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The Hijacking: The Remnants of Morrissey-Wolff Due Process in Solitary Confinement after *Sandin v. Conner*

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I. INTRODUCTION

Fifty years ago, in 1972, the United States Supreme Court, in an opinion by its new Chief Justice Warren Burger, issued a landmark prisoners' rights decision in *Morrissey v. Brewer*.[1] It involved the constitutionality of a parole board's revocation of paroles without a hearing, an issue that I had considerable involvement in during my law

1. Morrissey v. Brewer, 408 U.S. 471 (1972).

school years and the early years of my professional career with the Legal Services Organization (LSO) of Indianapolis—including co-authoring an amicus curiae brief on behalf of Morrissey while the case was pending before the Supreme Court. The fiftieth anniversary of the *Morrissey* decision has provided the occasion to write a retrospective on the historic decision and its legacy, including its continuing relevance today.

Celebrating Morrissey v. Brewer at 50! in the centennial edition of the NEBRASKA LAW REVIEW provides an in-depth examination of *Morrissey* and its progeny, *Wolff v. McDonnell*.[2] In *Wolff*, the Supreme Court extended due process protection to prison disciplinary decision making and opened the federal courts' doors to prisoners' constitutional claims for the first time.[3] *Wolff* also made a point that due process protections would apply to solitary confinement.[4] *Celebrating Morrissey* examined how *Morrissey*'s due process analytical framework was extended by *Wolff v. McDonnell*, *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*,[5] and *Vitek v. Jones*,[6] but was also limited in *Meachum v. Fano*.[7] *Wolff, Greenholtz,* and *Vitek* arose in the Nebraska correctional system, with the Nebraska Treatment & Corrections Act of 1969 (TCA) figuring prominently in each decision.[8] The Nebraska TCA was the catalyst for the Court's initial recognition of a state-created liberty interest in *Wolff* in 1974 and for the state-created liberty interest holdings in both *Greenholtz and Vitek* a few years later.[9] Like *Morrissey*, *Vitek* was also based on the

2. Russell E. Lovell, II, *In Celebration of Morrissey v. Brewer at 50! A Surprising UNL LAW Back Story to the Prisoners' Rights' Due Process Landmark*, 100 NEB. L. REV. 905 [hereinafter Celebrating Morrissey]. *See Celebrating Morrissey* for a discussion of this Author's involvement in correctional and parole reform in Nebraska and the back story which resulted in his involvement in the appellate stages of the *Morrissey* case. My article also provided the occasion to thank Harvey Perlman and the late Robert Kutak for their superb mentorship as we drafted and negotiated the Nebraska Treatment & Corrections Act (TCA). Although he was not involved in that legislative internship, the constitutional law and civil procedure I learned from Professor Richard Harnsberger were directly relevant to the 1968 Nebraska Law Review article and Amicus Curiae Brief I co-authored in *Morrissey*. Dick was a wonderful mentor too, and he was a member of the UNL law faculty with whom I remained in close touch. I always looked forward to a cup of coffee or lunch with Dick on annual visits to Lincoln. Affable, good-humored, with a twinkle in his eye, Dick Harnsberger's kindness added immeasurably to my UNL Law school experience.
3. Wolff v. McDonnell, 418 U.S. 539 (1974).
4. *Id.* at 564.
5. For a full discussion of Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1 (1979), *see Celebrating Morrissey*, *supra* note 2.
6. For a full discussion of Vitek v. Jones, 445 U.S. 480 (1980), *see infra* section I.D.
7. For a full discussion of Meachum v. Fano, 427 U.S. 215 (1976), *see infra* section I.C.
8. *See infra* sections I.B, I.C, and I.D.
9. *Id.*

"arising under the constitution" prong.[10] The state-created liberty approach builds upon the genius of the federal-state system that allows experimentation at the state level. Often that experience enables the Court or Congress to fine-tune and fashion a nationwide rule. Readers are directed to *Celebrating Morrissey* for detailed analysis of *Morrissey* and each of the above-mentioned cases, as well as their continuing relevance today.

This second Article, *A Hijacking: The Remnants of Morrissey-Wolff Due Process in Solitary Confinement after Sandin v. Conner*, will examine the continuing evolution of due process protections for prisoners placed in solitary confinement. Prisoners' rights in solitary confinement and due process were additional areas in which I had extensive involvement with the Indianapolis LSO. Both were central issues in *Aikens v. Lash*,[11] where the federal district court issued an injunction that closed a 48-cell solitary confinement building at the Indiana State Prison.[12] After a brief refresher on *Morrissey* and *Wolff*, this Article reviews the 1970's and 1980's caselaw that uniformly found solitary confinement triggered a liberty interest requiring significant due process protections—*Enomoto v. Wright*,[13] *Hughes v. Rowe*,[14] and *Hewitt v. Helms*.[15] *Wright* and *Hewitt* held that due process attached not only to disciplinary segregation but also administrative segregation.[16]

This Article will then examine *Sandin v. Conner* in detail.[17] In 1995 while the nation was experiencing a prison population explosion during the War on Drugs,[18] Chief Justice Rehnquist in *Sandin* crafted a new test for determining when a liberty interest would be recognized as arising under the constitution or by virtue of state law, which set the stage for sharp curtailment of *Morrissey-Wolff*'s application in solitary confinement cases.[19] Although the Chief Justice claimed that

10. *See infra* section I.D.
11. Aikens v. Lash, 371 F. Supp. 482 (N.D. Ind. 1974), *aff'd*, 514 F.2d 55 (7th Cir. 1975), *vacated for further consideration on due process issues only*, 425 U.S. 947 (1976), *prior judgment and opinion reinstated as modified*, 547 F.2d 372 (7th Cir. 1976).
12. *See Celebrating Morrissey*, *supra* note 2.
13. Enomoto v. Wright, 434 U.S. 1052 (1978). *See infra* sections II.A, II.B, and II.C.
14. Hughes v. Rowe, 449 US. 5, 9 (1980). *See infra* section II.B.
15. Hewitt v. Helms, 459 U.S. 460, 469 (1983). *See infra* section II.C.
16. *See infra* sections II.A and II.C.
17. Sandin v. Conner, 515 U.S. 472 (1995).
18. Sentencing Project, *Criminal Justice Facts*, THE SENTENCING FACTS, https://www.sentencingproject.org/criminal-justice-facts/ [https://perma.cc/G5S2-248C] (last visited Mar. 27, 2022). Michelle Alexander's pathbreaking book, *The New Jim Crow*, makes a powerful case that the Drug War, which officially began in 1982, has been the major contributor to America's mass incarceration and to dramatic racial disparities. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2d ed. 2020).
19. Sandin v. Conner, 515 U.S. 472 (1995).

Sandin's new test was a return to first principles, the dissents by Justices Ginsburg, Stevens, Breyer, and Souter vigorously disputed that claim. We will find that Justice Breyer's fear that *Sandin* was a stealth ruling that had worked a radical change of law quickly proved true. As construed by the federal circuit courts, *Sandin* essentially eliminated due process protection in the imposition of solitary confinement in all but the most extreme cases.

A. *Morrissey v. Brewer* (1972): Due Process Comes to Parole Revocation

Iowa caselaw afforded no right to a hearing to a parolee when he or she was charged with a violation of the conditions of parole. The Iowa cases reasoned that parole was a privilege and therefore it could be revoked by the state without having to demonstrate cause at a hearing.[20] In its landmark *Morrissey v. Brewer* decision, in an opinion written by Chief Justice Warren Burger, the Supreme Court rejected this right-privilege distinction, reasoning that while parole may be a privilege, a person on parole has a liberty interest that cannot be revoked without due process.[21] *Morrissey* recognized that a prisoner on parole has a limited set of constitutional rights, and, while those rights are not as robust as those of citizens who have not violated the criminal law, they do include the right to due process of law.[22] In the *Morrissey* case, that meant that the State could not revoke his parole without affording him a prior hearing at which he could seek to rebut a charge that he violated the conditions of his parole, or, if he did commit a technical violation, that there were mitigating circumstances.[23]

Morrissey recognized there was a second stage to the due process analysis, what it characterized as the "what process is due" stage.[24] Although cautioning that the "full panoply of rights due a defendant in a [criminal] proceeding does not apply to parole revocations," the Chief Justice held that due process required an evidentiary hearing with significant procedural protections not only at the final hearing before the parole board but also at the preliminary hearing stage.[25] The *Morrissey* Court summarized "the minimum requirements of due process" at the final parole board hearing:

> They include (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer spe-

20. Curtis v. Bennett, 131 N.W.2d 1 (Iowa 1964); Cole v. Holliday, 171 N.W.2d 603 (Iowa 1969); Curtis v. Bennett, 351 F.2d 931 (8th Cir. 1965).
21. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
22. *Id.*
23. *Id.* at 484.
24. *Id.* at 484–90.
25. *Id.*

> cifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.[26]

The Court emphasized that this more formal hearing process "should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial."[27]

B. *Wolff v. McDonnell* (1974): Due Process Comes to Internal Prison Discipline

Let's first study the big picture. Like *Morrissey*, it is important to note that the *Wolff* Court was unanimous in holding (1) that due process protections attached to the prison's revocation of good-time credits and (2) that, although not all of the *Morrissey* procedural safeguards were found to attach in the prison discipline setting, the following safeguards did:

> [I]nmates are constitutionally entitled to advance written notice of the charges against them and a statement of the evidence relied on, the facts found, and the reasons supporting the disciplinary board's decision. [A]n inmate is also constitutionally entitled to a hearing and an opportunity to speak in his own defense.[28]

However, Justices Marshall and Brennan argued the Court had not gone far enough while also acknowledging that "[t]hese are valuable procedural safeguards, and I do not mean for a moment to denigrate their importance."[29]

In its application of *Morrissey*'s "grievous loss" threshold test, which determines whether a liberty interest arises that is protected by the constitution, *Wolff* found that due process protections applied even though the revocation of good time was "qualitatively and quantitatively different from the revocation of parole or probation"[30] involved in *Morrissey* and was not "the same immediate disaster that the revocation of parole was for the parolee" in *Morrissey*.[31] Thus, the loss of good time credits, though not as severe a deprivation as revocation of parole, was significant enough to implicate the inmate's liberty interest that triggers due process protection. Because the Nebraska statute limited forfeiture of good time to disciplinary rulings finding "flagrant or serious" misconduct, Justice White, writing for the Court, concluded that revocation of good-time credit constituted a grievous

26. *Id.* at 489.
27. *Id.*
28. Wolff v. McDonnell, 418 U.S. 539, 581 (1974) (Marshall, J., concurring in part).
29. *Id.*
30. *Id.* at 561.
31. *Id.* at 560–61.

loss within the meaning of *Morrissey*.[32] The Court held those due process precedents were fully applicable and, thus, "a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State."[33]

Morrissey was the touchstone for the *Wolff* decision, but the state-created liberty interest was an important difference. *Morrissey* found a due process right arose because Iowa law deprived parolees of a liberty interest that was created under the constitution. *Wolff* found a due process right arose because the Nebraska penal laws only permitted forfeiture of good time credit "[i]n cases of flagrant or serious misconduct."[34] This is a distinction that matters as to the scope of the impact of these rulings. *Morrissey*'s ruling has nationwide impact, binding on every state's parole system; *Wolff*'s holding is binding on the Nebraska prison system and, by analogy, to other states with statutes that have the same statutory protections before prison discipline can be imposed.

