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Miranda in Prison: The Dilemma of Prison Discipline and Intramural Crime

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MIRANDA IN PRISON: THE DILEMMA OF PRISON DISCIPLINE AND INTRAMURAL CRIME

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"*Miranda* is part of a prisoner's bill of rights."

William O. Douglas [1]

Until very recently a prisoner enjoyed virtually no Bill of Rights protection against arbitrary or undeserved in-prison disciplinary punishment. A few courts had decided that barbarous conditions of solitary confinement violated the eighth amendment ban on cruel and unusual punishment.[2] But only within the past two years have courts begun to examine the extent to which due process safeguards must be observed in internal prison disciplinary proceedings. The event triggering judicial review in most of these cases has been the imposition of a serious disciplinary punishment like solitary confinement, transfer to maximum security or forfeiture of statutory "good time." [3] In several cases the courts have reasoned that such serious consequences to the prisoner—substantially prolonging his incarceration or rendering it more onerous—require at least "rudimentary" due process pro-

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1. Inmates of Attica Correctional Facility v. Rockefeller. 92 S. Ct. 35 (1971) (dissenting from denial of temporary restraining order).

2. *See, e.g.*, Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969); Barnes v. Hocker, No. R-2071 (D. Nev., Sept. 3, 1969); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

3. Almost all prison systems have a statutory scheme for reducing a prisoner's actual time served or advancing parole consideration by granting time off for good behavior. For typical "good time" statutes, see N.Y. CORREC. LAW § 230(4) (McKinney 1968); TEX. REV. CIV. STATS. ANN. art. 6184*l* (West 1970); 18 U.S.C. § 4161 (1970). The purpose of such statutes is to provide an incentive for prisoners to behave in a manner acceptable to prison officials. *See generally* Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 496-99 (1971).

tections to guard against error or arbitrariness in the disciplinary process.[4]

Some of the recent cases have spelled out specifically what due process requires by way of notice and a fair hearing.[5] The Second Circuit's important but very conservative decision in *Sostre v. McGinnis*[6] declined to lay down a definitive code of disciplinary procedure but did state that due process requires at least that the accused prisoner be given notice and "a reasonable opportunity to explain his actions" to the authorities.[7] Affirmation of the prisoner's right to be heard in his own defense is a common denominator of all the recent due process cases. That is, even courts that stop short of requiring counsel, confrontation and cross-examination of witnesses and the right to call witnesses recognize the prisoner's constitutional right to appear and be heard.

What all but one[8] of the cases have overlooked, however, is the effect of *Miranda v. Arizona*[9] on prison disciplinary proceedings. It seems clear that the *Miranda* decision requires drastic

4. *See* Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971), *appeal docketed,* No. 71-2357, 9th Cir., Aug. 30, 1971; Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971); Meola v. Fitzpatrick, 322 F. Supp. 878 (D. Mass. 1971); Wright v. McMann, 321 F. Supp. 127 (N.D.N.Y. 1970), *rev'd in part,* — F.2d —, No. 35572 (2d Cir., Mar. 16, 1972); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970); McCray v. State, — A.2d —, 40 U.S.L.W. 2307 (Md. Cir. Ct., Montgomery County, Nov. 11, 1971); *cf.* Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970); Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970). The cases have generally followed the procedural due process analysis of Goldberg v. Kelly, 397 U.S. 254 (1970). For the thoughtful views of a California Supreme Court Justice on prisoners' procedural guarantees, see Tobriner, *Due Process Behind Prison Walls,* THE NATION, Oct. 18, 1971, at 367.

Apart from procedural protections, several courts have recently held that due process requires the promulgation of substantive rules of conduct to be communicated to the inmate population. *See* Landman v. Royster, *supra;* Sinclair v. Henderson, 331 F. Supp. 1123 (E.D. La. 1971); Rhem v. McGrath, 326 F. Supp. 681 (S.D.N.Y. 1971); McCray v. State, *supra.* Thus, prisoners are entitled to fair warning of the kind of conduct that will risk severe disciplinary punishment.

5. *See* Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971), *appeal docketed,* No. 71-2357, 9th Cir., Aug. 30, 1971; McCray v. State, — A.2d —, 40 U.S.L.W. 2307 (Md. Cir. Ct., Montgomery County, Nov. 11, 1971); *cf.* Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971) (regulations voluntarily adopted); Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970) (consent decree).

6. 442 F.2d 178 (2d Cir. 1971) (en banc).

7. 442 F.2d at 198.

8. The exception is Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971), *appeal docketed,* No. 71-2357, 9th Cir., Aug. 30, 1971, which is discussed in detail below. The authors are counsel for the prisoners in *Clutchette,* but hope that this article does not substitute advocacy for analysis.

