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AN OVERVIEW OF ADMINISTRATIVE DUE PROCESS

PART II

O. JOHN ROGGE*

[In the initial part of this two-part Article, which appeared in Issue 1 of Volume 19, the author described the pervasiveness of administrative routine in the daily affairs of all citizens. He discussed the concept of due process as it has developed in American jurisprudence, and began an analysis of investigative and adjudicative agency action and the courts' reaction in identifiable areas. In this concluding part, Mr. Rogge continues this analysis with its concomitant emphasis upon which specific agency determinations may be challenged, and examines the role of agencies as regulators and legislators.] — (Editor's Note.)

M. Release on Parole

Probation is granted by the judge at the time of sentencing. Release from prison on parole, on the other hand, is granted by parole boards. Although the concepts of due process have long been applied to probation hearings, they have found little application in the determinations of parole boards.

In general, parole boards do not encourage help from counsel in determining whether to grant parole, although such action has been recommended. The travails of another of the writer's clients, David Greenglass, before the United States Board of Parole, furnishes an illustration. Mr. Greenglass, one of the defendants in the Rosenberg case, was sentenced to 15 years' imprisonment for conspiring to violate the Espionage Act of 1917 by communicating secret atomic and other military information to a foreign government during wartime.

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Eight times before his mandatory release he was considered for parole. Seven times the writer went before the United States Board of Parole with Mr. Greenglass's wife and made a presentation on his behalf. The eighth time the writer decided to stay away. In all eight cases the Board denied parole without furnishing reasons for its action.\textsuperscript{379}

Commenting on the denial of parole in the publicized cases of James R. Hoffa, former head of the Teamsters, and the brothers Philip and Daniel Berrigan, \textit{The New York Times} under the caption \textit{Invisible Federal Parole} editorialized:

In both cases the Federal Parole Board operated in the dark and failed to disclose its reasoning. In both cases there has been more than a hint of political considerations going beyond such relevant questions as whether or not the prisoners had behaved, been "rehabilitated," and would be a danger to the community if freed. The Berrigans and Hoffa were turned down, facts unknown, but leaving the public with good reason to speculate.

The sequence of events in the Hoffa case indicated that the Parole Board might indeed release the union leader if he promised to retire from all official posts in the Teamsters. His resignation as president cleared the way for the election last month of Frank E. Fitzsimmons, President Nixon's favorite union chief. In what had all the external trappings of a deal, the Parole Board advanced by nearly a year a scheduled review of Hoffa's right to get out of jail, then pulled a switch and rejected his appeal. Politics should not have been a factor in granting his attorney's plea for a special review in Washington or in denying him freedom, but the facts on both points remain shrouded in the impenetrable mystery that is the norm in the Federal parole system.\textsuperscript{380}

The McKay Commission, which investigated the origin and unfoldings of the 1971 prison riot at Attica, found that prior to the uprising, parole "had become by far the greatest source of inmate anxiety and frustration."\textsuperscript{381} The Commission found that the average parole hearing lasted 5.9 minutes, during which one board member decided whether a prisoner would remain incarcerated, possibly for years, or be released.

\textsuperscript{379} The writer's experience indicates that the United States Board of Parole discriminates against individuals like David Greenglass and draft resisters. Charlotte Reese, a Board member from 1964 to 1970, stated: "There was a tendency to regard a Jehovah's Witness as a good guy and the guy who burns his draft card as a bad guy." As quoted in Gumfert, \textit{Masters of Fates}, Wall St. J., Jan. 14, 1972, at 1, col. 1; At 18, \textit{N.Y. Times} Aug. 28, 1971, at 28, col. 3.

\textsuperscript{380} \textit{N.Y. Times}, Aug. 30, 1971, at 28, col. 3.

\textsuperscript{381} As reported in \textit{N.Y. Times}, Oct. 16, 1972, at 24, col. 1.
At its seventh plenary session in June 1972, the Administrative Conference of the United States unanimously approved a recommendation by its Committee on Informal Action that the United States Board of Parole issue guidelines under which a prison counselor could disclose the prisoner’s file to the inmate or to his representative in advance of a parole hearing, except for information which the sentencing judge had determined should not be disclosed. 382 The Conference also recommended that a prisoner be allowed assistance of counsel, or another representative of his choice, both in the examination of his file and at his parole interview, although participation in the latter would be limited to offering remarks at the close of the interview between the examiner and the prisoner. 383 Finally, with reference to the parole decision itself, the Conference recommended that a statement of reasons for deferral or denial of parole be given to the prisoner in all instances. 384

The issue, whether applicants for parole are entitled to due process rights, was finally decided by the Fifth Circuit in Scarpa v. United States Board of Parole. 385 After considerable pulling and hauling the court en banc, by a vote of 12 to 4, concluded: “Due process rights do not attach at such proceedings.” 386

However, exceptional situations do arise. In Sexton v. United States, 387 a prisoner was given a certificate of parole on November 7, 1972 advising him that he would be paroled on November 16, 1972. On November 13, 1972 he was informed, without prior notice or

383. Id. at 2831.
384. Id. It should be noted that George J. Reed, former Chairman of the United States Board of Parole, was quoted in 1972 as saying that the Board was going to begin to give reasons for the denial of parole. However, Chairman Reed also insisted that parole was a matter of grace, not a statutory or constitutional right. As quoted in Gumfert, Masters of Fates, Wall St. J., Jan. 14, 1972, at 1, col. 1.
385. 477 F.2d 278 (5th Cir.), vacated as moot, 414 U.S. 809 (1973); Scarpa v. United States Bd. of Parole, 468 F.2d 31 (5th Cir. 1972); Scarpa v. United States Bd. of Parole, 453 F.2d 891 (5th Cir. 1971).
hearing, that this decision had been reversed. The district court held that to be a violation of due process, and stated:

A prospective parolee who has been approved for parole enjoys a status as important as those suffering economic deprivation and is entitled to minimal due process safeguards before rescission of his parole. The Supreme Court has decided that probationers and parolees are entitled to due process at revocation hearings. Upon due process and equal protection grounds, it is inconsistent and unfair to deny Sexton the right of minimal due process before the Board acts on rescission of the parole.388

In Sobell v. Reed389 the district court held that the United States Board of Parole had embarked upon an unconstitutional course of action when it attempted to limit and restrict a parolee’s first amendment rights to speak, assemble with others and otherwise express his views. The parolee, Morton Sobell, another of the defendants in Rosenberg v. United States390 was denied permission to participate in demonstrations against the Vietnam war and to speak on prison conditions at a banquet sponsored by People’s World, a newspaper which, for the purposes of the suit, was stipulated as closely identified with the Communist Party. Judge Frankel invited Chairman Reed, or any of his colleagues, to appear before him to testify, but the Chairman declined. Thereafter, Judge Frankel ruled for the plaintiff, stating:

But it is urged that the Board’s action is outside the court’s power of review. It would be surprising, and gravely questionable, if Congress had meant to confer such final authority upon any administrative agency, particularly one that makes no pretense to learning in constitutional law. It would be bizarre to hold, as the Government’s position ultimately entails, that assertions of constitutional rights like those made here may be overridden without ever being faced and decided by any tribunal of any kind. But there is no occasion to become upset over such implications. The Government’s position is not soundly based.391

Not all jurisdictions follow the premise that due process rights are not applicable to parole proceedings. In 1971 the New Jersey

388. Id. at 149 (citations omitted). See Morrisey v. Brewer, 408 U.S. 471 (1972). In a similar situation, Daniel Hamm, a prisoner at the Auburn Correctional Facility, Auburn, New York, was told on October 13, 1973, that he had been granted parole, and then advised on December 1, 1973, without notice or a hearing, that the Board of Parole had rescinded his parole on the basis of new information. See Markham, Parole is Granted but Then Revoked for a ‘Harlem Six’ Inmate, N.Y. Times, Mar. 6, 1973, at 45, col. 4.
391 327 F. Supp. at 1301-02.
Supreme Court held that a State Parole Board’s rule which precluded the statement of reasons for parole denial should be replaced by “a carefully prepared rule designed generally towards affording statements of reasons on parole denial.”

N. Revocation of Probation or Parole

The responsibility for the revocation of probation lies within the judiciary and the responsibility for revocation of parole is vested in parole boards. Parole revocation is an administrative act; probation revocation partakes of the nature of an administrative act. The American Correctional Association has stated:

To an even greater extent than in the case of imprisonment, probation and parole practice is determined by an administrative discretion that is largely uncontrolled by legal standards, protections, or remedies. Until statutory and case law are more fully developed, it is vitally important within all of the correctional fields that there should be established and maintained reasonable norms and remedies against the sorts of abuses that are likely to develop where men have great power over their fellows and where relationships may become both mechanical and arbitrary.

The courts recently have recognized the problem and have applied due process concepts to the revocation of probation or parole. In *Mempa v. Rhay*, the Supreme Court decided that an individual was entitled to counsel at Washington State’s unusual probation revocation and deferred sentencing proceedings, and in *McConnell v. Rhay*, the Court applied *Mempa* retroactively.

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392. Monke v. New Jersey State Bd. of Parole, 58 N.J. 238, 249, 277 A.2d 193, 199 (1971). In Application of Cummings, N.Y.L.J., Dec. 17, 1973, at 1, col. 3 (N.Y. Ct. Albany County), the court ordered the State Board of Parole to make available to inmates whose applications for parole had been rejected the reasons for their denial. Cf. Masiello v. Norton, ___ F. Supp. ___ (D. Conn. 1973), wherein the court held that a federal inmate whose parole application was denied on the basis of an “organized crime” designation on his file was entitled to an opportunity to contest the allegations and information underlying that designation. But cf. Taliferro v. New Jersey Parole Bd., 460 F.2d 289 (3d Cir. 1972).

The denial in December 1973 for a second year in a row of executive clemency for Mark Fein, who was convicted of murdering his bookmaker, People v. Fein, 18 N.Y.2d 162, 272 N.Y.S.2d 753, 219 N.E.2d 274 (1966), suggests another area for the application of due process concepts — that of the denial of executive clemency. But in Bates v. Nelson, 485 F.2d 90, 96 (9th Cir. 1973), the Ninth Circuit stated: “We know of no authority which we possess, and none has been revealed to us, by which we may review acts of executive clemency.” Cf. Schick v. Reed, 483 F.2d 1266 (D.C. Cir. 1973) (presidential “no parole” condition attached to a commutation not reviewable).


In *Morrissey v. Brewer*\(^3\) the Court dealt with Iowa Board of Parole revocations of parole in the absence of a hearing. The Court, in an opinion by Chief Justice Burger, presented a guide to the due process requirements in proceedings for the revocation of parole. The Court concluded that although parolees did not have the full panoply of rights due a defendant in a criminal prosecution, they did have certain due process rights, including the right to a preliminary hearing after arrest. The Court’s view was that “due process requires that after the arrest, the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case.”\(^4\) Thereafter, the Court laid down requirements for the preliminary hearing:

With respect to the preliminary hearing . . . the parolee should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. The notice should state what parole violations have been alleged. At the hearing the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer. On request of the parolee, persons who have given adverse information on which parole revocation is to be based are to be made available for questioning in his presence. However, if the hearing officer determines that the informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination.

The hearing officer shall have the duty of making a summary, or digest, of what occurs at the hearing in terms of the responses of the parolee and the substance of the documents or evidence given in support of parole revocation and of the parolee’s position. Based on the information before him, the officer should determine whether there is probable cause to hold the parolee for the final decision of the parole board on revocation. Such a determination would be sufficient to warrant the parolee’s continued detention and return to the state correctional institution pending the final decision. As in *Goldberg*, “the decision maker should state the reasons for his determination and indicate the evidence he relied on . . .” but it should be remembered that this is not a final determination calling for “formal findings of fact and conclusions of law.” No interest would be served by formalism in this process; informality will not lessen the utility of this inquiry in reducing the risk of error.\(^5\)

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\(^3\) *Id.* at 471 (1972).  
\(^4\) *Id.* at 485.  
\(^5\) *Id.* at 486-87 (citation omitted).
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One will note the exception from disclosure of the ever present confidential informant.

For the revocation hearing itself, the Court set forth six minimum requirements of due process:

(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. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.399

The Court expressly left open the question of whether due process entitled a parolee to the assistance of counsel.400 The Second Circuit, however, in United States ex rel. Bey v. Connecticut State Board of Parole401 extended Mempa's grant of the right to counsel at the time probation is revoked to an individual involved in a parole revocation proceeding, and the New York Court of Appeals in People ex rel. Mencehino v. Warden402 has done likewise. On the other hand, the Fourth Circuit, in a four-to-three decision in Bearden v. South Carolina,403 has adopted the empirical case-by-case fundamental fairness approach of Betts v. Brady404 on the right to counsel in parole revocation hearings. Betts, in turn, is limited to the facts of that case.

399. Id. at 489.


403. 443 F.2d 1090 (4th Cir. 1971), cert. denied, 405 U.S. 972 (1972).

404. 316 U.S. 455 (1942). The court recognized that the Betts doctrine was not without its flaws:

We presently adopt the empirical rule of [Betts] fully aware that in adopting a case-by-case approach articulation of where the line should be drawn between those who should be given the benefit of counsel and those lawfully refused such assistance is a most difficult undertaking. That Betts proved unworkable after 21 years of experimentation does not mean, we think, that its
revocation hearings. Judge Craven, writing for the majority, stated: "We hold that the Sixth Amendment and the due process clause of the Fourteenth Amendment do not require the states in every case to afford counsel to indigent parolees." 405

Judge Winter, joined by Judges Sobeloff and Butzner, dissented from the majority's decision insofar as it held that the sixth and fourteenth amendments did not guarantee the right to counsel at parole revocation hearings. In his view, "[t]he basic error in the majority's opinion [was] its niggardly reading of Mempa v. Rhay." 406

The question of the right to counsel in probation revocation proceedings was recently before the Supreme Court in Gagnon v. Scarpelli. 407 The case involved a Wisconsin statute which provided that persons placed on probation, except those in Milwaukee, be placed in the custody of the state's Department of Health and Social Services; the Department, rather than the court, had the power to revoke probation. 408 The Seventh Circuit had held that although probation hearings could be administrative rather than judicial, probationers were entitled to have either retained or appointed counsel to assist them at hearings on probation revocation. 409 The Supreme Court first ruled, a fortiori, on the basis of Morrissey v. Brewer 410 that a probationer in a proceeding for the revocation of probation had the same due process rights as a parolee in a proceeding for the revocation of parole. 411 However, on the right to appointed counsel, the Court took the empirical case-by-case fundamental fairness due process approach, saying through Justice Powell:

We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the

rationale cannot be reasonably satisfactory in the administrative as opposed to the judicial context.

405. 443 F.2d at 1093.
406. Id. at 1096 (Winter, J., dissenting). Somewhat earlier in Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969), a panel of the Fourth Circuit held that Mempa required counsel at probation revocation hearings. Nevertheless, the majority in Bearden felt free to say that in rejecting the "contention that every parolee faced with the possibility of revocation has an absolute right to the assistance of counsel, we do not reject or undermine our decision in Hewett." 443 F.2d at 1094. The writer finds it difficult to accept this statement.
409. 454 F.2d at 411.
411. 411 U.S. at 782.
probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings there will remain certain cases in which fundamental fairness — the touchstone of due process — will require that the State provide at its expense counsel for indigent probationers or parolees.\(^{412}\)

**O. Treatment of Prisoners**

There was a time not too long ago when courts were hesitant and reluctant to interfere with prison discipline, leaving such matters wholly to the unsupervised discretion of prison officials and guards. Gradually the federal courts began to give relief where such treatment was demonstrably unwarranted and unnecessarily cruel. In *Jackson v. Bishop*,\(^ {413}\) the Eighth Circuit, in an opinion by Circuit Judge, now Justice Blackmun, granted injunctive relief restraining the personnel of the Arkansas State Penitentiary system from inflicting corporal punishment, including the use of the strap, as a disciplinary measure. Although the court based its opinion on the ground that the due process clause of the fourteenth amendment made the eighth amendment applicable to the states, the court also considered the fundamental fairness, case-by-case application of the due process clause:

With these principles and guidelines before us, we have no difficulty in reaching the conclusion that the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment; that the strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess; and that it also violates those standards of good conscience and fundamental fairness enunciated by this court in the *Carey* and *Lee* cases.\(^ {414}\)


In Zizzo v. United States, 470 F.2d 105 (7th Cir.), cert. denied, 409 U.S. 1012 (1972), the Seventh Circuit refused to apply Morrissey v. Brewer, 408 U.S. 471 (1972), retroactively to a revocation of parole hearing held prior to the date *Morrissey* was announced. The parolee in that instance was held to be in violation of one of the conditions of his parole in that he frequently associated with an individual with a well established reputation as a hoodlum.

For other recent cases dealing with the due process rights of probationers and parolees, see Appendix IV infra.

\(^{413}\) Id. at 579.

\(^{414}\) Id. at 579.
In *Wright v. McMann*\(^4\) the Second Circuit held that allegations in a complaint under the Civil Rights Act,\(^5\) concerning conditions in a solitary confinement cell in New York's Clinton State Prison stated a cause of action by reason of the eighth and fourteenth amendments:

The subhuman conditions alleged by Wright to exist in the "strip cell" at Dannemora could only serve to destroy completely the spirit and undermine the sanity of the prisoner. The Eighth Amendment forbids treatment so foul, so inhuman and so violative of basic concepts of decency.\(^6\)

In the past five years there have been numerous cases involving the due process rights of prisoners. In *Sostre v. Rockefeller*,\(^7\) the district court enjoined prison officials from returning the plaintiff prisoner to punitive segregation for charges previously preferred against him, awarded the plaintiff punitive as well as compensatory damages, and further enjoined the defendant prison officials:

from placing plaintiff in punitive segregation or subjecting him to any other punishment as a result of which he loses accrued good time credit or is unable to earn good time credit, without:

1) Giving him, in advance of a hearing, a written copy of any charges made against him, citing the written rule or regulation which it is charged he has violated;

2) Granting him a recorded hearing before a disinterested official where he will be entitled to cross-examine his accusers and to call witnesses on his own behalf;

3) Granting him the right to retain counsel or to appoint a counsel substitute;

4) Giving him, in writing, the decision of the hearing officer in which is briefly set forth the evidence upon which it is based, the reasons for the decision, and the legal basis for the punishment imposed.\(^8\)


\(^6\) *Id.* at 526. When the case was returned to the court below, the district court, after seven days of trial and 1,566 pages plus exhibits of record, ruled in favor of Wright and another prisoner, and awarded damages to Wright. *Wright v. McMann*, 321 F. Supp. 127 (N.D.N.Y. 1970).


Although the Second Circuit reversed the district court's order which required prison officials to adhere to numerous trial type procedures when punishing prisoners, it nevertheless stated:

We do not thereby imply that discipline in New York prisons may be administered arbitrarily or capriciously. We would not lightly condone the absence of such basic safeguards against arbitrariness as adequate notice, an opportunity for the prisoner to reply to charges lodged against him, and a reasonable investigation into the relevant facts — at least in cases of substantial discipline.420

The Second Circuit also reversed insofar as the district court had enjoined non-arbitrary restraint of communication between the prisoner and his co-defendant, but nevertheless held:

The refusal to mail Sostre's letter to the Post Office Inspector, complaining of prison practices, clearly infringed Sostre's Fourteenth Amendment rights. We also affirm [the district court's] order insofar as it enjoins defendants Follette and McGinnis, their employees, agents, successors, and all persons in active concert and participation with them, from deleting material from, refusing to mail or refusing to give to Sostre: (1) Any communication between Sostre and the following — (a) any court; (b) any public official or agency; or (c) any lawyer — with respect to either his criminal conviction or any complaint he may have concerning the administration of the prison where he is incarcerated.421

The courts, in various situations, have applied certain due process limitations to the imposition of disciplinary measures by prison officials. When Angela Davis was held in the New York City Women's House of Detention pending the outcome of extradition proceedings brought by the state of California, she was held in solitary facilities, separate and apart from the general inmate population. She petitioned the federal district court and obtained injunctive relief "to the extent of requiring that she be housed with the general inmate population and afforded all privileges enjoyed by them."422

In Nolan v. Scafati,423 a state prisoner sent a letter to the federal district court complaining that he was sent to solitary confinement without the right to cross-examine the complaining guard, to call his own witnesses, or to have counsel present. Additionally, he claimed that prison officials had refused to mail his letter to the Massachusetts

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420. 442 F.2d at 203.
421. Id. The court did affirm the award of compensatory damages against the warden.
Civil Liberties Union seeking advice and assistance on his due process claim. The district court dismissed his complaint and, with reference to the claim to rights at a disciplinary hearing, stated: "So far as this Court knows, this issue has not been adjudicated heretofore."\(^\text{424}\)

The First Circuit vacated the judgment and remanded the case. With reference to the prisoner's claimed due process rights at a disciplinary hearing, the court stated:

While all the procedural safeguards provided citizens charged with a crime obviously cannot and need not be provided to prison inmates charged with violation of a prison disciplinary rule, some assurances of elemental fairness are essential when substantial individual interests are at stake.\(^\text{425}\)

As to the prisoner's claimed right of access to the courts and to correspond with the Civil Liberties Union, the court added:

That a state prison inmate has a right of access to the courts was first enunciated in Ex parte Hull, 312 U.S. 546 (1941), wherein the Court stated that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." In order that this right be assured all inmates, the Court recently held that a state could not prevent one inmate from assisting another inmate in the preparation of his writ. The underlying rationale was that access to the courts is effectively denied unless the inmate can obtain some such legal assistance.