Having found a state-created liberty interest that is protected under the Fourteenth Amendment, the *Wolff* Court held that the amount of process due is determined by the federal constitution (not merely by the process that may have been provided by state law).[35] To make this determination, the Court employed a balancing test that considered "the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."[36] The Court recognized that "the deprivation of good time is unquestionably a matter of considerable importance" and that is confirmed by the State "reserv[ing] it as a sanction for serious misconduct."[37] Nonetheless, the Majority found that "the major consideration militating against adopting the full range of procedures suggested by Morrissey for alleged parole violators is the very different stake the

32. *Id.*
33. *Id.* at 558.
34. *Id.* at 546–47; *see also* NEB. REV. STAT. § 83-1,107(1)–(2) (Cum. Supp. 1972) (providing for allowance of good time and explaining how it factors into parole eligibility, and the reductions of such terms "may be forfeited, withheld, and restored by the chief executive officer of the facility . . . after the offender has been consulted regarding the charges of misconduct.").
35. Wolff v. McDonnell, 418 U.S. 539, 561 (1974).
36. *Id.* at 560 (citation omitted). Mathews v. Eldridge, 424 U.S. 319 (1976), had not yet been decided. It added a third factor: the risk of erroneous decision using the existing procedures. *Mathews*' three-part test to determine the sufficiency of due process procedures in prisons remains the governing standard at *Morrissey* stage two: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.
37. *Wolff*, 418 U.S. at 560–61.

State has in the structure and content of the prison disciplinary hearing"[38] which must take into account the reality of "the necessity to maintain an acceptable level of personal security in the institution."[39] Based on this balancing test, the Majority held "that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals."[40]

The dissent criticized the Court's rulings that granted prison officials' discretion as to whether and to what extent an inmate can present witnesses or other evidence, and that denied cross-examination and the assistance of retained counsel. The dissent pointed to *Chambers v. Mississippi* for the importance of witness testimony: "Few rights are more fundamental than that of an accused to present witnesses in his own defense."[41]

Although not necessary to the Court's disposition of the constitutionality of revocation of good time without a hearing, the *Wolff* Court made a powerful point by confirming that the same due process protections would have been applicable had the prison authorities sought to impose solitary confinement as the discipline. The *Wolff* Court noted:

> [U]nder the Nebraska system, the same procedures are employed where disciplinary confinement is imposed. The deprivation of good time and imposition of 'solitary' confinement are reserved for instances where serious misbehavior has occurred. This appears a realistic approach, for it would be difficult for the purposes of procedural due process to distinguish between the procedures that are required where good time is forfeited and those that must be extended *when solitary confinement is at issue. The latter represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct. Here, as in the case of good time, there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction.*[42]

38. *Id.* at 561.

39. *Id.* at 562–63 (also stating that "[t]he reality is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority and between inmates who are being disciplined and those who would charge or furnish evidence against them. Retaliation is much more than a theoretical possibility; and the basic and unavoidable task of providing reasonable personal safety for guards and inmates may be at stake, to say nothing of the impact of disciplinary confrontations and the resulting escalation of personal antagonism on the important aims of the correctional process.").

40. *Id.* at 566.

41. *Id.* at 583 (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973)).

42. *Wolff*, 418 U.S. at 571 n.19 (emphasis added). The Court explained: "When a prisoner is isolated in solitary confinement, there appear to be two different types of conditions to which he may be exposed. He may be incarcerated alone in the usual 'disciplinary cell,' with privileges severely limited, for as long as necessary,

Six cases—*Meachum v. Fano*, *Enomoto v. Wright*, *Vitek v. Jones*, *Hughes v. Rowe*, *Hewitt v. Helms*, *Harper v. Washington*—exemplify the Supreme Court's efforts to strike the right balance between procedural fairness for prisoners and prison administration concerns in the two decades prior to *Sandin*. *Meachum* dealt with an important institutional matter: intraprison transfer of inmates and began early on to define the limits of *Wolff*. *Vitek* and *Harper* held that the *Morrissey-Wolff* procedural protections are required before an inmate can be transferred to a prison mental health institution, distinguishing such transfers from the prison-to-prison transfers in *Meachum*. *Wright*, *Hughes*, and *Hewitt* confirmed *Wolff*'s application to both administrative and disciplinary solitary confinement.

C. *Meachum v. Fano* (1976): Intrastate Prison Transfers to Maximum Security Prison

The *Meachum* Court, in an opinion written by Justice White, held that the Due Process Clause is not implicated in every change where "the conditions of confinement [have] a substantial adverse impact on the prisoner,"[43] and that the transfer to a maximum-security prison with more burdensome conditions was "within the normal limits or range of custody which the conviction has authorized the State to impose."[44] *Wolff* was distinguished. First, unlike the forfeiture of good-time credits, the prison transfers would not directly affect the length of a prisoner's incarceration; second, the inmates were not placed in solitary or disciplinary confinement: "No [prisoner] was subjected to disciplinary punishment upon arrival at the transfer prison. None of the transfers ordered entailed loss of good time or disciplinary confinement."[45]

Justice Stevens, writing for Justices Brennan, Marshall, and himself, dissented because they were "unable to identify a principled basis for differentiating between a transfer from the general prison population to solitary confinement and a transfer involving equally disparate conditions between one physical facility and another."[46] Implicit in this observation was recognition that imposition of solitary confinement triggered due process protections per *Wolff*.

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or he may be put in a 'dry cell,' which unlike regular cells, contains no sink or toilet." *Id.* at 552 n.9.

43. Meachum v. Fano, 427 U.S. 215, 224 (1976).

44. *Id.* at 225.

45. *Id.* at 221–22.

46. *Id.* at 235. This observation confirms what appears to be the Court's common understanding, following *Wolff v. McDonnell*, that solitary confinement constituted a deprivation of liberty that required due process safeguards before its imposition. 418 U.S. 539 (1974).

D. *Vitek v. Jones* (1980): Prisoner Transfer to Mental Hospital

Justice White, as he had done in *Wolff* and *Meachum*, wrote the opinion for the Court.

1. State-Created Liberty Interest

The district court found that Nebraska Revised Statute § 83-180(1) gave Jones a liberty interest which required due process protection.[47] Section 83-180(1) provides, in relevant part, that "a prisoner would not be transferred unless he suffered from a mental disease or defect that could not be adequately treated in the prison."[48] This reflected not only law on the books, but the actual "practice" of the Nebraska prison system.

Justice White, writing for the Court,[49] held that these Nebraska TCA statutes created a state-created liberty interest:

> This "objective expectation, firmly fixed in state law and official penal complex practice," that a prisoner would not be transferred unless he suffered from a mental disease or defect that could not be adequately treated in the prison, gave Jones a liberty interest that entitled him to the benefits of appropriate procedures in connection with determining the conditions that warranted his transfer to a mental hospital.[50]

Despite some parameters it imposed in the context of intra-prison transfers in *Meachum v. Fano*, the Court made clear that *Morrissey* and *Wolff* provided the due process touchstone.[51] Citing *Enomoto v. Wright*,[52] Justice White pointed out that "following *Meachum* . . . we continued to recognize that state statutes may grant prisoners liberty interests that invoke due process protections when prisoners are transferred to solitary confinement for disciplinary or administrative reasons."[53]

2. Liberty Interest Created Under the Constitution

The Court also found that a liberty interest arose directly under the constitution, pointing to precedent that found involuntary commitment is "more than a loss of freedom" and "can engender adverse social consequences."[54] The Court noted Jones's experience at the prison system's mental hospital which "[c]ompelled treatment in the form of

47. Vitek v. Jones, 445 U.S. 480, 487–88 (1980).
48. *Id.* at 483.
49. The Majority was comprised of five Justices. Justice Stewart wrote a dissent for himself, the Chief Justice, and Justice Rehnquist; Justice Blackmun wrote a separate dissent. All four dissenters argued that the case was moot.
50. *Vitek*, 445 U.S. at 489–90.
51. *Id.* at 488.
52. Enomoto v. Wright, 434 U.S. 1052 (1978).
53. *Vitek*, 445 U.S. at 489.
54. *Id.* at 492 (quoting Addington v. Texas, 441 U.S. 418, 425–26 (1979)).

mandatory behavior modification programs."[55] Justice White extensively discussed the much greater restrictions that are experienced by inmates who have been transferred pursuant to an involuntary commitment to a psychiatric prison hospital. Not only is the inmate deprived of the general population prison living circumstances, the psychiatric hospital's behavior modification therapy is very intrusive on the inmate's personal security, so much so that such transfers of persons in the outside world are only permissible after a civil commitment hearing.

The Court concluded that the proposed transfer to a mental hospital in *Vitek* would work not merely a major change in the status quo, but a "deprivation of liberty."[56] More specifically, the Court stated: "[T]he stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that requires procedural protections."[57] In sum, the Court rejected the State's argument that transfer to a mental hospital is within the permissible range of confinement options for inmates: "Such consequences visited on the prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of a crime."[58]

3. Full Morrissey Procedural Safeguards Are The "Process Due"

The Court then turned to *Morrissey* stage two, "what process is due." With one minor tweak of the district court's injunction, the Court held that the *Morrissey* procedural protections must be afforded a prisoner whose transfer to a mental hospital has been proposed:

> "(A) Written notice;" "(B) [A]n opportunity to be heard in person and to present documentary evidence;" "(C) An opportunity at the hearing to present testimony of witnesses" and a qualified right to confront and cross-examine adverse witnesses; "(D) An independent decisionmaker;" "(E) A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;" "(F) [T]he assistance of "legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and" "(G) Effective and timely notice of all of the foregoing rights."[59]

The Court modified (F) to provide the district court with greater discretion as to whom to appoint, adding licensed psychiatrist or other mental health professional to the lawyer option.

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55. *Id.*
56. *Id.* at 494–96.
57. *Id.* at 494.
58. *Id.* at 493.
59. *Id.* at 494–95.

E. *Washington v. Harper* (1990)

In *Washington v. Harper*, the Court noted that the Special Offender Center (SOC), a correctional institute established by the Washington Department of Corrections, had developed SOC Policy 600.30 "in partial response to this Court's decision in *Vitek v. Jones*" holding that due process protections applied to prisoner transfers to mental hospitals.[60] Policy 600.30 was a detailed regulation intended to provide clear administrative guidance as to when an inmate could involuntarily be administered psychotropic medications and as to what procedural safeguards must be provided to protect the individual inmate's personal autonomy interests.[61]

In a 6-3 opinion written by Justice Kennedy, the Court examined the state regulation which "permit[ed] a psychiatrist to treat an inmate with antipsychotic drugs against his wishes only if he is found to be (1) mentally ill and (2) gravely disabled or dangerous" and concluded "the Policy creates a justifiable expectation on the part of the inmate that the drugs will not be administered unless those conditions exist."[62] The Court also held "that, in addition to the liberty interest created by the State's Policy, [the inmate] possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment."[63]

Following *Vitek*'s embrace of full-*Morrissey* procedures as its compass, Justice Kennedy concluded that the procedures set forth in the SOC departmental regulations satisfied due process in all respects: "The Policy provides for notice, the right to be present at an adversary hearing, and the right to present and cross-examine witnesses."[64] The dissenters expressed considerable concern about the independence of the internal decision-making process. Because of the adequacy of the procedures developed by the institution, the Court Majority held it would not speculate about theoretical deficiencies.[65]

60. Washington v. Harper, 494 U.S. 210, 215 (1990).

61. *Id.* at 215–16.

