HEARING THE CRIES OF PRISONERS: THE THIRD CIRCUIT'S TREATMENT OF PRISONERS' RIGHTS LITIGATION

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> The law, in all vicissitudes of government, fluctuations of passions, or flights of enthusiasm, will preserve a steady undeviating course; it will not bend to the uncertain wishes, imaginations and wanton tempers of men. . . . On the one hand it is inexorable to the cries and lamentations of prisoners; on the other, it is deaf, deaf as an adder to the clamors of the populace.[1]

I. INTRODUCTION

Despite assurances for more than fifteen years that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country,"[2] it is easy to be cynical about the efforts to extend the protections guaranteed by the Constitution to those incarcerated in our prisons and jails. In his novel *Falconer*,[3] John Cheever captures perfectly the frustrating chaos of prisoners' rights and institutional rules confronting an inmate attempting to sue his captors for a deprivation of his rights. Farragut, the protagonist, serving a ten-year sentence for fratricide, also happens to be a drug addict.[4] While in the general prison population, Farragut's drug problem is treated with a daily dose of methadone. After a search of his cellblock turns up contraband in his cell, however, Farragut is transferred to solitary confinement, where guards neglect to give him his methadone. Suffering ex-

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1 J. Adams, *Defense of the British Soldiers for the Boston Massacre* in C. ADAMS, 1 THE WORKS OF JOHN ADAMS, 2ND PRESIDENT OF THE UNITED STATES, 110 (1856).

2 Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).

3 J. CHEEVER, FALCONER (1977).

4 His addiction has nothing to do with his incarceration; Farragut reassures himself that "[t]he cream of the post-Freudian generation were addicts." *Id.* at 56.

cruciating withdrawal pains, Farragut bolts from his cell in an effort to get to the infirmary to obtain his medicine, but he is stopped by a guard wielding a chair. Farragut's injuries require twenty-two stitches and he decides to sue. After making certain that a number of his fellow inmates will serve as witnesses, Farragut arranges to see a lawyer who comes to the prison periodically to help inmates with their legal problems. The following exchange takes place, started by the lawyer:

> "Here are your facts," he said. . . . "You attempted escape on the eighteenth and you were disciplined. If you'll just sign this release here, no charges will be brought." "What kind of charges?" "Attempted escape," said the lawyer. "You can get seven years for that. But if you sign this release the whole thing will be forgotten." He passed Farragut the clipboard and a pen. Farragut held the board on his knees and the pen in his hand. "I didn't attempt escape," he said, "and I have witnesses. I was in the lower tier of cellblock F in the sixth lock-in of a maximum-security prison. I attempted to leave my cell, driven by the need for prescribed medicine. If an attempt to leave one's cell six lock-ins deep in a maximum-security prison constitutes an attempted escape, this prison is a house of cards."
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> "Oh my," said the lawyer. "Why don't you reform the Department of Correction?"
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> "The Department of Correction," said Farragut, "is merely an arm of the judiciary. It is not the warden and the assholes who sentenced us to prison. It is the judiciary."
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> "Oh ho ho," said the lawyer. "I have a terrible backache." He leaned forward stiffly and massaged his back with his right hand. "I got a backache from eating cheeseburgers. You got any home remedy for backaches contracted while eating cheeseburgers? Just sign the release and I'll leave you and your opinions alone. You know what they say about opinions?"
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> "Yes," said Farragut. "Opinions are like assholes. Everybody has one and they all smell."
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> "Oh ho ho," said the lawyer. . . . "You know Charlie?" the lawyer asked, softly, softly. "I've seen him in chow, " said Farragut. "I know who he is. I know that nobody speaks to him."
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> "Charlie's a great fellow," said the lawyer. "He used to work for Pennigrino, the top pimp. Charlie used to discipline the chicks." Now his voice was very low. "When a chick went wrong Charlie used to break her legs backwards. You want to play Scrabble with Charlie—you want to play Scrabble with

Charlie or you want to sign this release?"[5]

Life at least sometimes imitates art; for those who would dismiss Cheever's depiction as artistic license, I offer the following from the United States Supreme Court. In 1984, Chief Justice Burger, writing for a majority of the Court, noted that "the way a society treats those who have transgressed against it is evidence of the essential character of that society."[6] The full quote makes clear, or at least strongly suggests, that Chief Justice Burger intended to say that a society's willingness to recognize rights for those incarcerated for having violated its laws bespeaks (dare I say) a kinder and gentler nation.[7] However, inasmuch as Chief Justice Burger's prescription comes in a case in which the Court ruled categorically that the fourth amendment does not apply in prisons,[8] one may wonder about the Court's apparent dismal view of the essential character of society.

Measured against Justice Burger's standard, the Court of Appeals for the Third Circuit has shown at least somewhat more concern for society's character. In this article we will examine the Third Circuit's recent treatment of cases concerning prisoners' rights.[9] I do not intend to present a comprehensive overview of the court's docket in the area of prisoners' rights over the past ten to fifteen years. Rather, I will consider three cases in depth—*Helms v. Hewitt*,[10] *Shabazz v. O'Lone*,[11] and *Monmouth County Correctional Institution Inmates v. Lanzaro*[12]—two of which went on to the Supreme Court.

I chose these cases for the following two reasons. First, the cases raised serious claims involving important issues; in all three cases, the Third Circuit faced claims from inmates that prison offi-

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5 *Id.* at 65-66.

6 Hudson v. Palmer, 468 U.S. 517, 523-24 (1984).

7 The full quote, coming after a brief delineation of the various constitutional rights extended to inmates by the Court over the prior decade, reads as follows: "The continuing guarantee of these substantial rights to prison inmates is testimony to a belief that the way a society treats those who have transgressed against it is evidence of the essential character of that society." *Id.*

8 *Id.* at 537. For a fuller discussion of *Hudson*, see *infra* notes 154-66 and accompanying text.

9 I should clarify what I mean by "prisoners' rights." Persons incarcerated seek access to the courts for many reasons, including appeal of their underlying convictions and to gain release for unlawful detention through the writ of habeas corpus. This article deals only with a third category of cases brought by inmates: those in which inmates have alleged that the conditions of their confinement, either collectively or as a result of specific regulations or practices, deprive them of rights guaranteed to them by the United States Constitution.

10 655 F.2d 487 (3d Cir. 1981), *rev'd*, 459 U.S. 460 (1983).

11 782 F.2d 416 (3d Cir. 1986), *rev'd*, 107 S. Ct. 2400 (1987).

12 834 F.2d 326 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1731 (1988).

cials had infringed important constitutional rights: the right to due process in *Helms*, the right to free exercise of religion in *Shabazz*, and the right to privacy, encompassing abortion, in *Lanzaro*. Equally important, the court took the cases seriously, which is not always true in prisoners' rights litigation. Second, the court was provided with an opportunity to speak with its own voice on the issue presented; although the Third Circuit decided each case against the backdrop of what the Supreme Court had written about prisoners' rights in general and on related issues, in none of the cases was the Third Circuit confronted with Supreme Court precedent that had decided the precise issue presented by the inmate.

In each of the cases, the Third Circuit supported an expansion of rights for inmates beyond what the Supreme Court had previously recognized, and, just as important, arguably beyond where the Supreme Court had indicated a willingness to go. The Third Circuit arrived at its decisions generally using the tests and framework established by the Supreme Court. Nonetheless, the basic approach to the very idea of prisoners' rights taken by the Third Circuit was, I hope to demonstrate, significantly different from that taken by the Supreme Court. Moreover, this difference was critical to the result reached by the Third Circuit in each case.

Whether, of course, these three cases are representative of the Third Circuit's general approach to prisoners' rights litigation is a more difficult claim to make. In any event, examining these three cases will not only allow us to explore the Third Circuit's approach toward prisoners' rights litigation, but will also allow us to consider some broader issues concerning the interaction of the lower federal courts with the Supreme Court and the role of the lower federal courts in constitutional adjudication. Specifically, the interplay between the Third Circuit and the Supreme Court in these cases suggests the extent to which the lower federal court does not merely receive and apply doctrine from the higher Court. Instead, the interplay is more of a dialogue in which the lower court has an important role to play in formulating doctrine, even in areas in which the Supreme Court is very active.

In contrast to the wealth of material exploring and dissecting the work of the Supreme Court, there have been relatively few studies of the judicial opinions of, and doctrinal advances emanating from, the courts of appeals.[13] There have been studies of individual

[13] Political scientists and some legal scholars have studied the lower federal courts from an institutional perspective. *See, e.g.*, R. CARP & R. STIDHAM, THE FEDERAL COURTS (1985); F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME

cases, and occasional biographies of important lower court judges such as Learned Hand or Jerome Frank.[14] Some, like Frank, have commanded attention because of the magnitude and originality of their work, although generally for contributions off the bench rather than on it.[15] However, partly for justifiable reasons[16] and partly due to neglect, the lower courts have simply not received the attention accorded the Supreme Court and have certainly not received the attention they deserve.

II. BACKGROUND

To understand fully the recent decisions of the Third Circuit that are the subject of this article, it is necessary to place them in the context of what the Supreme Court has said and actually ruled in the past two decades regarding prisoners' rights. This is true because the Supreme Court is, in the formal structure of the federal court system, a superior court to the court of appeals, with both the authority and the opportunity to review Third Circuit decisions and to reverse any decisions the Court decides are in error. With regard to constitutional adjudication, this is especially true because the Court has come to assume the role, both real and symbolic, as the ultimate expositor of individual rights under the Constitution.[17] What follows is a brief review of the

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COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM (1927); J. HOWARD, COURTS OF APPEALS IN THE FEDERAL JUDICIAL CIRCUIT (1981). There have also been a number of historical studies, including one of the Third Circuit itself. *See, e.g.*, S. PRESSER, STUDIES IN THE HISTORY OF THE UNITED STATES COURTS OF THE THIRD CIRCUIT (1982); M. SCHICK, LEARNED HAND'S COURT (1970); M. TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY, 1789-1816 (1978). In addition, the role of the lower federal courts, and particularly the Fifth Circuit Court of Appeals, in protecting civil rights after Brown v. Board of Education, 347 U.S. 483 (1954), has been the subject of considerable study. *See, e.g.*, J. BASS, UNLIKELY HEROES (1981); J. PELATSON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961).

[14] *See, e.g.*, G. WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILE OF LEADING AMERICAN JUDGES 251-91 (1976); R. GLENNON, THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW (1985).

[15] *See, e.g.*, J. FRANK, LAW AND THE MODERN MIND (1930); J. FRANK, COURTS ON TRIAL (1949).

[16] *See infra* notes 169-72 and accompanying text,

[17] *See* A. COX, THE COURT AND THE CONSTITUTION 373 (1987) Archibald Cox described the Court as "the ultimate guardian of liberty, equality, and property against oppression by the Executive and Legislative Branches or by the States." Cox further argues that the Court has been especially aggressive in this role since World War II, asserting that this is the predominant theme of the Court's work in the last forty years. *Id.* at 177-83. *See also* H. ABRAHAM, THE JUDICIARY: THE SUPREME COURT IN THE GOVERNMENTAL PROCESS 95 (7th ed. 1987) ("Whatever one's individual views may be regarding either the wisdom or the appropriateness

history of prisoners' rights litigation, with the emphasis on the key Supreme Court decisions of the past two decades.[18]

A. The Rise and Fall of the "Hands Off" Doctrine

"[L]awful incarceration," noted Justice Murphy in 1948, "brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[19] For most of the century and a half or so since Americans began in earnest to build and fill prisons,[20] courts simply refused to hear complaints by inmates that conditions of their confinement violated their constitutional rights. In *Stroud v. Swope*,[21] for example, the Ninth Circuit affirmed the dismissal of an action by Robert Stroud, better known as "the Birdman of Alcatraz," challenging a prison regulation forbidding inmates to transact business. Although Stroud's expansive claim[22] to an "unlimited" right to engage in outside business activities would probably have been rejected no matter who made it, the Ninth Circuit did not even reach the merits. Instead,

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of the Court's role in our democratic society, one thing is clear: the Supreme Court of the United States is beyond question *the* great and ultimate defender of the basic freedoms of the American people.").

18 For a fuller treatment of recent trends in prisoners' rights litigation, see Berger, *Withdrawal of Rights and Due Deference: The New Hands-Off Policy in Correctional Litigation*, 47 UMKC L. REV. 1 (1978); Jacob & Sharma, *Disciplinary and Punitive Transfer Decisions and Due Process Values In The American Correctional System*, 12 STETSON L. REV. 1 (1982); Willens, *Structure, Content and the Exigencies of War: American Prison Law After Twenty-Five Years, 1962-87*, 37 AM. U.L. REV. 41 (1987) (an ambitious and interesting treatment focusing as much on the nature of prison as an institution as on court decisions).

19 Price v. Johnston, 334 U.S. 266, 285 (1948). *Price* was not a case where the inmate challenged a condition of confinement. At issue was whether the prisoner would be allowed to leave the institution to argue in person his petition for writ of habeas corpus. The Court concluded that courts of appeals, within their discretion, "do have the power . . . to issue an order in the nature of a writ of habeas corpus commanding that a prisoner be brought to the courtroom to argue his own appeal." *Id.* at 284. However, the Court determined that it was unnecessary to remand the case to the Circuit Court of Appeals to exercise its discretion since the case was being sent back to the district court for further proceedings. *Id.* at 286.

20 For one of the best and most interesting studies of the rise of prisons, see D. ROTHMAN, DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (1971) (placing the rise of the penitentiary in the context of the creation of a number of other institutions during the Jacksonian period such as the almshouse and the insane asylum).

21 187 F.2d 850 (9th Cir. 1951).

22 Stroud compounded his allegation with the charge that the prison regulation, although it was promulgated in 1931 and applied on its face to all prisoners, was in fact specifically directed against him, and was thus part of a nearly twenty-year conspiracy against him by the prison administrators. *Id.* at 850.

the court noted that "it is well settled that it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined."[23]

This "hands off" doctrine, a refusal to allow inmates their day in court to complain about unconstitutional conditions of confinement, was based on the premise that prison administrators were entitled to unfettered discretion in the running of their institutions.[24] It also reflected a view of the inmate best summarized by a frequently-quoted decision of the Virginia Court of Appeals of 1871[25] that described prisoners as "slaves of the State" having "not only forfeited [their] liberty but all [their] personal rights except those which the law in its humanity accords to [them]."[26]

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[23] *Id.* at 851-52. *See also* Powell v. Hunter, 172 F.2d 330, 331 (10th Cir. 1949) (court refused to hear challenge to loss of "good time" credits following disciplinary charge, declaring that "[t]he prison system is under the administration of the Attorney General . . . not the district courts. The court has no power to interfere with the conduct of the prison or its discipline. It may discharge upon habeas corpus only where the petitioner is illegally detained.")

Not all courts acquiesced in this abdication. In Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944), the court reversed the dismissal of the prisoner's petition for writ of habeas corpus, which alleged, among other things, that while in prison he had "suffered bodily harm and injuries and was subjected to assaults, cruelties and indignities from guards and co-inmates." *Coffin*, 143 F.2d at 444. Ruling that habeas corpus could be used to challenge an "unlawful restraint of personal liberty" even for a person in lawful custody, the court reasoned:

> A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law. While the law does take his liberty and imposes a duty of servitude and observance of discipline for his regulation and that of other prisoners, it does not deny his right to personal security against unlawful invasion. When a man possesses a substantial right, the courts will be diligent in finding a way to protect it. The fact that a person is legally in prison does not prevent the use of habeas corpus to protect his other inherent rights.

Id. at 445.

[24] *See, e.g.*, Willens, *supra* note 18, at 72. *See generally* Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Prisoners*, 72 YALE L. J. 506 (1963).

[25] Ruffin v. Commonwealth, 62 Va. 790 (1871).

[26] *Id.* at 796. The equating of a prisoner with a slave had at least some basis in fact because of the rise of the convict lease system in the South immediately following the Civil War. Under that system, the states allowed businessmen and local authorities to force convicts to work for them in exchange for a fee paid to the state by the businessman and an agreement to maintain and guard the convict. The convict lease system was not identical to the old system of plantation slavery. It was one of a number of types of forced labor, including peonage, in the post-bellum South that owed as much to the economic conditions of the New South as to the Old South. Still, as Edward Ayers has written, "[o]bviously, the roots of such forced labor reached into slavery, not only for the work force itself but also for the

By the 1960s, courts became more receptive to inmates' claims. Inmates were able to take advantage of a legal system that was opening up to the poor and other previously unrepresented groups,[27] aided by a new wave of public interest lawyers for whom inmates were another clientele.[28] Courts came to recognize, albeit slowly, that inmates retained at least some rights in prison; some judges began to entertain suits brought by inmates alleging that those rights had been violated.[29] Along with this

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habits of thought that encouraged employers to turn so readily to such heavy-handed means of securing labor." E. AYERS, VENGEANCE & JUSTICE: CRIME AND PUNISHMENT IN THE 19TH CENTURY AMERICAN SOUTH 191 (1984). *See also* Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J. OF S. HIST. 31 (1976).

More is at work in *Ruffin* than a description of the convict lease system, for the imagery and rhetoric of slavery endured after emancipation and the ratification of the thirteenth amendment. It is interesting that such imagery was often used to express support or compassion for a given segment of society. Thus, radical labor leaders of the late nineteenth century identified their audiences as "slaves" to the capitalist "masters" in the labor struggles of the time. One pamphlet prepared by the anarchist August Spies in 1886, shortly before the Haymarket Square bombing in Chicago, began "REVENGE! Workingmen to Arms!!! Your masters sent out their bloodhounds—the police; they killed six of your brothers at McCormicks this afternoon." It continued, "[y]ou have been miserable and obedient slaves all these years. Why? To satisfy the insatiable greed, to fill the coffers of your lazy thieving master?" *See* P. AVRICH, THE HAYMARKET TRAGEDY 190 (1984). As a second example, prostitution was frequently referred to as "white slavery" by the antiprostitution reformers at the turn of the twentieth century, with obvious sympathy and solicitude for the women and young girls they perceived as involuntarily lured into the profession. The Mann Act, passed in 1910, which made it a federal crime to transport a woman across state lines for "immoral purposes," was directed against the "white slave traffic." *See* P. BOYER, URBAN MASSES AND MORAL ORDER IN AMERICA, 1820-1920, 191-204 (1978). For a review of interesting efforts to define "slavery" and place changing concepts of slavery in historical and cultural perspective, see Soifer, *Status, Contract and Promises Unkept*, 96 YALE L.J. 1916 (1986); D. B. DAVIS, SLAVERY AND HUMAN PROGRESS 8-22 (1984); O. PATTERSON, SLAVERY AND SOCIAL DEATH (1982).

27 John Hart Ely, for one, has argued that the guiding principle behind the judicial activism of the Warren Court, and that which differentiates it from the activism of the *Lochner* era, was a focus not on defining fundamental substantive values, but on making certain that the political process opened up and remained open for all, eliminating discrimination against minorities, including "society's habitual unequals." *See* J. ELY, DEMOCRACY AND DISTRUST 73-75 (1980). *See also* COX, *supra* note 17, at 180.

28 On the renewed interest in public interest law in the 1960s, see J. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 280-83 (1976); L. FRIEDMAN, A HISTORY OF AMERICAN LAW, 677-78 (2d ed. 1985). On the rise of law school legal clinics addressing prisoners' legal needs and rights, see Johnson v. Avery, 393 U.S. 483, 495-96 (1969) (Douglas, J., concurring); Jacob & Sharma, *Justice After Trial: Prisoner's Need for Legal Services in the Criminal Correctional Process*, 18 U. KAN. L. REV. 493 (1970).

29 For a brief overview of the period at the very beginning of this time of transi-

new sensitivity to the rights of inmates came a new focus within the institutions on rehabilitation, which provided its own impetus and even justification for recognizing the rights of prisoners.[30]

B. Prisoners' Rights Litigation In the Supreme Court: The Early Cases

The retreat from the "hands off" doctrine was led at first by lower federal courts[31] and commentators.[32] The Supreme Court's initial forays into the field were tentative. In *Cooper v. Pate*,[33] the Court, in a brief, one-paragraph per curiam opinion reversed the dismissal of an inmate's claim that he was denied the opportunity to purchase certain items and denied other privileges accorded other inmates because of his religious beliefs. The Court set forth no guiding principles on the rights of those incarcerated, nor did it acknowledge that its decision was inconsistent with the "hands off" policy that had dominated for so long.[34] The Court stated modestly that "[t]aking as true the allegations of the complaint, as they must be on a motion to dismiss, the complaint stated a cause of action and it was error to dismiss it."[35] In support of this proposition, the Court relied on two lower court decisions, one from the Second Circuit and one from the Fourth Circuit.[36] Four years later, in the last term of the Warren era, the Court, again in a one-paragraph per curiam opinion, upheld a lower court decision striking down an Alabama statute that required state prisons to be racially segregated.[37] In a concurring opinion, Justice Black stated that such segregation could be justified if necessitated by security concerns within the

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tion, see Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985 (1962).

30 Willens, *supra* note 18, at 83-84.

31 For example, both the issues of censorship of prisoner mail and religious discrimination were considered by lower federal courts significantly before those issues were addressed by the Supreme Court. *See, e.g.*, Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961) (recognizing right to be free of discrimination based on religion); Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970) (recognizing first amendment implications of censorship of prisoners mail). *See generally* Note, *supra* note 29.

32 *See* Hirschkopf & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795 (1969); Note, *supra* note 29.

33 378 U.S. 546 (1964).

34 The Seventh Circuit, in affirming the dismissal of the inmate's complaint, had made clear that it was relying on the "hands off" doctrine. Cooper v. Pate, 324 F.2d 165 (7th Cir. 1963), *rev'd*, 378 U.S. 546 (1964).

35 *Cooper*, 378 U.S. at 546.

36 *Id.* (citing Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961); Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961)).

