PRISONER RIGHTS – DUE PROCESS – PROVISIONS FOR DUE PROCESS AND ACCESS TO COUNSEL IN PRISON DISCIPLINARY HEARINGS – *Clutchette v. Procunier**

The subject of the constitutional rights of prison inmates has come increasingly to the attention of the public in recent years as violence in the prisons has erupted with alarming frequency.[1] One of the major issues arising out of prison strife concerns the inmate's claim to procedural due process in the prisons; and, specifically, his ability to receive adequate legal assistance in disciplinary hearings. A prisoner incarcerated in a state institution looks to the fourteenth amendment for protection.[2]

Throughout most of American history, inmate complaints in prison were ignored by the courts.[3] Although complaints of mistreatment in prison were frequently brought before the courts, judges were reluctant to interfere with the enforcement of prison rules.[4] This lack of judicial scrutiny has perpetuated abuses within the prison gates.[5] The federal courts have begun to intervene in the administration of state and

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

[1] While prisoner violence may have awakened society to the legitimacy of some of the inmate complaints, another reason for this concern is the anguished cry of many that our prisons and jails are productive of little more than recidivist criminal behavior and human suffering. See Clements & Ferguson, Judicial Responsibility for Prisoners: The Process That is Due, 4 Creighton L. Rev. 47 (1970). As most of the inmates of the nation's prisons will return to the general population, either upon the expiration of their sentences or on parole, their treatment in prison is of critical importance to society. The penal institutions throught the United States regulate the day to day activity of approximately 220,000 convicted adult felons. President's Commission on Law Enforcement and Adminstration of Justice, Task Force Report: Corrections, Table 1 (1967).

[2] The fourteenth amendment was devised as a repository of individual rights protected from state infringement. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law;..." U.S. Const. Amend. XIV, § 1.

[3] See Turner, Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation, 23 Stan. L. Rev. 473 (1971). However, the status of prisoners has steadily improved. At one time the prisoner was considered a "slave of the state," forfeiting not only his liberty, but all personal rights not specifically afforded him by law. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871). Now he is viewed as retaining "all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), cert. denied, 325 U.S. 887 (1945).

[4] Expounding a "hands-off" doctrine, courts indicated that they lacked the necessary expertise to become involved in penal affairs. See, e.g., Snow v. Gladden, 338 F.2d 999 (9th Cir. 1964) (prison authorities have wide discretion as to the treatment of prisoners, including whether the convict should be placed upon an ulcer diet); Roberts v. Pegelow, 313 F.2d 548 (4th Cir. 1963) (questions concerning the right of Muslims to practice their religion in a reformatory free from interference were considered to be nonjusticiable since "routine" security measures and disciplinary action rested solely on the discretion of prison officials and their superior); Tabor v. Hardwick, 224 F.2d 526 (5th Cir.), appeal dismissed, 350 U.S. 890 (1955) (a convict's complaint that he was advised by the warden that he could not file a civil action was insufficient to show abuse of discretion on the part of the warden); and Adams v. Ellis, 197 F.2d 483 (5th Cir. 1952) (censorship by the penitentiary authorities of the inmate's mail did not constitute a deprivation of civil rights because it was not considered to be the function of courts to superintend the treatment and discipline of prisoners but only to deliver from imprisonment those who are illegally confined).

[5] See Turner, Establishing The Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation, supra note 3, at 473. The author emphasizes a trend towards greater involvement by the courts in reviewing complaints raised about prison regulations. The judiciary now invokes the hands-off doctrine less frequently because it represents an abdication of responsibility for assuring that the constitutional rights of prisoners are judicially protected. This trend is consistent with the increased judicial scrutiny of police departments and administrative agencies and a desire to hear disputes on their merits.

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federal prisons to prevent mistreatment of inmates.[6] A concern for the preservation of individual rights has led a number of courts to find that a prisoner "continues to be protected by the due process and equal protection clauses which follow him through the prison doors."[7] Continuing the trend towards application of the rudimentary elements of due process in penal affairs,[8] District Court Judge Alfonso Zirpoli held in *Clutchette v. Procunier* that the procedures used in the disciplinary hearing of John Wesley Clutchette[9] did not meet constitutional standards.

The significance of the *Clutchette* decision is its application of extensive due process requirements to prison disciplinary hearings. The district court found that the increased restrictions upon his already limited liberty[10] to which a prisoner might be subjected after a disciplinary hearing constituted a grievous loss.[11] The court held that when the potential punishment is severe enough, the constitution requires certain due process safeguards.[12] These protections include notice of the charges preferred against the inmate; the right to call witnesses and confront and cross-examine adverse witnesses; the right to the assistance of counsel or a counsel-substitute; a decision based on the evidence presented; and a decision by an impartial decision-maker.[13]

Clutchette was accused of assaulting a prison officer with a chair.[14] After a disciplinary hearing, he was placed in "isolation" for 29 days, thereby losing a one-hour a day exercise session for the same time period. Moreover, his personal possessions, other than legal papers, religious books, and toilet articles were removed from his cell for 29 days. The privilege of purchasing items from the inmate's canteen was suspended for a period of 60 days.[15] The procedures to which Clutchette was

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[6] See Johnson v. Avery, 393 U.S. 483 (1969) (an inmate is entitled to assistance in preparing petitions for post-conviction relief); Monroe v. Pape, 365 U.S. 167 (1961) (the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1964), provides a right of action against a person who, under color of state law, subjects another to the deprivation of any rights or privileges secured by the constitution); and Ex parte Hull, 312 U.S. 546 (1941) (a state law abridging an inmate's right to apply for habeas corpus relief is invalid). See note 19 infra.

[7] Jackson v. Bishop, 404 F.2d 571, 576 (8th Cir. 1968). A number of courts have recognized that certain prisoners' rights are not to be limited by deference to internal prison policy. See Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966), cert. denied, 388 U.S. 920 (1967) (the right of the accused to speak in his own behalf is assured); Wright v. McMann, 387 F.2d 519 (2nd Cir. 1967) (notice of the violation must be supplied); Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965); and Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967), vacated, 404 F.2d 571 (8th Cir. 1968) (determination of guilt and assessment of punishment must be done by an impartial body).

[8] 328 F. Supp. at 770.

