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Sandin v. Conner: Redefining State Prisoners' Liberty Interest and Due Process Rights

The Fifth[1] and Fourteenth[2] Amendments to the Constitution guarantee that the government will not arbitrarily interfere with our movements nor restrain our liberty without due process of law. For a free man or woman, the scope of liberty is "broad indeed,"[3] and its limitation is the exception rather than the rule. However, what constitutes the "liberty" interest of a prison inmate who has been legally deprived of freedom by conviction and sentencing? Does a prisoner retain every liberty not expressly taken away by his sentence?[4] Does he lose all liberty except that expressly created by the state within the prison walls?[5] Or does the answer lie somewhere in between? Finally, what is the role of the federal courts in protecting the liberty of individual state prisoners from arbitrary and unwarranted deprivation?[6] These are questions the Supreme Court has struggled with for decades and which it faced again in *Sandin v. Conner*.[7] In an opinion that reflects the continuing split on the Court as to the source of prisoners' liberty interests[8] and the role of federal courts in overseeing state prison decisions,[9] the *Sandin* Court struggled with defining the circumstances under which state prison regulations give rise to liberty interests that are protected under the Due Process Clause of the Fourteenth Amendment.[10]

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1. "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.
2. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.
3. Board of Regents v. Roth, 408 U.S. 564, 572 (1972).
4. *See* Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) ("A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.").
5. *See infra* note 95 and accompanying text.
6. *See infra* notes 42-43, 61-66 and accompanying text.
7. 115 S. Ct. 2293 (1995).
8. *See infra* notes 34-41, 44-58 and accompanying text.
9. *See infra* notes 55-56, 176-88 and accompanying text.
10. *See Sandin*, 115 U.S. at 2295. Any due process analysis must first answer whether process is required before examining how much process is sufficient. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies, the question remains what process is due."). In an opinion delivered the same term as *Morrissey*, the Court further explored the issue of when due process requirements are triggered—the "whether" question. Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972) (stating that an interest must fall under the Fourteenth Amendment's liberty or property

Clearly, the prisoner is no longer considered a "slave of the State,"[11] subject to any sort of treatment or abuse without redress. However, neither is the prisoner entitled to "the full panoply of rights due a defendant in [criminal] proceedings"[12] before he can be subject to discipline by the state. Between these two extremes, the Court held in *Sandin* that liberty interests arise only when the restraint contemplated "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[13] In so holding, the Court abandoned the line of reasoning, developed in cases since *Hewitt v. Helms*,[14] which gleaned the existence of a prisoner's liberty interest from "mandatory" language in state statutes or prison regulations.[15]

This Note first discusses the facts and procedural history of *Sandin*.[16] It then briefly describes the majority and dissenting opinions[17] before charting the development of prisoners' due process protections in the federal courts and the context in which the *Sandin* decision arose.[18] This Note also examines the assumptions upon which the decision is based[19] and the potential consequences *Sandin* will have for state prisoners seeking relief in federal court.[20]

DeMont Conner was serving a sentence of thirty years to life in Hawaii's maximum security Halawa Correctional Facility for murder

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protection in order to trigger due process). *See infra* notes 71-73 and accompanying text. Four years later, the Court developed its analysis for determining how much process would be constitutionally sufficient. Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (stating that the weighing process must take into account both the private and governmental interests at stake and the probable benefit of additional procedural protections). *But cf.* James E. Robertson, *Judicial Review of Prison Discipline in the United States and England: A Comparative Study of Due Process and Natural Justice*, 26 AM. CRIM. L. REV. 1323, 1341 n.164 (1989) (noting that prior to 1972 the question of how much process should be given was not generally discussed separately from whether process applied). Because the *Sandin* Court found that Conner did not have a liberty interest in remaining free from disciplinary segregation, and therefore was not entitled to procedural protections, it did not reach the second part of this analysis. *Sandin*, 115 S. Ct. at 2302.

11. Ruffin v. Commonwealth, 62 Va. 1024, 1026 (21 Gratt. 790, 796) (1871).

12. Wolff v. McDonnell, 418 U.S. 539, 556 (1974) (citing *Morrissey*, 408 U.S. at 488).

13. *Sandin*, 115 S. Ct. at 2300.

14. 459 U.S. 460 (1983) (holding that Pennsylvania regulations governing state prison administration give rise to prisoner liberty interest in avoiding administrative segregation because of mandatory language limiting official discretion); *see infra* notes 126-36 and accompanying text.

15. *Hewitt*, 459 U.S. at 472.

16. *See infra* notes 21-31 and accompanying text.

17. *See infra* notes 32-60 and accompanying text.

18. *See infra* notes 61-164 and accompanying text.

19. *See infra* notes 165-88 and accompanying text.

20. *See infra* notes 189-203 and accompanying text.

and other violent crimes.[21] When Conner responded with abusive and obscene language to a strip search conducted by a prison officer, he was charged with "high misconduct" for his obstructive behavior and "low moderate misconduct" for harassment of a prison employee.[22] Conner was notified of the charges and appeared before an adjustment committee that found him guilty and sentenced him to thirty days in "disciplinary segregation."[23] Conner was not allowed to present witnesses at the hearing.[24]

Conner sought administrative review of the charges.[25] Nine months later, the deputy administrator found the "high misconduct" charge to be unsupported, and Conner's disciplinary record was accordingly expunged.[26] Meanwhile, Conner filed a complaint under 42 U.S.C. § 1983[27] seeking, in part, damages for deprivation of procedural due process in connection with the disciplinary hearing.[28] The United States District Court for the District of Hawaii granted summary judgment in favor of the prison officials.[29] The Ninth Circuit Court of Appeals reversed, finding that Conner had a "liberty interest" in remaining free from disciplinary segregation and thus was entitled to call witnesses at his hearing.[30] The court based its decision on a prison regulation from which it drew the negative inference that disciplinary segregation could not be imposed absent a finding of "substantial evidence" of misconduct by the adjustment committee.[31]

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21. *Sandin*, 115 S. Ct. at 2295.

22. *Id.* at 2296. Hawaii's prison regulations enumerate and rank offenses by severity and establish available sanctions for each level of misconduct. *Id.* at 2296 n.1; *see also infra* note 41 (discussing the delegation of rule-making authority to corrections department).

23. *Sandin*, 115 S. Ct. at 2296.

24. *Id.*

25. *Id.*

26. *Id.*

27. 42 U.S.C. § 1983 (1988). Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

Id.

28. *Sandin*, 115 S. Ct. at 2296.

