NEW YORK LAW SCHOOL

NYLS Law Review

Volume 42 | Issue 1 Article 2

January 1998

Where Can a Prisoner Find a Liberty Interest These Days? The Pains of Imprisonment Escalate

Barbara Belbot
University of Houston-Downtown

WHERE CAN A PRISONER FIND A LIBERTY INTEREST THESE DAYS? THE PAINS OF IMPRISONMENT ESCALATE

BARBARA BELBOT, J.D., PH.D.*

I. INTRODUCTION

Scholars debate about if and when the federal courts rejected the "hands-off" doctrine[1] that had for so long guided the judiciary's approach to prison administration and prisoner allegations of constitutional deprivations. Most researchers identify the Supreme Court's 1964 decision in *Cooper v. Pate*[2] as the turning point in constitutional analysis.[3] In that case, the Court recognized that prisoners retain certain rights and privileges under the Constitution despite their incarceration and can seek redress in court if those rights are unlawfully violated.[4] After *Cooper*, a series of important decisions outlined the rights of inmates in a number of different areas including access to the courts,[5] medical care,[6] and censorship of mail.[7] One of the most significant decisions of "the

---

* Associate Professor, University of Houston-Downtown.

1. The "hands-off" doctrine was never a formal legal doctrine. "Hands-off" refers to an approach courts took toward prisoner litigation prior to 1964. Courts took the position that judges did not have the expertise to evaluate correctional practices, that principles of comity between state and federal courts counseled against federal court involvement, and that the separation of powers doctrine required judicial restraint.

2. 378 U.S. 546 (1964).

3. Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 423 & n.20 (1993) (stating that *Cooper v. Pate* foreshadowed *Monroe v. Pape*, which "marked a turning point in modern civil rights litigation").

4. *See Cooper*, 378 U.S. at 546.

5. *See* Bounds v. Smith, 430 U.S. 817, 828 (1977) (stating that constitutional right of access to courts requires authorities "to assist inmates in the preparation and filing of meaningful legal papers by providing [them] with adequate law libraries or adequate assistance from persons trained in the law").

6. *See* Estelle v. Gamble, 429 U.S. 97 (1976) (concluding that deliberate indifference to serious medical needs of prisoners constitutes "cruel and unusual punishment" proscribed by the Eighth Amendment).

7. *See* Procunier v. Martinez, 416 U.S. 396, 412-13 (1974) (noting that prison regulations authorizing the censorship of mail sent to and from prisoners must further an important or substantial governmental purpose, such as security, order, or rehabilitation, be unrelated to the suppression of expression, and be no greater than is necessary to protect the governmental interest).

prisoners' rights revolution"[8] was *Wolff v. McDonnell.*[9] *Wolff* held that inmates charged with serious disciplinary infractions were entitled to certain due process protections before they could be found guilty and punished.[10] The *Wolff* case sought to end the arbitrary infliction of disciplinary sanctions on prisoners who were not afforded a meaningful opportunity to defend themselves. It extended basic protections such as the right to advance notice of the charges, a written account of the evidence relied on, the right to present evidence, and in situations involving illiterate inmates or complex cases, the right to seek aid in preparing a case.[11] It did not provide prisoners with the "full panoply of rights" afforded to defendants charged with criminal offenses, but attempted to strike a balance between the needs of prison management and a concern for prisoners' liberties.[12] Its holding was as American as apple pie.

The extent to which the "hands-off" doctrine was abandoned by the courts is a matter of some controversy among lawyers, prison officials, and students of correctional litigation. In several decisions the Supreme Court has emphatically announced that prison administrators require broad administrative and discretionary authority over the institutions they manage, and that federal judges should give appropriate deference and flexibility to state officials who engage in the daily operations of penal institutions.[13] To claim that there had been a complete demise of the

---

8. *See* James B. Jacobs, NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT 33-60 (1983); Malcolm M. Feeley & Roger A. Hanson, *The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the Literature, in* COURTS, CORRECTIONS, AND THE CONSTITUTION 12-46 (John J. DiIulio, Jr. ed., 1990) (discussing the contributions of the prisoners' rights movement in the courts).

9. 418 U.S. 539 (1974).

10. *See id.* at 557.

11. *See id.* at 563-70.

12. *See id.* at 556.

13. *See id.* (stating that "[i]n sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application."); *see also* Hewitt v. Helms, 459 U.S. 460, 467 (1983) (stating that "[w]e have repeatedly said both that prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests."); Turner v. Safley, 482 U.S. 78, 85 (1987) (stating that "[o]ur task . . . is to formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights'"); Thornburgh v. Abbott, 490 U.S. 401, 407-08 (1989) ("Acknowledging . . . the judiciary is 'ill-equipped' to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world.").

"hands-off" approach ignores the Supreme Court's holdings in *Meachum v. Fano*,[14] *Olim v. Wakinekona*,[15] *Rhodes v. Chapman*,[16] *Thornburgh v. Abbott*,[17] and *Kentucky Department of Corrections v. Thompson*,[18] to name just a few cases in which the Court extended substantial deference to official discretion and explicitly curtailed the right of federal courts to interfere in the day-to-day making of management and policy decisions.

The Supreme Court's recent decision in *Sandin v. Conner*[19] is testimony to the proposition that the "hands-off" doctrine never completely expired.[20] Unlike the Court's previous cases that recognized limits on judicial intervention, *Sandin* did more than simply refuse to acknowledge a prisoner's claimed right. *Sandin* rescinded rights that many lower federal courts (and several Supreme Court Justices) believed the Court had

---

14. 427 U.S. 215 (1976). The Court held that prison administrators had wide discretion to transfer inmates among institutions for any number of reasons without affording them the opportunity for a hearing. *Id.* at 216. *See infra* text accompanying note 88.

15. 461 U.S. 238 (1983). The Court held that the transfer of a prisoner from one state corrections system to another state corrections system does not implicate a liberty interest entitling the inmate to any due process. *Id.* at 251. *See infra* text accompanying note 162.

16. 452 U.S. 337 (1981). The Court held that double celling prisoners is not cruel and unusual punishment as is proscribed by the Eighth Amendment.

17. 490 U.S. 401 (1989). The Court held that when prisoners receive publications, prison officials have to be "sensitive to the delicate balance . . . between the order and security of the internal prison environment and the legitimate demands of those on the 'outside' who seek to enter that environment, in person or through the written word." *Id.* at 407.

18. 490 U.S. 454 (1989). The Supreme Court held that Kentucky regulations do not provide inmates with a liberty interest in visitation privileges, entitling them to Due Process protections. *Id.* at 464-65. *See infra* text accompanying note 183.

19. 515 U.S. 472 (1995).

20. Recent federal legislation also encourages courts to take a "hands-off" approach. In April 1996, President Bill Clinton signed into law the Prison Litigation Reform Act of 1995. *See* 18 U.S.C. § 3626 (1996).

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A).

recognized since the 1974 *Wolff v. McDonnell* decision. *Sandin* turned back the clock on the prisoners' rights revolution by holding that some prisoners charged with serious disciplinary violations no longer have a right to the due process protections provided by *Wolff*.

The importance of *Sandin,* however, eclipses the rescission of procedural safeguards for inmates subjected to disciplinary punishment. Through Chief Justice Rehnquist, who wrote the 5-4 majority decision, the *Sandin* Court revised the entire state-created liberty interest doctrine that had provided the foundation upon which the *Wolff* due process requirements were built. The state-created liberty interest doctrine had long recognized that, through statutes and regulations, states may create rights and privileges for inmates beyond those granted directly by the Constitution.[21] Prior to *Sandin*, prisoners could not be deprived of these liberty interests, nor could the interests be modified without first affording prisoners certain due process rights.[22] The *Sandin* majority severely restricted the state-created liberty interests which are entitled to due process.[23] After *Sandin*, state laws which do not affect the duration of an inmate's sentence or impose an atypical or significant hardship on an inmate in relation to the ordinary incidents of prison life, no longer triggered constitutional procedural protection.[24] Specifically, in the *Sandin* Court's view, the sanction of disciplinary segregation neither lengthens an inmate's sentence nor constitutes an atypical or significant hardship;[25] therefore, an inmate could be sanctioned with a term in solitary confinement without *Wolff*-type due process.

More generally, the new, post-*Sandin* liberty interest doctrine is not restricted to what happens during the disciplinary process, but, rather, affects all claims to due process based on a state-created right.[26] *Sandin* is a far reaching decision that has enormous implications for prisoners who argue for reason and accountability in the operation of laws and regulations that seemingly provide them with certain rights and

---

21. *See generally* Hewitt v. Helms, 459 U.S. 460, 479 (1983) (acknowledging that inmates do have state-created liberty interests) (Blackmun, J., concurring in part, dissenting in part).

22. *See infra* Section II.

23. *See Sandin*, 515 U.S. at 474 (finding limits on prisoners' due process liberty interests).

24. *See id.* at 486 (finding that discipline in segregated confinement did not bring into question a due process liberty interest because the confinement did not present an atypical, significant deprivation).

25. *See id.* at 477-78 (discussing the state-created liberty interests addressed in *Wolff*).

26. *See infra* Section V.

privileges.[27] Depending on how *Sandin* is interpreted by the lower courts, the majority of state-created liberty interests may have no constitutional basis and may not provide inmates with any constitutional protections.[28]

Along with two other recent Supreme Court cases,[29] *Sandin v. Conner* has made a significant contribution to the Court's current position against the prisoners' rights revolution. Together, the three decisions gravely impact the ability of prisoners to rely on the Constitution as protection against arbitrary and unfair treatment and inhumane living conditions. In 1987, the Supreme Court decided *Turner v. Safley*[30] and developed a standard to determine the reasonableness of the constitutionality of prison rules that infringe on prisoners' constitutional rights.[31] If it can be shown that the regulation is reasonably related to a legitimate penological purpose, it passes constitutional muster.[32] Although the *Turner* court set forth specific reasonableness guidelines,[33] ultimately, the constitutional standard turns on a vague test that permits a court to reach whatever decision it wants based on its own inclinations and understanding of what is a legitimate penological purpose and what amounts to a reasonable relationship to that purpose.

In 1991, the Court ruled in *Wilson v. Seiter*[34] that prisoners who allege that the conditions under which they are confined constitute cruel and unusual punishment must show that prison officials manifest a culpable state of mind in order to establish a constitutional violation.[35] The new state-of-mind requirement has presented prisoners with significant proof problems, and evidences a decided return by the Court to an aggressive "hands-off" approach in prison conditions cases. The Court also admonished that whether prison conditions violated the Eighth Amendment

---

27. *See generally* Philip W. Sbaratta, Note, Sandin v. Conner: *The Supreme Court's Narrowing of Prisoners' Due Process and the Missed Opportunity to Discover True Liberty*, 81 CORNELL L. REV. 744, 745 (arguing that the *Sandin* ruling defies a common sense perception of prisoners' rights).

28. *See id.* at 746 (arguing that the *Sandin* case "narrows prisoner liberty-interest jurisprudence into virtual non-existence").

29. *See* Wilson v. Seiter, 501 U.S. 294 (1991); Turner v. Safley, 482 U.S. 78 (1987).

30. 482 U.S. 78 (1987).

31. *See id.* at 89-90 (listing the factors which are to be considered in this regard).

32. *See id.* (holding as erroneous the Court's prior application of strict scrutiny).

33. *See id.* (noting that the factors to be considered include, *inter alia*, whether there are alternative means by which prisoners may exercise their rights, and whether the regulation is an "exaggerated response" to the inmates' concerns).

34. 501 U.S. 294 (1991).

35. *See id.* at 299.

depended in part on the constraints faced by correctional officials.[36] In other words a lack of financial resources to remedy deprivations may well allow states to escape constitutional liability. Finally, *Sandin* restricted the liberty interest doctrine to the point that few state-created rights and privileges are accompanied by meaningful procedural safeguards. Those safeguards have potentially been reduced to little more than suggested guidelines for official conduct. *Turner*, *Wilson*, and *Sandin* are a trilogy of decisions that, together, signal that the "hands-off" doctrine has been resurrected. Whether the issue involves prison regulations, conditions of confinement, or due process rights, there is no area of prison life that remains untouched by the trilogy.

This article explores the particular manner in which the *Sandin* case has completed the return to judicial nonintervention. Section II examines the historical roots of the state-created liberty interest doctrine as it evolved from the doctrine of property interests. Section III looks at the early and later growth of the liberty interest doctrine for inmates through the end of the 1970s and into the 1980s when the doctrine took its final pre-*Sandin* form. Section IV focuses on how the courts of appeal interpreted the liberty interest doctrine, with special attention given to how those courts applied it to issues involving disciplinary and administrative segregation. Section V explains how the *Sandin* decision redefined the state-created liberty interest doctrine, and Section VI attempts to bring about an understanding of the full dimension of the Court's decision and the legal analysis it relied on. Section VII provides an early glimpse at how the lower courts have interpreted the new *Sandin* doctrine to date.

II. ROOTS OF THE STATE-CREATED LIBERTY INTEREST DOCTRINE

The Supreme Court has shaped the state-created liberty interest doctrine and its due process issues primarily in the context of prisoner lawsuits. When the government restricts liberties outside of the prison environment, the most likely legal challenge is to the constitutional basis for interference, not whether proper due process procedures were followed.[37] Because the government already has the right to limit the liberty of incarcerated persons, however, the question shifts to whether

---

36. *See id.* at 301-02.

37. *See generally* Deborah R. Stagner, Note, Sandin v. Conner: *Redefining State Prisoners' Liberty Interest and Due Process Rights*, 74 N.C. L. REV. 1761 (1996) (discussing prisoners' constitutional rights).

prisoners retain any liberty interests that are subject to procedural protection despite the legitimate loss of their freedom.[38]

Although refined in prisoners' rights lawsuits, the state-created liberty interest doctrine has its origins in the doctrine of property interests that was articulated by the Supreme Court in a series of decisions beginning in the 1970s, in which the Court buried the distinction between rights and privileges.[39] Under the rights-privilege doctrine, the only time an individual could claim due process protection against government action was when the government had infringed on a legal right arising either from the Constitution or the common law. The Due Process Clause only protected those interests that could be characterized as rights, and rights were restrictively defined.[40] Privileges, on the other hand, were bestowed by the government and could be withheld by the government absolutely or conditionally. In *McAuliffe v. Mayor of New Bedford*,[41] future Supreme Court Justice Oliver Wendell Holmes clarified the distinction between rights and privileges when he rejected a policeman's claim to be reinstated after losing his job because of political statements he had made while off-duty. Holmes wrote, "The petitioner may have a constitutional right to talk politics, but he has no constitutional rights to be a policeman . . . . The servant cannot complain, as he takes the employment on the terms which are offered him."[42]

Commentators have credited Charles Reich's article, *The New Property*,[43] as being an important influence over the Supreme Court's reevaluation of the rights-privilege distinction.[44] Professor Reich identified new forms of property resulting from the emergence of the state as an important creator of wealth.[45] Different forms of government largesse have included the granting of licenses, government employment payments,

---

38. Susan Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482, 502-03 (1984).

39. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 571 (noting the rejection of the "wooden distinction" between rights and privileges).

40. *See, e.g.*, Jay v. Boyd, 351 U.S. 345 (1956) (noting that while an undocumented alien has a right to a hearing to obtain discretionary relief of suspension of deportation, granting of relief is not a right); Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940) (holding that the complainants in a government contracts case failed to demonstrate any threatened legal right).

41. 29 N.E. 517 (1892).

42. *Id.* at 517-18.

43. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

44. *See, e.g.*, Timothy Terrell, *"Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis*, 70 GEO. L.J. 861, 882 (1982); Herman, *supra* note 38, at 483-84.

45. *See* Reich, *supra* note 43, at 733.

and government contracts. As the states create and distribute new forms of wealth, individuals grow to increasingly depend upon government largesse. States have fostered among many recipients of government wealth, a reasonable sense of reliance and expectation in the continued receipt of government wealth. If wealth created by the state is considered merely a privilege, and there are no constitutional protections against its arbitrary deprivation, a state's power over the lives of its citizens has significantly broadened. Reich argued that the traditional concept of property must be expanded to include these new forms of wealth, and that due process procedures must provide protection from arbitrary state action that seeks to terminate or restrict that wealth.[46]

A few years after the publication of Reich's article, the Supreme Court decided *Goldberg v. Kelly*[47] in which the majority opinion cited Reich for the proposition that welfare benefits were a form of property as opposed to a gratuity, and that they could not be terminated without providing an evidentiary hearing to the recipient.[48] Because the state had not contested the position that some procedural due process was required prior to the termination of benefits, the Court did not have to explain why welfare benefits are an entitlement subject to protection.[49] The issue was limited to the extent of required due process.[50] In an important footnote, however, Justice Brennan, writing for the Court, noted that "[i]t may be realistic today to regard welfare entitlements as more like "property" than a "gratuity." Much of the existing wealth in this country takes the form of rights that do not fall within the traditional common law concepts of property."[51] Brennan also commented that the extent to which procedural due process must be afforded is influenced by the extent to which an individual is "condemned to suffer grievous loss."[52] He suggested that the impact an action has on an individual is an important factor in determining whether the government had created a property interest.

In 1972, the Supreme Court furthered the development of the new property interest doctrine in the case *Board of Regents v. Roth*.[53] *Roth*, however, took the doctrine in a different direction than the original course chartered in *Goldberg v. Kelly*. David Roth was an untenured professor

---

46. *See id.* at 734-39.

47. 397 U.S. 254 (1970).

48. *See id.* at 262 n.8.

49. *See id.* at 262-63.

50. *See id.* at 255.

51. *Id.* at 262 n.8.

52. *Id.* at 263 (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

53. 408 U.S. 564 (1972).

at a state university, teaching under a one-year contract. When his contract was not extended he filed a civil rights action claiming he was entitled to a hearing before the state could refuse to rehire him.[54] The Supreme Court disagreed with Roth and held that he had no basis for a legitimate claim of entitlement according to the terms of his appointment, state statute, and university rules and policies.[55] Roth did not have a property interest in his employment, therefore, he had no right to due process prior to the university's decision not to renew his contract.[56] Justice Stewart wrote for the Court:

> Certain attributes of 'property' interests protected by procedural due process emerge from [prior] decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.[57]

Although the Court agreed with the *Goldberg v. Kelly* decision that property interests include more than the ownership of material things, the Court made clear that reliance and expectation alone are insufficient to create such interests.[58] The weight of the interest to the individual or the grievousness of the loss suffered are considerations in determining the type of due process that should be afforded against arbitrary government action, however, the first inquiry must be whether due process is actually necessary. In order to establish the need for due process, a property interest must be defined by some objective source. The emphasis must be on the nature, not the weight, of the interest at stake. The Court decided that property interests are to be found in the positive law:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent

---

54. *See id.* at 568-69. State law provided procedural rights for tenured faculty, however, professors on yearly contracts had no rights with respect to their reemployment. *Id.* at 566-67. Roth was not told why the university refused to rehire him. *Id.* at 568. He alleged that his outspoken criticism of university policy was the reason, and his discharge violated his rights under the First Amendment. The Supreme Court only dealt with the issue of whether Roth had a constitutional right to be given a reason and a hearing on the decision not to rehire. *Id.* at 569.

55. *See id.* at 578.

56. *See id.*

57. *Id.* at 577.

58. *See id.*

> source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[59]

In addressing the liberty interests that Roth may have suffered, Justice Stewart concluded that Roth was not stigmatized by the university's failure to renew his contract,[60] nor was he otherwise deprived of future employment,[61] either of which might have triggered a liberty interest.[62] Justice Stewart acknowledged that the definition of liberty must be expansive and suggested that the source of liberty interests is different than the source of property interests.[63] "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."[64] Liberty involves more than freedom from bodily restraint: it includes such freedoms as the right to contract, engage in occupations, acquire knowledge, marry, have a family, worship God according to your

---

59. *Id.*

60. *See id.* at 573.

