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# DUE PROCESS AS A MANAGEMENT TOOL IN SCHOOLS AND PRISONS

ELISABETH T. DREYFUSS\* AND JANE C. KNAPP\*\*

## I. INTRODUCTION

THE LAST BASTIONS OF AUTHORITARIANISM to have held out against due process protection for their populations have been prisons and schools, both shielded by convincing arguments of institutional considerations of order, efficiency, and security. During the 1960s and 1970s, the court system has criticized these institutions and has imposed upon them at least minimal constitutional standards of due process.<sup>1</sup>

Although institutional management always has been a legitimate concern for schools and prisons,<sup>2</sup> styles and methods of management remain an appropriate area for further examination. Development in the areas of fact-finding, rule-making and goal-setting is vital to the management process if institutions are to answer to societal goals as defined by society at large. This article will suggest that institutional goals for schools and prisons must include educational components.

One goal of education in a democratic society is to enable an individual to find personal fulfillment through the cooperative making of rules and setting of goals in those institutions within which he must function. Indeed the structure of such rule-governed institutions is in reality a microcosm<sup>3</sup> of the larger rule-oriented society which currently exists in America. The health of that society will to some extent be predicated upon the degree to which its citizens can fashion rules as a technique of conflict avoidance or of ongoing conflict resolution.

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The authors wish to thank Judith Zimmer for her research in the due process area and her assistance in gathering rule manuals from jail/prisons and schools. Also thanks goes to Judith Koziol for her help in preparing the manuscript.

<sup>1</sup> See *Bell v. Wolfish*, 99 S. Ct. 1861 (1979) (prisons); *Goss v. Lopez*, 419 U.S. 565 (1975) (schools); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (prisons); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (parole revocation); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (prisons); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (schools); *In re Gault*, 387 U.S. 1 (1967) (juvenile law).

<sup>2</sup> See, e.g., *Bell v. Wolfish*, 99 S. Ct. 1861 (1979); *Goss v. Lopez*, 419 U.S. 565 (1975); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Morrissey v. Brewer*, 408 U.S. 471 (1972).

<sup>3</sup> Hansen, *Rights, Responsibilities and Curriculum*, 31 EDUC. LEADERSHIP 659 (1974).

By their very nature, schools and prisons become societies unto themselves. Rules are created to impose order for the participants of the sub-society, and constant investigation is needed to determine who is designing the structure and whose interests are being protected and/or violated by that structure. Although this structure may appear orderly to an outsider or a person holding a vested authority interest within it, without shared decision-making the order may be a mere facade where irreparable injury to the democratic ideal of peoples' control over the events of their lives may occur.<sup>4</sup> Without the opportunity to exercise such control by shared decision-making and rule-making power, learning to responsibly exercise such control cannot occur. The examples of repressive authoritarianism may result in a passivity and acceptance of powerlessness that preclude responsible participation in the larger society at a later date, a goal ostensibly of both schools<sup>5</sup> and prisons.<sup>6</sup> Because democracy cannot be suspended, standards by which an individual can perceive his position vis-à-vis others must be continually developed. The risk of not providing for such cognizance of standards is a perception that "might makes right" or that physical or psychological strength, regardless of its justification, are the paramount ways to effectuate institutional goals.<sup>7</sup>

An alternative to a potentially destructive rule-oriented institution is an institution that explores and acts upon questions of control. Who is to control the goal-setting process? How does rule-making reflect these goals? Is there a relationship between goal formation and rule implementation? Is fact-finding the crucial mechanism for effective rule implementation? Issues like these must be addressed by both the

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<sup>4</sup> *Pugh v. Locke*, 406 F. Supp. 318 (N.D. Ala. 1976), *aff'd in substance sub nom. Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *Morales v. Turman*, 364 F. Supp. 166 (E.D. Tex. 1973).

<sup>5</sup> In schools, repressive authoritarianism can surface in the corporal punishment area. One child psychologist has explored the reactions of children to such authoritarianism:

Two extreme reactions can result when children are spanked regularly and hard. . . . [o]ne child might simply collapse. His ego—his feeling of being worthwhile—just goes down the drain. He begins to accept the idea that he is evil and that he deserves punishment.

The other extreme reaction is violent resentment. If a child has a strong ego, he often responds with an "I'll-get-you-yet" attitude. It's like a playground game except that his response is directed at authority figures not playmates.

At its worst, the violent response is an early sign of the child who might one day become a criminal. At its best—which isn't very good—it is simply a sign of the ultimately resentful adult.

Ramella, *The Anatomy of Discipline: Should Punishment Be Corporal?*, 67 P.T.A. MAGAZINE 24, 26 (1973).

<sup>6</sup> *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972).

<sup>7</sup> *Landman v. Peyton*, 370 F.2d 135, 139-41 (4th Cir. 1966).

managerial hierarchy and the population of the institution. The process becomes the management tool. The process, as a salutary episode in the life of the institution, creates the environment in which mutual trust, cooperation, and education can and will flourish.

The litmus paper for the process is fairness, which finds its best expression in the ongoing American efforts to define due process.<sup>8</sup> Due process, in an institutional setting, focuses essentially on what the rules are, who creates them, and how they are implemented.<sup>9</sup> Organizing one's day-to-day life in such a setting requires the prediction of results of given behaviors, the setting of realistic goals, and the exertion of reasonable control over events. Disruptions of these predictable routines may result in conflict. Resolution of such conflicts depends upon well-honed skills of early and accurate fact-finding. Only through insightful fact-finding can the fundamental fairness which is due process be preserved and acted upon at the lowest levels, i.e., initial confrontation. Courts tend to examine due process as it occurs in later stages of institutional interactions,<sup>10</sup> while the earlier stages escape due process scrutiny. If unfairness exists at this rudimentary level, no degree of later fairness can repair the injury. Skill in fact-finding provides the remedy, a skill which can be learned and is perhaps the most essential ingredient of a modern, humanistic society. It is the key to harmony within the institution and the minimal guarantee owed by the institution to its population.<sup>11</sup>

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<sup>8</sup> Chief Justice Warren expressed the continuing nature of the definitional process as follows:

"Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, . . . are all considerations which must be taken into account.

Hannah v. Larche, 363 U.S. 420, 442 (1960).

<sup>9</sup> See, e.g., the rule manuals discussed in the text accompanying notes 68-84 *infra*. See also appendices I and II *infra*.

<sup>10</sup> See cases cited in note 2 *supra*.

<sup>11</sup> Even judges such as Chief Judge Wyzanski of the United States District Court of Massachusetts, who have resisted the expansion of due process protections where prisoners are involved, nevertheless expect that fairness must be present in the actions of authority figures. As Judge Wyzanski observed: "Only where those who exercise authority over him have acted arbitrarily, without any plausible relation to considerations of fairness, or security, or legitimate order, or rational discipline, has he a constitutional right to have their authority subjected to judicial control." *Nolan v. Scafati*, 306 F. Supp. 1, 3 (D. Mass. 1969), *vacated and remanded with directions*, 430 F.2d 548 (1st Cir. 1970).

The process of rule-making and fact-finding so crucial to implementing rules is in itself both educational and workable. Skills in this area can include language development, identification of interests (one's own, others' and society's), citizenship skills (in terms of setting goals and working toward those goals), problem-solving techniques (including the ability to live with a certain inevitable degree of ambiguity), and interpersonal relations skills where cooperation can replace confrontation.

Once these skills have been learned and used effectively, they form the basis of a habit which is translatable into other human interactions outside the institution. Conversely, if situations are met with inarticulate brute force, there is a loss of this potential for controlling events and the development of the habit of a violent response.<sup>12</sup> Even force becomes justifiable since the student or inmate affected perceives no fundamental fairness which might prohibit his acts. The emergence of rules from given fact situations creates precedents for governing similar situations in the future. Regularity of response leads to other aspects of due process; rules can be written down, notice can be given, procedural protections can be provided. Again, educational experience will become legislative experience through active participation in rule-making.

Society faces many issues which relate to its rule-oriented nature. Courts have adopted a quasi-legislative posture, especially in areas such as school desegregation.<sup>13</sup> Institutions are exploring the costs of rules in terms of financial outlays and administrative use of time. The process begun by the "due process revolution"<sup>14</sup> of the 1960s and 1970s has

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<sup>12</sup> See note 5 *supra*. Circuit Judge Sobeloff warns of the potential for riot as such a violent response; see note 128 *supra*.

<sup>13</sup> See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

<sup>14</sup> This term seems to have been coined by Erwin N. Griswold in reference to the confrontation and cross-examination clauses of the Constitution. Writing in 1971, Mr. Griswold describes the "due process revolution" as follows:

Our law has changed a good deal in recent decades. . . . Yet it can be said, I think, that there has been a constitutional revolution in the past twenty years—or at least that we are in the midst of a constitutional revolution. It can also be said, I think, that the results have often been good—depending, of course, on one's standards of goodness in such matters. It is hard to articulate the intellectual bases for this revolution. Like the Court's power to declare acts of Congress unconstitutional, it may rest, in the last analysis, largely on fiat. From this it may follow that the revolution will always be in process, subject to qualification and reevaluation in changing times and circumstances. The heart of the revolution is found in the fourteenth amendment, a rather general provision whose historical origin is well known.

Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711, 711-12 (1971).

reached the point of guaranteeing students and inmates fair procedures and protections from arbitrary and capricious acts of officials.<sup>15</sup>

This article will explore due process as an effective tool for the management of schools and prisons through a close scrutiny of the fourteenth amendment.<sup>16</sup> The authors will attempt to identify emerging trends in case law<sup>17</sup> and give special attention to *Bell v. Wolfish*,<sup>18</sup> which may point to a new direction in due process analysis under the Burger Court.

The purpose of this article is to propose radical reform of schools and prisons through the involvement of their populations and staffs in the rule-making process. Spawned by a firm belief that only through such democratic processes can the violence and brutality which frequently exist in both schools and prisons be effectively eradicated, the analysis entails an examination of a representative sampling of models which may hold promise for reform.<sup>19</sup>

## II. STATE OF FOURTEENTH AMENDMENT IN SCHOOLS AND PRISONS

Recently the due process clause of the fourteenth amendment has received careful analysis, with particular emphasis on whether the interest involved is within the contemplation of the liberty or property language of the amendment.<sup>20</sup> To date, this protection has taken the

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<sup>15</sup> As one observer stated:

The purpose of these due process extensions has been to require some degree of *rule-oriented* or *rule-governed* behavior of public officials. At the extreme, the opposite of rule-governed behavior is the province of arbitrary, capricious and unreasonable behavior on the part of public officials. Of course, that extreme is by no means inevitable. Between the two extremes—specification of rules and procedures *for all seasons* on the one hand, and uncontrolled caprice on the other, is the domain of administrative discretion, wherein public officials have been given mandates of varying generality and then are expected to exercise their best judgment in carrying them out. Where definitive rules do not exist, discretion may either serve or stifle policy mandates. But when arbitrary and capricious behavior is the result, it forms the occasion for judicial intervention so that discretion can be controlled or channeled from unwarranted uses. A simple review of the facts of cases applying due process to novel areas provides a compendium of arbitrary and capricious behavior that has largely compelled judicial intervention.

Jackson, *The Little Red Schoolhouse Is No More: Due Process Comes to Public Education*, 13 IDAHO L. REV. 325, 327 (1977) (emphasis in original).

<sup>16</sup> See Part II *infra*.

<sup>17</sup> See Part III *infra*.

<sup>18</sup> 99 S. Ct. 1861 (1979).

<sup>19</sup> See Part IV(B) *infra*, especially materials cited in notes 145-164 *infra*.

<sup>20</sup> *Fuentes v. Shevin*, 407 U.S. 67 (1972). This focus indicates a shift from previous analysis which centered on the right-privilege distinction. In *Graham v.*

form of procedural safeguards, largely in the setting of a hearing.<sup>21</sup>

As Chief Justice Burger has noted, "due process is flexible and calls for such procedural protections as the particular situation demands. . . . Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure."<sup>22</sup> The result of this focus has been a series of cases examining the protections to be afforded a student or inmate in the school or prison setting.<sup>23</sup> At this level, the requirements are clear and highly developed; *Goss v. Lopez*<sup>24</sup> and *Wolff v. McDonnell*<sup>25</sup> illustrate what these requirements are. The need remains, however, for greater development of due process which reaches earlier stages in the confrontation between authority and the population subject to such authority. The language of these cases mandates the extension of a fairness standard to earlier stages. This section features an analysis of procedural due process essential to the hearing stage and also involves substantive due process issues relating to the inherent fairness of rules.<sup>26</sup>

#### A. Schools—*Goss v. Lopez*

*Goss v. Lopez*,<sup>27</sup> which is essentially a procedural due process case, examined the protections needed for students who are to be suspended from school. The Court's analysis began with an identification and balancing of the interests involved. Although the Court did not find a constitutional right to an education,<sup>28</sup> it did find that the children had a property interest in attending school<sup>29</sup> and a liberty interest in their good names, free of the onus of school suspension.<sup>30</sup> Since these interests

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Richardson, 403 U.S. 365 (1971), Justice Blackmun pointed out: "This Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Id.* at 374.

