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Fourteenth Amendment--Due Process for Prisoners in Commitment Proceedings

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FOURTEENTH AMENDMENT—DUE PROCESS FOR PRISONERS IN COMMITMENT PROCEEDINGS

Vitek v. Jones, 100 S. Ct. 1254 (1980).

INTRODUCTION

Last term the Supreme Court considered whether the due process clause of the fourteenth amendment entitles a convicted prisoner to procedural safeguards, including notice, an adversary hearing, and appointed counsel, before he is involuntarily transferred to a state mental hospital.¹ In *Vitek v. Jones*,² the Court held that the fourteenth amendment grants these protections to prison inmates, except that the state is required to provide only "qualified and independent assistance"³ and not legal counsel at the prisoner's hearing. The Court reasoned that characterizing prisoners as mentally ill and transferring them to mental hospitals had stigmatizing consequences which, together with the mandatory psychiatric treatment and greater physical restraints, constituted a major change in their conditions of confinement. Since the Court found that this change of conditions amounted to a grievous loss to the prisoner, it should not be imposed without the opportunity for notice and a fair hearing.

Vitek is important for two reasons. First, the Court held that prisoners have liberty interests independent of state law or specific constitutional guarantees. In so doing, the Court may have signaled a shift in procedural due process methodology in prisoners' rights cases. Rather than finding that state law is the exclusive source of prisoners' rights, as it had in earlier cases, the Court found that the deprivation of liberty following a determination of guilt is partial. Because liberty and custody are not mutually exclusive, a residuum of constitutionally protected liberties remains even after a determination of guilt.⁴ Thus the fourteenth amendment secures to prisoners many liberty interests which are among the natural rights that the Constitution was intended to protect. Hence, any interference with those liberties inflicting a grievous

loss on the individual must meet fourteenth amendment standards. The Court distinguished *Meachum v. Fano*⁵ and *Montanye v. Haymes*,⁶ which had concluded that a predicate for invoking due process protections is the existence of some positive law.⁷

Second, the Court found that a prisoner has a strong liberty interest in not being transferred from prison to a mental hospital. The Court found that such a transfer is distinguishable from involuntary transfer from one prison to another.⁸ The Court again distinguished *Meachum* and *Montanye*, which had approved transfers within the correctional system without hearings undertaken for administrative or rehabilitative reasons. The *Vitek* Court found that the transfer from prison to a mental hospital is not merely administrative, given the stigma that attaches to the mentally ill, as well as the involuntary medication and psychiatric treatment. Therefore, the Court reasoned that the requirement of a formal hearing before an involuntary transfer to a state mental hospital would not involve the judiciary in discretionary decisions of state prison officials that the Court is insitutionally incompetent to resolve.⁹

FACTS AND HISTORY

Joseph Jones was convicted of robbery in Nebraska and sentenced to prison for a term of years. He began serving his sentence with the Department of Corrections but was involuntarily transferred to a state mental hospital, which is not within the Department of Corrections but is within the Department of Public Institutions.

The Nebraska Director of Correctional Services is authorized by section 83-716 of the Nebraska Revised Statutes to designate any available, suitable, and appropriate residence facility or institution as a place of confinement, and to transfer a prisoner from one place of confinement to another.¹⁰ Jones, however, was transferred from

¹ U.S. CONST. amend. XIV states, in pertinent part: "nor shall any state deprive any person of life, liberty, or property without due process of law."

² 100 S. Ct. 1254 (1980).

³ *Id.* at 1267.

⁴ *Id.* at 1264. See Note, *Procedural Due Process—Prisoners' Rights*, 57 B.U. L. Rev. 387, 392 (1977).

⁵ 427 U.S. 215 (1976).

⁶ 427 U.S. 236 (1976).

⁷ 427 U.S. at 227.

⁸ 100 S. Ct. at 1264.

⁹ *Id.*

¹⁰ NEB. REV. STAT. § 83-176 (1943) declares that whenever any person is sentenced or committed under any

prison to a mental hospital pursuant to section 83-180(1), which provides that if a physician or psychologist designated by the Director finds that a prisoner "suffers from a mental disease or defect" and that he "cannot be given adequate treatment" in prison, the Director may transfer the inmate to a mental hospital.¹¹ Under section 83-180(3), any prisoner transferred to a mental hospital is to be returned to the Department prior to the expiration of his sentence if treatment is no longer necessary. Section 83-180(3) also provides that upon expiration of the sentence, if the State wants to retain the prisoner in a mental hospital, civil commitment procedures must begin promptly.¹² Jones was transferred without any formal notice or hearing, nor any procedural safeguard except the determination

provision of law to a specific facility within the Department of Correctional Services, "he shall be deemed to be sentenced or committed to the department." The Director of Correctional Services, according to the statute, is authorized to designate as the place of confinement of any person committed to the department "any available, suitable and appropriate residence facility or institution, whether or not operated by the state, and may at any time transfer such person from one place of confinement to another," with some declared restrictions as to minors.

¹¹ NEB. REV. STAT. § 83-180(1) (1943) provides:

When a physician designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical disease or defect, or when a physician or psychologist designated by the director finds that a person committed to the department suffers from a mental disease or defect, the chief executive officer may order such a person to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given adequate treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the department when, prior to the expiration of his sentence, treatment in such facility is no longer necessary.

¹² NEB. REV. STAT. § 83-180(3) (1943) provides:

When two psychiatrists designated by the Director of Correctional Services finds that a person about to be released or discharged from any facility suffers from a mental disease or defect of such a nature that his release or discharge will endanger the public safety or the safety of the offender, the director shall transfer him to, or if he has already been transferred permit him to remain in, a psychiatric facility in the Department of Public Institutions and shall promptly commence proceedings applicable to the civil commitment and detention of persons suffering from such disease or defect.

of the Director that he suffered from a mental disease and could not be given proper treatment in the prison.

Jones brought an action challenging the constitutionality of section 83-180(1) on procedural due process grounds. The United States District Court for the District of Nebraska held that the transfer procedure had indeed deprived him of liberty without due process of law contrary to the fourteenth amendment.¹³ The court held that due process required that the transfer to a mental hospital be accompanied by adequate formal notice, an adversary hearing before an independent decision maker, a written statement of the evidence relied upon and the reasons for the decision, and the appointment of counsel for Jones, since he was an indigent.¹⁴

The lower court offered two distinct grounds for its holding. First, it identified a liberty interest rooted in section 83-180(1), under which Jones could reasonably expect that he would not be transferred to a mental hospital unless he were mentally ill and could not receive adequate treatment in prison.¹⁵ Second, the court stated that, regardless of the statute, the transfer of Jones from prison to a mental hospital must be accompanied by appropriate safeguards. The court reasoned that transferring Jones to a mental hospital had some stigmatizing consequences, which, together with the mandatory medication, psychiatric treatment, and greater physical restraints to which he would be subject at the hospital, constituted a major change in his conditions of confinement. Since this change in conditions amounted to a grievous loss to Jones, it could not be imposed without notice and a fair hearing.¹⁶ Because Jones had been transferred back to the psychiatric ward of the prison, the district court permanently enjoined Nebraska from again transferring Jones to a mental hospital without the prescribed procedures.¹⁷

The United States Supreme Court vacated the judgment of the district court and remanded the case for consideration of whether it was moot.¹⁸ The Court's reason for the decision was that Jones had been paroled on the condition that he accept medical treatment after the district court had granted the injunction. However, Jones subsequently violated his parole and was returned to jail. Relying upon Jones' history of mental illness

¹³ *Miller v. Vitek*, 437 F. Supp. 569 (D. Neb. 1977).