62. *Id.* at 221.

63. *Id.* at 221–22.

64. *Id.* at 235.

65. The Majority found the procedures sufficient because they prohibited anyone "involved in the inmate's current treatment or diagnosis" from acting as a decisionmaker. *Id.* at 233. They further found that there was no evidence that "any institutional biases" impacted "the decision to medicate respondent against his will," and, therefore, they would not "presume that members of the staff lack the necessary independence to provide an inmate with a full and fair hearing in accordance with the Policy." *Id.*

F. The Common Ground Between *Morrissey* and *Vitek-Harper*, and How *Vitek-Harper* Differed from *Morrissey*

As it did in *Morrissey*, the Supreme Court in *Vitek* and *Harper* found a liberty interest arose directly under the federal constitution. In addition, *Vitek* and *Harper* found an alternative ground for their holdings, that a state-created liberty interest arose under the Nebraska statutes in *Vitek* and the Washington State SOC regulations in *Harper*. There could be no such state-created liberty interest holding in *Morrissey* as the Iowa caselaw was in direct conflict with parolee Morrissey's federal constitutional due process rights.

By looking to state statutes that it found created liberty interests triggering due process protections in *Wolff*, *Greenholtz*, *Vitek*, *Harper*, and *Hewitt*, the Court expanded due process protections in prison discipline in situations where it was not comfortable fashioning a nationwide constitutional rule. *Harper* based its finding of a state-created liberty interest on the detailed prison *regulations* promulgated by state correctional authorities; there was no indication in Justice Kennedy's opinion that he relied on a state statute. When the Court concludes that the state has created a liberty interest, it will apply a federal constitutional lens. It will examine whether the process afforded in state statutes, prison regulations, and practice satisfies the *Mathews* three-factor "what process is due" test, and, if not, will hold that federal courts can impose additional procedural safeguards, above and beyond any contained in the state legislation and prison regulations. By authorizing representation by a court-appointed advocate, including one with psychiatric expertise but not necessarily a lawyer, the procedural safeguards in *Vitek* were the full *Morrissey-Scarpelli* complement.

II. THE SOLITARY CONFINEMENT DUE PROCESS PRECEDENTS

A. *Enomoto v. Wright* (1978)

In 1978, four years after *Wolff,* the Supreme Court summarily affirmed the judgment in *Enomoto v. Wright*. The three-judge federal district court explained its reasoning:

> When a prisoner is transferred from the general prison population to the grossly more onerous conditions of maximum security, be it for disciplinary or for administrative reasons, there is severe impairment of the residuum of liberty which he retains as a prisoner[,] an impairment which triggers the requirement for due process safeguards.[66]

66. Enomoto v. Wright, 462 F. Supp. 397, 402 (N.D. Cal. 1976), *aff'd*, 434 U.S. 1052 (1978).

As is typical of summary affirmances, the Supreme Court affirmed the district court's judgment without writing an opinion.[67] Justice Rehnquist, joined by the Chief Justice, dissented on a jurisdictional issue, but the dissent did not take issue with the district court judgment on the merits. A summary affirmance is binding on the lower courts, but it "affirms the judgment of the lower court only and not necessarily the reasoning by which it was reached."[68] However, scholars Nowak and Rotunda observed that a summary affirmance "is not as binding on the Supreme Court as would be one of its own more considered opinions."[69]

Wright was an inmate in California's San Quentin prison who brought a class action "challeng[ing] the [California prison system's] procedures resulting in confinement of inmates in maximum security units for 'administrative' reasons."[70] The three-judge federal district court found that "In many cases, prisoners have been confined in solitary for days sometimes for weeks before any hearing. In some cases, inmates have been so confined and not told the reasons, even informally, until appearance before the Committee."[71]

Although recognizing that *Meachum* placed limits on *Wolff*'s state-created liberty interest rationale, the Court instructed that *Wolff-Meachum* held "that if the state itself imposed limits on [prison authorities'] discretion . . . the state creates a liberty interest which is

67. *Id.*

68. Mandel v. Bradley, 432 U.S. 173, 176 (1977) (Burger, C.J., concurring) (quoting Fusari v. Steinberg, 419 U.S. 379, 391–92 (1975). The Court explained that a summary affirmance "should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." *Mandel*, 432 U.S. at 176. *See also* JOHN NOVAK & RONALD ROTUNDA, TREATISE ON CONSTITUTIONAL LAW: at 30 n.17 (6th Ed. West Pub. Co. 2000) (citing *Mandel v. Bradley*).

69. NOVAK & ROTUNDA, at pg. 31 (citing Edelman v. Jordan, 415 U.S. 651, 671 (1974)). Justice Rehnquist, writing for the Court in *Edelman*, observed that while "summary affirmances obviously are of precedential value . . . [e]qually obviously, they are not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Id.*

70. *Wright*, 462 F. Supp. at 398–99. The district court made the following findings as to the conditions of confinement in the maximum security cells:

> Prisoners in the maximum security units are confined in cells approximately five feet wide by eight feet long. The cells are without fresh air or daylight, both ventilation and lighting being poor. The lights in some cells are controlled by guards. It is difficult for prisoners to get needed medical attention. They must eat in their cells or not at all. They are allowed very limited exercise and virtually no contact with other prisoners. They cannot participate in vocational programs. They are denied those entertainment privileges provided for the general prison population. Parole is usually denied to them until after release from maximum security segregation.

Id. at 399 (footnote omitted).

71. *Id.* at 400.

protected by due process."[72] The Court found that "the inmate has an interest, conferred by statewide regulation and protected by due process, in not being confined in maximum security segregation unless he is found, for clearly documented reasons, to come within the standard sets by the rules."[73]

The district court summarized the *Wolff* due process protections and modeled its injunction so as to include each element:

> An opportunity to appear before the decision-making body; written notice of the charge against him in advance of the hearing; an opportunity to present witnesses and documentary evidence "when (it) will not be hazardous to institutional safety or correctional goals"; a written statement of the reasons for the decision to punish him and of the evidence on which it is based; and, if he is illiterate or if the issues are complex, counsel-substitute (either a fellow inmate or a member of the prison staff) to help prepare his defense.[74]

The district court held: "Defendants [prison officials] have made no showing that inmates confined in maximum security for administrative reasons are in fact given prior notice, a hearing, and a written decision."[75] Nor have the officials made any "showing that prison administration or safety will be jeopardized if defendants are required to accord plaintiffs at least the minimal protections called for by *Wolff* in the case of disciplinary sanctions."[76] The Court concluded that the *Wolff* procedures were "essential if the inmate is to have any chance whatever to prove that he does not represent a risk to the security of the institution and thereby to avoid subjection to the severe deprivations of confinement in maximum security."[77]

The Court expressed deep concerns about "defendants' arbitrary practices in imposing administrative segregation," especially the vague allegations and the potential abuse of the indefinite duration that is common to administrative segregation.[78] The Court stated it would defer its decision "as to whether even *more* procedural protections must be required for such confinement for administrative reasons."[79] When disciplinary segregation is invoked its purpose is punitive, but the court explained it was particularly concerned about the indefinite nature of administrative segregation:

> The deprivation suffered by a prisoner confined for administrative reasons is greater than that suffered by one confined on a disciplinary charge. The latter is for a definite term, generally for a maximum of ten days. In contrast, administrative segregation is for an indefinite period [and] the prisoner may be confined for months, even years, without hope of release. The charges at a

72. *Id.* at 402.
73. *Id.* at 403.
74. *Id.*
75. *Id.* at 401.
76. *Id.* at 403.
77. *Id.*
78. *Id.* at 404.
79. *Id.* at 403 (emphasis added).

> disciplinary hearing are definite and narrow. The inmate is accused of violating a prison rule. In contrast, as is evidenced by plaintiffs' exhibits, the charges at a hearing resulting in administrative confinement tend to be vague, and are frequently based on mere rumor, suspicion, or conjecture.[80]

B. *Hughes v. Rowe* (1980)

On September 20, 1977, the inmate "was charged with a violation of prison regulations and placed in segregation."[81] A disciplinary hearing was held two days later, where he admitted to drinking a homemade alcoholic beverage.[82] He was confined to segregation for ten days and thirty days' good-time was forfeited.[83] After he exhausted his internal administrative remedies, he filed pro se a 42 U.S.C. § 1983 suit in federal district court alleging he was placed in a segregation cell prior to his hearing, without justification, because there was no "emergency or other necessity."[84] The district court dismissed the inmate's section 1983 civil rights action, and this dismissal was affirmed by the Seventh Circuit.[85] The Seventh Circuit concluded that the inmate was afforded the necessary procedural safeguards at his hearing on September 22.[86]

The Supreme Court, in an unsigned per curiam opinion,[87] reversed the Seventh Circuit, holding that "[s]egregation of a prisoner without a prior hearing may violate due process if the postponement of procedural protections is not justified by apprehended emergency conditions."[88] The Court found that the Seventh Circuit had overlooked the inmate's factual allegation that "the disciplinary hearing did not take place until two days after [the inmate] was placed in segregation on September 20."[89] The Court held that the inmate's complaint was sufficient to proceed to trial on his "claim that he was unjustifiably placed in segregation without a prior hearing."[90] The Court explained that

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80. *Id.* at 403–04 (internal citation omitted).
81. Hughes v. Rowe, 449 US. 5, 7 (1980).
82. *Id.* at 7–8.
83. *Id.* at 8.
84. *Id.*
85. *Id.* at 9.
86. *Id.*
87. One scholar noted:

> Most cases accepted for review by the Supreme Court proceed to plenary consideration-full briefing, oral argument, and a full opinion signed by the author . . . When there is plenary treatment, the likelihood is that the Court will issue a signed opinion . . . The Court also gives summary treatment to some cases . . . Summary treatment, however, may result in a full but unsigned opinion, designated *per curiam*, or 'by the Court.'

Stephen L. Wasby et al., *The Per Curiam Opinion: Its Nature and Functions*, 76 JUDICATURE 29, 29–30 (1992).
88. Hughes v. Rowe, 449 U.S. 5, 11 (1980).
89. *Id.*
90. *Id.* at 12.

the inmate's complaint "alleged that segregation was unnecessary in [his] case because his offense did not involve violence and he did not present a 'clear and present danger.'"[91] Although the DOC regulations "authorized segregation of prisoners pending investigation of disciplinary matters, where required 'in the interest of institutional security and safety," the Court pointed out there was no "showing that concern for institutional security and safety was the basis for immediate segregation of [the prisoner.]"[92] The State put on no evidence explaining why he was placed in segregation in advance of his hearing.[93]

The Court Majority does not expressly state that it found a liberty interest arising under the constitution, but it is evident that was its holding. First, there is no mention in the Majority opinion of any Illinois statute or prison regulation as a basis for finding a state-created liberty interest. Without any discussion of a state-created liberty interest, the Court likely thought the obvious default would be the arising under the constitution branch of due process analysis and therefore it need not be more explicit. Indeed, in *Morrissey* itself, the Court did not expressly state the parolee's liberty interest arose under the constitution.

