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Recent Development

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RECENT DEVELOPMENTS

Constitutional Law—Due Process Clause of Fourteenth Amendment May Require Elementary Procednral Safeguards For Prisoners in Administration of Prison Discipline

I. INTRODUCTION

Prisons in the United States house approximately 220,000 felons,[1] 95 percent of whom will eventually return to society.[2] Most state legislatures have delegated to prison administrative bodies the power both to establish regulations prescribing proper prison conduct and to impose sanctions for their violation.[3] Prison administrators thus have been granted wide latitude in establishing the procedures by which prisoners are determined to be guilty of disciplinary infractions and punished. Frequently, prisoners who allegedly have violated prison standards are not afforded notice of their offenses, are judged by their accusers, and are awarded disproportionately severe punishment, such as solitary confinement or loss of good time.[4] Judicial review of these post-conviction disciplinary matters has been limited, for the most part, to extreme cases.[5] Consequently, although there is an elaborate system of constitutional safeguards to protect the individual outside of prison, these safeguards frequently provide very little protection for one inside the prison walls. This Comment will discuss recent developments in case law which suggest that the due process clause of the fourteenth amendment requires that prison inmates be afforded certain rudimentary procedural standards in the administration of prison discipline.

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1. THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 161 (1967).

2. Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473 (1971).

3. *See, e.g.*, CONN. GEN. STAT. REV. § 18-81 (1968); FLA. STAT. ANN. § 944.14 (Supp. 1972); KY. REV. STAT. ANN. § 197.020 (1969); MISS. CODE ANN. § 7930 (Supp. 1971); N.C. GEN. STAT. § 148-11 (Supp. 1971); OHIO REV. CODE ANN. § 5145.03 (1970); PA. STAT. ANN. tit. 61, § 346 (1964). *Cf.* 18 U.S.C. § 4001 (1970).

4. Good time credit, awarded when a prisoner's conduct satisfies prison standards, serves to advance the prisoner's possible parole date and therefore ultimately reduces the amount of time spent in prison.

5. *See, e.g.*, Bethea v. Crouse, 417 F.2d 504 (10th Cir. 1969) (judicial review not permitted unless prison officials' acts are clearly abusive or capricious); Roberts v. Pegelow, 313 F.2d 548 (4th Cir. 1963) (no right to judicial review unless the punishment is vindictive, cruel, or inhuman).

II. TRADITIONAL STANDARDS

Until very recently, the courts were quite reluctant to review the constitutional validity of disciplinary measures imposed by prison administrators. The explanation most frequently offered for this reluctance is that the courts should defer to the experience and expertise of prison administrators.[6] This view, commonly denominated the "hands-off" doctrine, still commands a significant following, as the 1970 case of *Burns v. Swenson* well illustrates.[7] In *Burns*, a "troublemaker" suspected of committing a murderous assault was confined, without a prior administrative hearing, to a maximum security cell for three years. The United States Court of Appeals for the Eighth Circuit held that judicial review of prison discipline practices is to be narrowly limited, that federal courts should be loath to interfere, and that the punishment in the case before it had not been unconstitutionally administered. When prison administrative procedures have resulted in systematic and arbitrary deprivations, however, federal courts have manifested greater willingness to intervene.[8] This abandonment of the hands-off doctrine has occurred[9] when prison punishments and living conditions have been shown to be cruel and inhuman;[10] when restrictions on the free exercise of religion have been imposed by prison officials;[11] and when racial discrimination has been practiced in the prison system.[12] Finally, in

6. *See, e.g.*, McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964) (in most instances, judicial review is impractical and unwarranted); *cf.* Siegel v. Ragen, 180 F.2d 785 (7th Cir.), *cert. denied*, 339 U.S. 990 (1950) (federal government has no power to regulate the internal discipline of state penal institutions).

7. 430 F.2d 771 (8th Cir. 1970), *cert. denied*, 404 U.S. 1062 (1972). The state had adopted a set of regulations prescribing certain administrative procedures for disciplinary proceedings, but prison officials dispensed with them because they felt the prison's security was endangered.

