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INTRODUCTION

Due process[1] rights of the imprisoned have been the subject of several restrictive Supreme Court rulings.[2] When these cases are viewed against the background of already limited juvenile due process rights[3] and the atrocities revealed in numerous juvenile decisions,[4] images of the paintings of Goya are recalled.

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1. The Fourteenth Amendment to the United States Constitution, Section One provides in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."
2. *See* part I *et seq.*, *infra*.
3. *See* part II *et seq.*, *infra*.
4. *See, e.g.*, Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd*, 535

The disciplining of confined juveniles is an area where the need for effective control is great, and sadly, correctional administrators have provided little leadership in developing constitutionally sound disciplinary decision-making systems. It is opined that juveniles are citizens who have all rights commensurate with that status, and when a state finds it necessary to subject a juvenile to "treatment," even greater protection should be afforded. There is a distressing need for states, legislatively and through correctional administrators, to initiate required procedures, rather than wait for the courts to foist their less informed judgments upon them.

The object of this article is to analyze the impact of the Supreme Court's position on due process with reference to the administration of discipline in state juvenile corrections institutions, and to develop a model for disciplinary decision making. Part I of the article will present recent Supreme Court treatment of procedural due process in the area of prison discipline in general. Part II will analyze the due process treatment of juvenile proceedings by the Court. Part III will deal with the scope of due process in juvenile corrections discipline as extrapolated from parts I and II. Part IV will provide a decision-making model for the administration of discipline in juvenile correctional institutions. The article will not treat the due process right to treatment in correctional institutions[5] or the rights of juveniles prior to transfer from the juvenile justice system,[6] except as they imply rights in the disciplinary setting. The eighth amendment prohibition of cruel and unusual punishment is also beyond the scope of this article; however, all discipline must withstand the scrutiny of this dynamic and ethereal limitation.[7]

F. 2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354, 1367 (D.R.I. 1972), where Chief Judge Pettine ruled:

> If a boy were confined indoors by his parents, given no education or exercise and allowed no visitors and his medical needs were ignored, it is likely that the state would intervene and remove the child for his own protection. See R.I.G.L. § 14-1-34. Certainly, then the state acting in its *parens patriae* capacity cannot treat the boy in the same manner and justify having deprived him of his liberty.

5. *See generally* McNulty and White, *The Juvenile's Right to Treatment: Panacea or Pandora's Box?*, 16 SANTA CLARA L. REV. 745 (1976).

6. *See generally* Vitiello, *Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years Since Kent v. United States*, 26 DEPAUL L. REV. 23 (1976).

7. The following general principles or lines of inquiry have emerged in the application of the cruel and unusual punishment standard to prohibit penal measures:

(1) Conditions may be so bad they are cruel and unusual themselves. The federal courts have held punishments to be cruel and unusual

I. PROCEDURAL DUE PROCESS IN ADULT CORRECTIONAL DISCIPLINE

The seminal case of *Goldberg v. Kelly*,[8] while ruling on the reach of procedural due process, used language which appeared to provide a sound base from which to require due process in the administration of discipline in correctional institutions.[9] The decision concerned the adequacy of procedures for termination of financial assistance received pursuant to the Aid to Families with Dependent Children Program. In finding summary termination of assistance a violation of the due process clause, the Court stated:

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grevious loss," (footnote omitted) and depends upon whether the recipients interest in avoiding that loss outweighs the governmental interest in summary adjudication.[10]

The Court mandated the following minimum requirements:

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when they are "barbarous" or "shocking to the conscience," Sostre v. McGinnis, 442 F.2d 178, 191 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972); "foul, . . . inhuman, and . . . violative of basic concepts of decency," Wright v. McMann, 387 F. 2d 519, 526 (2d Cir. 1967); or of a "debased" nature, Jordan v. Fitzharris, 257 F. Supp. 674, 680 (N.D. Cal. 1966). Conditions may meet these criteria, in and of themselves. These standards are also relative depending on the individual subjected to punishment. For example, institution segregation in itself is not unconstitutional. *See, e.g.*, Sostre v. McGinnis, 442 F. 2d 178, 192 (2d Cir. 1971). But it may be cruel and unusual for certain individuals based on mental and physical health, or age, Lollis v. New York Department of Social Services., 322 F. Supp. 473 (S.D.N.Y. 1970).

(2) Punishments may be cruel and unusual if greater than necessary to achieve their legitimate aims, Weems v. United States, 217 U.S. 349, 370 (1910); Robinson v. California 370 U.S. 660, 677 (1962) (Douglas, J., concurring).

(3) Punishments may be cruel and unusual if greatly disproportionate to the behavior occasioning punishment. Excessive punishment has been held unconstitutional many times, *See, e.g.*, Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966). For example, a minor rule infraction alone should not result in highly consequential action from the affected individual's viewpoint. Of course, serious behavior may lead to minor consequences and the individual will not be aggrieved.

(4) Punishments may be ruled cruel and unusual based on a comparison with prevailing practice, as suggested in Landman v. Royster, 333 F. Supp. 621, 646 (E.D. Va. 1971), citing Rudolph v. Alabama, 375 U.S. 889 (1968) (Goldberg, J., dissenting from denial of cert.).

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

9. *Cf.* Johnson v. Avery, 393 U.S. 483 (1969), as to the watering down of the "hands off doctrine."

10. 397 U.S. at 262-63.

(1) a timely and effective notice;

(2) an opportunity to be heard;

(3) the right to confront or cross-examine adverse witnesses;

(4) the right to retained counsel;

(5) a statement as to the reasons for the determination made and the facts relied upon, all of which must have been adduced at the hearing; and

(6) an impartial decision maker.[11]

The response by the lower courts to subsequent requests for due process in prison discipline cases was extremely varied.[12] Support for an expansive reading of *Goldberg's* due process implications in the prison discipline setting was provided by two subsequent Supreme Court cases.

In *Morrissey v. Brewer*[13] the due process requirements for parole revocation were considered. The cases arose as habeas corpus proceedings involving two parolees who were arrested as parole violators and confined in a county jail on instructions from their parole officers. After review of the parole officer's report of their alleged violations, their parole was revoked by the state board of parole.[14] The issue before the Court was whether the revocations had denied the petitioners due process since their paroles had been revoked without a hearing. In making its determination, the Court began by reviewing the function of parole in the correctional process.[15] After finding the termination of parole a "grevious loss" since the liberty enjoyed by the parolee is similar to the unqualified liberty of the general population,[16] it determined due process requirements do apply generally to parole revocation. The Court found the fourteenth amendment required an informal hearing that would "assure that the finding of a parole violation will be based on verified facts" and that the decision-maker would exercise his discretion based on an "informed but accurate knowledge of the parolee's behavior."[17] The requirement was derived from an analysis of the state's interest. It was found that while the state had a strong interest in returning the parolee to prison without a new adver-

