An Application of Double Jeopardy and Collateral Estoppel Principles to Successive Prison Disciplinary and Criminal Prosecutions

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Notes

An Application of Double Jeopardy and Collateral Estoppel Principles to Successive Prison Disciplinary and Criminal Prosecutions

When an imprisoned person is accused of engaging in conduct which is a criminal offense under state or federal law, the law permits both the criminal justice and the prison disciplinary systems to prosecute and punish him for the same alleged criminal conduct. Even where a court finds the imprisoned person innocent of the criminal charge, prison disciplinary sanctions are seldom disturbed. The thesis of this note is that an imprisoned person should not be burdened with the prospect of multiple prosecutions and punishments for the alleged criminal conduct.

To obviate the prospect of multiple prosecutions and punishments, most imprisoned persons have asserted their fifth and fourteenth amendment rights not to be twice placed in jeopardy for the same offense. Though the United States Supreme Court has never


2 See Rusher v. Arnold, 550 F.2d 896 (3d Cir. 1977); People ex rel. Day v. Lewis, 376 Ill. 509, 34 N.E.2d 712 (1941); Ex parte Rody, 348 Mo. 1, 152 S.W.2d 657 (1941).

In Rusher v. Arnold, 550 F.2d 896 (3d Cir. 1977), the court found “no fundamental unfairness in a procedure whereby a prisoner is punished administratively for the same conduct that resulted in an acquittal on criminal charges.” Id. at 898. But cf. Barrows v. Hogan, 379 F. Supp. 314 (M.D. Pa. 1974) (prison discipline not permitted where imprisoned person acquitted on criminal charge by jury).

California has recently enacted legislation which adopts the position pronounced by the Barrows court:

No person confined in a state prison . . . shall be subject to any institutional disciplinary action subsequent to an acquittal in a court of law upon criminal charges brought and tried for the act or omission which is the sole basis of the institutional disciplinary action.


addressed the question whether the double jeopardy clause protects an imprisoned person from prosecution and punishment for the same alleged conduct, most state and lower federal courts have held that it does not. Although a defense founded on traditional double jeopardy principles has generally failed to protect the imprisoned person, the doctrine of collateral estoppel, as it inheres in the fifth amendment double jeopardy clause, can serve as an alternative defense. The doctrine has been construed to preclude relitigation in a noncriminal proceeding of any issue actually determined in a prior criminal proceeding; its application has been limited to cases in which the

rule on this issue originated in state court cases. Compare People v. Conson, 72 Cal. App. 509, 237 P. 799 (1925); State v. Mead, 130 Conn. 106, 32 A.2d 273 (1943); People ex rel. Day v. Lewis, 376 Ill. 509, 34 N.E.2d 712 (1941); People v. Huntley, 112 Mich. 565, 71 N.W. 178 (1897); Ex parte Rody, 348 Mo. 1, 152 S.W.2d 657 (1941); State ex rel. Turner v. Gore, 180 Tenn. 333, 175 S.W.2d 317 (1943) with Pagliaro v. Cox, 143 F.2d 900 (8th Cir. 1944).

The fifth amendment to the United States Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V. This guarantee against double jeopardy "is one of the oldest ideas found in western civilization," Bartkus v. Illinois, 359 U.S. 121, 151 (1959) (Black, J., dissenting), and its history can be traced from Greek and Roman times to the common law of England and into the jurisprudence of the United States. Id. at 151-55. See also Benton v. Maryland, 395 U.S. 784, 795-96 (1969); J. Sigler, Double Jeopardy 1-37 (1969).

The double jeopardy clause not only protects against multiple punishments for the same offense, Ex parte Lange, 85 U.S. (18 Wall.) 163, 173 (1874), but also prohibits reProsecution following an acquittal, United States v. Sisson, 399 U.S. 267 (1970), and following a conviction, In re Nielsen, 131 U.S. 176 (1889).


* See, e.g., People v. Robart, 29 Cal. App. 3d 891, 106 Cal. Rptr. 51 (1971) (collateral estoppel precluded revocation of parole proceeding); People v. Grayson, 58 Ill. 2d 260, 319
sanction imposed by the noncriminal tribunal is punitive in nature.  

This note initially analyzes the traditional double jeopardy precedents which distinguish the nature of the prison disciplinary system from the criminal justice system. It then explores the applicability of the doctrine of collateral estoppel to the prison disciplinary process, develops a “punitive sanctions” test for the prison disciplinary process and proposes an expanded role for the doctrine of collateral estoppel in prison disciplinary dispositions. Finally, the note discusses several administrative alternatives for resolving the multiple prosecution and punishment problem.

**Prison Disciplinary Process and the Double Jeopardy Clause: Traditional Analyses**

In most cases where the imprisoned person has asserted a plea of double jeopardy in order to obviate the prospect of both prison disciplinary and criminal prosecutions and punishments, the plea has eluded thoughtful judicial scrutiny.¹⁰ The United States Supreme Court has declined on several occasions to pursue the problem,¹¹ though it has been confronted by most state and lower federal courts.¹² Fashioned in an era when the judiciary refused to


¹² See, e.g., the cases cited in State v. Kjeldahl, ______ Minn. ______, 278 N.W.2d 58 (1979); State v. Croney, 425 S.W.2d 65 (Mo. 1968); State v. Maddox, 190 Neb. 361, 208 N.W.2d 274 (1973).
interfere with prison management, the early precedents manifest indifference toward the constitutional rights of imprisoned persons. Despite judicial intervention in prison affairs in the past


Prior to the revolution in the field of criminal justice in the 1960's, courts took the position that they were "without power to supervise prison administration or to interfere with ordinary prison rules or regulations." Banning v. Looney, 213 F.2d 771, 771 (10th Cir.), cert. denied, 348 U.S. 859 (1954). Judicial deference to prison administration came to be known as the "hands-off" doctrine. Note, supra, at 506 n.4.

No longer do courts strictly adhere to those early precedents which arbitrarily disregarded the constitutional claims of imprisoned persons: "[A convicted felon] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State." Ruffin v. Commonwealth, 19 Va. 1024, 1026, 21 Gratt. 790, 796 (1871). Although one commentator believes that the federal courts safeguard constitutionally protected interests if the exigencies of incarceration do not outweigh constitutional infringement, see J. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 125 (1977), this has not been the case where imprisoned persons are punished and prosecuted by the prison disciplinary and criminal justice systems for the same criminal act. See note 17 & accompanying text infra.

Another recent commentary suggests that the traditional "hands-off" approach is reappearing. Calhoun, The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal, 4 HASTINGS CONST. L.Q. 219, 220 (1977). Professor Calhoun argues that the Supreme Court does not analyze the merits of imprisoned persons' constitutional claims consistently with its statement that imprisoned persons possess constitutional rights. Id. at 219-20. She concludes:

Through such deference, the Court has achieved a result that it could much more easily and candidly have achieved had it simply declared that prisoners are not entitled to constitutional protection. The Court . . . has permitted a hardy weed, the "hands-off" approach, to creep back into the prison yard from which it ostensibly had been banished.

Id. at 220.

14 In People ex rel. Day v. Lewis, 376 Ill. 509, 34 N.E.2d 712 (1941), the Illinois Supreme Court decided that it could not interfere with the exercise of administrative disciplinary policy by substituting its judgment for that of the prison administration. Id. at 517, 34 N.E.2d at 715. The court did not disturb the prison disciplinary sanction, id., which included solitary confinement and forfeiture of all earned good-time credits, even though the imprisoned person had been acquitted on a criminal charge based on the same facts and the loss of good-time effectively lengthened the term of imprisonment by four years. Id. at 512, 34 N.E.2d at 713. See also People v. Conson, 72 Cal. App. 509, 237 P. 799 (1925); State v. Mead, 130 Conn. 106, 32 A.2d 273 (1943); State v. Cahill, 196 Iowa 496, 194 N.W. 191 (1923); People v. Huntley, 112 Mich. 569, 71 N.W. 178 (1897); Ex parte Rody, 348 Mo. 1, 152 S.W.2d 657 (1941).

