CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—STATE-CREATED PROCEDURAL DUE PROCESS LIBERTY INTERESTS ARE LIMITED TO FREEDOM FROM RESTRAINT WHEN PRISON REGULATIONS DO NOT UNEXPECTEDLY EXCEED THE SENTENCE BUT IMPOSE HARDSHIP ON THE INMATE IN RELATION TO ORDINARY INCIDENTS OF PRISON LIFE—*Sandin v. Conner*, 115 S. Ct. 2293 (1995).

Procedural due process[1] has proven to be one of the most basic protections of the Fourteenth Amendment of the United States Constitution.[2] In fact, the Due Process Clause of the Fourteenth Amendment is

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[1] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, at 664 (2d ed. 1988). Procedural due process sets constitutional limits on arbitrary government action and dictates which, if any, procedural safeguards are needed to afford the individual "the right to be heard before being condemned to suffer grievous loss of any kind." *Id.* (quoting Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)); *see* Mathews v. Eldridge, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the . . . Fourteenth Amendment."); *see also* Grannis v. Ordean, 234 U.S. 385, 394 (1914) (stating that the opportunity to be heard is a clear precept of due process of law); McVeigh v. United States, 78 U.S. (11 Wall.) 259, 265, 267 (1870) (the right to a hearing and *adequate* notice are fundamental requisites to due process of law); BARRON'S LAW DICTIONARY 149 (3d ed. 1991) (defining procedural due process as a flexible concept "guaranteeing procedural fairness where the government would deprive one of his property or liberty"). *See generally* BERNARD SCHWARTZ, THE NEW RIGHT AND THE CONSTITUTION 17-22 (1990) (tracing the Framers' meaning and understanding of due process to its present interpretation by modern judges).

[2] *See* Joseph P. Messina, Kentucky Dep't of Corrections v. Thompson: *The Demise of Protected Liberty Interests Under the Due Process Clause*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 233, 233 (1991); *see also* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

The Due Process Clause of the Fourteenth Amendment, as interpreted by the Supreme Court, protects substantive rights and guarantees procedural safeguards. *See* Craig W. Hillwig, Comment, *Giving Property All the Process That's Due: A "Fundamental" Misunderstanding About Due Process*, 41 CATH. U. L. REV. 703, 707 (1992). Procedural due process ensures that governmental entities provide adequate procedure, such as notice and some kind of hearing, before the deprivation of a protected life, liberty, or property interest. *See id.* at 707, 708; Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1267 (1975) (articulating the Supreme Court's consistent position that some kind of hearing is required before an individual is deprived of a property or liberty interest). Procedural safeguards extend to government deprivations of those life, liberty, or property interests found within the ambit of the Fourteenth Amendment. *See* Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of*

Prisoners and Others Under the Burger Court, 59 N.Y.U. L. REV. 482, 484 (1984). Therefore, when an arbitrary government action negatively affects an individual but does not constitute a deprivation of life, liberty, or property under the Fourteenth Amendment, the individual does not have the right to any process at all, not even a hearing. *See* JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 528 (2d ed. 1983).

Consequently, the meaning given to the words life, liberty, and property are extremely crucial and have continuously been narrowly construed by the Supreme Court. *See id.* at 530; GERALD GUNTHER, INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW 232 (4th ed. 1986). The Fourteenth Amendment meaning embedded in the concepts of life and property, although still not clear, are far less ambiguous than the term liberty. *See* NOWAK ET AL., *supra*, at 531, 533, 546; *see also* Marcia Coyle, *What's Liberty's Scope?*, NAT'L L.J., Jan. 20, 1997, at A18 (reporting that Professor Laurence Tribe argued that patients who wanted a physician to assist in their suicide had a constitutionally protected liberty interest in their "personal autonomy" and "human dignity"); Gregg v. Georgia, 428 U.S. 153, 177, 187 (1976) (holding that states may enact legislation imposing the death penalty on individuals for murder without violating the Fourteenth Amendment's Due Process Clause); Roe v. Wade, 410 U.S. 113, 157 (1973) (finding that "person" in the Fourteenth Amendment does not include an unborn fetus); *see also* Bishop v. Wood, 426 U.S. 341, 344 (1976) (finding government employment as a property interest); Paul v. Davis, 424 U.S. 693, 712 (1976) (holding that injury to reputation does not constitute a deprivation of property under the Fourteenth Amendment); Goldberg v. Kelly, 397 U.S. 254, 261, 262 (1970) (holding that welfare benefits implicate property interests).

The more elusive Fourteenth Amendment term liberty includes all freedoms that the United States Supreme Court considers fundamental. *See* NOWAK ET AL., *supra*, at 533; *see also* Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 414 (1977) (explaining that the meaning of the word liberty in the Due Process Clause has been, over time, expanded from its earlier conceptualization of freedom to move freely to today's meaning, which now encompasses concepts of private autonomy). Distinctly, individuals are deprived of a liberty interest under the Due Process Clause of the Fourteenth Amendment when the government attempts to imprison or physically restrain them without adequate procedure. *Id.* at 533, 534; *see also* Youngberg v. Romeo, 457 U.S. 307, 319 (1982) (finding that an involuntarily committed mentally handicapped individual had a liberty interest in remaining free from bodily restraint); Ingraham v. Wright, 430 U.S. 651, 672 (1977) (accepting the position that corporal punishment constitutes a deprivation of liberty for which some process is due); Mapp v. Ohio, 367 U.S. 643, 660 (1961) (holding that, to secure the basic Fourteenth Amendment rights of the accused, police arrests can only be made when based on probable cause). Another distinct instance of a liberty deprivation occurs when a government entity denies an individual the right to exercise or enjoy a specific constitutional protection, such as free speech, or prohibits an activity that does not have special constitutional protection, such as engaging in a certain business endeavor. *See* NOWAK ET AL., *supra*, at 533.

Since 1937, the Supreme Court has advocated the protection of only *fundamental* constitutional rights—those rights with textual recognition or those implied values found to be "'fundamental' to freedom in American society." *See id.* at 539. This conceptualization of liberty extends due process protection to those values lacking textual recognition, most significantly being the rights to privacy, to travel interstate, to vote, and to freely associate. *See id.* at 540.

Once a protected interest is found to lie within the definition of a life, liberty, or property interest under the Due Process Clause, the need for procedural protection is triggered and the question then becomes how much or how little should be afforded. *See* GUNTHER, *supra*, at 250; Mathews v. Eldridge, 424 U.S. 319, 334, 335 (1976) (setting forth a balancing test to determine the procedural protections appropriate under a specific set of circumstances); *see also* Dixon v. Love, 431 U.S. 105, 115 (1977) (finding that

the single most important protection against arbitrary state[3] encroachment of individual rights.[4] Despite this generally known concept, however, the actual protection afforded under the Due Process Clause of the Four-

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revocation of a driver's license does not require any prior hearing); Smith v. Organization of Foster Families, 431 U.S. 816, 853, 855-56 (1977) (requiring an informal proceeding before a foster child is removed from a foster home). Prior decisions indicate that in determining what kind of process is due, three distinct factors will be considered: first, the individual or private interest affected by the government action; second, whether the existing procedural safeguards will protect the individual from an erroneous deprivation and the probable value of additional safeguards; and third, the government interest involved. *See* GUNTHER, *supra*, at 250, 250-51 (arguing that the present day Supreme Court has settled on this uninformative and general balancing formula); *see also Mathews*, 424 U.S. at 334 ("'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" (alteration in original) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

[3] *See* Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J. 89, 92 n.13 (noting that the exact meaning of the word "State" in the Due Process Clause of the Fourteenth Amendment has been hotly debated).

[4] *See* Hillwig, *supra* note 2, at 713. The Due Process Clause of the Fourteenth Amendment is the mechanism through which the Supreme Court has applied most of the Bill of Rights to state governments. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 411, 413-14 (12th ed. 1991) (explaining the controversial doctrines by which the Fourteenth Amendment absorbs some of the guarantees of the Bill of Rights and how those incorporated rights apply to the states). The fundamental freedoms expressed in the Bill of Rights and incorporated into the Due Process Clause of the Fourteenth Amendment are afforded protection against arbitrary interference by the states. *See* Hillwig, *supra* note 2, at 713; Leonard G. Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1054-55 (1968); *see also* SCHWARTZ, *supra* note 1, at 188 (explaining that some of the Framers of the Constitution were reluctant to include a formalized "bill of rights" for fear of the implication that the enumerated rights were exclusive). The Supreme Court, not confined by the enumerated freedoms of the Bill of Rights, also protects those personal rights that are fundamentally inherent in our society's concept of freedom. *See id.* at 191; *see also* ROBERT F. CUSHMAN, CASES IN CIVIL LIBERTIES 121 (1968) (clearly agreeing that those rights not listed in the Bill of Rights must be protected under the Fourteenth Amendment's Due Process Clause, but wary of the fate of those rights that have not been incorporated into that clause).

Late in this century, the circle of interests that implicate due process protection widened. *See* TRIBE, *supra* note 1, § 10-9, at 514. Thus, interests not recognized as fundamental under the Constitution could gain the protection of the Fourteenth Amendment's Due Process Clause as "liberty" or "property" interests if recognized by state law. *See* Herman, *supra* note 2, at 500; Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 461 (1989) (holding that the existence of a liberty interest protected by the Due Process Clause is dependent upon an examination of relevant state law); *see also Entitlement, Enjoyment, and Due Process of Law*, *supra* note 3, at 110 ("The basic fallacy of conditioning the availability of due process protection upon the existence of an entitlement under state law flows from the fact that ultimately *all* property is a grant from the sovereign and exists only under such terms as the sovereign deems proper." (footnote omitted)). One commentator argued that the so-called entitlement doctrine results in circular reasoning and completely abrogates the Fourteenth Amendment because states could carefully tailor statutes to eliminate any implication of a property or liberty right. *See id.* at 97, 110-11.

teenth Amendment has been subject to ongoing debate and interpretation.[5]

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[5] *See* Messina, *supra* note 2, at 233. Conceivably, one of the most ambiguous and uncertain constitutional statements is the warning explicit in the Fourteenth Amendment. *See* Ratner, *supra* note 4, at 1049. Although one function of this constitutional provision is to supply a written record of the limitations on official authority, the written word reflects the ideas of a particular genealogical time and must, at the same time, respond to societal needs as they change with time. *See id.* at 1048. It is the intrinsic ambiguity of constitutional language that facilitates its adaptation to each generation's attitudes and needs. *See id.* In 1964, Charles Reich coined the term "new property" and revolutionized due process analysis. *See* Herman, *supra* note 2, at 483; Charles Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964). *But see* William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 490 (1977) (commenting that Professor Reich's ideas were not so revolutionary or necessary and stating that "the new property threatens now to leave us with the worst possible legacy—highly contingent and insecure dependencies on government and the doctrinal erosion of due process of law"). According to Professor Reich, this "new property" is government-created wealth, such as benefits, services, and jobs. *See* Reich, *supra*, at 733. Reich warned that this growing dependence upon government to provide wealth may lead to unchecked governmental power over the people, as long as the providing of this wealth is considered a mere privilege by the courts. *See id.*

Professor Reich's ideas articulated those that motivated the Supreme Court's retreat from the right versus privilege doctrine. *See* Herman, *supra* note 2, at 488. In a 1970 decision, the Supreme Court treated welfare benefits more like property than gratuity, setting forth the concept that a statutorily conferred benefit, although not a right, could mandate procedural protection. *See id.* at 489-90; *see also* Goldberg v. Kelly, 397 U.S. 254, 261-62 (1970) (holding that welfare benefits created a statutory entitlement that constituted a property interest that should be afforded due process protection against government intrusion); *see also Entitlement, Enjoyment, and Due Process of Law*, *supra* note 3, at 97 (stating that the entitlement concept was born out of the *Goldberg* Court's unsuccessful attempt to fit the government benefit of welfare payments, a new and different kind of property, into "traditional common law concepts of property").

Later, in 1972, the Supreme Court developed the entitlement concept "into a full-blown method of constitutional analysis." Herman, *supra* note 2, at 490; *see also* Board of Regents v. Roth, 408 U.S. 564, 572, 578 (1972) (giving the terms liberty and property meaning and holding that a college professor who was not rehired did not have a property interest deserving of due process protection); Peter N. Simon, *Liberty and Property in the Supreme Court: A Defense of* Roth *and* Perry, 71 CAL. L. REV. 146, 146 (1983) (contending that the Supreme Court's analytical approach to defining property interests has led to a constitutional doctrine, whereby, "legislatures create property, and courts protect it"). This new approach of recognizing statutory entitlements as property interests under the Due Process Clause later shaped the Supreme Court's understanding of liberty interests as well. *See* Messina, *supra* note 2, at 242; *see also* Paul v. Davis, 424 U.S. 693, 710-11 (1976) (suggesting that the entitlement theory may be extended and applied to liberty interests). *See generally* Youngberg v. Romeo, 457 U.S. 307, 314, 324 (1982) (balancing the interest of the individual against the interests of the state, the Supreme Court held that an involuntarily committed mentally handicapped person possessed a protected liberty in the conditions of the confinement); Ingraham v. Wright, 430 U.S. 651, 682 (1977) (concluding that some due process of law is required before the imposition of corporal punishment but notice and a hearing is not); McNeil v. Director, 407 U.S. 245, 249, 250 (1972) (holding that it is a denial of due process to continue to hold individuals for extended periods without the requisite protection).

