Journal of Criminal Law and Criminology

Volume 96
Issue 3 *Spring*

Article 7

Spring 2006

Wilkinson v. Austin and the Quest for a Clearly Defined Liberty Interest Standard

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0091-4169/06/9603-1029
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 96, No. 3

Printed in U.S.A.

WILKINSON V. AUSTIN AND THE QUEST FOR A CLEARLY DEFINED LIBERTY INTEREST STANDARD

I. INTRODUCTION

One day, while waiting for food at the Southern Ohio Correctional Facility, inmate Kevin Roe was hit over the head with a spatula by another inmate.[1] Though Roe refused to fight back, he was soon transferred to the Ohio State Penitentiary ("OSP"), a high-maximum security prison in Youngsville, Ohio.[2] OSP administrators locked Roe in his cell for twenty-three hours a day, seven days a week.[3] He could leave only to shower and to use the "recreation room," a small room with a grate to the outside to allow air circulation.[4] Roe's only contact with the outdoors was through this single grate.[5]

The Ohio Department of Rehabilitation and Correction ("Department") justified Roe's placement at OSP because Roe was "a longtime member of a gang and had participated in a racial disturbance over five years ago."[6] Yet, evidence demonstrated only "some past connection to the Aryan Brotherhood" and no role in the alleged disturbance.[7] More strikingly, during Roe's initial reclassification hearing, he received a negative score on a supervision review form, a score which qualified him for a security classification *decrease*, not an increase.[8] Furthermore, although the reclassification committee continued to recommend lowering Roe's security

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[1] Austin v. Wilkinson, 189 F. Supp. 2d 719, 732 (N.D. Ohio 2002), *aff'd in part, rev'd in part*, 372 F.3d 246 (6th Cir. 2004), *rev'd*, 125 S. Ct. 2384 (2005).

[2] *Id.*

[3] STATE OF OHIO CORR. INST. INSPECTION COMM., INSPECTION REPORT, OHIO STATE PENITENTIARY, 123rd Gen. Assem. (1999), *available at* http://www.ciic.state.oh.us/publications/osp_page.html [hereinafter INSPECTION REPORT].

[4] *Austin*, 189 F. Supp. 2d at 724.

[5] *Id.*

[6] *Id.* at 732.

[7] *Id.* at 732-33.

[8] *Id.* at 732.

classification and releasing him from OSP back to the general prison population, Roe remained confined at OSP for over two years.[9]

OSP is a maximum-security, "Supermax," prison designed to house Ohio's most dangerous and disruptive inmates.[10] At OSP, inmates are subject to extreme solitary confinement and sensory deprivation: contact with other people is strictly limited, and prisoners have little access to the outdoors.[11] A group of inmates challenged the OSP placement procedures, claiming that transfer to OSP violated the procedural due process requirement of the Fourteenth Amendment.[12]

In *Wilkinson v. Austin*, the Supreme Court found that inmates have a liberty interest in avoiding transfer to OSP, saying that the severe conditions at OSP, combined with loss of parole eligibility, impose an atypical and significant hardship on inmates.[13] However, the Court declined to impose additional procedural requirements, holding that notice and the opportunity to be heard are sufficient to meet the requirements of procedural due process.[14]

The Court's holding in *Austin* was correct. However, because the Court failed to clearly articulate a single liberty interest standard that addresses the needs of inmates that face transfer to Supermax prisons, its opinion fails to give adequate guidance to both prison administrators and lower courts. Consequently, future courts faced with similar challenges will struggle with a number of issues left unaddressed by the Court. The first issue is whether a liberty interest can be invoked by *either* conditions of confinement that impose atypical and significant hardship *or* loss of parole eligibility. Second, the baseline used to determine atypical and significant hardship still must be established. Finally, a previously-defined list of procedural requirements must be reconciled with the balancing test articulated in *Mathews v. Eldridge*[15] to determine which of these requirements would benefit an inmate without overly burdening the government.

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[9] *Id.* at 732-33.

[10] INSPECTION REPORT, *supra* note 3.

[11] *Id.*

[12] *Austin*, 189 F. Supp. 2d at 721.

[13] Wilkinson v. Austin, 125 S. Ct. 2384, 2394-95 (2005).

[14] *Id.* at 2397.

[15] 424 U.S. 319, 335 (1976).

II. HISTORICAL BACKGROUND

A. THE RISE OF THE SUPERMAX PRISON

The term "Supermax" generally refers to "maximum security or close custody segregation units which are designed and/or operated to provide some combination of greater isolation among prisoners, less contact with staff, less out-of-cell time, and less access to or sight of the outdoors than in the traditional prison segregation unit."[16] Supermax prisons concentrate the most dangerous inmates in one facility, thereby making the rest of the prison system safer.[17] Furthermore, Supermax prisons control their inmates through modern solitary confinement: "[E]xtreme social isolation, reduced environmental stimulus, the absence of recreational, vocational and educational opportunities and extraordinary levels of surveillance and control."[18]

During the nineteenth century, United States' prison officials attempted, then abandoned long-term solitary confinement.[19] One observer in New York commented that "[t]his experiment, of which such favourable results had been anticipated, proved fatal for the majority of prisoners. It devours the victim incessantly, and unmercifully; it does not reform, it kills. The unfortunate creatures submitted to this experiment wasted away . . . ."[20]

The extreme impact of solitary confinement can be traced to the near complete lack of sensory stimulation.[21] Research demonstrates that "the conscious mind is dependent on constant contact with the outside world . . . . Unless there is the constant incoming flood of sensation, behavior is highly disturbed as to bring on what amounts to transient psychotic states."[22] Consequently, solitary confinement can lead to extreme

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[16] Brief of Corrections Professionals as Amici Curiae Supporting Respondent at 8 n.1, *Austin*, 125 S. Ct. 2384 (No. 04-495) [hereinafter Corrections Professionals].

[17] INSPECTION REPORT, *supra* note 3.

[18] *Id.*

[19] Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae Supporting Respondent at 9 n.11, *Austin*, 125 S. Ct. 2384 (No. 04-495). The brief noted that Maryland, Massachusetts, Maine, New Jersey, Virginia and Rhode Island all attempted to introduce complete solitary confinement in their prisons in the first half of the nineteenth century. *Id.* By 1858, all states had abandoned their attempts. *Id.*

[20] *Id.* at 7 (quoting TORSTEN ERIKSSON, THE REFORMERS, AN HISTORICAL SURVEY OF PIONEER EXPERIMENTS IN THE TREATMENT OF CRIMINALS 49 (1976)).

[21] *Id.* at 10.

[22] *Id.* at 10 n.15 (quoting P. Solomon, *Quantitative Aspects of Sensory Deprivation*, *in* THE PSYCHODYNAMIC IMPLICATIONS OF PHYSIOLOGICAL STUDIES ON SENSORY DEPRIVATION 28, 47 (Leo Madow & Laurence H. Snow eds., 1970)).

dysfunction,[23] such as "verbal aggression, physical destruction of surroundings, and the development of an inner fantasy world, including paranoid psychosis."[24] Despite this evidence, in the past twenty years, prison officials have increasingly relied on Supermax prisons to control violent and disruptive inmates, and gang activity within their prison systems.[25]

B. PROCEDURAL DUE PROCESS

The procedural due process clause of the Fourteenth Amendment guarantees that no state can deprive a person of life, liberty or property without due process of law.[26] A state's decision to deprive a person must be neither arbitrary nor mistaken, and must adhere to some minimum requirement of due process.[27] As a person's interest in the life, liberty or property increases, the requirements needed to meet minimum due process also increase.[28]

The ordinary citizen is free from governmental restraint and may engage in any activity he pleases. Thus, he has the utmost interest in preserving his liberty. Consequently, the government can only imprison a person after a lengthy trial in which his due process rights are preserved.[29] Imprisonment reduces, but does not completely abolish, the constitutional rights of prisoners.[30] Prisoners still retain the right to procedural due process.[31] However, as will be discussed below in Part II.C., the extent to which this protection applies depends on the liberty interest at stake.