37 Lee v. Washington, 390 U.S. 333 (1968).

institution.[38]

The Court gave a somewhat fuller treatment to the claim of a Tennessee prisoner during the next term in *Johnson v. Avery*.[39] In *Johnson*, the Court struck down as a denial of inmates' right of access to the courts, a Tennessee prison regulation which stated that "[n]o inmate will advise, assist or otherwise contract to aid another, either with or without a fee, to prepare Writs or other legal matters."[40] State officials sought to justify the regulation based on concerns of security and discipline. Even though the Court appeared to concede that there was some merit to the official concerns,[41] the Court gave them surprisingly short shrift:

> There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene. It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with such rights, the regulations may be invalidated.[42]

The Court's main objection to the regulation was that it interfered with the right of inmates to petition for a writ of habeas corpus (as opposed to raising challenges to conditions of confinement), especially for illiterate or poorly educated inmates.[43] In this regard, the decision in *Johnson* is not much of a departure; even at the height of the "hands off" doctrine, courts recognized that inmates had a right of access to courts to challenge the legality of their confinements.[44] Prison officials could prohibit "writ writers" if alternatives existed to ensure the inmates' access to the courts, but the Court seemed to suggest that the burden was on the officials to demonstrate the availability and effectiveness of such alternatives.[45]

In his dissent in *Johnson*, Justice White joined by Justice Black, gave more weight to the administrators' fears of disciplinary and se-

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38 *Id.* at 334 (Black, J., concurring). Justice Black sought "to make explicit . . . that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Id.*

39 393 U.S. 483 (1969).

40 *Id.* at 484.

41 *See id.* at 488. "It is indisputable that prison 'writ writers' like petitioner are sometimes a menace to prison discipline and that their petitions are often so unskillful as to be a burden on the courts which receive them." *Id.*

42 *Id.* at 486.

43 *Id.* at 487.

44 *See Ex parte* Hull, 312 U.S. 546 (1941). *See also supra* notes 19-21 and accompanying text.

45 *Johnson*, 393 U.S. at 489-90.

curity problems posed by jailhouse lawyers.[46] Nevertheless, the dissenters were sympathetic to the plight of poorly-educated inmates trying to petition courts; in fact, Justice White suggested that it was precisely the poor quality of service provided by jailhouse lawyers that justified the regulation. Justice White argued that prisoners' right of access to the courts should be secured by more effective and carefully controlled alternatives.[47]

For the next few years after *Johnson*, Supreme Court cases involving prisoners' rights followed the same pattern: there was a recognition generally that inmates had rights, and that their complaints in given actions might state valid claims, but the court offered no elaboration of the parameters of those rights, or whether the exercise of such rights must change in a prison setting. For example, the Court recognized that inmates enjoyed some first amendment rights in *Cruz v. Hauck*[48] and *Younger v. Gilmore*.[49] Moreover, in *Cruz v. Beto*,[50] the Court endorsed the view that prisoners had at least some right to the free exercise of religion. However, in none of the cases did the Court spell out the content of those rights or even reach the merits of the prisoners' suits.[51]

C. *The October 1973 Term*

The October 1973 term marked something of a turning point. In that year, the Supreme Court made its grand entrance into the field of prisoners' rights with a trilogy of decisions. The cases represented the first effort by the Court to discuss prisoners' rights in depth, not only to identify specific rights retained by inmates, but also to set out some general guiding principles. In so doing, the Court accorded the subject the type of attention and a degree of analysis that such cases had simply not received up to that point.

The first of these cases was *Procunier v. Martinez*,[52] decided in April. At issue in *Martinez* were a series of regulations governing prisoners' mail. Operating on the premise that "personal correspondence by prisoners is 'a privilege, not a right,' "[53] the regula-

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46 *Id.* at 499 (White, J., dissenting).
47 *Id.* at 501-02 (White, J., dissenting).
48 404 U.S. 59 (1971).
49 404 U.S. 15 (1971).
50 405 U.S. 319 (1972).
51 *See* Calhoun, *The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal*, 4 HASTINGS CONST. L. Q. 219, 222 n.14 (1977).
52 416 U.S. 396 (1974).
53 *Id.* at 399 (citations omitted).

tions at issue gave prison officials nearly unfettered authority to censor inmate mail. One rule prohibited inmates from writing letters in which they "unduly complain" or "magnify grievances" about the prison.[54] Another rule defined "contraband" to include writings " 'expressing inflammatory political, racial, religious or other views or beliefs.' "[55] Yet another rule forbade inmates from sending or receiving letters " 'that pertain to criminal activity; are lewd, obscene, or defamatory; contain foreign matter, or are otherwise inappropriate.' "[56] The regulations allowed prison officials to screen inmate mail and to take any one of a number of steps if they found an offending letter, from refusing to deliver the letter to issuing a disciplinary charge to the inmate.[57]A three-judge panel of the United States District Court ruled that the regulations were invalid and the Supreme Court affirmed.

The Court began by confronting directly for the first time and rejecting the traditional "hands off" approach that had governed prisoners' rights litigation. Justice Powell, writing for the Court, conceded the difficulty in running correctional institutions: "Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. . . .[C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform."[58] "But," he continued,

> a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.[59]

Having gone that far, the Court declined the opportunity to delineate the scope of first amendment rights for those who are incarcerated. Instead, because the rights of inmates to send and receive mail are "inextricably meshed" with the rights of persons outside the institution with whom they would communicate, the Court chose to decide the case on what it termed the "narrower" grounds of how the censorship of prisoners' mail violated the first amendment rights

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54 *Id.*
55 *Id* (citation omitted).
56 *Id.* at 399-400 (citation omitted).
57 *Id.* at 400.
58 *Id.* at 404-05.
59 *Id.* at 405-06 (citing Johnson v. Avery, 393 U.S. 483, 486 (1969)).

of those not incarcerated.[60] The Court reviewed the various standards that had been applied by the lower federal courts to the problem of censorship of prisoners' mail.[61] The Court then looked to its own prior decisions interpreting the first amendment in various settings in *Tinker v. Des Moines Independent Community School District*,[62] *Healy v. James*,[63] and *United States v. O'Brien*[64] for the appropriate standard. After balancing the State's interest in maintaining the security of the institution against the first amendment interests at stake, the Court decided that some censorship of prisoners' mail might be justified (for example, the refusal to deliver mail containing escape plans) but only when the following criteria are met:

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. . . . Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.[65]

Justice Powell made clear that officials could not "censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements."[66] Employing that standard, the Court had little trouble invalidating the regulations at issue as sweeping too broadly. In addition, the Court held that the prison had to establish procedural protections to notify an inmate when a letter written by him or addressed to him was being held by officials. This would provide the inmate with "a reasonable opportunity to protest that decision," and provide a way to have the ultimate decision made by someone other than the person who originally seized the letter.[67]

Justices Marshall and Brennan concurred, but stated that they

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60 *Id.* at 408.

61 Lower court decisions had ranged from application of the "hands off" approach, through a requirement that the system of regulation be "rational," to an insistence that prison officials demonstrate a "compelling state interest" to justify restrictions. *Compare* McCloskey v. Maryland, 337 F.2d 72 (4th Cir. 1964) *with* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972).

62 393 U.S. 503 (1969) (striking down a high school regulation banning the wearing of black armbands to protest the Vietnam conflict).

63 408 U.S. 169 (1972) (striking down the actions of state college officials who refused to give official recognition to local chapter of *Students for a Democratic Society*).

64 391 U.S. 367 (1968) (upholding application of a statute prohibiting destruction of draft registration cards to someone who burnt draft card in protest of the Vietnam conflict).

65 *Martinez*, 416 U.S. at 413.

66 *Id.*

67 *Id.* at 418.

would have decided the case based on the first amendment rights of the prisoners. "A prisoner," Justice Marshall asserted, "does not shed such basic First Amendment rights at the prison gate."[68] Justice Marshall concluded his opinion with a stirring explication of the first amendment's importance to those incarcerated:

> When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment. Whether an O. Henry writing his short stories in a jail cell or a frightened young inmate writing his family, a prisoner needs a medium for self-expression. It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit.[69]

This paean to the importance of the first amendment interests at stake ironically did not really change the analysis; Justice Marshall indicated that he would employ the same standard to evaluate the restrictions as Justice Powell had set forth in the majority opinion.[70]

Two months later in *Pell v. Procunier*,[71] the second of the three cases, the Court was asked to decide the constitutionality of a prison regulation that prohibited face-to-face interviews between members of the media and inmates specifically selected by the journalists. This time the Court upheld the regulation in an opinion handed down near the end of the term. However, because the lower court had struck down the regulation as a violation of the rights of the inmates, as opposed to the press, the Court was forced to confront the issue left undecided in *Martinez* of whether prisoners retained first amendment rights in prison.

The Court ruled that they did. After quoting Justice Murphy's observation in an earlier case in which he declared that "incarceration brings about the necessary withdrawal or limitation of many privileges,"[72] Justice Stewart, writing for the majority, stated that, "[i]n the First Amendment context a corollary of this principle is that a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate

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68 *Id.* at 422 (Marshall, J., concurring).
69 *Id.* at 428 (Marshall, J., concurring).
70 *Id.* at 423-24 & n.4 (Marshall, J., concurring).
71 417 U.S. 817 (1974).
72 *Id.* at 822 (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)).

penological objectives of the corrections system."[73]

The Court held that challenges to practices that infringe upon prisoners' first amendment rights must be assessed in light of "legitimate penological objectives." Justice Stewart delineated four such objectives: deterrence, protection of society, rehabilitation and security.[74] The Court then upheld the regulations, noting the special security problems posed by actual visits to the institution from those outside.

Justice Stewart's analysis drew heavily on non-prison precedents, even though the rights at issue were those of the inmates. Relying in part on cases analyzing "time, place and manner" restrictions on the freedom of speech in non-prison settings,[75] the Court stressed that the regulation operated in a content-neutral fashion[76] and that alternative channels of communication existed—including use of the mails, the ability to communicate through family, friends or attorneys whose opportunity to visit was not curtailed, and the availability of random "conversations" between the prison population and visiting members of the media.[77] Nonetheless, Justice Stewart made clear that the Court was mindful that it was deciding a case involving a prison setting:

> We would find the availability of such alternatives [avenues of communication] unimpressive if they were submitted as justification for governmental restriction of personal communication among members of the general public. We have recognized, however, that "[t]he relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen," and that the "internal problems of state prisons involve is-

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73 *Id.*

74 *Id.* at 822-23.

75 *Id.* at 826 (citing Grayned v. City of Rockford, 408 U.S. 104 (1972); Cox v. Louisiana, 379 U.S. 536 (1965); Cox v. New Hampshire, 312 U.S. 569 (1941)).

76 While neutral on its face, the regulation may not in fact be as content neutral as the Court suggested. It may make sense to label as "content neutral" a regulation that limits use of a soapbox in Central Park, given the wide range of the interests of the various types of persons who might use it. However, the same is not necessarily true in the prison setting. I doubt the Court would have gone out on a limb if it had assumed that inmates and members of the media generally seek each other out to talk about one of two subjects: the inmate's case that landed him in prison or conditions in the facility. If that is the case, the regulation at issue in *Pell* begins to look significantly more like the blatantly content specific regulations struck down in *Martinez*, except that it sweeps even more broadly, a feature that should render the regulation even more objectionable under standard first amendment analysis, instead of saving it.

77 *Pell*, 417 U.S. at 827-28.

sues. . . peculiarly within state authority and expertise."[78]

As in *Martinez*, members of the media also objected to the regulation as a violation of their rights.[79] Unlike the earlier case, however, the fact that the restrictions again directly affected persons outside the institution did not change the result. The Court found that the regulation was not "part of an attempt by the State to conceal the conditions in its prisons," and noted that, under the regulation, the press was relegated to the same right of access to the institution as the general public.[80] Again relying on a non-prison precedent, *Branzburg v. Hayes*,[81] the Court rejected the view that the first amendment gave the media any right of special access to the institution and its prisoners.[82]

Justice Powell, joined by Justices Marshall and Brennan, in dissent, made little mention of the prison setting of the case, but made much of the underlying values of the first amendment which he perceived as being threatened by the majority decision. "What is at stake here," asserted Justice Powell, "is the societal function of the First Amendment in preserving free public discussion of governmental affairs."[83] Justice Powell cited the findings of the district court that the ban on interviews did in fact affect the quality and accuracy of news reporting about the institution. Justice Powell asserted that the heavier burden of justification set forth in *Martinez* should govern this case as well.[84] Justice Powell found the total ban to be unnecessarily broad; he would have struck the balance somewhere between the absolute ban on press interviews required by the regulations and upheld by the majority, and the case-by-case evaluation of interview requests the lower court had mandated. Justice

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78 *Id.* at 825-26 (quoting Preiser v. Rodriguez, 411 U.S. 475, 492 (1973)).

79 The plaintiffs who were members of the press, argued that the regulation had to be evaluated under the "clear and present danger" test because of its effect on them. *Id.* at 829. The Court, however, rejected this contention. *Id.* at 834.

80 *Id.* at 830. The effect of the regulation was to limit persons who could visit with an inmate to those with whom the inmate had a special relationship, such as his family or attorneys. *Id.*

81 408 U.S. 665 (1972).

82 *Pell*, 417 U.S. at 834-35. In Saxbe v. Washington Post Co., 417 U.S. 843 (1974), a companion case to *Pell*, the Court applied the same reasoning as was adopted in *Pell*. In so doing, the *Saxbe* Court rejected a challenge to a regulation promulgated by the Federal Bureau of Prisons which prohibited face-to-face interviews between the media and inmates. *Id.* at 850.

83 *Pell*, 417 U.S. at 862 (Powell, J., dissenting).

84 *Id.* at 865-66 (Powell, J., dissenting). Specifically, Justice Powell noted that *Martinez* required prison officials to demonstrate that the regulations further a substantial government interest unrelated to the suppression of expression and that no less restrictive alternative would serve that interest. *Id.* at 866 (Powell, J., dissenting).

Powell stood ready to accept a policy that set forth "reasonable time, place and manner restrictions" on interviews, including a limit on the number of interviews any one inmate could have over a given time period.[85]

The decision in *Wolff v. McDonnell*,[86] the last of the term's three prisoners' rights cases, was handed down two days after *Pell*. The main issues in *Wolff* were whether an inmate about to lose "good time"[87] credits was entitled to some procedural due process protection before the credits were taken away, and, if so, what were those procedural protections.[88] Two years earlier, in *Morrissey v. Brewer*,[89] the Court had held that a person faced with revocation of parole was entitled to a hearing, with written notice of the reason for the revocation, disclosure of the evidence against him, a right to call witnesses and present evidence, a right to confront adverse witnesses, a right to a neutral and detached finder of fact, and a right to a statement of reasons for the decision.[90] In *Wolff*, the Court similarly held that at least some process was due those threatened with the loss of "good time."

The Court again began with a confrontation and rejection of the "hands off" doctrine with what was to become one of its most

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85 *Id.* at 873 (Powell, J., dissenting). The reason Justice Powell would have allowed limits on the number of interviews with any particular inmate—and one of the main fears of prison officials and administrators that prompted the regulations at issue—was what came to be known in the course of the litigation as the "big wheel" phenomenon: the belief by administrators that repeated press interviews with selected inmate leaders tended to enhance their standing and influence among other prisoners and enabled them to spur the other prisoners on to acts of violence. *Id.* at 866 (Powell, J., dissenting).

86 418 U.S. 539 (1974).

87 "Good time" credits, also known as commutation time, reduce an inmate's prison sentence by taking time off his or her sentence for days or months served without serious disciplinary infraction.

88 The litigation raised two other issues. First, the Court held that allowing prison officials to open mail addressed to prisoners from their attorneys and to inspect that mail for contraband did not violate the inmates' rights as long as the mail was opened in their presence and was not read. *Id.* at 574-77. Second, the Court considered a regulation by which the warden appointed one specific inmate legal advisor to assist inmates in filing legal challenges and that further prohibited inmates from seeking the advice of other inmates on legal matters without the permission of the warden. The Court agreed with the court of appeals that a remand was necessary to develop a record from which it could be determined whether the appointed legal advisor could handle the work load. In the course of its ruling, however, the Court rejected the argument that the requirement to provide legal assistance set forth in Johnson v. Avery, 393 U.S. 483 (1969), applied only to habeas corpus petitions and not to civil rights actions challenging conditions of confinement. *Wolff*, 418 U.S. at 577-80.

89 408 U.S. 471 (1972).

90 *Id.* at 489.

frequently quoted passages: "[T]hough his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country."[91] However, after listing prior decisions recognizing various rights retained in prison the Court stepped back and stated:

> Of course, as we have indicated, the fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed. Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply. In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.[92]

As noted, the Court held that the threatened loss of "good time" did implicate the right to procedural due process retained by prisoners. Although the Court did not find that right in the Constitution itself, it instead based it on an entitlement to a "liberty interest" created by statute,[93] analogous to statutorily-created "property interests" recognized by the Court in *Board of Regents v. Roth*.[94] As to

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91 *Wolff*, 418 U.S. at 555-56.

92 *Id.* at 556 (citations omitted).

93 *Id.* at 556-57.

94 408 U.S. 564 (1972). Ironically, the Court in *Wolff* defined the new "liberty interest" in a passage in which it responded to and rejected the State's argument that prisoners had no due process rights whatsoever with regard to prison disciplinary hearings. This left the impression that this new approach to "liberty" served to clear a constitutional hurdle and expand prisoners' rights:

> We also reject the assertion of the State that whatever may be true of the Due Process Clause in general or of other rights protected by that Clause against state infringement, the interest of prisoners in disciplinary procedures is not included in that "liberty" protected by the Fourteenth Amendment. It is true that the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison. . . . But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.

Wolff, 418 U.S. at 556-57. Grounding the right in a state statute and not the Constitution, however, left the right vulnerable, as later cases demonstrated. *See infra* notes 112-18 and accompanying text. For a critique of the extension of the concept of statutorily-created "property" interests to "liberty" under the due process

the procedures required, the majority held that the "mutual accommodation" between the rights of the prisoners and the interests of the institution mandated that prisoners would receive written notice of the charge at least twenty-four hours before the hearing and that the hearing must take place before a neutral and detached hearing officer. Additionally, the prisoner must receive a written statement of the reasons for the decision, as well as the evidence relied upon by the hearing officer.[95]

Whether to allow prisoners to call witnesses presented a more difficult problem. "We are also of the opinion," Justice White wrote for the majority, "that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals."[96] Noting however, that "[t]he operation of a correctional institution is at best an extraordinarily difficult undertaking,"[97] the Court refused to make the right anything more than extremely contingent. The Court ruled that "[p]rison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence."[98] For similar reasons, the Court refused to give prisoners the right to confront and cross-examine adverse witnesses, noting that the risk of retaliation created even greater security risks.[99] Finally, the court refused to extend prisoners the right to counsel in disciplinary hearings, partly because of the delay such a right would cause, but also because "[t]he insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals."[100] The Court declared, however, that an inmate should have a "counsel substitute" if he is illiterate or if the hearing presents especially complex is-

clause, see Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U.L. REV. 482 (1984).

95 *Wolff*, 418 U.S. at 563-64.

96 *Id.* at 566.

97 *Id.*

98 *Id.*

99 *Id.* at 567-69.

100 *Id.* at 570. It is probably news to most inmates that prison disciplinary hearings—a procedure that can land them in solitary confinement or some other restricted custody housing for extended periods of time and can result in additional months if not years in prison—are not adversarial, but are supposed to be therapeutic.

sues.[101] The Court acknowledged that the procedures required were not as extensive as those set forth in *Morrissey*, but stated that its position was not "graven in stone" and indicated a willingness to reexamine its holding in the future.[102]

In separate dissenting opinions, Justices Douglas and Marshall joined by Justice Brennan objected strongly to the Court's refusal to provide prisoners with the right to call witnesses, the right of confrontation and the right to counsel.[103]

Martinez, *Pell* and *Wolff* are important because of both the rights accorded inmates and the manner in which the Court reached the decisions. From a substantive point of view, the cases produced mixed results to be sure. The decisions certainly did not go as far as many advocating inmates' rights would have liked.[104] The decision in *Martinez*, for example, did not even turn on the scope of the rights of the prisoners, an issue that was expressly reserved.[105] Moreover, in *Pell* the Court upheld the regulation, although it expressly recognized that inmates enjoyed some first amendment rights in prison. Similarly, *Wolff* accorded some procedural protections but passed on other rights such as the right to confrontation and the right to counsel that, in other contexts, the Court has recognized as essential to the fairness of hearings.[106] Even more fundamental, by grounding

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101 *Id.*

102 *Id.* at 571-72. The Court attempted to distinguish *Morrissey* by noting that while "unquestionably a matter of considerable importance," the loss of good time is not the "immediate disaster" for an inmate that loss of parole is for the parolee. Rather, the Court noted that the loss of parole works an immediate and certain loss of liberty, but loss of good time "does not then and there work any change in the conditions in his liberty" and, in the view of the Court, may not affect parole or extend the amount of time served. *Id.* at 561. On the other hand, the Court noted, parole revocation hearings do not implicate security concerns other than those raised in a normal criminal trial, whereas prison disciplinary hearings "take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so." *Id.* at 561.

103 *Id.* at 580 (Marshall, J., dissenting); *id.* at 593 (Douglas, J., dissenting).

104 *See, e.g.*, Calhoun, *supra* note 51.

105 This may be more apparent in hindsight. Some lower courts applied the stricter *Martinez* standard in cases after 1974 in situations which involved questions of the scope of prisoners' rights and in which the rights of those outside the institution were not implicated. *See* Abdul Wali v. Coughlin, 754 F.2d 1015 (2d Cir. 1985); Morgan v. LaVallee, 526 F.2d 221 (2d Cir. 1975). It was not until the Supreme Court's decision in Turner v. Safley, 107 S. Ct. 2254 (1987) that the Court made clear that *Martinez* dealt only with the rights of those outside the institution. *Id.* at 2260.

106 *See* Goldberg v. Kelly, 397 U.S. 254 (1970) (right to confrontation and cross-examination essential to accuracy of determination and fairness of hearing); Greene v. McElroy, 360 U.S. 474 (1959) (same); Gideon v. Wainwright, 372 U.S. 335 (1963) (recognizing importance of right to counsel).

the right to due process in a state statute rather than the Constitution, the Court, theoretically at least, made it easy for a state to take away even the limited procedural protections accorded by the Court's decision. This would ultimately prove to be an inadequate hedge against arbitrary governmental action that is supposed to be the rationale for procedural protections in the first place.

Nonetheless, the 1974 trilogy represents significant gains for prisoners and those working in the area of prisoners' rights litigation. The precise contours of the rights of inmates recognized by the Court may appear to be modest compared to rights enjoyed by persons outside prisons. Still, the introduction of due process into the institutions and the prohibition of wholesale censorship of inmates by prison officials, especially with regard to communications that criticize or embarrass the administration, represent real gains and give prisoners' rights protection from the arbitrariness of officials' actions that were simply unheard of twenty years earlier.[107]

Moreover, an assessment of the gains made in constitutional adjudication by a group that has been barred from the process for so long is more than a matter of counting wins and losses. More importantly, the manner in which the Court reached its decisions is at least as significant as the holdings in many cases and it is here that the opinions made their greatest contribution. For the first time, the Court squarely addressed the "hands off" doctrine and rejected it, often in strong language. In addition, although in each opinion the prison setting justified an accommodation in the exercise of constitutional rights that would not have been made for persons outside the institution, the opinions also contain language which recognizes broadly that inmates retain rights in prison. Finally, the frequent reliance on non-prison precedents suggested that inmates might be entering the constitutional mainstream. Prisoners had not secured the right to "equal treatment," but appeared to be moving toward "treatment as an equal."[108] Inmates were not yet full constitutional

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107 *See* Hirschkopf & Millemann, *supra* note 32.

