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The Process Due Prisoners: *Wolff v. McDonnell*, 418 U.S. 539 (1974)

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Note

The Process Due Prisoners

Wolff v. McDonnell, 418 U.S. 539 (1974).

I. INTRODUCTION

Federal courts have been called upon in recent years to delimit the scope of "prisoners' rights." This reflects an increased awareness of the need for due process safeguards to remedy unfair or dehumanizing conditions in state and federal prisons. *Wolff v. McDonnell*[1] is the most definitive decision to date considering the constitutionality of intra-prison rules and regulations. In that case, the United States Supreme Court used most of the modern methods of due process analysis in an attempt to find a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application."[2]

II. LOWER COURT DECISIONS

On his own behalf, and on behalf of other inmates similarly situated, R.O. McDonnell brought a civil action[3] under section 1983[4] in federal district court challenging the constitutionality of a number of administrative practices at the Nebraska Penal and Correctional Complex. Included in these practices were restrictions limiting the number of inmates allowed to use the prison law library at one time, and the number of hours a prisoner could confer with an inmate legal assistant; inmates were also denied the personal use of typewriters. McDonnell further alleged reprisals by prison officials against those inmates who petitioned the courts, the censorship of inmate mail and the absence of procedural safeguards at prison disciplinary hearings where serious sanctions might be imposed.

The court held that (1) the denial of an individual inmate's use of a typewriter did not infringe any constitutional rights because

1. 418 U.S. 539 (1974).
2. *Id.* at 542.
3. McDonnell v. Wolff, 342 F. Supp. 616 (D. Neb. 1972).
4. 42 U.S.C. § 1983 (1970).

the prison permitted inmate legal assistants to type those legal documents which the court required to be typewritten; (2) the plaintiffs failed to prove a widespread practice of reprisals against those inmates who petitioned the courts, although, if such a practice were proved, it would clearly be unconstitutional; (3) most of the regulations involving the inmate legal assistance program were reasonable but the seven-hour-per-week-per-inmate limit on independent research time was unreasonable; (4) because inmates' first amendment rights had been recognized,[5] censorship of mail between attorney and inmate was to be strictly limited to searches for contraband;[6] (5) the highly informal hearing procedure used in taking away good time[7] was constitutionally satisfactory, although the court found that it had not been followed in many instances.[8]

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5. Rowlands v. Jones, 452 F.2d 1005 (8th Cir. 1971).
6. Outgoing mail may not be inspected or opened; incoming mail may be opened only if manipulation of the envelope, use of fluoroscopes and metal detectors or other alternate means to opening the envelope fail to disclose contraband and there is a real possibility that contraband will be included in mail from an attorney; in addition, if the envelope from the attorney is marked "Privileged" it cannot be opened except in the presence of the inmate addressee.

   342 F. Supp. at 625. The court further held that delivery of both incoming and outgoing mail must be completed within 48 hours of receipt. *Id.* The procedure which was declared unconstitutional provided that all outgoing and incoming mail was to be read and inspected, although not stopped. *Id.* at 635.
7. Warden Wolff testified that the procedure used by the prison in taking away good time is as follows:

   (a) The chief correction supervisor reviews the "write-ups" on the inmates by the officers of the Complex daily;
   (b) the convict is called to a conference with the chief correction supervisor and the charging party;
   (c) following the conference, a conduct report is sent to the Adjustment Committee;
   (d) there follows a hearing before the Adjustment Committee and the report is read to the inmate and discussed;
   (e) if the inmate denies the charge he may ask questions of the party writing him up;
   (f) the Adjustment Committee can conduct additional investigations if it desires;
   (g) punishment is imposed.

   342 F. Supp. at 625-26.
8. *Id.* at 627. The court relied on the Eighth Circuit's continued adherence to the right/privilege dichotomy. *Id.* citing Morrissey v. Brewer, 443 F.2d 942 (8th Cir. 1971) and Douglas v. Sigler, 386 F.2d 684 (8th Cir. 1967). By so doing, the court merely required prison officials to follow Nebraska's statutory procedure.

   NEB. REV. STAT. § 83-1,107 (Supp. 1975) permits the withholding of good time upon the order of the chief executive officer of the Complex "after the offender has been consulted regarding the charges of misconduct." NEB. REV. STAT. § 83-185(2) (Reissue 1974) requires

Both parties appealed.[9] McDonnell claimed the trial court erred in finding the inmate legal assistance program constitutionally adequate and in holding due process requirements inapplicable to disciplinary hearings. The Warden contended that existing procedures at disciplinary hearings provided minimum due process and that the court had erred in striking down regulations governing mail censorship and inmate use of the prison library.

In response, the Court of Appeals for the Eighth Circuit, affirmed in part, reversed in part, and remanded several issues to the district court for resolution. The appellate court affirmed the district court's holding that regulations on inmate use of the prison law library were unconstitutionally restrictive and remanded the issue of whether the inmate legal assistance program as a whole adequately met the needs of prisoners in habeas corpus and civil rights actions under the test of *Johnson v. Avery*.[10] The court also affirmed the district court's ruling limiting attorney-client mail censorship.

Regarding McDonnell's due process claim, the court held that the Supreme Court's recent decisions in *Morrissey v. Brewer*[11] and *Gagnon v. Scarpelli*[12] applied to prison disciplinary proceedings as well. Accordingly, the Nebraska Penal Complex's procedures were held to be constitutionally infirm. Although inmates had been given a hearing, they had not been (1) not notified of charges early enough to prepare a defense, (2) not given an opportunity to summon, confront or cross examine witnesses, (3) not allowed legal assistance in presenting a defense, and (4) not given a written statement by the disciplinary board setting out the evidence relied on

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that, except in cases of flagrant or serious misconduct such as assault, escape or attempt to escape, punishments shall consist only of deprivation of privileges.