That prison inmates do not have all the constitutional rights of citizens in society — and may hold some constitutional rights in diluted form — does not permit prison officials to frustrate vindication of those rights which are enjoyed by inmates, or to be the sole judge — by refusal to mail letters to counsel — to determine which letters assert constitutional rights.\(^\text{426}\)

Inmates at the state correctional institution in Pittsburgh published a prison newsletter called *Vibrations*. In April 1971, relations between the *Vibrations* staff and the prison administration deteriorated markedly and the newsletter was shut down. Plaintiffs sought relief in federal district court alleging that they were transferred to other prisons, placed in punitive and administrative segregation, suspended from their jobs, subjected to physical and verbal abuse, and had their

\(^{424}\) Id. at 218. 425. Id. at 550. 426. Id. at 551 (citations omitted).
personal belongings confiscated.\textsuperscript{427} The district court dismissed the complaint for failure to state a claim upon which relief could be granted.\textsuperscript{428} The Third Circuit reversed, stating:

It is, of course, clear beyond doubt that a state prison inmate continues to receive the protection of the due process clause of the Fourteenth Amendment. . . . We do not consider it appropriate, on review . . . of a motion to dismiss . . . to suggest what may be the precise requirements of the due process clause in this case. . . . But we do hold that the transfer of a prisoner from the general prison population to solitary confinement without either notice of the charges or a hearing does not, absent unusual circumstances not evident in the pleadings, meet minimal due process requirements.\textsuperscript{429}

\textit{Rankin v. Wainright},\textsuperscript{430} dealt with an inmate at the Florida State Prison who had been tried for the offense of escape and found not guilty. Nevertheless, at the prison he was placed in solitary confinement as punishment for his alleged escape and deprived of 999 days of accrued good behavior "gain time." The district court held such punishment could not be imposed without an administrative hearing, at which time the petitioner would be entitled to:

(a) written notice of the alleged escape; (b) disclosure to petitioner of evidence against him; (c) an opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses; (e) a neutral and detached hearing body; (f) unqualified access to legal materials, within the prison, in preparation of his defense; and (g) a written statement by the fact finders as to the evidence relied on and the reasons for forfeiting petitioner's gain time, if the hearing body does in fact find that petitioner escaped from prison.\textsuperscript{431}

In a widely cited case, \textit{Clutchette v. Procunier},\textsuperscript{432} the district court concluded that certain disciplinary procedures at San Quentin Prison violated the due process as well as equal protection clauses of the fourteenth amendment:

Plaintiffs are hereby granted a declaratory judgment with respect to their first cause of action insofar as this opinion and

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\textsuperscript{427} Gray v. Creamer, 465 F.2d 179, 183 (3d Cir. 1972).
\textsuperscript{429} 465 F.2d at 184-85. In United States \textit{ex rel}. Jones v. Rundle, 358 F. Supp. 939 (E.D. Pa. 1973), the court refused to apply \textit{Gray} retroactively as to money damages but was of a different view for the purposes of equitable relief such as orders for reinstatement of good time credit lost in solitary confinement and expungement.
\textsuperscript{430} 351 F. Supp. 1306 (M.D. Fla. 1972).
\textsuperscript{431} 767 F.2d 1307 (N.D. Cal. 1971).
order declare that the disciplinary procedures employed at San Quentin Prison violate the due process and equal protection clauses of the 14th amendment by failing to provide for adequate notice of charges, the calling of favorable witnesses and cross-examination of accusing witnesses, counsel or counsel-substitute, a decision by a fact-finder uninvolved with the alleged incident, a written finding of facts, or uniform notice of any right to appeal the decision, when . . . a disciplinary hearing may result in grievous loss to the prisoner; and that certain disciplinary punishment, including but not necessarily limited to (a) indefinite confinement in the adjustment center or segregation; (b) possible increase in a prisoner’s sentence by reason of referral of the disciplinary action to the Adult Authority; (c) a fine or forfeiture of accumulated or future earnings; (d) isolation confinement longer than 10 days; or (e) referral to the district attorney for criminal prosecution, constitute . . . a grievous loss to the prisoner . . . .

In United States ex rel. Robinson v. Mancusi, the district court held that before the prisoner concerned could be denied mess hall and work privileges typically afforded inmates of the general prison population he had to be granted a hearing, and ordered that the hearing take place within 72 hours of the filing of its decision. The court considered it settled that due process required, at a minimum, that the prisoner be confronted with the accusation against him, informed of the evidence, and afforded a reasonable opportunity to explain his actions.

In the highly charged atmosphere of tension prevailing in the aftermath of the Attica uprising, the Rhode Island Adult Correctional Institution transferred 11 inmates to federal and state prisons throughout the country. The district court, in Gomes v. Travisono, held that, while the transfers in and of themselves were not cruel and unusual punishment in the constitutional sense, the procedures and practices under which they were effectuated violated due process. The court ordered that no prisoner be transferred to a prison in another state unless:

Prior to transfer (absent an emergency situation or compelling state interest), the inmate is given written notice of the charge or reasons for transfer; this charge or reason is investigated and reviewed by a superior officer; a hearing on the question of transfer is held before an impartial board; administrative review of the charge is available; and a record of the proceeding is kept.

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433. Id. at 784-85.
435. Id. at 663.
437. Id. at 465.
At the hearing the inmate must be read the charge and given the opportunity to respond, which opportunity shall include the right to call and examine witnesses and to have the assistance of a lay advocate. The decision to transfer must be based on substantial evidence.\textsuperscript{438}

Prisoners’ rights of access to counsel, the law library, and the courts have also been the subjects of due process protection. In Gilmore \textit{v. Lynch}\textsuperscript{439} a three-judge federal district court held invalid California prison regulations limiting law books in prison libraries to federal and state constitutions, certain codes, a law dictionary, a work on state criminal procedure, a digest, and certain rules of court — but excluding state and federal reports and annotated codes — on the ground that such limitations denied prisoners reasonable access to the courts. In \textit{Cross v. Powers},\textsuperscript{440} the district court invalidated, as violative of due process, a Wisconsin prison regulation that prohibited a prisoner from “taking materials, including legal papers, to prison areas shared commonly with other inmates; passing legal papers to other inmates; from working on other inmates’ legal problems; and from preparing legal papers, petitions, and documents on behalf of, or jointly with, other inmates.”\textsuperscript{441}

Another area in which the courts have acted to place restrictions on prison administrative policy has been censorship of a prisoner’s mail. In \textit{Smith v. Robbins}\textsuperscript{442} the district court held that an inmate was entitled to be present when a prison official inspected incoming mail from the inmate’s attorney for contraband. The First Circuit, in affirming that part of the district court’s decision, reasoned:

\begin{quote}
However strongly the warden may feel about a possible indignity to the prison administration in a suggestion by the court that it is not to be trusted not to read the letter, this
\end{quote}

\textsuperscript{438} \textit{Id.} at 472. After hearing the testimony, which included that of a guard who served as an advisor to the Afro-American Society and a sociologist who had studied race relations at the prison, the court expressed doubt as to whether the warden actually believed there even was a conspiracy which threatened the prison.


\textsuperscript{440} 328 F. Supp. 899 (W.D. Wis. 1971).

\textsuperscript{441} \textit{Id.} at 900.

\textsuperscript{442} For other recent cases which dealt with a prisoner’s right of access to counsel, to an adequate law library, or to the courts, see Appendix VI infra.
misses the point. The court does not suggest that the warden is untrustworthy. Rather, it is that a prisoner, and possibly some attorneys, may feel, if only to a small degree, that someone in the chain of command may not be trusted, and that the resulting fear may chill communications between the prisoner and his counsel. . . . [W]e see no reason to leave such possible apprehensions on such an important matter as right to counsel in the minds of the prisoner or his attorney.\textsuperscript{448}

In \textit{LeVier v. Woodson}\textsuperscript{444} a state prisoner in Colorado went to the federal district court with the claim that under the first and fourteenth amendments he had the right to have prison officials forward his correspondence, complaining about prison conditions and seeking an investigation, to the Governor, the state’s Attorney General, and the state’s Pardon Attorney. The trial judge concluded that the prisoner did not have such a right. The Tenth Circuit, however, disagreed, and held that such correspondence from a prisoner to appropriate officials was constitutionally protected.\textsuperscript{445}

The First Circuit, in \textit{Nolan v. Fitspatrick},\textsuperscript{446} directed the district court to enter a judgment declaring that the plaintiffs had a right to send letters to the press concerning prison management, treatment of offenders, and personal grievances unless the letters contained or concerned contraband, plans of escape, or devices for evading prison regulations.\textsuperscript{447}

A federal three-judge district court in \textit{Martinez v. Procurier}\textsuperscript{448} enjoined both the enforcement of the regulations of the California Department of Corrections insofar as they pertained to inmate mail and of an administrative rule of the Department that limited interviews with inmates to licensed investigators or members of the bar. The mail regulations were based on the premise that the use of the mails was a privilege, not a right.\textsuperscript{449} The court, however, recognized a prisoner’s right to correspond as fundamental, protected by the first amendment.\textsuperscript{450}

\textsuperscript{443} 454 F.2d at 697. In \textit{Meola v. Fitzpatrick}, 322 F. Supp. 878 (D. Mass. 1971), the district court commented: “The fact that prisoners may exaggerate about prison conditions and make false allegations against prison officials cannot justify prison review and censorship of the contents of an inmate’s correspondence with the courts.” \textit{Id.} at 885.

\textsuperscript{444} 443 F.2d 360 (10th Cir. 1971).

\textsuperscript{445} \textit{Id.} at 361.

\textsuperscript{446} 451 F.2d 545 (1st Cir. 1971), \textit{rev’d and remanding} 326 F. Supp. 209 (D. Mass.).

\textsuperscript{447} \textit{Id.} at 551.


\textsuperscript{449} \textit{Id.} at 1095.

\textsuperscript{450} \textit{Id.} at 1097.
If prisoners are to be allowed to communicate with newsmen, then the next logical step would be to give prisoners the right, subject to suitable conditions, to receive newsmen as visitors. The court took that step in *Burnham v. Oswald*.461

[T]he right of an inmate to send letters to the press survives incarceration... To say that inmates have the right to correspond necessarily means that, with suitable regulation, they must also have the right to have newsmen visitors. There are many inmates who would be deprived of their right to communicate if they could only correspond but not meet personally with newsmen. Further, there are many prison situations which can only be explored fully and accurately by a face-to-face interview.462

In *Washington Post Co. v. Kleindienst*463 Federal District Judge Gesell held the Federal Bureau of Prisons practice of prohibiting press interviews with individual inmates invalid as violative of the first amendment. He declared:

[U]nder the First Amendment, subject to reasonable restrictions as to time and place, the press has a right to access to interview

on an amorous correspondence with his sister-in-law. The judge reasoned that a prisoner had the same right to the use of the mail as a member of the general population. The Seventh Circuit reversed.

In *Adams v. Carlson*, 352 F. Supp. 882 (E.D. Ill. 1973), the court stated: [O]nce it is established that the intended recipient of a letter is a proper person to correspond with the inmate, and that the letter's contents do not fall within the possible justifications for censoring, then it follows that it is clearly impermissible for the defendants to withhold such letters merely because they do not like or believe what is stated therein. A central function of the First Amendment is to permit unfettered communications of grievances, real or imagined. *Id.* at 896.

In *Palmigiano v. Travisono*, 317 F. Supp. 776 (D.R.I. 1970), the district court issued a temporary restraining order, pending a hearing before a three-judge court on first amendment grounds barring censorship of the mail of inmates awaiting trial. Probably inspired in part by *Palmigiano*, the imprisoned Berrigan brothers, Philip and Daniel, brought a class action in the federal district court in Hartford, Connecticut, on behalf of themselves and other federal prisoners seeking the right to preach, teach, and write freely as guaranteed by the first amendment. Their motion for a preliminary injunction was denied. Berrigan v. Norton, 322 F. Supp. 46 (D. Conn. 1971).

In *Carothers v. Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970), the court enjoined prison officials from disciplining inmates “because of statements in letters to persons outside prison walls unless such letters present a clear and present danger of disrupting prison security or some other justifiable purpose of imprisonment.” *Id.* at 1030.

In *Worley v. Bounds*, 355 F. Supp. 115 (W.D.N.C. 1973), the court held that the refusal to permit a black inmate to write to the white unmarried mother of his own child was unconstitutional discrimination.

Recently the American Civil Liberties Union brought a class action in the United States District Court for the District of Columbia seeking to remove all restrictions on prisoner mail. See *N.Y. Times*, June 2, 1973, at 29, col. 5.


452. *Id.* at 772.

confidentially and without censorship any inmate of a federal correctional institution who consents to be interviewed, except where it is determined that serious administrative or disciplinary problems are likely to result from the particular interview sought. . . .

The Supreme Court granted a stay, and the District of Columbia Circuit remanded for additional evidentiary hearings. Judge Gesell held the additional hearings which reinforced his previous views both as to the law and the facts.

Similarly, the courts have protected the rights of prisoners to receive publications of their choice. For example, in Jackson v. Godwin a black prisoner claimed that state prison rules and regulations deprived him of equal protection of the law by denying him the right to receive black publications, while permitting white inmates to receive white newspapers and magazines. The district court denied relief. The Fifth Circuit, however, agreed that he was deprived not only of his fourteenth amendment right to equal protection, but also to his first amendment freedoms (on the assumption, of course, that the due process clause of the fourteenth amendment made the first amendment fully applicable to the states). Senior Circuit Judge Tuttle, writing for the court, stated:

It is also clear that the prison officials have not met the heavy burden of justifying either the resulting racial discrimination or the resulting curtailment of petitioner's First Amendment freedoms and denial of the equal enjoyment of rights and privileges afforded other, and white, prisoners.

In Brown v. Peyton the plaintiff, an inmate of the Virginia State Prison who professed adherence to the Islamic, or Black Muslim,

454. 357 F. Supp. at 779; accord, Houston Chronicle Publishing Co. v. Kleindienst, 364 F. Supp. 719 (S.D. Tex. 1973) ("When all is said and done, what remains is a case of prior restriction on the press' right to publish, the prisoner's right to speak out, and the public's right to know." Id. at 730.)
458. 400 F.2d 529 (5th Cir. 1968).
459. Id. at 533.
460. 437 F.2d 1228 (4th Cir. 1971).

In Cooper v. Pate, 378 U.S. 546 (1964), rev'd 324 F.2d 165 (7th Cir. 1963), the Court held that a prisoner's complaint alleging he was denied permission to purchase certain religious publications and denied other privileges enjoyed by other prisoners solely because of his religious beliefs, stated a cause of action. On remand, the district court enjoined prison officials from denying the petitioner and other Black Muslim prisoners the right to communicate and visit with ministers of their faith and the right to attend religious services conducted by them. The Seventh Circuit affirmed. 382 F.2d 518 (7th Cir. 1967).

For other recent cases, pro and con, involving the right of prison inmates to receive publications of their choice, see, e.g., Northern v. Nelson, 448 F.2d 1266 (9th Cir. 1971) (seven copies of Muhammad Speaks); Horn v. California, 436 F.2d 1225 (9th Cir. 1970); 379 F. Supp. 521 (E.D. Cal. 1968) (Black Muslim publications); Knuckles v. Prasse, 435 F.2d 1255 (3d Cir. 1970), cert. denied, 403 U.S. 1970).
faith, filed a complaint against prison officials alleging that he had been denied permission to subscribe to the Muslim newspaper *Muhammad Speaks*, to purchase the book *Message to the Blackman in America* by Elijah Muhammad, to order an Arabic dictionary and grammar, and to hold prayer meetings with other members of his faith. The district court dismissed the complaint without a hearing. The Fourth Circuit reversed the district court's dismissal and remanded for a plenary hearing.

The courts have also responded to protect prisoners in the free exercise of the religion of their choice. In the past few years these rulings have largely involved Black Muslims. For example, in *Pitts v. Knowles*, the district court enjoined Wisconsin officials from continuing the practice of permitting use of the *Koran* on a more limited basis than that of the sacred texts of other religions. No sooner had prison officials adjusted to the legal decisions favoring the free exercise of the Black Muslim faith, than they found themselves deadlocked with a new militant religious group composed of young white inmates who called themselves the Church of the New Song. This sect is comprised of about 400 members in at least four federal prisons who preach a kind of social mysticism. The sect's doctrine centers on self-affirmation and self-celebration through union with "Eclat," the

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936, *rehearing denied*, 404 U.S. 877 (1971) (Black Muslim publications in the hands of inmates not fully informed of the Muslim doctrine could constitute a clear and present danger of breach of prison security or discipline); *Sostre v. Otis*, 330 F. Supp. 941 (S.D.N.Y. 1971) (Black Muslim and other publications) (*We agree and for the reasons expressed in *Carothers* we believe that a prisoner is entitled as a matter of constitutional right to rudimentary due process under prison conditions including (1) notice; (2) some opportunity to object (either personally or in writing); and (3) a decision by a body that can be expected to act fairly.* *Id.* at 946); *Rowland v. Sigler*, 327 F. Supp. 821 (D. Neb.), *aff'd*, 452 F.2d 1005 (8th Cir. 1971) (*"A study by this court of the copies of Muhammad Speaks in evidence results in a finding that those copies do not contain any direct incitement to physical violence within the meaning of *Chapinsky* [sic] v. New Hampshire . . . or any other form of clear and present danger within the meaning of *Dennis v. United States*." *Id.* at 827); *Payne v. Whitmore*, 325 F. Supp. 1191 (N.D. Cal. 1971) (newspapers and magazines); *Fortune Society v. McGinnis*, 319 F. Supp. 901 (S.D.N.Y. 1970) (*Fortune News*).


462. *Id.* at 1186.


In *O'Malley v. Brierley*, 477 F.2d 785 (3d Cir. 1973), the visiting privileges of two Catholic priests were withdrawn because the authorities felt they were conducting a political rally under the guise of an Afro-American Mass, rather than a religious service. The Third Circuit held: *"[W]here a state does afford prison inmates the opportunity of practicing a religion, it may not, without reasonable justification, curtail the practice of religion by one sect."* *Id.* at 795. The priests' claim that their right to preach in the prison was guaranteed under the first amendment was denied, but the court remanded for a determination of the nature of the mass. The court noted that the record did not establish grounds for prohibiting the masses.
universal spiritual force. Prison officials considered the sect's meetings a forum for the erosion of essential discipline under the guise of religion. In Theriault v. Carlson,\(^{463}\) however, the district court ordered federal officials to permit the sect's members to meet in the Atlanta Penitentiary and in all other federal institutions, concluding:

This court interprets the First Amendment as guaranteeing the right of federal prisoners who share a common religion to gather for devotional meetings and to study the teachings of that religion. This right cannot be denied the members of the Church of the New Song.\(^{464}\)

Under the aegis of the eighth and fourteenth amendments, the courts have also begun to examine physical conditions within prisons. In Rhem v. McGrath\(^ {465}\) the Legal Aid Society of New York City brought a suit in federal court on behalf of all prisoners of the Manhattan House of Detention, known as the Tombs, to close the overcrowded facility until such time as it could be made safe, sanitary, and decent for its inmates. Although the court indicated that the prison conditions were far from satisfactory, the judge declined to rule that such conditions constituted cruel and unusual punishment within the eighth amendment. It did, however, order the city's Department of Correctional Services to adopt and display comprehensive rules governing the conduct of inmates and guards at the Tombs. These rules were to be submitted to the court for approval and then made available to all the inmates.

In Newman v. Alabama,\(^ {466}\) the district court found such barbarous and shocking neglect of the medical needs of Alabama prison inmates as to give rise to an eighth amendment violation and ordered a drastic reform of prison health care services:

It is the holding of this Court that failure of the Board of Corrections to provide sufficient medical facilities and staff to afford inmates basic elements of adequate medical care constitutes a willful and intentional violation of the rights of prisoners guaranteed under the Eighth and Fourteenth Amendments. Further, the intentional refusal by correctional officers to allow inmates access to medical personnel and to provide prescribed medicines and other treatment is cruel and unusual punishment in violation of the Constitution.\(^ {467}\)

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464. Id. at 385.
467. Id. at 285–86.
After the Attica uprising, the Second Circuit in *Inmates of Attica Correctional Facility v. Rockefeller* ordered the district court to grant preliminary injunctive relief against further physical abuse, tortures, beatings, or similar conduct. In the conclusion to the court’s opinion, Circuit Judge Mansfield stated:

The district court is directed to enter a preliminary injunction against such conduct and to consider any more specific measures that might be ordered to implement the injunction, including the appointment of federal monitors to serve at Attica. The injunction may be vacated upon a showing that it is no longer required for the protection of the inmates.

The Eighth Circuit in *Holt v. Sarver* required Arkansas to initiate a wholesale reform of its prison system. The court expressed reluctance to interfere with the operation and discipline of a state prison, but nevertheless held:

A hearing . . . should be held to determine whether appropriate steps have been taken to cure the constitutional deficiencies found by the court, after which such further order as may be appropriate should be entered.

Supervision over the state prisons by a federal court should of course not be kept in force for any longer period than necessary to provide reasonable assurance that incarceration therein will not constitute cruel and inhuman punishment violative of the Eighth Amendment.

In *Landman v. Royster* District Judge Merhige came to the conclusion that Virginia prisoners who were subjected to cruel and unusual punishment by Virginia prison authorities in violation of their constitutional rights were entitled to recover compensatory damages from their jailers, including the director of the Division of Corrections, who had had personal knowledge and, in some instances, had taken affirmative action to approve the unconstitutional deprivations.

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468. 453 F.2d 12 (2d Cir.), *application for temporary restraining order or injunction denied*, 404 U.S. 809 (1971).
469. *Id.* at 25.
470. 442 F.2d 304 (8th Cir. 1971).
471. *Id.* at 309.
The latest development in the protection of the rights of prisoners has been the appointment of an ombudsman for inmates. Minnesota created an ombudsman for correction in 1972. He provides a channel for complaints of mistreatment or loss of rights for the inmates of the state's nine correctional facilities. After the Attica rebellion in September 1972 which left 43 prisoners and guards dead, the Correctional Association of New York — a 127-year-old prison reform group — revived interest in the idea of an ombudsman to ventilate the grievances of inmates. In March 1973 the Association announced its intention of establishing such an ombudsman, but Governor Rockefeller strongly opposed the idea and introduced legislation to sharply curtail the Association's official advisory role.

Retrospectively viewing a period as short as the past five years, one can appreciate the distance the courts have traveled in applying due process concepts to prison proceedings, practices, and conditions.

