University of Baltimore Law Review

Volume 2
Issue 2 *Spring 1973*

Article 5

1973

# Notes and Comments: Right to Counsel at Prison Disciplinary Hearings

Mark A. Seff
*University of Baltimore School of Law*

# NOTES AND COMMENTS

## RIGHT TO COUNSEL AT PRISON DISCIPLINARY HEARINGS

*I am society's collector of debts, and*
*my purse is the bottomless maw of time*
*insatiably storing the payments of days*
*implacably totaling the months and the years . . .*
*Come—come and look upon the faces of these I hold*
*and see thereon the reflection of my image,*
*engraven as a deep and final proof*
*of society's inadequacy, of man's inhumanity . . .*
*I am gut-searching anguish destroying the man*
*who is with desperate hope,*
*waiting*
*for the letters, the visitors, that never come . . .*
*Yes, I AM THE PRISON*
*Wherein the smothering confines of a steel-barred cage*
*crush with the weight of inhuman reality;*
*wherein the endless emptiness of the days*
*and the shattering loneliness of the eternal nights,*
*repeat and repeat and repeat my message . . . endlessly.*[1]

The developing judicial attitude toward prisoners' rights is that "[a] prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."[2] The older retributive view of penology, that the inmate was a "slave of the state" with minimal legal rights,[3] has been discarded, not only because of humanitarian influences, but also by way of necessity in the wake of inmate rebellion. This note will explore and analyze the effects of a budding trend to require legal counsel at prison disciplinary hearings based substantially on fourteenth amendment due process requirements.

### I. CURRENT STATE OF PRISONERS' RIGHTS

Traditionally, prisoner complaints alleging unconstitutional treatment have been ignored by the courts, and judicial review has been avoided under the "hands-off" doctrine on the grounds that the

1. Hunt, R. L., *I Am The Prison*, 1 PRISON L. REP. 1 (Oct. 1971) (Poem by Inmate, Ariz. State Prison).
2. Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 225 U.S. 887 (1945).
3. "He [the convicted felon] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State." Ruffin v. Commonwealth, 68 Va. (21 Gratt.) 1024, 1026 (1871).

handling of prisoners was a complicated task which required expertise that the courts admittedly did not possess.[4] This doctrine was applied so mechanically that a claim which alleged that a prisoner had been beaten to death would go unreviewed.[5]

As a result, this immunity from judicial scrutiny prevented the public from acquiring knowledge of prison conditions and led to a breakdown in the corrections phase of the criminal process. The central problem was that, more often than not, prison administrators and staff also lacked the requisite expertise to deal with prison conditions.[6]

The Supreme Court recognized this problem by abolishing the "hands-off" doctrine[7] in the landmark case of *Johnson v. Avery*,[8] stating that "where state regulations applicable to inmates of prison facilities conflict with [federal constitutional] rights, the regulations may be invalidated."[9] Therefore, it appears that the "courts [are] . . . replacing the 'hands-off' approach with a determination of the reasonableness of the regulation."[10]

The primary vehicles eroding the "hands-off" doctrine have come in the areas of religion,[11] censorship,[12] and access to the courts[13] and to

4. The "hands-off" doctrine has been justified in the following manner: inasmuch as Congress has placed control of the federal prison system under the Attorney General, and inasmuch as the control of a state prison system is vested in the Governor or his delegated representatives, a federal court is powerless to intervene in the internal administration of this executive function even to protect prisoners from the deprivation of their constitutional rights. See, *e.g.*, United States *ex rel.* Morris v. Radio Station WENR, 209 F.2d 105 (7th Cir. 1953), Williams v. Steele, 194 F.2d 32 (8th Cir. 1952), *cert. denied*, 344 U.S. 822 (1952); Platek v. Aderhold, 73 F.2d 173 (5th Cir. 1934).

   For another interpretation of the "hands-off" doctrine see Millemann, *Prison Disciplinary Hearings and Procedural Due Process—The Requirement of a Full Administrative Hearing*, 31 MD. L. REV. 27, 36 n.44 (1971): "The doctrine is best described as a self-imposed limit on jurisdiction based upon respect for federal-state comity and a deference to the expertise of prison administrators."

5. State, *ex rel.* Clark v. Ferling, 220 Md. 109, 151 A.2d 137 (1959).
6. Ashman, *Rhetoric and Reality of Prison Reform*, The Daily Record (Baltimore) Aug. 29, 1972, at 1, col. 5.
7. See Note, *The Inadequacy of Prisoners' Rights to Provide Sufficient Protection for Those Confined in Penal Institutions*, 48 N.C.L. REV. 847, 849 n.8 (1970).
8. 393 U.S. 483 (1969).
9. *Id.* at 486.
10. See Note, *The Problems of Modern Penology: Prison Life and Prisoners' Rights*, 53 IOWA L. REV. 671, 671-72 (1967); *cf.* Haines v. Keiner, 404 U.S. 519 (1972).
11. The cases now establish that prisoners have rights to gather for corporate religious services, to consult a minister of their faith, to possess religious books like the *Koran* and *Message To The Blackman in America*, to subscribe to religious literature, including *Muhammad Speaks*, to wear unobtrusive religious medals and other symbols, to have prepared a special diet required by their religion, and to correspond with their spiritual leader. . . . [H]owever, . . .where prison officials can make an affirmative showing that the religious sect in question abuses. . . [these various rights,]. . .reasonable limitations may be imposed.

    Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 484 (1971).
12. *See generally* Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971), in which inmates were given the right to send letters concerning prison management to the news media, as long as those letters did not contain or concern control and plan of escape, or device for evading prison regulation; in Van Ermen v. Schmidt, 343 F. Supp. 377 (W.D. Wisc. 1972), the court stated that Wisconsin officials must show "compelling interest" to justify rule pro-

counsel.[14] "By recognizing that the Constitution's protections extend through prison walls, [the recent trend has] set the stage for the application of due process principles to prison [disciplinary hearings]."[15]

## II. PROCEDURAL DUE PROCESS AT PRISON DISCIPLINARY HEARINGS

The courts in recent years have been more willing, as in other areas of prisoners' rights, to examine inmates' alleged denials of procedural due process at prison disciplinary hearings. Since "[i]t is now well established that incarceration does not mean that prisoners have no constitutional rights,"[16] the forums in which these rights have been challenged must now, in order to prevent arbitrary treatment, adhere to judicially established safeguards.[17] The Federal District Court for Maryland, in *Bundy v. Cannon*,[18] discussed the nature of procedural due process in the prison setting in stating that the type of proceeding necessary to guarantee a particular right depends upon "[t]he nature of

---

hibiting receipt of law books other than from publisher; Sostre v. Otis, 330 F. Supp. 941 (S.D.N.Y. 1971), held that incoming books and periodicals may not be censored unless the inmate is given notice that the literature was being censored and unless the censorship was rendered by a body that would be expected to act fairly; the court in Fortune Society v. McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970), stated that prisoners have a right to receive any publications except those that the prison can show a clear and present danger to security or involve some other compelling interest; and in Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970), the court entered a temporary restraining order ending the reading and censorship of all incoming and outgoing mail, including that of courts, government officials and attorneys.