9. 384 U.S. 436 (1966).

modifications of the usual disciplinary procedures. This article explores the effect of *Miranda* and the possible modifications to deal with the problem presented.

The problem is that many disciplinary offenses also constitute crimes. Prison disciplinary committees frequently adjudicate charges of assault (on another inmate or on a guard), possession of weapons, rioting, gambling, possession or sale of drugs, escape, etc., all of which may be criminally prosecuted. All prison systems have rules prohibiting inmates from engaging in such behavior, and some even state that any act punishable as a crime in the free world is also a violation of prison rules.[10] On the basis of their findings, prison disciplinary committees often refer cases to the district attorney for prosecution.

In some states, when the in-prison offense constitutes a crime, the accused prisoner is advised by the disciplinary committee of his constitutional rights to remain silent and to have an attorney present during interrogation.[11] He is specifically advised that anything he says "can and will" be used against him in a court of law. However, if the prisoner then requests an attorney, he is told that he cannot see one until the district attorney interviews him. If he exercises his right to remain silent the committee nevertheless proceeds to adjudicate the disciplinary infraction, relying solely on written reports or the "prosecution's" evidence against him.

This was the procedure followed at San Quentin until the decision in *Clutchette v. Procunier*.[12] The *Clutchette* decision was the first to consider the effect of *Miranda* on prison disciplinary proceedings. The court found that "the trap is unavoidable" for the prisoner—warned that anything he says may be used against him in a criminal prosecution, the prisoner "definitionally prejudices himself" by either (1) remaining silent, thus sacrificing any defense or explanation of the disciplinary charge and risking

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10. *See, e.g.*, TEX. DEP'T OF CORREC., RULES AND REGULATIONS 10 (1968).

11. The *Miranda* warnings are required in California prisons by the decision in People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965); in New York prisons by an Attorney General opinion, N.Y. ATT'Y GEN. OP. 409/70, Feb. 11, 1971, *reported in* 8 CRIM. L. REP. 2486 (1971); and in federal prisons by Federal Bureau of Prisons Policy Statement No. 2001.1 (Feb. 19, 1968).

12. 328 F. Supp. 767 (N.D. Cal. 1971), *appeal docketed*, No. 71-2357, 9th Cir., Aug. 30, 1971.

severe punishment, or (2) speaking in his own defense and risking self-incrimination in a later criminal prosecution.

The court in *Clutchette* invalidated this procedure, pointing out that it presents even more serious constitutional infirmities than those in *Miranda*. As will be seen, the court's conclusion was plainly sound.

The Supreme Court in *Miranda* declared that when an individual is in governmental custody and "is subjected to questioning, the privilege against self-incrimination is jeopardized." [13] It is well-established that questioning an imprisoned suspect is custodial interrogation under *Miranda*,[14] even when the interrogation is not intended to elicit evidence for criminal prosecution and the person questioned is in custody for an entirely separate offense:

> These differences are too minor and shadowy to justify a departure from the well-considered conclusions of *Miranda* with reference to warnings to be given to a person held in custody. . . .
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> . . . .
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> There is no substance to such a distinction, and in effect it goes against the whole purpose of the *Miranda* decision which was designed to give meaningful protection to Fifth Amendment rights.[15]

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13. 384 U.S. at 478. Even if the *Miranda* decision were limited or substantially qualified, and even if the exclusionary rule announced in *Miranda* were abandoned, the rights protected thereby would remain, 384 U.S. at 442; and the need for the procedural safeguards discussed herein would be even greater than at present. As the court noted in *Clutchette*, the procedure condemned there suffers from even more serious constitutional infirmities than those involved in *Miranda*. 328 F. Supp. at 777.

14. *See* Mathis v. United States, 391 U.S. 1 (1968); Blyden v. Hogan, 320 F. Supp. 513, 519 (S.D.N.Y. 1970); *cf.* Brooks v. Florida, 389 U.S. 413 (1967); People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965). In Inmates of the Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971), the court denied injunctive relief to prisoners subject to interrogation by the attorney general's office in the aftermath of the Attica rebellion, but the court did not question the applicability of *Miranda* to the interrogations. Indeed, the court noted that the attorney general's staff was alert to giving the *Miranda* warnings and that many prisoners had in fact consulted with counsel. Accordingly, the court found no need for an injunction against interrogation except after consultation with counsel and only in the presence of counsel.