Currently, the liberty interests of state prisoners have been subjected to clarification and, consequently, restriction.[6] In determining whether state prisoners should be afforded the protection of the Fourteenth Amendment, courts have begun to look beyond the text of the Constitution and now find protected liberty interests arising out of duly enacted state statutes and regulations.[7] Specifically, through modern due process analysis, courts are finding that states, by promulgating statutes and regulations, may invent liberty interests that are protected by the Due Process Clause through the explicit use of obligatory language in connec-

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When deciding claims stemming from nonconstitutional sources, the Supreme Court has looked to state statutes, regulations, or rules that create property interests protected by the Due Process Clause. *See* Herman, *supra* note 2, at 494. In cases that asserted the existence of a liberty interest, the Supreme Court did not apply this approach because the asserted interests had constitutional roots. *See id.* at 501. It was in cases involving state prisoners that the new liberty doctrine developed. *See id.* at 503. Prisoners are the primary focus of this debate because states, in the prison context, have the acknowledged power to encroach upon individual freedoms, even liberties triggering procedural issues. *See id.* For this reason, prisoners' rights cases have become the leading forum for debating the procedural due process protections of liberty interests. *See id.*

This modern concept, positivism, now sets the trend. *See id.* at 494. The positivist or entitlement theory, developed by the Burger Court, redefines liberty to include entitlements created by state law, as well as more traditionally recognized due process interests. *See id.* at 484. Sharply distinguished from the natural law concepts of the Constitution, an entitlement can be created by any positive law: local, state, or federal. *See id.*

For a more comprehensive explanation of the creation and use of the entitlement theory and a history of its application, see generally TRIBE, *supra* note 1, §§ 10-11, 10-12.

[6] *See* Messina, *supra* note 2, at 233.

[7] *See id.* at 243. Prisoners must rely on the existence of state-created liberty interests as a result of the Supreme Court's consistent refusal to recognize their more basic constitutional freedoms. *See id.* (quoting Hewitt v. Helms, 459 U.S. 460, 467 (1983)); *see also* Montanye v. Haymes, 427 U.S. 236, 242 (1976) (stating that "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution," the need for the protection of the Due Process Clause does not arise). This reluctance stems from the belief that once an individual is lawfully imprisoned, only a very narrow range of protected interests are retained. *See* Messina, *supra* note 2, at 243 (quoting Hewitt v. Helms, 459 U.S. 460, 467 (1983)). As a result, the creation of liberty interests through state law becomes crucial for prisoners seeking procedural due process protection under the Due Process Clause. *See id.*

The Supreme Court's primary focus on the content of state laws, rather than on the significance of the interest in question, leads to dangerous consequences. *See id.* at 253. This type of analysis leads to states defining prisoners' rights under the Due Process Clause, which seems to be in direct conflict with the fundamental purpose of the Fourteenth Amendment. *See id.* Indeed, Justice Stevens, in his dissent in *Meachum v. Fano*, best described this untenable result:

> I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws and regulations.

427 U.S. 215, 230 (1976) (Stevens, J., dissenting).

tion with a limitation upon official discretion.[8] As a result, today's prisoner liberty interests are largely dependent upon semantic constructions of state statutes by the judiciary.[9]

Recently, in *Sandin v. Conner*[10] the United States Supreme Court confronted and clarified the breadth of the Federal Constitution's Due Process Clause as it applied to the disciplinary infliction of solitary confinement.[11] The *Sandin* Court rejected modern Fourteenth Amendment reasoning and bravely returned to traditional due process analysis, holding that the creation of due process liberty interests by prison regulations is limited to freedom from restraint when the imposed discipline does not unexpectedly exceed the original sentence, inflict greater hardships than

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[8] *See* Messina, *supra* note 2, at 234.

[9] *See id.* The traditional views of due process under the United States Constitution did not apply to prisoners until very recently. *See* Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 422 (1993). Historically, prisoners were considered slaves of the state, and it was this belief that evolved into the "hands off doctrine" of the federal courts, justifying the assertion that courts should not intervene with the administration of prisons. *See id.*; James E. Robertson, *Judicial Review of Prison Discipline in the United States and England: A Comparative Study of Due Process and Natural Justice*, 26 AM. CRIM. L. REV. 1323, 1323 (1989) (reflecting that although defendants were afforded many procedural safeguards protecting them from arbitrary punishment, the same fairness was not afforded once imprisoned); *see also* Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871) (setting forth the position that a prisoner was "a slave of the state" and, consequently, forfeited his liberty). It was not until the late 1960s that federal courts began to consider prisoners' rights suits. *See* Eisenberg, *supra*, at 423-24; *see also* William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 657 (1979) (explaining that the recent deluge of prisoners' rights suits is a reaction to the historical absence of judicial scrutiny of prison abuses and prisoners' liberties).

With the Supreme Court's repudiation of the right-privilege distinction, where benefits designated privileges and not rights could be rescinded without invoking a constitutional deprivation, prisoners were no longer precluded from asserting constitutional issues because the argument that prisoners were not entitled to protection was no longer valid. *See* Eisenberg, *supra*, at 423-24; *see also* JAMES E. LEAHY, LIBERTY, JUSTICE AND EQUALITY: HOW THESE CONSTITUTIONAL GUARANTEES HAVE BEEN SHAPED BY UNITED STATES SUPREME COURT DECISIONS SINCE 1789 50-58 (1992) (briefly deciphering prisoners' rights and the corresponding sources of their liberty); Thompson H. Gooding, Jr., *The Impact of Entitlement Analysis: Due Process in Correctional Administrative Hearings*, 33 U. FLA. L. REV. 151, 166-67 (1981) (noting that the Supreme Court now requires prisoners to identify a statutory interest before it will afford constitutional protection and, essentially, has given unchecked power to the states, by refusing to consider the significance of the interest involved unless a specific statutory reference exists). *See generally* Robert G. Doumar, *Prisoners' Civil Rights Suits: A Pompous Delusion*, 11 GEO. MASON L. REV. 1 (1988) (tracing the judicial history of prisoners' civil rights litigation and contending that the problems of prisoners are a long way from being solved or remedied).

[10] 115 S. Ct. 2293 (1995).

[11] *See id.* at 2300, 2301.

those ordinarily found in prison life, or affect the duration of the initial sentence.[12]

In *Sandin*, the prisoner, DeMont Conner, was duly convicted of several state crimes, including burglary, robbery, kidnapping, and murder and was serving an indeterminate sentence in a Hawaii correctional facility.[13] The incidents of this case began in August 1987, when a prison official routinely escorted Conner from his prison cell to another area of the prison.[14] During the transport, Conner was subjected to a strip search that included an examination of his rectal area.[15] In response to this invasion, Conner directed angry, foul language at the officer conducting the search.[16] Eleven days later, Conner received prison notification charging him with disciplinary infractions in connection with the search.[17] Conner was charged with high misconduct for physically interfering with a prison function and low moderate misconduct for using obscene language and harassing a prison official.[18]

On August 28, 1987, Conner appeared before a prison adjustment committee that, in the course of its proceedings, denied Conner's request

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[12] *See id.* at 2297-300, 2301. In this instance, the Supreme Court would not provide due process protection because greater hardship was not imposed on the inmate. *See id.* at 2293. As a result of the *Sandin* Court's restriction of state-created protected liberty interests to those involving freedom from restraint, Conner was without recourse. *See id.* at 2301.

[13] *See id.* at 2295. Conner was sentenced for 30 years to life and confined to the Halawa Correctional facility in Hawaii. *See id.* The correctional facility, located in central Oahu, is a maximum security prison. *See id.*

[14] *See id.* at 2295-96.

[15] *See Sandin*, 115 S. Ct. at 2296.

[16] *See id.*

[17] *See id.*

[18] *See id.* & n.1. Hawaii's prison regulations have instituted and codified a graded misconduct system where misconduct ranges from greatest to minor misconduct. *See* 17 HAR §§ 17-201-6 to -12 (1983) (setting forth the categories of misconduct, the actions that define those classifications, and the available sanctions for each category). Sections 17-201-7 to -10 of the Hawaii prison regulation code define the offenses punishable for each grade of misconduct and set forth the available discipline. *See id.* Offenses categorized as high misconduct are punishable by 30 days in disciplinary segregation or any sanction other than disciplinary segregation. *See id.* § 17-201-7(b). Low moderate misconduct offenses are punishable by up to four hours in a cell, monetary restitution, or any sanction other than disciplinary segregation. *See id.* § 17-201-9(b).

The regulations, in addition to establishing a hierarchy of misconduct, create and define a category for serious misconduct. *See id.* § 17-201-12. Serious misconduct, as defined by the regulations, subjects an inmate to additional punishment and is conduct that "poses a serious threat to the safety, security, or welfare of the staff, other inmates or wards, or the institution and *subjects the individual to the imposition of serious penalties, such as segregation for longer than four hours.*" *Id.* (emphasis added). The Court noted that the parties conceded that, in Conner's case, the physical obstruction charge constituted serious misconduct, while the charges of low moderate misconduct did not. *See Sandin*, 115 S. Ct. at 2296 n.1.

to offer witnesses.[19] Subsequently, the committee found Conner guilty of the charged misconduct and sentenced him to disciplinary segregation[20] for thirty days in a special holding unit[21] for the physical interference charge and to four hours of disciplinary segregation for the other two charges.[22]

Within fourteen days of receipt of the committee's decision, Conner sought administrative review[23] and, nine months later, the prison deputy administrator found the disciplinary charge of high misconduct to be unsupported and expunged Conner's record accordingly.[24] Before the deputy administrator rendered a decision in response to the prisoner's administrative appeal, however, Conner brought suit against prison officials

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[19] *See Sandin*, 115 S. Ct. at 2296. Generally, prison misconduct is sanctioned and punished through the procedures of the prison adjustment committee. *See* 17 HAR § 17-201-12 (1983); *see also id.* §§ 17-201-13 to -20 (stating the rules governing the composition, duties, and responsibilities of a prison adjustment committee). Defending its decision to refuse Conner's request to present witnesses at the disciplinary hearing, the adjustment committee reported that witnesses were not available as a result of a staffing shortage. *See Sandin*, 115 S. Ct. at 2296.

[20] *See Sandin*, 115 S. Ct. at 2296 n.1. Disciplinary confinement is used as a punishment for prison misconduct. *See* 17 HAR §§ 17-201-19, -22, -23 (1983) (governing disciplinary segregation, administrative segregation, and protective custody, respectively); *see also Sandin*, 115 S. Ct. at 2303 n.1 (Ginsberg, J., dissenting). Justice Ginsberg noted that the conditions of disciplinary confinement cannot be compared to administrative segregation and protective custody because there are no long-term consequences, unlike in disciplinary segregation. *See id.* Justice Ginsberg supported her position by stating that "discipline means punishment for misconduct; it rests on a finding of wrongdoing that can adversely affect an inmate's parole prospects." *Id.*

[21] *See Sandin*, 115 S. Ct. at 2296 n.2. The prison adjustment committee decided that Conner's sentence was to be served concurrently in a special holding unit. *See id.* at 2296.

The Special Holding Unit (Unit) accommodates inmates sanctioned to disciplinary confinement, administrative segregation or protective custody. *See id.* n.2 (citing 17 HAR §§ 17-201-19, -22 & -23 (1983) (providing for and setting forth the specifics for the sanctions of disciplinary segregation, administrative segregation, and protective custody, respectively)). The Unit is comprised of single-person cells in which conditions are substantially similar for each of the above three inmate classifications. *See id.* (citing 17 HAR § 17-201-19(c)-(h) (setting forth the permitted conditions surrounding the imposition of disciplinary confinement)). The only difference in conditions among the three classifications of inmates is that inmates segregated for protective custody receive one extra phone call and one extra visiting privilege, whereas those sanctioned to disciplinary and administrative segregation do not. *See id.*

[22] *See id.* at 2296. The committee decided that the two sentences should be served concurrently. *See id.* Conner's sanction began on August 31, 1987, and he was segregated until September 29, 1987. *See id.*

[23] *See id.* Administrative review was sought pursuant to Hawaii Administrative Rule § 17-201-20(a). *See id.; see also* 17 HAR § 17-201-20(a) (1983) (establishing a right to administrative review of the adjustment committee's decision within 14 days of its determination).