<sup>21</sup> In the school context, the hearing focused on has been the suspension hearing as mandated by *Goss v. Lopez*, 419 U.S. 565 (1975). See text accompanying notes 27-37 *infra*. In the prison context, it is the disciplinary hearing as set forth in *Wolff v. McDonnell*, 418 U.S. 539 (1974), which has received the Court's attention. See text accompanying notes 38-56 *infra*.

<sup>22</sup> *Morrissey v. Brewer*, 408 U.S. 471, 481 (1971).

<sup>23</sup> *Bell v. Wolfish*, 99 S. Ct. 1861 (1979); *Goss v. Lopez*, 419 U.S. 565 (1975); *Wolff v. McDonnell*, 418 U.S. 539 (1974).

<sup>24</sup> 419 U.S. 565 (1975).

<sup>25</sup> 418 U.S. 539 (1974).

<sup>26</sup> *Cf. Lochner v. New York*, 198 U.S. 45 (1905) (seminal case defining concept of substantive due process).

<sup>27</sup> 419 U.S. 565 (1975).

<sup>28</sup> See also *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

<sup>29</sup> The Court explicitly stated: "[A]mong other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause." 419 U.S. at 574.

<sup>30</sup> The Court stated: "'Where a person's good name, reputation, honor, or

were not to be regarded as *de minimis*, they were deserving of due process protection.<sup>31</sup>

After the protectable interests were identified, the Court determined which procedural protections were required. In keeping with the flexibility existing in the due process clause,<sup>32</sup> procedures which were responsive to the special demands of a school environment were established.<sup>33</sup> Using a balancing test, the Court determined that school authorities did not have to be "totally free from notice and hearing requirements if their schools [were] to operate with acceptable efficiency."<sup>34</sup> The *Goss* Court established that a student faced with a temporary suspension of ten days or less must "be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school."<sup>35</sup>

Although this case is addressed by the Court as one of procedural due process, there is an underlying fairness standard discernible: "[W]e do not believe that we have imposed procedures on school disciplinaries which are inappropriate in a classroom setting. Instead, we have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions."<sup>36</sup>

It has been suggested that there are three purposes for the requirement of governmental due process: (1) to ensure that decision-makers

dignity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied." *Id.* (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)).

<sup>31</sup> *Id.* at 576.

<sup>32</sup> See text accompanying note 3 *supra*. See also *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

<sup>33</sup> 419 U.S. at 580-84.

<sup>34</sup> *Id.* at 581.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 583. In the twelve pages of the opinion which address the subject of suspension procedures, the terms "fair" or "unfair" are used at least six times. In addition to the example quoted above, see text accompanying note 35 *supra*. The Court also stated:

The student's interest is to avoid unfair or mistaken exclusion from the educational process with all of its unfortunate consequences. The Due Process Clause will not shield him from suspensions properly imposed, but it disserves both his interest and the interest of the State if his suspension is in fact unwarranted. The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. . . .

But it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure than an injustice is not done.



are proceeding upon a correct determination of the underlying facts; (2) to provide a basis for later judicial review of decisions; and (3) to legitimize the actions of government by generating the feeling that just procedures have been followed.<sup>37</sup> These purposes collectively provide for a sense of legitimacy which is essential to a society predicated upon trust and adherence to rules because they are fair. The same concerns apply in microcosm in schools and prisons. This overall sense of legitimacy is the guarantee that one will answer to society's rules rather than to the whims or caprice of an individual, who, for however short a time, may act beyond the mandate of that society. It is the further guarantee that the rules themselves will be inherently fair.

### B. *Prisons* — Wolff v. McDonnell

The clearest statement of procedural due process protections in prison is *Wolff v. McDonnell*.<sup>38</sup> Here the Supreme Court established guidelines for disciplinary hearings resulting from infractions of prison rules by inmates. The Court began by determining that it was the inmate's liberty interest which was deserving of due process protection, even though the liberty involved was created by state statute.<sup>39</sup>

In determining which procedures were required, the Court examined "the precise nature of the government function involved as well as . . . the private interest that [had] been affected by governmental action."<sup>40</sup> A balancing of these interests was undertaken, with special deference given to the uniqueness of the prison environment.<sup>41</sup> The Court explored

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"[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . ." "Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."

*Id.* at 579-80 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170, 171-72 (1951) (Frankfurter, J., concurring)).

<sup>37</sup> Dessem, *Student Due Process Rights in Academic Dismissals From the Public Schools*, 5 J.L. & EDUC. 277, 293 (1976).

<sup>38</sup> 418 U.S. 539 (1974). Factually, the case appeared before the Court because prisoners in a Nebraska prison were subjected to a loss of good time credits or confinement in a disciplinary cell if found guilty of serious misconduct within the facility. Such loss of good time which affected the term of confinement and confinement in a disciplinary cell (affecting the conditions of confinement) were found, by the Court, to be liberty interests. Their analysis focused on the procedure whereby serious misconduct was determined. *Id.* at 544-53.

<sup>39</sup> *Id.* at 558.

<sup>40</sup> *Id.* at 560 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1971)).

<sup>41</sup> The Court noted the following special circumstances which exist when a prison disciplinary hearing takes place:

Prison disciplinary proceedings, on the other hand, take place in a closed, tightly controlled environment peopled by those who have

its antecedent decisions in *Morrissey v. Brewer*<sup>42</sup> and *Gagnon v. Scarpelli*,<sup>43</sup> ultimately refining the due process requirements to create protections that were fine-tuned to the institutional disciplinary hearing. The initial steps, paralleling those established in *Morrissey* and *Gagnon*, require advance written notice of the claimed violation and a written statement of the fact-finders as to the evidence relied upon and the reasons for the disciplinary action taken.<sup>44</sup> It also was noted 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 institutional safety or correctional goals."<sup>45</sup> This guarantee was not absolute in the face of

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chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life. Although there are very many varieties of prisons with different degrees of security, we must realize that in many of them the inmates are closely supervised and their activities controlled around the clock. Guards and inmates co-exist in direct and intimate contact. Tension between them is unrelenting. Frustration, resentment, and despair are commonplace. Relationships among the inmates are varied and complex and perhaps subject to the unwritten code that exhorts inmates not to inform on a fellow prisoner.

418 U.S. at 561-62.

<sup>42</sup> 408 U.S. 471 (1972). This case addressed parole revocation and determined that a revocation hearing must be conducted. Specific requirements were imposed: (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of the evidence against him; (c) the 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; and (f) a written statement by the fact-finders as to the evidence relied on and reasons for revoking parole.

<sup>43</sup> 411 U.S. 778 (1972). This case decided the question of whether due process requires that an indigent probationer or parolee be represented by counsel at revocation hearings. The Court decided that the state is not constitutionally obliged to provide counsel in all cases but that it should do so where the indigent probationer or parolee may have difficulty in presenting his version of disputed facts without the examination or cross-examination of witnesses or the presentation of complicated documentary evidence. Presumptively, counsel should be provided where, after being informed of his right, the probationer or parolee requests counsel, based on a timely and colorable claim that he has not committed the alleged violation or, if the violation is uncontested, that there are substantial reasons in justification or mitigation that make revocation inappropriate. The Court further required that in every case where a request for counsel is refused, the grounds for refusal should be stated in the record. See Comment, *The Right to Counsel and Due Process In Probation Revocation Proceedings*, *Gagnon v. Scarpelli*, 23 CLEVE. ST. L. REV. 151 (1974).

<sup>44</sup> 418 U.S. at 564.

<sup>45</sup> *Id.* at 566.

what the Court described as "the obvious potential for disruption"<sup>46</sup> if the inmate had the unrestricted right to call witnesses from the prison population. Although not mandated, it was suggested that the finder of fact "state its reason for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases."<sup>47</sup> The dissenting opinion of Justice Douglas evidenced his unwillingness to concede such an important safeguard absent any special overriding considerations,<sup>48</sup> "[b]ecause most disciplinary cases will turn on issues of fact."<sup>49</sup> This seems to be an uncharacteristic truncation of this highly-regarded right,<sup>50</sup> explainable only by the Court's extreme deference to the institutional considerations existing in prisons.

The deference to institutional considerations appears again in the right to counsel area where the *Wolff* Court refused "to hold that inmates have a right to either retained or appointed counsel in

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* It is interesting to compare this provision for confrontation and cross-examination of witnesses with the parallel provision in *Morrissey* in which the Court held that the minimum requirements of due process included "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." *Morrissey v. Brewer*, 408 U.S. 471, 489 (1971). The presumption is different: under *Morrissey*, the parolee is presumed to possess the right of confrontation and cross-examination absent a specific finding of good cause for refusal by the hearing officer. In *Wolff*, on the other hand, the total discretion seems to lie in the hands of the hearing committee, not even identifying a single accountable official or any statement of the underlying reason. The sole justification for this is a fear that if confrontation and cross-examination were allowed "there would be considerable potential for havoc inside the prison walls." 418 U.S. at 567.

<sup>48</sup> 418 U.S. at 595 (Douglas, J., dissenting).

<sup>49</sup> *Id.* (Douglas, J., dissenting) (quoting *Landman v. Royster*, 333 F. Supp. 621, 653 (1971)).

<sup>50</sup> In his dissent, Justice Douglas expressed his feelings about the broad applicability of these rights in the following terms:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. . . . This Court has been zealous to protect these rights 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.

*Id.* at 595-96 (Douglas, J., dissenting) (quoting *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959)).

disciplinary proceedings.”<sup>51</sup> The institutional need established in the right to counsel area is somewhat different from that seen in the confrontation/cross-examination area. Internal order and security outweigh individual rights in the latter area; as to the former, the Court expressed a fear that “[t]he insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals.”<sup>52</sup> The illiterate inmate, who is by no means a small proportion of the general population of such institutions, was singled out for greater protection in this area. Additionally, those inmates facing disciplinary action arising from issues so complex that they were unlikely to “be able to collect and present the evidence necessary for an adequate comprehension of the case” were afforded protection;<sup>53</sup> the institution must allow a fellow inmate to serve as counsel-substitute, and if no such aid is available or permitted by institutional rules, the staff of the prison must provide the help.

The final issue raised in *Wolff* concerned whether the committee charged with deciding the hearings was impartial so as to satisfy the requirements of due process. Although it was a committee comprised entirely of institutional staff, the Court found that the committee’s mandates precluded unlimited discretion.<sup>54</sup> Hence, the Court concluded that the committee did not present “such a hazard of arbitrary decisionmaking that it should be held violative of due process of law.”<sup>55</sup> It is worthy of note that the Court considered unlimited discretion and arbitrariness as threats to due process which must be guarded against.<sup>56</sup>

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<sup>51</sup> 418 U.S. at 570.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* The protection of illiterate prisoners must be viewed as advisory, however, since the plaintiff was not within the class of illiterate inmates.

<sup>54</sup> The Court found that the committee could not be totally discretionary or arbitrary because each member must reach his decision in conformity with controlling regulations of the institution: the need to consider the causes of adverse behavior; the need to take into account the setting and circumstances in which the behavior occurred; the need to assess the man’s accountability; and finally, the need to adjust his decision to accord with correctional treatment goals. *Id.* at 571.

The Court in examining the controlling regulations of the Nebraska prison found that they contained the direction that “disciplinary measures will be taken only at such times and to such degrees as are necessary to regulate and control a man’s behavior within acceptable limits and will never be rendered capriciously or in the nature of retaliation or revenge.” Because of the amount of internal protection against arbitrary and capricious action, the Court found it unnecessary to impose external controls either by changing the composition of the committee or by providing for external review of the committee’s decisions. *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Examples of the Court’s concern in regard to arbitrary acts are sprinkled throughout the opinion, such as its statements that “[t]he touchstone of due process is protection of the individual against arbitrary action of government,” *id.* at

The partially dissenting opinions of Justices Marshall, Brennan, and Douglas expressed concerns that *Wolff* did not go far enough in articulating due process protections to avoid those things which the Court found prohibited by the fourteenth amendment, *i.e.*, arbitrary, capricious, unfair acts by those in authority.<sup>57</sup> Although sharing the fear of the majority that arbitrariness was the evil to be avoided, the dissenters found that minimum due process had been clearly defined in *Morrissey v. Brewer*<sup>58</sup> and that the procedures allowed by the majority in *Wolff* were inadequate safeguards. The dissenters argue for *full* protection.<sup>59</sup>

In addition to noting that the Constitution follows the prisoner into the institution,<sup>60</sup> the dissenters also expressed concern for the

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558 (quoting *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)) and, in requiring written records, "[a] written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly." *Id.* at 565. See also note 38 *supra* and accompanying text.