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[23] *See id.* at 11.

[24] *Id.* at 15.

[25] U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORRS., SUPERMAX HOUSING: A SURVEY OF CURRENT PRACTICE 3 (1997), *available at* http://nicic.org/pubs/1997/013722.pdf ("Fifteen [S]upermax facilities or units were opened from 1989 through 1993, and five more from 1994 through 1996. Five additional facilities or units are projected to be opened by 1999.") [hereinafter SUPERMAX HOUSING].

[26] U.S. CONST. amend. XIV, §1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .").

[27] *See id.*

[28] *See* Wolff v. McDonnell, 418 U.S. 539, 555 (1974).

[29] *See id.* at 556; Morrissey v. Brewer, 408 U.S. 471, 488 (1972).

[30] *Wolff*, 418 U.S. at 555.

[31] *Id.* at 556.

C. THE PRISONER'S LIBERTY INTEREST

1. Early Release

Once an inmate is convicted and sentenced, he does not have a constitutionally-protected right to be released before his sentence expires.[32] However, if the state creates a right to or an expectation of early release, then the inmate *does* have a liberty interest in that right or expectation that is entitled to procedural due process protection.[33] The extent to which parole is treated as a liberty interest entitled to due process protection depends on the extent to which an inmate expects parole and its ensuing freedoms.[34]

a. The Right to Parole

Parole is a kind of restricted freedom: the parolee lives a relatively normal life, save the occasional visit to his parole officer and the threat that otherwise normal activities can lead to the revocation of this freedom.[35] In *Morrissey v. Brewer*, the Court held that once an inmate is paroled, his liberty interest is clearly established.[36] Though the former inmate is not entitled to full freedom, the parolee's release from prison "includes many of the core values of unqualified liberty[,] and its termination inflicts a grievous loss on the parolee and often on others."[37] Since the parolee's liberty is not equivalent to that of someone who has not been convicted of a crime, parole revocation does not require trial-like, adversarial procedures.[38] However, the Supreme Court held that to revoke parole, the *minimum* requirements of due process include:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing

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32 Greenholtz v. Inmates of the Neb. Penal and Corr. Complex, 442 U.S. 1, 7 (1979).

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

34 *See Greenholtz*, 442 U.S. at 1 (holding that a statutorily derived expectation of parole was a liberty interest that required minimal due process protection); *Wolff*, 418 U.S. 539 (holding that a loss of good-time credits was a liberty interest that required more than minimal due process protection, but less protection than revocation of parole); *Morrissey*, 408 U.S. 471 (holding that revocation of parole was a liberty interest that required significant due process protection, though a trial was not required).

35 *See Morrissey*, 408 U.S. at 482.

36 *Id.*

37 *Id.*

38 *See id.*

confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.[39]

b. Good Time Credits

Similarly, in *Wolff v. McDonnell*, the Court held that when the state creates a right to good time credits[40] and deprives that right only in the event of major misconduct, deprivation of those credits is subject to procedural due process protection.[41] By creating the right, the state in effect has acknowledged that good time credits are a liberty interest that can only be forfeited for serious misconduct—and therefore cannot be forfeited arbitrarily or at the discretion of prison officials, but, rather, only if certain procedural requirements are followed.[42]

The loss of good time credits, however, is not equivalent to parole revocation.[43] Parole revocation converts a nearly-free person to a prisoner, while loss of good time credits merely postpones the *possibility* of, not the *right* to, freedom.[44] Therefore, the minimum procedural requirements to deprive an inmate of good time credits are similar to, but less stringent than, those outlined in *Morrissey*.[45] Specifically, the Supreme Court suggested that in a hearing for good time credit deprivation, the prison must allow inmates to call witnesses and present evidence in their defense.[46] However, the Court declined to require this procedure, citing the need to balance the inmate's interest with prison officials' discretion in prison administration.[47]

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[39] *Id.* at 489.

[40] "Good time" refers to "[t]hat length of time, fixed by statute, by which the prison term of a convict is shortened by reason of his good behavior while in prison." BALLANTINE'S LAW DICTIONARY (1969). In *Wolff*, the Nebraska statute required the chief executive officer of the prison to reduce prison terms for "good behavior and faithful performance of duties." Wolff v. McDonnell, 418 U.S. 539, 547 n.6 (1974). However, the prisoner could forfeit the reduction due to misconduct. *Id.*

[41] *Wolff*, 418 U.S. at 557.

[42] *Id.* at 557-59.

[43] *Id.* at 560.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* at 565. Justice Marshall dissented, arguing that

> [w]ithout the enforceable right to call witnesses and present documentary evidence, an accused inmate is not guaranteed the right to present any defense beyond his own word. Without any right to confront and cross-examine adverse witnesses, the inmate is afforded no means to challenge the word of his accusers. Without these procedures, a disciplinary board cannot resolve disputed factual issues in any rational or accurate way.

c. Discretionary Parole

Finally, if the decision to grant parole is discretionary, a constitutionally-protected right to parole will be created only by statutory language.[48] However, even this right requires only minimum due process procedures.[49] In *Greenholtz*, the prisoners challenged the procedures for discretionary parole, a decision made by the Nebraska Parole Board.[50] The Supreme Court first held that an inmate has no inherent right to be released before his sentence expires.[51] When a governing board decides to grant parole at its discretion, the inmate has no inherent right to parole and therefore no constitutionally-protected interest.[52] The Court distinguished *Morrissey*, saying that "[t]here is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a *conditional* liberty that one desires."[53] A desire for the freedom brought by parole is not sufficient to create a liberty interest.[54]

Instead, the Court held that the inmates had a protectable *expectation* of discretionary parole that was created by Nebraska's statutory language.[55] However, because the statute vested broad discretion in the Parole Board, only minimal due process procedures were required.[56] The Court held that the opportunity for the inmate to be heard and notice of why parole was denied were sufficient to meet this minimal standard.[57]

Id. at 581-82 (Marshall, J., dissenting).

[48] *See* Greenholtz v. Inmates of the Neb. Penal and Corr. Complex, 442 U.S. 1, 11 (1979).

[49] *See id.* at 13.

[50] *Id.* at 3-4.

[51] *Id.* at 7.

[52] *Id.*

[53] *Id.* at 9 (emphasis added).

[54] *Id.*

[55] *Id.* at 11. The statute read in part:

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release 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;
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> (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 corrections treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

NEB. REV. STAT. § 83-1, 114(1) (1976).

[56] *Greenholtz*, 442 U.S. at 13.

[57] *Id.* at 16.

Justice Powell dissented, remarking that "[r]elease on parole marks the first time when the severe restrictions imposed on a prisoner's liberty by the prison regimen may be lifted, and his behavior in prison often is molded by his hope and expectation of securing parole at the earliest time permitted by law."[58] Thus, "a prisoner justifiably expects release on parole when he meets the standards of eligibility applicable within that system."[59] Powell would have required that prisons provide inmates reasonable notice of the hearing and the factors to be considered before the hearing, as well as a written statement of the reasons and facts used in an adverse decision after the hearing.[60]

2. *Confinement: The Atypical Conditions Requirement*

The Supreme Court has typically refused to recognize that an inmate has a liberty interest in avoiding prison transfer unless applicable state law or policy exists.[61] Once convicted, the inmate is subject to the rules of a prison system—"so long as the conditions of confinement do not otherwise violate the Constitution."[62] In *Meachum v. Fano*, prison officials had complete discretion to make any placement decision.[63] Therefore, prisoners had no constitutionally-protected right to remain in a certain prison, because Massachusetts law did not create any expectation of that right.[64]

On the other hand, in *Hewitt v. Helms*, the Court held that when a state establishes procedural guidelines that govern placement in administrative segregation, the state has created a protected liberty interest.[65] The *Hewitt* approach required courts to review the language of a particular regulation or statute to find a liberty interest.[66] This approach proved unworkable for two reasons. First, by creating a liberty interest that depended on state regulations and policy, states had a significant incentive not to codify their procedures.[67] After all, liberty interests cannot be found in regulations that do not exist. In addition, the Supreme Court expressed concern that "the

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[58] *Id.* at 19-20 (Powell, J., dissenting).