[24] *See Sandin*, 115 S. Ct. at 2296.

and the adjustment committee chair in the United States District Court for the District of Hawaii.[25] Conner alleged that he was deprived procedural due process when the adjustment committee, in determining his sentence of segregation for misconduct, refused to allow his presentation of witnesses during the disciplinary hearing.[26] The district court granted the prison official's motion for summary judgment, and Conner appealed.[27]

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the district court's judgment, holding that Conner possessed a liberty interest in remaining free from segregation.[28] In its holding, the court of appeals also found a remaining question of fact as to whether Conner received all process due.[29]

The United States Supreme Court granted certiorari[30] to determine whether the Hawaii prison regulations or the Due Process Clause af-

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[25] *See id.*

[26] *See id.* Conner's amended complaint sought damages as well as injunctive and declaratory relief for alleged procedural due process violations that occurred during the disciplinary hearing conducted by the adjustment committee. *See id.*

[27] *See id.*

[28] *See* Conner v. Sakai, 15 F.3d 1463, 1466 (9th Cir. 1993). The appellate court concluded that it was unclear whether Conner received due process under the Supreme Court's standards enunciated in *Wolff v. McDonnell*. *See id.* (citing Wolff v. McDonnell, 418 U.S. 539 (1974)).

[29] *See id.* at 1466-67. The court of appeals rooted its conclusion in the language of Hawaii's prison regulations, specifically Section 17-201-18(b)(2). *See id.* at 1467; *Sandin*, 115 S. Ct. at 2296. The regulation states:

> Upon completion of the hearing, the committee may take the matter under advisement and render a decision based upon evidence presented at the hearing to which the individual had an opportunity to respond or any cumulative evidence which may subsequently come to light may be used as a permissible inference of guilt, although disciplinary action shall be based upon more than mere silence. *A finding of guilt shall be made where:* (1) The inmate or ward admits the violation or pleads guilty [and] (2) The charge is supported by substantial evidence.

17 HAR § 17-201-18(b) (1983) (emphasis added).

This Hawaii administrative rule instructs the adjustment committee to find guilt when allegations of misconduct are supported by substantial evidence. *See Sandin*, 115 S. Ct. at 2296. The Ninth Circuit relied on prior law set forth in *Kentucky Department of Corrections v. Thompson* and held that the committee's duty was not discretionary. *See id.* at 2297 (citing Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 464-65 (1989) (explaining that although the regulations at issue contain substantive predicates or standards to guide the decision-maker, they do not contain the requisite mandatory language needed to create a liberty interest)); Messina, *supra* note 2, at 234 (contending that the creation of a protected liberty interest depends on close examination of the wording of the relevant statutes and regulations, not the importance of the interest in question). The Supreme Court explained that the court of appeals interpreted the language of the Hawaii regulation by negative inference when it held that the adjustment committee could not impose segregation if no substantial evidence of the alleged misconduct was found. *See Sandin*, 115 S. Ct. at 2297.

[30] 115 S. Ct. 305 (1994).

forded Conner a liberty interest that entitled him to procedural safeguards.[31] The Court found that disciplinary segregation did not dramatically depart from the conditions of Conner's life sentence, alter the duration of his original sentence, or present an atypical, significant deprivation wherein a state may create a liberty interest.[32] In reversing the court of appeals, the Supreme Court held that neither the Due Process Clause nor Hawaii's prison regulations furnished Conner with a liberty interest that entitled him to procedural protection.[33]

Since 1974, the United States Supreme Court has decided a long line of cases considering and defining the range of procedural due process rights afforded to prisoners.[34] In the landmark case of *Wolff v.*

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[31] *See Sandin*, 115 S. Ct. at 2295, 2302. The Court examined Conner's rights in light of the procedural protection set forth under *Wolff*. *See id.* at 2297; *Wolff*, 418 U.S. at 563-64 (setting forth the minimum requirements to satisfy due process). The *Wolff* Court acknowledged that states may create, in certain circumstances, liberty interests that invoke protection of the Due Process Clause. *See id.* at 557. The Court in *Sandin* held, however, that these protective interests will generally be limited to protection from freedom from restraint when the sentence does not unexpectedly exceed the original sentence and there is no imposition of hardship on the inmate not regularly found in prison life. *See Sandin*, 115 S. Ct. at 2301-02.

[32] *See Sandin*, 115 S. Ct. at 2301, 2302.

[33] *See id.* at 2302.

[34] *See id.* at 2297-300. The *Wolff* Court clearly articulated the long-standing position that prisoners, although subject to the retraction of rights and privileges available to ordinary citizens, are not devoid of constitutional protection. *See Wolff*, 418 U.S. at 555; *see also* Price v. Johnston, 334 U.S. 266, 285-86 (1948) (holding that a prisoner's right to argue orally on appeal lies within the appellate court's discretion); Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934) (standing for the proposition that a felony defendant has a privilege under the Due Process Clause to present a defense at trial and to be present at all stages of trial when absence would substantially affect his rights); Schwab v. Berggren, 143 U.S. 442, 449 (1892) (stating that a prisoner does not have an absolute right to argue his appeal or to be present at the appellate proceeding); Hopt v. Utah, 110 U.S. 574, 579 (1884) (same).

The *Wolff* Court, reminiscent of long-standing, democratic ideals, stated that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff*, 418 U.S. at 555-56. To illustrate this principle, the *Wolff* Court, per Justice White, pointed to the religious freedoms prisoners enjoy under the First and Fourteenth Amendments, the protection from invidious discrimination they enjoy under the Equal Protection Clause of the Fourteenth Amendment, and the procedural protection prisoners are afforded under the Due Process Clause of the Fourteenth Amendment. *See id.* at 556; *see, e.g.*, Cruz v. Beto, 405 U.S. 319, 322 (1972) (per curiam) (stating the proposition that prisoners maintain religious freedom afforded under the First Amendment); Haines v. Kerner, 404 U.S. 519, 521 (1972) (contending that prisoners may invoke the protection of the Due Process Clause); Lee v. Washington, 390 U.S. 333, 333, 334 (1968) (affirming the finding that a state statute requiring segregation by race in prisons and jails violates the Equal Protection Clause of the Fourteenth Amendment).

Importantly, the United States Supreme Court indicated in *Wolff* that the rights prisoners retain, specifically those under the Due Process Clause, are limited by the restrictions imposed by incarceration. *See Wolff*, 418 U.S. at 556. Justice White noted that

McDonnell,[35] the Supreme Court found that prisoners have a liberty interest[36] embraced by the Fourteenth Amendment and held that the statutory provisions of the Nebraska Treatment and Corrections Act[37] did not

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"there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution." *Id.*

[35] 418 U.S. 539 (1974).

[36] *See id.* at 557. The *Wolff* Court explained that even though the Constitution itself does not insure good-time credit for compliant behavior while in prison, the State has provided a statutory right to good-time credit and specified that it is to be revoked only for serious misconduct. *See id.* In essence, the *Wolff* Court found that Nebraska created "a right to a shortened prison sentence through the accumulation of credits for good behavior." *Id.* The Supreme Court, in recognizing a state-created right, noted that the interest involved was one of "real substance" that requires appropriate minimum procedures to guarantee that the state-conferred right would not be arbitrarily abrogated. *See id.* Therefore, the *Wolff* Court held that the determination of guilt for serious misconduct, punishable by loss of good-time credits, must be determined according to the minimum requirements of procedural due process. *See id.* at 558.

[37] *See* The Nebraska Treatment and Corrections Act, as amended, NEB. REV. STAT. § 83-185 (Cum. Supp. 1972). The *Wolff* Court began and revolved its analysis around the Nebraska Treatment and Corrections Act (Act). *See* 418 U.S. at 544-53. The Act details the prison disciplinary regime of the Nebraska penal system and controls the administration of penal justice in Nebraska. *See* NEB. REV. STAT. § 83-185 (Cum. Supp. 1972); *Wolff*, 418 U.S. at 545 & n.5.

The Act specifically delineates the responsibility for inmate discipline within a particular, insular penal institution to the chief executive officer of each correctional facility. *See* NEB. REV. STAT. § 83-185(1); *Wolff*, 418 U.S. at 545-46. When the misconduct is deemed flagrant or serious, the chief executive officer can impose punishment, withhold good-time credits, or impose disciplinary confinement. *See* NEB. REV. STAT. § 83-184(2); *Wolff*, 418 U.S. at 546-47. The *Wolff* Court noted that the forfeiture of good-time credits affects the duration of confinement, while the sanction of disciplinary confinement alters the conditions of confinement. *See id.* at 547.

The Act specifically establishes procedures for the forfeiture of good-time credits. *See id.;* The Nebraska Treatment and Corrections Act, as amended, NEB. REV. STAT. § 83-1,107 (Cum. Supp. 1972). In terms of procedural protection and requirements, the Court explained that this provision only requires "that an inmate be 'consulted regarding the charges of misconduct'" regarding the withholding, forfeiture, or restoration of good-time credits. *Wolff*, 418 U.S. at 548 (quoting NEB. REV. STAT. § 83-1,107 (Cum. Supp. 1972)).

In addition to the Act, prison authorities have structured written regulations to procedurally regulate inmate misconduct. *See id.* By regulation, misconduct is categorized into one of two categories: (1) major misconduct, which is a serious violation that must be reported to an adjustment committee; or (2) minor misconduct, which may be resolved informally or handled formally by an adjustment committee. *See id.* at 548-50.

The prison adjustment committee must examine and evaluate the misconduct reports and is authorized to direct investigations, make findings, refer cases for further analysis, charge disciplinary actions, recommend policy changes, and take any other actions necessary to secure decision effectiveness. *See id.* at 548, 550-51 & n.8 (contending that § 83-1,107 was the only statutory provision referring to the revocation of good-time credits, the *Wolff* Court noted that prison authorities had devised their own written regulations to frame policy for dealing with inmate misconduct); NEB. REV. STAT. § 83-1,107 (Cum. Supp. 1972).

comply with the minimum requirements of constitutional due process.[38] In that case, a Nebraska inmate challenged prison officials' decision to repeal good-time credits[39] without adequate procedures.[40] Attempting to

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Within its authority and consistent with its purpose, the prison adjustment committee may pursue a wide range of disciplinary sanctions. *See Wolff*, 418 U.S. at 552. For example, disciplinary action may include reprimand, assignment of extra duty, restrictions, confinement in the disciplinary cell, or withholding good-time credits. *See id.*

The Supreme Court analyzed the district court's findings regarding procedures that governed the quasi-judicial actions of the prison adjustment committee. *See id.* at 552-53, 558-60. The district court found that the following procedures applied when an inmate was charged with a prison violation:

> (a) The chief correction supervisor reviews the 'write-ups' on the inmates by the officers of the Complex daily; (b) the convict is called to a conference with the chief correction supervisor and the charging party; (c) following the conference, a conduct report is sent to the Adjustment Committee; (d) there follows a hearing before the Adjustment Committee and the report is read to the inmate and discussed; (e) if the inmate denies charge [sic] he may ask questions of the party writing him up; (f) the Adjustment Committee can conduct additional investigations if it desires; (g) punishment is imposed.

McDonnell v. Wolff, 342 F. Supp. 616, 625-26 (D. Neb. 1972). The *Wolff* Court found these established procedures to be inadequate because there was no indication that the committee ever notified the inmate, in writing or otherwise, of the evidence relied on by the committee or the reasons behind the decision to take a specific disciplinary course of action. *See Wolff*, 418 U.S. at 564. This inadequacy, the Court explained, did not comport with the function of notice, which is to allow the charged party to prepare a defense. *See id.*

[38] *See Wolff*, 418 U.S. at 557, 563-64.

[39] *See id.* at 557. As provided by Nebraska state law, good-time credits are awarded for compliant behavior while imprisoned and, if accumulated, can result in a reduced sentence. *See id.* A finding of misconduct, particularly a finding of serious misconduct against an inmate, however, can result in the revocation of good-time credits. *See id.*

[40] *See id.* at 554-55. Pursuant to 42 U.S.C. § 1983, McDonnell brought a class action suit on behalf of other inmates of the Nebraska Correctional Complex (Complex) in Lincoln, Nebraska. *See id.* at 542; *see also* 42 U.S.C. § 1983 (1988); *infra* note 41 (discussing the applicability of 42 U.S.C. § 1983). Primarily, McDonnell's complaint alleged that prison disciplinary proceedings violated the Due Process Clause of the Fourteenth Amendment of the Constitution. *See Wolff*, 418 U.S. at 542. The complaint sought damages as well as injunctive relief. *See id.* at 553.

After an evidentiary hearing, the United States District Court for the District of Nebraska rejected McDonnell's procedural due process claim. *See Wolff*, 342 F. Supp. at 627. On appeal, the Eighth Circuit held that the requirements of *Morrissey v. Brewer* and *Gagnon v. Scarpelli* should be followed in prison disciplinary hearings and remanded the matter, leaving the specific requirements to the district court's determination. *See* McDonnell v. Wolff, 483 F.2d 1059, 1063 (8th Cir. 1973) (citing Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972)).

Regarding a remedy, the Eighth Circuit held that restoration of good-time credits under 42 U.S.C. § 1983 was foreclosed under the doctrine of *Preiser v. Rodriguez*. *See McDonnell*, 483 F.2d at 1064; Preiser v. Rodriguez, 411 U.S. 475, 499 & n.14, 500 (1973) (holding that state prisoners challenging the duration of their confinement and seeking a speedier release were limited to the sole federal remedy of habeas corpus and

redress the alleged deprivation, the inmate commenced an action under 42 U.S.C. § 1983,[41] claiming that the State deprived him of a constitu-

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that only a claim challenging the conditions of confinement could be pursued under 42 U.S.C. § 1983).

