Journal of Criminal Law and Criminology

Volume 63 | Issue 2 Article 4

1972

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THE JOURNAL OF CRIMINAL LAW, CRIMINOLOGY AND POLICE SCIENCE
Vol. 63, No. 2

Printed in U.S.A.

CRIMINOLOGY

JUDICIAL INTERVENTION IN PRISON DISCIPLINE

HARVARD CENTER FOR CRIMINAL JUSTICE*

In recent years there has been growing attention to the question of prisoners' rights and to problems relating to discretion in prison administration. The catastrophe at Attica greatly increased the concern over conditions and inadequacies in our nation's correctional institutions.[1]

One crucial aspect of correctional problems—inmate discipline—was faced in a consent decree issued on March 11, 1970, by Federal Judge Raymond J. Pettine.[2] In *Morris v. Travisono*,[3] Judge Pettine established comprehensive procedural regulations for the handling of disciplinary matters in the Rhode Island Adult Correctional Institution (ACI). A short time after the entry of that decree, the Center for Criminal Justice at Harvard Law School agreed to study the impact of the *Morris* decision within the prison.[4] This article documents and analyzes the results of that study.

There were several reasons for the study. The recent furor over the treatment of inmates,[5] much of it centering on the problems of inmate discipline, indicated a definite need for an objective investigation of prison disciplinary practices. Moreover, while alleged abuses of discretion by correctional administrators have become increasingly a concern of the courts, in formulating their decisions they have available little empirical information and analysis treating the central problem of balancing prison administrative needs with inmate rights.

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* This article is the result of research undertaken in the summer of 1970 by the Center for Criminal Justice of the Harvard Law School. Edward J. Dauber, Harvard Law School '69, had continuing responsibility for the project and the preparation of this article. Mr. Dauber, a staff member of the Center until July, 1971, is now a member of the faculty of the Institute of Criminology and Criminal Law, University of Tel Aviv, Israel. William Falik, Harvard Law School '72, did field work and wrote and edited much of the article. The planning for the project and the analysis of the data were directed by James Vorenberg, Professor of Law at Harvard Law School and Director of the Center for Criminal Justice, and Lloyd E. Ohlin, Professor of Criminology at Harvard Law School and Research Director of the Center. Elinor Halprin, a staff member of the Center, assisted with the writing and did much of the editing.

In addition, Kenneth McNerny, Harvard Law School '72, Charles Hollen, Harvard Law School '71, and Alma Young, then a staff member of the Center, did field work and contributed material for the article. Comments and suggestions were received from Paul Nejelski, then Assistant Director of the Center, and Bertram Griggs and Gary McCune, both Fellows of the Center for Criminal Justice in 1970–71. Mr. Griggs is now Superintendent of the California Institution for Men at Chino, California, and Mr. McCune is Associate Warden at the Federal Correctional Institution at Lompoc, California.

[1] N. Y. Times. Sept. 14, 1971, at 1, col. 8.

[2] 310 F. Supp. 857 (D.R.I. 1970).

[3] *Id.*

[4] The Center began its study in June, 1970, with the primary field work conducted from June to August, 1970. A variety of research techniques were employed: (1) A sample of 460 disciplinary records from both the maximum and medium-minimum facilities were examined, 263 from maximum covering the period from July, 1969, to October, 1970, and 194 from medium-minimum covering the January, 1968–December, 1969 period. These records were chosen because they were readily available at the prison, and because they covered periods both before and after the entry of the *Morris* decree. (2) Disciplinary and classification hearings were observed during the summer of 1970. Of the 163 hearings monitored, 58 were disciplinary proceedings. (3) A sample of sixty inmates was interviewed. (4) Staff members were interviewed. (5) Related court proceedings were monitored.

[5] During the past few years, there have been large numbers of inmate protests, strikes, and rebellions, of which Attica was certainly the most disastrous. Litigation dealing with matters of internal prison administration has proliferated and model bills of rights for inmates have cropped up throughout the country. In addition, legal journals and other media have given prison problems increasing attention. *See, e.g.*, Hirschkop & Milleman, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969); Kimball & Newman, *Judicial Intervention in Correctional Decisions: Threat and Response*, 14 CRIME & DELIN. 1 (1968); Kraft, *Prison Disciplinary Practices and Procedures: Is Due Process Provided?*, 47 N.D.L. REV. 9 (1970); Rubin, *Developments in Correctional Law*, 16 CRIME & DELIN. 185 (1970); Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights in Litigation*, 23 STAN. L. REV. 473 (1971); Comment, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841 (1971). Note, *Administrative Fairness in Corrections*, 1969 Wis. L. REV. 587.

I. The Courts and the Prisons—an Overview

Judicial intervention is a recent phenomenon in the correctional field. The judiciary has traditionally hesitated to become involved in cases concerning the administration of internal prison affairs. Typical of such judicial restraint was the Supreme Court's statement that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." [6] The courts felt obliged to defer to the greater expertise which prison administrators were presumed to have in these matters.[7] Nor was the judiciary eager to undertake the burden of continuing supervision of prison administration.[8]

In recent years, however, the courts have replaced this passive restraint with cautious scrutiny and intervention. This reversal of the traditional stance was heralded by the Sixth Circuit's now-famous dictum that "[a] prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law." [9] Originally, courts would only depart from the hands-off doctrine when they found the prison's actions to be arbitrary or capricious, [10] but eventually they began to consider challenges to prison officials' exercise of traditional powers.[11]

A summary review of recent judicial decisions concerning prison discipline and inmate rights will place the *Morris* decision in its proper developmental context.[12] A fundamental decision in this evolution was *Ex parte Hull*,[13] in which the Supreme Court declared that prison officials could not deny inmates access to the judicial process. This critical right of access[14] has since been extended so as to invalidate prison regulations which placed excessive limitations on the preparation of legal documents,[15] on the types of library materials available,[16] and on the assistance of jail-house lawyers.[17]

Moreover, courts have recently intervened vigorously when correctional officials interfered with inmates' fundamental first amendment rights. Fear of institutional disruption, often posited as a determinative justification for limiting prisoners' rights,[18] was found insufficient to override an inmate's right to exercise his freedom of religion, in the absence of "a clear and present danger of a breach of prison security or discipline or some other substantial interference with the orderly functioning of the institution." [19] Courts have upheld the right to receive religious publications, [20] correspond with ministers to obtain spiritual advice,[21] and meet together to worship.[22] Inmates have attempted to secure freedom from institutional censorship and interference with correspondence,[23] and to establish a right to adequate

[6] Price v. Johnston, 334 U.S. 266, 285 (1948).

[7] *See, e.g.*, United States *ex rel.* Morris v. Radio Station WENR, 209 F.2d 105 (7th Cir. 1953).

[8] *See, e.g.*, Stroud v. Swope, 187 F.2d 850 (9th Cir.), *cert. denied*, 342 U.S. 829 (1951): "We reject the argument that any such burden of supervision may lawfully be imposed upon, or assumed by, the courts." 187 F.2d at 851.

[9] Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944).

[10] Conklin v. Wainwright, 424 F.2d 516 (5th Cir. 1970), *cert. denied*, 400 U.S. 965 (1971).

[11] *See* Kimball & Newman, *supra* note 5, at 3.

[12] For an extensive account of judicial intervention in prisons, *see* Kimball & Newman, *supra* note 5; Turner, *supra* note 5; Jacob, *Prison Discipline and Inmate Rights*, 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 227 (1970).

[13] 312 U.S. 546 (1941). "[T]he state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." *Id.* at 549.

[14] *See* Stiltner v. Rhay, 322 F.2d 314, 316 (9th Cir. 1963): "[R]easonable access to the courts is basic to all other rights . . . , for it is essential to their enforcement."

[15] *See, e.g.*, Sigafus v. Brown, 416 F.2d 105 (7th Cir. 1969).

[16] *See, e.g.*, Gilmore v. Lynch, 319 F. Supp 105 (N.D. Cal. 1970), *aff'd per curiam sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971).

[17] Johnson v. Avery, 393 U.S. 483 (1969) (If a lawyer is not available, a prisoner has a right to ask a fellow inmate to assist him in formulating a plea for relief).

[18] Cooper v. Pate, 324 F.2d 165 (7th Cir. 1963), *rev'd* 378 U.S. 546 (1964) (Court took judicial notice of studies showing that Muslims cause trouble in prison, with violence as a likely consequence).

[19] Long v. Parker, 390 F.2d 816, 822 (3d Cir. 1968). *But see In re* Ferguson, 55 Cal. 2d 663, 361 P.2d 417 (1961).

[20] *See* Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969).

[21] *See id. See also* Brown v. McGinnis, 10 N.Y.2d 531, 180 N.E.2d 791, 225 N.Y.S.2d 497 (1963).

[22] Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967); *see* Shaw v. McGinnis, 14 N.Y.2d 864, 200 N.E.2d 636, 251 N.Y.S.2d 971 (1964).

[23] Courts are divided as to whether prison officials should be permitted to open legal correspondence. Most courts would probably permit this procedure, but some courts protect confidentiality, especially since prison officials may be the defendants in upcoming litigation. *See* Marsh v. Moore, 325 F. Supp. 392 (D. Mass. 1971); Peoples v. Wainwright, 325 F. Supp. 402 (M.D. Fla. 1971); Smith v. Robbins, 328 F. Supp. 162 (D. Me. 1971) (can open mail from an attorney to inspect for contraband only in prisoner's presence). *See also* Palmigiano v. Travisono, 317 F. Supp. 776, 785–91 (D.R.I. 1970) (search warrant required before inmate outgoing mail can be opened).

medical treatment,[24] conjugal visits,[25] and racial integration of prison and jail facilities.[26]

With increasing frequency prisoners' claims have focused on the internal prison disciplinary process.[27] Formerly, courts had held that inmate discipline was a matter of administrative discretion with which they would not interfere.[28] Despite inmate complaints of cruel and unusual punishment, courts had upheld practices such as whippings with cat-o-nine tails,[29] other forms of corporal punishment,[30] segregation,[31] and solitary confinement.[32] Recently, however, courts have granted relief from these and similar punishments. In *Jackson v. Bishop*,[33] for example, Judge Blackmun, then speaking for the Eighth Circuit Court of Appeals, enjoined any use of the strap or any other corporal punishment as violative of the eighth amendment. Other courts have recently enjoined the use of "dry" cells[34] and "strip" cells which did not meet cleanliness standards.[35] Indeed, some courts have gone even further. In *Holt v. Sarver*,[36] the federal district court declared that conditions in the Arkansas penitentiary system were so bad that any confinement of persons there violated the eighth amendment's prohibition against cruel and unusual punishment.

This new judicial inclination toward intervention has also been extended to abuses of the prison disciplinary process. To date, several federal decisions have been concerned with the promulgation of broad procedural rules in this area. In *Sostre v. Rockefeller*,[37] Judge Motley responded to the segregation of an inmate in a form of solitary confinement for over one year by imposing requirements of written notice, a recorded hearing before a disinterested official, representation by retained counsel or an appointed counsel-substitute at the disciplinary hearing, direct and cross-examination of witnesses, and a decision supported by a written rationale. The Second Circuit reversed on appeal, reasoning that Judge Motley was wrong to conclude that each of the procedural elements incorporated in her injunction was constitutionally required. The court of appeals did recognize, however, that punishment probably could not be imposed without satisfying a prisoner's right to confront his accusers, to be informed of evidence against him, and to a reasonable opportunity to explain his actions.[38]

[24] Inmates are entitled to medical care while in prison, Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966), but no judicial relief will be given if the prisoner disagrees with the treatment chosen by the prison physician, Coppinger v. Townsend, 398 F.2d 392 (10th Cir. 1968), if the treatment has been delayed, Mayfield v. Craven, 433 F.2d 873 (9th Cir. 1970), or even if gross negligence by the physician is charged, Owens v. Alldridge, 311 F. Supp. 667 (W.D. Okla. 1970). Only treatment which is not recognized by any medical authority will provoke judicial intervention, Ramsey v. Ciccone, 310 F. Supp. 600 (W.D. Mo. 1970); Veals v. Ciccone, 281 F. Supp. 1017 (W.D. Mo. 1968). However, if there is a difference of opinion between the physician and prison officials, the officials have the burden of proving that their purposes could not be adequately served without jeopardizing the patient's health, Sawyer v. Sigler, 320 F. Supp. 690 (D. Neb. 1970), *aff'd*, 445 F.2d 818 (8th Cir. 1971).

[25] *See* Payne v. District of Columbia, 253 F.2d 867 (D.C. Cir. 1958).

[26] *See* Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1967) (per curiam); Montgomery v. Oakley Training School, 426 F.2d 269 (5th Cir. 1970); Board of Managers of Arkansas Training School v. George, 377 F.2d 228 (8th Cir. 1967). *Cf.* Dixon v. Duncan, 218 F. Supp. 157 (E.D. Va. 1963).

[27] While we have found no case challenging the types of misconduct for which an inmate may be disciplined, there have been numerous suits challenging the legitimacy of the punishment given and the procedures employed in arriving at disciplinary determination. *See, e.g.*, Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (5th Cir. 1971) (class action under eighth and thirteenth amendments); Graham v. Willingham, 384 F.2d 367 (10th Cir. 1967) (segregated confinement alleged to be cruel and unusual punishment); United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956) (action for damages).

[28] *See, e.g.*, Williams v. Steele, 194 F.2d 32 (8th Cir. 1952); United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956); Graham v. Willingham, 384 F.2d 367 (10th Cir. 1967).

[29] *In re* Candido, 31 Hawaii 982 (1931).

[30] *See* Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965) (whipping is not cruel and unusual punishment per se, but corporal punishment must not be excessive and must be applied by recognizable standards); United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956) (inmate may have a state cause of action for beatings by prison officials, but no federal right has been violated).

[31] Graham v. Willingham, 384 F.2d 367 (10th Cir. 1967).

[32] Krist v. Smith, 309 F. Supp. 497 (S.D. Ga. 1970), *aff'd*, 439 F.2d 146 (5th Cir. 1971).

[33] 404 F.2d 571 (8th Cir. 1968).

[34] *See* Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969).

[35] *See* Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

[36] 309 F. Supp. 362 (E.D. Ark. 1970).

[37] 312 F. Supp. 863 (S.D.N.Y. 1970), *modified sub nom.* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, —U.S.— (1972) *Cf.* Burns v. Swenson, 288 F. Supp. 4 (W.D. Mo. 1968), where the court approved new prison disciplinary procedures as constitutionally sufficient. In a subsequent modification, the court withdrew the approval and left the issue undecided. 300 F. Supp. 759 (W.D. Mo. 1969).