15. Mathis v. United States, 391 U.S. 1, 4 (1968). *See also* Blyden v. Hogan, 320 F. Supp. 513, 519 (S.D.N.Y. 1970). Nor should it make any difference that the prison disciplinary offense charged is not itself a crime; if it is closely related to criminal conduct and the interrogation at the disciplinary hearing may elicit evidence of a crime, the *Miranda* protections should apply. *See* the opinion of Waterman, J., dissenting from the panel's decision in Rodriguez v. McGinnis, 451 F.2d 730, 733-37 (2d Cir. 1971). In *Rodriguez* the disciplinary charge was possession of contraband (apparently not a crime), but the questioning concerned how the prisoner acquired the contraband—if the prisoner had

It seems plain, therefore, that the *Clutchette* court was correct in holding that the *Miranda* protections must be observed in disciplinary proceedings.[16] The prison officials are thus required to give the *Miranda* warnings and advise the accused prisoner of his right to remain silent and to have an attorney. But unless prison officials are willing to go further and actually implement the *Miranda* rights, the problem identified in *Clutchette* arises. The prisoner may give up his right to remain silent in order to defend himself, thus allowing the disciplinary committee to proceed; but the "voluntariness" of a statement made in such circumstances is questionable. The threat of punishment by solitary confinement or loss of statutory good time may operate to coerce waiver of the fifth amendment privilege. On the other hand, the prisoner who chooses to remain silent is left "stripped of any possible means of defense."[17] Imposition of serious disciplinary sanctions at that point makes the price of silence "costly" and impermissibly penalizes the prisoner's exercise of fifth amendment rights.[18]

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not refused to "talk" he might have implicated himself in a criminal conspiracy to smuggle contraband into the prison. The panel's decision denying the prisoner relief was overturned and the decision of the district court granting relief on other grounds was affirmed by the Second Circuit en banc. — F.2d —, No. 34567 (2d Cir., Jan. 25, 1972).

16. *See also* authorities cited in *supra* note 11. The decision in Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971), is not to the contrary. *See supra* note 14. In *Attica* there was no threat of any disciplinary action at all—the warden testified that there would be no discipline imposed—and the court's denial of injunctive relief was "without prejudice" to the prisoners' due process rights "in any disciplinary proceeding that might be instituted against them." 453 F.2d at 22.

17. Clutchette v. Procunier, 328 F. Supp. at 779.

18. *See* Spevack v. Klein, 385 U.S. 511, 515 (1967); Garrity v. New Jersey, 385 U.S. 493 (1967); Griffin v. California, 380 U.S. 609, 614 (1965); Malloy v. Hogan, 378 U.S. 1 (1964); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Melson v. Sard, 402 F.2d 653, 655 (D.C. Cir. 1968); *cf.* Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitationmen Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968); Simmons v. United States, 390 U.S. 377, 394 (1968).

Many cases have held that serious disciplinary sanctions inflict "grievous loss" on the prisoner. *See* authorities cited in *supra* note 4. Even the retrogressive decision in Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), conceded that punitive segregation was "onerous indeed" and pointed out the continuing punishment caused by deprivation of good time. 442 F.2d at 196, 204. There can be no doubt, therefore, as to the costliness of standing mute and defenseless before a prison disciplinary committee.

The decision in Crampton v. Ohio, 402 U.S. 183 (1971), does not undermine the conclusion reached in *Clutchette*. The Supreme Court there held that a separate penalty trial was not constitutionally mandated in capital cases, despite the "tension" between the accused's right to remain silent on the issue of guilt and his right to present mitigating testimony on the issue of punishment. But in the prison disciplinary situation the

Thus the disciplinary committee cannot, using the typical prison procedures, impose punishment. However, prison authorities may consider the prisoner's alleged misconduct too serious to permit him to remain in the general prison population. In other words, they may take the position that security requires imposition of discipline without awaiting the outcome of criminal prosecution. If so, they may conduct a disciplinary proceeding, but only if—as the court in *Clutchette* held—the accused is furnished with counsel and given the right to cross-examine and call witnesses. Counsel must be furnished not only to comply with rudimentary standards of due process,[19] but because *Miranda* requires it. Cross-examination and the right to call witnesses are required not only to provide due process protection,[20] but also because the accused who exercises his privilege to remain silent is defenseless without these rights and may then succumb to the obvious pressure to waive the privilege. In short, the demands of *Miranda* and elementary due process require drastic modifications in prison disciplinary proceedings.