11. *Id.* at 268-71.
12. *See* Harrison, *Civil Rights: Procedural Due Process In Prison Disciplinary Hearings*, 26 OKLA. L. REV. 261 (1973).
13. 408 U.S. 471 (1972).
14. *Id.* at 472-74.
15. *Id.* at 477-80.
16. *Id.* at 481-82.
17. *Id.* at 484.

sary proceeding where a violation exists, it had no interest in summary treatment of the issue.[18]

Specifically, the Court found two instances where due process is required in the revocation of parole, the preliminary hearing and the revocation hearing. At the former, a determination is required to establish whether there was "probable cause or reasonable ground to believe that the arrested parolee had committed acts that would constitute a violation of parole conditions . . .".[19] The following requirements were promulgated:

(1) Notice that the hearing would take place and that its purpose would be to determine whether there is probable cause to believe the parolee committed a violation;

(2) An opportunity to be heard and present evidence;

(3) The right to cross-examine adverse witnesses unless the hearing officer determines that a risk of harm to the informant would result from disclosure of his identity;

(4) A hearing officer not directly involved in tha case; and,

(5) A summary by the hearing officer stating the reason for his decision and the evidence relied upon.[20]

At the revocation hearing the minimum requirements of due process were found to be:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reason for revoking parole.[21]

The question of the right to a retained or appointed counsel at the hearings was not reached in *Morrissey*. In *Gagnon v. Scarpelli*[22] the Court reached this issue, as well as the due process requirements in probation revocation. Gagnon, a felony proba-

18. *Id.* at 483.
19. *Id.* at 485.
20. *Id.* at 485-87.
21. *Id.* at 489.
22. 411 U.S. 778 (1973).

tioner was apprehended along with a known criminal in the commission of a burglary. After being advised of his constitutional rights, Gagnon admitted committing the burglary. His probation was summarily revoked. The case arose as a writ of habeas corpus application. The petitioner challenged his confession as having been made under duress.[23] The Court held that due process requirements for parole revocation were equally applicable to probation revocation in view of the similar loss of liberty.[24] Due process was also held to require representation by counsel where fundamental fairness indicates that the effectiveness of the *Morrissey* rights would be hampered without such assistance. The Court included considerations of the complexity of presenting pertinent facts and the ability of the probationer to speak effectively for himself in deciding upon the need for counsel. A statement of grounds for refusal was required to be placed in the record.[25]

With these applications of the broad language of *Goldberg* in the corrections field, ample justification was present for the requirement of considerable safeguards in prision discipline cases.[26] Nonetheless, deference to the exigencies of the corrections environment was found to preclude many of the due process requirements of parole and probation revocation hearings in *Wolff v. McDonnell*.[27] McDonnell, an inmate of a Nebraska state prison, brought a civil rights action alleging, *inter alia* that disciplinary proceedings did not comply with the Due Process Clause of the Fourteenth Amendment. He had been denied "good time" credit, earned pursuant to a Nebraska statute,[28] in a disciplinary action authorized "in flagrant or serious cases" of misconduct.[29] The procedures used in the disciplinary action involved a conference between the inmate accused, the chief corrections supervisor and the charging party, to inform the prisoner of the charge and discuss its merits; and a conduct report was prepared and a hearing was held before the prison disciplinary body wherein the inmate was read the report and given an opportunity to question the charging party.[30]

Justice White's decision rejected the assertion that the proce-

23. *Id.* at 779-80.
24. *Id.* at 782.
25. *Id.* at 787-91.
26. *See, e.g.*, Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971), *modified*, 497 F. 2d 809 (9th Cir. 1974).
27. 418 U.S. 539 (1974).
28. NEB. REV. STAT. § 83-1,107 (1943).
29. NEB. REV. STAT. § 83-185 (1943).
30. 418 U.S. at 542-53.

dure for disciplining prisoners is "a matter of policy raising no constitutional issue."[31] The Court reaffirmed its position that all constitutional rights were not lost at the prison door. Due process rights were deemed to be diminished, however, "by the nature of the regime to which (the inmates) have been lawfully committed."[32] Justice White also ruled the statutory "good time" was "liberty" within the protection of the fourteenth amendment.[33]

The decision found the loss of "good time" sufficiently grevious to require protection by due process, but found the interest to be considerably less than was involved in the parole and probation revocation cases since the loss was neither as immediate or as certain. It also found the State's interests to be of a much more compelling nature:

> Prison disciplinary proceedings . . . take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life. Although there are very many varieties of prisons with different degrees of security, we must realize that in many of them the inmates are closely supervised and their activities controlled around the clock. Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace. Relationships among the inmates are varied and complex and perhaps subject to the unwritten code that exhorts inmates not to inform on a fellow prisoner.[34]

Based on these conflicting needs and reasserting the need for flexible application of due process, the decision found the Nebraska discipline proceeding sorely lacking. Advance written notice of charges, at least 24 hours prior to appearance before the disciplinary body, was found necessary to allow the prisoner an opportunity to obtain facts in his defense and to clarify the charge against him. The decision also found a need for a written statement by the fact-finding body setting further evidence and reasons for the discipline taken. This procedure was necessary to protect against uninformed collateral action based on the dis-

31. *Id.* at 555.
32. *Id.* at 556.
33. *Id.* at 558.
34. *Id.* at 561-62.

cipline, such as reclassification and parole consideration. The provision also was seen as a guard against improper exercise of discretion. It was recognized that in some instances the evidence relied upon in the decision may be of such a sensitive nature as to render improvident its inclusion in the record. In these cases a statement explaining its omission would suffice.[35]

The Court also found a conditional right to present evidence and call witnesses in defense in those cases which would not present undue hazards to safety or correctional goals. The Court went on to rule that while a statement of reason for refusal to allow witnesses to be called would be helpful, it was not mandated by the constitution, and prison officials' discretion in this regard should remain as unfettered as possible.[36]

The right to cross examine and the right to assistance of counsel were not found to be present because of the inherent dangers and the non-adversary, rehabilative nature of the action. In dicta, Jutice White did indicate that where an inmate is incapable of the collection and presentation of evidence, he should be allowed assistance from a member of the staff or fellow inmate.[37] The decision as to due process ended with the following caveat:

> Our conclusion that some, but not all, of the procedures specified in Morrissey and Scarpelli must accompany the deprivation of good time by state prison authorities is not graven in stone. As the nature of the prison disciplinary process changes . . . circumstances may then exist which will require further consideration and reflection of this court.[38]

The dissenting opinions of Justice Marshall, joined by Justice Brennan and Justice Douglas expressed a need for greater procedural protection to preserve the liberty interest of the inmates. Justice Marshall pointed to the diminishing impact denial of "the procedural tools essential to presentation of any meaningful defense" has on the safeguards which were required.[39] Justice Douglas contended the potential loss of the inmate is sufficient to afford him a "full hearing with all due process safeguards." He analogized the risks to the security and safety in prisons to the risks entailed in allowing bail before trial.[40]

Considering the Court's statement in *Wolff*, that the require-

35. *Id.* at 563-65.
36. *Id.* at 566.
37. *Id.* at 567-70.
38. *Id.* at 571-72 (footnote omitted).
39. *Id.* at 581-82.
40. *Id.* at 594, 600.