The failure of state courts to apply double jeopardy principles to the prison disciplinary process may, in part, be explained by the fact that the fifth amendment double jeopardy clause was not applicable to state criminal proceedings until 1969. See Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy clause held applicable to state criminal proceedings through the due process clause of the fourteenth amendment). However, prior to the Benton decision, all states except Connecticut, Maryland; Massachusetts, North Carolina and Vermont had double jeopardy provisions in their respective constitutions. J. SIGLER, supra note 3, at 78. The five states which did not, considered the protection from double jeopardy part of their common law. See id. For a history of common law double jeopardy, see generally
decade, recent state and federal decisions disclose a judicial reluctance to reevaluate antiquated precedent.

Courts frequently avoid the imprisoned person's double jeopardy defense by assigning the fifth amendment phrases "jeopardy" and "same offense" artificial meanings. They distinguish the nature of the prison disciplinary proceeding from the criminal proceeding on two grounds: (1) since the nature of the prison disciplinary process is not "essentially criminal," an imprisoned person is not placed in constitutional jeopardy; and (2) since a violation of a prison disciplinary offense is not a criminal offense, the imprisoned person is not twice placed in jeopardy for the "same offense."

See note 13 & accompanying text supra.


A third ground has occasionally been put forth: since infliction of a disciplinary sanction — to be endured contemporaneously with a court imposed sentence — does not lengthen a court imposed sentence, the prison disciplinary disposition is not a double punishment within the meaning of the fifth amendment; the extra punishment merely makes the service of the prison term more onerous. See Jenkins v. State, 367 So. 2d 587 (Ala. Crim. App. 1978); Alex v. State, 484 P.2d 877 (Alaska 1971); People v. Ford, 175 Cal. App. 2d 37, 345 P.2d 354 (1959); People v. Lewis, 73 Ill. App. 3d 361, 386 N.E.2d 910 (1979); Lewis v. Smith, 38 App. Div. 2d 883, 329 N.Y.S.2d 145 (1972); State v. Williams, 57 Wash. 2d 231, 356 P.2d 99 (1960). However, the United States Supreme Court has expressly recognized that the loss of good-time credits does effectively lengthen the term of imprisonment if the credits are not subsequently restored. Wolff v. McDonnell, 418 U.S. 539, 561 (1974).
The Concept of "Jeopardy" in the Prison Disciplinary Process

In its constitutional sense, "jeopardy" describes the risk that has been traditionally associated with criminal prosecutions.\(^2\) Though the constitutional language, "jeopardy of life or limb,"\(^2\) suggests proceedings which impose the most severe of sentences, it has always been construed to encompass those proceedings which can culminate in extremely slight sanctions.\(^3\) As a defendant in a prison disciplinary proceeding, however, an imprisoned person is not placed in constitutional jeopardy.\(^4\) To be deemed subject to

\(^{21}\) Breed v. Jones, 421 U.S. 519, 528 (1975) (extending the double jeopardy clause to juvenile delinquency proceedings).

The prospect of multiple prosecutions and punishments once plagued juvenile offenders. In In re Gault, 387 U.S. 1 (1967), the Supreme Court made applicable to juvenile proceedings certain constitutional rights traditionally associated with adult criminal prosecutions. The Court discarded the notion that constitutional guaranties could be denied where procedural distinctions existed:

We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.

Id. at 30.

Mr. Justice Blackmun stated in McKeiver v. Pennsylvania, 403 U.S. 528, 541 (1971), that "[l]ittle . . . is to be gained by any attempt simplistically to call the juvenile court proceeding either 'civil' or 'criminal.' The Court carefully has avoided this wooden approach." Yet prison disciplinary process is presently viewed by the courts in the same manner as the juvenile delinquency process was a decade ago.

One imprisoned person has argued that he should be entitled to the same constitutional rights that a juvenile offender is given in a delinquency proceeding, since the evolution of the prison disciplinary process closely parallels that of the juvenile delinquency process. See State v. Weekley, -- S.D. --, 240 N.W.2d 80 (1976). The two proceedings have been distinguished on the grounds that a prison disciplinary proceeding, unlike a juvenile delinquency proceeding, is not "essentially criminal" and that prison punishment is only meant to serve the orderly administration of the penitentiary. Id. at --, 240 N.W.2d at 82. Although many of the purposes of the two proceedings overlap and though the imprisoned person suffers the same anxiety as the juvenile offender, the court in Weekley decided that to treat jeopardy as attaching at a prison disciplinary proceeding would "trivialize" the protection provided by the double jeopardy clause. Id.

\(^{22}\) U.S. CONST. amend. V.

\(^{23}\) See Ex parte Lange, 85 U.S. (18 Wall.) 163, 173 (1874) (multiple punishment for the same offense violates the double jeopardy prohibition).

The prevention of multiple punishment for the same offense was foremost in the minds of the framers of the double jeopardy clause. James Madison's first double jeopardy proposal read: "No person shall be subject . . . to more than one punishment or one trial for the same offence." 1 ANNALS OF CONGRESS 486 (Gales & Seaton eds. 1789). Mr. Benson, of New York, understood the provision as embodying the "humane intention . . . to prevent more than one punishment." Id. at 753.

\(^{24}\) Despite the litany of similarities between the due process guaranties in a criminal and prison disciplinary proceeding, see notes 26-35 & accompanying text infra, it may be inferred from Wolff v. McDonnell, 418 U.S. 539 (1974), that an imprisoned person is not
constitutional jeopardy, an imprisoned person has been required to demonstrate that he has endured a "trial before a court of competent jurisdiction under an indictment or information sufficient in form and substance to sustain a conviction."28 A mere demonstration that he was tried before an administrative tribunal has not sufficed.

This characterization of the nature of the prison disciplinary process is supported by the Supreme Court's declaration in Wolff v. McDonnell28 that "[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply."27 The Court ruled, however, that before an imprisoned person could be seriously penalized for a disciplinary violation — the serious penalties in this case being the loss of good-time credits and solitary confinement — the state must provide certain minimal procedures.28

According to the due process criteria set forth in Wolff, an imprisoned person faced with disciplinary proceedings is entitled to at least twenty-four-hour written notice of the charges29 and has the right "to call witnesses and present documentary evidence in his defense when doing so [is] not . . . unduly hazardous to institutional safety or correctional goals."30 The imprisoned person is

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28 418 U.S. at 557-58.
29 Id. at 563-64.
30 Id. at 566.
also entitled to an impartial hearing body and to a written statement which discloses the evidence relied on and the reasons for any disciplinary action taken. The Court added that while it was not required, it might be useful for the prison officials to state their reasons for refusing to call a witness. Though an imprisoned person has no absolute right to cross-examine witnesses at the disciplinary hearing, the majority ruled that correctional officials could, in their discretion, permit cross-examination. Finally, the majority held that the imprisoned person had no right to be represented by counsel.

Though most jurisdictions now provide greater procedural safeguards than those constitutionally required by Wolff, courts remain adamant in their unwillingness to eschew “civil” or “administrative” labels of convenience; they continue to distinguish the nature of the prison disciplinary and criminal proceedings through procedural comparisons. Since they have failed to respond to the invitation of the Supreme Court to reassess continually the prison

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31 Id. at 570-71.
32 Id. at 564.
33 Id. at 566.
34 Id. at 568. Justice Douglas, dissenting, expressed the views that the threat of any substantial deprivation of liberty within the prison is a loss which can be imposed only after a full hearing with all due process safeguards and that imprisoned persons could not be deprived of their constitutional right to confront and cross-examine their accusers. Id. at 595 (Douglas, J., dissenting). See also id. at 580 (Marshall & Brennan, JJ., concurring and dissenting in part).
35 Id. at 570. But see id. at 595 (Douglas, J., dissenting).