108 R. DWORKIN, TAKING RIGHTS SERIOUSLY 272-78 (1977). Professor Dworkin explained the difference between the two claims to equality as follows:

> Citizens governed by the liberal conception of equality each have a right to equal concern and respect. But there are two different rights that might be comprehended by that abstract right. The first is the right to equal treatment, that is, to the same distribution of good or opportunities as anyone else has or is given. . . . The second is the right to treatment as an equal. This is the right, not to an equal distribution of some good or opportunity, but the right to equal concern and respect in the political decision about how these goods and opportunities are to be distributed.

beings, but the trilogy was a beginning.

D. The Retreat

The Supreme Court giveth and it taketh away; what appeared to be a beginning comes to look in retrospect more like an end. Almost immediately after *Wolff*, the Court began to retreat from an expansion of the rights of inmates and to renew its devotion to deference to the expertise and judgment of prison officials in running their institutions—a retreat that has come very close to a return to the "hands off" doctrine.[109] As one veteran of prisoners rights litigation has summarized the period after *Wolff*:

> [B]eginning in the last half of the 1970s, the Burger-Rehnquist Court has moved us, though not full circle back to the slave-of-the-state era, two-thirds of the way back. . . . In a series of cases beginning in 1976, we began to see a return to the "hands off" doctrine with language about a "wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts," and to the effect that "the day-to-day functioning of state prisons" involves "issues and discretionary decisions that are not the business of federal judges."[110]

The retreat was signalled first by a series of decisions involving the right to procedural due process. In *Meachum v. Fano*,[111] the Court held that the administrative transfer of an inmate to another institution in the state prison system, even one with significantly harsher living conditions, did not implicate the fourteenth amendment absent a statute creating a "liberty" interest as was found in *Wolff*. The Court stressed the deference that is due the decisions of administrators in running institutions.[112] Just as important, the Court explained the limited role the Constitution and the federal courts must play in evaluating challenges to such transfers:

> The Constitution does not require that the State have more than one prison for convicted felons; nor does it guarantee that the convicted prisoner will be placed in any particular prison if, as is likely, the State has more than one correctional institution. The initial decision to assign the convict to a par-

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Id. at 273.

109 *See* WILLENS, *supra* note 18, at 113-34; BERGER, *supra* note 18, at 1-2.

110 Bronstein, *Criminal Justice: Prison and Penology*, in OUR ENDANGERED RIGHTS 222 (N. Dorsen ed. 1984) (quoting Meachum v. Feno, 427 U.S. 215, 225-29 (1976)).

111 427 U.S. 215 (1976).

112 *See id.* at 225.

> ticular institution is not subject to audit under the Due Process Clause, although the degree of confinement in one prison may be quite different from that in another. The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in *any* of its prisons.[113]

The Court pointed out that simply because "life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules."[114]

In a companion case handed down the same day, *Montanye v. Haymes*,[115] the Court made clear that its decision and analysis in *Meachum* applied even if the transfer were undertaken for disciplinary, as opposed to administrative, reasons.[116] Again, in ruling against inmate Haymes the Court used the positivist approach, first developed in *Wolff*, to further the prisoners' claims. The Court noted that under state law, Haymes "had no right to remain at any particular prison facility and no justifiable expectation that he would not be transferred unless found guilty of misconduct."[117]

Seven years later, in *Olim v. Wakinekona*,[118] the Court extended *Meachum* to its logical extreme when it held that a prisoner who was transferred 4,000 miles, from a prison in Hawaii to a prison in California, was not entitled to any procedural protection under the due process clause in order to challenge his interstate transfer.[119] The Court arrived at its decision, regardless of the fact that, as the State conceded, the transfer effectively deprived the inmate of all contact with family and friends.

The Court's change in attitude is illustrated even more strik-

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113 *Id.* at 224 (emphasis in the original).

114 *Id.* at 225.

115 427 U.S. 236 (1976).

116 *Id.* at 242.

117 *Id.* at 243. The reasons for Haymes's transfer stemmed from his effort to circulate a petition to a federal judge. In the petition, Haymes and a number of other prisoners complained about being denied access to adequate legal assistance in the institution by virtue of Haymes's having been removed from the prison law library. *Id.* at 239. The majority did not attach any particular significance to that fact but Justice Stevens, joined by Justice Marshall and Justice Brennan in dissent and the Second Circuit on remand were willing to allow Haymes to prove that his transfer was part of an effort to retaliate against him for attempting to exercise his rights. *See id.* at 244 (Stevens, J., dissenting); Montanye v. Haymes, 547 F.2d 188 (2d Cir. 1976), *cert. denied*, 431 U.S. 967 (1977).

118 461 U.S. 238 (1983). For a discussion of *Olim* as an extension of *Meachum*, see Herman, *supra* note 94, at 519-21.

119 *Olim*, 461 U.S. at 251.

ingly in *Jones v. North Carolina Prisoners' Labor Union, Inc.*[120] At issue in *Jones* was a set of regulations that prohibited inmates from soliciting other inmates for union membership, barred meetings of the union and prohibited bulk mailings to inmates on behalf of the union. The lower federal court struck down the regulations as a violation of the inmates' first amendment rights and as a violation of the guarantee of equal protection. On appeal, the Supreme Court reversed.[121]

Justice Rehnquist, writing for the majority, noted that, while it is true that inmates retain first amendment rights not inconsistent with their status as prisoners, the associational freedoms of the first amendment are the first to be forfeited once an inmate is inside the institution.[122] Although the lower court had found that the formation of the union did not pose an immediate threat of violence or disruption, the majority accepted the prison officials assessment that "the concept of a prisoners' labor union was itself fraught with potential dangers."[123] More importantly, because the views of the administrators were "sincerely held" and "arguably correct," Justice Rehnquist stated that the officials had met their burden of justifying the regulations; it was incumbent upon the inmates to demonstrate by "substantial evidence" that the officials had exaggerated their response to the dangers posed by the union.[124] The Court again stressed the deference that was to be accorded prison officials in running their institutions[125] and upheld the regulations because they were "rationally related to the reasonable, indeed to the central, objectives of prison administration."[126]

In the majority's view, "[t]he invocation of the First Amendment, whether the asserted rights are speech or associational, does not change this analysis."[127] Justice Rehnquist discussed the interests of the administrators in controlling prisoners, without any mention of the corresponding interest of the inmates in the exercise of their first amendment rights. In doing so, he began with a subtle but important change in the language of prior decisions:

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120 433 U.S. 119 (1977).

121 *Id.* at 136.

122 *Id.* at 125-26.

123 *Id.* at 126.

124 *Id.* at 128.

125 For example, at one point Justice Rehnquist wrote, that "[b]ecause the realities of running a penal institution are complex and difficult, we have also recognized the wide-ranging deference to be accorded the decisions of prison administrators." *Id.* at 126.

126 *Id.* at 129.

127 *Id.*

> In a prison context, an inmate does not retain those First Amendment rights that are "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." Prisons, it is obvious, differ in numerous respects from free society. They, to begin with, are populated, involuntarily, by people who have been found to have violated one or more of the criminal laws established by society for its orderly governance. In seeking a "mutual accommodation between the institutional needs and objectives [of prisons] and the provisions of the Constitution that are of general application," this Court has repeatedly recognized the need for major restrictions on a prisoner's rights.[128]

Justices Marshall and Brennan dissented. Objecting to the majority's "wholesale abandonment of traditional principles of First Amendment analysis,"[129] Justice Marshall found the regulations unjustified because of the lack of proof that the prisoners' union had been a disruptive force in the institution.[130] Justice Marshall complained further that,

> [i]f the mode of analysis adopted in today's decision were to be generally followed, prisoners eventually would be stripped of all constitutional rights, and would retain only those privileges that prison officials, in their "informed discretion," deigned to recognize. The sole constitutional constraint on prison officials would be a requirement that they act rationally. Ironically, prisoners would be left with a right of access to the courts, but no substantive rights to assert once they got there.[131]

Justice Marshall noted the recent rejection of the "hands off" doctrine by federal courts and argued that the decision in *Jones* represented an abandonment of the approach taken in recent cases:

> Today, however, the Court, in apparent fear of a prison reform organization that has the temerity to call itself a "union," takes a giant step backwards toward that discredited conception of prisoners' rights and the role of the courts. I decline to

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128 *Id.* (citations omitted).

129 *Id.* at 141 (Marshall, J., dissenting).

130 *Id.* at 144-47 (Marshall, J., dissenting). Precisely how far the dissent was from the majority, philosophically at least, is illustrated by Justice Marshall's comment that even if the union posed a greater danger than the evidence suggested, the absolute ban on union meetings would still be unconstitutional: "The central lesson of over half a century of First Amendment adjudication is that freedom is sometimes a hazardous enterprise, and that the Constitution requires the State to bear certain risks to preserve our liberty." *Id.* at 146 (Marshall, J., dissenting) (citations omitted).

131 *Id.* at 147 (Marshall, J., dissenting) (citations omitted).

join in what I hope will prove to be a temporary retreat.[132]

With the Court's decision in 1979 of *Bell v. Wolfish*,[133] the evidence of renewed skepticism, if not hostility, toward complaints by inmates of unconstitutional conditions was unmistakable. In *Bell*, pre-trial detainees challenged the practice of double-bunking at the Metropolitan Corrections Center in Manhattan, as well as a number of other practices—including preventing inmates from receiving hardcover books unless they came directly from the publisher or a book club, prohibiting the receipt of food packages except at Christmas, unannounced cell searches, and visual body-cavity searches. The institution justified these practices on security grounds. The lower federal court had held that because the case involved the rights of those who had not yet been convicted of crimes, such restrictions could be justified only by a "compelling necessity" and on that basis, invalidated the challenged practices.[134]

The Supreme Court reversed. In another opinion written by Justice Rehnquist, the majority began by rejecting the notion that the presumption of innocence that applies to the impending criminal cases of pre-trial detainees plays any role in an evaluation of the conditions of confinement.[135] Instead, the Court stated that since a pre-trial detainee has the right under the due process clause to be free from punishment without due process of law, the validity of the practices turned on whether "the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose."[136] The Court then set forth a test that, like the analysis in *Jones*, limited the Court's inquiry to the reasonableness of the practice:

> Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable [for it]. . . ." Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment."

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132 *Id.* at 139 (Marshall, J., dissenting).

133 441 U.S. 520 (1979).

134 *Id.* at 527-30 (citations omitted).

135 *Id.* at 532-33. The Court also rejected the argument that the only justifiable basis for conditions of confinement imposed on pre-trial detainees was to ensure their appearance at trial. In this way, Justice Rehnquist made clear that the legitimate penological objectives, including security, recognized in prior cases, could justify conditions and restrictions for pre-trial detainees as well as those already convicted. *Id.* at 539-40.

136 *Id.* at 538.

> Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.[137]

Based on that standard, the Court had little trouble holding that the double-bunking did not amount to punishment and did not violate any constitutional rights of the inmates. Indeed, Justice Rehnquist noted that, there is no " 'one man, one cell' principle lurking in the Due Process Clause of the Fifth Amendment."[138]

As for the other regulations, Justice Rehnquist again set forth the guiding principle that "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison,"[139] but their rights are subject to restrictions in furtherance of legitimate correctional goals, including security. Moreover, the Court again stressed the "wide ranging deference" afforded prison officials in adopting and carrying out policies to run their institutions, "not merely because the administrator ordinarily will . . . have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial."[140] Justice Rehnquist easily found the "publisher only" rule, the restriction of food packages and the practice of unannounced cell searches, to be "rational" and therefore constitutional. Even the practice of visual body-cavity searches

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137 *Id.* at 538-39 (citations omitted).

138 *Id.* at 542. Justice Rehnquist's effort at a humorous takeoff on the famous "one man, one vote" principle from Baker v. Carr, 369 U.S. 186 (1962), is reminiscent of a remark made two years later in Atiyeh v. Capps, 449 U.S. 1312 (1981). In *Atiyeh*, in hearing an application as Circuit Justice, he stayed an order of the District Court of Oregon requiring prison officials to take immediate steps to remedy overcrowding in one of the state institutions. In granting the stay pending the Court's decision in Rhodes v. Chapman, 452 U.S. 337 (1981), Justice Rehnquist commented on the harsh prison conditions: "In short, nobody promised them a rose garden; and I know of nothing in the Eighth Amendment which requires that they be housed in a manner most pleasing to them, or considered even by most knowledgeable penal authorities to be likely to avoid confrontations, psychological depression and the like." *Atiyeh*, 449 U.S. at 1315-16.

139 *Bell*, 441 U.S. at 545 (citations omitted). This may be an accurate summary of results in prior cases but as a general principle, it is phrased somewhat more modestly than the principles enunciated in *Martinez* and *Wolff*. In those cases, the Court noted that prisoners retain all those rights not inconsistent with their status as prisoners (which itself hardly proved to be an impregnable barrier to restrictions on the rights of prisoners). It recalls Justice Rehnquist's linguistic twists in *Jones*, described above. *See supra* note 138, and accompanying text; *Martinez*, 416 U.S. at 412; *Wolff*, 418 U.S. at 555-56.

140 *Bell*, 441 U.S. at 548 (citations omitted).

without probable cause, which Justice Rehnquist wrote "[a]dmittedly . . . gives us the most pause,"[141] was held to be reasonable.[142]

In a lengthy concluding paragraph, Justice Rehnquist professed approval of the rejection of the traditional "hands off" approach to prisoners' litigation, but also criticized courts which have "in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations."[143] He again stressed the limited role that courts should play in addressing prisoners' constitutional claims, noting that "[t]he wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government."[144] Justice Marshall in dissent again accused the Court of "depart[ing] from the precedent it purports to follow and preclud[ing] effective judicial review of the conditions of pretrial confinement."[145]

Prisoners were not totally shut out in the period after *Wolff*, but even the few gains proved limited. In *Estelle v. Gamble*,[146] for example, the Court held that the "deliberate indifference" of prison officials to the serious medical needs of those confined in the institution amounted to a violation of the eighth amendment's ban on cruel and unusual punishment. At the same time, however, the Court rejected arguments that negligent medical care should also form the basis of a constitutional claim.[147] Additionally, in *Hutto v. Finney*,[148] the Court held, under a test examining the "totality of conditions," that the physical conditions of an institution could be so bad as to amount to cruel and unusual punishment, in violation of the eighth amendment.[149] *Hutto* was the culmination of the notorious Arkansas prison litigation that revealed shocking conditions that included not only overcrowding and poor sanitary conditions, but also torture and brutality.[150] Three years later, however, in *Rhodes v. Chap-*

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141 *Id.* at 558.
142 *Id.* at 560.
143 *Id.* at 562.
144 *Id.*
145 *Id.* at 564 (Marshall, J., dissenting).
146 429 U.S. 97 (1976).
147 *Id.* at 105-06.
148 437 U.S. 678 (1978).
149 *Id.* at 687.
150 Two years later, the brutal nature of American prisons was the central point of a case involving an issue of criminal, as opposed to constitutional law. In United States v. Bailey, 444 U.S. 394 (1980), two inmates escaped from a District of Columbia prison. In a subsequent criminal prosecution for escape, they attempted to assert the defense of necessity or duress based on the horrible conditions at the institution. Their efforts to raise the defense of necessity or duress to justify their

man,[151] in refusing to hold double-bunking per se unconstitutional, the Court made clear that "to the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminals pay for their offenses against society" from which the Constitution provides no relief.[152] Perhaps not surprisingly, a number of courts have viewed *Rhodes* as an instruction from the Court not to interfere with the running of institutions.[153]

Perhaps the culmination of the retreat came in *Hudson v. Palmer*.[154] In *Hudson*, an inmate brought an action challenging random "shakedown" cell searches that were conducted, he alleged, solely to harass him and that had resulted in the destruction of his personal property. On this issue, Chief Justice Burger, writing for the Court, held that the complaint did not state a cause of action

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escapes were rejected by the trial court. The failure to allow the defendants to introduce testimony on the conditions at the institution to develop a factual basis for the defense led the Court of Appeals for the District of Columbia to reverse. In turn, the Supreme Court reversed the judgment of the Court of Appeals and made clear that the defense of necessity or duress would be available in a prosecution for escape in only very limited instances. *Id.* at 411-12.

The majority opinion drew harsh criticism from Justice Blackmun in dissent: "The Court, in its carefully structured opinion, does reach a result that might be a proper one were we living in an ideal world, and were our American jails and penitentiaries truly places for humane and rehabilitative treatment of their inmates. . . . But we do not live in an ideal world 'even' (to use a self-centered phrase) in America, so far as jail and prison conditions are concerned." *Id.* at 420 (Blackmun, J., dissenting). Justice Blackmun went on to describe the litany of horrors inmates in American prisons face:

> The atrocities and inhuman conditions of prison life in America are almost unbelievable; surely they are nothing less than shocking. The dissent in the *Bailey* case in the Court of Appeals acknowledged that the "circumstances of prison life are such that at least a colorable, if not credible, claim of duress or necessity can be raised with respect to virtually every escape. . . ."
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> A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to the jail. Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim. Prison officials either are disinterested in stopping abuse of prisoners by other prisoners or are incapable of doing so, given the limited resources society allocates to the prison system. Prison officials often are merely indifferent to serious health and safety needs of prisoners as well.
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> Even more appalling is the fact that guards frequently participate in the brutalization of inmates. The classic example is the beating or other punishment in retaliation for prisoner complaints or court actions.

Id. at 421-22 (Blackmun, J., dissenting) (citations and footnotes omitted).

151 452 U.S. 337 (1981).

152 *Id.* at 347.

153 *See* Walker v. Mintzes, 771 F.2d 920 (6th Cir. 1985); Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984).

154 468 U.S. 517 (1984).

because the fourth amendment's prohibition against unreasonable searches and seizures simply does not apply in prison:

> Notwithstanding our caution in approaching claims that the Fourth Amendment is inapplicable in a given context, we hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions.[155]

The Court portrayed life in prison as a pitched battle between correctional officers and violence-prone inmates, whom the Court characterized as "persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct[,]. . . [who have] shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint.[156] The Court continued that prisoners "have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others."[157] Chief Justice Burger stated that the paramount goal of administrators was to ensure the safety of prison staffs, administrative personnel and visitors. To that end, he wrote, they need unfettered access to prison cells to search for drugs, weapons and contraband.[158] In balancing the administrators' interest in institutional security against the inmates' interest in the privacy of their cells, Chief Justice Burger gave little weight to the latter and concluded that "[a] right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order."[159] Thus, not even the allegation that the sole purpose of the searches was to harass was sufficient to state a constitutional claim; once the fourth amendment was held not applicable in prison, any inquiry into the reasonableness of the searches ended.[160]

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155 *Id.* at 525-26.

156 *Id.* at 526.

157 *Id.*

158 *Id.* at 527.

159 *Id.* at 527-28.

160 *Id.* at 529-30. The Court did suggest, however, without elaboration, that the eighth amendment stood to protect inmates from "calculated harassment unrelated to prison needs." *Id.* at 530. Given the extreme deference prison officials are accorded in addressing security concerns, it is difficult to think of the kind of showing

The opinion in *Hudson* illustrates another significant development in the Court's decisions after *Wolff*. While the Court based its analysis on the concept of a "reasonable expectation of privacy" set forth in *Katz v. United States*,[161] the majority otherwise relied very little, if at all, on non-prison precedents. All its lessons were drawn from other cases analyzing restrictions on rights in a prison setting. Prisoners' rights litigation, like prison itself, had become insular, a world unto itself shut off from the larger society. Whatever hope inmates might have had of someday entering the constitutional mainstream on a par with other constituencies, appeared to be gone.

Justice Stevens, joined by Justices Marshall and Brennan, again dissented. Justice Stevens rejected the Court's holding that "no matter how malicious, destructive, or arbitrary a cell search and seizure may be, it cannot constitute an unreasonable invasion of any privacy or possessory interest that society is prepared to recognize as reasonable."[162] Unlike the majority, Justice Stevens gave much weight to the interest of inmates subject to the shakedown searches: "Measured by the conditions that prevail in a free society, neither the possessions nor the slight residuum of privacy that a prison inmate can retain in his cell, can have more than the most minimal value."[163] Justice Stevens continued, that "from the standpoint of the prisoner, however, that trivial residuum may mark the difference between slavery and humanity."[164] Justice Stevens objected to what he characterized as the Court's view of inmates as "chattels"

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an inmate would have to make to state an eighth amendment claim in such a circumstance. Certainly in other contexts, the eighth amendment has been an uncertain, if not unreliable, source of protection. *Compare* Rummel v. Estelle, 445 U.S. 263 (1980) (upholding life sentence under habitual offenders act after third offense of theft totalling slightly more than $200) *with* Solem v. Helm, 463 U.S. 277 (1983) (striking down as cruel and unusual punishment a life sentence without parole under a habitual offenders statute where prior convictions had been for non-violent crimes).

161 389 U.S. 347 (1967).

162 *Hudson*, 468 U.S. at 542 (Stevens, J., dissenting). Justice Stevens suggested that the Court's resolution of the fourth amendment issue was itself inconsistent with the eighth amendment:

> The Court's implication that prisoners have no possessory interests that by virtue of the Fourth Amendment are free from state interference cannot, in my view, be squared with the Eighth Amendment. To hold that a prisoner's possession of a letter from his wife, or a picture of his baby, has no protection against arbitrary or malicious perusal, seizure, or destruction would not, in my judgment, comport with any civilized standard of decency.

Id. at 546 (Stevens, J., dissenting).

163 *Id.* at 542 (Stevens, J., dissenting).

