CRIMINAL PROCEDURE—DUE PROCESS—Due process clause held applicable to the revocation of statutory good time credits and punitive segregation in interprison administrative actions.—*United States ex rel. Miller v. Twomey*, 479 F.2d 701 (7th Cir. 1973).

On May 16, 1973, the United States Court of Appeals of the Seventh Circuit consolidated six cases on appeal and decided them in *United States ex rel. Miller v. Twomey*.[1] All the actions concerned internal administration of state prisons and were brought by prisoners who alleged violations of federal rights protected by the Civil Rights Act of 1871.[2] Because other circuits have had opportunities to rule on similar cases,[3] the importance of *Miller* lies in its novelty in the Seventh Circuit.

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[1]United States *ex rel.* Miller v. Twomey, 333 F. Supp. 1352 (N.D. Ill. 1971); Green v. Bensinger, No. 70-C-3056 (N.D. Ill., June 7, 1971); Thomas v. Bensinger, No. 71-C-56 (N.D. Ill., Feb. 30, 1971); Krause v. Schmidt, 341 F. Supp. 1001 (W.D. Wis. 1972); Armstrong v. Bensinger, No. 71-C-2144 (N.D. Ill., June 13, 1972); Gutierrez v. Department of Pub. Safety, No. 70-C-1778 (N.D. Ill., May 13, 1971). All of these were appealed, and were decided in United States *ex rel.* Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973).

[2]42 U.S.C. § 1983 (1970). This section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[3]In Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), the court held that a minimally fair inquiry would require certain safeguards before a prisoner was confined to a psychiatric observation cell. The court suggested the following safeguards: adequate notice, an opportunity for the prisoner to reply to charges, and a reasonable investigation of the facts in cases of substantial discipline. *Id.* at 198.

Jones v. Robinson, 440 F.2d 249 (D.C. Cir. 1971), involved the procedural safeguards to be afforded a hospitalized inmate before transferring him to a maximum security unit. The court required as a minimum that: the officer conducting the inquiry be impartial, that he interview all witnesses himself and make written reports of the interviews available to the accused, that the accused be allowed confrontation and cross-examination of witnesses when the health of the patient allowed, that the accused be allowed to have a lay representative, that detailed records of proceedings, findings, and reasons for decisions be kept permanently, and that a decision to transfer a patient to a maximum security unit first have the approval of the hospital superintendent. *Id.* at 251-52.

Luther Miller,[4] Andrew Green,[5] and Jack Thomas[6] each alleged that his statutory good time[7] had been revoked without due proc-

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In Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970), the court recognized that all the safeguards afforded a citizen charged with a crime could not be provided an inmate charged with a violation of prison rules but held that "some assurances of elemental fairness" are necessary when substantial individual interests are involved. *Id.* at 550.

[4]Miller v. Twomey, 333 F. Supp. 1352 (N.D. Ill. 1971). Miller alleged that ninety days of his statutory good time were revoked because he called an officer a foul name. He complained that the revocation proceedings were held ex parte and allowed him neither representation nor defense.

[5]Green v. Bensinger, No. 70-C-3056 (N.D. Ill., June 7, 1971). Green alleged that his good time was revoked on recommendation of three penal officers without having allowed him to appear in defense. The affidavit of Warden John J. Twomey of the Illinois State Penitentiary stated:

> It is my understanding that prior to November 1970, the following procedure was used in revoking a prisoner's Statutory Good Time: The prisoner was called to the Isolation Building on a call ticket, the disciplinary charge was read to the prisoner, and he was asked whether it was true or false. On major violations of the rules, the two captains would decide what action was to be taken against the prisoner. If the charge was serious enough, they would also refer his case of [*sic*] the Merit Staff for further action. If the prisoner emphatically denied the charge, the captains would investigate the incident. When his case was referred to the Merit Staff, the charges would be read by the captain to the full committee, the case would be discussed, and they would recommend the penalties to be given to the prisoner. If the penalty was lost [*sic*] of Statutory Good Time, the recommendation would have to be approved by the Warden and then sent to the General Office in Springfield, Illinois, for the final approval of the Director of the Department of Corrections.
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> According to the records in Andrew Green's No. 57902 file, this course of action was followed in his case.