<sup>57</sup> 418 U.S. at 580 (Marshall, J., concurring in part and dissenting in part); *id.* at 594 (Douglas, J., dissenting in part and concurring in the result in part).

<sup>58</sup> 408 U.S. 471, 489 (1972). See note 42 *supra*.

<sup>59</sup> Justice Marshall stated:

My disagreement with the majority is over its disposition of the primary issue presented by this case, the extent of the procedural protections required by the Due Process Clause of the Fourteenth Amendment in prisons disciplinary proceedings. . . .

I see no justification for the Court's refusal to extend to prisoners these procedural safeguards which in every other context we have found to be among the "*minimum* requirements of due process."

418 U.S. at 580, 582 (Marshall, J., concurring in part and dissenting in part) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (emphasis added by Marshall, J.)). Justice Douglas opined: "In my view, however, the threat of any substantial deprivation of liberty within the prison confines, such as solitary confinement, is a loss which can be imposed upon respondent prisoner and his class only after a full hearing with all due process safeguards." *Id.* at 594 (Douglas, J., dissenting in part and concurring in the result in part).

<sup>60</sup> The majority expressed its belief in this proposition, stating: "But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country." *Id.* at 555-56. Marshall expressed his agreement with this view, saying: "A prisoner does not shed his basic constitutional rights at the prison gate, and I fully support the Court's holding that the interest of inmates in freedom from imposition of serious discipline is a 'liberty' entitled to due process protection." *Id.* at 580-81 (Marshall, J., concurring in part and dissenting in part). Justice Douglas also shared this belief: "Conviction of a crime does not render one a nonperson whose rights are subject to the whim of the prison administration, and therefore the imposition of any serious punishment within the prison system requires procedural safeguards." *Id.* at 594 (Douglas, J., dissenting in part and concurring in the result in part).

rehabilitative goals of prisons within a democratic society.<sup>61</sup> This look at rehabilitation envisioned a prison environment where strong protections against arbitrariness exist. Justices Marshall and Brennan regarded this as pertinent to intra-institutional harmony<sup>62</sup> while Justice Douglas regarded it as pertinent to the re-entry of inmates into society at large.<sup>63</sup> The dissenters vigorously contended that the Court had defer-

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<sup>61</sup> Although the majority never expressly acknowledged rehabilitation as an institutional goal, it did acknowledge that that view has been presented to them and is worthy of consideration by them.

Indeed, it is pressed upon us that the proceedings to ascertain and sanction misconduct themselves play a major role in furthering the institutional goal of modifying the behavior and value systems of prison inmates sufficiently to permit them to live within the law when they are released. Inevitably there is a great range of personality and character among those who have transgressed the criminal law. Some are more amenable to suggestion and persuasion than others. Some may be incorrigible and would merely disrupt and exploit the disciplinary process for their own ends. With some, rehabilitation may be best achieved by simulating procedures of a free society to the maximum possible extent; but with others, it may be essential that discipline be swift and sure. In any event, it is argued, there would be great unwisdom in encasing the disciplinary procedures in an inflexible constitutional straitjacket that would necessarily call for adversary proceedings typical of the criminal trial, very likely raise the level of confrontation between staff and inmate, and make more difficult the utilization of the disciplinary process as a tool to advance the rehabilitative goals of the institution. This consideration, along with the necessity to maintain an acceptable level of personal security in the institution, must be taken into account as we now examine in more detail the Nebraska procedures that the Court of Appeals found wanting.

*Id.* at 562-63. Indeed, it would seem fair to conclude that the Court has adopted such a view since, in refusing to require confrontation and cross-examination, it does so in order to support the "desire and effort of many States . . . and the Federal Government to avoid situations that may trigger deep emotions and that may scuttle the disciplinary process as a rehabilitative vehicle." *Id.* at 568.

<sup>62</sup> Justice Marshall's remarks, while specifically addressed to the confrontation/cross-examination issue, reflect his underlying philosophy in the following language:

Moreover, by far the greater weight of correctional authority is that greater procedural fairness in disciplinary proceedings, including permitting confrontation and cross-examination, would enhance rather than impair the disciplinary process as a rehabilitative tool. "Time has proved . . . that blind deference to correctional officials does no real service to them. Judicial concern with procedural regularity has a direct bearing upon the maintenance of institutional order; the orderly care with which decisions are made by the prison authority is intimately related to the level of respect with which prisoners regard that authority. There is nothing more corrosive to the fabric of a public institution such as a prison than a feeling among those whom it contains that they are being treated unfairly."

As The Chief Justice noted in *Morrissey v. Brewer*, "fair treatment

red to the discretion of prison officials to the point where inmates' rights are practically unenforceable.<sup>64</sup>

Although the discussion in *Wolff* concerned a procedure which is severely truncated (a point of concern to scholars in this field)<sup>65</sup> and a procedure which may leave questions as to whether an inmate has any meaningful protection against mistaken fact-finding in the absence of the rights of confrontation, cross-examination, and counsel, there have been positive benefits from the decision. Institutions now function

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... will enhance the chance of rehabilitation by avoiding reactions to arbitrariness."

*Id.* at 588-89 (Marshall, J., concurring in part and dissenting in part) (citing, *inter alia*, *Palmigiano v. Baxter*, 487 F.2d 1280, 1283 (1st Cir. 1973)).

<sup>63</sup> Justice Douglas revealed his philosophy in the following language in the context of confrontation/cross-examination:

Likewise the prisoner should have the right to cross-examine adverse witnesses who testify at the hearing. Opposed is the view that the right may somehow undermine the proper administration of the prison, especially if accused inmates are allowed to put questions to their guards. That, however, is a view of prison administration which is outmoded and indeed anti-rehabilitative, for it supports the prevailing pattern of hostility between inmate and personnel which generates an "inmates' code" of non-cooperation, thereby preventing the rapport necessary for a successful rehabilitative program. The goal is to reintegrate inmates into a society where men are supposed to be treated fairly by the government, not arbitrarily.

*Id.* at 596-97 (Douglas, J., dissenting in part and concurring in the result in part).

<sup>64</sup> *Id.* at 582 (Marshall, J., concurring in part and dissenting in part); *id.* at 598 (Douglas, J., dissenting in part and concurring in the result in part).

Justice Douglas moved from the purely procedural aspects of due process into a concern for substantive due process:

A report prepared for the Joint Commission on Correctional Manpower and Training has pointed out that the "basic hurdle [to reintegration] is the concept of a prisoner as a nonperson and the jailer as an absolute monarch. The legal strategy to surmount this hurdle is to adopt rules . . . maximizing the prisoner's freedom, dignity, and responsibility. More particularly, the law must respond to the substantive and procedural claims that prisoners may have. . . ." We recognized this truth in *Morrissey*, where we noted that society has an interest in treating the parolee fairly in part because "fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." The same principle applies to inmates as well.

*Id.* at 598 (Douglas, J., dissenting in part and concurring in the result in part) (citing, *inter alia*, F. COHEN, *THE LEGAL CHALLENGE TO CORRECTIONS* 65 (1965)).

<sup>65</sup> *E.g.*, Special Project, *Behind Closed Doors: An Empirical Inquiry Into the Nature of Prison Discipline in Georgia*, 8 GA. L. REV. 919 (1974); Note, *The Fourteenth Amendment and Prisons: A New Look at Due Process for Prisoners*, 26 HASTINGS L.J. 1277 (1975); Note, *The Process Due Prisoners*, 54 NEB. L. REV. 724 (1975); Note, *Procedural Due Process in Prison Disciplinary Proceedings—The Supreme Court Responds*, 53 N.C.L. REV. 793 (1975); Note, *Backwash Benefits for Second Class Citizens: Prisoners' First Amendment and Procedural Due Process Rights*, 46 U. COLO. L. REV. 377 (1975).

under written rules<sup>66</sup> which provide information and accountability for both staff and population. This response is an effort to aid in reaching the rehabilitative goals of such institutions.

### C. *Effects On Administration Of Institutions*

In the wake of *Goss* and *Wolff*, institutions have moved to a new level of governance. Through the adoption of written rules and the correlative responsibility to make those available to students and inmates in a meaningful way,<sup>67</sup> schools and prisons have guarded against ar-

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<sup>66</sup> An empirical study undertaken by the staff of the Georgia Law Review at three of Georgia's correctional institutions explored inmates' knowledge of the rules. After compiling data, the staff observed:

The conclusion to be drawn from the disparity between what the inmates know and what they think they know is inescapable: the written rules do not always form the true basis for prison discipline. The rules around which the prison discipline system seems to function are not necessarily the written rules at all, but are rather whatever an officer says they are. The inmates can certainly understand such information, and this notion tends to explain why the inmates say they understand the rules.

Special Project, *supra* note 65, at 955.

<sup>67</sup> A good example of the rule writing which has occurred since 1975 is found in the Uniform Code of Student Conduct of the Detroit Public Schools. In its introduction, it provides for promulgation and dissemination:

The United States Supreme Court has held that a student may not be deprived of this right to a public education without adherence to procedural due process. It is the responsibility of the Detroit Board of Education and its staff to ensure that no student is arbitrarily denied the right to an education. It is the responsibility of each student to behave in a manner that does not threaten, interfere with or deprive other students of their right to an education.

The purposes of this conduct code are to provide regulations governing the behavior of students, to prevent actions or activities interfering with the school program and/or prohibited by law, and to provide for students' rights and responsibilities. Each staff member employed by the School District of the City of Detroit is required to function in accordance with this code. This code shall be mandatory and enforced uniformly in each Detroit public school. Individual schools may adopt additional regulations governing actions not covered by the code, but such additional regulations may neither substitute for nor negate any of these provisions.

It is the responsibility of all students and their parents to become familiar with the Student Code. Students must recognize that when they engage in unacceptable conduct they will be subject to disciplinary action.

UNIFORM CODE OF STUDENT CONDUCT 1 (4th ed. 1978-79) (Board of Education of the City of Detroit).

An example in the prison context is found in Rule 6 of the Code of Regulations of the Nebraska Department of Correctional Services:

Advisees of Disciplinary Procedures. It shall be the duty of the Chief Executive Officer to advise in writing those adult offenders admitted to the facility of the Department's disciplinary procedure. Such information



bitrary and capricious governance and have become rule-governed institutions where discretion is limited. This step has been a significant one for these institutions, and the authors' thesis is that the next step must be toward their becoming rule-making societies.

School boards and courts, pursuant to their supervisory powers, have largely been responsible for rules and regulations that presently govern schools and prisons. Their products have been manuals of rules designed for distribution to students and inmates. Some communities, in considering literacy problems, have designed rule manuals capable of being easily read and have translated them for the non-English speaking.

In looking at these institutions' rules,<sup>68</sup> the focus will be upon the protections that have been formed around the hearing stage. These protections have emerged directly from *Goss* and *Wolff*, often tracking the language of the opinions. The most common applications of due process surface in the creation of impartial hearing boards or officers, provision for investigation of facts, and better documentation and notice throughout the process.

Under *Goss v. Lopez*,<sup>69</sup> all schools are required to provide a hearing prior to suspending a student from school for up to ten days. At a minimum, some rule manuals simply state that "[n]o student will be suspended or expelled without receiving written notice of the charges and the opportunity to a hearing (admission or denial)."<sup>70</sup> Many schools fit a middle pattern where the procedures are set forth more explicitly in the manual. For instance:

Before a student may be suspended or expelled, the student

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may be given either at the time of admission to the facility or during the reception and orientation period. The dissemination of such information may be in the form of printed manuals or pamphlets or any other form which may be either kept on the adult offender or among personal belongings for ready reference.

CODE OF REGULATIONS OF THE DEPARTMENT OF CORRECTIONAL SERVICES OF THE STATE OF NEBRASKA, R. 6 Adult Offender Discipline 6-1 (Department of Correctional Services, Lincoln, Nebraska) [hereinafter cited as NEBRASKA RULES].