For these reasons, good time could only be taken away for flagrant and serious misconduct, such as fighting and threatening an officer's life. The court ordered the restoration of good time which had been taken away for such offenses as "messing up the 'count up,'" [sic], cussing a guard, or failing to have a conforming haircut. 342 F. Supp. at 628.

9. McDonnell v. Wolff, 483 F.2d 1059 (8th Cir. 1973).
10. 393 U.S. 483 (1969). The Court held that a prison regulation which barred inmates from furnishing assistance to other prisoners in preparing petitions for post-conviction relief was void, because the state had not provided a reasonable alternative legal assistance program for uneducated or illiterate inmates.
11. 408 U.S. 471 (1972). In this case, parolees' rights to due process safeguards at parole revocation hearings were recognized.
12. 411 U.S. 778 (1973). The right to procedural due process was made applicable to probation revocation hearings.

in imposing the punishment. The case was remanded to the district court to determine which minimum procedural due process standards were necessary and whether they were being met.

The court further held that restoration of good time was an improper remedy for inmates who were punished in proceedings which did not meet constitutional standards. Following *Preiser v. Rodriguez*,[13] the court stated that restoration of good time could not be granted in a section 1983 civil rights action and was only available in a habeas corpus action[14] after exhaustion of state remedies. The court. however, did authorize the district court to order the expungement of any determinations of misconduct from prison records if those determinations occurred in hearings where inmates were denied due process.[15]

III. THE SUPREME COURT DECISION

Defendant Wolff petitioned for certiorari and the United States Supreme Court affirmed in part and reversed in part the decision of the court of appeals.

Finding no reasonable distinction between civil rights suits and habeas corpus actions, the Supreme Court held that legal assistance must be provided for both, under the rule of *Johnson v. Avery*.[16] The issue of opening incoming attorney-inmate mail to inspect for contraband had been narrowed, on appeal, when prison authorities conceded they could not open and read all mail from attorneys to inmates but claimed they could open and inspect all mail from attorneys if this were done in the prisoner's presence. The Court upheld petitioner's claim and intimated that their concession exceeded even that which might be constitutionally required.[17]

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13. 411 U.S. 475 (1973).
14. [W]hen a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate or more speedy release from that imprisonment, his sole federal remedy is a writ of habeas corpus.

    Id. at 500.
15. Courts have recognized the damaging nature of such a record entry.

    "* * * [It] may follow him throughout the prison system; if his punishment was without cause, he is punished anew each time his record is used against him. . . . Similarly, his disciplinary record may affect his eligibility for parole. * * *"

    McDonnell v. Wolff, 483 F.2d at 1064 n.7. *See* note 99 *infra.*
16. *See* note 10 *supra.*
17. Wolff v. McDonnell, 418 U.S. 539, 577 (1974).

With respect to petitioner's primary claim of due process, the Court held that the protections of the Constitution and the due process clause extended to incarcerated offenders but that these rights were subject to limitation because of the nature of the prison regime. Where the potential sanctions for a prisoner's "flagrant or serious misconduct"[18] include solitary confinement[19] and loss of "good time,"[20] the Court required certain minimum due process safeguards in the disciplinary hearing. The Court refused to require the same procedures for in-prison disciplinary proceedings which it had previously mandated for parole and probation revocation hearings in *Morrissey* and *Gagnon*. However, some of the minimum due process safeguards required by *Morrissey* for parole revocation hearings[21] were deemed necessary in prison disciplinary proceedings. They included: (1) a hearing before an impartial examining body; (2) written notice of charges to the defendant at least 24 hours in advance of the hearing; (3) a written statement by the fact-finders as to the evidence relied on and reasons for the punishment imposed; (4) the right to call witnesses and to present docu-

18. "At the time this litigation was commenced, the statute gave examples of 'flagrant or serious misconduct'—'assault, escape, attempt to escape.' NEB. REV. STAT. § 83-185 (Reissue 1974)." *Id.* at 545.

19. NEB. REV. STAT. § 83-185(2) (Reissue 1974).

20. "Good time" was statutorily defined and credited to inmates as follows:

> The chief executive officer of a facility shall reduce for good behavior the term of a committed offender as follows: Two months on the first year, two months on the second year, three months on the third year, four months for each succeeding year of his term and pro rata for any part thereof which is less than a year. The total of all such reductions shall be credited from the date of sentence, which shall include any term of confinement prior to sentence and commitment as provided pursuant to section 83-1,106 and shall be deducted:
>
> (a) From his minimum term, to determine the date of his eligibility for release on parole; and
>
> (b) From his maximum term, to determine the date when his release under supervision becomes mandatory. . . .

NEB. REV. STAT. § 83-1,107(1) (Supp. 1975).

21. Procedures required by Morrissey v. Brewer are as follows:

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

408 U.S. at 489. *See also* Gagnon v. Scarpelli, 411 U.S. 778 (1973).

mentary evidence when doing so will not jeopardize institutional security or the goal of rehabilitation; and (5) the right of a defendant to seek the aid of a fellow inmate, staff member or inmate legal assistant in cases where the defendant is illiterate or the issues very complex.