Brief for Appellees, Appendix A., United States *ex rel.* Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973).

[6]Thomas v. Bensinger, No. 71-C-56 (N.D. Ill., February 30, 1971). Thomas alleged that without adequate hearing he was placed in solitary confinement and had one month of good time revoked. He admitted that he gave a letter to an officer to be mailed to an ex-inmate illegally, but objects to the procedure resulting in his punishment. Since Thomas was incarcerated in the Illinois State Penitentiary the same procedure outlined in note 5 *supra* was followed.

[7]These cases consider the revocation of good time credits in prison systems in which prisoners who comply with prison rules and regulations are entitled to a diminution of time from their sentences. These good time credits can be withheld or revoked for misconduct. Indiana and Wisconsin have similar statutes, IND. CODE §§ 11-7-6-1 to -3 (1971), WIS. STAT. ANN. § 53.11 (1967), but Illinois' good time statute was recently repealed, Act of Mar. 19, 1872, § 1, [1871-72] Ill. Laws 294 (repealed Ill. Pub. Act 77-2097, § 8-5-1, July 26, 1972).

ess.[8] Herman Krause[9] and Alfred Armstrong[10] contended that they too were denied procedural safeguards prior to being placed in segregated confinement. Simon Gutierrez[11] alleged that his civil

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[8]The fourteenth amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[9]Krause v. Schmidt, 341 F. Supp. 1001 (W.D. Wis. 1972). Much property was damaged and many people injured in a riot which began in the prison dining room. The court found the procedure used in this case to be as follows:

> The disciplinary committee, consisting of two associate wardens and a corrections officer, heard the charges against the plaintiff one week after the disturbance. The plaintiff was read the conduct report against him, which he had seen for the first time only three hours earlier. He was given an opportunity to explain what happened. The committee questioned him and retired to deliberate privately. The inmate was then sentenced to segregated confinement as punishment.

The court's findings regarding the various levels of confinement can be summarized as follows:

> An inmate in the general population lives in a cell of adequate size and comfort and is allowed personal toiletries. He may attend school or participate in a work program, is allowed recreational time, is permitted to talk with others, and may accumulate good time credits.
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> One confined in "lower segregation" is not allowed to work, and may not retain personal toiletries. His cell is equipped with a hard bed with only one sheet and a pillow. He may leave his cell only thirty minutes per week, and he may not earn good time credits.
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> A prisoner in "upper segregation" rooms in a 12' x 5' cell and sleeps on a cot with no sheets or pillow. A light bulb is left on twenty-four hours per day. He may not leave his cell and may not talk to anyone. The only reading matter allowed is a Bible. He may not accumulate good time. This is called "the hole" by both the inmates and the administration.

[10]Armstrong v. Bensinger, No. 71-C-2144 (N.D. Ill., June 13, 1972). The court found that a fight broke out on the prison's baseball field and that when officers moved in they were surrounded and apparently threatened, but order was restored without the use of force. A cross-section of the prison staff was later surveyed to identify any inmates who could be considered security risks. About four months later, over one hundred of these security risks were transferred to the "Special Program Unit," which is designed to remove prisoners with serious behavioral problems from the prison's general population. The plaintiff was one of those transferred. 479 F.2d at 710.

[11]Gutierrez v. Department of Pub. Safety, No. 70-C-1778 (N.D. Ill., May 13, 1971). Bobby Bright, who weighs about 225 pounds, assaulted fellow-

rights were violated when prison officials[12] failed to segregate a dangerous inmate from the general prison population and the inmate assaulted the plaintiff and injured him seriously.[13] The respective district courts dismissed the complaints of Miller, Green, Thomas, and Gutierrez, and each appealed.[14] Krause was granted

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inmate Gutierrez, who is about ninety pounds lighter, with a baseball bat while the two were assigned to work in the Mechanical Store of the Illinois State Prison on November 20, 1968. Two years earlier Bright had hit another inmate with a baseball bat, and since then had been involved in two other altercations. 479 F.2d at 711.

