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**Constitutional Law—Due Process—ALL BUT MINIMAL PROCEDURAL DUE PROCESS SAFEGUARDS HELD INAPPLICABLE AT IN-PRISON DISCIPLINARY PROCEEDINGS—*Wolff v. McDonnell*, 94 S. Ct. 2963 (1974).**

Inmates in penal institutions have historically been afforded less than the full panoply of procedural rights which the federal courts have guaranteed in criminal proceedings.<sup>1</sup> The traditional attitude that constitutional rights<sup>2</sup> were left outside the prison gate<sup>3</sup> eventually gave way to a recognition that some fundamental *substantive* due process rights are retained by prisoners.<sup>4</sup> Because of an unwillingness to risk possible impairment of security and order by overburdening officials with procedural matters, the judiciary fashioned a “hands-off” doctrine as to *procedural* due process rights.<sup>5</sup> This doctrine precluded judicial review of prison disciplinary action absent a showing that the action violated the eighth amendment

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1. For a discussion of some of these rights, see Stephens, *The Burger Court: New Dimensions in Criminal Justice*, 60 GEO. L.J. 249 (1971); Note, *Growth of Procedural Due Process Into a New Substance*, 66 NW. U.L. REV. 502 (1971).

2. Although this note primarily deals with the procedural due process rights of state prisoners under the fourteenth amendment, the same principles govern the fifth amendment due process rights of federal prisoners. *Braxton v. Carlson*, 340 F. Supp. 999, 1001 n.3 (M.D. Pa. 1972), *aff'd*, 483 F.2d 933 (3d Cir. 1973).

3. See, e.g., *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790 (1871):

He [the convicted felon] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords him. He is for the time being the slave of the State. *Id.* at 796.

4. *Sharp v. Sigler*, 408 F.2d 966, 970 (8th Cir. 1969); *Jackson v. Bishop*, 404 F.2d 571, 576 (8th Cir. 1968); *Howard v. Smyth*, 365 F.2d 428, 431 (4th Cir. 1966); *Landman v. Royster*, 333 F. Supp. 621, 643 (E.D. Va. 1971). Among the rights retained is freedom of speech and association. *Carothers v. Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970). Freedom of religion has been included. *Cruz v. Beto*, 405 U.S. 319 (1972); *Cooper v. Pate*, 378 U.S. 546 (1964); *Brown v. Peyton*, 437 F.2d 1228 (4th Cir. 1971). Access to the courts was guaranteed. *Younger v. Gilmore*, 404 U.S. 15 (1971), *aff'g Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970); *Johnson v. Avery*, 393 U.S. 483 (1969); *Ex parte Hull*, 312 U.S. 546 (1941); *McDonough v. Director of Patuxent*, 429 F.2d 1189 (4th Cir. 1970); *Blanks v. Cunningham*, 409 F.2d 220 (4th Cir. 1969); *Coleman v. Peyton*, 362 F.2d 905 (4th Cir.), *cert. denied*, 385 U.S. 905 (1966). Freedom from racial discrimination was upheld in *Lee v. Washington*, 390 U.S. 333 (1968) (*per curiam*); *Rivers v. Royster*, 360 F.2d 592 (4th Cir. 1966). The right to due process of law has been held applicable to prisoners. *Haines v. Kerner*, 404 U.S. 519 (1972); *Gray v. Creamer*, 465 F.2d 179, 184 (3d Cir. 1972).

5. FRITCH, CIVIL RIGHTS OF FEDERAL PRISON INMATES 31 (1961) (document prepared for the Federal Bureau of Prisons) is generally credited as the source of the phrase “hands-off doctrine.” It declares that courts are “without power to supervise prison administration or to interfere with the ordinary prison rules or regulations.” *Banning v. Looney*, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954). Cf. *Edwards v. Duncan*, 355 F.2d 993, 994 (4th Cir. 1966). See generally Hirschkop and Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795, 812 (1969); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

guarantee against cruel and unusual punishment, or that it ran afoul of the fourteenth amendment by being arbitrary and capricious.<sup>6</sup> Alternatively, some federal courts denied due process safeguards in prisons by using a "right-privilege" distinction to remove actions of prison officials that might be classified as privileges rather than rights from judicial scrutiny.<sup>7</sup>

In 1969 the Supreme Court announced that prison regulations conflicting with inmates' constitutional rights may be invalidated,<sup>8</sup> but did not specify which procedural safeguards were applicable. In this void of substantive guidance, it is no surprise that courts enumerated a wide variety of procedural requirements<sup>9</sup> when faced with prisoners' complaints of lack of due process in disciplinary proceedings.