164 *Id.*

and as "fit[ting] into a violent, incorrigible stereotype."[165] As Justice Stevens saw it, courts have a special responsibility toward prisoners:

> The courts, of course, have a special obligation to protect the rights of prisoners. Prisoners are truly the outcasts of society. Disenfranchised, scorned and feared, often deservedly so, shut away from public view, prisoners are surely a "discrete and insular minority. . . ." The Court's conclusive presumption that all conduct by prison guards is reasonable is supported by nothing more than its idiosyncratic view of the imperatives of prison administration—a view not shared by prison administrators themselves. Such a justification is nothing less than a decision to sacrifice constitutional principle to the Court's own assessment of administrative expediency.[166]

Thus, over a span of two decades, the Supreme Court made clear that prisoners retain at least some rights while incarcerated. The strength of the Court's commitment to that principle is considerably less certain. The Court's initial efforts to define the precise contours of the rights of inmates resulted in decisions—culminating in the 1974 trilogy of *Martinez*, *Pell* and *Wolff*—suggesting that inmates shared many of the rights of ordinary citizens and that the Constitution could serve as a significant constraint on the prerogatives of prison administrators under the appropriate circumstances. Since the mid-1970s, however, the Court has handed down a series of decisions in which it has shown a renewed willingness to defer to the judgment of prison officials and a corresponding reluctance to interpret the Constitution to limit the actions of those administrators. It is against this background that we must assess the Third Circuit's approach to complaints by prisoners of unconstitutional conditions of confinement.

III. The Third Circuit and Prisoners' Rights

A. Preliminary Observations

Cases brought by prisoners challenging conditions of confinement have been a regular part of the docket of the Third Circuit for at least the past fifteen years. For example, for the year ending June 30th, 1988, 384 such cases reached the Third Circuit from the trial courts, representing approximately fifteen percent of all cases coming to the court. Moreover, in terms of the number of cases, the Third Circuit handled as many prisoners'

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165 *Id.* at 553-54 (Stevens, J., dissenting).

166 *Id.* at 557 (Stevens, J., dissenting) (footnotes omitted).

rights cases as any other circuit with the exception of the Fourth and Fifth Circuits.[167] These patterns are generally consistent throughout the period since 1975.[168]

However, for a number of reasons it is more difficult to assess the body of work of the Third Circuit (or any court of appeals) in a given area than that of the Supreme Court. For example, unlike the Supreme Court, the judges appointed to the Third Circuit do not sit as a body in the regular course. Cases are usually decided by panels of three judges; only rarely will the court review a decision in banc. Analyses of given cases are, therefore, more often than not, analyses of the work of a numerical minority of the court.[169]

Second, and equally as important, the Supreme Court, through the device of granting and denying certiorari, essentially chooses its own caseload. Although the Court is still called upon to hear some mandatory appeals, the vast majority of its docket is comprised of cases it has selected to hear because it has determined that they raise important issues.[170] It is in part this ability to select which cases it will hear and which it will not that allows the Supreme Court to function as an important, rational, policy-making body. Courts of appeals do not enjoy this luxury. Their cases usually come from the trial courts as appeals of right,[171] no

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167 *See* 1988 ANN. REP. OF ADMIN. OFF. OF CTS. 16.

168 For example, in 1979, the Third Circuit had 91 prisoners' rights cases brought to it on appeal, representing approximately seven percent of its docket; again, the only circuit with significantly more such cases was the Fourth Circuit. 1979 ANN. REP. OF ADMIN. OFF. OF CTS. A-10. Just as revealing, for the first time in 1979, the number of cases brought by prisoners to federal appellate courts raising claims of violations of civil rights based on conditions of confinement outnumbered those cases brought as habeas corpus petitions, 1,069 to 859. *Id.* The latter calculation, however, must be examined in light of the fact that prisoners seeking to challenge the fairness of prison disciplinary hearings involving the loss of "good time" credits must raise that claim through a petition for writ of habeas corpus rather than a civil rights suit. *See* Preiser v. Rodriguez, 411 U.S. 475 (1973). *See also* Note, *Prison Regulations Constitutionally Valid if Reasonably Related to Legitimate Penological Interests*, 19 SETON HALL L. REV. 429 (1989) (authored by Robin A. Newman) (discussing increase in constitutional challenges to prison regulations).

169 Also, to the extent that the identity of those who sit on the bench makes a difference, a feature of the courts of appeals again makes it difficult to speak of the work of the court as a discrete body. While the personnel of the Supreme Court can hardly be said to be static, courts of appeals not only have changes in personnel typical of any court, but also frequently appoint judges from other courts or jurisdictions to sit "by designation" to hear specific cases and then return to their regular assignments. *See* 3D CIR. R. 4(1).

170 *See* L. BAUM, THE SUPREME COURT, 87-101 (1985); D.M. O'BRIEN, STORM CENTER, 157-212 (1986).

171 *See* 28 U.S.C. § 1291 (1982).

matter how frivolous the claims asserted. This is not to say that important cases do not come to courts of appeals, because obviously they do. But courts of appeals must decide many more "routine" cases than the Supreme Court. Therefore, not every reported case represents, or was intended by the court to represent, an opportunity to expand upon or explain a vital issue of law or policy.[172]

These reasons, as well as the fact that the Supreme Court officially has the last word on any legal question it chooses, explain why relatively little attention has been given the work of courts of appeals, at least in comparison to the attention that the Supreme Court receives. Nonetheless, courts of appeals do make vital contributions in areas where the Supreme Court has spoken loudly and often, as in the area of prisoners' rights. In this area, the Third Circuit in particular has spoken with a distinctive voice, according inmates rights beyond those which the Supreme Court has recognized or shown a willingness to recognize.

B. Helms v. Hewitt: *Deciding What Process is Due*

In 1978, Aaron Helms was an inmate at the State Correctional Institution at Huntington, Pennsylvania. On December 3rd of that year, a "general disturbance" occurred at the facility and Helms was removed from the general population to close administrative custody.[173] Helms was charged with violating disciplinary rules at the institution in connection with the December 3rd disturbance and a hearing was held five days later. At that hearing, however, the committee made no decision as to Helms's guilt or innocence regarding the disciplinary charge due to insufficient evidence. The hearing was adjourned to a later date.[174]

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172 Of course, lower federal courts may indicate which cases they consider important by affirming decisions without written opinions, or by issuing unpublished opinions.

173 Helms v. Hewitt, 655 F.2d 487, 489-90 (3d Cir. 1981), *rev'd*, 459 U.S. 460 (1983). "Close administrative" custody was, under Pennsylvania Bureau of Corrections regulations, the least restrictive of the four confinement statuses beyond that imposed upon the general population at the institution. *See Helms*, 655 F.2d at 490 n.1.

174 *Helms*, 655 F.2d at 490. The opinion of the court did not explain how the evidence at the disciplinary hearing was "insufficient." *See id.* If the evidence was insufficient to prove Helms's guilt, one would think that he should have been found "not guilty" and released to general population. Why the institution arrived at its decision can perhaps only be explained by reference to the "realities of prison life" that a majority of the Supreme Court likes to cite to justify practices ranging from double-bunking to visual body-cavity searches. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979). It is unlikely, to say the least, that the institutional hearing committee

Helms was kept in restricted custody while the investigation continued. Fifty-one days later, another hearing took place and Helms was found guilty, based on the testimony of a correctional officer claiming to summarize the statements of confidential informants. Neither Helms nor the hearing committee were told the identity of the confidential informants for "safety reasons." Helms was sentenced to serve an additional six months in restricted confinement.[175]

Helms brought suit in federal court, raising two constitutional issues.[176] First, he claimed that he was confined in administrative segregation without a hearing, in violation of his rights under the due process clause. Second, he claimed that the finding of guilt at the disciplinary hearing also violated due process because it rested solely on the uncorroborated hearsay testimony of unidentified confidential informants.[177] The first issue concerned the process required when transferring a prisoner to more restricted custody within the same institution for administrative as opposed to disciplinary reasons. This question was similar to the issues raised in *Wolff v. McDonnell*,[178] *Meachum v. Fano*[179] and *Montanye v. Haymes*,[180] although it was not specifically decided by those cases. The second issue similarly refined the question of the appropriate procedures in prison disciplinary hearings first considered in *Wolff*.

The trial court granted the defendants' motion for summary judgment on the grounds that under *Meachum* and *Montanye*, Helms had no protected liberty interest implicated in his assignment to administrative segregation.[181] As for the reliance on the hearsay testimony of confidential informants at the disciplinary hearing, the lower court held that, since inmates have no right to

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adjourned Helms's hearing to a later date because the evidence gathered at that point was insufficient to demonstrate Helms's innocence.

175 *Helms*, 655 F.2d at 490-91.

176 *Id.* at 489. Helms brought his action under 42 U.S.C. § 1983 (1976). *Helms*, 655 F.2d at 489. Helms also raised an issue of state law, claiming that the procedures he was given did not comply with those required by the regulations of the prison. Because of its resolution of the constitutional questions, the Third Circuit did not address this issue. *Id.* at 491 n.5.

177 *Id.* at 491-92.

178 418 U.S. 549 (1974). For a discussion of the *Wolff* decision, see text accompanying *supra* notes 86-103.

179 427 U.S. 215 (1976). For a discussion of the *Meacham* decision, see text accompanying *supra* notes 111-14.

180 427 U.S. 236 (1976). For a discussion of *Haymes*, see *supra* notes 115-17 and accompanying text.

181 *Helms*, 655 F.2d at 492.

confrontation and cross-examination at those hearings, the use of such testimony did not violate due process.[182] In an opinion authored by Judge Rosenn, the Third Circuit unanimously reversed.[183]

Judge Rosenn began by considering whether the due process clause was implicated in Helms's assignment to administrative custody. At first it appeared that Judge Rosenn would go well beyond the Supreme Court's most recent prisoner due process cases by finding a protectible liberty interest in the Constitution itself. Indeed, Judge Rosenn noted two sources for finding a protectible liberty interest. One source is state law "when the State, by statute, rule, or regulation, provides that the liberty will not be infringed except upon the occurrence of specified events."[184] Judge Rosenn identified the second source as the Constitution itself when a person suffers a "grievous loss" at the hands of the State,[185] harkening back to the Court's analysis in some of its early cases.[186] Relying on the Supreme Court's decision in *Vitek v. Jones*,[187] Judge Rosenn observed that

> [r]ecently, the Court appears to have moved in this direction, for it has returned to a more familiar test to ascertain whether a liberty interest exists: does the action of the state threaten to impose a "grievous loss" on the individual. . . . Whatever their roots, the interests protected under this theory are seen to be of such fundamental importance that the State need not expressly recognize—indeed, is precluded from denying—their existence for them to be cloaked with constitutional protection.[188]

Judge Rosenn retreated from this approach, however, not because the loss suffered by the inmate was not serious but because of the rationale underlying administrative confinement. He noted that

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182 *Id.*

183 *Id.* at 489. Judge Rosenn was joined by Judge Garth and Judge Miller of the United States Court of Customs and Patent Appeals, sitting by designation. *Id.*

184 *Id.* at 493.

185 *Id.* at 493-94.

186 *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471 (1972).

187 445 U.S. 480 (1980). *Vitek* involved the involuntary transfer of a convicted prisoner from a penal institution to a mental institution. The Court found a protectible liberty interest in that transfer not only in the state law governing such a transfer, but in the Constitution itself due to the "adverse social consequences" and the "intrusions on personal security" attendant upon involuntary transfer to a mental institution. *Id.* at 492 (citations omitted). Additionally, the Court found that such a transfer was "qualitatively different"from the range of punishments or conditions of confinement an inmate should expect upon conviction and incarceration. *Id.* at 493.

188 *Helms*, 655 F.2d at 494 (citations omitted).

courts are less likely to recognize a prisoner's liberty interest in avoiding administrative confinement, even though the conditions of administrative confinement are similar to that experienced in disciplinary confinement.[189] "This reluctance stems from the observation that administrative confinement is often used to maintain control in a volatile environment—to quench sparks before they become flames."[190]

Nonetheless, Judge Rosenn found a protectible liberty interest in the regulations governing placement in the restricted custody, relying on the Supreme Court's summary affirmance in *Wright v. Enomoto*.[191] He noted that the Pennsylvania regulations at issue in the present case stated four grounds for placement in restricted custody: "if necessary to maintain security;" if required by "the need for control" pending adjudication of a charge for serious misconduct; if "there is a threat of serious disturbance or a serious threat to the individual or others;" or if the inmate asks for "protective custody."[192] "The effect of these regulations," Judge Rosenn ruled, "is to limit segregation in Administrative and Disciplinary Custody to particular classes of inmates who meet objective criteria set out in the rules."[193] He concluded that such specifications "establish a liberty interest in all inmates to whom the regulations apply, not to be segregated in restrictive custody unless the regulatory criteria are met."[194] Judge Rosenn pointed to the "real" interests that inmates have in avoiding restrictive confinement and to the need inmates have for procedural safeguards in order to establish that they do not fall within the criteria.[195]

The court then turned to the question of what procedures are due when a prisoner is placed in administrative segregation. Helms did not contest that he had been given some procedural protection; he had received written notice of the reason for the confinement, an

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189 *Id.*

190 *Id.*

191 462 F. Supp. 397 (N.D.Cal. 1976), *aff'd summ.*, 434 U.S. 1052 (1978). Like *Helms*, *Wright* involved the issue of the process due in transferring an inmate from general population to administrative segregation. *Wright*, 462 F. Supp. at 398. There was a slight difference between the Pennsylvania and California schemes. Under the Pennsylvania system, the regulations set forth the conditions under which an inmate could be transferred to administrative segregation, but such transfer was not mandatory even if the conditions were met. Under the California scheme, once the conditions justifying transfer to restricted custody were met, the transfer *was* mandatory.

192 *Helms*, 655 F.2d at 496 n.7.

193 *Id.* at 496.

194 *Id.*

195 *See id.* at 496-97.

opportunity to present his side of the incident, and a review of his continued confinement a few weeks after the initial placement.[196] However, the court held that these procedures were not enough. Judge Rosenn acknowledged "the importance of swift and decisive action when using administrative detentions to maintain control and security at a penal institution."[197] But, in language reminiscent of the Supreme Court's assurance in *Martinez* that it would enforce the rights of inmates even in prison, Judge Rosenn continued, "[s]ympathetic as we are to these concerns, we are also charged with interpreting and applying the Constitution."[198]

The court concluded that, because of the similarity between administrative segregation and disciplinary confinement, the procedures set forth in *Wolff* had to be followed in a transfer to administrative segregation as well. The court then proceeded to discuss a remaining issue. It was not contested that Helms's hearing had to be timely; his main complaint was that he was held for fifty-one days before the hearing that determined the appropriateness of the confinement. What, then, constituted a timely hearing? Relying on Third Circuit precedents that predated *Wolff*,[199] Judge Rosenn held that a prisoner in Helms's situation, facing transfer to solitary confinement, "is entitled to a hearing prior to his confinement or, if exigent circumstances exist, within a reasonable time thereafter."[200] The court determined the hearing which took place fifty-one days after the transfer did not comport with this standard.[201] The court remanded the matter to allow the lower court to decide if the initial hearing five days after the incident was adequate to satisfy due process.[202]

The second half of Judge Rosenn's opinion addressed the issue of the constitutionality of the use of statements by confidential informants in prison disciplinary hearings. On this issue, the court ruled in Helms's favor, reversing the determination of guilt made at his disciplinary hearing. In so doing, the Court noted that the only evidence presented to the hearing committee was the testimony of a corrections officer summarizing what he had been told by two confi-

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196 *Id.* at 497 n.9.

197 *Id.* at 498.

198 *Id.*

199 *Id.* at 499 (citing Braxton v. Carlson, 483 F.2d 933 (3d Cir. 1973); Biagiarelli v. Sielaff, 483 F.2d 508 (3d Cir. 1973); Gray v. Creamer, 465 F.2d 179 (3d Cir. 1972)).

200 *Id.* at 500.

201 *See id.*

202 *Id.*

dential informants.[203] Nothing in the record before the hearing committee allowed its members to assess the credibility of the informants or to determine that the informants had personal knowledge of what they told the officer. Characterizing the officer's testimony as amounting to "next to no evidence," the court held that reliance on the officer's summaries was unacceptable.[204] "We believe," wrote Judge Rosenn, "that in entrusting to prison officials responsibility for promulgating procedures for arriving at an adequate basis for decision, *Wolff* intended a genuine, even if single, factfinding hearing and not a charade."[205] Moreover, unlike in the Supreme Court, here the harsh realities of prison life weighed in favor of the inmate's claim, not against it. The court explained:

> Under the tensions and strains of prison living fraught with intense personal antagonisms, determination of guilt solely on an investigating officer's secondary report of what an unidentified informant advised him, albeit by affidavit, invites disciplinary sanctions on the basis of trumped up charges. A determination of guilt on such a record, with no primary evidence of guilt in the form of witness statements, oral or written, or any form of corroborative evidence, amounts to a determination on the blind acceptance of the prison officer's statement. Such a practice is unacceptable; it does not fulfill *Wolff's* perception of "mutual accommodation between institutional needs and objections" and constitutional requirements of due process.[206]

Judge Rosenn conceded that Helms had no right to cross-examine the informants but reasoned that protection against such uncorroborated hearsay was required by the right to a written statement of reasons and of the evidence relied upon.[207] Drawing the appropriate procedures from a case decided by the First Circuit,[208] the court held that before the testimony of confidential informants could be used, two conditions must be met:

> (1) [T]he record must contain some underlying factual information from which the [tribunal] can reasonably conclude that the informant was credible or his information reliable; (2) the record must contain the informant's statement [written or reported] in language that is factual rather than conclusionary and must establish by its specificity that the informant spoke

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203 *Id.* at 501.
204 *Id.* at 502.
205 *Id.*
206 *Id.* (quoting Wolff v. McDonnell, 418 U.S. 539, 556 (1974)).
207 *Id.*
208 *Id.* (citing Gomes v. Travisono, 510 F.2d 537 (1st Cir. 1974)).

with the personal knowledge of the matters contained in such statement.[209]

Helms represented a modest advance in terms of the rights of prisoners. The precise issue of what, if any, process is due in connection with a transfer to administrative segregation had not been decided before, but cases raising similar issues certainly had been considered. Judge Rosenn's opinion is not a bold entry into newly-chartered areas, but one which follows the correct course dictated by precedents of the Supreme Court and lower federal courts, including prior decisions of the Third Circuit. By 1981, the Supreme Court's renewed hostility to prisoners' claims might have led a cautious court to follow *Meachum* and *Montanye* and to declare that no liberty interest was implicated in the transfer to administrative segregation, or at least to defer to prison administrators in determining the procedures that officials would have to follow. On the other hand, the court's ruling that confinement to segregation, whether for punitive or disciplinary reasons, is essentially the same and should require identical procedures—with a slight adjustment to allow for the exigencies in which decisions to transfer to administrative segregation are sometimes made—is reasonable. In short, nothing in the case indicated that it warranted the Court's granting certiorari, except perhaps for the fact that the inmates, rather than the administrators, had prevailed.[210] Nonetheless, the Supreme Court granted certiorari "to consider what limits the Due Process Clause of the Fourteenth Amendment places on the authority of prison administrators to remove inmates from the general prison population and confine them to a less desirable regimen for administrative reasons."[211] The Supreme Court reversed the decision of the Third Circuit.

Writing for the majority, Justice Rehnquist, initially filled in many details of the events that occurred on the evening of December 3rd, 1978, and in so doing set the tone for the opinion that followed. What Judge Rosenn had labelled simply a "general disturbance," Justice Rehnquist perceived as a "riot" in which groups of inmates had attempted to seize control of the institution and a

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209 *Id.* (quoting Gomes v. Travisono, 510 F.2d 537, 541 (1st Cir. 1974)).

210 *See* Ponte v. Real, 471 U.S. 491 (1985). In *Ponte*, Justices Stevens and Marshall, in separate concurring and dissenting opinions, objected to what they perceived as a pattern by the Court of agreeing to hear inconsequential cases pressed by State Attorneys General who have no better reason for seeking high Court review than dissatisfaction with a lower court ruling in favor of inmates. *Id.* at 501-02 (Stevens, J., concurring); *id.* at 522-23 n.21 (Marshall, J., dissenting).

211 Hewitt v. Helms, 459 U.S. 460, 462 (1983).

number of correctional officers had sustained injuries.[212]

The Court agreed with the Third Circuit that the Pennsylvania regulations gave inmates a protectible liberty interest in avoiding administrative segregation. Like Judge Rosenn, Justice Rehnquist also arrived at that conclusion by taking a long road, although it was a significantly different detour. Judge Rosenn had at first considered whether the inmates' interest in avoiding administrative segregation was so important that the liberty interest protecting it was rooted in the Constitution rather than merely in state law.[213] Justice Rehnquist approached from the opposite direction and questioned whether the Pennsylvania regulations, or any prison regulations, could confer a liberty interest protectible under the fourteenth amendment.

After beginning with the now almost ritualistic bow given to the deference of prison administrators,[214] Justice Rehnquist continued that "the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence."[215] This was especially true for prisoners in Pennsylvania, Justice Rehnquist maintained, since prison officials there used administrative segregation as something of a "catchall," making it the "sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration."[216] Of course, before the Third Circuit opinion in *Helms*, inmates had no right to the procedures necessary to make certain that officials were using administrative segregation properly. In any event, the proposition that the more inmates were subjected to restrictive or harsh conditions (and hence, the more they should expect them), the less they were entitled to procedures to guard against the inappropriate or arbitrary imposition of those conditions, has a certain Alice-in-Wonderland quality to it. It does, however, lead into Justice Rehnquist's next point.

Justice Rehnquist's central objection to recognizing a liberty interest for Helms was not confined to circumstances unique to Pennsylvania, he appeared to object to *any* effort to curtail the discretion of administrators. Despite the apparent similarity between assignment to disciplinary confinement and transfer to administrative confinement noted by Judge Rosenn, Justice Rehnquist stated that the

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212 *Id.* at 462-63.

213 *See supra* notes 184-90 and accompanying text.

214 *Hewitt*, 459 U.S. at 467.

215 *Id.* at 468.

216 *Id.*

Court had "never held that statutes and regulations governing the daily operation of a prison system conferred any liberty interest in and of themselves."[217] Justice Rehnquist distinguished *Wolff* as involving the loss of good time credits which, like parole, actually affected the time spent in custody.[218] Because of the difficulties in running a prison on a daily basis, Justice Rehnquist argued, "we should be loath" to apply the reasoning of prior cases and hold that regulations that guide discretion can create liberty interests that, in turn, interfere with that discretion.[219] Justice Rehnquist went so far as to suggest that regulations "structuring the authority of prison administrators may warrant treatment, for purposes of creation of entitlements to 'liberty,' different from statutes and regulations in other areas."[220] He posited that finding a liberty interest in regulations voluntarily promulgated by states punished those states that took that laudable step:

> The creation of procedural guidelines to channel the decision-making of prison officials is, in the view of many experts in the field, a salutary development. It would be ironic to hold that

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217 *Id.* at 469. Of course, much of the force of Justice Rehnquist's point about the Court's prior holdings is limited by the fact that both the concept of statutorily-created liberty interests and the Court's willingness to review inmate complaints regarding unconstitutional conditions were of relatively recent vintage at the times *Hewitt* was decided.