[12]There are two groups of defendants—those who Gutierrez claims were negligent in their supervision of the work area and those who he claims were negligent in not segregating his assailant, Bright, from the general population. Negligence of the former type on only one occasion is insufficient to establish that "punishment" was inflicted under the eighth amendment, so the second group of defendants appears to be the more important of the two groups for the purposes of this action. *See* notes 13, 40 *infra.*

[13]The Gutierrez appeal is based on the eighth amendment, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[14]The *Miller* trial court's order of July 22, 1971, provided:

> Plaintiff's 'Petition for Declaratory Judgment,' treated as an action under 42 U.S.C. § 1983, dismissed as frivolous. 28 U.S.C. § 1915(d). It is not for the federal courts to review or regulate the reasonable disciplinary procedures of state penal institutions. See *Cole v. Smith,* 344 F.2d 721 (8th Cir. 1965); *United States ex rel. Atterbury v. Ragen,* 237 F.2d 953 (7th Cir. 1956), *cert. denied,* 353 U.S. 964.

479 F.2d at 704 n.3.

The *Green* trial court held that the plaintiff's allegations did not establish a failure to satisfy minimum constitutional requirements. The court, referring to Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), stated:

> There the court held that the Constitution required only that the facts be rationally determined, including in most cases the opportunity of the inmate to confront his accuser and be informed of the evidence against him, and he be afforded a reasonable opportunity to explain his actions. If these measures are followed, an adequate balance between the needs of the orderly administration of the institution and the rights of the prisoner will result. The Constitution requires no more. . . .

479 F.2d at 706 n.9.

The *Thomas* trial court, relying on Walker v. Pate, 356 F.2d 502 (7th Cir. 1966), *cert. denied,* 384 U.S. 966 (1966), and rejecting the holding in Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), held that prison officials could use programs of isolation and segregated confinement without violating the fourteenth amendment, as long as they did not act so arbitrarily or so prejudicially that their conduct offended basic principles of fairness.

preliminary relief, with certain procedures ordered in any further hearings, and prison officials appealed.[15] Armstrong's legal contentions were accepted, but he appealed, arguing that the relief granted was insufficient.[16]

The *Miller* court concentrated on three main issues: the disallowance of statutory good time, punitive segregation, and the failure to adequately protect inmates from one another. The first two issues were considered in light of *Morrissey v. Brewer*,[17] decided by the Supreme Court while these appeals were pending. In *Morrissey* the Court held that parole revocation deprived the parolee of his liberty, and that he was thus constitutionally entitled to certain minimum procedural safeguards at a parole revocation

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In the Gutierrez case a special commissioner had investigated the incident prior to the district court's ruling and had suggested that if the plaintiff had any remedy at all, it was a negligence claim in the Illinois courts. The district court seemed to dismiss the complaint for similar reasons.

[15]The trial court enjoined the defendants from conducting any further hearings concerning the plaintiff until such hearings included: timely and adequate notice of the charges, an opportunity for the plaintiff to confront and cross-examine adverse witnesses, an opportunity to retain counsel or counsel substitute, an impartial decision-maker, and a summary of the evidence on which the decision is based. *See* Morales v. Schmidt, 340 F. Supp. 544 (W.D. Wis. 1972), *rev'd.*, No. 72-1373 (7th Cir., Jan. 17, 1973), *petition for rehearing granted*, (7th Cir., May 22, 1973).

[16]The trial court found that the Special Program Unit was a form of punishment and ordered that before an inmate was placed in the unit he should be afforded "an administrative hearing which would reasonably satisfy the concept of due process. . . . [H]e should be informed of all of the accusations against him and given an opportunity to respond to such charges." 479 F.2d at 710. *See also* Thomas v. Pate, 445 F.2d 105 (7th Cir. 1971).

[17]408 U.S. 471 (1972), *noted in The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 95 (1972); *see* Rose, *Conditional Liberty and the Fourteenth Amendment*, 33 U. PITT. L. REV. 638 (1972).