ments and limitations therein were not "graven in stone," the Court has nevertheless been niggardly in its allowance of new due process rights. In *Baxter v. Palmigiano*[41] the Supreme Court struck down a Ninth Circuit rule requiring prison authorities to justify their denial of cross-examination rights to an inmate by citing a concern mentioned in *Wolff*, such as reprisals, unmanageability, disruption, and safety of prison personnel. Failure to so justify a denial had been ruled prima facie evidence of abuse of discretion.[42] The Ninth Circuit had also held the reasons for discipline must be based on facts revealed in the hearing. This rule was also struck down.[43] The reasons for rejecting the extensions of the Appeals Court were they were "either inconsistent with the 'reasonable accommodation' reached in *Wolff*, or premature on the bases of the record before (the Court)."[44] Additionally, the Court held the requirements of *Miranda v. Arizona*[45] and *Mathis v. United States*[46] need not be met to render pretrial statements admissible in disciplinary hearings.[47]

Due process protections were further undermined in *Meachum v. Fano*[48] and *Montanye v. Haymes*,[49] In *Meachum*, the Court held the transfer of a state prisoner to an institution with less favorable conditions does raise due process implications "absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurence of other events."[50] The Justices agreed interprison transfers did not involve a liberty interest within the meaning of the due process clause. The nature of the loss, and not its griveousness, was held to be determinative. Since confinement in any of the states prisons was within the sentence imposed, no new procedural rights were forthcoming.[51] *Montanye* extended this rule to

41. 425 U.S. 308 (1976).
42. *Id.* at 322.
43. *Id.* at 323 n.5.
44. *Id.* at 324.
45. 384 U.S. 436 (1966).
46. 391 U.S. 1 (1968).
47. 425 U.S. at 315.
48. 427 U.S. 215 (1976).
49. 427 U.S. 236 (1976).
50. 427 U.S. at 216.
51. *Id.* at 223-25.

transfer that were classified as punitive.[52] The Court warned that to protect the "ephemeral and insubstantial" interest of a prisoner in staying at a particular institution "would place the due process clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges."[53]

The utility of the due process clause of the fourteenth amendment as a protection in prison discipline does not appear to be too great. To be within the liberty concept, an interest must be substantial, not removed by conviction, and grounded in the federal constitution or state law. When applicable, the degree of due process is determined by the grievousness and nature of the loss to the individual and the nature of the prison's interest. The custodial nature of prisons has been held to limit the right to call witnesses and substantially abrogate the right to confrontation. Exercise of statutory created discretion by prisons officials is apparently beyond the reach of due process limitations.

II. Procedural Due Process in Juvenile Justice: The Supreme Court Perspective

The evolution of juvenile justice in the United States has largely been a process motivated by benevolent intentions, but has resulted in counterproductive systems and cruel treatment of juveniles.[54] Due process has been severely circumscribed by the *parens patriae* concept, and has only recently begun to recover.[55] Supreme Court expansion of due process in juvenile proceedings began with *Kent v. United States*.[56] Speaking to the waiver of jurisdiction by juvenile courts, Justice Fortas' decision recognized the statutory right to the benefits of juvenile jurisdiction and the grievious effect of the loss of that right. Thus it was concluded that the District of Columbia statute allowing waiver, read in light of the due process clause and the right to assistance of counsel, required an informal hearing, assistance of counsel, access to records considered by the court, and a statement of the reasons for the decision.[57]

The landmark case of *In re Gault*[58] dealt with the adjudica-

52. 427 U.S. at 242.
53. 427 U.S. at 228-29.
54. *See generally* Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 Stan. L. Rev. 1187 (1970).
55. *See generally* Wong, *The Continuing Turbulence Surrounding the Parens Patriae Concept in American Juvenile Courts*, (Pts. 1-2), 18 McGill L.J. 219, 418 (1972).
56. 383 U.S. 541 (1966).
57. *Id.* at 557.
58. 387 U.S. 1 (1967).

tion of delinquency. In arriving at the procedures required, the Court noted that in spite of the fact there is no adjudication of guilt of a crime, and confinement is rehabilative and non-punitive, adjudication of deliquency can result in prolonged institutionalization and loss of liberty.[59] The Court, mandated (1) notice sufficiently in advance of the proceedings to afford a reasonable opportunity to prepare, setting forth the alleged misconduct with particularity; (2) right to counsel for the accused juvenile if delinquency may result in commitment; and, (3) the privilege against self-incrimination, the right to confrontation, and the right to cross-examination.[60]

In re Winship[61] also dealt with the adjudicatory stage, requiring the proof beyond a reasonable doubt standard in juvenile delinquency proceedings.[62] The Court found no sufficient basis on which to allow a lesser standard in juvenile proceedings, and rationalized the standard would not adversely affect state policies precluding criminal conviction and deprivation of civil rights, or the confidentiality, informality, flexibility and speed of the hearings.[63]

McKeiver v. Pennsylvania[64] found no due process requirement of a jury trial in delinquency adjudication. The applicable due process in juvenile proceedings was stated as fundamental fairness necessary for accurate fact finging.[65] The plurality of four Justices found the impanelling of a jury would not sufficiently aid in fact finding but it would cause the proceedings to become adversary, protracted, public, and less protective.[66] Nor could they identify any of the failures of the juvenile justice system which would be remedied by the presence of a jury.[67] Justice Brennan concluded that juries were not required so long as some other aspect of the adjudication process allows for protection against oppression by the state or improper discharge of judicial duties. He found these protections in the abili-

59. *Id.* at 27.
60. *Id.* at 33-57.
61. 397 U.S. 358 (1970).
62. *Id.* at 368.
63. *Id.* at 366-67.
64. 403 U.S. 528 (1971).
65. *Id.* at 543-51.
66. *Id.* at 545-51.
67. *Id.* at 547.

ty of any party so agrieved to "appeal to the community at large for executive redress through the medium of public indignation."[68] Justice Harlan concurred, based on his belief that neither the sixth amendment nor the due process clause requires states to provide criminal jury trials.[69]

The Court's approach to requests for due process in juvenile proceedings reveals an attempt to maximize the efficiency of the fact finding process without upsetting the rehabilitative ideals of the juvenile justice system.[70] *Parens patriae*, while not a byword for arbitrariness, is allowed to limit due process when a rehabilitative goal will be furthered.