13. *See generally Ex Parte* Hull, 312 U.S. 546 (1941) (state prisons may not abridge or impair an inmate's right to apply to a federal court for a writ of habeas corpus); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972) (prison officials may not punish inmates for bringing suit against the prison administration); Meola v. Fitzpatrick, 322 F. Supp. 878 (D. Mass.1971) (prison officials may not confiscate or delay legal pleadings or correspondence addressed to the courts); Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971) (prison officials must establish a library which insures that indigent prisoners can obtain a fair hearing by the judiciary).
14. Johnson v. Avery, 393 U.S. 483 (1969) (legitimized the "jailhouse lawyer"); Goodwin v. Oswald, 462 F.2d 1237 (2d Cir. 1972) (prison official required to deliver letters from the Legal Aid Society to inmate-clients advising them on legal status of a prisoner's union); Smith v. Robbins, 454 F.2d 696 (1st Cir. 1972) (court enjoined inspection of incoming mail from attorneys for contraband unless done in the inmate's presence); Jansson v. Grysen, Civil No. 6-130-71 C.A. (N.D. Mich. June 5, 1972) (jail authorities may not open or restrict length of inmate's mail to or from official or attorneys).
15. Millemann, *supra* note 4, at 37. For an extensive discussion of prisoner's rights, *see generally* Hollen, *Emerging Prisoners' Rights*. 33 OHIO ST. L.J. (1972); *Symposium: Prisoner's Rights*, 63 J. CRIM. L.C. & P.S. 154 (1972); Tibbles, *Ombudsmen for American Prisons*, 48 N. DAK. L. REV. 383 (1972).
16. Bundy v. Cannon, 328 F. Supp. 165, 172 (D. Md. 1971), citing Lee v. Washington, 390 U.S. 333 (1968); Johnson v. Avery, 393 U.S. 483 (1969); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966).
17. Comment, *Intra-Penal Disciplinary Proceedings*, 1971 U. TOLEDO L. REV. 618, 627.
18. 328 F. Supp. 165 (D. Md. 1971).

the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding . . . ."[19]

To determine whether the requirements of due process apply to prison disciplinary hearings a "balancing test" has been suggested,[20] whereby the courts, in examining the rights of the prisoners, must balance the necessities of managing and administrating a prison against the inmate's interest in the right in question.[21] The Supreme Court, in *Goldberg v. Kelly*,[22] stated that the affording of procedural due process is "influenced by the extent to which [one] may be 'condemned to suffer grievous loss,' . . . and depends upon whether the . . . interest in avoiding that loss outweighs the governmental interest in summary adjudication."[23]

It must then be decided when to invoke the "balancing test," *i.e.* what is the nature of the inmates' liberty, and when must it be protected by procedural due process? The federal courts[24] are in agreement that the loss of "good conduct time,"[25] which has the effect of extending the inmate's stay in prison, and the imposition of segregation or solitary confinement, which may affect the inmate's sanity,[26] both involve a sufficiently grevious loss of liberty to require due process hearings. Furthermore, an adverse disciplinary record may affect the inmate's eligibility for parole.[27]

The traditional rebuttal by the state to prison disciplinary due process hearings is that there is no *right* to good time and maximum institutional freedom; instead, they represent good time as a privilege granted by the state to the prisoner. However, the Supreme Court has refuted this argument in the landmark case of *Morrissey v. Brewer*,[28] in

---

19. *Id.* at 172, citing Hannah v. Larche, 363 U.S. 420, 442 (1960).
20. *See* Millemann, *supra* note 4, at 34.
21. Hermann, Schwartz, Kolleeny, Campana & Harvey, *Due Process in Prison Disciplinary Proceedings*, 29 GUILD PRAC. 79, 80 (1972).
22. 397 U.S. 254 (1970).
23. *Id.* at 263, citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter J., concurring). *See also* Morrissey v. Brewer, 408 U.S. 471 (1972) (citing favorably the *Goldberg* standard); Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961).
24. *See* cases cited note 36 *infra.*
25. Millemann, *supra* note 4, at 40 n.63 states:
    > MD. ANN. CODE art. 27, §§ 700 (b)-(d) (1971) authorize five days a month diminution of sentence for inmates "not guilty of a violation of the discipline or. . .rules" of the institution and an additional five days monthly for inmates who excel in their employment or maintain satisfactory progress in educational and training courses. Section 700 (e) requires the forfeiture of that "good time" which is earned in the month in which an inmate violates prison rules or exercises a lack of fidelity or care in the performance of his work or in his educational and vocational training. Section 700 (e) also empowers the Department of Corrections to deduct "a portion or all" of an inmate's "good time" as punishment for any of the above-mentioned delinquencies.
26. *See* Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *aff'd in part, rev'd in part, modified in part sub nom.* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971).
27. Hermann, *supra* note 21, at 84.
28. 408 U.S. 471 (1972).

stating that: "It is hardly useful any longer to try to deal with this problem [parole revocation] in terms of whether the liberty is a 'right' or a 'privilege.' By whatever name the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment."[29] The *Sands v. Wainwright*[30] court recently stated that the "rights-privileges" distinction is nonexistent, *i.e.* once a privilege is granted, the inmate is entitled to it. Therefore, procedural due process comes into play when the entitlement is taken away.

Once it has been established in a particular case that the inmate may suffer grievous loss or that the inmate's right outweighs the prison's interest in impairing that right, it is necessary to determine the specific protections the courts are employing to effect that inmate's right of procedural due process. Initially, some courts have indicated that due process standards were not met in the particular disciplinary hearings without going so far as to state what constituted adequate standards. For example, in *Talley v. Stephens*,[31] a prisoner had been summarily whipped for alleged violations. The court enjoined use of the strap until its use was surrounded by appropriate due process safeguards, but the court did not discuss what would constitute appropriate safeguards. More recently, a similar position was taken in *Sostre v. McGinnis*,[32] where the Second Circuit Court of Appeals overruled an order that the inmate petitioner may not forfeit earned good time credit unless specific procedural protections were implemented.[33] However, in overruling the District Court, the Court of Appeals stated: "[W]e are not to be understood as disapproving the judgment of many courts that our constitutional scheme does not contemplate that society may commit lawbreakers to the capricious and arbitrary actions of prison officials."[34] In other words, while recognizing the inmate's right to due process, the court did not indicate its approval of specific delineated procedural protections.[35]

Other courts have been more precise in their approach to the

---

29. *Id.* at 482.
30. Civil No. 71-339-Civ-J-S (M.D. Fla., Jan. 5, 1973).
31. 247 F. Supp. 683 (E.D. Ark. 1965). *See also* United States *ex rel.* Campbell v. Pate, 401 F.2d 55 (7th Cir. 1968).
32. 442 F.2d 178 (2d Cir. 1971).
33. The specific procedural protections included: "(a) written notice of the charges against him; (b) a recorded hearing before a disinterested official with a chance to cross-examine adverse witnesses and call witnesses in his own behalf; (c) the right to retain counsel substitute; and . . . (d) a written decision . . . ." *Id.* at 195.
34. *Id.* at 198.
35. However, the court did relent and to some extent indicated what process was "due":
    > If substantial deprivations are to be visited upon a prisoner, it is wise that such action should at least be premised on facts rationally determined. This is not a concept without meaning. In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him, and afforded a reasonable opportunity to explain his actions.

