results, however, when the court finds the defendant not guilty. Because of the different burdens of proof at a criminal trial and a prison disciplinary proceeding, it would be consistent for an inmate to be found not guilty at trial and then guilty of the same offense at a hearing. To prevent such a seemingly anomolous situation, California promulgated a regulation binding prison disciplinary boards to verdicts of the courts. The applicable regulation provided:

> A finding of guilty or not guilty by a court will be accepted at a disciplinary hearing on the same charge as proof that the inmate did or did not commit the specific act of the criminal charge. The court's finding and disposition will be entered . . . as the finding and disposition on the disciplinary charge.[158]

Pursuant to the regulation, the California prison system accepted a court's finding, whether guilty or not guilty, and did not bring disciplinary charges after a finding of not guilty. California recently amended its regulations, however, and disciplinary hearings no longer are suspended pending the trial outcome. Absent a statute or regulation like that formerly used in California, an inmate found not guilty by a court of law still may have to face prison disciplinary charges for the same incident.

The same reasoning applies to cases in which the inmate is found guilty at a disciplinary hearing and later is acquitted by a trial court. In *Rusher v. Arnold*,[159] the inmate, incarcerated at the federal penitentiary at Lewisburg, received a disciplinary hearing and was found guilty. The penalty was loss of good time.[160] Subsequent to the disciplinary hearing, the prisoner was prosecuted for a criminal violation arising out of the same incident.[161] He was found not guilty of the criminal offense, and, on the basis of the acquittal, he petitioned the federal court for reinstatement of his good time.[162] The petition was denied and on appeal the Third Circuit affirmed, holding that "there is no

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[156] *Id.*

[157] *See, e.g.*, Rusher v. Arnold, 550 F.2d 896 (3d Cir. 1977).

[158] California Department of Corrections, Rules of the Director, tit. 15, § 3316(d) (1978).

[159] 550 F.2d 896 (3d Cir. 1977).

[160] *Id.* at 897.

[161] *Id.*

[162] *Id.*

fundamental unfairness in a procedure whereby a prisoner is punished administratively for the same conduct that resulted in an acquittal on criminal charges."[163] The basis for the court's holding was the different standards of guilt required in a criminal trial and an administrative hearing.[164]

Where an inmate's conduct constitutes both a prison violation and a criminal offense, therefore, he may be tried both administratively and judicially. Furthermore, the administrative punishment may be imposed without conducting a disciplinary hearing where the inmate already has been found guilty by the court. If the prison officials do not want to wait until the court decides the case or if the trial ends with an acquittal, however, punishment may be imposed only after a full hearing or a knowing and voluntary waiver.[165]

Having described the procedures applicable to formal waivers and criminal convictions, it is important to evaluate whether they provide inmates with a favorable alternative to the *Wolff* procedures. On balance, there is little to recommend formal waivers. The standard is that the waiver must be both knowing and voluntary. In most cases, it would be difficult to show that either standard had been met. The educational level in all prisons is exceptionally low, and *Wolff* provides for either a staff or inmate representative where the accused is illiterate or the issues complex.[166] Yet by signing a waiver, an inmate who may need representation is relinquishing the right to the very person who is supposed to help protect his rights and defend him. In these cases, it is arguable that a waiver is never knowing.

As to the voluntariness standard, because of the very nature of a prison, it would not be difficult for prison officials to coerce an inmate into waiving his due process rights. The only advantage to a prisoner in proceeding by waiver is a speedier disposition of the charges. However, the only time that that would be an important consideration to an inmate is when he is being held in administrative segregation pending the hearing. It certainly would be difficult to argue, therefore, that an accused's waiver is voluntary when his choice is to proceed by waiver or remain in segregation until the hearing. Thus, for an inmate who intends to plead not guilty, there would seem to be very few occasions when a waiver is either knowing or voluntary.

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[163] *Id.* at 898.

[164] *Id.* at 899.

> The . . . Board is constitutionally entitled to conclude by less than proof beyond a reasonable doubt that prison rules have been violated. Thus Rusher's acquittal means no more than that the Government failed to persuade the jury beyond a reasonable doubt that Rusher has escaped from federal custody. The acquittal is not conclusive of the factual dispute before the Board on the issue of whether Rusher had escaped within the meaning of prison rules.

Id.

[165] Of the jurisdictions in the survey, eight make no mention of what action should be taken; six establish that alleged criminal violations should be reported to the proper authorities but do not include when, or if, a disciplinary hearing is to be held; nine indicate that the disciplinary hearing is to be suspended pending the outcome of the criminal charges; sixteen state that the disciplinary hearing is not to be suspended; and in three states the prison authorities have the discretion to suspend the hearing or to hold it immediately.

[166] 418 U.S. at 570.

Proceeding by criminal conviction, on the other hand, offers no real disadvantages to an inmate in those jurisdictions where the disciplinary hearing is suspended pending the disposition of the criminal charges. Although he may have to appear before the disciplinary board even if found not guilty by the court, he at least is guaranteed all of the due process protections of the criminal justice system, including the requirement that he must be found guilty beyond a reasonable doubt. Furthermore, if he is found guilty, there is the possibility that the prison will exercise its discretion and drop the internal charges.

In those jurisdictions where the hearing is not suspended, however, the inmate is at a severe disadvantage. First, the possibility of the prison dropping the charges after a finding of not guilty by the court is no longer available. Second, as will be discussed in Section IV-D, whatever the inmate says at the disciplinary hearing can be used against him at trial. While the Supreme Court has established that the inmate has a right to remain silent at the hearing when criminal charges are pending, the board may draw an adverse inference from such silence.[167] Furthermore, case law indicates that the board does not have the duty to inform the accused of his right to remain silent.[168] Sixteen jurisdictions in the survey have regulations requiring the board to give such a warning,[169] but of the sixteen prison systems which do not suspend the hearing pending the trial outcome,[170] only eight require a warning of the right to remain silent.[171] Compounding the problem is the fact that only Alaska requires that counsel be appointed in those cases where criminal charges are pending.[172] Thus, even though an inmate has the right to remain silent, most states do not provide a mechanism for informing him of his right. Even if he exercises his right, furthermore, the board may draw an adverse inference from his silence.

Thus, proceeding by waiver offers far less procedural protection to inmates than a disciplinary hearing pursuant to the *Wolff* standards. Also, in cases where criminal charges are pending, the better procedure from the inmate's point of view is to suspend the disciplinary hearing pending the disposition of the charges. The next section will focus on the pre-hearing procedures in cases where the inmate and the prison are proceeding pursuant to *Wolff*.

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[167] Baxter v. Palmiagiano, 425 U.S. 308, 320 (1976). See text and notes at section IV.D., *infra*.

[168] See text and notes at section IV.D., *infra*.

[169] Louisiana, Mississippi, Washington, the District of Columbia and the Federal Bureau of Prisons require the warning in all cases at all stages of the proceedings. Colorado, Hawaii and Massachusetts require the warning at the hearing in all cases. Idaho, Indiana, Iowa, Missouri, Nevada, Rhode Island, West Virginia and Vermont require the warning only in cases where criminal charges may be brought.

[170] Arizona, California, Colorado, Florida, Georgia, Idaho, Louisiana, Maryland, Nebraska, Nevada, Minnesota, Rhode Island, Washington, West Virginia, Wisconsin and Vermont.

[171] Colorado, Idaho, Louisiana, Nevada, Rhode Island, Washington, West Virginia and Vermont.

[172] ALASKA AD. CODE, art. 6, § 440(d).

IV. PRE-HEARING PROCEDURES

While a disciplinary hearing is where an accused prisoner's guilt or innocence is officially determined, many events occur before the hearing which may be determinative of the outcome. Because of the potential importance of these events, inmates must be afforded basic due process protections at the pre-hearing stage. This section will discuss an inmate's pre-hearing rights, including the inmate's right to notice of the charges; his right to the assistance of a representative in preparing a defense; and his right to remain silent. In addition, when an inmate is charged with an infraction, the inmate often will be placed in pre-hearing segregation. The section will begin, therefore, with a discussion of the pre-hearing segregation process.

A. *Pre-Hearing Segregation*

There are situations in which an inmate suspected of committing a prison violation may be placed in segregation immediately, even before receiving written notice of the charges.[173] The reasons given by the prisons for using segregation before a hearing come under the general categories of security of the institution and the safety of inmates and staff.[174] Isolated incidents of violence[175] and prison-wide disturbances,[176] such as riots or strikes, are the most typical incidents which are classified as threats to security or safety.[177] There are very few guidelines, however, for what procedures must be followed before placing a prisoner in pre-hearing segregation.

One court which has addressed the problem is the Supreme Court of West Virginia. In *Tasker v. Griffith*,[178] the court provided that an inmate may be placed in pre-hearing segregation only if prison officials have specific reasons for determining that effective investigation of an alleged incident requires isolation.[179] Before placing an inmate in segregation, however, the institution must inform the inmate that he is under investigation for misconduct. In addition, the prisoner must be advised of the specific offense alleged against him unless

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[173] This type of segregation is classified as administrative rather than disciplinary and is analogous to placing a criminal defendant in jail pending trial.

[174] *See, e.g.*, McKinnon v. Patterson, 568 F.2d 930, 939 n.10 (2d Cir. 1977). Thirty-one jurisdictions in the survey have reasons for using prehearing segregation and twenty-eight of them use language regarding security and safety. They are Arizona, California, Connecticut, Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New Hampshire, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, Wisconsin, the District of Columbia and the Federal Bureau of Prisons.

[175] *See, e.g.*, LeGrande v. Redman, 432 F. Supp. 1307 (D. Del. 1977).

[176] *Id.*

[177] Naturally, acts of violence pose the greatest threat to the security of an institution and the safety of both the staff and the inmates. Segregating the combatants is one method of terminating the violence.

[178] 238 S.E.2d 229 (W. Va. 1977).

[179] *Id.* at 234.

this information would adversely affect the integrity of the investigation.[180] Finally, after the investigation, the inmate must be informed whether he has been exonerated.[181] If he has not been exonerated, the inmate must receive an explanation of the charges to be brought against him.[182]

The surveyed handbooks are less detailed regarding procedures for pre-hearing segregation. Twenty-one jurisdictions require nothing more than the approval of an official with a rank superior to that of the charging officer before an inmate may be confined.[183] Nine others require only that the inmate receive a written statement of the reasons for confinement within forty-eight hours or less.[184] With respect to the duration of confinement, twenty-nine jurisdictions establish limits on the length of confinement by providing for a disciplinary hearing or periodic review of the inmate's status within a specific period.[185] New Hampshire, for example, allows an inmate to request release in writing to the director of the department.[186]

Thus, although most jurisdictions allow pre-hearing segregation, few have developed detailed due process standards which must accompany this form of confinement. This lack of procedural protections is of secondary importance, however, when weighed against the effect of this early segregation on other pre-hearing events. As discussed in the following sections, segregation before the hearing raises issues related to notification of the charges and preparation of the inmate's defense.

B. *Written Notice of the Charges*

Wolff requires that an inmate receive advance written notice of the disciplinary charges.[187] The purpose of written notice is "to inform [the inmate] of the charges and to enable him to marshal the facts and prepare a defense."[188] The only time limitation imposed by the *Wolff* Court is the re-

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[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] Arizona, Arkansas, Connecticut, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Nevada, New Hampshire, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Virginia, Vermont, Washington and the District of Columbia.

[184] California, Indiana, Iowa, Montana, Nebraska, Pennsylvania, South Carolina, Wisconsin and the Federal Bureau of Prisons. In addition, Florida requires oral notice of the reasons for segregation.

[185] Alabama, Arizona, California, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Montana, Nebraska (reviewed after fifteen days), Nevada, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Virginia, Washington, Wisconsin (a maximum of twenty days), Vermont, the District of Columbia, and the Federal Bureau of Prisons. Nebraska and Wisconsin fall within the outer limits of those jurisdictions which have some form of time limit.

[186] New Hampshire State Prison, Manual for the Guidance of Inmates, Disciplinary Procedures, § 5 (1978).

[187] 418 U.S. at 564.

[188] *Id.*

quirement that notice be received at least twenty-four hours *before the hearing* in order to allow time for preparation of the inmate's case.[189] A delay in providing notice after the alleged misconduct may also impair the preparation of a defense, however, in that the incident might have occurred so far in the past that the inmate does not clearly recall what took place. Thus, while providing a sufficient time prior to the hearing to prepare a defense is crucial, an equally important question unanswered in the *Wolff* decision is how soon *after the incident* must the inmate be notified of the charges to be brought against him.

The survey indicates that there is not one uniform period of time used by every prison system. Only six states, in fact, have regulations which use the date of the offense as the point of reference for when notice must be received.[190] Of those six states, five require notice within one to five days of the offense,[191] and California allows thirty days.[192]

The most common point of reference for when notice of the charges must be received is the date of the hearing.[193] Because the hearing comes after receipt of the notice, however, the date of the hearing does not help to establish how soon after the offense the notice must be received.

Other points of reference used by the prisons include the date of the discovery of the offense,[194] the date of the completion of the prison's investigation into the incident,[195] and the date of the completion of the incident report.[196] To say that notice must be received after any one of those three events, however, is not very helpful unless time limits have been placed on when those events must occur. For example, if a regulation states that notice must be received two days after the completion of the investigation, but there is no time limit as to how soon after the incident the investigation must be completed, then there is no time limit as to how soon after the incident the notice must be received. Sixteen prison systems in the survey use one of these three dates to determine when notice must be received.

There has been very little case law on the issue of how soon notice must be received. Furthermore, those courts that have taken up the issue have only addressed situations involving segregated detention. In this regard, two federal district courts have held that an inmate placed in pre-hearing segregation must

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[189] *Id.*

[190] Arizona, California, Maryland, Massachusetts, Mississippi and North Dakota.

[191] Arizona, Maryland, Massachusetts, Mississippi and North Dakota.

[192] California Department of Corrections, Rules of the Director, tit. 15, § 3320(a) (1978).

[193] *Wolff* requires at least twenty-four hours before the hearing and only seven jurisdictions in the survey require more than that. Alaska, Arizona, Montana, South Carolina and Wisconsin provide for forty-eight hours. North Carolina requires seventy-two hours and Minnesota provides for notice four days prior to the hearing.

[194] California, Colorado, Nevada, Tennessee, Virginia and the Federal Bureau of Prisons. Note that some jurisdictions use more than one point of reference.

[195] Alaska, Indiana and the District of Columbia.

[196] Alabama, California, Connecticut, Idaho, Indiana, Michigan, Minnesota, Oregon and Wisconsin.

receive notice as soon as the threat to security subsides.[197] In *Tawney v. McCoy*,[198] the District Court for the Northern District of West Virginia held that a delay of nine days between the offense and receipt of the notice was not too long.[199] That case, however, involved a large-scale disturbance or riot, and the court determined that nine days was rapid under the circumstances,[200] leaving the question open as to whether nine days would be too long a period of time under non-emergency circumstances.[201]

Aside from timing, one further issue is raised by the requirement of adequate notice. If notice is meant to inform the inmate of the charges, it should be sufficiently specific to do just that. In *Tawney v. McCoy*, the District Court for the Northern District of West Virginia addressed the question how specific notice must be for the accused to be adequately informed of the charges. The inmate alleged that he had been prevented from preparing a defense due to the inadequacy of the notice.[202] The notice stated that "[a]t approximately 1:30 p.m. you did resist Correctional Officers attempting to quell a riot on your floor, refuse to obey orders by said officers to cease rioting and attempted to aid another inmate who had attack [*sic*] a Correctional Officer."[203] The district court held that it was adequate notice, being "a complete account of the circumstances surrounding the incident."[204] The language of the court indicates that it found the notice to be clearly adequate, although there was no attempt to suggest what would constitute inadequate notice. In view of the conclusory nature of the notice in *Tawney*, the standard established for determining its adequacy must be considered vague.

Although no case law was found wherein notice was held insufficient for failure to inform the inmate of the charges, *Stewart v. Jozwiak*[205] found a Wisconsin regulation to be ambiguous and ordered that it be amended to contain language to the effect that "notice must inform the prisoner of the charges against him with specificity to enable him to marshal the facts and prepare a defense."[206] The "specificity" standard, however, goes no further than the *Tawney* standard. Most of the handbooks in the survey contain regulations which comply with the *Tawney* and *Stewart* standards by providing that notice include a description of the facts surrounding the incidents.[207] Only two of the regulations have adopted a more stringent standard. Both Iowa and Virginia

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[197] LeGrande v. Redman, 432 F. Supp. 1307, 1309 (D. Del. 1977) and Rompilla v. Nero, 448 F. Supp. 182, 184 (E.D. Pa. 1978).

[198] 462 F. Supp. 752 (N.D. W. Va. 1978).

[199] *Id.* at 755.

[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] 399 F. Supp. 574 (E.D. Wis. 1975).

[206] *Id.* at 578.

[207] Connecticut, Florida and South Carolina require that notice be read to the accused if he is illiterate.

require a statement of the facts which includes answers to the questions "who, what, when, where, why and how." Such a formula, if followed, would provide adequate notice.

Wolff established that notice of charges must be given to the inmate at least twenty-four hours before a hearing, but it did not decide how soon notice must be provided or how detailed it must be. Additionally, lower courts and prison regulations provide little guidance on these matters. It is not clear, therefore, how soon after an alleged offense the accused inmate must receive notice of the charges. Only eight jurisdictions in the survey have a regulation which specifies the maximum period of time. With regard to the degree of specificity required in the notice, the standard adopted by most jurisdictions is that it must contain a complete description of the facts surrounding the incident. Where little advance notice is given, the ability of the inmate to prepare a defense can be seriously impaired.

C. *Preparation of a Defense and Assistance of a Representative*

Perhaps the most significant event which occurs prior to the disciplinary hearing is the preparation of the inmate's defense. Several issues are raised regarding the inmate's ability to prepare a defense to the disciplinary charges. The first question that must be asked is how much time an accused has between receipt of notice and the hearing. A related question is whether an accused may request a continuance of the hearing to allow further preparation. Because of the restraints on movement within a prison, another issue is whether an inmate may be assisted by a representative. Some prisons provide for an investigation of disciplinary charges. This raises the question whether the accused has a right to receive a copy of the report, or whether he may conduct his own pre-hearing investigation.

Wolff established twenty-four hours as the minimum period of time between notice and hearing. The Supreme Court recognized that it is a "brief period,"[208] but only seven states in the survey specifically provide for a longer period of time.[209] Five states allow the inmate forty-eight hours,[210] one state provides for seventy-two hours advance notice,[211] and Minnesota provides for notice four days prior to the hearing. Virginia has adopted the twenty-four hour standard for most cases but will not schedule a hearing less than four days after notice is received where the inmate has retained an attorney.[212] Other

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[208] 418 U.S. at 564.

[209] Alaska, Arizona, Minnesota, Montana, North Carolina, South Carolina and Wisconsin.

[210] Alaska, Arizona, Montana, South Carolina and Wisconsin.

[211] North Carolina.

[212] Virginia Department of Corrections, Division of Adult Services Guideline, Inmate Discipline, § VI.B.3.b. (1977). The Rhode Island regulation states that notice must be received a "sufficient period of time prior to the hearing to give the inmate an opportunity to prepare a defense." Rhode Island Department of Corrections, Adult Correctional Institution, Disciplinary Procedures, § II.F. That regulation can be read to require more than twenty-four hours when needed by the inmate.

states in the survey made no specific provision for notice more than twenty-four hours in advance.

At least one court, however, has indicated that twenty-four hours may not be sufficient in every case. In *Fowler v. Oregon*,[213] an inmate alleged that notice was inadequate because he had received it only twenty-six hours prior to hearing.[214] Although the Oregon court held that notice was adequate, it did indicate that if Fowler had shown that "he was in some way prejudiced in his defense by the fact that only twenty-six hours elapsed between notice and hearing," it might find notice to be inadequate.[215]

In those instances in which the accused does not have sufficient time to prepare a defense, one remedy might be to have the hearing postponed. Twenty-six jurisdictions in the survey permit an inmate the opportunity to have the hearing continued to a later date.[216] Most of these regulations do not appear to require the prisoner to state a specific reason for the request, although fourteen state that there must be "good cause,"[217] and one allows a continuance only where a representative has been appointed.[218] The mode of making a request for a continuance is informal, with only four states requiring that it be written and one other specifying that it be made twenty-four hours in advance.[219] Finally, only twelve of the regulations indicate the maximum length of a continuance.[220] California[221] and South Carolina[222] allow up to thirty days. The District of Columbia permits only a three day continuance, but the initial request is automatically granted.[223]

An important question both in the preparation of a defense and in presenting the inmate's case to the hearing board is whether the prisoner can be assisted by a representative or advocate. It already has been pointed out that the amount of time available is short, and some inmates are placed in segregation before the hearing. Even for those prisoners not in segregation, freedom of movement within a prison is limited. It would seem difficult, therefore, for an

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[213] 18 Or. App. 280, 525 P.2d 191 (1974).

[214] *Id.* at 283; 525 P.2d at 192.

[215] *Id.*

[216] Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, North Carolina, North Dakota, Oregon, South Carolina, Vermont, Virginia, Washington, West Virginia, the District of Columbia and the Federal Bureau of Prisons.