P. Treatment of Juveniles

Custody is custody, whether of adult deviants, juvenile delinquents, or incompetents. As the Tenth Circuit stated in *Heryford v. Parker*, a habeas corpus proceeding brought by a mother on behalf of her son who had been committed to a state training school for the feeble-minded and epileptic:

> [W]e have a situation in which the liberty of an individual is at stake, and we think the reasoning in Gault emphatically applies. It matters not whether the proceedings be labeled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration — whether for punishment as an adult for a crime, rehabilitation as a juvenile for delinquency, or training and treatment as a feeble-minded or mental incompetent — which commands observance of the constitutional safeguards of due process. Where, as in both proceedings for juveniles and mentally deficient persons, the state undertakes to act in parens patriae, it has the inescapable duty to vouchsafe due process, and this necessarily includes the duty to see that a subject of an involuntary commitment proceedings is afforded the opportunity to the guiding hand of legal counsel at every step of the proceedings, unless effectively waived by one authorized to act in his behalf.

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475. 396 F.2d 393 (10th Cir. 1968).
476. 10. at 396.
In *Kent v. United States* and *In re Gault* the Supreme Court took a dim view of the value of placing wide discretionary powers in the hands of officials who have jurisdiction over juveniles, and held that juveniles must be accorded due process. The *Kent* Court stated:

The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is parens patriae rather than prosecuting attorney and judge. But the admonition to function in a "parental" relationship is not an invitation to procedural arbitrariness.

... .

There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.

In *Gault* the Court added:

Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts . . . ."

Considering the due process issue, the *Kent* Court held that a determination by a juvenile court under a provision of the District of Columbia Juvenile Court Act to waive its jurisdiction and permit the petitioner to be tried as an adult in the district court, entitled the juvenile to a hearing, access by his counsel to the social records and probation reports which the presiding court relied upon, and to a statement of reasons for the court's decision.

In *Gault* the Court found the practices of Arizona's juvenile courts wanting. The complaint alleged that the juvenile made a lewd telephone call to a woman neighbor, but the complainant was never required to attend or testify at any hearing. The Court held that

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479. 383 U.S. 554-56.
480. 387 U.S. at 18.
481. In *In re Winship*, 397 U.S. 358 (1970), the Court ruled that delinquency must be proven beyond a reasonable doubt when a juvenile is charged with an act which would constitute a crime if committed by an adult. *Id.* at 359.
where there is a dispositional hearing for a juvenile that may result in his confinement in a juvenile institution, he and his parents are entitled to be notified in writing of the hearing, to the assistance of counsel, including appointed counsel, to the right to present evidence, and to the right to confront and cross-examine witnesses produced by the state.

Although the Court has ruled that juveniles have due process rights, accounts that come out of institutions where juveniles are kept in custody continue to be horrifying. Lollis v. New York State Department of Social Services,\(^\text{482}\) for example, dealt with the two-week solitary confinement of a 14-year-old girl who was an inmate of a New York "Training School" as a "person in need of supervision." She had never been accused or convicted of a crime. Immediately after she had become involved in a fight with another inmate and a matron she was confined, without a hearing, in a small room which was stripped of all facilities normally available to inmates. "She was completely unoccupied for 24 hours daily."\(^\text{483}\) The federal district court held such treatment to be cruel and unusual punishment as proscribed by the eighth amendment.

Roberts v. Williams\(^\text{484}\) involved a 14-year-old male prisoner who had been confined at the Leflore County Farm, Mississippi, for stealing $2.11 worth of groceries. He was performing work on county roads when a shotgun, in the hands of a trusty guard, discharged into his face causing brain damage, the loss of both eyes, and other injuries. In a suit brought for the maimed boy by his father and guardian, the courts held that there was liability under the eighth and fourteenth amendments. The Fifth Circuit stated:

The evidence herein as to beating of juvenile and adult prisoners and the use of a trusty guard previously convicted of assault with intent to kill, come into focus with the demonstrated indifference to prisoners' safety, as establishing a cruel state of mind which with physical harm and causation provide the basis of Eighth Amendment tort liability.\(^\text{485}\)

An illustrative case pointing out the shortcomings of juvenile detention facilities is Inmates of the Boys' Training School v. Affleck\(^\text{486}\) in which Chief Judge Pettine inquired into the Rhode Island practices.


\(^{483}\) 322 F. Supp. at 475.

\(^{484}\) 456 F.2d 819 (5th Cir.), cert. denied, 404 U.S. 866 (1971).

\(^{485}\) Id. at 828.

concerning the detention and confinement of juveniles and found them sadly deficient in due process.

There is no psychiatrist or clinical psychologist on the BTS staff . . . . There is evidence, and I so find, of at least two probable suicide attempts by boys who received no medical or psychiatric care proximately following the attempts. The response of BTS supervisors to these suicide attempts was solitary confinement.

. . . .

Two of these cells are stripped isolation cells, containing nothing but a toilet, and a mattress on the floor. The cells have, at times, not had artificial lighting. In one of the cells, the window is boarded over, rendering it completely dark at times. These cells are known as "bug-out" rooms and are used for solitary confinement of boys.487

The plaintiff had sought an injunction prohibiting the confinement of juveniles in any facility which did not meet minimum standards of cleanliness and which failed to provide adequate care or make adequate provision for the personal hygiene of the inmates.488 Judge Pettine ordered the defendants to provide these minimum conditions of confinement, stating:

The state has offered no reason to justify this discrimination against juveniles. . . . They have been confined through a process offering them fewer protections than adults have; they may not now be treated worse than the adult inmates are.489

Response to the problems of juvenile detention has not been limited to the grant of relief in specific suits. For example, United States

487. Id. at 1359.
488. The injunction requested sought the following conditions:
   a) A room equipped with lighting sufficient for an inmate to read by until 10:00 p.m.;
   b) sufficient clothing to meet seasonal needs;
   c) bedding, including blankets, sheets, pillows, pillow cases and mattresses; such bedding must be changed once a week;
   d) personal hygiene supplies, including soap, toothpaste, towels, toilet paper, and a toothbrush;
   e) a change of undergarments and socks every day;
   f) minimum writing materials: pen, pencil, paper and envelopes;
   g) prescription eyeglasses, if needed;
   h) equal access to all books, periodicals and other reading materials located in the Training School;
   i) daily showers;
   j) daily access to medical facilities, including the provision of a 24-hour nursing service;
   k) general correspondence privileges.
489. Id.
District Judge Lasker ordered the appointment of an "independent ombudsman" to handle the grievances of children held in juvenile detention facilities in New York City, and directed city officials to submit a plan describing "the qualifications and duties of the ombudsman and procedures for his appointment." The New York Court of Appeals struck down the practice of putting children who were accused of no crime but who were called "persons in need of supervision" (PINS) together with children who had been convicted of some offenses and thus been classified as "juvenile delinquents." Finally, in February 1973, Robert W. Meserve, president of the American Bar Association, and Roger M. Blough, president of the Institute of Judicial Administration, announced the formation of a national commission to develop this country's first comprehensive standards and practical guidelines for juvenile justice. The two leaders appointed more than


In 1972, the New York State Division for Youth put into operation an experimental ombudsman program for the troubled teenagers who live in the institutions that it runs. See Sibley, Assisting Youthful Inmates Puts Strain on Ombudsmen, N.Y. Times, July 31, 1973, at 39, col. 6.

491. See Oelsner, Reform Schools Limited by Court to Delinquents, N.Y. Times, July 6, 1973, at 1, col. 5; Oelsner, City's Child Care is Tarmed Lagging, N.Y. Times, July 29, 1973, at 46, col. 4.

For other recent cases involving the due process rights of juveniles in custody, see, e.g., Lucarell v. McNair, 453 F.2d 836 (6th Cir. 1972) (juvenile had a civil rights cause of action against a referee and administrative officer of a juvenile court for personal assault and illegal incarceration); Shone v. Maine, 406 F.2d 844 (1st Cir.), judgment vacated with instructions to dismiss as moot, 346 U.S. 6 (1969) (transfer of a juvenile from boys' training center to men's correctional center based on an administrative finding of incorrigibility without a hearing violated due process and equal protection); Morales v. Turman, 364 F. Supp. 166 (E.D. Tex. 1973) ("The widespread practice of beating, slapping, kicking, and otherwise physically abusing juvenile inmates, in the absence of any exigent circumstances, . . . violates state law, . . . the avowed policies of the Texas Youth Council, . . . and the eighth amendment to the United States Constitution." Id. at 173.) Black Bonnet v. South Dakota, 357 F. Supp. 889 (D.S.D. 1973) (South Dakota statute that permits the incarceration of juveniles without a hearing held unconstitutional); Patterson v. Hopkins, 350 F. Supp. 676 (N.D. Miss. 1972) ("While the ideal situation would be to establish and maintain a fully equipped and properly supervised juvenile detention facility within the county for the detention of juveniles awaiting an adjudicatory hearing, and thus eliminate the necessity of detaining a juvenile in the county jail, the court does not feel that the failure to provide such a facility deprives the juveniles of the county of the 'due process and fair treatment' mentioned in Kent and its progeny." Id. at 684); Miller v. Quatsoe, 348 F. Supp. 764 (E.D. Wis. 1972) ("when the filing of the complaint determines juvenile court jurisdiction, then this filing cannot be delayed in order to avoid juvenile court jurisdiction unless the juvenile is granted a hearing with the necessary constitutional safeguard." Id. at 766); Baker v. Hamilton, 345 F. Supp. 345 (W.D. Ky. 1972) (confinement of juveniles in county jail constituted cruel and unusual punishment); United States v. Alsbrook, 336 F. Supp. 973 (D.D.C. 1971) (court directed federal and District of Columbia officials to submit plan for alleviating congestion at the existing youth facility provided for by the Youth Corrections Act in order to bring the facility into compliance with the act); In re E.M.B., . . . . A.2d . . . . (D.C. 1973) (finding civil commitment of "habitually disobedient and ungovernable" juveniles as "persons in need of supervision" was constitutionally vague).

Judge Irving R. Kaufman, the commission’s chairman, stated:

We hope to achieve substantive reform of the juvenile justice system, which is plagued by failures and inefficiencies. There are plenty of studies and reports, but there are no cohesive guidelines on handling the children in trouble for police, judges, legislators, social workers, schools, correctional institutions and other agencies.

More important, there is no judicial standards program endorsed by those ultimately responsible for law and judicial reform in this country. The Institute of Judicial Administration and the American Bar Association will attempt to fill that void.\footnote{As quoted in Lubasch, \\textit{Juvenile Justice Facing an Inquiry}, N.Y. Times, Feb. 18, 1973, at 27, col. 1.}

However, human beings make drastic changes with painful slowness. In the meantime, the courts will have to continue to apply due process concepts to the detention and confinement of juveniles.

\subsection*{Q. Treatment of Incompetents}

The stories that are told about the confinement of incompetents are as horrifying as those that come out of institutions for the detention of juvenile delinquents. In Pennsylvania, for example, a 16-year-old male, who had allegedly broken a store window near his home in Philadelphia, spent 22 years in prison without either a criminal trial or a civil commitment proceeding. As the result of a suit by the American Civil Liberties Union, he and 129 more individuals similarly situated were released in 1966; all had been incarcerated for periods ranging up to 25 years.\footnote{As quoted in Lubasch, \\textit{Juvenile Justice Facing an Inquiry}, N.Y. Times, Feb. 18, 1973, at 27, col. 1.}

In Michigan, a 36-year-old mental patient confined in a state mental hospital for 18 years agreed to experimental surgery on his brain to change his behavior. The experiment was halted by suit filed by a group of citizens on his behalf which challenged the propriety of allowing anyone held involuntarily to submit to such an operation. A three-judge panel of the Wayne County Circuit Court held that the mental patient was being dealt with unconstitutionally, and stated:

The State’s interest in performing psychosurgery and the legal ability of the involuntarily detained mental patient to give consent must bow to the First Amendment, which protects the
generation and free flow of ideas from unwarranted interference with one's mental processes.\textsuperscript{495}

The National Association for Mental Health and the American Association on Mental Deficiency, together with three mental patients, brought a civil suit in the United States District Court for the District of Columbia against the Department of Labor to end what the plaintiffs called widespread "peonage" in mental institutions. The suit charged that thousands of residents in non-federal hospitals and other institutions were working daily at menial jobs and receiving either token pay as low as one cent an hour, or no pay at all. Irving H. Chase, immediate past president of the National Association for Mental Health, said at a news conference that there were certainly more than 100,000 such institutionalized workers, and possibly as many as 200,000.\textsuperscript{496}

Finally, in \textit{New York State Association for Retarded Children v. Rockefeller},\textsuperscript{497} the district court, faced with inhumane and shocking conditions at the Willowbrook State School for the Mentally Retarded, directed the state to remedy the situation. The court ordered the immediate hiring of additional ward attendants sufficient to assure a one-to-nine ratio of staff to residents to insure the residents of protection from physical harm, and the hiring of at least 85 more nurses, 30 more physical therapists, 15 additional physicians, and sufficient recreational staff.

In a series of four cases — \textit{Baxstrom v. Herold},\textsuperscript{498} \textit{Jackson v. Indiana},\textsuperscript{499} \textit{McNeil v. Director},\textsuperscript{500} and \textit{Miller v. Gomez}\textsuperscript{501} — the


In the area of treatment an interesting situation has developed in Alabama and Georgia. In Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), the district court held that any person committed against his will to a state mental institution had a constitutional right to "adequate treatment from a medical standpoint." \textit{Id.} at 785. Subsequently, the court heard extensive testimony from professionals on the standards needed to secure adequacy of treatment and wrote a detailed set of guidelines that the state had to meet in order to provide this treatment, including specific staff-patient ratios. Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), 344 F. Supp. 387 (M.D. Ala. 1972). See Birnbaum, \textit{The Right to Treatment}, 46 A.B.A.J. 499 (1961). However, in a virtually identical case in Georgia, Burnham v. Department of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972), the district court held that there was no constitutional right to medical treatment and dismissed the case. The court found that "there has been no showing of a denial of a constitutionally protected right nor a \textit{federally} guaranteed statutory right." \textit{Id.} at 1341. On appeal, these cases were consolidated for argument and argued before the Fifth Circuit in December 1972. For an account of the argument, see N.Y. Times, Dec. 18, 1972, at 11, col. 10.

\textsuperscript{498} 383 U.S. 107 (1966).

\textsuperscript{499} 406 U.S. 715 (1972).

\textsuperscript{500} 405 U.S. 245 (1972).

\textsuperscript{501} 412 U.S. 914 (1973).
Supreme Court has set forth the constitutional rights available to incompetents in custody. Baxstrom, a prisoner, was declared insane by a prison physician. His sentence expired and official custody of him shifted to the Department of Mental Hygiene, but he continued to be confined at Dannemora State Hospital, an institution under the jurisdiction of the New York Department of Correctional Services. The Court held that he was entitled to hearings to redetermine the issue of his insanity and whether he must be kept in a maximum security hospital, stating:

We hold that petitioner was denied equal protection of the laws by the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York. Petitioner was further denied equal protection of the laws by his civil commitment to an institution maintained by the Department of Correction beyond the expiration of his prison term without a judicial determination that he is dangerously mentally ill such as that afforded to all so committed except those, like Baxstrom, nearing the expiration of a penal sentence.502

Jackson was charged with purse snatching, but was committed for an indefinite period after it was determined at a pretrial competency hearing that he would be unable to understand the charges against him or participate in his defense. The Court held that the Indiana commitment procedures allowing indefinite commitment violated both the equal protection and the due process clauses since absent the criminal charge Jackson would be subject to a more stringent commitment standard and to a more lenient standard of release. The effect of the procedure in this case was to condemn him to a strong probability of permanent institutionalization. Justice Blackmun, writing for the majority, noted:

At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.

We hold, consequently, that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment
proceeding that would be required to commit indefinitely any other citizen, or release the defendant.503

In McNeil, the lower court had sentenced the prisoner to five years for assault, but rather than committing him to prison, it referred him to Patuxent Institution for examination to determine whether he should be committed to that institution for an indefinite term under Maryland's law relating to defective delinquency.504 He served his full sentence, but remained in confinement because no determination had been made as to whether he should be committed to the Patuxent Institution. The Court ordered him released on the ground that his confinement after the expiration of his sentence was violative of due process, stating that "[a] confinement that is in fact indeterminate cannot rest on procedures designed to authorize a brief period of observation."505

In the fourth case, Miller v. Gomez,506 the Court summarily affirmed a decision of a three-judge district court invalidating certain New York statutory provisions because they permitted a criminal defendant, too mentally ill to stand trial, to be committed to a New York mental hospital operated by the State Correction Department without a jury determination that he was dangerous — a determination that was accorded to other mentally ill persons.507

Three-judge district courts have acted to invalidate other state civil procedures for the commitment of incompetents on constitutional grounds. For example, a three-judge panel, in Dixon v. Attorney General,508 held that the applicable section of the Pennsylvania Mental Health and Mental Retardation Act of 1966,509 authorizing the commitment of any person who appears, upon an application accompanied by certificates of two physicians, to be mentally disabled and in need of care, was unconstitutional on its face. The court found the challenged provision "to be almost completely devoid of the due process of law required by the Fourteenth Amendment."510 In Wisconsin, a three-judge court in Lessard v. Schmidt,511 found that state's civil commit-

503. 406 U.S. at 738.
505. 407 U.S. at 249.
507. The New York State Department of Mental Hygiene estimated that the Court's ruling would affect between 275 and 300 patients at Matteawan State Hospital, Beacon, New York, including George Metesky, the "Mad Bomber," who was one of the plaintiffs. See Tolchin, High Court Backs Commitment Curb, N.Y. Times, May 30, 1973, at 14, col. 1.
510. 325 F. Supp. at 972.
ment procedure for mentally ill persons on a preponderance of the evidence to be invalid on many grounds:

We conclude that the Wisconsin civil commitment procedure is constitutionally defective insofar as it fails to require effective and timely notice of the "charges" under which a person is sought to be detained; fails to require adequate notice of all rights, including the right to jury trial; permits detention longer than 48 hours without a hearing on probable cause; permits detention longer than two weeks without a full hearing on the necessity for commitment; permits commitment based upon a hearing in which the person charged with mental illness is not represented by adversary counsel, at which hearsay evidence is admitted, and in which psychiatric evidence is presented without the patient having been given the benefit of the privilege against self-incrimination; permits commitment without proof beyond a reasonable doubt that the patient is both "mentally ill" and dangerous; and fails to require those seeking commitment to consider less restrictive alternatives to commitment.

R. Public Housing

Over 15 years ago Circuit Judge Edgerton, in Rudder v. United States, pointed out that the government acting as landlord was still the government and had to act in accordance with due process. The Rudder case arose under the harsh Gwinn Amendment, passed

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513. 349 F. Supp. at 1103.

For other recent cases involving the rights of institutionalized incompetents, see, e.g., In re Bailey, 482 F.2d 648 (D.C. Cir. 1973) (involuntary commitment of person found mentally ill by a preponderance of the evidence rather than by proof beyond a reasonable doubt violates due process); Wheeler v. Glass, 473 F.2d 983 (7th Cir. 1973) (class action by two institutionalized, mentally retarded youths that alleged they were bound to their beds in spread-eagle fashion for 771/2 hours in a public area of the hospital and were made to wash walls for long periods while barely clothed stated a cause of action under the Civil Rights Act); Jones v. Robinson, 440 F.2d 249 (D.C. Cir. 1971) (in order to transfer a patient to the maximum security section of a hospital "some minimal degree of due process is required in order to make as certain as the hospital authorities reasonably can the correctness of their decisions." Id. at 251); Burchett v. Bower, 356 F. Supp. 1278 (D. Ariz. 1973) (by a state statute and "by committing Burchett . . . to the Hospital . . . the State of Arizona has both determined that he is in need of mental treatment and has undertaken the corresponding responsibility to provide it." Id. at 1281); United States v. Pardue, 354 F. Supp. 1377 (D. Conn. 1973) (federal defendant accused of bank robbery was not incompetent to stand trial, and since it was not foreseeable that he would be held incompetent, he was ordered released and indictment dismissed after three years because "there are no federal facilities which offer appropriate psychiatric services and adequate security for the treatment of the defendant with a mental disorder, not temporary in nature." Id. at 1377-78); Davy v. Sullivan, 354 F. Supp. 1320 (M.D. Ala. 1973) (Alabama's sexual psychopath statute held unconstitutional); McCray v. State, 40 U.S.L.W. 2307 (Md. Ct. Montgomery County, Nov. 11, 1971) (due process clause bars assignment of inmates at Maryland institution for defective delinquents to disciplinary solitary confinement without notice of charges, impartial hearing, and opportunity to offer defense); Fhagen v. Miller, 29 N.Y.2d 348, 278 N.E.2d 613, 328 N.Y.S.2d 393 (1972) (notice and a hearing may be dispensed with in cases of emergency); 226 F.2d 51 (D.C. Cir. 1955), rev'd 103 A.2d 741 (D.C. Mun. Ct. App. 1954).
in 1952 and amended the following year, which forbade any housing unit constructed under the United States Housing Act of 1937 to be occupied by anyone "who is a member of an organization designated as subversive by the Attorney General."\textsuperscript{515} Despite this provision, the United States Court of Appeals for the District of Columbia Circuit held that the refusal on the part of tenants to sign a so-called certification of non-membership in subversive organizations was an invalid basis for eviction. Chief Judge Edgerton stated:

The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process.\textsuperscript{516}

More recently, the Second Circuit in Escalera \textit{v. New York City Housing Authority}\textsuperscript{517} held that a class action complaint on behalf of tenants in New York City public housing projects against the New York City Housing Authority stated a cause of action because the procedures followed in terminating their tenancies violated due process. The court found the following deficiencies: (1) one-sentence summary notices of termination did not adequately inform the tenants of the evidence against them; (2) the tenants were denied access to relevant Housing Authority records; and (3) the tenants lacked the opportunity to confront and cross-examine the persons who supplied the information in the records.\textsuperscript{518}

The Department of Urban Development (HUD) has issued regulations that establish model lease and grievance procedures to protect the rights of public housing tenants.\textsuperscript{519} In \textit{Housing Authority \textit{v. United States Housing Authority}\textsuperscript{520} ten local housing authorities, later joined by 14 others, brought suit against HUD alleging that the regulations were issued in violation of the notice requirement of the Administrative Procedure Act (APA)\textsuperscript{521} and that they exceeded the limits of HUD's

\textsuperscript{516} 226 F.2d at 53.
\textsuperscript{518} 425 F.2d at 862.
\textsuperscript{519} HUD Renewal and Housing Management Circular RHM 7465.8 (Feb. 22, 1971); HUD Renewal and Housing Management Circular RHM 7465.9 (Feb. 22, 1971). Renewal and Housing Management circulars are the customary vehicle for HUD rulings and are kept in the various HUD offices throughout the country. Lefcoe, \textit{HUD's Authority to Mandate Tenants' Rights in Public Housing}, 80 \textit{Yale L.J.} 463, n.2 (1971).
\textsuperscript{520} 466 F.2d 862 (2d Cir. 1972), cert. denied, 410 U.S. 927 (1973).
\textsuperscript{521} 8 U.S.C. § 533(b) (1976).
rule-making power. The district court granted summary judgment for the plaintiffs and enjoined the enforcement of the regulations. The Eighth Circuit, finding that the regulations bore a reasonable relationship to the purposes for which HUD's rule-making power was authorized, reversed, holding that the regulations were not invalidated by the policy expressed in section 1 of the United States Housing Act—entrusting local housing agencies with a maximum amount of responsibility in the administration of low rent housing programs—and that the regulations fell within the exemption from the APA notice requirements for matters "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."

