How Much Process is Due Parolees and Prisoners

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In the past five years there has been a revolutionary expansion in the area of constitutional law known as procedural due process. The constitutional principle underlying this development stems from the language of the Fifth and Fourteenth Amendments of the United States Constitution which provides that neither the federal government nor the states shall deprive any person "of life, liberty, or property, without due process of law." In substance, this language reflects the fundamental notion that no man shall suffer significant injury at the hand of the state without the protection of an adequate notice of the proposed sanction and a full opportunity to defend himself.

Prior to 1969, the courts applied this mandate of "due process" largely to judicial proceedings: to trials of civil actions, and, more frequently, to criminal prosecutions. In 1969, however, the United States Supreme Court decided *Sniadach v. Family Finance Corp.* and opened the door to a wide range of decisions that expanded the reach of due process far beyond the courtroom setting. On June 29, 1972, in one of the most significant milestones of the new line of decisions, the United States Supreme Court held in *Morrissey v. Brewer* that before a state could revoke a parolee’s parole and order him returned to prison, the parolee under the due process clause should be given notice of the grounds for the proposed revocation and a hearing at which he could have an opportunity to submit a defense.

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1. U.S. CONST. amends. V, XIV.
The recent explosion of due process decisions provides broad outlines of the situations in which the due process clause initially comes into play, that is, *when* an individual must be given some opportunity to be heard. These decisions, however, generally provide little guidance for determining in any particular "due process" setting precisely *what form* the required notice and hearing must take, where the hearing should be held, and which of the numerous procedural safeguards—such as counsel, cross-examination, or the subpoena power—must be afforded.

Some recent decisions, while emphasizing the flexibility of the "due process" demands, have intimated that the breadth and scope of the required hearing varies with the degree of deprivation which an individual might suffer. These decisions suggest that the greater the possible deprivation—imprisonment following an initial conviction, for example—the more procedural safeguards are required, and the lesser the deprivation—the temporary loss of a driver's license—the fewer constitutionally mandated procedures. The severity of deprivation is certainly one legitimate factor to be considered in determining whether a given procedure is required or not; the more severe the penalty, the greater the need to structure a procedure which will minimize erroneous determinations. This approach, however, cannot serve as the sole, or even the most important, criterion in resolving the adequacy of procedure in specific cases.

Establishment of a "pecking order" of the relative severity of disparate deprivations would largely be a subjective task as to which is more serious: dismissal from a job or eviction from one's home, loss of a driver's license or a misdemeanor conviction for disturbing the peace, the attachment of one's refrigerator or stigmatization as an "excessive drinker"? Second, and more important, even if we could agree on a satisfactory "pecking order," this alone would not provide a guide as to which particular safeguards could be eliminated for a less serious deprivation, or which procedures must be afforded for a more drastic penalty or loss.

Another suggestion has been that the degree of "due process" to which one is entitled depends upon whether the proceeding is administrative or judicial, and if judicial, whether it is civil or criminal. The assumption underlying this analysis appears to be that there is a hierarchy of due process hearings, ranging from the most informal

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at the lowest administrative level to the most formal in a criminal trial. This model envisages due process rights as a “package” with each level of formality including more and more of the incidents of due process.

In our view, instead of concentrating solely on the severity of the threatened sanction or the characterization of the hearing’s setting as administrative or judicial, we must focus on the substantive nature of the inquiry undertaken because the nature of the inquiry fixes its attributes and characteristics. We shall try to develop the thesis that the particularly sought procedural safeguard must be weighed in the scale of its value in affording a fair hearing as to the substance of the inquiry. We must determine the importance of such a safeguard in providing a fair hearing on the underlying substantive issue to be resolved. In undertaking this analysis, we must look not only to the substantive question at issue but to the purpose of the particular safeguard under consideration.

Our reference to the substantive inquiry of a particular hearing does not refer to the ultimate legal conclusion that may be presented in a given setting—for example, should a teacher lose his teaching credential, should property be attached or should a prisoner be granted parole. Rather the substantive inquiry relates to the underlying, frequently factual, questions which determine the ultimate conclusion. For example: “Did the teacher use methods improper under current educational standards?” “Is the debtor likely to flee the state to avoid execution on a judgment?” “Does the prisoner have a stable environment in which to live outside of prison?” We believe that it is the nature of these underlying questions which, to a large degree, should dictate the form a due process hearing should take.