[9] Along with the deceased George Jackson and Fleeta Drumgo, John Clutchette was one of the "Soledad Brothers". N.Y. Times, July 28, 1971, at 16, col. 7.

[10] The "private interest" of an inmate is to avoid an increased term of imprisonment or confinement under maximum security with its concomitant loss of existing privileges. 328 F. Supp. at 780. He has an obvious interest in avoiding a deprivation of liberty.

[11] See Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970), referring to a term articulated in Mr. Justice Frankfurter's concurring opinion in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951): "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" The more severe the result of the administrative action, the more likely that due process safeguards will be required to prevent this "grievous loss." 328 F. Supp. at 780:

> The very real and substantial danger of an increased term of imprisonment by reason of a referral to the Adult Authority is a grievous loss, as is confinement in some form of maximum security accompanied by the loss of privileges or the loss of income, past or future.

[12] 328 F. Supp. at 780-81.

[13] Id. at 782-84.

[14] Ninth Circuit at 4, Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971) [hereinafter *Clutchette* Brief].

[15] Id.

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subjected were established in the San Quentin "Institution Plan."[16] The plan required a hearing officer to serve the inmate with a notice of complaint. This notice did not require a description of the particular act of misbehavior alleged; only the charge number and title was necessary.[17] Since a felony charge was involved, the prisoner could not see an attorney until the district attorney spoke to the inmate. Neither the author of the charge nor any other witness was present at the hearing, thereby precluding any opportunity for the inmate to confront and cross-examine his accusers.[18]

After Clutchette was punished, a civil action pursuant to the Civil Rights Act of 1871[19] was brought on behalf of Clutchette and other inmates at San Quentin.[20] The inmates alleged that the procedures used to determine whether violations of prison rules had occurred did not meet the minimum due process standards of the fourteenth amendment.[21] Both the form and procedure of the notice required by the Institution Plan were attacked as constitutionally infirm. The plaintiffs claimed that the procedure of gathering "testimony" of witnesses through written reports fell short of the right of confrontation and cross-examination guaranteed by the constitution. The complaint also asserted that the prohibition against aid from counsel or a counsel-substitute was contrary to due process.[22] Moreover, the plaintiffs complained that the decision could be based on evidence adduced outside the record, that the inmate could be punished without a showing of guilt beyond a reasonable doubt, and that the decision need not be based on substantial evidence.[23]

Before it ruled on the questions raised in the complaint, the court determined that federal jurisdiction was appropriate.[24] Addressing itself to the plaintiff's claims,

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16 328 F. Supp. at 773. Under the San Quentin Prison Institution Plan for the Administration of Inmate Discipline, when serious charges are pressed, prisoners may be moved to isolation cells immediately after the alleged infraction and may be held there up to seven days before adjudication by a disciplinary committee.

17 Id.

18 Id. at 773-74. The potential punishments include an indefinite confinement in the adjustment center or segregation; a possible increase in a prisoner's sentence by reason of referral of the disciplinary action to the Adult Authority; a confinement to isolation; a referral to the district attorney for criminal prosecution; or a fine or forfeiture of accumulated or future earnings. Id. at 775. 1942 U.S. C. § 1883 (1964) provides that:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

This section of the Code has usually been used to remedy civil rights violations.

20 328 F. Supp. at 769.

21 Id. at 773-77.

22 Id. at 774.

23 Id.

24 The court discussed the jurisdictional problems presented by the controversy including whether the exhaustion of state remedies is a prerequisite to a decision by a federal court; and whether a federal court should abstain from deciding a case properly within its jurisdiction. The "exhaustion" of state remedies is not a condition precedent to the exercise of jurisdiction by the federal courts in a civil suit under 42 U.S.C. § 1983 (1964). See, e.g., Monroe v. Pape, 365 U.S. 167 (1961). However, a requirement does exist for the exhaustion of state remedies under the federal habeas corpus statute, 28 U.S.C. § 2254 (b) (1966). The "abstention" doctrine, whereby a court will refuse jurisdiction when the case may be disposed of on questions of state laws, was not applicable here either. Only a federal constitutional issue was presented. In summary, the court decided that these two doctrines which have the effect of limiting the jurisdiction of federal courts did not prevent a decision upon the complaint here. 328 F. Supp. at 771-72. This is consistent with the trend of recent judicial decisions. See, e.g., Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971); and Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970).

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the court decided that the methods employed by the disciplinary committee suffered from serious constitutional infirmities when compared with the standard enunciated in *Miranda v. Arizona*,[25] and in view of the due process requirements outlined in *Goldberg v. Kelly*.[26]

In *Miranda*, the Supreme Court emphasized that a criminal defendant comes under the protective umbrella of due process at the moment of his apprehension.[27] Among other things, *Miranda* held that once an individual is taken into custody he has the right to remain silent as well as the right to have a lawyer present to advise him.[28]

Judge Zirpoli reasoned that the pressure upon the inmate to testify in his own defense, despite his right to remain silent, was far heavier in a prison disciplinary hearing than in the police interrogation discussed in *Miranda*.[29] Judge Zirpoli noted that without the aid of counsel or a counsel-substitute, or the right to call witnesses of his own choice or cross-examine adverse witnesses, the prisoner is faced with an unconstitutional dilemma. He can testify himself, thereby waiving his right to remain silent and risking self-incrimination, or fail to testify, leaving no one to present evidence in his behalf.[30] Furthermore, if he testifies, he does so at the peril of having his statements admitted as evidence in an action brought by the district attorney for the same offense. As a result, he prejudices himself in one proceeding by acting in his best interests in the other. Concluding that, under the circumstances of *Clutchette*, it was intolerable that one constitutional right[31] should have to be surrendered in order

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[25] 384 U.S. 436 (1966). Mr. Chief Justice Warren, delivering the opinion of the Court, stated that when an individual is taken into custody or otherwise deprived of his freedom by the authorities and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect that privilege, and a person must be warned prior to any questioning that he has a right to remain silent. Moreover, he has the right to the presence of an attorney, either retained or appointed.

[26] 397 U.S. 254 (1970). The Supreme Court held that a pre-termination hearing was necessary before welfare benefits could be revoked. The proceeding was required to meet certain minimum procedural standards required by rudimentary due process. These included affording the recipient the opportunity to confront and cross-examine adverse witnesses, to retain an attorney if he so desired, to present oral evidence to an impartial decision-maker, and to receive timely and adequate notice detailing the reasons for the proposed termination.