61. *See id.*

62. *See id.* at 573-74; *see also* Bishop v. Wood, 426 U.S. 341 (1976). In *Bishop*, a North Carolina city manager terminated a policeman's employment without a hearing, telling the officer privately that his dismissal was based on failure to follow orders, poor attendance, causing low morale, and conduct unsuited to his position. *Id.* at 342-43. A city ordinance provided that permanent employees may be discharged if they fail to perform up to standards, or are negligent, inefficient, or unfit to perform duties. The officer claimed he had a constitutional right to a pretermination hearing. *Id.* He claimed the reasons for his discharge were so serious as to constitute a stigma that severely damaged his reputation in the community. The Court concluded that *Roth* recognized that nonretention of a nontenured faculty might make him less attractive to other employers, but suggested it was a stretch to assume he was deprived of liberty when he is simply not rehired in one job but remains free to seek another. The same conclusion applied to the discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge. *See also* Paul v. Davis, 424 U.S. 693 (1976). In *Davis* a photograph of the respondent, Edward Davis, bearing his name was distributed in a flyer of active shoplifters after he had been arrested for shoplifting. After the charge was dismissed, Davis sued the police who distributed the flyer, alleging his liberty interests were deprived under the Fourteenth Amendment because his reputation and future job prospects were impaired. The Court held that reputation alone, apart from more tangible interests, did not amount to a liberty interest. *Id.* at 734.

63. *See Roth*, 408 U.S. at 577 (1972) (stating that property interests are defined by independent sources such as state law, rather than the Constitution).

64. *Id.* at 572.

own beliefs, and generally enjoy the privileges recognized as essential to the pursuit of happiness.[65]

Future Chief Justice Rehnquist wrote the plurality opinion in the 1974 case *Arnett v. Kennedy*[66] which considered the claim of a non-probationary federal government employee who was fired without a pre-termination hearing. A Congressional Act which governed his employment stated that an individual could only be discharged for cause, and that it was within the government's discretion to grant a pre-discharge hearing.[67] The employee argued that his employment was a constitutionally protected property interest, and his due process rights included a hearing prior to termination.[68] In five separate opinions, the Supreme Court analyzed his claim under the applicable statutes and regulations. The Justices all agreed the employee had a property interest in his employment, but there was significant disagreement about the nature of the interest and the due process requirements.[69]

According to Justice Rehnquist's plurality opinion, statutorily created rights may be circumscribed by the procedures which were created to accompany them.[70] That is, the procedural conditions that are attached to the property interest help to define the scope of the interest itself. Rehnquist agreed that the employee had a statutory expectation not to be removed other than for cause, however, the statute also outlined a procedure by which cause was to be determined. Rehnquist, stated "[w]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet."[71] In Justice Rehnquist's judgment, when the employee accepts the "sweet," he also accepts the procedural protections provided in the event of his termination—the "bitter."[72]

---

65. *See id.*

66. 416 U.S. 134 (1974).

67. *See id.* at 140.

68. *See id.* at 151.

69. Justice Rehnquist was joined by Chief Justice Burger and Justice Stewart in the plurality opinion. *Arnett*, 416 U.S, at 136. Justice Powell wrote a concurring opinion joined by Justice Blackmun. *See id.* at 164. Justice White wrote an opinion concurring in part and dissenting in part. *See id.* at 171. Justice Douglas wrote a dissent. *See id.* at 203. Justice Marshall wrote a dissent and was joined by Justices Douglas and Brennan. *See id.* at 206.

70. *See id.* at 152.

71. *Id.* at 153-54.

72. *See id.* at 154.

The six judges who did not join the plurality opinion opposed Rehnquist's "bitter-sweet" doctrine.[73] Those judges rejected Rehnquist's attempt to add the statute's procedural prescriptions to the definition of the employee's property interest. They concluded, instead, that federal constitutional law should govern the extent and nature of due process protections. If state law creates a property interest, the federal Constitution decides what procedures are due.

Eventually, the Court explicitly rejected the *Arnett* plurality opinion in *Cleveland Board of Education v. Loudermill.*[74] The Court considered a challenge to a state civil service statute that provided that although employees could be discharged only for cause, they were entitled to nothing more than a post-discharge review. The Court found that the statute created a property interest and that constitutional due process required a pre-discharge opportunity to be heard. Writing for the majority, Justice White stressed that the categories of substance and procedure are distinct. Life, liberty or property cannot be defined according to the procedures provided for their deprivation.[75] He stated "[I]t is settled that the 'bitter with the sweet' approach misconceives the constitutional guarantee."[76] In his dissent, Justice Rehnquist reasserted that the state should be able to limit procedural protections in defining substantive rights.[77]

The property interest doctrine of the 1970s recognized that government, through positive law, creates property interests that are subject to procedural protections. Reliance and expectations alone, however, do not create property interests. Property is created through statutory entitlements. Once created, the Due Process Clause mandates the nature and extent of appropriate procedural protections. As the property interest doctrine evolved through the 1970s, the liberty interest doctrine for prisoners evolved along similar definitional lines. "[T]he encroachment of this positivist test on the definition of liberty interests"[78] has

---

73. In his concurring opinion, Justice Powell stated that the plurality's "bittersweet" doctrine is incompatible with the principles laid down in *Roth* and *Sindermann*. *See id.* at 166. Justice White argued that due process requires a trial type hearing at some time, but that the hearing is required before the deprivation of a property interest occurs. *See id.* at 177-78.

74. 470 U.S. 532 (1985). Loudermill was fired as a security officer by the Board of Education after they discovered he had lied on his employment application. He was not given the opportunity to respond to the charges or challenge his dismissal. *See id.* at 535.

75. *See id.* at 541.

76. *See id.*

77. *See id.* at 561.

78. Herman, *supra* note 38, at 499.

characterized the Court's analysis of prisoners' rights. The decisions that grounded liberty interests in the positive law caused significant controversy among the members of the Supreme Court, with Justices Brennan, Marshall and Stevens regularly dissenting, arguing that property and liberty interests required different analysis, that liberty interests have their origins in the Due Process Clause, not state statutes and regulations. The positivist approach also allowed for the back door entrance of the "bitter-sweet" doctrine from the *Arnett v. Kennedy* plurality opinion. Justice Rehnquist's desire to limit substantive rights created by positive law crept slowly, albeit without acknowledgement, into the Court's liberty interest opinions, further limiting the extent of constitutional protections available to inmates.

III. THE LIBERTY INTEREST DOCTRINE FOR PRISONERS

A. *The Early Cases*

The same day that the Supreme Court handed down *Board of Regents v. Roth*, it decided *Morrissey v. Brewer*,[79] the first of several cases that addressed the liberty interests of incarcerated persons. Morrissey, sentenced to seven years confinement for writing bad checks, was released on parole but was arrested seven months later as a parole violator and immediately incarcerated in the local jail. Within a week, state officials revoked Morrissey's parole and returned him to the penitentiary. He claimed that his constitutional right to due process was violated because he was not given a hearing prior to his revocation. In reaching the decision that Morrissey was entitled to due process prior to revocation, and in language that fit neatly with the positivist foundation of property interests, Justice Burger noted, "[t]he question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is . . . within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."[80] The Court found that parolees have an interest in the continuation of their liberty, and rely on an implicit promise they will remain on parole as long as they abide by the conditions of parole. A parolee is able to live within the community, have a family, and hold gainful employment, all of which amount to a significant liberty interest. The Court did not examine the state statutes or regulations that governed parole or the revocation process, or identify which statute created the implied promise on which parolees relied, but, rather, traced the parolee's

79. 408 U.S. 471 (1972).

80. *Id.* at 481.

rights to the Fourteenth Amendment's Due Process Clause.[81] A year later in *Gagnon v. Scarpelli*,[82] the Supreme Court extended its holding in *Morrissey* to probation revocation proceedings.[83]

In *Wolff v. McDonnell* the Court introduced the state-created liberty interest doctrine to prisoners rights litigation.[84] *Wolff* involved a challenge to the internal disciplinary process in the Nebraska correctional system. Nebraska awarded good time credits which resulted in shortened terms of confinement to inmates for their satisfactory behavior during incarceration. The credits could be forfeited and an inmate could also be sentenced to a term in disciplinary confinement if the inmate was found guilty of a major disciplinary violation. In *Wolff*, an inmate filed a complaint challenging the procedures by which he was found guilty of a major infraction and had his good time credits reduced, maintaining he had a right to greater procedural protections than he had been afforded.

The Court rejected Nebraska's argument that a prisoner's interest in disciplinary procedures is not included within the liberty protected by the Fourteenth Amendment. Justice White concluded for the majority that although the Constitution did not provide a guarantee of good time credits,

---

81. The Court concluded that individuals facing parole revocation are entitled to a preliminary hearing shortly after arrest to determine whether there was probable cause to believe the arrested parolee had committed acts that would constitute a violation of his or her parole. The preliminary determination should be made by someone who was not directly involved with the case but need not be a judicial officer. The parolee should be given notice of the hearing and the alleged violations. The parolee may appear at the hearing and speak on his or her behalf, bring letters, documents, or individuals who have relevant information. The parolee has the right to confront his or her accusers if there would be no risk of harm in exposing their identities. Upon a finding of probable cause, authorities could hold the parolee until the actual revocation hearing. The actual revocation hearing must settle all contested issues and must occur within a reasonable time after the parolee is taken into custody. The parolee is entitled to written notice of the charges against him or her, disclosure of the evidence, opportunity to be heard in person and to present witnesses, a neutral and detached hearing body but not necessarily judicial officers, and a written statement by the fact finders as to the evidence upon which parole was revoked. The Court did not decide whether the a parolee is entitled to legal counsel during the revocation process. *See id.* at 486-89.

82. 411 U.S. 778 (1973).

83. In *Gagnon*, the Supreme Court also resolved the issue of the right to counsel during the parole and probation revocation processes, holding that the decision whether an indigent individual should have appointed counsel must be made on a case-by-case basis when fundamental fairness requires it. Presumptively, counsel is necessary if the individual has a colorable claim that he or she did not commit the alleged violation or that there were substantial reasons that justified or mitigated the violation and the reasons are complex or otherwise difficult to develop or present. The individual's ability to speak on their own behalf is an important factor. *See id.* at 788-91.

84. 418 U.S. 539 (1974).

the state of Nebraska had provided a statutory right to good time. Having created that right and providing that good time could only be forfeited for serious misconduct, the prisoner had a liberty interest of real substance. He was, therefore, entitled to due process procedures appropriate under the circumstances to ensure "that the state-created right is not arbitrarily abrogated."[85]

White announced the relationship between the property interest doctrine and the liberty interest doctrine:

> This analysis as to liberty parallels the accepted due process analysis as to property. The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests. The requirement for some kind of a hearing applies to the taking of private property, the revocation of licenses, the operation of state dispute-settlement mechanisms, when one person seeks to take property from another, or to government-created jobs held, absent "cause" for termination. (citations omitted).
>
> We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government.[86]

Because prisoners could lose good time only if they were guilty of serious disciplinary violations, determinations about their behavior were critical, and necessarily triggered appropriate procedural protections.[87]

By holding that prisoners have liberties that are not found directly in the Constitution but which have been created by state law, the Court applied a positivist analysis to the liberty interest doctrine. Liberty interests involve more than the right of a convicted offender to enjoy conditional liberty in the community without fear of having that liberty

---

85. *Id.* at 557.

86. *Id.* at 557-58.

87. The *Wolff* Court held that inmates must be afforded written notice of the charges at least 24 hours in advance of the disciplinary hearing, "a 'written statement by the fact finders as to the evidence relied on and the reasons' for the disciplinary action" taken, and the right to call witnesses and present documentary evidence in his or her defense unless the safety of the institution would be jeopardized. *Id.* at 564-66 (quoting *Morrissey v. Brewer,* 408 U.S. 471, 489 (1972)). Inmates are not entitled to confront and cross-examine their accusers or the right to legal counsel. Where illiterate inmates are involved or the complexity of the case makes it unlikely that the inmate will be able to collect and present evidence, he or she should be free to seek the aid of a fellow inmate or have adequate substitute aid from the staff. *See id.* at 568-70.

revoked. Liberty interests created by state laws and regulations extend into the world of the incarcerated offender as well. Justice White's holding upheld the positivist origins of liberty interests. He also suggested in a footnote that because of the serious impact of segregation, due process was required before placing an inmate in disciplinary confinement.[88] Justice White observed that although the issue in *Wolff* concerned the deprivation of good time, the Nebraska regulations were identical for imposing disciplinary confinement:

> This appears a realistic approach, for it would be difficult for the purposes of procedural due process to distinguish between the procedures that are required where good time is forfeited and those that must be extended when solitary confinement is at issue. The latter represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct. Here, as in the case of good time, there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction.[89]

B. *Clarification*

Wolff opened the door for inmates to challenge how prison officials used their discretion to decide many different matters. In *Meachum v. Fano*,[90] an inmate argued that he was entitled to notice and a hearing before being transferred from a medium to a maximum-security institution due to the serious change in the conditions of his confinement.[91] When Justice White wrote for the majority in *Meachum*, he was careful to note that none of the prisoners who had been transferred were subjected to disciplinary punishment of any kind. In particular, they had not suffered

---

88. *See id.* at 571 n.19; *see also* Thompson H. Gooding, Jr., *The Impact of Entitlement Analysis: Due Process in Correctional Administrative Hearings*, 2 U. FLA. L. REV. 151, 160 (1981). "The majority explicitly based its holding on a statutory entitlement to [good time] credits. The Court utilized the impact analysis approach to determine whether the solitary confinement sanction necessitated procedural protections." *Id.* at 160; Charles H. Jones, Jr. & Edward Rhine, *Due Process and Prison Disciplinary Practices: From Wolff to Hewitt*, 11 NEW ENG. J. CRIM. & CIV. CONFINEMENT 44, 59 (1985). "[W]hen the Supreme Court finally ruled [in *Wolff*] it combined both 'impact' and 'entitlement' analysis without explicitly saying so." *Id.*

89. *Wolff*, 418 U.S. at 571-72 n.19.

90. 427 U.S. 215 (1976).

91. *See id.* at 216-22.

loss of good time or disciplinary confinement.[92] Citing *Board of Regents v. Roth*,[93] Justice White rejected the notion that every grievous loss imposed on a person by the state invokes procedural due process.[94] He wrote:

> [w]e cannot agree that *any* change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause . . . given a valid conviction, . . . the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution.[95]

"Confinement in any of the State's [correctional] institutions is within the normal limits or range of custody"[96] anticipated by a valid conviction. Just because a prisoner is transferred to an institution where life is less agreeable than at the prior institution does not necessarily mean that a constitutional liberty interest has been implicated.[97]

Applying the positivist approach, Justice White distinguished the *Wolff* case. The liberty interest identified in *Wolff* originated in a state statute that guaranteed inmates good time credit for satisfactory behavior.[98] Due process was necessary to make certain the state did not arbitrarily abrogate the liberty interest it had created.[99] In contrast, in *Meachum* the state had not created a right for prisoners to be assigned to or to remain in any particular institution absent a finding of disciplinary misconduct.[100] Officials had wide discretion to transfer inmates among institutions for any number of different reasons, including discipline, without affording them the opportunity to be heard.[101]

Meachum settled the issue once and for all that not every deprivation in prison involves a loss of liberty.[102] Unless the Constitution is itself

---

92. *See id.* at 222.

93. 408 U.S. 564 (1972).

94. *See Meachum*, 427 U.S. at 224.

95. *Id.*

96. *Id.* at 225.

97. *See id.*

98. *See id.* at 226.

99. *See id.* at 227.

100. *See id.*

101. *See id.* at 228.

102. *See id.* at 224.

violated, when dealing with a lawful conviction that accords a state the right to confine a person and subject him or her to institutional rules, only the loss of a state-created liberty interest requires procedural protection.[103] Like the inmate in *Wolff*, the *Meachum* prisoner challenged the conditions under which he was confined.[104] However, unlike *Wolff*, the Court concluded the inmates in *Meachum* had no claim to due process.[105] The majority opinion closed the door on any further attempts to ground liberty interests primarily on the grievousness or impact of the loss to the prisoner.[106]

In his dissent, Justice Stevens, joined by Justices Brennan and Marshall, launched the first of several challenges to the majority's position that there are only two sources of liberty interests: the Constitution and state law.[107] Stevens wrote, "[i]f man were a creature of the State, the analysis would be correct. But neither the Bill of Rights nor the laws of the sovereign States create the liberty which the Due Process Clause protects."[108]

Morrissey v. Brewer[109] involved another such challenge. It held that the deprivation of liberty following a conviction is not total.[110] To hold that inmates have no more liberty than that which is provided by state law reduces prisoners to the status of slaves of the state. Justice Stevens concluded in *Meachum* that the appropriate legal inquiry is not whether state law has created a liberty interest on behalf of its prisoners, but whether the state's actions resulted in a sufficiently grievous loss to mandate procedural protection.[111] Justice Stevens argued that it was analytically unsound to impose a positivist approach to liberty interests similar to the Court's approach to property interests.[112] In *Roth*, the Supreme Court stated specifically that property interests are created and defined by rules or understandings that stem from a source other than the Constitution, such as state law.[113] Justice Stevens objected to the proposition that liberty could ever be the "product" of laws that were

---

103. *See id.*

104. *See id.* at 222.

105. *See id.* at 229.

106. *See id.* at 224.

107. *See id.* at 230 (Stevens, J., dissenting).

108. *Id.*

109. 408 U.S. 471 (1972) (arguing that revocation of prisoner's parole without a hearing violated due process).

110. *See id.* at 486.

111. *See Meachum*, 427 U.S. 215, 234-35 (1976) (Stevens, J., dissenting).

112. *See id.* at 231.

113. *See* Board of Regents v. Roth, 408 U.S. 572 (1972).

enacted for the purpose of limiting the state's power to curtail the liberties of its citizens.[114] He advocated a different analytical framework for liberty interests.[115] The *Meachum* dissent was repeated by Justices Stevens, Brennan and Marshall in a series of decisions addressing prisoners' liberty interests and again, almost twenty years later, in Justice Ginsburg's dissenting opinion in *Sandin v. Conner*.[116]

Inmates in the class action lawsuit *Greenholtz v. Nebraska Penal Inmates*[117] claimed they were entitled to *Morrissey*-type due process during the making of parole release decisions.[118] Nebraska had created a discretionary parole mechanism whereby inmates became eligible for parole when the minimum term, less good time credits, had been served.[119] The Board of Parole was governed by a procedure created both by statutory provisions and the Board's own practices.[120] The prisoners argued that the procedural protections they were afforded by statute and practice were constitutionally deficient under the Fourteenth Amendment. The District and Circuit Courts agreed with the inmates and ordered the institution of procedures similar to those suggested in *Morrissey v. Brewer*, which five years earlier had considered the rights of parolees during the revocation process.[121] On appeal by the state to the Supreme Court, the prisoners urged that the Constitution itself protected them in that, similar to the inmates in *Morrissey*, they also had a liberty interest recognized by the Fourteenth Amendment.[122] Alternatively, they argued

---

114. *See Meachum*, 427 U.S. at 230 (Stevens, J., dissenting).

115. *See id.* (arguing that the Due Process Clause protects basic freedom, not simply particular rights and privileges in the Constitution or statutes).

116. 515 U.S. 472, 488 (1995) (Ginsburg, J., dissenting).