[217] Alaska, Arizona, Colorado, Connecticut, Florida, Louisiana, Massachusetts, Minnesota, North Carolina, North Dakota, Oregon, Vermont, Virginia and the Federal Bureau of Prisons.

[218] Alabama.

[219] California, Indiana, Minnesota and North Carolina require that the request be in writing. Massachusetts requires that it be made at least twenty-four hours before the hearing.

[220] Alabama, Alaska, Arizona, California, Georgia, Iowa, Maine, South Carolina, Vermont, Virginia, West Virginia and the District of Columbia.

[221] California Department of Corrections, Rules of the Director, tit. 15, § 3320(e) (1978).

[222] South Carolina Department of Corrections, Inmate Guide, § 3.4(D) (1979).

[223] District of Columbia Department of Corrections, Prison Disciplinary Procedures and Code of Offenses, Rule 5(g) (1973).

inmate to investigate the charges and prepare a defense without some form of assistance. *Wolff* held that there is not a right to either retained or appointed counsel, but it did allow that an inmate has the right to the assistance of a fellow inmate or a staff member where the accused is illiterate or the issue is complex.[224] In either of these situations, the inmate has the right to assistance before the hearing to help "collect" evidence and at the hearing to "present" the evidence.[225]

One of the tests used in *Wolff*, whether the inmate is illiterate, is relatively easy to determine. The other test, whether the issue is complex, is open to interpretation. Nevertheless, to date very little case law exists on this issue. In *Aikens v. Lash*,[226] however, the Seventh Circuit offered some guidance when it held that the complexity of the issue must be evaluated relative to the ability of the inmate to gather necessary information and that an inmate's segregation is one of the factors to be considered.[227] Thus, the *Aikens* approach appears to give the test described in *Wolff* some flexibility. Nevertheless, *Wolff* remains a very narrow rule.

The response of the prison systems has been to offer a more liberal right to representation than that provided by *Wolff*. Only nine of the handbooks surveyed exclusively use the *Wolff* criteria of illiteracy and complexity of the issue.[228] Three other states rely primarily on the *Wolff* tests, but have expanded

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[224] 418 U.S. at 570.

> Where an illiterate inmate is involved . . . or where the complexity of the issue makes it unlikely that the inmate will be able to *collect and present* the evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff. (emphasis added)

Id.

[225] *Id.* Two years after *Wolff*, the Supreme Court addressed the issue of representation again in Baxter v. Palmigiano, 425 U.S. 308 (1976). The Court affirmed the holding in *Wolff* but refused to extend the right to representation to all cases in which the disciplinary charges "involve conduct punishable as a crime under state law." *Id.* at 315.

[226] 514 F.2d 55 (7th Cir. 1975).

[227] *Id.* at 59.

> The Court's decision [in *Wolff*] did not define what factors were to be considered in determining "the complexity of the issue. . . ." We note only that the complexity of an issue is often dependent on the amount of information available to a prisoner. It is conceivable that in many disciplinary transfer situations an inmate will already be confined in segregation, and thus unable to collect information. This will make his task of explaining his actions and defending himself all the more difficult. In these situations the inmate should be entitled to assistance in preparing and presenting his case.

Id.; *see also* Stewart v. Jozwiak, 399 F. Supp. 574, 577 (E.D. Wis. 1975).

Despite the limits imposed by *Wolff* and *Baxter*, at least one state court has expanded the right to representation. The Alaska Supreme Court, in McGinnes v. Stevens, 543 P.2d 1221 (Alaska 1975), stating that its decision was based on the Alaska Constitution and not the United States Constitution, held that inmates have a right to counsel at disciplinary hearings where felony charges are pending. *Id.* at 1235.

[228] Alabama, Arkansas, California, Colorado, Florida, Idaho, Iowa, Mississippi, and Oregon.

them slightly. Nevada uses the same tests but also allows retained counsel where criminal charges may be brought,[229] Massachusetts extends the *Wolff* rights to cases where the accused does not speak English,[230] and Indiana includes all cases in which the accused is held in pre-hearing segregation.[231] Twenty-seven jurisdictions permit a representative at any hearing.[232] Seven of those twenty-seven allow retained counsel.[233] In Alaska, the accused may even obtain appointed counsel where a felony may result,[234] and Washington allows a representative for the investigative stage of every case but limits appearances at the hearing to the *Wolff* criteria.[235]

A further question relates to the investigation of charges by the prison officials and whether the accused has access to the disciplinary report. In *Covington v. Sielaff*,[236] the accused received a copy of the disciplinary report.[237] Prior to the hearing, the charging officer also sent the disciplinary board an unofficial "cover letter" regarding the charges.[238] The accused did not receive a copy of that letter, and the District Court for the Northern District of Illinois held that he did not have a right to one:

> Although the prisoner must receive advance written notice of the charges against him and an explanation of the evidence forming the basis of the decision, he is not also entitled to discover evidence supporting the charge . . . courts should defer to the expertise of state officials and let them specify the extent to which evidence of a disciplinary violation must be disclosed to the prisoner. The purpose of notice is only to give the prisoner an opportunity to prepare his response.[239]

Despite the language in *Covington*, eleven of the handbooks in the survey provide that a copy of the investigative report be given to the accused or his representative.[240] Additionally, in three jurisdictions the inmate has the right to

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[229] In Nevada the attorney general's office is also represented at the hearing.

[230] Massachusetts Code of Human Services Regulations, tit. 3, ch. IV, § 430.12(b). Massachusetts also allows the use of retained counsel and law students. *Id.* at § 430.12(a).

[231] Indiana Department of Correction, Administrative Procedures, § 14 (1980).

[232] Alaska, Arizona, Connecticut, Hawaii, Illinois, Kentucky, Louisiana, Maine, Georgia, Missouri, Maryland, Minnesota, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, West Virginia, Wisconsin, the District of Columbia and the Federal Bureau of Prisons and Tennessee (inmate advocates are paid twenty dollars a month.)

[233] Arizona, Louisiana, Minnesota, Virginia and the District of Columbia allow retained counsel in all cases. Hawaii and Rhode Island allow retained counsel only where criminal charges are involved. It should be mentioned, however, that allowing inmates the right to retained counsel generally is a hollow concession because of the inmates' indigency. See text at § V *infra*.

[234] ALASKA AD. CODE, art. 6, § 440(d).

[235] W.A.C. 275-88-080(2) and 275-88-097 (1977).

[236] 430 F. Supp. 562 (N.D. Ill. 1977).

[237] *Id.* at 563.

[238] *Id.* at 564.

[239] *Id.*

[240] California, Colorado, Georgia, Hawaii (includes review only of nonconfidential

request an investigation,[241] and in Michigan the inmate is permitted to submit to the investigator questions which the accused desires to be asked of the witnesses.[242]

One final question involves whether an inmate or his advocate may conduct an investigation. Twenty-seven jurisdictions in the survey have regulations which specifically provide that an investigation of a disciplinary charge is to be performed by a prison official.[243] Only six of the handbooks in the survey provide for either an investigation by the prisoner or his representative.[244] In *Tawney v. McCoy*,[245] the inmate, represented by another prisoner, claimed that he was denied due process because he could not prepare for his hearing because he had been in segregation and was denied legal materials.[246] The district court held that any prejudice caused by his pre-hearing confinement was offset because he was represented by another inmate who was available to assist in the preparation of the defense.[247] If, however, a representative materially fails in his duties, prejudice may be held to result. In *Romano v. Ward*,[248] a New York court found the investigation performed by an inmate's staff representative to be insufficient.[249] The inmate had been given one staff representative and later that person was replaced by another staff member.[250] The accused asked each of them to interview specific witnesses but neither of them did so.[251] The court held that the prisoner "was not given the necessary assistance by either the original or substitute counselor in securing witnesses" and ordered a rehearing.[252]

In sum, although an accused inmate's opportunity and ability to prepare a defense is vital to the outcome of the disciplinary hearing, neither *Wolff* nor subsequent case law has given the issue much consideration. The minimum amount of time available between notice and hearing is twenty-four hours, and very few jurisdictions go beyond that minimum. Approximately half of the prisons in the survey, however, do provide some procedure for postponing the hearing to allow more time for preparation. *Wolff* does provide for the

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reports or a summary), Indiana, Oregon (discretionary), Rhode Island, West Virginia, Washington, Wisconsin and the Federal Bureau of Prisons (only the representative gets a copy).

[241] California, Louisiana and Oregon.

[242] Michigan Department of Corrections, Procedures for Implementation of PA 140, § II.C.3 (1979).

[243] Arizona, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Oklahoma, Rhode Island, Virginia, West Virginia, Wisconsin, the District of Columbia, and the Federal Bureau of Prisons.

[244] Alaska, Connecticut, Nebraska (the language, however, is vague), South Carolina, Tennessee, Wisconsin.

[245] 462 F. Supp. 752 (N.D. W. Va. 1978).

[246] *Id.* at 755.

[247] *Id.*

[248] 96 Misc. 2d 937, 409 N.Y.S.2d 938 (1978).

[249] *Id.* at 939, 409 N.Y.S.2d at 940.

[250] *Id.* at 938, 409 N.Y.S.2d at 939.

[251] *Id.*

[252] *Id.* at 939, 409 N.Y.S.2d at 940.

assistance of an inmate or staff representative where the accused is illiterate or the issues complex. There is no clear test for determining whether the issues are complex, however, although the Seventh Circuit has held that the accused's pre-hearing segregation is a factor to be considered. Generally, the prisons are more liberal than *Wolff* in allowing representation. With respect to providing the accused with a copy of any investigative report or permitting him or his representative to perform an investigation, the prisons are far less liberal.

D. *The Right to Remain Silent*

The final right to be considered is the right to remain silent. The fifth amendment protects an individual from being involuntarily called as a witness against himself in a criminal prosecution.[253] It also gives an individual the right not to answer official questions put to him in any other proceeding, civil or criminal, where the answers might be incriminating in future criminal proceedings.[254] Where a defendant exercises the right to remain silent in a criminal case, *Griffin v. California*[255] forbids the jury to draw an adverse inference from the failure to testify.[256] Additionally, *Miranda v. Arizona*[257] requires that a criminally accused be informed of his right to remain silent.[258]

The issue of how the fifth amendment applies to prison disciplinary proceedings breaks down into three questions: (1) Does an inmate have a right to remain silent in the face of prison disciplinary charges where the alleged misconduct might also constitute a criminal offense? (2) If so, may the disciplinary board draw an adverse inference from the accused's exercise of that right? (3) If there is a right to remain silent, do prison officials have a duty to warn the inmate of that right?

Two years after the *Wolff* decision, the Supreme Court addressed these first two questions in *Baxter v. Palmigiano*.[259] The Court held that inmates had the right to remain silent, but that prison officials could draw adverse inferences from such silence.[260] In *Baxter*, an inmate in the Rhode Island prison system had been advised that he could remain silent at a disciplinary hearing, but that his silence could be used against him.[261] The First Circuit, however, held that the fifth amendment forbids drawing an adverse inference from a prisoner's refusal to testify.[262] The Supreme Court reversed. The Court stated that the fifth amendment protects an individual from involuntarily testifying against himself in a criminal trial.[263] The amendment also protects a person

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[253] 425 U.S. at 316.
[254] *Id.*
[255] 380 U.S. 609 (1965).
[256] *Id.* at 612.
[257] 384 U.S. 436 (1966).
[258] *Id.* at 467-68.
[259] 425 U.S. 308 (1976).
[260] *Id.* at 320.
[261] *Id.* at 316.
[262] *Id.*
[263] *Id.*

from having to answer any question that might later be used against him in a future criminal proceeding.[264] The Court noted, however, that in a non-criminal context, such as a prison disciplinary hearing, there was no barrier to drawing adverse inferences from a person's silence.[265] The Court stated:

> [T]he Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." . . . Prison disciplinary hearings are not criminal proceedings; but if inmates are compelled in those proceedings to furnish testimonial evidence that might incriminate them in later criminal proceedings, they must be offered "whatever immunity is required to supplant the privilege" and may not be required to "waive such immunity."[266]

Thus, while acknowledging that prisoners have a right to invoke the fifth amendment privilege in disciplinary proceedings,[267] the Court held that the disciplinary board can draw an adverse inference from the inmate's silence.[268] The Court justified its decision on two grounds. First, prison disciplinary hearings are civil actions, not criminal, and the Court cited to "the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them. . . ."[269] Second, the Court pointed out that in Rhode Island "an inmate's silence in and of itself is insufficient to support an adverse decision by the Disciplinary Board."[270] If the Board had been authorized to find the accused guilty solely on the basis of his silence, the Court indicated that it would have held the practice to be an "invalid attempt by the State to compel testimony without granting immunity or to penalize the exercise of the privilege."[271] Because the inmate's silence does not lead to an automatic finding of guilt, however, the Court upheld the practice of drawing an adverse inference.

The practical result of the Court's holding in some jurisdictions is that a disciplinary committee can find an inmate guilty without taking any testimony at the hearing. In at least seven jurisdictions, the disciplinary or investigatory report is sufficient evidence alone to find an inmate guilty,[272] and in only fifteen

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[264] *Id.*

[265] *Id.*

[266] *Id.*

[267] *Id.* at 325 (Brennan, J., dissenting).

[268] *Id.* at 320.

[269] *Id.* at 318.

[270] *Id.* at 317.

[271] *Id.* at 318.

[272] Alaska, Connecticut, Kentucky, Mississippi, Washington, West Virginia and the Federal Bureau of Prisons specifically provide that the officer need not appear or that the report is sufficient if the officer is unavailable.

jurisdictions do the regulations provide either that the officer must appear at the hearing, if he is available, or that the inmate has the right to request the officer's presence.[273] In at least some prisons, therefore, the adverse inference drawn from an inmate's silence will be the only evidence at the hearing other than the charging document.

In those cases where an inmate has a right to remain silent, there is the question whether the prison has the duty to warn the inmate of that right. *Baxter* did not specifically address this issue, but the District Court for the Middle District of Tennessee has held that a warning is not required.[274] The district court's decision is a setback for inmates. Even though *Baxter* allowed an adverse inference to be drawn from an inmate's silence at the hearing, the decision still intended to provide protection of the accused's rights at subsequent criminal proceedings. Since inmates are not constitutionally afforded the assistance of counsel even where criminal charges are pending,[275] some form of *Miranda* warning regarding the fifth amendment privilege would seem important. An inmate cannot be presumed to know that he has such a right, but without counsel or a warning no mechanism exists to inform him.

Although the courts do not require prison officials to read an inmate his *Miranda* rights where a criminal prosecution may follow, some of the prison handbooks have instituted that requirement. Eight jurisdictions provide the right in all cases,[276] with five jurisdictions informing the inmate at all stages of the proceedings[277] and three only at the hearing.[278] Eight other states require the *Miranda* warnings only where criminal charges may be pending,[279] with six of those mandating it at the investigative stage of the proceedings.[280] Of the six-

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[273] Alabama, Alaska, Arizona, Colorado, Georgia, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, Oklahoma, South Carolina, Tennessee, Virginia and the District of Columbia.

[274] Tench v. Henderson, 430 F. Supp. 964, 968 (M.D. Tenn. 1977).

> [I]t is clear from the Court's opinion [in *Baxter*] that such action is not required by the Fifth or Fourteenth Amendments. Firstly, the Court specifically declined to extend the requirements of *Miranda* and *Mathis*, cases which dealt with what warnings must be given to an individual in custody, to prison disciplinary proceedings. Secondly, the Court held that an inmate is not entitled to be informed that he has a right to counsel at his hearing. Thirdly, the proceedings involved are civil not criminal. And finally, the Court held that if an inmate was compelled to give testimony which might incriminate him, he was entitled to whatever use immunity is required by the Constitution.

Id.

[275] 425 U.S. at 314.

[276] Colorado, Hawaii, Louisiana, Massachusetts, Mississippi, Washington, the District of Columbia and the Federal Bureau of Prisons.

[277] Louisiana, Mississippi, Washington, the District of Columbia and the Federal Bureau of Prisons.

[278] Colorado, Hawaii and Massachusetts.

[279] Idaho, Indiana, Iowa, Missouri, Nevada, Rhode Island, Vermont and West Virginia.

[280] Idaho, Indiana, Iowa, Missouri, Nevada and Rhode Island. In Rhode Island the accused is advised to consult an attorney.

teen jurisdictions in the survey which specify that disciplinary proceedings are not to be suspended pending the outcome of the criminal charges,[281] however, only eight require that the inmate must be advised of his right to remain silent prior to the hearing even though a criminal prosecution may follow.[282]

Prisoners charged with an institutional violation have a right to remain silent, therefore, when the incident also may result in a criminal investigation. The disciplinary board, however, may draw an adverse inference from the inmate's silence, and at least one court has held that the prison officials do not have the duty to inform the accused of the right to remain silent. Thus, the fifth amendment privilege against self-incrimination is very limited in the context of prison disciplinary hearings.

Indeed, a prisoner's pre-hearing rights in general are very limited. In some jurisdictions an inmate may find himself in segregated detention, generally unaware of the charges against him until the day before a hearing. Additionally, the inmate may not be entitled to any assistance in preparing to defend himself, and may be denied access to any investigatory reports. Finally, if the inmate exercises his right to remain silent at the hearing, this silence may be used against him, and in some jurisdictions, the inmate's silence in conjunction with the investigatory report may be sufficient to establish guilt.

V. The Disciplinary Process at Lorton Prison: A Case Study

In order to aid in the understanding of the due process issues raised in prison disciplinary proceedings, this section of the article will describe a typical disciplinary hearing held at the Central Facility of the District of Columbia Department of Corrections (Lorton), a medium security institution.[283] It is not contended that the disciplinary process at Lorton is, in every respect, typical of proceedings throughout the country, but its description will give an illustration of how the general process functions.

A copy of a handbook entitled Prison Disciplinary Procedures and Code of Prison Offenses[284] is issued to every inmate upon his arrival at Lorton.[285] As the title indicates, the handbook lists the offenses for which an inmate may be punished, the punishments which are applicable to each offense, and the pro-

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[281] Arizona, California, Colorado, Florida, Georgia, Idaho, Louisiana, Maryland, Nebraska, Nevada, Minnesota, Rhode Island, Vermont, Washington, West Virginia and Wisconsin.

[282] Colorado, Idaho, Louisiana, Nevada, Rhode Island, Vermont, Washington and West Virginia.

[283] This description of the disciplinary process at Lorton is the result of the author's observations during two years as the supervisor of a law school clinical program which provides student representatives for disciplinary hearings at Lorton.

[284] Department of Corrections for the District of Columbia, December 7, 1973. A revised edition of the handbook is scheduled to be put into use in 1981. It will result in some changes in the disciplinary procedures described in this section.

[285] Prison Disciplinary Procedures and Code of Prison Offenses (Code), Rule 1 (1973).

cedures for implementing those punishments. Thus, the first step in the disciplinary process, giving the inmate notice of prohibited conduct, takes place when the inmate receives a copy of the handbook.

The offenses described in the handbook are divided into four classifications based on the seriousness of the violation. After the list of offenses in each classification, the handbook lists the penalties which may be imposed. Class I offenses constitute the most serious infringements and result in the harshest penalties. Class IV offenses comprise the least serious violations, and the handbook gives the charging officer the discretion either to refer the matter to the disciplinary board or to impose summarily a minor penalty.[286]

For all violations other than Class IV, employees must report the alleged misconduct to their shift supervisors.[287] A disciplinary report (DR), which identifies the rules alleged to have been violated and the facts constituting each offense, must be filled out.[288] The regulations require that the shift supervisor investigate the charges.[289] However, in practice, he merely interviews the inmate and gives him verbal notice of the possible disciplinary action.[290] At that time, the shift supervisor also asks the inmate whether he desires to have any witnesses and advises him of his rights to remain silent and to obtain representation for the hearing.[291] At Lorton, area law students usually provide this representation, although inmates are allowed to retain counsel.[292] The inmate then is asked whether he wishes to make a statement.[293] The majority of the inmates exercise the right to remain silent and do not make a statement to the shift supervisor prior to the hearing.[294]

Following his investigation, the supervisor makes a determination whether the DR will be destroyed or will be referred to the disciplinary board.[295] If the DR is referred to the board, the inmate receives a copy, along with notice as to the time and place of the hearing.[296] Hearings are held within two working days after the inmate has received written notice.[297] Despite the requirement in *Wolff* of notice at least twenty-four hours prior to the hearing, the shift supervisor's investigation, the receipt of written notice, and the hearing, occasionally, have occurred on the same day.[298]

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[286] *Id.* at 22.

[287] Rule 2(a).

[288] Rule 2(c).

[289] Rule 5(a).

[290] During an orientation session for the students, it was explained that the Department did not have enough personnel to conduct a more thorough investigation.

[291] Rule 5(b).

[292] Rule 7.

[293] Rule 5(c).

[294] The author is aware of only two cases handled by a student representative in which the client had made a statement prior to the hearing.

[295] Rule 2(b).

[296] Rule 5(d).

[297] Rule 5(e).

[298] The author witnessed two cases where the twenty-four hour requirement was violated.