[27] Miranda v. Arizona, 384 U.S. 436 (1966) [hereinafter *Miranda*].

[28] Id. at 444.

[29] It is conceded that the inmate has a right to remain silent. The privilege applies "alike to civil and criminal proceedings, whereever the answer might tend to subject to criminal responsibility him who gives it." McCarthy v. Arndstein, 266 U.S. 34, 40 (1924). When the subject of the disciplinary committee is in-prison conduct that constitutes a crime, the accused prisoner is brought before the committee and advised of his right to remain silent. He is advised that anything he says "can and will" be used against him in a court of law. In-prison questioning of a suspect is custodial interrogation within the scope of *Miranda*. See Mathis v. United States, 391 U.S. 1 (1968). Moreover, San Quentin inmates are given *Miranda* warnings. See People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169, cert. denied, 381 U.S. 937, 946 (1965). It makes no difference that the person being interrogated is in custody for an entirely different offense from the one under investigation. See *Mathis*, supra.

[30] F. Supp. at 777-78. Indeed, it has been estimated that the practical problems in supplying counsel in only the most serious disciplinary cases would probably not impose an insurmountable burden. Jacob, Prison Discipline and Inmate Rights, 5 Harv. Civ. Rights Civ. Lib. L. Rev. 227 (1970). "Serious" cases must be heard by a three member disciplinary committee which meets once a week. Each housing unit at San Quentin has its own disciplinary committee. 328 F. Supp. at 773-74.

[31] The privilege against self-incrimination under the fifth amendment is applicable through the due process clause of the fourteenth amendment under the "incorporation" theory. Malloy v. Hogan, 378 U.S. 1 (1964).

[32] The right to speak in one's own behalf in a prison disciplinary hearing has been recognized in many recent cases including Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970); and Kritsky v. McGinnis, 313 F. Supp. 1247 (N.D.N.Y. 1970).

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to assert another,[32] Judge Zirpoli ruled that a prisoner should be afforded the assistance of counsel in disciplinary proceedings.[33]

In *Clutchette* other standards derived from Supreme Court interpretations in the criminal law area were applied to the correctional institution. The Court has held that an individual has a right to reasonable notice of charges against him.[34] The notice given San Quentin inmates accused of a disciplinary offense did not inform them of the specific misconduct with which they were charged. The notice given Clutchette was only the number and general title of the offense. Without notice of the alleged violation, a prisoner is incapable of conducting an effective defense.

Clutchette implies that a prisoner must be provided with an opportunity to conduct an effective defense. The Constitution requires that the "opportunity to be heard", if required, "must be granted at a meaningful time and in a *meaningful manner*."[35] In the criminal context, courts have not delved into what "meaningful" requires.[36] The word's importance in a case like *Clutchette* is that in order for the inmate to conduct an effective defense and give effect to his right to speak in his own behalf, extensive procedural safeguards must be implemented.

Secondly, *Clutchette* recognizes that inmates charged with serious misconduct violations must be provided with competent counsel. Without representation by counsel as well as other protections, an inmate has major difficulties in defending himself in a disciplinary hearing.[37] Because the inmate who is kept in isolation or

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[33] 328 F. Supp. at 779. Prisoners need the assistance of counsel because it is impermissible to impose any penalty for exercising the right to remain silent or any other sanction whatever that makes assertion of the fourteenth amendment privilege "costly." See, e.g., Spevack v. Klein, 385 U.S. 511, 515 (1967); United States v. Jackson, 390 U.S. 570 (1968) (the death penalty provision of the Federal Kidnapping Act applied the death penalty only to those defendants who asserted the right to contest their guilt before a jury. It was invalidated because it imposed an impermissible burden upon an accused's exercise of his fifth amendment right not to plead guilty and his sixth amendment right to demand a jury trial); Simmons v. United States, 390 U.S. 377 (1968) (when a defendant testifies in support of a motion to suppress evidence on fourth amendment grounds, his testimony may not thereafter be admitted against him at trial unless he makes no objection); and Griffin v. California, 380 U.S. 609 (1965) (the Supreme Court overruled the specific holding in Adamson v. California, 332 U.S. 46 (1947), and found unconstitutional the California rule permitting comment on the defendant's failure to testify). There are circumstances where only the assistance of counsel, not a counsel-substitute, provides sufficient protection for the prison inmate.

> [I]t is imperative that a prisoner be afforded counsel, not a counsel-substitute, when he is charged with a prison rule violation which may be punishable by state authorities. In such a position, the prisoner is put in a serious dilemma not faced by the accused in a normal *Miranda* situation, and counsel is required, for reasons more compelling than those present in *Miranda*, to protect his constitutional rights.

328 F. Supp. at 778.

[34] "[N]otice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. In re Oliver, 33 U.S. 257 (1948)." Cole v. Arkansas, 333 U.S. 196, 201 (1948).

[35] Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (emphasis added), an adoption case, expresses that principle. It is conceded by all jurisdictions that the prisoner subject to disciplinary punishment has the opportunity to testify in his own behalf. See, e.g., Grannis v. Ordean, 234 U.S. 385 (1914).

[36] Courts in non-criminal cases have discussed what "meaningful" requires. See Bell v. Burson, 402 U.S. 535, 541-42 (1971), involving the suspension of a driver's license; and Boddie v. Connecticut, 401 U.S. 371, 377-78 (1971), a marriage case.

[37] The Supreme Court, in a landmark decision, pointed out the virtual necessity of representation by counsel in order to prepare a meaningful defense.