¹⁴ *Id.* at 574-75.

¹⁵ *Id.* at 572-73.

¹⁶ *Id.*

¹⁷ *Id.* at 575.

¹⁸ *Vitek v. Jones*, 436 U.S. 407 (1978).

and Nebraska's representation that he was currently a serious threat to his own and others' safety, the district court held that the parole and revocation did not render the case moot because Jones could still be transferred if the injunction were removed.¹⁹ The district court reinstated its judgment, and Nebraska appealed.²⁰

THE SUPREME COURT OPINION

Writing for a majority of five,²¹ Justice White first held that the case was not moot. White reasoned that the controversy between Jones and Nebraska had not been rendered moot by the revocation of Jones' parole and his return to prison. Since Jones was protected from a future transfer to the state mental hospital only by the injunction of the district court, White concluded that it was not absolutely certain that Jones would never be transferred again.²² Since finding that the case was moot would not only vacate the injunction against Jones' transfer, but also the declaration that Nebraska's transfer procedures were inadequate, White found that the case presented a real controversy.²³

¹⁹ *Vitek v. Jones*, 100 S. Ct. at 1260.

²⁰ *Id.*

²¹ Justices Brennan, Marshall, and Stevens concurred in the judgment. Justice Powell also concurred in the judgment except that he did not believe that Nebraska was obligated to provide Jones with legal counsel as long as it otherwise provided him with "qualified and independent" assistance.

²² 100 S. Ct. at 1260. Because Jones had not completed serving his sentence, he was subject to the transfer procedures he challenged, unlike the plaintiff in *Weinstein v. Bradford*, 423 U.S. 147 (1975), where a challenge to the parole procedures was held to be moot because the plaintiff had completed his sentence and there was no longer any likelihood whatsoever that he would again be subject to the parole procedures challenged.

²³ *Id.* at 1260. See also *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *United States v. Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968); *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). In each of these cases, the Court adopted the standard that a case is not moot unless it is clear that the controverted wrongful behavior could not reasonably be expected to recur if there were no injunction. The Court has emphasized that the standard is strict in formulation and practice. If voluntary cessation of wrongful behavior was sufficient to moot the case, the Court would have no alternative other than to let the defendant repeat his previous behavior. However, that the Court has stressed a powerful public interest in having the legality of a disputed practice resolved militates against a determination that the case is moot. As the Court has noted, if a case is moot, the defendant is entitled to dismissal as a matter of right. *Vitek* demonstrates that courts are often unwilling to give defendants this opportunity to stave off effective enforcement of public laws.

Turning to the merits, Justice White then considered the threshold question of whether the involuntary transfer of Jones implicated a liberty interest protected by the due process clause of the fourteenth amendment. First, White agreed with the district court that section 83-180(1) creates an "objective expectation firmly rooted in state law and penal complex practice" that a prisoner would not be transferred "unless he suffered a mental disease or defect that could not be adequately treated in the prison."²⁴ Justice White found that this objective expectation gave Jones a liberty interest that entitled him to the safeguards of appropriate procedures to determine whether the transfer was justified. He noted that the Court has often held that state statutes create liberty interests which merit procedural protection under the fourteenth amendment. Once the state has granted an inmate a liberty interest, procedural protections are necessary "to insure that the state created right is not arbitrarily abrogated."²⁵

Second, and more important, Justice White agreed with the district court's holding that independently of the statute, a convicted criminal retains a residuum of liberty that would be infringed by a transfer to a mental hospital without minimum procedural safeguards. He reasoned that the consequences of transfer to a mental hospital are qualitatively different from criminal punishment, and therefore Jones could not be transferred without being afforded appropriate procedural safeguards.²⁶ The stigma attached to psychiatric treatment accounts for the qualitative difference between the two forms of confinement. Justice White noted that involuntary commitment produces adverse social and economic consequences for the individual that endure for the rest of his life. Furthermore, among the liberties protected by the due process clause is the "right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security."²⁷ Therefore, compelled treatment in the form of behavior modification, which Jones received, was weighted heavily by the district court in determining whether the conditions of Jones' confinement were within the sentence imposed upon him.

Justice White thought that the district court had properly identified the elements of the minimum

²⁴ *Vitek v. Jones*, 100 S. Ct. at 1262.

²⁵ *Id.* at 1261 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974)).

²⁶ *Id.* at 1264.

²⁷ *Id.* at 1263 (quoting *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)).

procedure that must be followed before transferring a prisoner to a mental hospital. While conceding that the decision to transfer a prisoner to a mental hospital was essentially medical, Justice White found that the medical nature of the decision did not justify dispensing with a due process requirement.²⁸ Instead, he held that "the subtleties and nuances of psychiatric diagnoses"²⁹ justify the requirement of adversary hearings.³⁰ Although the majority of the Court supported the conclusion that due process required notice and an adversary hearing, only four Justices voted for Justice White's conclusion that Nebraska must provide Jones with legal counsel in the formal hearing. Recognizing that the Court has not required the automatic appointment of counsel for indigent prisoners facing other deprivations of liberty, Justice White nevertheless contended that a prisoner suffering from a mental disease or defect had a greater need for assistance because he would be more likely "to be unable to understand or exercise his rights."³¹ Because Justice Powell would not have required the state to furnish a licensed attorney, the Court modified the district court decision to conform with Powell's concurrence.

Justice Powell joined the opinion of the Court except to the extent that it required that an attorney be provided. He noted that the issue in a commitment transfer proceeding is essentially medical, and that the Court would allow a nonlawyer to act as the impartial decisionmaker in the transfer proceeding. Justice Powell concluded that "the fairness of an informal hearing to determine a medical issue does not require the participation of lawyers,"³² because the resolution of factual disputes is less important than the evaluation of expert psychiatric testimony. Therefore, a mental health professional might well be preferred to a lawyer to render assistance in a transfer hearing. Since facts in such a hearing must be interpreted by psychologists and psychiatrists, Justice Powell would preserve the possibility that competent laymen may represent prisoners in some cases.

Justice Stewart, whose opinion Chief Justice

Burger and Justice Rehnquist joined, dissented on the ground that the case was moot.³³ Since Jones was incarcerated at the time the case reached the Court, Justice Stewart contended that he had no more standing than any other Nebraska prisoner to challenge the constitutionality of the statute. The mere possibility that the statute might be invoked to transfer Jones to another institution did not give him standing. Justice Stewart reasoned that although Jones was once transferred in accordance with the statute, no demonstrated probability existed that it would ever happen again.³⁴ Furthermore, the case did not fall within the ambit of the "capable of repetition yet evading review" exception to the standard of mootness.³⁵ Justice Stewart concluded that if Jones should again be threatened with transfer under the statute, there would be time to reach the merits of his claim. In the meantime, the Court should not adjudicate a nonexistent cause.³⁶

Justice Blackmun wrote a separate dissent in which he argued that the issue was not yet ripe.³⁷ Justice Blackmun thought that the asserted injury

³³ *Id.* at 1267. Justices Stewart, Rehnquist, Blackmun, and Chief Justice Burger did not reach the constitutional and administrative law issues in the case. Therefore, while their decisions have been summarized, they have not been analyzed.

³⁴ *Id.* at 1268 (citing *Weinstein v. Bradford*, 423 U.S. at 147).