<sup>68</sup> To examine the impact of *Goss* and *Wolff* on assorted institutions, the authors of this article selected representative institutions and requested copies of their rules and procedures. Schools which responded to this request include: Berea City School District, Berea, Ohio; Cleveland Heights-University Heights City School District, Cleveland, Ohio; Cleveland Public Schools, Cleveland, Ohio; Detroit Public Schools, Detroit, Michigan; Lakewood High School, Lakewood, Ohio; Mayfield High School, Cleveland, Ohio; Parma City School District, Parma, Ohio; Shaker Heights City School District, Shaker Heights, Ohio; Shaw High School, East Cleveland, Ohio; South Euclid-Lyndhurst City Schools, Cleveland, Ohio. Jails/prisons which responded to this request include: Cuyahoga County Correctional Facility, Cuyahoga County, Ohio; Department of Correctional Services, Lincoln, Nebraska; Ohio Department of Rehabilitation and Correction, Columbus, Ohio; Trumbull County Sheriff's Department, Warren, Ohio.

<sup>69</sup> 419 U.S. 565 (1975).

<sup>70</sup> STUDENT RULES, RIGHTS AND RESPONSIBILITIES 2 (1979-80) (Lakewood, Ohio Board of Education).

must be: Given written notice of the intention to suspend or expel and the reasons for this action. . . . In the case of suspension, provided with an informal hearing; at this hearing the student may challenge the reasons for the intended suspension or otherwise explain his/her actions. This hearing may be conducted by the superintendent, his/her designee, the principal or assistant principal. . . .

Decisions rendered in suspension/expulsion hearings may be appealed.<sup>71</sup>

The highest level of detailed rule writing (often accompanied by a higher level of due process protection) seems to be present in school districts which are subject to court-ordered desegregation plans. Here, the courts have gone beyond *Goss* and have provided greater safeguards because of equal protection concerns.<sup>72</sup>

<sup>71</sup> POLICIES AND PROCEDURES OF BEHAVIOR AND DISCIPLINE GOVERNING STUDENTS RIGHTS AND RESPONSIBILITIES (August 14, 1979) (Shaker Heights, Ohio, Board of Education).

<sup>72</sup> In Detroit, the rule manual provides:

Before being excluded, suspended or recommended for expulsion students . . . will be given a "hearing" before the principal (or person acting as principal). The principal . . . will inform the student orally or in writing of the charges against him (her), including the basis (evidence) for such charges. If the student denies the charges, he (she) will be given the opportunity to give his (her) version of the events relating to the charge. . . .

**Suspension Hearing**—In addition to written notice (certified letter) to the parents of the time of the hearing and charges to be made against the student, the following will be adhered to in all suspension hearings:

(a) At the hearing the student and his (her) parents or legal guardian will have the opportunity to present his (her) side of the case and to question witnesses. Parents or guardians may be represented by an advisor of their choice who may or may not be an attorney. Parental authorization for the advisor to appear on behalf of the student must be on file in writing with the principal at or before the time of the suspension hearing. No suspension hearing will be held unless and until it is attended by the parent or legal guardian of the student. (This requirement may be waived by the principal in the event of extenuating circumstances or if the student has reached his eighteenth birthday.)

(b) The staff person(s) making the charges pertinent to the suspension must be present at the suspension hearing and be available for questioning by the parents, legal guardian or representative. In the event that the person making the charges is the principal, another administrator assigned by the Region Office will hear the charges and otherwise fill the role of the principal (or person acting as principal) with regard to the suspension hearing process.

(c) Within one school day of the hearing, the principal (or person acting as principal) or other administrator will communicate with the parents and/or student by certified letter advising them:

1. His decision as to whether the student engaged in the behavior as charged.

2. What the discipline will be (if the charge was sustained).

The same general pattern can be found in prison rule books, whose origins date from the seminal decision *Wolff v. McDonnell*.<sup>73</sup> Again, the further removed one is from the federal court, the less refined are the rules. An example of the minimal nature of some disciplinary procedures is that of the Trumbull County (Ohio) Jail Manual which states:

A violation of a jail rule or regulation when detected by the sheriff or his designated officer, the sheriff shall cause the inmate who violated the rule or regulation to be separated from all other inmates. A formal written report shall be prepared by the officer who witnessed the infraction and who was responsible for the removal of the inmate from the other inmates and submitted to the sheriff and/or his designated representative.

The sheriff shall review the report to determine (1) If a violation was committed (2) The seriousness of the offense (3) Whether or not to return the inmate to the general jail population and (4) The appropriate disciplinary action to take. The violator in all cases shall be given the opportunity to defend himself or herself in writing and/or orally before the sheriff makes a final decision.<sup>74</sup>

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3. Of the right to appeal and the procedures provided in this code for instituting such appeal.

UNIFORM CODE OF STUDENT CONDUCT 8-10 (4th ed. 1978-79) (Board of Education of the City of Detroit). The Code goes on to establish procedures for appeal.

Students and parents who are dissatisfied with the outcome of a suspension . . . hearing have the right to appeal the decision to the Region Superintendent by informing him (her) in writing that they wish to appeal the principal's decision. . . . Upon receipt of the appeal, the Region Superintendent will appoint a review panel consisting of two staff members and one member of the community. . . .

Exclusions, suspensions and expulsions upheld by the Regional Hearing Panel may be reviewed by the Central Board if the student or his parents or guardian request such a review in writing. . . .

*Id.* at 10-11. The rules governing appeal provide the same procedural rights and protections as are noted in the suspension hearing discussion.

<sup>73</sup> 418 U.S. 539 (1974). See Part II(B) *supra*.

<sup>74</sup> RULES AND REGULATIONS FOR THE GOVERNMENT OF THE TRUMBULL COUNTY, OHIO, JAIL (July 7, 1977) (Trumbull County Sheriff's Department). It should be noted in reviewing these procedures that they may fall short of the *Wolff* mandate. In particular, there seems to be no specific provision for written notice of the charges to the inmate, no guarantee of a hearing (since written response by the inmate is permissible), and no provision exists for informing the inmate of the evidence on which the charges are based. Further, even the truncated rights to confrontation and cross-examination which *Wolff* allowed when it posed no undue hazard to the institution do not exist in these procedures.

Although the procedures are foreshortened, the liberty deprivation is no less than that in question in *Wolff*. Indeed, the manual itself points out that potential disciplinary actions include confinement for a period not in excess of one week "in the darker cell of the prison." *Id.*

At the other extreme, one finds court imposed procedures inspired directly by *Wolff*. In Cuyahoga County, Ohio, the federal district court developed a manual for jail operations in an inmate-instituted case, *Sykes v. Krieger*.<sup>75</sup> Prior to judgment the defendants agreed to a partial consent decree which established the following procedures for disciplinary hearings:

A charged inmate shall be informed in writing of the rule broken and the facts on which the charge is based. This shall be at least 24 hours before the hearing. He shall also be advised orally of what his rights are in regards to the disciplinary hearing. . . .

A hearing shall be held within 36 hours of the time inmate is placed into isolation, is locked in his cell, or has one of his privileges withdrawn. However, this time limitation will be suspended on weekends and holidays. . . .

There shall be a summary written record of the proceedings maintained by the Sheriff's Department.

The hearing officer shall be either the Warden or a shift lieutenant, as long as he is not the charging officer, or a witness. If he is the charging officer or a witness, someone of at least equal rank shall preside.

The inmate has the right to testify and shall be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to the institutional safety or orderly administration of the facility. When there is a limitation placed on the inmate's testimony, or on the witnesses he is allowed to call, the reasons shall be set forth in writing in the record.

The hearing officer shall exercise control over the hearings, and the evidence presented shall be subjected to reasonable limits as to amount and relevance. He shall make his decision, which shall be in writing, and based on the evidence taken, state the reasons for the decision, and the punishment to be imposed. The charging party shall have the burden of proving each element of the charged offense.<sup>76</sup>

The district court in its final order made possible additional safeguards in order to fully implement *Wolff's* due process standards:

The right of an accused inmate to confront and cross-examine his accuser at disciplinary hearings is committed to the sound discretion of jail officials administering such inquiries.

The right of accused inmates to legal counsel or counsel

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<sup>75</sup> No. C71-1181 (N.D. Ohio, filed May 15, 1975).

<sup>76</sup> *Id.*, Partial consent judgment at 2-3 (filed May 15, 1975).

substitute at a disciplinary hearing are committed to the sound discretion of jail officials administering such inquiries. . . .<sup>77</sup>

Interestingly, when the jail promulgated its rule manual, the provisions regarding board punishment went even further than the court's order and also beyond the *Wolff* requirements by necessitating a written report of the reasons for denying the right to call witnesses and to present documentary evidence. The rule mandates that "if a limitation is placed on the inmate's right to call witnesses or present evidence, the reasons therefore shall be stated in the Sheriff's log."<sup>78</sup>

In Nebraska, where *Wolff* arose, the Department of Correctional Services has created a discipline procedure which encompasses more due process protection than is required. In language permeated with the fairness standard inherent in substantive due process, it provides a set of guiding principles which include:

(3) Disciplinary Principles—In every disciplinary action taken throughout the Department, the following principles shall be applicable.

(a) Disciplinary action is to be of such a nature as to regulate a committed adult offender's behavior within acceptable limits, and shall be taken at such times and in such degrees as is necessary to accomplish this objective.

(b) The behavior of adult offenders committed to the custody of the Department shall be controlled in a completely impartial and consistent manner.

(c) Disciplinary action shall not be capricious, retaliatory or revengeful.

(d) Corporal punishment of any kind is strictly prohibited.

(e) Detailed reports of all disciplinary actions shall be kept.<sup>79</sup>

Concern is shown for the impartiality of the hearing body as well as rehabilitative concerns by the requirement that "a person representing the treatment or counseling staff . . . shall participate as a member of the facility Disciplinary Committee"<sup>80</sup> to the extent possible and that no person should serve on the Committee during a hearing "if that member has first hand knowledge of the charges brought against the accused adult offender, either as an eye witness or as the reporting officer or investigating officer."<sup>81</sup> Written reasons are also required if the rights to

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<sup>77</sup> *Id.*, slip op. at 21.

<sup>78</sup> RULES FOR THE REGULATION OF THE CUYAHOGA COUNTY JAIL 7 (May, 1976) (Cuyahoga County, Ohio) [hereinafter cited as CUYAHOGA COUNTY RULES].

<sup>79</sup> NEBRASKA RULES, *supra* note 67, R. 6 Adult Offender Discipline 6-1.

<sup>80</sup> *Id.* at 6-2.

<sup>81</sup> *Id.* The Cuyahoga County Rules contain a similar provision. CUYAHOGA COUNTY RULES, *supra* note 78, at 7.

call witnesses or to present evidence are abridged.<sup>82</sup> The assistance of counsel or counsel substitute, generally extended to illiterate inmates, is available under the Nebraska system to any inmate in order to better prepare his/her defense.<sup>83</sup>

With the advent of the written rule manual, some level of educational benefit has accrued to these institutions. Since officials and population are both held to a knowledge of and familiarity with the rules, there is an informational commonality present. Beyond this, there is an expectation of participation on both sides of the authority line in fact-finding and documentation. Students and inmates are no longer required to be mere passive obeyers of orders but instead have the potential to be active advocates of their version of events before an impartial fact-finder. On the other side, the discretionary authority of the institutional staff is curtailed by an obligation to operate fairly and consistently on the basis of institutional rules. Within this relationship one can speak of participation of all concerned parties in the limited range of those disciplinary infractions serious enough to trigger due process protections. The expansion of this stage (toward participatory institutional governance) is the subject of later discussion.<sup>84</sup>

### III. EMERGING TRENDS

Since the mid-1970s when *Wolff v. McDonnell*<sup>85</sup> and *Goss v. Lopez*<sup>86</sup> were decided, the United States Supreme Court has again addressed both school and prison due process issues. Although presented with opportunities to further refine the due process protections established by *Wolff* and *Goss* at pre-hearing stages,<sup>87</sup> the Court has refused to do so. The trend of the late-1970s is a return to the "hands off" doctrine<sup>88</sup> and a

<sup>82</sup> NEBRASKA RULES, *supra* note 67, R. 6 Adult Offender Discipline 6-3. See also text accompanying note 67 *supra*.

<sup>83</sup> NEBRASKA RULES, *supra* note 67, R. 6 Adult Offender Discipline 6-3.

<sup>84</sup> See Part IV *infra*.

<sup>85</sup> 418 U.S. 539 (1974).

<sup>86</sup> 419 U.S. 565 (1975).

<sup>87</sup> In the school setting, the Court has been presented with the corporal punishment issue, a disciplinary measure considered less severe than suspension and, therefore, not subject to the suspension hearing procedures. This case, *Ingraham v. Wright*, 430 U.S. 651 (1977), resulted in a refusal by the Court to impose advance procedural safeguards prior to a paddling.