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel ... [The layman] lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one.... Without it [counsel], though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

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segregation prior to the hearing is in no position to engage in his own legal research or conduct a factual investigation in preparation of his defense, he requires assistance.[38] Moreover, the importance of the presence of counsel in pre-trial situations has been acknowledged when custody has been achieved[39] and at the line-up.[40] In circumstances where post-conviction remedies were sought, a counsel-substitute has been allowed.[41] In these instances the courts have emphasized that the individual needs the protection of an attorney at times other than during the actual trial.[42]

Thirdly, recent decisions incorporating the sixth amendment into the fourteenth have recognized that truth and justice may not result from an adjudicatory proceeding in which witnesses against the alleged offender are not present to be cross-examined[43] and in which the accused cannot present his own witnesses.[44] The Supreme Court has held that all parties in a courtroom trial must be given an opportunity to confront and cross-examine witnesses as well as to present their own evidence.[45] Where the facts are in dispute, the right to confront one's accusers is essential.[46] The sixth amendment right of the accused to be confronted with the witnesses against him was primarily designed "to prevent depositions or *ex parte* affidavits ... [from] being used against the prisoner in lieu of a personal examination and cross-examination of the witness."[47]

Moreover, a major objective of the right of confrontation is "to guarantee that the fact-finder had an adequate opportunity to assess the credibility of witnesses."[48] This opportunity is not available to the disciplinary committee which, under San Quentin practice, relies solely on written reports. Courts are reluctant to allow one prisoner to testify on behalf of another.[49] This hesitancy is due in part to a fear that some inmates have the capacity to intimidate other prisoners and force them to give false testimony. Admittedly some difficulty may arise in allowing inmates who exercise power and influence in the inmate social structure to call witnesses. However, a disciplinary committee should not find it an insuperable obstacle to detect abuses and perjury.[50]

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[38] See Jacob, Prison Discipline and Inmate Rights, note 30 supra.

[39] *Miranda*. See note 25 supra.

[40] United States v. Wade, 388 U.S. 218 (1967).

[41] In Johnson v. Avery, 393 U.S. 483 (1969), Mr. Justice Fortas, expressing the views of seven members of the Court, held that unless and until the state provided a reasonable alternative to inmates assisting other inmates in the preparation of petitions of post-conviction relief, it could not validly bar prisoners from furnishing such aid. Categories of counsel-substitute include correctional personnel, other prisoners and law students.

[42] The necessity of appointed counsel for the indigent at trial has been recognized as essential and has been required as one of the protections afforded by the equal protection clause of the fourteenth amendment. Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963).

[43] Washington v. Texas, 388 U.S. 14 (1967); Pointer v. Texas, 380 U.S. 400 (9165).

[44] See Jacob, Prison Discipline and Inmate Rights, supra note 30, at 247.

[45] The right is not limited to criminal cases but applies wherever governmental action seriously injures an individual. The reasonableness of the action depends on the facts found. See ICC v. Louisville & N.R.R., 227 U.S. 88 (1913). "In no other way can a party maintain its rights or make its defense." 227 U.S. at 93. See also Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); Greene v. McElroy, 360 U.S. 474 (1959); 5 Wigmore on Evidence, § 1367 (3d. 1940) where Professor Wigmore commented on the importance of cross-examination: "[f]or two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law."

[46] Cf. Berger v. California, 393 U.S. 314 (1969); Parber v. Page, 390 U.S. 710 (1968); and Pointer v. Texas, 380 U.S. 400 (1965).

[47] Mattox v. United States, 156 U.S. 237, 242 (1895).

[48] Berger v. California, 393 U.S. 314, 315 (1969). See also Barber v. Page, 390 U.S. 719, 725 (1968).

[49] Cf. Jacob, Prison Discipline and Inmate Rights, supra note 30, at 247-48.

[50] Id.

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Other indispensible protections imposed during a trial, extended by *Clutchette* to the prison forum, include a decision by an impartial decision-maker[51] and a determination based on the evidence presented.[52] It is clear that these elements are essential in *Clutchette* type proceedings, since the inmate is under both material and procedural disadvantages due to his incarceration.[53]

The emergence of full due process protections in the area of criminal law has been parallelled by the extension of procedural guarantees in administrative law, culminating in *Goldberg v. Kelly*.[54] To develop the argument for complete protection of inmates in disciplinary proceedings, Judge Zirpoli fused the precedent of *Miranda* with the requirements of *Goldberg*.[55] *Goldberg* provided that whenever an individual is subject to a protential "grievous loss",[56] he may be entitled to certain procedural protections. The issue presented in *Goldberg* was whether the due process clause requires that a welfare recipient be afforded an evidentiary hearing before termination of benefits. There was no dispute that a recipient was entitled to an evidentiary review after termination. The Supreme Court held that although the pretermination hearing need not take the form of a trial, it was required to meet certain minimum procedural safeguards "demanded by rudimentary due process."[57] The protections included affording the recipient the opportunity to confront and cross-examine witnesses to be heard before an impartial decision-maker, to have timely and adequate notice detailing the reasons for a proposed termination, and to retain an attorney if he so desired.[58]

In *Clutchette* the court found that, as a result of the punishment imposed, there had been significant losses of already limited comforts in prison and a substitution of more burdensome conditions of confinement than had previously existed.[59] The district court rejected the contention advanced by California that "custody is custody", regardless of how it is carried out, provided that it does not violate the proscriptions of the "cruel and unusual clause" of the eighth amendment.[60] Judge Zirpoli quoted *Jackson* v. Godwin,[61] declaring that courts would scrutinize "any further restraints or deprivations in excess of that inherent in the sentence and normal

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51 In re Murchison, 349 U.S. 133 (1955). For the application of this element of due process to the prison context, see Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967), vacated, 404 F.2d 571 (8th Cir. 1968).

52 Thompson v. Louisville, 362 U.S. 199 (1960). See also Green v. Independent Consol. School Dist., 252 Minn. 36, 46, 89 N.W.2d 12, 19 (1958) where the court stated that "[i]t is elementary that a finding by the trier of fact must be based exclusively upon evidence received in the course of the trial and that it is not permissible to obtain or consider other evidence." Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971), a case arising out of a cause of action in a Virginia prison, indicated that fundamental to due process is that the ultimate decision be based on evidence presented at the hearing, which the prisoner has the opportunity to refute. See also Arciniega v. Freeman, 10 Cr. L. Rptr. 4050 (U.S. Oct. 26, 1971); United States v. Abilene & So. Ry., 265 U.S. 274 (1924); Takeo Tadano v. Manney, 160 F.2d 665 (9th Cir. 1947).

53 Many of the protections available to the defendant in the courtroom do not exist in prison hearings. For example, an inmate is not protected by the presumption of innocence. 328 F. Supp. at 779.

54 397 U.S. 254 (1970).