III. Procedural Due Process In Juvenile Corrections Discipline

The lower federal courts have been relatively liberal in granting injunctions against disciplinary practices in juvenile corrections institutions. The majority of these cases have dealt with cruel and unusual punishment used as disciplinary measures and the substantive due process right to treatment abridged by reformatory conditions.[71] In *Nelson v. Heyne*,[72] consideration was given to the right to treatment as a *quid pro quo* for society's exercise of *parens patriae* controls.[73] Even though this reasoning was embraced by the circuit court on appeal,[74] the *quid pro quo* rationale was criticized by the Supreme Court in a case involving involuntary commitment of mental patients as being incapable of co-existence with the flexible concept of due process.[75] The district court in *Nelson* found due process to be required when incarcerated juveniles were placed in solitary confinement, apparently relying largely upon cruel and unusual punishment implications and the right to treatment. The Court merely required an informed decision and that the child be made aware of the reason for the confinement.[76] In *Morales v. Turman*,[77] it mandated the following procedures after a juvenile

68. *Id.* at 554-55.
69. *Id.* at 557.
70. *See generally* Simpson, *Rehabilitation as the Justification of a Separate Juvenile Justice System*, 64 CAL. L. REV. 984 (1976), questioning the propriety of this approach.
71. *See, e.g.*, Martarella v. Kelly, 349 F. Supp. 575 (S.D.N.Y. 1972), and Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972).
72. 355 F. Supp. 451 (N.D. Ind. 1972), *aff'd*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).
73. *Id.* at 458-61.
74. 491 F.2d at 360.
75. O'Connor v. Donaldson, 422 U.S. 563, 584-89 (1975).
76. 355 F. Supp. at 457.
77. 383 F. Supp. 53 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd per curiam*, 430 U.S. 322 (1977).

had been in solitary confinement for five consecutive days or in security confinement for ten consecutive days: (1) a hearing before (2) an impartial tribunal which must (3) file written findings within forty-eight hours with the executive director of the state youth commission, (4) a right to representation by an advocate of his choice, and (5) a right to cross-examination and presentation of evidence and witnesses.[78]

An interesting contrast and a possible indication of the response that can be expected from the *Meachum* and *Montanye* decisions is found in *Lollis* v. *New York State Department of Social Services*.[79] In response to a class action suit by juveniles claiming their treatment in a state training school to be cruel and unusual, the district court had issued a preliminary injunction enjoining long periods of isolation except under regulations to be approved by the court.[80] In response to the Second Circuit's treatment of *Sostre v. McGinnis*[81] the court modified its earlier decree so as to obviate the need for submission of proposed regulations. The court thereby recognized the concept later supported by the Supreme Court,[82] that regulation of the administration of state custodial institutions by the federal courts was to be undertaken only in the most extraordinary circumstances.[83]

In *Meachum v. Fano*, the Court suggested an alternative to its many restrictive requirements when it stated; "The individual States, of course, are free to follow another course, whether by statute, by rule or regulation, or by interpretation of their own constitutions."[84] The potential of state forums varies greatly. The Supreme Court of Illinois in *In re Washington*[85] relied on *Meachum* in finding no protectable liberty interest in non-emergency discipline. The court stated,

> Given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine

78. *Id.* at 84.
79. 328 F. Supp. 1115 (S.D.N.Y. 1971).
80. Lollis v. New York Dep't of Social Services, 322 F. Supp. 473 (S.D.N.Y. 1970).
81. 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972).
82. 427 U.S. 215, 229 (1976).
83. 328 F. Supp. 1115, 1119 (S.D.N.Y. 1971).
84. 427 U.S. 215, 229 (1976).
85. 65 Ill. 2d 391, 359 N.E.2d 133 (1976).

him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution.[86]

In New York however, transfer to maximum security confinement has been held contrary to an adult reformatory sentence,[87] and due process has been mandated before one may be transfered from a reformatory, even though the transfer was discretionary and within the sentence imposed.[88] In applying its concepts of fairness and constitutional rights to *Wolff*, the New Jersey Supreme Court provides for many due process requirements not found by the United States Supreme Court.[89] These cases indicate that the state forum can provide a favorable vehicle for seeking due process where the federal courts may be less productive. Perhaps the Supreme Court has perceived the need for extra-constitutional protections, evinced by lower court cases.[90]

Protection afforded by the due process clause in juvenile corrections discipline has been scant. Where found, the analysis has not been as lucid as that of the Supreme Court in *Morrissey*.[91] If a court were to undertake such a thorough analysis of juvenile corrections, it would find a system whose *raison d'etre* is to rehabilitate rather than punish,[92] but a system which has failed to achieve its goal to any appreciable extent.[93] Instead, it has served to illustrate "that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure."[94] Juveniles are frequently sentenced to the care of state authorities for their minorities or until their response to treatment is deemed satsifactory.[95] Restriction of state efforts to rehabilitate are discouraged by *McKeiver*.[96] Unfortunately, rehabiliation can be a label of little limitation. In *Van v. Scott*,[97] an action challenging the constitutionality of the Illinois Juvenile Court Act as to minors who had violated a lawful court

86. *Id.*, 359 N.E.2d at 137 (footnote omitted).
87. Irving v. Preiser, 358 N.Y.S.2d 805 (1974).
88. Hatzman v. Reid, 364 N.Y.S.2d 396 (1975).
89. Avant v. Clifford, 67 N.J. 496, 341 A.2d 629 (1975).
90. *See, e.g.*, Pena v. New York State Division for Youth, 419 F. Supp. 203, 210 (S.D.N.Y. 1976). The court found it necessary to enjoin violation of existing state regulations governing room confinement and the use of physical and medical restraints because of a "doleful record of noncompliance" as to punitive use of isolation, hand and feet restraints and tranquilizing drugs.
91. 408 U.S. 471, 477-90 (1972).
92. In re Gault, 387 U.S. 1, 14-18 (1967).
93. McKeiver v. Penn., 403 U.S. 528, 544 (1971).
94. 387 U.S. at 18.
95. *Id.* at 8.
96. McKeiver v. Penn., 403 U.S. 528, 547 (1971).
97. 467 F. 2d 1235 (7th Cir. 1972).

order, the court ruled "neither the label which a State places on its own conduct, nor even the legitimacy of its motivation, can avoid the application of the Federal Constitution."[98] But, the Supreme Court has stated, "We are reluctant to say that, despite disappointments of grave dimensions, (the juvenile justice system) still does not hold promise, and we are particularly reluctant to say . . . that the system cannot accomplish its rehabilitative role."[99]

The first step in the judicial ascertainment of due process rights is the finding of a grievous loss to liberty within the fourteenth amendment's protection.[100] This liberty must not be such as was taken away by the adjudication of delinquency. It must have been granted either by state statute, as in good time credit, or be constitutionally grounded.[101] If reasonable corporal punishment is not ruled to constitute cruel and unusual punishment in the juvenile corrections evironment,[102] as it has been ruled in adult institutions,[103] then it might present a poor case for grievous loss. By its very reasonableness it would be temporary in effect and moderate, and therefore similar to the loss of privileges which the Court has indicated would not be grievous.[104] The anti-rehabilitative function corporal punishment can play[105] would militate against this decision, however. Solitary confinement, on the other hand, presents an excellent constitutionally grounded liberty interest. The district courts in *Morales* and *Nelson* found due process required and the Supreme Court has indicated a like inclination in *Wolff*.[106]

The extent of due process granted is determined by the extent of the loss to the juvenile and the interest of the state in summary adjudication.[107] Solitary confinement subjects a juvenile to extensive losses. It is emotionally and psychologically de-