In the prison area, the Court has been presented with the issue of the applicability of the due process clause to pre-trial detainees. The Court did hold that pre-trial detainees are covered by the due process clause. *Bell v. Wolfish*, 99 S. Ct. 1861 (1979). The Court failed to find, however, that the due process clause reached so far as to invalidate a variety of restrictions imposed by a federally operated short-term facility in New York upon pre-trial detainees.

<sup>88</sup> The term "hands-off" doctrine refers to the Court's historic reluctance to interfere in the day-to-day administration of jails and prisons. *Wolff v. McDonnell*, 418 U.S. 539 (1974), represents the Court's rejection of this doctrine with imposi-

heightened deference to institutional considerations rather than to individual interests of students or inmates. The "balancing test"<sup>89</sup> applied in *Goss* and *Wolff*, although not officially abandoned, seems to reflect a shift in the weight accorded the institutional interest.<sup>90</sup>

In *Goss*, Justice Powell expressed the concerns of the "Nixon Four"<sup>91</sup> that the "decision unnecessarily opens avenues for judicial intervention in the operation of our public schools that may affect adversely the quality of education."<sup>92</sup> He felt "[o]ne of the more disturbing aspects of today's decision is its indiscriminate reliance upon the judiciary, and the adversary process, as the means of resolving many of the most routine problems arising in the classroom."<sup>93</sup>

The minority rejected the balancing of interests employed by the ma-

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tion of rules protecting liberty interests of inmates. See generally Special Project, *supra* note 65, at 919-25; Note, *Backwash Benefits for Second Class Citizens: Prisoners' First Amendment and Procedural Due Process Rights*, 46 U. COLO. L. REV. 377, 378-83 (1975).

<sup>89</sup> The term "balancing test" indicates an approach used by the Court to weigh society's interest in the functions of its institutions, i.e., jail/prisons and schools, and the interests of individuals who populate them.

<sup>90</sup> The split of the Court in *Goss* served as a harbinger of the emerging trend. Although both the majority and the minority would seem to unite in their goal, i.e., providing better education,

it is in the means of achieving those ends that they differ. The "law and order" side would seek to perpetuate the *status quo*, even regressing, in order to bring to heel increased violence and crime in schools. Under this rubric, retention of corporal punishment, compulsory attendance, and states' rights are emphasized.

Opposed to this viewpoint of more repression are those who urge more freedom and more participation by children and the ultimate humanizing of the schools. Their view is that the Supreme Court was right . . . when it held that children are "persons" and are entitled to the same right an adult would have in similar circumstances. The group is interested in children more as ends than as means.

Nolte, *Are Students "Persons" Under the Constitution?*, 5 LAW AM. SOC'Y 9 (1976).

<sup>91</sup> These Justices are Chief Justice Burger, Justice Powell, Justice Blackmun, and Justice Rehnquist. See Nolte, *supra* note 90, at 11.

<sup>92</sup> *Goss v. Lopez*, 419 U.S. 565, 585 (1975) (Powell, J., dissenting). He continued:

The Court holds for the first time that the federal courts, rather than educational officials and state legislatures, have the authority to determine the rules applicable to routine classroom discipline of children and teenagers in the public schools. It justifies this unprecedented intrusion into the process of elementary and secondary education by identifying a new constitutional right: the right of a student not to be suspended for as much as a single day without notice and a due process hearing either before or promptly following the suspension.

*Id.*

<sup>93</sup> *Id.* at 594.

jority,<sup>94</sup> believing precedent required a "hands off" approach.<sup>95</sup> In addition, they failed to find divergent interests of the school and the student to balance.<sup>96</sup> This lack of divergent interests occurred because of the terms in which the minority defined the state's interest and the student's. Justice Powell stated that "[t]he State's interest, broadly put, is in the proper functioning of its public school system for the benefit of *all* pupils and the public generally."<sup>97</sup> He found suspension to be "one of the traditional means . . . used to maintain discipline in the schools."<sup>98</sup> Citing then-current statistics on suspensions,<sup>99</sup> he concluded that to require hearings in a substantial percentage of the cases would bring the educational process to a grinding halt.<sup>100</sup> The student's interest in educa-

<sup>94</sup> See text accompanying note 34 *supra*.

<sup>95</sup> Relying upon *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969), and *Epperson v. Arkansas*, 393 U.S. 97 (1968), the Court stated:

In prior decisions, this Court has explicitly recognized that school authorities must have broad discretionary authority in the daily operation of public schools. This includes wide latitude with respect to maintaining discipline and good order. Addressing this point specifically, the Court stated in [*Tinker*]: "[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."

Such an approach properly recognizes the unique nature of public education and the correspondingly limited role of the judiciary in its supervision. In [*Epperson*] the Court stated: "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

The Court today turns its back on these precedents.

419 U.S. at 589-90 (Powell, J., dissenting) (citations omitted).

<sup>96</sup> "Unlike the divergent and even sharp conflict of interests usually present where due process rights are asserted, the interests here implicated—of the State through its schools and of the pupils—are essentially congruent." 419 U.S. at 591 (Powell, J., dissenting).

<sup>97</sup> *Id.* (Powell, J., dissenting) (emphasis in original).

<sup>98</sup> *Id.* (Powell, J., dissenting).

<sup>99</sup> Justice Powell documents his observation as follows:

An *amicus* brief submitted by several school associations in Ohio indicates that the number of suspensions is significant: in 1972-1973, 4054 students out of a school enrollment of 81,007 were suspended in Cincinnati; 7,352 of 57,000 students were suspended in Akron; and 14,598 of 142,053 students were suspended in Cleveland. See also the Office of Civil Rights Survey . . . finding that approximately 20,000 students in New York City, 12,000 in Cleveland, 9,000 in Houston, and 9,000 in Memphis were suspended at least once during the 1972-1973 school year. Even these figures are probably somewhat conservative since some schools did not reply to the survey.

*Id.* at 592 n.10 (Powell, J., dissenting).

<sup>100</sup> *Id.* at 592 (Powell, J., dissenting).



tion was defined as not incompatible with the state's. In fact, Justice Powell defined education as "the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto, [which] is no less important than learning to read and write."<sup>101</sup> Consequently, the freedom of the school to discipline and the necessity of the student to succumb to such discipline are one and the same interest.

Justice Powell expressed deep concern about the parameters of the majority decision.<sup>102</sup> This fear has proven to be groundless since the *Goss* minority has become a majority, expounding its views of quite limited judicial intervention in schools as exemplified in the 1977 decision *Ingraham v. Wright*.<sup>103</sup>

In its most recent pronouncement in the prison area, *Bell v. Wolfish*,<sup>104</sup> the Court addressed several issues arising from a pretrial detention facility operated by the federal government in New York City. The focus of these issues was the conditions under which these detainees were being confined.<sup>105</sup> The Court upheld each of the conditions considered after a due process analysis which, they claimed,<sup>106</sup> derived from the interest-balancing approach utilized in *Wolff v. McDonnell*.<sup>107</sup>

<sup>101</sup> *Id.* at 593 (Powell, J., dissenting).

<sup>102</sup> Part III of Powell's dissent demonstrates his concern. At one point, he states: "No one can foresee the ultimate frontiers of the new 'thicket' the Court now enters. Today's ruling appears to sweep within the protected interest in education a multitude of discretionary decisions in the educational process." *Id.* at 597 (Powell, J., dissenting). Furthermore, he noted:

If, as seems apparent, the Court will now require due process procedures whenever such routine school decisions are challenged, the impact upon public education will be serious indeed. The discretion and judgment of federal courts across the land often will be substituted for that of the 50 state legislatures, the 14,000 school boards, and the 2,000,000 teachers who heretofore have been responsible for the administration of the American public school system.

*Id.* at 599 (Powell, J., dissenting) (footnotes omitted). He concluded, "the federal courts should prepare themselves for a vast new role in society." *Id.* (Powell, J., dissenting) (emphasis added).

<sup>103</sup> 430 U.S. 651 (1977).

<sup>104</sup> 99 S. Ct. 1861 (1979).

<sup>105</sup> The pretrial detainees were challenging various practices and rules of the Metropolitan Correctional Center. Included were the practice of housing two inmates in individual rooms originally intended for single occupancy (double-bunking); a "publisher-only" rule which prohibited inmates from receiving hard cover books not directly mailed from publishers, book clubs, or book stores; a prohibition against inmates' receipt of packages of food and personal items from outside the institution; the practice of body-cavity searches of inmates following contact visits; and the requirement that pretrial detainees remain outside their rooms during routine inspections.

<sup>106</sup> 99 S. Ct. at 1877-79.

<sup>107</sup> 418 U.S. 539 (1974). The Court had no difficulty in finding that the same due process protections afforded convicted prisoners should apply to pre-trial detainees.

Justice Rehnquist, writing for the majority, attempted to balance the interests of the institution with those of the inmates. In striking the balance, he found that "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees."<sup>108</sup> Because of this, he concluded that "[p]rison administrators therefore should be accorded *wide-ranging deference* in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."<sup>109</sup>

The Court placed a limit on the amount of discretion that prison administrators could exercise without depriving inmates of their liberty without due process. The Court defined the proper inquiry as whether the conditions imposed in the prison officials' discretion amount to punishment of the detainee.<sup>110</sup> The Court reminded prison administrators of the test traditionally applied to determine whether an act is punitive in nature:

"Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions."<sup>111</sup>

In applying this test, Justice Rehnquist characterized the Court's task as deciding

whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "[w]hether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]. Thus, if a particular condition or restriction of pretrial detention is reasonably related to a

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<sup>108</sup> 99 S. Ct. at 1878.

<sup>109</sup> *Id.* (emphasis added).

<sup>110</sup> *Id.* at 1872.

<sup>111</sup> *Id.* at 1873 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

legitimate governmental objective, it does not, without more, amount to "punishment."<sup>112</sup>

What emerged as a result of this "punishment" approach was an application of the rational basis test, generally confined to equal protection analysis. The usual due process standard—the compelling state interest test—which has always been used for cases like this,<sup>113</sup> has been abandoned. The dissenters pointed this out in a manner best described as outraged.

Justice Stevens' dissenting opinion, which opened with the remark "[t]his is not an equal protection case,"<sup>114</sup> pointed out that the liberty deprivation involved was a fundamental right and that under the proper due process standard analysis, the opposite conclusion would be reached.<sup>115</sup> Justice Marshall also commented upon the improper analysis of the majority:

In my view, the Court's holding departs from the precedent it purports to follow and precludes effective judicial review of the conditions of pretrial confinement. More fundamentally, I believe the proper inquiry in this context is not whether a particular restraint can be labeled "punishment." Rather, as with other due process challenges, the inquiry should be whether the governmental interests served by any given restriction outweigh the individual deprivations suffered. . . . Moreover, even if the inquiry the Court pursues were more productive, it simply is not the one the Constitution mandates here. By its terms, the Due Process Clause focuses on the nature of deprivations, not on the persons inflicting them. If this concern is to be vindicated, it is the effect of conditions of confinement, not the intent behind them, that must be the focal point of constitutional analysis.<sup>116</sup>

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<sup>112</sup> *Id.* at 1873-74 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

<sup>113</sup> *E.g.*, *Wolff v. McDonnell*, 418 U.S. 539 (1974).

<sup>114</sup> 99 S. Ct. at 1895 (Stevens, J., dissenting). Mr. Justice Stevens continued: An empirical judgment that most persons formally accused of criminal conduct are probably guilty would provide a rational basis for a set of rules that treat them like convicts until they establish their innocence. No matter how rational such an approach might be—no matter how acceptable in a community where equality of status is the dominant goal—it is obnoxious to the concept of individual freedom protected by the Due Process Clause. If ever accepted in this country, it would work a fundamental change in the character of our free society.

*Id.* (Stevens, J., dissenting).

<sup>115</sup> *Id.* at 1899-903 (Stevens, J., dissenting).

<sup>116</sup> *Id.* at 1887-88 (Marshall, J., dissenting).

Thus, despite the vigorous opposition of the three dissenters,<sup>117</sup> the majority in *Wolfish* left the inmates with less protection. The correctional officials need only show that their acts or policies are rationally related to institutional goals in order to prevail against an inmate's claim that his fundamental rights have been violated while upon the inmate rests the virtually insurmountable task of proving that the act or policy is based upon a subjective intent to punish. As Justice Marshall has observed in a slightly different context,<sup>118</sup> when one subjects challenged legislation or acts to the rational basis test, the government always wins. In like manner, it seems safe to predict that inmates will prevail only in cases of outrageous abuse.