³⁵ *See* *Super Tire Engineering Co. v. McCorkle*, 411 U.S. 115 (1973); *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498 (1910). This exception to established standards of mootness has been applied when there is nothing that a judgment of the Court could have affected if the suit had been entertained. The Court has stated that it uses this exception so that its judgments cannot be avoided by the short term and manipulative orders of government agencies, which are capable of repetition but also of evading review of the Court. The exception is inapplicable to the present case because Jones was protected from future transfers without a hearing only by the outstanding injunction of the district court. The Court commented that the current status of Jones was not the product of Nebraska's voluntary discontinuance of their plan to transfer Jones. The Court reasoned that even the decision to award and revoke parole was made by the Nebraska parole board, not by the state prison officials.

³⁶ *Vitek v. Jones*, 100 S. Ct. at 1268.

³⁷ *Id.* at 1269. Justice Blackmun noted that the Court has laid down a flexible standard to determine whether a dispute is ripe for adjudication. *See O'Shea v. Littleton*, 414 U.S. 488, 495 (1974) ("past exposure to illegal conduct does not in itself show a present case or controversy" and therefore "general assertions or inferences" that an individual will engage in illegal conduct do not render a case ripe); *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (requiring that the litigant "has sustained or is immediately in danger of sustaining some direct injury").

²⁸ *Id.* at 1265.

²⁹ *Id.* (quoting *Addington v. Texas*, 441 U.S. 418, 430 (1979)).

³⁰ *Id.* The *Addington* Court noted that psychiatric diagnoses are primarily based upon medical impressions that are heavily subjective. When these subjective impressions are filtered through the experience of the physician, he is seldom able to offer any definite conclusions about particular mental patients.

³¹ *Id.* at 1266.

³² *Id.* at 1267.

to Jones disappeared at the latest when he was granted parole, as did any immediate threat that the injury would recur. However, Justice Blackmun conceded that since Jones had been returned to prison his reincarceration and history of mental problems had brought the controversy back to life. Nevertheless, he did not believe that the facts indicated a ripe case, noting that since the remand state officials had indicated nothing more than that they retained a general right to apply their statute to Jones if necessary. They did not have a present desire to transfer Jones pursuant to statute if the injunction were lifted. Justice Blackmun concluded that the case was not ripe, because to determine whether prison officials will seek to transfer Jones again would take the Court into "the realm of speculation and conjecture."³⁸

ANALYSIS

Due process is triggered when the state seeks to deprive an individual of a constitutionally protected liberty interest.³⁹ Due process requires that the individual be given notice and the opportunity to be heard. These requirements protect the individual from an arbitrary infringement of his rights by the state.⁴⁰

The determination whether an individual is entitled to due process consists of two questions. First, the court must decide whether the asserted interest falls within the concepts of "life, liberty, and property" of the due process clause.⁴¹ Second, if a constitutionally protected interest is affected, the court must then determine what process is due.⁴²

³⁸ Justice Blackmun found it irrelevant that the Nebraska prison officials had announced their intention to continue to use the challenged procedures. He argued that it is not surprising that state officials say that they will abide by the state's own laws. See *United Public Workers v. Mitchell*, 330 U.S. 75, 91 (1947) ("the existence of the law and the regulations does not render the suit ripe"). However, Justice Blackmun did not want to go as far as Justice Stewart when Stewart said that Jones was "simply one of thousands of Nebraska's prisoners." 100 S. Ct. at 1267. He noted that for purposes of the case or controversy requirement, Jones differed from his fellow inmates in two respects. First, he had a recent history of psychiatric problems. Second, he had been previously transferred under the statute. However, for the other reasons stated, Justice Blackmun was unwilling to admit that this was enough to satisfy the case or controversy requirement.

³⁹ *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951).

⁴⁰ See generally Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part II*, 1974 DUKE L.J. 524, 537.

⁴¹ *Fuentes v. Shevin*, 407 U.S. 67 (1972).

⁴² *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

The extent of the procedural safeguards due the individual depends upon the extent to which he will suffer a grievous loss.⁴³ Thus, the court decides what process is due by balancing the individual's interest in avoiding the detriment against the state's interest in summary infliction of that detriment.⁴⁴

During the last decade, the Court has wavered about the source of a prisoner's liberty interest under the fourteenth amendment. At the same time that it has attempted to provide prison officials with guiding principles about the requirements of the fourteenth amendment, it has also pursued other important goals. These include limiting the judiciary's interference with administrative decisions, and restraining the logical possibilities of the broad language of the due process clause. Early prisoners' rights cases such as *Haines v. Kerner*,⁴⁵ *Morrissey v. Brewer*,⁴⁶ *Gagnon v. Scarpelli*,⁴⁷ *Wolff v. McDonnell*,⁴⁸ and *Baxter v. Palmigiano*⁴⁹ extended procedural due process safeguards to inmates by indicating that state law is not the exclusive source of prisoners' liberty interests. Then, in *Meachum v. Fano*,⁵⁰ *Montanye v. Haymes*,⁵¹ and *Greenholtz v. Nebraska Penal Inmates*,⁵² an erosion of due process protections appeared in the Court's determination that the existence of a state law conferring a right upon an inmate was a predicate for invoking due process. Finally, in *Vitek*, the Court appears to have returned to its original position that the word "liberty" in the fourteenth amendment guarantees inmates' rights independently of positive law.

In the first due process case involving prisoners' rights, *Haines v. Kerner*, an inmate was transferred to solitary confinement without a hearing. Both the district court and the court of appeals held that in the absence of state statutes specifying transfer procedures the prisoner did not have the right to due process safeguards.⁵³ The courts reasoned that the conviction extinguishes the prisoner's liberty, and consequently prison officials have wide discretion in discipline.⁵⁴ The Supreme Court reversed,

⁴³ *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. at 168.

⁴⁴ See *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970); Note, *supra* note 4, at 390.

⁴⁵ 404 U.S. 519 (1972) (per curiam).

⁴⁶ 408 U.S. 471 (1972).

⁴⁷ 411 U.S. 778 (1973).

⁴⁸ 418 U.S. 539 (1974).

⁴⁹ 425 U.S. 308 (1976).

⁵⁰ 427 U.S. 215.

⁵¹ 427 U.S. 236.

⁵² 442 U.S. 1 (1979).

⁵³ 404 U.S. at 520.

⁵⁴ *Id.*

arguing that the state may not arbitrarily abrogate a prisoner's rights concerning the conditions of his confinement. The Court implied that a prisoner has liberty interests even though there is no state statute which would give him an expectation of due process.⁵⁵

In *Morrissey v. Brewer*, the Court held that the state must give a prisoner a hearing before it revokes his parole. The *Morrissey* Court found an implicit promise in the state parole statute that an individual will not have his parole revoked in the absence of a violation of its provisions, regardless of the state courts' interpretation that the parole statute committed all parole-related issues to the discretion of the board.⁵⁶ The Court adopted the same standard for determining the procedural protections of prisoners that it adopted for procedural rights of other citizens in *Joint Anti-Fascist Refugee Committee v. McGrath*.⁵⁷ Whether procedural protections are due any person depends upon the extent to which he will be required to suffer a grievous loss. *Morrissey* rejected the concept that a prisoner's constitutional rights depend upon whether a state benefit can be characterized as a right under state law.⁵⁸ Consequently, an inmate retains a degree of liberty with which the state cannot arbitrarily interfere. A prisoner can be deprived of his liberty only following a valid conviction and only to a limited extent. The Court, however, commented that an individual whose parole has been revoked has been deprived merely of a conditional liberty rather than the absolute freedom enjoyed prior to conviction. As a result, the procedural protections due the parolee are not as stringent as those the state must afford him at trial.⁵⁹ The procedures that the state must use to deprive the parolee of his liberty interest are flexible. *Morrissey* emphasized that the revocation of parole triggered a constitutionally protected liberty interest that did not depend on state law.