The Court expressly denied inmates the right to confront or cross-examine adverse witnesses. By way of justification, the Court cited its obligation to make one rule for maximum as well as minimum security institutions, and pointed to the potential for hostility and retaliation which would be aggravated by requiring adversary procedures in proceedings whose goals are rehabilitation and behavior modification.[22]

Regarding appropriate relief, the Court affirmed the court of appeal's holding that *Preiser* foreclosed the restoration of good time in civil rights actions, but reversed on the issue of retroactive expungement of records. The Court held that prison records containing determinations of misconduct not reached in accordance with constitutional procedures need not be expunged, reasoning that expungement would have a significant impact on prison administration, would undermine the good faith reliance prison officials put on prior law which did not require such procedures, and would be "very troublesome for the parole system since performance in prison is often a relevant criterion for parole."[23]

IV. TRENDS IN DUE PROCESS

McDonnell can be seen as a product of the extension of fundamental due process beyond the courtroom into the procedures of states and administrative agencies.[24] This is a "revolutionary expansion in the area of constitutional law known as procedural due process."[25] It has been accompanied by a disaffection with the right/privilege distinction in constitutional analysis[26] and has pro-

22. The procedures settled upon by the Court are very similar to those in effect at disciplinary proceedings in federal prisons. The Federal Bureau of Prisons' procedural rules do not allow complete disclosure of all evidence against a defendant regardless of danger to security, right of defendant to confront or cross-examine witnesses, or right to counsel (but the assistance of a staff member is always available). The remaining safeguards required by the Court are in force. Brief for United States as Amicus Curiae at 13-15, Wolff v. McDonnell, 418 U.S. 539 (1974).
23. 418 U.S. at 574.
24. Tobriner & Cohen, *How Much Process is 'Due' Parolees and Prisoners*, 25 HASTINGS L. REV. 801 (1974).
25. *Id.* at 801.
26. *See, e.g.*, Morrissey v. Brewer, 443 F.2d 942 (8th Cir. 1971); McDonnell v. Wolff, 342 F. Supp. 616 (D. Neb. 1972).

moted inquiry into far-reaching governmental practices, including procedures for the administration of justice.[27]

The courts have held that the Constitution limits state and federal power to withhold arbitrarily certain statutory benefits such as unemployment compensation,[28] welfare payments,[29] tax exemptions[30] and drivers' licenses.[31] The Court in *McDonnell* considered good time as one of those statutorily prescribed benefits which could not be withheld without orderly process.

> [T]he State having created the right to good time and itself recognized that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated . . . . Since prisoners in Nebraska can only lose good time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.[32]

The Court did not go so far as to embrace the principle enunciated in Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*[33] that an individual has the right to be heard before being condemned to suffer grievous loss of any kind at the hands of the government.[34] The Court did, however, accept the proposition that "liberty," as well as property inter-

27. Landman v. Royster, 333 F. Supp. 621, 644 (E.D. Va. 1971).
28. Shapiro v. Thompson, 394 U.S. 618 (1969).
29. Goldberg v. Kelly, 397 U.S. 254 (1970).
30. Speiser v. Randall, 357 U.S. 513 (1958).
31. Bell v. Burson, 402 U.S. 535 (1971). *See also* Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Graham v. Richardson, 403 U.S. 365 (1971); Snaidach v. Family Finance Corp., 395 U.S. 337 (1969); Pickering v. Board of Educ., 391 U.S. 563 (1968); Sherbet v. Verner, 374 U.S. 398 (1963). *See also* cases cited by the Court for the proposition that a hearing procedure is required when an individual is deprived of property interests: Board of Regents v. Roth, 408 U.S. 564 (1972) (dismissal from government job absent "cause" for termination of employment); In re Ruffalo, 390 U.S. 544 (1968) (revocation of license to practice law); Grannis v. Ordean, 234 U.S. 385 (1914) (taking of private property).
32. 418 U.S. at 557.
33. 341 U.S. 123 (1950).
34. This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.

Id. at 168. *See* 418 U.S. at 594 (Douglas, J., dissenting).

ests, are protected against arbitrary invasion by government—clearly a next step in the development of due process doctrine.

In *McDonnell*, individual constitutional rights in general, and the right to due process of law in particular, have been limited, refined and accommodated to the needs and objectives of governmental institutions.[35] As the Court wrote in *Morrissey*, "not all situations calling for procedural safeguards call for the same kind of procedure."[36] In deciding which procedural safeguards are required[37] the Court's obligation in each situation is to identify and strike a balance between the needs of the governmental functions involved and the private interest affected by governmental action.

Before *McDonnell*, the Court had held that curtailment of constitutional rights was justified by institutional necessity and that restrictions could be imposed on constitutional rights because of the nature of an institutional regime. This position is illustrated in two recent decisions. In *Civil Service Commission v. National Association of Letter Carriers*,[38] federal employees and several political organizations challenged a statute[39] which prevented federal employees from actively participating in political campaigning and management. The Court allowed Congressional abridgement of constitutional rights in this situation because the federal employees' interest in political freedom of speech was outweighed by the threat of partisanship to the impartiality of the executive branch and the fear of "political justice."[40] Likewise, in *Parker v. Levy*,[41] the Court held that curtailment of first amendment rights was justified in the military environment. The conviction at a general court-martial of an Army physician who disobeyed orders, encouraged soldiers to refuse to obey their orders to go to Vietnam and openly maligned Special Forces personnel was upheld. The Court reasoned that the demands of military life allowed Congress greater flexibility and breadth in legislating the abridgement of freedom of speech. In *McDonnell*, the prison was considered to be a similar institutional regime, where the constitutional right to truth-seeking devices of due process could be curtailed because of the exigencies of the institutional environment.