Two alleged parole violators had their paroles revoked without hearings by the Iowa Parole Board. They were returned to prison. The Supreme Court reversed an Eighth Circuit decision, 443 F.2d 942 (8th Cir. 1971), which had denied relief, outlining two general "minimum requirements of due process." 408 U.S. at 489. First was proper preliminary inquiry and second was a timely hearing. The procedural safeguards listed were: 1) written notice of the alleged violations, 2) disclosure to the parolee of the evidence against him, 3) an opportunity to be heard and to present witnesses and evidence, 4) confrontation and cross-examination of adverse witnesses (unless the hearing officer finds good cause not to allow such), 5) a "neutral and detached" hearing body, and 6) a written report by the hearing body of the evidence and reasoning. *Id.* at 488-89.

hearing.[18] The majority noted that although *Morrissey* is directly applicable only to parole revocation, its rejection of a line of Eighth Circuit cases regarding the wide discretion of prison officials warranted a re-examination of the extent to which that discretion remains unreviewable. *Morrissey* dealt with legal custody pursuant to criminal conviction and held that parolees in such custody had a sufficient interest in liberty to warrant due process. The *Miller* court read *Morrissey* to portend a basic concept: liberty protected by the due process clause must, to some extent, coexist with legal custody pursuant to conviction. The *Miller* court stated that the deprivation of liberty following an adjudication of guilt is partial, not total, and that a residuum of constitutionally protected rights remains.[19] The majority further noted that *Morrissey* should not be narrowly limited by a distinction between physical confinement and conditional liberty to live in society. The *Morrissey* decision requires that due process precede any substantial deprivation of the liberty of persons in custody.[20] It remains clear, however, that due process is a flexible concept, depending on the various interests involved,[21] with only significant

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[18]408 U.S. at 489. Inherent in the right to a hearing is the right to a fair hearing which can accurately determine the relevant facts in dispute. Armstrong v. Manzo, 380 U.S. 545, 552 (1962); Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).

[19]The court went on to say that:

> The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual. 'Liberty' and 'custody' are not mutually exclusive concepts.

479 F.2d at 712.

[20]*Id.*

[21]The word "due" is deliberately broad to allow different procedural requirements under different circumstances. *See* Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971).

In Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972), the court held that a military cadet who was rendered subject to separation due to accumulated demerits had to be granted a hearing with the right to appear and present witnesses and evidence, but need not be accorded the right to representation by counsel. The court stressed the flexibility of due process, saying that it was not a rigid formula, but rather a flexible one which depended upon the balancing of various factors. *Id.* at 207.

Compare Goldberg v. Kelly, 397 U.S. 254 (1970) (the loss of welfare benefits), *with* Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir.), *cert. denied*, 400 U.S. 853 (1970), *and* Brown v. Housing Authority, 340 F. Supp. 114 (E.D. Wis. 1972) (the loss of a public housing tenant's lease).

deprivations of liberty raising constitutional issues.[22]

After brief analysis of the impact of *Morrissey,* the majority turned to the issues at hand, and analyzed them in light of *Morrissey* concepts. The approach was basically a two-step inquiry: Were the challenged actions serious enough to amount to deprivations of liberty, and if so, were the prisoners afforded due process?

In the first part of the opinion it seemed that the majority would adopt the minimum procedural safeguards outlined in *Morrissey* and would apply them to the revocation of statutory good time, but the decision ultimately provided for application of only half of the *Morrissey* safeguards.[23] The reasoning was inexplicable, as Chief Judge Swygert pointed out in a vigorous and persuasive dissent. The majority concluded from its analysis of *Morrissey* that the due process clause applies to the revocation of good time credits since cancellation of good time would inflict a similar grievous loss of liberty on the inmate as the revocation of parole does on the parolee.[24] The majority then outlined the *Morissey* safeguards and submitted that procedural due process for the revocation of good time credits would certainly be met with such precautions. The majority went on to state that until "the rule-making process" had been given an opportunity to develop more fully, it felt that the minimum constitutional requirements were advance written notice of the hearing, a dignified hearing in which the accused could be heard and allowed to call other witnesses, and an impartial decision maker.[25] It was thus deemed inappropriate to attempt to define the constitutional requirements more specifically and the court avoided the question to some extent. Reluctance to give *Morrissey* full effect in this situation can only be considered, as the dissent suggested, an overabundance of caution in a constitutional area already too slow in developing. The question avoided will only need to be answered in the future, not only at further monetary expense, but also at the expense inherent in a continued period of uncertainty in the area.

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[22]408 U.S. at 481.