29. *Id.*

30. Conner v. Sakai, 15 F.3d 1463, 1466 (9th Cir. 1993), *rev'd sub nom.* Sandin v. Conner, 115 S. Ct. 2293 (1995).

31. *Id.* The court of appeals held that a liberty interest was at stake in the outcome of the factual inquiry and, therefore, Conner was entitled to call witnesses as part of the process he was due under Wolff v. McDonnell, 418 U.S. 539 (1974). *Conner*, 15 F.3d at

In a five-to-four decision, the Supreme Court reversed the court of appeals.[32] While not explicitly overruling precedent,[33] the Court disavowed the methodology of *Hewitt* and later cases which used a two-part test of "substantive predicates" and "mandatory language" to determine whether liberty interests arose from state statutes and prison regulations.[34] Instead, the Court formulated a new test for determining state-created liberty interests for prisoners.[35] The Court held that Conner did not have a liberty interest in remaining in the general prison population.[36] Because Conner's disciplinary segregation "mirrored" conditions experienced by inmates in nondisciplinary, administrative segregation, the Court found that it "did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest."[37]

In rejecting the old test, which focused on formalistic interpretations of prison regulations to determine whether the state had created a protected liberty interest,[38] the majority emphasized the policy behind codified prison regulations.[39] The Court noted that the purpose of prison rules is to guide prison officials in their duties, not to confer rights on prisoners,[40] and further, that the "mandatory language" test created disincentives to states to codify prison regulations for fear of creating liberty interests that would in turn trigger procedural due process requirements.[41] Additionally, the Court

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1466-67.

32. *Sandin*, 115 S. Ct. at 2295, 2297. Chief Justice Rehnquist delivered the opinion of the Court, in which Justices O'Connor, Scalia, Kennedy, and Thomas joined.

33. *Id.* at 2300 n.5.

34. *Id.* at 2298, 2300; *see infra* notes 126-36 and accompanying text.

35. *Sandin*, 115 S. Ct. at 2300.

36. *Id.* at 2301.

37. *Id.*

38. *Id.* at 2300.

39. *Id.* at 2299.

40. *Id.*

41. *Id.* The Supreme Court in *Hewitt* named "statutes and regulations" as sources of state law which could give rise to protected liberty interests if they went beyond "simple procedural guidelines . . . [and] used language of an unmistakably mandatory character." Hewitt v. Helms, 459 U.S. 460, 470-71 (1983). Following this lead, lower courts found that other "expressions of state law" such as administrative rules, inmate handbooks, and posted prison rules could also give rise to liberty interests. Robertson, *supra* note 10, at 1351. In fact, the typical prison governance system delegates broad authority to state correction departments and prison officials to formulate and enforce the rules by which prison life is regulated. *See* W. Anthony Fitch & Julian Tepper, *An Introduction to Prison Reform Legislation*, 5 CLEARINGHOUSE REV. 627, 628-29 (1972); Robertson, *supra* note 10, at 1328. An example of this type of delegatory statute is the Hawaii law in effect at the time of Sandin's disciplinary action. By statute, the responsibility for prisons falls

stated that the *Hewitt* approach involved the federal judiciary too deeply in the day-to-day affairs of state prisons,[42] an attitude that harkens back to the pre-1970 "hands-off" doctrine[43] of the federal courts.

Justice Ginsburg, joined by Justice Stevens in dissent,[44] took up the banner long held by Justice Marshall[45] and insisted that the majority's approach wrongly placed the source of prisoners' liberty interests in state law rather than the Due Process Clause.[46] While Justice Ginsburg indicated that Conner likely had received sufficient procedural protection in this case,[47] she took issue with the Court's

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under the Department of Social Services and Housing; the director of social services

> shall have the entire government, control, and supervision of state correctional facilities . . . and of the administration thereof. The director may make and . . . amend rules relating to the conduct and management of such facilities and the care, control, treatment, furlough and discipline of persons committed to the director's care, which rules . . . [are] valid and binding upon all inmates, officers, and employees . . . .

HAW. REV. STAT. § 353-3 (1985).

42. *Sandin*, 115 S. Ct. at 2299.

43. The "hands off" doctrine is the theory that prisons generally are the responsibility of the legislative and executive branches, and state prisons specifically are within the realm of state laws and responsibility, and therefore the federal courts should not interfere. *See, e.g.*, Douglas v. Sigler, 386 F.2d 684, 688 (8th Cir. 1967) (stating that " 'it is settled doctrine that except in extreme cases the courts may not interfere with the conduct of a prison, with its regulations and their enforcement, or with its discipline' ") (quoting Lee v. Tahash, 352 F.2d 970, 971 (8th Cir. 1965)); McCloskey v. Maryland, 337 F.2d 72, 74 (4th Cir. 1964) (stating that due to security and safety concerns, prison officials "must have a wide discretion . . . in imposing disciplinary sanctions"); Banning v. Looney, 213 F.2d 771, 771 (10th Cir.) (per curiam) (stating that "[c]ourts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations"), *cert. denied*, 348 U.S. 859 (1954). *See generally* Charles E. Friend, Note, *Judicial Intervention in Prison Administration*, 9 WM. & MARY L. REV. 178, 179-81 (1967) (describing policies and history behind the "hands off" doctrine).

44. *Sandin*, 115 S. Ct. at 2302 (Ginsburg, J., dissenting).

45. Justice Marshall and Justice Stevens frequently wrote for the minority in prisoners' rights cases, championing the idea that prisoners retained inherent liberty rights by virtue of the Due Process Clause and that to base such rights on state law was to "assume that after his conviction a prisoner has, in essence, no liberty save that created, in writing, by the State which imprisons him." Hewitt v. Helms, 459 U.S. 460, 482 (1982) (Stevens, J., dissenting); *see also, e.g.*, Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 467-68 (1989) (Marshall, J., dissenting) ("[T]he retained liberty interest protected by the Constitution encompasses the right to be free from arbitrary governmental action affecting significant personal interests."); Olim v. Wakinekona, 461 U.S. 238, 251 (1983) (Marshall, J., dissenting) ("[A]n inmate's liberty interest is not limited to whatever a State chooses to bestow upon him.").

46. *Sandin*, 115 S. Ct. at 2303 (Ginsburg, J., dissenting).