35. 418 U.S. at 556.
36. 408 U.S. at 481.
37. *Id.* citing Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961).
38. 413 U.S. 548 (1973).
39. Hatch Act, 5 U.S.C. § 7354(a)(2) (1970).
40. Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973). *See also* Broderick v. Oklahoma, 413 U.S. 601 (1973).
41. 417 U.S. 733 (1974).

McDonnell also contains elements of an emerging theory of due process which requires that a person entitled to a hearing must be given only those due process safeguards which are crucial to a fair hearing on the underlying substantive issue to be resolved.[42] This individualized analysis was used in *Gagnon* in determining when counsel was to be provided at probation revocation proceedings. There, the Court focused on the nature of the inquiry and the importance of the safeguard in providing a fair hearing on the issue to be resolved. The right to counsel turned on "the need or the likelihood in a particular case for a constructive contribution by counsel."[43] Justice Powell wrote that counsel should be provided where the probationer makes a colorable claim that he has not committed the alleged violation with which he is charged and there are "reasons which justified or mitigated this violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present."[44]

In *McDonnell* the Court accepted this case-by-case analysis by finding that the right to counsel-substitutes for illiterate inmates or those with complex cases was necessary for a fair hearing on the substantive issues. However, with respect to the right to cross-examine or confront witnesses, the Court rejected this analysis and curtailed these rights. By so doing, the Court sacrificed these safeguards to the exigencies of the prison environment, despite the fact that these exigencies may differ between maximum and minimum security prisons and between individuals.[45]

Gagnon's case-by-case approach, with its reference to the underlying substantive issue to be resolved, is desirable in determining minimum due process requirements, because it serves to effectuate the true purpose of a hearing—giving the defendant a meaningful opportunity to be heard in mitigation as well as vindication. The drawback to this approach is that it forces officials of prisons and

42. For a very enlightening discussion of this approach to minimum due process requirements, see Tobriner & Cohen, *supra* note 24. According to the authors, the severity of the potential penalty imposed should not be the sole or even most important criterion in resolving the adequacy of procedures in specific cases. Tobriner & Cohen, *supra* note 24, at 802. Such is the currently prevailing philosophy: a full panopoly of procedural rights is given defendants in criminal trials while lesser procedures are prescribed for defendants in parole and probation revocation and prison disciplinary proceedings.

43. 411 U.S. at 787.

44. *Id.* at 808.

45. Others have struck the balance differently. *See* Wolff v. McDonnell, 418 U.S. 539 (1974) (Douglas & Marshall, JJ., dissenting) (Brennan, J., concurring).

other institutions to make difficult decisions of constitutional dimension every day, subject to ultimate review by the judicial branch, thereby increasing the burdens on both the prisons and the courts.

McDonnell represents a most significant departure from the "hands off" doctrine toward state prison administration which federal courts observed before the late 1960s. Absent flagrant or gross constitutional violations, the federal courts pursued this policy of restraint and noninterference with the management of and discipline in state and federal prisons.[46] The administration of prisons was considered an executive function and the doctrine of separation of powers was held to deprive federal courts of the power to control or regulate the internal management and discipline of either state or federal prisoners.[47] To this end, courts reasoned that the eighth amendment did not apply to states through the fourteenth amendment, that the sole power to adjudicate rights of prisoners was through a writ of habeas corpus,[48] and that prisoners were required to exhaust any and all state remedies before federal courts could

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46. The "hands-off" doctrine . . . is not a rule of law but a policy of judicial abstention. Courts usually justify this non-interference on the basis of separation of powers—administration of prisons viewed as an executive function; allocation of state-federal power—among the powers reserved to the states is the power to proscribe an act as criminal and to set the punishment; cost—improved penal procedures are expensive and courts cannot appropriate funds; or fear that judicial lack of expertise in penology will create disciplinary problems.
Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795, 812, n.92 (1969). The sentiment was early expressed in constitutional law that the federal government possesses no supervisory discretion or inherent power respecting internal affairs of the states. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

47. *See, e.g.*, McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964) (inmates right to express anti-Semitic beliefs in correspondence held clearly subject to administrative controls of prison officials); Roberts v. Pegelow, 313 F.2d 548 (4th Cir. 1963) (inmate who forfeited 60 days of good time and two weeks' privileges for eating "on the wrong mess" was not entitled to injunctive relief); United States *ex rel.* Wagner v. Ragen, 213 F.2d 294 (7th Cir. 1954), *cert. denied*, 348 U.S. 846 (1954) (prisoner in a state penitentiary held to have no right to sue warden in federal court for alleged infringement of due process rights and Civil Rights Act violations); Dayton v. Hunter, 176 F.2d 108 (10th Cir. 1949) (court declined to restrain warden of federal penitentiary from refusing to mail letter from inmate to young lady intended to initiate correspondence of a romantic nature); United States v. Jones, 108 F. Supp. 266 (S.D. Fla. 1952) (Federal Constitution and fourteenth amendment held not to secure to inmates the right not to be assaulted or whipped by state's agents).