Pending the hearing, the inmate may be placed in pre-hearing, administrative segregation, if the shift supervisor determines that there is a clear and present threat to the prisoner's safety, that the prisoner poses a clear and present threat to the safety of others, or that the prisoner poses a definite escape risk.[299] The majority of inmates, however, are not placed in pre-hearing segregation, and instead, are allowed to remain in the general prison population prior to the hearing. Inmates not confined to pre-hearing segregation report to the control building the morning of the day on which their hearing is scheduled. The control building contains both the administrative and the punitive segregation cells along with the disciplinary hearing room. Upon reporting to the control building, the inmate is placed in an administrative segregation cell until he is called for the hearing. The board convenes at 9 a.m. and conducts hearings until all those scheduled for that day are completed. It is rare, however, that hearings last after 3 p.m., and often all cases are disposed of by noon.

Each morning the officer who serves as the clerk of the board prepares a docket sheet, which lists the names of each inmate scheduled to be heard, the alleged offenses committed, and whether the inmate desires representation by an attorney or a law student. The inmate has the right to be represented by retained counsel, but he bears the responsibility for making the arrangements.[300] The appearance of such counsel is rare because the inmates generally cannot afford attorneys, and because law students registered with the Department of Corrections serve as volunteer counsel.[301] Typically, three days a week two or three students remain in the control building and represent any inmate who requests assistance. While the docket indicates whether representation has been requested, the inmate is allowed to change his mind on the day of the hearing.

If the accused requests student representation on a day on which there are no students at the institution, the inmate may ask the disciplinary board for a continuance of the hearing to a later date. An accused has the right to one continuance, for any reason, for up to three days.[302] All subsequent requests for a continuance are within the discretion of the board.[303] Usually, the board will grant a continuance of the hearing to a day on which it knows that students will be present. During times of the year, however, when students are on vacation or taking final examinations, the inmate must proceed without representation.

If a student is available, a guard brings the inmate out of the administrative segregation cell and handcuffs him. The student generally has only fifteen minutes to interview the client, although the guards will allow more time if a student requests it. The interview occurs in the same room where one or two other interviews are being conducted and two correctional officers are overseeing security. Thus, there is almost no privacy.

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[299] Rule 4.
[300] Rule 5(h).
[301] Rule 7(b).
[302] Rule 5(g).
[303] *Id.*

If the client does not have his copy of the DR, the student may go into the hearing room and request a copy from the clerk. At that time, or after interviewing the client, the student is allowed to look at the DR and the client's inmate file, or jacket. The jacket contains copies of all prior DRs. Knowledge of the client's inmate record is useful in the event that the inmate is found guilty and the student must make a recommendation for sentence.

If the client has requested witnesses, the institution will have issued call-out passes to those witnesses who are inmates, informing them of the date of the hearing. There is no established procedure for informing potential witnesses who are employees of the institution, and it generally is left to the accused to make such a request personally. With the exception of the charging officer, no requested witness is required to appear at the hearing, and those who are employees almost always decline the request.[304] If the witnesses have not appeared and the student feels that they are essential to the client's defense, the student can request a continuance to a later date.[305] If it is granted, new call-out passes will be issued. The student, however, will not have the opportunity to seek out these witnesses and can only hope that they will appear at the next scheduled hearing.

If the witnesses have arrived, the student is allowed to interview them one at a time while the client is taken back to his administrative segregation cell. The guards permit about fifteen minutes for the interview of each witness. After the student questions the witnesses, they are asked to wait outside and the client is brought back to the interview room. When the student is ready to proceed to the hearing, he so indicates to one of the officers.

The board presiding at this hearing consists of three members.[306] The chairman must be a correctional officer.[307] An officer of the rank of lieutenant, or higher, is appointed to the position for approximately six months. The other two positions are filled on a rotating basis by staff members of either psychological services or classification and parole (C and P).[308] Board members must not have been involved in any way with the incident which led to the DR, or with the investigation of the charges.[309] Therefore, the chairman frequently must excuse himself from the board, either because he wrote the DR or because he investigated it. The chairman does not have to excuse himself, however, when he has received second-hand reports of an incident from his fellow officers prior to the hearing.[310] The psychologists and C and P officers

[304] Rule 8(d) states that "[e]mployees . . . may not be excused from giving testimony before the board," but the usual technique used to avoid testifying is simply failing to appear. The board cooperates in the hoax by granting a continuance each time until the inmate grows tired of the process and agrees to proceed without the witness.

[305] Rule 5(g).

[306] Rule 6(b).

[307] *Id.*

[308] *Id.*

[309] *Id.*

[310] After the completion of a hearing and the removal of the accused from the hearing room, the chairman occasionally confides to the student representative that he has spoken to other officers about the alleged incident for which the inmate was charged.

almost never remove themselves from a hearing, even when the accused is a part of their caseload. Whether this practice works to the detriment of the prisoner depends on the relationship that the inmate has with his psychologist or C and P officer.

Upon entering the hearing room, the student and the client sit at a table directly opposite the board members. The client remains handcuffed and is required to sit in an oversized black wooden chair placed in front of the chairman. The tone established is adversarial. A tape recorder is turned on[311] and the chairman reads the charges against the inmate.[312] He then asks the inmate whether he desires witnesses, including the writer of the DR.[313] If the accused wants witnesses and they have not appeared, this is the appropriate time to request a continuance.[314] If the hearing is not continued, the chairman advises the accused that he has a right to remain silent[315] and then asks him what he has to say in response to the charges.[316]

At that time, the student makes whatever preliminary motions he has prepared. Typically, these include either a motion for a continuance or a motion to dismiss a charge for failure to allege sufficient facts to constitute the offense.[317] For the latter, the student and client usually are asked to leave the room while the board deliberates. When the two are brought back into the room, they are informed of the board's decision. Unless all charges have been dismissed, a rare event, the student then presents the client's defense.

The student representative has the option of questioning the client or relating the defense in his own words. No one formally represents the prison, or "the state," during the disciplinary hearing. When the student is finished questioning the accused or presenting the arguments for the defense, however, the board members may question the accused. Following the questioning of the accused, the student calls the accused's witnesses and questions them. The board, again, can ask its own questions. The degree of participation by the members, other than the chairman, varies widely. Some appear disinterested and never pose any questions. A few actually read newspapers and magazines during the hearing.[318] Others enjoy the legalistic nature of the proceedings and take the opportunity to ask many questions, often dealing with information irrelevant to the charges. The chairman, being more familiar with the procedures and with the operation of the prison, is more apt to do the relevant

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[311] Rule 10.

[312] Rule 5(c).

[313] Rule 8(a) and (c).

[314] Rule 5(g).

[315] Rule 7(c).

[316] Rule 5(c).

[317] Because the reports often are poorly written, the latter is the most successful method of defending against the charges.

[318] The practice became so prevalent that one student wrote to the administrator of the central facility to complain. The administration informed the author that he would direct all board members to discontinue such practices and indicated that the student could have obtained the same results without sending a copy of the letter to the director of the Department of Corrections and to the mayor of the District of Columbia.

questioning. The disciplinary board, thus, assumes the positions of factfinder and the administration's representative, roles which are conflicting.

By giving the inmate the right to call the writer of the DR, Lorton has gone beyond the requirements of *Wolff*, which does not provide the right of confrontation. Most clients are advised, however, not to exercise their right because the writer, more often than not, will only repeat the description of the incident given in his report, from which he is allowed to read at the hearing.

After all of the evidence has been presented and the student has made a summation, he and the inmate wait outside while the board deliberates the issue of guilt or innocence.[319] During that time, the student discusses with the client what sentence they should recommend to the board in the event that it finds the client guilty. If the board returns a guilty verdict, the student makes a recommendation for appropriate punishment,[320] and then he and the client again leave the room, while the board reviews the inmate's jacket for past violations, evaluations, and the offense for which he was committed.[321] Finally, the two return to the hearing room to be informed of the punishment.[322]

Penalties at Lorton are not severe in comparison with other institutions.[323] Good time almost never is taken from the inmate.[324] The most severe penalty imposed on inmates in central facility, a medium security unit, is a transfer to the maximum security unit, and the most common form of punishment imposed is punitive segregation, which means confinement in the punitive segregation cellblock in the control building.[325] The maximum length of confinement is fourteen days, during which the inmate is denied almost all privileges available to the general prison population.[326] While the majority of penalties imposed are for a period of segregation, the board often suspends imposition of penalty from three to six months.[327] The inmate will have to serve that time in segregation only if found guilty of a subsequent DR within the suspension period.

The rules provide for automatic review of all hearings by an assistant administrator,[328] and occasionally such review will result in the reversal of the board's finding of guilt, or a reduction in the penalty.[329] In addition, the inmate has the right to appeal in writing to the administrator of the central facility within two working days,[330] and the inmate's representative will assist him if

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[319] Rule 9(a).

[320] Rule 9(c).

[321] Rule 9(b).

[322] Rule 9(c).

[323] The maximum length of segregation is fourteen days. Code at 17.

[324] In two years, none of the author's students handled a case in which good time was taken.

[325] Code at 17.

[326] Code at 28.

[327] The regulations do not authorize suspended sentences, but it has become a common practice.

[328] Rule 11(a).

[329] Students occasionally represent a client whose case already has been heard by the board but which has been remanded for a new hearing following review.

[330] Rule 11(b) and (c).

there are grounds for an appeal.[331] The administrator does not adhere strictly to the two day limit and will accept late appeals.[332] The rules provide that the administrator must give the inmate a written decision within two working days if he is in segregation, otherwise within three working days.[333] The administrator, however, does not adhere strictly to that time limit either, and because penalties are not stayed pending appeal, often an inmate's sentence to segregation will have been served before the administrator has made his decision.[334]

VI. THE DISCIPLINARY HEARING

This section deals with the issues raised by the events which occur at a disciplinary hearing. The issues will be discussed under five main subsections, dealing with when and where the hearing takes place; the composition of the hearing body; the presentation of the prison's evidence; the presentation of the accused's defense; and the preparation of a written statement.

A. *When and Where does the Hearing Take Place?*

If an inmate has been charged with a major violation which has not resulted in criminal charges, and if he has not elected to proceed by waiver, he has the right to a hearing.[335] When and where that hearing takes place is important for a number of reasons. With respect to the timing of a hearing, an inmate's witnesses may no longer be available if the hearing is delayed too long. An inmate-witness may be released, paroled, transferred to another institution, or placed in segregation; all of which would make him unavailable for a disciplinary hearing. Additionally, if the accused is placed in pre-hearing segregation, he naturally will want the hearing held as soon as possible. Regarding the location of a hearing, an inmate at least has an interest in insuring that the setting is impartial. Finally, a hearing should not be used as harassment, and, therefore, should be held at a reasonable time of day.

The Supreme Court has not established either minimum or maximum time periods in which a hearing must be held. In fact, very few courts have addressed this issue and their conclusions have varied widely. At one extreme, the United States District Court for the Eastern District of Arkansas, in *Holt v. Hutto*[336] considered the constitutionality of the disciplinary procedures in the Arkansas prisons and among other things held that disciplinary hearings

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[331] That is the policy established in the clinic.

[332] Often it is impossible for students to meet the two-day requirement, yet during the author's two years at the clinic, no appeal was ever denied for that reason.

[333] Rule 11(f).

[334] This was a very common occurrence during the author's experience at the clinic.

[335] Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

[336] 363 F. Supp. 194 (E.D. Ark. 1973), *aff'd sub nom.* Finney v. Arkansas Board of Correction, 505 F.2d 194 (8th Cir. 1974).

generally must be held within seventy-two hours after the act of misconduct.[337] Limited extensions on the seventy-two hours requirement could be granted only in exceptional cases. Unfortunately, the court did not define what it meant by an "exceptional case."[338] On appeal this limit was specifically endorsed by the Eighth Circuit.[339]

At the other end of the spectrum, *Smith v. Oregon State Prison, Corrections Division*[340] held that a six week delay was reasonable. This case involved a disciplinary hearing which was recessed six weeks by the board pending the results of a police investigation which the board concluded would provide information regarding a disputed issue in the case.[341] Smith had been charged with being in an unauthorized area at the same time that another inmate had been sexually assaulted.[342] The police were investigating the sexual assault, and the board reasoned that the investigation might supply evidence concerning whether Smith had been present in the unauthorized area.[343] The court held that the board had "the inherent authority to recess hearings for good cause and for reasonable lengths of time."[344] It found that waiting for the results of the police investigation was good cause and that six weeks was not an unreasonable length of time.[345]

In the absence of clear guidance from the courts, the regulations dealing with the timing of hearings tend to be vague. Some of the jurisdictions use standards such as "within a reasonable time"[346] and "without undue delay."[347] As illustrated in the *Smith* case, the Oregon court did not feel that six weeks was

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[337] *Id.* at 207. The court also held that all hearings must be held between the hours of six a.m. and six p.m. *Id.*

[338] *Id.*

[339] Finney v. Arkansas Board of Correction, 505 F.2d 194, 208 (8th Cir. 1974). After the district court's decision and prior to the appeal, the Supreme Court decided *Wolff*. The Eighth Circuit affirmed the district court's holding as to the timing of the hearing, while also holding that the prisons must adopt the standards established in *Wolff*. *Id.*

Hopkins v. Maryland Inmate Grievance Commission, 391 A.2d 1213 (Md. App. 1978), stands for the proposition that when the prison has established a time limit for when the hearing is to occur, it must abide by that rule. In *Hopkins* a Maryland court reversed the disciplinary board's decision because the hearing had been held one day after the seventy-two hour limit established by the Maryland prison regulation. *Id.* at 1215-16. Hearings could be held later than seventy-two hours after the violation where the prison could show that an earlier hearing was prevented by exceptional circumstances. *Id.* at 1214. Stating that an administrative agency must follow its own rules, the court held that an ordinary backlog of cases did not constitute an exceptional circumstance and that the hearing should have been held within seventy-two hours. *Id.* at 1215-16.

[340] 18 Or. App. 668, 526 P.2d 642 (1974).

[341] *Id.* at 670, 526 P.2d at 642-43.

[342] *Id.* at 669, 526 P.2d at 642.

[343] *Id.* at 670, 526 P.2d at 643.

[344] *Id.* at 671-72, 526 P.2d at 643-44.

[345] *Id.* at 672, 526 P.2d at 643-44.

[346] Massachusetts Code of Human Resources Regulations, tit. 3, ch. IV, § 430.11(c).

[347] Nevada Department of Prisons, Code of Trial Discipline 9 (1978).

"unreasonable." Therefore, it is not clear whether that standard is very helpful.[348]

Equally as vague are regulations which provide for a hearing within a certain period of time after receipt of notice where the latter event is contingent upon an indefinite date such as completion of the investigation.[349] Alaska's regulation offers an illustration of that vagueness. While it requires that the hearing must occur within six months of the alleged act of misconduct,[350] the determination of when the hearing must be given within that six months is quite uncertain. The regulations provide for a hearing within five days of receipt of notice,[351] but it does not specify exactly when the accused receives notice. The notice provision requires only that a copy be given to the accused within twenty-four hours after the investigation,[352] but it does not comment on when the investigations take place. The date of the hearing, therefore, is contingent upon the date of the completion of the investigation, so long as it is completed within six months of the infraction.[353]

A second issue regarding the disciplinary hearing is where it takes place. While there is little expectation that the hearing would be held outside of the institution, it still is important that a relatively impartial atmosphere be maintained. In *Daigle v. Helgemoe*[354] the New Hampshire District Court reversed a disciplinary decision in which the hearing had been held while the prisoner was confined in a solitary cell and the board members sat outside the cell.[355] The court held that no disciplinary hearings could be so conducted.[356] Even where a security risk exists, the court stressed, the officials must hold the hearing in an open room or wait until the inmate is released from solitary.[357] Further, the court required that if the hearing is to be held in an unusual location because of security problems, the determination that a security problem exists must be made a part of the written record.[358] In explaining its decision, the court stated:

> To be constitutionally proper, a hearing should be fair in both form and substance. . . . Prison officials should endeavor to create

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[348] Where pre-hearing segregation is involved, at least two federal cases, LaGrande v. Redman, 432 F. Supp. 1307, 1309 (D. Del. 1977), and Rompilla v. Nero, 448 F. Supp. 182, 184 (E.D. Pa. 1978), hold that the inmate must receive notice and a hearing as soon as the threat to security subsides. That is a rather vague standard, and only thirteen jurisdictions in the survey have established time limits applicable to pre-hearing segregation cases.

[349] See Section IV *supra*.

[350] ALASKA ADMINISTRATIVE CODE, art. 6, § 425(a).

[351] *Id.*

[352] *Id.* at § 410(c).

[353] *Id.* at § 425(a).

[354] 399 F. Supp. 416 (D.N.H. 1975).

[355] *Id.* at 419.

[356] *Id.* at 420.

[357] *Id.*

[358] *Id.*

> an atmosphere in which prisoners will feel that they have been treated fairly and equally. It is highly doubtful that an inmate will believe that he has been treated fairly when he views both his judges and accusers through the steel bars of a solitary cell.
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> . . . [C]onducting a disciplinary hearing while an inmate is confined to a solitary cell is antithetical to the due process criterion that the hearing be held "in a meaningful manner." . . . A procedure which places the inmate in a grossly inferior position can only reinforce feelings of persecution and injustice.[359]

Other than the limitation established by *Daigle*, the site of a disciplinary hearing is almost totally within the discretion of the prison authorities. For purposes of administrative convenience, however, most hearings are held within the institution in which the accused is confined. North Carolina is the only state in the survey that has a different system.[360]

The standards for when and where a hearing must take place, therefore, are still vague. Only the Eighth Circuit has established a definite time limit. The majority of decisions and regulations, however, are not specific and use such vague standards as "within a reasonable time." The only limitation placed on the location of the hearing is that it cannot be held outside the prisoner's cell while he is locked within the cell.

B. *The Disciplinary Board*

Wolff did little to establish what requirements the disciplinary factfinding body had to meet to satisfy due process. It did not establish "specified criteria for neutral and detached hearing officers."[361] The impartiality of the disciplinary board is a critical issue. This section will analyze the judicial and administrative determinations made subsequent to *Wolff* with respect to the impartiality of the disciplinary board and of the individual members of the board. In particular this section will focus on three issues: first, the extent to which the board may serve both as prosecutor and adjudicator; second, the propriety of board member involvement in the investigation; and third, the makeup of the board. All of these issues affect the impartiality of the disciplinary board.

In general, disciplinary boards, like all administrative bodies, need not possess the same degree of detachment as is required of a judge. The Oregon

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[359] *Id.* at 419.

[360] As will be discussed later in this section, North Carolina establishes Area Disciplinary Committees (ADC) made up of employees from the different institutions in the area. 5 N.C.A.C., § .0203(b) (1979). An inmate charged with a major act of misconduct is heard by an ADC, and he must be transported to the institution at which the Committee is sitting. *Id.* at § .0203(b)(3). Illinois provides that all hearings "shall be conducted in an area of the facility that affords privacy . . . and allows for the confidentiality of any evidence presented." Illinois Department of Corrections, Administrative Regulations, § II.G.5. (1978).

[361] Powell v. Ward, 392 F. Supp. 628, 633 (S.D.N.Y. 1975), *modified*, 542 F.2d 101 (2d Cir. 1976).

Court of Appeals distinguished the functions of a court of law from those of an administrative hearing body in *Fritz v. Oregon State Penitentiary, Corrections Division*.[362] The court stated that in a judicial adjudication:

> [T]here is a total separation of the judging function from the investigatorial and prosecutorial functions as constitutionally mandated under the doctrine of separation of powers.
>
> In contrast, an administrator is usually selected because of . . . his commitment to the policy which he is charged to administer. The traditional justifications for administrative adjudications are those of administrative expertise and the avoidance of the cumbersome machinery of a court trial. Both imply a degree of prior knowledge and consequent prejudgment by administrative agencies, not only on matters of policy but also on questions of fact. As regular members of the prison staff, they are personally acquainted with the inmates and other staff members and thus are in a position to make tentative prejudgments on questions of credibility and appropriate sanctions or treatment. Presumably they make those prejudgments.
>
> Due process does not require an absence of these kinds of biases that are inherent in the administrative process. Indeed, abstract fairness may be better served through such a process. It would not be unreasonable to expect more arbitrary results from a panel of wholly disinterested, and thus unknowledgeable, persons who are not intimately acquainted with the personalities and operation of the prison . . . In *Wolff*, the Court stated that due process entitles the inmate to notice and to be heard. The right to be heard implies a corollary duty to listen and consider, but this does not mean that they must listen with a total absence of prejudgment.[363]

Unlike judicial proceedings, in administrative adjudication, the *Fritz* court stated, there is no need to separate clearly the judging function from the investigatorial and prosecutorial functions.[364] In *Fritz* one member's investigation prior to the hearing was held not to warrant disqualification.[365] Furthermore, complete impartiality was not required. In this regard the court reasoned that almost all board members, because of their employment within the institution, inevitably will have some knowledge of the incident or the accused prior to the hearing.[366]

As to the prosecutorial function, only three of the regulations surveyed establish a position comparable to a prosecutor in a criminal trial.[367] North

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[362] 30 Or. App. 1117, 569 P.2d 654 (1977).

[363] *Id.* at 1122-23, 569 P.2d at 657.

[364] *Id.*

[365] *Id.* at 1121, 569 P.2d at 657.