8. *See* Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970) (absence of defined administrative procedures may result in an unconstitutional violation of inmates' rights to procedural due process); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970) (advance notice of charges and hearing before an impartial tribunal are the minimum procedures necessary); Kritsky v. McGinnis, 313 F. Supp. 1247 (N.D.N.Y. 1970) (hearing required when prisoner charged with a serious violation of prison rules); Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970) (administrative hearing required when inmate faced with maximum security confinement).

9. *See* cases cited note 8 *supra*.

10. *See, e.g.*, Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (eighth amendment is violated when punishment or system of punishment offends concepts of decency and human dignity); Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965) (safeguards surrounding imposition of corporal punishment are required to maintain punishment within the bounds of eighth amendment).

11. *See, e.g.*, Barnett v. Rogers, 410 F.2d 995 (D.C. Cir. 1969) (when first amendment rights are involved, the state must show a compelling state interest in the regulation of the subject).

12. Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968) (equal protection clause forbids segregating prisoners on the basis of race).

Johnson v. Avery,[13] the Supreme Court implicitly endorsed judicial review of prison procedures when it invalidated a prison regulation on constitutional grounds because the rule prohibited one inmate from giving legal assistance to another. In *Goldberg v. Kelly*[14] the Supreme Court formulated the following general standard for determining when a due process violation has occurred in administrative actions: "[P]rocedural due process . . . is influenced by the extent to which [one] may be 'condemned to suffer grievous loss' . . . and depends upon whether [his] interest in avoiding that loss outweighs the governmental interest in summary adjudication."[15] In *Goldberg*, the Supreme Court applied this "grievous loss" test, holding that an administrative agency could not terminate welfare benefits without affording the recipient "rudimentary due process." Rudimentary procedural due process, according to the Court, requires the following safeguards: (1) prior notice of charges; (2) a hearing before an impartial tribunal in which the accused has the opportunity to confront his accusers, cross-examine opposing witnesses, present evidence, and be represented by counsel; and (3) a written decision based upon the evidence at the hearing, including findings of fact and reasons for the decision. Although the Supreme Court has not decided a case on procedural due process requirements in the prison administration context, the lower federal courts have begun to delineate minimal procedural due process safeguards for prisoners. In *Nolan v. Scafati*,[16] for example, the First Circuit Court of Appeals implicitly held that the absence of clearly defined administrative procedures for imposing punishment may produce an unconstitutional violation of an inmate's right to procedural due process. In *Carothers v. Follette*,[17] a federal district court ruled that a prisoner must be accorded advance notice of the charges against him as well as a hearing before an impartial tribunal. Still other federal district courts have required a hearing when-

13. 393 U.S. 483 (1969).

14. 397 U.S. 254 (1970).

15. 397 U.S. at 262-63. The Supreme Court has articulated this flexible standard on numerous occasions. *See, e.g.*, Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886 (1961) (the court must determine the nature of the government function involved and the private interest affected by government action); Hannah v. Larche, 363 U.S. 420 (1960) (the court must consider the nature of the right, the proceeding, and the potential burden of that proceeding); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring) ("The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.").

16. 430 F.2d 548 (1st Cir. 1970).

17. 314 F. Supp. 1014 (S.D.N.Y. 1970).

ever a prisoner is charged with a serious violation of prison rules or is faced with confinement in maximum security quarters.[18] These decisions, however, are in conflict over issues such as the existence of a prisoner's right to have counsel furnished for him, to cross-examine witnesses, to present witnesses of his own, to have a written record of the proceeding, and to have some form of appeal. In the midst of the ambivalence that has characterized the status of a prisoner's due process rights, a series of more recent cases has confronted directly the problem of defining which procedural due process safeguards are required in a prison disciplinary proceeding.

III. Recent Decisions

In *Sostre v. Rockefeller*,[19] a convicted narcotics dealer was placed in solitary confinement for an extended period of time and denied the benefit of a substantial amount of good time credit because he had made remarks in letters to his sister and his attorney indicating his connection with and possible receipt of help from a revolutionary organization,[20] and because he refused to discontinue providing legal assistance to other inmates. Sostre did not receive written notice of the charges against him, nor was he afforded an administrative hearing. The warden did discuss with Sostre his alleged misconduct, but no record of the discussion or the punishment was made. The district court held that the punishment had been unconstitutionally imposed, basing its decision in part on the ground that Sostre had been deprived of the procedural safeguards that were enunciated by the Court in *Goldberg*. The district court further stated that procedural safeguards are necessary whenever the punishment takes the form of punitive segregation, revocation of earned good time credit, or a denial of the opportunity to accumulate good time. On appeal, the Second Circuit also found that Sostre's treatment had been unconstitutional, but stated that the full panoply of specific due process safeguards ordered by the district court are not constitutionally necessary in every disciplinary action taken against a prisoner.[21] The court, in applying *Goldberg's* grievous loss test, did acknowledge that when

18. *See* cases cited note 8 *supra*.