The United States Supreme Court held that McDonnell's claim for damages was not barred by *Preiser* and seized the opportunity to determine the soundness of the Complex's procedures imposing the sanction of withholding good-time credits for misconduct. *See Wolff*, 418 U.S. at 554-55. The Supreme Court clarified the law of *Preiser* as it relates to remedial action and explained that it is appropriate "to determine the validity of the procedures for revoking good-time credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already canceled." *Id.* at 555 (footnote omitted).

For a more comprehensive discussion of the *Preiser* doctrine see Martin A. Schwartz, *The* Preiser *Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DEPAUL L. REV. 85 (1988).

[41] *See* Thadd J. Llaurado, Comment, *Civil Rights—42 U.S.C. § 1983—The Actionability of a Negligent Deprivation of a Liberty Interest in Light of* Daniels *and* Davidson, 69 MARQ. L. REV. 599, 600-01 (1986) (explaining in depth the history and present relevance of 42 U.S.C. § 1983).

Section 1983 creates a federal cause of action for any claim cognizable under the Fourteenth Amendment and provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988). The use of 42 U.S.C. § 1983 by prisoners to challenge prison conditions has grown steadily and has become the most viable avenue for prisoners' suits. *See* Turner, *supra* note 9, at 610, 612 (explaining that prisoners can sue local and state officials under 42 U.S.C. § 1983 to redress deprivations of their federal constitutional rights).

Section 1983 was initially enacted as part of the Civil Rights Act of 1871. *See* Llaurado, *supra*, at 600 n.5. Congress passed the Civil Rights Act of 1871 in response to the widespread atrocities perpetrated against blacks and white republicans after the Civil War. *See id.* at 603 & n.21, 604. Section 1 of the Civil Rights Act of 1871, commonly known as the Ku Klux Klan Act, was intended to enforce the Fourteenth Amendment by imposing civil liability. *See id.* at 604-05. Although that act targeted the Ku Klux Klan, its primary purpose was to focus on the actions of state officials. *See id.* at 605; Monroe v. Pape, 365 U.S. 167, 172 (1961) (finding that in 1871 Congress intended to devise a federal remedy for individual deprivation of constitutional rights by an official abuse of power), *overruled on other grounds*, Monell v. Department of Soc. Serv., 436 U.S. 658, 664, 669 (1977) (interpreting the language and history of § 1 of the Civil Rights Act of 1871 to extend liability to local municipalities); *see also* Turner, *supra* note 9, at 629 (contending that *Monroe v. Pape* "made it possible for prisoners to sue state officials"). The legislative history of the Civil Rights Act of 1871 indicates that Congress intended to fashion a remedy against official acts, including intentional and negligent acts, that led to a deprivation of individual constitutional liberties. *See* Llaurado, *supra*, at 605. The Supreme Court, however, quickly limited this "far reaching" remedy and eventually ruled civil rights suits unactionable under the Act of 1871. As a result, this federal statute remained dormant for 90 years. *See id.* at 605, 606.

tional right.[42] In response to the inmate's contention, the Court imposed new procedural requirements: (1) receipt of advanced written notice of the alleged charges; and (2) a written statement by the fact-finders, delineating the evidence relied on and the reasons for the specific disciplinary sanction chosen.[43] The finding of liberty in state law, not this mod-

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Then in the 1961 decision *Monroe v. Pape*, the Supreme Court extended the construction of 42 U.S.C. § 1983 to include a remedy for the deprivation of constitutional rights by state action. *See id.* at 606. In support of its expansive position, the *Monroe* Court stated:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Monroe, 365 U.S. at 180. Since then, the actionability and breadth of 42 U.S.C. § 1983 has been limited to dispel the fear that a literal reading of *Monroe* would lead to 42 U.S.C. § 1983 as a "'font of tort law.'" Llaurado, *supra*, at 610, 612 (quoting Paul v. Davis, 424 U.S. 693, 701, 713-14 (1976) (attempting to limit the scope of 42 U.S.C. § 1983 by refusing to find petitioners liable under 42 U.S.C. § 1983 on a tort claim of defamation)). For a more in depth discussion of the limitations of 42 U.S.C. § 1983, see Michael T. Carton, Note, 25 SETON HALL L. REV. 1560, 1562 n.5 (1995) and Daniel Steiner, Note, *Due Process and Section 1983: Limiting* Parratt v. Taylor *to Negligent Conduct*, 71 CAL. L. REV. 253 (1983).

In addition, the *Monroe* Court refused to require the exhaustion of state remedies before recovering under 42 U.S.C. § 1983. *See Monroe*, 365 U.S. at 183. On this issue the Court's position was unambiguous: "The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id. But see* The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, sec. 803(d), 110 Stat. 1321, 1321-71 (1996) (stating: "[n]o action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted") (amending 42 U.S.C. § 1997e (1988) (stating that the exhaustion of state remedies was not mandatory but within official discretion)).

When determining the applicability of 42 U.S.C. § 1983, courts must determine whether the complaint alleges a deprivation of any constitutional or statutory right. *See* Steiner, *supra*, at 260. Most of the alleged deprivations, however, stem from the Due Process Clause of the Fourteenth Amendment, challenging existing state procedures. *See id.* at 261.

As a result of the Supreme Court's decision in *Monroe*, 42 U.S.C. § 1983 became the basis of a significant number of complaints filed in the state and lower federal courts, particularly by prisoners. *See id.* at 258-59. In 1980, for example, there were 12,397 42 U.S.C. § 1983 claims filed by state prisoners, and the numbers continue to increase. *See* Herman, *supra* note 2, at 503 n.99. "This upsurge in volume is said to threaten both efficient judicial administration and the achievement of justice in individual cases, creating the possibility that judges will not be able to identify the meritorious cases in the flood of those deemed frivolous." Turner, *supra* note 9, at 611 (footnote omitted).

[42] *See Wolff*, 418 U.S. at 542-43.

[43] *See id.* at 563. The *Wolff* Court mandated that a charged inmate receive written notice of the pending charges and must be afforded at least 24 hours to prepare for a hearing. *See id.* at 564. In addition, the Supreme Court required the preparation of a

written statement describing the evidence relied on by the factfinders and explaining the rationale for the chosen course of discipline. *See id.*

Discussing the implemented procedures of the Complex, the Supreme Court disagreed with the Eighth Circuit's analysis and asserted that "the Nebraska procedures [were] in some respects constitutionally deficient but the *Morrissey-Scarpelli* procedures need not in all respects be followed in disciplinary cases in state prisons." *Id.* at 560. The *Wolff* Court explained that *Morrissey* set forth the minimum procedural requirements needed to be met before parole can be revoked. *See id.* at 559. The procedures included: (1) written notice of parole violations; (2) disclosure of the evidence against the parolee; (3) an opportunity to be heard; (4) the right to cross-examine and confront adverse witnesses, unless good cause is shown; (5) a neutral and detached hearing committee; and (6) a written statement delineating the evidence relied upon and the reasons for revoking parole. *See id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)). In *Scarpelli*, the Supreme Court added an additional procedural requirement, the right to counsel for parolees under certain circumstances, to the *Morrissey* standard. *See id.* Together, these requirements are known as the *Morrissey-Scarpelli* standard. *See id.* at 559-60.

The *Wolff* Court distinguished *Morrissey* by stating that parole revocation is fundamentally different from the deprivation of good-time credits. *See id.* at 560-61. Unlike parole revocation, the Court explained, the mere deprivation of good-time credit does not change the conditions of the inmate's liberty. *See id.* at 561. Because good-time credits may be restored, the Court articulated, it remains uncertain whether good-time credit revocation would result in the postponement of parole eligibility or an extension of the maximum time to be served. *See id.*

The *Wolff* Court also considered the distinct and atypical conditions of the prison environment and concluded that not all of the *Morrissey-Scarpelli* procedures must be satisfied before prisoners could be deprived of credits for goodtime. *See id.* at 562-63, 571. The Court stated:

> [T]here would be great unwisdom in encasing the disciplinary procedures in an inflexible constitutional straitjacket that would necessarily call for adversary proceedings typical of the criminal trial, very likely raise the level of confrontation between staff and inmate, and make more difficult the utilization of the disciplinary process as a tool to advance the rehabilitative goals of the institution.

Id. at 563.

The *Wolff* Court determined that two of the *Morrissey-Scarpelli* requirements, advanced written notice and a written summary including the evidence relied on and the reasons for the imposed discipline, were impermissibly absent from the Complex's procedures. *See id.*

The *Wolff* Court added a more stringent notice requirement to the Complex's procedures as a means to give the accused party a chance to prepare a defense and to clarify the specific charges brought against him. *See id.* at 564. The Court mandated that the inmate be given at least 24 hours to prepare for a hearing before an adjustment committee. *See id.* These procedural requirements, the Court stated, would strike a balance "between the interests of the inmates and the needs of the institution." *Id.* at 572.

The *Wolff* Court, reluctant to proscribe an inflexible procedure, noted that "'[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'" *Id.* at 560 (quoting Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (purporting that the availability of the protection of the Due Process Clause depends on the circumstances of the case, specifically, the nature of the governmental action and the affected private interest)). Importantly, the *Wolff* Court concluded by stating that its decision "is not graven in stone." *Id.* at 571-72. The *Wolff* Court indicated the need for flexibility because "[a]s

erate pro-prisoner holding, would set the tone for future prisoners' rights decisions.[44] The due process analysis of the *Wolff* Court was the background against which other potential rights were later compared, elaborated, and clarified.[45]

In *Meachum v. Fano*,[46] the Supreme Court considered whether the Due Process Clause entitled a state prisoner to a hearing before he was transferred to a prison with conditions substantially less favorable than the prison to which he was originally confined.[47] In that case, prisoners brought a civil rights suit in federal court, alleging a deprivation of due process of law.[48] The Supreme Court held that the Due Process Clause does not, in itself, protect a lawfully convicted prisoner from transfer within a state penal system.[49] This harsh positivist[50] approach to prison-

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the nature of the prison disciplinary process changes in future years, circumstances may then exist which will require further consideration and reflection by this Court." *Id.* at 572.

[44] *See* Herman, *supra* note 2, at 509.

[45] *See* Robertson, *supra* note 9, at 1347.

[46] 427 U.S. 215 (1976).

[47] *See id.* at 222, 223.

[48] *See id.* In *Meachum*, prisoners implicated in a series of prison fires brought suit under 42 U.S.C. § 1983 against prison officials, alleging that they were denied due process of law when transferred to a less favorable prison without an adequate hearing. *See id.* at 216, 222; *see also supra* note 41 (explaining the relevancy of 42 U.S.C. § 1983). The prison classification board initiated proceedings to decide whether the prisoners should be transferred to another prison, potentially a maximum security facility where the conditions are less favorable. *See Meachum*, 427 U.S. at 216-17. The prisoners received notice of the classification hearing and were informed of the alleged criminal conduct. *See id.* at 217. At the classification hearings in which the inmates were legally represented and allowed to present supporting evidence, the testimony of the prison superintendent was heard and confirmed in the absence of the prisoners. *See id.* at 217-18. The board notified the inmates that the allegations were supported and never furnished them with transcripts of the damaging testimony. *See id.* at 218. The board recommended that the prisoners found guilty of more serious misconduct be transferred from the medium security prison to a maximum security facility where prison conditions were considerably less favorable. *See id.* Reasons for such action were stated in the board's report, which were not then available to the prisoners and, furthermore, did not state the details regarding informant sources. *See id.* at 218-20. Subsequently, the board's determinations were reviewed, its recommendations were wholly accepted, and the inmates were, in fact, transferred. *See id.* at 221.

[49] *See Meachum*, 427 U.S. at 225. At the outset, the *Meachum* Court's opinion rejected the idea that *any* grievous loss imposed by the state is sufficient to invoke Fourteenth Amendment procedural due process protection. *See id.* at 224. The *Meachum* Court found that:

> [t]he Due Process Clause in and of itself [does not] protect a duly convicted prisoner against transfer from one institution to another within the state prison system. . . . That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules.

Id. at 225.

ers' freedoms narrowed the definition of liberty in *Wolff* by noting that an entitlement can be created only when the state imposes substantive decision-making criteria on administrative discretion.[51] This method for

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The *Meachum* Court distinguished *Wolff*, stating that "[t]he liberty interest protected in *Wolff* had its roots in state law, and the minimum procedures appropriate under the circumstances were held required by the Due Process Clause 'to insure that the state-created right is not arbitrarily abrogated.'" *See id.* at 226 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974)); *see also* Goss v. Lopez, 419 U.S. 565, 574, 576 (1975) (holding that students suspended from school for 10 days pursuant to an Ohio statute possessed property interests in public education and liberty interests in reputation protected by the Due Process Clause, which cannot be abrogated without adherence to minimum requirements of procedural protection); Board of Regents v. Roth, 408 U.S. 564, 568, 578-79 (1972) (holding that a state university professor who was discharged without an explanation or a hearing did not possess a protected liberty or property interest in continued employment absent a contract renewal clause, state statute, or university rule); Goldberg v. Kelly, 397 U.S. 254, 261-62 (1970) (finding that welfare, a statutory entitlement, may not be terminated by the state without affording the welfare recipient due process of law). The *Meachum* Court found that Massachusetts law did not confer on prisoners a right to remain in initially assigned prisons and, consequently, held that the basis for invoking the procedural protection of the Fourteenth Amendment in *Wolff* was totally nonexistent. *See Meachum*, 427 U.S. at 226-27. In *Meachum*, the Court was reluctant to involve the federal courts in the daily running of state prisons and, therefore, held that the Due Process Clause does not impose a blanket rule mandating transfer hearings. *See id.* at 228-29.