55 See *Miranda*; Malloy v. Hogan, 378 U.S. 1 (1964); Pennsylvania ex rel. Herman v. Claudy, 350 U.S. 116 (1956); and Brown v. Mississippi, 297 U.S. 278 (1936).

56 See note 11 supra. In his dissent to Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 901 (1961), Mr. Justice Brennan picked up the phrase, concluding that withholding employment from the plaintiff constituted a severe loss necessitating a due process hearing.

57 Goldberg v. Kelly, 397 U.S. at 267.

58 Id. at 267-71.

59 328 F. Supp. at 780.

60 Id.

61 400 F.2d 529 (5th Cir. 1968).

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structure of prison life."[62] When these restraints are imposed, Judge Zirpoli concluded, an individual should be afforded procedural due process to the extent to which he may be "condemned to suffer grievous loss."[63]

Clutchette employed the balancing approach resorted to in *Goldberg*, weighing the individual inmates concerns against the penal institution's administrative and security needs. In *Goldberg*, Mr. Justice Brennan, speaking for the majority, had answered the government's contention that an immediate termination of welfare benefits, without a hearing with due process safeguards, was a necessity. Brennan felt that the interest of the eligible recipient in the uninterrupted flow of public assistance, coupled with the state's interest that the payments not be erroneously terminated, clearly outweighed governmental fiscal and administrative needs. In similar fashion, Judge Zirpoli concluded that the severity of the potential penalties for inmates adjudged to have violated prison rules or regulations outwieghed the interests of the correctional institution and compelled the imposition of minimum due process guarantees.[64] In so doing, the opinion criticized the contrary approach of *Sostre v. McGinnis*,[65] a case arising in the Second Circuit, for allowing something less than "those requirements demanded by rudimentary due process."[66]

By extending the *Goldberg* rationale to the curtailment of liberty in the prisons, the court emphasized that deprivations in excess of those inherent in the sentence subject the inmate to a "grievous loss."[67] Hence, the principle emerging from *Goldberg* is that procedural due process must obtain whenever the individual is subject to a grievous harm at the hands of the state or its instrumentalities. The extent of the

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[62] 328 F. Supp. at 780, quoting 400 F.2d at 535. See also Jones v. Robinson, 440 F.2d 249 (D.C. Cir. 1971), where, in a different setting, the Court of Appeals specified that minimum protective procedures were required by due process before a hospital could determine that a patient had committed a crime which would require his transfer to maximum security facilities within the hospital. The court provided that when hospital authorities believe that confrontation and cross-examination would not adversely affect the patient involved, confrontation and cross-examination should be permitted.

[63] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). In the same opinion, Mr. Justice Frankfurter listed some of the considerations that will determine the extent to which procedural due process is required:

> The precise nature of the interest that has been adversely effected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed . . . the balance of the hurt complained of and good accomplished – these are some of the considerations that must enter into the judicial judgment.

Id. at 163.

[64] 328 F. Supp. at 781-85. See, e.g., United States ex rel. Marcial v. Fay, 247 F.2d 662, 669 (2d Cir. 1957), cert. denied, 355 U.S. 915 (1958) wherein the Second Circuit stated: "[w]e must not play fast and loose with basic constitutional rights in the interest of administrative efficiency."

[65] 442 F.2d 178 (2d Cir. 1971), cert. denied, 405 U.S. 978 (1972).

[66] The Second Circuit concluded that the requirements set out by the district court, similar to those expressed in *Clutchette*, were greater than those required by the due process clause. While the Court of Appeals conceded that the exaction of segregated confinement was onerous indeed and the conditions Sostre endured were quite severe, 442 F.2d at 191, there is at least some doubt that Judge Zirpoli's belief that the Second Circuit recognized that the disciplinary punishment constituted a "grievous loss" is the correct interpretation. Nevertheless, the *Clutchette* opinion is clearly at odds with the prevailing decision in the Second Circuit.

[67] The *Goldberg* decision has been limited recently by Daniel v. Goliday, 398 U.S. 73 (1970), wherein the Supreme Court reversed a lower court opinion holding that *Goldberg* due process procedures were required before reducing welfare benefits. However, at some stage a limit is reached and, in addition, a reduction of welfare benefits without due process safeguards should not be compared to deprivations of liberty beyond those inherent in the sentence. Any further restrictions upon liberty, though not "cruel or unusual," subject the inmate to a "grievous loss". In contrast, because of the differing levels between states, a reduction in public assistance receipts may not amount to a "grievous loss". A reduction of benefits may only put an individual in one state on a par with recipients in another state. Moreover, that welfare benefits can be reduced without a due process hearing does not imply that liberty can be further reduced without meeting due process standards.

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protections afforded the individual depends upon whether his interest in avoiding that loss outweighs the government's interest in denying certain procedural safeguards. Tested against that standard, if a prisoner's interest in the nature and period of his confinement, his very liberty, is considered a basic human need, as are public assistance payments, then the threat of prolonged or additional restrictions in the form of solitary confinement or an adverse Adult Authority determination is as deleterious to the individual's well-being as the loss of welfare benefits.[68] The procedures listed in *Goldberg* are therefore required to protect the inmate's interest in his own liberty and to provide correctional authorities with the opportunity to make accurate findings with regard to the alleged rule infraction.

Since *Clutchette* was a class action, Judge Zirpoli's ruling that fair procedures must accompany prison disciplinary hearings applied to the potential punishments for all San Quentin inmates as well as those specifically imposed on Clutchette. The serious punishments which a disciplinary committee could impose directly include sentence to isolation, confinement to segregation or the Adjustment Center, referral to the Adult Authority, assessment of damages or forfeiture of earnings, and referral to the District Attorney for prosecution. In addition, the decision of the disciplinary committee can have indirect, but equally adverse, consequences. The result of an adverse decision in a disciplinary hearing will often have the effect of delaying the release date of the inmate. The effect of this delay is that a prisoner who might have been released after serving the minimum required sentence may have to remain in prison for the maximum allotted term. The prisoner's effective term of imprisonment is thereby increased.[69] Moreover, confinement to isolation, segregation or the Adjustment Center, which may impose a severe punishment in itself, can actually result in a denial of parole. The implication that the inmate is incorrigible may not be overlooked by the parole board. Thus, inmates may be deprived "of the opportunity to appear under more favorable circumstances before the Parole Board."[70] Finally, a disciplinary finding of guilt may result in refixing the prisoner's sentence to the statutory maximum, thus extending the real term of incarceration. Assessment of damages or a forfeiture of earnings may strip an indigent prisoner of everything he owns.[71] As in *Goldberg*, Judge Zirpoli felt that a post-punishment hearing would provide no protection at all against undeserved punishments like isolation, segregation or postponement of parole.[72]