In *Gagnon v. Scarpelli*, the Court held that revocation of probation where a sentence has been previously imposed is constitutionally indistinguishable from revocation of parole. Therefore, due process must also be observed when the state revokes the conditional freedom afforded by probation. As in *Morrissey*, the Court did not predicate

due process upon the expectations flowing from the state probation statute, but instead examined the detriment suffered by a prisoner deprived of probation.⁶⁰ Finding that the loss of liberty caused by revocation of probation is a serious deprivation⁶¹ requiring that a prisoner be accorded due process, the Court held that the probationer had suffered a grievous loss.

Some commentators thought that *Morrissey* left the question undecided whether a convict who remains in custody is entitled to procedural safeguards.⁶² In *Wolff v. McDonnell*, the Court held that an inmate is entitled to due process protections to the same extent as a prisoner who has been granted the conditional liberty of parole. Thus incarceration is constitutionally irrelevant in determining a convicted criminal's rights under the due process clause. Furthermore, the Court held that when a prisoner is given the opportunity to obtain a shortened jail sentence by the accumulation of good-time credits, the revocation of credits is valid only if the state accords the prisoner procedural due process.⁶³ Although credits are statutory entitlements, the Court held that there was no constitutional difference between the procedures that are required for liberty interests protected by state statute and those protected by the due process clause.⁶⁴ The Court concluded that procedural safeguards are necessary whenever "a major change in the conditions of confinement" is imposed as a punishment for misconduct.⁶⁵ The Court stated:

Lawful imprisonment necessarily makes unavailable many of the rights and privileges of the ordinary citizen But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of

⁶⁰ 411 U.S. at 782 (1973).

⁶¹ *Id.*

⁶² Note, *supra* note 4, at 392; *The Supreme Court, 1972 Term*, 86 HARV. L. REV. 50, 101-02 (1972).

⁶³ 418 U.S. at 558.

⁶⁴ 418 U.S. at 571-72 n.19. The Court applied the same standard to determine when a prisoner has a liberty interest under the fourteenth amendment that it uses in cases of civilians: the court must determine whether an individual will be condemned to suffer a grievous loss. Then, the Court found that it must balance the governmental interest involved and the importance of the private interest that has been affected by state action. Consequently, the Court found no difference between the procedures that must be followed for revocation of good-time credits and those procedures that are mandated when solitary confinement, which is not regulated by state law, is to be imposed.

⁶⁵ *Id.* at 571-72 n.19.

⁵⁵ *Id.*

⁵⁶ 408 U.S. at 482.

⁵⁷ 341 U.S. at 168.

⁵⁸ 408 U.S. at 480 (citing *Graham v. Richardson*, 403 U.S. 365, 374 (1971)).

⁵⁹ 408 U.S. at 484.

constitutional protections when he is imprisoned for a crime. There is no iron curtain drawn between the Constitution and the prisoners of this country.⁶⁶

In *Baxter v. Palmigiano*, the Court reiterated that additional procedural protections are due whenever a major change in the conditions of prison life amounts to a substantial detriment to the inmate. Again, the Court refused to limit due process to rights guaranteed expressly by state statute. Although the Court, citing *Wolff*, did not extend supplementary procedural protections to a prisoner being given a disciplinary hearing, it did not limit procedural privileges in prisoners' rights cases.⁶⁷ The Court simply found that the institutional interests of the prison in avoiding the additional cost and inconvenience of supplementary procedures outweighed the inmate's need for more procedural protections.⁶⁸ The Court recognized that the convicted prisoner possesses many liberty interests protected by the due process clause. However, the procedural protections granted to the inmate were constitutionally adequate.

These decisions, moreover, suggest that prison procedures are given legitimacy in the eyes of the prisoners and society as a whole if they comport with the requirements of due process. The prisoner who is afforded an opportunity to be heard has the satisfaction of participating in the decision and knowing the reasons for the result.⁶⁹ The legitimacy of decisions affecting prisoners' rights is enhanced by public awareness that prison procedures adhere to societal notions of fundamental fairness. Thus, the requirements of due process in prisoners' rights decisions not only ensure that the state will not act arbitrarily, but also give these decisions moral and legal sanction outside the prison walls.⁷⁰

⁶⁶ *Id.* at 555-56.

⁶⁷ 425 U.S. at 324. The Court explicitly stated that it was not "retreating" from the position it carved out in *Wolff* concerning prisoners' rights to procedural safeguards.

⁶⁸ *Id.*

⁶⁹ *See* *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. at 171-72 (Frankfurter, J., concurring). Said Justice Frankfurter:

The validity and moral authority of a conclusion largely depend upon the mode by which it was reached . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him an opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

⁷⁰ *See, e.g.,* *Boddie v. Connecticut*, 407 U.S. 371, 374 (1971):

After laying the groundwork for the modern law of prisoners' rights, the Court decided *Meachum v. Fano*, *Montanye v. Haymes*, and *Greenholtz v. Nebraska Penal Inmates*. The positivist concept of prisoners' rights espoused in these cases ultimately proved inadequate to protect constitutional liberty. In *Meachum v. Fano*, for instance, prison officials transferred a prisoner from a medium security institution for disciplinary reasons after a minimal hearing. The Court concluded that prison officials may transfer an inmate to a more restrictive prison without infringing a protected liberty interest even if the prisoner's life is more disagreeable as a result. The Court based its conclusion on the finding that state law did not condition prison transfers on the occurrence of a specified event.⁷¹ The Court rejected the contention that any major loss inflicted upon the individual prisoner mandates additional procedural safeguards. Moreover, supplementary procedures are not necessary merely because a change in prison conditions adversely affects an inmate.⁷²

Meachum adopted an entitlement theory which holds that state law is the sole source of a prisoner's liberty interests. The Court emphasized that the existence of a state statute which gives an inmate an objective expectation of a liberty interest is a "predicate" for invoking due process protections.⁷³ The Court reasoned that the due process clause assures a prisoner no procedural protections unless the government affirmatively indicates that it will honor a particular liberty interest. However, the theory that expectations induced by government do not constitute interests protected by due process unless they are grounded in positive law is founded on the same notion as the discredited rights-privileges doctrine. This theory, in effect, states that where a state may refuse to grant a benefit at all, necessarily that benefit may be granted on any terms the state chooses. This proposition, as Justice Stevens stated in his dissent in *Meachum*, "demeans the concept of liberty itself."⁷⁴ Justice Stevens stressed that liberty exists apart from law, which merely serves to place restrictions on the state's

Perhaps no characteristic of an organized society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner.

⁷¹ 427 U.S. at 226-28; *see* Note, *supra* note 4, at 394.

⁷² *Id.* at 224.

⁷³ *Id.* at 227.

