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Implications of Morrissey v. Brewer for Prison Disciplinary Hearings in Indiana

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IMPLICATIONS OF MORRISSEY V. BREWER FOR PRISON DISCIPLINARY HEARINGS IN INDIANA

On September 2nd and 3rd, 1973, inmates at the Indiana State Prison in Michigan City rioted to dramatize their dissatisfaction with that institution.[1] As one condition for ending their disturbance, they demanded an end to the prison "kangaroo court system" and changes in prison disciplinary hearings.[2] Similar disturbances in other areas have produced similar demands.[3]

The demands of Indiana prisoners for reform of prison disciplinary procedures are given legal support by several recent federal decisions. In *Morrisey v. Brewer*[4] the Supreme Court held that parole revocation proceedings must be conducted in accordance with certain due process requirements. The United States Court of Appeals for the Seventh Circuit has used the approach of *Morrissey* to find, in *United States ex rel. Miller v. Twomey*,[5] that prison disciplinary proceedings are also subject to due process protections. *Miller* has already been applied by a district court to one aspect of Indiana prison discipline, interprison transfers.[6] This note will measure other disciplinary procedures against the newly recognized constitutional requirements.

The Morrissey Analysis

In *Morrissey* the Supreme Court was confronted with the question of whether the due process clause required a state to afford parolees a hearing before revoking their parole. In accord with a line of prior cases, the Court rejected the contention that parole was a privilege,[7] and held that

1. Indianapolis News, Sept. 3, 1973, at 1, col. 3; Indianapolis Star, Sept. 3, 1973, at 1, cols. 5-6; Indianapolis News, Sept. 4, 1973, at 1, cols. 1-3; Indianapolis Star, Sept. 4, 1973, at 1, cols. 5-6.

2. Indianapolis News, Sept. 3, 1973, at 1, col. 3; Indianapolis Star, Sept. 4, 1973, at 1, cols. 5-6. *See also* Indianapolis News, Oct. 10, 1973, at 1, cols. 4-6 (concerning a suit to prohibit solitary confinement for more than fifty consecutive days, disciplinary transfers and other issues).

3. *See generally* Morris & Hawkins, *Commentary: Attica Revisited: Prospects for Prison Reform*, 14 Ariz. L. Rev. 747, 750 (1972).

4. 408 U.S. 471 (1972).

5. 479 F.2d 701 (7th Cir. 1973).

6. Aikens v. Lash, Civil No. 72 S 129 (N.D. Ind., filed Jan. 23, 1974).

7. 408 U.S. at 481. *See also* Graham v. Richardson, 403 U.S. 365 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Kraft, *Prison Disciplinary Practices and Procedures: Is Due Process Provided?*, 47 N. Dak. L. Rev. 9, 11-21 (1970); Wick, *Procedural Due Process in Prison Disciplinary Hearings: The Case for Specific Constitutional Requirequirements*, 18 S. Dak. L. Rev. 309 (1973) [hereinafter cited as Wick]. *See generally*

parole revocation required due process protections. To reach this conclusion, the Court looked to whether the interest of the parolee which was subject to deprivation was within the contemplation of the liberty or property language of the fourteenth amendment.[8] The Court also looked to the seriousness of the loss.[9] It concluded that a parolee's interest in continued liberty, while subject to some restrictions, involves "many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' . . . ."[10]

By holding that liberty need not be unqualified, the Court implicitly accepts a notion of relative liberty, the deprivation of which, if sufficiently grievous, requires some amount of due process protection. The exact nature of this protection is then determined by balancing the interests of the individual, the state and society.[11]

In *Morrissey*, the Court concluded that while parole revocation does not call for the full panoply of rights due a defendant in a criminal proceeding,[12] six constitutional procedures were required.[13] First, an informal hearing must be held to determine if reasonable grounds exist to believe that the parolee violated a parole condition. The parolee must be given the opportunity to be heard at this hearing. Second, at the revocation hearing, the parolee must be given written notice of the charges against him or her. Third, the parolee must have the opportunity to be heard, present evidence, and call voluntary witnesses. Fourth, the opportunity to confront and cross-examine adverse witnesses must be made available where appropriate.[14] Fifth, the hearing board must be "neutral and detached," and finally, written findings and the reasons therefor must be furnished the parolee.

Extension of Morrissey to Disciplinary Hearings

In *United States ex rel. Miller v. Twomey*,[15] the analysis of *Morrissey* was applied to prison disciplinary hearings. In *Miller*, one group of inmates had been deprived of good time without a prior hearing.[16]

Singer, *Morrissey v. Brewer, Implications for the Future of Correctional Law*, 1 Pris. L. Rep. 287 (1972); *The Supreme Court, 1971 Term*, 86 Harv. L. Rev. 1, 101-02 (1972).