The importance of procedural guarantees in the adjudication of individual rights has been recognized in other areas of the law. The Second Circuit applied the "grievous loss" doctrine[73] and the due process requirements of *Goldberg* to prevent the government from depriving a private citizen of his continued tenancy in public housing, without affording him adequate procedural safeguards, even if that housing could be deemed a privilege.[74] In that case, the full panoply of *Goldberg* protections

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[68] See Condon, Procedural Due Process in Prison Disciplinary Actions, 2 Loyola U.L.J. 110 (1971).

[69] 328 F. Supp. at 777. Under California procedure, a prisoner's case comes before the Adult Authority each year, at which time the Adult Authority may do one of three things: it may put off consideration for another year, it may set the maximum term a prisoner will have to serve or it may set a release date (parole) once a maximum has been set.

[70] Carothers v. Follette, 314 F. Supp. 1014, 1027 (S.D. N.Y. 1970).

[71] A hearing was required before a wage garnishment could be imposed in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), where the court held that the Sniadach principle could be applied to the taking of property in other situations besides garnishment, when the deprivation would cause hardship to the individual.

[72] Accord, Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).

[73] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951).

[74] Escalera v. New York Housing Authority, 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970). The constitutional challenge to the manner of disciplinary proceedings cannot be defeated by an argument that a minimum sentence is a "privilege" and not a "right". Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969). While an inmate has no constitutional right to a minimum sentence, the decision of the disciplinary board will have a direct effect upon the

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were considered essential in order to satisfy constitutional dictates. By analogy, if a prisoner's liberty is considered as basic a human need as public housing, then the possibility of prolonged or greater restraints upon the small measure of "liberty" granted a prisoner would seem to require a similar due process shield.

The court in *Clutchette* might have also focused on the due process aspects of administrative agencies in general.[75] While each of the hearings heretofore discussed has been accompanied by certain elements of due process geared to the specific agency, adoption of this approach and its application to the prison disciplinary setting would have the advantage of giving the widest possible expanse to procedural safeguards.[76] Even prior to *Goldberg*, courts have imposed procedural guarantees to protect rights less vital than those involved in *Goldberg* or *Clutchette*. In *Hornsby v. Allen*,[77] a case involving the granting of a liquor license, among the elements of due process required was the right to cross-examine adverse witnesses within a fair hearing.[78] Similarly, in *Reilly v. Pinkus*,[79] where one who advertised through the mails a reducing treatment was barred from the use of the mails by the Postmaster General, it was held error not to permit the entrepreneur to cross-examine the government's medical witnesses whose testimony led to the administrative action. In *Hecht v. Monaghan*,[80] the Court of Appeals of New York decided that the New York City police commissioner's determination revoking the party's hack driver's license could not be accomplished except by due process of law.[81]

In comparison with those situations when economic interests are in question and due process protections are demanded, it is quite reasonable to argue that it would be illogical to deny such safeguards when the liberty of an inmate is at stake.[82] When by

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duration of his incarceration. See also Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970) where a three-judge panel including Judge Zirpoli recognized the lack of vitality in the "right-privilege" distinction in the context of a case involving the availability of law books in prison libraries.

75 See Davis, On Administrative Law 1 (1951), where an administrative agency was defined as an "organ of government, other than a court and other than a legislature, which affects the rights of private parties through either adjudication or rule making." Professor Davis explained that "[a]n administrative agency may be called a commission, board, bureau, office, administrator, department, authority, administration, division or agency." Id. at 1 n.1.

76 See generally Note, Due Process and the Right to a Prior Hearing in Welfare Cases, 37 Fordham L. Rev. 604 (1969).

77 326 F.2d 605 (5th Cir. 1964).

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> Due process in administrative proceedings of a judicial nature has been said generally to be in conformity to fair practices of Anglo-Saxon jurisprudence, which is usually equated with adequate notice and a fair hearing ... the parties must generally be allowed an opportunity to know the claims of the opposing party, to present evidence to support their contentions, and to cross-examine witnesses for the other side [Citations omitted].

Id. at 608. Accord, Morgan v. United States, 304 U.S. 1 (1938).

79 338 U.S. 269 (1949). Accord, Jenkins v. McKeithen, 395 U.S. 411 (1969), where a finding of criminal culpability by the Labor-Management Commission of Inquiry must be accompanied by the rights to confront and cross-examine witnesses.

80 307 N.Y. 461, 121 N.E.2d 421 (1954).

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> The hearing held by an administrative tribunal acting in a judicial or quasi-judicial capacity may be more or less informal. Technical legal rules of evidence and procedure may be disregarded. Nevertheless, no essential element of a fair trial can be dispensed with unless waived. That means, among other things, that the party whose rights are being determined must be fully apprised of the claims of the opposing party and of the evidence to be considered, and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal.

Id. at 470, 121 N.E.2d at 425.