[366] See Section V *supra*.

[367] Arizona, New Hampshire and North Carolina. Also, Nevada provides that when the accused is represented by retained counsel in a case where criminal charges are pending, a member of the attorney general's office will attend the hearing.

Carolina gives the Unit Superintendent the discretion to appoint a member of his staff to present the case to the committee.[368] In New Hampshire, the officer who investigates the incident also is charged with presenting the case against the accused at the hearing.[369] Although the regulation is somewhat vague, Arizona employs a Coordinator of Discipline who has the authority to request the appearance of the charging officer, make motions, and question all witnesses.[370]

In the remaining jurisdictions in the survey, there is no provision for a prosecutor. Often the charging and the investigating officers do not even appear at the hearing.[371] What does appear are the officers' reports. Some jurisdictions provide that either the board or the accused, or both, may request an officer's appearance.[372] In those instances, however, the officer is called to testify as a witness, not to present the institution's case.[373] The role of prosecutor, therefore, if such a role exists in a prison disciplinary hearing, belongs to the board. Thus, the roles of a disciplinary board are conflicting and the degree of impartiality is limited.

In addition to prosecutorial functions, there also exists the issue whether board members may participate in pre-hearing investigations. In *Fritz*, for example, a board member had spoken with the charging employee prior to the hearing and had agreed with her decision not to withdraw the report.[374] The inmate argued that as a result of this conversation the board member should have been excluded from the panel for having "arrived at a degree of prejudgment resulting from that investigation."[375] Citing two United States Supreme Court cases dealing with agency hearings other than prison disciplinary hearings,[376] the Oregon court stated that "due process does not require a formal separation of the investigative functions from the adjudicative or decision making func-

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[368] 5 NORTH CAROLINA ADMINISTRATIVE CODE, § .0203(b)(4) (1979).

[369] New Hampshire State Prison, Manual for the Guidance of Inmates, Disciplinary Procedures, § 3.B. (1978).

[370] Arizona Department of Corrections, Rules of Discipline, § III.D-3, 9-10 (1980).

[371] At least seven jurisdictions specifically provide that the officer need not appear or that the report is sufficient if the officer is unavailable. Alaska, Mississippi, Connecticut, Washington, West Virginia, Kentucky, and the Federal Bureau of Prisons.

[372] Alaska, Arizona, Florida, Georgia, Massachusetts, North Carolina, Pennsylvania, South Carolina and the District of Columbia. See Section V, *supra*, however, which describes how employees in the District of Columbia avoid appearing at a disciplinary hearing.

[373] In most of the handbooks the issue of whether the officer will appear at the hearing is discussed in connection with whether the accused will have an opportunity to cross-examine adverse witnesses.

[374] 30 Or. App. at 1119, 569 P.2d at 655-56.

[375] *Id* at 1121, 569 P.2d at 656.

[376] Withrow v. Larkin, 421 U.S. 35 (1975). The members of the Wisconsin Examining Board conducted an investigation of a doctor and then scheduled a contested case hearing to determine whether his license should be suspended. The Supreme Court held that the procedure was not violative of the Due Process Clause. Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1947). The F.T.C. had made an investigation into the cement industry pricing system and several members of the Commission had testified before Congress that they believed the system was illegal. The F.T.C. then brought an antitrust case attacking the pricing system. The Court held that the members need not disqualify themselves due to the prior investigation.

tions of an administrative agency, nor does it preclude those who perform the latter from participating in the investigative phase."[377]

While allowing pre-hearing investigations by a board member, the court was concerned with the degree of prejudgment which the member had developed.[378] The test used by the court to determine whether the board member was so prejudiced as to warrant disqualification from the board was whether "his mind was closed from hearing what others might have to say."[379] Applying the test to the facts in the case, the court determined that the member's agreement with the decision not to withdraw the charges did not mean that his "mind was necessarily closed to [the inmate's] arguments."[380] Thus, the board member was not "biased to a degree that is constitutionally unacceptable."[381]

Despite the justification in *Fritz* for allowing pre-hearing investigation by board members, the majority view is to the contrary.[382] *Myers v. Askew*,[383] a Florida case, provides a good summary of the reasons for exclusion from a disciplinary committee. In that case, the court would not disqualify a board member because he was a prison employee.[384] The court, however, added the following proviso:

> [p]rovided that no member of the disciplinary team has participated or will participate in the case as an investigating or reviewing officer, or is a witness or has personal knowledge of material facts related to the involvement of the accused, or is otherwise personally interested in the outcome of the disciplinary proceeding. . . .[385]

Other courts have specifically disqualified the charging officer[386] and the officer who classifies the offense as a major or minor violation, along with those whose judgment might be influenced by the classification officer.[387]

The majority view certainly is the better view. The Oregon court would allow pre-hearing investigation by a board member so long as "his mind was [not] closed from hearing what others might have to say." That is a totally subjective test which would have to be applied on a case-by-case basis, assuming that it could be applied at all. The majority view, on the other hand, draws a clear line by establishing a blanket prohibition on investigation. An objective test such as that is much easier to apply and requires less frequent judicial review. More importantly, the majority view requires a higher degree of impartiality.

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[377] 30 Or. App. at 1121, 569 P.2d at 656.
[378] *Id.* at 1124-25, 569 P.2d at 656-57.
[379] *Id.* at 1124, 569 P.2d at 658.
[380] *Id.*
[381] *Id.*
[382] See notes 387, 390, 391 *infra*.
[383] 338 So.2d 1128 (Fla. 1976).
[384] *Id.* at 1130.
[385] *Id.*
[386] *See, e.g.*, Finney v. Arkansas Board of Correction, 505 F.2d 194, 208 (8th Cir. 1974).
[387] *See, e.g.*, Gates v. Collier, 454 F. Supp. 579, 585 (N.D. Miss. 1978).

Another important issue regarding the impartiality of the panel concerns its composition. The Nebraska panel in *Wolff* was composed of three employees of the prison.[388] The Court found the board to be "sufficiently impartial to satisfy the due process clause."[389] A board made up entirely of employees of the institution, therefore, is not, *per se*, lacking in impartiality. A related question is whether the committee may be composed solely of correctional officers. Prison employees generally fall into two categories: those charged with the security of the institution, such as uniformed correctional officers, and those who provide services, such as counsellors and work supervisors. Due to the nature of a correctional officer's duties, inmates tend to have better relations with non-uniformed, service employees and prefer the latter to be sitting on disciplinary boards.[390] The New Jersey court in *Avant v. Clifford*[391] held the panel in that case to be sufficiently impartial, but ordered future boards to have a composition weighted more toward non-uniformed employees:

> The pervasive and understandable friction between correctional officers and prisoners noted in *Wolff* ought not to be exacerbated by two of the three members of the "impartial tribunal" being correctional personnel. Thus, from now on there must be no more than one correctional officer on the Adjustment Committee.
>
> We further think that when and if the single "hearing officer" adjudicator technique is implemented, such officer . . . should be assigned from the central office staff instead of coming from within the institution itself.[392]

Two other instances of alleged failure to provide an impartial panel merit comment. First, there is the question whether a witness to the alleged offense may sit on the board. In *Myers*, one member of the board had witnessed the offense and the court held that he should have been disqualified.[393] The *Myers* court suggested, however, that direct knowledge of offenses committed by the accused with which he is *not* currently charged is not grounds for disqualification. In *Myers* the inmate also had argued that the chairman should have been disqualified because the inmate had threatened him prior to the hearing.[394] Because the threats were unrelated to the pending charge, the court declined to so hold.[395]

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[388] 418 U.S. at 571.

[389] *Id.* at 570-71.

[390] From the author's conversations with inmates in several jurisdictions, it is apparent that the nature of the officers' duties, guarding inmates, often places them in conflict with the inmates. Services staff, on the other hand, are not used to maintain order and security and, therefore, are not perceived in the same adversarial light by the inmates.

[391] 67 N.J. 496, 341 A.2d 629 (1975).

[392] *Id.* at 527, 341 A.2d at 646.

[393] 338 So.2d at 1130.

[394] *Id.*

[395] *Id.*

In some instances personal animosity and feeling between a prisoner and a particular prison official may require that the official involved be disqualified from

The second issue is possible racial bias. In *Douglas v. United States Attorney General*,[396] the District Court for the Western District of Oklahoma dealt with this issue. In that case a black prisoner complained of racial discrimination because he had been found guilty by an all-white disciplinary board, but the court held that no right to an integrated board existed.[397] Two states, however, have regulations which provide for minority membership on disciplinary boards.[398] In Illinois, a minority member is mandatory.[399] In Indiana, minority membership is not mandatory, but "[p]referably, one member should be a minority group person."[400]

With respect to all sources of bias discussed above, state regulations generally provide no more protection than that required by the courts. A review of the regulations indicates that most jurisdictions provide for the disqualification of the charging and investigating officers.[401] Some of the handbooks are silent on the issue,[402] and few provide for disqualification for reasons not already stated in the case law.[403] Furthermore, even where a basis for disqualification exists, only two states have a procedure that allows an inmate to challenge a member prior to the hearing.[404]

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serving on a disciplinary committee involving that prisoner. But to say that a prison official is disqualified in every instance where a threat has been made against him by a prisoner would place in the hands of the prisoner population a method by which they could disqualify all prospective members of disciplinary committees. In the absence of showing that [the chairman] was in fact prejudiced by the alleged threat we hold that he was not disqualified.

Id.

[396] 404 F. Supp. 1314 (W.D. Okla. 1975).

[397] *Id.* at 1315.

Since a defendant in a criminal trial has no right to a jury of a particular makeup, Apodoca v. Oregon, 406 U.S. 404, 92 S. Ct. 1628, 32 L.Ed.2d 184 (1972), it may be doubted that the plaintiff has any constitutional right to have his disciplinary committee composed in a certain way.

Id.

[398] Illinois and Indiana.

[399] Illinois Department of Correction Adult Division, Administrative Regulations, § II.E.5 (1978)

One member of each committee shall be a minority staff member. If no such individual holding one of the above position classifications is physically available to participate in committee hearings on a given day, any minority staff member may be allowed to serve as an adjustment committee member on said day.

Id. A footnote in the regulations indicates that the above provision was made "pursuant to a consent decree in the case of the *U.S. Department of Justice v. the State of Illinois*." *Id.*

[400] Indiana Department of Correction, Adult Authority Disciplinary Policy, § 4(c) (1977)

[401] Alabama, Alaska, California, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Maine, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Virginia, West Virginia, the District of Columbia and the Federal Bureau of Prisons. In addition, five states exclude anyone with direct involvement in or knowledge of the incident.

[402] Arizona, Arkansas, Idaho, Kentucky, Maryland, Missouri, Nevada, Oklahoma and South Carolina.

[403] Alabama, Alaska, Florida, North Dakota and Oregon do not allow the party charged with reviewing disciplinary appeals to sit on the panel.

[404] Massachusetts and Michigan. It is ironic that Michigan, the only jurisdiction in the

North Carolina and Michigan potentially provide for the most impartial panels of the jurisdictions surveyed. For major violations in North Carolina, an Area Disciplinary Committee (ADC) is formed, which is composed of employees from the different units in the area.[405] No person in a position of direct supervision of the inmate may sit on the board.[406] Michigan provides an even better alternative than North Carolina. Pursuant to Public Act 140, effective February 1, 1980, the Michigan legislature created a hearings division within the Department of Corrections.[407] The division is under the supervision of the hearings administrator who is appointed by the director of the department, and it is responsible for hearing all cases involving major violations.[408] Most important, the hearing officers are under the direct supervision of the hearings division,[409] rather than the superintendents of the institutions, and each hearing officer hired after October 1, 1979, must be an attorney.[410] This arrangement maximizes both impartiality and competence.[411]

Thus, a disciplinary hearing body, by its very nature, combines the conflicting roles of factfinder and prosecutor, and to a lesser degree investigator. Because of these conflicting roles, a disciplinary board does not maintain the same level of impartiality as a court of law. There are requirements of impartiality, however, for individual members of a panel. The majority view is that a member must be excused if he has participated in the investigation of the incident or been a witness thereto. The major problem, however, is that the vast majority of jurisdictions do not provide a remedy for inmates who object to panel members on the basis of a lack of impartiality. The existence of due process in those cases, therefore, is called into question.

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survey with a separate hearings division, is one of only two states to provide inmates with a process of objecting to the impartiality of the factfinder.

[405] 5 NORTH CAROLINA ADMINISTRATIVE CODE, §§ .0203(b), .0206(b) (1979).

[406] Perhaps due to the resulting lack of familiarity with the accused, the accused's unit superintendent has the option of appointing a member of his staff to present the case to the ADC. *Id.* at § .0206(b)(4). North Carolina is one of the few jurisdictions which provides for a staff member to serve a prosecutorial function. This probably is due to the panel's unfamiliarity with the accused and the incident.

[407] Section 51(1).

[408] Section 51(1) and (2).

[409] Section 51(3).

[410] *Id.*

[411] Even though procedures are provided to ensure impartiality in several states, Massachusetts has one of the only specific provisions in the survey allowing the accused to challenge the impartiality of a member of the panel:

> The inmate shall address his objection to the chairman and shall state his reasons for believing the board member to be not impartial at the beginning of the hearing. The chairman shall remove the member challenged where the chairman determines that the challenged member could not sit as an impartial member of the disciplinary board.

Massachusetts Code of Human Resources Regulations, tit. 3, ch. IV, § 430.13(b). An inmate should not have to wait until the appeal procedure to be able to complain about the impartiality of the board. If the accused cannot obtain a fair hearing before a particular panel, he should have a remedy such as that used in Massachusetts. If a remedy does not exist, the inmate cannot receive a fair hearing and his due process rights will be violated.

C. *The Case Against the Accused*

The Massachusetts handbook states that the burden of proof in a disciplinary hearing is on the "proponent of the disciplinary report."[412] Because disciplinary hearings are administrative in nature, guilt need not be proved beyond a reasonable doubt.[413] The prison must only prove the accused's guilt by a "preponderance of the evidence"[414] or by "substantial evidence."[415] It is necessary, however, that the officials produce sufficient facts to fulfill all of the elements of the offense.[416] The prison's burden of proving guilt raises some critical issues involving the kinds of evidence which can be introduced. First is the question whether the prison may use hearsay evidence, and second, there are questions regarding the production and admissibility of real or demonstrative evidence.

None of the jurisdictions in the survey have adopted formal rules of evidence, and no case law was found which requires the use of formal rules. The only uniform restriction on the introduction of evidence found in the survey is that the evidence be relevant and noncumulative.[417] Hearsay, generally, is not excluded unless the evidence is found to be irrelevant.[418] The only other restrictions found in the handbooks relating to the admission of hearsay are that it be admitted within the bounds of "reason and fairness"[419] and that it have "probative value."[420]

Usually the only evidence produced against the inmate at a hearing is a disciplinary report and an investigatory report.[421] Indeed, seven jurisdictions in the survey have regulations which state specifically that the disciplinary and investigatory reports are sufficient evidence.[422] At least some prisons, therefore, are satisfying their burden of proof through the reports filed by the charging and investigating officers.

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[412] Massachusetts Code of Human Resources Regulations, tit. 3, ch. IV, § 430.13(b).

[413] *See, e.g.*, Rusher v. Arnold, 550 F.2d 896 (3d Cir. 1977).

[414] Several of the handbooks, including California, Colorado, Indiana, Massachusetts, Michigan, Mississippi, Pennsylvania and Wisconsin, use this standard.

[415] This standard is used by Hawaii, Nebraska, Oregon and Rhode Island. Twenty-three jurisdictions in the survey do not specify what standard of guilt is used.

[416] *See, e.g.*, Nebraska Department of Correctional Services, Disciplinary Rules, Rule 5(5) (1978); Ross v. Oregon State Penitentiary, Corrections Division, 538 P.2d 90, 92 (Or. App. 1975).

[417] Alabama, Alaska, Arizona, California, Colorado, Florida, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, Pennsylvania, South Carolina, Vermont, Virginia, Washington, West Virginia, Wisconsin, the District of Columbia and the Federal Bureau of Prisons.

[418] *See, e.g.*, Massachusetts Code of Human Resources Regulations, tit. 3, ch. IV, §§ 430.14(f), 430.15(c).

[419] Virginia Department of Corrections, Division of Adult Services Guideline, Inmate Discipline, § VIII.A. (1977).

[420] Colorado Department of Corrections, Code of Penal Discipline, § V.D.2.b.

[421] See text at notes 209-11 *supra* (§ IVp. 63).

[422] Alaska, Connecticut, Kentucky, Mississippi, Washington, West Virginia and the Federal Bureau of Prisons.

The United States District Court for the Eastern District of Arkansas, in *Finney v. Mabry*,[423] however, was not satisfied by that form of evidence.[424] In a wide ranging review of the hearing procedures in the Arkansas prison system, it held that complete reliance on investigatory reports was tantamount to delegating the decision making to the investigating officer.[425] The court went on to hold that a board may not make a determination of guilt "based on information from witnesses without actually receiving into evidence and considering such witnesses' testimony either in oral or written form."[426]

Finney is the strongest statement against the use of hearsay, and specifically against reliance on officers' reports. Even in *Finney*, however, the emphasis was not on eliminating hearsay but on providing corroboration so that the board does not render a decision based solely on hearsay. The District Court for the Eastern District of Virginia in *Flythe v. Davis*[427] was similarly concerned. The court upheld the use of hearsay, stating that it "did not in this instance work so as to deprive plaintiff of due process of law."[428] The court, however, pointed out that other evidence had been admitted and that the accused had been given the opportunity to contradict the hearsay.[429]

Aside from disciplinary and investigatory reports, the issue of the admissibility of hearsay most often arises with regard to the use of information from unidentified informants.[430] Because of the fear of retaliation, it is rare that one inmate will testify against another, and prison officials are cognizant of their duty to protect inmates from harm by other prisoners.[431] As a result, it is general practice not to reveal to the accused the identity of inmates who provide information against him.[432] This practice, however, raises questions as to the credibility of the informant and the reliability of the information.

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[423] 455 F. Supp. 756 (E.D. Ark. 1978).

[424] *Id.* at 770.

[425] *Id.* at 768-69. The court held that there was:

> [F]requent . . . reliance by the disciplinary committee on secondary "reports" of rule violations, with no primary evidence of guilt of any sort, in the form of witness statements, oral or written, or physical evidence, being brought before the committee. The committee cannot rationally determine guilt in such instances except by a blind acceptance of the "officer's statement," which is exactly what the typical case involves, . . . The effect is to simply delegate the decision making to the investigating officer.
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> . . . [I]n other words, something that could legitimately be called "evidence" must be presented to the hearing committee.
>
> . . . [T]he notion that a disciplinary committee may adopt, with no *corroboration*, a non-witness officer's report and opinion concerning allegations of an inmate's serious misconduct surely must be rejected out of hand. (emphasis added)

[426] *Id.* at 770.

[427] 407 F. Supp. 137 (E.D. Va. 1976).

[428] *Id.* at 138.

[429] *Id.*

[430] An unidentified informant is an inmate who provides information to a correctional officer regarding an alleged violation by another inmate. Such inmates are referred to as "snitches" in prison terminology, and an inmate labelled a snitch is considered fair game within the inmate population.

[431] *See, e.g.*, D.C. CODE § 24-442.

[432] At Lorton, for example, it is the prison's practice to omit the name of any informant from all reports which might come to the attention of the accused inmate.

Finney addressed the issues of reliability and credibility and held that the problems could be remedied by requiring that the informant's identity be revealed to the hearing board and by providing the board the opportunity to investigate further if it desires.[433] *Finney* did not require, however, that the board inform the accused of the contents of the informant's statement.

Other methods of ensuring reliability have been used short of revealing the informant's identity. Prior to *Wolff*, for example, the First Circuit, in *Gomes v. Travisono*,[434] established a two-pronged test:

> (1) the record must contain some underlying factual information from which the Board can reasonably conclude that the informant was credible or his information reliable; (2) the record must contain the informant's statement in language that is factual rather than conclusionary and must establish by its specifity [*sic*] that the informant spoke with personal knowledge of the matters contained in such statement.[435]

After the decision in *Wolff*, however, the First Circuit, in *McLaughlin v. Hall*,[436] abandoned the *Gomes* test on the grounds that *Wolff* left the "development of specific procedural requirements" to the prison authorities.[437]

The response of the prison officials can be seen in the survey. Only fifteen of the handbooks have specific provisions for the admission of information from unidentified informants.[438] The requirements, generally, are (1) that the information be corroborated by other evidence, (2) that a finding be made that the informant is credible, and (3) that a finding be made that the information is reliable.[439] At least one Oregon case has held that the board failed to make sufficient findings as to the reliability of the information.[440] In *Allen v. Oregon State Penitentiary, Corrections Division*,[441] the disciplinary report contained information from an informant who had given reliabile information in the past.[442]

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[433] 455 F. Supp. at 770.

> If the disciplinary committee is to rely on informants' statements, it will have to have before it at least the name and actual written statement of the informant, so that the information or charge may be explored, if necessary, by the committee, the informant questioned further, if necessary, and for some minimal assurance that a determination of fact is not based on error or deception.

Id.

[434] 510 F.2d 537 (1st Cir. 1974).