⁷⁴ 427 U.S. at 233.

ability to interfere with liberty.⁷⁵ The entitlement doctrine contradicts the political philosophy underlying the United States Constitution. John Locke viewed all men as naturally in "a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of nature, without asking leave or depending upon the will of any other man."⁷⁶ The authors of the *Federalist Papers* did not find it necessary to adopt a Bill of Rights for as the people "retain everything, they have no need for particular reservations."⁷⁷ Therefore, the *Meachum* Court's contention that liberty is defined by specific constitutional provisions or state law conflicts with the understanding that the people retain all rights and privileges not expressly delegated to their government.

The *Meachum* Court's reinterpretation of *Morrissey* and *Wolff* is illustrative of the Court's positivist focus. Without an examination of the informal understandings between the prison and the inmate about the conditions of confinement, the Court characterized the inmate's expectation that he could remain in a more favorable prison as "too ephemeral."⁷⁸ However, the *Morrissey* Court found an "implicit promise" that an individual would not have his parole revoked in violation of its terms. The *Meachum* Court also ignored the Court's earlier statement in *Wolff* that any substantial, negative change in the conditions of confinement necessitates a formal hearing.⁷⁹ The Court ignored a strong dictum in *Wolff* that a prisoner has a liberty interest in being free from deprivations which are not conditioned upon violation of statutory provisions, such as solitary confinement.⁸⁰ Instead, the Court argued that *Wolff* should be read narrowly because the liberty interest protected in *Wolff* did not spring from the Constitution but was grounded in state law. The Court compared the statute in *Wolff*, which authorized the revocation of credits only when an inmate misbehaves, to the statute in *Meachum*, which did not grant the prisoner the right to remain in the prison where he was initially confined.⁸¹ On the basis of this comparison, the

Court determined that, because the statute at issue in *Meachum* assigned the determination of whether an inmate should be transferred to the judgment of the prison administration, the reason for invoking due process in *Wolff* did not pertain.⁸²

In a companion case, *Montanye v. Haymes*, the Court faced the question whether an inmate may be transferred between maximum security institutions on the ground that he had circulated an unauthorized petition of grievances. Following the approach set down in *Meachum*, the Court held that no liberty interest of a convicted inmate is infringed when he is transferred from one prison to another within the state.⁸³ The Court reasoned that as long as the prisoner's conditions are within the sentence imposed upon him and not otherwise violative of specific provisions of the Constitution, due process is not triggered.⁸⁴ As in *Meachum*, the Court refused to look beyond positive law to the informal understandings between an inmate and the state to see if a substantial interest of the prisoner has been infringed.

The last case decided before *Vitek* was *Greenholtz v. Nebraska Penal Inmates*. *Greenholtz* held that a Nebraska statute limiting a prisoner's privilege of parole to certain specified circumstances triggered a protected liberty interest.⁸⁵ However, the Court limited the procedural protections mandated by this interest to the objective expectations that the prisoner obtained from the statute.⁸⁶ *Morrissey*, in contrast, held that a prisoner who suffers a grievous loss of parole rights is entitled to procedural protections to the full extent necessary to protect him from an arbitrary deprivation. The *Greenholtz* Court refused to allow the *Morrissey* test, which had reasoned that regardless of the statute, the mere existence of the parole system generated an expectation of due process. Instead, the Court in *Greenholtz* stated that the government need provide inmates only those protections prescribed by statute, even if different factual situations might justify more procedural protections in the interest of fundamental fairness.⁸⁷

The *Greenholtz* decision rests on an important distinction between being deprived of the liberty one possesses, as in parole revocation, and being denied freedom one desires, as in a parole release

⁷⁵ *Id.* at 230.

⁷⁶ J. LOCKE, *An Essay Concerning the True Original, Extent & End of Civil Government* (1690) in *SOCIAL CONTRACT* 1, 4 (1948).

⁷⁷ THE FEDERALIST No. 84 (A. Hamilton) in THE FEDERALIST 575, 578 (J. Cooke ed. 1961).

⁷⁸ 427 U.S. at 227.

⁷⁹ 408 U.S. at 482.

⁸⁰ 427 U.S. at 226.

⁸¹ *Id.*

⁸² *Id.*, see Note, *supra* note 4, at 395.

⁸³ 427 U.S. at 243.

⁸⁴ *Id.*

⁸⁵ 442 U.S. 1.

⁸⁶ *Id.* at 4-5.

⁸⁷ *Id.* at 4.

decision.⁸⁸ However, this distinction calls the holding into question, because the infringement is the same whether a prisoner is being released on parole or involuntarily returned to prison. When the state rejects the prisoner's request for parole, he must continue to suffer the degradations of prison life. If the parolee is returned to prison, he loses his freedom and good-time credits. Both deprivations are similar. By narrowly basing an inmate's liberty interests on a statutory entitlement, the *Greenholtz* Court adopted the positivist theory of *Meachum* and *Montanye*.

The *Vitek* Court, however, appears to have returned to the Court's earlier view in *Haines* and *Morrissey*. *Vitek* held that a prisoner has a liberty interest independent of positive law in the avoidance of being stigmatized as mentally ill and subject to involuntary psychiatric treatment.⁸⁹ *Vitek* clarifies the theory that state law and specific constitutional guarantees are not the sole source of an inmate's liberty interests. A protected liberty interest may be implied by the word "liberty" in the due process clause.⁹⁰ Nebraska attempted to define Jones' liberty interests as encompassing only those rights granted by state law. Nebraska contended that since section 83-180(1) specified that a prisoner may be transferred if a designated physician or psychologist found that he suffered from a mental disease not treatable in prison, Jones had no objective expectation that he would not be transferred until after a hearing. Since there was never any claim that the statute was violated, Nebraska argued that Jones had no right to additional procedural protections because any right he had by statute he received.⁹¹

Rigid application of Nebraska's reasoning would read the due process clause out of the Constitution as a restraint on state action in prisoners' rights cases. The Court rejected this reasoning. If an individual may be transferred to a mental hospital without due process safeguards, nothing prevents the state from transferring him to an institution using electroshock therapy or to a home for the retarded. The treatment that a prisoner may expect in a prison, in other words, is radically different from the treatment he may expect in a mental hospital. Involuntary psychiatric treatment is not within the scope of a prisoner's sentence nor within

the individual prisoner's reasonable expectations of what he will be forced to tolerate. However, according to the entitlement doctrine, an inmate has no liberty interest in not being transferred to an asylum, because the Nebraska statutes afforded him no justifiable expectation that he will not be transferred. When due process protections are made to turn on state law, the state can completely obviate the requirements of the fourteenth amendment by specifying which liberty interests will be secured to the prisoner. Thus in no case can a due process claim prevail against the wishes of the state under the entitlement doctrine.

The Court recognized that limiting the rights of a convicted prisoner to those that the state chooses to give him is a niggardly approach to liberty in a free society. The holding of *Vitek* recognized that even though a prisoner gives up some liberty following a valid conviction, he does possess a residuum of constitutionally protected liberty. Justice Stevens, in his dissent in *Meachum*, stated this concept which the Court adopted in *Vitek*:

[F]or if an inmate's liberty interests are no greater than the state chooses to allow, he is really no more than the slave described in the Nineteenth Century cases. I think it is clear that even an inmate retains an unalienable interest in liberty—at the very minimum the right to be treated with dignity—which the Constitution may never ignore⁹²

Consequently, *Vitek* rests on a broad concept of the word "liberty" in the fourteenth amendment. The Court rejected the approach that defined all protected inmate interests with reference to whether the government, through statutes or administrative regulations, had created an expectation that a certain status will continue.⁹³ Instead, *Vitek* makes clear that the liberty interests of prisoners may be implied by the language of the due process clause, which secures those natural rights that the framers intended to protect from arbitrary governmental interference.