For model correctional standards, see American Correctional Association, Model Correctional Rules and Regulations (1977) [hereinafter cited as ACA Model Disciplinary Policy]; IJA-ABA Joint Commission on Juvenile Justice Standards, Corrections Administration (1977) [hereinafter cited as ABA Model Juvenile Disciplinary Policy]; ABA Joint Committee on the Legal Status of Prisoners, The Legal Status of Prisoners, 14 Am. Crim. L. Rev. 375 (1977) [hereinafter cited as ABA Model Adult Disciplinary Policy].

disciplinary process,\footnote{The Court said that their conclusions in Wolff were “not graven in stone. As the nature of the prison disciplinary process changes in future years, circumstances may exist which will require further consideration and reflection of this Court.” 418 U.S. at 572. One commentator has interpreted the Supreme Court’s intention in Baxter v. Palmigiano, 425 U.S. 308 (1976), to restrict severely the ability of the judiciary to take part in the reshaping of the dispositional process. See J. Palmer, supra note 13, at 113. According to Professor Palmer, Wolff established the maximum, rather than the bare minimum, constitutional requirements. Id. If Professor Palmer is correct, then the obligation is clearly on legislatures and correctional agencies to expand the procedural safeguards of the prison disciplinary process. See notes 112-16 & accompanying text infra.} it seems that where prison disciplinary proceedings lack some of the procedural elements of a criminal proceeding an imprisoned person who is subject to prison disciplinary action is not placed in constitutional jeopardy.

The Concept of “Same Offense” in the Prison Disciplinary Process

Not only must an imprisoned person demonstrate that constitutional jeopardy has attached at a prison disciplinary proceeding, he also must be deemed to have been twice placed in constitutional jeopardy for the same offense.\footnote{See, e.g., Smith v. State, 1 Md. App. 297, 229 A.2d 723 (1967); People v. Wilson, 6 Mich. App. 474, 149 N.W.2d 468 (1967); accord, People v. Bachman, 50 Mich. App. 682, 213 N.W.2d 800 (1973); cf. In re Lamb, 34 Ohio App. 2d 85, 296 N.E.2d 280 (1973) (a prison disciplinary sanction subsequent to a criminal conviction punished an imprisoned person twice for the same offense).} Since the fifth amendment phrase “same offense” is narrowly construed by most courts,\footnote{See, e.g., Blockburger v. United States, 284 U.S. 299 (1923) (the “same evidence” test used to define the fifth amendment phrase “same offense”).} an imprisoned person’s plea of double jeopardy has provided inadequate protection.

In Blockburger v. United States,\footnote{After Blockburger, the Supreme Court applied the “same evidence” definition of “same offense” in cases involving multiple counts in one trial. See Gore v. United States, 357 U.S. 386, 388 (1958). There was uncertainty, however, as to whether the Court adopted the “same evidence” test in cases involving multiple prosecutions, rather than multiple counts, for the same offense. See Abbate v. United States, 359 U.S. 187, 198 n.2 (1959) (Brennan, J., concurring). A minority of the Court often advocated a broader definition of “same offense” because the “same evidence” definition would seldom prevent multiple prosecutions. See Ashe v. Swenson, 397 U.S. 436, 451-54 (1970) (Brennan, J., concurring, joined by Marshall & Douglas, JJ.). Justice Brennan maintained that the double jeopardy clause “requires the prosecution in one proceeding . . . to join . . . all the charges against a defendant that grow out of a single criminal act or occurrence.” Id. at 463-54.} the Supreme Court adopted the “same evidence” test to define the phrase “same offense.” According to the Court, “[t]he applicable rule is that where the same
act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." The test thus focuses on the statutory elements of each offense. If one offense specifies elements which the other does not, multiple prosecutions and punishments are not prohibited despite the substantial overlap of proof offered to sustain a conviction on each offense. Under the Blockburger test, an overzealous prosecutor can obtain multiple convictions for the same offense by assiduously using his thesaurus and statute book and continually redefining the crime, each time requiring slightly different criminal elements. In the case of sequential criminal prosecutions, the Blockburger test undermines the major policy basis of the double jeopardy clause.

42 Id. at 304. The "same evidence" test was first announced in The King v. Vandercomb, 168 Eng. Rep. 455, 461 (1796): "[U]nless the first indictment were such as the prisoner might have been convicted upon it by proof of facts in the second indictment, an acquittal on the first can be no bar to the second." See also J. SIGLER, supra note 3, at 63-69; Conley, Former Jeopardy, 35 YALE L.J. 674 (1926); Kirchheimer, The Act, the Offense and Double Jeopardy, 58 YALE L.J. 513 (1949); Lugar, Criminal Law, Double Jeopardy, and Res Judicata, 39 IOWA L. REV. 317 (1954); Note, Double Jeopardy: Multiple Prosecutions Arising from the Same Transactions, 15 AM. CRIM. L. REV. 259 (1975); Note, Ashe v. Swenson: Collateral Estoppel, Double Jeopardy, and Inconsistent Verdicts, 71 COLUM. L. REV. 321 (1971); Note, The Double Jeopardy Clause: Refining the Constitutional Proscription Against Successive Criminal Prosecutions, 19 U.C.L.A. L. Rev. 804 (1972).

43 See, e.g., Blockburger v. United States, 284 U.S. 299 (1932). In Blockburger, the defendant had been indicted and tried on five separate counts under the Harrison Narcotics Act. The third count charged the sale of a drug not in or from the original stamped package. Id. at 301. This same sale was charged in the fifth count as not having been made pursuant to a written order of the purchaser. Id. The Court held that this single sale constituted two offenses because it violated two sections of the Act and each provision required proof of a fact which the other did not. Id. at 304.

In Brown v. Ohio, 432 U.S. 161 (1977), however, the Court held that a greater and lesser included offense are the same offense for purposes of the double jeopardy protection against multiple trials. Cf. Jeffers v. United States, 432 U.S. 137 (1977) (defendant loses his double jeopardy protection against multiple prosecutions for greater and lesser included offenses when: (1) the events necessary to the greater crime have not taken place at the time the prosecution for the lesser offense is begun; (2) the facts necessary to the greater crime were not discoverable, despite the exercise of due diligence, before the first trial; and (3) the defendant asks for separate trials on the greater and lesser included offenses, or fails to raise the issue that one offense might be the lesser included offense of the other).


45 The general policy behind the double jeopardy clause was summarized by the Supreme Court in Green v. United States, 355 U.S. 184, 187-88 (1957):

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecu-
In the case of sequential prison disciplinary and criminal proceedings, the Blockburger construction of "same offense" has received an even more formalistic application.\textsuperscript{46} Courts have generally held that an imprisoned person is not twice placed in constitutional jeopardy for the same offense, since the alleged criminal conduct violates a prison regulation and a criminal statute. As stated by one court, there is no "identity of offenses" between a prison disciplinary regulation and a criminal statute.\textsuperscript{47} This distorted construction of the "identity of offenses" theory fails to take into account that a prison disciplinary regulation which prohibits criminal conduct is typically defined in terms of the respective criminal statute.\textsuperscript{48} Though the tribunals differ in each adjudication, neither the prison nor the criminal offense requires proof of a fact which the other does not.\textsuperscript{49}

The elements of the prison and the criminal offense are identical.\textsuperscript{50} In one state, an imprisoned person who violates the "general laws of the State or Federal government" also commits a prison disciplinary offense.\textsuperscript{51} The prison disciplinary offense is necessarily defined in the same terms as the criminal statute which is violated.


\textsuperscript{48} \textit{See} note 51 & accompanying text infra.