[435] *Id.* at 540.

[436] 520 F.2d 382 (1st Cir. 1975).

[437] *Id.* at 385.

[438] Alabama, Alaska, California, Colorado, Hawaii, Louisiana, Massachusetts, Montana, North Carolina, Oregon, Rhode Island, South Carolina, Virginia, Washington and Wisconsin. Wisconsin is the only state which requires that the informant give his information under oath.

[439] *See, e.g.*, Louisiana Department of Corrections, Disciplinary Rules and Procedures for Adult Prisoners, at 9-10 (1979). Ten jurisdictions use at least one or two of these tests, but Rhode Island is the only other state which lists all three tests.

[440] Allen v. Oregon State Penitentiary, Corrections Division, 33 Or. App. 427, 430, 576 P.2d 831, 833 (1978).

[441] *Id.*

[442] *Id.* at 429, 596 P.2d at 832.

However, on this occasion the officer did not appear at the hearing to corroborate the report, and there was no indication in the report of the basis for determining that the present information was reliable.[443] Therefore, the court vacated the board's finding of guilt. Massachusetts requires a finding that disclosure of the informant's identity would subject him to a risk of harm.[444] Where such a finding is made, nine states still give the accused a summary of the information, provided it would not lead to disclosure of the informant's identity.[445]

Hearsay testimony is excluded in court trials because the Anglo-American tradition requires that a witness' credibility must be tested under three conditions: the taking of an oath, personal presence at the trial, and cross-examination.[446] If the witness is not present, the factfinders cannot view his demeanor, have none of the assurance an oath brings and will not see the witness tested by cross-examination.[447] Further, mistakes can be made in the transmittal of hearsay testimony.[448] Witnesses at disciplinary hearings do not have to take an oath, but the other justifications for the rule apply. Nevertheless, hearsay is admitted, and in most jurisdictions, the only restriction is that the testimony must be relevant. Two courts require corroboration of hearsay, but at least some jurisdictions in the survey allow a finding of guilt to rest on the officers' written reports alone. With regard to testimony from unidentified informants, only ten jurisdictions require a finding of credibility or reliability.[449] Thus, in most jurisdictions inmates are not protected from the dangers of using hearsay evidence and can be found guilty of a prison violation based completely on second hand reports.

A second evidentiary issue involves the production of real evidence. The question is whether the prison must produce physical evidence, where relevant, in order to prove its case. For example, where an inmate has been accused of possession of contraband and at the hearing he demands that the officials produce the item, the question whether the contraband must be presented arises. In *Finney* the court stated that "if physical evidence in the possession of prison officers is involved in, or crucial to, the determination, such as weapons or con-

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[443] *Id.*

[444] Massachusetts Code of Human Resources Regulations, tit. 3, ch. IV, § 430.15(a)(1). Oregon had a similar regulation, and the Oregon Court of Appeals held in Stilling v. Oregon State Prison, Corrections Division, 33 Or. App. 3, 514 P.2d 352 (1978), that the information could not be used because the board did not have good cause to believe that revealing the informant's name would subject him to harm. *Id.* at 6-7, 574 P.2d at 353. Since that time, however, the regulation has been omitted from the amended Oregon handbook.

[445] Alabama, California, Hawaii, Massachusetts, Montana, North Carolina, Rhode Island, South Carolina and Wisconsin.

[446] C. MCCORMICK, LAW OF EVIDENCE 581 (2d ed. 1972).

[447] R. LEMPERT AND S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 335 (1977).

[448] *Id.* at 336.

[449] See note 439 *supra*.

traband, then that evidence should be presented to and considered by the committee."[450] Consistent with that holding is *Hignite v. Oregon State Penitentiary, Corrections Division*,[451] in which the court ruled that an inmate charged with drug abuse had a right to demand production of the results of his urine test.[452] The board had failed to produce the results, and the court reversed the board's finding of guilt.[453]

Only two of the reviewed regulations, however, require the prison either to produce physical evidence or a reasonable facsimile thereof. The West Virginia regulation provides that, where the inmate has been accused of possession of contraband, it must be produced at the hearing,[454] and in Tennessee the regulation states that the inmate will be "confronted with the physical evidence, if any, or a sample thereof."[455] Thus, while some case law supports the view that the prisons must produce physical evidence which is involved in the determination of guilt,[456] the regulations indicate that almost none of the prisons have adopted that practice. Indeed, as this section has shown, in many jurisdictions an inmate can be found guilty of possession of a weapon even though the only evidence is an officer's report stating that the inmate possessed a weapon.

D. *The Case for the Accused*

After the prison officials have presented the evidence against the accused inmate, he has the opportunity to respond to the charges.[457] The prisoner's right to be assisted in presenting evidence to the board is discussed in Section IV and need not be repeated here. What remains to be discussed is the accused's right to present evidence in the form of witnesses and documentary evidence, and the right to confrontation and cross-examination.

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[450] 455 F. Supp. at 769.

[451] 33 Or. App. 305, 576 P.2d 798 (1978).

[452] *Id.* at 307, 576 P.2d at 799.

[453] *Id.*

[454] If it has been destroyed or stolen, the employee with the best knowledge of the destruction or stealing may testify as to that fact. West Virginia Department of Corrections, Rules and Regulations Governing Inmates of the West Virginia Penitentiary, § 10(c) (1980).

[455] Tennessee Department of Correction, § 4.601.4(a). Wisconsin is the only other state which has addressed the issue, and its regulation places the production of physical evidence within the discretion of the board.

[456] In a recent case, Chavis v. Rowe, 643 F.2d 1281 (7th Cir. 1981), the Seventh Circuit held that the prison also must disclose to the accused inmates prior to the hearing any exculpatory evidence which is material to the issue of guilt. *Id.* at 1285-86. *See* Brady v. Maryland, 373 U.S. 83 (1963). Chavis was accused of assaulting an officer. 643 F.2d at 1283. The investigatory report prepared by the prison contained the results of a polygraph examination given to another inmate. The test indicated that the inmate was telling the truth when he identified a third prisoner as having assaulted the officer. *Id.* at 1284. Although the disciplinary committee was given a copy of the report, the court held that "Chavis was deprived of his ability to make his own use of this exculpatory evidence before it was given to the fact-finders." *Id.* at 1286.

[457] In Walker v. Hughes, 386 F. Supp. 32 (E.D. Mich. 1974), *modified*, 558 F.2d 1247 (6th Cir. 1977), the court stated that the inmate "must also be entitled to make a statement in his own behalf." *Id.* at 41.

In *Wolff* the Supreme Court declared that inmates must be afforded the right to call witnesses and present evidence, provided it will not jeopardize prison security or interfere with correctional goals.[458]

Thus the constitutional right to call witnesses and introduce evidence in a disciplinary hearing is a limited right. The Supreme Court referred to it as such in *Baxter v. Palmigiano*.[459] Just where the limits lie, however, is something of an open question. Some of the issues which have been raised in this area include whether any courts have gone beyond *Wolff* in guaranteeing inmates the exercise of that limited right; the reasons used for excluding witnesses from disciplinary hearings; the kind of documentary evidence that is admissible; whether prisoners may obtain written statements from witnesses in lieu of their appearance at the hearing; and, whether disciplinary boards must provide inmates with written reasons for the exclusion of witnesses.

A very important question left somewhat open by *Wolff* is what reasons can be used for excluding witnesses from testifying. *Wolff* established that witnesses may be excluded if their presence at the hearing would be "unduly hazardous to institutional safety or correctional goals."[460] *Wolff* went on to describe "irrelevance, lack of necessity or the hazards presented in individual cases" as reasons for the denial of witnesses.[461]

With the possible exception of irrelevance, the above standards are vague, giving prison officials a great deal of discretion. Furthermore, there has not been a significant amount of judicial interpretation of the standard. In *Green v. Nelson*,[462] the court reversed a disciplinary board's denial of three employee eyewitnesses on the basis that their testimony was merely cumulative.[463] The court found it doubtful that the incident report and the inmate's testimony "alone constituted a sufficient basis for the committee's finding of" guilt.[464] Stating that the test for determining whether a witness is "necessary" is whether he "may offer testimony that will influence the decision of the disciplinary committee," the court held that the employees' testimony was cor-

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[458] 418 U.S. at 566. *Wolff* stated that:

> [T]he inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. . . . [T]he unrestricted right to call witnesses from the prison population carries obvious potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution. . . . Prison officials must have the necessity [sic] discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority as well as to limit access to other inmates to collect statements or to compile other documentary evidence.

Id.

[459] 425 U.S. 308, 321 (1976).

[460] 418 U.S. at 566.

[461] *Id.*

[462] 442 F. Supp. 1047 (D. Conn. 1977).

[463] *Id.* at 1056.

[464] *Id.* at 1057.

roborative and not merely cumulative.[465] This test, however, is not substantially less vague than the standard from which it is derived. As to whether a witness is unduly hazardous to institutional safety, the district court in *Baxter v. Lewis*[466] upheld a disciplinary board's denial of a witness who was in solitary confinement.[467] The reason given by the board for the denial was the security of the institution, and the court deferred to the discretion of the board in determining that the witness posed a threat to security.[468]

The survey reveals that prison regulations are no more definite than the case law. The three main reasons allowed for the denial of an inmate's witnesses are lack of relevance, the testimony would be repetitious or cumulative, and the safety and security of the witness or institution may be threatened.[469] These reasons match very closely the reasons suggested in *Wolff*: irrelevance, lack of necessity, or the hazards presented in individual cases. These standards are vague, and they give prison officials wide discretion in denying witnesses.

Although courts have been reluctant to define the scope of an inmate's right to call witnesses, there has been some case law subsequent to *Wolff* which has helped to guarantee the inmate's right where it is deemed to exist. In *Powell v. Ward*[470] the Southern District of New York held that prison officials "have an obligation to inform inmates that they are entitled to call witnesses" at disciplinary hearings.[471] Additionally, two other district courts, in *Green v. Nelson*[472] and *Finney v. Mabry*,[473] have held that prison officials must obtain affidavits from witnesses whom the officials should know will be unable to attend the hearing.[474] Such a practice safeguards an accused whose witnesses may be released or transferred prior to the hearing. In *Murphy v. Wheaton*,[475] however, another district court expressed concern that the prison might be abusing the option of taking witnesses' statements when the witnesses were in fact available for the hearings.[476] It held that the officials' discretion to interview the accused's witnesses rather than allow them to appear at the hearing "should only be used in exceptional circumstances."[477]

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[465] *Id.*

[466] 421 F. Supp. 504 (W.D. W. Va. 1976).

[467] *Id.* at 507.

[468] *Id.*

[469] Alabama, Alaska, Arizona, California, Colorado, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Oregon, Pennsylvania, South Carolina, Vermont, Virginia, Washington, West Virginia, Wisconsin, the District of Columbia and the Federal Bureau of Prisons.

[470] 392 F. Supp. 628 (S.D.N.Y. 1975), *modified*, 542 F.2d 101 (2d Cir. 1976).

[471] *Id.* at 632.

[472] 442 F. Supp. 1047 (D. Conn. 1977).

[473] 455 F. Supp. 756 (E.D. Ark. 1978).

[474] See Section VI.C *supra*.

[475] 381 F. Supp. 1252 (N.D. Ill. 1974).

[476] *Id.* at 1256-57.

[477] *Id.* at 1257. The court was citing from Adams v. Carlson, 375 F. Supp. 1228, 1238-39 (E.D. Ill. 1974).

A final consideration in protecting the accused's right to call witnesses is preventing reprisals against inmates who testify. A prisoner who fears reprisals by prison officials, naturally, will not appear as a witness for another inmate. The District Court for the Eastern District of Virginia, in *Lamb v. Hutto*,[478] held that the officials do not have the right to punish an inmate-witness after the witness has testified.[479] Lamb filed a civil rights complaint alleging, *inter alia*, that he had been transferred to another institution for refusing to retract his statement on behalf of another inmate.[480] On motion for summary judgment, the court found that Lamb had stated an actionable first amendment claim.[481] The burden then shifted to the state to prove that Lamb had been transferred for constitutionally permissible reasons.[482] The state alleged that Lamb's transfer was the result of his participation in a subsequent prison disturbance, and because the allegation was not rebutted by Lamb, summary judgment was granted.[483] This case illustrates the reason for reluctance of inmates to testify at disciplinary hearings. It would be small consolation to a prisoner to know that if reprisals are taken, he can file a federal civil rights complaint alleging violation of his first amendment rights.

Wolff placed the same vague restrictions on the introduction of documentary evidence as it placed on the testimony of witnesses. As a result, similar questions are raised regarding the types of documentary evidence that are admissible.[484] There is a scarcity of case law on the issue of the admissibility of documentary evidence, and logically different rules should apply to different types of evidence. Therefore, it is difficult to determine what tests are applied. A form of documentary evidence which is common and very important to prisoners is the written affidavit of a witness. In the preceding subsection, the duty of prison officials to obtain written statements from witnesses who would not be available at the hearing was discussed.[485] A related question is whether affidavits obtained by the accused, rather than the officials, are admissible. *Wolff* addressed the question of inmate-obtained affidavits in part by stating that "prison officials must have the necessity [*sic*] discretion . . . to limit access to other inmates to collect statements or to compile other documentary evidence."[486] The extent of official discretion, however, remained open.

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[478] 467 F. Supp. 562 (E.D. Va. 1979).

[479] *Id.* at 565.

[480] *Id.* at 564.

[481] *Id.* at 565.

[482] *Id.*

[483] *Id.* at 565-66.

[484] An example of the type of documentary evidence offered at a disciplinary hearing is a call-out pass. An inmate may be charged with not reporting to his work assignment on time. The inmate may have had a valid reason for not reporting, such as an appointment with his classification officer. If the prisoner has a call-out pass signed by the classification officer, that pass may be presented to the disciplinary board as evidence that the accused had a valid reason for not reporting for work.

[485] Green v. Nelson, 442 F. Supp. 1047 (D. Conn. 1977) and Finney v. Mabry, 455 F. Supp. 756 (E.D. Ark. 1978).

[486] 418 U.S. at 566.

The main reason for concern by officials is the fear that the accused will obtain the affidavits by intimidation and threats of reprisal.[487] An example is a situation in which one inmate has been charged with assaulting a second inmate. Officials are concerned that the first inmate will try to extort from the victim an affidavit which exonerates the first inmate. This problem was addressed in *Chochrek v. Oregon State Penitentiary, Corrections Division*.[488] The board had disallowed the admission of personally solicited affidavits, although there was no rule prohibiting such use.[489] The court reversed, holding that "[t]here may have been valid factual reasons for viewing with distrust the affidavits presented by the [inmate], but the fact remains that the committee's finding was predicated on a nonexistent rule."[490] It is unclear from the opinion, but the implication is that the court would have affirmed the board's decision if it had stated in the record "valid factual reasons" for the exclusion. Unfortunately, the court did not state what it would consider to be a valid reason. Even if the court had described what constitutes a valid reason for exclusion, however, its applicability probably could not have been extended beyond the unique circumstances of inmate-obtained affidavits.

In a series of cases, the Oregon courts dealt with a somewhat more unusual evidentiary issue — whether polygraph examination results are admissible. The courts have found four valid reasons for the denial by the prison of a request for a polygraph examination, but these reasons cannot be carried over to other types of evidence. The reasons accepted by the courts are that polygraph test results are not generally accepted as accurate; there are not enough polygraph operators to provide tests for every inmate who has a hearing;[491] the equipment is unavailable; and the time and expense of administering a test is disproportionate to the probative value of the results.[492] These factors were then considered by the court "in conjunction with the necessity of a polygraph examination to resolve issues presented in the hearing."[493]

Only eleven of the jurisdictions surveyed allow the admission of written statements in lieu of the witnesses' appearance,[494] with six states limiting the option to instances when the witness is unavailable.[495] It is unclear from the

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[487] Statement made to the writer by a correctional officer at the Lorton Correctional Complex.

[488] 21 Or. App. 406, 534 P.2d 1175 (1975).

[489] *Id.* at 407, 534 P.2d at 1176.

[490] *Id.*

[491] Sandlin v. Oregon Women's Correctional Center, Corrections Division, 28 Or. App. 519, 522, 559 P.2d 1308, 1310 (1977).

[492] Bishop v. Oregon State Prison, Corrections Division, 35 Or. App. 315, 318, 581 P.2d 122, 124 (1978).

[493] *Id.*

[494] Arkansas, Connecticut, Florida, Indiana, Mississippi, North Carolina, South Carolina, Virginia, Washington, Wisconsin and the Federal Bureau of Prisons. In addition, Maryland has a provision for a conference call to obtain testimony from witnesses otherwise unavailable.

[495] Connecticut, Florida, Indiana, Mississippi, Wisconsin and the Federal Bureau of Prisons.

regulations, however, whether the statement is taken by an official or by the accused. On the other hand, two states allow the prison to use unavailability as a reason for denial of a requested witness, without specifically allowing a written statement from the witness.[496] The survey indicates, therefore, that the prisons generally do not allow inmate-obtained affidavits to be used as evidence. Only one state in the survey has a regulation regarding polygraph tests. In South Carolina, the board may request that the inmate submit to an examination. However, the test results cannot be the sole evidence of guilt, and if the inmate refuses to take the test, no adverse inference is permitted.[497]

The final issue is whether the disciplinary committee must provide written reasons for the exclusion of witnesses. *Wolff* suggested that it "would be useful for the Committee to state its reason for refusing to call a witness,"[498] although the Court would not make it a requirement. The Court maintained that position in *Baxter*.[499] The District Court for New Hampshire, however, in *Daigle v. Helgemoe*,[500] required that the board enter an explanation for its denial into the record and make it available to the prisoner,[501] and in *McGinnes v. Stevens*,[502] the Alaska Supreme Court, basing its conclusion on the Alaska Constitution, held that disciplinary panels in that state must make the reasons for their denial of witnesses a part of the record.[503] The Seventh Circuit established a middle ground between requiring a written statement of the reasons and allowing complete discretion. In *Hayes v. Walker*,[504] the court expressed its concern regarding the lack of information in the record indicating whether the board even had reviewed the request for witnesses before denying it.[505] For the purposes of judicial review of the board's decisions, therefore, the court required that there be some support in the record for a board's decisions, although the court explicitly declared that a statement of reasons was unnecessary.[506]

The prison systems for the most part do not require written reasons. Of the jurisdictions in the survey, only fourteen require written reasons for the denial of witnesses.[507] Two other states encourage such a procedure without

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[496] Alabama and Vermont.

[497] South Carolina Department of Corrections, Inmate Guide, § 3.7(c) (1977).

[498] 418 U.S. at 566.

[499] 425 U.S. at 322.

[500] 399 F. Supp. 416 (D.N.H. 1975).

[501] *Id.* at 421.

[502] 543 P.2d 1221 (Alaska 1975).

[503] *Id.* at 1231.

[504] 555 F.2d at 625 (7th Cir. 1977).

[505] *Id.* at 630.

[506] *Id.*

> We are not requiring that a statement of reasons be given to support the denial of a request for witnesses. We hold only that some support for the denial of a request for witnesses appear in the record. This will enable a court to make limited inquiry into whether the broad discretion of prison officials has been arbitrarily exercised. Prison officials should look at each proposed witness and determine whether or not he should be allowed to testify.

Id.

[507] Alabama, Alaska, California, Colorado, Illinois, Indiana, Maryland, Michigan, Mississippi, Montana, Nebraska, Oregon, the District of Columbia and the Federal Bureau of Prisons.

making it mandatory.[508] The result, therefore, is that most prisons still have the power arbitrarily to deny requests for witnesses with no written record available for either administrative or judicial review. This practice raises one of the most serious impediments to due process in disciplinary proceedings.

In sum, the standards for determining what evidence a prisoner may present at a disciplinary hearing are not very much clearer than they were immediately following the *Wolff* decision. There have been some decisions which have helped to protect the right to call witnesses but the reasons for which the prisons may refuse to allow a witness to testify are still vague, leaving the committees with too much discretion. Furthermore, very little law exists on the question of the admissibility of documentary evidence. With respect to inmate-obtained affidavits, however, the prisons in the survey generally do not admit them into evidence. Finally, the majority of prisons still do not require written reasons for the denial of witnesses, thereby insuring that arbitrary denials cannot be reviewed.

2. Confrontation and Cross-Examination

Wolff held that inmates do not have a constitutional right to confrontation and cross-examination in disciplinary hearings:

> If confrontation and cross-examination of those furnishing evidence against the inmate were to be allowed as a matter of course, as in criminal trials, there would be considerable potential for havoc inside prison walls. Proceedings would inevitably be longer and tend to unmanageability. . . . [I]t does not appear that confrontation and cross-examination are generally required in this context. We think that the Constitution should not be read to impose the procedure at the present time and that adequate bases for decision in prison disciplinary cases can be arrived at without cross-examination.
> . . . The better course at this time, in a period where prison practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons.[509]

This decision, however, has been sharply criticized. After the holding in *Wolff*, the District Court for the Northern District of Illinois in *Murphy v. Wheaton*[510] strongly disagreed with the Supreme Court's decision to disallow confrontation and cross-examination:

> While we are bound by these decisions, we are constrained to observe that the reasons given for denying the traditional right of an accused to confront and cross-examine his accusers are something less than overwhelmingly persuasive. . . . [S]taff or inmate witnesses may be in error as to their recollection of past events

[508] Florida and Hawaii.
[509] 418 U.S. at 567-69.
[510] 381 F. Supp. 1252 (N.D. Ill. 1974).