8. 408 U.S. at 481.

9. *Id.*

10. *Id.* at 482.

11. *Id.* at 481. *See also* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961).

12. 408 U.S. at 480.

13. *Id.* at 489.

14. This right may be denied if "the hearing officer specifically finds good cause for not allowing confrontation." *Id.* at 489.

15. 479 F.2d 701 (7th Cir. 1973).

16. *Id.* at 704. "Good time" is a statutory means of sentence reduction. If an in-

The *Miller* court found that good time is closely analogous to revocation of parole in that both directly affect the total length of imprisonment. As a result, the court had little difficulty in holding that, as in *Morrissey*, due process protections were required before good time could be rescinded.[17]

The *Miller* court confronted a greater obstacle in applying *Morrissey* to proceedings in which an inmate faced the prospect of punitive segregation.[18] However, by employing a concept of relative liberty, the court concluded that

> additional punishment inflicted upon an inmate may be sufficiently severe, and may represent a sufficiently drastic change from the custodial status theretofore enjoyed, that it must be classified as a "grievous loss."[19]

A deprivation of relative liberty was sufficient to trigger the operation of minimum due process requirements in disciplinary hearings. The same analysis has also been applied in *Aikens v. Lash*[20] to interprison transfers. Such transfers were considered akin to punitive segregation, and hence, resulted in "grievous loss" of an inmate's liberty.

Whether minimum due process is required, then, depends on whether potential sanctions cause a grievous loss of liberty. Since punishment for major rule violations[21] may include loss of good time and punitive

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mate has no rule infractions and performs the duties assigned him or her for a given length of time, he or she is entitled to a predetermined diminution of his or her sentence. The warden or superintendent of an institution may revoke previously earned "good time" and the right to earn "good time" as punishment for rule infractions.

17. 479 F.2d at 714-15.

18. *Id.* at 716. Punitive segregation involves confinement in a small, austere, often darkened cell and deprivation of items such as soap, towel, toothbrush, mattress, toilet paper and reading material. Inmates in punitive segregation are allowed little, if any, recreation and usually have contact only with guards. Leonard Orland, a law professor who spent eighteen hours of a simulated prison experience in punitive segregation, described the experience as "one of the most painful of my life." L. ORLAND, JUSTICE, PUNISHMENT, TREATMENT 277 (1973).

19. 479 F.2d at 717.

20. Civil No. 72 S 129 (N.D. Ind., filed Jan. 23, 1974).

21. In Indiana major rule violations include: being guilty of four minor rule violations within a ninety day period; gambling; intoxication; intentional or careless destruction of or damage to state property; escape or attempted escape; possession of contraband; sexual relations or attempted acts of sexual gratification with another person; participating and/or inciting disturbance of the peace, institutional routine, or riot; any act punishable by state law. Indiana Department of Correction, Adult Authority Disciplinary Procedures, Sept. 17, 1973, at 5-6 [hereinafter cited as Indiana Manual]. Although major rule violations are usually punished by loss of good time or punitive segregation, other punishments include: loss of commissary, movie, television, and recreation privileges; administrative segregation of varying severity; and transfer to another institution. *Id.* at 4-7. Although on paper these punishments may not seem harsh, in the prison context where seemingly trivial privileges become very important to inmates, depri-

segregation, proceedings to determine whether such violations have occurred require due process protections.[22] Once the seriousness of the inmate's interest triggers the need for these protections, the specific requirements are determined by balancing the interests of the state, the individual and society. Outside of the case where immediate action by prison officials is required to avoid imminent physical injury, the interest of the state is not sufficient to deny procedural protection.[23] Indeed in the case of intraprison disciplinary hearings, as in the case of parole revocation under *Morrissey*, the state's interests in accurately determining the facts, providing rehabilitation, and preventing arbitrary treatment, appear consistent with minimum procedural protections.[24]

INDIANA PROCEDURES[24a]

Although *Miller* adopted the approach of *Morrissey* in holding that due process is required in prison disciplinary proceedings, the *Miller* court was reluctant to detail the specific procedures required. The Federal District Court for the Northern District of Indiana has followed *Miller* and *Morrissey* in outlining the procedures that are required for interprison transfers.[25] Other aspects of Indiana prison discipline, however, must be examined to determine if current state rules[26]

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vation or curtailment of these privileges is often viewed as a great hardship. Also, since a summary of every disciplinary problem is placed in the inmate's file, *id.* at 2, it is possible that parole could be denied or postponed on the basis of an inmate's disciplinary record. These considerations underscore the importance of intraprison disciplinary actions to the inmate in terms of both the conditions and length of confinement.