48. Williams v. Steele, 194 F.2d 32 (8th Cir. 1952), *cert. denied*, 344 U.S. 822 (1952).

hear claims for relief.[49] Gradually, a great change came about, which is reflected by *McDonnell*:

> [T]hough his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime. There is no iron curtain drawn between the constitution and the prisons of this country.[50]

Lower federal courts had been showing an increased willingness to accept jurisdiction in cases brought by prisoners alleging civil rights violations. Religious freedoms,[51] access to the courts,[52] freedom from racial discrimination[53] and freedom from cruel and unusual punishment[54] were all explicitly granted to inmates of state and federal prisons, while administrative abuses in prison discipline were also exposed to judicial scrutiny.[55]

Prior to *McDonnell*, lower courts had been called upon to decide specifically which safeguards were due inmates at prison disciplinary hearings. The balance struck by the Supreme Court in *McDonnell* is more favorable toward granting procedural rights to prisoners than were some lower court decisions. For example, in *Sostre v. McGinnis*,[56] the Second Circuit Court of Appeals held that a hearing is minimally fair and rational when the prisoner is merely confronted with the accusation, informed of the evidence against him and afforded a reasonable opportunity to explain his actions.[57] On the other hand, the Ninth Circuit in *Clutchette v. Procunier*[58] found that legitimate state interests did not outweigh an inmate's interest

49. Wright v. McMann, 387 F.2d 519, 522 (2d Cir. 1967).
50. 418 U.S. at 555-56.
51. Cruz v. Beto, 405 U.S. 319 (1972); Cooper v. Pate, 378 U.S. 546 (1964).
52. Younger v. Gilmore, 404 U.S. 15 (1971); Johnson v. Avery, 393 U.S. 483 (1969).
53. Lee v. Washington, 390 U.S. 333 (1968).
54. Robinson v. California, 370 U.S. 660 (1962).
55. *See, e.g.*, Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (whipping of inmates was held to be unconstitutional and state prisoners were held to be protected by the due process and equal protection clauses of the Constitution); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967) (prisoner stated a cognizable claim under § 1983 for violation of eighth and fourteenth amendment rights in being forced to remain naked in solitary confinement for 11 days in cell with windows open to winter weather); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966) (solitary confinement in a strip cell without furniture, adequate heat and ventilation, and denial of food and health articles constituted cruel and unusual punishment).
56. 442 F.2d 178 (2d Cir. 1971), *cert. denied, sub nom* Oswald v. Sostre, 405 U.S. 978 (1972).
57. *Id.* at 198-99.
58. 497 F.2d 809 (9th Cir. 1974).

in (1) written notice of the charges against him and details of his alleged offense delivered promptly and sufficiently in advance of the hearing to allow him to prepare a defense, with such notice to include a written statement of procedures to be employed at the disciplinary hearing and the inmate's rights under the hearing rules; (2) the opportunity for the accused to show that he is not guilty of the charges or that there are mitigating circumstances, as well as the right to present witnesses and documentary evidence, limited by the examiners' power to avoid repetition and irrelevancy; (3) the right of the accused to confront and cross-examine adverse witnesses, subject to modifications where legitimate fear of retributive violence exists; (4) an impartial hearing examiner who is not involved personally with the facts or investigation of the infraction and is not interested in the outcome; (5) a written decision based solely on the evidence presented at the hearing; and (6) counsel or counsel-substitutes who are provided before "serious" sanctions may be imposed.[59]

V. UNRESOLVED ISSUES

A. Self-Incrimination

Although *McDonnell* provided many long-awaited solutions to pressing problems of prison administration, several issues remain unanswered. Soon the Supreme Court will likely be called upon to illuminate the interplay between the procedures mandated by *McDonnell* and the protections from self-incrimination required in such decisions as *Miranda v. Arizona*[60] and *Mathis v. United States*.[61] The possibility of self-incrimination arises when an in-

59. *Id.* at 818-22. *See* Dixon v. Henderson, 493 F.2d 467 (5th Cir. 1974); Meyers v. Alldredge, 492 F.2d 296 (3d Cir. 1974); Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973); Palmigiano v. Baxter, 487 F.2d 1280 (1st Cir. 1973); United States *ex rel.* Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973), *cert. denied sub nom* Gutierrez v. Department of Public Safety, 414 U.S. 1146 (1974); Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972).

60. 384 U.S. 436 (1966). *Miranda* held that the prosecutor may not use any statements stemming from an accused's interrogation initiated by law enforcement officers unless it has been demonstrated that procedural safeguards effective to ensure the fifth amendment privilege against self-incrimination were used.

61. 391 U.S. 1 (1968). While in state prison, petitioner was questioned by the IRS about his tax returns in a "routine investigation," and was given no *Miranda*-type warnings. His admissions were subsequently used in a criminal prosecution for filing false claims for refunds. The Supreme Court held that tax investigations were not immune from *Miranda* warning requirements and petitioner was entitled to be apprised of his right to remain silent and his right to counsel. The defini-

mate is required to appear before a prison disciplinary committee for violation of a prison rule and such violation may also be punishable in a criminal prosecution by the state.[62] The inmate faces the imposition of serious disciplinary sanctions, such as solitary confinement and the forfeiture of good time, and in addition, any information or evidence uncovered in the disciplinary hearing, including the inmate's own testimony regarding the alleged infraction, may become the basis of a later criminal prosecution for the same offense. Clearly, therefore, the requirement of *Miranda* warnings—the right to remain silent and to have counsel at interrogation—by its terms should extend to prison inmates charged with a crime.