218 *Id.* at 470. Ironically, in *Wolff*, the Court distinguished prison disciplinary hearings from parole revocation hearings and thereby justified the fewer procedural protections mandated in *Wolff* than required in *Morrissey*. It did this, in part, on its assessment that loss of parole resulted in certain loss of liberty. Loss of "good time" credits the *Wolff* majority noted, did not necessarily translate into a delay of parole eligibility or more time spent in prison. *See* Wolff v. McDonald, 418 U.S. 549, 560-62 (1974).

Even on his own terms, by shifting the focus of interests, Justice Rehnquist compares unequals. It is true that from the inmate's point of view, the consequences of a loss of good time are different, and probably worse, than a stay in administrative segregation. However, from the administrator's point of view, there is little difference between the intrusiveness of a federal court dictating the procedures to be followed in disciplinary proceedings, and dictating those that are to be followed in transferring inmates to administrative segregation. Both types of decisions are made in the institution with sufficient regularity to fall within any reasonable definition of "daily operations." Moreover, Justice Rehnquist's focus on the impact on the inmate sounds very much like the "grievous loss" analysis that the Court had employed in some early decisions but that had been abandoned in *Wolff* and the cases that followed. *See* text accompanying *supra* notes 109-66. To the extent that the "grievous loss" test applies, one would have to say that Judge Rosenn was truer to the precedents in suggesting that confinement in administrative segregation constitutes such a "grievous loss." Certainly any definition of "grievous loss" that turns on an actual loss of liberty would create a very high threshold.

219 *Hewitt*, 459 U.S. at 470.

220 *Id.*

> when a State embarks on such desirable experimentation it thereby opens the door to scrutiny by the federal courts, while States that choose not to adopt such procedural provisions entirely avoid the Due Process Clause.[221]

This "irony," if it is one,[222] deserves further comment. For one thing, the irony is deeper than Justice Rehnquist recognizes. In cases such as *Bell*, *Jones*, and *Hudson*, the Court's willingness to defer to prison administrators in matters of security and control resulted in the elimination or near elimination of substantive constitutional rights in the prison setting. Moreover, it led the Court to grant constitutional imprimatur to practices such as visual body-cavity searches without probable cause and deliberately destructive shakedown searches. What is truly ironic, then, is that broadly-worded phrases in the regulations that speak to such security concerns serve in *Helms* to introduce federal court scrutiny into the process and provide at least procedural, if not substantive protection that inmates might not have otherwise.

Second, the irony, which exists in non-prison contexts as well,[223] is to a large extent designed by the Court. It was the Supreme Court, after all, that refused to find a liberty interest in the Constitution, and claimed to find it only in positive state law, which the state can dispense with on a whim. Securing the right to due process by grounding it in the Constitution, as the Court had once suggested,[224] rather than in the much more fragile vessel of state

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221 *Id.* at 471.

222 What *is* ironic is to applaud states that "voluntarily" promulgate regulations to control the exercise of discretion in prisons while also asserting that any procedures insisted upon to ensure that they are correctly followed punishes those who promulgated the regulations.

223 For example, state and local governments that voluntarily promulgate regulations that allow dismissal from public employment only for cause similarly provide procedural protection for their employees and subject themselves to federal court scrutiny that would otherwise not exist. *Compare* Perry v. Sindermann, 408 U.S. 593 (1972) *with* Bishop v. Wood, 426 U.S. 341 (1976). *But see* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985). In *Loudermill*, the Court held that a state statute could create a property interest protectible under the due process clause, but the state could not define or limit by statute the procedures to which one would be constitutionally entitled. *Id.* at 541. The Court thus made clear its rejection of the plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974), and suggested that the approach under the due process clause was not *strictly* positivist. *Id.* at 541 (citing Arnett v. Kennedy, 416 U.S. 134 (1974)).

224 *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., dissenting). To be fair, it must be pointed out that the retreat into positivism and consequent narrowing of protected interests under the due process clause marked by *Meachum* and *Montanye* also occurred outside the prison context. *See, e.g.*, Paul v. Davis, 424 U.S.

law, may not be what Justice Rehnquist wanted, but such a result would not be ironic.

Finally, even conceding the irony, it does not automatically follow that the appropriate remedy is, as Justice Rehnquist argues, to remove the procedural protection. One might conclude that the opposite course is the one to take: to impose procedural protection based on the due process clause regardless of state law. This remedy is at least faithful to one of the underlying purposes of the clause: to control arbitrary governmental action.[225] It is not generally part of our jurisprudence to encourage unfettered discretion in the hands of governmental officials. To believe that this is inherently preferable in the prison context assumes at least one of the conclusions.

The real point is not that Justice Rehnquist, in dictum, made an argument that may not withstand careful analysis. His argument reveals, and is a product of, a more important attitude that pervades the post-*Wolff* cases: the refusal of many members of the Court, usually a majority, to credit the concerns of the inmates in the balance of interests. As a corollary, the Court gave practically unquestioning weight to the interests of prison administrators as expressed by those officials.

This was made explicit in the second half of Justice Rehnquist's opinion. As noted, despite Justice Rehnquist's doubts, the Court did find a state-created liberty interest warranting due process protection in the "unmistakably mandatory character" of the language of the regulations, "requiring that certain procedures 'shall,' 'will,' or 'must' be employed, . . . and that administrative segregation will not occur absent specified substantive predicates."[226] In this regard, the Court agreed with the Third Circuit, although the differences in approach between the two opinions are significant.

Having decided that due process protection was required in the decision to transfer someone to administrative segregation, the next issue was, what process was due? The Third Circuit had held that since confinement in segregation is, from the inmate's perspective, the same whether it is labelled "administrative" or "disciplinary," the procedures set forth in *Wolff* governed in both instances. The Third Circuit accommodated an important penal interest by adapt-

693 (1976). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-8 (2d ed. 1987).

[225] It would also serve the purpose of making the rights of inmates in different states uniform, another goal of the Constitution, which would again eliminate the irony to which Justice Rehnquist objects.

[226] *Hewitt*, 459 U.S. at 471-72 (citations omitted).

ing the procedures to the special purpose of administrative segregation, by adjusting the timing of the hearing, and by allowing officials to wait until a "reasonable time" after placement to hold the hearing if required by the exigencies of the situation.[227]

On this point the Supreme Court reversed, and held that even if Helms were entitled to some procedural protection in the decision to transfer him from general population to administrative segregation, he had been accorded all the process that was due by receiving notice of the reason for the placement and an opportunity to present his version. Using the three-step analysis set forth in *Mathews v. Eldridge*,[228] the Court began by finding the governmental interest in placing inmates in administrative confinement, based on the desire to maintain peace and safety in the institution, to be of great importance. In contrast to the finding of Judge Rosenn, however, the Court minimized the importance of the inmate's interest: "[r]espondent's private interest is not one of great consequence. He was merely transferred from one extremely restricted environment to an even more confined situation."[229]

Finally, the Court noted that additional procedures would not really help the decision-maker determine the appropriateness of the placement. The Court reasoned that this is so because the appropriate reason for placing an inmate in administrative segregation will often be subjective rather than objective:

> In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents. The judgment of prison officials in this context, like that of those making parole decisions, turns largely on "purely subjective evaluations and on predictions of future behavior."[230]

So ethereal and amorphous are the criteria the Court recognizes

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227 *See supra* notes 196-202 and accompanying text.

228 424 U.S. 319 (1976). *Mathews* teaches that, in determining what procedures are due in a given situation, a court should consider three elements: the private interests at stake, the governmental interests at stake, and whether increased procedural protection will aid in making the appropriate decision. *Id.* at 335.

229 *Hewitt*, 459 U.S. at 473. Further evidence of how out of touch with the realities of prison life the Court was, at least from the inmates' perspective, is their reasoning that the inmate's interest is slight since confinement to administrative confinement does not carry the same "stigma" as does a sentence to serve time in "disciplinary" confinement. *See id.*

230 *Id.* at 474 (quoting Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981)).

that one must concede the point: given the factors identified upon which administrators may base a decision to transfer an inmate to administrative segregation, it *is* difficult to conceive of what the inmate could offer by way of evidence to defend against the decision. However, that it is appropriate to allow officials to make the decision on nearly unreviewable criteria and thereby vest such power in prison officials in the first place, a more fundamental inquiry,[231] is simply accepted without question.

For these reasons, the Court concluded that prison officials "were obligated to engage only in an informal, nonadversary review of the information supporting respondent's administrative confinement, including whatever statement respondent wished to submit, within a reasonable time after confining him to administrative segregation."[232]

A subsequent decision of the Third Circuit deserves brief mention. *Mims v. Shapp*[233] is testament not only to the tendency of constitutional litigation to expand to the next logical conclusion, but also of the limits of the freedom of lower courts—or at least the Third Circuit—in the face of controlling Supreme Court precedent. *Mims* involved a prisoner, who had been sentenced to jail for murdering a police officer, and who also participated in the murder of the deputy warden while in prison. He was placed in administrative confinement without a prior hearing but did receive monthly reviews during his five-year confinement.[234] The issue before the court was what procedure was due, not at the initial transfer into

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[231] Again admittedly in other contexts, the Court has been much more skeptical of the use of broadly-worded or purely subjective criteria to guide official decision-making where the result might be to curtail constitutional rights. *See, e.g.*, City of Lakewood v. Plain Dealer Publishing Co., 108 S. Ct. 2138 (1988); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Cox v. Louisiana, 379 U.S. 536 (1965).

[232] *Hewitt*, 459 U.S. at 472. Justices Stevens, Brennan and Marshall dissented from the Court's opinion. *Id.* at 479 (Stevens, J., dissenting). Justice Stevens agreed that a liberty interest was implicated by an inmate's transfer to administrative segregation, but he would have found the source of that liberty interest not in state law, or even the Constitution, but in natural law, as described in the preamble of the Declaration of Independence. *See id.* at 483 (Stevens, J., dissenting). Justice Stevens posited that prisoners needed more procedural protection than the informal process approved by the majority. Among the concerns expressed by Justice Stevens on this issue were that poorly educated inmates would not be able to participate in a meaningful way if administrators chose to allow inmates to submit only written statements. *Id.* at 490 (Stevens, J., dissenting). Additionally, he noted that administrators might use an extended stay in administrative segregation as a pretext to punish inmates for incidents for which there was insufficient evidence to prove a disciplinary charge. *Id.* at 491-93 (Stevens, J., dissenting).

[233] 744 F.2d 947 (3d Cir. 1984).

[234] *Id.* at 948-49.

administrative segregation as in *Helms*, but at the periodic review mandated by *Helms*.[235]

The case actually came to the Third Circuit twice. The first time, after the Third Circuit's decision in *Helms* but before the Supreme Court's reversal, Judge Aldisert wrote an opinion affirming a district court holding that the prisoners' right to due process was violated by the lengthy stay and the use of subjective evaluations in the periodic reviews.[236] One effect of the initial opinion was to require that continued confinement in administrative segregation be based on objective criteria.

The case was remanded by the Third Circuit after the Supreme Court granted certiorari in *Helms*.[237] On remand, the court reversed in another opinion written by Judge Aldisert. Judge Aldisert was compelled by the Supreme Court decision in *Helms* to hold that use of subjective criteria during the periodic reviews was permissible.[238] Moreover, the court recognized that the prisoner's substantial history of violence increased the importance of concerns for security.[239] Nonetheless, the court described the very harsh conditions in administrative segregation and pointed to the fact that the inmate's stay would probably have been limitless if not for his lawsuit. The court noted that "[e]ven with the heightened governmental interest existent in this case, Burton's correspondingly heightened private interest makes resolution of the due process issue difficult,"[240] and expressed concern that "periodic review does not simply become a sham."[241]

C. Shabazz v. O'Lone: *Freedom of Religion and the Least Restrictive Alternative Test*

Three years after the Supreme Court's decision in *Hewitt*, the Third Circuit handed down its decision in *Shabazz v. O'Lone*.[242] In *Shabazz*, the court directly confronted the clash between institutional rules and prisoners' right to free exercise of religion, an issue that had not been squarely addressed by the Supreme Court.

At the heart of the dispute in *Shabazz* was the Jumu'ah, a

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235 *Id.* at 948.
236 *See id.* The Third Circuit's first opinion in this matter is unpublished. *Id.*
237 *Id.*
238 *Id.* at 951; *see supra* note 229 and accompanying text.
239 *Id.* at 951 n.4.
240 *Id.* at 951.
241 *Id.* at 954.
242 782 F.2d 416 (3d Cir. 1986), *rev'd*, 107 S.Ct. 2400 (1987).

weekly congregate religious service that is central to the Muslim religion. Pursuant to Muslim religious doctrine, the Jumu'ah must be recited at noon every Friday. Accordingly, prison officials at the New Jersey State Prison at Leesburg, a medium security institution, allowed a Jumu'ah prayer service to be held in the main building of the institution every Friday around noon.[243]

The plaintiffs in *Shabazz*, Ahmad Uthman Shabazz and Sadr-Ud-Din Mateen, were two Muslims incarcerated at Leesburg. Because of their security classifications, both worked outside the prison, as did other Muslims. Prior to 1984, prison officials accommodated the Muslims; inmates who wanted to participate in the congregate prayer service but whose jobs normally took them away from the main building were either allowed to travel back to the institution on their own specifically to participate in the Jumu'ah or were assigned to other jobs in the building on Friday.[244]

This situation had changed by early 1984 after officials passed two regulations unrelated to the Jumu'ah. The first regulation, actually passed in April of 1983, required all inmates classified as "gang minimum" to work outside the institution. The regulation was passed to relieve overcrowding by reducing the number of inmates actually present in the main building during the day, but a side effect was to eliminate the alternative Friday work details to which some Muslims had been assigned to participate in the prayer service. The second measure, designed to reduce discipline and security problems, prohibited inmates from returning on their own to the main building from outside work details.[245] The practical result of the two regulations was to prevent a large number of Muslims from participating in the Jumu'ah. Even though there had been no incidents under the old system, prison officials refused to relax the new regulations for Muslims seeking to exercise their first amendment rights. Shabazz and Mateen brought suit to challenge the regulations, alleging that enforcement of the regulations violated their right to free exercise of religion.[246]

It is somewhat surprising, given the prominent role religion plays in prison and the fact that many of the early lower federal court prisoners' rights cases involved allegations of discrimina-

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243 *Id.* at 417.
244 *Id.* at 417-18.
245 *Id.* at 418.
246 *Id.* at 419.

tion along religious lines,[247] that the Supreme Court had not decided a case establishing the proper standard for analyzing first amendment religion claims of prisoners.[248] Just six years before *Shabazz*, the Third Circuit had set forth an approach to such claims in *Saint Claire v. Cuyler*.[249] In that case, the court rejected the claims of a Muslim inmate in a Pennsylvania prison that enforcement of institutional rules governing clothing violated his first amendment right to free exercise of religion.[250] Relying on *Jones v. North Carolina Prisoners' Labor Union, Inc.*,[251] the court adopted a self-consciously deferential standard: to justify restrictions on inmates' religious freedom, prison officials need only produce evidence that a potential danger to institutional security might result from allowing prisoners to exercize their first amendment rights.[252] Once that is done, courts must defer to the judgment of prison officials unless the inmate establishes by "substantial evidence" that the officials have "exaggerated their response" to the security concerns.[253] The court made clear that its decision was based on the "wide-ranging deference that must be accorded prison officials and the determination that first amendment values must give way to the reasonable considerations of prison management" mandated by recent Supreme Court decisions.[254]

Applying the test set forth in *Saint Claire*, the trial court in *Shabazz* rejected the prisoners' challenge to the regulations.[255] While the Third Circuit also initially rejected the inmates' claim,

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247 *See, e.g.*, Sostre v. McGinnis, 442 F.2d 178 (2d Cir.1971); Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961).

248 In two earlier cases, the Court declared as a general proposition that inmates retain at least some right to religious freedom while in prison, but did not give any content to that right or make clear how prisoners' first amendment religion claims were to be analyzed. *See* Cruz v. Beto, 405 U.S. 319 (1972); Cooper v. Pate, 378 U.S. 546 (1964).

249 634 F.2d 109 (3d Cir. 1980).

250 *Id.* at 110-11. The challenged regulations precluded inmates from wearing religious head coverings in the prison dining room, and when passing through the prison security gate. *Id.* at 110. Additionally, an inmate alleged that the institution's denial of his request to attend Muslim religious services while in segregated confinement violated his free exercise rights. *Id.* at 111-12.

251 433 U.S. 119 (1977). *See supra* notes 120-32 and accompanying text.

252 *Saint Claire*, 634 F.2d at 114 (footnote omitted). The court further explained that the "evidence may consist of expert testimony from the responsible officials, provided they testify to opinions that are 'held sincerely and [are] arguably correct.' " *Id.* (quoting Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 127 (1977)).

253 *Id.* at 114-15.

254 *Id.* at 114.

255 Shabazz v. O'Lone, 595 F. Supp. 928, 935 (D.N.J. 1984).

the court subsequently reconsidered the case. Claiming that "there has been an increasing concern that the *Saint Claire* test provides inadequate protection for the rights of prisoners freely to exercise their religion,"[256] the Third Circuit granted rehearing in banc, sua sponte,[257] "for the purpose of reconsidering the *Saint Claire* standard."[258] The Court then proceeded, by a margin of nine to two, to vacate the prior holding and remand the matter for further consideration.[259]

Judge Adams began by noting the tension inherent in a prison setting. "Imprisonment necessarily places limits upon many of the constitutional freedoms enjoyed by free citizens," yet inmates do retain those rights "not inconsistent with their status as prisoners or with the legitimate penological goals of the corrections system."[260] It is the duty of the federal courts, he continued, to protect those rights.[261] Citing *Wolff*, Judge Adams spoke of the need for a "mutual accommodation" of the interests of both sides.[262] The flaw in *Saint Claire*, according to the majority, was that it did not achieve that accommodation:

> [T]he standard articulated in *St. Claire* does not call for such an accommodation. Rather, under *St. Claire*, a mere declaration by prison officials that certain religious practices raise potential security concerns is sufficient to override a prisoner's first amendment right to attend the central religious service of his faith. The prison officials are not required to produce convincing evidence that they are unable to satisfy their institutional goals in any way that does not infringe the inmates' free exercise rights. Nor do they carry a burden of showing that bona fide security problems occurred or are likely to arise because of the religious practice at issue.[263]

Judge Adams noted that prison officials had not only promulgated the regulations for security reasons, but had objected, also for reasons of security, to alternatives suggested by the prisoners that at-

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256 *Shabazz*, 782 F.2d at 417.

257 While the Third Circuit's opinion does not make it clear, the majority opinion in the Supreme Court states that the grant of rehearing in banc was at the appellate court's own direction. *See* O'Lone v. Shabazz, 107 S. Ct. 2400, 2403 (1987).

258 *Shabazz*, 782 F.2d at 417.

259 *Id.* at 421. Judge Adams was joined by Judges Seitz, Gibbons, Weis, Higginbotham, Sloviter, Becker, Stapleton and Mansmann. Judges Hunter and Garth dissented from the majority opinion.

260 *Id.* at 419 (citing Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977); Pell v. Procunier, 417 U.S. 817 (1974)).

261 *Id.* (citations omitted).

262 *Id.* (citing Wolff v. McDonnell, 418 U.S. 539 (1974)).

263 *Id.*

tempted to address the security concerns while allowing them to participate in the congregate service. Yet under the *Saint Claire* standard, the officials had no obligation "to establish that such security concerns were genuine and were based upon more than speculation."[264]

The court therefore held that the *Saint Claire* standard inadequately protected inmates' rights by failing to require an inquiry into the feasibility of ways to accommodate their interest.[265] Upon remand, prison officials would have to show "that the challenged regulations were intended to serve, and do serve, the important penological goal of security, and that no reasonable method exists by which appellants' religious rights can be accommodated without creating bona fide security problems."[266] Judge Adams further stated that, in making the appropriate inquiry, the expert testimony of prison officials could be given "due weight" but was not to be treated as "dispositive" of whether a reasonable adjustment was possible.[267] Once again, as in *Helms*, the court identified the inmates' interest as "particularly strong,"[268] but found the interests of the prison officials to be great as well. For that reason, the court did not decide the ultimate issue of the constitutionality of the regulations, but remanded it to the lower court to make the necessary factual inquiry.[269]

Judge Adams denied that the majority's approach was inconsistent with the deference called for by the recent Supreme Court cases. He conceded that prison officials are entitled to deference, "but where first amendment values are implicated such deference must be tempered by an effort to accommodate free exercise values."[270] "[W]hile we are not unaware of the role that the deference principle has played in the Supreme Court's opinions regarding prisoners' rights," concluded Judge Adams, "and indeed subscribe to that principle, we seek only to ensure that it does not deprive prisoners' free exercise rights of all content."[271]

Judge Hunter, joined by Judge Garth, dissented, claiming that the majority was departing from the appropriate precedents articu-

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264 *Id.* at 419-20.

265 *Id.* at 420.

266 *Id.* (citations omitted).

267 *Id.*

268 *Id.* at 421.

269 *Id.*

270 *Id.* at 420.

271 *Id.*

lated by the Supreme Court.[272] Judge Hunter questioned the "unsupported" assertion that there was general dissatisfaction with the *Saint Claire* standard.[273] However, he reserved his strongest criticism for the retreat by the majority from the deference he believed due to the judgment of prison administrators:

> Although the majority opinion recognizes and reiterates the deference principle, the standard announced today displays a lack of appreciation for the considerations supporting this principle. In part, deference is dictated by the very fact that our prisons are "places of involuntary confinement of persons who have demonstrated a proclivity for antisocial criminal and often violent conduct. Deference also stems from the inherent nature of the judicial branch as separate from those branches that administer our prisons, and lacking in the expertise to run correctional facilities.[274]

Judge Hunter accused the court of having usurped a greater role than was warranted. He explained that "under the majority's mutual accommodation standard, federal courts are no longer guardians of fundamental constitutional rights but arbitrators in disputes between prison officials and inmates.[275] He continued that "[t]o facilitate this dubious new calling, the majority asks federal judges to second guess the administrators' judgment by finding 'a reasonable method' to accommodate inmates."[276] Judge Hunter warned that "[t]his new standard opens the door to a floodgate of future litigation to determine what 'reasonable' accommodation must be permitted to override security or other penological objectives,"[277] and that the standard "will not only cause substantial problems in the already difficult field of prison administration, but it will necessarily result in an impairment of security in those institutions where security is the primary consideration."[278]

The majority opinion in *Shabazz*, more than *Helms*, represented a departure from Supreme Court precedent, despite the court's insistence that it accepted and was following prior teachings. To be

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272 *Id.* at 425 (Hunter, J., dissenting) (citations omitted).