    *Id.* (citations omitted).

question of what constitutes due process. In *Bundy v. Cannon*,[36] seventy-two inmates involved in a work stoppage were transferred from a medium security institution (Maryland House of Correction), to the punitive segregation quarters of a maximum security institution (Maryland Penitentiary). Seventeen of the seventy-two inmates accused of specific acts of misconduct were to be indefinitely confined in segregation at Maryland Penitentiary, forfeit five days of good conduct time, and lose another hundred days upon approval of the Commissioner of the Department of Corrections. The other fifty-five were to be confined in segregation at the penitentiary for at least thirty days. In none of the cases did the inmate receive, prior to his hearings, written notice of any charges or allegations of misconduct, nor was he provided with representation at the hearing or allowed to present witnesses of his own or to cross-examine his accusers. The Federal District Court for Maryland held that punishment imposed in this manner violated the requirements of procedural due process.

While the *Bundy* decision was still pending, the Department of Corrections promulgated the following rules:[37]

1) The inmate shall be furnished a written statement of the charges not later than forty-eight hours after the alleged violation, and the inmate will appear before the disciplinary adjustment team within seventy-two hours of the alleged infraction;

2) A hearing shall be held before an impartial tribunal in all cases which could result in the imposition of serious punishment;[38]

3) The inmate shall appear before the adjustment team to discuss his case and he shall be represented by another inmate or a staff member (if the accused or representative desires);

4) The inmate may call witnesses (including his accusers) and may question such witnesses;

5) The adjustment team shall make a written report of the proceedings to include a summary of the evidence, the team's

---

36. 328 F. Supp. 165 (D. Md. 1971). *See* cases cited note 16 *supra*. *See also* Krause v. Schmidt, 341 F. Supp. 1001 (W.D. Wis. 1972), in which inmates won a preliminary injunction against disciplinary sanctions imposed without procedural due process. The court imposed *Bundy* procedural protections; Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971), applied *Bundy* due process requirements to disciplinary hearings in a Virginia state prison whenever there was an imposition of solitary confinement, transfer to maximum security, loss of good-time, or 10 day padlock confinement; Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971), appeal docketed, No. 71-2357, 9th Cir., Aug. 30, 1971, held that state-instituted disciplinary proceedings at San Quentin had to be halted until some due process, equivalent to that in *Bundy*, was instituted; Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970), outlined detailed procedural due process guidelines; *cf.* Kritsky v. McGinnis, 313 F. Supp. 1247 (N.D.N.Y. 1970), *aff'd* 456 F.2d 79 (2d Cir. 1971) (*en banc*), *cert. granted sub nom.* Oswald v. Rodriguez, 407 U.S. 919 (1972).

37. 328 F. Supp. at 175. The cited rules apply only to major infractions (possible confinement for more than fifteen days in segregation and/or the loss of good time of more than five days).

38. The Maryland Department of Corrections employs hearing officers to satisfy this requirement.

evaluation and decision, and the reason for such decision. The decision of the team must be based on substantial evidence;

6) The inmate shall be informed of the decision and may appeal if he objects to the decision.[39] Judge Thomsen indicated his approval of these standards in his opinion.[40]

The trend toward recognizing the inmate's constitutional right to procedural due process has expanded since the *Bundy* decision. In *Collins v. Schoonfield*,[41] the court granted specific due process rights to pre-trial detainees in Baltimore City Jail who were threatened with confinement in isolation or solitary confinement;[42] and in *United States ex rel. Neal v. Wolfe*,[43] a Pennsylvania inmate won a $514.60 damage judgment against the state prison officials for sixteen days of solitary confinement, and loss of job status imposed without due process of law. The court recognized that due process demanded the imposition of standards similar to those recognized in *Bundy*, *i.e.* advance notice of charges, a hearing before an impartial tribunal, and the opportunity to call defense witnesses and cross-examine adverse witnesses. In *Brown v. Schubert*,[44] when the superintendent of a state hospital ordered the confined plaintiffs to be transferred to maximum security facilities after learning that the patients had mailed letters to the press, the district court granted the plaintiffs a preliminary injunction because the transfers were made without due process of law; reference was made to *Bundy*-type procedural protections. In *Lathrop v. Brewer*,[45] the court ruled that the prison officials' failure to contact inmates' witnesses in disciplinary proceedings resulted in a denial of confrontation and cross-examination which constituted a violation of due process and therefore rendered the proceedings null and void. Prisoners' procedural due process rights were further recognized in *Sands v. Wainwright*,[46] which not only granted *Bundy* procedural protections to Florida prison inmates, but also allowed inmates to retain counsel at disciplinary hearings.[47]

---

39. The rules provide that the warden shall review all cases involving major violations. The author of this note, a former employee of Maryland Diagnostic-Reception Center, witnessed several disciplinary proceedings in which the hearing officer always informed the inmate that his decision was appealable.
40. 328 F. Supp. at 174. *Accord*, Morrissey v. Brewer, 408 U.S. 471 (1972).
41. 344 F. Supp. 257 (D. Md. 1972). Although *Collins* was a case involving constitutional rights of pre-trial detainees (persons who have forfeited no rights due to conviction), this circumstance alone does not distinguish the *Collins* rule from other decisions involving prisoners. The state has the same interest in the speedy disposition of a disciplinary case in both jail and prison situations; the pre-trial detainee and prison inmate have the same interest in avoiding segregated confinement.
42. *Id.* at 273-74. *See also* Taylor v. Sterrett, 344 F. Supp. 411 (N.D. Tex. 1972). *Contra*, Clements v. Hamilton, Civil No. 7001 (W.D. Ky., May 3, 1972).
43. 346 F. Supp. 569 (E.D. Pa. 1972).
44. 347 F. Supp. 1232 (E.D. Wis. 1972).
45. 340 F. Supp. 873 (S.D. Iowa 1972).
46. Civil No. 71-339-Civ-J-S (M.D. Fla., Jan. 5, 1973).
47. *Id.*