Brown v. Housing Authority also concerned the validity of HUD regulations. Brown was a class action brought against the Housing Authority of the City of Milwaukee, Wisconsin, seeking declaratory and injunctive relief against termination of tenancies. The plaintiffs claimed that the housing authority summary procedures violated HUD regulations and due process guarantees. The district court granted the plaintiffs' summary judgment on the pleadings. The Seventh Circuit affirmed holding that the authority's procedures were invalid under HUD regulations and for that reason did not reach the due process issue. The housing authority argued that the regulations exceeded HUD's authority and were issued in violation of the APA notice requirements. The Seventh Circuit reached the same conclusion as did the Eighth in Housing Authority, deciding that the regulation was valid and fit within the "public benefits" exception to the APA notice requirements.

The Fourth Circuit held in Caulder v. Durham Housing Authority that the due process clause required that tenants in a federally subsidized North Carolina housing project be afforded notice, hearing, and administrative adjudication before the termination of their leases.

On appeal, the plaintiffs also argued that coerced implementation of the HUD regulations by withholding funds violated the due process clause. 468 F.2d at 10. The court recognized that in Torpe v. Housing Authority, 393 U.S. 268 (1969), "the Supreme Court strongly suggested that such an action might violate the constitutional prohibition of impairment of contracts," 468 F.2d at 10, but noted that since there had been no withholding of funds and that since none had been threatened, the issue of contractual impairment was purely hypothetical, premature for decision. Id. 524. 471 F.2d 63 (7th Cir. 1972).
525. 340 F. Supp. 114 (E.D. Wis. 1972). Attempting to meet the plaintiffs' claim that the housing authority procedures violated due process, the defendants contended, in the district court, that the availability of a hearing in a state court eviction action satisfied due process requirements. The district court, responded: "The fact that tenants in Wisconsin public housing are afforded a hearing in the eviction action in the state court does not, in my judgment, negate the need of procedural due process at the time the notice of termination is given." Id. 526. 433 F.2d 998 (4th Cir. 1970), cert. denied, 401 U.S. 1003 (1971).
The circuit court, analogizing the process due tenants upon removal from federally subsidized housing to the due process requirements for the termination of public assistance benefits, stated:

Succinctly stated, Goldberg requires (1) timely and adequate notice detailing the reasons for a proposed termination, (2) an opportunity on the part of the tenant to confront and cross-examine adverse witnesses, (3) the right of a tenant to be represented by counsel, provided by him to delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination and generally to safeguard his interests, (4) a decision, based on evidence adduced at the hearing, in which the reasons for decision and the evidence relied on are set forth, and (5) an impartial decision maker.527

McClellan v. University Heights, Inc.528 involved an apartment complex financed by mortgage loans guaranteed through a provision of the National Housing Act.529 The plaintiff tenants were notified that their leases would not be renewed. They requested statements of reasons and hearings on the decision not to renew, but their requests were refused. They filed a class action suit, and the district court granted them injunctive relief. The court balanced the value of a stable homelife in decent housing at an affordable rent against the insignificant harm the owners of the apartment complex would suffer as long as they continued to receive rent from their tenants. Since that balance of hardships weighed in favor of the tenants, the court held they were entitled to a full, fair, and impartial hearing prior to their evictions.530

Recently, in Otero v. New York City Housing Authority,531 it has been held that failure of the local housing authority to follow a published regulation which gave first priority to former site residents in housing constructed on the site from which they had been displaced, and its action in giving preference to Jews because the project was

530. 338 F. Supp. at 382.
conveniently located adjacent to an old and historic synagogue, violated the supremacy, due process, equal protection, and establishment clauses of the Federal Constitution. The housing authority was permanently enjoined from leasing units in violation of its own regulation and from leasing units on a priority basis to persons seeking proximity to their place of worship. When granting the preliminary injunction the court had stated:

The short of this subject is that the Housing Authority, in dishonoring its own regulations and denying first priority to plaintiffs and others in their class, has denied them the due process of law. If the Housing Authority's course be deemed less than a constitutional violation, it is in any event a breach of legal duty correctible in this proceeding. Together with the other circumstances of the case, the error of the City's officials has resulted, foreseeably and directly, in a racially discriminatory pattern of admissions to the apartments in question. Plaintiffs and their class are thus denied the equal protection of the laws.

S. Public Welfare Assistance

One of the cases which laid to rest the distinction between right and privilege was Goldberg v. Kelly. The Court there held that the

532. Id. at 957.

[F]rom renting any apartments in its Seward Park Extension buildings to any individual or family unless and until all former site occupants, who are eligible, (without regard to housing need) and have applied for and for whom there is an apartment of appropriate size, are offered leases in the building.

Id. at 957. But the Second Circuit reversed for new hearings, 484 F.2d 1122, 1149 (2d Cir. 1973). Subsequently, the contending parties arrived at a settlement of their differences. See Darnton, Ethnic Battle on Selecting Tenants Apparently Over, N.Y. Times, Feb. 11, 1974, at 37, col. 1.

For other recent cases involving the due process and other rights of tenants in federally assisted housing, see, e.g., Langevin v. Chenango Court, Inc., 447 F.2d 296 (2d Cir. 1971) (tenants in low income federally assisted housing not entitled to trial-type hearing before the FHA with reference to proposed rent increases that the agency authorized upon the termination of existing tenancies); People's Rights Organization v. Bethlehem Associates, 356 F. Supp. 407 (E.D. Pa. 1973) (no right to trial hearing on rent increases in federally assisted housing); Lopez v. White Plains Housing Authority, 355 F. Supp. 1016 (S.D.N.Y. 1972) (limiting eligibility for public housing to families with an adult citizen member "conflicts with the guarantees of the fourteenth amendment and thus denies plaintiffs equal protection of the laws." Id. at 1026); Neddo v. Housing Authority of City of Milwaukee, 335 F. Supp. 1397 (E.D. Wis. 1971) (rejecting application for housing without a hearing because Authority believed applicant owed rent from previous occupancy of public housing was arbitrary and unreasonable); Summer v. White Plains Housing Authority, 29 N.Y.2d 420, 278 N.E.2d 892, 328 N.Y.S.2d 649, cert. denied, 406 U.S. 928 (1972) (rejected applicant for public housing, as distinguished from evicted public housing tenant, is not entitled to full evidentiary hearing).

fourteenth amendment's due process clause required that a recipient of public assistance be given an evidentiary hearing before termination of benefits. Justice Brennan wrote for the Court:

Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

The hearing required, the Court stated, need not take the form of a judicial or quasi-judicial trial, but must provide the recipient with timely and adequate notice, the right of confrontation and cross-examination, and the chance orally to present his own arguments and evidence. The recipient must also be allowed the assistance of retained counsel and must be given an impartial decision maker.

Mr. Justice Black, in a strong dissenting opinion, wrote:

This decision is thus only another variant of the view often expressed by some members of this Court that the Due Process Clause forbids any conduct that a majority of the Court believes "unfair," "indecent," or "shocking to their consciences. . . ." I regret very much to be compelled to say that the Court today makes a drastic and dangerous departure from a Constitution written to control and limit the government and judges and moves toward a constitution designed to be no more and no less than what the judges of a particular social and economic philosophy declare on the one hand to be fair or on the other hand to be shocking and unconscionable.

Government officials — federal and state — were less than enthusiastic over the Court's ruling in Goldberg. They tried to limit the

than one year. The Court reitered its position in Goldberg that the constitutional challenge could not be met by arguing that public assistance benefits are a "privilege" not a "right." Id. at 627 n.6.

535. 397 U.S. at 265. In Alexander v. Silverman, 356 F. Supp. 1179 (E.D. Wis. 1973), the court held that welfare applicants whose applications for general welfare relief were denied were entitled as a matter of due process to a written statement of reasons and a post-denial hearing. If, however, from the face of the application it was clear that the applicant did not meet the Welfare Department's regulations, the procedures were not required. Id. at 1181.

In addition, the Third Circuit, in Rochester v. Baganz, 479 F.2d 603 (3d Cir. 1973), held that an across-the-board percentage reduction in the level of Aid to Families with Dependent Children (AFDC) benefits, effective eight days after notice was received by AFDC recipients, violated a regulation of the Department of Health, Education and Welfare that requires at least 15 days notice of "any proposed action to terminate, suspend, or reduce assistance." 45 C.F.R. § 205.10(a)(5) (1972). Contra Rochester v. Ingram, 332 F. Supp. 350 (D. Del. 1972).
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effect of the decision by confining its application to cases where questions of fact, as distinct from policy questions, were involved. In Yee-Litt v. Richardson, the court refused to accept the distinction, finding it too unclear and unmanageable to be implemented. The court characterized the fact-policy distinction as "not viable in the welfare context for making the critical determination of whether aid will be paid pending a hearing." The Supreme Court affirmed.

The courts also have corrected welfare officials, burdened though these officials may feel themselves to be, on various other points. In Aguayo v. Richardson the plaintiffs challenged, on constitutional and statutory grounds, New York's experimental work projects which required that employable members of families receiving Aid to Families with Dependent Children (AFDC) benefits in selected districts throughout the state register for training and employment. A failure to accept either a justifiable referral or to participate properly after such referral without good cause, constituted grounds for termination of assistance. Recipients were entitled to a pre-termination hearing, but an adverse determination at the hearing mandated a 30-day suspension of benefits regardless of whether the recipient agreed to comply in the future. The Second Circuit ordered the state defendants enjoined from enforcing 30-day suspensions until a final determination of their validity.

Milwaukee County had a Work Experience and Training Projects Division (WETPD) whose administrators determined whether persons eligible for general welfare relief were fit for a Work Experience assignment. Those selected were referred to openings in either a verified position in private industry or an unclassified position with

537. 353 F. Supp. 996 (N.D. Cal. 1973), aff'd sub nom. Carleson v. Yee-Litt, 412 U.S. 924 (1973); cf. Mothers' and Children's Rights Organization v. Sterrett, 467 F.2d 757 (7th Cir. 1972) (formal evidentiary hearing required where questions of fact or law or policy questions entwined with questions of fact are involved).

538. 353 F. Supp. at 1000. In concluding its opinion, the Yee-Litt court further explained its rejection of the fact-policy distinction:

When the Supreme Court fashioned the minimum due process standards for terminating welfare recipients, it was doing so in the context of a factual appeal. The defendants have interpreted Goldberg to allow separate treatment for recipients whose appeals do not raise issues of fact or judgment. However, implementation of this policy of distinguishing factual from policy appeals has resulted in the improper denial of aid pending for significant numbers of welfare recipients.

the county. Once the income from their employment made them ineligible for relief, their case records at the Welfare Department were formally closed. If these people lost their jobs, they had to reapply as new applicants in order to receive general welfare relief. In *Salandich v. Milwaukee County*,\(^4\) the court sustained a challenge to this procedure, holding that those whose employment under WETPD had been terminated were entitled to the welfare benefits for which they had previously qualified until such time as the administrator of the program determined that they were presently ineligible for such relief.\(^5\)

In Arizona, *Goldberg*-mandated hearings were held to determine whether indigents were physically able to work and thus no longer entitled to welfare payments. The Arizona statute and regulation required indigents to tender witness fees and allowances as a condition precedent to the issuance of subpoenas for witnesses and to obtain the cross-examination of authors of reports which indicated that the indigents were physically able to work. In *Bacon v. Graham*\(^6\) a three-judge court invalidated the statutory provision and regulation as violative of the due process and equal protection clauses of the Constitution.

**T. Social Security Benefits**

Although recipients of Social Security benefits have fared as well as recipients of public welfare assistance in terms of being accorded due process rights, claimants for Social Security disability benefits have not fared as well as either. In *Wright v. Finch*\(^7\) a three-judge federal district court in the District of Columbia held it a violation of due process for the Social Security Administration to suspend or terminate disability insurance benefits without first giving the recipient an opportunity: (1) to respond; (2) to submit evidence supporting his claim; and (3) to have conflicting evidence resolved by an impartial decision-maker. It should be noted, however, that the court declined to delineate the details of a suitable procedure until the Social Security Administration had an opportunity to develop pre-suspension proceedings which would afford a recipient fundamental due process.\(^8\) Shortly before the argument of this case in the Supreme Court, the Secretary of the Department of Health, Education

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542. Id. at 771.
544. For other recent cases involving welfare recipients or issues, see Appendix VII infra.
and Welfare responded to the district court’s ruling by adopting new regulations providing for “notice of a proposed suspension and the reasons therefor, plus an opportunity to submit rebuttal evidence.” The new regulations did not, however, provide for an oral presentation. Nevertheless, the Court vacated the judgment of the three-judge court and remanded the case, commenting, with reference to reprocessing under the new procedures: “If that process results in a determination of entitlement to disability benefits, there will be no need to consider the constitutional claim that claimants are entitled to an opportunity to make an oral presentation.”

Justice Brennan, in a dissenting opinion in which Justices Douglas and Marshall joined, stated:

Avoidance of unnecessary constitutional decisions is certainly a preferred practice when appropriate. But that course is inappropriate, indeed irresponsible, in this instance. We will not avoid the necessity of deciding the important constitutional question presented by claimants even should they prevail upon the Secretary’s reconsideration. The question is being pressed all over the country. . . .

The Secretary’s new regulations permit discontinuance of disability benefits without affording beneficiaries procedural due process either in the form mandated by Goldberg v. Kelly or in the form mandated by the District Court. The regulations require only that the beneficiary be informed of the proposed suspension or termination and the information upon which it is based and be given an opportunity to submit a written response before benefits are cut off. This procedure does not afford the beneficiary, as Goldberg requires for welfare and old-age recipients, an evidentiary hearing at which he may personally appear to offer oral evidence and confront and cross-examine adverse witnesses.

Richardson v. Perales involved the denial of a claim filed for disability insurance benefits under the Social Security Act. The claimant requested and was granted a hearing, was given written notice, was afforded an opportunity to examine all documentary evidence on file prior to the hearing, and was permitted to offer his own evidence. The hearing examiner denied the claim, relying upon written medical reports and the testimony of an independent “medical advisor”

546. 405 U.S. at 209.
547. Id.
who had not examined the claimant but had reviewed the medical evidence. Following an adverse decision by the Appeals Council, the claimant appealed to federal district court. The district court was reluctant to accept the written reports, unsworn and immune to cross-examination, as substantial evidence supporting the agency determination and ordered the case remanded to the agency for a new hearing before a different examiner.\textsuperscript{550} The Fifth Circuit, while noting that hearsay evidence was admissible under the Social Security Act, affirmed, holding that such hearsay could not constitute substantial evidence in light of the whole record since it was objected to and contradicted by witnesses.\textsuperscript{561} The Supreme Court reversed, concluding:

\begin{quote}
[A.] written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician.\textsuperscript{552}
\end{quote}

Justice Douglas dissented, with the concurrence of Justices Black and Brennan, stating:

Review of the evidence is of no value to us. The vice is in the procedure which allows it in without testing it by cross-examination. Those defending a claim look to defense-minded experts for their salvation. Those who press for recognition of a claim look to other experts. The problem of the law is to give advantage to neither, but to let trial by ordeal of cross-examination distill the truth.\textsuperscript{553}


\textsuperscript{551} 412 F.2d 44, 51 (5th Cir.), rehearing denied, 416 F.2d 1250 (5th Cir. 1969).

\textsuperscript{552} 402 U.S. at 402.

\textsuperscript{553} Id. at 414. (Douglas, J., dissenting).

In some instances the courts have sent cases back to the Secretary of HEW for the taking of testimony or for a rehearing. See, e.g., Concepcion v. Secretary of HEW, 337 F. Supp. 899 (D.P.R. 1971) (testimony); Zeno v. Secretary of HEW, 331 F. Supp. 1095 (D.P.R. 1970) (rehearing). In Zeno, Chief Judge Cancio in the course of his opinion commented:

Lack of representation by counsel at an administrative hearing such as this, is not a denial of due process. . . . But this Court and other federal courts have been troubled by this lack, even in civil matters, where a litigant with an apparent just claim, needs a degree of sophistication in the presentation of evidence, cross-examination and a knowledge of the existing case law, the statute, and its legislative history, in order to present his case. It is, therefore, somewhat startling to read a record where it is established that the claimant has never gone to school; cannot read or write; where the question of a subsequent fracture to the same leg is never clarified; where Vocational Rehabilitation has not considered him qualified to train for any work other than the heavy labor
U. Medicare and Medicaid

Medicare is a health insurance program that provides payment for medical care to persons over 65 years of age, while Medicaid is a federal-state program designed to provide federal sharing of state expenditures made in furnishing medical care to the needy of all ages. In *Martinez v. Richardson* the Tenth Circuit held that due process of law requires an evidentiary hearing before the discontinuance of payments of medicare benefits.

*Maxwell v. Wyman* was a class suit by nursing homes that participated in the New York Medicaid program and Medicaid reimbursement, but who failed to meet the fire and safety standards indirectly imposed by the federal statutory scheme. The Second Circuit ordered preliminary injunctive relief against the New York Department of Social Services and Health to prevent them from terminating medical reimbursement to the plaintiffs until a hearing had been afforded on the question of whether, under applicable federal regulations, waiver of compliance with the provisions of the Life and Safety Code should be permitted.

he had previously done (and for which he is no longer qualified); where the claimant does not know the place where he worked; and where a "vocational expert" is the only witness called besides the plaintiff — and to expect this humble individual to adequately cross-examine this expert, or to object to the basis of his testimony like an experienced lawyer, puts him in a position of having less than a fair hearing.

*Id.* at 1096 (citations and footnotes omitted).


556. 472 F.2d 1121 (10th Cir. 1973).

557. 458 F.2d 1146 (2d Cir. 1972). In *Maxwell v. Wyman*, 482 F.2d 1326 (2d Cir. 1973), the court ordered federal reimbursement to continue during a state court stay, pending judicial review, of an order of the New York Department of Social Services and Health decertifying certain nursing homes.

In *Klein v. Nassau County Medical Center*, 347 F. Supp. 496 (S.D.N.Y. 1972), vacated, 412 U.S. 925 (1973), a federal three-judge district court found that the refusal of Medicaid assistance for the performance of other than medically indicated abortions deprived indigent pregnant women of the equal protection of the laws. The Supreme Court vacated the judgment and remanded the cases for further consideration in the light of *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973) (declaring state abortion laws unconstitutional).

In *Dick v. Weinberger*, 361 F. Supp. 1 (S.D. Fla. 1973), the court invalidated a provision of the Social Security Act, 42 U.S.C.A. § 1395(b) (B) (Supp. 1973), that disqualifies aliens except permanent residents who have resided here continuously for five years from enrollment in Medicare's medical insurance program as violative of the due process clause of the fifth amendment.


V. Unemployment Compensation

Two discharged employees applied for and were ruled eligible for unemployment insurance benefits under the California Unemployment Insurance Program. Payments began immediately, but in each case the former employer, after learning of the grant of benefits, filed an appeal contending that payments should be denied because the claimants had been discharged for cause. In accordance with the applicable provision of the California Unemployment Insurance Code, payments were automatically and immediately terminated. The Supreme Court, however, in California Department of Human Resources v. Java559 held that enforcement of the provision should be enjoined since it was inconsistent with the relevant provision of the Social Security Act.560 Chief Justice Burger stated:

Our reading of the statute imposes no hardship on either the State or the employer and gives effect to the congressional objective of getting money into the pocket of the unemployed worker at the earliest point that is administratively feasible. That is what the Unemployment Insurance program was all about.561

The Court did not reach any constitutional issue.562

Crow v. California Department of Human Resources563 involved the termination of unemployment compensation benefits without prior hearing following a finding that the recipient, without good cause, had refused to accept suitable employment. The plaintiff had been deprived of benefits after a third party reported that she had refused to accept a job. The district court, relying heavily upon Goldberg v. Kelly564 and the district court opinion in Java v. California Department of Human Resources,565 held the procedure violative of due process. The court stated:

The Court now moves, perhaps cumbrously, to the ad hoc balancing process utilized in recent cases of this sort. "[One's] constitu-

561. 402 U.S. at 135 (footnotes omitted).
562. The three-judge district court had held the California scheme to be defective on both constitutional and statutory grounds. 317 F. Supp. 875, 879 (N.D. Cal. 1970). The court concluded that by not providing a termination hearing the scheme violated the principles enunciated in Goldberg v. Kelly, 397 U.S. 254 (1970), and that by its application which resulted in an average 7 week delay in initial payments to eligible claimants it violated the fundamental policy and intent of the Social Security Act. Id.
565. 317 F. Supp. 875 (N.D. Cal. 1970). aff'd, 402 U.S. 121 (1971). While the district court in Java based its decision on both constitutional and statutory grounds, see note 562 supra, the Supreme Court, affirming, did not reach the constitutional issue.
tional right to procedural due process entitles him to a quality of hearing at least minimally proportioned to the gravity of what he otherwise stands to lose through administrative fiat." While engaging in this comparison of interests, we repeat that it is clear that a pre-determination hearing, with the right to confront and question witnesses is the constitutional norm, and not the exception, as defendants would imply, when "government action seriously injures an individual," and where the crucial decision is based upon facts alleged by a third party.666

W. Government Subsidies and Grants

The federal government disburses billions of dollars annually in subsidies and grants. According to Senator William Proxmire, chairman of the Subcommittee on Priorities and Economy in Government, federal transportation subsidies cost the American people about $7 billion annually — the variety of subsidies for the maritime industry alone cost the public almost $1 billion.667

In October 1972 the Federal Advisory Committee Act became law.668 Advisory committees are composed of non-governmental representatives with some special expertise that can be utilized by the agencies involved. Members range from groups of ranchers and other land users, who advise state and national officers of the Bureau of Land Management, to highly technical committees of the National Academy of Sciences and the National Institutes of Health. The National Institutes of Health alone have some 185 research and training grant advisory committees.668

One might well question whether due process requirements should circumscribe the making of subsidies and grants or govern the actions of advisory committees in recommending grants.