22. United States *ex rel.* Miller v. Twomey, 479 F.2d 701, 714-19 (7th Cir. 1973).

23. *Id.* at 718-19.

24. *See* Morrissey v. Brewer, 408 U.S. 471, 483 (1972). *Compare* Worley v. Bounds, 355 F. Supp. 115, 122 (W.D.N.C. 1973) ("Rational and fair processes within prison can only aid in showing a willing prisoner the benefits of orderly procedures."), *and* Sostre v. McGinnis, 442 F.2d 178, 197 (2d Cir. 1971), *cert. denied,* 404 U.S. 1049 (1972) (it is speculation to say whether giving prisoners due process rights will promote rehabilitation), *with* Millemann, *Prison Disciplinary Hearings and Procedural Due Process—The Requirement of a Full Administrative Hearing,* 31 MD. L. REV. 27, 49 (1971) (due process is not intended to promote rehabilitation but rather to prevent arbitrary action).

24a. After this note was written, the Indiana legislature passed a statute revising the system for granting and revoking good time. The statute codifies many of the procedural safeguards suggested in this note—written notice of proposed good time revocation, an impartial hearing board, opportunity for the inmate to speak in his or her defense and to request witnesses, confrontation and cross-examination of adverse witnesses, representation by a lay advocate, a written statement of findings upon request and administrative review by the Commissioner of Correction. IND. CODE §§ 11-7-6.5-1 to -8 (1974), *amending* IND. CODE §§ 11-7 (1971). However, since these protections apply only to revocation of good time, not imposition of punitive segregation, this aspect of prison discipline is still covered by the Department of Correction's procedures discussed in the remaining portion of this note.

25. Aikens v. Lash, Civil No. 72 S 129 (N.D. Ind., filed Jan. 23, 1974).

26. The Indiana Department of Correction has adopted a detailed procedure for

satisfy procedural due process standards.

Promulgation of Rules in Advance

It is unjust to punish an individual for conduct which was not previously prohibited.[27] Moreover, when proscribed conduct it too vague to identify, punishment for such conduct violates the due process clause of the fourteenth amendment.[28] Although prison regulations need not meet the rigid standards applied to criminal statutes, they must be reasonably

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prison disciplinary actions against an inmate who has allegedly committed a major rule violation. *See* note 21 *supra*. When a guard determines a major rule violation has occurred, he or she files a disciplinary report. Within twenty-four hours of the filing, the inmate involved is given written notification of the charge. As soon as possible, the Conduct Adjustment Board holds a hearing at which the inmate may speak in her or his own defense, denying, admitting, or explaining the charges. At the hearing the inmate is not allowed to present voluntary witnesses, to confront or cross-examine his or her accuser, or to be represented by counsel although he or she may be represented by a member of the prison staff. The results of the hearing and disposition are given orally to the inmate; she or he may also request a written copy of the Board's findings. An inmate may appeal an adverse decision to the head of the institution and then to the head of the Department of Correction. Department of Correction, Adult Authority Disciplinary Procedures, Sept. 17, 1973, at 1-2 [hereinafter cited as Indiana Procedures]; Indiana Manual, *supra* note 21, at 1-5.

In explaining the policies behind its disciplinary procedures, the Indiana Department of Correction contrasts the conditions of society in general with those of prison:

> The most clear difference is that because a relatively small portion of the general population will perform, condone or tolerate anti-social behavior (criminal conduct) our system of criminal justice presumes innocence and correct social behavior. In contrast, we must postulate all correctional procedures upon the knowledge that every one of the prisoners have at least once performed a crime. . . . Many of these prisoners have demonstrated their willingness to use violence to achieve their ends.

Indiana Procedures, *supra*, at 1. This passage almost suggests a presumption of guilt. Another assumption supporting the informality of the hearing is that since a small proportion of the inmate population comprises most of the disciplinary problems, money, time and energy is better spent on rehabilitation. *Id.* at 2. It appears that these assumptions underlie the relative weights given to the various interests by the Indiana Department of Correction.

The current disciplinary procedures of the Indiana Department of Correction are the product of a recent modification of the procedures that were developed in response to a serious disturbance at the Pendleton facility in September, 1969, which resulted in the death and wounding of a number of inmates. Following the disturbance the Indiana Civil Liberties Union brought suit against the Department of Correction to mitigate conditions that had led to and followed the riot and also to obtain long range relief in a number of areas, including disciplinary hearings. After a long series of negotiations between the Department of Correction and the ICLU, a settlement was reached. Among other provisions, the settlement allowed inmates to cross-examine their accusers and to call witnesses at disciplinary hearings—rights which they are not afforded under current departmental policy but which may be required by *Morrissey*. 408 U.S. at 489.