[38] Sostre v. McGinnis, 442 F.2d 178, 198 (2d Cir. 1971), *cert. denied*, —U.S.— (1972).

In *Nolan v. Scafati*,[39] Judge Wyzanski declared in dictum that due process required

> that before serious penalty is imposed ... the authorities must (1) advise the prisoner of the charge of misconduct, (2) inform the prisoner of the nature of the evidence against him, (3) give him an opportunity to be heard in his own defense, and (4) reach its determination on the basis of substantial evidence.[40]

The First Circuit remanded on appeal, avoiding the determination of precisely which procedural safeguards were necessary for such disciplinary action.[41] More recently, however, two other district courts have imposed similar procedural safeguards on prison disciplinary hearings.[42] Whether or not these opinions are affirmed on appeal, or follow the decisions in *Sostre* and *Nolan*, the cautious attitude of the Second Circuit with regard to judicial intervention in prison disciplinary processes is worthy of note:

> It would be mere speculation for us to decree that the effect of equipping prisoners with more elaborate constitutional weapons against the administration of discipline by prison authorities would be more soothing to the prison atmosphere and rehabilitative of the prisoner or, on the other hand, more disquieting and destructive of remedial ends. This a judgment entrusted to state officials, not federal judges.
>
> We are particularly unwilling to interfere with state administrative processes when reliable, detailed information or empirical studies are as scanty as they are on the subject of prison disciplinary procedures.[43]

Even where the courts do intercede, the effects of judicial intervention may not always be salutary. Prison officials may view judicial involvement as a serious threat to their authority.[44] Moreover, a decision adverse to the prison administration may create a new assortment of disciplinary problems, by undermining inmate respect for prison officials. Inmates, having the court's sympathy, may think that the ultimate arbiter of the disciplinary process is the court and not the prison officials. Consequently inmate discipline as well as staff morale may decline substantially.

We shall examine below the extent to which these detrimental effects were experienced at the Rhode Island Adult Correctional Institution after the entry of Judge Pettine's decree in *Morris*. In addition, we shall consider the difficulties of insuring compliance with a judicial decree—a task which may require extensive judicial supervision. Given the present overcrowding of court dockets, and the limitations on judicial time, one must ask whether such court supervision is an efficient or even practicable expenditure of judicial resources.

II. The *Morris* Case and the Rhode Island Correctional Institution—The Setting

The litigation in the case of *Morris v. Travisono*[45] grew out of a request by inmate Morris for investigation of conditions at the Behavior Control Unit (BCU)[46] in the Adult Correctional Institution (ACI), where he was incarcerated. As a result of that investigation, Rhode Island Legal Services attorneys applied to Judge Pettine for immediate relief for twenty-four inmates, who had been confined to the BCU primarily because they had participated in an inmate strike, and who were, it was alleged in the complaint, living in conditions so polluted with filth, rotten food, and human excrement as to be a severe health hazard. After obtaining an agreement which resulted in the removal of the immediate health hazard,[47] Rhode Island

[39] 306 F. Supp. 1 (D. Mass. 1969) (Petitioner Nolan had asked for the right to counsel, cross-examination, and to call witnesses. Judge Wyzanski ruled that these specific safeguards were not constitutionally required and that the interest of security in preserving the authority of prison officials in the maintenance of prison discipline generally outweighed whatever advantages might attend the granting of such rights).

[40] *Id.* at 3.

[41] 430 F.2d 548 1st Cir. (1970).

[42] Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971) (When accused of an offense that could result in criminal penalties, prisoner must be given *Miranda* warnings, counsel, and the right to call and cross-examine witnesses. When serious internal sanctions could be imposed, prisoner has a right to detailed notice seven days before a hearing before an impartial fact-finder who is not a material witness or a member of a reviewing authority, to counsel or prison-appointed counsel-substitute, to call and cross-examine witnesses, to a written decision, and to notice of appeal procedures, where permitted); Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971) (Within 48 hours of the offense, the prisoner should be given notice of a hearing to be held within 72 hours of the offense before an impartial tribunal, at which voluntary inmate or staff assistance will be available. For minor infractions, a written summary of the proceedings and reason for decision will be provided, with a right to appeal within three days. For major violations, witnesses may be called and cross-examined if the tribunal thinks this is practical and relevant. A written report and decision based on substantial evidence will be provided and the warden will review all cases involving major violations).

[43] Sostre v. McGinnis, 442 F.2d 178, 197 (2d Cir. 1971), *cert. denied*, —U.S.— (1972).

[44] *See* Kimball & Newman, *supra* note 5, at 4.

[45] 310 F. Supp. 857 (D.R.I. 1970).

[46] The BCU is a detention facility segregated from the rest of the Rhode Island institution.

[47] 310 F. Supp. at 858.

Legal Services amended and expanded their complaint so that it constituted a broad attack upon the disciplinary procedures at the ACI.[48] Finally, after weeks of negotiation by the parties and consideration by the court, a consent decree was entered by Judge Pettine based on a proposed draft of "Regulations Governing Disciplinary and Classification Procedures" submitted and agreed to by the parties.[49]

The ACI is the only prison in the State of Rhode Island for adult male convicts, both short-term and long-term offenders. It is comprised of a Maximum Custody Facility, Medium and Minimum Custody Facility, Admission and Orientation Unit, Awaiting Trial Unit, and the Work Release Unit.[50] Judge Pettine's order applied to all inmates incarcerated after conviction, that is, to all but those in the Awaiting Trial Unit.[51] Approximately 360 inmates are affected by the order at any one time.

III. Findings—The Procedural Model

Judge Pettine's consent decree was aimed at insuring fairness in the prison's disciplinary proceedings[52] by establishing a variety of procedural safeguards. This "procedural due process" [53] approach is one which many courts have taken in attempting to balance the need for administrative discretion with the individual's right to protect his interests from governmental interference.[54] In this section, we shall examine the *Morris* order's major procedural provisions and, with respect to each of them, consider the following questions:

1. What was the situation at the ACI with regard to the particular problem prior to the entry of the order?
2. What were the explicit provisions of the order which were designed to meet the particular problem area?
3. What effect did the pertinent provision of the order have? To what extent was the provision implemented?
4. Could the specific provision have been improved to better meet this problem area?
5. What alternative means are available to deal with the problem?

A. *Notice of the Charges*

For the initiation of the disciplinary proceedings, the order requires that an inmate violation report be completed which details the alleged violation, and that both oral and written notice be given to the inmate of the disciplinary infraction with which he is charged. Notice is required, apparently not only to establish the precise nature of the offense and to inform the inmate fully of the charges, but also to give him an opportunity to prepare a defense.[55]

These notice provisions met with substantial compliance.[56] The violation report form serves as the foundation for the entire proceeding and was almost always filled out.[57] In the vast majority of

[48] The amended complaint was filed as a class action on behalf of all the prisoners at ACI and a sub-class action on behalf of those inmates in the BCU.

[49] Prior to entering the consent decree, the court heard the views of a number of inmates in court, distributed to all inmates a copy of the proposed procedures and provided opportunity for response—the court received 113 responses out of an inmate population of approximately 360—and consulted penologists with national experience. The court then entered its decision giving "due weight to the justifiable criticisms of the plaintiff class, to the very real interests of the defendant prison administration in an ordered prison environment, and to the commentary received from the aforementioned penologists." 310 F. Supp. at 860. The court retained jurisdiction for eighteen months, which period Judge Pettine felt would "allow the parties to get into a working scheme of enforcement of the Regulations but [would] also permit enough flexibility for necessary rule changes." *Id.* at 862.

[50] Annual Report: Adult Correctional Institutions, Rhode Island 1 (July 1, 1970) [hereinafter cited as Annual Report].

[51] 310 F. Supp. at 864.

[52] Two sets of disciplinary proceedings are held each week at ACI—one for those inmates in the medium-minimum section, and the other, for the maximum security prisoners.

[53] The procedures needed to provide "due process" or "fairness" vary from case to case:

> 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts . . . . 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).

[54] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); *In re* Gault, 387 U.S. 1 (1967); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

[55] The indictment serves similar purposes in criminal proceedings, while serving to avoid double jeopardy. *See, e.g.*, Russell v. United States, 369 U.S. 749 (1962). Notice is also a fundamental requisite for civil proceedings. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

[56] This was not really a new requirement. This practice was and is known at the ACI as "the book." Putting a man on "the book" (*i.e.*, charging an inmate with a disciplinary infraction) has for many years entailed filling out a form with substantially the same information as that required by the order.

[57] In only one case, involving two work-release inmates, was non-compliance observed. However, the Disciplinary Board dismissed that case because of the invalid procedure.

cases, oral notice was given the inmate when he was booked.[58] Written notice consisted of a copy of the violation report form, and, when given,[59] was presented to the inmate by the classification counselor,[60] usually on the day following the booking.

The notice, especially the description of the alleged violation, was generally very cursory. The charge was stated, but the circumstances surrounding the incident were rarely given.[61] Names were often misspelled, the writing sometimes illegible,[62] and the continuation of a single incident was often written up on two or three separate forms as distinct charges[63] with the times of infractions only minutes apart. Any or all of these factors could contribute to the inmate's confusion about the charges against him.

There is little question that notice is essential to a fair disciplinary proceeding, both to inform the inmate of the nature of the charges against him and to establish a basis for the subsequent proceedings. Although these provisions required a substantial amount of paperwork, there was little staff antagonism, probably because most of the work was already required at the ACI. However, the substance of the notice was, at times, insufficient,[64] which seems to indicate the necessity for staff training in filling out the forms[65] and communicating its contents to the inmates. The inmate violation report form should give as much detail as possible about the circumstances surrounding the alleged violation, and those staff members responsible for giving notice to the inmate should carefully explain the charges to him, see that he understands them, and advise the inmate to keep a copy of the violation report form for reference. In addition, all charges arising out of a single incident should be noted in the same report form.

These recommendations should make the report forms more useful for administrative purposes and more informative to the inmates. Any added work may create some staff resistance, but it should be possible to overcome this by a well-planned training program.[66]

B. *Prehearing Detention*

One of the primary objectives of the new regulations was to limit the use of inmate detention prior to a Disciplinary Board hearing to exceptional cases only, with such detention conducted in a "non-punitive" manner. However, the lack of clarity in defining an "exceptional" case fostered abuse of that basic objective.[67] The following description of one monitored case may illustrate more vividly the problems of prehearing detention, and the confusion in the order on this topic.

An inmate came before the Disciplinary Board having been booked for three separate offenses.

[58] A common exception to this practice was that notice was rarely given to those booked for intoxication until the next day, on the theory that at the time of the bookings these inmates were not capable of comprehending why they were charged.

[59] While the study's observers had the impression from monitoring the hearings that written notice was generally given, of fourteen interview respondents disciplined after the order, eight said that they had not received any written notice. Although we have no evidence either to support or refute those particular respondents, our feeling is that their answers are not representative of the practice employed at the ACI. However, those eight answers may reflect a failure on the inmate's part to understand the notice actually given or may result from the insufficiency of the notice itself.

[60] For a discussion and analysis of the classification counselor's role, *see* note 78 *infra*.

[61] This violation record is crucial, not only for the inmate's information but because the violation report form serves as the basis for the entire disciplinary proceeding. Since, as will be discussed, the subsequent process of gathering evidence is rather summary, failure to record all of the relevant circumstances at the time of the initial charge may mean that they will never receive proper consideration.

[62] In the few cases involving illegible handwriting, the charges were dismissed.

[63] The presence of numerous disciplinary reports in an inmate's file may affect the future disciplinary determinations, or even his chances for parole.

[64] Some of the difficulty and time may be minimized by careful design of the form. An experimental revision of the ACI form was designed as a result of this study.

[65] The staff training aimed at implementing the *Morris* decree was negligible—generally, limited to distribution of the decree to all staff members along with instructions to read it.

[66] As in all areas of institutional reform, the reasons and the necessity for the increased investigatory information report requirement must be carefully explained to the guards.

[67] The rules concerning pre-hearing detention are unclear in several respects. (1) They are confusing as to whom may authorize prehearing detention—officer, superior officer, or superior officer with immediate subsequent review. (2) They are confusing as to the necessary criteria for imposing pre-hearing detention. One provision provides that inmates may be detained "to avoid *grave* assault or *serious* disorder"; the "emergency" provisions of the rules suggest that there may be a temporary reassignment of the inmate only when there is an *immediate* threat to the security or safety of the prison as a result of an inmate's *serious* wrongdoing; while still another provision suggests that "lock-ups" may be appropriate when a threat to order or safety exists as a result of the alleged violation. (3) They do not provide standards for judging whether these criteria exist in a particular case. (4) They do not specify the conditions of the prehearing detention. (5) They are not explicit as to when the specific factual findings leading to the lock-up must be recorded and reviewed.

The first was that he had left his work area without authority after the officer in charge had refused to give him a pass to attend his education class after the inmate had been rude to the officer. The inmate then was "locked-up" in his cell, pending a Disciplinary Board hearing of his case. This "lock-up" was ordered by the superior officer who had investigated the violation. On the Discipline Report Form, the superior officer's investigation said in pertinent part: "[the inmate] . . . has a very negative attitude; he is going to contest his rights...."

While locked up pending hearing on the charge of leaving the work area without authorization, the inmate received two more bookings: one for playing a guitar in his cell and another for threatening the officer who told him to stop playing his guitar. Finally, sixteen days after the original charge, the three charges were presented to the Disciplinary Board. On the original charge, the inmate was found guilty and reprimanded, but it was said that the time he spent locked up in his cell was sufficient punishment for his misconduct. Therefore, with respect to that offense, he was returned to normal status. The inmate was then asked what he wished to do about the other two charges which were read to him. The inmate said that they were without foundation. The Deputy Warden noted that the officers who made the charges were on vacation, and asked the inmate if he wanted the charges heard anyway. [This would mean pleading guilty. When the inmate contests a charge, the "booking" officer is called into the disciplinary board meeting to "verify" the facts. With the officers absent, the case would have to be postponed until the officers returned. The inmate was not aware of this administrative practice, one which is not provided for in the order.]

The inmate, somewhat confused, commented again that the "charges were trumped up" and responded that he would wait until the officers returned to have the charges heard by the Board. The immediate reply by the Deputy Warden without any consideration with the other members of the Board was, "All right, you will return to your cell and remain locked up until the officers return."