98. *Id.* at 1240.
99. McKeiver v. Penn., 403 U.S. 528, 547 (1971).
100. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
101. Meachum v. Fano, 427 U.S. 215, 223-25 (1976).
102. *Cf.* Nelson v. Heyne, 491 F.2d 352, 354-56 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).
103. Jackson v. Bishop, 404 F. 2d 571 (8th Cir. 1968).
104. Wolff v. McDonnell, 418 U.S. 539, 571-72 n.19 (1974).
105. Nelson v. Heyne, 491 F.2d 352, 354-56 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).
106. Wolff v. McDonnell, 418 U.S. 539, 571-72 n.19 (1974).
107. Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970).

bilitating and serves neither treatment nor punitive goals.[108] If it is continued for more than a short period it can cause " 'sensory deprivation, withdrawal, or perhaps psychotic or autistic behavior.' "[109] In the case of juveniles, solitary confinement is even more of a loss than for adults. As the affidavit of a expert witness recited in *Lollis v. New York State Department of Social Services* states:

> What is true in this case for adults is of even greater concern with children and adolescents. Youngsters are in general more vulnerable to emotional pressures than mature adults; isolation is a condition of extraordinarily severe pyschic stress; the resultant impact on the mental health of the individual exposed to such stress will always be serious, and can occasionally be disastrous.[110]

On the other hand, the state may have some interest in solitary confinement for the safety of others or for security, and perhaps for treatment when used for short duration. The need for experimentation in rehabilitation by the States is noted in *McKeiver*.[111] The need for timely feedback to the juvenile, and the inappropriateness of federal court supervision of the state penal systems[112] are also interests of the state. When solitary confinement continues for extended periods, it would appear to become ripe for due process protection.

The difference in environments between adult and juvenile correctional facilities would indicate the need for some procedural safeguards not granted in *Wolff* for juvenile discipline. The inability of juveniles to represent themselves adequately is much more likely than in the case of an adult. The assistance of a counsel substitute would seem to be necessary. The Supreme Court recognized this possibility *Wolff*.

> Where an illiterate inmate is involved, however, 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.[113]

The likelihood of retribution by juvenile delinquents would not seem to be as great as in the case of adults. A method whereby the right to confront and cross-examine adverse witnesses

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108. Nelson v. Heyne, 355 F. Supp. 451, 456 (N.D. Ind. 1972), *aff'd*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

109. Inmates of Boy's Training School v. Affleck, 346 F. Supp. 1354, 1366 (D.R.I. 1972).

110. 322 F. Supp. 423, 481 (S.D.N.Y. 1970).

111. 403 U.S. 528, 547 (1971).

112. Meachum v. Fano, 427 U.S. 215, 229 (1976).

113. 418 U.S. 539, 570 (1974).

would be retained unless the disciplinary board determined that a risk of harm to the informant would result from disclosure of his identity would seem appropriate.[114]

The unwillingness of the Court to allow impediments on state experimentation presents a serious problem. The entire juvenile justice system, with its most heinous abuses, has been justified by its treatment aspects. It must be argued that just as the adjudication process is a portion of the treatment for which due process is required, so is discipline. Like adjudication, discipline must be based on the facts of a course of behavior which requires negative reinforcement. Without a realistic opportunity for unimpassioned, rational fact finding, discipline will be counterproductive.

Fair decision making is both a legal and correctional objective. The anger and frustration that flow from decisions perceived as unfair are almost impenetrable barriers to constructive correctional effort. Offenders should be active participants in the process, not powerless bystanders. Mutually agreed upon goals are far more likely to be reached than those imposed unilaterally upon another. Research in this area has been limited, but does ". . . suggest that the appearance as well as the actuality of fairness, impartiality, and order liness—in short, the essentials of due process—may be . . . impressive and . . . therapeutic."[115]

The cruel and unusual punishment and substantive due process approaches of the federal courts in their juvenile discipline cases appear to overlook the possibly useful tool of procedureal due process. To avoid imposing due process requirements, a court may find no liberty interest within the meaning of the fourteenth amendment, find the method possibly rehabilitative, and defer to the states' judgment, or simply refuse to supervise the state correctional institutions. But in so doing, the courts will be missing an opportunity to provide a positive influence on the juvenile justice system. As Justice Fortas stated in *Gault*, "It is [the] instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing

114. *Cf.* Morrissey v. Brewer, 408 U.S. 471, 487 (1972).
115. 387 U.S. at 26 n.37.

versions and conflicting data. 'Procedure is to law what 'scientific method' is to science.' "[116]

IV. A Decision Making Model For Administration Of Discipline In Juvenile Correctional Institutions

The restrictive rulings of the Supreme Court in the area of due process rights of the imprisoned should not be viewed by juvenile correctional institution administrators as a return to the peaceful days of the "hands off" doctrine. It is, rather, a period when a conservative approach to intervention dictates allowing states to initiate procedures which are constitutionally satisfactory and supportive of correctional goals. It is certainly in their own best interest that administrators who are most knowledgeable about the problems involved, develop policies and procedures which will accommodate the needs of the system as well as the interests of convicted offenders. The more adequate such internal controls are, the less necessary it will be for courts to intervene to define requisite procedures to review the merits of correctional decisions.[117] Also, decision makers must allocate the precious and limited correctional resources available. Managers have a major interest in assuring that these resources are allocated as carefully and objectively as possible. The goal is to spend no more, or less, than necessary in each case to accomplish the purposes of institutional placement. Judicial interest in correctional decision making has proved to be a powerful stimulant to change, but courts can only react to the questions raised through litigation, not seek out problems that need resolution. Necessary changes should not await court action when it is known what the law and good correctional practice require. Certainly, the judiciary prefers this approach. It is recognized that "[w]hat is needed is to provide offenders under correctional authority protections against arbitrary action, not to create for all correctional decision making a mirror image of trial procedure."[118]

While this decision making model is addressed to the administration of discipline, it is urged that no distinction between discipline and other means of treatment, such as classification, necessitates a separate system for their administration. This is reflected by the make-up of programs directed primarily at changing behavior, where discipline and classification are

116. *Id.* at 21.

117. *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS (1967).

118. *Id.* at 84.

conceived as overlapping. Staffs are organized into teams which focus on both functions simutaneously. The two are viewed as indistinguishable and call for a single decision making system.

The courts are also tending to view discipline and classification as similar. They are looking past the reasons advanced by correctional administrators for actions that deprive and focusing upon the substantive impact of the deprivation. When restrictions are the same, there is no meaningful difference between punishment and preventive segregation.[119] The *Landman* Court noted: "Deprivations of benefits of various sorts may be used so long as they are related to some valid penal objective and substantial deprivations are administered with due process. 'Security' or 'rehabilitation' are not shibboleths to justify any treatment."[120]

Any action which has the effect of taking something away that was possessed or denying something which could reasonably be expected by the individual as a part of the regular program should be carried out within the principles and procedures outlined in this decision-making model. The central issue is whether a "deprivation" may occur. The reason for involing a "deprivation" such as discipline, treatment or security status has no bearing on whether decision-making standards are employed.