\textsuperscript{49} \textit{See}, e.g., Jenkins v. State, 367 So. 2d 587 (Ala. Crim. App. 1978) (prison and criminal actions based on the same facts); Carruth v. Ault, 231 Ga. 547, 203 S.E.2d 158 (1974) (crime and act for which administrative punishment was assessed were one and the same); Washington v. Rodriguez, 82 N.M. 428, 483 P.2d 309 (1971) (criminal action based on the same act which was the basis of the prison disciplinary proceeding).

\textsuperscript{50} \textit{See} note 51 & accompanying text infra.

\textsuperscript{51} ILLINOIS DISCIPLINARY POLICY, supra note 36, at 1-3. In Indiana, disciplinary action might be brought against an imprisoned person who is charged by the prison administration with homicide, assault, battery, escape, extortion, blackmail, theft, arson, indecent exposure, counterfeiting and gambling. INDIANA DISCIPLINARY POLICY, supra note 36, at 32-36. Though the Federal Bureau of Prisons does institute disciplinary action for alleged criminal conduct, see, e.g., United States v. Boomer, 571 F.2d 543 (10th Cir.), \textit{cert. denied}, 436 U.S. 911 (1978); United States v. Salazar, 505 F.2d 72 (9th Cir. 1974); United States v. Herrera, 504 F.2d 859 (5th Cir. 1974); United States v. Acosta, 495 F.2d 60 (10th Cir. 1974); United States v. Apker, 419 F.2d 388 (9th Cir. 1969); Gibson v. United States, 161 F.2d 973 (9th Cir. 1947), the institutional investigating officer must suspend investigation of the crime and may not question the imprisoned person until the Federal Bureau of Investigation has completed its investigation, Federal Disciplinary Policy, supra note 36, § 541.12. Once the FBI has completed its investigation, the imprisoned person may be brought before the prison disciplinary board. \textit{Id}.
The prison disciplinary board cannot find an imprisoned person guilty of the prison disciplinary offense unless it is satisfied that the prison administration has proved every element of the offense.\textsuperscript{52} A state or federal prosecutor is also required to prove the same elements in a criminal action. In both the prison disciplinary and the criminal proceedings, the same evidence may be heard on the same elements.\textsuperscript{53} Most courts have failed to appreciate the new dimension which the prison disciplinary offense adds to the construction of “same offense.” A more fitting response would be a reasoned application of the Blockburger test, which pairs the prison disciplinary and criminal offenses against their elements; this would necessarily bar multiple prosecutions and punishments for the same offense.\textsuperscript{54}

\textsuperscript{52} In most prison disciplinary proceedings, the prison administration must demonstrate an imprisoned person’s guilt by a preponderance of the evidence or by substantial evidence. See, e.g., Federal Disciplinary Policy, supra note 36, § 541.15(f) (greater weight of the evidence and supported by substantial evidence manifested in the record of the proceedings); NEW YORK DISCIPLINARY POLICY, supra note 36, § 253.4 (substantial evidence on the record as a whole); ILLINOIS DISCIPLINARY POLICY, supra note 36, at 1 (reasonable satisfaction that offense committed); INDIANA DISCIPLINARY POLICY, supra note 36, at 23 (substantial evidence).

The ABA MODEL JUVENILE DISCIPLINARY POLICY, supra note 36, § 8.9(E), requires the prison administration to demonstrate the guilt of the imprisoned juvenile by clear and convincing evidence. However, the ABA MODEL ADULT DISCIPLINARY POLICY, supra note 36, § 3.2(e)(vi), only requires the prison administration to demonstrate guilt by a preponderance of the evidence. Unlike the juvenile disciplinary process, the adult disciplinary process does not permit the prison administration to bring disciplinary action where there has been an alleged criminal violation. Id. § 3.3(a).


Neither the prison nor the criminal offense requires proof of a fact which the other does not. See, e.g., Blockburger v. United States, 284 U.S. 299 (1932); cf. Brown v. Ohio, 432 U.S. 161 (1977) (one convicted of a greater offense may not be subjected to a subsequent criminal prosecution for a lesser included offense); Jeffers v. United States, 432 U.S. 137 (1977) (greater and lesser included offenses are the “same offense” for purposes of the double jeopardy defense). The prison disciplinary offense is not a lesser or greater included offense of the criminal statute. The elements of each offense are identical. See note 51 & accompanying text supra.

\textsuperscript{54} Although a reasoned application of the Blockburger test would bar multiple prosecutions and punishments, an artful prosecutor could institute criminal action against the imprisoned person by carefully redefining the criminal charge. The prosecutor would be free to charge a new offense in the criminal action so long as the prison offense were not a lesser or greater included offense. For this reason, the fifth amendment phrase “same offense” should be defined in terms of compulsory joinder, which would require the state to join all charges against an imprisoned person that grow out of a single criminal transaction, for the purpose of preventing multiple prosecution. See Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring).
Although traditional double jeopardy theories have failed to insulate imprisoned persons from multiple prosecutions and punishments, the doctrine of collateral estoppel, as it inheres in the double jeopardy clause, is an alternative remedy. Collateral estoppel is derived from the broader common law principle of res judicata. According to the doctrine, questions of fact and law ac-

In cases where the imprisoned person commits a single criminal act which has several victims, the courts may use the Blockburger test to allow a separate prosecution for each victim. Cf. Ciucci v. Illinois, 356 U.S. 571 (1958) (defendant accused of murdering wife and three children was tried separately for three of the murders); Moton v. Swenson, 488 F.2d 1060 (8th Cir. 1973), cert. denied, 417 U.S. 957 (1974) (defendant accused of robbing two men in one gas station robbery was tried separately for the robbery of each man); State v. Smith, 491 S.W.2d 257 (Mo.), cert. denied, 414 U.S. 1031 (1973) (defendant accused of raping two women, murdering the two women and a man, and robbing the house, all in one episode, was tried separately for two of the murders). Because the Blockburger test is satisfied if each charge requires proof of a fact which the other does not, the test will always sanction a criminal action if there are multiple victims; the identity of the victim is an additional question of fact. See, e.g., State v. Harris, 78 Wash. 2d 894, 480 P.2d 484, rev’d on other grounds, 404 U.S. 55 (1971). Even a substantial overlap in the evidence in the two proceedings is immaterial. See Brown v. Ohio, 432 U.S. 161, 166 (1977).

Where there is only one victim, an imprisoned person may, by one act, violate many different criminal statutes or sections of criminal statutes. Under the Blockburger test there can be a separate proceeding for each violation, since each will require proof of a fact which the other does not. See United States v. Hairrell, 521 F.2d 1264, 1266 (6th Cir.), cert. denied, 423 U.S. 1035 (1975); cf. United States v. Wilder, 463 F.2d 1263, 1266 (D.C. Cir. 1972) (prosecution for possessing an unregistered firearm did not bar prosecution for carrying a concealed weapon without a license); Percy v. South Dakota, 443 F.2d 1232, 1235 (8th Cir.), cert. denied, 404 U.S. 55 (1971) (prosecution for kidnapping did not bar a prosecution for indecent molestation); State v. Miller, 5 Or. App. 501, 507, 484 P.2d 1132, 1134 (1971) (prosecution for being an ex-convict in possession of a firearm did not bar prosecution for carrying a concealed weapon). But cf. State v. Ahuna, 52 Haw. 321, 326, 474 P.2d 704, 707 (1970) (prosecution for burglary and possession of an unregistered firearm barred prosecution for possession of a firearm by an ex-felon because statutes are directed at people, not for who they are, but for what they do).

The distinction between res judicata and collateral estoppel is set forth by the Supreme Court in Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1876) as follows:

'There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . .
ultimately litigated are conclusive in subsequent actions in which the same questions arise, even though the cause of action might be different. The defense of double jeopardy requires identity of offenses, but the doctrine of collateral estoppel does not. The defense of double jeopardy, if successful, operates as a complete bar to another prosecution, while the defense of collateral estoppel might merely preclude the relitigation of certain issues.