Dissenting, Justice Stevens, with whom Justices Brennan and Marshall joined, argued that the holding of the majority "rest[s] on a conception of 'liberty' which [is] fundamentally incorrect." *See id.* at 230 (Stevens, J., dissenting). The dissenters posited that the majority's analysis supported the contention that convicted criminals possess a residuum of constitutionally protected liberties, including procedural due process protection before any possible deprivation of an unalienable liberty interest. *See id.* at 231-32 (Stevens, J., dissenting) (citing *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (asserting that the revocation of parole perpetrated a loss so grievous as to bring the parolee's liberty interest in parole within the ambit of Fourteenth Amendment protection)); *see also* Morales v. Schmidt, 489 F.2d 1335, 1338-39 (7th Cir. 1973) (rejecting the view that inmates are mere slaves and asserting that custody and liberty are not mutually exclusive terms). Poignantly, Justice Stevens stated:

> It demeans the holding in *Morrissey*—more importantly it demeans the concept of liberty itself—to ascribe to that holding nothing more than a protection of an interest that the State has created through its own prison regulations. For if the inmate's protected liberty interests are no greater than the State chooses to allow, he is really little more than [a] slave.

Meachum, 427 U.S. at 233 (Stevens, J., dissenting).

Justice Stevens recognized the State's need to supervise and control its prisons, noting the need to change conditions quickly and without judicial review. *See id.* at 234 (Stevens, J., dissenting). The dissent argued, however, that when a change is grievous, it cannot be arbitrarily imposed and due process must ensue. *See id.* Justice Stevens concluded that a transfer to a prison with less favorable conditions constituted a grievous change, which undoubtedly invoked constitutional protection. *See id.* at 235 (Stevens, J., dissenting).

[50] *See* Herman, *supra* note 2, at 484 (defining positivism as a theory by which positive law or statutory law can create protectable liberty interests under the Due Process Clause).

[51] *See id.* at 512, 543.

analyzing prisoners' due process claims, however, proved to be not only important, but ambiguous and problematic.[52]

Three years later, the Supreme Court further elucidated the scope of prisoners' rights under the Fourteenth Amendment in a case involving Nebraska parole procedures.[53] In *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*,[54] the inmates claimed that they were unconstitutionally denied parole and that the parole board's procedures denied them procedural due process.[55] Reversing the decisions of the lower courts, the Supreme Court refused to find a protectable liberty interest in the possibility of parole.[56] The Supreme Court reviewed the applicable Nebraska statute,[57] which provided for an opportunity to be

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[52] *See* Barry R. Bell, *Prisoners' Rights, Institutional Needs, and The Burger Court*, 72 VA. L. REV. 161, 171 (1986). The *Meachum* decision attempted to provide a bright line to curtail developing litigation by refusing to afford prisoners protection under the Due Process Clause without a state law limiting the discretion of prison officials. *See id.* at 174. In later cases analyzing prisoners' rights, however, the bright line test of *Meachum* became blurred. *See id.* at 177.

[53] *See* Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 7-8 (1979).

[54] 442 U.S. 1 (1979).

[55] *See id.* at 3-4. The inmates brought a class action pursuant to 42 U.S.C. § 1983 against the individual members of the parole board. *See id.* at 3. See *supra* note 41 for a more expansive analysis of the interplay between 42 U.S.C. § 1983 and the Due Process Clause.

[56] *See Greenholtz*, 442 U.S. at 5-6, 7; *see also* Inmates of the Neb. Penal & Correctional Complex v. Greenholtz, 576 F.2d 1274, 1281 (8th Cir. 1978). The district court held that a protected liberty interest existed and prescribed additional requirements to guarantee constitutional protection under the *Morrissey* standard. *See Greenholtz*, 442 U.S. at 5. The Eighth Circuit found a statutorily defined protectable interest within the Nebraska statute and modified the requirements needed to ensure due process. *See Greenholtz*, 576 F.2d at 1281. Because this Eighth Circuit procedural expansion squarely conflicted with other courts of appeals' decisions, the Supreme Court granted certiorari to resolve the disparity. *See* Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 439 U.S. 817 (1978); *Greenholtz*, 442 U.S. at 6; *see, e.g.*, Franklin v. Shields, 569 F.2d 784, 788, 790 (4th Cir. 1977) (finding that while a state does not have to provide for parole at all, once it does it confers upon the prisoner a liberty interest in the possibility of being paroled that is subject to the Due Process Clause), *cert. denied*, 435 U.S. 1003 (1978); Brown v. Lundgren, 528 F.2d 1050, 1053 (5th Cir.) (holding that while revocation of parole falls within the procedural protection of the Fourteenth Amendment, the denial of parole does not and the only protection due a prisoner eligible for parole were those afforded by the state's parole enabling statute), *cert. denied*, 429 U.S. 917 (1976); United States *ex rel.* Richerson v. Wolff, 525 F.2d 797, 804 (7th Cir. 1975) (holding that due process implores that the denial of parole falls under the protection of the Due Process Clause to the extent that a brief statement must be issued indicating the reasons for denial), *cert. denied*, 425 U.S. 914 (1976).

[57] *See Greenholtz*, 442 U.S. at 11-16. The second prong of the inmates' argument contended that the language of the Nebraska statute created a protectable liberty interest in the expectation of parole. *See id.* at 11. The inmates relied on the following section, which provides in part:

heard and notification of the board's rationale for parole denial, and concluded that the statute afforded the inmates all the constitutional process due.[58] By refusing to afford constitutional protection to the hope of

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it *shall* order his release unless it is of the opinion that his release should be deferred because: (a) There is a substantial risk that he will not conform to the conditions of parole; (b) His release would depreciate the seriousness of his crime or promote disrespect for law; (c) His release would have a substantially adverse effect on institutional discipline; or (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

NEB. REV. STAT. § 83-1,114(1)(a)-(d) (1976) (emphasis added); *Greenholtz*, 442 U.S. at 11. The inmates argued that the statute created a presumption that parole would be granted unless one of the statutory justifications for denial was present. *See Greenholtz*, 442 U.S. at 12. Relying on the *Wolff* analysis, the inmates alleged that the language and structure of the provision created a legitimate expectation of parole. *See id.*; *see also* note 36 (discussing the *Wolff* Court's finding that Nebraska created a right to good-time credits and that a prisoner could not be stripped of that right without the appropriate minimum due process requirements afforded by the Due Process Clause).

[58] *See Greenholtz*, 442 U.S. at 16. Following precedential trends, the Supreme Court found that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Id.* at 7.

The *Greenholtz* Court determined that a reasonable entitlement to parole was not created merely because a state provided for the possibility of parole. *See id.* at 8-9, 11. In reaching this conclusion, the Court first addressed the inmates' unfounded reliance on *Morrissey* and articulated the distinguishing factors between parole release and parole revocation. *See id.* at 9-10; Morrissey v. Brewer, 408 U.S. 471, 488-89 (1972) (holding that parole revocation determinations must meet minimum due process standards). The *Greenholtz* Court stated that "[t]here is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires." *Greenholtz*, 442 U.S. at 9. Pointing out the crucial distinctions between parole release and parole revocation, the Court noted that parole revocation determinations turn on factual questions, while parole release decisions were almost entirely subjective. *See id.* at 9-10. The *Greenholtz* Court explained that parole determinations, like transfer "decision[s], may be made 'for a variety of reasons and often involve[ ] no more than informed predictions as to what would best serve [correctional purposes] or the safety and welfare of the inmate.'" *Id.* at 10 (quoting Meachum v. Fano, 427 U.S. 215, 225 (1976)) (third alteration in original).

The Court next addressed whether the statute created a protectable interest in the expectation of parole. *See id.* at 11. The Court accepted the inmates' contention that the structure of the provision, combined with the use of the term "shall," committed the board to parole an inmate unless one of the four statutory reasons for denying parole existed. *See id.* at 11-12. For text of the relative statutory provision, see *supra* note 57.

In response to the inmates' allegations, the Court embarked on an examination of Nebraska's statutory procedures to determine whether they afforded the process due under the Federal Constitution. *See Greenholtz*, 442 U.S. at 12. The Supreme Court noted that the Nebraska statute, like many state parole statutes that give broad subjective discretion to the board, was experimental. *See id.* at 13. The Court explained:

> No ideal, error-free way to make parole-release decisions has been developed; the whole question has been and will continue to be the subject of experimentation involving analysis of psychological factors combined with fact evaluation guided by the practical experience of the actual parole de-

> cisionmakers in predicting future behavior. Our system of federalism encourages this state experimentation.

Id. While the *Greenholtz* Court recognized that the language and structure of the Nebraska statute provided a parole mechanism entitled to some constitutional protection, the Court concluded that the statute provided all the process due with respect to discretionary parole decisions. *See id.* at 12, 16.

The Supreme Court rejected the additional procedures mandated by the court of appeals, which required a *formal* hearing for each inmate and, in adverse decisions, the inclusion of a statement explaining the evidence relied on by the board. *See id.* at 14, 15; Inmates of the Neb. Penal & Correctional Complex v. Greenholtz, 576 F.2d 1274, 1283, 1284 (8th Cir. 1978). The *Greenholtz* Court noted that the requirement of a formal hearing would provide only a slight decrease in the likelihood of error and that "[t]o require the parole authority to provide a summary of the evidence would tend to convert the process into an adversary proceeding and to equate the Board's parole-release determination with a guilt determination." *Greenholtz*, 442 U.S. at 14, 15-16. In conclusion, the Court found that the Nebraska statute provided an opportunity for the inmate to be heard and, in cases where parole was denied, the inmate was adequately informed of the reasons for denial. *See id.* at 16. These statutory procedures, the Court remarked, afforded all the process due under the circumstances. *See id.*

Concurring in part and dissenting in part, Justice Powell agreed with the majority that the inmates had a due process right in the parole determination process, but disagreed that the due process analysis hinged on statutory interpretation and that the limited notice mandated by the Nebraska statute comported with the requirements of due process. *See id.* at 18 (Powell, J., concurring in part and dissenting in part). Justice Powell suggested that the state invention of a parole system alone was sufficient to create a constitutionally protected liberty interest and remained unpersuaded by the majority's distinctions between parole revocation and parole release. *See id.* at 19 (Powell, J., concurring in part and dissenting in part).

Justice Marshall, dissenting in part, argued that whenever the state established a parole system, inmates have a legitimate expectation of release and explained that all prisoners who are potentially eligible for parole possess a liberty interest, which cannot be revoked without due process, regardless of the content of statutory language. *See id.* at 22 (Marshall, J., dissenting in part). Justice Marshall contended that the majority opinion reflected a misapplication of prior decisions and a very narrow view of the liberties protected by the Due Process Clause of the Fourteenth Amendment. *See id.*

Dissatisfied with the prison's method of notifying inmates of their parole hearing, Justice Marshall maintained that adequate notice, a basic requirement of due process, was not met by the board's procedures. *See id.* at 37, 38 (Marshall, J., dissenting in part); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14, 15 (1978) (holding that although the utility company provided adequate notice concerning the threat of discontinuing utility service, it did not sufficiently notify customers of the existing procedures available to protest a termination of service decision); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 319-20 (1950) (holding that notice by publication to beneficiaries whose addresses were known was inadequate because other, more easily available, means of notification existed). Justice Marshall noted that the notice procedures failed to specify the date or time of the hearing and that inmates had to, each day, check a bulletin board to find out whether their hearing was scheduled for that day. *See Greenholtz*, 442 U.S. at 37 (Marshall, J., dissenting in part). The Justice argued that, under this procedural scheme, the inmates were not given adequate notice in advance and, as a result, were disadvantaged. *See id.* at 37, 38 (Marshall, J., dissenting in part). Further, the dissenting Justice was convinced that due process required the parole board to give the inmates a written explanation of the evidence relied on by the board and, in addition, to

being paroled, the Court, in *Greenholtz*, further developed the implications of the *Meachum* decision through its continued preoccupation with statutory wording and, consequently, further limited the scope of the entitlement doctrine.[59]

Later, in *Vitek v. Jones*,[60] the Court held that a Nebraska statute allowing the involuntary transfer of a prisoner to a mental institution implicated a liberty interest protected by the Due Process Clause of the Fourteenth Amendment.[61] In that 1980 decision, the respondent, Larry Jones, challenged the adequacy of the procedures of the Nebraska statute governing transfers from the prison to a mental institution.[62] Affirming the district court, the Supreme Court found the existence of a protected liberty interest in the transfer to a mental hospital, held that such an interest

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provide a "meaningful explanation" for its decision to deny parole. *See id.* at 41 (Marshall, J., dissenting in part).