117. 442 U.S. 1 (1979).

118. *See id.* at 3-4.

119. *See id.* at 4.

120. Hearings were conducted in two stages: initial review hearings and finale parole hearings. Initial hearings were held at least once a year for every inmate. At this stage, the Board of Parole examined the inmate's pre- and post-confinement record and held an informal hearing. The Board interviewed the inmate and considered any letters or statements presented in support of release. If the Board determined the inmate was not a good parole risk, it denied parole and stated its reasons. If the Board decided that the inmate was a likely candidate for release, it scheduled a final hearing. At the final hearing the inmate could present evidence, call witnesses, and be represented by counsel. If parole was denied, the Board provided a written statement of the reasons. *See id.* at 4-5.

121. *See* Nebraska Penal Inmates v. Greenholtz, 576 F.2d 1274 (8th Cir. 1978); Nebraska Penal Inmates v. Greenholtz, 602 F.2d 155 (8th Cir. 1979).

122. *See Greenholtz*, 442 U.S. at 3-4.

that Nebraska had created a liberty interest when it created the possibility of parole, and the state statute had created an expectation of parole.[123]

The Court denied that the Constitution itself accorded prisoners due process protection by concluding that a convicted offender has no constitutional or inherent right to be conditionally released before his or her sentence has expired.[124] A state is under no obligation to establish a parole system.[125] If a state chooses to do so, it can be as specific or general as it wants in establishing release criteria.[126] The interests at stake in parole release are not the same as the interests at stake in parole revocation because the prisoner is not yet free and enjoying the liberties that other members of the community enjoy. Justice Burger, writing for the majority, also cited the importance of making parole decisions based on subtle elements, some of which are factual but much of which is the Board's own subjective appraisal of what is best for the inmate and society at large. Because parole is only a possibility for which there is no guarantee, it is not protected by due process.[127]

The *Greenholtz* Court engaged in a more complex analysis with respect to the state-created liberty interest argument. The Nebraska statute provided that the parole board "shall" order an inmate's release "unless" one or more of four specific reasons are found by the Board to defer release.[128] Although the four criteria involved highly subjective elements and gave officials wide discretion, the Court nevertheless held that the statute provided an expectancy of release which was entitled to some measure of procedural protection.[129] In other words, a statute incorporating a list of criteria so broadly defined as to have potentially little impact on the Board's actual discretion was sufficient to convince the majority that Nebraska had created a liberty interest. It was a somewhat surprising conclusion, made all the more curious by the Court's

---

123. *See id.* at 8-9.

124. *See id.* at 7.

125. *See id.*

126. *See id.* at 8.

127. *See id.* at 9-11.

128. According to Neb. Rev. Stat. § 83-1, 114(1) (1976), whenever the Board of Parole considers the release of a committed offender who is eligible for parole, it shall order his release unless it is of the opinion that his release should be deferred because: (a) There is a substantial risk that he will not conform to the conditions of parole; (b) His release would deprecate the seriousness of his crime or promote disrespect for law; (c) His release would have a substantially adverse effect on institutional discipline; or (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date. *See Greenholtz*, 442 U.S. at 11.

129. *See Greenholtz*, 442 U.S. at 12.

observation that "this statute has a unique structure and language and thus whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis."[130]

After noting that Parole Board decisions are subjective and predictive in nature, the Court held that *Morrissey*-type due process procedures which were designed to elicit specific facts were not appropriate in the parole release setting.[131] The procedures already in place were constitutionally adequate to protect the prisoners' expectancy of release.[132] The Court extended due process to inmates involved in the Nebraska parole process and agreed they had a state-created liberty interest, however, the due process protections they were afforded were minimal in nature, offering significantly less protection than what was afforded to inmates involved in parole revocation.[133] In addition, the case failed to clarify what type of, if any, procedural safeguards were available to parole eligible prisoners in other states, observing only that each statutory scheme must be judged on a case-by-case basis.[134] Although the majority opinion was written by Justice Burger, the ghost of Justice Rehnquist's "bitter-sweet" doctrine from *Arnett v. Kennedy* was lurking in the background. The Court was willing to recognize the existence of a liberty interest created by state statute, but it permitted the scope of that interest to be significantly defined by the state's procedural protections.[135] Although inmates involved in the parole eligibility process had a liberty interest subject to protection, in reality the interest was no greater than the due process protections provided by state law.

Two cases followed *Greenholtz* which further limited the liberty interest doctrine. In *Connecticut Board of Pardons v. Dumschat*, the Supreme Court considered whether the state had created a constitutionally protected expectancy of commutation which entitled prisoners to an

---

130. *Id.*

131. *See id.* at 13-14.

132. *See id.* at 15.

133. *See id.* at 9-12.

134. *See id.* at 15. In *Sultenfuss v. Snow*, the Eleventh Circuit Court of Appeals held that the current Georgia parole system, as embodied in the Georgia Constitution, Georgia statutes, and the rules and guidelines promulgated pursuant to the statutes did not create a liberty interest in parole protected by the Constitution. *See Sultenfuss*, 35 F.3d 1494, 1502 (11th Cir. 1994). The court concluded that state law left the Parole Board with significant discretion. In addition, the Board was permitted by law to depart from the guidelines set up to assist the Board in making more consistent, sound, explainable decisions. Furthermore, state law contains no language mandating the outcome that must be reached. *See id.*

135. *See Greenholtz*, 442 U.S. at 15.

explanation when their applications for commutation were denied.[136] Prisoners argued that the Board of Pardons had created a liberty interest by granting approximately three-fourths of all commutation applications.[137] The Court of Appeals held that the Connecticut statute did not create a liberty interest, however, the overwhelming likelihood that prisoners serving life sentences would be pardoned before they completed their minimum terms constituted a practice equivalent to the grant of a constitutionally protected interest.[138] With Justice Burger writing, the Supreme Court held that *Greenholtz* could not lead to the recognition of a de facto liberty interest.[139] The frequency with which the state grants clemency cannot generate constitutional protections. Justice Burger gave a strong endorsement to the positivist origins of liberty interests by concluding that a claim of due process must be found in statutes or other rules that define the duties of those charged with the clemency decision.[140]

Jago v. Van Curen involved an inmate whose grant of parole was rescinded without a hearing when officials discovered that he made untruthful statements to the parole board.[141] The prisoner maintained he had a legitimate expectation of release based upon a mutually explicit understanding that he was to be paroled, amounting to a liberty interest entitling him to procedural due process. The Supreme Court refused to recognize that the Board had an implied contract with the inmate that he would be released. The per curiam opinion held that certain principles of contract law may work well in the arena of property interests but are not appropriate in deciphering the liberty interests of prisoners.[142]

In *Meachum v. Fano*, the Supreme Court denied that a change in an inmate's conditions of confinement alone could constitute a state-created liberty interest.[143] The grievousness of the inmate's loss was ruled insufficient to activate constitutional protections,[144] despite Justice

---

136. 452 U.S. 458, 459 (1981). Connecticut Board of Parole was allowed to sentence by reducing the minimum prison term thereby accelerating the prisoner's eligibility for parole. *See id.*

137. *See id.*

138. *See* Dumschat v. Connecticut Bd. of Pardons, 593 F.2d 165, 166 (2d Cir. 1979).

139. *See Connecticut Board of Pardons*, 452 U.S. at 465.

140. *See id.* at 465.

141. 454 U.S. 14, 15 (1981).

142. *See id.* at 18.

143. 427 U.S. 215, 224-25 (1976).

144. *See id.* at 224.

Stevens's charge that such a conclusion was analytically unsound.[145] In *Greenholtz v. Nebraska*, the Court applied the positivist approach to find that, under state law, prisoners have a liberty interest in parole release decisions, however, their due process rights are limited to the procedures already provided by law.[146] The positivist approach to liberty interests, reinforced by the *Dumschat*[147] and *Jago*[148] decisions which denied that a liberty interest could be created by a pattern or practice, was now firmly imbedded in the Court's constitutional analysis of prisoners' rights.

C. *The Doctrine Takes Shape in the 1980s*

Three cases during the 1980s added final form to the liberty interest doctrine before the major revision worked by *Sandin v. Conner*[149] in 1995. In *Hewitt v. Helms*, an inmate was placed in administrative segregation because he was suspected of participating in a riot and considered a threat to prison security.[150] His placement in segregation was not considered disciplinary punishment,[151] and he was not afforded the protections outlined in *Wolff v. McDonnell*. He was initially segregated without a hearing pending investigation of the allegations against him.[152] Eventually, the Program Review Committee reviewed his segregated status and recommended its continuation. The Superintendent reviewed the committee's findings and concurred.[153] The inmate challenged his assignment to segregated status on the grounds that he had a liberty interest in remaining in the general population and that he should not have been reassigned prior to being afforded the same due process afforded inmates involved in the disciplinary process.[154]

---

145. *Id.* at 230-31 (Stevens, J., dissenting). Some commentators mark *Meachum* as the point at which the Court switched from an impact analysis to an entitlement analysis in deciding whether a state had created a liberty interest for prisoners. *See* Eugene Murphy, *Due Process Implications of Prison Transfers*, 16 U. RICH. L. REV. 583, 585-87 (1982); Thomas L. Finigan, Note, *The Procedural Due Process Implications of Involuntary State Prisoner Transfers:* Hewitt v. Helms *and* Olim v. Wakinekona, 25 B.C. L. REV. 1087, 1100 (1984).

146. 442 U.S. at 15.

147. 452 U.S. 458 (1981).

148. 454 U.S. 14 (1981).

149. 515 U.S. 472 (1995).

150. 459 U.S. 460, 464 (1983).

151. *See id.* at 473.

152. *See id.* at 463.

153. *See id.* at 465.

154. *See id.* at 466

The Supreme Court agreed that Helms had a liberty interest in remaining in the general population, but disagreed with the assertion that he was entitled to *Wolff*-type protections.[155] In deciding that a liberty interest existed, Justice Rehnquist, writing for the majority, emphasized the positivist nature of liberty interests. The Constitution was not the source of Helms' liberty interest. To allow any substantial deprivation of liberty to trigger protection under the Due Process Clause would result in excessive judicial interference with the daily operation of institutions and the broad discretion administrators need to operate.[156] Justice Rehnquist also noted that "[a]s long as the conditions or degree of confinement is . . . within the sentence imposed" and did not otherwise violate the Constitution, the Due Process Clause offered no protection.[157] In the majority's assessment, the transfer of an inmate to a more restrictive living environment for nondisciplinary reasons was well within the terms of confinement contemplated by a prison sentence.[158] In fact, administrative segregation is just the variety of confinement that prisoners should reasonably anticipate being subjected to at some time during their incarceration.[159]

Justice Rehnquist next considered whether the state regulations created a predictable interest for inmates to remain in the general population.[160] With the admitted exception of the Court's affirmance in *Wright v. Enomoto*,[161] he rejected the notion that the Court had ever held that statutes and regulations governing the daily prison confer liberty interests. Indeed, he stated that there were persuasive reasons why the Court would refuse to impose the state-created liberty interest doctrine on day-to-day matters which should be entrusted to the expertise of prison officials.[162]

---

155. *See id.* at 472.

156. *See id.* at 472.

157. *Id.* at 468 (quoting Montanye v. Haymes, 427 U.S. 236, 242 (1976)).

158. *See id.*

159. *See id.*

160. *See id.* at 472.

161. 462 F. Supp. 397 (N.D. Cal. 1976), *summarily aff'd,* 434 U.S. 1052 (1978). *Wright* was a class action filed by state prisoners confined to administrative segregation in which they challenged the conditions of their confinement and the procedures by which they were assigned to segregation. They complained that they were assigned without a meaningful hearing: no notice of why they were being segregated, no opportunity to call witnesses on their behalf, no access to counsel, no right to confront their accuser. The District Court held that the inmates had a liberty interest under state law to remain in general population and were entitled to a meaningful hearing before being segregated whether for administrative or disciplinary reasons. Due process protects the inmate from an arbitrary infliction of a severe impairment. *See id.* at 402-04.

162. *See Hewitt*, 459 U.S. at 470 (1983).

Alluding to *Wolff*, *Morrissey*, and *Greenholtz*, he noted that deprivations involving conditions of confinement are minor in comparison to custody issues addressed in parole decisions and good time credits.[163] Despite his reservations, however, he concluded that in this case the state's statutes and regulations granted inmates a liberty interest in remaining in the general population.

Justice Rehnquist's analysis involved a detailed review of the state's regulations, stressing that the existence of procedural guidelines alone did not result in the creation of a liberty interest.[164] The state in this case used language of an "unmistakenly mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed . . . and that administrative segregation will not occur absent specified substantive predicates."[165] The state had created a liberty interest by using mandatory language and requiring substantive predicates. Nonetheless, Justice Rehnquist was able to narrow the reach of this newly recognized liberty interest by limiting the due process procedures necessary to protect it. Even though confinement in administrative segregation may be identical, and at times even more restrictive and for longer periods of time than confinement in disciplinary segregation, the Court ruled that prisoners who are administratively confined are not entitled to *Wolff* due process. The only due process required was an informal, nonadversary review of the information supporting an inmate's confinement, including any statement that the inmate may wish to submit. The review should be conducted within a reasonable time after confinement.[166] Reminiscent of the "bitter-sweet doctrine," inmates were granted a liberty interest only to have its parameters restrictively defined by the due process afforded by state statute.

In *Meachum*, the Supreme Court entertained a challenge to an intra-state transfer and found that state law had not created a liberty interest.[167] In *Olim v. Wakinekona*,[168] decided shortly after *Hewitt v. Helms*, the

---

163. *See Hewitt*, 459 U.S. at 470. *Wolff* involved the loss of good time credits as a disciplinary sanction. *See* 418 U.S. 539, 544. *Morrissey* involved parole revocation procedures. *See* 408 U.S. 471, 481. *Greenholtz* involved parole release decisions. *See* 442 U.S. 1, 1-2. All three cases in which the Court found a state-created liberty interest concerned matters of length of custody. *Meachum* and *Wakinekona* concerned the conditions under which inmates were confined and in neither case did the Court recognize a liberty interest.

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

165. *Id.* at 471-72.

166. The Court concluded that Helms had been afforded all the due process required to protect his liberty interest. Helms may have won the battle, but he lost the war.

167. *See* Meachum v. Fano, 427 U.S. 215, 223-24 (1976).

168. 461 U.S. 238 (1983).

Court addressed the claim of an inmate who had been transferred from a state prison in Hawaii to an institution in California.[169] Unlike the situation in *Meachum*, however, in compliance with specific state regulations, Delbert Wakinekona was granted a hearing by an impartial committee prior to his transfer.[170] He was given notice of the hearing and was able to confront and cross-examine witnesses. Also in compliance with regulations, the committee's recommendation concerning transfer went to an administrator for final decision.[171] The regulations did not provide criteria to guide the administrator's exercise of discretion.[172] Wakinekona complained in his lawsuit that the committee whose recommendation was forwarded to the administration was not impartial because it was composed of the same individuals who initiated the hearing.[173]

The issue before the Supreme Court was whether the transfer of a prisoner from one state corrections system to another state corrections system implicated a liberty interest.[174] Despite written procedural safeguards far more extensive than those available to the *Meachum* prisoners, in *Olim* the Court found that Hawaii had not created a liberty interest because state law did not bind the administrator to accept the committee's recommendation, nor did it provide objective and defined criteria for the administrator to guide a final decision.[175] As the Court previously commented in *Helms*, procedures requiring a particular kind of hearing before the administrator can exercise discretion do not necessarily result in the creation of a liberty interest. "Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement."[176] The fact that Wakinekona was to be transferred a long distance from his home was not relevant. Confinement in a state other than an inmate's home state or the state of conviction is within the "range of custody" the state is permitted to impose.[177]

Led by Justice Marshall, the dissent attacked the positivist approach to liberty interests. The relevant question for Justices Marshall, Brennan and Stevens was the same question they asked in the *Meachum v. Fano*

169. *See id.* at 240.

170. *See id.* at 240-41.

171. *See id.* at 241.

172. *See id.* at 243.

173. *See id.*

174. *See id.* at 240.

175. *See id.* at 249-50.

176. *Id.* at 250.

177. *Id.* at 247 (quoting Meachum v. Fano, 427 U.S. 215, 225 (1976)).

dissent: Did the change in the conditions of imprisonment constitute a grievous loss of liberties?[178] Such a grievous loss is suggested when an inmate is transferred from Hawaii to the mainland. As an alternative argument, the dissent also took issue with the majority's analysis of Hawaii's regulations and maintained they were at least as substantial as the regulations found to have created a liberty interest in *Hewitt v. Helms*.[179] Because administrators had unfettered discretion in making final transfer decisions did not defeat an inmate's expectation that, under the rules, transfers only occurred if required to ensure an inmate's optimum placement.[180] The dissent pointedly commented that in *Hewitt v. Helms* prison regulations allowed the superintendent to review all decisions of the committee concerning administrative segregation assignments and did not impose criteria to guide the superintendent's decision.[181] He or she was free to place an inmate in segregated status for any reason or no reason at all.[182] Yet in that case the Court had held that state regulations created a liberty interest protected by due process.

The liberty interest doctrine was fine-tuned in *Kentucky v. Thompson*.[183] Two inmates were denied visits with family members because the visitors were suspected of smuggling contraband into the prison.[184] In both cases, visiting privileges were suspended without a hearing. The inmates sued the Commonwealth of Kentucky claiming that the suspension of their privileges without a hearing violated both a consent decree that had been entered in a prior lawsuit, and the Due Process Clause of the Fourteenth Amendment.[185] The Supreme Court dismissed

178. *See id.* at 250 (quoting Vitek v. Jones, 445 U.S. 480, 488 (1980)).

179. *See id.* at 255-57. Hawaii's standard for classifying inmates was the prisoner's "optimum placement within the Corrections Division" based on the "best interests of the individual, the State, and the community;" the rule outlines factors and detailed procedures applicable when the reclassification of an inmate lead to a transfer involving a "grievous loss," including notice to the inmate, access to information, and a hearing, confrontation and cross-examination. Alternately, the state law applicable to *Hewitt* classified inmates based on a prison official's "assessment of the situation." *Id.*

180. *See id.* at 257.

181. *See id.* at 258. The provision in *Helms* provided that the superintendent was the "decisionmaker." *Id.* at 258 n.12.

182. *See id.*

183. 490 U.S. 454 (1989).

184. *See id.* at 458.

185. *See id.* at 458. The Commonwealth of Kentucky had entered into a consent decree in a class action lawsuit filed by prisoners challenging the conditions of confinement in the Kentucky State Penitentiary. In the decree, the Bureau of Corrections agreed "'to maintain visitation at least at the current level, with minimal restrictions,' and to 'continue [its] open visiting policy.'" *See id.* at 456.

any notion that the Constitution provided inmates with a liberty interest in visitation.[186] Applying *Hewitt v. Helms* language, it found "[t]hat the denial of prison access to a particular visitor 'is well within the terms of confinement ordinarily contemplated by a prison sentence.'"[187] The Court reaffirmed its position that as long as the conditions of confinement were within the imposed sentence, the Due Process Clause had not been violated.[188]

The Court considered whether Kentucky state policies and procedures created a liberty interest in "unfettered visitation" for inmates.[189] Kentucky had agreed, as part of a consent decree, to encourage and maintain visitation with minimal restrictions and to continue an open visitation policy. The Kentucky State Reformatory had written policies stating that administrative staff may deny visitation if a visitor's presence "would constitute a 'clear and probable danger' to the safety and security of the institution or would interfere with the orderly operation of the institution."[190] The policies included a non-exhaustive list of nine reasons for denying visits.[191] The duty officer was to make the final decision.[192] Justice Blackmun wrote for the majority in an opinion that closely examined the consent decree and the administrative regulations in its analysis built on the theory of the positivist origins of liberty interests. Justice Blackmun stated:

---

186. *See id.* at 461.