In *Ashe v. Swenson*, the Supreme Court held that the doctrine of collateral estoppel precludes relitigation of an issue actually determined in a criminal action. The Court applied the doctrine in order to bar a second criminal action based on the same statutory offense. In the wake of the *Ashe* decision, other courts have designed a broadened theory of collateral estoppel which precludes relitigation in a noncriminal proceeding of any issue actually determined in a prior criminal action. These decisions, which have effectively expanded the scope of the double jeopardy defense, comport with the principles of judicial finality and fundamental fairness.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

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59 Id. Justice Brennan agreed with the majority that collateral estoppel precluded the second prosecution, but felt that double jeopardy barred reprosecution irrespective of whether collateral estoppel was applicable. Id. at 448-49 (Brennan, J., concurring).

60 Id. at 446. *Ashe* raises several questions, not the least of which is why collateral estoppel should be preferred to a more comprehensive doctrine of double jeopardy. Justice Brennan recognized that a broader definition of “same offense” would have precluded the second prosecution in *Ashe*. Id. at 449-50 (Brennan, J., concurring). If applied to the prison disciplinary process, it would preclude multiple prosecutions for the same offense. See notes 48-54 & accompanying text supra. Collateral estoppel was adopted in *Ashe* to compensate for the deficiencies of the double jeopardy protection. It represents a compromise between those members of the Court who would condemn multiple prosecutions and those who apparently prefer to live with the archaic rules of double jeopardy. See generally Note, *The Double Jeopardy Clause: Refining the Constitutional Proscription Against Successive Criminal Prosecutions*, 19 U.C.L.A. L. Rev. 804, 825-26 (1972).

Issues Determined in a Criminal Action Should Not Be Relitigated in a Prison Disciplinary Action

In People v. Grayson, the Illinois Supreme Court ruled that relitigation in a probation revocation proceeding of any issue actually determined in a prior criminal action was precluded by the doctrine of collateral estoppel. The case represents a revitalization of an early United States Supreme Court doctrine which favored finality of criminal judgments over technical distinctions which might be drawn from the difference in the burdens of proof imposed on the state in the two proceedings. In Grayson, the Illinois court reasoned that the doctrine of collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future law suit." The

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5 Id. at 265, 319 N.E.2d at 45. In Barrows v. Hogan, 379 F. Supp. 314 (M.D. Pa. 1974), a prison disciplinary case, the federal court took a similar position. Unlike the Illinois Supreme Court's reasoning in Grayson, the federal district court did not develop a "punitive sanctions" test for the prison disciplinary process. The Barrows court was concerned primarily with the finality of the criminal judgment and secondarily with the need to treat the imprisoned person fairly. Id. at 316. But see Rusher v. Arnold, 550 F.2d 896 (3d Cir. 1977) (no fundamental unfairness found).
58 Ill. 2d at 265, 319 N.E.2d at 45-46. The court cited United States v. United States Coin & Currency, 401 U.S. 715 (1971), as an example of the Supreme Court's most recent amplification of this position. 58 Ill. 2d at 265, 319 N.E.2d at 46.
Proceedings for the forfeiture of property which was allegedly the subject matter of a criminal transaction giving rise to a right of forfeiture have been barred against a claimant who showed that he was acquitted of the same criminal acts relied on to justify the forfeiture. See Coffey v. United States, 116 U.S. 436 (1886); accord, Lowther v. United States, 480 F.2d 1031, 1034 (10th Cir. 1973) (recognizing the vitality of Coffey). But cf. Helvering v. Mitchell, 303 U.S. 391 (1938) (acquittal on a criminal charge is not a bar to a noncriminal action by the state, remedial in nature, arising out of the same facts on which the criminal proceedings were based).

According to the Supreme Court, where the objective of the subsequent noncriminal action is punitive, the acquittal on the criminal charge bars the noncriminal proceeding, because to entertain the second proceeding in order to punish the defendant is double jeopardy: "double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or conviction." Id. at 398 (tax penalties considered remedial sanctions).
Prior to Grayson, the rule developed by Coffey and cases following it did not clearly articulate whether the rule was founded on principles of criminal res judicata, double jeopardy or both. The Grayson theory applies to both. The doctrine of collateral estoppel, as applied by the Illinois court, is part of the double jeopardy protection and also is part of the broader doctrine of criminal res judicata. The broader doctrine of criminal res judicata has been given effect in multiple criminal actions. See Collins v. Loisel, 262 U.S. 426 (1923) (arguendo); United States v. Oppenheimer, 242 U.S. 85 (1916) (constitutional guaranties against double jeopardy do not have the effect of abrogating or supplanting in criminal cases the principles of res judicata).
58 Ill. 2d at 263, 319 N.E.2d at 45 (citing Ashe v. Swenson, 397 U.S. 436, 443 (1970)).
court acknowledged that though the differences between a criminal trial and a probation revocation proceeding are substantial, the differences could not fairly serve to permit relitigation of identical issues on the same evidence. Thus, the doctrine of collateral estoppel applies so as to preclude relitigation in a noncriminal proceeding of any issue determined in a criminal action despite the difference in the burdens of proof imposed on the state in the two proceedings.

The critical question in determining whether a noncriminal proceeding, such as a prison disciplinary proceeding, can be equated with a criminal proceeding for purposes of collateral estoppel analysis is whether the noncriminal proceeding can culminate in punitive sanctions. The Supreme Court has ruled that an acquittal on a criminal charge does not bar a noncriminal action arising out of the same facts on which the criminal action was based, where the sanction of the noncriminal proceeding is "remedial." If the nature of the noncriminal sanction is punitive, however, an acquittal on a criminal charge precludes relitigation of the same issues in a subsequent criminal action based on the same facts. By applying this reasoning to the facts in Grayson, the Illinois Supreme Court was convinced that revocation of probation is sufficiently punitive in nature. If the doctrine of collateral estoppel is to be applied to the prison disciplinary process, the fundamental questions are whether the prison disciplinary process is sufficiently similar to the revocation process and whether the prison disciplinary sanction is punitive.

The prison disciplinary process is nearly indistinguishable from the parole and probation revocation processes. In Morrissey v.
Brewer and Gagnon v. Scarpelli, the Supreme Court ruled that a probationer and a parolee respectively must be provided certain minimal procedural safeguards in a revocation proceeding. Though the Court made it clear that a defendant in a revocation proceeding need not be accorded the full panoply of rights due a defendant in a criminal prosecution, it did not clearly articulate the ways in which revocation proceedings differ from criminal trials. The requisite procedural safeguards in the revocation pro-

When a defendant is placed on probation, a sentence is pronounced but then suspended, and the defendant is released. If the court later finds the conditions of his release violated, the original sentence is then executed, or, in some jurisdictions, a new sentence is pronounced. Compare Smith v. State, 261 Ind. 510, 307 N.E.2d 281 (1974) (increased sentence may be imposed on revocation) with Hord v. Commonwealth, 450 S.W.2d 530 (Ky. 1970) (unconstitutional to increase sentence upon revocation).

A defendant is placed on parole only after he has served part of his sentence. Parole is administered by a parole board, an administrative body, and not by a court. For a more complete discussion of the differences between probation and parole revocation proceedings, see generally Cohen, Due Process, Equal Protection and State Revocation Proceedings, 42 U. Colo. L. Rev. 197, 225-28 (1970); Van Dyke, Parole Revocation Hearing in California: The Right to Counsel, 59 Cal. L. Rev. 1215, 1239-43 (1971).

408 U.S. 471 (1972) (revocation of parole).
411 U.S. 778 (1973) (revocation of probation).
408 U.S. at 484. The defendant must be provided some preliminary proceeding to determine whether there is probable cause or reasonable ground to believe that a violation of a condition on which his liberty rests has occurred. 411 U.S. at 781-82; 408 U.S. at 485. Only after the existence of reasonable grounds is demonstrated can a second hearing be held. The second hearing determines: (1) whether the individual has violated the terms of the conditional liberty agreement; and (2) whether the violation was serious enough to warrant termination of the conditional liberty. 411 U.S. at 782, 784; 408 U.S. at 485, 487-88.