[59] *See* Herman, *supra* note 2, at 514, 515.

[60] 445 U.S. 480 (1980).

[61] *See id.* at 483, 487, 494. The Court explained that § 83-180 of the Nebraska statute authorized the transfer of prisoners determined to be suffering from a mental illness to a mental hospital. *See id.* at 483. Section 83-180(1) provides, in part:

> when a physician or psychologist designated by the [D]irector [of Correctional Services] finds that a person committed to the department suffers from a mental disease or defect. . . . [and] cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available.

NEB. REV. STAT. § 83-180(1) (Cum. Supp. 1976).

The Court determined that § 83-180 created an expectation that inmates would not be relocated unless a mental condition unable to be adequately treated in prison was found to exist. *See id.* at 489-90. The *Vitek* Court stated that prisoners were given a liberty interest, entitling them to those procedural protections considered to be appropriate under the given circumstances. *See id.* at 490. The *Vitek* Court explained further:

> if the State grants a prisoner a right or expectation that adverse action will not be taken against him except upon the occurrence of specified behavior, "the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed."

Id. at 490-91 (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)).

[62] *See Vitek*, 445 U.S. at 484. Jones, who was diagnosed as mentally ill and transferred to a state mental hospital, claimed that the Nebraska procedures permitting transfers from prisons to mental hospitals were inadequate on procedural due process grounds. *See id.* Accordingly, the district court declared § 83-180(1) unconstitutional in its application to Jones, holding that Jones was not afforded the minimum requirements of due process. *See* Miller v. Vitek, 437 F. Supp. 569, 574-75 (D. Neb. 1977). The district court found that Jones's transfer should have been accompanied and guided by adequate notice, an adversarial hearing before an impartial decision-maker, a written report by the fact-finder describing the evidence relied on and the rationale for the decision, and access to appointed counsel for indigent prisoners. *See id.* at 575. In declaring § 83-180 unconstitutional as applied, the district court permanently enjoined the state from relocating Jones to a mental hospital. *See Vitek*, 445 U.S. at 485.

must be accompanied by appropriate procedural protection and, consequently, set forth procedures required to ensure minimum due process under the circumstances.[63] Here, the Supreme Court relaxed the harsh-

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[63] *See Vitek*, 445 U.S. at 494-95. The Supreme Court found that Jones had a protectable liberty interest entitling him to appropriate due process protection. *See id.* at 490. Based on this finding, the Supreme Court noted that due process requirements were not diminished just because the State developed its own seemingly adequate procedural safeguards. *See id.* at 491.

The *Vitek* Court found that the transfer of an inmate to a mental hospital deserved appropriate procedural protection independent of § 83-180(1). *See id.* The Supreme Court confirmed that involuntary confinement to a mental facility involved a greater than expected limitation on freedom because it stigmatized the individual, unjustifiably intruded on an individual's personal security, and represented a significant change in the original conditions of confinement. *See id.* at 492-93. The Court further explained:

> It is indisputable that commitment to a mental hospital "can engender adverse social consequences to the individual" and that "[w]hether we label this phenomena 'stigma' or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual."

Id. at 492. (quoting Addington v. Texas, 441 U.S. 418, 426, 431 (1979) (requiring a clear and convincing standard in civil commitment proceedings)). The *Vitek* Court illustrated that ordinary citizens could not be subjected to involuntary confinement without triggering due process rights and therefore concluded that convicted felons, such as Jones, are also entitled to the benefit of appropriate procedures. *See id.* at 492-93.

Acknowledging that changes having a substantial and adverse affect on the conditions of confinement do not alone invoke due process protection, the *Vitek* Court decided that "involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual." *Id.* at 493; *see* Montanye v. Haymes, 427 U.S. 236, 243 (1976) (finding that a prisoner had no justifiable expectation in remaining in his original place of confinement); Jackson v. Indiana, 406 U.S. 715, 738 (1972) (explaining that due process mandates that the duration and nature of commitment bear a reasonable relation to the objective of confinement); Specht v. Patterson, 386 U.S. 605, 607, 609-10 (1967) (outlining procedural due process requirements for a post-conviction change in sentence); Baxstrom v. Herold, 383 U.S. 107, 114-15 (1966) (holding that the state may not civilly commit a prisoner, near the end of a prison term without a judicial hearing). The *Vitek* Court posited that criminal conviction and sentencing does not give the State the right to classify the convict as mentally ill and subject him, involuntarily, to psychiatric treatment without due process of law. *See Vitek*, 445 U.S. at 493-94.

After considering the district court's position, the Supreme Court found independently that Jones's involuntary transfer pursuant to § 83-180(1) to a mental facility undoubtedly implicated a protectable liberty interest and launched a remedial analysis. *See id.* at 494. To afford sufficient protection of the identified liberty interest, the district court noted, and the Supreme Court agreed, that the following minimum procedures must be followed before a prisoner can be transferred to a mental institution: (1) notice in writing of the transfer; (2) a hearing presenting the evidence relied on in making the decision to transfer; (3) an opportunity to be heard, to present witness testimony, and to cross-examine the state's witnesses at the hearing; (4) an independent decision-maker; (5) a written statement prepared by the fact-finder describing the evidence relied upon and the rationale for the transfer; (6) the availability of legal counsel for indigent prisoners; and (7) timely notification of all these implicated rights. *See id.* at 494-95; *see also* Mor-

ness of the *Meachum* approach and temporarily laid aside its threshold test, requiring mandatory language and unfettered official discretion.[64]

In 1983, the United States Supreme Court continued its commitment to addressing and discerning the due process liberty interests of prisoners in *Hewitt v. Helms*.[65] In that case, the Supreme Court determined that

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rissey v. Brewer, 408 U.S. 471, 488-89 (1972) (creating similar procedures applicable to the revocation of parole in accordance with minimal due process protection).

Essentially affirming the district court's determinations, the Supreme Court recognized and balanced the State's interest in segregating and treating mentally ill prisoners with the prisoner's interest in not being arbitrarily or wrongly diagnosed as mentally ill. *See Vitek*, 445 U.S. at 495. Despite the State's strong motivation to separate and treat, the Court agreed with the district court's finding that the risk of error inherent in making determinations pursuant to § 83-180 is substantial enough to require appropriate procedures to safeguard against error. *See id.*

Interestingly, Justice Powell, while agreeing that Jones was entitled to competent assistance at the required hearing, disagreed with the assertion that the State is required to furnish a licensed attorney. *See id.* at 497 (Powell, J., concurring in part). The concurring Justice articulated that the State was not constitutionally required to appoint a licensed attorney to represent a prisoner and explained that due process is satisfied when a prisoner is provided "qualified and independent" assistance by, for example, a health professional, before being involuntarily committed. *See id.* at 500 (Powell, J., concurring in part); *see also* Gagnon v. Scarpelli, 411 U.S. 778, 790-91 (1973) (holding that counsel was not a necessary requirement at probation revocation hearings and that the availability of counsel should be determined case by case).

[64] *See* Herman, *supra* note 2, at 523-24.

> [T]he rationale of *Vitek* is significant and should not be obscured: conviction does not extinguish all liberty; even a prisoner retains a residuum of liberty and is not altogether a slave of the state or the vagaries of its laws. The line drawn in *Vitek* may be difficult to apply, but it is a line. The discretion that the Burger Court has awarded prison administrators is generous, but it is not absolute.

Id. at 525.

[65] 459 U.S. 460, 467, 472 (1983). Aaron Helms, an inmate in a Pennsylvania correctional institution, was removed from the general population to be questioned by state police about a prison uprising. *See id.* at 463. An internal investigation began, and Helms received a report charging him with assaulting officers and conspiring to disrupt normal institutional routines by forcefully taking over the prison control center. *See id.* at 464. Four days later, a hearing committee convened to determine the legitimacy of the charges brought against Helms. *See id.* Although the committee did not have enough information to make a determination of guilt, Helms was subjected to continued confinement in restricted housing. *See id.* Almost one month later, after the State had filed criminal charges of assault and riot, the committee reconvened and unanimously concluded that Helms was to remain in segregation. *See id.* at 465. Later that month, a hearing committee, relying on the testimony of one guard, found Helms guilty of disruptive conspiracy and ordered his placement in disciplinary segregation for a period of six months, but dropped the initial misconduct charge without a determination of guilt. *See id.*

Helms brought suit claiming that the prison administrators imposed confinement and administrative segregation in violation of his rights under the Due Process Clause of the Fourteenth Amendment. *See id.* at 462. The court of appeals found that Helms possessed a protected liberty interest rooted in state law, but not the Federal Constitution, in continuing to be in the general prison population. *See* Helms v. Hewitt, 655 F.2d 487,

although the Pennsylvania regulations describing the procedures confining an inmate to administrative segregation[66] created a protected liberty interest, the delineated procedures satisfied the minimum requirements of the Due Process Clause.[67] The Court further found that an informal,

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503 (3d Cir. 1981). The Third Circuit found that the Pennsylvania statutes governing the administration of state prisons created a statutory interest that required the initial hearing to comply with the procedures mandated in *Wolff*. *See id.* (citing Wolff v. McDonnell, 418 U.S. 539, 564, 566 (1974) (holding that inmates facing disciplinary sanctions for misconduct be afforded: (1) 24-hour written notice of the charges; (2) a right to call witnesses and present evidence; (3) aid in preparing a defense; and (4) a written statement explaining the reasons relied on by the tribunal)). The Third Circuit explained:

> The facts of this case portray a state prisoner subjected to disciplinary sanctions entailing a loss of liberty on the strength of, literally, next to no evidence. . . . A determination of guilt on such a record, with no primary evidence of guilt in the form of witness statements, oral or written, or any form of corroborative evidence, amounts to a determination on the blind acceptance of the prison officer's statement. Such a practice is unacceptable; it does not fulfill *Wolff's* perception of "mutual accommodation between institutional needs and objectives" and constitutional requirements of due process.

Id. at 502 (citation omitted).

[66] *See Hewitt*, 459 U.S. at 468. Under the prison regulations of Pennsylvania, administrative segregation may be used to protect a prisoner's safety, to break up disruptive groups of prisoners, to protect inmates from other prisoners, or to house inmates awaiting later classification or transfer. *See id.*; 37 PA. CODE. § 95.104 (1978) (authorizing the imposition of administrative segregation when: (1) the prisoner poses a security threat; (2) disciplinary charges are pending against the prisoner; and (3) the prisoner requires protection). The *Hewitt* Court noted that "administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration." 459 U.S. at 468.

[67] *See Hewitt*, 459 U.S. at 466. The *Hewitt* Court began its analysis by explaining basic theoretical legal principles regarding due process. *See id.* at 466-67. The Supreme Court instructed that protected liberty interests can arise from either one of two sources: the Due Process Clause of the Fourteenth Amendment or state law. *See id.* at 466 (citing Meachum v. Fano, 427 U.S. 215, 225, 226 (1976) (holding that the Due Process Clause itself does not protect a prisoner against transfer from one prison to another absent state law conferring such a right)); *see also* Wright v. Enomoto, 462 F. Supp. 397, 403 (N.D. Cal. 1976) (concluding that state law created a liberty interest in segregated confinement within a prison), *aff'd*, 434 U.S. 1052 (1978). The Court concluded that an examination of the Pennsylvania regulations and statutes in question leads to finding a protected liberty interest in remaining in general population. *See Hewitt*, 459 U.S. at 470-71.

Conceding that a statutorily-created liberty interest is rooted in the Pennsylvania regulation, the *Hewitt* Court found that "in this case the Commonwealth has gone beyond simple procedural guidelines." *Id.* at 471. The Supreme Court found that the regulation contained "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 [such as] 'the need for control,' or 'the threat of a serious disturbance.'" *Id.* at 471-72 (citation omitted); *see also* 37 PA. CODE § 95.104(b)(3) (providing that an inmate subject to confinement: (1) "shall" receive written notification of a pending investigation; (2) "will receive a hearing if disciplinary action is being considered after the investigation"; (3) "must" be released if the determination is negative; and (4) that the investigation "shall" commence immediately to ascertain

nonadversarial review of the evidence is sufficient to determine whether an inmate poses a security threat and whether the prisoner should be confined to administrative segregation.[68]

Concluding that an inmate must, at a minimum, receive notice of the alleged charges and an opportunity to present his side to the decision-maker, the Court determined that the prisoner received all the process

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whether a violation has occurred). With this in mind, the *Hewitt* Court determined that the statute's explicit mandatory language and requirement of specific substantive predicates dictates the conclusion that Pennsylvania has unmistakenly created a liberty interest that is recognized and protected under the Due Process Clause. *See Hewitt*, 459 U.S. at 472.