K. C. Wu, a Georgia college professor, applied to the National Endowment for Humanities, a federal agency, for a $70,000 grant in order to write a comprehensive history of China. Under the agency's procedure, the application was referred, initially, to five experts on Chinese history, each of whom was a professor of history at an American university. It was then referred to a panel of outside experts who consulted the Endowment for Humanities generally, but not neces-


sarily on Chinese history in particular, and later to a committee of full-time staff members of the Endowment. Finally, the application was referred to the National Council on Humanities, which rejected it. Wu went to court under the Freedom of Information Act\(^5\) to find out what the five China specialists said. The district court denied relief on the grounds that the information sought fell within an exemption to the Act and the Fifth Circuit affirmed\(^6\).

In *Mil-Ka-Ko Research & Development Corp. v. Office of Economic Opportunity*\(^7\) the plaintiffs, grantees of the OEO, sought review of the OEO’s refusal to refund their grant. Section 2944(3) of the Economic Opportunity Act of 1964 provided that “financial assistance . . . shall not be terminated for failure to comply with applicable terms and conditions unless the recipient agency has been afforded reasonable notice and opportunity for a full and fair hearing.”\(^8\) While conceding that the original grant could not be curtailed in amount or duration without a full, fair pretermination hearing, the court distinguished the denial of an application for refunding as “merely the disappointment of a ‘unilateral expectation’ . . . unencumbered with the constitutionally required burden of procedural due process.”\(^9\) Finding no property interest in receiving the refunding for the grant within the meaning of the fifth amendment’s prohibition against the taking of property without due process of law, the court dismissed the action since the agency had acted neither arbitrarily nor capriciously.\(^10\)

**X. Termination of Utility Services**

In determining whether to apply due process concepts to the termination of utility services, the courts first have had to consider whether the utilities’ acts constitute state action. The utilities, of course, contend that in cutting off services they do not engage in state action. The district court in *Hattell v. Public Service Co.*\(^1\) in holding a shutoff of utility services to be state action, stated:

> When defending against a requirement for a minimal hearing in advance of a utility shutoff, we are sure that all utility companies share the view that their conduct is not state action, but

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574. 352 F. Supp. at 173. Section 2944(2) provides that an application for refunding shall not “be denied, unless the recipient agency has been given reasonable notice and opportunity to show cause why such action should not be taken.” For a case arising under this provision, see Monmouth Legal Servs. Organization v. Carlucci, 330 F. Supp. 985 (D.N.J. 1971).
575. 352 F. Supp. at 173.
it all depends upon whose ox is being gored. When charged under the anti-trust laws, utility companies vigorously argue that their conduct is exempt because it is state action.\textsuperscript{577}

This view, however, has not been universally accepted. The Seventh Circuit in Kadlec \textit{v. Illinois Bell Telephone Co.}\textsuperscript{578} and Lucas \textit{v. Wisconsin Electric Power Co.}\textsuperscript{579} found that the utilities' conduct did not constitute state action, while the Eighth Circuit took the opposite view in Ihrke \textit{v. Northern States Power Co.}\textsuperscript{580}

In Lucas, an en banc decision, Circuit Judge Sprecher, in a dissenting opinion in which Chief Judge Swygert joined, stated:

I would hold that, prior to the discontinuance of power because of a disputed account, the disputant is entitled to some kind of hearing before an impartial arbiter other than representatives of the public utility.

I would also hold that some notice reasonable in time and adequate in content must clearly advise the customer that he has the right to such a hearing if he disputes the charges leading to the threatened disconnection. If he indicates his desire for the hearing, obviously he would be entitled to further reasonable notice as to the time and place of the hearing.\textsuperscript{581}

The majority of courts have held that the termination of utility services does constitute state action and have ruled that the consumer is entitled to some sort of notice and a hearing. In Bronson \textit{v. Consolidated Edison Co.}\textsuperscript{582} the district court poignantly wrote:

It has been clearly established that once the state has undertaken to provide a service to the public, be it welfare or unemployment benefits, drivers' licenses or tax exemptions, it must then comply with the requirements of due process before it can terminate access to such service or benefits in the case of any given individual. This is the concept of the "entitlement," which provides the individual with his only line of defense against arbitrary withdrawal by the state of his access to what, although initially not his right to demand, he has become dependent upon.

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The courts . . . have recognized the distressing realities of the customer's plight. They have found that, more frequently

\textsuperscript{577} Id. at 245 (citations omitted).
\textsuperscript{578} 407 F.2d 624 (7th Cir.), cert. denied, 396 U.S. 846 (1969).
\textsuperscript{579} 466 F.2d 638 (7th Cir. 1972), cert. denied, 409 U.S. 1114 (1973).
\textsuperscript{580} 459 F.2d 566 (8th Cir.), vacated as moot, 409 U.S. 815 (1972).
\textsuperscript{581} 466 F.2d at 671. It should be noted that the court in Hattell did not feel it proper to enunciate, as did the dissent in Lucas, what type of hearing would comport with due process. 359 F. Supp. 1139 (S.D.N.Y. 1972).
than not, the customer is confronted by an impersonal bureaucracy held together by computers, wherein inefficiency and a resultant high level of error are the norm, and unresponsiveness or "run-arounds" the only answer to his inquiries. 583

Y. Right to Buy a Drink

Many states have statutes which provide that designated persons may post in liquor stores the names of individuals who are "excessive drinkers." Sales or gifts of liquor are barred to such persons. The Wisconsin version of this type of statute 584 was held unconstitutional by the Supreme Court in Wisconsin v. Constantineau, 585 as violative of the due process rights of those individuals whose names were posted. The Court, per Justice Douglas, held: "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." 586 Chief Justice Burger and Justices Black and Blackmun dissented on the ground that the individual should have gone to the state courts first.

Z. No-Action Letters

This Article has considered administrative and executive agencies and officials as investigators and as adjudicators. It shall also consider them as regulators. The no-action letters of the Securities and Exchange Commission (SEC) bear some characteristics of adjudication, and some of regulation.

If an individual wants to embark upon a course of conduct, but is uncertain as to whether such proposed course is in violation of the applicable securities law and regulations, he may write to the SEC, describe his proposed course of conduct, and request a no-action


An example of the possible effects of a utility determination to terminate service has recently been in the news. The Niagara Mohawk Power Corporation turned off an elderly couple's electricity for nonpayment of a $202 electric bill. The couple froze to death. Officials and civic groups launched investigations to determine whether criminal negligence and violations of the state utility regulations were involved. N.Y. Times, Dec. 27, 1973, at 24, col. 1.


586. Id. at 437.
position. At one time whether these no-action letters and the responses should be made available for public inspection was an issue. However, in October 1970 the SEC adopted new regulations providing that no-action and interpretative letters, and the responses thereto, are to be made available for public inspection or copying 30 days after the staff has given or sent the responses to the persons requesting them. In particular cases where it appears that a further delay in publication will be appropriate, the letter and response will be given confidential treatment for a reasonable period not exceeding an additional 90 days.

AA. Corporate Charters

Administrative officials sometimes have discretion in the granting of corporate charters, such as those of banks and certain membership corporations. The Comptroller of the currency, for example, approves national bank charters. When a state bank was denied permission to open another bank by state authorities, it converted to a national bank and obtained the desired permission from the Comptroller. In Wood County Bank v. Camp a competitor state bank filed suit contending that the Comptroller had acted unlawfully in failing to make findings of fact and to render a reasoned opinion disclosing the legal and factual bases for his action. The Comptroller responded that he never made such findings and further that he considered that he had no obligation to do so. The court in concluding that the Comptroller had acted in violation of the plaintiff's due process rights stated:

In the light of this finding that the hearing held was adjudicatory rather than legislative, due process requires that findings of fact be made in support of any conclusion or decision made as a consequence of said hearing. No such findings were made in this case, hence, the approval of the Comptroller was made unlawfully and is without legal effect.

Camp v. Pitts was a suit to compel the issuance of a national bank charter which the Comptroller had denied after a determination that the market area of the proposed bank was adequately served by

588. Id. § 200.81(b). Further similar areas suggest themselves: e.g., letter rulings and advice memoranda of the Internal Revenue Service; procedures by which business firms may obtain Justice Department advice as to whether the proposed transaction will be challenged under antitrust laws. In Tax Analysts and Advocates v. IRS, 362 F. Supp. 1298 (D.D.C. 1973), the court held that the Freedom of Information Act required disclosure of letter rulings and technical advice memoranda. The Justice Department recently revised its business review procedure. See 42 U.S.L.W. 2316 (Antitrust Division Directive No. 14-73, Dec. 11, 1973).
existing banks. The district court, in granting summary judgment for the Comptroller, held the Comptroller's decision was neither arbitrary nor capricious and was based on substantial evidence. The Fourth Circuit reversed and remanded the case to the district court for a trial de novo because the Comptroller had failed to state the basis of his decision in the record. The Supreme Court in turn vacated the judgment of the Fourth Circuit and remanded the case to the agency where, by affidavits or testimony, the record could be made sufficient for the purpose of judicial review.

**BB. Intermediate Agency Action**

Given that an individual is entitled to notice and a hearing before administrative or executive adjudication, two related questions remain. First, at what point in the adjudicatory process may the right be demanded, and, second, may an individual demand and be accorded more than one hearing? It would appear that one fair and adequate hearing before adjudication will suffice. As the Supreme Court stated in *Opp Cotton Mills v. Administrator*:

The demands of due process do not require a hearing, at the initial state or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective.

In *United States v. Goldstein* the defendant taxpayer claimed that he was entitled to a series of four conferences at various administrative levels before criminal charges against him could be presented to the grand jury, that denial of these conferences was arbitrary, and, therefore, that he had been deprived of due process and equal protection of the laws. The court rejected both constitutional arguments concluding: (1) denial of the pre-indictment conference did not violate due process as the petitioner's rights would be fully protected at trial; and (2) in the absence of invidious class discrimination, the selection by the government prosecutor of any particular case for prosecution was not a denial of equal protection of the laws.

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592. Id. at 138-39.
594. 463 F.2d 632 (4th Cir. 1972).
595. 411 U.S. at 142-43.
596. 312 U.S. 126 (1941).
597. Id. at 152-53.
600. Id. at 668.
CC. Agency Discretion

There is one area of administrative or executive action where the courts hesitate to tread — agency discretion. Indeed, the Administrative Procedure Act specifically provides that the courts are not to step in where "agency action is committed to agency discretion by law."[^601] This exception touches the thesis of this article.

The best as well as the oldest example of uncontrolled agency discretion is the exercise of the power for the remission or mitigation of forfeitures, fines, or penalties. Both the Attorney General of the United States as well as the Secretary of the Treasury have such power.[^602] Moreover, statutes granting such power date to 1790,[^603] almost to the beginning of our government. Yet the courts have refused to harness the exercise of this power.

Illustrative of the approach of the courts in this area is United States v. One 1961 Cadillac,[^604] a case which involved the forfeiture of an automobile allegedly used in the transportation of narcotics. The Sixth Circuit in denying relief to General Motors Acceptance Corporation declared:

The purpose of the remission statutes was to grant executive power to relieve against the harshness of forfeitures. The exercise of the power, however, was committed to the discretion of the executive so that he could temper justice with mercy or leniency. Remitting the forfeiture, however, constituted an act of grace. The courts have not been granted jurisdiction to control the action of the executive, even where it is alleged, as here, in general conclusory language, that discretion has been abused.[^605]

In a more recent case, Bramble v. Kleindienst,[^606] the plaintiff, seeking injunctive and declaratory relief as well as damages, attacked the constitutionality of a forfeiture statute. The court noted that once the plaintiff had elected an administrative remedy, via a petition for remission or mitigation of a forfeiture, the court no longer had jurisdiction, since the matter was committed to agency discretion by law.[^607]

[^603]: See, e.g., Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122.
[^604]: 337 F.2d 730 (6th Cir. 1964).
[^605]: Id. at 733.
[^607]: Id. at 1033.

The Supreme Court in United States v. United States Coin & Currency, 401 U.S. 715 (1971), gave relief, but did so by limiting the scope of the forfeiture statute there involved, saying through Justice Harlan: "When forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." Id. at 722 (footnotes omitted). The Sixth Circuit in United States v. Cadillac, 437 F.2d 739 (6th Cir. 1971), has given relief on comparable grounds.
The above decisions to the contrary notwithstanding, this writer can see no substantial reason why the courts should not develop a common law to circumscribe the exercise of the power of executive officials to remit or mitigate forfeitures.

There are other areas of executive or administrative discretion in which the courts have hesitated to tread. Just as prosecutors have an almost unreviewable discretion as to whom they shall prosecute, so the courts have given the general counsel of administrative agencies a like discretion as to the complaints they shall bring. For example, in *Vaca v. Sipes* the Court remarked that the NLRB's general counsel "has unreviewable discretion to refuse to institute an unfair labor practice complaint."

Comparably, in *Butz v. Glover Livestock Commission Co.* the Court reversed the judgment of the Tenth Circuit that had set aside a 20-day suspension by the Secretary of Agriculture of a stockyard operator for short weighing. Justice Stewart, in a dissent in which Justice Douglas joined, wrote rather sharply:

The reversal today of a wholly defensible Court of Appeals judgment accomplishes two unfortunate results. First, the Court moves administrative decisionmaking one step closer to unreviewability, an odd result at a time when serious concern is being expressed about the fairness of agency justice. Second, the Court serves notice upon the federal judiciary to be wary indeed of venturing to correct administrative arbitrariness.

An illustration of the harm inherent in allowing agency discretion to go unchecked occurred in what has become known as the Tuskegee Study, a controversial federal syphilis experiment. The study, initiated in 1932 and sponsored by the United States Public Health Service, a division of the Department of Health, Education and Welfare, ended after public disclosure of the program in the summer of 1972. Conducted among poor rural black men in Macon County, Alabama, more than 430 men, all with syphilis, were never given treatment for the disease so that doctors could study what damage untreated syphilis does to the human body. At least 28 of the men died as a direct result of untreated syphilis.

Another example of inherent harm in allowing agency discretion to go unchecked is the sterilization of welfare mothers. As a result of

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609. Id. at 182; accord, Braden v. Herman, 468 F.2d 592 (8th Cir. 1972), cert. denied, 411 U.S. 916 (1973); Terminal Freight Cooperative Ass'n v. NLRB, 447 F.2d 1099 (3d Cir. 1971), cert. denied, 409 U.S. 1063 (1972).
charges that in some cases such sterilizations were involuntary, Secretary of Health, Education, and Welfare, Casper W. Weinberger, ordered a freeze on federal funds that might be used for involuntary sterilizations until detailed guidelines for such operations could be put into effect.

The past year has seen the impounding or withholding of funds, authorized to be spent by Congress, by executive and administrative officials. In this area the courts have usually given relief. The district court in Berends v. Butz decided that the Secretary of Agriculture's unilateral termination of the Federal Emergency Loan Program in Minnesota, without notice to the affected farmers, was in violation of the statutes that established the program, of administrative regulations, and of the due process clause of the fifth amendment. Pennsylvania v. Lynn involved programs providing federal subsidies for low and moderate income housing projects. In January 1973 the Administration ordered them halted for the stated purpose of reevaluating the entire housing program; however, the programs were never resumed during the fiscal year that ended June 30 and the White House did not seek any refinancing for them for the 1973-1974 fiscal year. The court concluded: "It is not within the discretion of the Executive to refuse to execute laws passed by Congress but with which the Executive presently disagrees." Again, in Campaign Clean Water, Inc. v. Ruckelshaus, the court, although conceding that the Administrator of the Environmental Protection Agency had some discretion to allot less than the full $11 billion appropriated by Congress for the construction of sewage treatment plants, held that he did not have discretion to allot $6 billion less. Although refusing to supervise the Administrator in the future administration of appropriations, the court concluded that the withholding of 55 per cent of the total allotment was a flagrant abuse of administrative discretion which, in effect, negated the purpose of the authorization, and thus entered a

617. Id. at 1372.
618. In the City of New York v. Ruckelshaus, 358 F. Supp. 669 (D.D.C. 1973), the court concluded that the administrator of the Environmental Protection Agency had discretion to monitor the rate of spending at the obligation stage but not at the obligation stage.
declaratory judgment holding the instant controversial policy null and void.\textsuperscript{619}

A final example of court intervention in an agency's policy of withholding authorized funds occurred in a suit filed by the National Council of Community Health Centers.\textsuperscript{620} The court ordered HEW to release more than $52 million in impounded funds intended to establish community mental health centers. The government argued that the President had political discretion not to spend money appropriated by Congress. The court rejected that line of reasoning, concluding the intent of the appropriation was to remedy the vast mental health needs of the nation. With that intent before it, the court determined that Congress wanted the full amount of funds appropriated to be dispensed.\textsuperscript{621}

There have been instances in which the courts have attempted to restrict and even to harness the agency discretion exception. In \textit{Citizens to Preserve Overton Park, Inc. v. Volpe},\textsuperscript{622} petitioners claimed that the Secretary of Transportation violated the provisions of federal statutes by authorizing the expenditure of federal funds for the construction of a six-lane interstate highway through Overton Park in Memphis, Tennessee. Overton Park, located near the center of Memphis, contained a zoo, a nine-hole municipal golf course, an outdoor theatre, nature trails, a bridle path, an art academy, picnic areas, and 170 acres of forest. The proposed highway would have severed the zoo from the rest of the park. The Supreme Court determined that the Secretary's decision did not fall within the agency discretion exception.\textsuperscript{623} The exception, the Court continued, was applicable only where "statutes are drawn in such broad terms that in a given case there is no law to apply."\textsuperscript{624} Since by specific statutory direction,\textsuperscript{625} the Secretary could not approve a project which required the taking of public parkland unless no feasible and prudent alternative existed, the agency did not have unbridled discretion, but was indeed subject to judicial

\textsuperscript{619} Id. at 691.


\textsuperscript{621} Id. at 901-02.

\textsuperscript{622} 401 U.S. 402 (1971).

\textsuperscript{623} Id. at 410.


review. Thus, the Court remanded the case to the district court for plenary review of the Secretary's decision.