47. *Id.* (Ginsburg, J., dissenting).

failure to recognize his liberty interest in remaining free from disciplinary segregation.[48]

In a separate dissent, Justice Breyer, joined by Justice Souter,[49] argued that the Court need not abandon its precedent and state a new standard in order to protect inmates from important, as opposed to insignificant, deprivations.[50] Justice Breyer pointed to the fact that the Court historically had considered either the "nature" or severity of a prisoner's deprivation in determining whether a liberty interest was at stake, such as in *Vitek v. Jones*[51] and *Washington v. Harper*,[52] or state laws governing less severe deprivations.[53] He therefore criticized the majority's attempt to define a new "minimum standard," which threatens to create uncertainty and invites varying interpretations in the lower courts.[54]

Justice Breyer acknowledged the majority's concern over federal judicial involvement in day-to-day prison affairs and the potential for due process procedural requirements for minor disciplinary matters.[55] Defending his approach, however, he argued that it is possible to distinguish those prisoner claims that clearly fall within the protection of the Due Process Clause from those that are too trivial to merit procedural protection.[56] Further, he stated that he would keep the "entitlement"[57] approach of examining state law to determine liberty interests in the "broad middle category" of prisoner restraints which are not easily defined either as insignificant or as implicating fundamental liberty.[58]

Both dissents sharply criticized the majority's reliance on the fact that the State later expunged Conner's disciplinary record.[59] Justices Ginsburg and Breyer emphasized that the nature of the loss threatened or suffered must determine an individual's entitlement to

48. *Id.* at 2302 (Ginsburg, J., dissenting).
49. *Id.* at 2304 (Breyer, J., dissenting).
50. *Id.* at 2306 (Breyer, J., dissenting).
51. 445 U.S. 480 (1980); *see infra* notes 102-09 and accompanying text.
52. 494 U.S. 210 (1990); *see infra* notes 102-09 and accompanying text.
53. *Sandin*, 115 S. Ct. at 2304 (Breyer, J., dissenting).
54. *Id.* at 2306 (Breyer, J., dissenting).
55. *Id.* (Breyer, J., dissenting).
56. *Id.* at 2306-07 (Breyer, J., dissenting).
57. *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (holding that positive state law could create a protected "entitlement"); *infra* text accompanying notes 71-73.
58. *Sandin*, 115 S. Ct. at 2306-07 (Breyer, J., dissenting).
59. *Id.* at 2303 n.1 (Ginsburg, J., dissenting); *id.* at 2309 (Breyer, J., dissenting).

procedural protections, not the State's after-the-fact categorization of its action.[60]

The Court's journey to the *Sandin* decision and the struggle over defining state prisoners' liberty interests began with the opening of a legal avenue for such claims to be heard. The 1961 decision *Monroe v. Pape*[61] provided this opening, giving renewed life to the long-dormant Civil Rights Act of 1871,[62] 42 U.S.C. § 1983, which "provide[s] a federal remedy for constitutional violations occurring 'under color' of state law."[63] By making the federal courts accessible without first requiring the exhaustion of state remedies, *Monroe* paved the way for state prisoners to seek relief in federal court for the denial of constitutionally protected rights.[64] Additionally, in the following decade a growing number of lower federal court decisions began to cast doubt on the "hands off" doctrine,[65] and courts began to take seriously prisoners' claims of unjust, arbitrary, and often inhumane treatment at the hands of state prison officials.[66]

Although neither involved a prisoner's suit, two cases in the early 1970s set the stage for a changed view of prisoners' right to due process in disciplinary proceedings and for a philosophical split within the Court as to the source of those rights—a split which is still evident in *Sandin*.[67] In *Goldberg v. Kelly*,[68] the issue was whether an

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60. *Id.* at 2303 n.1 (Ginsburg, J., dissenting); *id.* at 2309 (Breyer, J., dissenting).

61. 365 U.S. 167 (1961).

62. The act was originally § 1 of "[a]n Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." 17 Stat. 13 (1871). For the text of § 1983 see *supra* note 27.

63. Robertson, *supra* note 10, at 1343-44.

64. *Monroe*, 365 U.S. at 183 (holding that "[the] federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked"); *see also* William B. Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 612 n.20 (1979) (explaining prisoners' preference for pursuing § 1983 claims as opposed to habeas corpus relief).

65. *See supra* note 43.

66. *See, e.g.*, Gray v. Creamer, 465 F.2d 179, 184 (3d Cir. 1972) (stating that "when a state prisoner makes specific allegations of unconstitutional treatment, the federal courts must become involved"); Sostre v. McGinnis, 442 F.2d 178, 189, 204 (2d Cir. 1971) (holding that inmate was improperly punished and discriminated against by prison officials on the basis of his religious and political beliefs), *cert. denied*, 404 U.S. 1049, *and cert. denied*, 405 U.S. 978 (1972); Washington v. Lee, 263 F. Supp. 327, 331 (M.D. Ala. 1966) (holding that permanent segregation of state prisoners by race violates the Fourteenth Amendment), *aff'd*, 390 U.S. 333 (1968) (per curiam); Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966) (holding that state prisoners have a constitutional right, which may be enforced under 42 U.S.C. § 1983, to be free from cruel and unusual punishment).

67. *See supra* notes 34-38, 44-58 and accompanying text.

68. 397 U.S. 254 (1970).

individual whose welfare benefits were to be terminated was entitled, under the Due Process Clause, to a pre-termination hearing.[69] The Court held that "[t]he extent to which procedural due process must be afforded . . . is influenced by the extent to which [an individual] may be 'condemned to suffer grievous loss.' "[70] In *Board of Regents v. Roth*,[71] decided two years later, the Court held that an individual is entitled to procedural protections when some source of positive law creates a "legitimate claim of entitlement."[72] In *Roth*, the Court refused to find that an untenured professor had a right to a hearing on the nonrenewal of his contract because neither the terms of his employment, state statute, nor university policy created any such "legitimate claim of entitlement."[73]

In these two decisions, the Court began to recognize what had already been termed "the new property."[74] This new method of defining protected interests[75] did not, however, remain limited to property interests. Lower courts began using the *Goldberg* analysis in reviewing prison discipline cases.[76] In 1972, the Supreme Court also extended *Goldberg* beyond property interests in *Morrissey v. Brewer*,[77] applying the "grievous loss" test to the question of whether the "requirements of due process in general apply to parole revocations."[78] However, application of the *Goldberg* "grievous

69. *Id.* at 255.

70. *Id.* at 263-64 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)). The *Goldberg* Court also stated that a balancing must occur between the government's interest in summary adjudication and the individual's interest in avoiding the loss when determining whether and how much process is sufficient. *Id.*; *see supra* note 10 (discussing later development of this balancing test in Mathews v. Eldridge, 424 U.S. 319 (1976)).

71. 408 U.S. 564 (1972).

72. *Id.* at 577.

73. *Id.* at 578.

74. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). Professor Reich proposed this way of defining an individual's reliance on government benefits and "largess" as a measure of his wealth and, thus, his property. *Id.* at 785-87.

75. "Protected interests" are life, liberty, and property. *See supra* note 2.