Impetus from the courts obviously is the primary motivating force toward more precise decision-making standards. The decision-making model, incorporates the requirements emerging from this trend. It goes further, however, and recognizes what should be sound correctional practice.

Decision-Making Model

This decision-making model is designed for youthful offenders who are placed indeterminately in correctional institutions for training and treatment. It assumes that the institution is organized around treatment teams which are delegated major decision making responsibility.

119. In re Hutchinson, 23 Cal. App. 3d 337, 341, 100 Cal. Rptr. 124, 127 (1972).
120. Landman v. Royster, 333 F. Supp. 621, 645 (E.D. Va. 1971).

Elements of the Model. This model is made-up of three decision making levels. These are illustrated in Appendix I. At the highest levels serious behavior may lead to the most consequential actions. More precise decision-making standards apply. Lesser behavior may lead to lower order results, using a lesser decision-making standard. In other words, as the potential results rise in magnitude, higher decision-making standards are applied. This carries out the due process principle that the interests of the state and individual must be balanced using greater care as the potential consequence to the individual increase. It also brings about some correspondence between the magnitude of behavior and result, meeting one of the principles encompassed in the prohibition against cruel and unusual punishment.

Additionally, the model incorporates three processes; namely, preparation, hearing, and review. These must be followed in order. A common shortcoming of correctional decisions is that one or more of these processes are omitted, or they are not followed in sequence. For example, a decision to impose a serious sanction may be hastily reached before the facts are collected and exposed to an impartial fact finding process. Apart from potential unfairness, confusion often results and a great deal more time may be taken than actually required.

1. Circumstances justifying action.

One of the serious shortcomings of correctional systems is program objectives are not specified with precision in individual cases, and institution rules are often vague. Fair decisions are rooted in clearly stated expectations. Given this, failure to meet expectations may result in action intended to correct behavior.[121] Behavior that may result in action is of two kinds, namely, rule or law violations or failure to meet program objectives.

Rules and law violations are acts or occurrences that stand alone. They are something which an individual does; the individual is the actor. The decision-making levels at which specific rules or law violations are placed, in order of seriousness, is largely a matter of policy or judgment, taking into consideration the context in which the program operates.

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121. *Landman* weighed the justification for vagueness in institution rules and concluded ". . . that the existence of some reasonably definite rule is a prerequisite to prison discipline of any substantial sort." Moreover, regulations must be ". . . distributed, posted, or otherwise made available in writing . . ." 333 F. Supp. 621 at 656.

One of the major weaknesses of the correctional system is that treatment is not individualized with enough specificity so that separate, concrete plans are made and carried out for each person. All actions should be directed toward the accomplishment of pre-established correctional goals. An advantage of this decision-making model is it helps force the development of specific program plans. If plans are not clear and understood in advance, they will not suffice as a basis for corrective action.

2. Preparation Process

The first step is a "preparation stage." It is very simple for lower level decisions, to become more precise standards for more serious actions.

(a) Temporary Restriction

(1) Lock-Up

Sometimes it is necessary to place a person in temporary lock-up pending action. This practice has a parallel in juvenile and criminal court where statutes allow a short period of preliminary confinement before formal action is undertaken. Confinement at this point is not used for therapeutic purposes. A person should not be locked up unless he is a danger to himself or others, or is an escape risk. Lock up, at this stage, must be as short as possible and only when this criterion applies. At the same time, enough latitude must exist to take care of emergencies.[122] With each increase in length of lock-up, higher administrative levels of approval are required. Long periods of lock-up should be exceptional and would probably occur only when there is a major institutional disturbance and the time required by the emergency does not allow rapid follow through with the system as a whole. In no case should lock up be used in lieu of carrying out the policies and procedures required by this model.

It may be necessary to lock-up for longer periods when the matter is referred to the district attorney for prosecution. Here the time interval is almost totally dependent upon local authorities. However, persons should not be locked up simply because court action is pending. The criterion for lock-up is the

122. Urbano v. McCorkle, 334 F. Supp. 161, 168 (D.N.J. 1971).

same, regardless of whether the decision will be made internally, or by the court.

(2) Day Passes or Furloughs

As a temporary measure, it may be necessary to withhold a scheduled day pass, or other off-grounds activity, pending action. From the affected individual's point of view, this is usually considered a more consequential deprivation than temporary lock-up. Accordingly, the decision to "withhold" should be reserved for middle managers, the superintendent, or superintendent designate.

(b) Investigation

It is necessary, of course, to investigate alleged occurrences that may serve as a basis for some action. Investigations of this kind include the collection of facts as to when, where, and how the incident occurred and what it was all about. Investigation, in the formal sense, is not required when failure to accomplish program objectives is the basis for action, provided that these failures can be described with precision.

Quite often, the behavior which occasions action by correctional staff is also a crime. A decision must be made about referring the matter to the district attorney for prosecution. This presents a problem since custodial interrogation may jeopardize the privilege against self-incrimination.[123] There are several alternative ways of meeting this problem,[124] but the preferable one is to withhold institutional action and refer the action for prosecution as soon as possible.[125] Care must be taken to assure the *Miranda* warnings are given as soon as the investigation focuses on likely suspects.[126]

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123. Miranda v. Arizona, 384 U.S. 436, 478 (1966).

124. *See* Turner and Daniel, *Miranda in Prison: The Dilemma of Prison Discipline and Intramural Crime*, 21 BUFFALO L. REV. 759 (1972).

125. Turner and Daniel, *Id.*, argue the solution reached in Clutchette v. Procunier, 328 F. Supp. 767, 777 (N.D. Cal. 1971), *modified*, 497 F. 2d 809 (9th Cir. 1974), is preferable where counsel is required for the inmate. They discount postponing institutional action, arguing that prison administrators routinely segregate the accused and subject them to the same deprivations as if convicted of the criminal misconduct. This is a spurious argument, however. Citizens in the community at large may be restrained pending trial under some circumstances. Those already in institutions need not, and should not, be restrained further unless they pose a serious escape risk, or are dangerous to others, or themselves. *See also*, Baxter v. Palimigiano, 425 U.S. 308 (1976), wherein the Court ruled an inmates failure to respond to questions at a disciplinary hearing could be used against him.

126. Miranda v. Arizona, 384 U.S. 436, 437 (1966) (syllabus) requires the following: "The person in custody must, prior to interrogation, be clearly informed

(c) Notice

Notice means "information" given to a person telling him enough about the issue that will be decided in the course of the action so he can prepare and present information on his own behalf.[127] It may be given orally at the lower decision-making levels but for more consequential decisions, it must be in writing. In all instances notice must be given at least twenty-four hours prior to any disciplinary hearing.[128]

3. Hearing Process

When the preparation stage is completed, the hearing process may be started. It has two distinct and separate phases. The first is directed at whether behavior did, in fact, occur which justifies some action. Assuming the answer is yes, the second phase focuses on what to do about it. This process is not intended as an adversary procedure similar to criminal courts. Rather, it is an informal adminstrative proceeding that can be likened to a "forum" where relevant information is brought, discussed, and a conclusion reached. At the same time, however, certain procedures must be applied so that the essential ingredients of due process are included.