187. *See id.* (quoting Hewitt v. Helms, 459 U.S. 460, 468 (1983)).

188. *See id.* at 461.

189. *Id.* at 460.

190. *Id.* at 457 & n.2 (quoting Kentucky State Reformatory Procedures Memorandum, No. KSR 16-00-01 (Sept. 30, 1985)).

191. *See id.* at 457. The nine reasons given in the Procedures Memorandum are:

> (1) The visitor has a past record of disruptive conduct. (2) The visitor is under the influence of alcohol or drugs. (3) The visitor refuses to submit to a search or show proper identification upon request. (4) The visitor is directly related to the inmate's criminal behavior. (5) The visit will be detrimental to the inmate's rehabilitation. (6) The visitor is a former resident currently on parole who does not have the approval of his Parole Officer or the Warden. (7) The visitor is a former resident who has left by maximum expiration of sentence and does not have the prior approval of the Warden. (8) The visitor has previously violated institutional visiting policies. (9) Former employees of the Kentucky State Reformatory will not be allowed to visit inmates unless they have authorization from the Warden prior to the time of the visit.

Id. at 457 n.2.

192. *See id.* at 457-58.

> The fact that certain state-created liberty interests have been found to be entitled to due process protection, while others have not, is not the result of this Court's judgment as to what interests are more significant than others; rather, our method of inquiry in these cases always has been to examine more closely the language of the relevant statutes and regulations.
>
> . . . .
>
> Most of our procedural due process cases in the prison context have turned on the presence or absence of language creating "substantive predicates" to guide discretion.[193]

According to the Court, liberty interests which are not found directly in the Constitution are defined by state laws that articulate specific directives to decision-makers, and which contain explicitly mandatory language to the effect that if the regulations' substantive predicates are present, a particular outcome *must* result.[194] Unfortunately for the inmates involved in this case, the Court concluded that although the visitation policies contained certain substantive predicates to guide the duty officer, they lacked the requisite mandatory language. The policies failed to require a particular result upon a finding that one of the substantive predicates were present.[195] The duty officer was not compelled to exclude all visitors who fell within one of the categories, and visitors who did not fall within one of the nine reasons for exclusion could be excluded.[196] Inmates, therefore, could not reasonably expect that a visit would necessarily be allowed absent one of the listed reasons.

Once again Justice Marshall led the dissent by cutting through the legal theorizing and summing up in practical terms what could easily result from the Court's decision. Prison administrators were now "free to deny prisoners visits from parents, spouses, children, clergy members, and close friends for any reason whatsoever, or for no reason at all. Prisoners will not even be entitled to learn the reason, if any, why a visitor has been turned away."[197] Frustrated by the majority's lack of appreciation for the realities of prison life and the enormous potential for the abuse of official discretion, Justice Marshall observed that one need not be cynical about prison administrators to foresee the possibility that they, for groundless or

193. *Id.* at 461-62.

194. *See id.* at 463.

195. *See id.* at 463-64.

196. *See id.* at 464-65.

197. *Id.* at 465-66 (Marshall, J., dissenting).

retaliatory reasons, may deny the visits which have long been recognized as important contributors to rehabilitation.[198]

In the strongest case yet made for grounding prisoners' liberty interests in the Constitution itself, the dissent attacked the majority position that the Due Process Clause was not implicated as long as the conditions of confinement were within the terms of the sentence.[199] This approach allowed inmates to retain liberty interests in theory, but, in fact, their interests materialized only when a majority of the Court happened to say so. The search for substantive predicates and mandatory language more often involve, first, a decision that the claimed "right" was important enough to constitute a state-created liberty interest, then, a justification of the decision with the wording of the statute. Justice Marshall wrote a stinging attack:

> On its face, the "within the sentence" test knows few rivals for vagueness and pliability, not the least because a typical prison sentence says little more than that the defendant must spend a specified period of time behind bars. As applied, this test offers prisoners scant more protection, for the Justices employing it have rarely scrutinized the actual conditions of confinement faced by the prisoners in the correctional institutions at issue.[200]

Justice Marshall faulted the majority's finding based on its positivist approach. He asked why mandatory language must also be an essential element once a regulation established substantive predicates to guide the use of discretion.[201] He reasoned that officials are not likely to ignore the criteria simply because "there is not some undefined quantity of the words 'shall' or 'must'."[202] Furthermore, the regulation language was sufficiently mandatory, even under the majority's own standards.[203] Focusing on the entire context in which the duty officer was permitted to exclude visitors rather than on the rule's specific language, Justice Marshall concluded that the officials did not have unfettered discretion.[204]

---

198. *See id.* at 466.

199. *See id.*

200. *Id.* at 466-67.

201. *See id.* at 471.

202. *Id.*

203. *See id.* at 472-73.

204. *See id.* at 473. The duty officer has the responsibility of denying a visit for one of the enumerated reasons laid out in the Procedures Memorandum. *Id.*; *see also supra* text accompanying notes 191-92.

During the 1980s, the Supreme Court defined the types of state laws and regulations that create liberty interests. Statutes had to be mandatory in character and provide substantive criteria to guide the exercise of official discretion. As *Olim v. Wakinekona* demonstrated, not all policies and procedures resulted in liberties protected by due process.[205] The *Thompson* Court significantly narrowed the scope of prisoners' liberties by applying a hypertechnical analysis of words and phrases which caused Justice Marshall to warn in the dissent that, ultimately, it was the majority's judgment about the nature of the liberty interest that determined the manner in which the law or regulation was interpreted, not vice versa.[206] In the one case in which the Court recognized a state-created liberty interest, *Hewitt v. Helms*, the procedural protections were limited by state law.[207]

D. *Two Exceptional Cases*

Only when the state has infringed on already established constitutional rights will the Court recognize protection under the Due Process Clause. In *Morrissey v. Brewer*[208] and *Gagnon v. Scarpelli*,[209] the Supreme Court ruled that the Due Process Clause protects prisoners against the arbitrary revocation of probation and parole. *Vitek v. Jones*[210] was the first prisoner rights case outside of parole and probation revocation to recognize that inmates have liberty interests derived from the Constitution itself.[211] Justice White wrote the majority opinion which considered whether an inmate is entitled to due process protections before being involuntarily transferred to a state mental hospital for treatment. The Court concluded that both the Constitution's Due Process Clause and state law provide

---

205. 461 U.S. 238 (1983) (stating that an interstate prison transfer in and of itself did not deprive an inmate of a liberty interest protected by the Due Process Clause).

206. Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 467 (1989).

207. *See generally Hewitt*, 459 U.S. at 466 (deciding that in light of Pennsylvania statutes and regulations setting forth the procedures for confining an inmate to administrative segregation, respondent did not acquire a liberty interest in remaining in the general prison population).

208. 408 U.S. 471 (1972).

209. 411 U.S. 778 (1973).

210. 445 U.S. 480 (1980).

211. *See id.* at 490-91. Nebraska created a liberty interest where "a prisoner would not be transferred unless he suffered from a mental disease or defect that could not be adequately treated in the prison . . . ." *Id.* at 490. The Court stated that this was a liberty interest under the Fourteenth Amendment that entitled Jones to the appropriate procedures. *See id.* at 490-91.

procedural safeguards.[212] Although *Vitek* also addressed the rights of prisoners during a transfer, unlike *Meachum* and *Olim*, the transfer was to a mental hospital as opposed to another correctional institution. The Court concluded that transfer to a mental hospital is not within the range of confinement justified by a prison sentence because commitment imposes qualitatively different adverse consequences than does punishment, including social stigma and the possibility of mandatory participation in behavior modification programs.[213]

The Court had little difficulty in also recognizing that state law had created a liberty interest because statutory language required a finding of mental illness that could not be adequately treated in prison before an inmate could be transferred to a mental institution.[214] What is especially interesting in *Vitek* as it relates to *Sandin v. Conner*, is Justice White's discussion of prior cases in which the Supreme Court had found a state-created liberty interest.[215] White observed that in *Wolff* the Court had found a state-created liberty interest in good-time credits[216] and further:

> We also noted that the same reasoning could justify extension of due process protections to a decision to impose "solitary" confinement because "[it] represents a major change in the

---

212. *See id.* at 487-88.

213. *See id.* at 492.

214. *See id.* at 494. Under Nebraska law, an inmate's due process rights included:

> A. Written notice to the prisoner that a transfer to a mental hospital is being considered;
>
> B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;
>
> C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination;
>
> D. An independent decision-maker;
>
> E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;
>
> F. Availability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and
>
> G. Effective and timely notice of all the foregoing rights.

Id. at 494-95.

215. *See id.* at 488 ("We have repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment.").

216. *See id.*

> conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct."[217]

The second case in which the Court found that inmates have a liberty interest grounded in the Constitution is *Washington v. Harper.*[218] Inmate Harper had been treated involuntarily with antipsychotic medications while he was incarcerated in the mental health unit at the Washington State Penitentiary.[219] He claimed the Fourteenth Amendment's Due Process Clause entitled him to a judicial hearing prior to being medicated with antipsychotics against his will.[220] Similar to the *Vitek* holding, the Court found that both state law and the Constitution create a prisoner liberty interest in avoiding the unwanted administration of antipsychotic drugs.[221] The Court held that the state statute incorporated mandatory language and specific substantive predicates which created a justifiable expectation among inmates that these drugs would not be administered to them unless certain circumstances were shown to exist.[222]

Before considering what type of procedural safeguards are required, the Court addressed the scope of Harper's liberty interests under the Due Process Clause and whether they differed from the rights he had been extended under the Washington state statute.[223] Harper maintained that, under the Constitution, the state could not override his refusal of

---

217. *Id.* at 488 (quoting Wolff v. McDonnell, 418 U.S. 539, 571-72 n.19).

218. 494 U.S. 210 (1990).

219. *See id.* at 213-14.

220. *See id.* Antipsychotic drugs, sometimes called "neuroleptics" or "psychotropic drugs," alter the chemical balance in a patient's brain and are used to treat mental disorders such as schizophrenia. *See id.* at 214. They assist the patient in organizing his or her thought processes. *See id.*

Justice Stevens, in his dissent, discussed the controversy surrounding antipsychotic drugs. "They can induce catatonic-like states, alter electroencephalographic tracings, and cause swelling of the brain. Adverse reactions include drowsiness, excitement, restlessness, bizarre dreams, hypertension, nausea, vomiting, loss of appetite, salivation, dry mouth, perspiration, headache, constipation, blurred vision, impotency, eczema, jaundice, tremors, and muscle spasms." *Id.* at 240. They can also cause tardive dyskinesia (uncontrollable movements that are often irreversible) and neuroleptic malignant syndrome, which is often fatal. *See id* at 214.

221. *See Washington,* 494 U.S. at 228 ("state law recognizes a liberty interest, also protected by the Due Process Clause, which permits refusal of antipsychotic drugs unless certain preconditions are met").

222. *See* James R.P. Ogloff et al., *Mental Health Services in Jails and Prisons: Legal, Clinical, and Policy Issues,* 18 LAW & PSYCH. REV. 109, 131 (1994) ("The most common form of treatment in prisons is psychotropic drug therapy.").

223. *See* Washington v. Harper, 494 U.S. 210, 220-22 (1990).

antipsychotic medication unless he was first found to be incompetent; with the fact finder using a substituted judgment to determine that if Harper had been competent he would have consented to drug treatment.[224] He argued for a competent person's absolute liberty interest in refusing psychotropic drugs. The Supreme Court disagreed and held that the extent of a prisoner's due process rights to be free from the forced administration of antipsychotics must be considered in the special context of incarceration.[225]

State law required a medical finding of mental illness as a result of which there existed a likelihood of serious harm to the inmate or others, and/or that the inmate was gravely disabled. It did not require a finding of incompetency, nor the application of substituted judgment.[226] According to the majority, under the standard of *Turner v. Safley*, this state law met the mandate of the Due Process Clause because infringement of a prisoner's constitutional right to be free from unwanted medical treatment is reasonably related to a legitimate penological purpose.[227] Although the Court recognized the existence of a Constitutionally based liberty interest, the substance of that interest is defined by state law.[228] The Court did not independently determine the scope of a prisoner's liberty interest to be free of forced medication with antipsychotic drugs. Instead, it analyzed whether the statute that created the interest met the requirements of the Due Process Clause pursuant to the *Turner v. Safley* standard.[229] While

---

224. *See id.* at 222.

225. *See id.*

226. The state's policy provided that if a psychiatrist ordered the medication, an inmate may be treated involuntarily only if he or she suffered from a mental disorder and was "gravely disabled" or posed a "likelihood of serious harm" to himself or herself or others. *Id.* at 215. The inmate was:

> entitled to a hearing before a special committee consisting of a psychiatrist, a psychologist, and the Associate Superintendent of the Center, none of whom may be, at the time of the hearing, involved in the inmate's treatment or diagnosis. If the committee determine[d] by a majority vote that the inmate suffer[ed] from a mental disorder and [was] gravely disabled or dangerous, the inmate may be medicated against his will, provided the psychiatrist [was] in the majority.

Id. at 215-16. The inmate was required to have 24 hours notice of the hearing, and notice of the diagnosis and why the staff supported medication. At the hearing, the inmate had the right to attend and present witnesses and evidence, to cross-examine staff, and to have the assistance of a lay advisor. The inmate had the right to appeal the committee's decision to the Superintendent within 24 hours. He or she could also seek judicial review of the decision in state court. After the initial hearing, involuntary medication would be subject to periodic review. *See id.* at 216.

227. *See id.* at 223; *see also* Turner v. Safley, 482 U.S. 78 (1987).

228. *See* Washington v. Harper, 494 U.S. 210 (1990).

229. *See id.*; *see also Turner*, 482 U.S. 78 (1987).

the Supreme Court had previously applied the *Turner* standard to determine the constitutionality of prison regulations that restricted inmates' rights, it had never applied that standard to evaluate the constitutionality of regulations that actually create a liberty interest for prisoners, or, as in *Washington v. Harper*, regulations that attempted to define the scope of liberty interests already recognized by the Due Process Clause.[230]

The *Washington v. Harper* dissent, written by Justice Stevens who was joined by Justices Brennan and Marshall, argued that Washington state law failed to provide the protection guaranteed by the Constitution.[231] Justice Stevens concluded that the law undervalued a prisoner's liberty interest in

---

230. In *Turner*, the Supreme Court considered the constitutionality of two prison regulations. The first regulation permitted mail correspondence between family members who were inmates at different institutions and between inmates concerning legal matters. *See Turner*, 482 U.S. at 81. Other inmate-to-inmate correspondence was allowed only if each inmate's classification/treatment team deemed it in the best interests of the inmates. The second regulation permitted an inmate to marry only with the prison superintendent's permission. Such approval would be given only if a compelling reason existed. *See id.* at 82.

The Court established a standard for determining whether a prison regulation that impinged on inmates' constitutional rights was constitutionally valid. According to the standard, such a regulation is valid if it is reasonably related to a legitimate penological purpose. Four factors are relevant to determining its reasonableness. *See id.* First, "there must be a valid, rational connection between the regulation and the legitimate governmental interest put forward to justify it." *Id.* at 89. The second factor is "whether there are alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. Third is "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* Fourth, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation; however, officials are not obligated to follow a least restrictive alternative test." *Id.* Using the newly-created standard, the Court ruled that the marriage regulation was unconstitutional but the correspondence regulation was constitutional. *Id.* at 93, 99.

In *O'Lone v. Shabazz*, 482 U.S. 342 (1987), the Court considered the constitutionality of a regulation that made it impossible for many Islamic inmates to attend certain religious services. *See id.* at 353. The regulation did not allow inmates who had work assignments outside the building to come in for the Friday Jumu'ah service. *See id.* The Court applied the *Turner* standard and its four factors and concluded that the regulation was constitutionally permissible because it was reasonably related to legitimate penological purposes. *See id.*

In *Thornburgh v. Abbott*, 490 U.S. 401 (1989), the Court decided that regulations promulgated by the Federal Bureau of Prisons concerning the right of inmates to receive publications from the outside met the *Turner* standard. The regulations involved a detailed procedure for rejecting publications that were considered detrimental to the security, good order, or discipline of the institution or would facilitate criminal activity. *See id.* at 419.

231. *See Turner*, 494 U.S. at 237.

being free from forced antipsychotic treatment because it allowed the drugs to be used as a mechanism to maintain institutional order. The dissent further asserted that it is incorrect to assume that such drugs would only be administered in the inmate's medical interest. The law permitted the administration of antipsychotic drugs based purely on the impact of an inmate's disorder on an institution's security without consideration of any medical benefit the drugs might have for the prisoner.[232] In essence, an inmate's liberty to refuse such drugs could be sacrificed to administrative concerns.[233] Justice Stevens maintained that the majority seriously misapplied *Turner* when it recognized that both a prisoner's medical interests and a state's administrative interests independently could justify involuntary medication.[234] As a result, the majority opinion permitted the exaggerated response of forced medication based solely on institutional needs.[235]

The majority's satisfaction with the substantive aspects of the prison regulation also extended to its procedural components. It held that a judicial decision-maker is not necessary to protect an inmate's liberty interests, explaining that the decision to medicate is best made by medical professionals, and the statute's review procedures adequately assure neutral and independent decisions.[236] In so holding, the Court again allowed a statute's procedural mechanisms to seriously impact the scope of the prisoner liberty interest.[237]

Vitek v. Jones and *Washington v. Harper* are important cases in the area defining inmates' liberty interests. They are the only cases to ground the liberties of inmates in the Constitution's Due Process Clause.[238] Both

---

232. *See id.* at 242-44.

233. *See id.* at 246.

234. *See id.*

235. *See id.*

236. *See id.* at 233.

237. The dissent criticized the procedures outlined in the statute because they did not go far enough to reduce the potential for institutional bias. *See id.* at 250. The committee that reviews a decision to medicate is composed of the colleagues of the treating physician who made the original decision. *See id.* at 251. The in-house decision can be further compromised because appeals of the committee's decision are resolved by the superintendent of the institution. *See id.* at 251-52.

238. *See Vitek*, 445 U.S. at 482-83 ("The question in this case is whether the Due Process Clause of the Fourteenth Amendment entitles a prisoner . . . to certain procedural protections . . . ."). *See also* Washington v. Harper, 494 U.S. 210, 213 (1990) ("The central question before us is whether a judicial hearing is required before the State may treat a mentally ill prisoner with antipsychotic drugs against his will. Resolution of the case requires us to discuss the protections afforded the prisoner under the Due Process Clause of the Fourteenth Amendment.").

cases recognize that, constitutionally, a criminal conviction does not permit every intrusion into a prisoner's liberty.[239] Specifically, conviction is not equivalent to a determination that a prisoner is mentally ill and should be confined to a mental hospital,[240] nor that a prisoner should be medicated against his or her will with antipsychotic drugs.[241] Both decisions concluded that issues concerning mental health treatment are qualitatively different than issues involving length of custody. The extent to which inmates have a state-created liberty interest in the parole process or the disciplinary process is defined by statute and regulation. This is not so with regard to issues concerning placement in a mental institution or forcible drug treatment. Perhaps the Court, directed in large part by prior decisions addressing the rights of non-incarcerated individuals to refuse medical treatment[242] and the due process protections against involuntary commitment to a mental hospital,[243] felt compelled to soften its position that validly convicted prisoners have no constitutional liberty interests, no matter how grievous the loss suffered as a result of the state's actions. Nonetheless, in both cases the Court permitted the statutes' due process provisions to define the parameters of the liberty interests, even though the

---

239. *See Vitek*, 445 U.S. at 488-89 ("Once a state has granted prisoners a liberty interest, . . . due process protections are necessary 'to insure that the state-created right is not arbitrarily abrogated.'" (quoting *Wolff*, 418 U.S. at 557)); *see also Washington*, 494 U.S. at 221-22 ("[I]n addition to the liberty interest created by the State's Policy, respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment").