82 Cf. United States v. Weller, 309 F. Supp. 50, 54 (N.D. Cal. 1969), appeal dismissed, 401 U.S. 254 (1971), on jurisdictional grounds:

> Although the issuance of a liquor license would hardly be considered by most a "right", nevertheless an applicant for a liquor license has far more procedural rights than a Selective Service registrant whose life may ultimately be placed in jeopardy. See Hornsby v. Allen 326

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administrative action a person is denied something of substantial value and the denial is based partly on testimony supplied by another, the accused might readily be afforded the right to confront and cross-examine with regard to that evidence.[83]

Three recent Supreme Court cases[84] suggest analogies to the situation of an inmate facing severe disciplinary punishments. In the first, *In re Gault*, the Supreme Court concluded, with respect to a fact-finding proceeding to determine delinquency where commitment of a juvenile to a state institution may result, that certain elements of due process must be provided to protect a youth from arbitrary determinations. A juvenile has the right to notice of the charges, of access to counsel, to confront and cross-examine adverse witnesses as well as the privilege against self-incrimination. A number of similarities present themselves between the inmate subject to severe penalties and the minor in *Gault*. Both are accused on facts warranting imposition of punishments. For the juvenile, restrictions such as commitment to a state facility of a determination of delinquency; for the prisoner, additional limitations upon liberty, typified by confinement or reduction in privileges. Both are also confronted with a decision-maker possessed with wide discretionary authority to impose those limitations when rules or laws have been allegedly violated.[85] When punishment takes the form of further restrictions upon liberty, *Gault* is representative of a trend requiring substantial and increased procedural protections for an accused.[86]

In the second case, *Mempa v. Rhay*, the Court unanimously held that revocation of probation and imposition of deferred sentencing were invalid where the defendant was not represented by retained or appointed counsel. Representation by counsel was deemed essential to the fairness of deferred sentencing proceedings.[87]

In *Specht v. Patterson*, Justice Douglas, speaking for a unanimous Supreme Court, held due process protections were required even though the hearing was conducted to determine not guilt, but whether additional restrictions not required under the conviction were justifiable. The trial judge in *Specht* had determined that the petitioner constituted a threat of bodily harm to members of the public and sentenced him to an additional indeterminate term of from one day to life. It is clear that without due process safeguards, Specht's ability to avoid a longer sentence than was statutorily required would be seriously impaired. By the same yardstick, a prisoner subject to a disciplinary hearing could have his sentence, in effect, extended markedly or made fundamentally harsher. As in *Specht*, it may be argued that a prisoner facing restrictions on liberty greater than those nherent in the sentence, deserves a disciplinary hearing meeting certain minimum standards.

Whereas most courts still believe that a parole revocation hearing need not be accompanied by due process, including representation by counsel,[88] some jurisdictions

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F.2d 605 (5th Cir. 1964).... [Likewise] an applicant for admission to the bar. Willner v. Comm. on Character and Fitness, 373 U.S. 96 (1963).

The principle in *Weller* as well as in *Clutchette* is that various non-economic interests require a large measure of procedural protection in order not to be completely destroyed by administrative considerations.

[83] See Note, Due Process and the Right to a Prior Hearing in Welfare Cases, supra note 76, at 615.

[84] Mempa v. Rhay, 389 U.S. 128 (1967); In re Gault, 387 U.S. 1 (1967) and Specht v. Patterson, 386 U.S. 605 (1967).

[85] Condon, Procedural Due Process in Prison Disciplinary Actions, supra note 68, at 126.

[86] See generally Condon, Procedural Due Process in Prison Disciplinary Actions, supra note 68, where the author felt some hearing was required before punitive action is taken. He went on to add that if a hearing is to be meaningful, it would have to entail the opportunity to defend against a charge of misconduct to the greatest extent possible without posing a severe threat to prison security.

[87] Accord, Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969) and Ashworth v. United States, 391 F.2d 245 (6th Cir. 1968) where the principle undergirding *Mempa* v. Rhay, 389 U.S. 128 (1967), was extended to revocation of probation proceedings in general.

[88] See, e.g., High Pine v. Montana, 439 F.2d 1093 (9th Cir. 1971); Earnest v. Willingham, 406 F.2d 681 (10th Cir. 1969) and Williams v. Patterson, 389 F.2d 374 (10th Cir. 1968).

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have recently begun to recognize that the right to an attorney at a parole revocation hearing is constitutionally mandated.[89] An outgrowth of the feeling that due process guarantees are indispensible whenever an individual's liberty is jeopardized, extension of the safeguards would seem to be consonant with a trend toward greater protections for the individual. Moreover, the cases denying procedural rights in parole revocation hearings do so on the grounds that a parolee is in custody and it is a matter of "grace" that he is permitted to serve part of his sentence outside prison.[90] The reasoning here is that the normal status of the convicted individual is in the prisons and therefore parole can be revoked without elaborate safeguards.[91] However, this reasoning cannot be applied to the setting of the disciplinary hearing. The normal status of the prisoner is not in isolation or segregation. He loses his normal status within the general inmate population only if he is found guilty of a rule violation. Therefore, the parole revocation proceedings that do not provide extensive procedural protections should have no application to a prison disciplinary hearing.[92]

The thrust of these cases is that due process guarantees, approaching those afforded a defendant in a criminal trial, must be adhered to in any proceeding where a determination of fact which may result in a deprivation or increased restrictions on liberty is involved.[93] Reasoning from this, an inmate arguably should be afforded extensive due process protections, at least in disciplinary cases in which there is a possiblity that solitary confinement will be imposed or where the Adult Authority is likely to impose the maximum amount of years under the indeterminate sentence.

In *Clutchette* Judge Zirpoli might have focused upon one of the primary objectives of incarceration, the rehabilitation process. As a matter of sound correctional and rehabilitative practice, it is vital that the prison inmate's legal needs be met. A feeling of being treated unfairly will insure a hostile attitude toward the criminal justice system and the community in general by the prisoner. By treating him fairly and giving him an adequate and effective opportunity to be heard, it is possible that significant rehabilitation may be accomplished.[94] A prisoner who suffers confinement to solitary or a longer sentence than necessary, in part due to a denial of procedural protections, is unlikely to feel he has been dealt with fairly.[95] If the inmate is given access to a lawyer and is provided with procedural safeguards, many unwarranted punishments due to incorrect misconduct reports are likely to be prevented.

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89 See, e.g., United States ex rel. Bey v. Connecticut Bd. of Parole, 443 F.2d 1079 (2d Cir.), vacated, 404 U.S. 879 (1971); Goolsby v. Gagnon, 322 F. Supp. 460 (E.D. Wis. 1971); People ex rel. Menechino v. Warden, 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971). See also Hester v. Craven, 322 F. Supp. 1256 (C.D. Cal 1971), where redetermination of a sentence of a parolee based on a factual determination of events which occured outside the prison, without granting him the right to confront and cross-examine witnesses, constituted a violation of due process.

90 Williams, v. Patterson, 389 F.2d 374, 375 (10th Cir. 1968).

91 *Clutchette* Brief, supra note 14, at 24.