> whether inadvertently or deliberately. Since the possible punishment . . . may be severe . . . it is no less important to seek to ascertain the truth in disciplinary proceedings than it is in criminal trials.
>
> No experienced penologist or inmate would seriously contend that the identity of a staff or inmate witness is likely to remain a secret from the accused for very long. The circumstances of any incident giving rise to disciplinary proceedings necessarily limits the potential witnesses to those present. In addition, prison "grapevines" are much too effective to achieve that degree of secrecy in most instances. Protection against possible retaliation requires more than non-confrontation while its denial may well result in injustice.[511]

In addition to this stinging attack on *Wolff*, the Alaska Supreme Court jabbed at the decision. In *McGinnes v. Stevens*,[512] it held that its state constitution requires confrontation and cross-examination in disciplinary hearings, unless there are "compelling reasons" to deny it.[513]

Subsequent to *Murphy* and *McGinnes* the United States Supreme Court again considered the issue of confrontation and cross-examination in disciplinary hearings in *Baxter v. Palmigiano*.[514] There, the Court maintained the position it had taken in *Wolff*.[515] The lower court in *Baxter* had required written reasons for the denial of the privilege to confront and cross-examine witnesses.[516] If the reasons did not relate to at least one of the concerns expressly mentioned in *Wolff*, the denial would be deemed an abuse of discretion.[517] The lower court in *Baxter* also had required that the board base its decision solely on the evidence presented at the hearing, reasoning that, otherwise, confrontation and cross-examination would be meaningless.[518] The Supreme Court, however, reversed, stating that the lower court's holding was "inconsistent with *Wolff*."[519] The Court reasoned that a requirement of written reasons for the denial of the privilege had the effect of "[m]andating confrontation and cross-examination, except where prison officials can justify their denial on one or more grounds that appeal to judges, effectively preempt[ing] the area that *Wolff* left to the sound discretion of prison officials."[520] Additionally, because it had held that no right to confrontation and cross-examination exists in disciplinary hearings, the Court held that the Board may consider information that

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[511] *Id.* at 1258.
[512] 543 P.2d 1221 (Alaska 1975).
[513] *Id.* at 1231.
[514] 425 U.S. 308 (1976).
[515] 425 U.S. at 322.
[516] *Id.*
[517] *Id.*
[518] *Id.* at n.5.
[519] *Id.* at 322.
[520] *Id.*

was not brought up at the hearing when deciding the case.[521] Thus, in *Wolff* and *Baxter*, the Supreme Court has made it clear that prison authorities do not have to permit confrontation and cross-examination, do not have to give written reasons for the denial thereof, and may consider facts which come to light after the hearing.

Nevertheless, the grumblings of rebellion have continued in the lower courts. Subsequent to *Baxter*, *Green v. Nelson*[522] upheld an earlier Second Circuit case which gave an accused prisoner the right to confront and cross-examine adverse witnesses "if the factfinder cannot otherwise rationally determine the facts."[523] Additionally, in *Daigle v. Hall*,[524] the Federal District Court in Massachusetts held that where testimony is not given directly by the witnesses, such as confidential informants, the testimony "nevertheless must be revealed to the inmate with sufficient detail to permit the inmate to rebut it intelligently."[525]

As for state regulations, the survey indicates that thirty jurisdictions allow the accused or his representative to question either all witnesses who appear at the hearing, or at least the charging officer.[526] Two other states allow the accused to submit questions to the board to be asked of adverse witnesses prior to the hearing.[527] In those jurisdictions where the inmate is permitted to cross-examine all witnesses who appear at the hearing, however, the officials still have the discretion to accept written statements from confidential informants rather than having the person testify at the hearing.[528] In some of these jurisdictions, furthermore, the charging officer is not required to appear because his written report is deemed sufficient.[529] Most disciplinary reports are written because the charging officer saw the incident or because information was received from a confidential informant. Where the report is submitted to the board in lieu of testimony, therefore, allowing the accused the right to cross-

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[521] *Id.*

> Due to the peculiar environment of the prison setting, it may be that certain facts relevant to the disciplinary determination do not come to light until after the formal hearing. It would be unduly restrictive to require that such facts be excluded from consideration, inasmuch as they may provide valuable information with respect to the incident in question and may assist prison officials in tailoring penalties to enhance correctional goals.

Id.

[522] 442 F. Supp. 1047 (D. Conn. 1977).

[523] *Id.* at 1057.

[524] 387 F. Supp. 652 (D. Mass. 1975), *rev'd on other grounds*, 564 F.2d 884 (1st Cir. 1975).

[525] *Id.* at 660.

[526] Alabama, Alaska, Arizona, California, Colorado, Connecticut, Georgia, Hawaii, Idaho (only when criminal charges are pending), Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New Hampshire, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin and the District of Columbia.

[527] Illinois and Michigan. Colorado and Georgia provide for written questions when having the charging officer appear at the hearing is impractical.

[528] See text and notes at notes 426-49 *supra*.

[529] See text and notes at notes 271-73, 371-74, 421-25 *supra*.

examine all witnesses who appear at the hearing is a meaningless concession in most cases. Thus, prisons can be liberal in allowing cross-examination in their rules because they have the discretion to accept written reports and statements in lieu of requiring adverse witnesses to appear at the hearing.

If, however, prison officials in a jurisdiction that allows cross-examination want to deny a prisoner that right, generally they are free to do so without explanation. Only five of the jurisdictions in the survey which permit confrontation and cross-examination require written reasons for its denial.[530] Another state encourages the practice but does not make it mandatory.[531] Permissible reasons for denying cross-examination in these states are the same as the reasons used for denying witnesses — irrelevance, lack of necessity and need for security. Here, however, safety and security are more heavily emphasized.[532]

Finally, while the Supreme Court has given the prisons the authority to consider facts which come to light after the disciplinary hearing, fourteen jurisdictions in the survey restrict the board to considering only evidence which is produced at the hearing.[533] This also is a minor concession inasmuch as the standard of guilt and the allowance of written reports would eliminate the necessity in most cases of further information to find the accused guilty. Nevertheless, twenty-eight jurisdictions in the survey have not restricted the panel to considering only that evidence produced at the hearing.[534]

In sum, an accused inmate has few tools with which to mount a defense. The Supreme Court has not required confrontation and cross-examination and has left the development of that aspect of disciplinary hearings to the discretion of the prison systems. Some lower courts have disagreed with the Supreme Court's decision and many prisons now allow cross-examination, but because those same prisons do not require the appearance of confidential informants and often the officers' reports are sufficient, the right to cross-examine is meaningless. The majority of the jurisdictions which allow cross-examination, furthermore, do not require written reasons for its refusal. Finally, in conform-

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[530] Alaska, California, Indiana, Massachusetts (the regulation requires written reasons for denial of a request for the appearance of the charging officer which, in effect, serves as a denial of cross-examination), and the District of Columbia.

[531] Hawaii.

[532] *E.g.*, the Alabama regulations provide that the chairman of the disciplinary board is responsible for ensuring that the accused is advised of his right "to question . . . accuser(s) unless personal safety of witness or prison security is threatened." Section III.4.d(c). Another subsection provides that "[q]uestions may be asked of any person called to the hearing. The chairman will exercise control of all questioning to prevent lack of relevance, harassment, abuse, or repetitiveness." III.4.d.(6)(e).

[533] Alaska, Connecticut, Illinois, Iowa, Kentucky, Louisiana, Maine, Montana, Mississippi, Nevada, Virginia, Washington, Wisconsin and the District of Columbia.

[534] Alabama, Arizona, Arkansas, California, Florida, Idaho, Indiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, West Virginia, Vermont and the Federal Bureau of Prisons. Colorado, Georgia and Hawaii specifically allow the board to seek evidence after the hearing.

ance with *Baxter*, most prisons do not restrict the boards to consideration of only that evidence obtained at the hearing.

E. *Written Statement*

A procedural right provided by *Wolff* is the right to a "written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken."[535] In establishing this right, the Court was concerned with providing an accurate factual record for administrative and judicial review purposes.[536]

Some of the issues which have arisen with regard to written statements include whether the inmate has a right to a copy of the statement; what must be included in the statement; if the inmate has a right to a copy, how soon after the hearing must it be received; and whether a tape recording may satisfy the written statement requirement.

Wolff does not specifically state that a copy of the written statement must be given to the inmate. It does, however, imply that an inmate is entitled to a copy. First, the decision states that "[w]ithout written records, the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others."[537] It is logical that an inmate would need a copy of the statement for it to be useful in helping the inmate to propound his cause or to defend himself. Second, the Court went on to provide that certain items of evidence could be excluded from the statement when personal or institutional safety is implicated.[538] The Court would not have been concerned with personal or institutional safety if only the prison administration were to see the written statement. The implication is clear, therefore, that the inmate is supposed to receive a copy of the statement, and for that reason, certain items of evidence, such as an informant's identity, may be excluded.

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[535] 418 U.S. at 563.

[536] *Id.* at 565.

> Although Nebraska does not seem to provide administrative review of the action taken by the Adjustment Committee, the actions taken at such proceedings may involve review by other bodies. They might furnish the basis of a decision by the Director of Corrections to transfer an inmate to another institution . . . and are certainly likely to be considered by the state parole authorities in making parole decisions. Written records of proceedings will thus protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding. Further, as to the disciplinary action itself, the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly.

Id. The right to a written statement was not an issue in *Baxter*. The Court, however, did hold that a disciplinary committee may consider evidence which comes to light after the hearing. 425 U.S. at 322 n.5. As a result of that holding, the Court found it was necessary to clarify that such a holding did not, in any way, diminish the right to a written statement. *Id.*

[537] *Id.*

[538] *Id.*

The District Court for the Eastern District of Tennessee is in accord with this interpretation of *Wolff*. In *Bills v. Henderson*,[539] the court held that "the written record cannot satisfy due process requirements unless it is certain that the inmate has complete and full access to it. Such access is assured only if the record is in fact furnished to him."[540]

There has been no case law holding that inmates do not have a right to a copy of the written statement. Four of the states surveyed, however, do not specifically provide for a copy to be given to the prisoner.[541] One of the above four states, Florida, does make a specific provision for an oral statement to the prisoner.[542] Additionally, in *Lightfoot v. Wainwright*,[543] a Florida appellate court held that inmates have the right to a copy of the written statement.[544]

As to the contents of the statement, *Finney v. Mabry*[545] is one of many cases which have held that it must be more than a mere "rote recitation of shorthand phrases."[546] *Finney v. Arkansas Board of Corrections*[547] held that it must "be reported in such a manner that a reviewing authority could determine what had transpired."[548] In *Grever v. Oregon State Correctional Institution, Corrections Division*,[549] an Oregon court required that the statement reflect a finding on each charge.[550] The inmate had been found guilty on one charge, and the board stated that it had made no finding on the second charge. The court found this too ambiguous and stated that the record should clearly indicate the disposition of all charges.[551]

A problem arises, however, when the board's decision is based, at least in part, on information from a confidential informant. *Bills* held that "it is not constitutionally required that such a statement contain the names of all witnesses, especially when the security of the institution mandates otherwise."[552] To avoid that problem, the court gave the board the authority to prepare separate written records, one for the prisoner and one for the prison officials, with the names of confidential informants deleted from the inmate's copy.[553] Where information is excluded, that fact should be indicated in the statement[554] so that the inmate is not misled in preparing any possible appeal.

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[539] 446 F. Supp. 967 (E.D. Tenn. 1978).

[540] *Id.* at 976.

[541] Arkansas, Florida, Rhode Island and Tennessee. The Indiana regulations do not provide for a copy to the inmate, but the form used for preparing the statement has a place for the inmate to sign, indicating that he received his copy.

[542] Florida Department of Offender Rehabilitation, Rules, ch. 33, § 3.08(13)(1) (1977).

[543] 369 So.2d 110 (Fla. Dist. Ct. App. 1979).

[544] *Id* at 111.

[545] 455 F. Supp. 756 (E.D. Ark. 1978).

[546] *Id.* at 776. *See also* Green v. Nelson, 442 F. Supp. 1047, 1058 (D. Conn. 1977) and Hayes v. Walker, 555 F.2d 625, 633 (7th Cir. 1977).

[547] 505 F.2d 194 (8th Cir. 1974).

[548] *Id.* at 208.

[549] 28 Or. App. 829, 561 P.2d 669 (1977).

[550] *Id.* at 835-36, 561 P.2d at 673.

[551] *Id.*

[552] 446 F. Supp. at 976.

[553] *Id.*

[554] 418 U.S. at 565.

A related issue is when the inmate is entitled to receive the statement. If the statement's purpose is to assist in reviewing the board's action, it would seem reasonable that the copy should be received prior to any review or appeal. A Maine case, *Carlson v. Oliver*,[555] offers an illustration of the purpose of the written statement. The prisoner alleged procedural violations at his disciplinary hearing, including failure of the institution to provide him with a copy of the statement.[556] The court denied the claim because the prisoner had filed his appeal immediately after the board's decision without waiting for the written statement.[557] One of the purposes of the statement is to assist the inmate in preparing an appeal of the board's decision. By immediately filing his appeal without waiting for the written statement, the inmate indicated that he did not need it. None of the regulations in the survey, however, specifically states that the statement must be received prior to any review or appeal, but twelve states have established a time limit, varying from one to five days.[558] Five jurisdictions require receipt "immediately" or "as soon as possible,"[559] and two states provide for a copy as soon as it is prepared.[560]

One method of simplifying the requirement of drafting a written statement would be to tape record the proceedings. Nine jurisdictions in the survey provide that the hearings be tape recorded.[561] Three states allow the prisoner to tape the hearing.[562] Five of the jurisdictions specify the length of time the tapes are to be kept.[563] Of those jurisdictions in which the prison, not the inmate, tapes the proceedings, only two jurisdictions require that the inmate is to have access to the tape to assist in preparing an appeal.[564]

Case law indicates that at least two other states provide for taping of disciplinary hearings. First, *Hurley v. Ward*[565] involved a disciplinary hearing in New York, a state that did not participate in the survey. There the court was unable to properly review the hearing because the attempt to record it had been

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[555] 372 A.2d 226 (Me. 1977).

[556] *Id.* at 230.

[557] *Id.* The opinion also implies that the inmate received a written statement subsequent to the filing of the appeal.

[558] Alaska, California, Colorado, Georgia, Hawaii, Illinois, Massachusetts, Mississippi, Montana, Nevada, Oregon and Washington.

[559] Arizona, Kentucky, Michigan, Virginia and the District of Columbia.

[560] Idaho and New Hampshire.

[561] Alaska, Arizona, Colorado, Louisiana, Nevada, Oklahoma, Oregon, Virginia and the District of Columbia. The Alaska regulation requiring tape recordings was mandated by the Alaska Supreme Court in McGinnes v. Stevens, 534 P.2d 1221 (Alaska 1975):

> A verbatim record of the proceedings will furnish a more complete and accurate source of information than the "written statement" requirement of *Wolff*, will assist in facilitating a more intelligent review of the disciplinary proceeding, and moreover, the use of cassettes . . . may well prove less burdensome than the written statement requirement.

Id. at 1236.

[562] Massachusetts, Rhode Island and Washington. In all three states, the prison takes possession of the tape with access to the inmate only for preparation of an appeal.

[563] Arizona, Colorado, Louisiana, Nevada and the District of Columbia.

[564] Nevada and the District of Columbia.

[565] 61 A.D.2d 881, 402 N.Y.S.2d 870 (1978).

inadequate. Coupled with other procedural errors, the faulty recording caused the court to void the decision of the disciplinary board.[566] Second, while Arkansas is part of the survey, its regulations do not specify a tape recording. In *Finney v. Mabry*,[567] however, the court sanctioned its use, specifying that the tapes "be carefully kept, filed, and maintained."[568]

Although many states allow tape recording, it is not clear that a recording can serve as a substitute for a written statement. *Dean v. Oregon State Correctional Institution, Corrections Division*[569] raised the question whether a tape recording, or a transcript of the recording, is sufficient to satisfy the written statement requirement. The record on appeal in that case included a transcript of the hearing. The Oregon court held that the inclusion of the transcript made a written statement of the evidence relied upon by the board unnecessary.[570] The court also held, however, that the transcript did not alter the requirement of a written statement of the board's reasons for its decision.[571]

The use of a tape recording is beneficial to inmates because it facilitates a more intelligent review of the proceeding. A recording thus prevents a hearing board from acting arbitrarily and in violation of the inmate's rights. To insure its value, however, two measures must be taken. First, the prisons must be required to keep the tapes for a specific period of time so that they will be available for review. As already pointed out, only five prisons in the survey have such a requirement. Second, if the recordings are going to replace the written statements, the inmates must have access to the tapes. In the survey, as already seen, three states allow the inmate to tape the hearing and only two jurisdictions require that the inmate have access to the prison's tape.

It is clear, therefore, that inmates do have the right to a copy of the written statement. While the statement need not contain the names of informants, it must be more than a mere "rote recitation of shorthand phrases." Because the purpose of the statement is to assist in reviewing the board's action, it is logical that the inmate should receive his copy prior to review. Only eight states in the survey, however, have established time limits for receipt of the statement. Finally, some states now provide for the tape recording of hearings, and some courts have held that a tape satisfies the statement requirement. Most jurisdictions are unclear, however, as to whether the prisoner has access to the recording prior to review or appeal of the proceedings.

VII. PENALTIES

The Supreme Court held in *Wolff* that minimum due process applies to disciplinary proceedings in which the inmate, if found guilty, could be punished by such major penalties as loss of good time or by solitary confinement.[572]

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[566] *Id.* at 881, 402 N.Y.S.2d at 871.

[567] 455 F. Supp. 756 (E.D. Ark. 1978).

[568] *Id.* at 776. The court delayed until a later date a decision as to how long the tapes must be kept and required that until such time they must be kept indefinitely. *Id.*

[569] 533 P.2d 191 (Or. App. 1975).

[570] *Id.* at 192.

[571] *Id.*

[572] 418 U.S. at 539, 557-58, 571 n.19.

While other lesser penalties such as loss of privileges did not, in the *Wolff* Court's view, require these procedural protections, a majority of lower courts have extended due process to all forms of disciplinary segregation. There are questions, however, regarding penalties. This section will address the issues whether an inmate has a right to prior notice of the penalties that may be applied for a specific violation; what information the board may consider before imposing punishment; and whether a court will review a penalty imposed by a disciplinary board and, if so, what the standard of review is.

As pointed out above, due process requires advance notice to the inmates of what behavior constitutes misconduct.[573] There is some indication that advance notice of possible penalties also is required. In *Collins v. Vitek*,[574] for instance, the inmates alleged in the Federal District Court for New Hampshire that the failure to establish "written standards for the punishment to be inflicted for specific offenses"[575] was a violation of the fourteenth amendment. Even though the court dismissed that cause of action, it indicated by the following *dictum* that some standards should be established. Specifically, the court stated: "Although sentencing has traditionally been an area given much discretion, even judges are limited by statutory standards. Prisoners have a right to know the scope of punishment possible for infractions. Moreover, written guidelines may well serve to eliminate the equal protection problems inherent in a standardless sentencing procedure."[576] In *Newkirk v. Butler*[577] the District Court for the Southern District of New York went beyond this dictum and held that prisons must inform the inmates of the penalties which can be imposed.[578] *Newkirk* involved an action by inmates for relief from unconstitutional punishment.[579] The court held that the prisoners have a right to know what the institution's rules are and that "[t]hey are entitled to know the general range of sanctions that may be imposed for given offenses."[580] The precise penalty, of course, depends upon factors such as the circumstances of the violation and the inmate's past record.

Just as a sentencing judge takes into consideration a defendant's past record, it is common practice for disciplinary panels to review an inmate's file prior to imposing punishment.[581] In *Penrod v. Oregon State Prison, Corrections Divi-*

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[573] See Section I *supra*.

[574] 375 F. Supp. 856 (D.N.H. 1974).

[575] *Id.* at 859.

[576] *Id.* at 862.

[577] 364 F. Supp. 497 (S.D.N.Y. 1973).

[578] *Id.* at 503.

[579] *Id.* at 499.

[580] *Id.* at 503. Where rules are established stipulating the type of penalties to be applied, Avant v. Clifford, 67 N.J. 496, 341 A.2d 629 (1975), held that no punishment may be meted out other than what is prescribed by the rules. Some of the regulations in the survey did not include the offenses and penalties, but contained only the rules of procedure. Of those available, there are two basic formats. One approach is to place all offenses into two or more classifications and give a range of penalties which may be imposed for each class. The other format is to list the minimum and maximum penalty for each offense.

[581] See, e.g., Section V *supra*.

sion,[582] the court found implicit authority in one of the prison regulations for the board to review the file in determining the proper penalty.[583] Some jurisdictions implicitly require the board to review the file by providing stiffer penalties for repeat offenders.[584] To avoid prejudice to the inmate, the panels generally are prevented from reviewing the file prior to the determination of guilt, although there is no case law on that point. Some jurisdictions have specific provisions to that effect,[585] while in others there is a regulation permitting the board to consider only that evidence produced at the hearing.[586] Some institutions are silent on the issue. Whatever the rule, however, board members almost always work in the institution where the accused is incarcerated,[587] and therefore there is a good possibility that the board members will be aware of the inmate's record without looking at the file.