19. 312 F. Supp. 863 (S.D.N.Y. 1970), *rev'd in part sub nom.* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972).

20. Sostre was placed in solitary confinement (prison officials described it as "punitive segregation") in excess of one year and was denied good time credit of 124 1/3 days. In a letter to his sister, Sostre had stated that he would "be out soon;" in a letter to his attorney he mentioned the R.N.A. (Republic of New Africa) and would not answer the warden's questions concerning that organization.

21. Sostre v. McGinnis, 442 F.2d 178, 198 (2d Cir. 1971).

prison officials act arbitrarily and capriciously in disciplinary action that results in severe deprivation, the accused is thereby denied the rudimentary due process rights to confront his accuser, to be informed of the evidence against him, and to be afforded an opportunity to explain his actions. The court, however, apparently felt that Sostre's case did not properly present the question whether the New York prisons regularly or systematically ignore due process requirements,[22] and therefore concluded that judicial imposition of minimum procedural requirements for all prison disciplinary proceedings represented an inappropriate course of action; this conclusion may perhaps reflect an unwillingness to interfere with the state prison process because of the unavailability of empirical data on the administration of prison discipline.

In *Bundy v. Cannon*,[23] 72 inmates were transferred to punitive segregation quarters because of alleged involvement in a work stoppage.[24] The inmates received no notice of the charges before their subsequent hearing and were not permitted to present witnesses or cross-examine their accusers. The board hearing the cases included several persons who had been involved with the transfer; no written record was kept of the proceedings or the findings. The federal district court held that these prison procedures violated the fourteenth amendment because the inmates did not receive written notice of the charges, and because the tribunal hearing the cases lacked objectivity and impartiality. The court found that certain procedural safeguards are required whenever an inmate may be subjected to a forfeiture of more than five days good time or to segregated confinement for a period in excess of fifteen days. The requirements were substantially the same as the guidelines enunciated by the district court in *Sostre*, but with two exceptions. First, the *Bundy* court limited the full right to counsel to representation by a counsel substitute only. Secondly, the court in *Bundy* ruled that prisoners must be afforded the right to appeal adverse decisions to the warden of the institution.

22. The warden charged that Sostre had violated Prison Rule 5 (prisoners are to obey orders promptly and fully, pending whatever appeal they wish to make) and Rule 12 (prisoners are to answer questions "truthfully and fully"). The warden concluded that Sostre's attitude "was one of defiance, of flatly refusing . . . to conduct himself as a proper inmate." *Id.* at 184. Section 140 of the New York Correction Law authorized the warden to commit Sostre to segregation when "necessary . . . to produce [his] entire submission and obedience" and to keep him there "until he shall be reduced to submission and obedience." *Id.*

23. 328 F. Supp. 165 (D. Md. 1971).

24. Seventeen of the 72 inmates were charged with specific acts of misconduct. They were committed indefinitely to maximum security quarters, forfeited 5 days of good time, and were deprived of accumulating an additional 100 days of good time. The other 55 inmates were transferred to maximum security for "amenability" reasons but neither lost nor forfeited any good time.

In *Clutchette v. Procunier*,[25] prisoners at San Quentin alleged that the procedures by which charges of prison rule violations were adjudicated violated fourteenth amendment due process safeguards.[26] The district court agreed with the petitioners and set forth the procedural standards of *Goldberg* as requirements for prison procedural due process. As in *Bundy*, however, the court restricted the right to counsel to representation by a counsel substitute; a full right to counsel exists, according to the court, only when the offense committed by the prisoner could be referred to the district attorney for a separate criminal prosecution. Moreover, the *Clutchette* court unequivocally stated that prisoners do not possess a constitutional right to appeal a prison hearing to the warden. The court then limited the applicability of the enumerated procedural safeguards to the following situations: whenever an inmate could be subjected to indefinite confinement in any segregated area; whenever the sentence could be increased; whenever a fine or forfeiture of accumulated or future earnings might occur; whenever a prisoner could be confined in isolation for more than ten days; or whenever a violation could be referred to the district attorney for criminal prosecution. The *Clutchette* court concluded that the Second Circuit's decision in *Sostre* had applied the *Goldberg* grievous loss test correctly to identify the necessity for meeting minimum procedural due process standards, but had reached the wrong conclusion on the question of specifying procedural requirements.[27]