[23]*Compare* note 17 *supra,* which lists the *Morrissey* safeguards, *with* the discussion following in the text, which lists the *Miller* requirements. This comparison would indicate that the *Miller* court has not provided for disclosure to the parolee of evidence against him, confrontation and cross-examination of adverse witnesses, and a written report of the evidence and reasoning, all of which are provided for in *Morrissey.*

[24]479 F.2d at 715.

[25]*Id.*

On the question of punitive segregation, the majority adopted the test Chief Justice Burger used in *Morrissey, i.e.*, the procedural precautions necessary depend on the extent to which an individual will be condemned to suffer a grievous loss.[26] The majority noted that every adverse change in a prisoner's status cannot be considered a grievous loss of liberty in that minor deprivations are inevitable in a prison community. However, the records in the cases of Armstrong and Krause, involving segregation following violent disturbances, reflected a sufficient contrast between life in the general prison population and life in segregated confinement to be classified as a grievous loss of liberty. The court was cognizant of the possibility of circumstances in which the government's interest in prompt action may outweigh an individual prisoner's interest in proper procedure.[27] Armstrong and Krause are examples of the ever present danger of violence in a prison community. However, after the danger has passed, the state's interest in summary disposition lessens, and the prisoner's interests warrant procedural safeguards.

The majority found a lesser interest in liberty and a greater state interest in summary disposition of interprison disciplinary matters than of parole revocation matters. Based on that rationale, it adopted *Morrissey* safeguards as the maximum protection required for due process in in-prison disciplinary proceedings.[28] In any case involving a grievous loss, the court adopted as a "bare minimum" those same standards held applicable for proceedings to revoke statutory good time. Such minimum standards went beyond the standards required by the trial court in the case of Armstrong.[29] But the relief granted Krause by the trial court[30] exceeded the *Morrissey* standards, which the *Miller* majority had set as a maximum. Therefore, the *Miller* court remanded both cases for modification in accordance with its guidelines.

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[26] *Id.* at 717.

[27] *See Prisoners' Rights and the Correctional Scheme: The Legal Controversy and Problems of Implementation—A Symposium*, 16 VILL. L. REV. 1029 (1971); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

[28] 479 F.2d at 718.

[29] The inmate had to be informed of the accusations against him and given a chance to respond according to the *Armstrong* trial court. *See* note 16 *supra*. The *Miller* standards thus went beyond those required by that court.

[30] The *Krause* trial court required adequate notice, confrontation and cross-examination of adverse witnesses, counsel or counsel substitute, an impartial decision-maker, and a summary of the evidence. *See* note 15 *supra*. These exceeded not only the *Miller* standards, but also the *Morrissey* standards.

Chief Judge Swygert, dissenting, disagreed with the idea that the state holds a greater interest in summary disposition of in-prison disciplinary cases than in parole revocation matters. He agreed that the state has a legitimate interest in expedited discipline when proper procedure would endanger the institution with widespread violence, but insisted that when the threat of violence passes, the state has no interest in summary disposition of the case greater than the interest it would have in summarily returning a parole violator to prison if he had been in state custody. For that reason, Judge Swygert felt that the *Morrissey* standards should be applicable whenever prison officials attempted to segregate an inmate for nonimmediate punishment, *i.e.*, whenever segregation operated as a grievous loss of that inmate's liberty.[31]

Concerning the Gutierrez issue, the majority affirmed the trial court order dismissing his eighth amendment claim. The court recognized two ways in which the amendment could be

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[31]The arguments of the majority and dissent appeared diametrically opposed, but they actually were based on similar thoughts. Both recognized a need in certain instances for summary disposition by prison officials, and both also realized the need for due process for those who stood to suffer a grievous loss of liberty. The majority stated:

> In any case which may involve 'grievous loss,' we believe the bare minimum is that applicable to a proceeding which may result in the revocation of statutory good time, namely, an adequate and timely written notice of the charge, a fair opportunity to explain and to request that witnesses be called or interviewed, and an impartial decision-maker.