## III. RIGHT TO COUNSEL AT PRISON DISCIPLINARY HEARINGS

### A. DUE PROCESS

Against this background of emerging prisoners' rights in such areas as first amendment freedoms, right to access to the courts, and the right to procedural due process, there is an emerging attitude that prisoners are entitled to assistance by counsel at disciplinary hearings.[48] The underlying premise is that the right to counsel in all criminal prosecutions, as a necessary ingredient of due process, is a fundamental right, and that the state is precluded from abridging that right unless there is a "compelling state interest" to be safeguarded.[49] The historical basis for this concept is found in *Powell v. Alabama*,[50] in which the Supreme Court held that a failure of the state court to appoint counsel in a capital case violated "fundamental fairness," thereby denying fourteenth amendment due process protection. The Court reasoned that a valid hearing has always included the right to the aid of counsel and that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."[51]

48. Brief for Appellant at 21, Nieves v. Oswald, Dkt. No. 72-1974 (2d Cir. 1972), setting forth the following commentators who urge the presence of counsel at prison disciplinary hearings:
    Hollen, Emerging Prisoners Rights, 33 Ohio St. L. J. 1, 60 (1972); Turner & Daniel, Miranda in Prison: The Dilemma of Prison Discipline and Intramural Crime, 21 Buff. L. Rev. 759 (1972); Forys, Constitutional Rights of Prisoners, 55 Mili. L. Rev. 1, 39 (1972); Brant, Prison Disciplinery [*sic*] Proceedings; Creating Rights, 21 Clev. St. L. Rev. 83 (1972); Singer, Confining Solitary Confinement: Constitutional Arguments for a "New Penology," 56 Iowa L. Rev. 1251, 1292 n.188 (1971); Millemann, Prison Disciplinary Proceedings and Procedural Due Process, 31 Md. L. Rev. 27 (1971); 1 Kraft, Prison Disciplinary Practices and Procedures, 47 N. D. L. Rev. 9, 71 (1970); Jacob, Prison Discipline and Inmate Rights, 5 Harv. Civ. Libs.- Civ. Rts. L. Rev. 227, 247 (1970). Note, Scope of 14th Amendment Due Process: Right to Counsel in Disciplinary Proceedings, 1971 Utah L. Rev. 275. Note, Decency and Fairness: An Emerging Judicial Role for Prison Reform, 57 Va. L. Rev. 841, 874-75 (1971); Note, Procedural Due Process in Prison Disciplinary Proceedings, 2 Loy. L. J. 110 (1971); Note, Procedural Due Process for Peno-Correctional Administration: Progressive and Regressive, 45 St. Johns 468, 483 (1971); Note, Federal Court Intervention in State Prison Disciplinary Hearings to Guarantee 14th Amendment Due Process, 17 Wayne L. Rev. 931, 949 (1971). See also NSCD, A Model Act for the Protection of Rights of Prisoners § 4 (1972); President's Commission on Criminial Justice and Administration, Task Force: Corrections 86 (1967).
49. *See* Powell v. Alabama, 287 U.S. 45, 70 (1932).
50. 287 U.S. 45 (1932).
51. *Id.* at 68-69. *Contra*, Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968) (no right to counsel at disciplinary proceeding against high school student); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967) (no right to counsel at disciplinary proceeding against cadet attending Merchant Marine Academy). These cases are distinguishable from prison disciplinary hearings because the amount of personal liberty at stake in prison hearings entitles a prisoner to greater protection than the possible suspension or expulsion from a school or college. Furthermore, most students are better able to protect their rights than presumably less-educated prison inmates. Millemann, *supra* note 4, at 56 n.60.

More recently, the Supreme Court[52] has interpreted the due process clause of the fourteenth amendment as incorporating the protections of the sixth amendment, thus making them applicable to the states. Although the accused now has a right to counsel in all cases involving the imposition of one or more days of incarceration,[53] along with the recognized pre-trial protections,[54] the courts until recently have been reluctant to afford right to counsel protections after sentencing.[55]

However, in *Mempa v. Rhay*,[56] the Supreme Court held that as a result of due process requirements, a defendant had a right to counsel at a post-trial proceeding for revocation of his probation since imposition of deferred sentencing is a critical stage of a criminal proceeding materially affecting the substantial rights of the accused. *Mempa* arose under a Washington State law[57] which requires the sentencing judge to impose the statutory maximum, but also requires that he submit his recommendation to the parole board regarding the length of time the prisoner should serve.[58] Though the final determination of the sentence is the responsibility of the parole board, the judge's recommendation is usually given considerable weight. The Supreme Court held that the right to counsel attaches at the hearing to determine the judge's recommendation; counsel is deemed necessary for marshalling the facts, introducing evidence of mitigating circumstances, and giving general aid and assistance to the defendant in presenting his case as to the length of sentence to be served. Although many courts have interpreted *Mempa* as restricting the right to counsel to sentencing proceedings and denying the assistance of counsel where the defendant has been sentenced but has not yet been placed on probation,[59] *Mempa* is more accurately "an important incursion by the federal judiciary into the state peno-correctional area."[60] The distinction lies

---

52. Gideon v. Wainwright, 372 U.S. 335 (1963).
53. Argersinger v. Hamlin, 407 U.S. 25 (1972).
54. *See generally* Coleman v. Alabama, 399 U.S. 1 (1970) (appointed counsel required at preliminary hearing); Miranda v. Arizona, 384 U.S. 436 (1966) (appointed counsel required when suspect taken custody); Escobedo v. Illinois, 378 U.S. 478 (1964) (appointed counsel required when the investigation focuses on the individual suspect); Hamilton v. Alabama, 368 U.S. 52 (1961) (appointed counsel required at arraignment).
55. *See* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971).
56. 389 U.S. 128 (1967).
57. *See* REV. CODE WASH. ANN. §§ 9.95.010, 9.95.030 (1961).
58. 389 U.S. at 135.
59. *See, e.g.*, Shaw v. Henderson, 430 F.2d 1116 (5th Cir. 1970); Brown v. Warden, 351 F.2d 564 (7th Cir. 1965), *cert. denied*, 382 U.S. 1028 (1966); United States v. Hartsell, 277 F. Supp. 993 (E.D. Tenn. 1967). *See also* Knight v. State, 7 Md. App. 313, 255 A.2d 441 (1969) (probationer may be represented at hearing by counsel but an indigent has no right to have counsel appointed unless due process would be affronted. *But see* Laquay v. State, __ Md. __, 299 A.2d 527 (1973) (although sentence had already been imposed, an indigent probationer was denied due process, under the circumstances, by lack of appointed counsel at the revocation hearing).
60. Note, *Federal Court Intervention in State Prison Internal Disciplinary Hearings to Guarantee Fourteenth Amendment Procedural Due Process*, 17 WAYNE L. REV. 931, 949 (1971). For decisions requiring the presence of counsel at parole revocation hearings see Mozingo v. Craven, 341 F. Supp. 296 (C.D. Cal. 1972); Goolsby v. Gagnon, 322 F. Supp.