[59] *Id.* at 20 (Powell, J., dissenting).

[60] *Id.* at 23 (Powell, J., dissenting).

[61] *See* Sandin v. Conner, 515 U.S. 472 (1995); Hewitt v. Helms, 459 U.S. 460 (1983); Meachum v. Fano, 427 U.S. 215 (1976).

[62] *Meachum*, 427 U.S. at 224.

[63] *Id.* at 226.

[64] *Id.*

[65] *Hewitt*, 459 U.S. at 471-72.

[66] *Sandin*, 515 U.S. at 481.

[67] *Id.* at 482.

Hewitt approach has led to the involvement of federal courts in the day-to-day management of prisons . . . ."[68]

Thus, in *Sandin v. Conner*, the Court overruled the "combing the regulations" approach.[69] Relying on *Wolff*, the Court held that states may create liberty interests that are protected by the Due Process Clause.[70] However, these interests

> will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.[71]

The "atypical and significant hardship" standard requires courts to compare conditions of a prison or type of segregation against some "typical" baseline of prison life to determine whether an inmate has an interest in avoiding transfer.[72] In *Sandin*, the Court held that placement in disciplinary confinement did not give rise to a protected liberty interest because the conditions in disciplinary confinement were similar to administrative segregation,[73] and placement in administrative segregation was entirely discretionary.[74] Thus, an inmate has a liberty interest in avoiding placement only if the conditions impose "atypical and significant hardship."[75] Conditions that mirror discretionary segregation do not impose such hardship.[76]

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[68] *Id.* at 482. In *Hewitt*, the Court also expressed concern about judicial deference, saying "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." 459 U.S. at 472 (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)).

[69] *Sandin*, 515 U.S. at 483.

[70] *Id.* at 483-84.

[71] *Id.* at 484 (internal citations removed).

[72] *See id.*

[73] *Id.* at 486. In *Sandin*, the differences between administrative segregation and disciplinary confinement were subtle but significant. *Id.* at 489 n.1 (Ginsburg, J., dissenting). In both, inmates were placed in the same single-cell units and had similar privileges revoked. *Id.* at 476 n.2. However, placement in administrative segregation was discretionary, and therefore not noted on an inmate's record. *Id.* at 489 (Ginsburg, J., dissenting). Conversely, an inmate could only be placed in disciplinary segregation because of serious misconduct. *Id.* (Ginsburg, J., dissenting). Therefore, disciplinary segregation would adversely affect an inmate's prospects for parole. *Id.* (Ginsburg, J., dissenting).

[74] *Id.* at 486.

[75] *Id.* at 484.

[76] *Id.* at 486.

The Court decided *Sandin* by a five-to-four margin, with Justices Ginsburg, Stevens, Breyer and Souter dissenting.[77] Justice Ginsburg distinguished disciplinary confinement from administrative segregation because disciplinary confinement "also stigmatizes [inmates] and diminishes parole prospects."[78] The "immediate and lingering consequences," Ginsburg argued, are sufficient to invoke a liberty interest protected by the Due Process Clause.[79] Justice Breyer also agreed that disciplinary segregation caused significant deprivation.[80] Furthermore, Breyer pointed out that "the Due Process Clause does not require process unless, in the *individual* case, there is a relevant factual dispute between the parties."[81] Only when there is a relevant factual dispute will additional procedures, such as calling a witness, be useful. According to Breyer, this requirement helps guard against meritless cases—if there is no evidence of a factual dispute, there is nothing to be gained by invoking the additional procedures of the Due Process Clause.[82]

III. PRESENTATION OF THE CASE

A. FACTS AND PROCEDURAL HISTORY

In May 1998, the State of Ohio opened the Ohio State Penitentiary, a Supermax facility designed to hold 504 male inmates.[83] Ohio sought to control "predatory and dangerous prisoners" by isolating them from the general prison population.[84]

At OSP, inmates face highly restrictive conditions, including solitary confinement and sensory deprivation:[85]

> Inmates are locked in their solid door-front cells 23 hours each day. Each solid-front cell door has a small, thick glass window and a key controlled "food slot" hatch. Each cell is approximately 89.7 square feet and allows for a small degree of natural light. Privileges are very restricted and limited. Tape recorders, cassette tapes, fans, typewriters [or access to typewriters], and smokeless tobacco, are not permitted. . . .

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[77] *See id.*

[78] *Id.* at 489 (Ginsburg, J., dissenting).

[79] *Id.* (Ginsburg, J., dissenting).

[80] *Id.* at 502 (Breyer, J., dissenting).

[81] *Id.* at 503 (Breyer, J., dissenting).

[82] *See id.* at 504 (Breyer, J., dissenting).

[83] Austin v. Wilkinson, 189 F. Supp. 2d 719, 732 (N.D. Ohio 2002), *aff'd in part, rev'd in part,* 372 F.3d 246 (6th Cir. 2004), *rev'd,* 125 S. Ct. 2384 (2005).

[84] *Id.* at 723 (quoting the deposition of Reginald Wilkinson, the director of the Ohio Department of Rehabilitation and Correction).

[85] *Id.*

One (1) hour of recreation per day is allowed at least five (5) times per week. All meals are delivered to inmates at their cells.[86]

Although the Department of Rehabilitation and Correction began transferring inmates to OSP as early as May 1998, the Department did not establish a policy to govern those transfers until August 31, 1998.[87] Despite the implementation of this policy, the Department continued to transfer inmates to or retain them at OSP without a hearing or contrary to the recommendations of a reclassification committee.[88]

On January 1, 2001, a class of current and former inmates of OSP filed a complaint in the Northern District Court of Ohio, stating both a procedural due process claim regarding placement at OSP and an Eighth Amendment claim regarding conditions at OSP.[89] The Eighth Amendment claim was settled before trial.[90]

The district court found a liberty interest because, under *Sandin*, the conditions at OSP "are atypical and impose a significant hardship."[91] Additionally, the district court found that the plaintiffs were not afforded due process when placed at OSP.[92] The district court ordered several substantive and procedural modifications to the Department's current version of the placement and retention policy ("New Policy"), which were implemented on the eve of trial.[93] The Sixth Circuit affirmed the district

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[86] INSPECTION REPORT, *supra* note 3.

[87] *Austin*, 189 F. Supp. 2d at 727.

[88] Austin v. Wilkinson, 372 F.3d 346, 350 (6th Cir. 2004), *rev'd*, 125 S. Ct. 2384 (2005); *see also Austin*, 189 F. Supp. 2d at 723-36. For example, James DeJarnette was transferred to OSP after assaulting an officer, even though the discipline committee "unanimously agreed *against* increasing his classification level and transferring him to the OSP." *Id.* at 728 (emphasis added). Lahray Thompson was transferred to OSP because of alleged gang affiliations. *Id.* at 734. The evidence used to justify his transfer included affiliation with the Crips gang several years before, a tattoo often associated with the Crips, and the mere fact that he once wrote a letter using a letter "b" commonly used by Crips members. *Id.* at 735. *See also supra* text accompanying notes 1-9.

[89] *Austin*, 372 F.3d at 350; *see also Austin*, 189 F. Supp. 2d 719.

[90] *Austin*, 189 F. Supp. 2d at 722.

[91] *Id.* at 740-43.

[92] *Id.* at 749.