Certain minimum procedural protections must be provided at the second hearing: (1) written notice of the claimed violation of parole or probation; (2) disclosure to the parolee or probationer of evidence against him; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses, unless the hearing officer specifically finds good cause for not permitting confrontation and cross-examination; (5) a neutral and detached hearing body; and (6) a written statement by the factfinders as to the evidence relied on and the reasons for parole or probation. 411 U.S. at 786; 408 U.S. at 488-89.

411 U.S. at 781; 408 U.S. at 486. The opportunity to cross-examine may be denied for good cause, id.; the right to counsel is not guaranteed, 411 U.S. at 790; and the state need not demonstrate a parolee's or probationer's guilt beyond a reasonable doubt. See United States v. Chambers, 429 F.2d 410 (3d Cir. 1970); United States v. Lauchi, 427 F.2d 258 (7th Cir.), cert. denied, 400 U.S. 868 (1970); Amaya v. Beto, 424 F.2d 363 (5th Cir. 1970); United States v. Markovich, 348 F.2d 238 (2d Cir. 1965).


411 U.S. at 789. The Court has treated parole and probation revocation proceedings similarly. In Gagnon, the Court noted that the two proceedings are constitutionally
ceedings are nearly identical to the ones required by Wolff v. McDonnell in the prison disciplinary proceeding. Since the prison disciplinary proceeding is nearly indistinguishable from the probation and parole revocation processes, the Grayson construction of collateral estoppel is wholly applicable to the prison disciplinary disposition. However, mere procedural similarities are not entirely determinative of whether the doctrine of collateral estoppel should apply; it is the nature of the civil or administrative sanction which is most significant.

Several jurisdictions have declined to view the revocation process as the Illinois Supreme Court did in Grayson, on the ground that the revocation of probation or parole is a "remedial" sanction. The majority of jurisdictions, however, consider the loss of good-time credits or solitary confinement as entirely "punitive." Unlike revocation cases, where a probationer or parolee has already enjoyed some of the rewards of his good conduct, in prison disciplinary cases, the imprisoned person forfeits earned good-time credits that have not been redeemed. As the split in authority indicates, revocation of probation or parole is arguably "remedial." This cannot be said of prison discipline; its function is to punish criminal and noncriminal violations of prison disciplinary regulations.

\[\text{Id. at 782 n.3.}\]


\[\text{In Standlee, the federal court acknowledged that an acquittal on a criminal charge will bar a noncriminal action where the noncriminal action could culminate in a punitive sanction. 557 F.2d at 1306. The court did not, however, consider the revocation of parole to be a punitive sanction. Id. at 1306-07.}\]


\[\text{In most jurisdictions, the prison disciplinary board may impose a broad range of sanctions. The disciplinary sanctions are intended as punishment. ABA Survey, supra note 36, at 2. An imprisoned person may be punished by solitary confinement, loss of privileges, loss of earned good-time credits and transfer to another institution. See Federal Disciplinary Policy, supra note 36, § 541.11(d); New York Disciplinary Policy, supra note 36, § 253.5; Illinois Disciplinary Policy, supra note 36, at 1-3; Indiana Disciplinary Policy, supra}\]
In its concern for fundamental fairness and for the interests an imprisoned person has in his earned good-time credits, one court has ruled that relitigation in a prison disciplinary proceeding of any issue actually determined in a criminal action was precluded by the doctrine of collateral estoppel. In *Barrows v. Hogan,* a habeas corpus case, an imprisoned person was acquitted by a jury which had heard all of the evidence on a charge of assault. Following the criminal action, the prison administration charged Barrows with assault, a prison disciplinary violation, and the prison disciplinary board, which heard the same evidence as the jury, found him guilty and revoked his earned good-time credits. The prison administration argued that an acquittal on a criminal charge did not preclude punitive sanctions in a proceeding which was governed by a lesser standard of proof. The federal district court, unpersuaded, ordered that the good-time credits be restored on the ground that a finding by a jury was a final determination against the government on the question of whether Barrows committed the alleged crime. The court stated that “it is impermissible for the prison administration to determine otherwise and punish the prisoner for an offense as to which he had been acquitted.”

Since the *Barrows* decision, one state has enacted legislation

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The ABA Model Adult Disciplinary Policy, supra note 36, § 3.2(c), does away with solitary confinement as a permissible disciplinary sanction. The ACA Model Disciplinary Policy, supra note 36, § I(B)(1), at 7, limits the maximum number of days of solitary confinement to 15.


*Id.*

*Id.* at 316. See also note 52 & accompanying text supra.

379 F. Supp. at 315.

*Id.* at 316. But see *Rusher v. Arnold,* 550 F.2d 896 (3d Cir. 1977). In *Rusher,* the prison administration was not collaterally estopped from denying an imprisoned person his earned good-time, even though he was subsequently acquitted on a criminal charge based on the same facts. *Id.* at 899. However, *Barrows* is distinguishable, since the disciplinary proceeding followed the criminal action. See text accompanying note 85 supra.

379 F. Supp. at 316. The common law doctrine of collateral estoppel is designed to prevent the relitigation by the same parties of the same claims or issues. The traditional policy, as adhered to by the courts, makes issues actually determined binding so as to foreclose further inquiry. The policy is followed no matter how clear the mistake of fact, how obvious the misunderstanding of law, how unfortunate the choice of policy, how unjust the practical consequences or how inadequate the evidence in the record. The interest of the parties and of the public in ending litigation normally precludes a party who has had an adequate opportunity to present his case from further pressing the same claims or issues. See generally 1B J. MOORE, FEDERAL PRACTICE ¶ 0.441 (1974 & Supp. 1979).

379 F. Supp. at 316.
which prevents an imprisoned person from being “subject to any institutional [prison] disciplinary action subsequent to an acquittal in a court of law . . . .” Barrows and the parallel state statutory safeguard provide only meager protection, however, for the scope of their collateral estoppel effect is restricted to prison disciplinary proceedings that are commenced after a criminal proceeding at which the imprisoned person was acquitted. The great majority of cases reported involve a criminal proceeding that is brought after a prison disciplinary proceeding. In order to provide effective protection against multiple prosecutions and punishments, the doctrine of collateral estoppel must be broadened to preclude relitigation in a criminal action of any issue actually determined by the prison disciplinary board.

**Issues Determined in a Prison Disciplinary Proceeding Should Not Be Relitigated in a Criminal Action**

There is a developing body of case law which has applied the doctrine of collateral estoppel to administrative adjudications to preclude relitigation in a civil action of any issues actually determined by an administrative adjudicatory body. In United States v. Utah Construction & Mining Co., the Supreme Court unanimously held that a board of contract's valid determination of an issue for breach of contract is binding in a subsequent civil suit for breach of contract involving the same facts and the same parties. The Court stated that its holding was harmonious with general principles of collateral estoppel where the administrative adjudication has met three criteria. The decision expressly requires that before the doctrine can be invoked the administrative body must be acting in a judicial capacity, it must resolve disputed issues of

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89 CAL. PENAL CODE § 2657(a) (West Supp. 1979).
90 The contours of the law of administrative res judicata were first proposed by Professor Davis in 1958. See 2 K. Davis, ADMINISTRATIVE LAW TREATISE § 18.12 (1958). The Supreme Court adopted his position in United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966), by stating: “When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.”
92 Id. at 418-19.
93 Id. at 422.
fact which are properly before it, and the parties must have had an adequate opportunity to litigate the facts. Other courts have added a fourth criterion which requires that a finding by the administrative tribunal on a material issue be supported by substantial evidence on the record as a whole.