27. *See, e.g.*, Bouie v. City of Columbia, 378 U.S. 347 (1964).

28. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Jordan v. DeGeorge, 341 U.S. 223 (1951).

Although *Morrissey* does not mention the principle that it is unjust to punish an individual for conduct which was not previously defined as prohibited, this omission may be because the rules of parole are more individualized than those regulating the highly structured life of prison.

clear and precise in order to inform prisoners, guards and members of the hearing board of prohibited behavior.[29] The rationale for this requirement is clear: "Nothing is more violative of the ideal of rehabilitation than the arbitrary imposition of punishment for 'misconduct' which a prisoner did not realize was prohibited."[30]

Indiana's prison disciplinary rules generally recognize this principle by requiring that "rules be expressed in writing in clear and understandable language . . . positive in character and minimum in number . . . [and] known by all concerned."[31] However, the disciplinary procedures also provide for punishment of rule infractions "not specifically set forth in the . . . Inmate Handbook . . . ."[32] Therefore, the possibility remains for an inmate to be punished for a major rule violation although the rule is unwritten.

Notice and Timing of the Hearing

In *Morrissey* the Court required written notice of the alleged parole violation and disclosure of evidence against the parolee so that he or she could prepare a defense.[33] Under Indiana practice, an inmate must be notified in writing within twenty-four hours after a disciplinary report has been filed,[34] but there is no requirement that he or she be informed of the factual basis of the charge.[35] This procedure creates the possibility that the inmate may not fully understand the charge until the time of the hearing, thus precluding an adequate defense and amounting to a denial of due process unless the hearing is postponed.[36]

In *Miller,* the court was unsure whether *Morrissey* required disclosure of all or some of the evidence. It avoided the issue by allowing state officials to specify the "appropriate time and form of written notice."[37] The *Miller* approach de-emphasizes trial-type procedures

29. *See* Morrissey v. Brewer, 408 U.S. 471, 479-80 (1972); Wick, *supra* note 7, at 321.

30. Wick, *supra* note 7, at 321. *See also* Gates v. Collier, 349 F. Supp. 881, 895, 899 (N.D. Miss. 1972); Rhem v. McGrath, 326 F. Supp. 681, 691 (S.D.N.Y. 1971); Landman v. Royster, 333 F. Supp. 621, 655-56 (E.D. Va. 1971) (detailed discussion of specificity of rules in prison).

31. Indiana Manual, *supra* note 21, at 1. *See also* IND. CODE § 11-2-1-7 (1971), IND. ANN. STAT. § 13-239 (1971).

32. Indiana Manual, *supra* note 21, at 2.

33. 408 U.S. at 489.

34. Indiana Manual, *supra* note 21, at 1-2. The inmate may be granted additional time to prepare a defense at the discretion of the hearing board. *Id.* at 2.

35. Question now exists concerning this Indiana procedure in light of *Aikens.* It held notice of changes was required at least two days prior to an interprison transfer hearing. Aikens v. Lash, Civil No. 72 S 129 (N.D. Ind., filed Jan. 23, 1974).

36. Holland v. Oliver, 350 F. Supp. 485, 487 (E.D. Va. 1972).

37. 479 F.2d at 716 & n.33. *Contra,* Sands v. Wainwright, 357 F. Supp. 1062, 1086

and relies on the discretion of correctional officials for the development of hearing procedures.[38] However, more detailed standards regarding notice would undoubtedly better protect inmates' rights without unduly burdening the prison staff. Indiana practice should require sufficient disclosure of evidence to inform the prisoner of the nature of the charges against him or her.

In addition, since an inmate is often placed in maximum security prior to a disciplinary hearing, just as a parolee is often incarcerated prior to a parole revocation hearing, he or she faces an arbitrary and relatively great loss of liberty until disposition of the case. While the inmate's interest in a prompt hearing is tempered by the state's interest in maintaining order and security in emergency situations, *Miller* notes that even in riot situations

> after the immediate crises is past, the relative importance of the inmate's interest in a fair evaluation of the facts increases and the state's interest in summary disposition lessens.[39]

Indiana's procedure states that the hearing should be held as soon as practicable, but there can be no prehearing detention for more than five days without review by the Institution Head.[40] At least in theory, these requirements appear to be a reasonable reconciliation of the parties' conflicting needs. Yet, no guarantee exists that only those inmates who display a proclivity towards violence would face maximum security detention before a hearing. It is therefore possible that a peaceful inmate, charged with a nonviolent major rule violation, could be placed in solitary confinement for prehearing detention. Since *Morrissey* is based on a premise which requires the minimum amount

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(M.D. Fla. 1973) (requiring written notice, personally delivered to the inmate, allowing him or her a reasonable time to prepare a defense; notice must include a statement of the factual basis for the charge and the name and number of the rule allegedly violated); Clutchette v. Procunier, 328 F. Supp. 767, 782 (N.D. Cal. 1971). *See also* Holland v. Oliver, 350 F. Supp. 485, 487 (E.D. Va. 1972); Colligan v. United States, 349 F. Supp. 1233, 1237-38 (E.D. Mich. 1972).