Finally, in *Landman v. Royster*,[28] prisoners brought a class action in which they sought to register their objections to severe disciplinary punishment, to challenge regulations that neglected to state which offenses would justify solitary confinement or loss of good time, and to question the validity of disciplinary committees that did not include impartial members or provide for written notice of charges, cross-examination, or appeal. The court first distinguished the *Sostre* Circuit Court decision on the ground that *Landman* presented a consistent pattern of due process violations, but *Sostre* apparently involved what could have been an isolated incident. Relying on the *Goldberg* decision, the court then balanced the needs of the state against those of the individual in order to determine the specific procedural safeguards to which the prisoners constitutionally were entitled. The prisoners, according to the court, were entitled to procedural safeguards comparable

25. 328 F. Supp. 767 (N.D. Cal. 1971).
26. *Id.* at 773-77.
27. *Id.* at 781-84.
28. 333 F. Supp. 621 (E.D. Va. 1971).

to those propounded by the Court in *Goldberg*, and the safeguards were necessary for basically the same types of punishment for which the district court in *Sostre* would have imposed its set minimal procedural safeguards.[29] As in *Clutchette*, however, the *Landman* court found no requirement for an appellate procedure.[30]

IV. Synthesis of Recent Cases

A. Procedural Due Process Requirements.

The courts in *Landman, Clutchette, Bundy* and *Sostre* determined which procedural safeguards were required by the fourteenth amendment by applying the *Goldberg* balancing test, which consists of weighing the individual's interest in not suffering a grievous loss against the state's interest in summary adjudication.[31]

An inmate's interest in obtaining procedural safeguards can be appreciated readily. Although there are varying degrees of deprivation within a prison system, an inmate's most basic desire is to avoid arbitrarily imposed punishment. Recent decisions have characterized frustration of this fundamental desire by prison authorities who administer severe punishments as a grievous loss, because such punishments amount to nothing less than the imposition of an additional sentence. The district court in *Sostre* indicated that the defendant had, in effect, been "sentenced" to more than one year of punitive segregation[32] without the benefit of minimal procedural safeguards. Moreover, the court in *Clutchette* observed that, for many of the same kinds of punishment imposed upon prisoners, persons outside prison would receive the benefit of substantial due process safeguards.[33] Inmates thus have a substantial interest in obtaining similar safeguards to ensure that punish-

29. The court held that whenever a punishment involved solitary confinement, placement in maximum security, loss of good time, or padlock confinement greater than 10 days, the prison administration must provide both an impartial tribunal and a hearing in which the accused would receive written notice of the charges, could submit evidence in his own behalf, cross-examine his accuser, and have the assistance of counsel substitute. In addition, the court struck down prison regulations that it characterized as too vague, in an effort to provide fair notice for prisoners and to avoid arbitrariness on the part of prison officials. *Id.* at 653-56.

30. The *Landman* court departed from the *Clutchette* decision, however, in stating that counsel is necessary whenever a prisoner faces the possibility of substantial sanctions and the state can show no compelling interest in summary adjudication. Unfortunately, the court made no further effort to clarify that standard and apply it to the specific facts in the case at hand. *Id.* at 654.

31. 397 U.S. at 262-63.

32. 312 F. Supp. at 872. *See also* Millemann, *Prison Disciplinary Hearings and Procedural Due Process—The Requirement of a Full Administrative Hearing*, 31 Md. L. Rev. 27 (1971).

33. 328 F. Supp. at 780.

ments are not capriciously imposed.