Justice White "agree[d] with the result in Part II . . . [as] a prior hearing was required for the particular disciplinary action involved here-segregation and loss of good time."[94] But, citing *Wolff*, he contended that the due process "procedural protections were triggered only because under state law—here prison regulations—segregation and good-time reduction could be imposed only for serious disciplinary lapses and only after a prior hearing."[95] Justice White also commented that if the prisoner succeeded on remand, "it is likely only nominal damages would be available" since he "had a full hearing within 48 hours of his confinement."[96]

Justice White's concurrence confirmed that the Court's holding was based on the arising under the constitution branch of *Morrissey* due process analysis, and not on the *Wolff* state-created liberty interest branch, as he concurred only "with the result in Part II"[97]—the due process issue. Consistent with Justice White's concurrence "with the result," the Majority did not cite *Wolff* for its stage one analysis as to whether there is a liberty interest protected by due process; in a footnote it cited *Wolff*, but only for the specific stage two hearing pro-

91. *Id.* at 11.
92. *Id.* at 12 (citation omitted).
93. *Id.* at 9.
94. *Id.* at 16 (White, J., concurring in part and concurring in the result).
95. *Id.*
96. *Id.* at 17.
97. *Id.* at 16 (White, J., concurring in part and concurring in the result).

cedures *Wolff* held constituted the "process due" when a liberty interest was found in the prison disciplinary setting.[98]

With Justice White's concurrence, there was a six-member Majority. Chief Justice Burger "would grant the [certiorari] petition" and "set the case for oral argument."[99] Justice Stewart "would affirm the judgment of the Court of Appeals insofar as it affirmed the District Court's dismissal of the petitioner's complaint," but he did not join Justice Rehnquist's dissent. Justice Stewart did not explain his decision, but since he joined the *Wolff* and *Wright* opinions that embraced due process protections as generally applicable to the imposition of solitary confinement, it certainly is possible his disagreement with the Majority was only that any injury the inmate experienced from a two-day delay in the provision of a hearing was de minimis.

Justice Rehnquist dissented, contending the prehearing segregation was proper because the inmate had admitted to being intoxicated;[100] even if the inmate did not represent "a threat to prison security," his "removal from the general prison population for a brief period was fully justified in order to protect the integrity of the later hearing before the review board"[101] as that ensured that he could not develop a "contrived defense."[102] Furthermore, if there was error, Justice Rehnquist contended it was harmless because the inmate subsequently received a fair hearing two days later.[103]

The Court Majority responded to the dissent in considerable detail. Its refutation contended that the factual record does not support the conclusions asserted by Justice Rehnquist.[104] The Majority also argued:

> Even if the subsequent hearing accorded petitioner minimized or eliminated any compensable harm resulting from the initial denial of procedural safeguards, his constitutional claim is nonetheless actionable . . . for nominal damages without proof of actual injury.[105]

It is important to point out that Justice Rehnquist did not dispute the overriding principle that due process hearing protections generally apply before solitary confinement can be imposed. The fighting issue was the prison's failure to provide a probable cause preliminary hearing before placing the inmate in segregation even though it provided him with a full hearing two days later. The *Hughes* case, thus, is especially notable because it holds that solitary confinement—even for a time period as short as two days—can constitute a deprivation of

98. *Id.* at 23 n.6.
99. *Id.* at 16.
100. *Id.* at 20.
101. *Id.* at 21 (footnote omitted).
102. *Id.* at 13 n.12.
103. *Id.*
104. *Id.*
105. *Id.* (citing Carey v. Piphus, 435 U.S. 247, 266–67 (1978)).

liberty when it is imposed without affording an inmate due process.[106] It is fair to say that the *Hughes* Court's holding was the high-water mark for due process protections in the context of solitary confinement.[107] Unquestionably, it is a per curiam opinion "in which the Court ma[de] substantive law. This is most obvious when the Court hands down a ruling that looks every bit like a signed opinion except for the per curiam label, or when it reaches the merits without argument. These include rulings on the substance of procedural law."[108]

C. *Hewitt v. Helms* (1983)

Nine years after *Wolff*, in *Hewitt v. Helms*, the Court engaged in its most extensive examination of due process in the context of solitary confinement in the era preceding *Sandin*. In an opinion authored by Justice Rehnquist, the Court addressed a prisoner's claim that his confinement in administrative segregation violated his constitutional right to due process at both the probable cause stage and at the periodic review stage.[109]

After a riot in the Pennsylvania State Prison, Helms was confined to administrative segregation while he was being investigated for his role in the riot.[110] Helms was charged with misconduct.[111] On December 8, 1978, Helms had an opportunity to provide his version of events to a Hearing Committee, but the record was unclear whether he was allowed to appear in person and the committee made no finding.[112] Criminal charges were filed, but subsequently dropped.[113] While the internal investigation went on, "a Review Committee concluded that [Helms] should remain in administrative segregation" because he posed a threat to other prisoners and to prison security.[114] On January 22, 1979, the Hearing Committee dropped the initial disciplinary charge but, based on a guard's testimony, found Helms guilty of a revised misconduct charge and ordered him confined to disciplinary segregation for six months.[115]

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106. *Id.*
107. We will find that fifteen years later those protections were significantly cut back in Sandin v. Conner, 515 U.S. 472 (1995), authored by Chief Justice Rehnquist, followed by dramatic retrogression in the circuit court progeny that followed *Sandin*. *See infra* section III.B. The strength of *Hughes*' per curiam holding will be very relevant to the third article's contention that *Sandin v. Conner* should be revisited and modified, or even overruled.
108. Wasby, *supra* note 87, at 34.
109. The inmate did not challenge the constitutionality of the disciplinary hearing that was afforded him.
110. Hewitt v. Helms, 459 U.S. 460 (1983).
111. *Id.* at 464.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 465.

The Third Circuit held that the governing Pennsylvania prison statutory framework gave rise to a liberty interest and remanded to determine whether Helms' *initial* hearing on December 8, 1978 satisfied the *Wolff* procedural requirements.[116] The initial hearing was limited to the prison's imposition of indefinite "'administrative segregation' [which lasted] for over seven weeks—from the evening of December 3, 1978 until January 22, 1979—before he received an evidentiary hearing, and he was then sentenced to six months in 'disciplinary custody.'"[117]

The Supreme Court reversed, with Justice Rehnquist writing the opinion for the Court. The Court concluded that the Pennsylvania statutes did give rise to a state-created liberty interest, but the nonadversary hearing procedures afforded to Helms on December 8, 1978, satisfied due process.[118] The Court unanimously agreed that the prisoner had a state-created liberty interest which triggered Fourteenth Amendment due process protection in avoiding seven weeks of administrative segregation, but the Court split 5-4 on the *Morrissey* second stage "what process is due" issue. The four dissenting justices contended that the majority erred in finding that nonadversary hearing procedures satisfied due process at the probable cause stage of the investigation.[119] The dissenting opinion by Justice Stevens also forced the Majority to acknowledge that due process requires periodic review of administrative segregation due to its indefinite nature.[120]

1. The State-Created Liberty Interest

Justice Rehnquist emphasized *Wolff*'s recognition of the "broad administrative and discretionary authority" granted prison administration because of its "extraordinarily difficult undertaking" and that "our decisions have consistently refused to recognize more than the most basic liberty interests in prisoners."[121] In dictum that was the basis for major disagreement with the dissent, the Court observed that "administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration."[122] The Court explained:

> The phrase "administrative segregation," as used by the state authorities here, appears to be something of a catchall: it may be used to protect the pris-

116. *Id.* at 466.
117. *Id.* at 481 (Stevens, J., dissenting).
118. *Id.* at 476–77.
119. *See id.* at 479 (Brennan, Marshall, Blackmun, & Stevens, JJ., dissenting).
120. *Compare id.* at 490–96 (Stevens, J. dissenting), *with id.* at 477 n.9 (Rehnquist, J.).
121. *Id.* at 467 (citing Wolff v. McDonnell, 418 U.S. 539, 566 (1974)).
122. *Id.* at 468. There is no empirical or other authority cited for this conclusion, just a vague statement: "This conclusion finds ample support in our decisions regarding parole and good-time credits."

> oner's safety, to protect other inmates from a particular prisoner, to break up potentially disruptive groups of inmates, or simply to await later classification or transfer."[123]

After a lengthy exposition to the effect that the "daily operations of a prison system [seldom] confer any liberty interest,"[124] the Court held: "[I]n the light of the Pennsylvania statutes and regulations . . . [the] respondent did acquire a protected liberty interest in remaining in the general prison population."[125] It was apparent from the above discussion that the Court experienced some angst in reaching its decision. In seeking to emphasize the narrowness of the Court's holding, Justice Rehnquist explained that the liberty interest was not based on "the mere fact that Pennsylvania has created a careful procedural structure to regulate the use of administrative segregation . . . ."[126] The differentiating factor was that the state's statutes and regulations "used language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed, and that administrative segregation will not occur absent specified substantive predicates—viz., 'the need for control,' or 'the threat of a serious disturbance.'"[127]

2. Stage Two: What Process Is Due

In applying the *Mathews* factors, Justice Rehnquist found that the inmate's "private interest is not one of great consequence. He was merely transferred from one extremely restricted environment to an even more confined situation."[128] The Court found that each of the "two closely related reasons" stated by correctional officials "for confining Helms to administrative segregation prior to conducting" his disciplinary hearing was of "great importance."[129] Justice Rehnquist elaborated:

> First, they concluded that if housed in the general population, Helms would pose a threat to the safety of other inmates and prison officials and to the security of the institution. Second, the prison officials believed that it was wiser to separate respondent from the general population until completion of

123. *Id.* (internal citation omitted). This dictum would portend what was to come a dozen years later in *Sandin v. Conner*.

124. *Id.* at 469.

125. *Id.* at 470–71 (footnote omitted).

126. *Id.* at 471. The Court also articulated a policy argument that it "would be ironic to hold that when a State embarks on such desirable experimentation it thereby opens the door to scrutiny by the federal courts, while States that choose not to adopt such procedural provisions entirely avoid the strictures of the Due Process Clause." Twelve years later, Chief Justice Rehnquist renewed this same policy argument, characterizing it as a disincentive, in *Sandin v. Conner*.

127. *Id.* at 471–72.

128. *Id.* at 473.

129. *Id.*

> state and institutional investigations of his role in the December 3 riot and the hearing on the charges against him.[130]

Prison administrators, when they assess the seriousness of a threat to institutional security, Justice Rehnquist observed, "draw on more than the specific facts" of the incident, but also the "character of the inmates," "longstanding relations between prisoners and guards," "and the like."[131] Justice Rehnquist stated such "intuitive judgments . . . would not be appreciably fostered by the trial-type procedural safeguards . . . ."[132]

The Court concluded: "[T]he 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.[133] The Court emphasized that the administrative hearing as to Helms' confinement to administrative segregation should be viewed as a probable cause determination, and not the final misconduct hearing that would determine disciplinary segregation. The Court found that Helms "had an opportunity to present a statement to the Committee"[134] and therefore due process did not require procedural protections beyond those he received:

> An inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation. Ordinarily a written statement by the inmate will accomplish this purpose, although prison administrators may find it more useful to permit oral presentations in cases where they believe a written statement would be ineffective.[135]

The issue of whether due process requires periodic review of a prisoner in administrative segregation was in response to the contention in Justice Stevens's dissent that administrative segregation, if not closely monitored, can be abused because of its indefinite nature.[136] Justice Rehnquist agreed in general: "Of course, administrative segregation may not be used as a pretext for indefinite confinement of an inmate."[137] Justice Rehnquist provided few details, and examination of his response will make more sense after the dissent's contentions are set forth below.