38. *Miller* also allows state correctional officials to determine the
> extent to which evidence must be disclosed; the method for enabling a prisoner to explain or rebut the charges, including, if appropriate, an indication of the situations in which [the inmate] may insist that witnesses be called or at least interviewed; and the extent to which a written statement of the disposition of the charge should be made.

479 F.2d at 716.

39. *Id.* at 717-18; *cf.* Morrissey v. Brewer, 408 U.S. 471, 483 (1972) ("summary treatment . . . [may be necessary to control] a large group of potentially disruptive prisoners."). *See also* Note, *Due Process Safeguards in Prison Disciplinary Proceedings: The Application of the Goldberg Balancing Test,* 49 N. DAK. L. REV. 675, 678 (1973).

40. Indiana Manual, *supra* note 21, at 2.

of detention necessary,[41] prison officials should distinguish between violent and nonviolent infractions before approving prehearing detention. Also, hearings should be held as promptly as possible to avoid excessive detention.

Opportunity to be Heard

Virtuality all courts that have dealt with prison disciplinary hearings[42] and the Indiana Department of Correction,[43] agree that the right of an individual to appear before a hearing committee to explain his or her version of the facts is essential for fundamental fairness. However, disagreement exists on how far this right extends. *Morrissey* allows a parolee to present a reasonable number of voluntary witnesses,[44] but *Miller* and *Aikens* grant inmates only a right to request witnesses.[45] Thus, *Miller* and *Aikens* keep open the possibility that a request will be denied, leaving the inmate unable to substantiate his or her version of the facts.

Although Indiana's procedure allows an inmate to explain his or her conduct, it apparently does not allow an inmate to call or even to request any witnesses because "it may be assumed that many will want to testify to avoid work . . . ."[46] Since hearings could be held at times when prisoners are not working, this consideration hardly seems compelling. In order to avoid any such problems, the hearing board could easily limit both the number of witnesses and the scope of their testimony on grounds of relevance. This less restrictive alternative is important because without the ability to call witnesses, the inmate must rely on those persons brought to the attention of the board only through the often inadequate and biased medium of the investigating officer's report.[47] With reasonable restrictions, the right to call witnesses will not burden the hearing process, but enhance its ability to find facts.

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41. 408 U.S. at 487.

42. *E.g.*, United States *ex rel.* Miller v. Twomey, 479 F.2d 701, 716 (7th Cir. 1973); Sostre v. McGinnis, 442 F.2d 178, 198 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972); *cf.* Morrissey v. Brewer, 408 U.S. 471, 488 (1972); Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

43. Indiana Procedures, *supra* note 26, at 2.

44. 408 U.S. at 489.

45. 479 F.2d at 716; Aikens v. Lash, Civil No. 72 S 129 (N.D. Ind., filed Jan. 23, 1974). Specifically, *Aikens* requires a fair opportunity to request witnesses be called or interviewed in the inmate's presence. *Id.*

46. Indiana Procedures, *supra* note 26, at 1.

47. *See, e.g.*, Harvard Center for Criminal Justice, *Judicial Intervention in Prison Discipline*, 63 J. CRIM. L.C. & P.S. 200, 208 (1972) [hereinafter cited as *Judicial Intervention*], which discusses the frequent inadequacy of the investigating officer's report.

Confrontation and Cross-Examination of Accusers

Closely tied to the controversey over the right to call voluntary witnesses is the issue of whether an inmate should be allowed to confront and cross-examine his or her accusers. Some argue that allowing prisoners this right will result in loss of respect for supervisory personnel and the possibility of reprisals against adverse witnesses.[48] For these reasons, *Miller* declined to permit confrontation,[49] although *Morrissey* and *Aikens* required this procedure unless the hearing officer specifically found reasons not to do so.[50] Indiana procedure does not allow confrontation or cross-examination because it would undermine the guards' abilities to deal with inmates and would be an undue imposition on their time.[51] The Department of Correction assumes that all prisoners will attempt to turn hearings into guard-baiting sessions. However, the hearing board could easily prohibit caustic or vindictive questioning, and with limitations on the scope and nature of cross-examination, the possibility of a guard's being embarrassed is minimal. Also, the time spent requiring guards to attend hearings must be balanced against the crucial fact that confrontation and cross-examination are valuable methods for ascertaining the veracity of testimony and are "of fundamental importance in administrative proceedings where the ordinary rules of procedure are relaxed."[52]

Trial-type cross-examination is not necessarily required. As an alternative to trial-type cross-examination, the hearing board could question adverse witnesses. This method would promote accurate fact-finding without detracting from the dispositional aspect of the hearing;[53] it would also minimize overly harsh cross-examination which may cause guards to retaliate against the inmate.[54] With reasonable modification,[55] cross-

48. *E.g.*, Indiana Procedures, *supra* note 26, at 1.