The hearing process should not start until the individual has had a reasonable opportunity to prepare. This is especially true at the higher decision-making levels where written notice is given, and the person may ask for the assistance of a staff member. At least forty-eight hours between giving notice and hearing should be allowed at the highest level, longer upon request. The time interval may be waived by the individual involved.

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that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him. If the individual indicates, prior to or during, questioning must cease until an attorney is present."

127 "To constitute meaningful notice, at least a brief statement of the facts upon which the charge is based, as well as the name and number of the rule allegedly broken must be included." Clutchette v. Procunier, 328 F. Supp. 767, 782 (N.D. Cal. 1971).

128. *See* note 35, *supra*, and accompanying text.

(a) Fact Finder—Disposition Maker

The least consequential actions may be taken rapidly, if necessary, by the staff member who observed the behavior. Higher level decisions should be made by the treatment team.

The fact finder-disposition maker must be "disinterested" or have no prior involvement in the circumstances, to allow for as much objectivity as possible. For this reason, the person who "writes up" the circumstances and those who may be the victims of incidents must not assume a fact finder role.[129] This is not to say that such persons are excluded from supplying pertinent information to the hearing process.[130]

(b) Appearance at hearing.

An opportunity must be given the youth to be present at the hearing so he may hear information presented by others, and present information having a bearing on the issues.

(c) Representation

Some institutionalized persons simply do not have the skills or maturity required to speak lucidly for themselves. Their verbal skills may be limited by education, experience, and in some cases, intelligence. At the highest decision-making level, the youth should be given an opportunity to select a staff member from the team or a panel selected by the superintendent for this purpose. Two alternatives are provided here since team members are often on shift assignment and may not be available at the time when a decision must be made. In addition, youthful offenders should have an opportunity to choose a person in

129. *Landman* required that ". . . the decision to punish must be made by an impartial tribunal. This bars any official who reported a violation from ruling . . . A substantial question arises whether filed unit officials can ever so divorce themselves from events in their small units sufficiently to sit impartially. The Court has not been shown that this is impossible, but in any individual case participation in occurrences giving rise to a charge shall bar any man from sitting in judgment." 333 F. Supp. 621, 653 (E.D. Va. 1971).

130. Some argue institution personnel cannot be expected to act independently if they work in fairly close proximity to the residents. This would be true of treatment team members, especially since they work daily with those under their supervision. *Morrissey* concludes preliminary revocation hearings need not be conducted by a judicial officer. 408 U.S. 471, 486 (1972). They may be held by an uninvolved person. It is logical to extend this concept to institution actions which have the effect of a deprivation. Institution staff are charged with responsibility for carrying out a rehabilitation program. The treatment team concept is built on the recognition that those who work most closely with institution residents have the greatest possibility of impact. If decision-making is removed from their control, it would greatly diminish program effectiveness.

whom they have some confidence. Representation is not required at the lower decision-making levels.[131]

(d) Witnesses

Confrontation and cross examination of witnesses are highly prized rights in most fact finding forums. However they are particularly troublesome since the close proximity of those living together in correctional institutions makes it highly vulnerable to acts of reprisal or pressuring by the stronger residents. Nonetheless, confrontation and cross examination should be allowed unless the fact finder determines that witnesses may be subjected to risk of harm.[132]

(e) Standards of certainty (evidence).

In the absence of some standard of evidence, decisions may become simply a matter of whim.[133] "Preponderance" as a standard, is less demanding than "beyond a reasonable doubt," the evidence standard applied by the criminal courts. Stated simply, preponderance means that a finding must be based on information showing that it is "more likely than not" that the circumstances alleged did, in fact, occur.

(f) Written Record

A written record should be made for consequential actions showing the alleged behavior, information relied upon for the finding, and reasons for the action taken. Justifiable criticism has been directed at covert decisions where those involved were denied clear and concise information.

Records are important since they make it possible to retrace the steps taken, showing all necessary requirements were met and what the disposition was intended to accomplish. A ques-

131. *See* note 113, *supra*, and accompanying text.
132. *See* note 114, *supra*, and accompanying text.
133. "Rules of evidence, as a general proposition, do not rise to constitutional levels. Thus, it would be inappropriate for . . . (a federal) court to establish a 'weight of evidence' rule more stringent than the due process clause requires. When reviewing a disciplinary committee decision . . . district courts have traditional standards to review decisions for arbitrariness. It is hoped, although not constitutionally compelled, that disciplinary committees will apply a 'weight of the evidence' rule somewhat more exacting." Clutchette v. Procunier, 328 F. Supp. 767, 784 (N.D. Cal. 1971).

tion arises about retaining records when the fact finding process establishes that alleged behavior did not occur. An argument can be made for retaining these records so it can be shown that the matter was cleared. It is also suggested that records are needed for casework purposes. On the other hand, records of unsubstaintiated behavior may prove detrimental, since users of the record may simply ignore findings and later treat the matter as if it did occur. An answer to this question depends on some extent on who has access to records. On balance, it is preferable to destroy all records of alleged behavior that is not substantiated by the decision-making system.

4. Review Process.

A review procedure has the advantages of assuring each case is audited at the next higher level to assure that the decision-making model was followed and the disposition was appropriate. A disadvantage is that it does not allow the individual to appeal what he considers to be errors.[134] However, review is preferable because it is more comprehensive, and it also serves administrative purposes.

Errors in the hearing process which may be revealed through review should be sent back to the decision-maker for correction. The reviewing officer may not go outside the record and countermand a finding.[135] However, provided an affirmative finding is made, a reviewing officer may change the disposition as long as the new disposition is permitted at that or a lower decision-making level.

Staff Roles. Members of the staff are required to assume several different roles. They may not be played by the same person.[136] All staff have a responsibility to report behavior that may require some action. Beyond this, however, one principle of

134. It is outside the scope of this paper to discuss grievances in their broader context. Suffice it to say, the individual should have access to a grievance mechanism which can be used in lieu of appeal.

135. "If higher authorities than the disciplinary committee feel duty bound to re-examine decisions, their review must be restricted to the charge made and the evidence presented. The practice of going outside the record in search of basis for punishment must cease. 'It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be convict him upon a charge that was never made.' (Cole v. Arkansas, 333 U.S. 196)." Landman v. Royster, 333 F. Supp. 621, 653 (E.D. Va. 1971).

136. "Another basic component of fundamental procedural fairness is a hearing before a relatively objective and impartial tribunal. This principle is violated when the same . . . official assumes the dual responsibility of (1) initiat-

fair play is that staff who have some actual or potential personal involvement, suc as being the victim of an incident should not carry out certain roles or responsibilities. When this occurs, professional ethics demand the staff member should withdraw and not become involved in the decision-making process. Otherwise, bias or the appearance of bias, may occur.