The inmate left confused and embittered. He had chosen to postpone the hearings because the officers were not present and the Deputy Warden had just finished telling him he would return to normal status. Now he was to remain locked up with no idea as to when the Disciplinary Board would have a hearing on the other two charges.

In locking up the inmate, the superior officer was acting presumably pursuant to provision II.H. of the court order:

> H. Only a superior officer shall have authority to order an inmate locked up pending a Disciplinary Board hearing. If this is done, it must not be in accordance with punitive segregation regulations. . . .

This provision includes no explicit criteria for when a superior officer can exercise this discretion. However, in provision I.E., there is brief mention of such criteria for "locking up" a prisoner:

> E. *When a threat to order or safety is, in an officer's opinion, present as a result of the alleged violation,* a superior officer shall determine whether the inmate should be released or held pending further investigation. (Emphasis added)

As a result of this lock-up, the inmate is confined to his cell with his work eligibility suspended. However, it should be noted that under the emergency or temporary provisions of the rules, the requirements for such reassignments are expressed in more stringent terms than the requirements for lock-up pending a Disciplinary Board hearing:

> When faced with an *immediate* threat to the security or safety of the ACI or any of its employees or inmates, officials of the institution may temporarily reassign inmates in accordance with the following regulations:
> I. Reassignment by a correctional officer on approval of his immediate supervisor:
> A. When a correctional officer or other employee witnesses an inmate commit a *serious* wrong doing . . . . (emphasis added)

In addition to the "immediate threat" and "serious wrong doing" requirements, unlike the situation in "lock-ups," a written record of the reassigment must be forwarded to the Warden and the Deputy Warden for approval or disapproval. Furthermore, such reassignments are to be reviewed at the next sitting of the Classification Board, which is to take place not longer than one week from the date of the reassignment. No such review is required for regular lock-ups. Therefore, although it appears that "lock-up pending a disciplinary board hearing" and "temporary reassignments" under the emergency provisions of the rules result in the same segregation (*i.e.*, confinement to cell) and treatment of the inmate (with the possible exception that under the emer-

gency temporary reassignment an inmate can conceivably be placed in punitive segregation while this is not permitted under the "lock-up" provisions), lock-up can be effected without meeting the emergency requirements of immediate threat to the safety or security of the ACI and without the subsequent review necessary for temporary reassignment.

This confusion in the regulations may account in part for the fact that, contrary to the apparent intention of the consent decree, the incidence of prehearing detentions after the entry of the decree remained about the same as it had been before.[63] Perhaps another reason is that such detention may really be necessary in many cases. While the regulation's standards were somewhat unclear, it is apparent that the main purpose of prehearing detention is to segregate the inmate from the rest of the population when it appears that the alleged violation makes him a threat to himself, to others, or to the security of the institution.[69] In the context of a prison setting, with its close quarters and substantial numbers of people with previous histories of violence, it is very possible that almost any irregular incident can be seen as a likely threat and a potential spark to serious disturbances. Certainly, the prediction of future trouble, even in the relatively immediate future, is highly speculative,[70] but overprediction in the prison setting, and therefore overdetention, might be more justified than on the outside because of the potentially volatile nature of penal institutions.

This does not mean, however, that there should be no limits on prehearing detention. The nature of the threat and the reason for detention should be clearly specified in writing and such detentions should be subject to immediate review. In addition, the nature of the confinement should be as close to normal incarceration as possible[71] and the disciplinary hearing on the alleged infraction should be held as soon as possible.[72] If the inmate's threat to the institution has abated, he should be released pending his hearing. Moreover, in disposing of the alleged violations, the Disciplinary Board should consider any time spent in detention prior to the hearing.[73] Staff training as to when prehearing detention should be invoked and in what manner is crucial.

C. *Superior Officer's Investigation*

The superior officer's investigation[74] is another important aspect of the decree; the Disciplinary Board relies heavily on it in its consideration of the case.[75] Our study revealed that the superior

[63] The study's findings in this respect, based on a review of 460 disciplinary records, revealed that prior to the decree 57% of the inmates charged were detained prior to receiving a hearing and that after the decree 51% were so detained. Similarly, based on interviews with a sample of 26 inmates, the findings showed that before the decree 85% received prehearing detention and after the consent decree 77% were detained before a hearing. Analysis of the hearings actually monitored by our observers (all after the decree) also revealed a high proportion of prehearing detentions—in 38 of the 58 cases observed (65%).

[69] Contrast this purpose with that of pretrial detention in non-prison society, which is ostensibly to assure the defendant's presence for trial. The "threat" criterion in the prison setting is more like the "dangerousness" standard which has been advocated for preventive detention and which some say is the real basis of the present detentions under the bail system. *See, e.g.*, Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 960 (1965); Comment, *Preventive Detention: An Empirical Analysis*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 289 (1971); Comment, *Pretrial Detention in the District of Columbia: A Common Law Approach*, 62 J. CRIM. L.C. & P.S. 194, 199, 203 (1971). Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 39–44 (1964).

[70] *See* Comment *Preventive Detention: An Empirical Analysis, supra* note 69 at 324–32.

[71] The study found that most inmates detained prior to hearing were locked up in their own cells. Of the 31 monitored cases involving prehearing detention on which there was information concerning the place of detention, in 22 of them (71%), the inmate had been detained in his own cell. Other locations included the following: admission and orientation cell (3); hospital cell, a form of punitive segregation (2); cell block in medium-minimum (2); hole, a form of segregation (1); unemployed, locked up in own cell, but only during day (1).

[72] In order to reduce the hardship of prehearing detention, the hearings should normally be held within one day of the initial charge. Weekends and holidays may necessitate a forty-eight hour delay. The study found that prehearing detentions were usually for a considerably longer period of time, although after the consent decree the detention period slightly decreased. Besides the fact that there was not a general decrease in the length of prehearing detention after the entry of the decree, there were still postdecree cases in which the detention prior to hearing was more than one week.

[73] The study revealed that the Disciplinary Board at the ACI did consider the prehearing detention in their dispositions in a large number of cases. In 43% of the cases prior to the decree the Board considered prehearing detention as punishment; after the decree, 25% were considered as punishment.

[74] Of the approximately 152 correctional officers at the ACI, 17 of them are superior officers (six captains and eleven lieutenants). Above them are the two deputy wardens, each of whom has responsibility for one of the two facilities—maximum and medium-minimum. The deputy wardens preside at the disciplinary meetings. Their immediate superior is the assistant warden.

[75] Many penal institutions rely heavily on the investigative process for fact-finding, while the board hearings are more dispositional in nature. This alloca-

officer's investigation was in most cases quite summary and the reports often very inadequate.[76] In many incidents there were no witnesses, but even in those in which there were, rarely was anyone except the charging officer and the inmate interviewed. In most cases, the summary of the investigation amounted to one sentence stating either whether the inmate admitted the offense or whether the superior officer thought the inmate was guilty. In addition, the superior officer frequently gave his opinion (usually negative) of the inmate's attitude, and, in a few cases, he gave his view of the proper sentence. The superior officer's report seldom shed any light on the facts of the incident itself or the circumstances surrounding it. The inadequacy of the reports is probably due to a number of reasons: a lack of training regarding the significance of these investigations, a resistance to additional paper work, and, perhaps most important, a feeling that there is no need for more, since the Board has generally found these quite summary reports sufficient for its purposes. The cursory nature of the superior officer's investigation is a corollary to the subsequent de-emphasis of the fact-finding process by the Disciplinary Board.[77]

D. *Representation*

The *Morris* decree mandated classification counselors as the representatives of the inmate at the Disciplinary Board hearing.[78] The decree makes the counselor responsible for transmitting the written notice of the charges and hearing to the inmate, for informing the inmate of his right to have a counselor assist him at the hearing, and for assisting the inmate on appeal if he is dissatisfied with the Board's decision.[79]

The experience at the ACI in making the correctional staff responsible for serving as inmates' advocates in disciplinary proceedings is instructive. At the hearings themselves, classification counselors generally seemed to play an extremely limited role. This might be due to the fact that the defense was usually an outright denial, and the result often rested on the question of credibility, the officer's against the inmate's. Usually though, the counselors were reluctant to become ardent advocates for inmates in the disciplinary hearings. Our staff interviews indicated that the reason for this reluctance was the conflict they felt between their role as advocate for the inmates and their role as a member of the prison staff:

> There's a basic conflict—we are caught between the inmate and the rest of the staff. If we win a case for him, the staff resents it; if we lose, he resents us.
>
> There is also a problem in that the counselor is resented by the staff when an inmate he represented at a disciplinary board hearing is found not guilty.
>
> Classification Counselors are confused as to how they should act. They are required to be something between a lawyer and a social worker.

At the same time, almost all the inmates in the interview sample said they were dissatisfied with the counselor's representation at the hearing.[80]

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tion of trial functions is more like that of the civil law countries than of our criminal process, which, in theory at least, concentrates the fact-finding function at the trial stage. *Cf.* Clutchette v. Procunier, 328 F. Supp. 767, 774 (N.D. Cal 1971) ("Most of the time spent by the [disciplinary] committee in deliberation is devoted to directing what disposition to take rather than ascertaining guilt or innocence").

[76] In almost all cases the space on the form for the superior officer's report was filled in, although there were some forms in which that space was left blank.

[77] *See* text accompanying note 106 *infra* for a detailed discussion of the de-emphasis of the fact-finding process.

[78] The classification counselor is the social worker of the ACI. At the time of the study there were four classification counselors, only three of whom were responsible for "counseling." Because of other administrative responsibilities, these men spend a relatively small amount of their time actually counseling inmates. Since the time of the study, the classification department has been expanded somewhat, but not sufficiently so that the counselors can perform the "garbage details" and still adequately counsel the inmates.

[79] The following percentages, based on interview responses of a sample of 14 inmates, describe the extent to which the classification counselor (CC) was used as a representative after the entry of the decree: Told of right to CC (72%); Requested CC (57%); CC present at hearing (83%); Told of right to CC on appeal (50%); Requested CC on appeal (58%).

[80] The most common reasons given for this dissatisfaction were that the counselor "didn't do anything" or was "no help." One inmate complained that he didn't see the counselor before the hearing and another, perhaps reflecting the counselor's dual role, said that the counselor had helped to put the blame on him.

Of course, dissatisfaction with counsel is common throughout the criminal process, even among defendants having privately retained counsel. But the dissatisfaction is almost assured when counsel is seen as part of the disciplining system. This was especially true at the ACI, where the effect of the consent decree was not only to make the counselor an advocate, but also to put him on the Disciplinary Board. The decree required that a member of the treatment staff be on the board: classification counselors comprised the bulk

An alternative to using correctional staff for representational purposes might be to use outside counsel,[81] but this, also, presents a number of problems. Outsiders, especially those assuming an adversary role, are often viewed with hostility and suspicion by the staff. Their "interference" in prison affairs is resented, and they are seen as a threat by the staff, who fear any undermining of their authority and the possibility of civil liability suits against them.[82] These fears might lead the staff to bypass the formal disciplinary process, where they would be subjected to counsel's investigation and interrogation, either by disciplining the inmates informally or by ignoring infractions of the prison rules.[83] Outside counsel is also resisted because of a fear that Board proceedings will be transformed into criminal trials. A number of staff members felt that the decree already went too far in that respect:

> The fallacy is in instituting court procedures in the ACI hearings. We are not a court.... There are too many confusing technicalities in the order.
>
> The entire order is wrong as to discipline. The system should not be so formal. The average inmate is glad to get his court appearance over. He can then relax and do his time. However, with the new system, it is like he is always going back to court. The average inmate doesn't want to bother with such a formal system.[84]

Moreover, if retained counsel were permitted, equal protection problems would be raised regarding indigent inmates who could not afford such counsel.[85] Finally, given the institutional de-emphasis on the entire fact-finding process, legal representation at Board hearings may not in fact be necessary in all disciplinary cases. To provide for such legal representation in particular cases[86] would be tantamount to refocusing the disciplinary inquiry.

E. *Disciplinary Hearing—The Disciplinary Board*

1. *Composition of the Board.* The *Morris* decree required that the Disciplinary Boards in both the maximum and medium-minimum security in-

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of treatment personnel, and they were selected. This put the counselor in conflicting roles, a conflict which the counseling staff has sought to avoid by petitioning Judge Pettine for a change in the decree. In their petition, dated October 1, 1970, the Classification Department staff articulated these problems:

> The issue at hand is a fundamental one in our role as counselors. Simply stated, whenever a Classification Counselor sits in judgment of an inmate (as he does when sitting on an institutional Disciplinary Board), the counselor is put in the position of jeopardizing his relationship with inmates and decreasing the possibility of effecting positive change in behavior on the part of inmates, *e.g.*, if a counselor sits on a Disciplinary Board which sends one of his inmate counselees to segregation for five days, the possibility of the counselor afterwards establishing or continuing a meaningful relationship in terms of helping the inmate achieve positive behavioral change is practically nil.
>
> The effect of the counselor's sitting on the Disciplinary Board extends beyond those cases which involve an inmate who is part of that particular counselor's caseload. The mere fact of the counselor's presence on the Board puts him in the role of disciplinarian which is antithetical to his role of counselor. We feel this issue is too critical to be resolved by characterizing Classification Counselors as individuals who must function in many roles, some of which are in conflict with others.

[81] While the right to counsel has been extended to any "critical" stage of the criminal process, *see, e.g.*, White v. Maryland, 373 U.S. 59 (1963) (preliminary hearing before magistrate); it has not as yet been clearly applied to the peno-correctional process; Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment). *Compare* Mempa v. Rhay, 389 U.S. 128 (1967) (probation—deferred sentencing proceeding) *with* Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1969) (parole revocation hearing). *But see* Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971) (right to counsel for prison disciplinary proceedings when offense could also result in criminal charges). *See generally* Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47 TEX. L. REV. 1 (1968); Kadish, *The Advocate and the Expert Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803 (1961).

[82] 42 U.S.C. § 1983 (1970), a part of the Civil Rights Act of 1871, makes anyone acting under color of state law, who deprives another citizen of a right, privilege or immunity secured by the Constitution, liable at law, in equity or other proper proceeding. This section has already been the basis for a major portion of prisoners' suits against prison officials. *See* Note, *Prisoners' Rights Under Section 1983*, 57 GEO. L. J. 1270 (1969).

[83] For a discussion of staff practice of bypassing the formal disciplinary process, *see* note 155 *infra* and accompanying text.