6. *Therault v. Blackwell*, 437 F.2d 76, 77 (5th Cir. 1971) (prison official's discretion in cancelling good time credit is upheld absent a showing that officials acted arbitrarily, capriciously, or fraudulently); *Abernathy v. Cunningham*, 393 F.2d 775 (4th Cir. 1968) (placing prisoner in maximum security is upheld since there is no proof that such action was arbitrary or capricious).

7. The first application of this distinction with respect to prisoners was in *Ughbanks v. Armstrong*, 208 U.S. 481 (1908), where the granting of parole was characterized as a mere matter of sovereign grace. Justice Cardozo's opinion in *Escoe v. Zerbst*, 295 U.S. 490, 492 (1935) is often quoted:

. . . [W]e do not accept the petitioner's contention that the privilege [probation revocation hearing] has a basis in the Constitution apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose.

The "right-privilege" distinction was laid to rest in *Morrissey v. Brewer*, 408 U.S. 471 (1972). See generally Comment, *Procedural Due Process for Intraprison Disciplinary Hearings: An Arkansas Analysis*, 27 ARK. L. REV. 44, 47-49 (1973).

8. *Johnson v. Avery*, 393 U.S. 483, 486 (1969). The Court stated:

There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene. It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with such rights, the regulations may be invalidated.

9. Perhaps the first case to list required safeguards was *Nolan v. Scafati*, 306 F. Supp. 1 (D. Mass. 1969), *rev'd on other grounds*, 430 F.2d 548 (1st Cir. 1970). Although the holdings are too varied to categorize meaningfully, the consensus seems to be that only the bare "essentials" of due process were required—notice, opportunity to be heard, decision by a fair hearing body; while the rights of confrontation, cross-examination, and counsel representation were generally denied. See *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972); *Lathrop v. Brewer*, 340 F. Supp. 873 (S.D. Iowa 1972); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971); *Sinclair v. Henderson*, 331 F. Supp. 1123 (E.D. La. 1971); *Bundy v. Cannon*, 328 F. Supp. 165 (D. Md. 1971); *Meola v. Fitzpatrick*, 322 F. Supp. 878 (D. Mass. 1971); *Carothers v. Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970); *Sostre v. Rockefeller*, 312 F. Supp. 863 (S.D.N.Y. 1970), *rev'd in part sub nom.*; *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1094, *cert. denied*, 405 U.S. 978 (1972).

In *Morrissey v. Brewer*,<sup>10</sup> the Burger Court applied its familiar balancing technique<sup>11</sup> to a parole revocation situation and held that parolees are entitled to: a written notice of claimed violations; disclosure of damaging evidence; an opportunity to be heard and to present witnesses and documentary evidence; the right to confront and cross-examine adverse witnesses unless the hearing officer specifically finds good cause for not allowing confrontation; a "neutral and detached" hearing body; and a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.<sup>12</sup> *Morrissey* did not reach the issue of retained or appointed counsel. *Gagnon v. Scarpelli*,<sup>13</sup> following quickly, involved a proceeding for probation revocation without deferred sentencing. The Court held the matter of counsel to be within the discretion of prison officials on a case by case basis<sup>14</sup> but required grounds for refusal to be succinctly stated in the record.<sup>15</sup>

The federal courts now had standards for some post-conviction proceedings, but not specifically for in-prison disciplinary proceedings. It became necessary to consider whether the differences between the individual's and state's interests in parole/probation-revocation proceedings and prison disciplinary proceedings were sufficient to warrant altering these standards.<sup>16</sup>

In *Wolff v. McDonnell*,<sup>17</sup> the Supreme Court was provided with an oppor-

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10. 408 U.S. 471 (1972).

11. The "balancing test" considers first whether the nature of the individual's interest is within the contemplation of the "liberty or property" language of the fourteenth amendment. Then there is an inspection of the precise nature of the interests at stake. In *Morrissey*, the individual's interest was retention of freedom; the state's interest was avoiding administrative burdens and the concomitant costs in time and money.

12. 408 U.S. at 489.

13. 411 U.S. 778 (1973).

14. The Court's holding was reminiscent of *Betts v. Brady*, 316 U.S. 455 (1942). The Court said in *Scarpelli* that "the need for counsel at revocation hearings derives, not from the invariable attributes of those hearings, but rather from the peculiarities of particular cases." 411 U.S. at 789.