The solution required by the *Clutchette* decision is not the only possible means of resolving the constitutional difficulty. Roughly in order of diminishing utility to the accused prisoner and of decreasing justification in terms of public policy and constitutional doctrine, the following proposals might be considered: (1) no disciplinary punishment at all would be imposed and the

dilemma does not arise from a "tension" between two rights. It arises from the prisons' unwillingness to implement the admittedly applicable right announced in *Miranda* "to have counsel present during any questioning." 384 U.S. at 470. Moreover, the accused in a capital case is not "stripped of any possible means of defense" even if he decides not to take the witness stand. He enjoys the presumption of innocence (which is unknown at prison disciplinary hearings) and is protected by the reasonable doubt requirement. He has a right to decision by an impartial jury; he is represented by an attorney who can cross-examine and call witnesses and argue mitigating circumstances to the jury. *See* Clutchette v. Procunier, 328 F. Supp. at 778-79 nn.6 & 7. The silent prisoner accused of crime in a disciplinary proceeding lacks all these protections.

19. *See* Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971); *cf.* Goldberg v. Kelly, 397 U.S. 254, 270 (1970). The right to counsel has been held so essential to "the very integrity of the fact-finding process" as to require retroactive application in the criminal procedure context. *See* McConnell v. Rhay, 393 U.S. 2 (1968).

20. *See* Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971); *cf.* Goldberg v. Kelly, 397 U.S. 254, 269 (1970). The right to confront and cross-examine witnesses in criminal proceedings has been held so essential to "the integrity of the fact-finding process" as to require retroactive application. *See* Berger v. California, 393 U.S. 314, 315 (1969); *cf.* Pointer v. Texas, 380 U.S. 400 (1965).

state would rely on criminal prosecution as the only sanction; (2) as in *Clutchette,* the accused prisoner would be given an attorney with the right to cross-examine and call witnesses at the disciplinary hearing; (3) a statutory or judicially implied immunity would be provided, permitting the inmate to defend himself in the disciplinary proceeding without the risk that his statements could be used against him in the criminal prosecution; (4) the officials could decline, as a matter of policy, to give the *Miranda* warnings, thus rendering inadmissible in court whatever statements the prisoner might make in the disciplinary proceeding; and (5) the disciplinary proceeding would be postponed until after the criminal prosecution had concluded. We consider each of these proposals below.

1. *No Disciplinary Punishment.* While this solution satisfactorily resolves the dilemma from the prisoner's point of view,[21] it is likely to be unacceptable to prison officials.[22] This is especially true where the offense involves assault on a guard or on another inmate. In such cases, prison officials may fear that further violence will occur if the accused prisoner is permitted to circulate in the general prison population. They reason that failing to impose visible punishment on a prisoner charged with assaulting a guard will create the impression that "he got away with it." If he is charged with assaulting another inmate, the officials may fear reprisals by the other inmate or his friends. Accordingly, in many cases officials feel that some type of disciplinary lockup is required to maintain order in the prison.

Aside from the reluctance of prison officials to forego disciplinary punishment where serious offenses are involved, it is unlikely that a court would enjoin officials from imposing administrative controls and require them to rely on criminal prosecution alone. Therefore, despite its appeal to the accused prisoner and satisfactory resolution of the constitutional dilemma, this solution is unlikely to be adopted by prison officials.

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21. Obviously, substitution of a criminal prosecution which might not otherwise have been undertaken does not improve the inmate's situation. But where the crime would have been prosecuted anyway, not having to face prison disciplinary proceedings is a clear gain.

22. *But see* Inmates of the Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971), where the officials unequivocally disclaimed any interest in imposing disciplinary or administrative sanctions on Attica prisoners who were suspected of criminal acts during the September, 1971, uprising.

2. *The Clutchette Solution.* The court in *Clutchette* resolved the *Miranda*-due process dilemma by holding that if a disciplinary proceeding is held when the offense may also be prosecuted as a crime, the accused inmate must be given an attorney to help him make the choice between exercising his fifth amendment privilege and waiving it to speak in his own defense. Further, the court held that due process requires that the inmate be given the right to cross-examine and call witnesses. Otherwise, if he remained silent, he would be defenseless to the charge.

This solution has the advantage of permitting the inmate to protect against the risk of self-incrimination without forfeiting a defense to the disciplinary charge. With the aid of an attorney and the right to cross-examine and call witnesses, the inmate may be able to show that he is not guilty or that mitigating circumstances should preclude either disciplinary punishment or criminal referral. This solution does not eliminate the risk of double punishment,[23] but its other advantages to the accused prisoner are clear.