If, as one might infer from Wolff v. McDonnell, a disciplinary proceeding is not the equivalent of a criminal trial, then it must be viewed as an administrative adjudication. The prison disciplinary board acts in a “judicial capacity”; it abides by the essential elements of an adjudicatory hearing, including notice, cross-examina-

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84 Id.

The Third Circuit’s decision in Seatrain also stands for the proposition that res judicata is applicable in administrative proceedings:

Normally, if such an issue [the jurisdiction of the tribunal]... has once been decided between the parties by a competent court, another court will not permit the matter to be relitigated between the same parties in another case.... The present case does present the additional consideration that the first decision was by... an administrative tribunal, rather than a court. But in the circumstances that should make no difference.

207 F.2d at 259 (citations omitted). A similar position was taken by the Third Circuit in its recent decision in Gulf Oil. The court refused to overturn the Federal Power Commission’s application of the doctrine of collateral estoppel; rather it considered the doctrine’s application to be harmless error. 563 F.2d at 603. In Edgewood Contracting, the Fifth Circuit affirmed the district court’s conclusion that a National Labor Relations Board’s determination that a union was guilty of a secondary boycott was res judicata as to the question of liability in a subsequent damage action brought against the union; it concluded:

The policy considerations which underlie res judicata — finality to litigation, prevention of needless litigation, avoidance of unnecessary burdens of time and expense — are as relevant to the administrative process as to the judicial.... Nor is there any difference in the underlying principles because the administrative decision is sought to be given effect in a judicial proceeding.

416 F.2d at 1084 (citations omitted).


Six federal cases have been cited for the proposition that neither res judicata nor collateral estoppel are applicable to the administrative process. See Bridges v. United States, 346 U.S. 209 (1953); Commissioner v. Sunnen, 333 U.S. 591 (1948); Pearson v. Williams, 202 U.S. 281 (1906); Jason v. Summerfield, 214 F.2d 273 (D.C. Cir.), cert. denied, 348 U.S. 840 (1954); Niagara Mohawk Power Corp. v. FPC, 202 F.2d 190 (D.C. Cir. 1952), aff’d on other grounds, 347 U.S. 239 (1954); Churchill Tabernacle v. FCC, 160 F.2d 244 (D.C. Cir. 1947). None of these cases, however, individually or collectively, stand for the foregoing principle; instead, they generally turn on one or both of the following factors: (1) an administrative proceeding which lacked the essential elements of an adjudicatory proceeding, see Garner v. Giarrusso, 571 F.2d 1330 (5th Cir. 1978), or (2) the absence of technical elements, such as lack of identity of parties and issues, see 2 K. Davis, supra note 90, § 18.02.

tion and confrontation, presence of counsel or counsel-substitute and full opportunity to present evidence.\textsuperscript{98} The prison administration has both personal jurisdiction over the imprisoned person and subject matter jurisdiction to institute charges against the imprisoned person for alleged violations of prison disciplinary regulations.\textsuperscript{99}

Like other administrative adjudicatory bodies, the prison disciplinary board resolves "disputed issues of fact" which come before it.\textsuperscript{100} Both parties have a full and fair opportunity to argue their version of the facts. The board makes a factual determination that there has been a violation of a prison disciplinary regulation and a dispositional decision to punish the imprisoned person for the breach of prison discipline.\textsuperscript{101} On a finding of guilt, the board may sanction the imprisoned person by revoking all or part of his earned good-time credits, by placing him in solitary confinement, by transferring him to another institution or by denying him customary privileges.\textsuperscript{102} The board also must prepare a written statement that discloses the evidence relied on and the reasons for any disciplinary action taken.\textsuperscript{103}

While the Supreme Court has never determined which standard of proof is applicable in a prison disciplinary adjudication, correctional departments generally require that an imprisoned person's guilt be demonstrated at least by the substantial weight of the evidence.\textsuperscript{104} Despite the difference in the burdens of proof imposed on the state in the criminal and prison disciplinary proceeding, the Wolff Court designed a system of procedural safeguards that were meant to insure that the prison administration and the imprisoned person have an adequate opportunity to litigate the facts.\textsuperscript{105} The minimal difference in the burden of proof cannot fairly serve to permit the relitigation of identical issues on the same evidence.

\textsuperscript{98} See notes 27-35 & accompanying text supra.

\textsuperscript{99} See, e.g., Federal Disciplinary Policy, supra note 36, § 541.10; New York Disciplinary Policy, supra note 36, § 253.1; Illinois Disciplinary Policy, supra note 36, at 1; Indiana Disciplinary Policy, supra note 36, at 1.

\textsuperscript{100} 384 U.S. at 422; see notes 27-35 & accompanying text supra.

\textsuperscript{101} 418 U.S. at 563-68.

\textsuperscript{102} See note 81 & accompanying text supra.

\textsuperscript{103} 418 U.S. at 564.

\textsuperscript{104} See note 105 & accompanying text infra.

\textsuperscript{105} See note 52 & accompanying text supra. One model disciplinary process requires the state to demonstrate an imprisoned person's guilt by a preponderance of the evidence, ABA Model Adult Disciplinary Policy, supra note 36, § 3.2(e)(vi), while another requires that guilt be demonstrated by clear and convincing evidence. ABA Model Juvenile Disciplinary Policy, supra note 36, § 8.9(E).
Since the prison disciplinary proceeding clearly qualifies as an administrative adjudication within the meaning of *Utah Construction*, an issue actually determined by the prison disciplinary board should not be relitigated by the same parties in a subsequent civil action. Moreover, since the sanctions imposed by the prison disciplinary board are punitive in nature, the state should not only be precluded from relitigating the same issues in a subsequent civil action, it also should be precluded from relitigating the same issues in a subsequent criminal action. Where the nature of the administrative sanction is punitive, considerations of “repose” or judicial finality, avoidance of duplicative proceedings, and fundamental fairness\textsuperscript{106} outweigh the logical evidentiary discrepancies arising from the different burdens of proof imposed on the state in the two proceedings.\textsuperscript{107}

**Administrative Safeguards: A Humane and Resourceful Alternative**

*The Role of Prison Administrators*

Despite an underlying theory of the double jeopardy defense that “it is not the danger or jeopardy of being a second time found

\textsuperscript{104} See Mogel, *supra* note 90, at 466. See also note 87 & accompanying text *supra*.

According to Professor Davis, any particular decision must be held either binding or not binding. 2 K. Davis, *supra* note 90, § 18.03. The choice is not between taking all or none of the traditional doctrine, for the doctrine may be relaxed or qualified in any desired degree without destroying its essential service. *Id.* The doctrine is also at its best as applied to issues of fact. *Id.* The party asserting collateral estoppel has the burden of demonstrating that the issues are identical and that they were determined on the merits in the first proceeding. This would not present an imprisoned person with any difficulty, since the elements of the prison disciplinary and criminal offense and the evidence offered in support of those elements are the same in both proceedings. *See* notes 48-54 & accompanying text *supra*.

For purposes of collateral estoppel, one governmental agency may be deemed in privity with another governmental agency, since the state is the prosecuting party in both proceedings. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940).

Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. . . . There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government. *Id.* at 402-03.

\textsuperscript{107} *Contra*, Rusher v. Arnold, 550 F.2d 896 (3d Cir. 1977) (acquittal was not conclusive of the factual dispute before the prison disciplinary board on the same issue, since the prison administration could demonstrate guilt by a lesser standard than reasonable doubt).
guilty. It is the punishment that would legally follow," in practice, courts exempt the prison disciplinary process from the fifth amendment double jeopardy protection. In order to bring the prison disciplinary process within the protection of the double jeopardy clause, it would be necessary for courts continually to broaden the doctrine of collateral estoppel or to reassess precedents that have given the constitutional phrases "jeopardy" and "same offense" artificial meanings.