92 Moreover, should procedural safeguards be considered a matter of "grace" in the disciplinary hearing setting, where a privilege granted by government is a matter of discretion, the right-privilege distinction is becoming increasingly outmoded and should not be a controlling factor here. Cf. Shapiro v. Thompson, 394 U.S. 618 (1969).

93 See Jacob, Prison Discipline and Inmate Rights, supra note 30, at 245.

94 "[w]here rehabilitation of criminal offenders is concerned, 'reformation can best be accomplished by fair ... treatment of the person sought to be reformed.'" Cohen, Due Process, Equal Protection and State Parole Revocation Hearings, 42 U. Colo. L. Rev. 197, 215 (1970).

95 See Jacob, Prison Discipline and Inmate Rights, supra note 30, at 244. See also Jackson v. Godwin, 400 F.2d at 535, where it was believed that "[u]nrestricted, arbitrary and unlawful treatment of prisoners would eventually discourage prisoners from cooperating in their rehabilitation."

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Summarizing the trend in administrative law represented by *Goldberg*, procedural rights are increasingly conferred upon individuals before they are subjected to economic loss.[96] The district court found no rational basis for withholding similar protections where prisoners' liberty was at stake. Judge Zirpoli could have justified this extension of due process by application of the criminal law alone. Protection of criminal defendants has been expanded continuously.[97] However, Zirpoli adopted an approach emphasizing developments in administrative law in addition to those in the criminal law field. The opinion is a hybrid, emphasizing the right of counsel under *Miranda* and other due process safeguards where a severe loss has resulted similar to *Goldberg*. The approach here is significant. A mixture of criminal and administrative law, either of which is possibly insufficient to grant relief to the plaintiffs, is a novel approach to a major problem.[98]

The district judge's holding illustrates the trend of criminal procedure and administrative procedure towards recognition of more extensive applications of due process. It reflects an increasingly common position that individual liberty must be zealously safeguarded. Liberty is vital to the interests of the individual and any effort to circumscribe its exercise must be consistent with due process of law. Without sufficient safeguards, people are powerless to protect their interests from the momentum of the administrative juggernaut to dispense with their case as quickly and as expediently as possible. The application of due process has been expanded into various fields including welfare and pre-trial interrogation. The time may well have come to extend this constitutional imperative to the correctional institution.

The conclusion in *Clutchette* is not surprising considering that Judge Zirpoli has been a pioneer in extending prcedural safeguards to the disadvantaged.[99] The impact of the *Clutchette* opinion is to provide ammunition for critics of the *Sostre* decision[100] with precedent to establish procedural due process in prison disciplinary

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96 See note 26 supra.

97 See text accompanying notes 34-41 supra.

98 Due to a lack of precedent, total reliance on either criminal or administrative law alone would not justify permitting a major departure in prison procedure. Substantial procedural protections exist for the defendant in a criminal trial. However, a prison disciplinary hearing is not a trial and has not been accorded the same treatment. Moreover, while the San Quentin disciplinary committees are a part of the California penal system, they also perform the duties of an administrative agency. Such agencies, as mentioned in notes 77-83 supra, follow the procedure outlined by the Federal Administrative Procedure Act § 7, 5 U.S.C. § 556 (1970). The same procedural standards have been applied in cases dealing with issues like old age benefits and licensing. See Wheeler v. Montgomery, 397 U.S. 280 (1970) and Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964). Prison hearings have been treated distinctly as an element of the criminal law, but that body of law has not been extended to provide ample procedural due process in prison hearings. Therefore, an approach combining both administrative and criminal law was adopted by the district court in order to extend procedural safeguards.

99 See Gilmore v. Lynch. 319 F. Supp. 105 (M.D. Cal. 1970). See also Ellhamer v. Wilson, 312 F. Supp. 1245 (N.D. Cal. 1969), rev'd, 445 F.2d 856, (9th Cir. 1971); William v. Nelson, 323 F. Supp. 585 (N.D. Cal. 1970) and Mays v. Nelson, 323 F. Supp. 587 (N.D. Cal. 1970) where appeals are still pending. Through these three cases, Judge Zirpoli has attempted to extend the due process clause of the fourteenth amendment to parole revocation hearings.

100 442 F.2d 178 (2d Cir. 1971), cert. denied, 405 U.S. 978 (1972), supra note 65, wherein the Second Circuit rejected the contention that extensive procedural safeguards were required by the Constitution for prison disciplinary hearings. It is also noteworthy that the Second Circuit view of prisoners in *Sostre* contrasts sharply with its view of the public housing tenant in Escalera v. New York Housing Authority 425 F.2d 853 (2d Cir.), cert. denied, 400 U.S. 853 (1970). See note 74 supra. As the last frontier in the development of procedural safeguards, it seems that the Second Circuit has exempted prisoners from the trend toward affording extensive due process protections for disadvantaged people. The opinion in *Sostre* does not elucidate why prisoners should be treated differently than the tenant in *Escalera*. Furthermore, the holding fails to prescribe new perameters for the due process clause in prisons.

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hearings. It will be interesting to see what the Ninth Circuit does with the appeal by the State of California.[101] If the Court of Appeals affirms the district court opinion, the Supreme Court may become involved with the procedures required in a disciplinary hearing in order to resolve the opposing views of the Second and Ninth Circuits.

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[101] The Ninth Circuit, as reflected by numerous parole revocation decisions, supra notes 88 and 99, may not be any more sympathetic to the cause of "prison reform" than was its counterpart in *Sostre*. The *Sostre* decision is an obstacle for *Clutchette* and does not bode well for the future of rudimentary procedural due process in the correctional institutions. However, the decision in *Miranda* was the result of years of frustration and grappling over the issue of the extensiveness of due process and, more specifically, representation by counsel, in custodial situations where the investigation has focused on a particular individual. Cf. Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); Cicenia v. Lagay, 357 U.S. 504 (1958) and Crooker v. California, 357 U.S. 433 (1958). The extent of procedural safeguards may be a continuing problem for years to come. If the holding in *Clutchette* is not altered substantially by the successive appellate courts, enforcement of detailed requirements could still prove to be difficult within the prison walls. As a result, the potential for abuse of lofty principles is tremendous. A diligent effort to enforce any due process guarantees will be needed to protect the incarcerated.

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