The majority carved out one exception to the subjective intent test for restrictions or conditions which can be shown to be arbitrary or purposeless. In such cases "a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees."<sup>119</sup>

The trend which emerges in cases like *Ingraham v. Wright*<sup>120</sup> and *Bell v. Wolfish*<sup>121</sup> is a return to the "hands off"<sup>122</sup> doctrine of the pre-*Goss*, pre-*Wolff* era. This trend is clearly expressed throughout the majority opinion in *Wolfish*. Justice Rehnquist, instructing courts to be mindful that their roles in inquiries into the policies of running correction

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<sup>117</sup> Mr. Justice Marshall's vigor is apparent from his words:

The Court holds that the Government may burden pretrial detainees with almost any restriction, provided detention officials do not proclaim a punitive intent or impose conditions that are "arbitrary or purposeless." As if this standard were not sufficiently ineffectual, the Court dilutes it further by according virtually unlimited deference to detention officials' justifications for particular impositions. Conspicuously lacking from this analysis is any meaningful consideration of the most relevant factor, the impact that restrictions may have on inmates. Such an approach is unsupportable given that all of these detainees are presumptively innocent and many are confined solely because they cannot afford bail.

*Id.* at 1886-87 (Marshall, J., dissenting). Mr. Justice Stevens expressed his anguish in these terms:

In short, a careful reading of the Court's opinion reveals that it has attenuated the detainee's constitutional protection against punishment into nothing more than a prohibition against irrational classifications or barbaric treatment. Having recognized in theory that the source of that protection is the Due Process Clause, the Court has in practice defined its scope in the far more permissive terms of equal protection and Eighth Amendment analysis.

*Id.* at 1898 (Stevens, J., dissenting).

<sup>118</sup> See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 319 (1976).

<sup>119</sup> 99 S. Ct. at 1874.

<sup>120</sup> 430 U.S. 651 (1977).

<sup>121</sup> 99 S. Ct. at 1861.

<sup>122</sup> See text accompanying note 88 *supra*.

facilities must "spring from constitutional requirements and that judicial answers to them must reflect that fact rather than a court's idea of how best to operate a detention facility," grounds this return to "hands off" in the traditional separation of powers analysis.<sup>123</sup> He reiterates this forcefully in the concluding remarks of his opinion:

There was a time not too long ago when the federal judiciary took a completely "hands off" approach to the problem of prison administration. In recent years, however, these courts largely have discarded this "hands off" attitude and have waded into this complex arena. The deplorable condition and draconian restrictions of some of our Nation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems. But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations. Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution, or in the case of a federal prison, a statute. The wide range of "judgement calls" that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.<sup>124</sup>

If this return to court abstention is the current trend, then there is little reason to expect a change in the foreseeable future. The composition of the Court indicates that the *Wolfish* majority will remain as the majority position.<sup>125</sup>

<sup>123</sup> 99 S. Ct. at 1874. Justice Rehnquist explained why courts should give wide-ranging deference to the institutional officials:

[J]udicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial.

*Id.* at 1879.

<sup>124</sup> *Id.* at 1886.

<sup>125</sup> To compare the makeup of the Court as the major decisions discussed in this article were handed down, see Appendix III *infra*.

The imposition of written rules, as mandated by the school and prison cases, may prompt developments within institutions that will be significant in the future. Progress has been made in getting due process inside the prison and schoolhouse gates. Now the institutions are challenged to find innovative ways of resolving their internal conflicts in a manner consistent with the underlying philosophy of the due process decisions. Even if the courts retreat from active intervention, they leave in place institutions which are responsible for living within their own rules—rules which must be fair and must be fairly implemented. Arbitrary and capricious acts will remain reviewable by the judiciary.

#### IV. PROPOSAL FOR REFORM: DUE PROCESS AS A MANAGEMENT TOOL

##### A. *Conflict Resolution*

The basic purposes of rules within any rule-governed institution are to establish the guidelines of behavior by which conflict can be avoided and to provide touchstones of mutual agreement by which conflict can be resolved. To fulfill these functions, the rules must engender a sense of legitimacy both in the party asserting the rule and in the party modifying his behavior in compliance therewith. This legitimacy can arise from three sources: (a) the consent of the governed; (b) the degree to which the rules are workable so that larger social goals can be pursued; and (c) the inherent fairness of the rules as they reflect the ability of group members to trust in equal application which assures protection of individual interests and protection of interests of the group at large. Rules tend to be conservative in their overall effect because they establish regular habits and predictable behavior and remove personality issues from routine occurrences.

If conflict does erupt within an institution functioning under rules, it must be resolved before progress can be made. In seeking resolution, three modes can be pursued. Outside authority, such as the court system, can impose resolution upon the parties. To the degree that all concerned have faith in the integrity of the outside authority, success can be achieved, particularly if the solution somehow harmonizes the divergent interests involved. For schools and prisons in the 1980s, court-imposed remedies may be less available than they have been in the past.<sup>126</sup> A second possible mode of resolution has been an

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<sup>126</sup> See text accompanying notes 85-125 *supra*. Not all commentators share this view. It has been noted:

[C]ourts are beginning . . . to take a more active interest in micro-level concerns (i.e., issues of classroom practice and management) as the awareness builds that court decisions and legislation are of little value if they are never implemented in classrooms. Hence it is likely that class action suits will have to share dockets with more suits involving specific students and classroom situations.

Duke, Donmeyer & Farman, *Emerging Legal Issues Related to Classroom Management*, 60 PHI DELTA KAPPAN 305, 305 (Dec. 1978) [hereinafter cited as

authoritarian one. In this model, one authority figure often imposes his/her will and thereby solves the problem. This can be a swift and sure method of providing rule enforcement.<sup>127</sup> However, the danger is constantly present that such acts may be arbitrary and capricious. In addition, group members' interests become adverse, and much energy can be expended in violent reaction<sup>128</sup> or passive-aggressive behavior.<sup>129</sup> The

Duke]. Although the authors anticipate an increased role of the judiciary in school matters in the future, nowhere is it clear whether they refer to federal or state courts. Since they are writing at Stanford University, one might expect they are observing California courts which may be at a more interventionist stage than the current U.S. Supreme Court.

<sup>127</sup> It has been suggested that:

There are types of authority which do not have as their sole or even principal constituent, rationality; Parents, teachers, army commanders, and above all, prison wardens have the right to depend to a large extent (though not arbitrarily) upon habit, custom, intuition, common sense not reduced to express principles, and other forms of judgment based more on experience than on logic. Life requires in some aspects another sovereign than reason. To rule is not to opine.

Nolan v. Scafati, 306 F. Supp. 1, 4 (1969), *vacated and remanded with directions*, 430 F.2d 548 (1st Cir. 1970).

<sup>128</sup> As Circuit Judge Sobeloff observed:

Experience teaches that nothing so provokes trouble for the management of a penal institution as a hopeless feeling among inmates that they are without opportunity to voice grievances or to obtain redress for abusive or oppressive treatment. It is common knowledge that many prison riots have been in protest of abuses in disciplinary cell blocks.

Landman v. Peyton, 370 F.2d 135, 141 (4th Cir. 1966).

<sup>129</sup> "A major conclusion of those who have studied the structural features of the school organization is that preoccupation with student control permeates the life of the school." Licata, *Student Brinkmanship and School Structure*, 42 EDUC. F. 345, 347 (1978). As a result, students frequently develop a skill called "brinkmanship" which has been defined as "assertive student behavior which attempts to challenge the school's authority system while avoiding its negative sanctions." *Id.* at 345. Licata finds three categories of student brinkmanship: subversive obedience, tight-ropeing, and boundary testing. He identifies these categories as follows:

Subversive obedience is rule-obeying behavior in which the student follows a rule to the letter or in an exaggerated way in order to use the organization's rules to its own disadvantage. The "class lawyer" is always ready to insist on strict enforcement of the rules at the most embarrassing time for the teacher. The "class clown" is quick to mimic a robot when the teacher asks him to stand straight. The "mock enforcer" jumps at the opportunity to repeat a teacher's reproof to a classmate.

Tight-ropeing is neither rule obeying nor rule disobeying behavior, but behavior which is difficult to define in terms of specific rules of the organization. Rule vagueness is used as a means to avoid organizational sanctions. Student coughing or laughing in an exaggerated manner is very difficult for the teacher to formally define in terms of specific rule-breaking. Does he always cough like that, the teacher wonders? Did those books fall on the floor by accident, or did the student push them

effects can be equally destructive to the authority figure; as the proverb states, "all power corrupts and absolute power corrupts absolutely."<sup>130</sup> The third mode, by far the preferred one, can be found in a self-regulatory participation of group members in goal-setting and rule-making. By involvement in the process by which the rules are created, group members have an opportunity to insure that their interests are represented and taken into account. Habits of cooperation, compromise and mutual trust, the ability to cope with ambiguity and implicit knowledge of what is required, all combine to promote an assumption that conflicts can and will be fairly resolved. This mode is a valid educational/rehabilitative tool whereby order is maintained and individual skills are developed. The effect on the individuals involved is to promote self-discipline, to reward maturity, and to enable leadership skills to develop. Responsibility for enforcement is shared by group members and officials who are now authoritative leaders rather than authoritarian ones. The distinction is that authoritative denotes possession of skills and knowledge prized by the group whereas authoritarian connotes reliance on force and power.

### B. *The Model Itself*

The first component of the model is that there must be written rules for the institution in question, rules that are generally understood by all segments of the institution. Although not arrived at by group participation, the Ten Commandments<sup>131</sup> serve as a good historical example of the importance of written rules. These rules, with their simplicity and their economy, exemplify the sense of legitimacy<sup>132</sup> requisite in a rule-governed society through their workability in preventing and resolving

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there on purpose? The successful tight-roper is careful not to leave the teacher enough evidence to answer those questions. After all, there are probably no rules against coughing, laughing, or harmless accidents.

Boundary testing is rule disobeying behavior disguised in some way so that organizational sanctions are avoided. The "student banzai" . . . is a boundary-testing act based on the rationale that massive, simultaneous rule-breaking is very difficult for the organization to control. After all, it is difficult to punish everybody, and to call attention to such collective efforts by students may result in loss of face for the teacher.

*Id.* at 346.

<sup>130</sup> Acton's classic proverb about the corrupting influence of absolute power is true of prison guards no less than of other men. In fact, prison guards may be more vulnerable to the corrupting influence of unchecked authority than most people. It is well known that prisons are operated on minimum budgets and that poor salaries and working conditions make it difficult to attract high calibre personnel. Moreover, the "training" of the officers in methods of dealing with obstreperous prisoners is but a euphemism in most states.

Landman v. Peyton, 370 F.2d 135, 140 (4th Cir. 1966).

<sup>131</sup> *Exodus* 20:3-17.

<sup>132</sup> See Part IV(A) *supra*.



conflict over the past several centuries. As they have been applied throughout history, they have illustrated a reliance upon authoritative rules, not authoritarian ones; an enforcement based on self-discipline, not external sanctions; and a universal acceptance, transcending time and personality. As institutions begin to develop a process by which new rules can be written and present rules modified, they should keep in mind that rule-making is an art form which perhaps has reached its quintessence in the Ten Commandments.

One commentator has observed that the regular, impartial and in this sense, fair, administration of law may be called "justice as regularity."<sup>133</sup> "It follows that in order to have 'regularity' there must be some rules—public substantive rules that define rights, powers, duties and obligations—procedural rules that specify how and when rights, powers, duties and obligations can be exercised."<sup>134</sup> This analysis surfaces the two major components of good rules. First, they must be substantively fair; a rule must be minimally intrusive upon the liberty, property or other fundamental interest of the individual, finding its justification in the compelling needs of the institution. Further, it must not be vague; the individual must subjectively understand that the contemplated behavior is of the proscribed type.<sup>135</sup> An example of how these substantive requirements would be applied in a school setting is provided by R. Edmund Reutter in his set of guidelines

for determining the minimum essentials for an enforceable rule of student behavior.

1. Whether it is issued orally or in writing, school authorities must take reasonable steps to bring the rule to the attention of students. A major exception is when the act for which a student is to be disciplined is obviously destructive of school property or disruptive of school operation.

2. The rule must have a legitimate educational purpose.

3. The rule must have a rational relationship to the achievement of the stated educational purpose.

4. The meaning of the rule must be reasonably clear.

5. The rule must be sufficiently narrow in scope that it does not encompass constitutionally protected activities along with those that constitutionally may be proscribed in the school setting.

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<sup>133</sup> J. RAWLS, *A THEORY OF JUSTICE* 235 (1971).

<sup>134</sup> Jackson, *supra* note 15, at 328.