15. *Id.* at 791.

16. The courts were even more varied than before in their holdings. Some courts required only the bare minimal safeguards. See note 9 *supra*. Others adopted the *Morrissey-Scarpelli* standards, while still others required the unqualified rights of confrontation, cross-examination, and counsel or counsel-substitute representation. See, e.g., *Clutchette v. Procunier*, 497 F.2d 809 (9th Cir. 1974); *Meyers v. Alldredge*, 492 F.2d 296 (3d Cir. 1974); *Palmigiano v. Baxter*, 487 F.2d 1280 (1st Cir. 1973); *Braxton v. Carlson*, 483 F.2d 933 (3d Cir. 1973); *United States ex rel. Miller v. Twomey*, 479 F.2d 701 (7th Cir. 1973); *Clements v. Turner*, 364 F. Supp. 270 (D. Utah 1973); *Sands v. Wainwright*, 357 F. Supp. 1062 (M.D. Fla. 1973); *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972); *Stewart v. Jozwiak*, 346 F. Supp. 1062 (E.D. Wis. 1972); *Workman v. Kleindienst*, 2 Prison L. Rptr. (W.D. Wash. July 20, 1973).

17. 94 S. Ct. 2963 (1974).

tunity to specify due process requirements for actions taken by prison officials. McDonnell, an inmate, filed a class action complaint under 42 U.S.C. § 1983,<sup>18</sup> alleging loss of liberty in the form of revoked good time credits<sup>19</sup> and placement in solitary or primitive segregation without due process of law.<sup>20</sup> The procedures alleged to be inadequate consisted of a conference between convict, charging party, and supervisor, where convict is advised of the charge, and a hearing before the Adjustment Committee, where the report from the conference is read and the convict may question the charging party.<sup>21</sup>

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18. 42 U.S.C. § 1983 (1970) provides that:

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

19. NEB. REV. STAT. § 83-1,107 (Supp. 1972) provided for the allowance of good time as follows:

(1) The chief executive officer of a facility shall reduce, for parole purposes, for good behavior and faithful performance of duties while confined in a facility the term of a committed offender sentenced as follows: Two months on the first year, two months on the second year, three months on the third year, four months of each succeeding year of his term and pro rata for any part thereof which is less than a year. In addition, for especially meritorious behavior or exceptional performance of his duties, an offender may receive a further reduction, not to exceed five days, for any month of imprisonment. The total of all such reductions shall be deducted:

(a) From his minimum term, to determine the date of his eligibility for release on parole; and

(b) From his maximum term, to determine the date when his release under supervision becomes mandatory . . . .

(2) Reductions of such terms may be forfeited, withheld and restored by the chief executive officer of the facility after the offender has been consulted regarding the charges of misconduct. . . .

*Cf.* 18 U.S.C. §§ 4161, 4165 (1970); VA. CODE ANN. §§ 53-213 to -214 (Cum. Supp. 1974).

20. McDonnell also challenged the prison's procedures for opening mail from attorneys and making available adequate legal assistance for civil rights actions and habeas writs. The relief sought was in the form of damages, restoration of good time, and a declaratory judgment with respect to procedures for imposing loss of good time. The Court held that under *Preiser v. Rodriguez*, 411 U.S. 475 (1973), restoration of good time could only be sought by writ of habeas corpus, with the concomitant requirement of exhausting state remedies; however, damage claims as well as suits challenging the conditions of confinement rather than the fact or length of custody could be pressed under § 1983. 94 S. Ct. at 2973-74.

21. The district court found the following procedures in effect when an inmate is charged with a prison violation:

(a) The chief correction supervisor reviews the "write-ups" on the inmates by the officers of the Complex daily;

(b) The convict is called to a conference with the chief correction supervisor and the charging party;

Justice White, writing for the majority, used the two-pronged balancing technique.<sup>22</sup> While finding the loss of good time credits encompassed within the concept of "liberty" protected by the fourteenth amendment,<sup>23</sup> he stressed that the resulting right to due process protection may be subject to restrictions "imposed by the nature of the regime to which [the inmate] has been lawfully committed."<sup>24</sup> Therefore, the interests of the state must be balanced against those of the individual to determine the extent that procedural safeguards should apply inside the prison.