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130. *Id.*
131. *Id.* at 474.
132. *Id.*
133. *Id.*
134. *Id.* at 477.
135. *Id.* at 476.
136. *Id.* at 477 n.9.
137. *Id*.

3. The Dissent: The Indeterminate Risk of Administrative Segregation

The dissent, authored by Justices Stevens, Brennan, Marshall, and Blackmun, focused on the conditions of solitary confinement experienced by Helms, noting that administrative segregation and disciplinary segregation were "in all material respects" the same and that the conditions in both were "significantly more restrictive than those experienced by inmates in the general prison population."[138] The dissent emphasized that Helms was "held in 'administrative segregation' for over seven weeks—from the evening of December 3, 1978 until January 22, 1979—before he received an evidentiary hearing, and he was then sentenced to six months in 'disciplinary custody.'"[139]

As he had contended in his dissent in *Meachum*, Justice Stevens argued that the liberty interest that triggers due process protections is rooted in a person's inalienable rights, and therefore cannot turn on state law, which is subject to the whim of the legislature or prison authorities.[140] The Majority's reasoning, therefore, has "a fundamental flaw" in relying on written prison regulations to find a state-created liberty interest as, in doing so, it "attaches no significance either to the character of the conditions of confinement or to actual administrative practices in the institution."[141] In Justice Stevens' view, citing *Morrissey v. Brewer* and *Vitek v. Jones*, "the relevant question in this case is whether transfer into administrative segregation constitutes a 'sufficiently grievous' change in a prisoner's status to require the protection of 'due process.'"[142]

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138. *Id.* at 479 (footnote omitted) (Stevens, J., dissenting). Because of the unique harshness of the isolation that is inherent in solitary confinement, it cannot be "balanced" without understanding what it entails and the restrictions that customarily attach to it. Only then can one begin to grasp its inhumanity. Justice Stevens quoted Helms' "uncontroverted affidavit" in footnote one:

> While confined in segregation I had no access to vocational, educational, recreational, and rehabilitative programs as I would have had while out in the general population. Exercise was limited to between five and ten minutes a day and was often only three or four days a week. Showers were virtually nonexistent in segregation in December and January. The changing of clothes was also only once or twice a week while I could have changed more often in population. Had I been in general population I would have had access to various exercise facilities such as the gym and the yard and would have been able to do this for most of the time out of my cell which would have been approximately 14 hours a day. While in segregation I only got out of my cell a few minutes for exercise, showers and an occasional visit. I was virtually confined there 24 hours a day otherwise.

139. *Id.* at 481.

140. *Id.* at 482.

141. *Id.*

142. *Id.* at 484 (citing Vitek v. Jones, 445 U.S. 480, 492 (1980)) (then citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

The dissent pointed out that "for a prisoner as for other persons, the grievousness of any claimed deprivation of liberty is, in part, a relative matter: one must compare the treatment of the particular prisoner with the customary, habitual treatment of the population of the prison as a whole."[143] Here, the institutional norm was the "general prison population." Justice Stevens stressed that "administrative segregation" is "solitary confinement" and "[t]hat confinement was not specified by the terms of his initial criminal sentence. Not only is there a disparity, but the disparity is drastic."[144] Justice Stevens cited *Wright* and *Wolff* for the proposition that solitary confinement represents "grossly more onerous conditions of maximum security, be it for disciplinary or for administrative reasons."[145] Justice Stevens contended the Court essentially ignored its summary affirmance in *Wright* and its considered statements in *Wolff* footnote nineteen and *Vitek*.[146]

a. The Interim Probable Cause Hearing

Justice Stevens agreed with the Court "that the Constitution does not require a hearing with all of the [*Wolff*] procedural safeguards . . . when prison officials initially decide to segregate an inmate to safeguard institutional security or to conduct an investigation of an unresolved misconduct charge."[147] However, the dissenters disagreed with the Majority's denial of a right to make an oral presentation at the prison officials' probable cause determination; the dissent strongly contended that due process requires that the inmate be given the opportunity to present in person to the reviewing officials.[148] As many prisoners have little education, limiting an inmate to a written statement is unlikely to provide a "meaningful opportunity to be heard."[149]

b. The Periodic Review

Justice Stevens went on to emphasize that his disagreement with the Majority went far beyond its holding that a written statement satisfied the due process requirements at the probable cause determination. "Of greater importance," Justice Stevens explained, "the majority's due process analysis fails to provide adequate protection

143. *Id.* at 486.
144. *Id.* at 487 (footnote omitted).
145. *Id.* at 487–88 (quoting Enomoto v. Wright, 462 F. Supp. 397, 402 (N.D. Cal.1976)). The dissent also referenced *Wolff* in a footnote, noting *Wolff*'s statement that administrative segregation imposed for disciplinary reasons "represents a major change in the conditions of confinement," and, therefore, triggers due process. *See id.* at 497 n.15.
146. *Wright*, 462 F. Supp. at 403.
147. *Hewitt*, 459 U.S. at 489–90 (Stevens, J., dissenting).
148. *Id.* at 489 (Stevens, J., dissenting).
149. *Id.* at 490 (quoting Goldberg v. Kelly, 397 U.S. 254, 267–69 (1970)).

against *arbitrary continuation* of an inmate's solitary confinement."[150] While Justice Rehnquist agreed that due process principles were applicable to indefinite solitary confinement, the ambiguity in his statement—"prison officials must engage in some sort of periodic review" of inmates in administrative segregation—and its placement solely in its concluding footnote suggested to the dissent that only "minimal review" was contemplated.[151] The Court said very little, but with what little it said, the Court indicated it envisioned a very limited review: "This review will not necessarily require that prison officials permit the submission of any additional evidence or statements."[152] The dissent contended such a "minimal review" does not satisfy due process, which "requires a more searching review of the justifiability of continued confinement."[153]

Justice Stevens acknowledged that the two major justifications given by prison authorities as justification for Helms' administrative segregation could serve important governmental interests, "[b]ut it cannot fairly be assumed that either rationale, though it might initially be adequate, remains valid or sufficient indefinitely."[154] Justice Stevens suggested that the majority "simply ignores the passage of time" while one is in administrative segregation and that conditions "simply do not remain static."[155] The dissent asserted that "due process demands periodic reviews that have genuine substance—not mere paper-shuffling" and concluded that two procedural safeguards were necessary to ensure each periodic review satisfied due process.[156] First, prison authorities should be required to provide the inmate the opportunity to appear in-person and verbally speak to the "consequences of continued confinement."[157] Second, the decisionmaker should be required to furnish a brief, written statement explaining the reasons to the prisoner if the authorities order continued solitary confinement.[158]

It should be recalled that the *Wright* Court's concern about the abuses that can arise due to the inherent ambiguity of many of the reasons used to justify administrative segregation and its indefinite

150. *Id.* at 490 (emphasis added).
151. *Id.* at 477.
152. *Id.* at 490 n.9.
153. *Id.* at 490–91.
154. *Id.* at 491.
155. *Id.* at 492.
156. *Id.* at 493.
157. *Id.* at 494.
158. *Id.* at 495. *Hewitt* is complicated, so a synopsis of its holding may be helpful. *Hewitt* held that due process required (1) notice and at least an opportunity for the prisoner to submit written submissions at the probable cause stage when administrative segregation was invoked while the prison investigated whether to commence a disciplinary proceeding and (2) "some kind" of periodic review during indeterminate administrative segregation.

duration was such that it suggested that the *Wolff* procedures were the minimum floor, and that greater protections might be required. The arbitrariness and abuses of administrative segregation which were so clearly demonstrated in the facts in *Wright* were not evident in *Hewitt*.[159] In sum, the *Hewitt* facts—both with regard to the governing state statutes and prison regulations that the legislature enacted and prison officials had promulgated, and the state's eventual provision of a *Wolff* evidentiary hearing to Helms—cast the State and its prison administration in a much more favorable light than was the case with the California prison system in *Wright*. This Author will elaborate on this point in Article Three, as he believes it is understandable that the Court may have taken Pennsylvania's conscientious efforts into account when it engaged in the *Mathews* three-factor analysis at the "what process is due" stage.

III. *SANDIN V. CONNER* (1995): THE FEDERAL COURTS' "HANDS OFF" POLICY MAKES A COMEBACK AS COURT CURTAILS DUE PROCESS PROTECTIONS IN SOLITARY CONFINEMENT

Wolff had foreseen that the balance of interests it struck in 1974 might be different in the future "as the problems of penal institutions change and correctional goals are reshaped."[160]

While few, if any, commentators could foresee the dramatic changes that were to take place in the U.S. penal system beginning a decade or so later, *Wolff* was prescient that criminal justice policy is not static:

> Our conclusion that some, but not all, of the procedures specified in Morrissey and Scarpelli must accompany the deprivation of good time by state prison authorities is not graven in stone. As the nature of the prison disciplinary process changes in future years, circumstances may then exist which will require further consideration and reflection of this Court.[161]

The body of caselaw examined in Part I was developed during the Burger Court years, which concluded with the Chief Justice's retire-

159. Justice Rehnquist noted "that on January 2 a Program Review Committee considered whether Helms' confinement should be continued . . . [and] [t]his review, occurring less than a month after the initial decision to confine Helms to administrative segregation, is sufficient to dispel any notions that the confinement was a pretext." *Id.* at 477–78 n.9. Justice Stevens was not satisfied as "the record does not adequately disclose the reasons for [Helms'] prolonged confinement" nor is it clear the January 2 review proceedings, and Helms' appearance before the committee, satisfied due process. *Id.* at 496–97.

160. Wolff v. McDonnell, 418 U.S. 539, 568 (1974).

161. *Id.* at 571–72 (footnote omitted).

ment in 1986.[162] Based on the perception that federal courts had become too involved in minor matters of prison administration, the Rehnquist Court significantly cut back on the state-created liberty interest caselaw that had developed over the prior two decades. Its first opportunity to do so came in 1995. In *Sandin v. Conner*, authored by Chief Justice Rehnquist, the Court revisited the issue of due process in the context of solitary confinement and turned that body of law upside down.[163] *Sandin* significantly curtailed the due process protections afforded prisoners placed in solitary confinement.[164]

Sandin occurred during the explosion in the nation's prison population. In light of the *Wolff* observation that due process is not graven in stone and that changes in prison discipline practices can require the Court to reconsider its rulings, it seems a certainty that the expansion of the prison population, and the accompanying problem of overcrowding, were contextual factors the Court took into account. The prison population in federal and state prisons in the United States increased from 196,429 in 1970 to 1,610,446 in 2008, a staggering increase of 820 percent![165] Viewing *Sandin* as a benchmark, the prison population in 1996 was 1,137,322—nearly a 600 percent increase from 1970.[166]

The Prison Litigation Reform Act,[167] which significantly curtailed prisoner litigation in the federal courts, had not been enacted in 1995 when *Sandin* was decided. Although the legislative winds favoring curtailment of prisoner litigation were blowing strongly with the new Republican majority Congress in 1995, the outcome of such reform was uncertain when *Sandin* was pending before the Court because such proposed legislation, if enacted, would still be subject to a possible veto by President Bill Clinton.[168]

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162. *Warren E. Burger Biography*, BRITANNICA, https://www.britannica.com/biography/Warren-E-Burger [https://perma.cc/9YK2-YPY3] (last visited Mar. 27, 2022).