[84] The judicialization of disciplinary procedures was criticized by some of the staff not only because of the complexity of the rules or because it might bring some of the court's problems, such as judicial backlog, to the institution, but also because there was a feeling, as one staff member said, that, "the decree is directed toward punishment" rather than rehabilitation.

[85] For applications of the equal protection clause in other criminal contexts, *see* Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963). In Earnest v. Willingham, 406 F.2d 681 (10th Cir. 1969), the court recognized that if retained counsel were permitted by statute to be present at parole revocation hearings, then indigents must also be given appointed counsel.

[86] In Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971), the court required that counsel be given to prisoners accused of an offense which could result in criminal penalties.

stitutions have three members, consisting of the Deputy Warden of the particular facility and two members "selected from the custody and treatment departments." This provision was interpreted as requiring one member from custody and one from treatment, and these requirements were almost always met.[87]

The compositional provision of the decree was subjected to substantial criticism by both staff and inmates. The staff problem of having to use classification counselors (who were also supposed to represent inmates) on the Board to meet the treatment member requirement, has already been discussed.[88] On the other hand, the inmates simply felt that the Board was unfairly constituted. In citing the composition of the Board as the most unfair aspect of the disciplinary process at the ACI,[89] the inmates characterized the board as a "kangaroo court" and a "biased board" which did not "know how to be fair." They alleged that the Board members held "grudges" and showed favoritism, and they particularly criticized the presence of guards on the Board[90] as well as the absence of blacks, in alleging racial prejudice.

The impartiality of the Disciplinary Board may be impeded by several factors. In a small, closed institution like the ACI, staff members are familiar with many of the inmates and usually bring to the Board hearings a great deal of personal knowledge about a particular inmate and sometimes bias, either favorable or unfavorable, toward him. The result often is that the disciplinary decision is made on the basis of the personal and usually unarticulated feelings of a staff member, rather than on the facts presented at the hearing.[91]

Board members may not act impartially because they feel that their duty is to support the staff in all cases. As one Board member put it, "The philosophy in the past has been always back up your officers, whether they are right or wrong." Such a view is particularly harmful to the integrity of the disciplinary process, when, as in most contested hearings, the evidence consists mainly of conflicting testimony by the prisoner and a staff member.

Another factor which may affect the disposition of the case is the inmate's behavior before the Board. An inmate who is "defiant" or had a "hard attitude" or insists on his "rights" is unlikely to win the sympathy of the Board.

These factors affecting the Board's decisions—personal knowledge of, and sometimes bias toward, the inmate defendant, tendency to support staff, and reaction to inmate attitude before the Board[92]—combine to make the prison disciplinary process something less than a hearing before

[87] The decree was not interpreted as requiring the same three people for every Board hearing. Therefore, the custodial position was filled by any number of guards and superior officers. Similarly, while the treatment position was usually assumed by a classification counselor, there were times when a male nurse, teacher, or shop instructor served in that capacity. The Deputy Warden was almost always present; in his absence, the captain—the highest ranking correctional officer—presided over the meeting.

[88] *See* note 78 *supra*.

[89] Inmates in the interview sample who had been disciplined were asked whether they felt the disciplinary proceeding was fair. If they responded that it was unfair, the inmates were asked the following questions: what was unfair about this proceeding? In general, how can disciplinary proceedings be changed to make them fairer? In response to these questions, the composition of the Board was cited most frequently as an unfair aspect of the disciplinary process.

[90] Often more than three staff members participated on the Board. On these occasions, the additional personnel was usually from the custodial staff. At times, this gave a marked custodial tone to the Disciplinary Board hearing.

[91] One observed case, for example, presented the following scenario:

> The inmate was charged with refusing to work. Before the inmate was brought into the hearing room, a custodial officer on the board said: "These guys cause problems. They don't want to work. I recommend B.C.U. . . . I want to say this before they come in . . . . They defy every rule." The inmate was then brought in, and was subsequently confined to his cell except for meals and referred to the Classification Board for reclassification to a lower status. In the observer's opinion the prehearing conversation had definitely been prejudicial to the inmate.

In another case, a Board member's favorable view of the inmate helped him:

> After the inmate had conceded guilt and had left the room, the chairman said: ". . . [He] has a shot at parole next month, and I don't want to mess him up . . . I don't want to foul up his visits [either], because he gets a lot of good out of them." The inmate was deprived of five days' pay [a rather nominal penalty considering that non-work-release inmates at ACI earn a maximum of one dollar per day].

Also, in a rather paradoxical turn of events, inmates branded as "trouble-makers" may be treated more leniently precisely because of their troublesome nature. Prior to one set of cases, the chairman made the following comment:

> Look, these guys are searching for some way of causing trouble. Let's follow the rules to the letter and go as easy as possible on them so they have nothing to protest about to the court.

[92] David Ward's study of inmate discipline in a federal prison found these same factors at work in their board proceedings. D.A. Ward, Prison Rule Enforcement and Changing Organization Goals (unpublished thesis) (1960).

impartial arbiters based only upon evidence and argument in open court.[93]

It may be that some of these problems could be solved by changing the composition of the Board.[94] The inmates interviewed had numerous suggestions for such changes: an inmate jury, one inmate on the Board, the same people on every Board, the Warden or Assistant Warden on the Board, fewer guards present, and outsiders on the Board. However, with the possible exception of including an outsider, these proposals do not seem designed to create a more impartial Board. It is difficult to see how a change among prison staff would improve matters, since almost all prison personnel have personal knowledge of many of the inmates and are subject to similar pressures with regard to staff support. Even adding inmates to the Board would not remedy the problem of personal knowledge and possible bias toward the charged prisoners. While the use of an outsider would solve that difficulty (at least temporarily, *i.e.*, until he gets to know the inmates), such a move would create a whole variety of problems, some of which have already been referred to in connection with the representation issue,[95] and others of which will be discussed in more detail below.[96]

2. *Jurisdiction of the Board.* The *Morris* decree stated that "[only] a duly authorized Disciplinary Board has the power to issue punishment to inmates...."[97] The question remains, which inmate actions are subject to punishment? While the prison has no comprehensive set of rules which outline the boundaries of permissible conduct,[98] there are many regulations concerning such matters as mail, headcounts, searches, card playing and gambling, institutional property, television use and personal hygiene, as well as numerous other activities and forms of conduct.[99] These rules, printed in the *Inmate Guide*, outline many types of conduct for which prisoners *might* be punished. The study's examination of disciplinary records, observations of hearings, and interviews with inmates revealed a broad range of behavior for which the prisoners were subject to disciplinary board action, as seen in Table 1.[100]

The most frequent pattern of misbehavior involved trouble with the guards and staff, for example, arguing with the cook, not telling the guard that someone was out of his cell, or threatening the officer. Almost always, verbal abuse of an officer by an inmate resulted from an inmate's feeling that his rights or privileges had been denied in some way. Only rarely did the inmate go so far as to threaten the guard with physical harm, and only once or twice did an inmate actually threaten a guard with a weapon. Typically, then, there was no real direct threat of physical harm in the inmate's action, nor was there any real physical danger to the institution or its personnel. Basically,

[93] Patterson v. Colorado, 205 U.S. 454, 462, (1906) (Holmes, J.). *Cf.* Irvin v. Dowd, 366 U.S. 717, 722–23 (1961):

> It is not required... that the jurors be totally ignorant of the facts and issues involved.... It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

[94] At a minimum, custodial personnel witnessing or charging the inmate with the alleged infraction should disqualify themselves. *See* Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971) (official was instrumental in pressing charges against an inmate and did not disqualify himself from Disciplinary Board, held violation of fourteenth amendment due process).

[95] *See* note 81 *supra.*

[96] *See* note 162 *infra. See also* Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971), where the court issued regulations similar in scope to those included in the *Morris* decree and required that the Disciplinary Board include a hearing examiner from the office of the Commissioner of the Department of Corrections.

[97] However, the decree also provided that an officer or employee observing minor violations should handle such incidents tactfully and firmly by warning and counseling. 310 F. Supp. at 871 (1970).

[98] In the preface to the Inmate Guide, prisoners are told:

> We purposefully have refrained from listing a series of 'do's' and 'dont's' because we know no one answer covers all situations or circumstances. If you enter into the spirit of this guide your mistakes will be minimal and life here will be better for others because you have helped to make it that way.

Inmate Guide, Adult Correctional Institutions, Rhode Island, (August 15, 1965; revised March 1, 1967).

[99] Other regulated conduct includes smoking, reading, "horseplay," betting, offensive speech, hobbies and unnecessary movement during headcounts. Inmates are required to obey orders of an employee in a cooperative manner and submit to searches of their persons or quarters. *Id.* at 18–20. This partial list of regulations supports the view that because "life in the ordinary prison has to be lived wholly within walls," few inmate functions are not regulated. Grosser, *External Setting and Internal Relations of the Prison*, in PRISON WITHIN SOCIETY 15 (L. Hazelrigg ed. 1968).

[100] In using the tables which follow, one must remember that in a few instances the same incident may occur in more than one sample. Ward's study indicated similar distributions of infractions: Insolence (203 cases) (14%); Refusing to work and to obey direct orders (247) (18%); Fighting (186) (13%); Contraband (366) (25%); Group Assault, Creating a Disturbance (65) (4%); Sex, Race, Attempted Escape, Assaulting an officer (61) (4%); Violation of Movement Regulations (78) (5%); other (Gambling, Poor Work Report, Miscellaneous) (99) (7%). Ward, *supra* note 92, at 109.

TABLE 1

TYPES OF MISCONDUCT FOR WHICH INMATES ARE BROUGHT BEFORE THE DISCIPLINARY BOARD

Type of Misconduct	Number of Incidents in Each Sample			Total	Percentage
	Record Sample	Monitored Sample	Interview Sample		
Trouble w. Guard & Staff	141	9	10	160	25%
Fight/Assault & Battery	81	11	8	100	16%
Refusals	65	17	5	87	14%
Use and/or Possession of Alcohol, Drugs	35	12	2	49	8%
Poss. of Prohibited Articles	36	4	5	45	7%
Creating a Disturbance	41	2	2	45	7%
Escape	36	4	4	44	7%
Destruction of State Property	25		1	26	4%
Out of Place	21	1	2	24	4%
Throwing Food Out of Cell	14			14	2%
Talking When Not Permitted	9	1	2	12	2%
Carrying a Protest Sign	5			5	1%
Fire in Cell	3		1	4	1%
Larceny of Table	2		1	3	
Violating Security Rules	2			2	
Sharing Bed With Another Inmate		2		2	2%
Strike			2	2	
Suspicion in Stabbing Case, General Suspicion			2	2	
Shaving Head			2	2	
Making a Bomb			1	1	
Cutting Wrist	1			1	
Total Infractions				630	100%

in these situations the inmate failed to obey an officer's or staff member's order, or, perhaps while obeying the order, would complain somewhat abusively about it. For this the inmate was punished, almost always without regard to the substance and validity of the staff member's order.

Other offenses have similar characteristics. "Refusals" include: refusing to do a certain job or refusing to give up cigarettes where they were not allowed. There is usually little inquiry as to whether an inmate's refusal was justified.[101]

While the *Morris* decree did not specifically resolve the question of what particular patterns of behavior could be subject to prison discipline,[102] our study revealed that inmates were disciplined for a broad range of actions, suggesting the many purposes for which a prison disciplinary system is used. These purposes include the promotion of staff status and respect, the maintenance of control, order and security, deterrence, punishment, and at least theoretically, rehabilitation. Obviously this multiplicity of purpose may create conflicting pressures in particular situations, pressures which

[101] The following situations are examples of such practices: One inmate, brought before the Disciplinary Board for refusing to perform a loading job, complained that it wasn't his assignment and that others who had been ordered to do the loading had refused and hadn't been punished. The Deputy Warden chairing the hearing dismissed his plea, stating: "The only question in my mind is, did you refuse to do what an officer ordered you to do?"

Another inmate, when ordered to give up his cigarettes on being reclassified to a lower status, refused, claiming that cigarettes were allowed in that status. Regardless of the merits of his claim, the refusal was thought to justify disciplinary action.

[102] The court specifically excluded that point as "inappropriate to this action [*Morris*] at this time. . . ." Judge Pettine did note, however, that:

> [I]t has been contended that standards of substantive wrong for which an inmate can be classified into a lower category are either non-existant or so vague as to be meaningless. In essence, this grievance seeks a code of conduct setting out clear but fair categories for intra-prison anti-social behavior for which punishment can be given. While the court has decided to place this grievance beyond the reach of this case, it is one which should be given serious consideration.

310 F. Supp. at 861 (1970).

may require different procedures than those used in traditional due process proceedings.[103]

3. *Hearing Procedures.* The *Morris* decree established the following procedures for conducting the hearing: reading to the inmate the charges and the record of the surrounding circumstances; admission or denial of the charges by the inmate; interrogation of the inmate by the Board; and presentation of evidence by the inmate.

In most of the cases observed by our researchers there was considerable discussion of the case preceding the inmate's entry into the hearing room.[104] Following the inmate's arrival, standard procedure was to tell the inmate the charge and to ask him whether he admitted or denied the allegations. If he admitted them, the charge would be read in full and frequently the sentence would then be imposed. If he denied the charge, the charging officer would be called into the room to re-read the charge to the inmate. There was seldom any detailed questioning of the officer about the facts of the case or the circumstances surrounding it. The inmate was given an opportunity to tell his version of the incident. While there is no explicit provision in the decree authorizing the inmate to call witnesses, on a number of occasions inmates made such a request and were denied, although one case was observed in which a witness was permitted.[105] Generally the classification counselor rendered limited assistance. After this usually brief presentation of the evidence, the inmate would be sent out of the room and disposition would be discussed, with the chairman's recommendation most often the controlling opinion. The inmate would then be called back into the room and told of the Board's decision and the disposition.

In sum, the disciplinary hearings were very cursory affairs. The changing and investigative reports upon which the Board relied almost exclusively presented the circumstances surrounding the alleged infraction inadequately.[106] Furthermore, although only in a minority of the monitored cases did the inmate deny the charges, when there were such denials the fact-finding inquiry was minimal. Even when conflicting factual testimony was presented, no attempt was made to probe more deeply or to reconcile the contradictions. Perhaps this resulted primarily from fear of calling into question the charging officer's credibility, a fear which colors the entire disciplinary process. If an inmate were found not guilty in the face of an officer's assertion of the inmate's guilt, the officer might well take such a finding as an attack on his truthfulness. Rather than so insult the charging officer, a prison official with whom each member of the Disciplinary Board must work and live, the presumption of credibility is strongly biased against the inmate or inmate witness in any contested case.