Having concluded that a liberty interest existed within the Pennsylvania regulations governing administrative segregation, the Supreme Court continued its analysis, deciding whether the process afforded Helms under the regulations conformed with the minimum standards of due process in the prison context. *See id.* Conceding that prison administrators should be given wide deference in adopting and executing prison policy, the *Hewitt* Court balanced the competing private interests at stake with those governmental needs. *See id.* at 473 (quoting Bell v. Wolfish, 441 U.S. 520, 546-47 (1979) (stating that due to the importance of preserving prison order, discipline may justify suppression of the already diminished rights of duly convicted inmates and pretrial detainees, and that prison administrators should be allowed discretion in the formulation and carrying out of prison policies that are deemed necessary)). Relying on *Mathews v. Eldridge*, the *Hewitt* Court weighed the individual interest at stake against the government objective involved and the probable value of any procedural requirements, to determine what process, if any, was due under the circumstances. *See id.* at 473 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (articulating three factors to be weighed in determining the parameters of due process: (1) the private interest affected; (2) the probability of erroneous deprivation of the interest by existing procedures and the probable value of any additional procedural safeguards; and (3) the governmental interest involved)). The *Hewitt* Court, balancing the public and private interests, concluded that ultimately, "the Due Process Clause requires only an informal nonadversary review of evidence . . . in order to confine an inmate feared to be a threat to institutional security to administrative segregation." *Id.* at 474.

[68] *See Hewitt*, 459 U.S. at 476. Relying on precedent set forth in *Gerstein v. Pugh*, the *Hewitt* Court articulated that the process of confining a prisoner to administrative segregation pending a complete investigation of the disciplinary charges filed against him does not require any elaborate procedural safeguards. *See id.* at 475 (citing Gerstein v. Pugh, 420 U.S. 103, 121, 124-25 (1975) (mandating that a "fair and reliable determination of probable cause" by a judicial officer be made as a condition of any appreciable pretrial restraint on liberty and requiring that only an informal proceeding was needed to determine whether or not probable cause existed to believe the detained person committed the alleged offense)). Using *Gerstein* as a guide, the *Hewitt* Court concluded that some of the procedural requirements of *Gerstein* are not necessary in the unique context of prison discipline. *See id.* at 476. The Supreme Court decided that only an informal, nonadversarial review of the evidence is sufficient to determine whether an inmate poses a security threat and whether the inmate should be confined to administrative segregation until an investigation into those charges is complete. *See id.* The *Hewitt* Court required two informal procedures: some notice of the pending charges and an opportunity for the inmate to present his view. *See id.* So long as these procedures are used, as they were in *Hewitt*, the Court determined that due process was satisfied. *See id.*

due.[69] The *Hewitt* Court found the existence of a liberty interest because the Pennsylvania statute contained mandatory language, as did the statute in *Greenholtz*, and also provided substantive predicates to guide the decision-makers.[70]

Later the same year, in *Olim v. Wakinekona*,[71] however, the Supreme Court declined to implicate a liberty interest within the confines of the Due Process Clause when a state prisoner was transferred from a Hawaii prison to one located in California.[72] In that case, Delbert Kaahanui Wakinekona filed suit, alleging that he had unequivocally been denied procedural due process because the prison committee that suggested his interstate prison transfer violated Hawaii's prison rules.[73] The Su-

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[69] *See id.* at 477.

[70] *See* Herman, *supra* note 2, at 522.

[71] 461 U.S. 238 (1983).

[72] *See id.* at 251. Relying on the prior decision of *Meachum v. Fano*, the *Olim* Court found, through analogy, that just as there is no justifiable reason to expect to be incarcerated in any specific state prison, there is no reason to expect to be imprisoned in any particular state. *See id.* at 245; Meachum v. Fano, 427 U.S. 215, 225 (1976) (finding that the Due Process Clause does not protect a prisoner against intrastate prison transfer); *see also* Montanye v. Haymes, 427 U.S. 236, 242-43 (1976) (holding that an intrastate prison transfer did not implicate Due Process Clause protection).

Rejecting the prisoner's argument and reiterating prior law, the *Olim* Court distinguished *Vitek* by stating that a transfer to a mental institution is not analogous to the interstate transfer in question. *See Olim*, 461 U.S. at 245; Vitek v. Jones, 445 U.S. 480, 487-88 (1980) (stating that the involuntary transfer of a prisoner from a state prison to a mental hospital implicated the protection of the Due Process Clause). The *Olim* Court commented further by stating that transferring a prisoner to another prison, unlike an involuntary transfer to a mental institution, was well within the limits of the state's authority. *See Olim*, 461 U.S. at 247 (citing *Meachum*, 427 U.S. at 225) (holding that the Due Process Clause does not protect an inmate from transfers from one prison to another within the state prison system even when the transfer would result in harsher conditions)). Concluding, the *Olim* Court found that because the prisoner had no justifiable expectation to be imprisoned in a particular state, the inmate cannot justifiably expect not to be transferred to another state's prison. *See id.* at 245. The Supreme Court adamantly posited that such a transfer is within the limits of the Constitution and does not serve as a deprivation under the Due Process Clause. *See id.* at 247-48.

[73] *See Olim*, 461 U.S. at 243. The prisoner in *Olim* was convicted of murder and is serving a life imprisonment term in a Hawaii state prison outside of Honolulu. *See id.* at 240. While in the confines of the Hawaii penal system, the prisoner was designated a security risk and, accordingly, was placed in the prison's maximum control unit. *See id.* As a result of a breakdown in discipline, a prison committee held hearings on August 2, 1976, to determine the reasons the unit was failing and singled out the prisoner as a troublemaker. *See id.* Three days later, the prisoner received notice that a committee would conduct a hearing on August 10 to determine whether his prison classification should be changed and whether or not he should be moved to another Hawaii or mainland facility. *See id.* The committee recommended to the prison administrator that the prisoner should maintain the maximum security risk classification and be transferred to a mainland prison. *See id.* at 241. The inmate received a written explanation from the committee, justifying its decision. *See id.* The prison administrator fully accepted the recommendation of the committee and transferred the inmate to a state prison in California. *See id.* The commit-

preme Court held that the Due Process Clause does not protect an inmate from an interstate prison transfer because inmates have no justifiable expectation that they will be incarcerated in any particular state, even when the transfer is long distance.[74] In addition, the Court determined that Hawaii's prison regulations[75] do not create a constitutionally protected liberty interest because there is, within the language of the regulations,

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tee that conducted the August 10 hearing was comprised of the same individuals who presided at the August 2 hearing. *See id.*

The inmate then filed suit in federal district court pursuant to 42 U.S.C. § 1983, alleging that the committee recommending his transfer from Hawaii to California was comprised of the same persons who had presided at the initial hearing in violation of Hawaii prison regulations. *See id.* at 243. For a brief explanation of the federal remedy of 42 U.S.C. § 1983 in general, and as it relates to prisoners, see *supra* note 41. The district court dismissed the complaint, finding that the Hawaii rules governing prison transfers did not create a substantive liberty interest and that, consequently, no protection was due. *See* Wakinekona v. Olim, 459 F. Supp. 473, 476 (D. Haw. 1978).

The Ninth Circuit reversed, holding that Hawaii, in promulgating a rule providing for a transfer hearing before an independent decision-maker created a protectable liberty interest. *See* Wakinekona v. Olim, 664 F.2d 708, 711, 712 (9th Cir. 1981). The Ninth Circuit reasoned that the Hawaii rule provides Hawaii prisoners with a justifiable expectation that a transfer to the mainland will not occur without a hearing by an impartial committee. *See id.* at 712.

[74] *See Olim*, 461 U.S. at 247-48.

[75] *See id.* at 241 & n.1. The prisons of Hawaii have promulgated regulations governing prison administration to advance the interests of the state, the prison, and the inmates. *See id.* at 241-42.

Rule IV anticipated the need to transfer inmates interstate and required a hearing prior to such transfers involving a "grievous loss" to the prisoner. *See id.* at 242. The Hawaii prison regulations also required the creation of "an *impartial* program committee" to conduct the proscribed hearing. *See id.* (emphasis added). Rule IV further provided that the committee must be "'composed of at least three members *who were not actively involved in the process by which the inmate . . . was brought before the committee.*'" *Id.* (emphasis added). The inmate, under Rule IV, must: (1) receive written notice of the pending hearing; (2) be permitted to cross-examine witnesses; (3) be afforded an opportunity to be heard; and (4) be apprised of the committee's findings after the hearing has been conducted. *See id.*

After the proscribed hearing, the committee makes a recommendation to the prison administrator, who then decides which course of action to take and

> [the Administrator] may, as the *final decisionmaker*: (a) Affirm or reverse, in whole or in part, the recommendation; or (b) hold in abeyance any action he believes jeopardizes the safety, security, or welfare of the staff, inmate[s], or the community . . . and refer the matter back to the Program Committee for further study and recommendation.

Id. at 242-43 (emphasis added) (first alteration in original).

In light of the foregoing Hawaii provisions, the *Olim* Court noted that the administrator's discretion to transfer an inmate under Rule IV was unfettered and that there were no standards restricting the administrator's decision. *See id.* at 249. Acknowledging that states may create liberty interests "by placing substantive limitations on official discretion," the *Olim* Court refused to find that Rule IV created a protectable liberty interest without the inherent presence of statutorily proscribed decisionmaking criteria. *See id.*

no substantive restriction on the official discretion of the prison administrators.[76]

Against this foundation of precedent, the United States Supreme Court, in *Sandin v. Conner*,[77] limited state-created due process liberty interests to freedom from restraint where the hardship is not within the original conditions of confinement and poses atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.[78] In *Sandin*, the Court shifted the focus of the liberty interest inquiry used in *Hewitt* and later cases, focusing on the nature of the deprivation instead of the language of a particular regulation.[79]

Writing for the majority, Chief Justice Rehnquist began by providing an outline and analysis of precedent to determine under what circumstances state prison regulations give inmates liberty interests protected by the Due Process Clause.[80] The Chief Justice explained that the decision of the *Wolff* Court contributed much to the landscape of prisoners' due process rights by defining rights through an intricate balancing of the concerns of prison management with prisoners' liberties.[81]

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[76] *Olim*, 461 U.S. at 249. The *Olim* Court explained that a liberty interest is essentially a substantive interest. *See id.* at 250 (quoting Shango v. Jurich, 681 F.2d 1091, 1100-01 (7th Cir. 1982) (citing Suckle v. Madison Gen. Hosp., 499 F.2d 1364, 1366 (7th Cir. 1974)).

The Supreme Court illuminated the principle that:

> a State creates a protected liberty interest by placing substantive limitations on official discretion. An inmate must show "that particularized standards or criteria guide the State's decisionmakers." *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981) (Brennan, J., concurring). If the decision-maker is not "required to base its decisions on objective and defined criteria," but instead "can deny the requested relief for any constitutionally permissible reason or for no reason at all," the State has not created a constitutionally protected liberty interest.

Olim, 461 U.S. at 249. (other citations omitted). The *Olim* Court determined that Hawaii's prison regulations, Rule IV particularly, did not place substantive limitations on the prison official's discretion and, subsequently, concluded that it did not create a protectable liberty interest. *See id.*; *see also* Lono v. Ariyoshi, 621 P.2d 976, 981 (Haw. 1981) (holding that Rule IV did not create a protectable liberty interest because the discretion of prison administrators to transfer inmates is virtually unfettered).

[77] 115 S. Ct. 2293 (1995).

[78] *See id.* at 2300, 2301.

[79] *See id.* at 2298-300.

[80] *See id.* at 2297-300.

[81] *See id.* at 2297. See *supra* notes 36-40, 43 and accompanying text for a discussion of the *Wolff* Court's analysis. Chief Justice Rehnquist realized that the *Wolff* Court's due process analysis led to the holding that it was not the Due Process Clause itself that created a liberty interest in good-time credits for good behavior; rather it was the Nebraska statutory provision governing the administration of good-time credits. *See id.* at 2297. The *Sandin* Court recognized *Wolff's* important contribution to due process analysis in the context of prisoners' rights and noted that the *Wolff* Court had analyzed the statutory liberty interest as one of "real substance" and, more importantly, set forth the minimum re-

Continuing, the Court instructed that the foundational analysis in *Wolff* led to the *Meachum* Court's more thorough treatment of the definition of a liberty interest.[82] Chief Justice Rehnquist noted that the *Meachum* Court created a mechanical dichotomy, which focused on whether the state action was discretionary or mandatory, unlike the *Wolff* Court, which looked for state-created interests of "real substance."[83]

Shortly after *Meachum*, the majority continued, the Supreme Court employed a different approach to define state-created liberty interests and, starting with the decision in *Greenholtz*, began examining whether the state created a liberty interest through its prison regulations.[84] Presently, the Chief Justice explained that due process analysis looked not to whether the state created an interest of "real substance," but instead inquired whether the state had, within statutory provisions, proscribed procedural guidelines and used mandatory language.[85]

As this new methodology took hold, the majority observed, inmates no longer needed to show that their loss of liberty was grievous because the Court had stopped examining the nature of the state-created interest and focused instead on semantics.[86] Since the Supreme Court's decision in *Hewitt*, according to the Chief Justice, the Court has mistakenly wres-

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quirements to reach a compromise between the needs of the penal institution and the objectives of the Constitution. *See id.* (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974)).

[82] *See Sandin*, 115 S. Ct. at 2297.