If an inmate receives a penalty within the standards promulgated by the prison, a further question is whether a court will review such a penalty. The courts, on occasion, have used the eighth amendment ban on cruel and unusual punishment to vacate penalties imposed by prison disciplinary committees. This approach has been approved by the United States Supreme Court, which in *Hutto v. Finney*,[588] held that "[c]onfinement in . . . an isolation cell is a form of punishment subject to scrutiny under eighth amendment standards."[589] In *Hutto*, the Supreme Court upheld a district court's ban on indeterminate sentences.[590] The Supreme Court made it clear, however, that both its decision and that of the lower court were based on the totality of the conditions in the segregation cells.[591] The Court stated that indeterminate sentences to punitive confinement do not, *per se*, constitute cruel and unusual punishment.[592]

Other courts have taken a similar approach. In *Hardwick v. Ault*[593] the Middle District of Georgia stated two tests for establishing cruel and unusual

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[582] 35 Or. App. 391, 581 P.2d 124 (1978).

[583] *Id.* at 321-22, 581 P.2d at 125.

[584] Arkansas, Colorado, Connecticut, Idaho, Indiana, Iowa, Montana, Nebraska, Nevada, Pennsylvania, South Carolina, Virginia, Washington, Wisconsin and the District of Columbia.

[585] Louisiana, Massachusetts, Montana, Tennessee, Virginia, Washington, Wisconsin and the District of Columbia.

[586] Alaska, Connecticut, Iowa, Kentucky, Louisiana, Maine, Montana, Mississippi, Nevada, Virginia, Washington and the District of Columbia.

[587] See Section V *supra*. Only Michigan and North Carolina provide for factfinders from outside the institution.

[588] 437 U.S. 678 (1978).

[589] *Id.* at 685.

[590] *Id.* at 687. The lower court had imposed a thirty-day limit on preventive segregation. *Id.* at 685.

[591] *Id.* at 685-87.

[592] *Id.* at 686. Of the handbooks in the survey which specify the maximum amount of time which may be spent in segregation, none allow indefinite periods of confinement. Indiana and Nebraska have three year maximums, although Nebraska provides for a review of the inmate's status every fifteen days and Indiana every thirty days. South Carolina recently added a habitual offender provision which can add three years onto the existing two year maximum.

[593] 447 F. Supp. 116 (M.D. Ga. 1978).

punishment with regard to disciplinary penalties. First, the court considered whether the penalty was disproportionate to the offense, and second, whether it had been capriciously inflicted without purpose.[594] In answering either test, the district court direct that the totality of the circumstances, not just the abstract offense, must be weighed.[595] Applying the tests to the facts in that case, the court found the punishment to be both disproportionate and capriciously inflicted.[596] The inmate had been found guilty of openly advocating insubordination and given an indeterminate sentence in segregated confinement. The court concluded that an indeterminate sentence with no clear criteria for release was disproportionate because the offense "does not call for several months or years of harsh confinement . . ." and because "the idea of an indefinite duration of confinement shocks the conscience."[597] The court also found the punishment to be capricious in that it was extremely harsh, was not related to a legitimate penal purpose, and required many inmates to remain in segregation for months after a classification team had recommended their transfer because the department found it difficult to place them in any of the other already overcrowded institutions in the state.[598]

In *Covington v. Sielaff*,[599] another eighth amendment case, the District Court for the Northern District of Illinois indicated that in determining whether a penalty is proportionate to the offense courts should take into consideration the misconduct involved, the prisoner's disciplinary record, and the offense for which he was convicted.[600] In *Covington* the punishment involved loss of six months good time, placement in segregation, and a two-level reduction in classification.[601] The state moved to dismiss on the ground that the eighth amendment proportionality test applied only to the imposition of segregation.[602] The court denied the motion, holding that loss of good time also may be disproportionate.[603]

Not all courts, however, are as willing to intervene in the area of disciplinary punishment. The Oregon courts have held that so long as the penalty is constitutional and lawful and supported by substantial evidence, the court will not inquire into the extent of the sanction.[604] There is no indication, however, of what test the court applies to determine constitutionality, and some rather severe penalties have been upheld. In *Grever v. Oregon State Correctional Institution, Corrections Division*,[605] the inmate was found guilty of con-

[594] *Id.* at 125.
[595] *Id.*
[596] *Id.* at 125-26.
[597] *Id.* at 125.
[598] *Id.*
[599] 430 F. Supp. 562 (N.D. Ill. 1977).
[600] *Id.* at 565.
[601] *Id.* at 563-64.
[602] *Id.* at 565-66.
[603] *Id.* at 565.
[604] Melton v. Oregon State Correctional Institution, Corrections Division, 34 Or. App. 951, 954, 580 P.2d 572, 573 (1978).
[605] 28 Or. App. 829, 561 P.2d 669 (1977).

spiracy to commit disruptive behavior after attempting to organize a sitdown strike.[606] The board ordered him to spend one year and sixty days in segregation and took away 608 days of good time. The Oregon Court of Appeals upheld this penalty.[607] Thus, a wide variation in the application of the eighth amendment exists from jurisdiction to jurisdiction.

From the foregoing, it is clear that just as inmates have the right to be informed of the prison's rules of conduct, they also have the right to know what penalties they will be subject to for violation of those rules. Rather than one penalty for each violation, however, a range of penalties may be specified so that disciplinary boards can take into consideration variables such as an inmate's past disciplinary record in determining a penalty. Additionally, the courts have made it clear that they will review a disciplinary penalty to determine whether it violates the eighth amendment, although some courts have upheld rather severe penalties.[608]

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[606] *Id.* at 831, 561 P.2d at 670-71.

[607] *Id.* at 836, 561 P.2d at 672. The same court upheld a co-conspirator's loss of 608 days of good time and two years and ninety days in segregation. Wimberly v. Oregon State Correctional Institution, Corrections Division, 28 Or. App. 837, 839, 561 P.2d 673, 674 (1977). Of the handbooks in the survey which indicate the amount of good time that may be taken for violation of a prison rule, Alaska, Arizona, Arkansas, Colorado, Florida, Idaho, Massachusetts, Nebraska, South Carolina, Virginia, District of Columbia, Oregon, Vermont and the federal government permit the loss of all earned good time; West Virginia has a two year maximum; Illinois, Minnesota and New Hampshire have a one year maximum; and California, Connecticut, Louisiana, Maine, North Carolina and Wisconsin have maximums of ninety days or less.

Finally, there is the question of whether prison disciplinary boards have the authority to order an inmate found guilty of destruction of state property to pay restitution. In most prisons, currency is classified as contraband. As a result, inmate accounts are established at the prisons and any amount of money received by the inmates must be placed in their accounts. Prison officials control the accounts, and therefore, they are in a position to withdraw money from an inmate's account if the board were to order restitution.

In Sells v. Parratt, 548 F.2d 753 (8th Cir. 1977), the board ordered restitution. The Eighth Circuit held that "an administrative agency has no right without underlying statutory authority to prescribe and enforce forfeitures of property as punitive measures for violation of administrative rules and regulations, and . . . when an agency does so it violates the due process clause of the fourteenth amendment." *Id.* at 759. At least two state courts, however, have found the requisite statutory authority to prescribe and enforce forfeitures in those statutes which empower the commissioner or director of the department of corrections to provide such measures as he may deem necessary for the safety and security of the institutions. Baker v. Wilmot, 410 N.Y.S.2d 184, 185 (A.D. 1978), and Curtis v. Oregon State Correctional Institution, Corrections Division, 20 Or. App. 530, 532 P.2d 798, 799 (1975). In other words, the New York and Oregon courts have granted the prison administrators wide discretion based on a general enabling statute, restricted only by judicial review.

[608] One other sentencing practice worth noting is that twenty-three jurisdictions in the survey provide for suspended sentences. They are Alaska, Arizona, Arkansas, California, Colorado, Georgia, Illinois, Indiana, Louisiana, Maine, Massachusetts, Mississippi, Montana, Nevada, New Hampshire, North Carolina, Oregon, Rhode Island, South Carolina, Vermont, Virginia, Washington, the District of Columbia (the administrator, not the board, may suspend punishment) and the federal government. This is a practice analogous to placing a criminal defendant on probation. As long as the inmate commits no further violations during the period of suspension, the penalty will not be imposed.

VIII. REVIEW

Courts, of course, are not limited in their review of disciplinary action to penalties. As was discussed earlier, the Supreme Court in *Wolff* required that a written statement be prepared after each disciplinary hearing.[609] The statement must include a description of the evidence relied upon and the reasons for the disciplinary action taken. The main reason given by the Court for requiring such a statement was that the disciplinary committee's actions would be reviewed by other bodies.[610] A written statement would provide an accurate record of the disciplinary proceedings and would assist the inmate in "propounding his own cause to or defending himself from others."[611]

Since the *Wolff* Court anticipated that disciplinary decisions would be subject to some form of scrutiny, this section will discuss the availability of administrative and judicial review. The available judicial review will be discussed under the categories of the state and federal Administrative Procedures Acts (APA), state law other than the APAs and federal law other than the APA.

A. *Administrative Review*

While recognizing that the disciplinary proceedings might be reviewed by other bodies, the *Wolff* Court did not discuss the process in any detail. *Wolff* did not even establish whether administrative review should be required. The courts might be expected to establish administrative review as a due process requirement as a means of reducing the number of cases filed alleging due process violations in disciplinary proceedings. However, there is no case law since *Wolff* which has required administrative review. The major reason is that the prison administrations have acted without waiting for a judicial declaration. Despite the Supreme Court's silence on the issue, forty-one of the prison systems in the survey have adopted some form of administrative review of disciplinary proceedings.[612] As a result, the issue rarely is raised.

There are two basic forms of review: those which require the inmate to initiate an appeal, and those which provide for automatic review of the proceedings. Nineteen of the prison systems provide both forms of review.[613] In these systems, an administrator automatically reviews all disciplinary hearings, and if a prisoner is not satisfied with the decision, he can file a written appeal arguing his grounds for reversal. In some jurisdictions, the written appeal goes to

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[609] 418 U.S. at 564.

[610] *Id.* at 565.

[611] *Id.*

[612] The one exception is Michigan. Under Public Act 140, effective February 1, 1980, the inmate does have the right to request a rehearing, § 54, and he has the right to petition for judicial review, § 55.

[613] California, Connecticut, Georgia, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, North Carolina, Oklahoma, Oregon, Pennsylvania, Tennessee, Vermont, Virginia, Washington and the District of Columbia.

the same person who conducted the automatic review.[614] Thirty-nine of the jurisdictions in the survey have a system of inmate-initiated appeals.[615] Fourteen of those prison systems provide for more than one level of appeal,[616] with Arkansas, Idaho and South Carolina giving inmates four opportunities for administrative review.

While there is no case law holding that prisons must establish administrative appeal procedures, *Hale v. Oregon State Penitentiary, Corrections Division*[617] held that once those procedures are established the prison authorities must abide by them. Hale had been found guilty and had received both loss of good-time and punitive segregation, with segregation imposed immediately after the hearing.[618] He appealed to the superintendent, who under the institution's appeal procedures had nineteen days in which to render a decision.[619] The superintendent modified the punishment to include only loss of good-time, but the decision came after the nineteen day deadline had elapsed.[620] Because Hale had been in segregation continuously since the hearing and the administrator's decisions had been late, the Oregon court ordered that the disciplinary board's decision as to loss of good-time must also be reversed, limiting Hale's punishment to time served in segregation.[621]

Apart from requiring that a prison follow its own rules, the *Hale* case highlights a problem often encountered in the appeal process. If the penalty imposed by the disciplinary board is loss of good-time, and the panel's decision is reversed on appeal, the prisoner's time can be reinstated. Where the penalty is punitive segregation imposed immediately after the hearing, however, the inmate may already have served several days in confinement before the board's decision is reviewed. A solution to this problem would be to stay punishment pending an appeal. Unfortunately, only fourteen jurisdictions in the survey provide for suspension of the penalty,[622] and of those fourteen only ten states make suspension mandatory,[623] while the remaining four states leave the decision to the discretion of the hearing board.[624]

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[614] Maine, Maryland and Oregon.

[615] Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois (a petition for reduction of segregation time), Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin, the District of Columbia and the Federal Bureau of Prisons.

[616] Alaska, Arkansas, California, Georgia, Idaho, Indiana, Iowa, North Dakota, South Carolina, Vermont, Virginia, West Virginia, the District of Columbia and the Federal Bureau of Prisons.

[617] 33 Or. App. 529, 577 P.2d 531 (1978).

[618] *Id.* at 531, 577 P.2d at 531.

[619] *Id.*

[620] *Id.* at 531, 577 P.2d at 531-32.

[621] *Id.* at 532, 577 P.2d at 532.

[622] Alabama, Alaska, Arizona, Georgia, Iowa, Louisiana, Massachusetts, Minnesota, Montana, Nevada (only when the inmate is referred for prosecution), North Carolina, North Dakota, Rhode Island and Washington.

[623] Alabama, Alaska, Georgia, Iowa, Massachusetts, Montana, Nevada (only when the inmate is referred for prosecution), North Carolina, Rhode Island and Washington.

[624] Arizona, Louisiana, Minnesota and North Dakota.

Thus, while the courts have not established a right to an administrative appeal, the prison systems uniformly have created some form of review. An inmate-initiated procedure, adopted by the majority of jurisdictions, generally is preferable because the inmates have the opportunity to file written appeals emphasizing their arguments for reversal. With an automatic review, on the other hand, prisoners do not necessarily have the opportunity to prepare written arguments and must hope that the reviewer detects the errors in the case. It is analogous to an appellate court reviewing every criminal trial in its jurisdiction without the benefit of written briefs or oral argument. Automatic review, however, has the advantage of protecting the rights of those inmates who are unable for whatever means, to file their own appeals. If the administrators are providing meaningful review rather than just rubber stamping the hearing board's decisions, this is one area in which prisoners' due process rights have progressed since *Wolff*. To insure meaningful administrative review, however, judicial review of the administrators' decisions must be available.

B. *Judicial Review*

An inmate seeking judicial review of a disciplinary action generally has more than one option, depending on the jurisdiction in which he is confined. First, some states consider their administrative procedure acts applicable to prison disciplinary actions. Thus, the judicial review provisions of these statutes may be used by inmates. Second, some states have alternate review procedures specifically for disciplinary hearings. Perhaps the most common of these alternatives is a writ of habeas corpus. Finally, inmates may often seek federal review of their disciplinary action under either 42 U.S.C. section 1983 or the federal habeas corpus statute. Under each of the above actions the scope of review and the remedies available are slightly different. The various options and their individual ramifications are discussed below.

1. Judicial Review Under Administrative Procedure Acts

In Section III of this article, the federal Administrative Procedure Act (APA) was discussed with regard to rule-making procedures.[625] *Ramer v. Saxbe*[626] held that the Federal Bureau of Prisons is an agency within the meaning of the APA and that its rulemaking is subject to the requirements of the Act.[627] The APA, however, applies not only to an agency's rule-making procedures, but also to its adjudicatory procedures.[628] A government body which comes within the definition of "agency," and which has not been exempted from the Act's provisions, must provide procedural rights at adjudicatory proceedings which go beyond *Wolff*, including the right to judicial review.[629] In light of

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[625] See note 62 *supra*.

[626] 522 F.2d 695 (D.C. Cir. 1975).

[627] *Id.* at 697. The plaintiffs in *Ramer* were concerned with receiving notice of prohibited conduct and of the rules of procedure. *Id.* at 698-99.

[628] 5 U.S.C. §§ 554-557.

[629] *Id.*

Ramer, the issue became whether the Federal Bureau of Prisons must apply the APA procedural standards to disciplinary hearings, just as it must to rule-making procedures.

The Ninth Circuit, in *Clardy v. Levi*,[630] held that it did not. The court reasoned that "[t]he formality envisioned by [the APA] [is] not suited for various reasons to disciplinary proceedings of the Bureau of Prisons."[631] The court then pointed out that, following court holdings that deportation proceedings and the Parole Commission functions come within the APA, Congress changed the law and exempted deportation proceedings and all functions of the Parole Commission except rule-making.[632] Looking to the legislative history of the APA, the court concluded "that the APA countenanced unexpressed exemptions of agencies as well as authority to apply its terms to selected functions of agencies."[633]

The Ninth Circuit also pointed out that both *Wolff* and *Baxter* as well as subsequent decisions have fashioned procedural safeguards specifically for prison disciplinary proceedings which, unlike the procedures provided in the APA, would not unduly inhibit prison management.[634] Further, the court stressed that Congress had made no attempt specifically to bring the Bureau of Prisons within the APA.[635] Based on these reasons, the court held that the APA is not applicable to prison disciplinary proceedings, and thus allowed the "continuation of the evolution that currently is taking place in the federal courts."[636]

Contrary to the Ninth Circuit's construction of the federal administrative act, the Michigan Court of Appeals held that it was compelled to interpret its state act as encompassing disciplinary hearings within state prisons. In *Lawrence v. Michigan Department of Corrections*,[637] the court first found the Department of Corrections to be an "agency" within the Act's definition.[638] The Michigan APA provides that, unless expressly exempted, all agency proceedings are governed by the Act,[639] and, therefore, a party to an agency proceeding which qualifies as a "contested case" is entitled to certain procedural safeguards provided by the Act, including judicial review.[640] Since disciplinary proceedings are not expressly exempt from the Michigan Act, the court held that disciplinary hearings come within the requirement of being a "contested case."[641] Based on this construction, therefore, the court reasoned that it had

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[630] 545 F.2d 1241 (9th Cir. 1976).

[631] *Id.* at 1244.

[632] *Id.* at 1245.

[633] *Id.* The House report stated that "manifestly the bill does not unduly encroach upon the needs of any legitimate government operation, although it is of course operative according to its terms even if it should cause some administrative inconvenience or changes in procedure." *Id.*

[634] *Id.* at 1245-46.

[635] *Id.* at 1245.

[636] *Id.* at 1246.

[637] 88 Mich. App. 167, 276 N.W.2d 554 (1979).

[638] *Id.* at 170, 276 N.W.2d at 555.

[639] *Id.* at 170, 276 N.W.2d at 556.

[640] *Id.*

[641] *Id.* at 171, 276 N.W.2d at 557.

no choice under the law but to hold that prison disciplinary hearings are governed by the APA.[642]

The determination that Michigan's prison hearings must comply with that state's administrative procedure act has several direct consequences on the rights of inmates. First, this holding means that the accused has a right to cross-examination and a right to call witnesses without qualification.[643] Additionally, an official record of the evidence introduced at the hearing and all proceedings must be recorded and available for transcription.[644] Finally, the accused has a right to judicial review of the proceedings.[645]

Despite the holding in *Lawrence*, and perhaps because of these additional procedures, the Michigan court expressed concern that its decision, while legally required, was not sound policy. It urged the legislature, therefore, to consider the effect on prison management that the holding would have and to grant the Department of Corrections an exemption from the Act.[646] The legislature granted the exemption, but it also enacted Public Law 140 which created a separate hearings division within the Department[647] and which provided for judicial review under the APA.[648]

The issue of exemption from a state APA arose also in Florida. In *Florida Department of Offender Rehabilitation v. Jerry*,[649] an administrative hearing examiner found the Department's disciplinary rules to be invalid for failure to meet the procedural guidelines of the Florida APA.[650] On appeal, however, the state court reversed, holding that Jerry did not have standing because he did not lose good time and he no longer was in segregation at the time his petition for administrative relief was filed.[651] Following *Jerry* the Administration Commission, comprised of the Governor and the Cabinet, then granted the Department a temporary exemption from the APA, and later the state legislature granted a permanent exemption from the formal hearings requirement of the Act.[652] However, as a state court of appeals held in *Brown v. Florida*,[653] inmates still may seek judicial review pursuant to the APA.[654]

In *State ex rel. Armistead v. Phelps*,[655] a Louisiana inmate filed a state habeas corpus petition seeking review of the disciplinary board's finding of guilt.[656] The district court denied the writ on the merits, but the Louisiana Supreme

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[642] *Id.* at 172, 276 N.W.2d at 556-57.

[643] *Id.* at 169 n.1, 276 N.W.2d at 555 n.1.

[644] *Id.*

[645] *Id.* at 170, 276 N.W.2d at 556.

[646] *Id.* at 173, 276 N.W.2d at 557.

[647] Section 51.

[648] Section 55.

[649] 353 So.2d 1230 (Fla. Dist. Ct. App. 1978).

[650] *Id.* at 1231.

[651] *Id.* at 1235.

[652] FLA. STAT. § 120.52(10). The Department still is required to abide by the rulemaking procedures of the Act.

[653] 375 So.2d 66 (Fla. Dist. Ct. App. 1979).

[654] *Id.* at 67.

[655] 365 So.2d 468 (La. 1978).

[656] *Id.* at 468.