On the other hand, prison officials will undoubtedly resist this solution because it requires the presence of lawyers at internal prison hearings. The officials are likely to contend that their presence would interfere with the smooth functioning of the prison disciplinary system. In addition, they may claim that recruiting attorneys to serve in disciplinary proceedings will be unduly difficult—especially at prisons remote from urban centers. But *Miranda* obligates the state to appoint attorneys for indigent prisoners who want them,[24] and in any event this should not be prohibitively expensive because the state must furnish counsel only where felony conduct is involved.[25]

23. The court in *Clutchette* suggested that there might be a double jeopardy problem if the prisoner is twice subjected to punishment for the same act, once in disciplinary proceedings and once in a criminal prosecution. 328 F. Supp. at 778. It has been held, however, that prison administrative punishment, coupled with criminal prosecution, does not raise a double jeopardy question. *See* United States v. Cordova, 414 F.2d 277 (5th Cir. 1969). But as *Clutchette* indicates, the soundness of this position seems questionable when a punishment like loss of statutory "good time" is imposed in addition to criminal prosecution. In such a case, where the in-prison punishment goes beyond administrative control and operates in substance like a new sentence to prison (because it prolongs the prisoner's overall term of incarceration), the policy underlying the double jeopardy clause should be given effect. If the criminal prosecution (or the disciplinary punishment) were barred by double jeopardy, of course, the problem considered in this article would not exist because the prisoner would need to defend himself in only one forum.

24. 384 U.S. at 472-73.

25. *But cf.* Argersinger v. Hamlin, No. 70-5015 (U.S., argued Dec. 6, 1971), involving the right to appointed counsel in misdemeanor prosecutions. It should also be noted

The real basis for the officials' objection to the presence of lawyers at disciplinary proceedings is their almost paranoid mistrust of lawyers who represent prisoners. Many officials oppose the intrusion of *any* outsider in the prison inner sanctum, but lawyers who represent the interests of prisoners vis-à-vis the prison administration are, in their view, particularly suspect.[26] The officials also fear that attorney participation in disciplinary proceedings would create an adversarial climate inimical to the sound administration of discipline. They prefer to emphasize disposition rather than fact finding at disciplinary hearings. However, when criminal conduct is charged, fact finding cannot be avoided and the presence of counsel, even acting in a non-adversarial role, is essential to the integrity of the fact-finding process.[27] In any event, prison officials will no doubt prefer an alternative that does not require the presence of attorneys.

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that considerations of additional expense are not an excuse for failure to respect constitutional rights. *See* Goldberg v. Kelly, 397 U.S. 254 (1970) (hearings required despite fiscal and administrative burdens on the state); *cf.* Jones v. Metzger, — F.2d —, No. 71-1865 (6th Cir., Mar. 14, 1972) (budgetary and manpower changes required in jail reform suit); Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968) ("Humane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations . . . ."); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Holt v. Sarver, 309 F. Supp. 362, 385 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (recognition that legislature must appropriate very substantial sums to remedy unconstitutional conditions).

Several cases have held that due process may be satisfied in the prison context by the provision of "counsel substitute" in non-felony cases. *See* authorities cited in *supra* note 5. The substitute may be a staff member, a law student, or a fellow inmate. The court in Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971), said that while the state need furnish no more (and could constitutionally furnish no less) than such lay representation, an accused prisoner could also bring in a privately retained attorney.

26. One of the principal charges in California's attempt to destroy California Rural Legal Assistance was the OEO program's allegedly improper representation of prisoners. A special federal investigating commission found the charge "totally irresponsible and without foundation." *See* Sigman, *A Case for Skepticism*, THE NATION, Nov. 1, 1971, at 424. California officials have also tried to blame prison violence on the activities of "revolutionary" attorneys. *Id.* It is not uncommon for prison officials summarily to bar prisoners' rights attorneys from entering the prison, although such action has not survived court challenge. *See, e.g.*, Doe v. Bell, No. C-71 310 (N.D. Ohio, Oct. 19, 1971); Atencio v. King, No. 9165 (D.N.M., Oct. 13, 1971). *But see* Hellerstein & Shapiro, *Prison Crisis Litigation: Problems and Suggestions*, 21 BUFFALO L. REV. 643, 647 n.9 (1972). It has required court orders in numerous cases to stop officials from interfering with prisoners' mail to attorneys complaining of prison conditions. *See, e.g.*, Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970); Coleman v. Peyton, 362 F.2d 905 (4th Cir. 1966); McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964).

27. *See supra* note 19. Courts in varying contexts have recognized that counsel can enhance the fairness of the proceeding without necessarily playing an inappropriate adversarial role. *See, e.g.*, United States v. Wade, 383 U.S. 218 (1967); United States *ex rel.* Bey v. Connecticut State Bd. of Parole, 443 F.2d 1079 (2d Cir. 1971).

3. *Immunity.* If the accused prisoner were granted immunity, permitting him to defend himself in the disciplinary proceeding without the risk that his statements could be used against him in a later criminal prosecution, the *Miranda* problem would seem to disappear. A grant of immunity would acknowledge the inherently coercive atmosphere of the disciplinary hearing and protect against involuntary waiver of the fifth amendment privilege. It would eliminate the need to litigate the question of voluntariness in every case. It would seemingly give the prisoner "the full and free ability to testify in his own behalf and present his case" before the disciplinary committee.[28] At the same time, it would permit the state both to impose administrative controls in prison and to protect its interest in the prosecution of crime.