The various state interests are more difficult to identify and characterize. An attempt by the state to justify punishment of prisoners without procedural due process by classifying the disciplinary action as merely a termination of privileges would probably be rejected on the ground that the "federal Constitution circumscribes governmental power to withhold such benefits arbitrarily or discriminatorily."[34] Judicial rejection of the right-privilege distinction also reduces the persuasiveness of the frequently asserted argument that penal sanctions are imposed to secure the state's interest in "control or security" rather than to punish inmates. Presumably, labeling a sanction as one that is necessary for control or security is intended to imply that procedural safeguards are superfluous. There is a valid state interest to be served through efforts designed to promote security or control, but that interest should not be construed as a justification for discrimination and arbitrary punishment.[35] A second argument frequently raised by the State is that prison discipline is rehabilitative rather than punitive in nature, and that procedural safeguards are therefore unnecessary or even harmful to successful therapy. The argument is not compelling, however, because all too frequently the person who actually determines the appropriate punishment to be imposed is not a qualified psychologist, psychiatrist, or similarily trained individual;[36] thus, the sanctions may prove to be more arbitrary than therapeutic. In *Landman*, for example, prison guards and superintendents with less than high school educations retained wide-ranging discretionary power to administer punishments such as solitary confinement and maximum security.[37] Penological experts recognize that routine use of severe punishments embitters rather than rehabilitates inmates, and destroys rather than builds incentives for future good behavior.[38] A third contention is that the state's interest in administratively feasible prison disciplinary procedures is thwarted and undermined by procedural safeguards. The Supreme Court has held, however, that fundamental consitutional rights cannot be sacrificed for administrative and fiscal efficiency.[39] In *Holt v. Sarver*,[40] an Arkansas

34. Landman v. Royster, 333 F. Supp. 621, 644 (E.D. Va. 1971). *See also* Shapiro v. Thompson, 394 U.S. 618 (1969) (public assistance benefits); Sherbert v. Verner, 374 U.S. 398 (1963) (unemployment compensation).

35. *See* Landman v. Royster, 333 F. Supp. 621, 645 (E.D. Va. 1971).

36. Millemann, *supra* note 32, at 42.

37. 333 F. Supp. at 631-32.

38. AMERICAN CORRECTIONAL ASS'N, MANUAL OF CORRECTIONAL STANDARDS 411-13 (1966).

39. *See, e.g.*, Harman v. Forssenius, 380 U.S. 528, 542 (1965); *cf.* Oyama v. California, 332 U.S. 633, 646-47 (1948).

40. 309 F. Supp. 362 (E.D. Ark. 1970).

federal district court ordered a complete reorganization of the Arkansas penal system despite the tremendous cost of the undertaking. Nevertheless, the state does have a legitimate interest in this area, and it should be weighed against the prisoner's interest in avoiding the chance that the particular type of deprivation in issue will be arbitrarily imposed. Prison administrators frequently claim that administrative hearings would necessarily require the presence of security guards for purposes of offering testimony, thereby either weakening the prison security or imposing a prohibitive financial burden on the state if it chooses to increase its security force. The objections are difficult to evaluate, however, in the absence of empirical data. Some penal experts have hypothesized that fair and impartial treatment of prisoners would serve a positive rehabilitative function and thus, in the long run, reduce expenditures for prisons.[41] Other commentators have concluded that "if additional personnel are necessary to render prison discipline constitutional and to maintain security, then they must be provided for in the budget."[42] Prison administrators also argue that hearings would erode the traditional inmate-staff relationship because the adversary nature of the proceeding would briefly elevate the inmates to the same level as the prison staff.[43] This position, however, seems to have been impliedly rejected by the courts.[44] The apparently successful adoption of the *Goldberg* rudimentary procedural due process requirements by the federal prison system and some state systems[45] is perhaps an indication that implementation of these administrative procedures will not destroy the security, financial stability, or discipline of prisons.

B. Types of Punishment Requiring an Administrative Hearing.

Although there are numerous variations among the recent cases discussed, all of them require an administrative hearing whenever the punitive sanction to be imposed is solitary confinement, punitive segre-

41. Millemann, *supra* note 32, at 48.

42. Millemann, *supra* note 32, at 45-46.

43. *See generally* Millemann, *supra* note 32, at 52-54.

44. *See, e.g.*, Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970) (rejected lower court's argument that the cross-examination of prison officials would tend to elevate the prisoner to the same level as the officials).