in the fact that in Washington the judge has no choice in determining the length of the sentence; it is set by statute and ultimately determined by the parole board. In other states, the judge has full responsibility for setting sentence. The role of counsel in *Mempa* is to produce facts for indirect use by the parole board in determining whether the probationer's conditional liberty will be revoked. The Court's reasoning, that counsel is required at every stage of a criminal proceeding where the substantial rights of the accused may be affected, implicitly recognized that penal proceedings affecting the freedom of the individual and the form of his incarceration require counsel to protect his personal liberty, *i.e.* his substantial rights.[61] By analogy, since prison disciplinary decisions affect the freedom of the accused inmate (revocation of good time extends his sentence) as well as the form of his incarceration (institutional confinement versus solitary confinement), *Mempa* arguably requires counsel at disciplinary hearings to protect the substantial rights of the accused inmate.[62]

The Supreme Court recently had the opportunity to rule on the issue of the right to counsel at post-trial proceedings in *Morrissey v. Brewer*.[63] Although the Court applied *Bundy* due process protections to parole revocation hearings, the majority refused to rule on whether a parolee is entitled to the assistance of retained counsel, or to appointed counsel if he is indigent.[64] Three justices felt that the Court should

---

460 (E.D. Wis. 1971); People *ex rel.* Combs v. LaVallee, 29 App. Div. 2d 128, 286 N.Y.S. 2d 600 (1968); Commonwealth v. Tinson, 433 Pa. 328, 249 A.2d 549 (1969); and for decisions requiring the presence of counsel at probation revocation hearings see Mempa v. Rhay, 389 U.S. 128 (1967); Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969); Gunsolus v. Gagnon, 454 F.2d 416 (7th Cir. 1971), *cert. granted*, 40 U.S.L.W. 3617 (U.S. June 26, 1972) (No. 71-1225); Perry v. Williard, 247 Ore. 145, 427 P.2d 1020 (1967); Oestrich v. State, 55 Wis. 222, 198 N.W.2d 664 (1972) (requires counsel at probation and parole revocation hearings).

61. *See* Comment, *Due Process: The Right to Counsel in Parole Release Hearings*, 54 IOWA L. REV. 497, 503 (1968). In administrative hearings where the personal liberty of a party is at stake, the proceedings closely approximate criminal proceedings and therefore require the presence of counsel. Examples of such hearings requiring the presence of counsel in most jurisdictions include commitments for insanity or communicable disease and commitments under several psychopathy laws.

*See also* MD. ANN. CODE art. 27A, § 4(b)(5) (1971), which provides that legal representation shall be provided to indigents in "any . . . proceeding where possible incarceration pursuant to a judicial commitment of individuals in institutions of a public or private nature may result."

62. *See* Note, *supra* note 60, at 949, which states: "The liberal reading of *Mempa* therefore calls for the right to counsel in prison disciplinary hearings because determination of length of incarceration is an obviously 'critical stage' where rights of the prisoner are affected; and parole decisions are based on inmate conduct as determined by the prison disciplinary board."

*See also* Smith & Pollack, *After Conviction: Therapy or Punishment*, 1 STUDENT LAW. 7, at 51 (1973), which states: "The [*Mempa*] decision . . . may be . . . an important first step in broadening the post-adjudicatory rights of probationers, *prisoners* and parolees." (emphasis added).

63. 408 U.S. 471 (1972).

64. *See* Singer, *Morrissey v. Brewer: Implications for the Future of Correctional Law*, 1 PRISON L. REP. 287, 289 (1972), which states:

[T]he Court's reluctance to hold that there was a right to counsel may stem from

have ruled on the right to counsel question: Justices Brennan and Marshall stated that the parolee must at least be *allowed* to retain counsel,[65] while Justice Douglas expressed the view that the parolee should be *entitled* to counsel.[66] This dilemma was discussed in *Sands*,[67] where the court denied inmates the *right* to appointed counsel. The Court recognized, however, that although there is no duty upon the state to furnish counsel in prison disciplinary proceedings, an inmate must be allowed to retain an attorney if he so desires.[68]

While it has not been conclusively stated by the courts that inmates have the right, or must be allowed, to retain counsel at disciplinary proceedings, this procedural safeguard has been applied in differing areas of civil administrative proceedings. Using the previously discussed "balancing test" where private interests are at stake, counsel is allowed when a welfare recipient may be denied benefits,[69] or where a public housing tenant may be evicted.[70] Prisoners who arguably have a potentially greater interest at stake than welfare recipients and public housing tenants, still are not allowed or have the right to legal counsel in most jurisdictions.[71] The court in *Landman v. Royster*[72] recognized the potential severity of prison discipline[73] and concluded that inmates should be entitled to representation by retained counsel at proceedings which threaten these interests since these "deprivation[s] may be momentarily as telling as the loss of financial support or housing . . . ."[74]

Furthermore, while there is no significant disparity between the conditional liberty[75] at stake in prison disciplinary hearings and the

two other considerations: (a) the issue was not directly before the Court; (b) this opinion was written by Chief Justice Burger who would have had to repudiate *in toto* his opinion in *Hyser v. Reed*, were he to find that there was a right to counsel at the parole revocation hearings.

*See also* Gunsolus v. Gagnon, 454 F.2d 416 (7th Cir. 1971), *cert. granted*, 40 U.S.L.W. 3617 (U.S. June 26, 1972) (No. 71-1225), which presents before the Supreme Court the question of the right to counsel at probation proceedings.

65. 408 U.S. at 491.
66. *Id.* at 498.
67. Civil No. 71-339-Civ-J-S (M.D. Fla., Jan. 5, 1973).
68. *Id.* at 28.
69. Goldberg v. Kelly, 397 U.S. 254 (1970).
70. Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971).
71. While staff or inmate substitute counsel are required in many jurisdictions, legal counsel is not even allowed upon request. *See, e.g.*, Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971); Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970). *Contra*, Sands v. Wainwright, Civil No. 71-339-Civ-J-S (M.D. Fla., Jan. 5, 1973).
72. 333 F. Supp. 621 (E.D. Va. 1971).
73. *Id.* at 652, stating:

> A man in solitary confinement is denied all human intercourse and any means of diversion. Padlock confinement isolates the individual as well from his fellows. Maximum security confinement is a lesser penalty, but like the others it interrupts a prisoner's efforts at rehabilitation and curtails many recreational activities. Loss of good time credit may in effect amount to an additional prison sentence.