479 F.2d at 718.

However, the majority did not express itself clearly. In the situation of potential violence, requiring summary disposition by prison officials, "grievous loss" may result, but the majority would hold the state's interest to be greater than the inmate's and not afford the inmate immediate procedural safeguards. But after the potential violence has been neutralized, probably by temporary segregated confinement of the troublemakers, it seems that the majority would find it reasonable to grant the inmate procedural safeguards before segregating him for a long term. The dissent was more carefully worded when it stated, ". . . I view *Morrissey* as applying with full force whenever prison officials seek long term segregation for one in their charge." *Id.* at 723 (Swygert, C.J., dissenting). This would impliedly account for the situation where violence had to be avoided by summarily confining an inmate temporarily. That leaves as the only real difference between the majority view and dissent the number of safeguards which should be made applicable, with the dissent arguing that the majority is inconsistent to recognize a potential "grievous loss" and then deny the prisoner the minimum safeguards outlined in *Morrissey*.

violated: intentional infliction of punishment which is cruel[32] or such callous indifference to the predictable consequences of the situation that an intent to inflict harm may be inferred.[33] It construed the legal question to be whether a correction officer is subject to section 1983 liability when he accepts the admittedly foreseeable risk of violence by allowing a potentially dangerous inmate to associate with the general population and such violence actually occurs.[34] The majority reasoned by analogy, which it admitted was not decisive, that if the plaintiff's theory were held valid, parole boards might be required to defend their exercise of discretion when a parolee committed a foreseeable attack on another citizen.[35] It implied that a similar argument, that judicial review would inhibit the exercise of prison officials' discretion, could be made in the instant case. The majority submitted that the placement of a dangerous inmate should not present the prison official with a "Hobson's choice" between eighth amendment claims—segregation based on inadequate criteria, subjecting him to a claim by the segregated prisoner, or failure to segregate, giving rise to a claim by anyone in the general population who is assaulted by the dangerous inmate. The majority insisted that even if the prison officials made an erroneous decision due to negligence, the eighth amendment was still not violated.[36]

It would seem that the majority misconstrued the issue in the Gutierrez case. The potentially dangerous inmate in this case was not, as the majority put it, "permitted to associate with the general

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[32]*See* Furman v. Georgia, 408 U.S. 238 (1972); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967).

[33]*See* Francis v. Resweber, 329 U.S. 459 (1947); Williams v. Field, 416 F.2d 483 (9th Cir. 1969); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

[34]479 F.2d at 720. It is an established principle that a person confined in a state or county prison is within the protection of 42 U.S.C. § 1983 (1970), and the right of a state prisoner to be free from cruel and unusual punishment or to be within the protection of the eighth amendment is one of the rights that a state prisoner in a proper case may enforce under section 1983. Roberts v. Williams, 302 F. Supp. 972 (N.D. Miss. 1969); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966); Redding v. Pate, 220 F. Supp. 124 (N.D. Ill. 1963).

[35]479 F.2d at 721.

[36]*Id.* The majority argued that if the prison officials were guilty only of negligence, then there was no intent to inflict harm and thus no violation of the eighth amendment. However, it seems to have overlooked the second recognized way in which the amendment could be violated, *i.e.*, callous indifference to predictable consequences such that intent can be inferred.

population."[37] Rather, Gutierrez, along with Bright, was assigned to manage the prison's Mechanical Store, which housed numerous weapons[38] and was unguarded by prison officials.[39] As the dissent noted, a prisoner like Gutierrez does not have the option available to a free man, to flee dangerous circumstances. It would appear that Gutierrez, rather than the prison officials, was presented with the "Hobson's choice," in that punishment was inevitable—be it a result of neglecting his assignment and being punished by prison authorities or be it at the hands of a dangerous man provided with weaponry. Simple negligence probably cannot constitute "punishment," but when that negligence is allowed to rise to gross negligence or recklessness, and a prisoner is injured as a result, that injury is cruel and unusual punishment and should be actionable under 42 U.S.C. section 1983, regardless of subjective intent or lack thereof.[40]

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[37] *Id.*

[38] According to a prison employee, the Mechanical Store also housed equipment such as ax and sledge hammer handles, iron pipe, and pieces of steel—all available as weaponry. Affidavit of M. F. Riley, Exhibit C. to Response, Gutierrez v. Department of Pub. Safety, No. 70-C-1778 (N.D. Ill., May 13, 1971). 479 F.2d at 724.