163. 515 U.S. 472 (1995).

164. *Wilkinson v. Austin* came a decade later and involved application of *Sandin*'s "atypical, severe hardship" test in the context of the extraordinary isolation that is solitary confinement in the Ohio Supermax prison. *See generally* Wilkinson v. Austin, 545 U.S. 209 (2005). *Wilkinson* found a state-created liberty interest that warranted limited due process protections and will be examined closely in this Author's third article. *Wilkinson* was decided in 2005, three years before the prison population peaked in 2008.

165. *Criminal Justice Facts*, THE SENTENCING PROJECT, https://www.sentencingproject.org/criminal-justice-facts [https://perma.cc/6SCJ-K35A] (last visited Oct. 2, 2021).

166. *Id.*

167. Prison Litigation Reform Act of 1995, Pub. L. No. 104–34, tit. VIII, § 803, 110 Stat. 1321, 1321–71 (1996).

168. The PLRA "was signed into law by President Bill Clinton after passing through Congress, including the Senate Judiciary Committee—of which Joseph R. Biden was the ranking minority member—with nary a peep from Democrats." John Boston, *25 Years of the Prison Litigation Reform Act*, PRISON LEGAL NEWS, https://

A. *Sandin v. Conner*: Remnants of Due Process in Solitary Confinement

Conner was an inmate in a maximum-security prison in Hawaii.[169] After an altercation with a guard in which he was strip searched and his rectal area inspected, Conner "retorted with angry and foul language directed at the officer."[170] He was charged with "disciplinary regulations"[171] for "'high misconduct' for using physical interference to impair a correctional function, and 'low moderate misconduct' for using abusive or obscene language and for harassing employees."[172] Conner appeared before an adjustment committee, but his request to present witnesses was denied by the committee because the witnesses were not available.[173] The committee found Conner guilty and sentenced him to thirty days' disciplinary segregation for the physical obstruction charged, and four hours segregation for each of the other two charges to be served concurrent with the thirty days.[174] Conner served the thirty-days' segregation but "pursued an administrative appeal," which concluded the high misconduct sentence was "unsupported and expunged Conner's disciplinary record with respect to that charge."[175]

Conner brought a section 1983 suit against the Hawaii prison officials for damages. The Ninth Circuit concluded "that Conner had a liberty interest in remaining free from disciplinary segregation and that there was a disputed question of fact with respect to whether Conner received all of the process due under . . . *Wolff v. McDonnell*."[176]

In a 5-4 decision, written by Chief Justice Rehnquist, the Supreme Court reversed.[177] The Chief Justice revisited caselaw that recognized that a liberty interest could be created by state law beginning with *Wolff* and *Meachum*, and critically concluded that some strands of that caselaw, including *Hewitt,* had mistakenly focused on the language of a particular regulation—for example, whether the regulation "was mandatory or discretionary"[178]—and not the nature of the depri-

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www.prisonlegalnews.org/news/2021/aug/1/25-years-prison-litigation-reform-act/ [https://perma.cc/6NDT-ESMG] (last visited Mar. 27, 2022).

169. Sandin v. Conner, 515 U.S. 472, 488 (1995).
170. *Id.* at 475.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 475–76.
175. *Id.* at 476–88.
176. *Id.* at 476.
177. *Id.* at 473, 488.
178. *Id.* at 479.

vation.[179] The Chief Justice asserted there were "at least two undesirable effects" of this misguided focus:

> First, it creates disincentives for States to codify prison management procedures in the interest of uniform treatment. Second, [it] has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone.[180]

Another unwitting result, the Chief Justice asserted, was this caselaw "encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges."[181]

1. The New Test: The Pendulum Swings Back Too Far

The Chief Justice opened his analysis of the constitutional issue by stating: "Our due process analysis begins with *Wolff*," and explained the Nebraska "statutory provision created a liberty interest in a 'shortened prison sentence' which resulted from good time credits, credits which were revocable only if the prisoner was guilty of serious misconduct."[182] That was the Court's clearest explanation of what it suggested was merely a restatement of first principles. Asserting that a course correction was required, with only cryptic explanation the Court crafted an entirely new test:

> The time has come to return to the due process principles we believe were correctly established and applied in *Wolff* and *Meachum.* Following *Wolff,* we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. [T]hese interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.[183]

In what can only be described as a very awkwardly worded paragraph, *Sandin* ostensibly created a dual test of when a liberty interest was created that would require Fourteenth Amendment due process protection.[184] First, such a liberty interest can arise under the federal constitution if the state's action, by prison authorities or a parole board, "exceed[s] the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force."[185] The Court cited *Vitek v. Jones* and *Harper v. Washington*, cases in

179. *Id.* at 472.
180. *Id.* at 482 (citation omitted).
181. *Id.* at 481.
182. *Id.* at 477–78 (citing Wolff v. McDonnell, 418 U.S. 539, 577 (1974)).
183. *Id.* at 483–84 (internal citations omitted).
184. *See* Sharif A. Jacob, *The Rebirth of Morrissey: Towards a Coherent Theory of Due Process for Prisoners and Parolees*, 57 HASTINGS L.J. 1213, 1226 (2006) [hereinafter Rebirth of Morrissey].
185. *Sandin*, 515 U.S. at 483–84.

which inmates were transferred to psychiatric hospitals without having been civilly committed. Second, "following *Wolff* . . . States may under certain circumstances create liberty interests . . . [b]ut these interests will be generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[186]

It was clear that the Chief Justice and the Majority contemplated a reduced role for the federal courts in prisoner due process cases and prison litigation generally. It was also clear that the Court was rolling back the due process protections it had previously formulated in cases involving solitary confinement. The dissenters were fearful that the sweep of *Sandin*'s new test would roll back protections far beyond the *Sandin* facts and might dramatically limit the federal courts' role in prison discipline cases.

Wolff had expressly based its finding of a state-created liberty interest on a key provision in the Nebraska TCA, but it is not apparent how its facts—a forfeiture of good-time credit for prison misconduct—falls under *Sandin*'s test for state-created liberty interests: "freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[187] Rather, *Wolff* seems to better fit the *Sandin* "test" for a liberty interest arising under the constitution because of the effect that loss of good-time has on the calculation of the time that an inmate must serve of his or her prison sentence.

The Chief Justice reaffirmed *Wolff*'s holding that due process is applicable to good-time revocation because the heightened statutory protections in Nebraska Revised Statute section 83-185 coupled with actual prison practice created a liberty interest protectable by due process.[188] But the Chief Justice's attempt to thread the needle in *Sandin* and *Meachum* fell short. Despite *Wolff*'s subsidiary holding that section 83-185 also triggered due process protections for solitary confinement disciplinary cases, *Sandin* went on to hold that thirty-days' disciplinary segregation was not a significant deprivation requiring due process protection.[189] Likewise, *Sandin* embraced *Meachum*'s holding and reasoning, and explained: "[T]he Due Process Clause does not protect every change in the conditions of confinement having a substantial adverse impact on the prisoner."[190] However, the Chief Justice did not mention that *Meachum* emphasized that none of the prisoners involved in the intrastate prison transfers had been placed in solitary confinement.

186. *Id.* at 484.
187. *Id.* at 472.
188. *Id.* at 483–84.
189. *Id.* at 486–87.
190. *Id.* at 478 (citations omitted).

2. The "Exceed[s] The Sentence In Such An Unexpected Manner" Test

The Court's test embraced *Vitek* and *Harper*, which involved involuntary transfer to a state mental hospital and involuntary treatment with anti-psychotic medications, as examples of when a liberty interest arises under the Due Process Clause of its own force.[191] Although the Court concluded that the thirty days' solitary confinement that Conner experienced did not implicate a liberty interest arising under the constitution, the Court never explained why. The Court also did not explain what distinguished the transfers to mental health hospitals in *Vitek* and *Harper* from transfers to solitary confinement, in light of the Court's precedent that had uniformly held that solitary confinement did trigger due process protection.[192]

One can think of potential distinctions, but this Author is not convinced they are meaningful. One distinction might be duration. The transfers to the state mental hospitals would be viewed as indefinite or indeterminate, quite possibly lasting throughout the term of the prisoners' sentences; in contrast, Conner's disciplinary segregation was limited to thirty days. Another distinction might be severity. Conner would likely argue that the exceptional isolation of solitary confinement carries with it substantial risks of claustrophobia and paranoia that can push prisoners without a mental illness diagnosis over the edge and into clinical depression or worse; and for prisoners who have a mental illness diagnosis, solitary confinement can push them into the abyss of a significantly aggravated mental illness diagnosis. Conner might also argue that prisoners transferred to a state mental hospital have been transferred for a benign purpose of treating the prisoner's mental illness; there is no such benign intention when a prisoner is punished for a disciplinary violation and the harshest punishment in the prison's disciplinary arsenal is imposed. *Vitek* and *Harper* emphasize a stigma often attached to a transfer to a prison mental hospital; Conner would reply there is also a stigma attached to solitary confinement, that such prisoners are considered "the baddest of the bad" or "incorrigible" and that stigma can adversely affect them throughout their years in prison and can adversely affect their chances for parole.

In sum, the total lack of an explanation of the Court's reasons for concluding *Conner* had not made out an arising under the constitution liberty interest undermines any claim that its holding is entitled to deference or stare decisis precedent. The Court's failure to provide any guidance as to the test's arising-under the constitution claim has also confounded the lower courts in the years since *Sandin*. Although only

191. *Id.* at 484.
192. *See generally*, *supra* Part II.

a limited examination of the post-*Sandin* federal circuit caselaw was conducted, arising-under claims almost never figure into the circuit court analyses—perhaps under the assumption that such claims have been subsumed by the "atypical and significant hardship" test forged for state-created liberty interest claims.[193]

Finally, the *Sandin* test included what appeared to be a favorable citation to *Board of Pardons v. Allen*, and that was puzzling given the rationale for the new test.[194] Whatever the explanation for the citation of *Allen*, the Court in *Wilkinson v. Austin*, albeit ten years later, left no doubt that *Allen* has no continuing precedential value after *Sandin*.[195]

3. The Court's Application of Its "Atypical, Significant Hardship" Test

Sandin held that "Conner's discipline in segregated confinement did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest," but the Court offered only cryptic explanations and murky guidance.[196] It made a comparison of the conditions of disciplinary segregation with those of administrative segregation and concluded that "disciplinary segregation, with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody."[197] It noted the expungement of the solitary confinement disci-

193. *See Rebirth of Morrissey*, *supra* note 184, at 1227–28 (footnotes omitted):

> In order to avoid the appearance of disrupting precedent from *Wolff* forward, the Court needed to maintain at least a nominal difference between liberty interests that are protected 'by the Due Process Clause of its own force' and those created by the states. However, distinguishing between state-created and constitutional interests amounts to nothing more than a subtle reference to *Morrissey*'s tripartite taxonomy. . . . But regardless of the nominal classification as state-created or constitutional, the Fourteenth Amendment now provides protection solely as a function of the nature and weight of the deprivation.