74. *Id.*
75. Inmate conditional liberty encompasses institutional freedom from solitary confinement and traditional freedom which is denied by the inability to earn good time.

conditional liberty at stake in probation or parole revocation hearings, probationers and parolees, in a growing number of cases, are entitled to legal assistance.[76] Other situations which require presence of counsel include: the possibility that the defendant may be imprisoned for one day,[77] the possibility of commitment to a mental institution,[78] and possible confinement in a juvenile institution.[79] Certainly "the interest which [prisoners] have at stake in these disciplinary hearings is substantial enough, and indistinguishable enough, from the above-cited interests to require representation by retained counsel when that interest is to be revoked."[80]

As previously discussed, where prisoners show a grevious loss of liberty, the right to counsel should attach at disciplinary hearings unless the state will be unduly burdened. Such state interests will certainly encompass the argument that the presence of counsel will delay disciplinary hearings and will constitute an undue administrative burden upon prison officials and the conduct of disciplinary hearings.[81] Although the delay is possibly significant since it seemingly erodes the principles that punishment should be speedy and that pre-hearing detention should be short, "[t]he question is not whether, because of delay, counsel should be excluded but rather, what reasonable rules and regulations would allow the presence of counsel without exacerbating the delay problem."[82] One court solved this problem by stating that "a prisoner who desires to secure counsel . . . may reasonably be limited to four days."[83] This state interest in summary adjudication, however, ignores the other goal of the disciplinary process, *i.e.* accuracy in finding facts and the fairness of the result.[84] One reason for the Supreme Court's requirement, in *Argersinger v. Hamlin*,[85] of counsel in any criminal case carrying a potential prison sentence is that the presence of counsel can play some role in slowing down "assembly-line justice."[86]

Other state interests include the burden which would be placed upon prison officials if prisoners were allowed legal counsel. The prison staff

76. *See* cases cited note 60 *supra*.
77. Argersinger v. Hamlin, 407 U.S. 25 (1972).
78. Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968).
79. *In re* Gault, 387 U.S. 1 (1967). *See also* State *ex rel.* Bernal v. Hershman, 54 Wis. 2d 626, 196 N.W.2d 721 (1972) (requires counsel at proceedings to revoke juvenile's "liberty under supervision").
80. Brief for Plaintiff at 34, Inmates v. McColley, Civil No. 72-764-M (D. Md. 1973) [hereinafter cited as Brief for Plaintiff], citing Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Krause v. Schmidt, 341 F. Supp. 1001 (W.D. Wis. 1972). *See also* Campbell v. Rodgers, Civil No. 1462-71 (D.D.C., Jan. 11, 1972), where an amended consent order provided for representation by counsel or law students at disciplinary hearings in the District of Columbia jail.
81. Brief for Plaintiff, *supra* note 80, at 38.
82. *Id.* at 39. *See also* Morrissey v. Brewer, 408 U.S. 471 (1972).
83. Landman v. Royster, 333 F. Supp. 621, 654 (E.D. Va. 1971).
84. Brief for Plaintiff, *supra* note 80, at 39.
85. 407 U.S. 25 (1972).
86. *Id.* at 36.

would have to contact the inmate's attorney; indigent inmates would conceivably claim they are entitled to appointed counsel if such representation may be retained by financially able inmates;[87] and the disciplinary hearings may be disrupted by the presence of counsel intimidating legally untrained hearing officers.

While these contentions may justify limiting the role of counsel, they do not constitute such a "compelling state interest" as to weight the "balancing test" in favor of the state: 1) requiring prison employees to make telephone calls is certainly not a substantial burden on the state justifying the *total* exclusion of legal counsel from disciplinary hearings;[88] 2) the presence of counsel will *not* subvert the authority of the hearing officers since the rules of evidence do not apply to these proceedings;[89] 3) the hearing officer is fully empowered to order the attorney to leave if he causes any problems;[90] and 4) there are administrative settings which allow the presence of counsel though the hearing officer is without legal training.[91] Regarding an indigent inmate's claim to appointed counsel, it is well accepted that "the state may choose to solve part of a problem without dedicating itself to a complete solution."[92] Even if there were some requirement for appointing counsel to represent indigent inmates, there are adequate legal sources available without placing the expense of providing counsel upon the state.[93] Constitutional rights, however, cannot be denied

87. Millemann, *supra* note 4, at 56 n.15, states:

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

88. In Inmates v. McColley, Civil No. 72-764-M (D. Md. 1973) (a case now in litigation involving the right to counsel at prison disciplinary hearings), the plaintiffs' expert witness, in describing the disciplinary system at the Kansas State Penitentiary, stated that telephoning attorneys for inmates imposed a minimal additional burden on the penitentiary staff. Brief for Plaintiff, *supra* note 80, at 22.
89. Bundy v. Cannon, 328 F. Supp. 165, 172 (D. Md. 1971).
90. Brief for Plaintiff, *supra* note 80, at 42.
91. *See* MD. ANN CODE. art. 41, § 109 (1971) (parole system places responsibility for revocation decisions with the parole board, the members of which are not required to be attorneys); Morrissey v. Brewer, 408 U.S. 471, 486 (1972) (independent decision maker at a parole revocation hearing need not be a lawyer). *See also* Goldberg v. Kelly, 397 U.S. 254 (1970); Caulder v. Durham Housing Auth., 433 F.2d 998 (4th Cir. 1970).
92. Brief for Plaintiff, *supra* note 80, at 41, citing Dandridge v. Williams, 397 U.S. 471 (1970); Sands v. Wainwright, Civil No. 71-339-Civ-J-S (M.D. Fla., Jan. 5, 1973) (no right to appointment of counsel in hearings, but inmate may retain counsel if desired).
93. The Maryland Public Defender System and the Baltimore Legal Aid Bureau's Prisoner Assistance Project are examples of potential sources. Also, third year law students would be qualified to represent prisoners. *Cf.* MD. R. CIV. P. 18(c) (allowing 3d year students to appear in court under supervision of counsel). Many law schools have prisoner's aid programs which could be of assistance.

because of a lack of funds.[94] The role of counsel in this setting is not to challenge the role of correctional officers, but to develop facts which aid in reaching a fair decision.[95]