The inmate faced with loss of good time or solitary confinement is found to be less prejudiced than the individual faced with revocation of parole or probation, because he will not suffer immediate change in the conditions of his liberty. His deprivation, if not restored, may extend the maximum term to be served, but this extension may have no effect on the actual date of parole.<sup>25</sup> On the other hand, the state's interest is deemed greater in the setting of the prison than in revocation of parole and probation proceedings. The prison officials have the need to maintain a closed and tightly controlled environment to cope with the tension, frustrations, resentment, and despair of everyday prison life.<sup>26</sup>

Because of these different interests, the Court found only two of the *Morrissey* safeguards fully applicable in prison disciplinary proceedings. The inmate must be given at least twenty-four hours advance written notice of the claimed violation and a written record of the fact-findings "as

(c) following the conference, a conduct report is sent to the Adjustment Committee;

(d) there follows a hearing before the Adjustment Committee and the report is read to the inmate and discussed;

(e) if the inmate denies the charge he may ask questions of the party writing him up;

(f) the Adjustment Committee can conduct additional investigations if it desires;

(g) punishment is imposed.

94 S. Ct. at 2973.

22. See note 11 *supra*.

23. 94 S. Ct. at 2975. The Court states:

. . . [T]he State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.

24. *Id.* See also *Parker v. Levy*, 94 S. Ct. 2547 (1974); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972).

25. 94 S. Ct. at 2977.

26. *Id.* at 2977-78.

to the evidence relied upon and the reasons for the disciplinary action taken."<sup>27</sup> The right to call witnesses is left to the discretion of prison officials.<sup>28</sup> Confrontation and cross-examination of adverse witnesses is rejected,<sup>29</sup> as is the right to counsel.<sup>30</sup> Finally,<sup>31</sup> without specifying a standard, the Court refused to find the Adjustments Committee not sufficiently impartial to violate the due process clause requirements.<sup>32</sup>

The Court's holding that "the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to

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27. *Id.* at 2978.

28. *Id.* at 2979-80.

29. Confrontation and cross-examination of adverse witnesses are deemed to have too much "potential for havoc inside the prison walls. Proceedings would inevitably be longer and tend to unmanageability." *Id.* at 2980. Danger of reprisal against informants and resentment towards guards create the "potential for havoc" according to the Court. *Id.* at 2981. Note that Nebraska's procedure allowed a form of confrontation or cross-examination by the prisoner. See note 21 *supra*.

Justices Brennan, Marshall, and Douglas record a strong dissent on this issue, backed by cited authority that is lacking in the majority opinion. They contend that the purpose of notice and a hearing, to allow the accused to prepare and present a defense, is defeated where confrontation and cross-examination are disallowed. *Id.* at 2987-91, 2994-95. These rights have been required when decisions turn on questions of fact. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). This is invariably the case in prison disciplinary proceedings. *Landman v. Royster*, 333 F. Supp. 621, 653 (E.D. Va. 1971). See *Davis v. Alaska*, 94 S. Ct. 1105, 1110 (1974); *Greene v. McElroy*, 360 U.S. 474, 496 (1959). See generally Comment, *Procedural Due Process in the Involuntary Institutional Transfer of Prisoners*, 60 VA. L. REV. 333, 355-57 (1974).

30. The Court's reasons include financial cost, prolongation of process, and reduction of the proceeding's utility as a means to further correctional goals. 94 S. Ct. at 2981. Justices Marshall and Brennan weakly dissent, contending that when an inmate is unable to adequately present a defense, at least counsel-substitute (usually a law student or better qualified inmate) should be provided. *Id.* at 2992. See *Gagnon v. Scarpelli*, 411 U.S. 778, 786-87 (1973); *Johnson v. Avery*, 393 U.S. 483, 487 (1969); *Landman v. Royster*, 333 F. Supp. 621, 654 (E.D. Va. 1971).

31. Other tangential issues were resolved. The Court held that due process requirements are not to be applied retroactively to expunge prison records; that a requirement that mail from attorneys to prisoners be opened in the presence of inmates, without being read by prison officials, does not infringe prisoners' first, sixth, and fourteenth amendment rights; and that the capacity of the inmate advisor be assessed in light of the demand for assistance in civil rights actions as well as in the preparation of habeas writs. 94 S. Ct. at 2983-86.