However, the possibility that immunity may be granted is at present only speculative. In the first place, we are aware of no statutes granting immunity for the purpose of disciplining prisoners. Any immunity would have to be implied by a court which recognized the need for a means of protecting the fifth amendment privilege. There is respectable authority for such an implied immunity. In an analogous situation the Court of Appeals for the District of Columbia noted the dilemma facing a parolee who was subjected to a parole revocation hearing based on new criminal charges and held that "any self-incriminatory statements made in a parole revocation hearing shall not be used affirmatively against the parolee in any subsequent criminal proceeding."[29] But in the absence of either a statute or a prior judicial declaration of immunity within the jurisdiction, this solution is too uncertain to be relied upon to resolve a key problem in any disciplinary plan.

Further, granting immunity leaves open the questions whether the prisoner is entitled to counsel and whether he may

28. *Cf.* Melson v. Sard, 402 F.2d 653, 655 (D.C. Cir. 1968). The danger should be noted, however, that even if the prisoner's statement cannot be used affirmatively against him, it might be used for impeachment purposes in a later criminal proceeding. *Cf.* Harris v. New York, 401 U.S. 222 (1971). This danger would be eliminated if full transactional immunity were granted. *See* text accompanying notes 31-34, *infra.*

29. *Id. See also* Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964) (federal authorities barred from using state-compelled testimony); Uniformed Sanitationmen Ass'n v. Commissioner of Sanitation, 426 F.2d 619, 626-27 (2d Cir. 1970) (no need for statute to grant use immunity); *cf.* Simmons v. United States, 390 U.S. 377, 390 (1968) (testimony on motion to suppress inadmissible at trial); Adams v. Maryland, 347 U.S. 179, 181 (1954) (fifth amendment renders compelled testimony inadmissible).

cross-examine or call witnesses at the disciplinary hearing. With *Miranda* out of the picture, only procedural due process remains, and the courts now disagree on whether due process mandates these rights in the prison context.[30] Without them, the prisoner's interests are jeopardized by a substantially less reliable fact-finding process. Thus, granting immunity may leave the prisoner much worse off in resisting disciplinary punishments.

Nor is there any guarantee that an immunity grant would protect him from double punishment in case of criminal prosecution. That would depend on whether "use" immunity or "transactional" immunity were granted. The former would merely exclude from evidence any statements (or the "fruits" thereof) made by the prisoner at the disciplinary hearing.[31] Transactional immunity would completely bar prosecution based on the criminal transaction to which his statements refer. Whether full transactional immunity is required to protect fifth amendment interests is currently in dispute.[32] The problem is not easy: if the *Miranda* aspect of the dilemma is emphasized, only use immunity need be granted since the result is to render any statements inadmissible; but if the emphasis is on preventing compulsion to give incriminating testimony regardless of its use, transactional immunity would be required.[33] Transactional immunity would also

30. *Compare* authorities cited in *supra* notes 19 & 20, *with* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971).

31. Although the court did not discuss the issue, it declared an implied "use" immunity in Melson v. Sard, 402 F.2d 653, 655 (D.C. Cir. 1968). *See* text at *supra* note 29. The court in Uniformed Sanitationmen Ass'n v. Commissioner of Sanitation, 426 F.2d 619, 627 (2d Cir. 1970), was willing to require a grant of use immunity in the absence of an enabling statute but questioned whether full transactional immunity could be granted by city officers without a statute.

32. *Compare* United States *ex rel.* Catena v. Elias, 449 F.2d 40 (3d Cir. 1971), *with* Uniformed Sanitationmen Ass'n v. Commissioner of Sanitation, 426 F.2d 619 (2d Cir. 1970). Although Counselman v. Hitchcock, 142 U.S. 547 (1892), has usually been read to require a grant of transactional immunity before a state can compel testimony (*e.g.*, before a grand jury), Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964), barred only the use of state-compelled testimony by federal authorities. The Court almost resolved the matter in Piccirillo v. New York, 400 U.S. 548 (1971), but dismissed certiorari as improvidently granted when New York began granting transactional immunity. See Mr. Justice Brennan's dissenting opinion for an exhaustive analysis of the issue and a conclusion that transactional immunity is constitutionally required. 400 U.S. at 562. The Court may decide the question this term in Zicarelli v. New Jersey State Comm'n of Investigation, No. 69-4 (U.S., argued Jan. 11, 1972), and Kastigar v. United States, No. 70-117 (U.S., argued Jan. 11, 1972).