The policy considerations supporting the Court's decision in *Vitek* demonstrate that the entitlement theory of constitutional liberty espoused in *Meachum*, *Montanye*, and *Greenholtz* is logically circular.⁹⁴

⁸² 427 U.S. at 232.

⁸³ 100 S. Ct. at 1264.

⁸⁴ See generally, Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 515 (1963). The author refers to the circular argument that states that administrative decisions are not subject to judicial review because they are administrative decisions and therefore not subject to administrative review.

⁸⁸ *Id.*

⁸⁹ 100 S. Ct. at 1263.

⁹⁰ *Id.* at 1264.

⁹¹ See Brief for Appellee at 19-20, *Vitek v. Jones*, 100 S. Ct. 1254 (1980).

Since due process protections depend upon the existence of an entitlement under state law, the states are allowed to determine the existence of a liberty interest and the procedures to be followed in determining the rights of prisoners without regard to the Constitution. If the existence of due process safeguards hinges upon whether a prisoner has an objective expectation of a benefit under state law, then the judiciary is compelled to overlook the fact that ultimately the existence of all liberty depends upon acquiescence of the state. The entitlement doctrine contains no self-limiting principle to prevent the state from conditioning the existence of a liberty interest so that the interest will be unprotected when the state determines that the requisite conditions do not exist. Under the entitlement doctrine, whether the method the state employs to determine a prisoner's liberty interests is consistent with the requirements of fundamental fairness is irrelevant. Rather, the prisoner's liberty interest will automatically fail when the state makes the judgment that the reasons for forfeiture exist, leaving the prisoner with no statutory entitlement to support his claim of a denial of due process under the fourteenth amendment. Therefore, the state may then deprive the prisoner of his liberty interest without violating the guarantees of the due process clause. This positivist concept is logically circular because it allows the states to determine the existence of these rights in the first instance without regard to the Constitution.

If Nebraska's arguments had prevailed in *Vitek*, the Court would have effectively retreated to the discredited view that prisoners are slaves of the state.⁹⁵ Nebraska argued that responsibility for prison administration lies exclusively with the legislature, and that the legislature had properly assigned this responsibility to the Department of Corrections.⁹⁶ Control of the procedural protections afforded to prisoners, however, should not reside in the political branches of government. Judicial abdication of responsibility for protecting prisoners' rights would negate the judicial commitment to

achieve the purposes of sentencing.⁹⁷ Several commentators have observed that the specific goals of sentencing a prisoner will be frustrated if control over penological practices lies exclusively within the political branches. For instance, the judiciary may want to emphasize rehabilitation and deterrence in sentencing. However, these goals will be frustrated if state correctional authorities choose to emphasize retribution. The judiciary will be impotent to exercise its rightful authority if penological practices are immune from review. Consequently, the entitlement doctrine allows the legislature and the executive to thwart the objectives of the criminal justice system by virtually eliminating the check of the judicial branch on their power.

Furthermore, the entitlement doctrine assumes that the state intended to shield practices of the correctional system from judicial review.⁹⁸ The fact that the state gives a prisoner a reasonable expectation that he will not be denied a benefit unless specified statutory conditions exist does not compel the conclusion that the state intended to limit a prisoner's rights to statutory entitlements. The legislature could have concluded that statutory entitlements should be supplemental to constitutional guarantees. Alternatively, the legislature may not have considered the balance between statutory and constitutional protections at all in constructing its penological system. Therefore, the judiciary does not necessarily contradict the intent of the legislature when it supplements statutory entitlements with constitutional protections. Courts often are forced to extend the scope of prisoners' rights by rendering decisions which do not conflict with penological practices, but which fill a void created by the legislature and the executive.⁹⁹ Indeed, the role of judicial review in constitutional government is in part to ensure that a state operates its correctional system in a manner countenanced by the Constitution of the United States.¹⁰⁰

The entitlement doctrine, moreover, departs

⁹⁷ See generally, Haas, *Judicial Politics and Correctional Reform: An Analysis of the Hands-Off Doctrine*, 1977 DET. C.L. REV. 795, 802; Robbins, *The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & C. 211 (1980).

⁹⁸ See Kimball & Newman, *Judicial Intervention in Correctional Decisions: Threats and Reprisals*, 14 CRIME & DELINQUENCY 1, 8 (1968).

⁹⁹ See Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 496 (1980).

¹⁰⁰ *Holt v. Sarver*, 309 F. Supp. 362, 385 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

⁹⁵ The expression "slaves of the state" was first adopted in *Rullin v. Commonwealth*, 62 Va. (21 Graft) 1024, 1026-27 (1871). The term implies that once a prisoner is convicted and incarcerated, he is no longer a free man. Therefore, he is outside the protection of the due process clause, although it was apparently always recognized that he retained the benefit of more specific constitutional guarantees.

⁹⁶ See Brief for Appellee at 21, *Vitek v. Jones*, 100 S. Ct. 1254.

from the recent trend under the due process clause to require equity in all state action. The entitlement doctrine, carried to its logical conclusion, would allow the states to rewrite their statutes to eliminate all possible liberty interests. Interpreted in this manner, the entitlement doctrine not only defeats its purpose as a source of individual rights, but also has the potential to undermine many of the procedural protections already afforded under state law.¹⁰¹ For example, in *Morrissey, Wolff, and Gagnon* the Court held that due process attached where state law affirmatively granted a liberty interest such as parole, good time, and probation. In any of these cases, a state would be free to dilute the procedural safeguards afforded by the Court simply by rewriting its statute so that an inmate would no longer have an objective expectation that he would not be deprived of these privileges unless he was given a hearing.

Meachum, Montanye, and Greenholtz relied upon the theories of federalism in declining to extend additional procedural protections to inmates. The Court stressed its institutional incapacity to review prison management. However, this argument is weak because the Supreme Court has shown proper respect for states' rights in many other areas without abdicating the judicial function to protect constitutional rights.¹⁰² The inevitable involvement of the judiciary in criminal punishment means that it cannot avoid the complicated issues that arise in cases involving prison administration. As the parties' briefs in *Vitek* demonstrate, the judiciary can rely upon parties with adverse interests to provide a wealth of information for evaluating public policy. In *Vitek*, the briefs included substantial excerpts from social science studies about prison administration as well as excerpts from the department of corrections about internal department procedures.¹⁰³ Therefore, the briefs virtually provided a legislative history upon which judges could rely to weigh the competing interests of individual prisoners and prison administration. Moreover, unlike the legislature, the judiciary is immune from immediate political pressures. The Court is in a position to refuse to accept budgetary pressures as an excuse for failure to comply with constitutional requirements in determining prisoners' rights. Legislators who are facing reelection do not enjoy

similar luxuries.¹⁰⁴ Similarly, the Court is not a bureaucracy, as is a department of corrections, and need not work through a rigid line of authority to enforce the requirements of fair process.¹⁰⁵ Moreover, the Court is in a position to consider a broader range of values than a department of corrections. While concern about administrative efficiency and convenience may predominate in the decisions of the executive branch, the Court is able to consider the broader implications of protecting human dignity in prison management. Therefore, the argument that courts should not enter into the province of the legislature is inapposite in prisoners' rights cases.