[93] Austin v. Wilkinson, 204 F. Supp. 2d 1024, 1026-29 (N.D. Ohio 2002), *aff'd in part, rev'd in part* 372 F.3d 346 (6th Cir. 2004), *rev'd*, 125 S. Ct. 2384 (2005). The procedural modifications ordered by the District Court included: written notice at least forty-eight hours before the hearing, along with written notice "of all the grounds believed to justify [an inmate's] placement at [the highest security level] and a summary of the evidence that the defendants will rely upon for the placement," the opportunity to call reasonable witnesses, and a summary of the evidence that supports the recommendation. *Id.* at 1026-27. The substantive modifications addressed the grounds that merit transfer to OSP. The district court ordered the Department to describe the type and quantity of contraband, to "clearly set

court's finding of a liberty interest and affirmed the procedural modifications but reversed the substantive modifications.[94]

B. THE OPINION OF THE SUPREME COURT

In a unanimous opinion by Justice Kennedy, the Supreme Court held that the inmates had established a constitutionally-protected liberty interest in avoiding assignment at OSP.[95] However, the Court also found that the New Policy implemented by the Department satisfied the constitutional requirement for procedural due process and reversed the district court's modifications.[96]

1. The Liberty Interest

The Court began its analysis by noting that a liberty interest may arise from the language of the Constitution itself or from "an expectation or interest created by state laws or policies."[97] The Court first noted that in *Meachum*, the Court held that a liberty interest in avoiding transfer cannot be found in the language of the Constitution itself because "[c]onfinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose."[98] Therefore, any liberty interest in avoiding transfer must arise from state policies or regulations.[99]

The Court affirmed the standard it articulated in *Sandin*: an inmate may have a protected liberty interest if prison transfer "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[100] However, despite the diversity of baselines used by the

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out the type of security group threat or gang involvement that justified placement at [the highest security level] classification," and to "clearly state the factors to be used for reclassification." *Id.* at 1028.

[94] *Austin*, 372 F.3d at 360.

[95] Wilkinson v. Austin, 125 S. Ct. 2384, 2393 (2005).

[96] *Id.*

[97] *Id.* In its brief to the Supreme Court, Ohio conceded that the inmates had a liberty interest, Brief for Petitioners, *Austin*, 125 S. Ct. 2384 (No. 04-495), but the United States, which supported Ohio as *amicus curiae*, disagreed with Ohio's concession. Brief for the United States as Amicus Curiae Supporting Petitioners, *Austin*, 125 S. Ct. 2384 (No. 04-495). Consequently, Justice Scalia raised the issue during oral arguments, Transcript of Oral Argument at 2-4, *Austin*, 125 S. Ct. 2384 (No. 04-495) [hereinafter Oral Transcript], and the Court addressed the issue in its decision. *Austin*, 125 S. Ct. at 2393-95.

[98] *Austin*, 125 S. Ct. at 2393 (quoting Meachum v. Fano, 427 U.S. 215, 225 (1976)).

[99] *Id.*

[100] *Id.* at 2394 (quoting Sandin v. Conner, 515 U.S. 472, 484 (1995)).

circuit courts, the Court declined to establish the appropriate baseline.[101] Instead, the Court found that assignment to OSP "impose[d] an atypical and significant hardship under any plausible baseline."[102]

Two conditions struck the Court as especially atypical: the indefinite duration of placement at OSP, and the fact that placement disqualified inmates from parole consideration.[103] Otherwise, the Court observed that the conditions at OSP "likely would apply to most solitary confinement facilities . . . ."[104] The duration *and* the parole disqualification, together, imposed enough of a hardship to create a liberty interest in avoiding assignment to OSP.

2. *The Procedural Requirements*

With a liberty interest established, the Court turned to the question of due process. The Court initially noted that the requirements of due process are flexible and depend on the particular situation and circumstances in question.[105] Thus, courts typically evaluate these requirements within the framework that the Supreme Court first articulated in *Mathews v. Eldridge*:[106]

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[107]

Thus, in any due process evaluation, courts will balance three factors: 1) the private interest at issue; 2) the risk of erroneous deprivation, along with the value of additional safeguards; and 3) the additional burden on the state presented by those safeguards.[108]

In this case, the interest at issue was the right to avoid erroneous placement at OSP—the right to avoid extremely severe confinement.[109]

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[101] *Id.*; *see infra* Section IV.A.2; *see also* Maximilienne Bishop, Note: *Supermax Prisons: Increasing Security or Permitting Persecution?*, 47 ARIZ. L. REV. 461, 476 (2005) (noting that "[d]ifferent courts use different baselines for comparison").

[102] *Austin*, 125 S. Ct. at 2394.

[103] *Id.* at 2394-95.

[104] *Id.* at 2394.

[105] *Id.* at 2395.

[106] *Id.* (citing Mathews v. Eldridge, 424 U.S. 319 (1976)).

[107] *Id.* (quoting *Mathews*, 424 U.S. at 335).

[108] *Id.*

[109] *Id.*

The Court observed that prisoners by definition have their liberty curtailed, whether or not they are placed at OSP.[110] The prisoner whose liberty is already curtailed is entitled to fewer procedural protections than the free person who, when facing imprisonment, is entitled to a full trial.[111]

Under *Mathews*, the second factor addresses the current procedures: the risk of erroneous placement and the value of any additional or alternative safeguards.[112] The Court stressed that under the New Policy, the inmate received notice of the factual basis for his consideration for OSP placement, as well as the opportunity for rebuttal.[113] These safeguards "are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations."[114] In addition, the New Policy provided that the recommendation for placement would be reviewed at several levels and that the process would terminate at any level if the recommendation for transfer were overturned.[115] If OSP placement was recommended, the policy required the reviewer to note the reasons for that recommendation, reducing the risk of an arbitrary decision by giving the inmates a basis for objection at each level of review.[116] Finally, the New Policy provided a placement review within thirty days of the inmate's initial assignment to OSP, which further reduced the risk of erroneous placement.[117]

Finally, the Court analyzed Ohio's interest and the burden that additional procedural safeguards would place on Ohio. Ohio has a significant interest in ensuring safety within its prison system.[118] At stake are the lives of its guards, prison personnel, the general public and the prisoners themselves.[119] The obligation to protect these interests implicates another important state interest: limited and often scarce resources.[120] Any additional expenditure draws funding from critical prison programs, such as education and vocational assistance.[121] Thus, "[c]ourts must give substantial deference to prison management decisions" before imposing additional costly safeguards on the prison administration.[122]

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[110] *Id.*

[111] *Id.*

[112] *Id.* at 2395-96.

[113] *Id.* at 2396.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.* at 2397.

[121] *Id.*

[122] *Id.*

The Court noted that procedural requirements of a more adversarial-type hearing, such as the ability to call and cross-examine witnesses, would threaten Ohio's control over its prison system.[123] For example, a prisoner who testifies as a witness against another prisoner may be subject to retaliation.[124] The Court did not discuss the value or burden of any other additional procedural requirement, including those addressed by the district court.[125]

Thus, after balancing the three *Mathews* factors, the Court determined that the New Policy adequately safeguards an inmate's interest in avoiding transfer to OSP.[126] Because the inmate's liberty interest is not nearly as significant as the right to be free from confinement, only informal, non-adversarial procedures are required to safeguard his interest.[127] The New Policy provides notice, the opportunity to be heard and several levels of review, and "strikes a constitutionally permissible balance between the factors of the *Mathews* framework."[128] Thus, the Supreme Court upheld Ohio's New Policy and reversed the procedural modifications ordered by the district court.

IV. CASE ANALYSIS

Though the Supreme Court's holding in *Wilkinson v. Austin* is correct, the Court failed to answer three questions which are likely to arise in future litigation: 1) what additional constraints on a prisoner's freedom will merit the procedural protections of the Fourteenth Amendment; 2) what is the liberty interest from which this protection derives—the interest in parole or the hardship of confinement; and 3) what are the minimum requirements of that procedural protection.