## B. THE CLUTCHETTE AND MIRANDA DILEMMA

In the context of the prison disciplinary setting, many of the offenses committed by inmates also constitute crimes, whereby the inmate may be prosecuted by the state. Some of these offenses include charges of assault against another inmate (or on a guard), possession of weapons, rioting, possession or sale of drugs, and escape. At their option, prison adjustment teams refer cases to the district attorney. In these situations, the accused inmate is given the standard *Miranda* warnings,[96] including his right to remain silent, his right to counsel and the fact that anything he says at the *disciplinary hearing* may be used against him at his subsequent trial. "Should he [the inmate] then ask for the assistance of counsel, either retained or appointed, he is told that this right attaches *only* when he is questioned by the district attorney."[97] The dilemma faced by an inmate in this predicament is that, should he choose to remain silent pursuant to his fifth amendment rights, the disciplinary committee may still proceed to adjudicate his case; thus the inmate is compelled to give up the right to present an affirmative defense. "Should he desire to make a statement in his own behalf, for example, a statement that he did do the act with which he is charged but the circumstances were such as to mitigate his disciplinary punishment, he does so at the peril of having his "confession" admitted as evidence in a state prosecution."[98]

To solve this dilemma, the court in *Clutchette v. Procunier*[99] decided, among other available choices,[100] that the prisoner must be afforded counsel, *not a counsel-substitute*, when he is charged with a prison rule violation which may be punishable by state authorities. In

---

94. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

95. Brief for Plaintiff, *supra* note 80, at 42 n.106 (plaintiff's expert witness testified that he, as chairman of the disciplinary board, often discharged some of the responsibilities which would normally be those of a "prosecutor").

96. *See also* Turner & Daniel, *Miranda in Prison: The Dilemma of Prison Discipline and Intramural Crime*, 21 BUFF. L. REV. 759, 761 n.11 (1972) [hereinafter cited as Turner].

97. Clutchette v. Procunier, 328 F. Supp. 767, 777 (N.D. Cal. 1971), *appeal docketed*, No. 71-2357, 9th Cir., Aug. 30, 1971.

98. *Id.*

99. 328 F. Supp. 767 (N.D. Cal. 1971).

100. *See* Turner, *supra* note 96, at 764–65, which states:

> [Instead of granting the inmates the right to counsel, other available alternatives are]: . . . (1) no disciplinary punishment at all would be imposed and the state would rely on criminal prosecution as the only sanction; . . . (3) a statutory or judicially implied immunity would be provided, permitting the inmate to defend himself in the disciplinary proceeding without the risk that his statements could be used against him in the criminal prosecution; (4) the officials could decline, as a

*Miranda*, "the Supreme Court recognized that custodial interrogation[101] of a person suspected of a crime 'contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.' "[102] Therefore, the Court held that procedural safeguards must be employed to protect the fifth amendment privilege against self-incrimination when a person suspected of criminal conduct is held in custody for questioning.[103] In the subsequent case of *Mathis v. United States*,[104] the Supreme Court stated that prisoners are entitled to *Miranda* warnings when there is a chance that an incident will be criminally prosecuted.[105] The court in *Clutchette* reaffirmed this principle, concluding that "[t]he need for protection of the [fifth amendment] privilege is even greater in the context of prison disciplinary hearings because there is even greater pressure to abandon the privilege caused by the necessity of conducting a defense to administrative charges."[106] In any proceeding in which an accused party exercises his right to remain silent, he sacrifices one means of defense. However, in the normal criminal prosecution, the defendant still retains the means of defending himself by having his attorney call and cross-examine witnesses. Furthermore, the defendant is entitled to the presumption of innocence with the burden of proof (beyond a reasonable doubt) on the state, a procedural safeguard unheard of within the prison hearing room. Putting a choice to the prisoner to abandon one right in favor of another is unquestionably unconstitutional.[107]

The logical argument against the application of *Miranda* rights to prison disciplinary hearings is that the inmates are protected by the "prophylactic" exclusionary rule.[108] However, application of this rule would not protect inmates against the risk of volunteering statements

---

matter of policy, to give the *Miranda* warnings, thus rendering inadmissible in court whatever statements the prisoner might make in the disciplinary proceeding; and (5) the disciplinary proceeding would be postponed until after the criminal prosecution had concluded.

101. "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or *otherwise deprived of his freedom in any significant way*." Miranda v. Arizona, 384 U.S. 436, 444 (1966) (emphasis added).
102. Carter v. McGinnis, 351 F. Supp. 787, 792 (1972), citing Miranda v. Arizona, 384 U.S. 436, 467 (1966).
103. 384 U.S. at 478.
104. 391 U.S. 1 (1968).
105. *Id.* at 4.
106. Brief for Plaintiff, *supra* note 80, at 51. Clutchette v. Procunier, 328 F. Supp. 767, 778 (N.D. Cal. 1971), which states: "The prisoner, warned that anything he says may be used against him in a criminal prosecution, is put to the choice between remaining silent and sacrificing his right to defend himself before the committee, or speaking to the committee and risking incriminating himself in a future prosecution. The trap is unavoidable."
107. 328 F. Supp. at 779. *See also* Garrity v. New Jersey, 385 U.S. 493, 500 (1967); Spevack v. Klein, 388 U.S. 511, 515-19 (1967); Simmons v. United States, 390 U.S. 377, 394 (1968); United States v. Jackson, 390 U.S. 570, 581-85 (1968).
108. All evidence obtained by an illegal search and seizure in violation of the fourth amendment is inadmissible in federal and state court. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

which unintentionally incriminate them,[109] or against the use of involuntary statements for impeachment purposes in subsequent criminal prosecutions.[110]

Recently, the court in *Carter v. McGinnis*,[111] was faced with the same dilemma recognized in *Clutchette*. In reaching the conclusion that the sentences imposed upon the plaintiff-inmates unconstitutionally penalized their privilege against self-incrimination, the court refused to follow the *Clutchette* rationale. Instead, it stated that either counsel *or* an inmate granted immunity would provide adequate procedural safeguards, but since neither of these protections was made available, the inmates' rights were violated. On the other hand, the *Sands*[112] court totally rejected the *Clutchette* solution, stating that "it is yet not certain that even counsel can . . . vitiate the constitutionally obnoxious dilemma: it is then still as substantial as if the attorney were not there."[113] The court, however, in recognizing the prisoner's predicament, granted accused inmates "use" immunity to the extent that his statements would not be used affirmatively against him in future criminal prosecutions.[114]

If this immunity trend gains acceptance, inmate's right to counsel based on the fifth and fourteenth amendments will be refuted. Nonetheless, due process requires that prisoners have the right to retain counsel at prison disciplinary hearings.

## C. THE ROLE OF COUNSEL IN INSURING BUNDY RIGHTS

Given the constitutional right of inmates to a full hearing before imposition of major punishment, it is essential that counsel be allowed to participate in order to insure a fair and impartial result. Such a due process hearing is "adversarial," or "adjudicatory,"[115] "insofar as it applies pre-existing policies or rules to particular factual determinations."[116] This setting logically calls for the skills and talents which only a lawyer can successfully exhibit.