[83] *See id.* at 2297, 2298. Chief Justice Rehnquist explained that the *Meachum* Court distinguished *Wolff*:

> by noting that there the protected liberty interest in good time credit had been created by state law; here, no comparable [state] law stripped officials of the discretion to transfer prisoners to alternate facilities "for whatever reason or for no reason at all."

Id. at 2297 (quoting Meachum v. Fano, 427 U.S. 215, 228 (1976)).

[84] *See id.* at 2298. The Court observed that *Greenholtz* foreshadowed the due process "methodology that would come to full fruition in *Hewitt v. Helms*." *Id.* In *Greenholtz*, the Court accepted the prisoner's argument that the inclusion of the word "shall" in the Nebraska statute resulted in a foreseeable expectation of a particular outcome, namely release absent one of the enumerated justifications for denial. *See id.* (citing Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 442 U.S. 1, 11-12 (1979)).

[85] *See id.* at 2298 (citing *Hewitt*, 459 U.S. at 471-72). Chief Justice Rehnquist noted:

> Such a conclusion may be entirely sensible in the ordinary task of construing a statute defining rights and remedies available to the general public. It is a good deal less sensible in the case of a prison regulation primarily designed to guide correctional officials in the administration of a prison. Not only are such regulations not designed to confer rights on inmates, but the result of the negative implication jurisprudence is not to require the prison officials to follow the negative implication drawn from the regulation, but is instead to attach procedural protection that may be of quite a different nature.

Id. at 2299.

[86] *See id.* at 2298.

tled with the intricate language of prison guidelines in determining whether mandatory language created a protectable expectation that a state would furnish a particular outcome in regard to the inmate's conditions of confinement.[87]

Shifting the focus of the liberty interest inquiry from the nature of the interest to the language of a particular regulation, the Chief Justice asserted, wrongfully encouraged inmates to comb state statutes and regulations, searching for mandatory language upon which to base claims of entitlements to state-conferred privileges.[88] Chief Justice Rehnquist commented that *Hewitt* also produced the undesirable effects of federal court involvement in the daily management of prisons and the creation of disincentives for states to codify their prison management procedures.[89]

The Chief Justice criticized the precedential trends and concluded that the exploration of mandatory language of prisoner regulations has severely deviated from the real purposes underlying the Due Process Clause of the Fourteenth Amendment.[90] Scrutinizing this trend in due process analysis, the Chief Justice asserted that "[t]he time has come to return to the due process principles" established in *Wolff* and *Meachum*.[91] The majority opinion assured that the abandonment of

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[87] *See Sandin*, 115 S. Ct. at 2298. In *Hewitt*, the Supreme Court made explicit what was implicit in *Greenholtz*—language of an unmistakenly mandatory character in the regulations created a protected liberty interest. *See id.* (quoting *Hewitt*, 459 U.S. at 471).

[88] *See id.* at 2299.

[89] *See id.* From a public policy standpoint, Chief Justice Rehnquist remarked that prison administrators should be concerned foremost with the safety of the prison staff and inmates. *See id.* In the majority's analysis, the regulations were not promulgated solely for the benefit of the prisoners, but to grant prison officials the needed authority and discretion to deal daily with "prisoners hostile to the authoritarian structure of the prison environment." *Id.* The majority further noted that the present methodology encourages states not to codify their regulations and to confer standardless discretion on prison officials. *See id.*

In addition, the Chief Justice was concerned that the *Hewitt* approach has led to the involvement of federal courts in the daily management of prisons, which "often squander[s] judicial resources with little offsetting benefit to anyone." *Id.* The Chief Justice remarked that such interference also directly conflicts with the Supreme Court's consistent view that federal courts should defer to the judgment of state officials trained to manage such a unique and volatile environment. *See id.*; *see also Hewitt*, 549 U.S. at 470 (suggesting that prison regulations, unlike regulations in other areas, may warrant a different treatment as far as the creation of entitlements because of the need to insure the safe operation of prisons); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125, 126 (1977) (stating that lawful incarceration necessarily places limitations on prisoners' constitutional rights as a result of the realities of running and managing a penal institution); Burgin v. Nix, 899 F.2d 733, 734, 735 (8th Cir. 1990) (holding that the details of prisoners' diets were in the discretion of prison officials, assuming the diets were adequate).

[90] *See Sandin*, 115 S. Ct. at 2300.

[91] *Id.*

Hewitt's due process methodology did not, technically, overrule any Supreme Court holding, but only an approach that was difficult to administer and produced irregular and unusual results.[92]

Returning to and applying traditional due process standards, Chief Justice Rehnquist looked to the nature of the interest involved and concluded that Conner's disciplinary confinement was not an atypical, significant deprivation of liberty and did not affect the duration of Conner's sentence because his punishment was within the confines of the original sentence.[93] In conclusion, the Court determined that Conner did not have a protected liberty interest, under either the Due Process Clause or Hawaii law, entitling him to the procedural protection of *Wolff*.[94]

In a dissenting opinion, Justice Ginsberg, with whom Justice Stevens joined, argued with the majority's determination that a liberty interest protected by the Due Process Clause of the Fourteenth Amendment did not exist.[95] Justice Ginsberg explained that Conner's punishment

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[92] *See id.* n.5.

[93] *See id.* at 2301.

[94] *See id.* at 2302. The *Sandin* Court addressed and rejected Conner's argument, which asserted that state action, qualifying as punitive, abridges liberty interests protected under the Due Process Clause even absent any state regulation. *See id.* at 2300; Bell v. Wolfish, 441 U.S. 520, 536-37 (1979) (holding that arrestees may be imprisoned until trial if they are considered, for example, flight risks, so long as the detainment does not rise to the level of punishment); Ingraham v. Wright, 430 U.S. 651, 682 (1977) (finding that the Due Process Clause does not command notice and a hearing before the imposition of corporal punishment); *see also* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165-66, 184 (1963) (holding that free citizens must receive the procedural safeguards of the Fifth and Sixth Amendments prior to revocation of citizenship as a congressional punitive measure for draft evasion). Chief Justice Rehnquist found that punishment of incarcerated prisoners served different purposes than those enunciated in *Bell* and *Ingraham*. *See Sandin*, 115 S. Ct. at 2301.

According to the Chief Justice's reasoning, reprimand in the prison context effectuated prisoner rehabilitative goals and prison management, which fall within the expected parameters of the originally imposed sentence. *See id.*

The Chief Justice further determined that the disciplinary confinement that Conner endured mirrored the conditions imposed upon prisoners in protective custody and administrative segregation. *See id.* The *Sandin* Court stated that Conner's 30-day placement in disciplinary segregation did not prove to be a "major disruption" when compared to life outside disciplinary segregation. *See id.* In addition, Chief Justice Rehnquist mentioned that the duration of Conner's punishment would not change the duration of his initial confinement. *See id.* at 2302.

Finally, the Chief Justice noted that prisoners, like Conner, have other protections from arbitrary state action that affects the conditions of their confinement besides the Due Process Clause of the Fourteenth Amendment. *See id.* n.11. The Chief Justice noted that prisoners may still bring suit to challenge the conditions of their confinement under the Eighth Amendment, the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and also may use prison grievance procedures and judicial review in the state courts for recourse. *See id.*

[95] *See Sandin*, 115 S. Ct. at 2302-04 (Ginsberg, J., dissenting).

produced a dramatic alteration to the conditions of his confinement.[96] The dissenting Justices based their differing opinion on the Due Process Clause itself and argued that the Constitution is the source for the protection due Conner.[97] Furthermore, Justice Ginsberg stated that recognized constitutional liberties should not hinge upon the particularities of the language of local prison codes.[98] Rather, the dissenting Justice would adhere to the basic universal due process requirements that fundamentally include notice and an opportunity to respond.[99] Justice Ginsberg found that Conner was deprived of a liberty entitled to protection under the Due Process Clause.[100]

In a separate dissenting opinion, Justice Breyer scrutinized the majority's reasoning and found that Chief Justice Rehnquist's analysis was misplaced and, in light of precedent, erroneous.[101] Justice Breyer com-

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[96] *See id.* at 2302 (Ginsberg, J., dissenting). Justice Ginsberg refuted the majority's position regarding the significance of the prisoner's disciplinary confinement, stating that

> discipline means punishment for misconduct; it rests on a finding of wrongdoing that can adversely affect an inmate's parole prospects. Disciplinary confinement therefore cannot be bracketed with administrative segregation and protective custody, both measures that carry no long-term consequences.

Id. at 2303 n.1 (Ginsberg, J., dissenting).

Justice Ginsberg explained that the disciplinary confinement to which the prisoner was subjected had immediate and lingering consequences. *See id.* at 2302 (Ginsberg, J., dissenting). Contending that disciplinary segregation not only stigmatizes prisoners but diminishes parole prospects, Justice Ginsberg found no reason why such confinement should not qualify as "liberty-depriving for purposes of Due Process Clause protection." *Id.*

[97] *See id.* at 2303 (Ginsberg, J., dissenting).

[98] *See id.* Justice Ginsberg articulated that prison codes, such as Hawaii's, should not be the "wellspring" of due process protection. *See id.* Refuting such a reliance on statutory construction, Justice Ginsberg predicted that fundamental rights would be determined state-by-state, becoming something in one state and something else in another. *See id.* This conceptualization of liberty, Justice Ginsberg argued, is not the liberty enshrined in the Bill of Rights. *See id.* The dissent stated that "'[t]he Due Process Clause protects [the unalienable liberty recognized in the Declaration of Independence] rather than the particular rights or privileges conferred by specific laws or regulations.'" *Id.* (second alteration in original) (quoting Meachum v. Fano, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting)).

[99] *See id.* Justice Ginsberg criticized the majority's conclusion, stating that it created an ambiguous, undefined "category of liberty interest that is something less than the one the Due Process Clause itself shields, something more than anything a prison code provides." *Id.* n.2. In particular, the dissenting Justice attacked the standard of "atypical and significant hardship" announced by the majority. *Id.* Justice Ginsberg stated that these key words were left unanalyzed and that the majority left their meaning unfathomable. *See id.*

[100] *See Sandin*, 115 S. Ct. at 2304 (Ginsberg, J., dissenting).

[101] *See id.*

mented that the majority, while not disagreeing with pre-existing law, changed it radically, leaving the law of this area uncertain.[102]

Arguing that the holding may be interpreted as granting significantly less protection against liberty deprivation, the dissenting Justice argued that there is no inherent need to change existing law to reach the majority's objective.[103] Justice Breyer suggested that the majority should have, without radical revision, elaborated and explained the existing standards as they applied to Conner to achieve its objective of "remov[ing] minor prison matters from federal-court scrutiny."[104]

Analyzing the majority's finding that Conner's segregation did not meet the "atypical significant deprivation" standard, Justice Breyer agreed with the contention that the punishment mirrored the conditions of administrative segregation and protective custody.[105] Justice Breyer also agreed that prison officials, pursuant to Hawaii's prison regulations, were given broad discretion.[106] The dissenting Justice, however, could not agree that the expungement of Conner's record wiped out any trace of a liberty interest.[107] Therefore, in applying the majority's standard of "atypical and significant hardship," Justice Breyer concluded that Conner was deprived of a constitutionally protected liberty as a result of the major changes in his condition of confinement.[108]

The *Sandin* Court's rejection of the methodology of *Hewitt* and its return to the traditional analysis of *Wolff* has done nothing to clarify or develop prisoners' rights under the Due Process Clause. Although the *Sandin* majority recognized and admitted the disasters[109] of the recent line of entitlement analysis, the Justices did not completely resolve the ongoing conflict between that doctrine and the traditional view that minimum protection for property and liberty can be found in the Due Process Clause of the Constitution.[110] Thus, the Supreme Court's opin-

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[102] *See id.* at 2306 (Breyer, J., dissenting).

[103] *See id.*

[104] *Id.*

[105] *See Sandin*, 115 S. Ct. at 2309 (Breyer, J., dissenting).

[106] *See id.*

[107] *See id.*

[108] *See id.*

[109] *See id.* at 2299. Such disasters include the potential for states to abrogate individuals' and prisoners' Fourteenth Amendment procedural due process rights by deliberately constructing statutes to exclude the creation of liberty interest by not using mandatory language or giving away unfettered decision-making power. *See id.* Another disaster would be the constant involvement of the federal judiciary in the daily administration of prisons, already an area in which the federal courts are admittedly disinterested. *See id.*

[110] For a discussion of the disagreement among the Justices regarding the conflict between the traditional view and the entitlement doctrine, see Karen H. Flax, *Liberty, Prop-*

ion in *Sandin* has not improved the clarity of Fourteenth Amendment jurisprudence.

Instead, this Court merely imposed its own standard of "atypical and significant" hardship without providing guidelines, definitions or examples of its meaning. The Supreme Court's weakening of the entitlements doctrine and adoption of a mutated form of the "substantial hardship" standard of *Wolff* should be viewed as a serious blow to prisoners' rights law, potentially insulating prisoners' constitutional claims from judicial review.

Colleen Tracy

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erty, and The Burger Court: The Entitlement Doctrine in Transition, 60 TUL. L. REV. 889, 900 (1986).