[39] Riley was the nearest employee, and he was approximately 120 feet from Gutierrez and Bright at the time of the incident. 479 F.2d at 724.

[40] *See* Roberts v. Williams, 456 F.2d 819 (5th Cir. 1971), in which the court stated:

> Thus in an Eighth Amendment case, if there were, as here, no conscious purpose to inflict suffering, we would look next for a callous indifference to it at the management level, in the sustained knowing maintenance of bad practices and customs. When prison wardens are cruel in their attitudes, negligent as well as intended injuries result.

Id. at 827.

In *Roberts*, a prisoner brought an action in federal court for injuries sustained as a result of the intentional discharge of a shotgun being carried by a trustee of the prison at the time. The theory of recovery was that the prison officials were negligent in arming trustees without any supervision or instruction in the use of weapons. At trial, the evidence showed that the firing was an accident, but the district court held the officials liable under both Mississippi tort law and under 42 U.S.C. § 1983 (1970).

The conduct need not be an intentional infliction of harm. It may, instead, consist of the knowing maintenance of conditions, customs, and practices that are so excessively cruel and inhuman as to shock the general conscience. Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970). The injuries suffered by the prisoners in *Holt* were not intended by the prison officials, but they continued both the trustee and barracks systems even after they were made aware of the serious abuses that each system fostered. Intent is inferred from con-

The courts have traditionally been reluctant to review prison officials' administrative actions.[41] Although this reluctance has received much judicial support,[42] it has begun to be rejected as a viable concept.[43] This court had the opportunity to decide *Miller* within this developmental area but took a disappointing step backwards. The court recognized that the prisoner who was to have good time credits revoked or was to be segregated from the general prison population as punishment stood to suffer the same grievous loss of liberty talked of in *Morrissey*, yet the court accepted only half the procedural safeguards the *Morrissey* court had deemed minimal. Then the court misconstrued the issue in the Gutierrez

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ditions that cause more than an isolated instance of injury, that are known to prison authorities, and maintained in spite of the dangers.

See also Francis v. Resweber, 329 U.S. 459 (1947); Williams v. Field, 416 F.2d 483 (9th Cir. 1969); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

[41]This has been called the "hands-off doctrine," a term first used in COMM. FOR THE FEDERAL BUREAU OF PRISONS, CIVIL RIGHTS OF FEDERAL PRISON INMATES 31 (1961). It declares that courts are "without power to supervise prison administration or to interfere with the ordinary prison rules or regulations." Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954).

[42]*E.g.*, Kostal v. Tinsley, 337 F.2d 845 (10th Cir. 1964), *cert. denied*, 380 U.S. 985 (1965); Harris v. Settle, 322 F.2d 908 (8th Cir. 1963), *cert. denied*, 377 U.S. 910 (1964); Childs v. Pegelow, 321 F.2d 487 (4th Cir. 1963), *cert. denied*, 376 U.S. 932 (1964); Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961); Sherwood v. Gladden, 240 F.2d 910 (9th Cir. 1957); Tabor v. Hardwick, 224 F.2d 526 (5th Cir.), *cert. denied*, 350 U.S. 971 (1955); Ortega v. Ragen, 216 F.2d 561 (7th Cir. 1954), *cert. denied*, 349 U.S. 940 (1955); Siegel v. Ragen, 180 F.2d 785 (7th Cir.), *cert. denied*, 339 U.S. 990 (1950).

[43]In Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966), *cert. denied*, 388 U.S. 920 (1967), the court stated:

> Under our constitutional system, the payment which society exacts for transgression of the law does not include relegating the transgressor to arbitrary and capricious action. . . . Where the lack of effective supervisory procedures exposes men to the capricious imposition of added punishment, due process and eighth amendment questions inevitably arise.

Id. at 141.

Then in Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd.*, 390 U.S. 333 (1968), the court said that prisoners do not lose all their constitutional rights and that the due process clause of the fourteenth amendment follows them into prison, and protects them from unconstitutional actions on the part of prison authorities. *Id.* at 331.