<sup>135</sup> *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). The Court has set the standard for vagueness as failure "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden," *United States v. Harriss*, 347 U.S. 612, 617 (1954), and as encouraging arbitrary and erratic arrests and convictions. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

6. If the rule infringes a fundamental constitutional right of students, a compelling interest of the school (state) in the enforcement of the rule must be shown.<sup>136</sup>

A substitution of the words *prison/inmate/rehabilitative* for *school/student/educational* in the above guidelines will result in standards readily applicable in the prison context.

The implementation of the substantive component of good rules begins with the involvement of each segment of the institution in the rule-making process. This involvement is essential to give the rules that legitimacy which evolves from setting the goals which the rules are designed to effectuate. Such a shift from a custodial role to one of active participation has several benefits which accrue to the individual and, through his/her development, to the institution as a whole.

Active participation in the rule-making process is essentially training in acceptance of adult responsibilities. It will involve the individual in activities which reward his gaining of control over himself and events around him. It will make the individual responsible for his own growth and carry with it opportunities for development of self respect. Skills in communication, problem identification, and creation of alternatives will increase. Participation will add to the individual's capacity to understand ways in which perceptions and conclusions can differ among individuals and develop skills in harmonizing interests, dealing with ambiguity, identifying long term goals, and working cooperatively to achieve them.<sup>137</sup> This process may require the reevaluation of rule enforcement techniques currently in use in both schools and prisons, in particular, strip searches<sup>138</sup> and corporal punishment,<sup>139</sup> which are by

<sup>136</sup> E. REUTTER, *THE COURTS AND STUDENT CONDUCT* 6 (1975), *quoted in* Duke, *supra* note 126, at 306.

<sup>137</sup> Although this list is a compilation by the authors of this article, it was inspired by Murton, *Shared Decision-Making as a Treatment Technique in Prison Management*, 3 N. ENG. J. PRISON L. 97 (1976) and Roberts, *Children Learn Rules by Helping to Make Them*, 54 PARENTS MAGAZINE 84 (Apr. 1979).

<sup>138</sup> The destructive nature of strip searches was eloquently expressed by Mr. Justice Marshall as follows:

In my view, the body cavity searches of MCC inmates represent one of the most grievous offenses against personal dignity and common decency. After every contact visit with someone from outside the facility, including defense attorneys, an inmate must remove all of his or her clothing, bend over, spread the buttocks, and display the anal cavity for inspection by a correctional officer. Women inmates must assume a suitable posture for vaginal inspection, while men must raise their genitals. And, as the Court neglects to note, because of time pressures, this humiliating spectacle is frequently conducted in the presence of other inmates.

The District Court found that the stripping was "unpleasant, embarrassing, and humiliating." A psychiatrist testified that the practice placed inmates in the most degrading position possible, a conclusion amply corroborated by the testimony of the inmates themselves. There was

their nature so degrading as to be inimical to the trust relationship on which this model rests.

If the substantive rules meet the fairness test, procedural habits will follow. While not advocating that the formal procedural safeguards established at higher levels be brought into the daily confrontations between guard and inmate, teacher and student, the procedures proposed would require informal, but consistent, responses to confrontation which rely upon accurate fact-finding, careful documentation and predication

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evidence, moreover, that these searches engendered among detainees fears of sexual assault, were the occasion for actual threats of physical abuse by guards, and caused some inmates to forego personal visits.

Not surprisingly, the Government asserts a security justification for such inspections. These searches are necessary it argues, to prevent inmates from smuggling contraband into the facility. In crediting this justification despite the contrary findings of the two courts below, the Court overlooks the critical facts. As respondents point out, inmates are required to wear one-piece jumpsuits with zippers in the front. To insert an object into the vaginal or anal cavity, an inmate would have to remove the jumpsuit at least from the upper torso. Since contact visits occur in a glass enclosed room and are continuously monitored by corrections officers, such a feat would seem extra ordinarily difficult. There was medical testimony, moreover, that inserting an object into the rectum is painful and "would require time and opportunity which is not available in the visiting areas," and that visual inspection would probably not detect an object once inserted. Additionally, before entering the visiting room, visitors and their packages are searched thoroughly by a metal detector, fluoroscope, and by hand. Correction officers may require that visitors leave packages or handbags with guards until the visit is over. Only by blinding itself to the facts presented on this record can the Court accept the Government's security rationale.

*Bell v. Wolfish*, 99 S. Ct. 1861, 1893-94 (1979) (Marshall, J., dissenting). In this case, the holding on body cavity searches is a 5-4 decision as Justice Powell joins the dissenters on this issue:

I join the opinion of the Court except the discussion and holding with respect to body cavity searches. In view of the serious intrusion on one's privacy occasioned by such a search, I think at least some level of cause, such as a reasonable suspicion, should be required to justify the anal and genital searches described in this case. I therefore dissent on this issue.

*Id.* at 1886 (Powell, J., dissenting in part). This practice is unfortunately not limited to the prison setting but is also used by some school administrators. See *M. M. v. Anker*, 477 F. Supp. 837 (E.D.N.Y.), *aff'd*, 607 F.2d 588 (2d Cir. 1979) (per curiam).

<sup>139</sup> The results of the use of corporal punishment have been previously documented. See note 5 *supra*. "The N.E.A. (National Education Association) thinks it's ironic that physical abuse of school children is legal, while striking prisoners, military personnel and inmates of institutions is forbidden." Ramella, *The Anatomy of Discipline: Should Punishment Be Corporal?*, 67 P.T.A. MAGAZINE 24, 26 (June 1973). It may well be that although forbidden, corporal punishment is still used in the prison situation in the context of use of excessive force in enforcing institutional rules. Assault charges against corrections officers may be evidence of this phenomenon.

on reason not emotion. The confrontations that emerge in this model should be increasingly reflective of the authority shift to the population generally. Therefore, inmate may confront inmate or student may confront student about issues of disruption or disobedience which frustrate that individual's realization of institutional goals. The roles in the institution will change as guards and teachers become facilitators and enablers rather than stark authority figures. Potentially this would result in a better use of energy and resources within the institution.

This model is both practical and idealistic. It is idealistic in its reliance upon the theory of openness and participation within society as it is reflected in the American democracy. It is practical in the sense that it would reduce costs<sup>140</sup>—both human and financial—by the voluntary involvement of individuals within the institution.

Commentators have censured both prisons and schools as failures: "The ultimate problem, to paraphrase a number of experts, is that a 'prison system is the only business that succeeds by its failure.' Prisons cannot justify themselves. They are costly and destructive, and they have not served the purposes for which they were intended."<sup>141</sup> Although approaches utilized within the American penal system during the last two centuries have varied, there is abundant, irrefutable evidence that prisons have not achieved success in performing the rehabilitative function.<sup>142</sup>

Schools, supposedly preparing students for citizenship in a democratic society, among other goals, have been said to be "one of the most undemocratic places in the world."<sup>143</sup> Test scores have been declining and "the National Assessment has charted a steady decline since

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<sup>140</sup> The operation of both schools and prisons is costly. It has been suggested that it costs from \$17,000 to \$25,000 a year to incarcerate one prisoner. Potts, *Alternative Punishments for Being Poor Won't Reduce Crime: A Proposal for Non-Correctional Alternatives to Punishment*, 2 PRISON L. MONITOR 160, 160 (1979). Entire school systems have suspended operations for inability to meet payroll. Reduction in the amount of administrative and staff time spent in disciplinary efforts will result in overall savings inherent in the better use of that time in furthering educational and rehabilitative goals. Additional saving could accrue with violence and vandalism reduced.

There is genuine fear on the part of the authors that, in these times of reduced tax revenue and voter unwillingness to increase investment in schools and prisons through approval of operating levies, institutions may find themselves attempting to reduce costs by reducing staff or overcrowding the institutional population. The only foreseeable result of such attempts is an increased emphasis on institutional needs for security and order which will outbalance individual claims to due process protections. Arbitrariness will be legitimized if the institution is forced to function below minimal levels of staffing. Such occurrences are not constitutionally permissible.

<sup>141</sup> *Id.*

<sup>142</sup> Murton, *supra* note 137, at 111.

<sup>143</sup> Mullins, *Needed: A Fair Shake for Children*, TODAY'S EDUC. 80, 81 (Nov.-Dec. 1975).

the early 1970's in knowledge of the U.S. governmental system among 17-year-olds."<sup>144</sup> In the face of such failure, the search for new alternatives is a justifiable social goal.

Several experiments have already taken place which incorporate in schools one or more aspects of the model herein proposed. This process is predicated upon reevaluating the assumptions upon which old institutions were built.

In the prison area, one frequently suggested reform is that of finding alternatives to incarceration. These may take the form of "social maintenance programs designed only to assist people in learning to identify and use existing resources available to them."<sup>145</sup> Presently such programs necessarily are coercive and are provided within a prison setting.

James L. Potts, editor of the Prison Law Monitor, suggests that such programs are based on two premises: first, he sees street crime as based on poverty and second, as a result, he views it as a social, not a correctional problem. His proposal focuses on alternatives for the future which would concentrate on providing poor people who populate prisons with skills and opportunities which would help them function successfully in the larger society upon their release. Mainstream people learn these skills as part of their socialization process. The crucial skills would include communication skills, goal-setting, and the ability to identify contact persons in the larger community.<sup>146</sup>

The need for skill-building argues strongly for the inclusion of inmates in program planning. Mr. Potts, formerly an inmate himself, serves as a good example of a person who is now earning a living utilizing skills acquired in his prison days.

Professor Murton, who views shared decision-making as a treatment modality<sup>147</sup> in which the two main variables are representation and power, argues strongly for increased democratization and increased involvement of inmates in the management of institutions. Murton found that most prisons which have innovated by the formation of inmate councils have utilized one of three models, labeled "Token," "Quasi-Governmental" and "Governmental."<sup>148</sup> Additionally, Murton developed an idealized fourth model, which he called "Full Participation." This model, with an extensive amount of responsibility in decision-making shared by inmates, staff and administrators of the prison, was deemed by Murton to be superior; the formation of the structure, duties, and

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<sup>144</sup> Remy, *Basic Citizenship Competencies: Guidelines for Educators, Policy makers, and Citizens*, 5 MERSHON CENTER Q. REP. 1, 1 (1979).

<sup>145</sup> Potts, *supra* note 140, at 161.

<sup>146</sup> *Id.*

<sup>147</sup> See Murton, *supra* note 137.

<sup>148</sup> *Id.* at 101.

goals of the council is a joint effort, never imposed from the top.<sup>149</sup> Although Professor Murton found no pure examples of this model, he did identify the work of four prison reformers as including various basic elements of this Full Participation model. He admits that inmate council programs have failed up to this point, but he attributes this to the fact that too little power has been given to the inmates and staff. More democracy, rather than less, is needed for success.

A highly successful program in shared decision-making was implemented in the Berkshire County (Massachusetts) House of Correction in Pittsfield, Massachusetts.<sup>150</sup> In this program, a university and a correctional facility worked together to offer inmates positive opportunities for growth inside and outside the institution. Where formerly the jail had been operated in a typically hierarchical fashion, closed from outside scrutiny and accountability, decision-making became shared, and increased visibility led to heightened accountability.

The program staff helped the institution develop mechanisms for more effective policy-making which would involve all members of the correction community interacting in nontraditional roles. A system of committees and boards was created including a "Governance Board," the objective of which was the development of shared power and shared decision-making within the jail.<sup>151</sup> Although the program left veto power in the hands of the sheriff, he never utilized that power to frustrate the will of the majority so far as specific programs were concerned.<sup>152</sup> Once the mechanisms for governance, decision-making and problem-solving were in place, changes in the roles of the participants occurred.<sup>153</sup>

The governance board created a disciplinary board in response to a proposal generated by an inmate study group. The board, which consisted of four corrections officers elected by the inmates, was a response to the previous practices of disparate charging and sentencing by in-

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<sup>149</sup> *Id.* at 104-05.

<sup>150</sup> See generally Cohen, *Jail Reform: An Experiment That Worked?*, 12 CRIM. L. BULL. 758 (Nov.-Dec. 1976). The program was called the Model Education Program [hereinafter referred to as MEP].

<sup>151</sup> *Id.* at 765-66.

<sup>152</sup> *Id.* at 768.

<sup>153</sup> Those correctional officers who had come to work simply to "do time," took a new interest in their own development and in the operation of the jail. The harshness of the institution was visibly softening under the impact of former adversaries meeting in settings that required collaboration. Ideas were being dealt with on the basis of merit and the persuasiveness of a presentation and not simply on their source. What was unthinkable prior to MEP—officers and inmates deciding on how aspects of the jail would be run—became an everyday occurrence. Process and structure alone, however, would not be sufficient to account for the high levels of inmate and officer enthusiasm and participation. Each group could define something in MEP of benefit to them, and if an individual could not, that individual likely stayed out of the programs.

dividual officers. It shows how a due process approach has been used to reduce discretion and arbitrariness, a due process approach conceived of and implemented by the inmates themselves.<sup>154</sup> In its final form, this became a program in which community/prison barriers broke down significantly. Staff became better trained, inmates gained skills and jobs, the community came into the prison, and inmates successfully reentered the community. Above all of these significant improvements stood the fact that inmates gained even greater power within the institution. Programs such as these, involving at least segments of our model, show the feasibility of such an approach.