45. In the federal prison system, regulations require a hearing before the committee authorized to punish the inmate, a record of the hearing, notice at the hearing of the alleged misconduct, an opportunity to make a statement, the right to counsel-substitute, and an opportunity to appeal whenever a prisoner is subject to loss of good time. FEDERAL BUREAU OF PRISONS, POLICY STATEMENT NO. 7400.6, WITHHOLDING, FORFEITURE, AND RESTORATION OF GOOD TIME 1-4 (1966). *See also* MISSOURI STATE PENITENTIARY, PERSONNEL INFORMATIONAL PAMPHLET RULES AND PROCEDURES 1-6 (1967); MODEL PENAL CODE § 304.7 (Proposed Official Draft, 1962).

gation, or loss of good time.[46] The courts have manifested an inclination to regard these sorts of severe punishment as constituting a grievous loss. As for solitary confinement or punitive segregation, the cases indicate that the prisoner's potential grievous loss tends to outweigh any asserted state interest by virtue of the severe deprivation entailed by the conditions under which such punishments are often administered. Several courts have viewed these penalties as constituting cruel and unusual punishments because of the abominable living conditions frequently attendant to segregated confinement,[47] the unnecessarily cruel purpose of the punishment,[48] and the disproportionate severity of the punishment in relation to the offense.[49] The term grievous loss presents a more difficult definitional problem when the punishment involved is loss of good time. Many states have enacted statutes whereby a prisoner may accumulate good time and thus reduce his sentence substantially or receive early parole by complying with the prison's regulations.[50] While good time credit is an obvious incentive that induces inmate compliance with prison rules, disciplinary techniques involving denial or forfeiture of good time raise serious questions. In prison systems in which procedural requirements are limitcd or nonexistent, the power to grant or revoke good time is subject to abuse, especially when unqualified prison guards retain wide discretionary authority to assign punishments. Moreover, it has been suggested that because judges know or should know the amount of good time that may be accrued under state law and in practice and may take this factor into consideration in imposing sentences, revocation of good time without meeting minimum procedural requirements constitutes an unconstitutionally imposed increase in sen-

46. The terminology used by the various state prisons is varied and often unclear. The following types of punishment have been specifically designated as requiring procedural due process safeguards: (A) *Landman*: solitary confinement, maximum security, loss of good time, and padlock confinement greater than 10 days; (B) *Clutchette*: indefinite confinement in the adjustment center or segregation, possible increase in sentence by referral from the disciplinary committee to the Adult Authority, a fine or forfeiture of accumulated or future earnings, isolation confinement greater than 10 days, and referral to the district attorney for criminal prosecution; (C) *Bundy*: confinement greater than 15 days and loss of more than 5 days of good time.

47. *See* Wright v. McMann, 387 F.2d 519 (2d Cir. 1967) (prisoner was denuded and exposed to bitter cold for substantial period of time while in solitary confinement); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969) (inmate was forced to eat under brutal conditions and sleep nude on concrete floor).

48. *See* Dearman v. Woodson, 429 F.2d 1288 (10th Cir. 1970) (official's failure to provide food for 50 1/2 hours held beyond anything necessary to achieve legitimate penal aims).

49. *See* Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962) (disproportionate severity viewed as indicia of unreasonable punishment). *See generally* Turner, *supra* note 2, at 492-95.

50. In New York, for example, an inmate may earn as much as 10 days per month of good time. This potentially reduces a sentence by 33%. N.Y. CORREC. LAW § 230 (McKinney 1966).

tence. Although this theory is rebuttable on the ground that sentences do not, or should not, reflect possible accrual of good time, the argument may continue to constitute a persuasive means of establishing the possibility of a grievous loss. Despite the uniformity of the decisions in requiring a hearing for punishment involving loss of good time, a question remains whether both revocation of good time earned and denial of the opportunity to accumulate good time necessarily imply that a grievous loss has been imposed on the inmate. The Second Circuit's opinion in *Sostre* distinguished between the two,[51] rejecting the contention that "good time not permitted to accumulate" qualifies as a grievous loss and deferring the question of requiring procedural due process when prison officials are authorized to revoke good time earned until future decisions.