273 *Id.*

274 *Id.* at 422 (Hunter, J., dissenting) (citing Hudson v. Palmer, 468 U.S. 517 (1984); Bell v. Wolfish, 441 U.S. 520 (1979)).

275 *Id.* at 423 (Hunter, J., dissenting).

276 *Id.*

277 *Id.* at 425 (Hunter, J., dissenting). In the second half of his dissent, Judge Hunter argued that, even under the standard devised by the majority, the prison officials had produced enough testimony of the security dangers posed by the regulations and the alternatives suggested by the inmates to uphold the regulations. *Id.* at 426-30 (Hunter, J., dissenting).

278 *Id.* at 431 (Hunter, J., dissenting).

sure, *Shabazz* was not the first decision to require officials to consider whether less restrictive alternatives existed by which one could accommodate both institutional and inmate interests.[279] Indeed, it was not even the first Third Circuit case to require such an inquiry. In *O'Malley v. Brierley*,[280] the court reversed a grant of summary judgment against inmates who challenged the decision of prison officials not to allow their clergymen to visit them.[281] In remanding the case for trial, Judge Aldisert explained, "[i]n arriving at its 'reasonableness' determination, the fact finder shall find the regulation to be reasonable only if the alternative chosen (complete exclusion [of the priests]) result[s] in the least possible 'regulation' of the constitutional right consistent with the maintenance of prison discipline."[282]

Nonetheless, the court's in banc decision in *Shabazz* differs in important ways from the Supreme Court decisions it claims to follow. As in *Helms*, the court accorded great weight to the interest of the inmates. Judge Adams's opinion went further, however. While conceding the importance of the institution's interests, Judge Adams refused to accept unquestioningly that administrators or other prison officials always give proper regard to the inmates' interests or even that they always act in good faith. The result was a standard that, while not totally eschewing deference, was certainly more balanced than that employed by the Supreme Court in cases such as *Jones*, *Bell* and *Hudson*.

This willingness to question the motives of prison officials may partly explain, or at least justify, an approach that insists on an inquiry into less restrictive alternatives. Imposing the requirement

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279 *See, e.g.*, Safley v. Turner, 777 F.2d 1307 (8th Cir. 1985), *aff'd in part, rev'd in part*, 107 S. Ct. 2254 (1987); Gallahan v. Hollyfield, 670 F.2d 1345 (4th Cir. 1982); Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975). Even the Supreme Court, in *Martinez*, had held that restrictions on first amendment freedoms could not be justified unless they were "no greater than is necessary or essential to the protection of the particular governmental interest involved." *Martinez*, 416 U.S. at 413. That, of course, was an explication of the rights of those outside the institution seeking to communicate with inmates. *See supra* notes 52-70 and accompanying text.

280 477 F.2d 785 (3d Cir. 1973).

281 *Id.* at 786. Ironically, Judge Aldisert, writing for a unanimous panel, held that the priests had no right to visit the institution, and that summary judgment against them was appropriate. *Id.* at 795. Recognizing that the inmates may have constitutionally protected rights to free exercise of religion, the Court reversed the grant of summary judgment against them. *Id.* at 796.

282 *Id.* at 796. The trial court in *Saint Claire* had relied on *O'Malley* to require an inquiry into less restrictive alternatives. Saint Claire v. Cuyler, 481 F. Supp. 732, 737 (E.D. Pa. 1979), *rev'd*, 634 F.2d 109 (3d Cir. 1980). The Third Circuit in *Saint Claire* rejected this approach and adopted the deferential approach that was subsequently discarded in *Shabazz*. *See Saint Claire*, 634 F.2d at 114.

that officials demonstrate that they have considered alternatives and that no other course of action would further the institutional goals without raising other security concerns may be, as the court claimed, a necessary part of the "mutual accommodation" required by *Wolff*. Additionally, it is a way to ensure that administrators' proffered security justifications are real and are asserted in good faith. In this regard, a "least restrictive alternative" test, or something close to it, calls to mind John Hart Ely's analysis of the interplay between the "strict scrutiny" test employed for analysis of equal protection claims and the search for unconstitutional motivation.[283] If in fact there are easy alternatives by which administrators could allow inmates to exercise their right to worship without jeopardizing institutional security and those alternatives are not adopted, it is at least some evidence that the administrators are concerned with more than just insuring institutional security.[284]

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283 *See* J. ELY, *supra* note 27, at 145-70. Ely argues that the two prong test—that is, the law must further a compelling state interest and must be necessary to achieve that goal—used to analyze laws that impact on a "suspect classification" such as race may be understood as a way to discover unconstitutional motivation. *Id.* at 145-46. Ely argues that when confronted with a law that by its terms, disadvantages a member of a suspect classification, one would naturally suspect that the purpose of the legislation was simply to harm members of that group. Ely sets forth the criteria to allay this suspicion:

> [t]o start with, the classification fits as well as it fits the goal of comparatively disadvantaging the minority affected. For if it turns out that the classification fits the invidious goal more closely than it fits the goal the state now comes up with, you will ask why they didn't classify in terms more germane to the goal they are now arguing, and your suspicion that the goal suggested by the face of the statute was the real one will hardly be allayed.

Id. at 147. Even if there is a tight fit between the means selected and the proffered goal, however, that is only half the equation and you must still look for a governmental interest of sufficient weight: "For even a perfect fit between the classification in issue and the goal the state is arguing shouldn't be enough to allay your initial suspicion if that goal is so unimportant that you have to suspect it's a pretext that didn't actually generate the choice." *Id.* at 147-48. Of course, in the context of prisoners' rights, with the frequent resort to security to justify any and all regulations, there is no question about the importance of the asserted governmental interest. Nonetheless, the first half of Ely's analysis seems relevant in the prisoners' rights context.

284 It is important to keep in mind the limitations of the relevance of unconstitutional motivation for the issue in *Shabazz*. Ely was considering the problem raised by cases in which the underlying governmental action was not in and of itself unconstitutional but only became so because it was undertaken to discriminate, or to impermissibly disadvantage a minority group. *See, e.g.*, Palmer v. Thompson, 403 U.S. 271 (1971) (suit challenging town officials' closing of municipal pools after directed to open pools to blacks). Actions challenged as an unconstitutional infringement on the right of free exercise of religion will usually be struck down if the effect of the action is to inhibit the free exercise of religion, even if one can be

This skepticism is different from the approach of the Supreme Court, at least in post-*Wolff* cases, in which the Court assumes that administrators are in fact motivated by the security concerns they claim and that they invariably act reasonably in assessing the situation.[285] While it is true that the Court's decision in *Jones* did purport to require that the views of prison officials be "held sincerely" as well as "arguably correct,"[286] it is clear that in the context of the opinion, that language expressed not skepticism toward the officials but a take-off point for even greater deference. The Court neither developed any way to determine whether officials' opinions were sincerely held and correct, nor engaged in any inquiry to see if this was so. Nor in subsequent cases did the Court suggest that there was any real substance to the inquiry described in *Jones*. Indeed, in *Hudson*, the Court rejected the inmate's claim even after assuming as true the allegation that the shakedown searches at issue were done to harass him. In this way, the Third Circuit's decision in *Shabazz* departed from the Supreme Court's decisions of the past decade, by introducing into the analysis a meaningful assessment of the reasonableness and good faith of prison administrators whose actions are claimed to be motivated by security concerns.

Given these important differences in approach it is not surprising that the Supreme Court granted certiorari in *Shabazz* and reversed.[287] The approach of the Third Circuit was largely, although not totally, discarded. The Court upheld the regulations and criticized the Third Circuit decision as not sufficiently deferential.[288] Employing the analysis first set forth nine days earlier in its decision in *Turner v. Safley*,[289] Justice Rehnquist, again writing for the *Shabazz*

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certain that it was not the purpose of the action. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977); Sherbert v. Verner, 374 U.S. 398 (1963).

285 It was this attitude that Justice Stevens criticized in his dissenting opinion in *Hudson*. *See* Hudson v. Palmer, 468 U.S. 517, 542, (1984) (Stevens, J., dissenting). A number of commentators have been much less willing to accept the good faith and reasonableness of judgments made by prison officials and guards. *See* Berger, *supra* note 18, at 22. "Probably the most abhorrent result of judicial deference to administrative expertise, however, is the granting of unrestricted and unreviewed discretionary authority to the undereducated and undertrained guard." *Id.* *See also*, Hirschkopf & Millemann, *supra* note 32, at 811-12.

286 *Jones*, 433 U.S. at 127.

287 O'Lone v. Shabazz, 107 S. Ct. 2400, 2407 (1987).

288 *Id.* at 2405. The Court explained that "[b]y placing the burden on prison officials to disprove the availability of alternatives, the approach articulated by the Court of Appeals fails to reflect the respect and deference that the United States Constitution allows for the judgment of prison administrators." *Id.*

289 107 S. Ct. 2254 (1987). *Turner* was decided on June 1st, 1987, and *Shabazz* was handed down June 9th, 1987. *Turner* was a class action brought by inmates in the Missouri prison system. *Id.* at 2257. In that case, the Court upheld a prison

majority, restated the general test: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[290] By itself, the language of the standard was not very different from that set out in cases such as *Jones*[291] and *Bell*.[292] Justice Rehnquist went on, however, to identify a number of factors to guide the inquiry into the reasonableness of the regulations. First, "a regulation must have a logical connection to legitimate governmental interests invoked to justify it."[293] The requirement of a "logical connection," however, does not appear to be any more burdensome than the "rational relationship" test under standard equal protection analysis.[294] The Court cited evidence in the record to demonstrate that the policy that required certain inmates to work outside the institution was related to the effort to solve an overcrowding problem described as "critical." Moreover, the Court noted that the ban on inmates' re-

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regulation that, with few exceptions, allowed prison officials to withhold mail between inmates if the officials determined that course of action to be "in the best interests of the parties involved." *Id.* at 2258. However, the Court struck down another regulation that presumptively disallowed marriages between inmates. *Id.* at 2267. The state refused to allow such marriages unless there were "compelling" reasons to do so, which meant, as the regulation was interpreted, only where pregnancy and the birth of an illegitimate child were involved. *Id.* at 2258. The Court held that such regulation was not even reasonably related to the proffered penological goal. *Id.* at 2266.

290 *Shabazz*, 107 S. Ct. at 2404 (quoting Turner v. Safley, 107 S. Ct. 2254, 2261 (1987)). A year later in Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562 (1988), the Court upheld the censorship by high school officials of an article on teenage pregnancy in a student newspaper. *Hazelwood*, 108 S. Ct. at 572. In assessing the constitutionality of the school officials' actions, the majority rejected the standard first enunciated in Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969), that restrictions on students' first amendment rights were invalid unless "necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others." *Hazelwood*, 108 S. Ct. at 567 (quoting Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969)). Instead, the Court adopted a new standard: "[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are *reasonably related to legitimate pedagogical concerns*." *Id.* at 571 (emphasis added) (footnote omitted).

The similarity to the standard adopted in *Turner* to govern restrictions on inmates' rights is striking. Yet neither the majority, nor even the strongly-worded dissent by Justice Brennan remarked on this similarity. The equation of prisoners and students for constitutional purposes probably provides little comfort to either group.

291 *See supra* note 120-28 and accompanying text.

292 *See supra* note 133-44 and accompanying text.

293 *Shabazz*, 107 S. Ct. at 2405 (citing Turner v. Safley, 107 S. Ct. 2254 (1987)).

294 *See* Turner v. Safley, 107 S. Ct. 2254, 2262 (1987) ("[A] regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.").

turning to the institution alleviated additional pressure placed on guards and congestion created at the main gate, both of which exacerbated security problems. Thus, the Court determined that the regulations were valid under the first factor.[295]

Second, the Court examined whether the inmates had "alternative means of exercising the right."[296] This inquiry was somewhat more difficult. Muslim inmates did have many other opportunities to exercise the right to worship their religion in prison, including the right to engage in solitary prayer and the right to congregate prayer at times other than during working hours. Moreover, prison officials took a number of affirmative steps to accommodate Muslim inmates, such as preparing a special religious diet for those who requested it, and making special arrangements during the month-long observance of Ramadan, in which inmates eat meals at special times and engage in prayer.[297] Because of the special time constraints involved, however, there were no alternatives to participating in the Jumu'ah.

Despite the central role the Jumu'ah plays in the Muslim religion, the Court refused to force prison officials to bend the rules to the logistics of the rite. Rather, the Court held that the opportunity to participate in other facets of the religion was sufficient; the inability to participate in the Jumu'ah did not, in itself, make the regulations unreasonable. "While we in no way minimize the central importance of Jumu'ah to respondents," declared Justice Rehnquist, "we are unwilling to hold that prison officials are required by the Constitution to sacrifice legitimate penological objectives to that end."[298]

The third factor considered by the Court was the "impact that accommodation of respondents' asserted right would have on other inmates, on prison personnel, and on the allocation of prison resources generally."[299] The Court found a number of adverse conse-

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295 *Shabazz*, 107 S.Ct. at 2405-06.

296 *Id.* at 2406 (quoting Turner v. Safley, 107 S. Ct. 2254, 2262 (1987)).

297 *Id.*

298 *Id.* To return to the point concerning unconstitutional motivation, it is interesting to note that Justice Rehnquist concluded that the Muslims' opportunity to take part in other religious observances rendered the regulations at issue reasonable. *Id.* It is difficult, however, to see why the ability to participate in other services indicates that the regulations at issue are reasonable. The willingness to make accommodations to the demands of the inmates' religion elsewhere *is* at least some evidence that administrators, in passing the regulations, were not motivated by a desire to discriminate against Muslims solely because of their religion. That, however, is only half of the inquiry. *See supra* notes 283-84.

299 *Shabazz*, 107 S. Ct. at 2406 (citing Turner v. Safley, 107 S. Ct. 2254 (1987)).

quences that would result from failing to enforce regular prison practices or policies to accommodate the Muslims' religious rights. Assigning the inmates to work inside the main building on Fridays would undermine efforts to solve the overcrowding problem, while allowing them to work on weekend details would drain resources by requiring extra supervision. As a general matter, the Court noted that to develop special arrangements for the Muslims would create a perception of favoritism that could lead to security problems.[300] Moreover, the Court accepted the fears articulated by officials, that accommodating Muslims who wanted to participate in the Jumu'ah would risk allowing "affinity groups" to flourish in the institution.[301]

The Court did not totally reject the relevance of available alternatives, however, and conceded that they were relevant to the inquiry into the reasonableness of the regulations. Justice Rehnquist's explanation of this factor was truncated compared to the discussion of the same point in *Turner*, which is somewhat surprising in light of the centrality of the issue in the Third Circuit. The Court did make clear however, that the relevance of alternatives did not amount to a "least restrictive alternative" test: "we have rejected the notion that 'prison officials . . . have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint.' "[302]

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300 *Id.* at 2406-07. This reasoning overlooks the fact that other special arrangements had been made for Muslims at other times. In fact, as noted, prison officials offered their willingness to make accommodations in other areas as evidence of the reasonableness of the regulations at issue, and did not suggest that the other accommodations created a potential security problem. Justice Rehnquist does not say why accommodating inmates attempting to participate in the Jumu'ah would foster a perception of favoritism, but accommodating Muslims who request a special diet or who want to participate in the observance of Ramadan would not create this problem. Indeed, the problem of a perception of favoritism, if applied in every situation, could work against any efforts at accommodation at any time.

301 *Id.* Again, the rationale offered by the administrators proves too much. The fear of "affinity groups," described by the Court as "a group of individuals . . . with one particular affinity interest," would lead to a ban of all congregate religious services by the institution, a step the administration did not otherwise believe was necessary. *Id.*

302 *Id.* at 2405 (quoting Turner v. Safley, 107 S. Ct. 2254, 2262 (1987)). In *Turner*, Justice O'Connor, writing for the majority, explained:

> Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation. . . . By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an "exaggerated response" to prison concerns. This is not a "least restrictive alternative" test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. . . . But if an inmate claimant can point to an alternative that fully accommodates the

Justices Marshall, Blackmun and Stevens joined a passionate dissent written by Justice Brennan. "Prisoners are persons whom most of us would rather not think about,"[303] Justice Brennan began. "Banished from everyday sight, they exist in a shadow world that only dimly enters our awareness."[304] The dissent continued that "[i]t is thus easy to think of prisoners as members of a separate netherworld, driven by its own demands, ordered by its own customs, ruled by those whose claim to power rests on raw necessity."[305] Justice Brennan reminded that "[nothing] can change the fact, however, that the society these prisoners inhabit is our own. Prisons may exist on the margins of that society, but no act of will can sever them from the body politic."[306]

The dissenters objected strongly to the "reasonableness" standard accepted by the majority: "Such a standard is categorically deferential and does not discriminate among degrees of deprivation. . . . If a directive that officials act 'reasonably' were deemed sufficient to check all exercises of power, the Constitution would hardly be necessary."[307] More than this, the use of such a standard sent a signal that prisoners' claims are of little importance, argued Justice Brennan:

> A standard of review frames the terms in which justification may be offered, and thus delineates the boundaries within which argument may take place. The use of differing levels of scrutiny proclaims that on some occasions official power must justify itself in a way that otherwise it need not. A relatively strict standard of review is a signal that a decree prohibiting a political demonstration on the basis of the participants' political beliefs is of more serious concern, and therefore will be scrutinized more closely, than a rule limiting the number of demonstrations that may take place downtown at noon.[308]

> prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.

Turner, 107 S. Ct. at 2262 (emphasis in original). In that case, the availability of reasonable alternatives was important in the Court's decision to strike down the regulation presumptively barring inmate marriages. Additionally, the availability of alternative avenues of communication played an important role in the Court's upholding the ban on face-to-face interviews in *Pell*. *See supra* notes 77-78 and accompanying text.

303 *Shabazz*, 107 S. Ct. at 2407 (Brennan, J., dissenting).

304 *Id.*

305 *Id.* at 2408 (Brennan, J., dissenting).

306 *Id.*

307 *Id.*

308 *Id.* at 2409 (Brennan, J., dissenting).

Justice Brennan advocated a variable standard rather than the uniform standard employed by the majority.[309] If the activity involved was "presumptively dangerous" or if the restriction of the activity related only to the time, place or manner of its occurrence, the only question, according to Justice Brennan, was whether the standard was reasonable.[310] If, however, the activity was not dangerous and the regulation at issue curtailed the activity completely, Justice Brennan would hold the regulation invalid unless it furthered an important governmental interest and the restriction was "no greater than necessary to effectuate the governmental objective involved."[311] Such a standard, Justice Brennan asserted, "takes seriously the Constitution's function of requiring that official power be called to account when it completely deprives a person of a right that society regards as basic."[312]

Finally, Justice Brennan argued that, even under the test the majority claimed to apply, the regulations failed to pass constitutional muster. Justice Brennan again stressed the absolute nature of the deprivation—the total inability to participate in the Jumu'ah—and rejected the security concerns raised by the administrators as mere pronouncements without any support in the record.[313] Justice Brennan noted that in both the federal system and in Leesburg itself for the five years before the regulations at issue were passed, prisoners were allowed to participate in the Jumu'ah without incident. He analyzed the alternatives at accommodation suggested by the inmates and accepted each as plausible.[314]

On the most basic level of who won and who lost, *Shabazz*, like *Helms*, is an example of the Third Circuit's efforts to reach a more balanced approach to the accommodation between the rights of those incarcerated and the legitimate interests of those charged with the admittedly formidable task of running the institutions. Also, as in *Helms*, that more balanced effort was largely, but not totally, repudiated by the Supreme Court. Yet, something of the Third Circuit's approach survived. The "reasonableness" test set forth in *Turner* and *Shabazz* was not, by itself, new. However, in attempting to clarify that standard, the Court set forth a number of factors to guide courts in the assessment of the reasonableness of official actions. Moreover, the Court conceded that the availability of "obvious, easy

309 *Id.* (citing Abdul Wali v. Coughlin, 754 F.2d 1015 (2d Cir. 1985)).
310 *Id.* (quoting Abdul Wali v. Coughlin, 754 F.2d 1015, 1033 (2d Cir. 1985)).
311 *Id.* (quoting Abdul Wali v. Coughlin, 754 F.2d 1015, 1033 (2d Cir. 1985)).
312 *Id.*
313 *Id.* at 2413-14 (Brennan, J., dissenting).
314 *Id.* at 2412-14 (Brennan, J., dissenting).

alternatives" was at least a factor to be considered, although the majority fell short of requiring administrators to meet a "least restrictive alternative" test.

In determining whether *Turner* and *Shabazz* represent a softening of the approach dictated by the Court in the cases after *Wolff*, or whether the pessimism and the passion of the dissenters are justified, it would fall to the lower federal courts, including the Third Circuit, to give substance to the analysis insisted upon by the Court.

D. Monmouth County Correctional Institution Inmates v. Lanzaro: *Giving Some Substance to the Test*

At one level, all governmental action must be "reasonable," at least insofar as the government may not act in an arbitrary or capricious manner. To require only that of the actions of governmental officials, however, effectively writes the Constitution out of the analysis. Following the decisions in *Shabazz* and *Turner* the question was whether courts were to define "reasonableness" to require any more than the most minimal protection, or whether the fact that constitutional rights were involved in a given case mattered in the analysis. As usual, with the application of Supreme Court decisions, that question was addressed first by the lower courts. The Third Circuit, for one, answered that it did matter when constitutional rights are involved.

The 1987 case of *Monmouth County Correctional Institution Inmates v. Lanzaro*[315] was an unlikely vehicle for an expansion of the rights of those incarcerated. To be sure, conditions at the Monmouth County jail were so deplorable, that Judge Harold Ackerman of the United States District Court, three years earlier, held that those conditions amounted to cruel and unusual punishment in violation of the eighth amendment.[316] The issue in *Monmouth County* before the Third Circuit, however, was much narrower. Specifically, it involved one of the most controversial issues in the past fifteen years: the right to abortion.[317]

The case involved a challenge to a county policy that refused to provide access to or funding for "purely elective and nontherapeutic" abortions to inmates in the institution. Instead, inmates

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315 834 F.2d 326 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1731 (1988).