240. *See Vitek*, 445 U.S. at 493 ("We conclude that a convicted felon also is entitled to the benefit of procedures appropriate in the circumstances before he is found to have a mental disease and transferred to a mental hospital").

241. *See Washington*, 494 U.S. at 228 ("[s]tate law recognizes a liberty interest, also protected by the Due Process Clause, which permits refusal of antipsychotic drugs . . . .").

242. *See, e.g.*, Mills v. Rogers, 457 U.S. 291 (1982). In *Mills*, the Supreme Court considered whether involuntarily committed mental patients have the constitutional right to refuse treatment with antipsychotic drugs. *See id.* at 306. The Court did not decide the issue because the Massachusetts Supreme Court had already interpreted state law to have created a liberty interest to refuse such treatment. *See id.* Its decision could be overcome only by a judicial determination of substituted judgment on the patient's behalf. *See id.* at 301-02. The U.S. Supreme Court concluded that the state could create liberty interests broader than those created by the Federal Constitution. *See id.* at 300.

243. *See* O'Conner v. Donaldson, 422 U.S. 563, 576 (1975) ("[A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.").

interests are mandated by the Constitution itself.[244] In *Washington v. Harper*, the Court went so far as to allow state law to define not only due process, but also the nature of an inmates' substantive constitutional rights to be free from forced psychotropic medications.[245]

IV. DEVELOPMENT OF THE DOCTRINE IN THE LOWER COURTS

The lower federal courts were faced with the task of applying the evolving state-created liberty interest doctrine to the large numbers of lawsuits in which prisoners claimed that their liberties were infringed without due process.[246] Inmates claimed liberty interests in remaining in general population status as opposed to being assigned to administrative or disciplinary segregation, in being considered for parole release according to specific criteria,[247] in being considered for particular jobs or work

---

244. *See Vitek*, 445 U.S. at 494 (stating that the Nebraska statute at issue "implicated a liberty interest protected by the Due Process Clause"). *See also Washington*, 494 U.S. at 227 (holding that "given the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest").

245. *See Washington*, 494 U.S. at 227.

246. *See generally* Robert G. Doumar, *Prisoner Cases: Feeding the Monster in the Judicial Closet*, 14 ST. LOUIS U. PUB. L. REV. 21 (1994) (documenting the effects of prisoner civil rights cases on the federal court system). Doumar notes that the number of lawsuits filed by prisoners has skyrocketed over the last two decades. *See id.* at 22. The vast majority of civil rights lawsuits filed by inmates are filed under 42 U.S.C. § 1983. *See id.* Citing statistics from the Administrative Office of the U.S. Courts, Annual Reports of the Director, from 1967 to 1993, Doumar shows the alarming increase. For example, in 1993, inmates filed 33,018 § 1983 cases, compared to 29,588 in 1992 and 25,917 in 1991. *See id.* Nationwide, 23.25% of the civil docket in U.S District Courts were prisoner cases. *See id.* at 24. Prisoner civil rights cases have also become a greater proportion of the workload in federal courts of appeal. *See id.* at 26. Citing statistics compiled by the Bureau of Justice Statistics, Doumar points out that in 1991, appeals by inmates in § 1983 cases amounted to 4655. *See id.* In 1992, this figure grew to 5396, and in 1992 there were 6044. *See id.* In 1993, prisoner civil appeals made up 28.62% of federal appellate cases. *See id.* at 25. Obviously, not all these cases involved state-created liberty interest issues. Other than the fact that they were filed under § 1983, there are no data available that categorize prisoner rights cases by the legal claims they raise.

247. *See* Board of Pardons v. Allen, 482 U.S. 369, 373 (1987) (Justice Brennan, writing for the majority, applied *Greenholtz*; the Court found that the Montana statute used explicitly mandatory language and created a liberty interest for inmates in parole release. *See id.* at 377-78. Justices O'Connor, Rehnquist and Scalia dissented, arguing that the Montana statute failed to set forth meaningful constraints on official discretion and did not create a liberty interest. *See id.* at 384-85. The dissent noted that the statute

release programs,[248] in assignment to certain custody levels or participation in certain programmatic activities,[249] in receiving regular meals as opposed

---

at issue in *Greenholtz* "did not offer particularized standards, and did not significantly restrain the parole decision. *Greenholtz* is thus an aberration and should be reexamined and limited strictly to its facts." *Id.* at 385.

The Eleventh Circuit Court of Appeals held in *Sultenfuss v. Snow*, 35 F.3d 1494 (1994) that the Georgia parole statutes did not create a protected liberty interest in release for prisoners because they failed "to limit meaningfully the discretion of state officials." *Id.* at 1503. The dissent in that case pointed out that the Georgia laws were no less mandatory that those of Nebraska and Montana. *See id.* at 1508.

248. *See, e.g.*, DeTomaso v. McGinnis, 970 F.2d 211, 213 (7th Cir. 1992); Codd v. Brown, 949 F.2d 879, 883 (6th Cir. 1991); O'Bar v. Pinion, 953 F.2d 74, 84 (4th Cir. 1991) (all holding that inmates did not have a liberty interest in participating in a work release program); Baumann v. Arizona Dept. of Corrections, 754 F.2d 841, 844 (9th Cir. 1985). *But see* Winsett v. McGinnes, 617 F.2d 996, 1007-08 (3rd Cir. 1980) (*en banc*), *cert. denied*, 449 U.S. 1093 (1981) (state guidelines created a liberty interest when prisoners meet the work release eligibility requirements.).

249. *See* Browning v. Vernon, 44 F.3d 818, 821 (9th Cir. 1995) (An inmate had a protected liberty interest under state law in a fair and accurate rehabilitation evaluation and report to determine whether the inmate qualified for a program for early release.); Klos v. Haskell, 48 F.3d 81, 88 (2d Cir. 1995) (An inmate who was removed without explanation from New York's Shock Incarceration Program and returned to the general population did not have a protected liberty interest to remain in the program; the Commissioner was free to approve an applicant for admission or to remove an inmate from the program at any time.); Carney v. Houston, 33 F.3d 893, 894 (8th Cir. 1994) (State law did not create a liberty interest for prisoners in being assigned a particular classification; the inmate had alleged that officials improperly withheld four points from his classification score which precluded him from participating in a work release program.); Hernandez v. Coughlin, 18 F.3d 133, 137 (2d Cir. 1994) (Inmates did not have a protected interest in conjugal visits.); Williams v. Nix, 1 F.3d 712, 717-18 (8th Cir. 1993) (Prison regulations regarding transferring inmates to other institutions and procedures for handling their legal paperwork did not create a predictable liberty interest.); Jones v. Moore, 996 F.2d 943, 945 (8th Cir. 1993) (State law did not grant inmates a liberty interest in participating in a sex offender program at any particular time relevant to their presumptive parole dates.); Doe v. Sullivan County, Tenn., 956 F.2d 545, 557-58 (6th Cir. 1992) (An inmate who had been sexually assaulted by his cellmate had a liberty interest under county regulations in being classified by officials with regard to his safety and mental disabilities.); Conlogue v. Shinbaum, 949 F.2d 378, 380 (11th Cir. 1991) (Alabama regulations providing that an inmate's criminal record "may" be considered in determining Incentive Good Time status did not create a liberty interest because such award was discretionary.); Patchette v. Nix, 952 F.2d 158, 161 (8th Cir. 1991) (Prisoners had a liberty interest in weekend visitation which could not be abridged without affording due process.); Smith v. Massachusetts Dept. of Corrections, 936 F.2d 1390, 1397 (1st Cir. 1991) (State regulations governing transfers to higher custody did not create a liberty interest.); Lanier v. Fair, 876 F.2d 243, 248 (1st Cir. 1989) (Massachusetts procedures governing transfers from halfway houses together with an inmate's community release agreement gave an inmate a protected liberty interest in

to sack lunches or food loafs,[250] to name some of the more frequent claims. Although it has been a challenging task, the lower courts, with a few exceptions, have developed a consistent pattern in both their analyses and holdings.

A. *Administrative Segregation*

By far the largest category of cases in which inmates have claimed state-created liberty interests has involved assignment to administrative segregation.[251] Prisoners are typically assigned to administrative segregation because they are disruptive and unable to live peacefully in the general population. They are considered threats to the security, safety, and operation of the institution. Conditions in segregated status vary from state to state, but segregation usually entails a restrictive housing unit, augmented security and monitoring devices, the reduction or often

---

remaining in a halfway house.); Merritt v. Broglin, 891 F.2d 169, 174-75 (7th Cir. 1989) (Regulations did not create a liberty interest in being granted a furlough to attend a funeral of a close family relative.); Paoli v. Lally, 812 F.2d 1489, 1493 (4th Cir. 1987) (The Commissioner of Corrections could remove an inmate from minimum security and subsequently disapprove recommendations that he be transferred to a minimum security facility because Maryland law did not create a liberty interest for inmates in a particular classification or to be assigned to a particular facility.); Beard v. Livesay, 798 F.2d 874, 877 (6th Cir. 1986) (Tennessee's reclassification system created a protected liberty interest; inmates were entitled to a hearing before being reclassified.); Miller v. Henman, 804 F.2d 421, 423 (7th Cir. 1986) (An inmate could be transferred to the U.S. Penitentiary at Marion without due process because inmates have no liberty interest in being assigned to any particular institution; the inmate had argued that conditions at Marion were qualitatively different than anywhere else.); Spruytte v. Walters, 753 F.2d 498, 506 (6th Cir. 1985) (An inmate had a protected state-created *property* interest in receiving books that did not threaten prison security.); Smith v. Shettle, 690 F.Supp. 746, 752 (N.D. Ind. 1988), *aff'd* 946 F.2d 1250 (7th Cir. 1991) (Indiana inmates sentenced to death did not have a protected liberty interest in being housed in the general population.).

250. *See* United States v. State of Michigan, 680 F. Supp. 270, 277-78 (W.D. Mich. 1988) (Prison regulations created a protected liberty interest for inmates in not being served a food loaf as opposed to a regular prison meal; according to regulations, inmates may only be placed on food loaf status for certain disciplinary violations.) *But cf.* Burgin v. Nix, 899 F.2d 733 (8th Cir. 1990) (Prison regulations did not create a protected liberty interest for inmates in not being served a sack meal as opposed to regular prison food. According to regulations, inmates who throw urine, water, feces, food, etc. on staff members are placed on incorrigible inmate status; inmates on this status can, but not necessarily must, be placed on sack meals.).

251. Administrative segregation is referred to by a number of designations including Special Housing Unit (SHU), Special Management Unit (SMU) or disruptive maximum security.

elimination of group activities among inmates, reduced programs and services that are restructured and brought to the inmates' housing areas, and strengthened measures to control contraband.[252] It is a bleak and highly constrained living environment to which inmates may be assigned for a few days to many months, and some for several years at a time. The length of time an inmate remains in administrative segregation depends on the circumstances under which he or she was placed there and whether officials think those circumstances have changed. Although inmates are assigned to administrative segregation because of their disruptive or violent behavior, segregation is not considered punishment for a specific disciplinary infraction. It is a nonpunitive, administrative assignment to a restrictive housing unit where, it is hoped, the disruptive inmate can be better managed for the safety and security of the facility, other inmates, and staff.

Hewitt v. Helms set out the basic parameters that courts have utilized to determine whether the placement of an inmate in administrative segregation triggers due process protections. However, over the past decade, judges have had to apply the *Helms* parameters to a myriad of different and confusing fact situations. The Second Circuit has decided several liberty interest cases in the context of New York State law. The appellate court ruled that a decision to assign an inmate to a very restrictive unit for three to eight weeks need not be "preceded by due process procedures because neither the Fourteenth Amendment independently nor New York law accords an inmate a liberty interest in remaining at a particular prison facility."[253] On the other hand, assignment to protective custody, also involving restrictive living conditions, was found to trigger due process because the Second Circuit decided that the New York statutes placed limits on official discretion.[254] After carefully examining state regulations, the same circuit concluded that inmates who were placed in a Special Housing Unit in order to restrict their communication with other inmates have a liberty interest that should have been protected by due process.[255] Keeplock confinement, in which an inmate is restricted to his own cell for ten days and loses privileges, was also found to trigger procedural protections because state law had created a liberty interest.[256] The Second Circuit concluded that when New York

252. *See* ROBERT BUCHANAN ET AL., DISRUPTIVE MAXIMUM SECURITY INMATE MANAGEMENT GUIDE (1988).

253. Sher v. Coughlin, 739 F.2d 77, 80 (1984).

254. *See* Deane v. Dunbar, 777 F.2d 871 (2d Cir. 1985).

255. *See* Matiyn v. Henderson, 841 F.2d 31 (2d Cir. 1988), *cert. denied*, 487 U.S. 1220 (1988).

256. *See* Russell v. Coughlin, 910 F.2d 75, 78 (2d Cir. 1990).

"mandates . . . a hearing no later than fourteen days after admission to the [special housing unit] and a prisoner's confinement continues without a hearing for sixty-seven days, a protected liberty interest [is] impaired."[257] In contrast, assignment to special housing in a state penitentiary pending a disciplinary hearing, and during the pendency of the appeal of that hearing, was not found to implicate a state-created liberty interest, and the inmate had no due process rights.[258]

Like the Second Circuit, the Seventh Circuit Court of Appeals has approached questions about state-created liberty interests with detailed examinations of state statutes and regulations. After two such examinations, the Seventh Circuit concluded in *Cain v. Lane*[259] and *Pardo v. Hosier*[260] that Illinois law did not create a liberty interest for inmates to remain in general population.[261] They could be assigned to administrative segregation status without due process. The Court also found that Illinois law also does not place substantive limitations on the ability of correctional officials to place and keep inmates in involuntary protective custody,[262] or to confine prisoners to their cells on a temporary lockdown status.[263] Neither, according to the Seventh Circuit, does Wisconsin law provide a liberty interest for prisoners to remain in the general population and out of nonpunitive temporary lockup status pending a disciplinary hearing.[264]

---

257. Wright v. Smith, 21 F.3d 496, 500 (2d Cir. 1994).

258. *See* Russell v. Scully, 15 F.3d 219, 221 (2d Cir. 1993).

259. 857 F.2d 1139 (7th Cir. 1988), *rev'd*, 911 F.2d 736 (7th Cir. 1990).

260. 946 F.2d 1278 (7th Cir. 1991).

261. *See Pardo*, 946 F.2d at 1282; *see also Cain*, 857 F.2d at 1143 (stating that "plaintiff alleges violations of his Fourteenth Amendment right to due process and his Eighth Amendment right to be free from cruel and unusual punishment").

262. *See* Kellas v. Lane, 923 F.2d 492, 495 (7th Cir. 1990).

263. *See* Woods v. Thieret, 903 F.2d 1080, 1083 (7th Cir. 1990).

264. Russ v. Young, 895 F.2d 1149 (7th Cir. 1990).

> The Wisconsin Administrative Code § H.S.S. 303.11 (4) (b) permits prison employees to place a convict in temporary lockup ("T.L.U.") if, among other reasons, it is more likely than not that 'if the inmate remains in the general population, he or she will encourage other inmates, by example, expressly, or by their presence, to defy staff authority and thereby erode staff's ability to control a particular situation.'

Id. at 1150. WIS. ADMIN. CODE § H.S.S. 303.11 (2) states: "[t]he next working day, the decision to confine the inmate in T.L.U. is reviewed by the security director, who is required to consider any statements the inmates may wish to make in determining whether temporary lockup is still appropriate." *Id.* WIS. ADMIN. CODE § H.S.S. 330.11 (3) states: "[t]he continued holding of the inmate in T.L.U. is reviewed by the security director every seven days, and absent a special order by the superintendent of the

In accordance with the Ninth Circuit's combined reading of several sections of the California Administrative Code, prisoners in California have a liberty interest in not being placed in administrative segregation without being afforded procedural due process.[265] The Ninth Circuit, however, ruled that prisoners in Washington do not have a liberty interest in remaining in the general population according to the Washington Administrative Code.[266] They could be placed in administrative segregation without procedural protections.[267]

All of the federal appeals courts have had to apply the Supreme Court's state-created liberty interest doctrine to decide what due process an inmate should have received before he or she was assigned to a prison within a prison.[268] The existence of a liberty interest to remain in general

---

institution, the maximum stay in T.L.U. is 21 days." *Id.*

265. *See* Toussaint v. McCarthy, 801 F.2d 1080 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987); *see also* 15 CAL. ADMIN. CODE § 3339 (a); 15 CAL. ADMIN. CODE §§ 3335, 3336.

266. *See* Smith v. Noonan, 992 F.2d 987, 989 (9th Cir. 1993) (citing to WASH. ADMIN. CODE 137-32-005, stating "that the superintendent 'may' segregate an inmate if 'in the judgment of the superintendent' the inmate's presence in the general population would constitute a serious threat to the staff, others, or the inmate himself, or interfere with the operation of the institution").

267. *See id* at 989. *But cf.* Mendoza v. Blodgett, 960 F.2d 1425 (9th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993) (stating that an inmate at the Washington State Penitentiary had a liberty interest in not being assigned to a dry cell. Inmates were placed in a custody-locked cell for the purpose of maintaining and inspecting their bowel movements for contraband. According to the penitentiary's own policies and procedures, he was found to have a right to due process prior to placement).

268. *See* Stephany v. Wagner, 835 F.2d 497 (3d Cir. 1987) (county prison regulations did not create a liberty interest for inmates to remain in general population); Layton v. Beyer, 953 F.2d 839, 845 (3d Cir. 1992) (an inmate placed in prehearing administrative segregation was entitled to a hearing within five days of his placement based on state regulations that created a liberty interest in his remaining in the general population.); *see also* Berrier v. Allen, 951 F.2d 622, 625 (4th Cir. 1991) (North Carolina Administrative Code did not establish a protected liberty interest for inmates to remain in the general population.); Mackey v. Dyke, 29 F.2d 1086, 1092 (6th Cir. 1994) (Michigan regulations established that an inmate had a protected liberty interest in being released from administrative segregation once the reasons for the original placement expired.); Clark v. Brewer, 776 F.2d 226, 231 (8th Cir. 1985) (the Iowa Corrections Employees' Manual established that inmates had a liberty interest in not being placed in administrative segregation without due process); Sanders v. Woodruff, 908 F.2d 310, 314 (8th Cir. 1990) (Missouri regulations did not create a liberty interest for an inmate to remain in Level II administrative segregation status); Swenson v. Trickey, 995 F.2d 132, 135 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 568 (1993) (Missouri regulations allowed an inmate to be immediately placed in administrative segregation upon transfer to a new institution without due process.); Sheley v. Dugger, 833 F.2d 1420,1425 (11th Cir. 1987)

population, and out of the restrictive environment of administrative segregation, has depended on the language of state law and the manner in which the appellate courts have interpreted concepts like "explicitly mandatory" and "substantive predicates."[269] Courts have combed administrative policies and procedural manuals looking for the phrase or combination of phrases that hold the key to their analysis.