Finally, if the overriding objective of the entitlement doctrine is the protection of legitimate expectations of an individual in his dealings with government, the entitlement doctrine defeats this objective.¹⁰⁶ The assertion that government creates expectations only through the enactment of statutes is unrealistic. Most citizens are unlikely to be aware of the details of positive law. Consequently, the expectations that an individual has in certain liberty interests depend upon his perceptions of the values inherent in a free society. Rather than thinking in terms of statutory law, most individuals perceive constitutional liberty as those natural privileges recognized at common law as essential to the orderly pursuit of happiness by free men.¹⁰⁷ The Constitution, moreover, does not support the positivist notion that the citizens shall enjoy those rights that the government expressly grants them. The framers intended that the people be guaran-

¹⁰⁴ See, Eisenberg & Yeazell, *supra* note 99, at 506-07.

¹⁰⁵ See Note, *supra* note 4, at 403-04.

¹⁰⁶ *Id.* at 397.

¹⁰⁷ Obviously, this standard is not subject to precise formulation. However, the Supreme Court's substantive due process analysis has furnished a broad definition of liberty protected against arbitrary encroachments by procedural protections. Core liberty interests included in this capacious definition were described by the Court in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923): "[N]ot merely freedom from bodily restraint but also the right of the individual to contract, to engage in the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children [and] to worship God according to the dictates of . . . conscience." Surely, the right to be free from involuntary commitment to a mental hospital is of an equally fundamental nature. Indeed, it appears to be encompassed in the Court's statement that an individual is entitled to be free from arbitrary physical restraints. Since physical restrictions are greater in an asylum than in a prison, an inmate's initial confinement is irrelevant in determining whether he is entitled to the residual liberties that he possesses under the *Meyer* test.

¹⁰¹ See Note, *supra* note 4, at 397.

¹⁰² See *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁰³ See Brief for Appellant at 29-31, 34-37, *Vitek v. Jones*, 100 S. Ct. 1254 (1980); Brief for Appellee at 24-27, *Vitek v. Jones*, 100 S. Ct. 1254.

teed natural rights of liberty, broadly conceived, and that the government have only those powers expressly granted by the Constitution.

Finding that the transfer of an inmate from prison to a mental hospital did affect significant liberty interests, the *Vitek* Court used the test set out in *Mathews v. Eldridge*¹⁰⁸ to determine the requirements of due process. The *Mathews* Court stated that three factors determine the procedures which satisfy due process. First, the Court must weigh the private interest which will be affected by the state action. Second, the Court must also consider the risk of an erroneous deprivation of the private interest and the probable value of following substitute procedural safeguards. Finally, the Court must consider the administrative and fiscal burdens which the alternative procedural safeguards would entail.¹⁰⁹

The prisoner's right to avoid transfer to a mental hospital is different from his interest in avoiding an administrative transfer between prisons. In *Meachum v. Fano*¹¹⁰ and *Montanye v. Haymes*,¹¹¹ the Court held that an inmate's liberty interests are not infringed when he is transferred from one prison to another without a hearing, unless there is some justifiable expectation rooted in state law that he will not be transferred except upon the occurrence of specified events. However, when an inmate is transferred from prison to a mental hospital, he has a liberty interest which is affected because of the adverse consequences of being officially labeled insane. Furthermore, the transferred prisoner undergoes involuntary psychiatric treatment and medication as well as greater physical restraints. Therefore, an inmate transferred to an asylum is not making a horizontal transfer between institutions which impose similar deprivations. Instead, he is "twice cursed" because he will be forced to endure both the indignities of being a criminal and a mental patient.¹¹²

The case of Joseph Jones provided convincing evidence that the difference in conditions of confinement between any of Nebraska's prisons and its mental hospitals were substantial in that the latter were additionally oppressive. Jones was involuntarily given medication which itself can damage mental health. He was also subject to a behavior modification program which restricted personal liberties to a significantly greater extent than a

maximum security institution. The mental hospital deprived Jones of such elementary freedoms as the choice of whether to take an afternoon nap, chew gum or keep books and writing paper in his room. Moreover, the rules of the asylum did not allow patients to have normal contacts with the outside world by watching television or listening to the radio. Since involuntary medication and stringent behavior modification programs are not part of normal prison life, this set of facts provided an incentive for the Court to distinguish transfers to a mental hospital from the internal prison transfers of *Meachum* and *Montanye*.¹¹³

Mental patients must endure added deprivations and regimentation to which the average prisoner is not exposed. Several decisions of the Court and lower courts addressed this problem before *Vitek* was decided. In *Baxstrom v. Herold*,¹¹⁴ the Court reasoned that although transfer among like institutions is a purely administrative matter, assignment of prisoners among functionally distinct institutions may not be wholly arbitrary. The Court concluded that a transfer between a mental hospital and a prison is not merely an administrative concern. In *United States ex rel. Schuster v. Herold*,¹¹⁵ the court again held that a prisoner had a right to a full hearing before he was transferred from a state prison to a state mental hospital for the criminally insane. In *Mathews v. Hardy*,¹¹⁶ the court found a distinctive stigma associated with mental illness which is different from that associated with criminality and concluded that the impact of a commitment on future job possibilities and personal friendships is devastating, regardless of the length of the commitment. Finally, in *Chesney v. Adams*,¹¹⁷ the court noted that the need to ensure the efficient administration of prisons and maintain prison order did not justify labelling the transfer of a prisoner from prison to a mental hospital as administrative. The court reasoned that the state's acceptance of the term "commitment" to characterize such a transfer was a concession that it was not merely an administrative concern.

Therefore, at the time *Vitek* was decided there was substantial support in the Supreme Court and lower courts for the proposition that the transfer of an inmate to a mental hospital does infringe protected liberty interests, and is not merely a part of normal prison administration. Because such a

¹⁰⁸ 424 U.S. 319 (1976).

¹⁰⁹ 424 U.S. at 334-35.

¹¹⁰ 427 U.S. 215.

¹¹¹ 427 U.S. 236.

¹¹² *United States ex rel. Schuster v. Herold*, 410 F.2d 1071, 1073 (1969).

¹¹³ Brief for Appellee at 29-31, *Vitek v. Jones*, 100 S. Ct. 1254.

¹¹⁴ 383 U.S. 107 (1966).

¹¹⁵ 410 F.2d 1071 (2d Cir. 1969).

¹¹⁶ 420 F.2d 607 (D.C. Cir. 1969).

¹¹⁷ 377 F. Supp. 887 (D. Conn. 1974).

transfer amounts to a grievous loss to the prisoner, it should not be imposed without a full hearing. In *Vitek*, the district court concluded that the greater physical restraints at the Nebraska hospital, the stigmatizing consequences of the transfer, and the hospital's use of behavior modification techniques combined to make this transfer a major change in conditions of confinement. The court stated that such a transfer is not within the range of deprivations to which a conviction and sentence subjects a prisoner.¹¹⁸

Finding that a prisoner has a strong private interest in avoiding an involuntary transfer to a mental hospital, the Court concluded that the risk of an erroneous deprivation of this interest is high when the inmate is transferred without a hearing. As the district court noted, the only procedural safeguard attending such transfers is often the opinion of a single physician or psychologist appointed by the department of corrections.¹¹⁹ Since the diagnostician is often an employee of the department, his professional evaluation may be colored by his desire to give his employer the diagnosis he desires. Moreover, even if the psychiatrist is scrupulously objective, psychiatric diagnoses are inherently uncertain. Therefore, a system which relies upon a psychiatric evaluation by one person is likely to produce a large number of mistakes. In addition, the quality of psychiatric care an indigent inmate is likely to receive is at best uneven because indigent inmates cannot pay well for psychiatric services. Another problem is that the transferee may not be able to understand or challenge the professional conclusions of the physician.¹²⁰ Because the patient and his physician are likely to come from drastically different social and educational backgrounds, the physician will possess unreviewable discretion if the prisoner is not granted a hearing before transfer. The record of *Vitek* indicates that an even higher risk of mistake is involved when there is a delay in returning the prisoner to the prison after he has been cured. In the case of an intervenor in the *Vitek* case, for instance, the four-week delay in returning the prisoner was attributable to bureaucratic inefficiency.¹²¹

In determining the state's interest in transferring a prisoner to a mental hospital without a hearing, the Supreme Court approved the district court's

¹¹⁸ *Miller v. Vitek*, 437 F. Supp. 568, 573 (D. Neb. 1977).