One example may help to explain the general thesis we are proposing. Under recent decisions it is clear that a tenured teacher cannot be dismissed from his job without “notice and hearing.”6 State law may establish a variety of grounds upon which dismissal may be based, however, and these grounds may influence the shape the required “notice and hearing” may take. On the one hand, for example, the state may provide that one ground for dismissal is a teacher’s “persistent violation of or refusal to obey the school laws of the state”; a hearing examining a dismissal on such grounds will probably deal with many contested factual issues and may require testimony by various eyewitness-

nesses to the alleged incidents of misconduct. On the other hand, the state may enact a loyalty oath and provide that refusal to take the oath is itself a ground for dismissal. A hearing on such a dismissal will differ substantially from the former misconduct hearing, because the state law may make the teacher's refusal or nonrefusal to take the oath the only relevant factual matter at such a hearing; the full panoply of evidentiary safeguards, e.g., confrontation or cross-examination, probably would not be essential to determine whether or not the teacher has refused to sign the oath. Similarly, when state law provides for the dismissal of a teacher on the basis of a conviction of a specific crime, the teacher's guaranteed hearing may be very limited in scope, passing only on whether or not the teacher has in fact suffered such a conviction.

We need a workable analytical framework in the procedural due process field not only for courts faced with the question of determining the constitutionality of established procedures but also for legislators and administrators who are attempting to devise permissible procedures for use in the future. The revolutionary expansion of due process in recent years means that in many fields administrators must begin for the first time to grapple with these difficult and complex constitutional questions.

In the instant article we shall attempt to demonstrate our analytical approach by a brief discussion of the application of due process in the prison setting in the wake of Morrissey. In the prison environment a variety of problems call for different applications of the due process principle. In some cases certain protections of procedural due process should apply; in other circumstances, other aspects should prevail. The problems include such matters as parole release decisions and prison disciplinary matters. In devising procedural schemes to be used in testing such procedures against constitutional demands, we search for guideposts for evaluating the need for particular procedures in these varied settings.

To illustrate how the importance of a particular safeguard varies with the substance of the inquiry, and how the individual attributes of a particular decision must be scrutinized in determining which safeguards should be provided, we shall briefly discuss three specific "due process" safeguards: (1) the location of the hearing, (2) the right to counsel, (3) the burden of proof.

The location of the hearing

In *Morrissey* the Supreme Court took a first step toward incorporating this factor of a fair location into the due process equation; and, although it did not articulate this rationale, it did evaluate the fairness of location in terms of the substantive content of the inquiry. The *Morrissey* decision initially identified two separate substantive issues which were embodied in any parole revocation decision: first, a "factual" inquiry had to be undertaken to determine whether the parolee had actually committed a violation of his parole; second, if a parole violation were found, a policy decision had to be rendered as to whether, in view of the parolee's entire history, such violation warranted the revocation of parole and recommitment to prison, or whether some other steps—such as imposition of new conditions of parole—would be preferable.

The *Morrissey* court accordingly set out a two stage series of hearings, paralleling, although not precisely, the dual substantive issues it had previously identified. As envisioned by the court, the parole revocation process would begin with a "preliminary hearing" type proceeding, which would determine whether there was "probable or reasonable cause" to believe that the parolee had in fact violated his parole. With respect to the initial inquiry, the court held that "due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest. . . ." The second hearing, which might be conducted as much as two months after the first inquiry, would determine definitively if a parole violation had occurred and also would decide the appropriate sanction for the violation. The Court assumed, however, that this second hearing would not be held in the vicinity of the parole violation but rather would be conducted at a more centralized location, such as the state penitentiary.

Insofar as the initial "preliminary hearing" is intended to focus primarily on the factual questions of whether the parolee did or did not violate his parole, the *Morrissey* court was clearly on sound ground in insisting that "due process . . . require[s] that [such] inquiry be conducted at or reasonably near the place of the alleged parole violation . . . ." A local hearing is necessary to insure the defendant that

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8. *Id.* at 479.
9. *Id.* at 480.
10. *Id.* at 484-89.
11. *Id.* at 485.
12. See *id.*
13. *Id.* at 485.
his right to present witnesses is a meaningful one; such a local hearing likewise serves the interests of the state by eliminating the expense of transporting the prosecuting witnesses. Thus, this portion of *Morrissey* supports the proposition that when the underlying substantive issue of a hearing turns on a factual occurrence and involves the credibility of eyewitnesses and the like, due process requires that such hearing be held reasonably near the site of the alleged occurrence so the respondent's opportunity to defend is made meaningful.