76. *See, e.g.*, Knell v. Bessinger, 489 F.2d 1014, 1018 (7th Cir. 1973) (holding that 15 days in punitive isolation and loss of good time constituted "grievous loss" warranting procedural safeguards); Sands v. Wainwright, 357 F. Supp. 1062, 1083 (M.D. Fla.) (stating that disciplinary and administrative segregation and loss of good time constituted grievous losses), *vacated on juris. grounds*, 491 F.2d 417 (5th Cir. 1973), *cert. denied*, 416 U.S. 992 (1974); Clutchette v. Procunier, 328 F. Supp. 767, 781 (N.D. Cal. 1971) (stating that the severity of potential punishment must be considered when determining whether prisoner is subjected to a "grievous loss" requiring procedural protections), *modified*, 497 F.2d 809 (9th Cir. 1974), *rev'd sub nom.* Baxter v. Palmigiano, 425 U.S. 308 (1976).

77. 408 U.S. 471 (1972).

78. *Id.* at 481.

loss" analysis did not retain its momentum in the realm of procedural due process protections; ultimately it was overtaken by the *Roth* entitlement theory.[79]

A pivotal decision in the history of prisoners' due process claims came in 1974 with *Wolff v. McDonnell.*[80] *Wolff* took the concept of a "state-created right" and applied it to a prisoner's liberty interest in a claim seeking the restoration of "good-time" credits.[81] Finding that the State itself had created a right to good-time credits and had prescribed deprivation of the credits as a sanction for serious misconduct, the Court held that the State had created an interest of "real substance" and the prisoner was entitled to minimum due process procedures to ensure that his liberty interest was not arbitrarily taken away.[82] Justice White, writing for the Court, reaffirmed that a prisoner is not "stripped of constitutional protections"[83] and rejected the State's assertion that "the interest of prisoners in disciplinary procedures is not included in that 'liberty' protected by the Fourteenth Amendment."[84]

While the *Wolff* Court explicitly adapted the *Roth* entitlement theory to find a state-created liberty interest, its holding was arguably broader and did not limit the sources of prisoners' liberty interests to positive state law.[85] Further, by focusing on whether a prisoner's right to "good time" was one of "real substance"[86] and by stating that lesser penalties would not necessarily require procedural protections,[87] the *Wolff* Court also implicitly retained the reasoning of "grievous loss" analysis.[88] However, any expectations *Wolff* may have engendered in prisoners that the Supreme Court had become

79. *See infra* notes 92-101 and accompanying text.

80. 418 U.S. 539 (1974). Much of the significance of *Wolff* came from its delineation of how much process was sufficient in the context of prison discipline cases. *Sandin*, 115 S. Ct. at 2297; *see Wolff*, 418 U.S. at 560-72. For the purposes of this Note, however, the main focus will be on the *Wolff* Court's discussion of when due process liberty interests are implicated in the first place.

81. *Wolff*, 418 U.S. at 557. "Good time" credits work to reduce a prisoner's sentence as a result of good behavior in prison. *See, e.g.*, NEB. REV. STAT. § 83-1,107 (1971).

82. *Wolff*, 418 U.S. at 557.

83. *Id.* at 555.

84. *Id.* at 556-57.

85. Charles H. Jones, Jr. & Edward Rhine, *Due Process and Prison Disciplinary Practices: From* Wolff *to* Hewitt, 11 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 44, 112-13 (1985).

86. *Wolff*, 418 U.S. at 557.

87. *Id.* at 572 n.19.

88. Elizabeth Alexander, *The New Prison Administrators and the Court: New Directions in Prison Law*, 56 TEX. L. REV. 963, 979-80 (1978).

receptive to their due process complaints were quickly dashed by two decisions in 1976. *Meachum v. Fano*[89] and *Montanye v. Haymes*[90] both involved the transfer of an inmate to a prison other than the one to which he had originally been assigned.[91] In *Meachum*, the majority explicitly disavowed the *Goldberg* analysis, stating that "[w]e reject at the outset the notion that *any* grievous loss . . . is sufficient to invoke the procedural protections of the Due Process Clause."[92] The Court went on to embrace fully the *Roth* entitlement analysis for determining prisoners' liberty interests.[93] Rather than enlarge the scope of protected interests for which prisoners could expect procedural due process, as *Wolff* initially seemed to do, the *Meachum* decision heralded a much narrower definition of a prisoner's liberty interests.[94] In essence, the majority held that, absent the creation of a right by positive state law, the prison inmate had no liberty interests.[95] Thus, because the State had not provided any statutory entitlement to remain in the prison to which an inmate had been initially assigned, there was no liberty interest implicated in transfer to another prison.[96] Even if the conditions in the second institution were more onerous, an inmate would not be entitled to a pre-transfer hearing or other procedural protection before suffering such a substantial deprivation.[97]

The decision in *Montanye* echoed this reasoning. The Court held that no liberty interest requiring a hearing was at stake in a transfer to another prison "absent some right or justifiable expectation rooted in state law that [the prisoner] will not be transferred except for misbehavior."[98] The Court further dismissed the need for judicial oversight of a prisoner's treatment by prison authorities in any case in which "the conditions or degree of confinement . . . [are] within the sentence imposed upon him and [are] not otherwise violative of the

89. 427 U.S. 215 (1976).
90. 427 U.S. 236 (1976).
91. *Meachum*, 427 U.S. at 216; *Montanye*, 427 U.S. at 238.
92. *Meachum*, 427 U.S. at 224.
93. *Id.*
94. *Id.*; Alexander, *supra* note 88, at 981; Jones & Rhine, *supra* note 85, at 115.
95. *Meachum*, 427 U.S. at 224 ("[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution.").
96. *Id.* at 225.
97. *Id.*
98. *Montanye*, 427 U.S. at 242.

Constitution."[99] This would hold true whether the action was disciplinary or administrative.[100] Thus, the decisions in *Meachum* and *Montanye* appeared to steer the Court plainly down the path of entitlement analysis of liberty interests and away from the "grievous loss" or impact analysis in the search for protected prisoner liberty interests.[101]

However, the Court reemphasized in *Vitek v. Jones*[102] and *Washington v. Harper*[103] that some "residuum of liberty"[104] is retained by an inmate after conviction and that a change of condition that is "qualitatively different" from the terms of his sentence implicates due process protection independent of any state-created right.[105] These two cases involved, respectively, the involuntary transfer of an inmate to a mental hospital[106] and the involuntary administration of psychotropic drugs to a prisoner.[107] In both instances, the Court found an independent basis for protection under the Due Process Clause itself because the nature of the action to be taken implicated a prisoner's fundamental "liberty" interest.[108] The Court held that this type of state action was not within the "range of confinement justified by imposition of a prison sentence."[109]