Schools have also implemented innovative programs which contain aspects of our model. The Lewiston-Porter Central School in Youngstown, New York began the system of change through the establishment of the Lew-Port System Redesign Committee.<sup>155</sup> This was a sixty member board on which students sat with equal power as an integral part of the planning process. This committee was charged with "the task of assessing the community's educational needs, suggesting methods of improving the ability of the school district to meet the needs, developing a mission statement as to district goals and district general objectives and recommending the approach to these matters to the board of education."<sup>156</sup> As well as serving on this system-wide committee, students assumed decision-making roles within individual schools. An example was the creation of a student-faculty committee which held regular meetings to provide an open discussion forum with the dual purposes of opening communication lines and solving minor difficulties before they grew into major confrontations.<sup>157</sup>

Another creative use of students in the decision-making process occurred in Staples High School, Westport, Connecticut.<sup>158</sup> In this situa-

<sup>154</sup> *Id.* at 775.

Topics such as the quality of food and hours spent by all inmates in lockup now are reviewed by the board. A disciplinary board, composed of four officers elected by the inmates, has been functioning since the fall of 1975. Previously, individual officers were responsible for disciplinary matters, and this resulted in disparate charging and sanctioning practices. The governance board created the disciplinary board in response to a proposal generated by an inmate study group.

*Id.*

<sup>155</sup> Herman, *Students' Rights: A Program That Works*, THE CLEARING HOUSE 54 (Sept. 1973).

<sup>156</sup> *Id.* at 54.

<sup>157</sup> *Id.* at 55. One result of this committee was the creation of written rules. These rules were formulated as "students' rights and responsibilities" rather than as a more traditional disciplinary code.

Herman takes a very activist posture: "Students are intelligent, articulate, service-minded, and positively realistic in their approach to problem solving. Involve them." *Id.* at 58.

<sup>158</sup> See generally Calkins, *Are Students Involved in Deciding Crucial Issues?*, 58 NAT'L A. SECONDARY SCH. PRINCIPALS BULL. 13 (Oct. 1974).

tion, school administrators, realizing that they had to take prudent but definite risks, involved young people in crucial areas of the school decision-making process. Based on a philosophy that schools must be humane and democratic,<sup>159</sup> the system put these principles into action. As a result of this shared power, significant changes occurred in the policies and practices of the school.<sup>160</sup>

The Staples High School experience began in the early 1970s. It is worthy of note that although it predates *Goss v. Lopez*<sup>161</sup> and the Freedom of Information Act,<sup>162</sup> it anticipates the content of both in the changes it produced. Another school system that shared this view of students as change agents was the Pike County High School of Brundidge, Alabama.<sup>163</sup> Here, the school system empowered students to create a program to solve the drug problem at the high school by involving them in the power structure of the school. The details of the pro-

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<sup>159</sup> Calkins observed:

If the school is to be humane and democratic, students should be involved in the decision-making process. If that is not the intent, it really makes little difference what is done. Unless the students are given their fair share of power, neither humanization nor democratization is possible. What exists otherwise is benevolent despotism at the worst, or condescending paternalism at best.

*Id.* at 15.

<sup>160</sup> The following is a partial list of the significant changes that occurred:

Some of these actions were: elimination of "tracking" in all subjects . . . elimination of all bells . . . elimination of homerooms and systematic attendance taking on a daily basis . . . provision of a system of shared responsibility between the home and school for attendance and progress . . . elimination of mandatory study halls . . . creation of option areas for serious and quiet study, talk-study tutorials, smoking, and blowing off steam . . . opening up the cafeteria as a coffee and doughnut shop for breakfast and provision for pretzel stands, soda machines, snack machines . . . provision for a suspension review board of students and faculty as an initial step in eliminating suspension . . . provision of complete freedom of campus and buildings as long as classes and rights of others were not interfered with . . . initiation of an open-ended schedule for all students which permitted them to come when their first class began and leave when the last class was over . . . provision for faculty professional self-evaluation through a program of professional development and appraisal . . . elimination of prerequisites for participation in extracurricular activities . . . subdivision of courses into a variety of elective units which students could select to build a year's work . . . expansion of opportunities in individualized programs . . . provision for an uncensored school newspaper . . . provision of students' access to their own records.

*Id.* at 17-18.

<sup>161</sup> 419 U.S. 565 (1975).

<sup>162</sup> 5 U.S.C. § 552 (1976).

<sup>163</sup> See generally Wright, *Students Can Be Effective Change Agents*, 63 NAT'L A. SECONDARY SCH. PRINCIPALS BULL. 44 (Feb. 1979).



gram are not important for purposes of this article. What is significant is that it was successful and that the "changes and actions [were] made *by students and for students*."<sup>164</sup>

## V. CONCLUSION

People who have worked in schools and prisons<sup>165</sup> have frequently been adversely affected by the misuse of energies within these institutions. Each segment of the institutional population possesses skills, values, and information which could be tapped in order to provide more creative methods for the institution to use in achieving its goals. Seldom do programs emerge utilizing these talents.<sup>166</sup> People confined in these institutions have had little say in defining them. Reformers working within the institutional structure have frequently been not well received, even to the point of losing their jobs.<sup>167</sup>

Another recurring observation, from within and without, is that these institutions lack control. This lack of control may stem from the failure of the institutions to articulate clearly their own goals so that, as a result, daily matters become the central issues of their operation. Once mundane matters become central, the client population responds with creative means of violating the rules, which forces the institution to respond with greater measures of control.<sup>168</sup> The strip search enters the school; some prisoners spend their entire term in solitary confinement. The ultimate result of this concern with control is the alienation of both

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<sup>164</sup> *Id.* at 46 (emphasis in original).

<sup>165</sup> The authors of this article have drawn heavily upon their own experiences in such institutions. After several years as public school teachers, they have been active recently in designing curricula used in the instruction of inmates, corrections officers, and police officers. They have provided instruction in the prison setting and worked with corrections officers in creating rules responsive to due process mandates.

<sup>166</sup> For exceptions to this statement, see the programs discussed in Part IV(B) *supra*.

<sup>167</sup> Murton discussed the consequences of the efforts of four prison wardens to implement innovative reforms in these terms: "Perhaps the only disadvantage of their innovations was to the wardens themselves, for each man suffered personally for his efforts. Revolutionary attempts to overthrow oppression and to inculcate honesty and genuine concern were rewarded in all cases, with the professional demise of the reformer." Murton, *supra* note 137, at 105.

<sup>168</sup> A typical response is the following:

When student behavior problems have perplexed educators in the past, they typically have responded by creating more rules or making punishments for breaking existing rules more harsh. These standard approaches have not been very effective. A recent study of California alternative high schools suggests, in fact, that fewer rules may be associated with reduced behavior problems. Where relatively few rules exist, they may tend to be taken more seriously by students and teachers.

Duke, *supra* note 126, at 306. We would suggest that the remedy of reducing the number of rules is worthy of careful consideration of any school or prison.

staff and population.<sup>169</sup> In addition, society is dismayed both at the rule-breaking behavior, such as violence and vandalism, and at the institutions' failure to prepare their populations to productively reenter the larger society.

The model herein proposed with its emphasis on written rules is actually an extension of self-government within the institution and accountability of the institution to the larger society. Due process concerns of fairness create a self-perpetuating cycle: the content of the rules must be fair and reflective of group goals; in addition procedural rules enforcing or implementing substantive rules must be fair; procedures must be established to provide opportunities for change in the goals; change in goals must be reflected in amended substantive rules; and so the process continues.

At each point, supervision is necessary. This supervision within the institution is provided by all segments of the population as they supervise each other with built-in mechanisms of checks and balances. Externally, society at large is able to examine the written rules and is obligated to ascertain that these are the rules under which the institution actually operates. Through school and prison inspections by boards or agencies created for this purpose, this monitoring function can be effectuated. Courts can assist when necessary through their supervisory powers.

Throughout this article, the authors have examined the impact of various United States Supreme Court decisions upon these institutions. Although the Court seems now to be removing itself from intervention in areas which it views as administrative, it leaves in place due process protections for students and inmates. The challenge of the 1980s to the institutions is to make these rules an organic part of institutional growth. In the process, skills of documentation, fact-finding, goal-setting and rule-making will lead the institutions to a healthy exploration of alternative management styles. Shared decision-making as a guarantee of fundamental fairness is crucial to the evolution of a successful management method.

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<sup>169</sup> An example of the alienating effect of solitary confinement is found in J. Anthony Kline's remark that "while some prisoners must be isolated, only five percent of the men who go into the Hole for the first time have any previous history of violence or assault. However, . . . if you put a man in the Hole for any length of time, he becomes violent. He becomes an animal." *The Hole*, THE NATION 582 (Dec. 7, 1974). Mr. Kline was the chief attorney in a suit against Raymond K. Procunier, California's Director of Corrections, challenging punishment by confinement in the Hole. The challenge was unsuccessful.

## APPENDIX I

VERBATIM RECORD OF APPEAL TO BOARD OF EDUCATION			X							
STUDENT/FACULTY COMMITTEE REVIEW OF SCHOOL RULES AND REGULATIONS	X		X		X					
ESTABLISHED GRIEVANCE PROCEDURE			X		X	X				
DEMERIT SYSTEM				X						
REPRESENTATION ALLOWED AT SUSPENSION/EXPULSION LEVEL			X	X		X	X	X	X	X
EMERGENCY REMOVAL PROCEDURE		X	X	X	X		X	X	X	X
EXPULSION APPEALS TO BOARD OF EDUCATION		X	X	X	X	X	X	X	X	X
EXPULSION PROCEDURE BY SUPERINTENDENT WITH DUE PROCESS		X	X	X	X	X	X	X	X	X
APPEALS PROCEDURE FOR SUSPENSION		X	X	X	X	X	X	X	X	X
SUSPENSION PROCEDURE WITH DUE PROCESS		X	X	X	X	X	X	X	X	X
MINIMUM DUE PROCESS PROCEDURE	X									

Lakewood High School

Parma City School District

Cleveland Heights-University Heights

Mayfield High School

Shaw High School  
East Cleveland

Cleveland Public Schools

South Euclid-Lyndhurst  
City Schools

Berea City School District

Shaker Heights City School  
District

Detroit Public Schools

## APPENDIX II

BOARD PUNISHMENT Record Kept	Hearing		Hearing	Hearing
SUMMARY PUNISHMENT Record Kept	Without Hearing		Without Hearing	X
INMATES RECEIVE NOTICE OF RULES AND RIGHTS	X	X	X	X
APPEAL PROCEDURE	X	None Listed		X
CONFINED TO CELL OR DARKER CELL Not > 1 Week		X		
SOLITARY CONFINEMENT Not > 48 Hours		X		
SHERIFF DETERMINES		X		
PROCEDURAL DUE PROCESS	X	X	X	X

Nebraska

Trumbull  
CountyCuyahoga  
CountyEast Cleveland  
Municipal Jail

## APPENDIX III

MORRISSEY V. BREWER

(1971)

## MAJORITY

\*Rehnquist  
 \*Burger  
 Stewart  
 White  
 \*Blackmun  
 \*Powell

## MINORITY

Brennan  
 Marshall  
 Douglas

WOLFF V. McDONNELL

(1974)

## MAJORITY

White  
 \*Rehnquist  
 \*Powell  
 \*Blackmun  
 \*Burger  
 Stewart

## MINORITY

Marshall  
 Brennan  
 Douglas

GOSS V. LOPEZ

(1975)

## MAJORITY

White  
 Douglas  
 Brennan  
 Stewart  
 Marshall

## MINORITY

\*Powell  
 \*Burger  
 \*Blackmun  
 \*Rehnquist

INGRAHAM V. WRIGHT

(1977)

## MAJORITY

\*Powell  
 \*Burger  
 \*Blackmun  
 \*Rehnquist  
 Stewart

## MINORITY

White  
 Brennan  
 Marshall  
 Stevens

BELL V. WOLFISH

(1979)

## MAJORITY

\*Rehnquist  
 \*Powell  
 \*Burger  
 Stewart  
 White  
 \*Blackmun

## MINORITY

Marshall  
 Stevens  
 Brennan

## \* NIXON APPOINTEES