The *Morrissey* decision, however, does not entirely adhere to this principle. Thus, although the court first recognizes the importance of having the factual questions fully aired in the vicinity of the alleged violation, it goes on to hold that the "hearing officer" who hears the evidence at the local site need not decide whether a violation occurred but should determine only whether there is "probable cause" to believe that such a violation occurred. The definitive resolution of the initial factual question is postponed until the subsequent hearing is conducted at a removed location.

Although at first blush this dual hearing may appear as an ameliorative approach, giving the accused parolee two chances to rebut the charges against him, in reality the procedure may dilute the protection seemingly afforded the parolee. The advantage of a local hearing is that it makes possible the receipt of evidence from the actual witnesses to the alleged event; conflicts in testimony and questions of credibility can thus be determined by a trier of fact who has had an opportunity to observe the participating witnesses in person. If the trier of fact in this local hearing is not given the responsibility of resolving such conflicts or evaluating such credibility, however, and need only determine whether "probable cause" exists, then the parolee loses much of the benefit of the local hearing. When such conflicts are resolved by the parole boards in the subsequent, distant hearing, such board well may not have the benefit of examining the personal demeanor of the witnesses and may be compelled to rely only on the summary of evidence related by the initial hearing officer.

Moreover, this postponement of the definitive finding on the factual question may not only inure to the detriment of a parolee who cannot afford to transport witnesses to a distant hearing, but as a practical matter it may be unduly costly for the state as well. Under *Morrissey*, a parolee, in general, has the right to confront and cross-examine adverse witnesses, both at the "preliminary hearing" and at the subse--

14. *Id.* at 486-87.
quent "final" hearing, since the factual question of actual violation is at issue in both proceedings. This will mean that in many cases the state will have to bear the expense of transporting prosecuting witnesses from the locale of the violation to the centralized parole board hearings; the expense of such an undertaking could be considerable, and in many cases it is conceivable that such expense, in itself, might lead the state to forego revocation.

Viewing the proper location of hearings purely from the standpoint of the substantive content of the inquiry, we believe that the Morrissey court might have been better advised to provide for the definitive resolution of the factual questions at the local hearing and to leave only the general judgment to the subsequent proceeding before the parole board. Indeed, a state on its own might well decide to adopt such an approach notwithstanding Morrissey's contrary suggestion; certainly there is nothing in Morrissey to prevent a state from affording more protection to the parolee by providing that at the initial hearing the parolee can only be detained if the hearing officer finds that there has actually been a violation, rather than only that "probable cause" indicates that a violation occurred.

In sum, by postponing the ultimate decision on the factual question of violation to the second distant hearing, the Morrissey court to some extent undermined the value of the initial local hearing; in this case the purpose of a particular procedure—a fair location—should perhaps have led the court to hold that the final factual decision should be reached at the local hearing.

Right to Counsel

The recent United States Supreme Court decision of Gagnon v. Scarpelli15 decided in May 1973, provides a second illustration of how the substance of a due process inquiry may determine its procedural make-up, in this case with respect to the procedural safeguard of right to counsel. In Gagnon the court addressed the question of whether due process requires that a parolee or probationer be afforded a lawyer at his parole or probation revocation hearing, an issue which the earlier Morrissey opinion had specifically left open.16

Justice Powell, writing for a nearly unanimous court, refused to treat the "right to counsel" question as an "all or nothing" proposition, and held instead that the necessity for affording counsel in a parole

16. 408 U.S. at 489.
or probation revocation proceeding turned on "the need or the likelihood in a particular case for a constructive contribution by counsel." In reaching this conclusion, the court pointed out that in many revocation matters, the probationer or parolee has already been convicted of, or has admitted committing, a second crime and in such cases no significant factual issue may remain that would require counsel's presence. The court also noted that in many revocation proceedings, the parolee or probationer's claim of mitigating circumstances is a simple one requiring little investigation or exposition by counsel.

The Gagnon court made clear, however, that whenever the nature or complexity of a particular revocation inquiry does indicate that the presence of counsel is needed to provide the parolee or probationer a fair hearing, the Constitution does require that a lawyer be provided, and at the state's expense if the individual cannot afford one himself. Although Justice Powell did not attempt to devise a detailed set of standards for testing under precisely what circumstances counsel could be considered essential, he did provide at least some tentative guidance. He indicated that counsel should be provided where the parolee or probationer claims either (1) that he has not committed the alleged violation with which he is charged, or (2) that there are "substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present."

Thus, the approach of Gagnon basically coincides with the analysis outlined above—the constitutional requirement of right to counsel turns not upon the severity of the sanction or the administrative nature of the proceeding, but rather upon the underlying substance of the hearing and the need for counsel in relation to that substance.