The Court lost this opportunity to establish a single, coherent standard by which a prisoner can invoke a liberty interest. Although the Court analyzed the conditions at OSP using the "atypical and significant hardship" test, the Court refused to establish the baseline against which atypical would be compared and found that both loss of parole eligibility *and* confinement were required to establish a liberty interest.[129] A better test would be to hold that 1) confinement that imposes atypical and

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[123] *Id.*

[124] *Id.*

[125] *See supra* note 93 for a description of procedural requirements ordered by the district court.

[126] *Austin*, 125 S. Ct. at 2397.

[127] *Id.*

[128] *Id.* at 2398.

[129] *See id.*

significant hardship; *or* 2) the loss of parole eligibility is independently sufficient to create a liberty interest. Furthermore, the baseline against which atypical and significant hardship will be compared remains undefined. Finally, the *Mathews* balancing test must be reconciled with the *Morrissey* procedural requirements to establish procedures that adequately safeguard due process protection without overly burdening the government.

A. A CLEARLY ARTICULATED LIBERTY INTEREST TEST

1. Parole

The reasoning of the parole cases (*Wolff*, *Morrissey*, and *Greenholtz*) suggests that the loss of parole eligibility is independently sufficient to invoke a liberty interest, separate from the atypical hardship imposed by the confinement rule articulated in *Sandin*.[130] Instead, in *Austin*, the Court ruled that the loss of parole eligibility was merely an important factor to consider when determining whether a liberty interest existed.[131]

These cases demonstrate that the Court finds a liberty interest in parole revocation.[132] Furthermore, inmates have a liberty interest in both the right to parole,[133] and the statutorily-derived expectation of parole.[134] In reaching these decisions, the Court reasoned that the freedom granted by parole so closely resembled the freedom of normal life that a person had a liberty interest in retaining parole[135] or being granted parole.[136] The expectation of that freedom was sufficient to invoke a liberty interest.[137]

Similarly, a transfer or placement that leads to the loss of parole eligibility should create a liberty interest, independent of the issue of confinement. In both *Wolff* and *Greenholtz*, the Court showed a willingness to create a liberty interest in the right to and expectation of freedom. In *Austin*, inmates transferred to OSP automatically lost their *eligibility* for freedom.[138] Although *eligibility for* is not equivalent to the *expectation of*

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[130] *See* Wolff v. McDonnell, 418 U.S. 539 (1974); Morrissey v. Brewer, 408 U.S. 471 (1972).

[131] *Austin*, 125 S. Ct. at 2395.

[132] *See Morrissey*, 408 U.S. at 482.

[133] *See Wolff*, 418 U.S. at 557.

[134] *See* Greenholtz v. Inmates of the Neb. Penal and Corr. Complex, 442 U.S. 1, 11 (1979).

[135] *See Morrissey*, 408 U.S. at 482.

[136] *See Wolff*, 418 U.S. at 557.

[137] *See id.*

[138] *See* Austin v. Wilkinson, 189 F. Supp. 2d 719, 732 (N.D. Ohio 2002), *aff'd in part, rev'd in part*, 372 F.3d 346 (6th Cir. 2004), *rev'd*, 125 S. Ct. 2384 (2005).

freedom, inmates eligible for parole at least expect that they will be considered for parole—near-total freedom.[139] The Due Process Clause should protect this expectation because the interest at stake—freedom—is so important to the inmate.[140]

In his dissent in *Greenholtz*, Justice Powell addressed the importance of the parole-release determination to the inmate.[141] The expectation of parole provides an important incentive to inmates, guiding their behavior in hopes of early release.[142] Consequently, prison administrators have the utmost interest in properly conducting the parole-release determination. A fair decision-making process motivates an inmate to follow the rules in hope of release, which promotes the safety and security of the prison system.

One argument against this analysis is that the statutory basis for finding a liberty interest in the expectation of parole does not exist in Ohio. In *Greenholtz*, the Court created a liberty interest in the expectation of parole because language in the statute suggested that parole would be granted routinely, save several delineated exceptions.[143] However, the Ohio Code grants routine parole *eligibility*,[144] but once eligible, an inmate is granted parole only at the parole board's discretion.[145] Nothing in the Ohio code suggests that parole will be granted routinely or automatically—only upon review by the parole board.

Nevertheless, dictum in *Sandin* suggests that the Court will focus the liberty interest inquiry on the "nature of the deprivation," rather than statutory language.[146] Therefore, the Court will not look at the words of a particular statute, but rather what is at stake.[147] When eligibility for parole is at stake, nothing less than the chance for freedom is at stake.

Although loss of parole and parole eligibility should be an independent reason to create a liberty interest, the atypical and significant hardship test articulated in *Sandin* still governs. In other words, a transfer that leads to the loss of parole can create a liberty interest only if that loss of parole

[139] *See Greenholtz*, 442 U.S. at 11.

[140] *See Morrissey*, 408 U.S. 471.

[141] *Greenholtz*, 442 U.S. at 20 (Powell, J., dissenting).

[142] *Id.* (Powell, J., dissenting).

[143] *Id.* at 11; *see supra* note 55 for text of statute.

[144] OHIO REV. CODE ANN. § 2967.13 (LexisNexis 2006).

[145] Ohio Department of Rehabilitation and Correction, Frequently Asked Questions, http://www.drc.state.oh.us/web/FAQ.htm#Parole (last visited June 9, 2006).

[146] Sandin v. Conner, 515 U.S. 472, 481 (1995).

[147] *See id.*

imposes atypical and significant hardship.[148] If the transfer does not lead to a loss of parole eligibility, or that loss does not impose atypical and significant hardship, no liberty interest is created. Therefore, courts must still look to some baseline condition to determine whether the loss of parole is atypical.[149]

2. *Typical and Insignificant Hardship: The Baseline*

a. The Circuit Split

Courts will invoke a liberty interest when transfer or placement results in conditions that impose "atypical and significant hardship."[150] However, the Court did not determine what the baseline for that comparison would be—what is typical and insignificant hardship.[151] Instead, it held that conditions at OSP would meet this test "under any plausible baseline."[152]

This issue is especially significant in light of several courts of appeals' decisions following *Sandin*. Since 1995, courts of appeals have discussed what the baseline in *Sandin* should be. The Fourth and the Ninth Circuits have used the conditions of the general prison population in the state in question,[153] while the Seventh Circuit looks at conditions statewide, *including* the most restrictive confinement available.[154] The Second and Third Circuits and the District of Columbia Circuit follow *Sandin*, using administrative segregation as the baseline.[155] The Fifth Circuit alone holds that only a transfer that lengthens a prisoner's sentence will invoke a liberty interest.[156] Finally, the Sixth Circuit addressed the issue in *Austin*, upholding the district court's decision to use typical segregation conditions as the baseline.[157]

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[148] *See infra* Section IV.A.2.

[149] Examples of such conditions could include whether prisoners in the general prison population can lose parole eligibility at the discretion of prison administrators, see, e.g., Greenholtz v. Inmates of the Neb. Penal and Corr. Complex, 442 U.S. 1 (1979), or whether prisoners in administrative segregation lose eligibility for parole. *See, e.g.*, *Sandin*, 515 U.S. 472.

[150] *See Sandin*, 515 U.S. 472.

[151] Wilkinson v. Austin, 125 S. Ct. 2384, 2394 (2005).

[152] *Id.*

[153] Beverati v. Smith, 120 F.3d 500, 503 (4th Cir. 1997); Keenan v. Hall, 83 F.3d 1083, 1089 (9th Cir. 1996).

[154] Wagner v. Hanks, 128 F.3d 1173, 1175 (7th Cir. 1997).

[155] Hatch v. District of Columbia, 184 F.3d 846, 856 (D.C. Cir. 1999); Griffin v. Vaughn, 112 F.3d 703, 708 (3d Cir. 1997); Brooks v. DeFasi, 112 F.3d 46, 49 (2d Cir. 1997).

[156] Orellana v. Kyle, 65 F.3d 29, 31-32 (5th Cir. 1995).