The real function of the Board is dispositional in nature. Even in contested cases, with the presumption of credibility so heavily weighted against the inmate, the Board's fact-finding role is subordinated to its dispositional function. If the predominant purpose of the Disciplinary Board were to evaluate an inmate's general progress in the institution rather than to find facts regarding a particular alleged offense, errors in fact-finding might be tolerated. However, where the disposition is keyed directly to the charged misconduct, as is ostensibly the case at the ACI, fact-finding is critical. Indeed, to minimize fact-finding would tend to reduce inmate morale and confidence in the integrity of the disciplinary process.

4. *Disposition*

a. *Procedure.* As has already been noted, after the evidence is presented at the hearing, the inmate leaves the room while the Board discusses its decision and the appropriate disposition. The regulations dictate that the Board's decision be based upon "substantial evidence." While this requirement might be thought to be useful in assuring at least a minimum of testimony that the alleged infraction actually occurred, in practice there is almost always such evidence because the officer's testimony usually states sufficient facts to constitute a prima facie case of inmate violation.[107]

The decree also specifies that the inmate be advised of the rationale and consequences of the Board's decision. Only five of the thirteen inmates in our interview sample who had been disciplined

[103] *See* note 161 *infra.*

[104] Often such extensive prior discussion centered around the Board members' personal knowledge of the inmate and the circumstances of the alleged infraction.

[105] The witness's testimony was disregarded by the Board in the face of the charging officer's conflicting testimony.

[106] *See* note 76 *supra.*

[107] This is especially true in the absence of any set list of regulations, since almost any incident could constitute a violation. Furthermore, given the presumption of credibility against the inmate, *see* text accompanying note 76 *supra,* that Board findings be based upon "substantial evidence" is an ineffective standard.

by the Board said that they were given any explanation at all. The rationale could be extremely important, both for developing an underlying philosophy for the disciplinary system and for explaining apparent inconsistencies in disposition which tend to be seen by the inmate population as arbitrary or discriminatory actions. The following account is an example of the situation prevailing when the hearings were being monitored:

> Three inmates participated in smuggling food into the institution in violation of an institutional rule. Two of the inmates, who were clearly accessories to the violation, transferring the food to the receiving inmate, were punished differently. One was sentenced to three days in punitive segregation and lost three days' good time, while the other was merely docked five days' pay (one dollar/day). No explanation was given as to the reasons for distinguishing between the two in terms of punishment when both had committed the same offense. A possible explanation is that the one who was punished more severely was a veteran prisoner who had several previous disciplinary violations and who was on work release, while the other inmate had no disciplinary record. However, no mention of these factors was made at the hearing.[108]

Requiring the rationale to be written and providing thorough review might well give added weight to the requirement of substantial evidence.

b. *Types of Dispositions.* A broad range of dispositions is used by the Disciplinary Boards at the ACI. Table 2 describes the number of times each punishment was used as revealed by our examination of the records, observations of the hearings and interviews with the inmates.[109]

Obviously the Disciplinary Board has a broad range of "sentencing" alternatives at its disposal. In fact, the Board often uses these dispositions in combination. In the examination of our record samples, 159 different punishment combinations were discovered. While there is a substantial number of non-punitive as well as punitive options, the actions taken were essentially punitive ones.

The *Morris* decree did not limit the types of punishment which the Board could impose, but sanctioned the existing types of dispositions and placed a thirty-day limit on the duration of any specific punishment.[110] A detailed study of the cases in the record sample arising after the consent decree indicated that, with only minor exceptions,[111] there was substantial compliance with these limitations. However, subsequent conversations with staff members revealed one or two cases in which inmates were segregated for longer than thirty days, although not in the same segregation area. As a rule, according to our record sample analysis, punishment seems to have become more lenient after the decree.[112] The punishments generally thought to be most severe, *i.e.*, segregation and loss of good time, comprised only 19% and 7% respectively of the dispositions after the decree. Before the decree 30% of the dispositions involved segregation and 15% loss of good time. At the same time, the "lighter" dispositions, such as reprimands, suspensions, and probations increased, as did the percentage of charges dropped and findings of not guilty, as seen in Table 3. This change, however, does not necessarily reflect the impact of the decree, but may be due to the change in

[108] A similar situation obtains in classification hearings where the inmate's job and custodial security status is determined. At one classification hearing, for example, all of the inmates sought to have their security status changed from maximum to minimum in order to enhance their opportunity for parole. The first inmate whose case was heard was transferred from maximum security status to medium status despite evidence of his good behavior. The warden stressed that transfer from maximum status to medium status was the rule, and maximum to minimum status the exception. In three other cases that morning, inmates were reclassified directly from maximum to minimum security status.

[109] Ward, using a lesser number of dispositional categories found the following distribution: Punitive confinement (692 instances—48%); Restriction of Privileges and Loss of Good Time (350—24%); Verbal Penalities and Suspended Sentence (228—16%); Other (137—9%); No Action (42—3%). Ward, *supra* note 92.

[110] The regulations stipulate that the following actions may be taken by a Disciplinary Board: (1) Dismissal of Charge; (2) Reprimand; (3) Recommendations to Classification Board for change of status; (4) Temporary loss of specified privileges within inmate classification not to exceed thirty days; (5) One to thirty days placement in punitive segregation; (6) Referral to Classification Board with recommendation of reclassification plus (5) *supra*; (7) Loss of good time as prescribed by law under § 13-3-44 of the General Laws of Rhode Island; (8) Any combination of (3) through (7) and/or suspended action on any or all of (3) through (7).

[111] Only nine cases were found in which something other than the punishments described in the regulations was the stated disposition. In four cases, the inmates were given 90 days' probation. The decree makes no mention of probation, although it does allow "suspended action." The regulations also establish an outer limit of thirty days on most disciplinary activity. In four other cases, the disciplinary record indicates that the inmate was released on bail. In the ninth case, the record simply indicates that the case was referred to the warden.

[112] For example, some interviewed inmates when asked for changes caused by the decree responded: "They're not putting guys in the hole [a form of segregation] as much," and "the board got easier." Similarly, a staff member commented that "the extremes have been eliminated."

TABLE 2

TYPE OF PUNISHMENT METED OUT BY DISCIPLINARY BOARD

Type of Disposition	Number of Times Disposition Used in Each Sample			Total
	Record Sample	Monitored Sample	Interview Sample	
Segregated*	189	20	21	230 (27%)
Lost Good Time**	143		12	155 (18%)
Reprimanded, Suspended Punishment, Probation	132	16	7	155 (18%)
Loss of Privileges***	82	6		88 (10%)
Referred to Classification Board†	79	3	1	83 (10%)
Kept in Cell‡	38	4	14	56 (6%)
Transferred‡†	38		1	39 (5%)
Charges Dropped‡‡	18			18 (2%)
Not Guilty	13	4	1	18 (2%)
Other	16	4		20 (2%)
Total No. Dispositions				862 (100%)

* Segregation implies that an inmate is removed from his regular cell or living area and is placed apart from the general inmate population. The privileges accorded to one in segregation vary from time to time and often from inmate to inmate and differ according to the particular segregation area in which the inmate is placed.

** All prisoners sentenced to terms of six months and over are eligible for good time deductions ranging from one to ten days per month depending upon the length of their sentence. These credits are deducted from this maximum sentence and provide a means for the inmate to bring closer his date of release. However, those good time credits may be lost as a result of disciplinary action. In many cases where segregation is imposed at the ACI, good time is also removed automatically. For a discussion of the seriousness of loss of good time and its effect upon lengthening an inmate's sentence, *see* Turner, *supra* note 5.

*** Loss of privileges encompasses a wide variety of punishments. An inmate may be deprived of his evening activities, his job (and pay), and his exercise period. On occasion, inmates have even been deprived of mail, visitation, and chapel privileges. Deprivation of privileges is considered to be a most effective punishment, since it enables the administration to punish an inmate in the way most particularly meaningful to him. At the same time, it does not require cutting him off from the rest of the population or extending his sentence.

† Inmates are usually referred to the Classification Board when segregation is thought desirable. In addition, as a result of the *Morris* decree, reclassification to a lower status (meaning fewer privileges and more rigid control), while really a disciplinary function, must be decided by the Classification Board.

‡ The punishment of keeping an inmate in his cell also covers a number of types of discipline. These include two-night lockups (*see* note 150 *infra*), confinement to cell during day, confinement to cell at night, and confinement to a particular area of the prison (*e.g.*, work release area). In all of these situations, the inmate is kept in his own quarters but is not allowed to leave them at certain periods, as he regularly would.

‡† Rather than confining an inmate to his cell, the Board may feel that, for a variety of reasons, the inmate's difficulties result from his being in one area or another, either for work or for residence. In such cases, the inmate may be transferred to another job or residence assignment.

‡‡ In a few cases, the charges are dropped. These are not acquittals but rather dismissals for a variety of technical reasons. Sometimes the inmate's sentence will have expired, and he will be discharged before appearing before the Board. In other cases, particularly after the court's decree, the charge may have been dismissed for failure to comply with required procedures. These cases are rare and usually indicate a blatant disregard of the regulations of the decree.

TABLE 3

PUNISHMENT BEFORE AND AFTER THE DECREE

Punishment	Date of Punishment	
	7/69–3/10/70 Before	3/11/70–10/70 After
Segregation	32 (30%)	44 (19%)
Loss of Good Time	17 (15%)	16 (7%)
Reprimand, Suspended, Probation	13 (12%)	70 (31%)
Loss of Privileges	34 (30%)	37 (16%)
Referred to Classification Board	5 (5%)	16 (7%)
Kept in Cell	2 (2%)	12 (5%)
Transferred	0 (0%)	1 (1%)
Charges Dropped	2 (2%)	13 (6%)
Not Guilty	3 (2%)	10 (4%)
Other	2 (2%)	10 (4%)
Total No. of Dispositions	110 (100%)	229 (100%)

wardens, which took place at about the same time as the decree took effect.[113]

[113] By way of contrast, there was much less of a change in the types of misconduct being brought before the Board. This may reflect the fact that the decree did not deal with this topic, or it may be that the warden either did not disagree with the existing practices or else was not able to translate desired change into practice. Table 4 describes the types of misconduct brought before the Board before and after the decree, as revealed by our record sample.

TABLE 4

MISCONDUCT BEFORE AND AFTER THE DECREE

Misconduct	Date of Misconduct	
	7/69–3/10/70 Before	3/11/70–10/70 After
Trouble with Guards	27 (35%)	64 (31%)
Fighting/A & B	12 (15%)	47 (22%)
Refusals	12 (15%)	32 (15%)
Escape	1 (1%)	0 (0%)
Poss. Prohib. Articles	1 (1%)	15 (7%)
Alcohol, Drugs	2 (3%)	14 (7%)
Creating a Disturbance	0 (0%)	9 (4%)
Out of Place	0 (0%)	14 (7%)
Destruction of State Prop.	4 (5%)	4 (2%)
Throwing Food Out of Cell	14 (18%)	0 (0%)
Fire in Cell	2 (3%)	1 (1%)
Larceny of Table	2 (3%)	0 (0%)
Violating Security Rules	1 (1%)	1 (1%)
Cutting Wrists	0 (0%)	1 (1%)
Carrying Protest Sign	0 (0%)	5 (2%)
Total No. of Infractions	78 (100%)	207 (100%)

c. *Relationship between dispositions and other factors.* Since no underlying rationale for discipline at ACI was stated either in prison documents or at the hearings themselves, our study attempted to discover if there were some de facto rationale, by examining the correlations between the dispositions and a number of other factors: *viz.*, types of misconduct, custodial classification, and a variety of "demographic" factors.

i. *Correlation between dispositions and types of misconduct.* The study showed little correlation between the type of misconduct with which an inmate was charged and the type of punishment he received. For example, an inmate who gets into trouble with the guards is as likely to be reprimanded, or given a suspended punishment, or put on probation (all relatively light penalties) as he is to lose good time (a very severe punishment). Moreover, one may lose good time or be segregated for mere refusal, or being out of place, or talking when not permitted, as well as for the more serious offenses of escape, fighting, and use or possession of alcohol or drugs. Much the same can be said for prior detention—one is just about as likely to be detained prior to a hearing for lesser offenses as for more serious ones. Table 5 shows the correlation between the various types of misconducts and dispositions found in the study's record sample.

There are a number of possible explanations for these findings. One is that our judgment as to the seriousness of an offense may be considerably different from that of the Disciplinary Board. That is, to the members of the Board, being out of place may be as serious as fighting. While this explanation might rationalize the seeming lack of difference in the range of punishments for the various types of misconduct, it still would not explain the differences in punishment *within* each misconduct category.

A second possible explanation is that the dispositional decision is not based on categorization of the type of misconduct, but on the details of the individual incident. This explanation is untenable not only because the fact-finding process was too inadequate to suggest Disciplinary Board consideration of the circumstances of individual incidents, but also because one would still expect the different categories of misconduct to show some significant differences in disposition. In the larger criminal justice system, for example, while both a murderer and a pickpocket may receive suspended sentences due to the circumstances of their indi-

TABLE 5

CORRELATION BETWEEN MISCONDUCT AND DISPOSITION

Type of Misconduct	Type of Punishment (Numbers of Inmates)											
	Segregated	Loss of Good Time	Rep. Susp. Prob.	Loss of Privs.	Refered to Class. Board	Kept in Cell	Transfer	Charges Dropped	Not Guilty	Other	Pre-Hearing Detention	Detention Considered
Trouble w/Guards	67	43	41	20	11	6	10	8	1	5	68	26
Fighting, A & B	19	13	40	16	0	1	1	3	6	2	60	15
Refusals	20	15	15	14	11	10	1	6	2	1	42	11
Alcohol, Drugs	27	14	4	2	15	2	5	0	1	0	20	5
Other Prohibited Articles	20	15	7	3	4	2	5	1	1	1	28	6
General Disturbance	17	28	5	3	18	7	6	1	0	1	21	2
Escape	23	30	1	6	25	8	8	0	0	3	11	2
Destruction of Prop.	4	16	4	2	4	6	1	0	1	2	18	1
Out of Place	4	2	5	9	6	4	2	0	0	1	15	4
Throwing Food	1	0	0	12	0	0	0	0	1	0	0	0
Talking at Wrong Time	5	2	4	0	0	0	1	0	0	0	6	1
Carrying Protest Sign	0	0	4	0	0	0	0	0	0	1	4	0
Fire in Cell	3	1	1	1	0	0	0	0	1	0	1	1
Larceny of Table	0	0	2	0	0	0	0	0	0	0	0	0
Cutting Wrist	1	0	0	1	0	0	0	0	0	0	0	0

vidual crime, it is unlikely that the pickpocket would ever be subject to the same maximum sentence as the murderer. That is, there is a scale of seriousness reflected in our criminal code, indicated by the maximum punishment to which an offender is subject. There seems to be no such scale with regard to prison offenses at the ACI. Using maximum punishments as an indicator of seriousness, it would seem that virtually every category of misconduct is potentially as serious as the others.