B. *Disciplinary Segregation*

In *Wolff v. McDonnell,* the Supreme Court outlined the due process requirements necessary to protect the liberty interests of prisoners involved in the disciplinary process. Although the direct question before the Court concerned an inmate who lost good time credits, in his footnote to the majority opinion, Justice White suggested that the procedural protections triggered by loss of good time were also triggered by the imposition of disciplinary confinement.[270] Several years later in *Baxter v. Palmigiano,*[271] the Supreme Court considered the due process rights of prisoners who had been sentenced to thirty days in disciplinary segregation.[272] Although the Court's primary focus was on the prisoner's rights to retain legal counsel, the privilege against self-incrimination, and the right to cross-examine witnesses during disciplinary hearings,[273] Justice White, writing for the majority, assumed that the imposition of segregation under the Rhode Island statutes involved a liberty interest that needed *Wolff*-type procedures.[274] Numerous appellate courts have also held that various state

---

(Florida regulations established a protected liberty interest for inmates to remain in the general population.).

269. *See Layton,* 953 F.2d 839, 846. "[W]e are persuaded that the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest." *Id.*; *see also Berrier,* 951 F.2d at 625.

> The something 'more' required to create a liberty interest protected by the Fourteenth Amendment is the establishment by state law of substantive predicates to govern official decisionmaking and limit discretion, coupled with language that explicitly mandates the outcome to be reached upon a finding that the relevant criteria have been met.

Id.

270. *See Wolff,* 418 U.S. at 581 n.1.

271. 425 U.S. 308 (1976).

272. *See id.* at 311.

273. *See id.* at 314-21.

274. *See also* Hughes v. Rowe, 449 U.S. 5, 7 (1980) (An inmate was placed in segregation after being charged with a violation of disciplinary regulations.). In *Hughes,* the inmate's hearing was conducted two days after he was segregated. *See id.* In the

statutes had created liberty interests for prisoners in receiving *Wolff*-type due process prior to being sentenced to disciplinary segregation.[275]

C. *The Mandatory Language Requirement*

Perhaps the most important controversy that the state-created liberty interest doctrine has generated in the lower courts had its origin in the case *Kentucky Department of Corrections v. Thompson*.[276] In *Thompson*, the Supreme Court provided its most comprehensive explanation regarding the mandatory nature of state laws and regulations that create liberty interests on behalf of inmates.[277] The Court emphasized that in order to create a liberty interest, regulations must have explicitly mandatory language such that if the regulation's substantive predicates are present, a particular outcome must follow.[278] Because the regulations at issue in that case stopped short of requiring a particular result upon a finding that the substantive predicates were met, an inmate could not reasonably expect to enforce them against a prison official.[279]

A year after the *Thompson* decision, the Seventh Circuit Court of Appeals labored over the what makes a regulation "mandatory" in a case that resulted in an *en banc* decision that overruled an earlier three-member

---

absence of evidence that he was segregated without a hearing based on concern for institutional safety or security, the per curiam decision held that his case should not have been dismissed by the District Court. *See id.* at 12-13. Justice White noted in his concurring opinion that under *Wolff* a prior hearing was required for the particular disciplinary action involved in that case—segregation and loss of good time. *See id.* at 16. In his dissent, Justice Rehnquist concluded that a hearing was not required. *See id.* at 21. He reasoned that because the inmate admitted violating regulations, officials could remove him from the population without a hearing. *See id.* at 18-22.

275. *See, e.g.*, Rowe v. DeBruyn, 17 F.3d 1047 (7th Cir. 1994); Walker v. Bates, 23 F.3d 652 (2d Cir. 1994); Walker v. Sumner, 14 F.3d 1415 (9th Cir. 1994); Mitchell v. Sheriff Dep't, 995 F.2d 60 (5th Cir. 1993); Pembroke v. Wood County, Texas, 981 F.2d 225 (5th Cir. 1993); Brown-El v. Delo, 969 F.2d 644 (8th Cir. 1992); Gaston v. Taylor, 946 F.2d 340 (4th Cir. 1991); Gilbert v. Frazier, 931 F.2d 1581 (7th Cir. 1991); Smith v. Massachusetts Dep't of Correction, 936 F.2d 1390 (1st Cir. 1991); Jackson v. Cain, 864 F.2d 1235 (5th Cir. 1989); Todaro v. Bowman, 872 F.2d 43 (3d Cir. 1989); Abdul-Wadood v. Duckworth, 860 F.2d 280 (7th Cir. 1988); Green v. Ferrell, 801 F.2d 765 (5th Cir. 1986); Gibbs v. King, 779 F.2d 1040 (5th Cir. 1986); Parker v. Cook, 642 F.2d 865 (5th Cir. 1981).

276. 490 U.S. 454 (1989).

277. *See id.* at 463.

278. *See id.*

279. *See id.* at 464-65.

panel decision. In *Wallace v. Robinson*,[280] Phillip Wallace argued that he was terminated from his prison job because his supervisor found homemade liquor near his work station. Wallace claimed that the termination was disciplinary in nature and should have been handled through a formal disciplinary process. In contrast, prison officials characterized the termination as a change in work assignment necessitated by poor relations between Wallace and his supervisor. They claimed his termination was not a disciplinary action and was not subject to the requirements of the filing and hearing of a disciplinary charge. They also argued that because state law does not create a liberty interest for inmates in prison employment, officials had considerable discretion in making and terminating job assignments.[281]

The three-member panel that first considered Wallace's claims held that if the termination had occurred for disciplinary reasons, Wallace had a protected liberty interest in having the state law enforced with regard to disciplinary charges.[282] After reviewing the record, however, the panel concluded that there was insufficient evidence that his termination was for punitive reasons, and under state law, a non-punitive job transfer or termination does not require due process protection.[283] In a concurring opinion, Judge Easterbrook, a panel member, stated that since inmates have no constitutional entitlement to a particular job and officials could have terminated Wallace's job for any reason or no reason at all, officials could also have terminated his job for disciplinary reasons without raising due process questions.[284] Regulations, Easterbrook stated, of the form "[t]he warden may do A for any reason, but if that reason is M the warden must prove M before acting" create no liberty interest because there are no substantive predicates and no explicitly mandatory language.[285] Such regulations do not limit official discretion. In Wallace's case, officials would have been free to terminate his job even if he had been afforded due process under state law, and charges of misconduct had not been proven against him.

Especially interesting in Judge Easterbrook's concurring opinion was his admonition:

> Because everything prisons do is state action, and prisons control every aspect of the inmates' lives, decisions that to some degree

280. 914 F.2d 869 (7th Cir. 1990), *overruled by* 940 F.2d 243 (7th Cir. 1991).

281. *See Wallace*, 914 F.2d at 871.

282. *See id.* at 873.

283. *See id.* at 875.

284. *See id.* at 877.

285. *See id.* at 876.

> depend on the regulatory apparatus occur every day for every inmate . . . . When the state takes away good time credit or denies release on parole, the decision affects the duration of confinement. When a state turns one inmate from a tailor into a clerk, another inmate gets to be a tailor. Both experience the ordinary incidents of confinement in any penal system.[286]

The Judge noted that if a state wants to do more than is required by the Constitution and falls short of its own regulations, such error is a violation of state law to be redressed through state agencies and state courts.[287] The Due Process Clause does not guarantee that states will follow their own laws.[288]

A few months later, Judge Easterbrook wrote the majority opinion filed *en banc* in *Wallace v. Robinson.* The full panel held that a rule which gives prison officials discretion to act for any reason, but places restraints on their options if their motive is to discipline an inmate, does not create a liberty or property interest.[289] Without changing the outcome of the case, under Judge Easterbrook's authorship, the Seventh Circuit's decision significantly altered the legal reasoning applied by the earlier three-member panel. The change in legal logic was possible because of the court's extremely conservative attitude toward both what constitutes the ordinary incidents of confinement in a penitentiary and the extent of the need to protect prisoners against abuses of official discretion.[290]

The two dissenters to the *en banc* opinion called the majority's reasoning "unprecedented" and "unsupported" by the Supreme Court and other federal circuits.[291] They claimed that the correct issue is not whether state law creates a liberty interest, but "whether Illinois law proscribes the arbitrary infliction of punishment."[292] If the regulations permit inmates to be segregated for broad discretionary administrative reasons, inmates could

---

286. *Id.* at 877.

287. *See id.* at 878.

288. *See Colon v. Schneider*, 899 F.2d 660 (7th Cir. 1990) in which Judge Easterbrook was part of the three-member panel that decided a case involving the use of mace against an inmate. The inmate charged that the mace was used in violation of Wisconsin's Administrative Code and, therefore, in violation of his protected liberty interest in not being subjected to its use. *Id.* at 663. The court held that the inmate did not have such a liberty interest and that a violation of state law was actionable in state court. *Id.* at 673. Guidelines for the staff did not result in protected liberty interests for prisoners.

289. *See Wallace*, 940 F.2d 243 (7th Cir. 1991).

290. *See id* at 248.

291. *Id.* at 249 (Cudahy, J., dissenting).

292. *Id.*

also be segregated for punitive reasons without being afforded due process. By not asking why officials have taken a certain action, the majority blurred the distinction between disciplinary and administrative judgments. The dissent pointed specifically to the Second Circuit Court of Appeals decision in *Sher v. Coughlin* which held that if an inmate's placement in segregation is punishment, a liberty interest is implicated and due process must be provided.[293]

The *Wallace v. Robinson* case is important for several reasons. In *Sandin v. Conner*, the Supreme Court disposed of the need to evaluate the mandatory nature of prison rules and regulations. That part of the *Wallace* analysis is now obsolete. However, Judge Easterbrook's position that only decisions that affect the duration of confinement merit the protection of the Constitution won the High Court's favor.[294] As Easterbrook commented, and the Supreme Court later agreed, state courts should redress violations of state regulations that impact areas other than an inmate's length of incarceration.[295] The *Wallace* decision also expressed concern that:

> Using criteria of state law to define liberty that in turn activates the due process clause converts state entitlements into constitutional ones. Yet states have legitimate interests in freedom from federal oversight as they attempt to devise and implement their own rules. Violations of state law do not automatically offend against the Constitution too.[296]

The Seventh Circuit also held that there are no limits on official discretion as long as the regulations allow the action to be taken for reasons other than discipline.[297] It is irrelevant that the motive behind the action was discipline. The *Wallace* case evidenced an attitude that actions taken against prisoners for disciplinary reasons do not necessarily require closer scrutiny than actions taken for nonpunitive reasons.[298] The disciplinary character of the decision should not automatically place additional or stricter requirements on the use of official discretion. Officials need broad

---

293. 739 F.2d 77, 82 (2d Cir. 1984). The *Sher* Court also held that if the decision involved both punitive and administrative motivations, segregation would not trigger procedural protections if the evidence showed officials would have segregated for administrative reasons anyway. *See id.*

294. 515 U.S. 472, 487 (reiterating that "Conner's situation [does not] present a case where the State's action will inevitably affect the duration of his sentence").

295. *See Wallace*, 940 F.2d 243, 249 (stating that "states may define for themselves the entitlements their prisoners will possess").

296. *Id.* at 248

297. *See id.* at 244.

298. *See id.*

latitude in punishing prisoners free from the interference and delay imposed by excessively burdensome due process procedures.[299] In *Sandin,* the Supreme Court adopted a similar legal analysis based on a similar perspective toward disciplining prisoners. Neither the Seventh Circuit in *Wallace* nor the Supreme Court in *Sandin* were concerned about the potential for the arbitrary infliction of punishment or the constitutional issues which that potential should raise.

V. *SANDIN V. CONNER* REDEFINES THE DOCTRINE

At the very end of its 1995 term, the Supreme Court turned the liberty interest doctrine on its head and redefined a doctrine that had guided the Court since the early 1970s. Moreover, the liberty interest doctrine helped secure the due process rights of prisoners in a number of important contexts. It impacted significantly the manner in which correctional officials managed the day to day operations of a prison. It reduced the opportunities officials had to make arbitrary decisions based on facts and criteria that had little or no connection with the issue at hand. Of course, while it provided increased procedural due process protection for inmates, the Supreme Court and the lower courts were not reluctant to limit its protection when they saw fit.[300] It was not a doctrine that was easy to apply in all circumstances, but judges were not hesitant to recognize its limits.

Sandin v. Conner[301] came before the Supreme Court under the following circumstances. DeMont Conner was serving thirty years in Hawaii, confined in a maximum security unit. A correctional officer who had escorted him from his cell to a program area subjected him to a strip search, including an inspection of the rectal area. Conner retorted angrily and with foul language. He was charged with a disciplinary infraction that accused him of "'high misconduct' for using physical interference to impair a correctional function," and two "low moderate misconduct" charges "for using abusive or obscene language" and harassing an employee.[302] A charge of high misconduct carried up to thirty days in disciplinary segregation.

At his hearing before the adjustment committee, Conner requested several witnesses. His request was denied because the witnesses were

---

299. *See id.* at 245 (stating that "no statute, regulation, or practice with the force of a regulation curtails the discretion of prison officials to assign a prisoner to any job on whim").

300. *See, e.g.*, Plyler v. Moore, 100 F.3d 365, 374 (4th Cir. 1996); *see also* Slezak v. Evatt, 21 F.3d 590, 594 (4th Cir. 1994).

301. 515 U.S. 472 (1995).

302. *Id.* at 475.

deemed unavailable because they had been moved from a medium facility, and because the units were short staffed. Conner was found guilty of the high misconduct and sentenced to thirty days in the Special Holding Unit.[303] On the low moderate misconduct charge, he was sentenced to four hours segregation each to be served concurrently with the thirty-day sentence.[304] He served the full thirty-day period in segregation. Nine months after the adjustment committee's decision, pursuant to Conner's request for administrative review, the deputy administrator found the high misconduct charge unsupported and expunged that charge from Conner's disciplinary record.[305]

Conner had filed a lawsuit seeking injunctive, declaratory and damage relief before his administrative appeal was decided. Among other things, Conner complained he had been deprived of procedural due process at his adjustment hearing. The District Court granted summary judgment for the prison officials.[306] The Ninth Circuit reversed and concluded that Conner had a liberty interest in staying in the general population based on the language of the relevant statutes and regulations.[307] Relying on *Kentucky v. Thompson*, the appellate court concluded that the Hawaii rule in question[308] "provide[d] explicit standards that fetter[ed] official discretion."[309] Under the regulation, adjustment committees must be presented with substantial evidence before reaching a finding of guilt.[310] If the committee did not find substantial evidence, there could be no finding of guilt. The regulation established substantive predicates to govern official decision making, and required, with explicitly mandatory language, that if the predicates were met, a certain outcome—"freedom from disciplinary segregation—must follow."[311] The Ninth Circuit concluded that if the predicates were not met, the outcome could not follow.[312]

---

303. *See id.*

304. *See id.*

305. *See id.*

306. *See Sandin*, 515 U.S. at 476.

307. *See* Conner v. Sakai, 15 F.3d 1463 (9th Cir. 1993).

308. HAW. ADMIN. RULE § 17-201-18(b)(2) (1983).

309. *Conner*, 15 F.3d at 1466.

310. *See id.*

311. *Id.*

312. *See id.* (stating that "if the inmate does not admit guilt, or the committee does not find substantial evidence, the particular outcome—freedom from disciplinary segregation—must follow"). *Id.* Therefore, if the precedents were not met, the particular outcome could not follow.

Having decided that Conner had a liberty interest in remaining out of segregation, the Circuit Court next examined whether he had been afforded due process to protect that interest.[313] Under *Wolff v. McDonnell*, an inmate "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."[314] The court decided there was a genuine issue of material fact as to whether Conner was not permitted to call witnesses in violation of his due process rights.[315] Prison officials failed to establish adequate justification for denying Conner's request in their motion for summary judgement.[316]

In a case that would probably have been resolved in a renewed motion for summary judgment in which prison officials convincingly explained their grounds for denying Conner's witnesses, the Supreme Court issued a 5-4 decision that rewrote an important area of the law governing prisoners' rights.[317] Authored by Chief Justice Rehnquist, the majority opinion launched a broad side attack against the state-created liberty interest doctrine.[318] Rehnquist began by tracing the doctrine from its origins in *Wolff* to its most recent development in *Kentucky Department of Corrections v. Thompson*. In *Wolff*, the Court held that a statutory provision created a liberty interest of real substance—a shortened prison sentence that resulted from good time credits.[319] Good time could not be taken away as a disciplinary punishment without due process. According to Rehnquist, *Wolff*'s contribution to inmate due process protections was the balance it struck between prison management and concern for prisoners' liberty.[320]

---

313. *See id.*

314. 418 U.S. 539, 566 (1974).

315. *See Conner*, 15 F.3d at 1467.

316. *See id.*

317. Justice Rehnquist was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Ginsburg filed a dissenting opinion in which Justice Stevens joined. Justice Breyer filed a dissenting opinion in which Justice Souter joined. *See* Michelle C. Ciszak, Sandin v. Conner: *Locking Out Prisoners' Due Process Claims*, 45 CATH. U. L. REV. 1101, 1106-07 (1996) (stating that "[i]n *Sandin v. Conner*, the Court redefined the methodology for recognizing liberty interests and reconsidered the types of deprivations that invoke due process safeguards."). *See generally* Philip W. Sbaratta, Sandin v. Conner: *The Supreme Court's Narrowing of Prisoner's Due Process and the Missed Opportunity to Discover True Liberty*, 81 Cornell L. Rev. 744, 787 (1996) (discussing the impact of the *Sandin* decision).

318. *See Sandin*, 515 U.S. at 477-82.

319. *See Wolff*, 418 U.S. at 557.

320. *See Sandin*, 515 U.S. at 478.

With *Greenholtz v. Nebraska* and *Hewitt v. Helms*, the liberty interest doctrine took its current direction. In *Greenholtz*, statutory language was found to create a liberty interest for inmates in the parole process.[321] In *Hewitt*, the Court concluded that statutory language created a liberty interest for inmates in remaining out of segregation.[322] In each of these cases, Rehnquist maintained, the Court did not examine whether the liberty interest was one of real substance, but focused its analysis on the language of the regulation. Rehnquist asserted that:

> As this methodology took hold, no longer did inmates need to rely on a showing that they had suffered a 'grievous loss' of liberty retained even after sentenced to terms of imprisonment (citation omitted) . . . . For the Court had ceased to examine the 'nature' of the interest with respect to interests allegedly created by the State.[323]

According to the majority opinion, the shift in focus away from the nature of the deprivation to the language of the regulation has encouraged inmates to search regulations for mandatory language on which to base entitlements.[324] Courts, including the Ninth Circuit in the instant case, were drawing negative inferences from mandatory language. If a directive mandated a finding of guilt under certain circumstances, the absence of those circumstances prevented a guilty finding.[325] The search for negative implications from mandatory language has strayed from the real concerns of the liberty interest doctrine as first recognized in *Wolff*. States may indeed create liberty interests, however:

> [T]hese interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, *see, e.g., Vitek* . . . nonetheless

---

321. *See* Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 9 (1979).

322. *See* Hewitt v. Helms, 459 U.S. 460, 470 (1983).

323. *Sandin*, 515 U.S. at 480.

324. *See id.* at 481.

325. *See id.*

> Courts have . . . drawn negative inferences from mandatory language in the text of prison regulations. The Court of Appeals' approach in [the instant] case is typical: It inferred from the mandatory directive that a finding of guilt 'shall' be imposed under certain conditions the conclusion that the absence of such conditions prevents a finding of guilt.

Id.

> imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.[326]

Prison discipline falls within the expected parameters of a sentence of incarceration. Conner's thirty day assignment to disciplinary segregation was not a dramatic departure from the basic conditions of his prison sentence. It was not the type of atypical, significant deprivation in which a state might create a liberty interest. Conditions in disciplinary segregation mirrored conditions in administrative segregation and protective custody. There was no major disruption in Conner's environment. Neither would his segregation affect the duration of his sentence. There are no provisions in the Hawaii code which require the parole board to deny parole because of misconduct,[327] and the chance that misconduct would affect his parole eligibility was "too attenuated to invoke" due process protections.[328] The majority opinion concluded that Conner did not have a liberty interest in remaining out of disciplinary segregation that "would entitle him to the procedural protections set forth in *Wolff*."[329]

Chief Justice Rehnquist included important policy considerations in his legal analysis of the liberty interest doctrine. He first attacked the doctrine on the grounds that it encouraged states to codify management procedures. He suggested that because rules and regulations designed to curb the discretion of staff could engender liberty interests that spawn litigation, states have been afraid to create standards.[330] The doctrine had also led to greater involvement of federal courts in the daily operations of prisons, again failing to afford deference and flexibility to correctional officials.[331]

Both dissenting opinions were highly critical of the majority. In her dissent, which sounds very much like Justices Marshall, Stevens, and Brennan in *Meachum*, *Olim*, *Helms*, and *Thompson*, Justice Ginsburg concluded that Conner had a liberty interest, created not by the Hawaii prison regulations, but stemming from the Due Process Clause itself.[332] Ginsburg advocated reinterpreting the law to no longer derive protected liberty interests from the language of prison codes which "would make of the fundamental right something more in certain States, something less in

---

326. *Id.* at 484.

327. *See id.* at 487.

328. *Id.*

329. *Id.*

330. *See id.* at 482 (stating that *Hewitt* "creates disincentives for States to codify prison management procedures in the interest of uniform treatment").

331. *See id.*

332. *See id.* at 488.

others."[333] Liberty interests should not depend on the particularities of the local government code. Justice Ginsburg would have remanded the case for the lower court to determine whether Conner received due process as provided directly pursuant to the Fourteenth Amendment.[334]

Justice Breyer also wrote a dissenting opinion, in which he questioned whether the Court meant to change the prior law so radically.[335] If so, he warned that the generality of the new standard (finding liberty interests only if the deprivation imposes atypical and significant hardship in relation to the ordinary incidents of prison life) threatened the law with uncertainty.[336] Some lower courts, he asserted, may interpret the standard to provide inmates with significantly less protection against deprivations.[337] Other courts may read it to extend protection to certain hardships that the current law would not cover.[338]

Rather than a radical revision of the then present law of liberty interests, Breyer suggested an elaboration of the law to clarify that liberty interests do not exist when minor matters are at stake. In *Vitek v. Jones* and *Washington v. Harper*, the Court identified certain deprivations that were so severe as to amount to deprivations of liberty regardless of what state law provided.[339] According to Breyer, a broad middle category of deprivations exists which is neither so obviously serious or so insignificant.[340] By examining whether local law has created a liberty interest by limiting official discretion, courts can determine how to treat this middle category.[341] Justice Breyer attacked a pure positivist approach to defining liberty interests. Unlike the property interest doctrine, he noted that the justification for looking to local law is not to determine the existence of entitlement.[342] In protecting liberty, due process protects the

---

333. *Id.* at 489.

334. *See id.* at 491.

335. *See id.* at 496.

336. *See id.*

337. *See id.*

338. *See id.* Justice Ginsburg addressed the same concern. She noted that, "[t]he Court ventures no examples, leaving consumers of the Court's work at sea, unable to fathom what would constitute an 'atypical, significant deprivation,' *ante*, at 490 n.2, and yet not trigger protection under the Due Process Clause directly." *Id.*

339. These deprivations were "the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness." Vitek v. Jones, 445 U.S. 480, 481 (1980).

340. *See Sandin*, 515 U.S. at 497.

341. *See id.* at 499.

342. *See id.*

absence of government restraint. Breyer suggested that the grievousness of the loss should be an important consideration in defining liberty interests.[343] If local rules limit official discretion before an inmate's freedom can be restrained, the issue at hand is likely to play an important role in prisoner life.[344] Laws that limit discretion suggest that the deprivation requires procedural protection, usually because a particular inmate is singled out, or the deprivation is conditioned upon the existence of certain facts.[345] Local rules help courts determine whether the deprivation under consideration calls for due process. Where a deprivation is unimportant, courts should not recognize a liberty interest. Justice Breyer observed that the Court has never held that minor deprivations constituted liberty interests even if state regulations limited official authority to impose the deprivations.[346] The pre-*Sandin* liberty interest doctrine made explicit which deprivations triggered procedural protection and which were not important enough to do so.[347]

Justice Breyer also took issue with the majority over the seriousness of disciplinary confinement. Although conditions in disciplinary confinement and administrative segregation were relatively similar in Hawaii, Justice Breyer felt that Conner had suffered a significant deprivation.[348] Compared to Justice Breyer's conclusory comments about the nature of disciplinary segregation, Justice Ginsburg's observations were even more powerful. She concluded that prison punishment effects a severe change in an inmate's incarceration experience which deprives him or her of many privileges and often imposes a severe stigmatizing effect.[349] She noted, specifically, that disciplinary action could have both immediate and long term consequences, especially with respect to parole eligibility prospects.[350]

VI. WHAT DOES *SANDIN* MEAN?

For over twenty years, the Supreme Court has held that "the use of 'explicitly mandatory language,' in connection with the establishment of 'specified substantive predicates' to limit discretion, forces a conclusion

343. *See id.*

344. *See id.*

345. *See id.*

346. *See id.* at 499.

347. *See id.*

348. *See id.* at 502.

349. *See id.* at 488.

350. *See id.*

that the State has created a liberty interest."[351] Yet in *Sandin*, the Court chose not to engage in a review of Hawaii state regulations or to analyze the requirements of the state-created liberty doctrine as it had evolved to that point.

The *Sandin* Court had before it an amicus brief submitted on behalf of New Hampshire and thirty-six other states through their attorneys general.[352] In it, the states urged the Court to create a bright-line test that would re-focus judicial inquiry to exclude the daily operational decisions of state prisons which did not affect the duration or nature of confinement from the scope of liberty interests, regardless of the content of state prison regulations concerning those activities.[353] Their brief in *Sandin* urged the argument made by the Kentucky Department of Corrections and their *amici* in the *Thompson* case. The Supreme Court decided in *Thompson* that such a bright-line test was not necessary for ruling in favor of the state and declined to consider the same argument the Court adopted six years later in *Sandin*.

A strong argument can be made that Hawaii disciplinary regulations contain mandatory language requiring specific procedures to be followed in establishing substantive predicates.[354] An inmate had to engage in misconduct as defined by a list of specific offenses before he or she could

---

351. Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 463 (citing *Hewitt v. Helms*, 459 U.S. at 472).

352. Brief of Amicus Curiae for the State of New Hampshire and 36 Other States, *Sandin v. Conner*, 515 U.S. 472 (No. 93-1911).

353. *See id.* at 30.

354. The State argued that Hawaii's disciplinary regulations did not create a liberty interest under prior case law, despite the requirement that guilt be determined by substantial evidence. *See* Petitioner's Brief at 39, *Sandin v. Conner*, 515 U.S. 472 (No. 93-1911). At a minimum, the State argued Hawaii's rules failed to specify that segregation must be ordered upon a guilty finding, thereby failing to generate the sort of mandatory outcome required by *Kentucky v. Thompson*, 490 U.S. at 464. In addition, the Ninth Circuit misconstrued the regulation's plain language as creating a mandate to acquit an inmate under certain circumstances, when the regulation creates only a mandate to convict if substantial evidence is found. *See id.* at 11. Officials had discretion to order disciplinary action despite the lack of substantial evidence of misconduct. *See id.* at 11. In this context, the burden of proof was at most procedural. *See id.* at 44. The expectation of receiving due process is not, without more, a liberty interest. *See id.* at 43. The State also argued that the Court of Appeals erred in overlooking the regulation that allows the facility administrator to review the adjustment committee's decision, leaving it in his or her discretion to modify its finding. *See id.* at 11. The lack of limits placed on the administrator's discretion confers unfettered discretion which further bars the conclusion that a liberty interest has been conferred on the inmate.

be disciplined.[355] Misconduct had to be established by specific procedures, including a burden of proof of substantial evidence.[356] Official discretion was limited by the specific procedures and the burden of proof requirement.[357] Applying the state-created liberty interest doctrine, it would have been far more difficult for the Court to rule in favor of the state in *Sandin* than it was for the Court in *Thompson*. First the explicit and mandatory nature of the regulations in the two cases were considerably different. *Thompson* involved visitation rights while *Sandin* was concerned with the weightier matter of prisoner discipline. Second, prior Supreme Court cases had suggested that state regulations can create a liberty interest for inmates in remaining out of disciplinary segregation. Over the years, numerous appellate decisions held that state statutes create liberty interests for inmates in receiving *Wolff* due process before being sentenced to disciplinary confinement.[358] Indeed, in 1992, the District Court of Hawaii had ruled in a case involving disciplinary segregation that "[t]he State of Hawaii's procedural requirements combined with substantive restrictions on administrative action created a liberty interest that is subject to due process protections."[359]

In order to rule in favor of the state in *Sandin*, the Supreme Court had to either ignore the weight of legal authority or change it. The Court chose to change it and develop a new doctrine. The *Sandin* majority had to do more than change prior precedent, however, it had to discount certain important facts surrounding the punishment of disciplinary segregation. The Court concluded that disciplinary confinement does not affect the ordinary incidents of prison life nor is there an inevitable effect on the duration of confinement.[360] In so deciding, the Court either misinterpreted or ignored the operations of Hawaii's parole system which allowed for the denial of parole when the paroling authority finds, among other things, that a prisoner has been a management or security problem as shown by his or her institutional misconduct record.[361] Parole can be

355. *See* HAW. ADMIN. R. 17-201-6 (categorizing the misconduct, or prohibited acts into degrees of severity for which they were to be punished).

356. *See* HAW. ADMIN. R. 17-201-18(b). An adjustment committee finds an inmate guilty of misconduct where; "(1) the inmate or ward admits the violation or pleads guilty or (2) the charge is supported by substantial evidence."

357. *See* Stagner, *supra* note 37, at 1778. "The *Sandin* Court rejected the 'mandatory' versus 'discretionary' distinction, which determined a prisoner's liberty interest based upon whether language in a statute or prison regulation clearly limited a prison official's discretion."

358. *See supra* notes 246-50 and accompanying text.

359. Mujahid v. Apao, 795 F. Supp. 1020, 1025 (D. Haw. 1992).

360. *Compare* Sandin v. Conner, 515 U.S. 472 (1995).

361. *See* HAW. ADMIN. R. § 23-700-33 (b).

rescinded prior to an inmate's release when the paroling authority receives new information about a prisoner that would serve as a basis for denying parole.[362] Clearly, a finding of misconduct could well result in a deprivation of freedom. The "chance that a finding of misconduct will alter the balance"[363] in considering a prisoner's release on parole is far from being "simply too attenuated to invoke the procedural guarantees of the Due Process Clause."[364] Hawaii's parole system is typical of parole systems set up by statute in all states. Paroling authorities do not examine the accuracy or fairness of misconduct, although misconduct findings are a major factor in making parole release decisions.[365] The *Sandin* decision allows parole boards to base release decisions on findings of misconduct that resulted in disciplinary confinement where the inmate was not afforded an adequate opportunity to present evidence and regular procedures were not available. Chief Justice Rehnquist noted that a prisoner is afforded procedural protections at the parole hearing in order to explain the circumstances behind a record of misconduct.[366] His comment invites prisoner litigation that challenges parole decisions based on misconduct findings rendered without due process, further complicated by the inability or unwillingness of parole authorities to reconsider the misconduct matter during the parole hearing process.[367]

The Court also ignored the consequences of disciplinary segregation for an inmate incident to his or her incarceration experience. Disciplinary segregation is frequently imposed as a sanction for serious misconduct. It is often the sole sanction for serious misconduct.[368] In Hawaii, segregation is the most severe sanction legally available for serious misconduct.[369] Not only does segregation result in severely restricted confinement for the period of the sanction, but, as Justice Ginsburg asserted in her dissent, a record of serious misconduct affects an inmate's classification status, employment opportunities within the facility, transfer

362. *See* HAW. ADMIN. R. § 23-700-31(c).

363. *Sandin*, 515 U.S. at 487.

364. *Id.* at 487.

365. Brief Amicus Curiae of the Edwin F. Mandel Legal Aid Clinic in Support of Respondent at 49, *Sandin v. Conner*, 115 S.Ct. 2293 (1995) (No. 93-1911).

366. *See Sandin*, 515 U.S. at 489.

367. Especially in light of the fact that although *Greenholtz*, 442 U.S. 1 (1979), found that the state law created a liberty interest for inmates in being released on parole, only minimal due process was required.

368. *See, e.g.*, HAW. ADMIN. R. § 17-201-7 (setting segregation as the usual punishment for serious misconduct).

369. *See* HAW. ADMIN. R. § 17-201-19 (providing as punishment either temporary loss of privileges or segregation).

requests, eligibility for educational and vocational programs, work release, and furloughs.[370] The majority opinion stressed the similarities between administrative and disciplinary segregation without taking into account the significant difference between a classification assignment and a conviction for a serious rule infraction which often results not only in disciplinary confinement but has important collateral consequences. Equating disciplinary segregation with administrative segregation is like comparing the proverbial apples with oranges. The Court's opinion permits a prisoner to be found guilty of a serious offense with severely limited due process (what is required post-*Sandin* the Judges do not inform us) as long as the punishment does not include the forfeiture of good time credits. Unfortunately, after *Sandin*, serious disciplinary convictions that directly affect an inmate's parole eligibility, classification status, job opportunities, furloughs, program eligibility, do not trigger due process because the Supreme Court does not think they lead to atypical or significant hardships.[371] In reaching such a conclusion, the majority deliberately

---

370. Many court cases have decided that individual deprivations of these matters did not trigger due process because, based on the state regulations under scrutiny, inmates did not have a liberty interest in a particular classification status, job, work release, furlough, or programmatic activity. *See supra* notes 248-49 and accompanying text. None of those cases, however, addressed the cumulative effect of denying or limiting an inmate's access to all or several of these matters as the consequence of deciding the inmate was guilty of a disciplinary infraction.

371. Studies have confirmed the detrimental emotional consequences that can result from segregation. *See* Martin Humphreys & Frances Burnett, *Monosymptomatic Hypochondriacal Psychosis and Prolonged Solitary Confinement,* 34 MED. SCI. L. 343 (1994) (presenting a psychiatric case history of a 27 year old prisoner who had been incarcerated for 11 years for murder and who developed unremitting and treatment resistant monosymptomatic hypochondriacal psychosis following a 12 month assignment to solitary confinement. Doctors concluded that while solitary confinement alone was not sufficient to cause the disorder, it played a significant role in the illness's development); Stuart Grassian, M.D., *Psychopathological Effects of Solitary Confinement,* 140 AM. J. PSYCHIATRY 1450, 1452 (1983) (a study of 14 inmates confined to solitary in a Massachusetts correctional facility showed that inmates in isolation experienced hyperresponsivity to certain stimuli, distortions, hallucinations, anxiety and difficulty with thinking, concentration, memory, and impulse control); *see also* Thomas B. Benjamin & Kenneth Lux, *Solitary Confinement as Psychological Punishment,* 13 CAL. W.L. REV. 265 (1977) and *Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine State Prison,* 2 NEW ENG. J. PRISON L. 27 (1975) (evidence appears overwhelming that solitary confinement alone, in the absence of physical brutality and unconstitutional living conditions, can produce emotional damage, declines in mental functioning, and in extreme cases psychopathology. Evidence also shows that solitary confinement does not deter misconduct and is often disproportionate to the committed infraction); Sheilagh Hodgins & Gilles Côté, *The Mental Health of Penitentiary Inmates in Isolation,* 33 CANADIAN J. CRIMINOLOGY 175 (1991); Maria A.

ignored the realities of incarceration. It ignored the central role that prison discipline plays in the daily lives of inmates and how it directly impacts almost everything they can and cannot do while in the penitentiary, as well as their parole release dates.

Over twenty years ago, *Wolff v. McDonnell* ended the often exercised, unfettered discretion of prison administrators to inflict punishment on inmates without any procedural due process.[372] The history of corrections in this country provides no shortage of horror stories.[373] In

---

Luise, Note, *Solitary Confinement: Legal and Psychological Considerations*, 15 NEW ENG. J. CRIM. & CIV. CONFINEMENT 301, 317 (1989) (concluding that "[r]ecent studies indicate that serious emotional consequences result when isolation is utilized as a disciplinary measure"). *But see* Peter Suedfeld et al., *Reactions and Attributes of Prisoners in Solitary Confinement*, 9 CRIM. JUST. & BEHAV. 303 (1982). Data was collected from volunteer respondents at five U.S. and Canadian prisons. A structured interview was administered along with measures of personality, intelligence, mood, subjective stress, and creativity. The results showed that there was no dramatic difference between inmates who had experienced solitary confinement and those who had not. *See id.* at 334.

372. *See* James E. Robertson, *"Catchall" Prison Rules and the Courts: A Study of Judicial Review of Prison Justice*, 14 ST. LOUIS U. PUB. L. REV. 153, 156 ("Until the Supreme Court's ruling in *Wolff v. McDonnell*, disciplinary hearings were often conducted with little regard for fairness. *Wolff* and its progeny have transformed the appearance of disciplinary hearings by mandating . . . procedural safeguards."); Jones & Rhine, *supra* note 88, at 51 ("Until the early 1970s, there was a complete absence of procedural due process with respect to prison discipline . . . Prison officials had unlimited discretion to summarily enforce the myriad rules and regulations of their institutions and to mete out punishment without regard for an inmate's innocence or guilt."); *see also*, William D. Wick, *Procedural Due Process in Prison Disciplinary Hearings: The Case for Specific Constitutional Requirements*, 18 S.D. L. REV. 309, 313 (1973) (Describing disciplinary processes before the 1974 *Wolff* decision: "Thus, the official state and federal disciplinary hearing procedures do not insure that a prisoner will receive a fair hearing. In addition, in many prisons even such minimal procedures do not exist, or if they do, they are freely circumvented by the guards.").

373. *See* BEN M. CROUCH & JAMES W. MARQUART, AN APPEAL TO JUSTICE: LITIGATED REFORM OF TEXAS PRISONS, 62 (1989) (describing the disciplinary process in the Texas correctional system).

> Until the late 1970s . . . Inmates were brought in [to the disciplinary panel] one at a time, told the charge, questioned and then told to state their plea. A plea other than guilty was usually greeted with howls and glares. (Sometimes, before the first rule violator was brought before the court, one of the officers placed on the desk a sheet of paper with *guilty* written on it in large letters so that inmates could correctly spell their plea when they were told to write it down on the disciplinary hearing form.) No witnesses were brought, the charging officer was almost never present, and no notes or tape recordings were ever made. Sometimes the field major held his own rump hearings after the inmates had returned from the field.

response to *Wolff*, every state has adopted administrative requirements that provide prisoners with due process before they can be disciplined.[374] The due process standards outlined by *Wolff* provide only minimal protection, but they have helped assure inmates that the disciplinary system is fair and the punishment response is proportionate to the offense committed. Even so, many observers believe that *Wolff's* legal reforms will never completely protect prisoners from arbitrary and unfair treatment because officials retain many ways to exercise authority that reforms cannot address.[375] An individual's conviction for a criminal offense should not

---

Id. Special Project, *Behind Closed Doors: An Empirical Inquiry into the Nature of Prison Discipline in Georgia*, 8 GA. L. REV. 919 (1974) (What written rules existed were broadly and vaguely worded so that officials had enormous discretion to punish prisoners.); *Judicial Intervention In Prison Discipline—Harvard Center For Criminal Justice*, 63 J. CRIM. L. 200 (1972). (The Center analyzed nearly 700 rule violations and more than 800 dispositions, conducted interviews, and observed disciplinary hearings at the Rhode Island Prison Complex in connection with studying the impact of *Morris v. Travisano*, 310 F.Supp 857 (D.R.I. 1970). The study concluded that there was little correlation between disposition and type of misconduct. *See id.* at 216. It also found a number of cases where the bias of disciplinary committee members influenced the determination of guilt and the punishment that was imposed.) *See id.* at 210 n.91; Michael A. Millemann, *Prison Disciplinary Hearings and Procedural Due Process: The Requirement of a Full Administrative Hearing*, 31 MD. L. REV. 27 (1971) (Millemann described the case of Martin Sostre, an outspoken Black Muslim and jailhouse lawyer, who was assigned to solitary confinement for one year during which time he was completely isolated from other prisoners, placed on a restricted diet, permitted to shower with hot water once a week, and refused a number of other privileges afforded other inmates. The only due process he was afforded before being assigned to punitive segregation was a conversation with the warden. He was given no notice of the charges, a hearing to determine guilt, or a written explanation of why he was found guilty. In *Sostre v. Rockefeller*, 312 F.Supp. 863 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 178 (2d. Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972), Sostre's case was one of the first and the few decisions prior to *Wolff* to recognize the need for procedural protections in the disciplinary process.).