In *Clutchette v. Procunier*,[63] the Ninth Circuit determined under what circumstances inmates could be adequately protected at a later criminal prosecution from self-incriminatory statements which were made at a disciplinary hearing without the benefit of counsel or *Miranda* warnings. The court held that

> [a]dequate protection is provided either by postponing disciplinary action until after criminal proceedings have been completed by the courts or by providing the accused inmate with an attorney and advising him of his right to silence pursuant to the requirements of *Miranda v. Arizona* . . . .[64]

Under *Clutchette*, failure to observe *Miranda*'s requirements would clearly render any statements obtained in custodial interrogation inadmissible at the subsequent criminal trial. In addition, the court held that failure to observe *Miranda* requirements would render the disciplinary hearing itself constitutionally invalid. This determination was based on the Supreme Court's opinions in *Lefkowitz v. Turley*[65] and *Gardner v. Broderick*.[66] These decisions invalidated impermissibly coercive governmental actions compelling self-incriminatory statements and granted relief in the form of returning the parties to *status quo ante*.[67]

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tion of custodial interrogation was extended to include any interrogation of the incarcerated suspect, "regardless of whether the questioning was intended to obtain evidence for criminal prosecution" and regardless of whether it was related to the offense for which the accused was imprisoned.

62. The Supreme Court in *McDonnell* did not need to address the issue of possible self-incrimination in prison disciplinary hearings because the district court did not find that any members of the plaintiff class had ever been disciplined in an in-prison proceeding in advance of a criminal prosecution.
63. 497 F.2d 809 (9th Cir. 1974).
64. *Id.* at 823.
65. 414 U.S. 70 (1973).
66. 392 U.S. 273 (1968).
67. 497 F.2d at 822-23.

Another decision supporting the proposition that *Miranda* safeguards are not adequate in the prison setting is *Palmigiano v. Baxter*.[68] In that case, the First Circuit held that an accused inmate's privilege against self-incrimination is not sufficiently safeguarded by his being afforded the right to remain silent and to be advised by counsel. On the contrary, in prison disciplinary hearings, the inmate's exercise of his right to remain silent would seriously prejudice his defense at the hearing and impose a substantial burden on the fact-finding process. Thus, the inmate is prejudiced at the administrative proceeding to an extent not present in a normal criminal trial where the defendant is protected by stringent procedural safeguards, such as a strong presumption of innocence for the accused, a high burden of proof for the prosecutor, and the right to call and cross-examine adverse witnesses.[69] In its effort to find a rational accommodation between the imperatives against self-incrimination and the legitimate requirements of a prison disciplinary proceeding, the First Circuit Court held that the inmate was entitled to "use" immunity for statements made in the prison

68. 487 F.2d 1280 (1st Cir. 1973).

69. While [McGautha v. California, 402 U.S. 183 (1971)], holds that a defendant faced with the difficult conundrum in a unitary trial of speaking out for a lenient sentence and risking self-incrimination on the issue of guilt is not denied the protection of the Fifth Amendment, the choice facing prisoners within a prison disciplinary hearing is far different. A criminal defendant faces many difficult choices during the course of his trial: whenever he exercises his right to remain silent, he quite naturally sacrifices one means of defense; on the other hand, if he speaks out, he may open himself to otherwise inadmissible matters which may be brought out on cross-examination and also to impeachment by proof of prior convictions. *See* Spencer v. Texas, 385 U.S. 554, 561, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967). The dilemma faced in *McGautha* is but one variant on these traditional, strategic considerations that run through criminal trials. It should be kept in mind, however, that a defendant in a criminal trial may remain silent and yet still have the opportunity to mount a strong defense by calling and cross-examining witnesses. He is also protected by the high burden of proof which the government must sustain before he can be found guilty. Under these circumstances silence is not a fundamental sacrifice. It is often a wise strategy.

The accused prisoner, however, has no such procedural safeguards within the prison hearings. His opportunity to call witnesses and cross-examine them is necessarily limited by the possibility that the disciplinary board may rely upon informants. The burden of proof which must be sustained against him is far lower than in a criminal trial, merely calling for "substantial evidence". If he keeps silent, his silence is almost bound to seriously cripple his defense within the disciplinary hearing. Silence is not a strategic alternative for him.

Id. at 1288 n.21.

disciplinary proceeding when there was the possibility of his being penalized for the same criminal conduct at a subsequent criminal trial.[70]

The most rational accommodation between the demands of both *Miranda* and *McDonnell* was the one finally reached in *Clutchette*:

> In essence then, the prison authorities have a choice: either they can guarantee a right to silence without the silence adversely affecting the accused inmate and provide *Miranda* safeguards, thus preventing the disciplinary hearing from being impermissibly coercive, in which case there is no right to use immunity if the prisoner decides to speak at the hearing; or they can require that the inmate speak in his own defense [Gardner v. Broderick, 392 U.S. 273, 278-79 (1968); Palmigiano v. Baxter, 487 F.2d 1280 (1st Cir. 1973)], in which case use immunity follows as a necessary consequence of the compelled disclosures . . . .[71]

This solution has found favor with academic commentators[72] for several reasons. It allows the inmate to protect himself against the risk of self-incrimination while preserving the integrity of the fact-finding process and in addition, subsequent criminal prosecutions are sure to be forestalled when the inmate is found innocent at the disciplinary hearing or is able to present mitigating facts with the help of his attorney. California,[73] New York,[74] Florida,[75] Rhode Island,[76] and the Federal Bureau of Prisons[77] have recognized the potential risk of self-incrimination and already require that either *Miranda* warnings or the right to use immunity and an absolute right to counsel be given at disciplinary hearings when the in-prison offense also constitutes a crime.[78]