_Peoples v. United States Department of Agriculture_626 involved an action by a number of poor Alabama families against the Department of Agriculture and others, raising various statutory and constitutional objections to the way in which the defendants were administering the Food Stamp Act of 1964,627 the Commodities Distribution Program,628 and the Agriculture Act of 1969.629 While the district court dismissed the complaint on the ground that the plaintiffs lacked standing, the District of Columbia Circuit reversed. On appeal, in addition to standing, the defendants argued that the district court did not have subject matter jurisdiction over the plaintiffs' claims because the matter was one committed to the non-reviewable discretion of the Secretary. The court of appeals did not consider it appropriate to rule on the argument.630 However, in a supplemental opinion issued on petition for rehearing, the court noted that its decision was made in the context of the general rule that although an agency's discretion may be broad, its decisions are subject to judicial review for arbitrariness or abuse of discretion, except in those limited areas where Congress has specifically made certain issues non-reviewable to prevent confidential information from appearing in the public record.631

In addition to the deference courts may accord agency discretion, there are what the courts denote as withdrawal statutes which specifically exempt certain agency action from judicial review. The Administrative Procedure Act itself provides that it does not apply when "statutes preclude judicial review."632 Illustrative is a section of the act which created the Federal Deposit Insurance Corporation. This section, which deals among other things with the disciplining of insured banks, their officers, directors and others, provides that "except as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section or to review, modify, suspend, terminate, or set aside any such notice or order."633 Under this section the Comptroller of the Currency summarily prohibited a stockholder

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626. 427 F.2d 561 (D.C. Cir. 1970).
628. Id. § 612c.
629. Id. § 1431.
630. 427 F.2d at 566.
631. Id. at 567; cf. Environmental Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970) (involving DDT) ("Although the FIFRA provides that the Secretary 'may' suspend the registration of an economic poison that creates an imminent hazard to the public, we conclude that his decision is not thereby placed beyond judicial scrutiny." Id. at 1098).
from participating in the affairs of a national bank because of a 1965 felony conviction and took the position, in *Manges v. Camp*, 634 that the court did not have jurisdiction to review his order. The Fifth Circuit disagreed on the ground that he had exceeded his statutory authority, stating:

There is, however, a very strong court created exception to withdrawal statutes. This exception comes into play when there has been a clear departure from statutory authority, and thereby exposes the offending agency to review of administrative action otherwise made unreviewable by statute. 635

A good illustration of what the courts can do if so inclined may be seen in *Jeffries v. Olesen*, 636 a case which involved a fraud complaint filed by the solicitor for the Post Office Department. A hearing was set before a hearing examiner in Washington, D.C. The individual against whom the complaint was directed lived in Los Angeles and asked that the hearing be held there because he could not leave his polio afflicted wife unattended, and, in addition, was financially unable to bring witnesses to Washington. His request was denied, despite the fact that an applicable regulation provided: "The hearing examiner shall grant or deny such application having due regard for the convenience and necessity of the parties." 637 The hearing was held without him and the fraud order issued. The United States District Court for the Southern District of California, at the defendant's request, held the fraud order void. The court described a fair hearing in this manner:

The "fair" hearing essential to meet minimum requirements of any accepted notion of due process includes not only rudimentary fairness in the conduct of the hearing when and where held, but also a reasonably fair opportunity to be present at the time and place fixed, to cross-examine any opposing witnesses, to offer evidence, and to be heard at least briefly in defense. 638

The court went on to hold that the violation of an administrative regulation was itself a violation of due process — even though the regulation went beyond statutory or constitutional requirements:

Violation of valid administrative regulations, even by the administrator himself, constitutes in legal effect a violation of the statute. . . . And where administrative regulations set a higher standard of procedural due process than that required by the

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634. 474 F.2d 97 (5th Cir. 1973).
635. Id. at 99.
636. 121 F. Supp. 463 (S.D. Cal. 1954). It should be noted that no withdrawal statute was applicable.
638. 121 F. Supp. at 479 (citations omitted).
Constitution or the statute, violation amounts to a denial of administratively-established due process of law. 639

Counsel for private clients confronted with a claim of the agency discretion exception should check to determine whether the administrative official is acting beyond the scope of the statute, outside the area of his discretion, violating an applicable regulation, conducting himself arbitrarily, or abusing his discretion. If the remission or mitigation of a forfeiture is involved, counsel should urge the courts to develop a common law to compel reasonable administrative action. Possibly counsel should even be so bold as to suggest that statutes which preclude judicial review of agency action are themselves violative of the due process clause of the fifth amendment in the case of federal statutes, and of the fourteenth amendment in the case of state statutes. Counsel can cite the early English cases in which the judges relied upon the common law, not only to control acts of the crown, but even acts of Parliament. 640

DD. Membership Organizations

Heretofore this Article has examined the courts’ approach to executive and administrative bodies and officials. One might question whether the courts will next proceed to apply due process concepts to other bodies that exert a large measure of control over the lives of many of us. Will the courts, for instance, step in and apply due process concepts to various membership organizations such as political parties, economic groups, labor unions, stock exchanges, Veteran’s associations, religious organizations, and professional societies? Of course, if these groups act in violation of their constitution or by-laws, or practice discrimination, the courts will give relief. Yet, the question is whether the courts will give due process relief. They have begun to do so.

In an interesting state case, Van Daele v. Vinci, 641 the Supreme Court of Illinois gave due process relief to retail grocers who had been expelled from membership in a grocery cooperative because of lack of impartiality of the cooperative’s board, even though the board followed the procedure set out in the cooperative’s by-laws for disciplinary hearings.

639. Id. at 476 (citations omitted).
641. 51 Ill. 2d 339, 282 N.E.2d 728, cert. denied, 469 U.S. 1007 (1972).
Perhaps the most discussed situation to date involved the power of the Democratic Party to exclude from its 1972 national convention certain challenged delegates from California and Illinois. The California delegates were selected in a “winner-take-all” primary. The District of Columbia Circuit in Brown v. O’Brien ruled in their favor, reasoning:

The decision of the Party to exclude these 151 delegates, who were elected in compliance with each of the party’s applicable rules then in force, jeopardizes the integrity of the election process, and it therefore injures every voter in the United States and every individual and institution which is subject to the authority of the President. Because we are convinced that the process of electing the President of the United States is not, and cannot be, placed outside the rule of law, we set aside the arbitrary and unconstitutional action of the Democratic Party.

The Supreme Court first granted a stay and subsequently vacated the judgment and remanded the case for a determination whether it had become moot. When the case returned, the District of Columbia Circuit agreed that the case was not moot. However, the majority felt that there was then no equitable basis upon which either it or the district court could grant declaratory or injunctive relief.

American labor unions have also found themselves subject to the expanding reach of administrative due process. George Hardeman, a member of the Boilermaker’s Union, brought suit against the union after he was expelled for allegedly assaulting a business manager whom he felt had discriminated against him in job referrals. Hardeman charged the union with violating section 101(a)(5) of the Labor-Management Reporting and Disclosure Act, which provides that “no

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643. 469 F.2d at 570.

644. The Supreme Court vacated the judgment in Brown v. O’Brien and remanded with directions to dismiss as moot. 409 U.S. at 816. However, in Keane v. National Democratic Party, 469 F.2d 563 (D.C. Cir. 1972), a case decided by the District of Columbia Circuit contemporaneously with O’Brien, the Court, while vacating the judgment, remanded with directions to determine whether the case had become moot. 409 U.S. at 816.


In Briscoe v. Kusper, 435 F.2d 1046 (7th Cir. 1970), the Seventh Circuit was faced with a class action brought by candidates and registered voters seeking declaratory judgment with reference to the constitutionality of the manner in which new practices of the city Board of Elections commissioners for processing objections to aldermanic nominating petitions was instituted. The court held that the board’s application of a new anti-duplication rule to nullify previously acceptable aldermanic nominating petitions without prior notice to candidates, together with its action of striking signatures which failed to include middle initials, even if the signature was genuine and verifiable by reference to registration lists, without forewarning candidates of its technical interpretation of the statute which stated qualified voters must sign in their own proper persons only, constituted denial of due process of law.
member . . . may be fined, suspended, expelled or otherwise disciplined except for nonpayment of dues unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." 646 Judgment was granted Hardeman and was affirmed per curiam by the Fifth Circuit. 647 The Supreme Court, however, reversed stating per Justice Brennan:

We think that this is sufficient to indicate that § 101(a)(5) was not intended to authorize courts to determine the scope of offenses for which a union may discipline its members. And if a union may discipline its members for offenses not prescribed by written rules at all, it is surely a futile exercise for a court to construe the written rules in order to determine whether particular conduct falls within or without their scope. 649

Justice Douglas, dissenting, expressed the view that although a union had more leeway than an administrative agency, it did not have as much leeway as the majority gave it:

I agree that a court does not sit in review of a union as it does of an administrative agency. But by reason of § 101(a)(5) judicial oversight is much more than procedural; it provides in subsection (C) for "a full and fair hearing." Even if every conceivable procedural guarantee is provided, a hearing is not "fair" when all substantive rights are stripped away to reach a preordained result. If there is to be a "fair hearing" there must, I submit, be some evidence directed to the charges to support the conclusion. 650

During its 1972-1973 term, the Court, in three cases, passed on the legality of union fines imposed upon members or former members. In two, NLRB v. Textile Workers, 651 and Booster Lodge No. 405 v. NLRB, 652 the Court held that unions could not fine strikebreakers who had lawfully resigned from their unions during the strike period but later returned to work. However, in the third case, NLRB v. Boeing Co., 653 the Court ruled that even under section 8(b)(1)(A) of the

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649. Id. at 244-45 (footnotes omitted).
650. Id. at 250 (Douglas, J., dissenting).
National Labor Relations Act,\(^6\) relating to unfair labor practices, the NLRB did not have power to inquire into the reasonableness of disciplinary fines which a union imposed. Justice Douglas again dissented, this time with the concurrence of the Chief Justice and Justice Blackmun. In the last paragraph of his dissent, Douglas wrote persuasively:

> It is said that Congress has provided the Board with no guidelines for passing on the "reasonableness" of union-imposed fines. But the Board through case-by-case treatment has been developing an administrative common law concerning "unfair" practices of employers and unions alike. . . . A fine discretely related to a legitimate union need and reflecting principled motivations under the law is one thing. A fine that reflects the raw power exercised by a union in its hunger for all-pervasive authority over members is quite another problem. The Labor Board, which knows the nuances of this problem better than any other tribunal, is the keeper of the conscience under the Act. It and it alone has primary responsibility to police unions, as well as employers, in protection of the rights of workers. In my view it cannot properly perform its duties under § 8(b)(1)(A) unless it determines whether the nature and amount of the fine levied by a union constitute an unfair labor practice.\(^6\)

Of course, if a union engages in discrimination the courts will give relief. In \textit{NLRB v. Mansion House Center Management Corp.}\(^6\) there was evidence that the union discriminated against blacks. The Eighth Circuit decided that the remedial machinery of the National Labor Relations Act was not available to a union which was unwilling to correct past practices of discrimination, stating:

> Federal complicity through recognition of a discriminating union serves not only to condone the discrimination, but in effect legitimates and perpetuates such invidious practices. Certainly such a degree of federal participation in the maintenance of racially discriminatingary practices violates basic constitutional tenets.\(^6\)

Thus, although the court agreed with the NLRB that the defendant company was in fact guilty of an unfair labor practice in refusing to bargain, it refused to enforce the Board's order unless the union could show a lack of discrimination on remand.\(^6\)

In \textit{Jones v. United States Secretary of Defense}\(^6\) several reservists, who were not in sympathy with the political views of the

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\(^6\) 412 U.S. at 83 (Douglas, J., dissenting).
\(^6\) 473 F.2d 471 (8th Cir. 1973).
\(^6\) Id. at 477.
\(^6\) 838 F.2d 775.
Veterans of Foreign Wars (VFW), and who supported the candidacy of George McGovern, sought a temporary restraining order relieving them from the requirement of marching in a parade in connection with a VFW convention. Former Vice President Agnew, whose candidacy the plaintiffs alleged the convention was advancing, was to address the convention. The Court denied a temporary restraining order, but added several conditions to its denial, including a prohibition against conducting the parade contemporaneously with the appearance of any candidate for the presidency or vice presidency.660

Members of stock exchanges, involved in disciplinary proceedings, also have taken their respective exchanges to court with due process claims. In Crimmins v. American Stock Exchange, Inc.661 the court, although ruling against the right to counsel in that case, nevertheless said:

We think that the day is long gone when a national stock exchange can be considered a private club when it conducts disciplinary proceedings against its members or their employees. When an exchange conducts such proceedings under the self-regulatory power conferred upon it by the 1934 Act, it is engaged in governmental action, federal in character, and the Act imposed upon it the requirement that it comply with fundamental standards of fair play.662

In Villani v. New York Stock Exchange, Inc.663 counsel for the Exchange advised the court by letter that the Board of Governors of the Exchange approved various recommendations to change the hearing procedures and disciplinary proceedings conducted by the Exchange. In a subsequent letter, counsel reported that both the SEC and the membership of the exchange had approved the recommendations, one of which abolished the Exchange's "no-counsel rule":

A person, firm or corporation shall have the right to be represented by legal or other counsel in any hearing and review thereof held pursuant to the provisions of this Article and in any investigation before any committee, officer or employee of the Exchange authorized by the Board of Directors.664

660. Id. at 100.
662. Id. at 1259.
664. Id. at 1189, quoting § 23, Article XIV of the Constitution of the New York Stock Exchange. For other recent cases, pro and con, involving membership organizations, see, e.g., Silver v. New York Stock Exchange, 373 U.S. 341 (1963) (New York Stock Exchange could not deny to two Texas over-the-counter broker-dealers direct wire connections without the notice and hearing that they requested. "The basic nature of the rights which we hold to be required under the antitrust laws in the circumstances of today's decision is indicated by the fact that public agencies, labor unions, clubs, and other associations have, under various legal principles, all been required to afford notice and opportunity to appear in disciplinary actions involving charges to one who is about to be denied a valuable right." Id. at 354 n.17); Schonfeld v.
EE. Private Entities with a Public Interest

Akin to the membership organizations discussed above are private entities with a public interest: private colleges and schools, private hospitals, private corporations, societies, and associations. In this area the courts have made little progress in applying due process concepts to official action. The older view with reference to private colleges and schools, was that the relations between a student and a private university were a matter of contract. This view is still with us. The question which the courts must address is whether there is enough governmental contact to bring the individual within the protection of the due process clauses. In a recent case, Grafton v. Brooklyn Law School, the district court held that a private law school's dismissal of anti-war activists was not state action, notwithstanding that the school operated under a charter granted by the state, occupied a site acquired from the city under conditions favorable to the school, received subsidies from the state for each graduate student as well as for physically disabled students, and was regulated by rules of the New York Court of Appeals concerning the admission of attorneys. The court reasoned:

The dichotomy between public and private education was spawned by Chief Justice Marshall in Dartmouth College Trustees v. Woodward. Many changes have occurred in educational systems since that time and now numerous private institutions are dependent in varying degrees on governmental assistance. Perhaps these institutions should be subject to closer regulation because

Penza, 477 F.2d 899 (2d Cir. 1973) (union’s action in removing official from office and declaring him ineligible to run in interim election was part of a deliberate effort to suppress dissent) ; Local Union 13410 v. UMW, 475 F.2d 906 (D.C. Cir. 1973) (“Absence a reasonable belief in the necessity for immediate action, all practical steps must be taken to afford a hearing before a trusteeship is imposed.” Id. at 915); Semancik v. UMW, 466 F.2d 144 (3d Cir. 1972) (“Requiring unions to limit their prosecutions to constitutional provisions and by-laws which reasonably inform union members of the nature of the proscribed activity is a logical extension of the requirement of a full and fair hearing in accordance with due process. . . . The denial of the political opponents of those on trial offends our most basic notions of fairness.” Id. at 157); Reyes v. Laborers’ International Union, 464 F.2d 595 (10th Cir. 1972), cert. denied, 411 U.S. 915 (1973) (union's findings at the disciplinary hearing are to be sustained “if supported by any evidence produced at the disciplinary trial conducted by an unbiased trial body which afforded a fair and impartial determination of guilt.” Id. at 597) (footnotes omitted) ; Intercontinental Industries, Inc. v. American Stock Exchange, 452 F.2d 935 (5th Cir.), cert. denied, 409 U.S. 842 (1972) (delisting proceeding accorded due process) ; Evans v. American Federation of Television & Radio Artists, 354 F. Supp. 823 (S.D.N.Y. 1973) (compulsion to join union and submit to union discipline was a chilling of the first amendment rights of radio-television commentators M. Stanton Evans and William F. Buckley, Jr.) ; Stears v. Veterans of Foreign Wars, 353 F. Supp. 473 (D.D.C. 1972) (Veterans of Foreign Wars may limit its membership to men, since constitutional chartering of the organization is not significant state involvement violative of equal protection).

of their reliance on governmental grants, but the requirements of academic freedom counsel caution on extending such control. 667

In *Powe v. Miles*, 668 Circuit Judge Friendly, in his opinion for the Second Circuit, “split” Alfred University into two parts, finding one portion to be under the fourteenth amendment and the other to be free from state action. The university, a private college in the state of New York, operated a ceramics school on its campus under contract from the state. The court held that the ceramics school, operated only pursuant to the contract with the state, was subject to the fourteenth amendment to the same extent as if it were a state school. As to students of Alfred University who were not attending the ceramics school, however, the court found insufficient state action to apply the fourteenth amendment to student disciplinary procedures.

In another recent decision, *Ryan v. Hofstra University*, 669 the court took a broader view of the governmental contacts required to bring due process considerations into play and stated:

Hofstra University, though termed a “private” university, cannot expel, bar and fine a student without following fair and reasonable procedures. It cannot be arbitrary. It must abide by constitutional principles of fair conduct implicit in our society. 670

The student in question, a Hofstra freshman in the spring of 1971, allegedly was involved in three rock-throwing incidents, and was also a leader in student protests against tuition increases. He was called before a disciplinary committee composed of three staff members appointed by the dean. The committee also spoke with a school psychologist and the chief security officer, and considered the statement of a security policeman. The dean subsequently levied a fine and expelled the student. The court decided that the student’s expulsion was (1) unconstitutional and (2) Hofstra had failed to follow its own rules. In reaching the conclusion that the private status of Hofstra University was not very significant in determining the applicability of the due process clause of the fourteenth amendment, the court reasoned:

The university is replete with public interest, requirement and supervision. The university is in the most real comparable sense a public trust for the rendition of education. It is only for this

668. 407 F.2d 73 (2d Cir. 1968).
669. 519 F.2d 195 (2d Cir. 1971).
670. *Id.* at 653, 324 N.Y.S.2d at 968.
reason that so much public wealth and effort have been supplied to it.

A private university like Hofstra is an oligarchical form tending to be self-perpetuating. Its fundamental legal responsibilities are to the public. Its existence and favored position can be justified only as a public stewardship.\(^671\)

The question, whether there is enough governmental involvement in the affairs of a private entity for the courts to consider extending the concept of due process to the entity’s actions, has arisen in various fields. In Lefcourt v. Legal Aid Society,\(^672\) for example, the Second Circuit held that the activities of the Legal Aid Society in New York City did not constitute state action, since the society’s history, constitution, by-laws, organization, and management showed that it was an independent private institution. On the other hand, however, in Falcone v. Middlesex County Medical Society,\(^673\) the Supreme Court of New Jersey held that a county medical society acted in an arbitrary, unreasonable, and illegal manner in refusing to admit a duly licensed and registered physician, who met all qualifications prescribed in the society’s written by-laws, because of an unwritten requirement of four years’ attendance at an American Medical Association approved medical college. The court carefully distinguished “fraternal organizations” whose function is social, civic, or political, from organizations in which membership was an “economic necessity” to the individual.\(^674\)

The latter organizations, the court noted:

must be particularly alert to the need for truly protecting the welfare and advancing the interests of justice by reasonably safeguarding the individual’s opportunity for earning a livelihood while not impairing the proper standards and objectives of the organization.\(^675\)

An interesting situation arose during a football game in October 1972 between Tulane and Miami. Miami scored the game winning touchdown on an illegal fifth down, allowed because the official linesman lost count of the downs. Subsequently, David Nelson, Secretary of

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\(^{671}\) Id. at 666, 324 N.Y.S.2d at 981. Subsequently, the court reviewed the procedure the university intended to use in disciplinary proceedings against the student and, with modifications, expressed its approval. 68 Misc. 2d 890, 328 N.Y.S.2d 339 (Sup. Ct. Nassau County 1972).

\(^{672}\) 445 F.2d 1150 (2d Cir. 1971).

\(^{673}\) 34 N.J. 582, 170 A.2d 791 (1961).

\(^{674}\) Id. at 591-92, 170 A.2d at 796-97.

the National Collegiate Athletic Association rules committee, found that there was no ground for appeal or complaint. "The final score is all that counts," he said. "The game is played for the game — there's a finality to it that makes it different from what we think of in life day by day." But, as The New York Times commented editorially: "The ideals of true sportsmanship would be better served if . . . Miami forfeited last week's game." For the time being, we are apparently in the outer reaches of due process.

V. Rules, Regulations, and Rulings

Far greater than their roles as investigators and adjudicators is the role of administrative and executive agencies and officials as regulators and legislators. The Code of Federal Regulations occupies three times as much shelf space as the United States Code. These rules, regulations, and rulings control our lives. One questions whether those affected by them should have any voice in their preparation and promulgation.

Sections 553, 556, and 557 of the Administrative Procedure Act provide a logical basis for the advent of this discussion. Section 553(b) — with exceptions that include interpretative rules, general statements of policy, and rules of agency organization, procedure, and practice — provides:

General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Section 553(c) provides in pertinent part:

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate

678. Id. § 553(b).
in the rules adopted a concise general statement of their basis and purpose.\footnote{679}

In contrast to section 553, sections 556 and 557 provide for an adjudicatory type hearing, and are applicable when a statute requires rules to be made on the record after an opportunity for an agency hearing.

Two recent Supreme Court cases are illustrative of the significance of the difference between the sections: United States v. Allegheny-Ludlum Steel Corp.\footnote{680} involving two legislative type rules promulgated by the Interstate Commerce Commission (ICC) which generally required that unloaded freight cars be returned in the direction of the owning railroad, and United States v. Florida East Coast Ry.\footnote{681} dealing with ICC established incentive per diem rates for freight car use. In both cases the Court held that written presentations under section 553, rather than the adjudicatory type hearing under sections 556 and 557 sufficed. In Allegheny-Ludlum the Court reasoned:

Because the proceedings under review were an exercise of legislative rulemaking power rather than adjudicatory hearings the provisions of [sections] 556 and 557 were inapplicable.

This proceeding, therefore, was governed by the provisions of [section 553] of the Administrative Procedure Act, requiring basically that notice of proposed rulemaking shall be published in the Federal Register, that after notice the agency give interested persons an opportunity to participate in the rulemaking through appropriate submissions, and that after consideration of the record so made the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. The "Findings" and "Conclusions" embodied in the Commission's report fully comply with these requirements, and nothing more was required by the Administrative Procedure Act.\footnote{682}

After the Supreme Court in Permian Basin Area Rate Cases\footnote{683} encouraged the Federal Power Commission (FPC) in the use of streamlined procedures, the FPC drastically changed its procedure, in fixing just and reasonable rates for the sale of natural gas in interstate commerce, from the traditional method involving a trial type adjudicatory proceeding to the rulemaking type, which section 553
envisions. The Tenth Circuit in *Phillips Petroleum Co. v. FPC*\(^{684}\) approved the new procedure, stating that informal proceedings are generally sufficient where hearings involve "quasi-legislative rather than quasi-judicial activities."\(^{685}\)

A good example of a commission that will issue many rules, regulations, and rulings is the new Consumer Product Safety Commission.\(^{686}\) The Commission, with certain exceptions, will regulate the safety features of nearly all products sold to, or used by, consumers. Existing functions dealing with flammable fabrics, hazardous substances, toys, refrigerators, and poison prevention packaging are to be transferred to the new Commission. The Consumer Product Safety Act\(^{687}\) provides that proposed consumer product safety rules shall be promulgated:

pursuant to section 553 of Title 5, except that the Commission shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation.\(^{688}\)

A prime example of executive and administrative agencies and officials issuing rulings which are in effect legislation can be seen in the regulation of tobacco and its use. At different times three agencies have been involved: the Federal Trade Commission (FTC), the Federal Communications Commission (FCC), and the Civil Aeronautics Board (CAB).