374. *See, e.g.*, N.Y. CORRECT. LAW, ch. 43 § 138 (1987).

375. *See* Jim Thomas et al., *Exacting Control Through Disciplinary Hearings: "Making Do" with Prison Rules*, 8 JUST. Q. 37 (1991) (The authors observed 150 adjustment hearings in various Illinois prisons and reviewed several hundred disciplinary tickets, inmate letters, federal civil rights lawsuits, and summaries of proceedings from prison records for various years. They concluded that despite legal reforms, disciplinary proceedings are useful for hassling inmates who do not comply with staff wishes, for coercing prisoners to act in ways that serve an officer's end, for retroactively judging past behavior that had not been previously disciplined); N.E. Schafer, *Discretion, Due Process, and the Prison Discipline Committee*, 11 CRIM. JUST. REV. 37 (1986) (Data was collected from the daily reports of a prison disciplinary committee at a maximum security facility in Indiana from July 1980 to June 1981. Schafer concluded that while officials conformed to court ordered reforms, the discretionary decision-making power of the

also give the state unlimited power to impose additional punishment during the offender's incarceration. *Sandin* allows principles of prison management and administration to regress dangerously close to the time when officials operated their institutions outside the rule of law.

VII. THE LOWER COURTS INTERPRET THE NEW DOCTRINE

The lower courts have already started the task of applying the *Sandin* liberty interest doctrine. The decisions evidence some confusion, some reluctance, and some resistance. Several cases have addressed the issue of disciplinary confinement. In the Ninth Circuit where *Sandin* originated, the Court of Appeals ruled that a prisoner's fourteen-day punishment in disciplinary segregation in the Hawaii prison system did not trigger procedural protection.[376] In contrast, the Ninth Circuit was reluctant to conclude that disciplinary confinement in a Washington prison was not an atypical and insignificant hardship so as to involve a liberty interest.[377] The court decided the record was insufficient for determining the nature of the punishment and reversed the district court's dismissal.[378] The Seventh Circuit also concluded that there was insufficient evidence to decide whether a six month confinement in disciplinary segregation significantly altered the conditions of an inmate's incarceration and remanded the case for further findings.[379] In interesting dicta, the court

---

disciplinary committee had not been weakened by court decisions).

Research concerning the relationship between race and gender and disciplinary process has provided mixed results. *See, e.g.*, Eric D. Poole & Robert M. Regoli, *Race, Institutional Rule Breaking, and Disciplinary Response: A Study of Discretionary Decision Making in Prison*, 14 LAW & SOC. R. 931 (1980) (a self-report survey of 182 adult male inmates in a medium-security institution concluded that patterns of rule enforcement were systematically biased against black inmates). *But see* Hewitt et al., *Self-Reported and Observed Rule-Breaking in Prison: A Look at Disciplinary Response*, JUST. Q. 437, 441 (1984) (A self-report survey of minimum security inmates showed that the race or sex of the inmate has no significant effect on whether correctional officers file disciplinary reports); Ben M. Crouch, *The Significance of Minority Status to Discipline Severity in Prison*, 18 SOCIOLOGICAL FOCUS 221 (1985) (a self-report survey of prisoners in a maximum security facility found that the minority status of a prisoner was not an important predictor of severity of sanctions).

376. *See* Mujahid v. Meyer, 59 F.3d 931, 932 (9th Cir. 1995) (explaining that the Court based its decision on the fact that in *Sandin*, the Supreme Court "determined that prison regulations on confinement of an inmate did not create a liberty interest").

377. *See* Gotcher v. Wood, 66 F.3d 1097, 1101 (9th Cir. 1995) (reversing a dismissal for failure to state a claim regarding disciplinary segregation because there was a material issue of fact regarding whether the confinement presented a hardship).

378. *See id.*

379. *See* Whitford v. Boglino, 63 F.3d 527, 537 (7th Cir. 1995).

commented that, after *Sandin*, the difference between a thirty-day and a six-month disciplinary confinement might not be an important factor in determining whether the inmate had a liberty interest.[380]

Several other cases have applied *Sandin* to the placement of prisoners in administrative segregation. In *Sandin*, Justice Rehnquist stated that although the Court had abandoned the *Hewitt* methodology, technically it was not required to overrule the case.[381] In *Hewitt*, the Court found that state prison regulations had created a liberty interest for inmates in remaining out of administrative segregation.[382] Justice Rehnquist explained that the liberty interest finding was unnecessary because the Court had also concluded that the inmate had received the due process to which he was entitled. Despite the Court's denial that it had overruled *Hewitt*, it is hard to imagine what of *Hewitt* remains. After all, it was Justice Rehnquist who wrote in *Hewitt* that "administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration."[383]

Applying the new liberty interest test, it is doubtful that in the post-*Sandin* era *Hewitt* would be decided the same way, and the circuit courts so far seem to agree. The Sixth Circuit realized that *Hewitt* was dead when it decided that, regardless of the mandatory language of the Michigan prison regulations, assignment to administrative segregation did not impose an atypical and significant hardship within the context of a life sentence; therefore, there was no liberty interest to protect.[384] The Seventh Circuit decided that, as a result of *Sandin,* it was not required to resolve whether an inmate's confinement was for disciplinary or administrative purposes because his segregation did not inflict a "catalogue of harms"[385] that greatly exceeded what prison life generally entailed.[386] Regardless of whether the purposes were disciplinary or administrative, no liberty rights were implicated. The Seventh Circuit commented, in a case involving jail regulations that governed administrative segregation placement, "[w]hile this regulation could also conceivably grant [the prisoner] a protected right to stay out of segregation, *Hewitt's* analysis may no longer be applicable

380. *See id.* at 533.

381. *See* Sandin v. Conner, 515 U.S. 472, 483 n.5 (1995).

382. 459 U.S. 460, 470-71 (1983).

383. *Id.* at 468.

384. *See* Rimmer-Bey v. Brown, 62 F.3d 789 (6th Cir. 1995) (inferring from Mich. Admin. Code r. 791.4405(1) that administrative segregation is not a punishment but rather "a method to physically separate from the general population those prisoners who for certain reasons cannot be placed in the general prison population"). *Id.* at 790 n.2.

385. Williams v. Ramos, 71 F.3d 1246, 1249 (7th Cir. 1995).

386. *See id.*

to that determination."[387] The appellate court decided the regulation was not mandatory so it did not have to resolve the fate of *Hewitt*.[388] Finally, a two-day placement without a hearing in a strip cell without clothing, bedding, and running water was not considered violative of due process rights by the Eighth Circuit Court of Appeals.[389]

In addition to disciplinary and administrative confinement, the Courts of Appeal have had other opportunities to examine the impact of the new liberty interest doctrine. In *Mitchell v. Dupnik*,[390] a prisoner argued that officials had searched his legal papers while he was not present in violation of written jail regulations.[391] He alleged that he had a liberty interest in being present during the search based on the mandatory and explicit language of the regulations. The court ruled that the recent change in liberty interest law compelled them to conclude that a violation of the written policies did not present an atypical or significant hardship. The Ninth Circuit commented: "Our holding explicitly recognizes that the Jail's regulation governing the inspection of an inmate's legal papers, as well as myriad other prison regulations elsewhere, are not legally enforceable. We are aware that the inmate now reading his prison's regulations may view them as nothing more than empty promises."[392]

The Fifth Circuit ruled that Texas parole laws do not create a liberty interest for inmates in being paroled, so the court did not decide whether the statutes affected duration of confinement for purposes of imposing the *Sandin* test. The court noted in dicta, however, that:

> [I]t is difficult to see that any other deprivations in the prison context, short of those that clearly impinge on the duration of confinement, will henceforth qualify for constitutional "liberty" status. *Sandin* itself involved disciplinary segregation, a severe

---

387. Zarnes v. Rhodes, 64 F.3d 285, 292 (7th Cir. 1995).

388. *See id.* at 292.

389. *See* Seltzer-Bey v. Delo, 66 F.3d 961, 964 (8th Cir. 1995).

390. 67 F.3d 216 (9th Cir. 1995), *opinion superseded by* Mitchell v. Dupnic, 75 F.3d 517 (9th Cir. 1996).

391. *See Mitchell*, 75 F.3d at 522.

392. *Mitchell*, 67 F.3d at 221. In an interesting twist, the inmate in *Mitchell* also claimed he was denied due process when he was not permitted to call witnesses at a disciplinary hearing at which he was assessed 19 days of disciplinary segregation. *Id.* at 219. The jail had a blanket policy of prohibiting inmates from calling witnesses to testify and always exercised the option to have officers interview witnesses and submit their written responses. *Id.* at 222. The Ninth Circuit ruled that the blanket policy violated the inmate's constitutional rights but did not analyze whether the inmate's punishment triggered due process protection pursuant to the newly created liberty interest test. *Id.* at 223.

> form of prison discipline, yet held that such confinement, "though concededly punitive, does not present a dramatic departure from the basic conditions of Conner's indeterminate sentence." . . . . Few other incidents of prison life involve such a level of deprivation as disciplinary segregation.[393]

Several courts have reached around the *Sandin* doctrine by grounding due process in the Constitution itself. The Tenth Circuit found that termination from a pre-parole conditional release program without a hearing violated the inmate's due process rights.[394] The court acknowledged that the extent to which the state liberty interest survived *Sandin* was a difficult question, however, it could avoid the issue because the program sufficiently resembled parole to fall under the protection of *Morrissey v. Brewer*.[395] Both the Eighth and Ninth Circuits have held that *Sandin* did not change the law with respect to retaliation claims.[396] Prisoners who alleged they were punished or transferred in retaliation for exercising their constitutional rights, can still assert claims without fear that because the punishment or the transfer did not involve an atypical or significant deprivation, they have no due process protections.

The federal courts have been struggling with the fall-out of *Sandin v. Conner* and will be for some time. As Justice Breyer warned, the generality of the new standard for liberty interests has threatened the law with some uncertainty.[397] Several appellate courts have remanded cases back to the lower courts to determine whether the action at issue involved an atypical and significant hardship in relation to the ordinary incidents of prison life so as to constitute a liberty interest.[398] As could be anticipated, several courts have effectively overruled *Hewitt v. Helms*.[399] In dicta, some judges have wondered out loud just how far the *Sandin* standard will reach.[400] The fall-out will continue as prisoners move their litigation from the federal courts, which are now bound to apply the highly restrictive *Sandin* liberty interest test, to the state courts to attempt to enforce state

---

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

394. *See* Harper v. Young, 64 F.3d 563, 567 (10th Cir. 1995).

395. *See id.*

396. *See* Cornell v. Woods, 69 F.3d 1387, 1390 (8th Cir. 1995); Hines v. Gomez, 108 F.3d 265, 269 (9th Cir. 1997).

397. *See Sandin*, 515 U.S. at 496 (Poreyer, J., dissenting).

398. *See* Whitford v. Boglino, 63 F.3d 527, 533 (7th Cir. 1995).

399. *See* Hechavarria v. Quick, 670 F. Supp. 456 (D.R.I. 1987); Hall v. Unknown Agents (of N.Y.S. Dep't of Correctional Services), 825 F.2d 642 (2d Cir. 1987).

400. *See* Rodriguez v. Phillips, 66 F.3d 470, 480 (2d Cir. 1995).

rules and regulations. If state courts are responsive, they will have to fashion new state law remedies.

VIII. CONCLUSION

Sandin v. Conner is one of the most significant cases the Supreme Court has decided in the area of prisoners' rights. Depending on how appellate court judges interpret its holding, it may well signal the most important retrenchment the Court has made in applying the Constitution to the world behind prison walls. *Sandin* reaches deeply into the daily lives of prisoners involved in any number of situations in which officials use discretion to determine how men and women will experience their incarceration. Administrators and staff have always had enormous discretion, however, under *Sandin*, that discretion has been broadened, lengthened, and stretched to the point that prisoners have little claim to procedural due process before they can be disciplined (as long as good time credits are not involved) or sentenced to a "prison within a prison," with other post-*Sandin* consequences yet to be decided.

In *Wolff v. McDonnell,* the Supreme Court adopted a positivist approach to liberty interests that promised to go beyond direct constitutional requirements to give inmates the constitutional right to due process in those instances where state law created liberty interests for them.[401] The *Wolff* decision suggested that the impact an official action had on an inmate was an important factor in deciding whether a liberty interest had been created.[402] *Helms v. Hewitt* and *Kentucky v. Thompson* strengthened and refined the positivist approach. Both cases, however, abandoned the impact analysis. Liberty interests were to be found in a close and technical reading of the statute or regulation at issue. The wording of the law was not just the paramount concern for the courts, it became the only concern. Although positivism may have seemed to enhance the rights of inmates, its critics claimed that by grounding constitutional deprivations in the language of state law, the Court engaged in unsound legal analysis that placed the liberties of prisoners at risk.[403]

---

401. 418 U.S. at 557.

402. *Id.* at 560-61.

403. *See* Jones & Rhine, *supra* note 88, at 59-64.

> Nonetheless, *Wolff*, and by implication *Avant*, are at their core[,] neither clear nor consistent in their analysis of when or under what circumstances due process must be provided . . . . This ambiguity remains in the case law that has developed since *Wolff*; to the extent that it has been addressed, it has been resolved to the detriment of the prisoner.

Id. at 64.

Instead of providing a uniform and unwavering bedrock for constitutional rights based on the Fourteenth Amendment itself, the state-created liberty doctrine allowed liberties to be the product of the whims and fancies of state legislatures and agency administrators, and worse, perhaps, the courts who translated those whims and fancies into practice. Again and again, Justices Marshall, Brennan, and Stevens demonstrated in their dissents how important and serious decisions that gravely impacted a prisoner's life could be left entirely to unfettered official discretion because of the manner in which the statute or regulation was written and interpreted. In actuality, that discretion was often unfettered even in those instances where the Court recognized that a state had created a liberty interest on behalf of inmates.[404] Applying the "bitter-sweet doctrine," the Court frequently decided that the due process requirements were minimal and had already been provided by the statute that created the liberty interest.

The state-created liberty interest doctrine was perhaps full of many hollow promises, as important for their form as for their substance. Nonetheless, due process protections for prisoners during the disciplinary process and before a prisoner could be assigned to administrative segregation (depending on state statutes and regulations) emerged out of the doctrine. Due process did not end official abuses. Inmates have never been totally secure from arbitrary and capricious decisions.[405] Due process protections, however, introduced a level of accountability that had not previously existed. Prisoners who believed they had experienced official actions that abused their liberties could turn to the judiciary for relief. Short of a lawsuit, in most states they could seek relief through an internal grievance system that was bound to enforce federal requirements. Prison officials had a reason not to be arbitrary and capricious for fear that they would have to account for their behavior in a review by agency watchdogs or, worse, a court of law. Due process requirements are time-consuming and expensive, however, their purpose is to influence institutional practices and cultures as much as to protect the fairness of the process in an individual case.[406]

Sandin v. Conner reduced the level of accountability under which officials can now be held. In one of the most important arenas in which an inmate may find himself or herself, the disciplinary process, unless the imposed sanction includes forfeiture of good time credits, officials do not have to provide the full panoply of *Wolff*'s protections. For all intents and purposes, an inmate considered for administrative placement in

404. *See* Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974).

405. *See* James E. Robertson, *The Decline of Negative Implication Jurisprudence: Procedural Fairness in Prison Discipline After* Sandin v. Conner, 32 TULSA L.J. 39, 40-41 n.11, 44 (1996).

406. *Id.* at 44.

segregation, which often lasts for many months and in some cases years,[407] has no constitutional procedural protections regardless of the statutory criteria for such a restrictive placement or the manner in which the decision should be made.

In essence, the Court has rejected the state-created liberty interest doctrine, regardless of the lip service it pays to its future. In *Meachum*, *Olim*, *Helms*, and *Thompson*, the Supreme Court held that the Due Process Clause was not directly implicated by official actions which did not affect the duration of confinement or the conditions of confinement ordinarily contemplated by a prison sentence.[408] In *Sandin*, the Court went an important step further by holding that statutes and regulations, the enforcement of which did not affect the length of an inmate's sentence or the ordinary conditions of confinement, could no longer trigger constitutional protection. In fact, because such statutes did not affect sentence length or confinement conditions, they are no longer considered state-created liberty interests. Justice Rehnquist employed a rationale that the Court had previously used to limit the direct reach of the Due Process Clause to now limit the reach of the Constitution as it had previously operated through state law. At the same time, Justice Rehnquist also reduced the number and types of confinement conditions that will "qualify for constitutional 'liberty' status."[409] Due process requirements are flags, warnings, signals that a particular matter "is more likely to have played an important role in the life of the inmate."[410] Clearly, the Court felt free to restrict due process in *Sandin* because it judged that there are few deprivations prisoners do not deserve simply by virtue of their criminal conviction.

As is made obvious by decisions like *Meachum, Olim,* and *Thompson*, the Court has been reluctant to recognize, much less expand, the liberty interests of prisoners. The Court has argued consistently in favor of the need to limit judicial interference in the correctional setting.[411] *Sandin* makes it possible, if not mandatory, for federal courts to relinquish a great deal of whatever was left of their right to intervene on behalf of inmates. It is difficult to find much room in the *Sandin* analysis for lower courts to find that prisoners have suffered atypical or significant hardships that require procedural protections. In a strange twist, the *Sandin* Court

---

407. *See* BUCHANAN ET AL., *supra* note 252.

408. *See* Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 459-65 (1989); Olim v. Wakinekona, 461 U.S. 238, 251 (1983); Hewitt v. Helms, 459 U.S. 460, 472 (1983); Meachum v. Fano, 427 U.S. 215, 224 (1976).

409. *See* Orellana v. Kyle, 65 F.3d 29, 31 (5th Cir. 1995).

410. *See* Sandin v. Conner, 515 U.S. 472, 498 (Breyer, J., dissenting).

411. *See Meachum*, 427 U.S. at 228; Whitford v. Boglino, 63 F.3d 527, 533-37 (7th Cir. 1995).

rejected a state-created liberty analysis based on a positivist approach and returned to an impact analysis. Unfortunately, however, the Court's perspective of what constitutes atypical or significant hardships is based, at best, on an uninformed and naive understanding of prison life, or, at worst, on a mean-spirited attitude that panders to society's less noble instincts, as opposed to encouraging "evolving standards of decency that mark the progress of a maturing society."[412]

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