A third possible explanation of the divergence of misconduct and disposition is that punishment varies not according to the facts of the incident itself, but according to the institutional history of the offender.[114] This may mean an inmate is branded as a "troublemaker" for whatever reason and however appropriately. Such an indelible mark on an inmate's informally perceived record may arise from an inmate's getting into fights, or his reading revolutionary literature, or his pressing court claims against the institution. At times, these underlying grounds of decisions are articulated; more often, they are not.

Regardless of the explanation, apparent dispositional inconsistencies can only lead the inmate to question the fairness of the disciplinary process and to attribute the discrepancies to some other factor, such as the differences in personality type of the two Deputy Wardens, or the custodial composition of the Board, or blatant discrimination against him. Individualized punishment may have its advantages, but it must be based on an objective appraisal of the inmate's problem and his conduct, and should rest on clearly articulated rationales.[115]

[114] *Cf.* note 91 *supra.*

[115] The correctional field has witnessed a debate between those who would advocate individualized punishment and those who favor a fixed penalty for each type of misconduct. Proponents of the fixed penalty maintain that individualized dispositions by the disciplinary court are "vague, contradictory and inconsistent" and "preclude a stable atmosphere of inmate expectations around the definition and limits of orderly behavior." R. KORN & L. MCCORKLE, CRIMINOLOGY AND PENOLOGY 476 (1959). They further contend that, absent uniformity in punishment, correctional officials will lose confidence in the disciplinary court and apply their own punishments. *Id.*

Proponents of individualized punishment posit that objectionable behavior in prison is so diverse that any set of rules will be so "complex as to be difficult to apply, or so arbitrary as to arouse resentment by dealing similarly with highly diverse acts." D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 179 (1964). The proponents maintain that flexible rules will minimize inmate-staff friction by providing for penalties which are likely to have a positive effect on the future behavior of the individual offender. *Id.*

The appropriate solution may lie somewhere in between, perhaps, as Glaser suggests, by using a flexible policy for major infractions and a more rigid policy for the less serious violations. *Id.* at 184.

TABLE 6

TYPE OF DISPOSITION COMPARED WITH CUSTODIAL CLASSIFICATION

Type of Disposition	Custodial Setting		
	Work Release	Medium-Minimum	Maximum
Segregated	18 (25%)	111 (28%)	76 (22%)
Lost Good Time	17 (24%)	107 (27%)	33 (10%)
Reprimand, Suspended, Probation	2 (3%)	40 (10%)	83 (25%)
Lost Privileges	1 (1%)	11 (3%)	71 (21%)
Referred to Classification Board	21 (29%)	58 (15%)	21 (6%)
Kept in Cell	5 (7%)	23 (6%)	14 (4%)
Transferred	7 (10%)	36 (9%)	1 (0%)
Charges Dropped	0 (0%)	3 (1%)	15 (4%)
Not Guilty	0 (0%)	0 (0%)	13 (4%)
Other	1 (1%)	4 (1%)	12 (4%)
Total Number of Dispositions	72 (100%)	393 (100%)	339 (100%)

TABLE 7

DETENTION CONSIDERED COMPARED WITH CUSTODIAL SETTING

	Custodial Setting		
	Work Release	Medium-Minimum	Maximum
Pre-Hearing Detention	8 (30%)	132 (68%)	116 (44%)
Detention Considered in Final Disposition	1 (4%)	35 (18%)	31 (12%)
Total Disciplinary Cases	27 (100%)	194 (100%)	264 (100%)

ii. *Correlation between dispositions and custodial setting.* The custodial setting in which an inmate was incarcerated and therefore the Disciplinary Board to which he was subject did make a difference in the disciplinary treatment of the inmate. In general, punishment in the minimum facility was harsher than that in maximum. Table 6 describes the study's analysis of the record sample according to custodial classification. In minimum, an inmate charged with a disciplinary violation was much more likely to be segregated or lose good time than an inmate in maximum. Conversely, he was much less likely to be merely reprimanded, given a suspended punishment or probation, lose privileges, have his charges dropped, or be found not guilty, than his fellow inmate in maximum. While a large proportion of all inmates are likely to be detained prior to the Disciplinary Board hearing, those in minimum have an even greater prospect of prehearing detention, as seen in Table 7.

This disparity in dispositions between the two parts of the institution may be explained in a number of ways. First, the barracks-type setting of the medium-minimum facility could make it more imperative that an unruly inmate be removed by segregation or reclassification, while in maximum an inmate could be isolated merely by confining him to his own cell. Second, the staff in medium-minimum may expect more from that facility's inmates (and work releasees, for that matter), since the less secure custody classification is supposed to connote increased privileges tempered by greater responsibility. Hence, due to their expectations of better behavior, the staff in medium-minimum may punish misdeeds more severely.[116] Finally, the disparity may be due to the different personnel on both boards and the absence of any uniform dispositional standard or guidelines. The impression of the study's observers was that the different personalities of the members of the two boards made a significant difference in the dispositions they reached.

iii. *Correlation between dispositions and demographic factors.* The study's analysis of this issue

[116] With the seeming arbitrariness of the classification procedure at the ACI, *see* note 108 *supra*, this notion of varying institutional expectations may be inappropriate.

is based on the interview sample of sixty inmates.[117] Age, race, length of sentence, number of convictions, maximum release date, and parole eligibility date appeared to make no significant difference with respect to the type of misconduct engaged in or the type of punishment received.

The lack of significant difference on all of these factors may be due to the limited size of our sample, and therefore, we do not conclude from these results that the disciplinary system as a whole at the ACI is non-discriminatory as to any or all of these factors. On the other hand, our data certainly do not provide any evidence of this kind of discrimination. Therefore, it would appear that while the disciplinary process may be individualistic, the individualistic determinations are probably based upon factors other than, or in addition to, this demographic data, such as the facts of the incident itself, an overall evaluation of the inmate's progress, the board members' personal opinions of the inmate, and the custodial setting.

d. *The Use of Classification for Disciplinary Purposes.* As has already been indicated, referral to the Classification Board is one possible disciplinary dispositional alternative. The *Morris* decree established four classification statuses:

Category "A"—This is the normal status of the general prison population. Inmates in this status are entitled to all privileges.

Category "B"—"Category of inmates who because of their pattern [of] conduct require close restrictive movement and closer supervision than Category 'A' population on a temporary basis. Work eligibility is suspended in this category." Other privileges are limited and living location is to be determined by the administration.

Category "C"—"Category of inmates whose conduct indicates chronic inability to adjust to general prison population or who require maximum protection for themselves or others or whose conduct constitutes a threat to the security of the institution." Privileges are even further limited and the inmate is to be placed in a separate living location.

Category "D"—"Category for inmates who because of their course of conduct while classified within Category 'C' require closer control than provided with 'C' category." Privileges are severely limited and the inmate is to be placed in a separate living location.

As established by the consent decree, reclassification from the normal "A" status is "predicated on conduct of inmate which indicates inability to adjust in general prison population for the protection of inmates or others and for the security of the institution." Any downgrading of status is to be accompanied by procedural protections similar to those required for disciplinary proceedings and must be predicated upon a prior finding of misconduct by the Disciplinary Board. The rationale underlying this disciplinary reclassification procedure is that once the inmate has been identified by the Disciplinary Board, on the basis of its finding of misconduct, as a serious enough disciplinary problem to warrant segregation, the inmate is to be referred to the Classification Board for a downgrading of his status from Category "A." He is then placed in either Category "B," or "C," or "D," with concomitantly decreasing privileges.[118]

In practice, only rarely does the Classification Board refer to the A, B, C, and D categories, as they are detailed in the regulations. Instead, the Board speaks in terms of the substance of the punishment (*i.e.*, segregation, lock-up, etc.) and not in terms of broad categories of punishment sets. At times, this practical divergence from the regulations created considerable confusion.[119]

[117] The demographic information was not collected on the inmates whose hearings were actually observed or on the record sample because of difficulties inherent in such data collection.

[118] This notion of "reclassification" for discipline is similar to the practice in other correctional systems of having different types of facilities for inmates who are disciplinary problems. California, for example, has special "adjustment centers." In Rhode Island, with limited resources and limited facilities, this flexibility does not exist.

[119] The following monitored case illustrates this confusion:

> An inmate was charged before the Disciplinary Board with refusing to give up his cigarettes while being placed in punitive segregation. The inmate claimed that, pursuant to the classification categories outlined in the court order, cigarettes were not one of the privileges that could be denied him. The hearing chairman said that punitive segregation was something different from the classification categories established in the order. The inmate said: "Punitive—what do you think these 'classification' categories are? That's what it's all about." There was an argument about the meaning of classification and the difference between classification and discipline. The inmate read from the rules and argued that he was entitled to cigarettes in segregation. The chairman admitted that the difference between punitive segregation and some of the classification categories was confusing. The hearing then proceeded to other matters. Eventually the inmate was punished for having sworn at the guard who told him he couldn't have the cigarettes.

Moreover, the rigid categories sometimes work to the disadvantage of the inmates. For example, Category "B" requires suspension of work eligibility, which, in the view of some staff members, is not always necessary or prudent for inmates who might be assigned to that status.

The study's analysis of the record sample revealed that only a relatively small percentage of the classification hearings[120] which were held after the decree was entered were for disciplinary purposes. Sixteen disciplinary cases out of 229 (7%) were referred to the Classification Board. Eight classification hearings out of the 105 (7.67%) monitored by the study's observers involved disciplinary action.[121] In all these eight cases there was substantial compliance with the procedural requirements of the order.

There seems to be little reason for the Classification Board to be involved in disciplinary considerations at all. Since in practice there is no real discussion of the appropriate "classification category" for the inmate, but rather a mere imposition of punishment through downgrading of status, the Classification Board, in reclassifying inmates, seems to be performing the same disciplinary function as the Disciplinary Board. In fact, some Classification Board members expressed the view that there were times when the Disciplinary Board, by referring a case, was merely "passing the buck" and not giving the case the consideration which it deserves. At the same time, the Classification Board was distracted from its main function of designing constructive programs for inmates,[122] a task to which the Board could devote considerably more time and attention.[123] Discipline at the ACI should be the responsibility of the Disciplinary Board exclusively. Disciplinary action should not interfere with the inmate's institutional program, unless the misconduct is closely related to that program (*e.g.*, constant fights with the program supervisor, escape from work release). If the punishment decided upon requires a disruption of the inmate's program, the staff and inmate should work toward restoring the inmate to his program and toward meeting its rehabilitative goals. In practical terms, this also means that discipline will not be according to the rigid A, B, C, or D categories prescribed in the order; rather, punishment will be more individualized.

Removing the disciplinary function from the Classification Board does not mean, however, that the Classification Board cannot consider whether an inmate's misconduct or pattern of misconduct in conjunction with other available information

[120] Classification hearings are held every Tuesday morning and are chaired on alternate weeks by the Warden and the Assistant Warden. In attendance at a typical classification hearing are either the Warden or Assistant Warden, the deputy wardens of both maximum and medium-minimum, one classification counselor, and the vocational supervisor or his assistant. The classification counselor reads a summary of the inmate's central file and the Board members discuss why the inmate is coming before them as well as how best to dispose of his case. Usually, a determination is made before the inmate enters the meeting. Once called in, the inmate is generally asked a few routine questions (*e.g.*, "Where do you want to work?" "Why don't you like your present job?"). The inmate is then asked to leave the room. The Board usually has a brief discussion of their final disposition; this discussion usually does not differ very much from their discussion prior to the inmate's entry into the meeting. The inmate is then called in for a second time and told where he will be working or that he has been given a lower or higher security classification.

[121] Although the decree proscribes the Classification Board's considering misconduct, in a minor sense misconduct was considered by the Classification Board in cases other than reclassification. However, these were not cases involving downgrading. For instance, a prisoner might have his job changed or his security rating changed because he was constantly picking fights in his job or living area. This uses his misconduct, but not in a severe way such as placing him in segregation.

[122] Judge Pettine's decree set the following goals for the ACI classification process:

> The primary objective of classification as a systematic process is the development and administration of an integrated and realistic program of treatment for the individual, with procedures for changing the program when indicated. This primary objective is attained through five general approaches: (a) The analysis of the individual's problems through the use of every available diagnostic technique, including social investigation, medical, psychological, psychiatric examinations, educational, vocational, religious, and recreational studies. The observations of custodial officers offer data of value. (b) A treatment and training program is evolved in staff conference during or after the inmate's personal appearance before the Board, based upon these analyses and a frank discussion of its purposes with the inmate. (c) The program decided upon must be placed into operation. (d) It may be revised when indicated. Classification, a dynamic process, cannot be effective unless program modifications are made in accordance with the changing needs of the individual inmate. (e) What is done for the inmate in the institution needs to be correlated with his program on parole.

[123] There is no real "systematic process" of developing "an integral and realistic program of treatment for the individual" at the ACI. *Cf.* Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970). Although this classification inadequacy is primarily a result of a lack of resources, facilities, staff and training, it may also be partly attributed to the confusion in the classification procedure itself. The Classification Board in practice served three entirely different functions: (1) security classification (2) job and program classification, and (3) disciplinary reclassification.

about him requires a revision of his program. That decision, however, should not be a punitive or disciplinary one, but should result in an individualized reorientation of goals and means to reach these goals consonant with the inmate's progress up to that time.

F. *Review*

According to the regulations, review by the Warden is required "of any [disciplinary] proceeding which . . . results in an unfavorable decision for the inmate." While the review process was extremely difficult to monitor, our findings suggest that although the Warden apparently does "see" all of the decisions of the Disciplinary Board, the excessive time pressure on him makes the present review mechanism at the ACI fundamentally inadequate.[124]

In other than extraordinary cases there was very little channelling of information about the review process from the Warden down to the staff and inmates. Many inmates were not aware of their appeal perogatives. Furthermore, although in a few select cases the classification counselor assisted the inmate in the preparation of his appeal, a large majority of inmates interviewed stated that they did not receive such assistance in preparing their case for the Warden's review. Given the fundamental importance of the review process in insuring the integrity of the disciplinary proceedings, reforms are critically needed.