49. 479 F.2d at 718.

50. 408 U.S. at 489; Aikens v. Lash, Civil No. 72 S 129 (N.D. Ind., filed Jan. 23, 1974). *Aikens'* holding that inmates must be allowed to cross-examine adverse witnesses in transfer hearings casts doubt on the Indiana rule prohibiting cross-examination and confrontation in disciplinary hearings. *Aikens* allows cross-examination of all adverse witnesses at the transfer hearing or interview, unless "the written record shall reflect sufficient proof of the reliability of [an] anonymous informant." *Id.* at ——. *Aikens* does not specify how the reliability of an informant is to be established.

51. Indiana Procedures, *supra* note 26, at 1-2.

52. Sands v. Wainwright, 357 F. Supp. 1062, 1087 (M.D. Fla. 1973).

53. Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841, 874 (1971). *See also* Jacob, *Prison Discipline and Inmate Rights*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 227, 247-48 (1970) [hereinafter cited as Jacob].

54. Sands v. Wainwright, 357 F. Supp. 1062, 1088 (M.D. Fla. 1973). Confrontation and questioning of inmate accusers, as well as the accused, by the hearing board would also limit the possibility of inventing charges out of malice.

55. One such modification would be to allow the inmate's counsel or counsel sub-

examination and confrontation should be permitted in disciplinary hearings.

Impartial and Detached Hearing Board

The requirement that the hearing board be neutral is a basic principle of procedural due process, accepted by the Supreme Court in *Morrissey,*[56] the court in *Miller,*[57] and the Indiana Department of Correction.[58] However, all three attempt to achieve neutrality simply by requiring no prior involvement in the case. Since the purpose of neutrality is presumably to remove bias in adjudication, allowing only prison officials to comprise the hearing board may not adequately ensure impartiality.

Empirical studies indicate that hearing officers in intraprison disciplinary hearings de-emphasize fact-finding and tend to believe staff members rather than inmates.[59] To remedy this lack of objectivity, it has been suggested that the hearing board be composed exclusively of people outside the prison system.[60] This proposal overemphasizes the objective, fact-finding function of the hearing at the expense of the need to consider subjective factors in reaching a solution appropriately tailored to the rehabilitative needs of individual prisoners. A better balance of interests would be maintained by a hearing board composed of both interested nonprison persons and prison personnel. If the non-prison persons are able to function independently, such a hearing board could increase objectivity without sacrificing correctional ideals. In addition,

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stitute to cross-examine witnesses. Wick, *supra* note 7, at 324. South Carolina employs this practice except the inmate representative cannot attack the staff's credibility in the presence of the accused. Pearson v. Townsend, 362 F. Supp. 207, 222-23 (D.S.C. 1973). *Aikens* allowed an inmate to be represented by a lay advocate of his or her own choosing. If the lay advocate is an inmate, he or she must be confined in the same institution as the accused and cannot be confined in segregation. Aikens v. Lash, Civil No. 72 S 129 (N.D. Ind., filed Jan. 23, 1974).

56. 408 U.S. at 486, 489.

57. 479 F.2d at 718. *See also* Sands v. Wainwright, 357 F. Supp. 1062, 1084-85 (M.D. Fla. 1973); Meyers v. Alldredge, 348 F. Supp. 807, 823-24 (M.D. Pa. 1972); Bundy v. Cannon, 328 F. Supp. 165, 172-73 (D. Md. 1971); Clutchette v. Procunier, 328 F. Supp. 767, 784 (N.D. Cal. 1971). *Contra,* Baker v. Beto, 349 F. Supp. 1263, 1267 (S.D. Tex. 1972) (officer initiating charge may sit on hearing committee).

58. Indiana Procedures, *supra* note 26, at 2. It is suggested that one member of the Board should be a "minority group person." Indiana Manual, *supra* note 21, at 4. The Conduct Adjustment Board is composed of at least three members of the staff who are appointed by the Institution Head. According to Indiana procedures, the ideal composition of the Conduct Adjustment Board would be: the Assistant Institution Head or his designate, a noncustodial member of the staff, and one representative from other institution departments. *Id.*

59. *Judicial Intervention, supra* note 47, at 213.