There is a simpler solution. The problem of multiple prosecutions and punishments could be resolved by the correctional agencies. Where an imprisoned person has allegedly engaged in criminal conduct, the prison administration should forego prison disciplinary action. Where the alleged breach of prison discipline does not involve criminal conduct, as was the case in Wolff v. McDonnell, the procedures required by Wolff are arguably sufficient to strike a proper balance between correctional needs and objectives and the imprisoned person's constitutional rights. Under these circumstances the imprisoned person faces the prospect of only one adjudicatory proceeding and one punishment. The due process safeguards mandated by Wolff are insufficient, however, to serve as adequate protection of an imprisoned person who faces a

109 See notes 10-54 & accompanying text supra.
110 418 U.S. 539 (1974). In McDonnell v. Wolff, 342 F. Supp. 616 (D. Neb. 1972), modified, 418 U.S. 539 (1974), the conduct which gave rise to the forfeitures of good-time credits consisted of the following: swearing at a guard, possessing a sandwich in an unauthorized place, being intoxicated, organizing a protest against the warden, loitering, staging a sit-down strike in order to protest institutional policies, and refusing to obey orders to work, to wear socks, to shave or to get a conforming haircut. 342 F. Supp. at 626-27.

The Supreme Court's position in Wolff cannot be read as an approbation of the view that minimum procedural safeguards provided an imprisoned person in a prison disciplinary proceeding are sufficient where the alleged prison offense is also a criminal offense. Wolff merely establishes the appropriate procedures that the prison administration must adhere to before it can deny an imprisoned person his earned good-time or place him in solitary confinement for a breach of prison discipline.

111 Most prison administrations mete out punishment on two levels. One level deals only with minor breaches of prison discipline. The other level deals with major breaches. A criminal violation is adjudicated at the second level. The severity of the punishment is limited by the level at which the imprisoned person is tried. See generally Federal Disciplinary Policy, supra note 36; Illinois Disciplinary Policy, supra note 36; Indiana Disciplinary Policy, supra note 36; New York Disciplinary Policy, supra note 36.

The ABA Model Adult Disciplinary Policy, supra note 36, § 3.3, also provides for a two tier system. However, the ABA model does not permit a disciplinary hearing where the alleged conduct involves a possible criminal offense. Id. But cf. ACA Model Disciplinary Policy, supra note 36, § IV(B), at 9 (permitting a disciplinary proceeding for alleged criminal conduct).
prison disciplinary board on a criminal charge.

Where the alleged breach of prison discipline involves a possible criminal offense, the role of the prison disciplinary process changes significantly. Under these circumstances, the sole question put to the prison disciplinary board is whether the individual committed the elements of a crime. The resolution of that question, the *raison d'être* of the criminal justice system, should not be undertaken by the prison disciplinary system.\(^2\)

Several committees concerned with correctional reform have drafted model standards which adopt this recommendation.\(^3\) The model disciplinary standards propose that a prison disciplinary proceeding be barred if the state decides to prosecute.\(^4\) However, a sampling of the revised disciplinary procedures of several departments of corrections indicates that prison administrators remain unwilling to relinquish their power to punish the imprisoned person for criminal conduct irrespective of whether a criminal charge has been brought.\(^5\)

\(^{112}\) If the imprisoned person is charged criminally and if institutional order or security dictates, the imprisoned person may be confined in more secure housing during the pendency of the criminal action. According to the *ABA Model Adult Disciplinary Policy*, supra note 36, § 3.3(b):

> If required by institutional order and security, the prisoner to be charged criminally may be confined in his assigned quarters or in a more secure housing unit for no more than 90 days, unless during that time an indictment or information is brought against him. If a charge is made he may be so confined during the pendency of the criminal prosecution.

\(^{113}\) See *ABA Model Adult Disciplinary Policy*, supra note 36; *ABA MODEL JUVENILE DISCIPLINARY POLICY*, supra note 36.

\(^{114}\) See *ABA Model Adult Disciplinary Policy*, supra note 36, § 3.3(a). But see *ABA Model Juvenile Disciplinary Policy*, supra note 36, § 8.3 (if criminal charge is not pursued, the matter may be treated within the institution as a major breach of prison discipline).

\(^{115}\) See note 36 & accompanying text supra.

The rationale for permitting ancillary punishment by the prison administration has not been clearly articulated. The Ohio Department of Corrections has argued that the public interest in the safe and orderly operation of a penal institution and the prevention of criminal activity within the penitentiary outweighed any personal inconvenience suffered by the imprisoned person. *In re Lamb*, 34 Ohio App. 2d 85, 83, 296 N.E.2d 280, 289 (1973). Other courts have upheld similar arguments. See, *e.g.*, People v. Eggelston, 255 Cal. App. 2d 337, 63 Cal. Rptr. 104 (1967) (punishment more important for its deterrent effect on other inmates); People v. Huntley, 112 Mich. 569, 71 N.W. 178 (1897) (punishment intended for good government of prison); State v. Weekley, — S.D. —, 240 N.W.2d 80 (1976) (disciplinary proceeding meant to serve orderly administration of penitentiary). The Ohio department considered the multiple punishment justifiable, since it was levied “pursuant to standard, long established, unvarying policy.” 34 Ohio App. 2d at 93, 296 N.E.2d at 289. Those arguments failed to persuade the *Lamb* court:

> We find neither reason sufficient to justify judicial tolerance of behavior which had shocked the conscience of civilized man for almost two thousand years.
The Role of the Prosecutor

Where departments of correction are unwilling to relinquish their right to bring disciplinary action for alleged criminal conduct, the disciplinary action should only be permitted when the state has declined to file criminal charges. A prosecutor might permit the prison disciplinary system to adjudicate the alleged misconduct, but where the state permits the prison disciplinary system to do so, it must be willing to forego any criminal prosecution. While this is not the preferred alternative, since it should not be the function of the prison disciplinary system to adjudicate criminal guilt or innocence, it does serve as a compromise alternative where the prison administration believes that it must preserve its power to punish for criminal conduct. However, where the number of days of good-time at risk are greater than the number of days in the maximum sentence for the alleged criminal offense, the state should be restricted to two choices: a criminal action or no action at all.

CONCLUSION

Where the traditional double jeopardy standards have failed to protect the imprisoned person from multiple prosecutions and punishments for the same offense, the doctrine of collateral estoppel can serve as an alternative safeguard. The doctrine may be construed to preclude relitigation in a prison disciplinary proceeding of any issue actually determined in a prior criminal proceeding. Since the sanctions imposed by the prison disciplinary board are punitive, the state should also be precluded from relitigating in a criminal action any issue previously determined by the prison disciplinary board. The policies of judicial finality, avoidance of du-

We do not doubt that efficient means can be devised to prevent prisoners from escaping. Tyranny has frequently been efficient. But we recoil from it as we recoil from the notion of punishing . . . a human being . . . twice for a single offense.

Id. (footnote omitted). While the court did not condone the criminal conduct, it considered multiple prosecutions and punishments unconstitutional means of preventing it. Id.

It is inefficient for the state to proceed twice against an imprisoned person. Although two proceedings give the state the "benefits" of two chances to secure an appropriate disposition, duplicative proceedings waste tax dollars and are not justifiable measures or rehabilitation. The popular conception that the prison disciplinary process functions to rehabilitate has never been true, although it has been the standard rhetoric for many years. See Bronstein, supra note 27, at 31.

116 See notes 112-15 & accompanying text supra.
plicative proceedings and fundamental fairness outweigh any technical evidentiary discrepancies arising from the different burdens of proof imposed on the state in each proceeding.

If the judiciary proves unwilling to broaden the doctrine of collateral estoppel, the problem of multiple prosecutions and punishments can be remedied outside the courthouse. Where the alleged prison disciplinary offense involves possible criminal acts, the prison administration should forego any disciplinary action and turn the case over to the criminal justice system. The imprisoned person should never be burdened with the prospect of multiple prosecutions and punishments for the same alleged criminal conduct.

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