In 1964, the FTC issued what it designated as a Trade Commission Rule, stating in part:

"[I]t is an unfair or deceptive act or practice within the meaning of section 5 of the Federal Trade Commission Act to fail to dis-

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684. 475 F.2d 842 (10th Cir. 1973).
685. *Id.* at 852.
687. *Id.*
688. *Id.* at § 2058(a)(2).


The important thing is that there be movement towards a system in which the police are obliged to embody their operational policy determinations in formal rules for all to see. That way lies a chance to achieve both greater freedom from oppression for the individual and greater security for society.

*Id.* at 676. Judge McGowan further explained:

What is contemplated is that the police, in the classic tradition of administrative law, have a larger share in devising the rules for the governance of their own conduct in the first instance, with ultimate amenability to the commands of constitution and statute as interpreted and enforced by the courts in a reviewing role.

*Id.* at 679.
close, clearly and prominently, in all advertising and on every pack, box, carton or other container in which cigarettes are sold to the consuming public that cigarette smoking is dangerous to health and may cause death from cancer and other diseases.\textsuperscript{689}

But one year later, Congress enacted the Federal Cigarette Labeling and Advertising Act\textsuperscript{690} which required cigarette packages to bear the milder statement: "Caution: Cigarette Smoking May Be Hazardous to Your Health."\textsuperscript{691} The Act further provided: "No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package."\textsuperscript{692}

Subsequently, the FCC issued a ruling requiring radio and television stations which carry cigarette advertising to devote a significant amount of broadcast time to presenting the case against cigarette smoking.\textsuperscript{693} The District of Columbia Circuit in \textit{Banshaf v. FCC}\textsuperscript{694} affirmed the ruling, and the Supreme Court denied review.

Next, Ralph Nader brought a proceeding to review the refusal of the Federal Aviation Administrator to impose an emergency ban on smoking on commercial aircraft. The court in \textit{Nader v. Federal Aviation Administration}\textsuperscript{695} denied review, but stated in a footnote: "The freedom to smoke may have to give way to the freedom of others to be unannoyed by smoke but that is not a safety problem."\textsuperscript{696}

In May 1973 the CAB adopted what it termed an economic regulation, effective July 10, 1973,\textsuperscript{697} which required certified air carriers to: "... provide a 'no-smoking' area or areas for each class of service and for charter service ... [and to establish procedures] which shall insure that a sufficient number of seats in the 'no-smoking' areas of the aircraft are available to accommodate persons who wish to be seated in such areas."\textsuperscript{698}

Recently a fourth federal agency, the Consumer Product Safety Commission, entered the picture. The Commission's chairman, Richard O. Simpson, indicated that a ban on the sale of cigarettes containing

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\textsuperscript{689} 29 Fed. Reg. 8324, 8325 (1964) (rescinded 1965) (citation omitted).
\textsuperscript{693} Television Station WCBS-TV, 8 F.C.C.2d 381 (1967).
\textsuperscript{694} 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969).
\textsuperscript{695} 440 F.2d 292 (D.C. Cir. 1971).
\textsuperscript{696} Id., at 295 n.4.
\textsuperscript{698} Id.
a higher percentage of tar and nicotine than that allowable by Commission rulings, would be sought. 699

Another instance of a legislative type ruling by an administrative agency that has produced two Supreme Court decisions is the FCC's "fairness doctrine," 700 which requires that in the discussion of public issues over the air each side of those issues be given fair coverage. In Red Lion Broadcasting Co. v. FCC, 701 the Court sustained the FCC's position in a case involving a personal attack. The Rev. Billy James Hargis had attacked Fred J. Cook as a Leftist. When Cook heard of the broadcast he concluded that he had been personally attacked and demanded free reply time, which the station refused. The FCC ruled that the station had to provide reply time, whether or not Cook would pay for it. The Court held:

In view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional. 702

However, in Columbia Broadcasting System v. Democratic National Committee 703 the Court, again sustaining the FCC's position, held that neither the Federal Communications Act nor the first amendment required broadcasters to accept paid editorial advertisements. The case arose from separate unsuccessful efforts of the Democratic National Committee and the Business Executives' Move for Vietnam Peace to persuade broadcasters to sell them air time to present their views. Both charged limitations of their constitutional right of free speech. The FCC took the position that a broadcaster who meets his public obligation to provide full and fair coverage of public issues is not required to accept editorial advertisements. The Court agreed.

In another recent case, International Harvester Co. v. Ruckelshaus, 704 petitioners — International Harvester and the three major auto companies — sought review of a decision by the administrator


700. The "fairness doctrine" evolved from a long history of FCC rulings; see, e.g., Young Peoples' Ass'n for the Propogation of the Gospel, 6 F.C.C. 178 (1938).


702. 395 U.S. at 400-01.

703. 412 U.S. 94 (1973). For an account of the argument in the Supreme Court, see 41 U.S.L.W. 3217 (Oct. 24, 1972). In National Petroleum Refiners Ass'n v. PTC, 482 F.2d 672, 698 (D.C. Cir. 1973), the court held that "the Federal Trade Commission is authorized to promulgate rules defining the meaning of the statutory standards would be "inconsistent with the intent of the Congress the rulemaking authority." (emphasis in original)

of the Environmental Protection Agency denying their applications, filed pursuant to section 202 of the Clean Air Act, for 1-year suspensions of the 1975 emission standards prescribed under the Act for light duty vehicles. The Court of Appeals remanded the case for further proceedings because the vehicle manufacturers had shown by a preponderance of the record evidence that technology was not available within the meaning of the Clean Air Act to meet the standards of 1975, and because the administrator had not given a sufficiently reasoned presentation of the reliability of his prediction, based on his methodology, to the contrary. The court reasoned:

In approaching our judicial task we conclude that the requirement of a “reasoned decision” by the Environmental Protection Agency means, in present context, a reasoned presentation of the reliability of a prediction and methodology that is relied upon to overcome a conclusion, of lack of available technology, supported prima facie by the only actual and observed data available, the manufacturers’ testing.\(^{706}\)

Chief Judge Bazelon, who would not go as far as the majority as to what was required of the administrative agency in the way of due process, nevertheless stated:

I cannot believe that Congress intended this court to delve into the substance of the mechanical, statistical, and technological disputes in this case. Senator Cooper, the author of the judicial review provision, stated repeatedly that this court’s role would be to “determine the question of due process.” Thus the court’s proper role is to see to it that the agency provides “a framework for principled decision making.” Such a framework necessarily includes the right of interested parties to confront the agency’s decision and the requirement that the agency set forth with clarity the grounds for its rejection of opposing views.\(^{707}\)

The majority went so far as to suggest that “in the interest of providing a reasoned decision, the remand proceeding will involve some opportunity for cross-examination.”\(^{708}\)

Further illustrations of administrative rulings involved in court proceedings are legion. On one day alone, June 18, 1973, the Court handed down no less than six decisions involving the rulings of administrative agencies: four involving rulings of the Food and Drug Administration in its effort to keep ineffective drugs off the market,\(^{709}\)

706. 478 F.2d at 648.
707. Id. at 651.
708. Id. at 649 (footnotes omitted).
and two involving rate rulings of the ICC. In the main the Court sustained the position of the agencies, although in one case it remanded to the agency because the agency had not adequately explained the basis for its judgment, and in another considered that a drug manufacturer had made a sufficient submission to warrant a hearing.

However, there have been decisions where the rules and regulations of the administrative agencies have not prevailed. One example is Milnot Co. v. Richardson. The plaintiff company in that case produced Milnot, a food product which is a blend of fat-free milk and vegetable soya oil to which vitamins A and D are added. Milnot is low in cholesterol. In 1923, Congress passed the Filled Milk Act which prohibited the interstate shipment of filled milk products. Following the enactment of that statute, the plaintiff, then known as Carolene Products Company, shipped the prohibited products and was convicted. After extensive litigation, the United States Supreme Court twice upheld the validity of the statute. After the affirmance of its second conviction, the company limited its distribution of Milnot to intrastate commerce in the several states in which it was produced.

Circumstances then changed, including new knowledge about cholesterol. A number of new food products appeared on the market in competition with Milnot, which the Secretary of Health, Education and Welfare permitted to be shipped in interstate commerce. The Milnot Company again wanted to ship its product in interstate commerce. In 1972, the district court ruled in its favor, saying:

This court limits its decision to the conclusion, as a matter of law, that the Filled Milk Act, as applied to prohibit interstate shipment of Milnot, deprives the plaintiff of due process of law and provides no rational means for the achievement of any announced objective of the Act.


Another example of an instance in which the agency's position has not prevailed is *Bell Aerospace Co. v. NLRB*,\(^{717}\) wherein the Second Circuit held that when the National Labor Relations Board wanted to effect a change in its long standing position that buyers are managerial employees excluded from the protection of the National Labor Relations Act, it had to do so in the form of a legislative type ruling that conformed to the requirements of section 553 of the Administrative Procedure Act.\(^{718}\) Chief Judge Friendly wrote for the court:

This is an appropriate case in which to give effect to the Supreme Court's observation in the second *Chenery* decision, largely disregarded by the Board for a quarter century:

The function of filling in the interstices of the Act should be performed, as must [sic] as possible, through this quasi-legislative promulgation of rules to be applied in the future.

. . . .

. . . Although policy-making by adjudication often cannot be avoided in unfair labor practice cases, since the parties have already acted and the Board must decide one way or the other, there is no such problem in a representation case. Finally, the argument for rule-making is especially strong when the Board is proposing to reverse a long-standing and oft-repeated policy on which industry and labor have relied. . . . The point rather is that when the Board has so long been committed to a position, it should be particularly sure that it has all available information before adopting another, in a setting where nothing stands in the way of a rule-making proceeding except the Board's congenital disinclination to follow a procedure which, as said in *Texaco, Inc. v. FPC*, "enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated," despite the Court's pointed admonitions.\(^{719}\)

As a final example, one can look to *Hou Ching Chow v. Attorney General*,\(^{720}\) wherein the court held that the Immigration and Naturalization Service could not revoke an administrative regulation that exempted alien students seeking immigrant visas from the labor certification requirements applicable to other aliens, without following the relevant rule-making provisions.\(^{721}\)

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717. 475 F.2d 485 (2d Cir. 1973).
719. 475 F.2d at 495, 496-97 (footnotes omitted) (citations omitted).
721. "enables the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated," despite the Court's pointed admonitions.
VI. LEGISLATIVE INVESTIGATIONS

The writer is loathe to close his account of the activities and actions of administrative and executive agencies and officials to which the courts should apply due process concepts without a reference to legislative investigations. Four Supreme Court cases extending over nearly a century have established that such investigations are subject to constitutional limitations. In *Kilbourn v. Thompson*, 722 the Court held that a legislative investigation into individual affairs was invalid and unrelated to any legislative purpose. *United States v. Rumely* 723 made it plain that the mere semblance of a legislative purpose would not justify an inquiry in the face of the Bill of Rights. *Watkins v. United States* 724 involved John T. Watkins, a labor organizer who was subpoenaed to appear before a subcommittee of the House Committee on Un-American Activities and who refused to tell whether he knew certain persons to be members of the Communist Party. He explained to the subcommittee why he took such a position:

I am not going to plead the fifth amendment, but I refuse to answer certain questions that I believe are outside the proper scope of your committee’s activities. I will answer any questions which this committee puts to me about myself. I will also answer questions about those persons whom I knew to be members of the Communist Party and whom I believe still are. I will not, however, answer any questions with respect to others with whom I associated in the past. I do not believe that any law in this country requires me to testify about persons who may in the past have been Communist Party members or otherwise engaged in Communist Party activity but who to my best knowledge and belief have long since removed themselves from the Communist movement.

I do not believe that such questions are relevant to the work of this committee nor do I believe that this committee has the right to undertake the public exposure of persons because of their past activities. I may be wrong, and the committee may have this power, but until and unless a court of law so holds and directs me to answer, I most firmly refuse to discuss the political activities of my past associates. 725

The Chairman of the subcommittee explained that the subcommittee was investigating subversion and subversive propaganda and would report to the House of Representatives for the purpose of remedial legislation. Watkins refused to change his position and was convicted.

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722. 103 U.S. 168 (1881).
723. 345 U.S. 41 (1953).
725. at 185.
of contempt of Congress. The Court upset the conviction. Chief Justice Warren, in the Court’s opinion, explained:

Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on the grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. To be meaningful, the explanation must describe what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it.

The statement of the Committee Chairman in this case, in response to petitioner’s protest, was woefully inadequate to convey sufficient information as to the pertinency of the questions to the subject under inquiry. Petitioner was thus not accorded a fair opportunity to determine whether he was within his rights in refusing to answer, and his conviction is necessarily invalid under the Due Process Clause of the Fifth Amendment.\(^\text{728}\)

\textit{Groppi v. Leslie}\(^\text{727}\) dealt with an attempt by the Wisconsin assembly to imprison Milwaukee’s protesting priest, the Rev. James E. Groppi, by ex parte resolution under its contempt power, two days after alleged contemptuous conduct, without giving him notice of the charge against him or an opportunity to be heard. The Court held that it could not be done, stating, through Chief Justice Burger:

\begin{quote}
We find little in our past decisions that would shed light on the precise problem, but nothing to give warrant to the summary procedure employed here, coming as it did two days after the contempt. Indeed, we have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are “basic in our system of jurisprudence.”\(^\text{728}\)
\end{quote}

\section*{VII. Conclusion}

The writer, from sources including his own experience and research, has catalogued the activities and actions of administrative and executive agencies to which the courts have been, and should be, applying due process concepts. The reader can add to the list from his own experience.

It is to the English, under Henry II (1154–1189), that we can directly trace the development of individual rights and the concomitant concept of fundamental fairness that we call due process of law. We should strive to make the application of due process a hallmark of the vitality of our government and our civilization. Indeed, a high

tribute may be paid to the concept of due process by noting that it was an admired characteristic of one of the greatest flowerings of Western Civilization — the Periclean Age of Greece.

Although our due process is not inherited directly from the Greeks, it is profitable to view, with the perspective of history, Periclean Greece and note that the names of the immortals of that age are associated with the values we must strive to protect today. One will find the ideas of the rule of law, fairness, and human freedom expressed by the historians Herodotus and Thucydides, by the dramatists Aeschylus and Euripides, and by the playwright Aristophanes.

The best statement of Athenian democracy is attributed to Pericles himself in his famed funeral oration delivered in honor of the first Athenians to die in the 30-year struggle with Sparta. The speech reminds the writer of Mr. Justice Brandeis as well as President Lincoln. Pericles stated:

Our constitution is named a democracy, because it is in the hands not of the few but of the many. But our laws secure equal justice for all in their private disputes, and our public opinion welcomes and honours talent in every branch of achievement, not for any sectional reason but on grounds of excellence alone. And as we give free play to all in our public life, so we carry the same spirit into our daily relations with one another. We have no black looks or angry words for our neighbour if he enjoys himself in his own way, and we abstain from the little acts of churlishness which, though they leave no mark, yet cause annoyance to who so notes them. Open and friendly in our private intercourse, in our public acts we keep strictly within the control of law. We acknowledge the restraint of reverence; we are obedient to whomsoever is set in authority, and to the laws, more especially to those which offer protection to the oppressed and those unwritten ordinances whose transgressions bring admitted shame.  

The emphasis placed upon the meritorious respect for individual freedom and the fair application of the rule of law is coupled with a high respect for authority and law. One cannot be present without the other.

As noted, our own concept of due process has been in a continuous state of development since the time of Henry II of England. Today the bench and bar are applying this concept to the activities and actions of executive and administrative agencies and their officials to the end that the individual may have a greater assurance that he will obtain equal, reasoned justice under the law.

APPENDIX

IV. Recent cases dealing with the due process rights of probationers and parolees.

Lane v. Attorney General, 477 F.2d 847 (5th Cir. 1973) (since the federal government permits retained counsel at parole revocation hearings it must provide counsel for indigent parolees at such hearings); Cottle v. Wainwright, 477 F.2d 269 (5th Cir.), vacated, 414 U.S. 895 (1973) (since Florida statute provided that a parolee may be represented by counsel at his parole revocation hearing, the court concluded: "We are of the view that inasmuch as such assistance is, by statute, available to those who can afford it, who should likewise be available to those who cannot." 477 F.2d at 271); Valdez v. Ferini, 474 F.2d 19 (6th Cir. 1973) (Morrissey does not apply retroactively); Van Blaricom v. Forscht, 473 F.2d 1323 (5th Cir. 1973) (Morrissey applies to federal parolees. "The minimum standards of constitutional due process imposed on the federal Board of Parole are certainly no less than those imposed on State Boards of Parole." Id. at 1328); Birzon v. King, 469 F.2d 1241 (2d Cir. 1972) (federal parole board revocation hearing was fundamentally unfair in that the board relied upon a synopsis of a state parole violation report which was apparently based on statements by several confidential informants without questioning the informants themselves); United States ex rel. Martinez v. Allredge, 468 F.2d 684 (3d Cir. 1972) ("Our research discloses no court of appeals decision holding that appointed counsel for indigents is constitutionally required at a mandatory release revocation hearing at which the factual grounds for revocation are uncontroversial." Id. at 685); Baxter v. Davis, 450 F.2d 459 (1st Cir. 1971), cert. denied, 405 U.S. 999 (1972) (where parole violations had been clearly proven, due process did not require prerevocation adversary hearing).

Anderson v. Nelson, 352 F. Supp. 1124 (N.D. Cal. 1972) ("Because of the loss of liberty that results from the determination of a sentence, a deprivation like an additional criminal sanction, the court concludes that due process applies." Id. at 1128); Myers v. Bendus, 343 F. Supp. 370 (E.D. Pa. 1972) ("Federal law does not appear to require that a state prisoner be represented by counsel at state parole proceedings." Id. at 371); Mozingo v. Craven, 341 F. Supp. 296 (C.D. Cal. 1972) (in the circumstances of this case parolee had a due process right to counsel at a parole revocation hearing); Bransted v. Schmidt, 324 F. Supp. 1232 (W.D. Wis. 1971) ("Therefore, I hold that due process requires that prior to parole revocation a hearing must be held at which a parolee may have a reasonable opportunity to explain away the accusation that he has violated the conditions upon which his parole was granted," Id. at 1236); Goolsby v. Gagnon, 322 F. Supp. 460 (E.D. Wis. 1971) ("The value and necessity of counsel in representing the interests of the person facing revocation is the same whether he be a probationer or a parolee." Id. at 467); Laquay v. State, 16 Md. App. 709, 299 A.2d 527 (Md. Ct. Spec. App. 1973) ("We are constrained to hold that as to the inquiry whether conditions of probation were violated as here conducted, due process was afforded, in that, for lack of counsel appellant was at such a disadvantage that an ingredient of unfairness actively operated in the process leading to the revocation of her probation." Id. at 535); Perry v. Willard, 247 Ore. 145, 427 F.2d 1020 (1967) (revocation of probation) ("We now hold that counsel is not only desirable but is so essential to a fair and trustworthy hearing that due process of law when liberty is at stake includes a right to counsel." Id. at 149, 427 F.2d at 1022).

In Douglas v. Buder, 412 U.S. 430 (1973), the Court reversed a Missouri court decision that revoked the probation of a truck driver for failing to report as an arrest a traffic citation. The Court concluded per curiam that the revocation decision "was so totally devoid of evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment." Id. at 432.

The conditions attached to the grant of probation or release on parole are varied and many. In United States v. Manfredonia, 341 F. Supp. 790 (S.D.N.Y.), aff'd, 459 F.2d 1392 (2d Cir.), cert. denied, 409 U.S. 851 (1972), the district court revoked probation because of the defendant's refusal to submit monthly reports. However, in United States v. Wilson, 469 F.2d 368 (2d Cir. 1972), the Second Circuit vacated a district court's judgment of revocation of probation that was based on the ground that the probationer had "wilfully" violated the special condition of his probation that he pay all alimony and support assessments then owing by him to his estranged wife and make such further alimony payments as the New York City Family Court
In Morgan v. Wofford, 472 F.2d 822 (5th Cir. 1973), the probationer was ordered to pay $7,000 restitution to the victim in weekly installments of $35 a week, but the $7,000 figure was determined by the probation office rather than the sentencing judge. The Fifth Circuit found a due process violation, saying, after referring to Fuentes v. Shevin, 407 U.S. 67 (1971): “A fortiori, prior notice and an opportunity to be heard are prerequisite where $7,000 is ordered by a court of law to be paid out of appellant’s weekly salary and the penalty for failure to pay is imprisonment.” Id. at 827.


V. Recent cases involving the due process rights of prisoners.

Lindsay v. Mitchell, 455 F.2d 917 (5th Cir. 1972) (“While forfeiture of goodtime credit is a function which addresses itself to prison administration, subject to supervision by the Attorney General of the United States, . . . an alleged abuse of that function constitutes proper grounds for federal judicial review.” Id. at 918); Andrade v. Hauck, 452 F.2d 1071 (5th Cir. 1971) (assertion that prisoner was deprived of his commissary privileges by his jailers in retaliation for writing to a federal judge required a hearing); Allison v. Wilson, 434 F.2d 646 (9th Cir. 1970), cert. denied, 404 U.S. 863 (1971) (allegations of physical abuse by prison guards stated a cause of action under the Civil Rights Act); Dearman v. Woodson, 429 F.2d 1288 (10th Cir. 1970) (refusal to provide food for a period of 50½ hours stated a cause of action); Wiltse v. California Dep't of Corrections, 406 F.2d 515 (9th Cir. 1968) (allegation of unjustifiable beating of a prisoner stated a cause of action); Brown v. Brown, 368 F.2d 992 (9th Cir.), cert. denied, 385 U.S. 868 (1966) (beating of a prisoner without cause stated a cause of action).