Prison authorities, on the other hand, assert that counsel-substitute adequately safeguard the interests of the accused inmate.[117] They

109. *See* Miranda v. Arizona, 384 U.S. 436, 478 (1966).
110. *See* Harris v. New York, 401 U.S. 222 (1971); Inmates v. Rockefeller, 453 F.2d 12 (2d Cir. 1971).
111. 351 F. Supp. 787 (W.D.N.Y. 1972).
112. Civil No. 71-339-Civ-J-S (M.D. Fla., Jan. 5, 1973).
113. *Id.* at 36.
114. Sands v. Wainwright, Civil No. 71-339-Civ-J-S at 37 (M.D. Fla., Jan. 5, 1973).
115. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT, §§ 7.02–.04 (1972).
116. Brief for Plaintiff, *supra* note 80, at 35. *Contra*, Sostre v. McGinnis, 442 F.2d 178, 196 (2d Cir. 1971).
117. As a former employee of the Maryland prison system who has witnessed disciplinary hearings at the Maryland Diagnostic-Reception Center, this writer believes that the use of counsel-substitute is worthless. Prison staff members representing accused inmates often did not speak at all in the defense of their "clients" and were discouraged from calling witnesses or cross examination. Legal counsel could have been helpful to the accused and to the disciplinary board in articulating the facts.

reason that inmate and prison staff representatives are more familiar than legal counsel with the prison make-up and can therefore better communicate with the prison adjustment team. This reasoning is faulty in that many inmates lack the forensic ability to communicate adequately. Inmate-representatives invariably engage in irrelevant argument and fail to focus upon issues central to the conditional freedom of the accused.[118] Furthermore, correctional officers and staff often resent being cross-examined by inmates, thus creating an atmosphere of tension in the hearing room.

Prison staff representatives are similarly inadequate because of the obvious conflict in roles: employed by the institution on one hand, and representing the accused inmate on the other. For this reason inmates do not often request representation by staff at disciplinary hearings.[119]

In view of the inadequacy of either prison staff or inmate representation, the only choice left to the accused inmate is to attempt to defend himself at the hearing. This is obviously inadequate, due to his lack of the training which would enable him to articulate possible mitigating circumstances. He is often totally incapable of recognizing and effectively rebutting factual statements made against him. His dual role of advocate and subject of the inquiry leaves him in a position from which he would not be able to make an objective analysis of the impact and significance of the charges made by his accuser.[120] Finally, he cannot have the opportunity to investigate his case adequately because he is locked in his prison cell.

Legal counsel would enjoy all the advantages which the prisoner lacks as his own advocate: counsel would be able to take an objective view of factual statements and allegations. The diligent attorney certainly could put together a more accurate picture of the particular incident by interviewing witnesses and accusers and obtaining relevant documents from the inmate's file, thereby benefiting both the inmate and the adjustment team. He would be able to determine whether the testimony of a particular witness would be helpful to the accused inmate, thus saving time. To help further shorten the procedure, counsel could be responsible for insuring that accused inmates understand the charges against them and thus avoid the necessity of repetitive notice.

Presently in Maryland, a prison employee (such as a social worker) is responsible for the time-consuming task of informing the inmate that he has been charged with a violation and that he has various (*Bundy*) rights. If counsel were allowed and designated by the particular inmate, the prison employee would simply inform the attorney that the inmate has been placed in segregation for a prison violation and desires counsel.

---

118. Brief for Plaintiff, *supra* note 80, at 54.

119. At ninety-five hearings of major violations at the Maryland House of Corrections between June 1 and August 7, 1972, counsel-substitute was employed on only thirteen occasions. *Id.* at 57.

120. *See* Comment, *supra* note 61, at 503. *See also* Johnson v. Avery, 393 U.S. 483 (1969).

The burden would then be upon counsel to inform the inmate of the charges and his rights and to conduct further investigations necessary to present the inmate's case adequately. Therefore, "[i]n the context of a prison disciplinary hearing, the role of counsel would be to utilize legal skills to adequately develop facts which may be the premise for punishment."[121]

Another consideration in favor of the attorney's presence is the fact that disciplinary hearings are not open to the public.[122] One of the most important protections against official arbitrariness is publicity. In such a setting, where all of the participants in the hearing are employed by the prison or the state, "it may well be that only the representation of counsel can avoid a summary and coercive atmosphere."[123] The analogy to the parole revocation process is relevant in that "[t]he presence of an attorney at a parole revocation hearing may be even more necessary than that presence in a courtroom because of the close-knit, almost family-like, atmosphere that prevails at parole hearings."[124]

Other ways in which counsel could be of assistance at the disciplinary hearings include acting as a "buffer" between the inmates and correctional officers who refuse or express hostility at being questioned by the prisoners.[125] This could serve to alleviate tensions in the hearing room that inevitably result from inmates conducting cross-examinations. Finally, it is important for rehabilitative purposes that inmates perceive disciplinary proceedings as fair and just;[126] with an attorney present, there is a greater likelihood that this will be accomplished.

## IV. CONCLUSION

The plight of the prisoner has, in recent years, struck a responsive chord in the judiciary. It is apparent that many courts have abandoned the "hands-off" approach in dealing with prisoners' rights, examining instead the reasonableness of the particular institutional rule in question. To determine whether such a rule meets the requirements of reasonableness, the courts have implemented a "balancing test," involving the relative interests of the state and the prisoner. The result has been a virtual explosion of new standards and safeguards that have

121. Brief for Plaintiff, *supra* note 80, at 23.
122. Even state legislators in New York have been banned from disciplinary hearings. The matter is currently in litigation in the Supreme Court, Erie County, New York. Brief for Appellant, Nieves v. Oswald, Dkt-No. 72-1974 (2d Cir. 1972), at 21.
123. *Cf.* Mathis v. United States, 391 U.S. 1 (1968); Blyden v. Hogan, 320 F. Supp. 513 (S.D.N.Y. 1970).
124. Dyke, *Parole Revocation Hearings in California: The Right to Counsel*, 59 CAL. L. REV. 1215, 1227 n.49 (1971).
125. Brief for Plaintiff, *supra* note 80, at 28.
126. *Cf.* Morrissey v. Brewer, 408 U.S. 471 (1972).

given the prisoner a measure of dignity. This can only help the much-maligned rehabilitative process that our prison systems are reluctantly beginning to implement. In order to protect these newly acquired rights, the prisoners' right to the assistance of counsel at prison disciplinary hearings must become effective. The presence of counsel in this setting can help guarantee the integrity of the system and can force the adjustment team, through questioning of values and assumptions, to make needed appraisals.[127] If this progressive trend continues, there is an excellent prospect that the right to counsel will truly become an effective one.

*Mark A. Seff*

127. Comment, *The Parole System*, 120 U. PA. L. REV. 282, 364 (1971).