316 Monmouth County Correctional Inst. Inmates v. Lanzaro, 595 F. Supp. 1417 (D.N.J. 1984).

317 *Monmouth County*, 834 F.2d at 328. For a summary of the controversy generated by the Supreme Court's decision in Roe v. Wade, 410 U.S. 113 (1973), recognizing the right to abortion, see D.M. O'BRIEN, *supra* note 170, at 23-43.

desiring such abortions were forced to secure a court order temporarily releasing them from jail so they could arrange for the abortions themselves. The plaintiffs argued that the county policy violated the inmates' right to privacy under the fourteenth amendment.[318] Additionally, they alleged that the state's refusal to provide medical treatment deprived them of equal protection of the law in violation of the eighth and fourteenth amendments.[319] Finally, the prisoners alleged that the county policy violated analogous provisions of the New Jersey Constitution. The county, on the other hand, did not contest its obligation to provide "medically necessary" services to inmates. The county even conceded its obligation to provide abortions that the jail physician determined to be medically necessary. However, because the abortions at issue were "purely elective medical procedures," the county argued that it had no obligation to provide the services.[320]

Judge Ackerman, sitting in the United States District Court for the District of New Jersey, issued a preliminary injunction, striking down the county policy.[321] Relying in part on the Supreme Court's decision in *Martinez*,[322] and on the Third Circuit's opinion in *Shabazz*, Judge Ackerman ruled that the county policy had to be based on a "compelling" state interest and had to satisfy a least restrictive alternative test.[323] Applying those standards, Judge Ackerman held that the county's policy impermissibly burdened the inmates' fundamental right to choose to have an abortion, in violation of the fourteenth amendment.[324] Because Supreme Court precedent had established that the State is not constitutionally obligated to provide funding for nontherapeutic abortions,[325] however, Judge Ackerman refused to hold that the county's policy of refusing to provide funding also violated inmates' right to privacy. As a practical matter, that distinction became moot by Judge Ackerman's ruling that the failure to provide funding violated the inmates rights under the eighth

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318 *Monmouth County*, 834 F.2d at 329.

319 *Id.*

320 *Id.* at 334.

321 Monmouth County Correctional Inst. Inmates v. Lanzaro, 643 F. Supp. 1217, 1221 (D.N.J. 1986), *aff'd*, 834 F.2d 326 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1731 (1988).

322 *See supra* notes 52-70 and accompanying text.

323 *Monmouth County*, 643 F. Supp. at 1223.

324 *Id.* at 1228-29.

325 *See, e.g.*, Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977).

amendment and under the New Jersey Constitution.[326]

The county appealed the grant of the preliminary injunction and the Third Circuit affirmed. The Court did so despite the Supreme Court's reversal of *Shabazz* which made clear that neither the "compelling state interest" test nor the "least restrictive alternative" test was appropriate when analyzing regulations burdening prisoners' rights. Judge Higginbotham, in an opinion joined by Judge Rosenn, employed the test from *Turner* and *Shabazz* and concluded that the county policy failed to meet the "reasonableness" standard established in those cases.[327]

Judge Higginbotham first addressed the question of whether the policy infringed on the right to privacy guaranteed by the fourteenth amendment. As in *Helms* and *Shabazz*, the court sided strongly with the inmates seeking the abortions, citing the very strong interest at stake for them. Relying on nonprison precedents, the court noted that hardly any decisions "are more personal and intimate, more properly private, or more basic to individual dignity and autonomy than a woman's decision—with the guidance of her physician and within the limits specified in [*Roe*]—whether to end her pregnancy. A woman's right to make that choice is fundamental."[328] The court had little trouble finding that the right of privacy encompassing the right to elect to have an abortion is a right retained upon incarceration.[329] Further, Judge Higginbotham rejected the county's argument that its policy did not infringe on the right to abortion. Rather, the court found that the policy, although purporting to allow inmates to seek court orders to gain release and arrange for abortions, actually amounted to a total denial of access to that procedure. Maximum security inmates would not realistically be able to secure a court an order releasing them to obtain an abortion. Moreover, even for low security inmates who might convince a court to release them, the delays inherent in obtaining a court ordered release and then arranging an abortion effectively denied them access to abortions as well.[330]

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[326] *Monmouth County*, 643 F. Supp. at 1223-27.

[327] *Monmouth County*, 834 F.2d at 338-44.

[328] *Id.* at 334 (quoting Thornburgh v. American College of Obstetricians, 476 U.S. 747, 772 (1986)).

[329] *See id.* at 334 n.11. The county conceded this point and the Third Circuit noted that the Supreme Court had recognized that prisoners retain similar aspects of the right to privacy. *Id. See* Turner v. Safley, 107 S. Ct. 2254 (1987) (striking down nearly absolute ban on inmate marriages); Skinner v. Oklahoma, 316 U.S. 535 (1942) (striking down sterilization program aimed at certain convicted felons).

[330] *Monmouth County*, 834 F.2d at 337. Although Judge Higginbotham did not cite

The court not only disagreed with the county's concept of the effect of the policy on the right to abortion, but more importantly, it rejected the county's efforts to justify the policy as well. Judge Higginbotham first considered the main justification for the policy offered by the county: the financial and administrative burdens that would be imposed on the county if it was required to provide access to and funding for purely elective, nontherapeutic abortions. Pointing out that the Supreme Court's decision in *Shabazz* had not altered the requirement that the government justify infringement of prisoners' constitutional rights by "a legitimate state interest,"[331] the court held that a desire to avoid financial and administrative burdens did not qualify as a legitimate state interest. Economic considerations could play a role in devising the appropriate remedy for an infringement of a constitutional right, ruled Judge Higginbotham, but " 'the cost of protecting a constitutional right cannot justify its total denial.' "[332]

Judge Higginbotham turned next to the question of whether the county policy could be justified on the ground of security, although he expressed doubt that this was the justification for the policy.[333] Looking to the four factors set out in *Safley* to determine the reasonableness of the prison regulations, the court held that the policy could not be justified by security concerns. First, the court simply rejected categorically the claim that the policy at issue had any valid, rational connection to legitimate security concerns. "The court order requirement . . . centers around the nature of the treatment; it in no way relates to the gravity of any perceived security risks."[334] Agreeing with a finding made by

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any factual evidence to support his conclusions about the practical effect of the county policy, one of the women whose request for an abortion led to the challenge of the county policy did in fact experience significant delays in obtaining her release. *Id.* at 329.

331 *Id.* at 336 (citing O'Lone v. Shabazz, 107 S. Ct. 2400, 2405 (1987)).

332 *Id.* at 337 (quoting Bounds v. Smith, 430 U.S. 817, 825 (1977)).

333 *See id.* at 336. Judge Higginbotham wrote that "[t]he sole governmental interest asserted by the County as justification for the policy is that unspecified, yet insurmountable, administrative and financial burdens will result if the county is required to provide access to, and funding for, elective, nontherapeutic abortions." *Id.* (footnote omitted). He continued that "the county has never affirmatively maintained on this record 'that security concerns underlie the challenged regulation.' " *Id.* at 336 n.15 (citations omitted). Both Judge Ackerman in the District Court and Judge Mansmann, who wrote a concurring opinion, believed that the County *was* asserting security concerns as justification for the policy. *See Monmouth County*, 643 F. Supp. at 1223; *Monmouth County*, 834 F.2d at 352 (Mansmann, J., concurring) (emphasis added).

334 *Monmouth County*, 834 F.2d at 338.

Judge Ackerman, Judge Higginbotham noted that, " '[a]ll other things being equal, inmates who wish to have an abortion pose no greater security risk than any other inmate who requires outside medical attention.' "[335]

Second, Judge Higginbotham considered whether the policy left inmates alternative means to exercise the right to abortion and concluded that the policy did not provide adequate alternatives. Judge Higginbotham repeated his findings that maximum security inmates would be unable to secure a court-ordered release to arrange for an abortion. He also noted that low security inmates would face delays that would effectively preclude exercise of the right to have an abortion.[336]

Third, the court examined the impact that accommodation of the inmates' right would have on other inmates and other members of the prison community. The court not only determined that accommodating the right to elective abortions did not affect other inmates, it also concluded that, for the same reasons, the lower court's finding that there was no obligation to provide funding for abortions was erroneous. Ironically, in this part of his analysis, Judge Higginbotham reasoned that incarceration gave rise to a right the inmates would not otherwise have. After reviewing Supreme Court precedents that held that the government has no constitutional obligation to fund abortions, Judge Higginbotham ruled that those decisions did not control when the person asserting the right was incarcerated. "Whatever the government's constitutional obligations to the free world, those obligations often differ radically in the prison context."[337] Judge Higginbotham pointed to the obligation to provide food and housing to prisoners, obligations not constitutionally required of government for the poor and homeless outside prisons. "Because of the very fact of incarceration," Judge Higginbotham wrote, "the Supreme Court has recognized that "the public [is] required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself [or herself]." "[338]

Moreover, Judge Higginbotham noted that instead of requiring expenditure of greater resources, accommodating prisoners' right to abortions would consume the same or fewer resources as the medical care the prison would have to provide if prisoners

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335 *Id.* (citation omitted).

336 *Id.* at 338-40.

337 *Id.* at 341 (citing Southerland v. Thigpen, 784 F.2d 713, 716 (5th Cir. 1986)).

338 *Id.* at 341 (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)).

carried their pregnancies to term.[339] He also rejected the idea that providing abortions to inmates who wanted them would be perceived as favoritism toward those inmates.[340] He conceded that the state may have a legitimate interest in encouraging natural childbirth over abortion.[341] In focusing on the penological setting, however, he held that the interest could not be pursued because "encouraging childbirth in the prison context furthers none of the traditionally recognized penological objectives of rehabilitation, internal security or deterrence of crime."[342] Judge Higginbotham concluded that:

> We simply perceive no "significant ripple effect on fellow inmates or on prison staff". . . that would be caused by providing medical services to inmates choosing abortion equal or comparable to those provided to inmates electing childbirth. Nor has any reason been suggested why, in terms of costs, a prison's obligation to accommodate the retained right of the inmate to choose abortion should be treated any differently

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339 *Id.* at 341-42.

340 *Id.*

341 This had been an important part of the rationale of the cases that refused to find a constitutional obligation on the part of government to fund abortions. *See, e.g.*, Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977).

342 *Monmouth County*, 834 F.2d at 342-43 (footnote omitted). Judge Higginbotham's reasoning—that government may not pursue what are concededly valid state interests in the prison setting unless they *also* serve one of the legitimate penological objectives identified in *Pell*—is questionable at best. The legitimate penological objectives identified in *Pell* (and nearly every prisoners' rights decision since that one) typically serve the purpose of justifying restrictions on constitutional rights that would not be acceptable but for the fact of incarceration and the special character and needs of penal institutions. Judge Higginbotham suggests the opposite result: that the legitimate penological objectives, if not furthered by the particular restriction, prevent the state from pursuing a policy it could have adopted if the person involved was not incarcerated. But it is difficult to see why this should be so. There is no reason why, as a general proposition, a state interest that is legitimate when applied to persons outside the institution automatically becomes less so simply because the person who is the target of the policy is incarcerated. Why the state may "encourage" free women to choose natural childbirth over abortion but loses the power to attempt the same persuasion once a woman enters prison is not clear.

That is not to say that the policy at issue is constitutional. The problem with the county's analogy to *Maher* and *Beal* is not that the state loses the power to encourage women in prison to opt for childbirth. It is that a policy that "encourages" childbirth when applied to free women may, in effect, go well beyond mere encouragement and effectively preclude the exercise of choice. It is one thing to encourage women to carry a pregnancy to term when those women still have the free choice to reject the government's suggestion and pursue an abortion; it is quite another to set up cumbersome procedures, under the guise of "encouragement," that effectively prevent the women who are incarcerated from making their own decision about abortion.

> from its obligation to accommodate other fundamental rights, such as access to the courts or free exercise of religion. In those contexts, prison funds are routinely expended to facilitate the meaningful exercise of the asserted right.[343]

For these reasons, Judge Higginbotham found that the regulations were an "exaggerated response" to the financial, administrative and security concerns offered by the county officials and were thus unreasonable.[344]

Judge Higginbotham devoted considerably less attention to the issue of whether the policy constituted a violation of the eighth amendment under the Supreme Court's "deliberate indifference" standard announced in *Estelle v. Gamble*.[345] Once again, Judge Higginbotham found that the "burdensome" court-ordered release procedures insisted upon by county officials, as well as the failure of those officials "even to attempt to minimize the delay in access to abortion services" amounted to "deliberate indifference" to the inmates' medical needs.[346] In addition, despite the characterization of the abortions at issue as "elective," Judge Higginbotham had no trouble finding that the women's medical needs in connection with an abortion, as well as the consequences of a denial of those services, were "serious," satisfying the second prong of the *Estelle* test.[347]

In a separate concurring opinion, Judge Mansmann agreed with the result reached by the majority, but she did not accept all of their reasoning. Although she agreed that the plaintiffs had demonstrated a likelihood of success on the fourteenth amendment privacy issue sufficient to require affirmance of the grant of the preliminary injunction, she objected to the breadth of the opinion.[348] Judge Mansmann accepted the county's claim that they were motivated by security concerns in carrying out the policy. Nonetheless, she would have held the policy unreasonable because it effectively prevented exercise of the right to abortion and because an "obvious and easy" alternative—allowing inmates seeking elective abortions to take advantage of the in-jail procedure for performing medically necessary abortions—existed.[349] Judge Mansmann also disagreed with the

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343 *Id.* at 343 (citations omitted).

344 *Id.* at 344.

345 429 U.S. 97 (1976). *See supra* note 146 and accompanying text.

346 *Monmouth County*, 834 F.2d at 347.

347 *Id.* at 348-49 (citation omitted).

348 *Id.* at 352 (Mansmann, J., concurring).

349 *Id.* at 352-53 (Mansmann, J., concurring). In identifying this "alternative," Judge Mansmann assumed that the purpose of the court-ordered release policy was actually to accommodate, rather than burden, the inmates' right to seek abortions.

majority that the refusal to provide elective abortions amounted to "deliberate indifference" to "serious medical needs" in violation of the eighth amendment.[350] The Supreme Court declined to take the case.[351]

The importance of *Monmouth County* lies not only in the immediate result of recognizing a right of access to, and funding for, elective abortions for women in jail. It is also significant for its effort to give content to the "reasonableness" standard set out in the Supreme Court's decisions in *Turner* and *Shabazz*, and for the careful analysis engaged in by the court in reviewing the constitutional claims at issue. Drawing an analogy to the analysis employed in equal protection doctrine where the language is often quite similar, Judge Higginbotham's decision certainly presents a much more searching review than is typically found under the extremely deferential "rational relationship" test used to evaluate most classification schemes.[352] Indeed, his skepticism of the sincerity of the government's claim that security concerns lay at the heart of their policies, and his willingness to second-guess county officials about the financial and administrative burdens inherent in performing elective abortions in the jail, provides an illustration. The Third Circuit's approach in *Monmouth County* certainly calls for a much more careful and exacting review than that required either under the usual roll-over-and-play-dead standard of the "rational relationship" test or in the Supreme Court's prisoners' rights cases after *Wolff*.

This is not to suggest that Judge Higginbotham's analysis is wrong or insufficiently deferential. What makes *Monmouth County* different, and what *should* make the case different from the run-of-the-mill equal protection case, is that the prisoners asserted that

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That assumption is questionable because Judge Mansmann's focus is too narrow. After all, if all the county truly wanted was to accommodate inmates' efforts to secure elective abortions, it *would* simply have agreed to perform those abortions along with all medically necessary abortions, as Judge Mansmann suggests. Perhaps the whole purpose of the policy was not to directly impede inmates' efforts to seek abortions, but specifically to enable the county to avoid performing elective abortions *in the jail*, whether for financial, administrative or security reasons, or simply because county officials believed that the use of county funds and jail facilities to perform elective abortions is morally obnoxious. In light of that, it seems a little odd, if not simply incorrect, to label as an "alternative" a course of action that requires county officials to do precisely what they set out not to do.

350 *Id.* at 354-55 (Mansmann, J., concurring).

351 108 S. Ct. 1783 (1988).

352 *See* Lyng v. International United Auto Workers, 108 S. Ct. 1184 (1988); Lyng v. Castillo, 106 S. Ct. 2727 (1986); Williamson v. Lee Optical, 348 U.S. 483 (1955).

their constitutional rights were being violated. The Third Circuit took that seriously and gave it considerable weight in its analysis.

What, then, was the standard or level of review employed by the Third Circuit in prisoners' rights cases, and what should that standard be? Assuming that courts are simply unwilling to subject prison regulations to something close to strict scrutiny analysis because of the problems of running the institutions, perhaps the better analogy is to cases like *Eisenstadt v. Baird*,[353] and *City of Cleburne v. Cleburne Living Center*,[354] in which the Court claimed to apply a rational relationship test. In these cases, involving something close to, but not exactly, a fundamental right or a suspect classification, the court applied a much more careful review of the regulation at issue.[355]

Whether or not this is what the Supreme Court had in mind in *Turner* and *Shabazz*, the Third Circuit's decision in *Monmouth County* raises at least the possibility that the "reasonableness" test will provide some significant protection for the rights of inmates and a limitation on the actions of prison officials, at least in the hands of a lower federal court like the Third Circuit. Justice Brennan's pessimism in dissent in *Shabazz* might be, if not unwarranted, at least exaggerated.[356]

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353 405 U.S. 438 (1972) (statute prohibiting distribution of contraceptives to unmarried couples held unconstitutional).

354 473 U.S. 432 (1985) (ordinance prohibiting operation of home for mentally retarded men and women held invalid).

355 *See also* Plyler v. Doe, 457 U.S. 202 (1982). In *Plyler*, the Court refused to apply either "strict scrutiny" or the "rational relationship" test but fashioned an intermediate standard of review to strike down a Texas law denying access to education for children of illegal aliens, even though access to education is not a fundamental right and illegal aliens do not constitute a "suspect classification." *Id.* at 216-17.

See generally Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model For A Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Note, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L. J. 123 (1972). It is important not to suggest that modern equal protection law is marked by definite standards, or even much coherence and consistency. For judicial criticism of the state of flux of equal protection law, see City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 460 (1985) (Marshall, J., concurring in part, dissenting in part); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1972) (Marshall, J., dissenting). It has even been suggested that the very concept of equality has no substantive content. *See* Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

356 The Third Circuit in *Monmouth County*, as well as the Court's own decision in *Turner*, striking down the ban on inmate marriages, suggests that the analysis is more searching than in the Court's decisions after *Wolff*. Decisions from other circuits applying the *Turner* test indicate mixed results. *See, e.g.*, Williams v. Lane, 851 F.2d 867 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 879 (1989) (number of restrictions on inmates in protective custody found invalid). However, decisions from a number of other circuits indicate that the *Turner* test has not really changed the

IV. THE ROLE OF THE THIRD CIRCUIT IN PRISONERS' RIGHTS LITIGATION

It is important not to overstate the case. The Third Circuit

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analysis or will make much of a difference in terms of results. *See, e.g.*, Pollock v. Marshall, 845 F.2d 656 (6th Cir. 1988) (restrictions on inmate hair length held constitutional although allegedly contrary to an inmate's religious beliefs); Kahey v. Jones, 836 F.2d 948 (5th Cir. 1988) (failure to provide special non-pork diet for Muslim inmate did not violate inmate's first amendment rights); McCabe v. Arave, 827 F.2d 634 (9th Cir. 1987) (upholding ban on group religious service for close custody inmates, but striking down policy of refusal to shelve in the prison library literature promoting racial hatred, where the literature did not also advocate violence); Rodriguez v. James, 823 F.2d 8 (2d Cir. 1987) (upholding prison directive allowing officials to read prisoners' business mail). Even in the Third Circuit, a second opportunity to address the rights of Muslim inmates to participate in group religious services, this time while in a close custody unit, produced an opinion in which the court, relying on the Supreme Court's decision in *Shabazz*, had little trouble upholding the ban on such services. *See* Cooper v. Tard, 855 F.2d 125 (3d Cir. 1988).

As this article was going to print, the Supreme Court issued two more decisions in the area of prisoners' rights, both of which also leave a somewhat mixed picture. In *Thornburgh v. Abbott*, 109 S. Ct. 1874 (1989), the Court vacated the lower court judgment that had applied the standard enunciated in *Martinez* to prison regulations governing the receipt by inmates of publications from outside publishers. The regulations, promulgated by the federal Bureau of Prisons, allowed officials to withhold from an inmate any publication if that publication was found to be "detrimental to the security, good order or discipline of the institution or if it might facilitate criminal activity." *Id.* at 1877. The regulations also provided that a publication may not be banned "solely because its content is religious, philosophical, political, social or sexual or because its content is unpopular or repugnant." *Id.* The regulations required issue by issue review of any periodical and even allowed an appeal of a decision to ban an issue to be taken to the regional director of the Bureau of Prisons. *Id.* at 1878.

The Court held that the proper standard to assess the validity of the regulations was not *Martinez's* relatively strict standard, but the "reasonableness" standard set out in *Turner*. The fact that the rights of non-inmates, as in *Martinez*, were implicated, did not make a difference. In fact, although the majority admitted it was not strictly necessary to its decision, it expressly overruled those portions of *Martinez* insofar as the earlier case held that the stricter standard applied to all mail coming into the prison. The stricter standard now applies only for mail leaving the prison.

Nonetheless, the methodology of the decision at least suggests the influence of a moderating force in contrast to the Court's decisions in *Jones* and *Hudson*. Although the Court upheld the regulations, it carefully applied the factors drawn from *Turner* to uphold the regulations. Among the elements of the regulations that "comforted" the majority were that the regulations distinguished between rejection that was detrimental to the security of the institution compared to rejection because of religious, philosophical, political or social content, and also by the individualized nature of the determinations required by the regulations. The Court also considered whether any "easy alternative" existed to accomplish the goals of the regulations and found that it did not.

There is also a "good news/bad news" flavor to the second decision last term, *Kentucky Department of Corrections v. Thompson*, 109 S. Ct. 1904 (1989). In that case, the Court rejected the argument that prison regulations in Kentucky setting forth

has not unquestioningly sided with inmates at every opportunity, nor has it been insensitive to the concerns of prison administrators. Still, it is fair to say that the Third Circuit, at least in the cases examined, has been more receptive to the recognition and accommodation of the constitutional rights of inmates than has the Supreme Court over the past decade.[357] Given the Supreme Court's record during that period of time, such an assessment is certainly faint praise.