60. Wick, *supra* note 7, at 324.

the presence of citizen and inmate observers might increase inmate confidence in the hearing system.[61]

Counsel and Counsel Substitutes

The question of representation by counsel was not reached in *Morrissey*[62] but in *Gagon v. Scarpelli*,[63] the Supreme Court stated:

> [T]he effectiveness of the rights guaranteed by *Morrissey* may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess.[64]

The Court then ordered a case-by-case determination of whether counsel would be appropriate in parole and probation revocation hearings.[65] In evaluating the need for counsel, the Court suggested that the relevant factors to be considered were the need for cross-examination, the complexity of the facts, and the probationer's or parolee's capacity for self-expression.[66] The Court did not recognize a general right to counsel because to do so would upset the balance between accurate fact-finding and "the predictive and discretionary" nature of post-conviction hearings.[67]

Indiana does not allow counsel at any prison disciplinary hearings, although an inmate charged with a major rule violation may request the assistance of a prison staff member.[68] However, in light of recent rulings in the context of parole revocation hearings, the Indiana practice should be re-evaluated.[69] As in parole and probation revocation hearings, in

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61. *See* Jacob, *supra* note 53, at 276.
62. 408 U.S. at 489.
63. 411 U.S. 778 (1973).
64. *Id.* at 786.
65. *Id.* at 790-91.
66. *Id.* at 787, 790-91.
67. *Id.* at 787. In Russell v. Douthitt, —— Ind. ——, 304 N.E.2d 793 (1973), the Indiana Supreme Court reluctantly followed *Gagnon*, noting however:
> those involved in parole revocation can take no other course than to appoint counsel in all cases and to have a full-blown trial for every alleged charge of parole violation.

Id. at ——, 304 N.E.2d at 794.
68. Indiana Manual, *supra* note 21, at 4. Cases allowing counsel substitutes include: Sands v. Wainwright, 357 F. Supp. 1062, 1088-89 (M.D. Fla. 1973); Colligan v. United States, 349 F. Supp. 1233, 1238 (E.D. Mich. 1972); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971). Johnson v. Avery, 393 U.S. 483 (1969), by holding that prison officials cannot forbid inmates from aiding other inmates in preparing habeas corpus petitions, may indicate that in the absence of better legal assistance, inmates may give legal aid to fellow inmates in other situations, such as disciplinary hearings.
69. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973) (counsel necessary in certain circumstances); United States *ex rel.* Miller v. Twomey, 479 F.2d 701, 718 n.36 (7th Cir. 1973) (doubtful that counsel is necessary); Pearson v. Townsend, 362 F. Supp. 207, 222-23 (D.S.C. 1973); *cf.* Goldberg v. Kelly, 397 U.S. 254, 270 (1970).

unusual circumstances, such as where the inmate is unable to express himself or herself, the facts are complex or the alleged rule violation is a criminal offense, counsel should be provided.[70] Where a rule violation is also a criminal offense lack of counsel is probably unconstitutional.[71] An attorney is necessary at the prison hearing to assure that appropriate steps are taken to preserve the inmate's defenses to a criminal charge arising from the same conduct. Representation can provide skilled cross-examination for the inmate and can remove the dilemma of having to forfeit either the fifth amendment right to remain silent or the right to respond to prison charges.[72]

Use of a prison staff member as a representative[73] presents three additional problems. First, since no privilege exists between the staff member and the inmate, an inmate may not fully cooperate in the preparation of his or her defense. Second, the two roles played by the staff member would inevitably pose difficult conflict of interest problems.[74] Third, the staff member is unequipped and unskilled to handle work of this kind. Even if lawyers are not utilized, these problems could be avoided by the use of legal paraprofessionals, law students, prison ombudsmen, or even other inmates[75] as counsel substitutes.

Written Statement of Findings, Reasons and Disposition

A written decision of the hearing board, stating reasons for the decision and summarizing the evidence, is required by *Morrissey* and *Aikens*.[76] A written report is essential so that administrative and judicial

70. *See* Russell v. Douthitt, —— Ind. ——, 304 N.E.2d 793 (1973).

71. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

72. In Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971), the court found the need for counsel in disciplinary hearings where the inmate was charged with a rule infraction which was also punishable under state law to be "more compelling . . . than in Miranda." *Id.* at 778-79; *accord,* Carter v. McGinnis, 351 F. Supp. 787 (W.D.N.Y. 1972). Sands v. Wainwright, 357 F. Supp. 1062 (M.D. Fla. 1973), rejects the *Clutchette* remedy, and instead grants the inmate "use" immunity so that his or her testimony in the prison proceeding may not be used "affirmatively against him" or her in a later criminal prosecution. *Id.* at 1093; *accord,* Palmigiano v. Baxter, 487 F.2d 1280, 1288-90 (1st Cir. 1973); *cf.* Simmons v. United States, 390 U.S. 377 (1968) (holding that testimony given to establish standing to bring a motion to suppress illegally obtained evidence may not be used against the defendant on the issue of guilt or innocence at his or her trial). *See also* Kastigar v. United States, 406 U.S. 441 (1972) (upholding a federal statute granting "use" and "derivative use" immunity). *Kastigar* raises questions as to the scope of 'use" immunity in the context of prison disciplinary hearings.