Holt v. Moore, 357 F. Supp. 1102 (W.D.N.C. 1973) (increased state punishment as the result of a filing of a federal detainee violated due process); Sands v. Wainwright, 357 F. Supp. 1062 (M.D. Fla. 1973) (“This court holds that in the prison disciplinary context an inmate has the right to be heard and the right to support his contentions with evidence.” Id. at 1087); Mabra v. Schmidt, 356 F. Supp. 620 (W.D. Wis. 1973) (motion to dismiss complaint of prisoner in segregation who was denied visits by his two- and three-year-old children denied); Carlisle v. Bensingr, 355 F. Supp. 1359 (N.D. Ill. 1973) (failure of state official to follow state regulation providing for a hearing within 72 hours after a disciplinary ticket is written did not violate due process); Griggs v. Liethhler, 355 F. Supp. 1121 (N.D. Ill. 1973) (in a disciplinary proceeding, due process did not require a confrontation and cross-examination); Black v. Brown, 355 F. Supp. 925 (N.D. Ill. 1973) (ameliorative prison regulation need not be applied retroactively) (“[J]udicial economy necessitates that the ever-changing concept of what due process encompasses be applied prospectively only.” Id. at 927); Smith v. North Carolina, 355 F. Supp. 217 (W.D.N.C. 1973) (“Extending or increasing punishment because an inmate successfully petitioned a court is an unconstitutional denial of his right to unhampered access to the courts.” Id. at 219); Castor v. Mitchell, 355 F. Supp. 123 (W.D.N.C. 1973) (“The defendants put Castor in punitive segregation and otherwise punished him because he started a suit complaining of his prison treatment. This will not do.” Id. at 125); Collins v. Hancock, 354 F. Supp. 1253 (D.N.H. 1973) (due process requires a “hearing before an impartial tribunal. This means that a prison official who has participated in the investigation of the offense cannot be a member of the hearing tribunal.” Id. at 1258-59); United States ex rel. Nelson v. Twomey, 354 F. Supp. 1151 (N.D. Ill. 1973) (institutional lockdown did not violate due process when imposed in response to a real threat to prison security and limited to a reasonable period of time); Allen v. Nelson, 354 F. Supp. 505 (N.D. Cal. 1973) (prisoner’s continued solitary confinement after the basis for confinement has ended, without notice or a hearing to permit a challenge to that status, violated due process); Inmates of Milwaukee County Jail v. Petersen, 353 F. Supp. 1157 (E.D. Wis. 1973) (prison official denied an inmate his right to429 F.2d 1288 (1970) (refusal to provide food for a period of 50½ hours stated a cause of action); Wiltse v. California Dep't of Corrections, 406 F.2d 515 (9th Cir. 1968) (allegation of unjustifiable beating of a prisoner stated a cause of action); Brown v. Brown, 368 F.2d 992 (9th Cir.), cert. denied, 385 U.S. 868 (1966) (beating of a prisoner without cause stated a cause of action).

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risk based solely on a history of past escapes cannot be used to deprive an inmate of his due process rights); Lamar v. Coffield, 353 F. Supp. 1081 (S.D. Tex. 1972) (curtailment of prisoner’s speech in mess hall, corridors, and during performance of his duties may be justified on the grounds of disciplinary necessity); Holland v. Oliver, 350 F. Supp. 485 (E.D. Va. 1972) (written notice of charges one hour before hearing did not afford inmate “his full constitutional due.” Id. at 487); Ferrell v. Hufman, 350 F. Supp. 164 (E.D. Va. 1972) (denial of highest honor status for prisoner is not violative of due process unless arbitrary or capricious); Colligan v. United States, 349 F. Supp. 1233 (E.D. Mich. 1972) (before being placed in segregation a prisoner is entitled to: (1) a neutral and detached hearing board; (2) written notice of the charges and the evidence against him; (3) a right to confront the opperate persons against him; (4) a right to summon his own witness: (5) the right to testify in his own behalf if he chooses; (6) opportunity to obtain inmate or staff counsel-substitute; and (7) a written decision based solely upon the evidence presented); Meyers v. Alldredge, 348 F. Supp. 807 (M.D. Pa. 1972) (forfeiture of good time and segregation not disproportionate to offenses); Stewart v. Jozwiak, 346 F. Supp. 1062 (E.D. Wis. 1972) (a prisoner charged with misconduct is entitled to reasonable advance notice of charges, a hearing before a neutral hearing officer, the right to confront and question accusers, to present witnesses, and a reasoned decision); United States ex rel. Neal v. Wolfe, 346 F. Supp. 569 (E.D. Pa. 1972) (deontional disciplinary transfer of state prisoner from one institution to another within the state correctional system, accompanied by isolation without hearing is denial of due process); Krause v. Schmidt, 341 F. Supp. 1001 (W.D. Wis. 1972) (inmates facing “grievous loss” by transfer entitled to minimum procedural due process safeguards); Lathrop v. Brewer, 340 F. Supp. 873 (S.D. Iowa 1972) (“[I]n the federal context the basic rights that must be afforded are those that will at least give a prisoner ample notice of the pendency of a disciplinary proceeding and the nature of the infractions with which he is charged, a reasonable opportunity to present his side of the issue, and an impartial tribunal basing its decision on an unbiased record.” Id. at 880); United States ex rel. Colen v. Norton, 335 F. Supp. 1316 (D. Conn. 1972) (“While it is settled law that the grant or denial of good-time credits rests within the sound discretion of the penal authorities, it also has been emphasized that judicial intervention is warranted if that discretion is abused by a disregard of the rules, regulations and policies of the Bureau of Prisons.” Id. at 1317); United States ex rel. Walker v. Mancusi, 338 F. Supp. 311 (W.D.N.Y. 1971), aff’d, 467 F.2d 51 (2d Cir. 1972) (“Rational inquiry in turn requires that the inmate be confronted with the accusation, informed of the evidence against him and afforded a reasonable opportunity to explain his actions.” Id. at 318); Urbano v. McCorkle, 344 F. Supp. 161 (D.N.J. 1971) (“This court is of the opinion that prisoners who are confined to administrative segregation for the good of the institution should be entitled to the same minimal due process that is already afforded prisoners who are confined to segregation for disciplinary infraction.” Id. at 168); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971) (prison disciplinary proceedings must comply with due process requirements); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971) (prison disciplinary proceedings must comply with due process requirements); Rippen v. Nickles, 332 F. Supp. 1233 (W.D. Va. 1971) (“The responsibility for running the federal system is an executive function.” Id. at 1235); Beishir v. Swenson, 331 F. Supp. 1227 (W.D. Mo. 1971) (procedure applied was fundamentally fair under conditions which bordered on riot); Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971) (“Adequate notice of charges in a substantial disciplinary proceeding is necessary to afford the prisoner the opportunity to prepare a defense.” Id. at 172); Meola v. Fitzpatrick, 322 F. Supp. 878 (D. Mass. 1971) (disciplinary punishments resulting in substantial loss of good time or inability to earn good time require at least notice of charges and an opportunity to reply to them); Wilson v. Garnett, 332 F. Supp. 888 (W.D. Mo. 1970) (prisoner may not be committed to a seclusion cell without administrative due process); Carter v. McGinnis, 320 F. Supp. 1092 (W.D.N.Y. 1970) (“If the evidence against plaintiffs is so substantial as to justify confinement in segregation for a period now in excess of thirty days, it must in accordance with its own rules and regulations present that evidence in a hearing with the inmate present.” Id. at 1097-98); Carothers v. Pollet, 314 F. Supp. 1138 (S.D.N.Y. 1970) (disciplinary officials are permitted to deprived inmate in solitary confinement or strip-him of good time without procedures complying with minimum constitutional due process requirements.” Id. at 1030); Kritsky v. McGinnis, 313 F. Supp. 1247 (N.D.N.Y. 1970) (summary hearing resulting in segregation and loss of good time insufficient due process protection); Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970) (parties negotiated regulations governing disciplinary and classification procedures for inmates) (“Finally, it has been most seriously and most frequently asserted that the Regulations will not be followed. This is simply not so; these Regulations establish rules of law which must be followed.” Id. at 861).
One of the cases which held that state prisoners could maintain their federal actions under the Civil Rights Act before exhausting state court remedies, Rodriguez v. McGinnis, 456 F.2d 79 (2d Cir.), cert. granted sub nom. Oswald v. Rodriguez, 407 U.S. 919 (1972), was argued in the Supreme Court in January 1973. 41 U.S.L.W. 3390 (Jan. 16, 1973). The Court reversed sub nom. Preiser v. Rodriguez, 411 U.S. 475 (1973), on the ground that habeas corpus was the sole remedy: "[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 speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." Id. at 500.

A number of recent cases involve pre-trial detainees. See, e.g., Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972); Brennanman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972); Conklin v. Hancock, 344 F. Supp. 1119 (D.N.H. 1971); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971) ("It is clear that the conditions for pre-trial detention must not only be equal to, but superior to, those permitted for prisoners serving sentences for the crimes they have committed against society." Id. at 1191).

In Haines v. Kerner, 404 U.S. 519 (1972), the Court held that a prisoner's pro se complaint for damages alleging physical injuries and deprivation of rights in disciplinary confinement should not have been dismissed without an evidentiary hearing.

Cases have gone different ways on the redetermination of a sentence. Compare Specht v. Patterson, 386 U.S. 605 (1967), with Sturm v. California Adult Authority, 395 F.2d 446 (9th Cir. 1967), cert. denied, 395 U.S. 947 (1969). In Specht, where a judge sentenced appellant under the Colorado Sex Offenders Act, which allowed indeterminate sentence of from one day to life even though the specific statute under which he was convicted carried a 10 year maximum sentence, the Court ruled that due process required that the defendant "be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own." Id. at 610. But in Sturm, where the California Adult Authority redetermined the sentence from 6 to 10½ years after the prisoner broke prison rules, the Ninth Circuit found no due process violation.

In an interesting case, Dreyer v. Jalet, 349 F. Supp. 452 (S.D. Tex. 1972), three prisoners in the custody of the Texas Department of Correction sought injunctive relief to bar Frances T. Freeman Jalet, a VISTA lawyer who had inmate clients, from the prison system as a result of her alleged activities to organize and, in effect, to instigate an uprising among the inmate population. The district court found in her favor and made these observations about the prison system:

[The framework of prison regulations and procedures within which the inmate must live his highly regimented life and serve his sentence must, above all, reflect an evenhanded fairness in application at all levels of administrative disciplines. . . . With a lack of public awareness and an absence of independent outside checks on prison methods, it certainly cannot be denied that the opportunity, at least, has been present for a prison system to become a law unto itself. Once such a total institutionalization emerges, its very preservation depends upon the exercise of unrestrained administrative discretion to control every facet of the lives of its inmates.

One vital deterrent to such a situation is the maintenance of a viable administrative structure for the handling of inmate grievances.

Id. at 487-88.

VI. Recent cases involving a prisoner's right of access to counsel, to an adequate law library, or to the courts.

Christman v. Skinner, 468 F.2d 723 (2d Cir. 1972) ("Sostre made it clear that jail officials are not permitted to refuse to mail a communication between an inmate and an attorney." Id. at 725-26); Corby v. Conboy, 457 F.2d 251 (2d Cir. 1972) ("Prisoners no less than other persons have a constitutional right of access to the courts . . . and prison authorities may neither place burdens on that right . . . nor punish its exercise. . . ." Id. at 253); McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972) (court clerk's negligence which impeded filing of papers for post-conviction relief stated a cause of action); Evans v. Moseley, 455 F.2d 1084 (10th Cir. 1972), cert. denied, 409 U.S. 865 (1972) (the habeas corpus court should take into consideration the possibility of reasonable alternatives, the State could not enforce a regulation barring inmates
from furnishing legal assistance to other prisoners." *Id.* at 1087-88); Harris v. Pate, 440 F.2d 315 (7th Cir. 1971) ("[A] prisoner's complaint based on interference with his access to the courts states a claim for relief under the Civil Rights Act." *Id.* at 317); Simmons v. Russell, 352 F. Supp. 572 (M.D. Pa. 1972) ("The policy in effect in seclusion at Huntingdon restricting Court correspondence to cases with a prescribed deadline was clearly unreasonable and completely impeded inmates from either obtaining legal advice or access to the Courts. The practices in punitive segregation of only allowing one letter per week to be mailed out similarly was unreasonable and constitutionally unsupported." *Id.* at 578-79); Hooks v. Wainwright, 352 F. Supp. 163 (M.D. Fla. 1972) (the state has an affirmative constitutional duty to furnish prison inmates with adequate law libraries); Lamar v. Kern, 349 F. Supp. 222 (S.D. Tex. 1972) ("With regard to outgoing general mail, that is, non-special mail, the inmate may write uncensored mail to anyone at his own expense without restriction as to length or volume." *Id.* at 225. Incoming letters may be opened by prison authorities but only in the presence of the inmate.); Guajardo v. McAdams, 349 F. Supp. 211 (S.D. Tex. 1972) (authorities enjoined from censoring or opening mail from inmates of the Dallas County jail addressed to the courts, prosecuting attorneys, probation and parole officers, governmental agencies, lawyers, and the press); Wells v. McGinnis, 344 F. Supp. 594 (S.D.N.Y. 1972) ("Channels of communication between a prisoner and his counsel must be kept open." *Id.* at 596); Van Ermen v. Schmidt, 343 F. Supp. 377 (W.D. Wis. 1972) (refusal to permit prisoner to receive law books from any source but the publisher was an unreasonable interference with prisoner's freedom to use the mails); McDonnell v. Wolff, 342 F. Supp. 616 (D. Neb. 1972), aff'd in part, rev'd in part, 483 F.2d 1059 (8th Cir. 1973), cert. granted, 94 S. Ct. 913 (1974) (regulation allowing a total of approximately 7 hours a week for an inmate's independent legal research was unreasonable); Tyron v. Fitzpatrick, 325 F. Supp. 554 (D. Mass.), aff'd, 445 F.2d 627 (1st Cir. 1971) ("[I]t cannot be doubted that petitioner has a right to communicate freely with this court and with his counsel. . . ." *Id.* at 558); People v. Wainwright, 325 F. Supp. 402 (M.D. Fla. 1971) (prison officials at Florida State Prison at Raiford enjoined from opening, reading, or censoring correspondence between prisoners and counsel of record); Marsh v. Moore, 325 F. Supp. 392 (D. Mass. 1971) (injunction granted against censoring prisoner's correspondence with counsel); In re Jordan, 7 Cal. 3d 930, 500 P.2d 873, 103 Cal. Rptr. 849 (1972) (censoring prisoner's correspondence with counsel enjoined).

VII. Recent cases involving prison conditions.

Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973) (state prison's involuntary injections of nauseating drugs to affect behavior violates eighth amendment); LaReau v. MacDougall, 473 F.2d 974 (2d Cir. 1972), cert. denied, 414 U.S. 878 (1973) (conditions "in the strip cell fall below the irreducible minimum of decency required by the Eighth Amendment," 473 F.2d at 978); Fitzke v. Shappell, 468 F.2d 1072 (6th Cir. 1972) ("Thus it is that fundamental fairness and our most basic conception of due process mandate that medical care be provided to one who is incarcerated and may be suffering from serious illness or injury." *Id.* at 1076); Antonio v. Barnes, 464 F.2d 584 (4th Cir. 1972) (allegation that solitary confinement quarters at Virginia State Farm were unfit for human habitation); Anderson v. Nosser, 456 F.2d 835 (5th Cir.), cert. denied, 409 U.S. 848 (1972) (participants in a civil rights march without a parade permit in Natchez were arrested and crowded into the quarters for felons at Parchman State Penitentiary, processed as prisoners rather than detainees, made to take laxatives with toilet paper in short supply, and some of the women were not supplied with sanitary napkins) (verdict should have been directed against superintendent under the Civil Rights Act for the "denial of due process of law through summary punishment." *Id.* at 841); Woolsey v. Beto, 450 F.2d 321 (5th Cir. 1971) ("The alleged imposition of unreasonable punitive work assignments and solitary confinement with the deliberate and knowing effect of activating appellant's tubercular condition states a cause of action. . . ." *Id.* at 321); Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970) (deliberate indifference to a prisoner's condition states a cause of action); Sinclair v. Henderson, 435 F.2d 125 (5th Cir. 1970) (allegations that inmates were denied sunshine and exercise and were fed from filthy foodcarts, required hearing and adjudication on the merits).

Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972) ("We hold that confinement of inmates at Parchman in barracks unfit for human habitation . . . [and maintaining a] trusty system, which allows inmates to exercise unchecked authority over other inmates, is patently impermissible." *Id.* at 894); Taylor v. Sterrett, 344 F. Supp. 221 (W.D. Ark. 1972) (the court recognizes that enlarging the jail will be costly, but inadequate resources can never be an adequate justification for the

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state's depriving any person of his constitutional rights." *Id.* at 422; Mayberry v. Maroney, 337 F. Supp. 601 (W.D. Pa. 1971) ("[T]he physical abuses of the plaintiff by the defendant asserts a deprivation of the plaintiff's Eighth and Fourteenth Amendment right to be free from cruel and unusual punishment." *Id.* at 602-03); Schmitt v. Crist, 333 F. Supp. 820 (E.D. Wis. 1971) (complaint alleging that prison authorities denied prisoner use of soap, toothbrush, and clean bedding and chained him to a steel bed without food or water for two days stated a cause of action under the Civil Rights Act); Sinclair v. Henderson, 331 F. Supp. 1123 (E.D. La. 1971) ("Confinement for long periods of time without the opportunity for regular outdoor exercise does as a matter of law, constitute cruel and unusual punishment in violation of the Eighth Amendment ..." *Id.* at 1131); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971), aff'd, 456 F.2d 854 (6th Cir. 1972) ("In any event, when the total picture of confinement in the Lucas County Jail is examined, what appears is confinement in overcrowded quarters, lightless, airless, damp and filthy with leaking water and human wastes, slow starvation, deprivation of most human contacts, except with others in the same sub-human state, no exercise or recreation, little if any medical attention, no attempt at rehabilitation, and for those who in despair or frustration lash out at their surroundings, confinement, stripped of clothing and every last vestige of humanity, is a sort of oublieette." *Id.* at 99); Hamilton v. Schiro, 338 F. Supp. 1016 (E.D. La. 1970) ("Prison life inevitably involves some deprivation of rights, but the conditions of plaintiffs' confinement in Orleans Parish Prison so shock the conscience as a matter of elemental decency and are so much more cruel than is necessary to achieve a legitimate penal aim that such confinement constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution." *Id.* at 1019); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969) (solitary confinement under animal-like conditions violated the eighth amendment); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966) (unjustifiable conditions in solitary confinement constituted eighth amendment violation). The federal government announced through Donald E. Santerrelli, administrator of the Law Enforcement Assistance Administration, a ban on the use of federal anticrime money for psychosurgery, medical research, and chemotherapy for prison inmates, juvenile offenders, and alcoholics. See Oelsner, *U.S. Bars Crime Fund Use on Behavior Modification*, N.Y. Times, Feb. 15, 1974, at 54, col. 1.

VIII. Recent cases involving welfare recipients.

New York State Dept of Social Servs. v. Dublino, 413 U.S. 405 (1973) (work incentive program provisions of Social Security Act do not preempt the New York work rules of the New York Social Welfare Law for persons participating in AFDC programs); Daniel v. Goliday, 398 U.S. 73 (1970) (district court to determine on the basis of the record made by the parties whether reduction of benefits need be preceded by a pre-reduction hearing); Doe v. Gillman, 479 F.2d 646 (8th Cir. 1973) (Iowa statute disallowing AFDC payments in absence of a certification that parent receiving aid is helping to obtain support money for children from persons legally responsible held invalid); Wilson v. Dietz, 456 F.2d 314 (6th Cir.), cert. denied, 408 U.S. 928 (1972) (recipients of AFDC need not be kept on rolls until termination decision becomes final and unappealable); Merriweather v. Buson, 439 F.2d 1092 (5th Cir. 1971) (district court to determine on the basis of the record made by the parties whether reduction of benefits need be preceded by a pre-reduction hearing); Doe v. Norton, 365 F. Supp. 65 (D. Conn. 1973) (unwed mother may be required to disclose the name of the child's putative father and to institute a paternity action); Glover v. McMurray, 361 F. Supp. 235 (S.D.N.Y. 1973) (decision to close publicly funded day-care center triggered hearing procedures of Social Security Act); Wilson v. Weaver, 358 F. Supp. 1147 (N.D. Ill. 1973) (Illinois practice of denying AFDC benefits to unborn children contravenes Social Security Act and thus is illegal under the supremacy clause); Majchzak v. Schmidt, 358 F. Supp. 1165 (E.D. Wis. 1973) (Wisconsin's denial of AFDC benefits to wives whose husbands are incarcerated prior to trial is in conflict with the standards of the federal Social Security Act); Stewart v. Wohlgemuth, 355 F. Supp. 1212 (W.D. Pa. 1972) (regulation of the Pennsylvania Department of Public Welfare which set up conclusive presumption that fulltime college students did not meet employment requirements was without rational basis and violative of due process); Boucher v. Minter, 349 F. Supp. 1240 (D. Mass. 1972) (automatic reclassification of family into group receiving no shelter allowance upon mother's remarriage on basis of presumption that household expenses will be paid by the stepfather, is unrealistic and arbitrary); Buena v. Juraj, 349 F. Supp. 91 (D. Ore. 1972) (suspension of welfare grants including AFDC matched grants, during the farm harvest season could not be enforced to the extent that it was necessitated by federal regulations); Serritella v. Engelman, 339 F. Supp. 738 (D.N.J. 1972) (plaintiffs who
alleged that they had suffered either termination or reduction of welfare benefits under federally aided programs by action of their county welfare boards without a hearing were given preliminary injunctive relief; Hunt v. Edmunds, 328 F. Supp. 468 (D. Minn. 1971) (abrogation of shelter allowance required a prereduction notice and chance to be heard); Meyers v. Juras, 327 F. Supp. 759 (D. Ore.), aff'd, 404 U.S. 803 (1971) (invalidated an Oregon regulation requiring local welfare administrators to terminate aid to families with dependent children if the mothers refused to cooperate with law enforcement officials in obtaining financial support from non-supporting fathers).

New York City has been winning 43 per cent of its claims to halt or reduce grants to welfare clients after the required hearings. See N.Y. Times, July 16, 1973, at 33, col. 1.