194. *See* Sandin v. Conner, 515 U.S. 472, 484 (1995). If there was any doubt that the *Sandin* Court would find a state-created liberty interest in the *Allen* or *Greenholtz* parole release processes under the *Sandin* "atypical, significant hardship" test, that doubt was eliminated ten years later in *Wilkinson*. "Although *Sandin* abrogated *Greenholtz*'s and *Hewitt*'s methodology for establishing the liberty interest, these cases remain instructive for their discussion of the appropriate level of procedural safeguards." Wilkinson v. Austin, 545 U.S. 209, 229 (2005). Although *Wilkinson* declined to explain *Sandin*'s repudiation of *Greenholtz*'s "methodology," it appears the Court would conclude that the denial of an oral presentation opportunity to a prisoner at the parole release hearing would not constitute the "atypical, significant hardship" *Sandin* requires.

195. *See Wilkinson*, 545 U.S. at 229 ("Although *Sandin* abrogated *Greenholtz*'s and *Hewitt*'s methodology for establishing the liberty interest, these cases remain instructive for their discussion of the appropriate level of procedural safeguards.").

196. *Sandin,* 515 U.S. at 486.

197. *Id.*

pline from Conner's record following his successful administrative appeal of the misconduct decision, and accompanying footnote ten asserted "he personally has no chance of receiving a delayed release from the parole board as a direct result of that allegation."[198]

The Chief Justice's observation seems to be pure speculation. The next sentence set out a conclusion: "Thus, Conner's confinement did not exceed similar, but totally discretionary, confinement in either duration or degree of restriction."[199] This vague comment is confusing as there was no discretionary confinement; Conner was not placed in administrative segregation. More likely, although Conner was wrongfully held in solitary confinement for thirty days, he should not experience any further detriment since his wrongful "conviction" on the misconduct charge has since been expunged. There is also a comparison to the conditions of the general population, noting these inmates experience "significant amounts of 'lockdown time'" and, in its accompanying footnote eight, the Court noted that "[g]eneral population inmates are confined to cells for anywhere between 12 and 16 hours a day, depending on their classification."[200] The Chief Justice states that the Court's conclusion that "the State's actions in placing him [in solitary confinement] for 30 days did not work a major disruption in his environment" was "[b]ased on a comparison between inmates inside and outside disciplinary segregation."[201]

As the Court never describes the conditions and restrictions of Conner's solitary confinement, one must turn to Justice Breyer's dissent to learn that Conner was allowed out of his cell less than one hour each day and then was in "leg irons and waist chains."[202] The Court never explained why solitary confinement for twenty-three hours per day with waist chains and leg irons for the one hour per day outside one's cell is not severe when compared to those in the general population who, even on days there are lockdowns, are allowed out of their cells eight to twelve hours per day. The Court also never explained why a comparison to the conditions and restrictions placed on prisoners in the general population is not the exclusive measure of comparison to the conditions and restrictions the prisoner would experience if placed in solitary.

Pre-*Sandin* there was no atypicality component to the grievous loss test; its focus was on the severity of the hardship or deprivation. The term "atypical" cannot be found in either of the lodestar *Morrissey*

198. *Id.* at 487 n.10.
199. *Id.* at 486.
200. *Id.* at 486 n.8.
201. *Id.* at 486.
202. "Conner, for 30 days, had to spend his entire time alone in his cell (with the exception of 50 minutes each day on average for brief exercise and shower periods, during which he nonetheless remained isolated from other inmates and was constrained by leg irons and waist chains)." *Id.* at 494.

or *Wolff* opinions. The Court never explained what authority it based its "atypicality" comparison on between the conditions of "disciplinary segregation" and the conditions of "administrative segregation."[203] Such a straw man comparison is based on a false dichotomy, as Circuit Judge Richard Posner would observe, because in most prisons the conditions and restrictions of disciplinary and administrative segregation are essentially the same.[204] To justify a conclusion that disciplinary segregation is not severe or atypical because it is not dissimilar to administrative segregation is fallacious.

The *Sandin* Court instructed that, in determining whether due process attached to the thirty days' solitary confinement discipline imposed on Conner, the lower court should consider the duration and degree of restriction of the solitary confinement imposed, the nature of prison life in the Hawaiian prison in question, and the inmate's indeterminate sentence of thirty years to life.[205] The Court never explained the significance of an inmate's underlying sentence to this determination. And, the Court did not point to any data that would support a finding that an inmate who has a long sentence is almost certain to have experienced administrative segregation, and having likely experienced it at least once, that somehow makes it is less severe the next time. It is widely known that people "age out" of crime, and it seems likely they age out of misconduct within the prison setting, too.[206] Without proof based on his prison misconduct record, this Author submits the Court cannot fairly infer from Conner's thirty years-to-life indeterminate sentence that he has become so hardened that confinement to solitary is not severe or atypical.[207] The Court's

203. The Chief Justice's opinion was criticized by the lower courts as cryptic, vague, and murky. *See*, *e.g.*, Sealey v. Giltner, 197 F.3d 578, 583 (2d Cir. 1999) ("The *Sandin* ruling has generated several issues. . . . Fortunately, we need not consider all of these issues.").

204. For a full discussion of *Wagner v. Hanks*, *see infra* Subsection II.B.1.

205. Sandin v. Conner, 515 U.S. 472, 485–86 (1995).

206. *See e.g.*, BB Benda & TJ Pavlak, *Aging Out of Crime – A Neglected Area of Juvenile Delinquency Theory Research and Practice*, NEW DESIGNS FOR YOUTH DEVELOPMENT, Vol. 4, Issue 6, 21–27 (1983), https://www.ojp.gov/ncjrs/virtual-library/abstracts/aging-out-crime-neglected-area-juvenile-delinquency-theory-research [https://perma.cc/3GKR-UA6A] (last visited Mar. 27, 2022); *see also* Caitlin Cornelius & Christopher Lynch, *Aging Out of Crime: Exploring the Relationships Between Age and Crime with Agent Based Modeling*, (2017), https://scs.org/wp-content/uploads/2017/06/6_Final_Manuscript.pdf [https://perma.cc/8WMX-4MBY] (last visited Mar. 27, 2022).

207. Award-winning author Kenneth Hartmann served thirty-eight years in California state prisons before his sentence was commuted and he was granted parole and released. I found Hartmann's writings in the Solitary Watch describing what he experienced during eleven different occasions in solitary confinement moving and eye-opening:

> But placement in the hole, contrary to the [*Sandin*] court's analysis, is always a significant event for the man or woman placed there. The only

summation made clear that the required showing to establish a liberty interest protected by due process essentially incorporated the Eighth Amendment: "This case, though concededly punitive, does not present a *dramatic departure* from the basic conditions of Conner's indeterminate sentence."[208] It is impossible to distinguish *Sandin*'s "atypicality" and "dramatic departure" terminology from the "unusual" prong of the Eighth Amendment's cruel and unusual punishment clause.

There were several other passages in the Court's opinion that confirm the gloss over of the Eighth Amendment the Court imposed to limit the scope of due process protections. The Court found that "the State's actions in placing him there for 30 days *did not work a major disruption* in his environment."[209] The Chief Justice observed that a solitary confinement misconduct sanction on Conner's record *will not* "*inevitably affect* the duration of his sentence. *Nothing* in Hawaii's code *requires the parole board to deny parole* in the face of a misconduct record or to grant parole in its absence, even though misconduct is by regulation a relevant consideration."[210] The Court noted it had rejected a similar claim regarding the effect a transfer to a higher security prison might have on parole chances in *Meachum*, and that Conner would have the opportunity "to explain the circumstances behind his misconduct record" at his parole hearing.[211]

4. The Court Gave Short Shrift to Its Precedent

You may ask, what about the Court's due process solitary confinement precedent, from *Wolff* through *Wright*, *Hughes*, and *Hewitt*? Near the opinion's conclusion, Chief Justice Rehnquist finally addressed the inmate's argument that the Ninth Circuit's due process ruling was supported by the Court's existing precedent that held "solitary confinement automatically triggers due process protection."[212] The Court gave this argument short shrift, brushing the precedent aside in one sentence by asserting: "[T]his Court has not had the opportunity to address in an argued case the question whether disciplinary confinement of inmates itself implicates constitutional liberty interests."[213] The Chief Justice apparently sought to dismiss "as

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> times that suicide ever felt like a viable option to get out from under the long, slow death sentence of life without the possibility of parole happened when I was in the hole.
>
> Kenneth E. Hartman, *Inside the Hole: The Experience of Solitary Confinement in California*, MEDIUM (Feb. 18, 2020), https://medium.com/@kennethehartman/inside-the-hole-cf79de81cfd [https://perma.cc/383M-YUX9].

208. *Sandin*, 515 U.S. at 485 (emphasis added).
209. *Id.* at 486 (footnote omitted).
210. *Id.* at 487 (emphasis added) (citation omitted).
211. *Id.*
212. *Id.* at 485.
213. *Id.* at 486.

dicta" the *Wolff* Court's unanimous statement that, due to the state-created liberty interest, due process protections applied when solitary confinement was imposed and the *Vitek* Court's key distinction that "following *Meachum* . . . we continued to recognize that state statutes may grant prisoners liberty interests that invoke due process protections when prisoners are transferred to solitary confinement for disciplinary or administrative reasons."[214]

Chief Justice Rehnquist ignored the holdings of *Wright*, *Hughes*, and *Hewitt*. While *Wright*, as a summary affirmance may not carry "the same precedential value as would be an opinion of this Court treating the question on the merits,"[215] the Chief Justice himself acknowledged it has precedential weight. Indeed, *Wright* has considerable precedential weight as *Vitek* expressly cited *Wright* as precedent for a state-created liberty interest whenever solitary confinement might be imposed and, further, held that *Wright* confirmed this principle continued as the governing law after *Meachum*.[216] Chief Justice Rehnquist wrote a jurisdictional dissent in *Wright*, but his dissent did not contest the merits of *Wright*'s due process holding.[217]

In a per curiam opinion, the *Hughes* Court held that solitary confinement of two days triggered due process protections arising under the constitution.[218] Chief Justice Rehnquist in *Sandin* does not even acknowledge the existence of *Hughes*—even though the Court wrote a full opinion in *Hughes*. Without mentioning it by name, the Chief Justice appears to have cast *Hughes* aside because it was not "an [orally] argued case."[219] He cited no authority for this distinction, and the definitive Judicature article on the "nature and functions" of per curiam opinion reports no such distinction.

The most recent of these precedents was *Hewitt*, whose Majority opinion was authored by Justice Rehnquist. The *Hewitt* Majority held that a liberty interest had been created by the Pennsylvania statutes and regulations when administrative segregation was imposed for seven weeks, only three weeks longer than the disciplinary segregation in *Sandin*. The dissent would have forged a broader precedent, contending that a liberty interest arose directly under the constitution. But the *Hewitt* Court was unanimous that a state-created liberty interest had been created that required due process protection.[220]

214. Vitek v. Jones, 445 U.S. 480, 489–90 (1980).
215. Edelman v Jordan, 415 U.S. 651, 671 (1974).
216. *Vitek*, 445 U.S. at 489–90.
217. Enomoto v. Wright, 434 U.S. 1052 (1978) (Rehnquist, C.J., dissenting).
218. Hughes v. Rowe, 449 U.S. 5, 10–11 (1980).
219. Sandin v. Conner, 515 U.S. 472, 486 (1995). "[T]his Court has not had the opportunity to address in an argued case the question whether disciplinary confinement of inmates itself implicates constitutional liberty interests." *Id.*
220. Justice Blackmun joined the five-member *Hewitt* Majority in holding that inmate Helms had a state-created liberty interest in avoiding segregation that was pro-

Without any meaningful consideration of these four cases and the principles of *stare decisis*, the *Sandin* Court effectively overturned two decades of its precedents in one paragraph.