[157] Austin v. Wilkinson, 372 F.3d 346, 350 (6th Cir. 2004), *rev'd*, 125 S. Ct. 2384

Consequently, the question of whether placement invokes a liberty interest depends not only on the conditions of that placement, but also the jurisdiction in which the trial takes place. If the inconsistency were among the states, this result might be understandable—after all, prisons are run and administered by the states. However, the inconsistency is among the courts of appeals; thus, the liberty to which a prisoner may be entitled depends on the *federal* judicial jurisdiction in which the prison is found.

This issue is easily resolved by determining which baseline is appropriate as the comparison for atypical and significant hardship. The baseline is, initially, critical because it determines what is "typical." Courts can only address the question of atypical after the baseline is determined. Conditions that closely resemble the baseline would quickly be eliminated from an atypical and significant hardship analysis.

Establishing the baseline would provide guidance to lower courts by determining the starting point for the analysis. Once the correct baseline is established, courts can analyze the typical/atypical issue and quickly dispose of a large number of cases. Furthermore, a standard baseline would provide guidance to future inmates who challenge prison procedural requirements by resolving the conflict within the courts of appeals as well as by indicating the chances of success of a liberty claim. Finally, a standard baseline would ease prison administration, as prison officials would be able to predict whether a transfer may implicate due process considerations.

b. The Appropriate Baseline

The courts of appeals have used four different baselines in the atypical and significant hardship analysis: (1) the effect on the length of sentence, (2) the conditions faced by typical inmates, (3) the most restrictive prison conditions statewide, and (4) the conditions faced in administrative segregation.[158] However, none of these approaches offers prisoners any significant procedural protection against unwarranted transfer.[159]

Increasing the length of the prison sentence is perhaps the harshest test.[160] This baseline requires a "bright-line rule," whereby a liberty interest will never be found unless a prisoner's sentence will almost certainly be

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(2005).

158 *See* Section IV.A.2 *supra*.

159 *See* Donna H. Lee, *The Law of Typicality: Examining the Procedural Due Process Implications of* Sandin v. Conner, 72 FORDHAM L. REV. 785 (2004); Michael Z. Goldman, Note: Sandin v. Conner *and Intraprison Confinement: Ten Years of Confusion and Harm in Prisoner Litigation*, 45 B.C. L. REV. 423 (2004).

160 Goldman, *supra* note 159, at 446.

lengthened because of the action in question.[161] Nothing else, no matter how harsh, will invoke procedural due process protection.

The second baseline approach, conditions faced by typical inmates, requires the courts to inquire into the facts of a particular prison system.[162] This approach is useful because it requires an empirical, objective finding of "typical" and "significant."[163] However, this fact-intensive approach has proven difficult to apply, especially since prison officials rarely keep the kind of statistics needed to conduct this analysis.[164] Consequently, courts have struggled when working with this approach as the baseline.[165]

The Seventh Circuit is the only circuit to apply the third baseline approach: the most restrictive conditions statewide.[166] The theory that underlies this approach is the idea that it is arbitrary to "distinguish between the different parts of the same prison, on one hand, and the different prisons in the same system, on the other."[167] Thus, any inquiry must examine prison conditions statewide, rather than prison by prison.[168] This approach essentially forecloses any determination of atypical and significant, since the conditions imposed would have to be "significantly more restrictive than conditions of confinement elsewhere within [the state's] prison system."[169] Using this baseline approach, a court could only find atypical and significant hardship if the conditions imposed were unique to that prisoner.[170] Otherwise, conditions found anywhere within the prison system of that state would be typical and insignificant, however restrictive they might be.[171]

The Supreme Court favored the baseline of administrative segregation, which several circuits have upheld.[172] However, this baseline implies that administrative segregation is a normal part of prison life.[173] While administrative segregation may be imposed at the discretion of prison officials, such segregation "is not typical of the normal inmate

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[161] Lee, *supra* note 159, at 828.

[162] *See id.* at 817.

[163] *Id.* at 789.

[164] Lee, *supra* note 159, at 818; Goldman, *supra* note 159, at 456.

[165] *See* Lee, *supra* note 159, at 813-17.

[166] Wagner v. Hanks, 128 F.3d 1173, 1175 (7th Cir. 1997).

[167] *Id.*

[168] *Id.*

[169] *Id.* at 1177.

[170] *See id.* at 1176.

[171] *See id.*

[172] *See supra* note 155.

[173] *See* Goldman, *supra* note 159.

experience."[174] Furthermore, any attempt to characterize disciplinary confinement as insignificant, as in *Sandin*, ignores the reality that there are "considerable dissimilarities between administrative and punitive confinement in terms of the effects each respective sentence may have on a prisoner's existence in prison," as well as "the devastating harm that prolonged solitary confinement can have on prisoners."[175]

One flaw in the current analysis by both the courts of appeals and the Supreme Court is that it gives little weight to the second factor of the *Sandin* test.[176] The *Sandin* test requires two considerations: (1) atypical and (2) significant hardship.[177] Yet, courts seem to consider both prongs at the same time.[178] A better approach would be to consider each separately: (1) whether the placement in question is objectively typical and (2) whether the placement in question is a significant event.[179]

With this concern in mind, Professor Donna H. Lee of Brooklyn Law School has proposed a multifactor balancing test. First, typicality is determined by "empirical evidence of actual state practices."[180] Then, significance is "applied as a de minimis threshold test."[181] Finally, "state positive law 'should' continue to inform liberty interest analysis."[182] The first prong of this test requires the court to conduct a factually-intensive analysis of the typical practices of a particular prison system, such as statistics regarding placement, disciplinary proceedings and prisoner classification.[183] The second prong allows the court to determine that the alleged deprivation is potentially significant, thereby eliminating meritless claims.[184] Finally, the third prong uses

> state law as an evidentiary tool for determining whether a deprivation implicates a liberty interest and warrants procedural due process protection . . . . For example, if a state has detailed statutes and regulations governing classification as a sex offender, then the very existence of that state law is evidence of the significance of the underlying issue. Conversely, if a state's statute regarding placement in administrative segregation is broadly framed and gives prison officials considerable

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174 *Id.* at 458.
175 *Id.* at 463.
176 *Id.* at 462.
177 Sandin v. Conner, 515 U.S. 472, 484 (1995).
178 Goldman, *supra* note 159, at 462.
179 *Id.* at 459-66.
180 Lee, *supra* note 159, at 835.
181 *Id.*
182 *Id.*
183 *Id.* at 835-36.
184 *Id.* at 835; *see also Sandin*, 515 U.S. at 504 (Breyer, J., dissenting).

discretion, then a prisoner may not have an enforceable expectation in a particular outcome or procedure in this context.[185]

While this final approach resembles the *Hewitt* methodology overruled by *Sandin*, Lee argues that most courts still use *Hewitt* as an analytical tool when considering due process claims.[186] Thus, the acceptance of a *Hewitt*-like consideration would strengthen courts' due process analysis.

This approach enables the courts to consider both the atypical and the significant considerations of the *Sandin* test. In addition, the test gives weight to the prisoner's expectations that are created by the state and enables courts to conduct a state-specific analysis. Finally, the baseline depends on state practices and therefore is state-specific, rather than specific to each court of appeals.

The most significant problem with this test is that determining the baseline requires empirical evidence that rarely exists, if at all, in a form useful for courtroom analysis.[187] Compiling that evidence on a state-by-state basis would require a substantial undertaking, diverting labor and, more importantly, money away from other valuable programs. While a compilation of this information would clearly be valuable, the logistics of obtaining and organizing information in every state render it unfeasible.

One solution is to change the burden of production and persuasion. To implement her plan, Lee suggests that the state should have the burden of production since the relevant statistical information will be "exclusively in the [state's] possession."[188] In addition, the state should also have the burden of persuading the court that a given practice is typical, rather than atypical.[189] The state would have an incentive to collect the relevant statistical information, so that it can demonstrate that the action in question is one which the 'typical' inmate faces. In the absence of such statistical information, the state can point to its procedural guidelines and expert testimony to describe the typical conditions of prison. Finally, the prisoner still has the burden of persuading the court that his deprivation was significant, which should guard against meritless claims.[190]

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[185] Lee, *supra* note 159, at 837.