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categories of visitors who might be excluded from visitation gave rise to a protectible liberty interest in receiving other visitors. Nonetheless, the Court was prepared to concede that prison regulations may, if they are sufficiently strict in controlling decision-making, create an enforceable liberty interest in a prison setting. At least for the time being, the Court stopped short of a ruling that prison regulations may never, by themselves, create protective liberty interest for inmates, the direction in which the Court appeared headed from *Wolff* to *Helms*.

357 How typical these three decisions are of the entire body of the Third Circuit's work in this area is another question. The results are again mixed. There have been other cases in which the court has extended Supreme Court precedent and analysis to situations not considered by the Court with the result that inmates were accorded more rights. For example, in Main Rd. v. Aytch, 522 F.2d 1080 (3d Cir. 1975), the court extended the analysis in *Martinez* to strike down regulations prohibiting inmate press conferences that were called to criticize the public defender system. *Id.* at 1089. Equally as significant, the decision was based on the rights of the inmates, not the rights of the media. *Id.* at 1086. Similarly, in Inmates of Allegheny County v. Pierce, 612 F.2d 754 (3d Cir. 1979), where inmates launched a broad-ranging attack on conditions at an institution, the court extended the eighth amendment's guarantee of adequate medical care beyond physical illness to the much more problematical area of psychiatric care. *Id.* at 763. The Third Circuit was one of the first, but not the first circuit to do so. *See* Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977). And recently, in Ryan v. Burlington County, 860 F.2d 1199 (3d Cir. 1988), the court held the Commissioner of Corrections of the New Jersey Department of Corrections personally liable for injuries sustained by an inmate in a county jail from an attack by state prisoners in a very overcrowded prison cell. *Id.* at 1209. Nonetheless, there are certainly many cases in which the court has passed on opportunities to extend the rights of inmates and simply applied precedent that appeared to be controlling or adopted an analysis that was very deferential to prison officials. *See, e.g.*, Cooper v. Tard, 855 F.2d 125 (3d Cir. 1988) (upholding ban on Muslim group religious service while in a close custody unit); Wilson v. Schillinger, 761 F.2d 921 (3d Cir. 1985) (upholding regulations governing hair length applied to Rastafarian inmate); Union County Jail Inmates v. DiBuono, 713 F.2d 984 (3d Cir. 1983) (refusing to hold double-bunking unconstitutional based on space considerations alone); Saint Claire v. Cuyler, 634 F.2d 109 (3d Cir. 1980) (rejecting claims of Muslim inmate that enforcement of institutional rules governing clothing violated his first amendment rights).

It is interesting to note that the holding in *Monmouth County* was not followed or even cited by the Eighth Circuit in Reproductive Health Services v. Webster, 851 F.2d 1071 (8th Cir. 1988), *rev'd*, 109 S. Ct. 3040 (1989). In an opinion that was otherwise hostile to the various restrictions placed on abortions by the Missouri statutory scheme, the court refused to declare invalid the practice by Missouri prison officials of transporting inmates outside the institution to obtain abortions, rather than requiring officials to provide abortions. In so holding, the Court of Appeals reversed the lower court's decision. *Webster*, 851 F.2d at 1083-84.

A more important issue, however, is what lies behind the results in the individual cases. Specifically, do the Third Circuit decisions reveal a significantly different approach in the area of prisoners' rights litigation from that taken by the Supreme Court or do those decisions represent only different judgment calls from what the Court would have decided in close cases? Perhaps the evidence suggests that the Third Circuit's approach in prisoners' rights cases has been significantly different from that taken by the Supreme Court, and it is this different approach that makes the Third Circuit's contribution to the area of prisoners' rights substantial.

That different approach taken by the Third Circuit comes from diverse views in the Supreme Court and the Third Circuit regarding the parties and the interests involved. In the Supreme Court decisions since *Wolff*, we have been presented with two competing images. Prisoners, at least in the view of a majority of the Court, are almost invariably portrayed in the starkest terms: antisocial, usually violent, involuntarily confined and therefore presumptively unable to control their behavior or to conform it to any civilized standard or set of rules. As Chief Justice Burger wrote in *Hudson v. Palmer*:[358]

> Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial, criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others.[359]

The Court's portrait of prison officials is not as fully developed. It is fair to say, however, that the Court sees the operation of a prison as an extremely complex undertaking, requiring difficult decisions that are fraught with danger. Prison officials do their best to make the difficult decisions and handle a troublesome population.

The effect of such a view of the competing interests and parties is two-fold. First, of course, it lessens respect for inmates and for their claims about what is at stake for them when prison officials adopt regulations infringing upon their constitutional rights. Second, it makes the interests of the institutions appear overwhelming; the view of prisoners, added to the general complexity of running

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358 468 U.S. 517 (1983).

359 *Id.* at 526.

the institutions, requires that the deference necessarily granted to administrators be so expansive as to amount almost to abdication. As Jonathan Willens has summarized the view:

> Prisoners, then, are not citizens with "the dignity and intrinsic worth of every individual" but, rather, hardened criminals. They threaten the safety of prison guards, administrative personnel, visitors and themselves. Institutional security requires a "constant fight against the proliferation of knives and guns, illicit drugs, and other contraband" that lead to riots, escapes and murder in the prison. The prison is, just as guards have always said, "always about to blow." The necessities of institutional security become paramount because the institution itself appears at risk. The legal analysis lends itself to this swing toward custody. . . .
>
> The courts stress the complexity of prison problems. The constant risk of violence requires an assessment of danger that involves more than the individual case and specific facts. Prison officials must make intuitive judgments based on imponderable factors, necessarily subjective and predictive. Their expertise is almost mystical. It not only justifies deference by legitimating the delegation of discretion, but finally it requires that courts remove themselves from the process. Prison is so complicated and so dangerous that judicial intervention can only do harm.[360]

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360 Willens, *supra* note 18, at 122-23 (footnotes omitted).

Whether this view of inmates apparently held by the Court is in fact currently shared by correctional officials is questionable. In his important study of the correctional facilities of three states — Texas, Michigan and California — John J. DiIulio, Jr. describes the "keeper" philosophy shared by administrators in all three systems. That philosophy, although obviously not discounting the possibility of inmate violence, is much more generous in its view of inmates and much more receptive to the notion of inmates' rights than judicial decisions such as *Hudson*. According to DiIulio, the central tenets of this philosophy are as follows:

> There are two basic principles which together constitute the keeper philosophy. The first is that, whatever the reasons for sending a person to prison, the prisoner is not to suffer pains beyond the deprivation of liberty. Whatever the law says, and whatever the prevailing wisdom among commentators and outside experts, prisoners should not suffer any punishments inside prison except those which may be incidental to their confinement: confinement itself is the punishment. A corollary to this principle, and the second basic tenet of the keeper philosophy, is that regardless of this crime, a prisoner should be treated humanely and in accordance with how he behaves inside the institution. Even the most heinous offender is to be treated with respect and given privileges if he behaves well once behind the walls.

J. DIIULIO, JR., GOVERNING PRISONS 167 (1987). Of course, the fact that such a philosophy is widely shared does not mean that there are not significant differences in how prisons are run and how much control and discipline are exercised over inmates. DiIulio, for example, describes the Texas system, operated on a "control

The Third Circuit's view of life in the institutions, however, appears to be somewhat more balanced. Certainly, institutional concerns, including security, are taken seriously. But the Third Circuit decisions, particularly *Shabazz* and *Monmouth County*, accept the possibility that prison officials may overstate or overreact to security concerns, and that prison officials may even act in bad faith, a view to which a majority of the Supreme Court has paid only lip service. Most importantly, the Third Circuit decisions take seriously the inmates' side of the dispute. Prisoners are not invariably antisocial; moreover, the Third Circuit has realized that the inability to exercise certain fundamental rights while incarcerated causes serious harm to those in prison.

This is of more than passing literary interest. In his dissent in *Shabazz*, Justice Brennan worried about the message implicit in judging restrictions on first amendment rights against a deferential standard of "reasonableness" rather than a stricter standard.[361] The importance of Justice Brennan's concerns goes beyond its symbolism. In its approach, the Supreme Court over the past decade has, without admitting it, skewed the analysis and abandoned any real effort at the kind of mutual accommodation between the rights of those incarcerated and the interests of those running the institution. This abandonment has resulted in part from the one-sided view of the interests involved.

Much has been written of the vagueness of various provisions of the Constitution and of the difficulty in discerning the meaning of its important terms.[362] It has been much less frequently remarked

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model," as a much more tightly run system than the Michigan system operated on the "responsibility model," or the California system operated on a "consensual model." *See id.* at 165-87. Two further observations seem to be in order. First, while DiIulio's description of the keeper philosophy suggests that the Court's harsh view of inmates is out of step with prison officials' view of inmates, the prison officials' philosophy, if true, suggests that officials are motivated by the good faith with which the Court credits them. Secondly, the generous "keeper" philosophy, even if widely shared, has far from eliminated the need for court intervention into the system. Indeed, the Texas system was embroiled for over ten years in landmark litigation that became almost a paradigm for system-wide prisoners' rights litigation. *See id.* at 212-16 (citing Ruiz v. Estelle, 688 F.2d 266 (5th Cir. 1982)).

361 *See supra* notes 303-08 and accompanying text.

362 The literature on this subject is quickly becoming voluminous. *See, e.g.*, J. ELY, *supra* note 27, at 11-41; M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980). Some have gone so far as to argue that drawing meaning from the indeterminate language of the text of the Constitution is simply impossible. *Compare, e.g.*, Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982); Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683 (1985) *with* Tushnet, *Does Constitutional Theory Matters*, 65 TEX. L. REV. 777 (1987). On drawing

that the same problem is found with regard to the language of the tests devised by the Supreme Court to aid in giving meaning to the various constitutional guarantees.[363] In particular, the language of the Supreme Court's test for assessing the constitutionality of prison regulations infringing the rights of inmates—currently phrased as requiring an assessment of whether the regulation is "reasonably related to legitimate penological interests"—is, by its terms, vague and indefinite. Of course the same is true of tests devised in other contexts, such as the "clear and present danger" test in first amendment analysis,[364] the various attempts at a definition of pornography,[365] and whether, under the eighth amendment, a punishment violates "evolving standards of decency that mark the progress of a maturing society."[366] In contexts other than the area of prisoners' rights, the vagueness of the constitutional tests is at least offset by the fact that the Supreme Court takes seriously the interests of the person asserting the right, or the fact that a constitutional right is being asserted.[367] This by itself provides some guidance or help in applying the test. It gives some "constitutional ballast" or focus which help to ensure that the effort to accommodate the constitutional interests at stake is meaningful.

In the area of prisoners' rights, however, this has been missing from the Supreme Court decisions since *Wolff*, at least until *Turner*. Although purporting to balance interests, the Court's attempts at

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meaning from the language of legal texts generally, see White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415 (1982).

363 Robert Nagel, for one, has noticed, and criticized, the proliferation of tests or standards to replace analysis of the constitutional text. *See* Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985).

364 *Compare* Dennis v. United States, 341 U.S. 494 (1951); Schenck v. United States, 249 U.S. 47 (1919) *with* Brandenburg v. Ohio, 395 U.S. 444 (1969).

365 *Compare* Roth v. United States, 354 U.S. 476 (1957) *with* Miller v. California, 413 U.S. 15 (1973). Recall, also Justice Stewart's famous statement in Jacobellis v. Ohio, 378 U.S. 184 (1964), where he said that he could not define hard-core pornography, "[b]ut I know it when I see it." *Id.* at 197.

366 Trop v. Dulles, 356 U.S. 86, 101 (1958).

367 In his famous dissent in Abrams v. United States, 250 U.S. 616 (1919), Justice Holmes dismissed the leaflets opposing the war effort prepared by the anarchists on trial for sedition in that case as "poor and puny anonymities." *Id.* at 629 (Holmes, J., dissenting). Nonetheless, for reasons related to the nature of the first amendment itself and its role in the search for truth in a democratic society, Justice Holmes perceived the interest protected by acquitting the defendants. *Id.* There is an interesting side note to Justice Holmes's readiness to dismiss the anarchists and their message. Almost certainly unknown to Justice Holmes, along with most of the other persons involved with that case, the English translation of the leaflet was considerably watered-down when compared to a version drafted in Yiddish that was also distributed. *See* R. POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT AND FREE SPEECH 49-55 (1987).

accomodating the needs of the institution and the interests of the inmates have been shams. The Court gives more than enough weight to the interests of the administrators, but when it turns to consider the interests of the prisoners, it sees nothing there. It is hardly surprising that, as the Court balances the interests, the scale hardly ever tips in favor of the prisoners; one side of the scale is practically empty.[368]

Not so with the Third Circuit, which has shown a willingness to take seriously the interests of the inmates as part of the constitutional equation. The court has, at least in the cases examined, consistently recognized the loss suffered by the inmate as a result of the official action, and has recognized the value that exercising constitutional rights has for the inmates. In *Helms*, *Shabazz*, and *Monmouth County*, this view has shifted the balance and resulted in decisions favorable to the prisoners. But even if inmates do not always prevail, as in *Mims v. Shapp*,[369] the approach of the Third Circuit is truer not only to what the Court says it is doing, but what it should be doing if we are to take seriously the proposition that inmates do not lose all their constitutional rights at the prison gate.

The Third Circuit's different approach to prisoners' rights litigation has thus led to results that the Supreme Court apparently would not adopt. After all, in view of cases such as *Meachum*, *Montanye*, and *Olim*,[370] the Third Circuit in deciding *Helms* might certainly have anticipated the Court and might have deferred to prison administrators on the decision of whom to place in administrative segregation. Even more strikingly, when the court fashioned a more rigorous standard in *Shabazz* to address its perceived dissatisfaction with the deferential *Saint Claire* standard,[371] certainly it could not have believed that that dissatisfaction came from a Supreme Court that had decided *Bell* and *Hudson*. Nor is it at all certain that a Court that decided *Bell* would recognize the right of pretrial detainees to have access to (let alone funding for) elective abortions while incarcerated or would find constitutionally "unreasonable" the institution's insistence that inmates seeking to exercise their right to abortion obtain a court-ordered release. The Third Circuit's differ-

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368 Perhaps because prison population is disproportionally composed of minorities, one cannot help but recall Ralph Ellison's description of blacks who attempt to assert themselves and refuse to submit to the role pre-ordained for them in the dominant white world as "invisible." *See generally* R. ELLISON, INVISIBLE MAN (1952).

369 744 F.2d 946 (3d Cir. 1984). *See supra* notes 233-41 and accompanying text.

370 *See supra* notes 115-19 and accompanying text.

371 *See supra* note 254 and accompanying text.

ent approach to prisoners' rights litigation raises as a final point a more fundamental issue concerning the interaction of the Supreme Court and lower federal courts, which are bound to follow Supreme Court rulings. Is the Third Circuit's approach legitimate in light of the tenor and results of the recent Supreme Court cases discussing prisoners' rights? Is Judge Hunter correct in his dissent in *Shabazz* that the "mutual accommodation" required by *Wolff* had been watered down by the Supreme Court in subsequent cases,[372] suggesting that the Third Circuit's effort to give that accommodation real meaning has gotten away from what the Court intended?

It has been argued that the Constitution has a meaning independent of that which any person or body, including the Supreme Court, declares. As a result, the argument goes, lower federal courts who are convinced that the Court has erred in interpreting the Constitution have an obligation to disregard the Court's interpretation and follow their own interpretation.[373] That overstates the matter;[374] to give lower federal courts carte blanche, unrestricted by Supreme Court precedent neither describes accurately how lower federal courts generally approach their task, nor is it clear that such an approach is desirable.[375]

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372 Shabazz v. O'Lone, 782 F.2d 416, 423-24 (3d Cir. 1986) (Hunter, J., dissenting).

373 *See* S. A. BARBER, ON WHAT THE CONSTITUTION MEANS 5 (1984). Interestingly, one of the takeoff points of Barber's analysis is a speech by Justice Marshall before the judges of the Second Circuit at the Second Circuit Judicial Conference in 1979. In his speech, Justice Marshall told his audience that he believed that the Second Circuit, and not the Supreme Court, had reached the right decision in *Bell* in subjecting the regulations affecting the constitutional rights of pretrial detainees to strict scrutiny and invalidating them. *Id.* at 2-4.

374 The notion that the Constitution may have a meaning other than that handed down by the Supreme Court is not new. *See, e.g.*, Graves v. New York, 306 U.S. 466, 491-92 (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."); R. DWORKIN, *supra* note 108, at 211-12. Indeed, the issue of the appropriateness of a court that is technically bound to follow Supreme Court interpretation of the Constitution that chooses to depart from the Court's analysis when it believes it to be mistaken dates back at least to the antebellum debates over constitutional issues raised by the slavery question. *See* R. COVER, JUSTICE ACCUSED, 185-87 (1975) (discussion of the Wisconsin Supreme Court's refusal to follow Supreme Court precedent in a case concerning the constitutionality of the Fugitive Slave Act of 1850); Soifer, Book Review, 67 GEO. L. J. 1281 (1979) (reviewing W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA (1977)).

The further argument that, because of the formal autonomy of the constitutional text, lower federal courts are free to follow their own view of the Constitution is not a part of constitutional orthodoxy.

375 Purely from the point of view of results, it matters as usual, whose ox is being gored. Those who applaud, for example, the Third Circuit's more generous approach to prisoners' rights as preferable to that currently in vogue among a major-

Lower federal courts should follow Supreme Court precedents that directly control a case before them.[376] But that does not require them to act merely as predictors of what the Supreme Court would do were the case before the higher court. Lower federal courts have the opportunity and incentive to exercise considerable judicial independence,[377] both because lower federal courts such as

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ity of the Supreme Court, must discern a way to distinguish the refusal of a number of lower federal courts to implement in a meaningful way the Court's decision in Brown v. Board of Educ., 347 U.S. 483 (1954). *See* R. KLUGER, SIMPLE JUSTICE 751-52 (1975); J. WILKINSON, FROM BROWN TO BAKKE 80-87 (1979). There is a difference between the two that makes the former a legitimate exercise of the judicial power and the latter an improper exercise, for reasons that will follow. This position, however, is not based on the results of those decisions.

376 To state this as a general proposition is not to gloss over the fact that reasonable minds may differ whether the result in a given case *is* directly compelled by existing Supreme Court precedent. That may be the most difficult question to answer.

One example of a case in which the lower court refused to follow Supreme Court precedent is West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). *Barnette* is famous not only for its holding that students could not be compelled to recite the *Pledge of Allegiance*, but for its quick reversal of Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), in which the Court had reached the opposite conclusion. The lower court decision in *Barnette* was issued by a three-judge panel. Barnette v. WestVirginia State Bd. of Educ., 47 F. Supp. 251 (S.D. W. Va. 1940), *aff'd*, 619 U.S. 624 (1943). That panel refused to follow *Gobitis* and enjoined the board of education from enforcing a regulation compelling Jehovah's Witnesses to salute the flag. *See Barnette*, 47 F. Supp. at 255. The lower court did not contest the general principle that it was obligated to follow Supreme Court precedent directly on point. It declined to do so in that case for a number of reasons, including that a majority of the Justices had publicly criticized the *Gobitis* decision as unsound since it was handed down and had refused to cite it in a subsequent case. *Id.* at 253. The lower court concluded that

> [u]nder such circumstances and believing, as we do, that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs, we feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties.

Id.

This is also not to ignore the problems presented when other branches of the government, federal or state, refuse to follow or raise questions about the binding effect of Supreme Court decisions, such as Abraham Lincoln's remarks about the limited effect of Supreme Court decisions in response to the *Dred Scott* decision. *See* D. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW & POLITICS, 442-43 (1978).

377 Woodford Howard has written,

> [i]n theory, of course, federal judges form a pyramid that supports the will of the Justices [of the Supreme Court]. In reality, federal judicial power is widely diffused among lower court judges who are insulated by deep traditions of independence, not only from other branches of government but also from each other. So strong are the sources of frag-

the Third Circuit usually have the first chance to decide important issues of law and, even more so, because the vast majority of their cases are not reviewed by the Court, rendering the lower courts the actual courts of last resort.[378] As long as the result in each case is reasoned and legitimate, given the breadth of the language of earlier precedent and otherwise comports with prevailing ideals of judicial craft,[379] it is no usurpation of power for a court to issue a decision that results in an expansion of rights or some other outcome that one might reasonably expect the Supreme Court would not adopt had they considered the issue. This is especially so in cases such as *Monmouth County*, where the Third Circuit's analysis at least attempted to work within the framework established by the Court, and *Shabazz*, where the Third Circuit saw itself addressing an area or issue on which it reasonably believed the Court had not spoken definitively.

Finally, such lower court judicial independence is important because these courts serve not simply to implement Supreme Court decisions, or to decide issues the Court does not address. Even in areas where the Court speaks frequently, such as on issues of constitutional rights, lower courts make a valuable contribution to the development of such rights by what they have decided and the reasons they offer in support. The cases examined here offer an illustration. In the lower courts, both the Third Circuit in *Shabazz* and the Eighth Circuit in *Turner* had applied something close to a "least restrictive alternative" test to the prison regulations under attack. The Supreme Court reversed much, but not all of the lower courts' analyses. In its decisions in *Turner* and *Shabazz*, the Court rejected the requirement of a "least restrictive alternative" test, but it did not reject the importance of such alternatives altogether. Moreover, for the first time, the Court set forth a number of factors to be considered in determining the "reasonableness" of prison regulations that infringe inmates' constitutional rights. It seems likely that the lower court opinions had at least some influence on the Court's decisions in those cases.

The interaction between the lower courts and the Supreme Court has continued after the decisions in *Shabazz* and *Turner*, as

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> mentation, in fact, that the most challenging questions are: what keeps the federal judiciary from flying apart? Why is consensus actually more characteristic of circuit courts than conflict?

J. HOWARD, *supra* note 13, at 3.

378 *See* W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 24-25 (1964).

379 *See, e.g.*, A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

lower courts apply the standards in new cases. The Third Circuit's application of the Court's standard in *Monmouth County* indicates that the new standard has more substance to it than the Court's approaches in *Jones* and *Bell*. For the time being, *Monmouth County* is binding precedent in the Third Circuit; it may also be taken as persuasive precedent elsewhere, to be followed, built upon, criticized or rejected. Whether the Supreme Court itself will offer a clarification remains to be seen. The dialectic goes on.

Of course, this "dialogue" between the Supreme Court and lower federal courts, including the Third Circuit, may be more metaphor than reality. In any event, it is a dialogue between unequals and the Supreme Court has the right to declare the lower court wrong and to end the conversation, similar to what it did in *Helms*. But I think further study of the doctrinal influence of lower court opinions on the Supreme Court's work in important areas of constitutional law would reveal that the Court rarely does not at least listen.