33. The question turns on the purpose of the fifth amendment privilege. Transactional immunity is required in Mr. Justice Brennan's view: "The clause does not prohibit a *prosecution* or *conviction;* it prohibits the application *vel non* of compulsion to an individual to force testimony that incriminates him, regardless of whether he is actually prosecuted." Piccirillo v. New York, 400 U.S. 548, 564 (1971). It is true that state prison

be required by a court taking the view that criminal prosecution after prison disciplinary punishment is unconstitutional double punishment.[34]

4. *Omission of Miranda Warnings.* If an accused prisoner were not given the required warnings at a disciplinary hearing, any statements he made in his own defense would be inadmissible in a later criminal trial, by virtue of the *Miranda* decision itself. Prison officials might argue that the exclusionary rule adequately protects the prisoner's rights, and thus attempt to resolve the *Miranda*-due process dilemma by systematically omitting *Miranda* warnings.[35] Theoretically, the prisoner could then exercise his right to speak in his own defense without fear of self-incrimination.

But closer examination shows this course to be unsatisfactory from all points of view. The state's prosecutorial interest in preserving the admissibility of all relevant evidence would be frustrated because valid *Miranda* waivers could never be obtained. Therefore, otherwise-admissible statements would often have to be excluded. On the other hand, the prisoner would not be protected against the risk of unintentionally incriminating himself by "volunteering" statements in his own defense.[36] Their admissibility would be a perennial source of litigation. Some prisoners would undoubtedly recognize the possibility of self-incrimination, even without *Miranda* warnings, and would refuse to make any statements at the disciplinary hearing; but they would then be left with no other means of defending themselves.[37] And their silence might also be unsatisfactory from the point of view of the prison administration, which would be deprived of assurance that

officials are not affirmatively seeking a prisoner's testimony in a disciplinary proceeding and this might serve as a distinction from the grand jury situation, but the threat of disciplinary punishment is nevertheless an obvious kind of compulsion on the prisoner to make statements that could later incriminate him.

34. *See supra* note 23.

35. This practice is followed in many states today, but probably does not result from design but rather from failure to recognize the impact of *Miranda*.

36. "Volunteered" statements may be outside the scope of *Miranda* protection, 384 U.S. at 478. However, applying this rule to the prison situation would be unjustified. Unlike the police station suspect, the prisoner faces serious and authorized punishment if he does not speak in his own defense. Because the compulsion to speak is so much greater, it should be irrelevant that a statement is not prompted by a direct question. *See also supra* note 28.

37. This is what the prisoner did in Haines v. Kerner, 92 S. Ct. 594 (1972). Rather than explain his version of the events at the disciplinary hearing, the prisoner remained silent when accused of assault and was sentenced to solitary confinement. The Supreme Court ruled that he was entitled to a hearing on his claim of unduly harsh punishment.

the disciplinary problem had been appropriately resolved. Finally, it is singularly inappropriate and probably unconstitutional for a state to adopt an official policy of deliberately disobeying clearly applicable law.[38] *Miranda* warnings are required because of the inherently coercive nature of custodial interrogation, and their omission can hardly be justified on the ground that it is administratively inconvenient to conduct hearings that actually implement *Miranda*.

5. *Postponing Disciplinary Proceedings.* It may be suggested that the *Miranda*-due process dilemma can be solved by postponing disciplinary proceedings until the criminal case has been disposed of. At first glance, this seems to be a sensible and administratively feasible solution, and indeed it would be if the accused remained at large in the prison during this period. But most prisons would refuse to permit this. They routinely segregate criminally-accused prisoners from the general prison population until the prosecution has concluded, confining them in conditions that are indistinguishable from punitive segregation or maximum security. In other words, the mere accusation of criminal conduct results in the same treatment that would follow conviction of a serious disciplinary offense. Thus, to postpone disciplinary proceedings is to impose punishment without any hearing at all.

Prison officials may attempt to dispense with the due process safeguards required at disciplinary proceedings by treating the matter as a "classification" problem. Classification committees are typically empowered to assign inmates to segregation for a wide variety of reasons, including a general belief that the inmate is "a menace to [himself] or others, or to property, or to the morale of the general population."[39] In the usual classification proceed-

38. In Inmates of the Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971), a divided court declined to enjoin interrogation of Attica prisoners where (1) the state was conscientiously administering *Miranda* warnings and permitting consultation with counsel prior to questioning; (2) the interrogators were not prison staff and the inmates were shielded from any penalty from silence; and (3) intervening in a "pending state criminal proceeding" would have violated applicable principles governing federal-state relations. The entire court recognized that statements taken from prisoners without *Miranda* warnings would be inadmissible in a criminal prosecution, and despite concurring Judge Lumbard's position that *Miranda* is just "a rule of evidence," the other opinions made it clear that a systematic failure to observe *Miranda* would not be tolerated. *Cf.* Blyden v. Hogan, 320 F. Supp. 513 (S.D.N.Y. 1970) (injunction requiring *Miranda* warnings before interrogation).