[186] *Id.* at 837.

[187] *See id.* at 839-40.

[188] *Id.* at 840.

[189] *Id.*

[190] Sandin v. Conner, 515 U.S. 472, 504 (1995) (Breyer, J., dissenting).

B. THE REQUIREMENTS OF DUE PROCESS

Thus, courts should find a liberty interest in two situations: (1) when transfer results in conditions that impose atypical and significant hardship; and (2) when transfer results in loss of parole eligibility. A determination of atypical and significant hardship depends on establishing the baseline, which will be derived by evaluating state practices and state law. Once a liberty interest has been established, however, the procedures necessary to meet the requirements of the Due Process Clause must be established.

1. Which Test?

In *Austin*, the Court analyzed the procedural requirements for placement into OSP using the *Mathews* balancing test.[191] However, the Court used a different approach in the parole cases. In *Morrissey*, the Court listed what it considered to be the minimum requirements to satisfy due process.[192] Then, in *Wolff* and *Greenholtz*, the Court removed specific requirements in each case because the liberty interest in each was less.[193]

Thus, there are two different approaches to determine what minimum requirements are necessary to satisfy the requirement of due process. The *Mathews* test balances the liberty interest with the benefit gained by the additional procedures and the government's interest.[194] This test provides a framework by which courts can "evaluate the sufficiency of particular procedures."[195] More importantly, this test allows each situation to be evaluated in context, preserving the flexible nature of due process protection.[196]

Conversely, in the parole cases, the Court starts with a list of minimum requirements, then adds or subtracts requirements based on the liberty interest involved.[197] The list of minimum requirements would give prison administrators and inmates a clear description of what procedures the Court expects. The requirements listed in *Morrissey* include the absolute minimal requirements of due process—notice and the opportunity to be heard—as well as disclosure of the evidence, the opportunity to present and confront witnesses, a neutral hearing board and a written statement of the reasons for

[191] *See* Wilkinson v. Austin, 125 S. Ct. 2384, 2394 (2005).
[192] 408 U.S. 471, 489 (1972).
[193] *See supra* Section II.C.1.
[194] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
[195] *Austin*, 125 S. Ct. at 2395.
[196] *Id.*
[197] *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 489 (1972).

revoking parole.[198] These requirements are consistent with minimum requirements suggested by a group of correctional professionals:

> To ensure the reliability and integrity of the decision to place a prisoner in a [S]upermax prison, the following are necessary and can be provided without undue burden on prison staff.
>
> 1. There should be a clear legal standard – criteria – upon which the decision is based. . . .
>
> 2. The prisoner should know in advance what is at issue in the hearing. . . .
>
> 3. The hearing process of necessity will combine the inquisitorial with the adversarial. If facts must be withheld from the prisoner the hearing body must inquire about the facts to ensure their reliability. . . .
>
> 4. Prisoners should be able to call witnesses when there are facts at issue that witnesses may shed light on. . . .
>
> 5. [T]he hearing body must be independent, but must be willing, indeed required, to make its own inquiry of witnesses and information when further inquiry is indicated. . . .
>
> 6. In its decision, the hearing body should specifically find the facts upon which it relies and analytically relate those facts to the criteria for placement and retention. . . .
>
> 7. The fact finding and analytic reasoning process need to be specific enough to allow meaningful review of the decision at higher levels of the prison system.[199]

Thus, adhering to a list either derived from *Morrissey* or defined by correctional professionals would ensure that once a liberty interest was created, inmates would be guaranteed certain basic procedural rights.

However, a list of minimum requirements imposed by the courts defeats the flexible nature of due process, which calls for procedures to be evaluated by considering the "particular situation."[200] Perhaps in response to this need for flexibility, the Court has added and subtracted requirements from the list depending on the liberty interest at issue.[201] While this process allows the Court to evaluate the procedures needed for specific situations, it defeats the purpose of having a list of required procedures. If the requirements vary depending on the situation, a *Mathews*-like balancing test would be more appropriate. Finally, in *Sandin*, the Court suggested that "federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment."[202] Imposing a list of

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198 *Id.*

199 Corrections Professionals, *supra* note 16, at 16-18 (footnotes omitted).

200 *Austin*, 125 S. Ct. at 2395.

201 *See* Greenholtz v. Inmates of the Neb. Penal and Corr. Complex, 442 U.S. 1, 13-16 (1979); Wolff v. McDonnell, 418 U.S. 539, 560 (1974).

202 Sandin v. Conner, 515 U.S. 472, 482 (1995).

procedural requirements forces the court to interfere with day-to-day management of the prison instead of properly deferring to prison administrators, an approach the Court explicitly rejected in *Sandin*.[203]

One option is to use the *Mathews* test when confinement invokes a liberty interest and using the minimum requirements list when parole invokes the interest. However, this approach would cause considerable confusion as well as create unnecessary inconsistency. Having two sets of requirements, depending on which branch of a standard a court chooses to invoke, is overly confusing and burdensome. Furthermore, when both confinement and parole can invoke a liberty interest, choosing which test to use can be both difficult and arbitrary.

The alternative to maintaining two sets of standards is to use the *Mathews* test to balance all procedural requirements, whether the liberty interest is invoked through confinement, parole or both. However, the Court should always keep in mind the minimum requirements listed in *Morrissey* and strive to meet those requirements whenever those requirements would not overly burden the government. This combination test would require courts to first look at the three *Mathews* factors to evaluate the current procedures, as well as the procedures sought by the inmates. Next, courts would ask whether the additional procedures listed in *Morrissey* would benefit the inmate without overly burdening the government. This test would enable courts to maintain the flexibility required by the Due Process Clause while ensuring that the value of each core procedural requirement is evaluated.

2. The Additional Procedures Required

In light of this analysis, the Supreme Court should require the Department to add two procedures. First, the Department must provide inmates with "adequate advance notice of all the reasons for the proposed placement, and *disclosure* of the evidence subject to necessities of security and safety, so the prisoner can respond meaningfully to them at the placement hearing."[204] Second, the Department should allow inmates to call witnesses to resolve factual issues unless there are overriding safety concerns.[205]

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[203] *Id.*

[204] Corrections Professionals, *supra* note 16, at 7 (emphasis added).

[205] *See* Morrissey v. Brewer, 408 U.S. 471 (1972); Corrections Professionals, *supra* note 16.

The Department currently provides "a basic statement that [the inmate is] being considered for reclassification."[206] Specifically, the notice received by the inmates states: "You were referred to the Classification Committee for the following reason(s)," followed by several blank lines.[207] However, nothing requires the Department to tell the inmate the reason he is being considered for *transfer* to OSP, only the reasons for *referral* to the Committee.[208] The Department should tell the inmate the reasons why he is being considered for transfer, and outline the evidence supporting these reasons. Otherwise, the inmate cannot adequately prepare for the hearing because he will have no idea what the hearing is about.[209]

Similarly, the inmate must be allowed to call witnesses to resolve factual disputes unless there are overriding security considerations. Without a witness, an inmate's evidence is merely an allegation—one person's word against another's. Witnesses enable the inmate to substantiate his story and establish the facts of a situation. As Justice Marshall observed, without witnesses, "a disciplinary board cannot resolve disputed factual issues in any rational or accurate way."[210]

These procedures would neither overly burden the government nor interfere with the state's interest, especially in light of the benefit these procedures would provide the inmate.[211] The Department should already know the evidence and reasons for OSP placement consideration when the notice is issued. Thus, this requirement merely forces the Department to give the inmate advance notice of what evidence will be used against him. The benefit is the opportunity to establish the truth, the ultimate goal of any hearing. The state does face an increased burden by allowing inmates to call witnesses because of the danger of retribution and coercion. However, the state could refuse to allow witnesses when the state is concerned with security. This safeguard would address the state's burden, while inmates would benefit from the added procedural requirement when security is not as great a concern.