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99. *Id.*
100. *Id.*
101. *See* Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482, 509-12 (1984). *See generally* Thomas O. Sargentich, *Two Views of a Prisoner's Right to Due Process:* Meachum v. Fano, 12 HARV. C.R.-C.L. L. REV. 405, 431-39 (1977) (suggesting that an "impact" or "grievous harm" analysis would be preferable to the *Meachum* Court's reliance on a narrow "entitlement" view of procedural due process rights in light of prison life realities).
102. 445 U.S. 480 (1980).
103. 494 U.S. 210 (1990).
104. *Vitek*, 445 U.S. at 491.
105. *Id.* at 492-94.
106. *Id.*
107. *Harper*, 494 U.S. at 217.
108. *Id.* at 221-22; *Vitek*, 445 U.S. at 494. However, this holding in the *Harper* case realistically had little meaning for the prisoner because his refusal of the drugs was overridden. *Harper*, 494 U.S. at 222-23. The Court found that the procedural protections afforded by the State were sufficient because medical personnel determined the drugs were necessary given the "legitimate needs of his institutional confinement." *Id.* This is arguably an issue of how much process is due rather than whether process is due. *See supra* note 10. It is questionable, however, whether protection is afforded at all if the level of process given is not meaningful. *See* Bradford L. Thomas, *Restricting State Prisoners' Due Process Rights: The Supreme Court Demonstrates Its Loyalty to Judicial Restraint*, 22 CUMB. L. REV. 215, 242-44 (1992).
109. *Vitek*, 445 U.S. at 493. This refers to the language in Montanye v. Haymes, 427 U.S. 236 (1976), stating that procedural protections are not required for changes in

Significantly, while the Court in each case held that the inmate was entitled to procedural protection regardless of any state-created right or "justifiable expectation,"[110] the Court also noted that there was specific language in the applicable Nebraska statute[111] and Washington policy[112] that gave rise to a state-created liberty interest as well.[113]

Outside the limited scope of involuntary treatment for mental illness, however, the Court has been unwilling to find other prisoner interests which are so fundamental as to rise to this level of inherent protection. Since *Wolff*,[114] the Court increasingly has looked exclusively to positive state law to determine the "nature"[115] of the interest at stake in order to determine whether the prisoner is entitled to some procedural protection.

Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex[116] was a clear example of the Court parsing the language of a state statute in order to find a protected interest (an "entitlement"), rather than looking to the seriousness ("grievousness") of the loss at stake or weighing the relative interests of the state and the

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condition "within the sentence imposed" regardless of the adverse impact on the prisoner. *Id.* at 242; *see supra* text accompanying note 99.

110. *Vitek*, 445 U.S. at 489.

111. The relevant language provides that "when a physician or psychologist . . . finds that a person committed to the department [of corrections] suffers from a mental disease or defect" the prisoner may be transferred "[i]f the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility." NEB. REV. STAT. § 83-180(1) (1976). The Court interpreted this to mean that a prisoner has a justifiable expectation that he will not be transferred absent such findings and therefore is entitled to "appropriate procedures" to determine if his condition warrants transfer to a mental hospital. *Vitek*, 445 U.S. at 489-90.

112. The "expression of state law" in Harper's case was a policy promulgated to govern the Washington Department of Corrections Special Offender Center (SOC). *Harper*, 494 U.S. at 214-15; *see supra* note 41 (describing different forms of state law which may give rise to a prisoner liberty interest). The Court found that in this case, the SOC policy "confer[red] upon [Harper] a right to be free from the arbitrary administration of antipsychotic medication" because the policy required findings of certain conditions—"mental illness" and "gravely disabled" or "dangerous"—before an inmate could be involuntarily treated. *Harper*, 494 U.S. at 221.

113. *Harper*, 494 U.S. at 221; *Vitek*, 445 U.S. at 489. This additional support for decisions already grounded on an independent constitutional right appears to strengthen the Court's primary preference for the "entitlement" view of prisoners' liberty interests.

114. Wolff v. McDonnell, 418 U.S. 539 (1974); *see supra* notes 80-88 and accompanying text.

115. Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972) ("[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake . . . .").

116. 442 U.S. 1 (1979).

prisoner.[117] *Greenholtz* was a class action suit brought by Nebraska inmates under 42 U.S.C. § 1983 claiming unconstitutional denial of parole release.[118] The inmates argued that the parole statutes and the parole board's procedures did not afford them procedural due process.[119] The Court held in *Greenholtz* that the mere possibility of parole did not rise to the level of a "legitimate claim of entitlement," and therefore, the fact that a state had established a system of parole did not in itself create a liberty interest in prisoners who might benefit from that system.[120] The Court, however, accepted the argument that the particular language of the statute created a presumption ("a legitimate expectation") that parole release would be granted absent one of four justifications for deferral.[121] Because the statute used the words "shall" and "unless,"[122] the Court found that some measure of procedural protection was mandated.[123]

Given the *Greenholtz* Court's earlier admonishment that "there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence,"[124] the Court's holding that this particular statute did indeed create a liberty interest was perhaps surprising. However, Chief Justice Burger, writing for the majority, went on to caution that "this statute has unique structure and language and thus whether any other state statute provides a protectible entitlement must be decided on a *case-by-case basis.*"[125]

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117. *Id.* at 11-12; *see also* Herman, *supra* note 101, at 513-15 (criticizing the *Greenholtz* decision for its "preoccupation with statutory wording").

118. *Greenholtz*, 442 U.S. at 3-4.

119. *Id.* at 4-5.

120. *Id.* at 7, 11.

121. *Id.* at 11-12. The Nebraska statute provided in part that the Board of Parole "shall" order the release of an offender being considered for parole

> unless it is of the opinion that his release should be deferred because:
> (a) There is a substantial risk that he will not conform to the conditions of parole;
> (b) His release would depreciate the seriousness of his crime or promote disrespect for law;
> (c) His release would have a substantially adverse effect on institutional discipline; or
> (d) His continued correctional treatment . . . will substantially enhance his capacity to lead a law-abiding life when released at a later date.

NEB. REV. STAT. § 83-1114(1) (1976).

122. *Greenholtz*, 442 U.S. at 11-12; *see supra* note 121.

123. *Greenholtz*, 442 U.S. at 11-12.

124. *Id.* at 7.