In order for the review process to be effective, the record which serves as a basis for review must be complete and must clearly state all the relevant issues.[125] While training of staff to perform this function in the first instance is important,[126] investigational aides could be used to help prepare cases for review. These aides could include internal prison personnel or outside groups with access to the prison, such as law students[127] or practicing attorneys.[128] These aides could perform the following functions:

(1) They could investigate inmate complaints and where such complaints are clearly unfounded or lacking sufficient grounds to present a reviewable issue, the aides could explain to the inmates why they are unlikely to be successful in their appeal. This function may decrease the number of appeals to the formal reviewing authority.

(2) They could assist the inmates in presenting their claims where they are well founded, thereby clarifying the issues for review.

(3) Through their work with inmate complaints, they could help identify deficiencies in procedures, policies and practices and could work with the prison administration to correct these deficiencies.

Although, clearly, where such investigational aides convey their findings directly to the prison authorities, problems in sustaining inmate trust and confidence would arise, the mere presence of such personnel might well induce closer adherence to all disciplinary regulations by correctional officers and other prison officials. Furthermore, outsiders, either citizen advisory commissions,[129] special masters,[130] or all-purpose ombudsmen,[131] may even serve as the final reviewing authority. The presence of such outsiders might offset some of the problems of "internalization" endemic to correctional institutions in the following respects:

(1) The outsider's decision is not as likely to be affected by past, personal, informal knowledge of the involved parties.

(2) He is less subject to institutional pressures. He is not threatened, as is the administrative staff,

[124] At the time of the study, the Warden had decreased punishment in "three or four cases" within the few months he presided over the ACI.

[125] Where the record of the proceedings below is incomplete, any review to be based upon a "substantial evidence requirement" is ineffectual.

[126] In particular, the initial account by the charging officer, the superior officer's investigation and the written account of the Board hearing should be completed in substantially more detail than they are presently.

[127] Law students participating in prison legal assistance projects (forming in law schools throughout the country) could effectively screen and assist in the preparation of cases for review.

[128] Judge Pettine elicited the volunteer services of several lawyers in Rhode Island to assist in investigating inmate complaints and preparing legitimate complaints for appropriate review.

[129] Such groups, composed of private citizens, already exist in some states, including Rhode Island and New York. Usually, however, these groups have been rather inactive, responding only to crisis situations.

[130] Such special masters have been appointed to prevent discrimination in voting, pay, and promotion, and in a recent suit in Philadelphia, federal Judge John Fullam was asked to appoint a special master to oversee the activities of the police department. The purpose of that master was to control police abuse by conducting investigations and holding "public contempt" hearings.

[131] *See* discussion of the functions of impartial, professional prison ombudsmen, in Gellhorn, *Ombudsman's Relevance to American Municipal Affairs*, 54 A.B.A.J. 134 (1968). Indeed, the Oregon Department of Corrections announced that an ombudsman, selected from a list of candidates submitted by the inmates, would be appointed to expedite the processing of inmate grievances. *See* N.Y. Times, March 6, 1971, at 10, col. 5.

by disrupting staff morale. His examination of the facts would not be encumbered by an automatic presumption against the inmate's credibility.

(3) Whether or not the initial stages of the disciplinary proceeding have been fair, an objective outsider is likely to have more credibility with inmates because of the apparent impartiality of his position.

(4) His fact-finding investigation may meet with greater success because inmates with relevant information may be less fearful of retaliatory action than they would be when revealing possibly self-incriminatory evidence to administrative staff. Although such outsiders may initially be viewed as a threat to the administrative staff of the correctional institution, their continued presence, in helping to secure the integrity of the disciplinary process, might eventually lend authority and greater inmate respect for correctional personnel.

An efficient and effective review procedure is essential, both to correct any injustices that might occur in the disciplinary proceeding and to assure the proper functioning of the system consistent with the disciplinary regulations. Review, then, should not only be seen as a process of correcting abuses, but should also be viewed by the prison administration as a means of monitoring the internal operations of the prison.

IV. The Limits of the Procedural Due Process Approach

As the preceding discussion has indicated, disciplinary and classification procedures at the ACI, observed by the Center's researchers after the imposition of the *Morris* decree, did not meet the expectations of the court. While notice was often given, its adequacy was questionable; indeed, a substantial number of the inmates interviewed claimed that they never received any notice. Prehearing detention was as prevalent after the decree as before, and the reasons for such detentions were nowhere recorded. The superior officer's investigation was little more than a restatement of the charge and a cursory report of the inmate's attitude. Classification counselors were torn between conflicting role requirements and consequently were unable to afford the inmates the vigorous advocacy which was anticipated by the representation provision of the regulations. The Disciplinary Board hearings were substantially dispositional in nature, with little effort at fact-finding and a great deal of deference given to the testimony of the charging officer and to the views of the Board chairman. While the extremes of the Board's dispositions were ostensibly eliminated, there were one or two cases in which the maximum punishment limits appeared to have been exceeded. In addition, the classification categories set out in the decree proved unduly restrictive in practice. And finally, the review process was inadequate.

Although this summary statement of our findings presents a rather pessimistic picture of the practical application of the *Morris* decree to the ACI, inmate responses to the effects of the new classification and disciplinary procedures were, for the most part, far from unfavorable. While much of this positive inmate response may be merely a reaction to judicial intervention and attention,[132] rather than an indication of the practical impact of the decree, there clearly were some objective manifestations of institutional change. Cases were dismissed where there were technical violations of the regulations, inmate witnesses were allowed in some cases, delays between charge and final hearing were minimized, and the extreme forms of punishment which instigated the imposition of the order were largely eliminated.[133] Further, there was a growing recognition by administrative and custodial staff that inmates did have rights, rights that would be contested and enforced. Acceptance of this fundamental notion is a necessary predicate to any effective prison reform. However, despite any progressive changes promulgated by the new regulations, the effectiveness of the procedural due process model at the ACI was critically limited.[134]

[132] The inmates were generally quite aware of the decree's existence. A copy of the regulations was to be distributed to every inmate at the ACI and given to every newly committed prisoner upon entry. To check the familiarity of the prison population with the decree, we asked the inmates in our interview sample whether they had heard of the decree, received a copy of it, read a copy of it, discussed it and used it. Their responses were: Heard of decree (88%); Received copy (70%); Read copy (68%); Discussed copy (57%); Used decree (23%).

[133] Again it is important to reiterate the difficulty of determining how many of these changes resulted from the court decree and how many can be attributed to the new Warden.

[134] In examining and evaluating the effect of the *Morris* decree, our analysis has been directed toward what we have described as a procedural due process model, a model which stipulates procedures providing for a limited adversary hearing. This procedural protection approach followed by the *Morris* court is the one most often taken by courts when problems of checking administrative discretion have been presented to them.

The following discussion will suggest reasons for this limited effectiveness.

A. *The Multiple Purposes of Prisons*

The court's decree approaches prison disciplinary procedures in a basically unidimensional manner, imposing intricate fact-finding procedures as preconditions to disciplinary actions. Although the similarity of this procedural due process approach to the judicial trend toward insuring procedural regularity in our criminal system is apparent, the dissimilarities between the prison disciplinary setting and the criminal trial setting are equally apparent. Prison disciplinary processes often serve multiple if not conflicting purposes. Any analysis of such correctional processes must therefore be viewed in the context of these multiple objectives.

Perhaps the most significant factor observed by our researchers was that the disciplinary processes at the ACI were pervasively dispositional in nature.[135] The critical problem, therefore, in applying a procedural due process model to the ACI is that such a model is designed to insure the integrity and fairness of the fact-finding, and not the dispositional, process. Certainly, where there is a dispute as to the facts of a particular case, fair procedures in resolving that dispute are desirable. However, the value of these procedures may be considered against their possible interference with other functions and the purposes of the disciplinary process.

We have already examined some of the reasons why fact-finding is minimized at the ACI.[136] Primary among them is the preservation of staff morale, especially custodial staff morale. The presumption of credibility must be against the inmate if the members of the Disciplinary Board are to continue to be on "good terms" with the charging and superior officers with whom they work daily. This maintenance of staff morale is reflected not only in the minimization of the fact-finding process, but also in the types of conduct subject to disciplinary action. Well over one-third of the misconduct incidents for which inmates were brought before the Disciplinary Board involved conflicts with guards and staff.[137]

Scrutiny of the types of behavior subject to disciplinary action reveals that the maintenance of control is another critical purpose of the disciplinary process at the ACI.[138] Discipline contributes to control, not only by curtailing potentially disruptive incidents, but also by creating a substantial deterrent to such disruption. Clearly, the maintenance of tight control is a paramount concern of all prison administrators. However, at the ACI, almost *all* "rule infractions" were viewed as threats to control and institutional authority. Such rigidity of response and attitude may well exacerbate rather than ease the control problem.

Treatment is yet another potential purpose of a prison disciplinary system.[139] While the wide range of punishable actions and the types of dispositions meted out at the ACI might not immediately suggest concern for treatment as a prime factor in the disciplinary process,[140] a staff member commented:

> The court decree works against the inmate. It is too formal, too rigid. It dehumanizes the ACI. We have tried to humanize the ACI by abolishing the use of prison numbers. The new regulations work in the opposite direction.[141]

The prison disciplinary system may also serve as a means of suppressing unpopular views. The banning of certain books,[142] limitations on protest

[135] *See* text accompanying note 106 *supra*.

[136] *See* text accompanying note 77 *supra*.

[137] Incidents involving trouble with guards or staff and refusals to obey prison personnel comprise 39% of the disciplinary incidents in our sample. *See* Table 1. Many of these incidents led to rather severe penalties. *See* Table 2.

[138] The vast majority of misconduct violations reported were for actions threatening institutional control or authority. *See* Table 1. These were not situations in which large-scale riots or outbreaks were likely, but ones in which the reporting staff member felt that his authority or that of the institution had been threatened. The inmate may have refused to do a certain job, talked back, or in some other way affronted authority. While a single incident would not usually have any major repercussions, institutional administrators generally feel that repeated incidents of this type could eventually mushroom into an outbreak of major proportions.

[139] *But see* Sol Rubin's critique that treatment for inmates may really be an illusion. Rubin, *Illusions of Treatment in Sentences and Civil Commitments*, 16 CRIME & DELIN. 79 (1970).

[140] The line differentiating punishment from treatment is not always clear. *Cf In re* Gault, 387 U.S. 1 (1967). Of course, punitive action may be a form of treatment, just as some types of treatment may be punitive.

[141] This comment to our researchers was made at one of the weekly meetings the Warden had with his supervisory staff in response to a question asking whether a more detailed, explicit disciplinary code was needed.

[142] *Cf.* 83 HARV. L. REV. #2, at VII (With The Editors) (1969) describing the *Sostre* case. *See* note 37

activities,[143] and the censorship of mail[144]—all raise serious first amendment questions. Although such suppression may not be a legitimate objective of prison discipline,[145] in framing procedures appropriate to such a system, all of the relevant purposes and processes must first be ascertained. Punishment, maintenance of staff morale, control, deterrence, treatment, and the suppression of unpopular ideas must all be considered before a system can be designed which will accommodate the often conflicting purposes of prison discipline.

B. *Different Levels of Disciplinary Action Within the Prison*

Another factor limiting the effectiveness of the court's decree was the fact that the regulations applied substantially the same procedural system to all disciplinary incidents, no matter how minor or serious.[146] Traditionally, our criminal justice system has drawn distinctions in handling offenses according to their severity. Crimes are classified into misdemeanors and felonies,[147] with lesser penalties for the less serious offenses, and often with separate institutional facilities for housing the two classes of offenders. Moreover, we tend to provide greater procedural protections for the alleged serious offender than we do for the misdemeanant, presumably because of the possibility of more severe punishment.[148]

As we have already discussed, the types of acts subject to discipline in a particular institution are a function of the purposes of the disciplinary system. If an institution eased its rigid approach to "control," some acts presently handled through the formal disciplinary process, particularly many of those resulting from inmate-guard altercations, could be handled in different manners. Staff personnel could be trained to handle these situations non-punitively. As with the policeman in potential riot situations, the prison staff should be trained to play down minor situations and not to escalate them through their own words or actions.[149] This does not mean that the staff member should usurp the Disciplinary Board's function; rather it may require the staff member occasionally to tolerate or ignore an inmate's abusive remark. If such minor incidents do reach the Disciplinary Board, the Board should not always feel bound to reach a "disciplinary decision" and impose some form of punishment. Taking "no action" in such cases may be in itself very significant action.

Furthermore, some matters, while serious enough to warrant discipline, do not require full Disciplinary Board hearings with all the attendant procedural protections.[150] In these cases, dispositional decisions might best be made on the level of the superior officer or Deputy Warden after a thorough investigation of all the facts and a written record of detailed findings has been made. The inmate should have the opportunity to have this decision reviewed by the Disciplinary Board.[151]

supra. The *Review* reports that Sostre's offenses included "distributing copies of the *Harvard Law Review* to other prisoners."

[143] One of the cases presented before the Disciplinary Board in the maximum security institution involved an inmate who had refused to remove from his cell a protest sign which he had carried into the dining hall.

[144] *See* note 23 *supra*.

[145] *See id.*

[146] It is important to note that the decree did provide that "an officer or employee observing minor violations should handle such incidents tactfully and firmly by warning and counselling." Furthermore, an amendment to the decree isued by Judge Pettine, provided for a more informal "two-night lock-up" procedure for minor disciplinary infractions. *See* note 150 *infra*. It is clear, however, that such informal procedures can be the subject of severe abuse without proper staff training and attitudinal changes.

[147] Indeed, the Model Penal Code establishes four categories of offenses differentiated according to the punishment permitted. MODEL PENAL CODE § 1.04(1) (1962).

[148] *Cf.* the "petty offense" doctrine for jury trials. *See* Singer v. United States, 380 U.S. 24, 33 (1964); Low v. United States, 169 F. 86 (6th Cir. 1909).

[149] To say that this attitudinal change would require extensive training is an understatement. Custodial personnel traditionally have viewed any act of disobedience, however minor, as a serious threat to institutional order. An understandable attitude is "if we let this inmate get away with his actions, thirty others will follow suit." This custodial response, not without foundation, focuses on the central problem of differentiating between actions which require punishments basically for deterrence purposes and ones which do not.