In Johnson v. Avery, 393 U.S. 483 (1969), the Supreme Court of the United States remarked that state regulations are applicable to state prison

case and applied a narrow reading of the eighth amendment to it.[44]

The court's caution was misdirected. A heavy burden should lie upon anyone who attempts to deny constitutional protection to anyone else.[45] The court should have been cautious in denying a prisoner constitutional rights; however, it was overly cautious in the wrong direction, to the point of rejection of those rights. The court, itself part of the "rule-making process"[46] it speaks of, has

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administration, but when there are conflicts with federal or constitutional rights the state regulations may be invalidated. *Id.* at 486.

Such thought made application of due process principles possible in regard to the prison. In Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970), the court adopted several procedural safeguards for prison administration, *e.g.*, inmates must be given notice of any charges against them, investigation of the charges must be made by a superior officer, there must be an administrative determination of guilt before the prisoner has good time credits revoked or is segregated from the general prison population, the administrative board must be made up of people from the prison's custody and treatment departments, the reporting officer must not sit on the board, the prisoner is entitled to representation by a prison employee, may present information available to him, but has no right of confrontation, a record of the hearing must be made, and the decision must be based on substantial evidence. *Id.* at 871-74.

More recent cases have attempted to crystallize and implement these standards to other specific situations. *E.g.*, Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970); Shone v. Maine, 406 F.2d 844 (1st Cir. 1969); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970); Kritsky v. McGinnis, 313 F. Supp. 1247 (N.D.N.Y. 1970). *See also* Millemann, *Prison Disciplinary Hearings and Procedural Due Process—The Requirement of a Full Administrative Hearing*, 31 MD. L. REV. 27 (1971); Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841 (1971).

[44]*See* note 40 *supra.*

[45]It would seem that this is so fundamental that no discussion or authority need be cited. However, for those who tend to resist procedural due process for prisoners, it may be a starting point. A visit to a state prison may be what is necessary to convince the skeptical that procedural safeguards are needed, but very few ever get that opportunity. A substitute is to read about some of the inequities which emerge from a prison without procedural justice, e.g., the inmate who loses a year of freedom at the whim of a guard who happens to be in bad mood that day or the inmate who is confined in "the hole" for walking down the hall too slowly. Some of the following articles indicate that this type of "justice" happens every day in our prisons, and that procedural safeguards are indeed necessary: Oxberger, *Revolution in Corrections*, 22 DRAKE L. REV. 250 (1973); Rabinowitz, *The Expression of Prisoners' Rights*, 16 VILL. L. REV. 1047 (1971); Sheehan, *Prisoners' Redress for Deprivation of a Constitutional Right: Federal Habeas Corpus and the Civil Rights Act*, 4 ST. MARY'S L.J. 315 (1972); Note, *Prisoners' Rights Under Section 1983*, 57 GEO. L.J. 1270 (1969).

[46]479 F.2d at 716.

set narrow guidelines[47] for courts considering similar problems in the future. If our penal system ever is to consider rehabilitation as something other than nonsense,[48] courts must surpass the timid guidelines set by the *Miller* court and take strides forward to grant prisoners all the federal rights possible in a prison community.[49]

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[47]In Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972), the court stated:

> Because of the factors controlling what process is due usually vary from case to case, prior decisions on the subject cannot ordinarily furnish more than general guidelines which might give the reader a 'feel' for what is fundamentally fair in a particular instance.

Id. at 209.

[48]*See* Rabinowitz, *The Expansion of Prisoners' Rights*, 16 VILL. L. REV. 1047 (1971), in which it is noted that the vast majority of our prisons are good for only two purposes: punishment and quarantine, with any talk of reform or rehabilitation being ludicrous. If we begin treating prisoners as people rather than animals then maybe rehabilitation will become something more than nonsense.

[49]We have already begun to see the effects of *Miller*. In Adams v. Carlson, No. 73-1268 (7th Cir., Aug. 23, 1973), *Miller* was held to apply retroactively. Also, the Indiana Department of Corrections has adopted (effective Aug. 27, 1973) new disciplinary rules for adult institutions which are patterned largely after *Miller*. It should be with a feeling of some remorse that the judiciary sees such bare minima used as precedent. Although it can be said that *Miller* represents some improvement, greater expectations continue, as does the need for greater procedural safeguards in our prisons.