125. *Id.* at 12 (emphasis added). The apparently undesirable effect of this statement was to invite close examination of particular statutory language in search of protected,

The outcome at which the Court hinted in these earlier cases came to fruition in *Hewitt v. Helms*,[126] with the pronouncement of a two-part test[127] for determining whether a state statute or regulation created a liberty interest.[128] In *Hewitt*, a prisoner claimed a violation of due process protection resulting from his confinement in administrative segregation.[129] First, the Court stated that while "[l]iberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the States[,]"[130] Helms did not have a protected right to remain in the general prison population by virtue of the Due Process Clause.[131] Further, the Court stated that it had "never held that statutes and regulations governing daily operation of a prison system conferred any liberty interest in and of themselves."[132] Therefore, in order to find that a state had in fact created a liberty interest in which a prisoner had an entitlement to due process protections, a statute or regulation must go "beyond simple procedural guidelines."[133] The statute or regulation must contain "language of an unmistakably mandatory character"[134] and require "specified substantive predicates."[135] The Court held that because the Pennsylvania regulations that governed prison officials' authority to segregate prisoners contained such mandatory language and substantive predicates, Helms "ac-

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state-created interests. *Sandin*, 115 S. Ct. at 2299; *see, e.g.*, Board of Pardons v. Allen, 482 U.S. 369, 381 (1987) (relying on *Greenholtz* for the holding that a Montana statute contained language creating a liberty interest in parole release). In *Allen*, Justice O'Connor sharply criticized both the majority and the *Greenholtz* decision in a dissent joined by Chief Justice Rehnquist and Justice Scalia. She argued that "the Court has abandoned the essential inquiry in determining whether a statute creates a liberty interest." *Allen*, 482 U.S. at 385 (O'Connor, J., dissenting). Justice O'Connor disagreed with the approach of looking for mandatory language purporting to create a standard rather than determining whether the statute placed actual and meaningful constraints on official discretion. *Id.* at 384-85 (O'Connor, J., dissenting).

126. 459 U.S. 460 (1983).

127. *See infra* text accompanying notes 134-35.

128. *Hewitt*, 459 U.S. at 471-72.

129. *Id.* at 462.

130. *Id.* at 466.

131. *Id.* at 467.

132. *Id.* at 469.

133. *Id.* at 471; *see supra* note 41.

134. *Hewitt*, 459 U.S. at 471. "Mandatory language," for example, requires that "certain procedures 'shall,' 'will,' or 'must' be employed." *Id.*

135. *Id.* at 472. "Substantive predicates" are directions that action will not be taken absent specific findings, "viz., 'the need for control,' or 'the threat of a serious disturbance.' " *Id.*

quire[d] a protected liberty interest in remaining in the general prison population."[136]

The application of the *Hewitt* test in later cases resulted in "anomalous" outcomes.[137] If indeed the purpose of due process protection is to protect against arbitrary abrogation of individual rights by the government,[138] the process of "combing"[139] state prison statutes and regulations for mandatory language upon which to hinge those rights has not served that purpose well. For instance, in *Olim v. Wakinekona*,[140] the Court found no liberty interest implicated when the State of Hawaii transferred an inmate to a prison in California,[141] even though the loss was "grievous" indeed—resulting in the virtual exile of the inmate by separating him from his family by an ocean.[142] The sole justification for denying the prisoner a hearing was that because the state retained discretion to transfer prisoners, the state had not created a constitutionally protected liberty interest.[143] Justice Marshall, however, noted in his dissent that Hawaii's laws *had* imposed substantive criteria which limited or guided the discretion of officials.[144] In contrast, the Court in *Board of Pardons v. Allen*[145] found a liberty interest in parole release because the requisite "mandatory language" and "substantive predicates" were present,[146] even though, as the dissent noted, officials retained "sweeping discretion" in making parole decisions.[147]

136. *Id.* at 470-71. The specific language in the Pennsylvania regulation provides that an inmate may be placed in segregated custody "not routinely but based upon [the officer's] assessment of the situation and the need for control." *Id.* at 470 n.6 (citing 37 PA. CODE § 95.104(b)(1) (1978)). It further allows that temporary segregation may be employed pending an investigation, but "[i]f no behavior violation has occurred, the inmate must be released as soon as the reason for the security concern has abated." *Id.* (citing § 95.104(b)(1)).

137. *Sandin*, 115 S. Ct. at 2300 n.5.

138. Wolff v. McDonnell, 418 U.S. 539, 557 (1974).

139. *Sandin*, 115 S. Ct. at 2299.

140. 461 U.S. 238 (1983).

141. *Id.* at 251.

142. *Id.* at 252-53 (Marshall, J., dissenting).

143. *Id.* at 249.

144. *Id.* at 255 (Marshall, J., dissenting). Justice Marshall added this as an additional reason for granting process, arguing, again, that the source of prisoners' due process rights was the Constitution itself. *Id.* (Marshall, J., dissenting); *see supra* note 45 (noting Justice Marshall's consistent position that prisoners retain inherent liberty rights by virtue of the Due Process Clause).

145. 482 U.S. 369 (1987).

146. *Id.* at 377-79.

147. *Id.* at 381 (O'Connor, J., dissenting); *see supra* note 125. Lower courts struggled to interpret and apply the *Hewitt* test to determine when "mandatory" language sufficiently

Another important case in the saga leading to *Sandin* was *Kentucky Department of Corrections v. Thompson*,[148] in which the Court decided that Kentucky prison regulations did not give prisoners a liberty interest in receiving certain visitors.[149] Here the Court attempted to spell out its rationale for determining when prisoners' liberty interests arise. Initially, the Court recognized that the purpose of the Due Process Clause is to protect the individual against arbitrary government action;[150] however, the Court went on to state that the interests which are entitled to protection are "not unlimited."[151] *Thompson* summarized those actions that might warrant protection under the Due Process Clause itself as arising only when the consequences were "qualitatively" different from the normal punishment.[152] Outside of these limited circumstances, the Court stated, an inmate's right to procedural protections exists only when state law creates an "enforceable liberty interest."[153] The Court went on to repeat the *Hewitt* test[154] that such an interest was created when statutes or regulations " 'plac[ed] substantive limitations on official discretion' "[155] by "establishing 'substantive predicates' to govern

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limited official discretion to create an enforceable liberty interest. *See, e.g.*, Colon v. Schneider, 899 F.2d 660, 667 (7th Cir. 1990) (denying a prisoner's liberty interest in not being maced, stating that "we have repeatedly rejected the notion that any and all state prison rules and regulations containing [mandatory] language automatically create 'legitimate claims of entitlement' triggering . . . procedural protections"); Stephany v. Wagner, 835 F.2d 497, 502 (3d Cir. 1987) (holding that prison rules governing administrative segregation did not create a liberty interest because they did not contain "mandatory criteria" even though the rules specified circumstances when segregation was appropriate), *cert. denied*, 487 U.S. 1207 (1988); Toussaint v. McCarthy, 801 F.2d 1080, 1097-98 (9th Cir. 1986) (holding that three sections of the state code governing administrative segregation of prisoners, taken together, contained the necessary combination of mandatory language and substantive predicates to create a liberty interest, even though warden retained discretion), *cert. denied*, 481 U.S. 1069 (1987).