73. Indiana Manual, *supra* note 21, at 4.

74. Wick, *supra* note 7, at 323; *Judicial Intervention, supra* note 47, at 208.

75. *See* note 55 *supra.*

76. 408 U.S. at 489; Aikens v. Lash, Civil No. 72 S 129 (N.D. Ind., filed Jan. 23, 1974). *See also* Childs v. United States Board of Parole, 14 CRIM. L. REP. 2135 (D.D.C. 1973) (Parole Board required to provide written reasons for denial of parole). *Aikens* not only requires a written, reasoned decision, but sets a standard of decisionmaking.

review may ensure that the decision is based on evidence presented at the hearing.[77]

The Indiana prison disciplinary procedure does not satisfy the *Morrissey* and *Aikens* requirements. It provides that a written statement should be furnished the inmate if requested.[78] This written report contains only the "findings" of the disciplinary hearing board.[79] Thus, if *Morrissey's* analysis is extended to intraprison disciplinary hearings a fuller statement of reasons for the decision would be required in every case.

Appeal

Although neither *Morrissey* nor *Miller* mentions the right to appeal as an essential element of procedural due process, an appellate procedure is desirable as a means of monitoring and correcting abuses in disciplinary hearings.[80] Indiana allows review of decisions that result in loss of good time or punitive segregation by the warden, and then by the head of the correctional system.[81] While this procedure results in no review by a disinterested body, it is probably adequate to protect inmates from arbitrary treatment in most cases. For this reason, and because *Morrissey* and *Miller* lack such a requirement, the Indiana procedure would probably satisfy any judicially determined procedural due process requirement of appellate review.[82]

CONCLUSION

In applying *Morrissey* to prison disciplinary hearings, courts, ad-

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Under this standard, all decisions must be supported by "substantial evidence." Aikens v. Lash, *supra* at ——. *Aikens* also requires a copy be given to the inmate. *Id.* at ——.

77. *See* Colligan v. United States, 349 F. Supp. 1233, 1238 (E.D. Mich. 1972). *See also* Pearson v. Townsend, 362 F. Supp. 207, 223-24 (D.S.C. 1973); Landman v. Royster, 333 F. Supp. 621, 653 (E.D. Va. 1971); Clutchette v. Procunier, 328 F. Supp. 767, 783-84 (N.D. Cal. 1971).

78. Indiana Manual, *supra* note 21, at 2.

79. *Id.*

80. Cases requiring an appellate procedure include: Nelson v. Heyne, 355 F. Supp. 451, 457 (N.D. Ind. 1972); Meyers v. Alldredge, 348 F. Supp. 807, 823 (M.D. Pa. 1972) (dictum). Review was not required in: Landman v. Royster, 333 F. Supp. 621, 653 (E.D. Va. 1971); Clutchette v. Procunier, 328 F. Supp. 767, 784 (N.D. Cal. 1971).

81. Indiana Manual, *supra* note 21, at 4-5. All decisions which result in loss of good time, punitive segregation, or change in status are to be automatically reviewed by the head of the institution who may confirm the decisions or order more extensive or new proceedings. The inmate is then allowed to appeal to the head of the Department of Correction or his designate. *Id. Aikens* also requires administrative review by the Commissioner of Correction or his designate. Aikens v. Lash, Civil No. 72 S 129 (N.D. Ind., filed Jan. 23, 1974).

82. Review of significant deprivations of liberty in violation of the Constitution may be had in habeas corpus proceedings. *See* Note, *Habeas Corpus vs. Prison Regulations: A Struggle in Constitutional Theory,* 54 MARQ. L. REV. 50 (1971).

ministrators, and inmates will inevitable differ as to the weight to be given various factors in carrying out the balancing that due process analysis requires. The current procedures of the Indiana Department of Correction represent its effort at balancing, but the courts will inevitably be required to re-evaluate the state's determination. Courts should find that Indiana's procedures for notice, appeal and hearing board neutrality adequately promote administrative fairness. However, procedures limiting the right to call witnesses and to cross-examine should be found inadequate to assure factual accuracy. Efficiency should not be so heavily weighted that the inmate's right to fairness is abrogated.

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