We suggest, however, that Gagnon's determination that due process does not require counsel for every parole revocation proceeding should not be interpreted as any sort of directive to parole boards that counsel should not as a matter of policy be made available in all revocation proceedings. Although Justice Powell intimates that in his opinion counsel will not be required in a significant number, perhaps even a majority, of revocation hearings, experience may well prove that prediction inaccurate. If it turns out that in the bulk of revocation proceedings the substance of the inquiry does call for the assistance of counsel,

17. 411 U.S. at 787.
18. Id.
19. Id. at 790.
both legislative and administrative bodies may decide to supply counsel as a matter of course, thus eliminating the need for making that individual determination in every case.

Although the *Gagnon* decision deals with the right to counsel in the probation or parole revocation context, other due process settings may bring different relevant factors into play. In prison disciplinary hearings, for example, the adjudicatory process performs almost always a traditional fact-finding role, analogous to a criminal trial. A prisoner will generally be charged with violating an established prison rule, and the determination of the charge will depend upon the testimony of eyewitnesses and the presentation of circumstantial evidence. This trial-like setting, of course, is the milieu in which the lawyers have traditionally operated.

Several distinctions between such disciplinary proceedings and criminal trials, however, have led those few courts which have faced this issue to stop short of holding that lawyers must be provided before any disciplinary sanction can be imposed. In the first place, many disciplinary infractions are relatively simple in nature and do not require professional, expert defense; second, because of the unique circumstances of the prison environment, witnesses are not likely to disappear. Given these considerations, and the additional and weighty factor of the great economic cost in providing counsel for all prison disciplinary matters, several lower federal courts have interpreted the due process guarantee as requiring representation by counsel only in the case of complex and serious disciplinary matters in which a prisoner is threatened with severe sanctions such as a substantial confinement in an isolation cell.\(^{20}\) For other, simpler disciplinary matters, courts have either declined to require legal representation at all or else have fashioned a compromise by suggesting the use of "counsel substitutes" in the form of law students or fellow prisoners with some legal experience.

**Burden of Proof**

We shall discuss one final example of how the issue presented by the hearing influences the procedural incidents of that hearing, this time with respect to the quasi-procedural issue of "burden of proof."

The substantive inquiry of a particular due process hearing influences the "burden of proof" question not by establishing one particular standard that must be applied to the hearing, but instead by setting

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limits on the range of standards that can possibly be required. Two examples will illustrate this point. In the context of prison disciplinary hearings, in which the substance of the inquiry is the traditional question of determining the truth of a particular factual accusation, a wide range of "burden of proof" could conceivably be imposed: the state could be obligated to prove that a prisoner violated a given rule beyond a reasonable doubt, by clear and convincing evidence, by a preponderance of the evidence or perhaps even by only presenting substantial evidence that the prisoner may have committed the proscribed act.

By contrast, the possible "burden of proof" standards that can be applied in parole release hearings or in the second stage of parole revocation hearings are much more limited; in this context the substantive inquiry is not one of fact-finding but of judgment and prediction: has the prisoner demonstrated sufficient rehabilitation to warrant release? Is the prisoner likely to commit another criminal act if granted parole? These substantive inquiries, by their very judgmental and discretionary nature, invalidate any use of a "beyond a reasonable doubt" test. Because the answers to these questions are not susceptible of any specific proof, the decision-makers cannot be held to a strict burden of proof standard.

Conclusion

The main thrust of our suggested analysis is that in determining which procedural safeguards should be afforded in various due process settings, we must analyze the function of the particular safeguard with respect to the substantive issue of the particular hearing in question. Procedural due process is not unlike a legal chameleon that takes on its color and nature in accordance with the underlying substantive issue to be resolved. In the prison context the differing nature of the various due process settings may well call for the utilization of fundamentally different hearing procedures in each context.

We have concentrated in this article on what might be considered a somewhat technical aspect of the entire subject of due process in the prison context. But while the evaluation of particular procedural safeguards may appear an overly technical exercise, in the long run it is the nature of just such procedural guarantees that provides the surest protection against the excesses of arbitrary abuse of power. As Justice Felix Frankfurter observed more than 25 years ago: "The history of liberty has largely been the history of observance of procedural safe-
guards.” To the extent that recent due process decisions succeed in opening the prison system to the light of public inquiry and in restoring some dignity to the inmates of America’s correctional institutions, they will have done so largely by surrounding prisoners with those procedural safeguards necessary to secure fair decisions at the hands of prison officials.