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206 Oral Transcript, *supra* note 97, at 10.

207 Austin v. Wilkinson, 189 F. Supp. 2d 719, 750 (N.D. Ohio 2002), *aff'd in part, rev'd in part*, 372 F.3d 246 (6th Cir. 2004), *rev'd*, 125 S. Ct. 2384 (2005); Joint Appendix at 58, Wilkinson v. Austin, 125 S. Ct. 2384 (2005) (No. 04-495), *available at* 2005 WL 273552.

208 *Austin*, 189 F. Supp. 2d at 750.

209 *Id.*; *see also* Oral Transcript, *supra* note 97, at 28-29 (testimony of Jules Lobel, esq.) (explaining that the notice gives vague notice: "[You get] a notice. The notice said you're a gang leader. How is a man supposed to respond to a vague notice that I'm a gang leader when he doesn't know what it is that they are saying is their—is the reason that he's a gang leader?").

210 Wolff v. McDonnell, 418 U.S. 539, 565 (1974) (Marshall, J., dissenting).

211 *See Austin*, 125 S. Ct. 2384.

The witness's safety could be ensured by allowing the hearing board to interview witnesses anonymously, without the inmate present. For example, the inmate could submit a list of witnesses to contact and a list of questions to ask. Those witnesses would then be called to testify in front of the hearing board that would ask all relevant questions, including those provided by the inmate. The witness can refuse to testify for safety concerns, and the state can refuse to call a witness if the state is concerned for his safety. The hearing board could question both inmates and prison guards in this fashion, then compile and analyze the statements, and issue its ruling based on those statements. The inmate would see only the ruling and the evidence used to support that ruling, not the entire record. This procedure would allow the hearing board to get a complete picture of the facts without the inmate knowing who testified and who testified to what.

3. The Release Decision

Finally, the Court should have addressed the procedures governing the inmate's continued placement and eventual release from OSP. When faced with the decision to release an inmate from OSP back to the general prison population, prison administrators must balance two factors.[212] First, prison administrators must minimize the inmate's exposure to the harsh conditions at OSP in the interest of the inmate's health, while maintaining the general safety and security of the prison and the general population.[213] In addition, to be released from OSP, an inmate must progress down two security levels, then stay free of any rule violations for twenty-four consecutive months or else receive a security override from the reclassification committee.[214] Therefore, an inmate will spend a *minimum* of two years at OSP before he can be transferred to a less restrictive prison, barring the expiration of his sentence.

The amount of time an inmate must remain at OSP and the importance of the release decision to the inmate and to the general prison population highlights the magnitude of the continued placement and release decisions. Consequently,

> the decision and process for review of [S]upermax confinement must be just as careful and reliable as the process for placing them in it initially, and should be similar to that initial placement. The need for clear standards, notice to the prisoner of what will be at issue at the hearing, inquiry into factual issues, and specificity in fact-finding and

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[212] Corrections Professionals, *supra* note 16, at 18-20.

[213] *Id.*

[214] INSPECTION REPORT, *supra* note 3.

> relating those facts to the standard for retention in [S]upermax confinement are equally important at the review stage.[215]

In other words, the release decision is just as important as the placement decision, and requires the same procedural protection as the placement decision.

C. THE FUTURE OF THE SUPERMAX PRISON

1. Future Supermax Challenges

The number of Supermax prisons in the United States has risen significantly in the last twenty-five years,[216] and there is little reason to believe that states will abandon their investments in these new, state-of-the-art maximum-security facilities.[217] Thus, the challenges to placement in Supermax prisons will only continue. Clear policy and procedural guidelines to govern Supermax placement, retention, and release are essential to ensure that inmates receive adequate due process at every step of imprisonment. In fact, "[t]he decision to place a prisoner in Supermax confinement is actually more significant than prison discipline, because it affects the quality of life of individual prisoners more than virtually every disciplinary sanction."[218] It is absolutely critical that the Supreme Court provide appropriate guidance to ensure that every inmate is guaranteed the minimum requirements of due process when facing transfer to a Supermax prison.

2. An Eighth Amendment Claim

Another issue for future courts and litigants to consider is whether an Eighth Amendment cruel and unusual punishment challenge to Supermax prisons would be more productive than a Fourteenth Amendment claim, such as in *Austin*.[219] Though the respondents originally filed an Eighth Amendment claim in *Austin*, the parties settled this issue before trial, and the district court never addressed the claim.[220]

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[215] Corrections Professionals, *supra* note 16, at 19-20 (footnotes omitted).

[216] *See* SUPERMAX HOUSING, *supra* note 25.

[217] For example, OSP cost $65 million to construct. INSPECTION REPORT, *supra* note 3.

[218] Corrections Professionals, *supra* note 16, at 10.

[219] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[220] Austin v. Wilkinson, 189 F. Supp. 2d 719, 722 (N.D. Ohio 2002), *aff'd in part, rev'd in part*, 372 F.3d 246 (6th Cir. 2004), *rev'd*, 125 S. Ct. 2384 (2005).

Supermax prisons have faced Eighth Amendment challenges in the past.[221] Though critical of the harsh conditions in Supermax prisons, courts have been reluctant to alter prison conditions and interfere with prison administration.[222] Courts have only gone so far as to hold that prisons cannot transfer mentally ill prisoners to Supermax prisons without violating the Eighth Amendment.[223] Thus, the only Eighth Amendment claims that have succeeded do not analyze the conditions of the prison itself, but, rather, the characteristics of the inmates placed in that prison.[224]

These Eighth Amendment claims allow the courts to analyze a tangential aspect of prison administration—placement of mentally ill prisoners—instead of considering the conditions of the prison themselves. Similarly, a Fourteenth Amendment claim, such as the one in *Austin*, challenges procedural aspects of Supermax placement, not the Supermax conditions themselves.[225] Thus, "[a] successful Fourteenth Amendment claim . . . represents much less significant judicial interference with the administration of the prison, and the argument for deference is correspondingly weaker in such a situation, though a court's response to the [S]upermax conditions may be just as strong" as in an Eighth Amendment claim.[226] As a result, future challenges to Supermax prisons will likely rely on a procedural Fourteenth Amendment claim, as in *Austin*, rather than a substantive Eighth Amendment claim. This consequence confirms the importance of clearly articulated standards by the Supreme Court.

V. CONCLUSION

Transfer to a Supermax prison is one of the most critical decisions affecting prisoners, given the severity of the conditions at Supermax prisons and the fact that transfer to a Supermax prison almost invariably increases the length of a prisoner's incarceration.[227] A clearly articulated liberty test is essential to provide guidance to lower courts facing challenges to Supermax prisons, to prison administrators establishing procedures for placement in Supermax prisons, and to inmates being transferred to

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[221] Mikel-Meredith Weidman, Comment, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505 (2004).

[222] *Id.* at 1532.

[223] *Id.*; *see, e.g.*, Jones'El v. Berge, 164 F. Supp. 2d 1096, 1098 (W.D. Wis. 2001); Ruiz v. Johnson, 154 F. Supp. 2d 995, 1000 (S.D. Tex. 2001); Madrid v. Gomez, 889 F. Supp. 1146, 1155 (N.D. Cal. 1995).

[224] Weidman, *supra* note 221, at 1542.

[225] *Id.* at 1548.

[226] *Id.*

[227] Corrections Professionals, *supra* note 16, at 10.

Supermax prisons. The Supreme Court's failure to establish a clearly-defined standard will only increase the uncertainty in the area of due process challenges to prison transfers.

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* J.D. Candidate 2007, Northwestern University School of Law. I would like to thank Katina Austin, John Ganz and Professor Ronald Allen for their guidance and comments in preparing this note. In addition, I would like to thank my parents, Joe Sutanto and Julia Trisnadi, my brother, Michael Sutanto, and my fiancé, John Shen, for their everlasting love and support.