C. Scope of Procedural Due Process.

Whenever a disciplinary proceeding entails punishment that calls for a hearing before an impartial tribunal, *Bundy, Clutchette, Landman*, and the district court's opinion in *Sostre* require the prison administrator to afford the prison inmate written notice of the charges against him as well.[52] The accused also must be permitted to present his own witnesses, cross-examine his accusers, and have the assistance of counsel-substitute. Only in *Bundy* did the court require that the prisoner be afforded a limited right to appeal adverse determinations to the warden.[53] The *Clutchette* court acknowledged that the law on the question is unclear, but held that there is no constitutional right to an appeal from an administrative action.[54] A simple procedure for appeal to the warden, however, has obvious advantages. The appellate process serves as a safety valve for administrative hearings, provides the warden with a means of evaluating the quality of his administrative proceedings, and affords the administrative hearing program a degree of flexibility. On the other hand, the right to appeal could produce an increased workload for prison administrators, because most prisoners would probably invoke their new-found right. A final objection to an informal appellate procedure offered by prison administrators is that reversal of hearing

51. 442 F.2d at 198. *See also* FEDERAL BUREAU OF PRISONS, POLICY STATEMENT No. 7400.6, WITHHOLDING, FORFEITURE, AND RESTORATION OF GOOD TIME (1966). This policy statement does draw a distinction between the forfeiture of good time previously earned and the withholding of good time during the month in which the infraction occurs. Forfeiture of good time is considered a more severe punishment that necessitates greater procedural safeguards.

52. 442 F.2d at 198.

53. 328 F. Supp. at 177. The court held that appeal is mandatory for all major violations.

54. 328 F. Supp. at 784.

decisions by the warden would tend to diminish the effectiveness of the official who initiated the proceeding and perhaps would contribute to further disciplinary problems.

The recent cases also disagree over the question of the prisoner's right to counsel. The district court opinions in *Sostre*[55] and *Landman*[56] unequivocally state that there is a right to counsel when substantial sanctions are possible and when no compelling government interest in summary adjudication is shown. In the *Bundy* decision, however, the court did not mention the right to counsel, and the court in *Clutchette* would limit the right to cases in which the inmate could be prosecuted by the district attorney.[57] The primary difficulty in resolving the right-to-counsel issue appears to stem from practical considerations; since over 90 percent of all inmates qualify as indigents, state financial and legal resources may prove to be insufficient to provide lawyers at all prison disciplinary hearings.[58] A second problem is that courts consistently have held that there is no right to counsel for various other types of administrative hearings.[59] A practical solution that is consistent with the rationale of *Goldberg* would be to follow the court's holding in *Clutchette* and permit the inmate the assistance of counsel only when the prisoner is subject to prosecution by the district attorney and the evidence taken at the administrative hearing could be used against the prisoner in subsequent proceedings.

V. CONCLUSION

Landman, Bundy and *Clutchette* define the outer limits of judicial intervention on procedural due process grounds into the workings of prison disciplinary proceedings. Although a growing number of courts have imposed procedural requirements upon the administration of prison discipline, a substantial number of jurisdictions continue to adhere to the rationale of the hands-off doctrine. For those courts willing to break with the traditional hands-off approach, it is probable that in light of *Landman, Bundy*, and *Clutchette*, minimum procedural due process safeguards will be afforded whenever solitary confinement, loss of good time, or a similarly severe punishment might be administered.

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55. 312 F. Supp. at 872.

56. 333 F. Supp. at 654.

57. 328 F. Supp. at 783.

58. Jacob, *Prison Discipline and Inmate Rights*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 227, 243-44 & n.94 (1970).

59. *See, e.g.*, Murphy v. Turner, 426 F.2d 422 (10th Cir. 1970) (revocation of parole); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967) (expulsion from school).

The procedural safeguards required whenever a prisoner faces any of these punishments will probably include notice of the charges and a hearing before an impartial tribunal in which the accused can confront his accuser, be represented by counsel-substitute, and present his own evidence. Implementation of such procedural requirements poses few substantial difficulties, and the potential gain to the imprisoned and prison administrators far outweighs economic and administrative costs. The right to retained or appointed counsel and the right of appeal, however, cannot be implemented so simply, and therefore remain unresolved issues as demonstrated by the conflicting opinions in *Landman, Bundy, Sostre* and *Clutchette*. Resolution of these conflicts in future cases will require a finer balancing of the individual's interest in not suffering a grievous loss against the state's interest in summary adjudication.