148. 490 U.S. 454 (1989). *See generally* Joseph P. Messina, Kentucky Department of Corrections v. Thompson: *The Demise of Protected Liberty Interests Under the Due Process Clause*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 233, 248-59 (1991) (arguing that *Thompson* continued the Court's line of decisions narrowing prisoners' due process rights by using a formalistic rather than a realistic approach to defining liberty rights).

149. *Thompson*, 490 U.S. at 464.

150. *Id.* at 459-60 (citing Wolff v. McDonnell, 418 U.S. 539, 558 (1973)).

151. *Id.* at 460.

152. *Id.* (citing Vitek v. Jones, 445 U.S. 480, 493 (1980)).

153. *Id.* at 461-62.

154. *See supra* notes 134-35 and accompanying text.

155. *Thompson*, 490 U.S. at 462 (quoting Olim v. Wakinekona, 461 U.S. 238, 249 (1983)).

official decision making and . . . by mandating the outcome to be reached upon a finding that the relevant criteria have been met."[156]

The *Thompson* Court reasoned that the presence of the requisite mandatory language resulted in conditions which an inmate "could reasonably expect to enforce . . . against the prison officials."[157] However, an inmate's reasonable expectations have had little weight in the Court's determination of protected liberty interests. For example, *Connecticut Board of Pardons v. Dumschat*[158] clearly limited the creation of a liberty interest to those instances where the written language of a statute itself was mandatory, regardless of whether the actions of state officials in carrying out the statute were consistent enough to give rise to an expectancy.[159] In *Dumschat*, a pardons board was given "unfettered discretion"[160] to grant commutations and pardons. Nevertheless, the board in fact granted favorable action of some sort in seventy-five percent of cases similar to the defendant's.[161] The Court held, however, that "the mere existence of a power to commute a lawfully imposed sentence, and the granting of commutations to many petitioners, creates no right or 'entitlement.' "[162] This decision made it clear that only mandatory language requiring state officials to act, or not act, on prescribed grounds could create a liberty interest,[163] notwithstanding the reasonableness of reliance on those officials' past actions.[164]

The decision in *Sandin* made a clear break from the *Hewitt* line of reasoning, which had defined prisoners' rights to due process protection—in the context of prison officials' actions, disciplinary or

156. *Id.* (citing Hewitt v. Helms, 459 U.S. 460, 472 (1983)).
157. *Id.* at 465.
158. 452 U.S. 458 (1981).
159. *Id.* at 465.
160. *Id.* at 466.
161. *Id.* at 461.
162. *Id.* at 467.
163. *Id.*
164. The prison inmate's position is unique in this respect, compared to other circumstances in which an individual's justifiable reliance *is* protected. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (stating that a parolee has a liberty interest in retaining freedom by having "relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions"); Perry v. Sinderman, 408 U.S. 593, 600-02 (1972) (holding that a professor's "legitimate reliance" on rules and "mutual understandings" supported his claim of entitlement to tenure). The Court has sometimes used the language "justifiable expectation" in cases involving prisoners. *See, e.g.*, Vitek v. Jones, 445 U.S. 480, 489 (1980); Montanye v. Haymes, 427 U.S. 236, 242 (1976). However, in order to give rise to a protected liberty interest the Court has required the expectation to be "rooted in state law," i.e., the required statutory language must be present. *Montanye*, 427 U.S. at 242.

otherwise—in terms of strict statutory interpretation.[165] The *Sandin* Court rejected the "mandatory" versus "discretionary" distinction, which determined a prisoner's liberty interest based upon whether language in a statute or prison regulation clearly limited a prison official's discretion.[166] The result in *Sandin* was not a complete abandonment of the entitlement theory; the Court affirmed its holding in *Wolff* that "under certain circumstances [states may] create liberty interests which are protected by the Due Process Clause."[167] Exactly what those circumstances must be, however, is not entirely clear from the new test *Sandin* establishes: State-created liberty interests arise when a prisoner faces a deprivation which "imposes atypical and significant hardship ... in relation to the ordinary incidents of prison life."[168]

The Court did not wholly reject or embrace the entitlement theory of prisoners' right to due process; in fact, it hinted at a revival of the "grievous loss" analysis.[169] The language "atypical and significant hardship" is reminiscent of "grievous loss," and the Court also criticized the lower court for not examining the "real substance" of the interest at stake.[170] However, the Court rejected the assertion that *any* official discipline of prisoners implicated a liberty interest.[171]

The post-*Wolff* approach to the liberty interest inquiry, which focused on the particular language of a statute or regulation to find a state-created entitlement, had several negative effects that the *Sandin* Court criticized and sought to remedy with the new test.[172] First, the Court stated that such a rule encouraged prisoners to "comb" through regulations seeking "mandatory language upon which to base entitlements to various state-conferred privileges."[173] This result was an improper use of prison statutes and regulations, the Court said, because the primary purpose of these rules is to guide officials' decisionmaking and not to create prisoner expectations.[174]

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165. *Sandin*, 115 S. Ct. at 2300.
166. *Id.* *But see supra* note 125 (discussing Justice O'Connor's argument that this inquiry was not applied in a meaningful way).
167. *Sandin*, 115 S. Ct. at 2300.
168. *Id.*
169. *Id.* at 2298; *see supra* notes 70, 77-78 and accompanying text.
170. *Sandin*, 115 S. Ct. at 2298.
171. *Id.* at 2300.
172. *Id.* at 2299-300.
173. *Id.* at 2299.
174. *Id.*

The Court reasoned that states would be discouraged from regularizing prison management procedures if a codification of administrative guidelines would inadvertently result in a state-created liberty interest by use of "mandatory" language ("shall," "will," or "must").[175] This explanation suggests that prisoners would be better protected by uniform treatment under regulations that guide and curb official discretion but do not create legal entitlements than by a rule that burdens the state with procedural requirements.