32. *Id.* at 2982. Some courts have suggested standards. See, e.g., *Sands v. Wainwright*, 357 F. Supp. 1062, 1084 (M.D. Fla. 1973); *Clutchette v. Proconier*, 328 F. Supp. 767, 784 (N.D. Cal. 1971) (disqualified anyone who reported, was involved in, or was a witness to a rule infraction, or who was supposed to review a decision of the disciplinary committee). See *Colligan v. United States*, 349 F. Supp. 1233, 1237 (E.D. Mich. 1972) (disqualified superior or subordinate to anyone bringing charges). See generally Comment, *supra* n. 29 at 360.

institutional safety or correctional goals"<sup>33</sup> leaves his right unenforceable.<sup>34</sup> Prison officials are not even required to state their reasons for refusing a prisoner his right to call a witness.<sup>35</sup> This lack of accountability means that a hearing may serve as a cloak to arbitrary and capricious action.

By denying the prisoner the right to confront and cross-examine adverse witnesses, the Court leaves him at the mercy of "individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy . . ." <sup>36</sup> The dissenters would hold these rights applicable to inmates, unless "the hearing officer specifically finds good cause for not allowing confrontation."<sup>37</sup> While consistent with previous authority, this solution would seem to answer the Court's objections to these rights.<sup>38</sup> Likewise, consideration of whether or not counsel may be present, on a case by case basis, adds little to the administrative burden but adds much to the fairness of a hearing.

Arguably, the Court's rationale is untenable. The balancing process overlooks some important considerations. As for the individual, his interest in the limited liberty left to him is perhaps the more substantial.<sup>39</sup> At any rate, the Court fails to cite any authority holding that due process is more applicable where the threat is of *immediate* loss of liberty. In assessing state interests, the Court failed to consider the possible rehabilitative effects that might result from the appearance of fairness.<sup>40</sup>

33. 94 S. Ct. at 2979.

34. The opportunity to be heard includes the right to present evidence. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970). But in *McDonnell* the Court allows the former while denying the latter.

35. 94 S. Ct. at 2979-80.

36. *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959). The Court continues:

. . . This Court has been zealous to protect these rights [confrontation and cross-examination] from erosion. It has spoken out not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny.

In *Landman v. Royster*, 333 F. Supp. 621, 653 (E.D. Va. 1971), Judge Merhige states: "Because most disciplinary cases will turn on issues of fact . . . the right to confront and cross-examine witnesses is essential."

37. 94 S. Ct. at 2994, citing *Morrissey*, 408 U.S. at 489.

38. See note 29 *supra*.

39. 94 S. Ct. at 2993 (Justice Douglas dissenting). Prisoners are sometimes placed in solitary or punitive segregation for months or even years. See *Bryant v. Harris*, 465 F.2d 365 (7th Cir. 1972); *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971); *Adams v. Carlson*, 368 F. Supp. 1050 (E.D. Ill. 1973); *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971).

40. Forced dependence on administrative decisions helps create intense hostility and the type of environment where security is tenuous at best. G. SYKES, *THE SOCIETY OF CAPTIVES* 73-75 (1958). On the other hand, ". . . fair treatment . . . will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972). *Accord*, *Landman v. Royster*, 333 F. Supp. 621, 653 (E.D. Va. 1971).

Especially disturbing is the Court's failure to recognize that the objections to providing wholesale due process rights, due to the different interests, are met in the *Morrissey* approach of allowing denial of the rights but providing for some accountability. The task of running a prison is not an easy one, and the Court is correct to take cognizance of possible security risks and administrative burdens. Yet it is precisely the unchecked power of prison administrators which is the problem that due process safeguards are required to cure.<sup>41</sup>

W.J.I.

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See Rabinowitz, *The Expression of Prisoners' Rights*, 16 VILL. L. REV. 1047 (1971), in which it is noted that treating prisoners like animals makes attempts at rehabilitation ludicrous and makes prisons good only for punishment and quarantine. See generally F. COHEN, *THE LEGAL CHALLENGE TO CORRECTIONS* 65 (1969); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE TASK FORCE REPORT: CORRECTIONS 13, 82-83 (1967).

41. *Id.* See *Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969), wherein the Court states: "Not only the principle of judicial review, but the whole scheme of American government, reflects an institutionalized mistrust of any such unchecked and unbalanced power over essential liberties." *Id.* at 621.

See generally Paulsen, *Prison Reform in the Future—The Trend Toward Expansion of Prisoner's Rights*, 2 PRISONER'S RIGHTS 449 (M. Haft & M. Hermann, PLI, 1972).

For a comprehensive study of all aspects of prisoners' rights, including history and future trends in reform and remedies, see M. HERMANN & M. HAFT, *PRISONERS' RIGHTS SOURCEBOOK* (1973).