¹¹⁹ *See Miller v. Vitek*, 437 F. Supp. at 573.

¹²⁰ *Id.* at 575.

¹²¹ Brief for Appellee at 23, *Vitek v. Jones*, 100 S. Ct. 1254.

conclusion that a mentally ill inmate can usually be adequately maintained in the prison system without a hearing. Most prisons possess physical security, a staff of psychiatrists, and a prison hospital so the prisoner can be kept without hurting himself or others.¹²² Unlike other hearings in which the witnesses will be prison inmates exposed to peer pressures, witnesses at a commitment hearing are often civilians. Therefore, the danger of calling witnesses is less when the question is whether the inmate is mentally ill than when the issue is whether he has disobeyed some rule and should be punished.¹²³ Furthermore, supplementary procedures would not create an additional fiscal or administrative burden. In most cases, those likely to be transferred are so clearly in need of treatment that the transfer would be uncontested. In those cases where the transfer is disputed, the propriety of commitment is more likely to be ambiguous. Furthermore, the hearing probably would not force the state to hire more personnel, which would otherwise increase the financial burden. The state could use its hearing officers, who were hired to conduct parole and probation revocation proceedings, to serve as an independent decisionmaker in the transfer hearing.¹²⁴ Therefore, the requirements of notice, a formal hearing before an independent decisionmaker, and a written statement of the evidence relied upon and the reasons for the decision do not place an unacceptable burden on the state.

The requirement that an inmate who is involuntarily transferred to a mental hospital must be afforded counsel in the hearing is a more controversial proposition. A mentally ill person needs competent assistance because he may be unable to understand the nature of the proceedings against him.¹²⁵ Additionally, an inmate suffering mental illness is often regularly medicated before being involuntarily transferred.¹²⁶ Because a sedated person often behaves in a way indistinguishable from someone who is mentally ill, there is no guarantee that he will not be medicated at a hearing and

¹²² *Miller v. Vitek*, 437 F. Supp. at 574.

¹²³ *Id.*

¹²⁴ Brief for Appellee at 24, *Vitek v. Jones*, 100 S. Ct. 1254. *See also* *Wolff v. McDonnell*, 418 U.S. at 562-66. The Court had required states to hire hearing officers to serve as independent decisionmakers in hearings in which good-time was at stake. Therefore, the cost of hiring an independent decisionmaker in the case at hand would be minimal.

¹²⁵ Brief for Appellee at 39, *Vitek v. Jones*, 100 S. Ct. 1254.

¹²⁶ *Id.* *See also* *Addington v. Texas*, 441 U.S. at 430.

thus appear to be mentally ill even if he is not.¹²⁷ Furthermore, psychiatrists have been known to abuse medication, particularly when treating indigent and disruptive patients. A psychiatrist employed by the department of corrections may succumb to pressure by prison officials to medicate a particularly troublesome prisoner who wanted to contest his hearing. If prisoners are not permitted legal representation to protect their interests, prison officials could abuse medication of prisoners in order to farm out those that they do not like. Another problem is that an inmate without an attorney might rely upon the mistaken diagnoses of a single psychiatrist, without appreciating that psychiatric diagnoses are largely subjective.¹²⁸ For these reasons, Justices White, Brennan, Marshall, and Stevens joined in *Vitek* to conclude that an inmate has a right to counsel at the transfer hearing.

Nevertheless, as Justice Powell noted, some characteristics of this type of hearing indicate that a qualified and independent representative who is not a lawyer could adequately represent the inmate at the hearing. A mental health professional, for instance, might be better able than an attorney to detect the presence of medication or to recognize the need of another professional opinion about sanity. Because a transfer hearing involves analyzing psychiatric evaluations, with which lawyers are unfamiliar, a mental health professional might even be preferable to an attorney as an advocate. Furthermore, the presence of lawyers might transform involuntary commitment proceedings into adversary hearings, which are not conducive to aiding the prisoner's positive and satisfactory adjustment to institutional life.¹²⁹ Requiring an attorney at the hearing would increase the costs to the state, with the result that many prisoners in need of psychiatric care may not be transferred if the state deems the costs of the transfer to exceed the benefits to the institution. Consequently, the presence of counsel at involuntary transfer proceedings was wisely left to the discretion of the state by the *Vitek* Court.

CONCLUSION

The holding in *Vitek* that prisoners have liberty interests independent of positive law indicated that

¹²⁷ Brief for Appellee at 39, *Vitek v. Jones*, 100 S. Ct. at 1254.

¹²⁸ *Id.*

¹²⁹ *Miller v. Vitek*, 437 F. Supp. at 575.

the Court is ready to take an active role in protecting prisoners from arbitrary administrative action. The Court rejected a passive, "hands-off" role for the federal courts in prisoners' rights cases, portending a new era in which the federal judiciary will actively shield the rights and dignity of prisoners. The Court recognized that an interpretation of the due process clause to protect only those rights which the legislature has expressly granted is inconsistent with the purpose of a written constitution. Protecting the rights of prisoners, who have no access to the political process, is a legitimate judicial function. The purpose of the due process clause is to protect individuals from arbitrary state action. For the state to determine the existence of protected rights and appropriate protective procedures offends the theory underlying the Constitution, that the people retain natural rights of liberty.

In balancing the state's interest in summary action against Jones' interest in avoiding transfer to a mental institution, the Court determined that Jones had a strong private interest in avoiding commitment. The Court noted that the peculiar conditions of prison life differentiate it from a mental institution and rejected Nebraska's claim that treatment of mental illness is functionally indistinguishable from other medical treatment. Moreover, the Court concluded that the uncertainties of psychiatric diagnoses of indigent inmates produce frequent mistakes of judgment in involuntary commitment proceedings. Thus, the risk of erroneous commitment outweighed the state's interest in avoiding the minimal cost and inconvenience of providing a formal hearing before a prisoner is transferred to an asylum. Finally, the Court indicated that the specific procedures which must be followed before a prisoner is committed are flexible. Because the issue at a commitment hearing is essentially medical, the Court reasoned that a qualified and independent advisor who is not an attorney is able to represent a prisoner at a commitment proceeding. Judicial appreciation of the conditions of prison life and the realistic possibilities for improvement is a first step toward ensuring that decisions affecting prisoners' rights are made in a manner that comports with due process. *Vitek v. Jones*, therefore, effectively removes the entitlement doctrine from the law of prisoners' rights in its recognition that incarceration is only a restraint on physical liberty.