Next, the Court stated that the *Hewitt* approach involved the federal courts too intimately in the operation and administration of state prisons.[176] While the *Sandin* decision did not expressly revive the "hands off" doctrine,[177] the Court clearly expressed a preference for deferring to the states and to prison officials in managing the "volatile environment" of prison life.[178] The majority here alluded to many of the old rationales for the "hands off" doctrine: the need for prison officials to have flexibility in dealing with security and safety issues,[179] the expertise of prison officials and relative lack of expertise of the courts,[180] and the penalogical purpose of prison discipline.[181] Also of concern to the *Sandin* Court was the preservation of judicial resources,[182] and in large part the decision to further limit the circumstances under which protected entitlements arise was a response to the perceived "explosion" of prisoner lawsuits.[183] The sampling of lower court cases listed in *Sandin* was clearly an attempt to provoke concern, if not indignation, over the misuse of the court

175. *Id.*; *see supra* notes 121-23 and accompanying text.
176. *Sandin*, 115 S. Ct. at 2299.
177. *See supra* note 43.
178. *Sandin*, 115 S. Ct. at 2299.
179. *Id.*
180. *Id.*
181. *Id.* at 2301.
182. *Id.* at 2299.
183. There is indeed a factual basis for the concern about increased use of the courts by prisoners seeking § 1983 relief. In 1966, the first year federal courts reported this statistic, 218 civil rights suits were filed by state prisoners; in 1976 there were 6,958, and in 1986 there were 20,072 such cases. JIM THOMAS, PRISONER LITIGATION: THE PARADOX OF THE JAILHOUSE LAWYER 110 (1988). However, the impact on the courts may be much smaller than the numbers suggest. Only a small percentage of cases filed actually result in a trial. In one study "only 18 of 664 cases . . . had either an evidentiary hearing or trial," and only a small percentage of those were appealed. Turner, *supra* note 64, at 624; *see also* THOMAS, *supra*, at 184 (noting that only about five percent of prisoners' civil rights suits went to trial between 1975 and 1985). Further, the increase in prisoner suits does not appear as "explosive" when the tremendous growth in prison population is considered. For example, the *rate* of lawsuit filings increased only from 2.95 to 4.14 per 100 prisoners from 1976 to 1986. THOMAS, *supra*, at 110.

system by prisoners in pursuit of minor or frivolous deprivations of "liberty"[184]—e.g., claiming a right to a tray lunch rather than a sack lunch,[185] claiming a liberty interest in receiving a dictionary,[186] or protesting the transfer to a cell with no electrical outlets.[187] However, the concern this reasoning should raise is that the perception of a federal judiciary "clogged" with unimportant claims is being used as an excuse to significantly shrink the prison inmate's procedural protection against very important and serious deprivations.[188]

A "floodgates" argument, used to narrow due process protections in the name of conserving judicial resources, "gives little weight to achieving just results in individual cases."[189] In the case of DeMont Conner, the liberty of which he claimed to have been deprived without due process was not a lunch or a television. Conner was sentenced to, and served, thirty days in solitary confinement as a result of being charged with disciplinary misconduct.[190] The Hawaiian prison regulations provided that long periods of segregation would be imposed for "serious" misconduct and that findings of guilt must be supported by "substantial evidence."[191] Further, solitary segregation was inarguably a grievous loss, even for an inmate already deprived of any semblance of free movement.[192] Yet the Court did not find that Conner's confinement constituted the sort of "atypical and significant hardship" that would implicate a liberty interest.[193]

As justification for its holding, the Court found that in Conner's case the disciplinary segregation that he endured "mirrored ...

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184. *Sandin*, 115 S. Ct. at 2299-300.

185. Burgin v. Nix, 899 F.2d 733, 735 (8th Cir. 1990).

186. Spruytte v. Walters, 753 F.2d 498, 506-08 (6th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986).

187. Lyon v. Farrier, 727 F.2d 766, 768-69 (8th Cir.), *cert. denied*, 469 U.S. 839 (1984).

188. *See, e.g.*, Cerda v. O'Leary, 746 F. Supp. 820 (N.D. Ill. 1990) (holding no violation of due process where prisoner was confined to disciplinary segregation for seven days without any charges against him). Justice Breyer addressed this issue in his dissent from *Sandin*. *See Sandin*, 115 S. Ct. at 2308 (Breyer, J., dissenting). He pointed out that separating the "unimportant from the potentially significant" involves "making . . . judicial judgment[s which] seems no more difficult than many other judicial tasks." *Id.* (Breyer, J., dissenting); *see supra* note 56 and accompanying text.

189. Turner, *supra* note 64, at 629.

190. *Sandin*, 115 S. Ct. at 2296.

191. *Id.* at 2296 nn.1 & 3.

192. Conner spent the entire 30 days isolated in his cell with the exception of approximately 50 minutes per day for shower and exercise. During these brief periods he was still kept apart from other inmates and held in leg irons and chains. *Id.* at 2305 (Breyer, J., dissenting).

193. *Id.* at 2301.

conditions imposed upon inmates in administrative segregation and protective custody."[194] The Court decided that because Conner's sentence did not exceed "either in duration or degree"[195] restrictions imposed for purely discretionary reasons, no state-created liberty interest had arisen that entitled him to procedural protections. The implication of the Court's reasoning is that if prison officials are given discretion to treat some prisoners in certain ways for administrative reasons, then they may treat all prisoners in the same manner, for disciplinary reasons or for any reason at all, without procedural requirements. Ironically, eliminating this emphasis on "discretionary" versus "mandatory" actions was a stated purpose of the Court in abandoning the *Hewitt* and *Thompson* methodology.[196]

This was not an issue of whether Conner received *sufficient* process, but whether he had a right to any process at all.[197] Under the Court's "atypical and significant hardship" test, he did not.[198] Given the rejection of solitary confinement as an atypical and significant hardship,[199] however, it remains to be seen just what sorts of state actions will implicate a liberty interest. Prior decisions have held that transfer of an inmate to another prison with more severe conditions[200] or to a prison in another state[201] did not implicate protected due process rights, and the *Sandin* Court cited these results with approval.[202] The only circumstance in which a prisoner might be assured of procedural protections is when prison officials attempt to take action involving the status of a mentally ill inmate which "qualitatively" changes the terms or conditions of his confinement.[203] This Note does not suggest that *Sandin* stands for the proposition that inmates have no remaining constitutional rights; however, it is clear that prisoners now may be subject to a wide range

194. *Id.*

195. *Id.*

196. *Id.* at 2300.

197. *Id.* at 2302. Justice Ginsburg noted in her dissent that while she would find that Conner had a liberty interest, he did in fact receive sufficient process. *Id.* at 2303 (Ginsburg, J., dissenting).

198. *Id.* at 2301-02.

199. *Id.* at 2301. The Court noted that it was not answering the question "whether disciplinary confinement of inmates itself implicates constitutional liberty interests." *Id.* However, the Court minimized the importance of dicta in Wolff v. McDonnell, 418 U.S. 539, 571 n.19 (1974), which suggested that solitary confinement might "automatically trigger[] due process protection." *Sandin*, 115 S. Ct. at 2301 (characterizing *Wolff*).

200. Meachum v. Fano, 427 U.S. 215, 228 (1976).

201. Olim v. Wakinekona, 461 U.S. 238, 247 (1983).

202. *Sandin*, 115 S. Ct. at 2300.

203. Vitek v. Jones, 445 U.S. 480, 493 (1980).

of serious disciplinary and administrative actions without recourse to constitutionally guaranteed procedural protections.

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