Court granted the writ to clarify the proper procedure for obtaining judicial review in such cases.[657] The court held that habeas corpus was not the proper remedy and that the judicial review procedures of the state APA applied to prison disciplinary proceedings because the statute did not expressly exempt the department of corrections.[658] The statute provides that final agency action is subject to review by petition in the state district court within thirty days, and that judicial review is confined to the record except for alleged procedural irregularities.[659] Additionally, inmates have the right to appeal the final judgment of the district court to the court of appeals.[660]

In Oregon, judicial review pursuant to the state APA is available in any disciplinary case in which an inmate has been sentenced to segregation for more than seven days or forfeiture of any amount of good-time.[661] Oregon is unique, however, by providing notice to the inmates in the disciplinary regulations that judicial review is available and that they have thirty days in which to file an appeal.[662]

In a state which has an Administrative Procedures Act, therefore, inmates have a right to judicial review under the Act unless the legislature has granted the corrections department an exemption from the entire Act. Assuming that such review is available, the next question is what standard of review will the court apply. In *Phelps*, the Louisiana Supreme Court enunciated the scope of review under that state's act which is representative of administrative procedure acts.

The district court may reverse or modify the disciplinary board's decision if substantial rights have been prejudiced and the decision is (1) in violation of constitutional or statutory authority, (2) in excess of the statutory authority of the agency, (3) made upon unlawful procedure, (4) affected by other error of law, (5) arbitrary or capricious or characterized by abuse of discretion, or (6) manifestly erroneous in view of reliable, probative and substantial evidence on the whole record.[663] The next issue is whether state court review is available under any other procedure.

2. Judicial Review Under State Law Other Than the Administrative Procedure Acts

The state Administrative Procedure Acts, as pointed out, have become a relatively common method of judicial review of disciplinary hearings. Not all states have APAs, however, and inmates must seek other methods of review. The other avenue most often pursued in state courts is the writ of habeas corpus.

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[657] *Id.*

[658] *Id.* at 469.

[659] *Id.* at 469-70.

[660] *Id.* at 470.

[661] OR. REV. STAT. § 421.195.

[662] Oregon Department of Human Resources, Corrections Division, Rule Governing Inmate Conduct, and Procedures for Processing Disciplinary Actions, § VI.G.11.b. (1980).

[663] 365 So.2d at 469-70.

All states authorize writs of habeas corpus, and it is a common procedure for challenging disciplinary decisions. The writ is available to anyone who is being illegally detained, and an inmate who is punished by placement in segregation or loss of good time without due process is being illegally detained.[664] Habeas is available to anyone placed in segregation without due process because segregation is a stricter form of confinement than originally ordered by the sentencing court. Similarly, loss of good-time is reviewable by habeas corpus because it affects the duration of confinement. For example, if an inmate loses ninety days of good-time, he must serve that additional ninety days before being released from prison. If the inmate's due process rights were violated during the proceedings which resulted in segregation or the loss of good-time, the stricter or additional imprisonment would constitute illegal detention.

The scope of review in habeas corpus is not unlike that under Administrative Procedure Acts. In *Bagley v. Brierton*,[665] for example, the Florida Court of Appeals reversed a lower court denial of a habeas corpus petition because the petition had stated "specific allegations regarding the disciplinary proceedings which, if true, would establish that the Department of Corrections failed to comply with its own rules and with the procedural requirements of *Wolff*."[666] In fact, in *Brown v. Florida*,[667] the state court of appeals held that an inmate who alleges constitutional violations may seek habeas corpus relief even though he failed to pursue his remedy under the APA.[668] Finally, in *Sanchez v. Hunt*[669] the Louisiana Supreme Court held that "[a] reviewing court must not disturb an order of the agency charged with the administration of a prison unless . . . its order is clearly arbitrary or capricious."[670] Thus, the scope of review under habeas corpus includes whether the inmate's constitutional rights were violated, whether the state complied with its own rules, and whether the state acted arbitrarily or capriciously.[671]

3. Judicial Review Under Federal Law Other Than the Administrative Procedure Act

Aside from each jurisdiction's statutory review provisions, two federal statutes exist that provide for federal judicial review of certain disciplinary practices. Under federal law state prisoners have two vehicles for challenging disciplinary proceedings: a civil rights action pursuant to 42 U.S.C. § 1983 and a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. A section

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[664] *See, e.g.*, Preiser v. Rodriquez, 411 U.S. 475, 487, 499 (1973).

[665] 362 So.2d 1048 (Fla. Dist. Ct. App. 1978).

[666] *Id.* at 1049.

[667] 375 So.2d 66 (Fla. Dist. Ct. App. 1979).

[668] *Id.* at 67.

[669] 329 So.2d 691 (La. 1976).

[670] *Id.* at 692.

[671] If a disciplinary decision is reversed on appeal, the remaining issue becomes whether the courts will order expungement of the disciplinary proceedings from an inmate's file. Upon reversal, the obvious remedies available to inmates are reinstatement of good time and release from segregation. Expungement, however, may be just as important because an inmate's file is

1983 civil rights complaint must allege a violation of a constitutional right by state action. Thus, a complaint alleging deprivation of due process in a disciplinary proceeding states a claim upon which relief can be granted under section 1983.[672] Alternatively, as stressed in *Willis v. Ciccone*,[673] "it is generally acknowledged that habeas corpus is a proper vehicle for *any* prisoner to challenge unconstitutional actions of prison officials."[674]

State inmates, therefore, have an option as to which federal procedure they want to pursue. There are advantages and disadvantages to both actions. First, the remedies under each action are different. The Supreme Court, in *Preiser v. Rodriguez*,[675] held that if an inmate is seeking the restoration of good-time, his only federal remedy is a writ of habeas corpus.[676] The Court reasoned that good-time affects the duration of confinement, and if an inmate is seeking a speedier release, a habeas petition is the only remedy. The Court reached this result by determining that the State has such a strong interest in the administration of its prisons that considerations of comity require that the state not be bypassed when the relief sought lies at the "core of habeas corpus."[677] Conversely, if the inmate is seeking damages, the proper vehicle is a civil rights complaint.[678] Thus, if an inmate wants to obtain both damages and the restoration of good-time, he will have to file two separate actions.[679] A second difference between the two actions is that before filing a federal habeas petition a state prisoner must exhaust all effective state court remedies,[680] while under section 1983,[681] however, exhaustion is not required. Thus section 1983 offers a speedier remedy.

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reviewed for many purposes, including consideration for parole and reclassification. The existence of the record of the disciplinary proceedings in the file, even if the court's reversal is noted, can negatively affect the decision of a parole board or classification team. Despite the importance of this question, New York is the only state which deals with the expungement question. In both Hurley v. Ward, 61 A.D.2d 881, 402 N.Y.S.2d 870 (1978), and Ortez v. Ward, 87 Misc.2d 307, 384 N.Y.S.2d 960 (1976), the two New York courts ordered expungement after holding that the board's decisions must be reversed. Twenty-five jurisdictions in the survey provide for expungement of the disciplinary record from an inmate's file following a finding of not guilty either at the hearing or on appeal.

[672] *See, e.g.*, Mitchell v. Beaubouef, 581 F.2d 412, 415 (5th Cir. 1978); Grillo v. Sielaff, 414 F. Supp. 272, 276 (N.D. Ill. 1976). Because a § 1983 complaint requires deprivation of an individual's constitutional rights by *state action*, this vehicle is unavailable to federal prisoners.

[673] 506 F.2d 1011 (8th Cir. 1974).

[674] *Id.* at 1014.

[675] 411 U.S. 475 (1973).

[676] *Id.* at 500.

[677] *Id.* at 489-92.

[678] *Id.* at 494, 498-99. Where the inmate is seeking money damages, prison officials have a qualified immunity defense. The defense is not available, however, if the inmate can show (1) that the constitutional right was clearly established at the time of the challenged conduct, that the officials knew or should have known of the right, and that they knew or should have known that their conduct violated the right; or (2) that the officials acted with malicious intention to deprive the prisoner of the right or to cause him other injury. Chapman v. Pickett, 586 F.2d 22, 25 (7th Cir. 1978).

[679] *See, e.g.*, Wolff v. McDonnell, 418 U.S. at 554-55.

[680] 28 U.S.C. § 2254(b).

[681] *See, e.g.*, Mitchell v. Beaubouef, 581 F.2d 412, 416 (5th Cir. 1978).

The scope of review exercised by federal courts under both types of actions is comparable to that exercised in state courts. With respect to state prisoners, *Carter v. Cuyler*[682] held that the details of a state's "prison disciplinary procedures are not under the direction of the federal courts,"[683] but that a federal court will intervene where federal constitutional or statutory rights are involved.[684] Federal rights, however, are not strictly procedural rights.

The federal rights referred to in *Carter*, of course, were due process rights, which while primarily procedural in nature, do possess some substantive elements. As for procedural due process in disciplinary hearings, the Sixth Circuit, in *Walker v. Hughes*,[685] stated that both *Wolff* and the "constitutional protection of liberty and property require[s] that the final judgment regarding the procedural safeguards be invested in the judiciary."[686] As to substantive due process, judicial power is more limited. The courts will not review the sufficiency of evidence, or the credibility of the witnesses.[687] The federal courts will examine, however, whether there is basis in fact to support the action taken.[688] As stated in *Covington v. Sielaff*,[689] "if the decision finding plaintiff guilty was not arbitrary and capricious, the decision did not deprive him of substantive due process."[690]

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[682] 415 F. Supp. 852 (E.D. Pa. 1976).

[683] *Id.* at 856.

[684] *Id.* When the plaintiff is a federal prisoner, the Second Circuit, in Ron v. Wilkerson, 565 F.2d 1254 (2d Cir. 1977), held that the court's power is somewhat broader. It declared that a district court judge "also has at least pendent jurisdiction to enforce" the procedural rules of the Federal Bureau of Prisons. *Id.* at 1258. Procedurally, it also would be proper for a federal court to assert pendent jurisdiction to enforce state law. However, the policy expressed in *Carter* reflects the general approach of federal courts in all matters dealing with the administration of state prisons. It is a vestige of the hands-off policy discussed earlier in this article.

[685] 558 F.2d 1247 (6th Cir. 1977).

[686] *Id.* at 1254.

[687] Russell v. Division of Corrections, Commonwealth of Virginia, 392 F. Supp. 476, 477 (W.D. Vir. 1975), *aff'd*, 530 F.2d 969 (4th Cir. 1975).

[688] *See, e.g.*, Willis v. Ciccone, 506 F.2d 1011 (8th Cir. 1974). The Eighth Circuit, in *Willis*, stated that:

> [T]he role of the district court is not to afford a de novo review of the disciplinary board's factual findings. The district court should simply determine whether the decision was supported by some facts. The sole and only issue of constitutional substance is whether there exists any evidence at all, that is, whether there is any basis in fact to support the action taken by the prison officials.

Id. at 1018.

[689] 430 F. Supp. 562 (N.D. Ill. 1977).

[690] *Id.* at 564-65. Finally, as discussed in the previous section, even though the remedy of expungement is important to inmates, only the New York courts have ordered the remedy. Two federal cases which have addressed the question are Chapman v. Pickett, 586 F.2d 22 (7th Cir. 1978), and Gates v. Collier, 454 F. Supp. 579 (N.D. Miss. 1978). In *Chapman* the Seventh Circuit remanded the case with instructions to address the issue of the "expurgation of the record of his punishment." 586 F.2d at 25. It is not known, however, how the district court dealt with the issue because an opinion was not published. In *Gates*, the district court found that expungement was not supported by the facts in the record. 454 F. Supp. at 585. The Court also stated, however, that it was "inconsistent with the Supreme Court's ruling in *Wolff*," *id.*, indicating that it may not be an available remedy.

It is clear, therefore, that federal court review is available to both state and federal inmates where federal rights allegedly have been violated. Federal inmates can file a petition for a writ of habeas corpus. State prisoners can pursue either a habeas petition or a civil rights action. These actions are not identical, however. Habeas corpus is the only remedy available for restoration of good-time, and an inmate seeking monetary damages must file a section 1983 complaint. Furthermore, a state inmate must exhaust state court remedies before filing for a writ of habeas corpus.

In sum, the *Wolff* Court anticipated that the decision of disciplinary boards would be subject to some type of review, and as has been discussed, inmates have access to various forms of both administrative and judicial review. Despite the lack of a judicial mandate, almost every jurisdiction in the survey has responded by providing for either automatic review of board decisions or inmate-initiated appeals. Some jurisdictions, in fact, provide both forms of review. At the judicial level, both state and federal court review is available. Many states allow judicial appeals pursuant to an Administrative Procedure Act, while in others inmates may petition for a writ of habeas corpus. The scope of review under either procedure includes whether the prisoner's constitutional rights were violated, whether the state complied with its own rules, and whether the state acted arbitrarily or capriciously. The federal APA has been held not to be available to federal inmates. However, federal habeas corpus is available to all prisoners, and state inmates alleging a denial of constitutional rights by state action may file a section 1983 civil rights complaint. However, if a state inmate is seeking restoration of good-time, he must file a habeas petition, which requires the exhaustion of state remedies. On the other hand, damages are cognizable only under section 1983. The scope of review under both procedures is comparable to that exercised by the state courts. The review includes whether federal constitutional or statutory rights were violated and whether the state acted arbitrarily or capriciously. If the plaintiff is a federal inmate, the courts also will decide whether the procedural rules of the Bureau have been violated.

The disciplinary process now has been examined from the issue of whether the institutions must promulgate rules of conduct to whether inmates have access to review of disciplinary decisions. The one remaining issue is whether prison officials have the means of imposing some form of major sanctions on inmates without the necessity of complying with the *Wolff* standards.

IX. PUNISHMENT BY ANY OTHER NAME: CIRCUMVENTING DUE PROCESS REQUIREMENTS

An inmate may not lose good-time or be placed in disciplinary confinement without due process. This is the holding in *Wolff*. *Wolff* left open the question whether inmates have a right to due process where lesser penalties, such as loss of privileges, are involved.[691] There are, however, other methods of pun-

[691] 418 U.S. at 571 n.19.

ishing inmates, such as placement in administrative segregation and transfer to another institution. Subsequent to *Wolff*, it has been possible for prison officials to avoid the procedural requirements of that case by labelling an inmate's segregation as administrative, rather than punitive, or by transferring the inmate to a more restrictive institution. Both forms of punishment have been challenged on due process grounds.

In 1976, the United States Supreme Court decided two cases dealing with prison transfers. In *Meachum v. Fano*,[692] the inmates challenged the procedures used for all inter-prison transfers within the Massachusetts prison system.[693] The Supreme Court used a two-pronged test to determine whether transfers violated the due process clause. Initially, the Court asked "whether the transfer . . . infringed or implicated a 'liberty' interest . . . within the meaning of the Due Process Clause."[694] If so, then the Court asked whether the hearings in that case were adequate to protect that liberty interest.[695]

The Court did not reach the second issue because it held that not all transfers infringe a liberty interest within the meaning of the due process clause.[696] Looking to the "nature of the interest involved rather than its weight,"[697] the Court found that state law "conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct."[698] The Court went on to state that "[w]hatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him whatever reason or for no reason at all."[699]

While *Meachum* involved a challenge to prison transfers in general, *Montanye v. Haymes*[700] dealt only with transfers within the New York State prison system which were made for disciplinary reasons.[701] In *Montanye*, the lower court held that due process applies to such transfers,[702] but the Supreme Court reversed, restating its holding in *Meachum* that no liberty interest of an inmate is infringed "absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events."[703]

The *Meachum* and *Montanye* test has been carried over to cases involving administrative segregation. The result, however, has been somewhat different.

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[692] 427 U.S. 215 (1976).
[693] *Id.* at 222.
[694] *Id.* at 223-24.
[695] *Id.* at 223.
[696] *Id.* at 224-25.
[697] *Id.* at 224.
[698] *Id.* at 226.
[699] *Id.* at 228.
[700] 427 U.S. 236 (1976).
[701] *Id.* at 242.
[702] *Id.*
[703] *Id.*

In *Wright v. Enomoto*,[704] California inmates challenged the procedures for placing an inmate in administrative segregation.[705] The District Court for the Northern District of California held that in California inmates have a liberty interest in not being placed in maximum security segregation for administrative reasons.[706] The United States Supreme Court affirmed this decision without an opinion.[707]

In *Wright*, the district court applied the same two part test used in *Meachum* and *Montanye*, but distinguished *Wright* from these two cases on two grounds. First, the court found that when an inmate is transferred from the general prison population to maximum security, whether it is disciplinary or administrative, "there is a severe impairment of the residuum of liberty which he retains as a prisoner."[708] Second, the district court found that state law had limited the discretion of prison officials in placing inmates in administrative confinement.[709] Statewide regulations provided that inmates could be segregated only after finding that "they are a menace to themselves and others or a threat to the security of the institution."[710] Thus, in *Wright* the first part of the test was met; a liberty interest in not being transferred existed. The district court then looked to the second part of the test covering what procedures are required. The court held that inmates subject to administrative segregation pursuant to the California regulation are entitled to the same minimum due process that *Wolff* established for prison disciplinary proceedings.[711]

The issue of whether due process applies to transfers or to placement in administrative segregation, therefore, is determined by whether state law has established criteria for when an inmate can be transferred or confined to segregation. If under state law an inmate may be transferred or segregated for any reason or no reason at all, there is no protected liberty interest involved, and due process is not required. In those instances, the state is able to punish an inmate by transfer to a more secure institution or by confinement in administrative segregation and totally avoid the *Wolff* standards.

In a jurisdiction where prison officials have complete discretion with regard to transfers and segregation, therefore, there is the potential for significantly undermining the impact of *Wolff*. There are practical restrictions, however, even in jurisdictions with total discretion. Overcrowding is a problem in almost every prison system. As a result, it would not be possible to transfer an inmate to another institution every time a major act of misconduct allegedly

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[704] 462 F. Supp. 397 (N.D. Cal. 1976).

[705] *Id.* at 398-99.

[706] *Id.* at 402.

[707] Enomoto v. Wright, 434 U.S. 1052 (1976).

[708] 462 F. Supp. at 402. In the transfer cases, the Supreme Court had stated specifically that the inmates had not been placed in segregation. 427 U.S. at 222; 427 U.S. at 238.

[709] *Id.* at 402-03.

[710] *Id.* at 403.

[711] *Id.* The question whether more procedural protections are required was not reached by the district court because of the inadequacy of the record. *Id.*

is committed. The same restrictions would apply to administrative segregation because of the limited number of cells available for that purpose. Furthermore, the trend appears to be away from total discretion. Seventeen jurisdictions in the survey include transfers as a punishment in their disciplinary regulations,[712] thus invoking the *Wolff* standards, and application of due process standards to administrative segregation is still a new and developing area of the law.[713] However, the fact remains that in some jurisdictions prison officials still possess complete discretion with regard to transfers, segregation, or both, and in selected cases they are able to use one of those sanctions as punishment without the necessity of providing the inmate with either notice or a hearing.

X. CONCLUSION

The quote at the beginning of this article illustrates the arbitrariness in punishing prison inmates which existed prior to *Wolff v. McDonnell*. The 1974 Supreme Court decision did a great deal to restrict the absolute discretion of prison guards in administering punishment. The Court held that the loss of good-time and confinement in disciplinary segregation involve liberty interests and that those interests cannot be deprived without due process. The Court, however, was reluctant to mandate strict procedures, and after weighing the interests of the prisoners against those of the state, it established limited procedural safeguards. The better course, the Court reasoned, was to leave further development of the procedures to the discretion of prison administrators.

Wolff left many questions unanswered in the belief that the prisons should be allowed to develop their own standards. The purpose of the survey was to find out how the prison systems have responded. Case law subsequent to *Wolff* was studied to determine how the courts have responded to the procedures which the prisons have adopted, or failed to adopt. The results show that some advances have been made. For example, almost every prison system has instituted some form of internal administrative appeal, many allow the assistance of a representative in situations not required by *Wolff* and some provide for the tape recording of the hearings.

The overall result of the survey, however, is a clear indication that most of the questions left unanswered by *Wolff* either remain unanswered or have been answered to the detriment of prisoners. Few institutions, for example, allow the inmate or his representative to investigate the changes prior to the hearing, thus limiting the ability to prepare a defense. In forty of the forty-two jurisdictions in the survey, the disciplinary board is composed entirely of employees from the same institution in which the accused is incarcerated. Such a composition is inimical to impartiality. Some jurisdictions allow a finding of guilt to be

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[712] California, Colorado, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Nebraska, Nevada, Pennsylvania, South Carolina, Tennessee, Vermont, Washington, the District of Columbia and the Federal Bureau of Prisons.

[713] Because the Supreme Court affirmed *Wright* without an opinion, it did not have the immediate impact that *Wolff* did.

based solely on the written reports of the officers with no corroboration. Because of vague standards and no requirement of written reasons, the boards have almost complete discretion to deny requested witnesses. A final example is confrontation and cross-examination. While many jurisdictions allow cross-examination, the exclusion of informants from testifying and the reliance on written reports leaves no one to cross-examine.

Wolff took the discretion to impose major penalties away from the charging officers and gave it to the disciplinary boards and hearing officers. In the seven years since *Wolff*, however, that discretion has not been limited to a significant degree, and the due process accorded prisoners at disciplinary hearings remains minimal.

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