[150] An example of such nondisciplinary board discipline is the "two-night lock-up" procedure at the ACI. Under this procedure, a charging officer, with the supervision of a superior officer, could have an inmate confined to his cell for two consecutive nights in response to a minor disciplinary infraction. There was considerable difference of opinion as to whether provisions of the regulations could be construed to allow such discretionary disciplinary action. In response to this confusion, as well as to inmate complaints about the abuse of the two-night lock-up procedure (through "piggybacking" consecutive two-night lock-ups), Judge Pettine amended his decree to formalize the two-night lock-up procedure. The amendment gives the inmate "the option of a written charge and subsequent appearance before the Disciplinary Board, or administrative loss of institutional privileges for a period of up to two nights." The amendment also limits the number of such options available to the inmate to three incidents per month, after which time the inmate must appear before the Disciplinary Board.

[151] Such an option for Disciplinary Board review is

A fundamental problem with such a two-tiered approach to disciplinary action would be differentiating between cases which require formal hearing before the Disciplinary Board and those which would not. Perhaps the most appropriate standard for allocating the responsibility for the decision would be according to the potential severity of the punishment.[152] This does not mean that a detailed list of penalites must be prescribed for each type of misconduct;[153] rather, the non-Disciplinary Board dispositional authority would be limited to minor punishments, such as a denial of privileges for a short period of time. In cases involving potentially severe dispositions, such as extended segregation and/or the loss of good time, the inmate would be afforded the more extensive procedural safeguards provided by Board hearings.

C. *The Closed Nature of the Prison Setting.*

Traditionally prisons are isolated and of low visibility to the outside world. This pervasive "closed" atmosphere has diverse effects upon the prison disciplinary system. The closed nature of the institution makes it inevitable that Disciplinary Board members bring personal knowledge of each inmate to the hearings. Although, in many instances this personal information may have some dispositional value, often it taints the proceedings with unfair prejudice.

Furthermore, an inmate who chooses to defend himself vigorously by directly challenging a guard's veracity may, because of the nature of the institution, find himself subject to harmful and perhaps unanticipated repercussions.[154] Unlike the court defendant, who may never again come into contact with the arresting officer, in most instances the inmate must return to his same cell or shop area, under the supervision of the officer whose charge brought him before the Disciplinary Board, and whose credibility he has challenged. With proper training and restraint, an officer of the institution may learn to disregard this challenge. It is at least equally possible, however, that an offended officer may harass and intimidate the inmate, especially in those rare cases where the inmate has, in effect, won at the Disciplinary Board hearing.

Moreover, the closed nature of the institution also allows prison personnel to discipline inmates summarily as a means of avoiding formal procedural requirements with their attendant additional paper work. While it is very difficult for an outside evaluator to discover the extent of unauthorized discipline, we were able to get some insights on that subject from the inmates in our interview sample. Twenty-three inmates (38%) reported being subject to disciplinary action by procedures other than coming before the Board.[155]

There is little question that some discipline was administered contrary to the provisions of the court decree, but it is difficult to determine whether such activity increased or decreased after the new regulations. One could speculate that if members of the prison staff resented the court's intervention and saw the decree as unduly restricting their actions, they might respond by bypassing the formal disciplinary procedures in favor of summary discipline. The diversity of inmate comments on the issue of non-Disciplinary Board punishment leaves this question open for speculation.

D. *Staff Training and Involvement*

Another significant factor limiting the effectiveness of the decree was the lack of any staff involvement in its formulation and the lack of staff training with regard to its implementation. Even though the decree was based upon a consent agreement between the parties, that agreement did not really reflect the views of the employees of the ACI or even of its supervisory staff. The agreement was framed primarily by counsel for the Department of Social Welfare (who had relatively little experience within the prison itself) and by the Acting Warden.

similar to that option effected by the amended decree's two-night lock-up procedure. The inmate should be made aware of the fact that the Disciplinary Board is not limited in its possible disposition of the case, as is the superior officer who handles the action informally.

[152] For cases employing other two-tiered approaches to prison disciplinary procedures, *see* note 42 *supra*.

[153] *See* note 115 *supra*, for a discussion of fixed versus individualized punishment.

[154] Clearly, to the extent that the inmate anticipates such unfortunate repercussions, he may be deterred from actively defending himself and challenging the charging officer's version of the facts.

[155] Segregation was usually imposed only for the more serious types of misconduct—strike, escape, riot, suspicion of committing a crime, bribery—although it was occasionally used for fighting, being out of place, trouble with the staff, and possession of prohibited articles. The two-night lock-up, however, was typically the preferred punishment for these latter types of misconduct. Further, it is interesting to note that inmates did not mention other types of informal punishment, such as harassment and loss of privileges. It is doubtful that there has not been at least some of this form of discipline. However, it is possible that the inmates interviewed might not have really thought of such action as a punishment in the context of our questions about discipline.

The new Warden and the rest of the staff simply inherited their work, almost by default.

The cooperation of the staff, particularly the custodial staff, is essential for the effective implementation and operation of any disciplinary system. The guards initially detect all disciplinary problems and are likely to have the most knowledge about the alleged infractions, as well as about the inmates involved. Because of their responsibility for initiating the disciplinary process, the custodial staff is in a unique position to bypass or abuse that process. For example, a guard may simply ignore observed violations; he may arbitrarily or discriminatorily report some inmates and not others; he may exaggerate infractions in his "booking"; or he may substitute unwarranted informal discipline and harassment for the established processes. Furthermore, where the disciplinary scheme includes procedural requirements, a staff member may negate, or at least undermine, the whole process by failing to comply with one or more of the required procedures. Moreover, correctional officer cooperation is essential because of the crucial effect that the conduct of custodial personnel has on the inmates' view of the prison system.[156]

The ACI staff resented the fact that they had not been involved in the framing of the *Morris* decree. Some custodial personnel expressed such strong resentment to the court's intervention and their non-involvement in that process that they refused to read the copy of the regulations which had been distributed to them. One staff member commented:

> There is some confusion as to who is running the ACI, the Warden or Judge Pettine. Judge Pettine's intervention is important to bring attention to the inadequacies in corrections, but he must act in conjunction with the Warden. Many aspects of the new regulations apply more to a larger institution than to the ACI.

The staff urged that if there is a new or final decree the court should work directly with the ACI administrative and custodial staff in framing its provisions. "Without such cooperation," another staff member commented, "the decree will be composed in a vacuum and will be extremely impractical in its application to the ACI."

Another source of resentment, which may have in turn affected the degree of staff compliance with the regulations, was the custodial staff's reluctant recognition of inmate rights and the burdensome problem of enforcing these rights. Officials and guards alike began to view the court not as an impartial arbiter, but as an advocate for the inmates. Administrators resented the repeated trips to court to defend themselves against inmate charges, not only because they felt that their rightful discretion was being fettered, but also because of the amount of time they were required to spend away from the prison. Some of the guards felt that the decree had resulted in a tremendous loss of discipline and control by easing the disciplinary penalties and hence decreasing the factor of deterrence. A typical comment was, "Officers are reluctant to book because they think the guy will only get a reprimand." The fact that the penalties were less onerous, they felt, tended to undermine their authority as did the repeated threats by inmates to take every complaint directly to the judge. Furthermore, because of the increased amount of paper work necessary for entering a booking or an infraction, officers were said to be less inclined to make such bookings.

Somewhat paradoxically, the guards also felt the regulations should be more detailed and definitive. Custodial staff felt trapped by some of the vagueness in the decree, especially about when a prehearing lock-up was permitted.[157] Moreover, some of the supervisory administrative staff felt that the guards were afraid of the decree because of the possibility of contempt proceedings and the possibility of being censured in open court.[158] In an effort to counteract this adverse custodial reaction, Judge Pettine went to the prison and met with the guards. He emphasized that he expected that there would be a good faith attempt to comply with the decree, and that he was not concerned with technicalities. However, he was met with some hostility and a great deal of dissatisfaction.[159]

[156] *Cf. What Do Administrative and Professional Staffs Think About Their Correctional System,* CORRECTIONAL RESEARCH, Bulletin No. 17, Part Two (May, 1968), at 2. Respondents to the study were "in general agreement that correctional officers do, indeed, exceed all other categories of staff members in the extent of their influence on prisoners; 311 (85%) of the 366 respondents expressed that opinion."

[157] *See* note 67 *supra* for discussion of the confusion created by the decree's provision for locking up inmates.

[158] This fear was heightened by Judge Motley's decision in Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), which awarded compensatory and punitive damages against prison officials for violation of an inmate's civil rights. On appeal, punitive damages were disallowed. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied,* —U.S.— (1972).

[159] For example, one guard stated at the meeting,

This custodial antagonism clearly indicates that in addition to involving staff in formulation of disciplinary policy and procedures,[160] once the system is developed, extensive staff training is essential for any effective implementation. Several members of the supervisory staff felt that the custodial officers were confused by the new regulations. As one supervisory official commented:

> The old guard must be re-educated toward more rehabilitative approaches. Any officer who has been with the ACI for ten years or more has a tendency to think more in terms of discipline. Thirty out of eighty officers in maximum have been within the ACI for ten years or more—fifty-five out of eighty for more than five years. There must be an extensive training program developed for all officers.

In the final analysis, the success or failure of any new correctional program depends upon the underlying attitudes of the custodial as well as the administrative staff toward the change. Where there is antagonism, no amount of care in drafting meticulous provisions and structuring intricate processes will achieve the objective of a fair and impartially administered disciplinary system.

E. *Inadequate Facilities and Resources*

Perhaps the most pervasive limitation which plagues the ACI is the inadequacy of its resources. Due to the structural limitations of the ACI's maximum and medium-minimum security institutions, inmates of vastly different criminal backgrounds and degrees of institutional "adjustment" are all lumped together. These inadequate living conditions, compounded by the almost complete absence of training programs, exacerbate disciplinary problems. Where resources allocated by the state legislature remain entirely inadequate, any judicial decree, however thoughtfully designed, cannot remedy these fundamental ills which go to the very core of the prison disciplinary system.

V. A Concluding Look at the Court's Role

We began this study by stating that we would examine not only the decree's effect on the disciplinary process at the ACI, but also the effectiveness of the court as an institutional mechanism for assuring fairness in administrative decision-making, particularly in the prison context. Courts would not seem particularly well-suited for such a task for a number of reasons.

First, American courts[161] are designed primarily for resolving factual controversies. Each party in the adversary system presents those facts which best support his contentions. The judiciary is not suited for remedying managerial and administrative problems, such as the design of prison disciplinary processes, which involve multiple and complex purposes and require extensive consultation with the affected staffs and inmate populations as well as subsequent training and supervision of personnel. Usually, the court has before it only what relevant evidence the parties present, and party presentations will probably be inadequate for a task as "many-centered" [162] as the development of a prison disciplinary system.

Second, being limited to the evidence presented by the parties before it, most courts will lack the expertise necessary to understand the unique problems of discipline within the prison context. While such expertise may not be necessary for the resolution of a particular case of abuse, it is desirable for the broader fashioning of policies and regulations for the institution.

Third, any such decree requires a massive burden of supervision. The load of litigation on Judge Pettine was so great that he virtually had to set up a special calender for prison cases, even though the ACI is a relatively small institution.

However, these reasons are not as controlling as they might first appear. Courts have increasingly extended class actions, declaratory judgments, and

"We find it impossible to run this place under these foolish rules which we had nothing to do with making."

[160] Inmate views should also be solicited. Inmate complaints and comments were actively encouraged by Judge Pettine through sealed, written communications as well as through court appearances.

[161] Both Italy and France have judges with specific responsibility for prison matters. In Italy, he is called the surveillance judge and he has "the responsibility of regularly visiting the penitentiaries within his jurisdiction and seeing that they are being administered according to law." Mueller, *Punishment, Corrections and the Law*, 45 Neb. L. Rev. 58, 96 (1966). Here, the appointment of such a judge would probably require legislation, although a judge for prisons might arise by judicial fiat if the presiding judge of the jurisdiction simply calendared all prison cases to a particular judge.

[162] Professor Lon Fuller developed in detail the idea that "many-centered" or "polycentric" problems are not suitable for judicial resolution. Fuller, *Collective Bargaining and the Arbitrator*, 1963 Wis. L. Rev. 3. He states:

> If an optimum solution [to these problems of managerial direction] had to be reached through adjudicative procedures, the court would have had to set forth an almost endless series of possible divisions and direct the parties to deal with each in turn.

Id. at 33.

the use of the expertise of special masters.[163] In addition, many courts have not been reluctant to solicit the advice of experts, if necessary. Judge Pettine consulted and received comments from a number of penologists with national experience. Furthermore, the court may obtain aid in its supervisory task through review mechanisms such as those previously discussed.[164] However, the critical reason why courts must continue to intervene in inmates' rights cases is because no viable alternative exists. Legislatures have been consistently unresponsive to prison needs.[165] Citizens' commissions seem to respond only to crisis situations, fading into the background when the flare-up is over. The courts often provide the only continuing outlet for the hearing of grievances and the solution of conflicts concerning correctional administration.[166] And while judicial solutions may never be fully implemented, at least they may succeed in eliminating extreme abuses, or perhaps more optimistically, in setting a model and a tone for eventual internal reform by the prisons themselves.

Our study has documented and evaluated judicial intervention in one particular correctional institution. Although much of our analysis would apply to other institutions, further empirical research is necessary, analyzing conditions and the remedial effects of judicial intervention in other prisons. However, the death of forty-two inmates and guards at the correctional institution in Attica, New York, is a tragic reminder that research is simply not enough. If Attica is to be history rather than precedent, active intervention by concerned and knowledgeable correctional officials and legislators as well as courts is essential to effect long overdue institutional reform.

[163] In addition, under the Federal Magistrates Act, there seems to be some latitude for utilizing a magistrate in this connection. The relevant provision, found in 28 U.S.C. § 636(b) (1970), reads as follows:

> (b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designed by the court, may be assigned within the territorial jurisdiction of such court such additional duties authorized by rule may include, but are not restricted to . . .
>
> (3) *preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.* [emphasis added].

[164] *See* note 129 *supra*.

[165] It is to be remembered that inmates do not constitute a voting constituency.

[166] As Fuller has stated: "I am not here asserting that an agency called a 'court' should never under any circumstances undertake to solve a 'polycentric' problem. Confronted by a dire emergency, or by a clear constitutional direction, a court may feel itself compelled to do the best it can with this sort of problem." Fuller, *supra* note 162, at 34.