1. Investigator Role

After behavior is reported which may require action, relevant facts must be collected. This is not intended to be a highly technical task requiring the skills associated with law enforcement, except in very difficult cases. It is simply a matter of objectively collecting information which may be useful in deciding what actually occurred. Collecting facts as an investigator must not be confused with the fact finder role. The investigator's task is not to decide whether certain behavior occurred, but rather to collect facts which will assist the fact finder in determining what occurred.

2. Representative Role

The representative role is to help the young persons get his point across. It is not intended as an "advocate" or "lawyer." The fact finding process is not an adversary proceeding but a forum where all revelant information is brought for screening, discussion, and decision. The representative must be a staff person who is available, and should be someone in whom the youth has some confidence. The staff member fulfilling this role should assist in helping the young person understand the process and have some confidence in its general fairness.

3. Fact Finder—Disposition Maker Role

The fact finding and disposition making role is carried out by the same staff member or team. However, these are separate and distinguishable tasks which are carried out in sequence. As fact finder, the job is to weigh and evaluate information, sorting

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ing and pressing charges of misconduct, and (2) subsequently determining as a member of an administrative body, whether misconduct has occurred and assessing appropriate punishment." Bundy v. Cannon, 328 F. Supp. 165, 172 (D. Md. 1971).

fact from opinion, and making a finding on the basis of facts. Following fact finding, the same staff member or team proceed to the disposition making task. They evaluate behavior in relation on program goals (casework reasons) and decide on an appropriate disposition.

4. Reviewer Role

Someone at a higher level than the fact finder-disposition maker must fulfill a reviewer role. This task is to assure that all necessary procedures have been followed and that the disposition is appropriate. The reviewer may modify the disposition in one direction only; that is, to a similar or lesser deprivation.

Evaluation And Summation

This decision making model is designed for youthful offenders in correctional institutions where teams have been delegated primary responsibility for treatment. It assumes the decision to confine or release is made by another body.

Some argue efficiency may be imperiled and costs will be excessive if a formalized decision-making system is employed. Workload is a function of the residents and institution climate generally. It also depends to some extent on the amount of time previously given these matters. It is true that some additional staff time is required at the outset. The system is more complex than most existing practices. Also, staff quality is directly related to whether it will operate smoothly and accomplish its purpose. Those with experience and some training in legal concepts find it easier. Workload also depends on the number of occurrences requiring highly consequential action since they do require considerable time. Lower order decisions can be made rather rapidly. Experience suggests that about ten per cent of actions taken are at the highest decision-making level, fifteen per cent at the intermediate level, and the remaining seventy-five per cent at the least consequential level. On the whole, workload is not increased significantly, though this depends upon all of these factors.

Staff and youthful offenders alike must be trained thoroughly so that the principles embodied in the model are understood. There is a tendency for staff to become immobilized at the beginning because the concepts may be unfamiliar or seem alien to correctional practice. This is particularly true with the information collecting and investigating function. There is a tendency for staff to be overcautious. It is difficult for some

case-workers to separate facts from opinions and conclusions. The need to play several separate and distinct roles is sometimes confusing. This is particularly true of the investigator and fact finder roles which must be clearly distinguished.

Affording more precisely defined, and perhaps extended, rights to the offender does mean the existing prerogatives of staff may be limited. This may be threatening to some staff and managers. The system focuses on establishing whether certain behavior occurred and channels the disposition into permissable limits.

There are several persuasive reasons for adopting this model notwithstanding difficulty in adjusting to it. Clearly defined procedures facilitate day-to-day institutional operation. When staff members understand their roles, confusion is reduced, and responsibility for decision-making is clearly shared. The model provides a vehicle for communication and resolution of conflicts. It also causes staff to act more slowly and deliberately, especially in serious matters. Experience has shown fewer matters are referred to higher administrative levels for action. They are resolved satisfactorily between the resident and staff member closest to the situation. Experience has also shown that decisions are more consistent, qualitatively better, and above all, more fair.

This model is to be viewed as a positive decision-making mechanism. There may be a tendency to use this rather complex decision-making apparatus in an entirely negative way. It is not intended as a means for dispensing penalities, and should not be implemented from that perspective. It is an orderly means for making all major decisions affecting the rehabilitation of youthful offenders in correctional institutions.

V. Conclusion

Recent Supreme Court decisions evince a conservative approach to the requirement of due process safeguards in the imposition of prison discipline. This trend in no way reflects the Court's unwillingness to assure that correctional systems are operated in a constitutional manner. It is instead an effort to restrain judicial law-making until correctional leadership has an opportunity to provide the necessary protection of inmates'

constitutional rights through administrative procedure. If the leadership is not forthcoming, another round of intervention by the courts can be expected.

Juvenile correctional administrators hopefully will institute rules and regulations which will guarantee due process protections for youth in correctional settings at least equal to that provided adults similarly situated. Analysis indicates this protection should be greater because most youth are too immature and are unable to adequately articulate a satisfactory defense. The position that due process protections are not necessary in a rehabilitative program, as every action is taken in "the best interest of the child," is indefensible. The very foundation of any treatment approach is that it must occur in an environment in which the juvenile feels he is being handled in a fair and just manner. Consequently, a treatment setting must necessarily provide a climate of trust, respect, honesty, and above all, fairness. Hopefully, the protections necessary to provide such an environment can be developed administratively rather than superimposed by the courts because of administrative omission. One means for accomplishing much of this task is provided by the decision making model herein. Such vehicles should be developed in response to the benefits of the administrative process, not court mandates. In providing a system which goes beyond what is required by the courts' interpretations of the Constitution, correctional administrators can not only remove themselves from the pale of judicial intervention, but also effect furtherance of institutional goals.

APPENDIX I

SUMMARY OF DECISION MAKING MODEL

	Decision Making Levels I	II	III
BEHAVIOR REQUIRING ACTION	Failure to meet pre-established individual program goals. Minor rule infraction.	Failure to meet pre-established individual program goals. Major rule infraction. Lesser law violation.	Failure to meet pre-established individual program goals. Major law violations.
DECISION MAKING STANDARDS			
Preparation Process			
Temporary restriction	No	Apply criterion	Apply criterion
Investigation	Yes	Yes	Yes
Notice	Oral	Oral	Written
Hearing Process			
Fact finder-disposition maker	Staff member	Treatment team	Treatment team
Appearance	Yes	Yes	Yes
Representation (staff)	No	No	Upon request
Witnesses (when disclosure of identity will not endanger)	Upon request	Upon request	Upon request
Standard of certainty (evidence)	Preponderance	Preponderance	Preponderance
Written record	Optional	Yes	Yes
Review Process			
Higher level review	Supervisor	Team leader	Superintendent
ALTERNATIVE DISPOSITIONS	No action	(All Level I)	(All levels I and II)
	Extra duty	Lock up 24 hours or less	Change to more restricted program
(Examples)	Restrict privileges Lock up 24 hours or less	Restrict off grounds privileges	Transfer