B. Double Jeopardy

There also arises the possibility of double jeopardy when an in-prison rule violation constitutes a crime punishable by state authorities. The inmate may be punished twice for the same act—once in the disciplinary hearing and again in a criminal prosecution.[79]

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70. *Id.* at 1289-90.
71. 497 F.2d at 824 n.23. *See* Kastigar v. United States, 406 U.S. 441 (1972); Garrity v. New Jersey, 385 U.S. 493 (1967).
72. Turner & Daniel, *Miranda in Prison: The Dilemma of Prison Discipline and Intramural Crime*, 21 BUFFALO L. REV. 759 (1972).
73. People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965).
74. N.Y. ATTY GEN. OP. 409/70, Feb. 11, 1971, reported in 8 CRIM. L. REP. 2486 (1971); Carter v. McGinnis, 351 F. Supp. 787 (W.D.N.Y. 1972).
75. Sands v. Wainwright, 357 F. Supp. 1062 (M.D. Fla. 1973).
76. 487 F.2d 1280 (1st Cir. 1973).
77. *See* Turner & Daniel, *supra* note 72, at 761 n.11.
78. This problem was noted in Turner & Daniel, *supra* note 72.
79. *Id.*

If the in-prison punishment is the forfeiture of good time and is imposed in addition to the sentence imposed at the criminal prosecution, "in-prison punishment goes beyond administrative control and operates in substance like a new sentence to prison (because it prolongs the prisoner's overall term of incarceration) . . . ."[80]

Although several courts of appeals have addressed the issue of double jeopardy and held that no constitutional problem exists,[81] the issue seems far from settled. No court has addressed the proposition that due process is offended when a convicted inmate loses good time and, therefore, may be forced to serve a sentence longer than that imposed by statute or by the sentencing judge.

C. Remedies Available for Procedural Violations

There is uncertainty concerning the procedures available to an inmate who believes that the determination of his guilt in a prison disciplinary hearing was not based on substantial evidence, that the sanctions imposed were not in keeping with the offense committed, or that his rights as enumerated in *McDonnell* were violated.[82] In their separate opinions in *McDonnell*, Justices White and Douglas both thought that disciplinary actions taken by the Adjustment Committee at the Nebraska Penal Complex were not subject to administrative review.[83] This would not appear to be strictly true, because Nebraska's State Administrative Procedures Act,[84] by its terms extends the jurisdiction of the state courts to prisoners contesting their prison disciplinary convictions. However, even if this appeal procedure were available, neither it nor appeal by an action in federal district court for alleged constitutional violations would be an entirely satisfactory method of accommodating the entirely new category of individuals who were granted rights of constitutional dimension by *McDonnell*.

The federal courts should ostensibly provide a remedy since federal jurisdiction extends generally to prisoners complaining of constitutional infringements in disciplinary proceedings.[85] However,

80. Turner & Daniel, *supra* note 72, at 766 n.23.
81. United States v. Cordova, 414 F.2d 277 (5th Cir. 1969); Keaveny v. United States, 405 F.2d 821 (5th Cir. 1969); United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967); Mullican v. United States, 252 F.2d 398 (5th Cir. 1958).
82. This would occur if he claims that he was not given written notice of the charges against him in advance of the hearing, or that he is illiterate and was not allowed access to a counsel-substitute for help in preparation of his defense.
83. 418 U.S. at 565; 418 U.S. at 598 (Douglas, J., dissenting).
84. NEB. REV. STAT. §§ 84-901 *et seq.* (Supp. 1974).
85. 42 U.S.C. § 1983 (1970); *see, e.g.*, McDonnell v. Wolff, 342 F. Supp. 616 (D. Neb. 1972).

the United States Supreme Court has held that the only federal remedy available to an inmate challenging the length of his sentence and wishing to obtain relief in the form of restoration of "good time" is a habeas corpus action, whose concomitant requirement is exhaustion of state remedies.[86] Consequently, there should exist a state remedy for prisoners whose "good time" has been taken away in violation of the constitutional mandates of *McDonnell.* An additional reason to have a state forum for these complaints is because of real concern about the heavy workload of federal courts.[87]

Nebraska prisoners claiming constitutional and other procedural violations at disciplinary hearings theoretically have an avenue for redress under Nebraska's State Administrative Procedures Act,[88] which was "intended to constitute an independent act establishing minimum administrative procedure for all agencies".[89] It entitles any person aggrieved by an action of an administrative agency to judicial review in state courts.[90] The Nebraska Penal Complex fits the definition of administrative agency,[91] and nowhere is it ex-

86. Preiser v. Rodriguez, 411 U.S. 778 (1973). The habeas corpus jurisdiction of federal courts will have to be invoked if the inmate desires to have "good time" restored. *See also* 418 U.S. at 554. However, section 1983 could be used to obtain a declaratory judgment that the forfeiture of a prisoner's "good time" was unconstitutional. If this were done, then a writ of habeas corpus and exhaustion of state remedies would be superfluous, as a practical matter, to effectuate restoration of "good time."

87. The volume of appeals from disciplinary proceedings will differ among jurisdictions. Warden Wolff testified that only a small number of "write-ups" in the Nebraska prison are forwarded to the Adjustment Committee and most complaints are resolved without a hearing. 342 F. Supp. at 626. However, 22,000 inmates were incarcerated at 19 correctional institutions in California in 1973 and 20,490 disciplinary hearings were held. Brief for Attorney General of California as Amicus Curiae at Exhibit 2, Wolff v. McDonnell, 418 U.S. 539 (1974). The federal government conducted 19,000 prison disciplinary hearings in 1973. 418 U.S. at 574.