39. *See, e.g.*, California Department of Corrections, Director's Rule D4205.

ing, the inmate appears and is given an opportunity to be heard. The committee then decides whether, in their view, segregation is advisable. If criminal conduct is suspected, the inmate may be given *Miranda* warnings, but, as in the disciplinary proceeding condemned by *Clutchette,* a request for the presence of counsel will be denied.[40]

Prison officials contend that the procedural safeguards of the *Clutchette* decision are not required at classification proceedings because it is not their function to adjudicate whether the accused in fact committed an offense. But at least some fact finding is required to determine whether the criteria for assignment to segregation have been met.[41] Moreover, it was not the adjudicatory function of the disciplinary committee that was crucial in *Clutchette.* The sense of *Clutchette* and the other due process decisions is that where the *consequences* of the administrative determination are sufficiently serious, fundamental procedural guarantees of fairness must be observed.[42] Since these decisions specifically identified long-term segregation as a "serious" consequence, attaching a "classification" label to the committee making the determination cannot lead to a different result.[43]

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40. It is sometimes forgotten that *Miranda* requires more than merely reciting a litany of warnings. The Court there flatly declared that "[T]he Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires." 384 U.S. at 470.

41. Such proceedings in practice operate on the premise that the inmate is guilty, because it is his alleged crime that triggers the classification process in the first place.

42. *See* authorities cited in *supra* note 4.

43. In Urbano v. McCorkle, 334 F. Supp. 161 (D.N.J. 1971), the court said that prison officials could not be allowed to "circumvent" due process by labeling proceedings "administrative" instead of "disciplinary," and held that equal protection requires that "prisoners who are confined to administrative segregation for the good of the institution should be entitled to the same minimal due process that is already afforded prisoners who are confined to segregation for disciplinary infractions." *See also* United States *ex rel.* Walker v. Mancusi, 338 F. Supp. 311 (W.D.N.Y. 1971). In *Walker,* the court condemned "protective" segregation of Attica prisoners suspected as leaders of the uprising there, noting that even Second Circuit due process decisions required notice and some kind of hearing when "substantial deprivations" are visited on prisoners.

Officials may also argue that due process is inapplicable by analogizing the classification committee's segregation decision to a magistrate's decision to jail an accused pending trial—which does not require an evidentiary hearing. This analogy is faulty. In the first place, bail is set in open court, where the accused is entitled to representation by counsel. More important, a judge's decision to set high bail effectively equivalent to pre-trial detention is legally unjustified unless the court finds that a lower amount would be insufficient to ensure the accused's appearance at trial. *See, e.g.,* Stack v. Boyle, 342 U.S. 1, 5 (1951). Obviously, that consideration is inapplicable to a defendant already in prison. Where "preventive detention" as such is permitted pending trial, it is hedged with procedural safeguards including an adversary hearing to establish that the statutory criteria are met. *See* D.C. CODE ANN.

Since due process is applicable, the inmate is entitled to an opportunity to be heard. But once again, as in the procedure condemned by *Clutchette,* he cannot defend himself unless he waives his fifth amendment privilege. Thus, utilizing the prison classification committee instead of the disciplinary committee would not solve the *Miranda*-due process problem. It would merely change the stage on which the dilemma is played. The prisoner would still be prevented from giving his own version of the alleged misconduct unless he waived the fifth amendment. He would still face the same penalty—segregation—for exercising the privilege. He would still be "stripped of any possible means of defense" [44] and, thus, vulnerable to the coercive pressures to waive his rights.

CONCLUSION

Of the possible solutions to the dilemma of prison discipline and intramural crime, the *Clutchette* approach is the most sound. It accords full respect to the *Miranda* decision and does not interfere with any substantial state interest. It provides the accused prisoner with counsel and procedural rights necessary to protect basic interests and ensure fair fact finding, while permitting the prison to deal promptly with disciplinary problems. Finally, by making valid *Miranda* waivers possible, the procedure protects the state's interest in criminal prosecution. Widespread adoption of the *Clutchette* approach would thus satisfactorily resolve, from all points of view, the serious problems presented by prison officials' attempts to deal with intramural crime.

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§§ 23-1321 & 1322 (Supp. IV, 1971). There is no reason to require less for the segregation of men in prison.

44. *See supra* note 17 and accompanying text.