88. NEB. REV. STAT. §§ 84-901 *et seq.* (Supp. 1974).

89. *Id.* § 84-916 (1943).

90. *Id.* § 84-917(1).

91. Agency means each board, commission, department, officer, division or other administrative office or unit of the state government authorized by law to make rules, except . . . the courts, including the Nebraska Workmen's Compensation Court, the Court of Industrial Relations and the Legislature . . . .

Id. § 84-901(1) (Supp. 1974). Only if the Adjustment Committee were considered to be a court could its decisions be immune from review under this Act. If this were so held, however, NEB. REV. STAT. § 25-1901 (Supp. 1974) would come into play.

pressly excluded from the Act's operation.[92] The state district court has the power to affirm, reverse or modify an agency's decision if it is (1) in violation of constitutional provisions, (2) in excess of the statutory authority or jurisdiction of the agency, (3) made upon unlawful procedure, (4) affected by other error of law, (5) unsupported by competent, material and substantial evidence in view of the entire record, or (6) arbitrary or capricious.[93] Although this method of judicial review of prison disciplinary hearings is arguably available, it may be unrealistic from the prisoners' viewpoint, because the Act requires that review by the state district court be without a jury and must be based on the record of the agency hearing.[94] Ordinarily, in contested cases,[95] the agency is required to prepare an official record, including testimony and exhibits, upon the request of any party to the hearing, but the record is transcribed only when the appealing party pays.[96] Even if the procedures required for an official record were made available at the prison, indigent inmates might be barred from this appeals procedure for want of funds, since Nebraska's in forma pauperis statutes do not, by their terms, apply to administrative appeals.[97]

Provision must be made for a review procedure for prison disciplinary determinations which would be available to all inmates who are treated unfairly at hearings.[98] Possible solutions include

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> A judgment rendered, or final order made, by any tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court.

92. The actions of the State Parole Board are expressly excluded from review pursuant to the provisions of the State Administrative Procedures Act, NEB. REV. STAT. § 83-199 (1943), but there exists no comparable provision in the statutes dealing with the Department of Correctional Services.
93. NEB. REV. STAT. § 84-917(6) (1943).
94. *Id.* § 84-917(5). Any final judgment of the state district court is to be reviewable de novo on the record by the Nebraska Supreme Court. *Id.* § 84-918.
95. NEB. REV. STAT. § 84-901(3) (Supp. 1974).
96. *Id.* § 84-913 (1943).
97. NEB. REV. STAT. § 25-2305 (Supp. 1974) provides that upon an affidavit of poverty, expenses of printing the record *on appeal* in civil and criminal cases are to be borne by the county. This new act has not as yet been construed to encompass administrative appeals.
98. With L.B. 275, 84th Leg., 1st Sess. (1975) (never reported out of committee), the Legislature was attempting to enact the constitutional requisites of *Wolff v. McDonnell* into statutory law. The bill dealt with the issue of review of in-prison disciplinary determinations by taking jurisdiction over cases brought by inmates aggrieved because of actions of the disciplinary board out from under the operation of the State Administrative Procedures Act and placing such jurisdiction

amending the Administrative Procedures Act or enacting an independent set of procedures which would (1) permit review on the written statement of findings of fact and determination of punishment which must be prepared by the Adjustment Committee;[99] (2) create a wholly new procedure for handling these claims, such as empowering a board of appeals (made up of persons from outside the prison system) with jurisdiction to reverse or modify disciplinary determinations; or (3) permit a hearing de novo in state district court where an inmate alleges constitutional violations, claims that the disciplinary board exceeded its statutory authority, or alleges that determinations of guilt were not based on substantial evidence.

Nowhere in the majority's opinion in *Wolff v. McDonnell* is it indicated that the Court intended prison disciplinary determinations to be immune from judicial review. Even if it were held that such immunity from review were constitutional under the due process clause of the fourteenth amendment, the Nebraska State Constitution independently guarantees its citizens a sui generis remedy in state courts for all injuries to person or reputation.[100]

VI. CONCLUSION

When the self-incrimination and double jeopardy problems inherent in the prison disciplinary hearing procedure are finally solved by the Supreme Court, and when an adequate appeals procedure from in-prison determinations is formulated by the Ne-

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in the hands of a Grievance Committee. L.B. 275, section 5. The bill was unclear as to whether the Grievance Committee was to have jurisdiction to reverse or modify the disciplinary board's determinations in order to vindicate violations of the constitutional standards articulated in *McDonnell*. Without this power, the Grievance Committee would be ineffective as a tool with which to check unfairness in prisoner treatment at the hands of the disciplinary board.

99. The importance to the inmate of the accuracy of the written statement of findings of fact and reasons for punishment was recognized by the *Wolff* court.

> [The written statements] might furnish the basis of a decision by the Director of Corrections to transfer an inmate to another institution because he is considered "to be incorrigible by reason of frequent intentional breaches of discipline," NEB. REV. STAT. § 83-185(4) (Supp. 1972) and are certainly likely to be considered by state parole authorities in making parole decisions.

418 U.S. at 565. *See* note 15 *supra*.

100. "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation shall have a remedy by due course of law, and justice administered without denial or delay." NEB. CONST. art. I, § 13.

braska Legislature, only then will a proper accommodation between institutional needs and constitutional rights of prisoners be effected. The Supreme Court's recognition in *Wolff v. McDonnell* that inmates do not shed all of their constitutional rights upon entering state prisons is merely the first step in the proper direction.

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