5. The Dissents: Justices Ginsburg-Stevens and Breyer-Souter

a. Justices Ginsburg & Stevens

Dissenting Justices Ginsburg and Stevens agreed that the determination of a state-created liberty interest "should not depend on the particularities of the local prison's code," but they contended that the imposition of solitary confinement imposes severe hardships and therefore implicates a liberty interest directly under the constitution itself "in avoiding the disciplinary confinement he endured."[221] Justice Ginsburg wrote:

> Disciplinary confinement as punishment for "high misconduct" not only deprives prisoners of privileges for protracted periods; unlike administrative segregation and protective custody, disciplinary confinement also stigmatizes them and diminishes parole prospects. Those immediate and lingering consequences should suffice to qualify such confinement as liberty depriving for purposes of Due Process Clause protection.[222]

Conner received notice of the charges and was allowed to personally answer them before the committee.[223] Therefore, the dissent acknowledged the inmate had been provided two of the *Wolff* procedural protections. However, since the committee "denied his request to call as witnesses staff members he said would attest to his innocence," the dissent would subject the prison officials' explanation that the "witnesses were unavailable" to examination on remand.[224]

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tected by due process. *See* Hewitt v. Helms, 459 U.S. 460, 472 (1983). Justice Stevens and his dissenting colleagues, Justices Brennan and Marshall, would have found a liberty interest arose directly under the constitution. *Id.* at 488.

221. *Sandin*, 515 U.S. at 488–90 (citations omitted).

222. *Id.* at 488–89 (Ginsburg, J., dissenting). Neither in *Morrissey*, nor subsequent cases, has the Court ever stated with any specificity the source of the liberty interest in the Constitution. Justices Ginsburg and Stevens eloquently argued in their dissenting opinion in *Sandin* that each person has a liberty interest that can be found among the "'unalienable Rights' with which all persons are endowed by their Creator," but their view has never commanded a majority. *Id.* at 489. The word "natural right" has not appeared in any of the Court's opinions, although that is how many commentators characterize the liberty interest protected by due process. While there continues to be ambiguity on the precise locus of this right—even after fifty years—what is clear about *Morrissey*, *Vitek*, and *Harper*, is that an individual's liberty interest can arise under the Constitution when the State's actions cause a "grievous loss" even when the relevant state statute denies such an interest exists. Clearly, when Morrissey's parole was revoked, there was nothing remotely like a liberty interest in parole under Iowa law.

223. *Id.* at 488 (Ginsburg, J., dissenting).

224. *Id.* at 475, 488 (Ginsburg, J., dissenting), 504 (Breyer, J., dissenting).

b. Justices Breyer & Souter

Citing *Vitek* and *Harper*, Justice Breyer noted:

> [T]his Court has said that certain changes in conditions may be so severe or so different from ordinary conditions of confinement that, whether or not state law gives state authorities broad discretionary power to impose them, the state authorities may not do so "without complying with minimum requirements of due process."[225]

These "general pre-existing principles" required due process protections under the arising-under prong:

> [T]he punishment worked a fairly major change in Conner's conditions. In the absence of the punishment, Conner, like other inmates in Halawa's general prison population would have left his cell and worked, taken classes, or mingled with others for eight *hours* each day. As a result of disciplinary segregation, however, Conner, for 30 days, had to spend his entire time alone in his cell (with the exception of 50 *minutes* each day on average for brief exercise and shower periods, during which he nonetheless remained isolated from other inmates and was constrained by leg irons and waist chains.).[226]

Justice Breyer briefly summarized several of the Court's due process solitary confinement cases as precedent supporting the arising-under basis.[227]

Principally citing *Hewitt*, Justice Breyer then explained that Conner was also entitled to due process based on a state-created liberty interest: "[I]rrespective of whether this punishment amounts to a deprivation of liberty *independent* of state law, here the prison's own disciplinary rules severely cabin the authority of prison officials to impose this kind of punishment."[228] While *Hewitt* ultimately rejected the inmate's due process claim based on its conclusion that the Pennsylvania prison officials afforded Helms all the process he was due, the *Hewitt* Court was unanimous on the issue in *Sandin* that Justice Breyer saw as decisive—that when the state has "cabined" the authority of prison officials to impose solitary confinement due process protections are triggered.

Based on both lines of precedent, the dissenters viewed disciplinary solitary confinement an extreme form of punishment that can only be imposed on prisoners found to have committed high misconduct determined in a hearing that afforded the inmate the *Wolff* due process protections.[229] Since Conner was not allowed to call witnesses,

225. *Id.* at 493. (Breyer, J., dissenting) (citation omitted). Although *Morrissey* was not cited, the liberty interest in *Morrissey* clearly arose from the Constitution alone.
226. *Id.* at 494 (emphasis in original) (citations omitted).
227. *Id*. In his dissent, Justice Breyer summarized *Hughes* and *Wolff*. Under *Hughes*, disciplinary "[s]egregation of a prisoner without a prior hearing may violate due process if the postponement of procedural protections is not justified by apprehended emergency conditions." *Id.* Under *Wolff*, "solitary confinement . . . 'represents a major change in the conditions of confinement.'"*Id.*
228. *Id.* at 494 (emphasis in original).
229. *Id.* at 495–96.

the four dissenting Justices would have remanded the case to the district court so that Conner would have "an opportunity to point to 'specific facts' that might explain why these witnesses (or other procedures) were needed."[230]

So, the dissent disagreed with the disposition of the case on its facts. However, what alarmed Justice Breyer was the majority's new test whose sweep and breadth went far beyond the facts of the Conner case.[231] Justice Breyer expressed fear that the Court's new "atypical, significant hardship" test, though ostensibly only a restoration of first principles, could "change prior law radically." Justice Breyer further contended the new test's sweep far exceeded the scope of the identified problem and:

> There is no need . . . for a radical reading of this [existing] standard, nor any other significant change in present law, to achieve the majority's basic objective, namely, to read the Constitution's Due Process Clause to protect inmates against deprivations of freedom that are important, not comparatively insignificant."[232]

Justice Breyer then explained that the state-created liberty caselaw only is relevant in a "middle category of imposed restraints or deprivations that, considered by themselves are neither obviously so serious as to fall within, nor obviously so insignificant as to fall without, the Clause's protection."[233] Further, Justice Breyer argued that the better approach would continue to look to state law when there is "difficult line-drawing . . . [in] this middle category" of cases and to clearly explain that current "standards will not create procedurally protected 'liberty' interests where only minor matters are at stake."[234] Justice Breyer would have held that Conner was deprived of a state-created liberty interest within the meaning of the Due Process Clause: "In sum, expungement or no, Conner suffered a deprivation that was significant, not insignificant. And, that deprivation took place under disciplinary rules that . . . do cabin official discretion sufficiently."[235]

B. The Circuit Courts' Solitary Confinement Caselaw Confirms a "Vanishing" Due Process Right

No attempt will be made to comprehensively summarize the complex body of caselaw that has sought to apply the *Sandin* "atypical, significant hardship" test. My purpose for dipping into the circuit court caselaw has principally been to ascertain whether *Sandin* has worked the radical law change its dissenters feared. What becomes

230. *Id.* at 504.
231. For further discussion of how the facts in *Sandin* hid the impact of its "atypical, significant hardship" test, *see infra* Subsection V.C.4.
232. *Sandin*, 515 U.S. at 496.
233. *Id.* at 497.
234. *Id.* at 496–97.
235. *Id.* at 502 (internal citation omitted).

very clear is that none of the circuits have concluded that the thirty days' solitary confinement upheld in *Sandin* is the upper limit in duration that would be allowed without due process procedural safeguards. While there are significant differences within the circuits, with the exception of the Second Circuit, due process protections are not triggered when solitary confinement is imposed except in circumstances that would have been considered egregious in the pre-*Sandin* era. My brief overview is intended as support for that conclusion, and also to point out the Second Circuit's post-*Sandin* approach because I believe it provides a framework based on duration of the confinement that can be helpful in developing the reforms that I will propose in article three.

On the continuum of circuit court cases, the Second Circuit holds down the most moderate position. But how moderate can the Second Circuit be when it holds that due process protections do not come into play until the duration exceeds ten months if the prisoner has been placed in a "typical" solitary confinement condition? The Fifth Circuit appears to have erased due process from solitary confinement cases except in draconian circumstances.

1. The Seventh Circuit

The Seventh Circuit's Chief Judge Richard Posner was known for his legal realist views. Early on, in *Wagner v. Hanks*, he explained that due process claims in the solitary confinement setting were futile because "under *Sandin* the key comparison is between disciplinary segregation and nondisciplinary segregation rather than between disciplinary segregation and the general prison population."[236] Under this comparison the Chief Judge denied a claim challenging one year of administrative segregation, pointing out that the prisoner will rarely be able to prove "atypicality" "because the prison is likely to provide facilities for, and create conditions of, administrative segregation and protective custody that are virtually identical to the facilities for and conditions of disciplinary segregation, and no more is necessary under *Sandin* to deny the prisoner's claim."[237] Thus, Chief Judge Posner spoke *Sandin*'s hard truth: "the right to litigate disciplinary confinements has become vanishingly small."[238]

There are exceptions to Chief Judge Posner's far-reaching observation about *Sandin* ending due process protections in solitary confinement cases but, in large part, it has proven true. The exceptions are

236. Wagner v. Hanks, 128 F.3d 1173, 1175 (7th Cir. 1997).
237. *Id.* at 1174–75.
238. *Id.* at 1175. "[W]hen the entire sanction is confinement in disciplinary segregation for a period that does not exceed the remaining term of the prisoner's incarceration, it is difficult to see how after *Sandin* it can be made the basis of a suit complaining about a deprivation of liberty." *Id.* at 1176.

few and limited to when the conditions were egregious or the duration was extreme. Shortly after the *Sandin* decision, the Seventh Circuit held that "six months of segregation is not 'such an extreme term' and, *standing alone*, would *not* trigger due process rights."[239] Even though six months is six times longer than the thirty days' solitary confinement upheld in *Sandin*, the Seventh Circuit has been consistent in rejecting claims that do not meet this durational threshold. It has rejected due process protections for prisoners who experienced seventy days of disciplinary segregation[240] and six months of administrative segregation.[241] The Seventh Circuit will consider claims where isolation has exceeded six months but only if the conditions were atypically severe. The Seventh Circuit's *Hardaway v. Meyerhoff* decision involving administrative segregation for six months made clear the evidentiary bar on atypical severity is a high one, implying that anything short of the extreme isolation such as a Supermax prison isn't enough.[242]

The Third, Sixth, Tenth, and District of Columbia Circuits have likewise found that the *Sandin* "atypicality" comparison should "consider the conditions of confinement relative to administrative segregation."[243] As Chief Judge Posner so candidly observed, it appears that in those four circuits it will be very difficult for an inmate to demonstrate that his or her disciplinary confinement is atypical.

2. The Fifth Circuit

Earlier on, in 1997, the Fifth Circuit had held that a liberty interest can only occur as a result of disciplinary segregation when it "inevitably" lengthens a prisoner's sentence—essentially the facts in *Wolff*.[244] The Fifth Circuit also held, in *Orellana v. Kyle*, that administrative segregation is an ordinary incident of prison life, and therefore

239. Marion v. Columbia Corr. Inst., 559 F.3d 693, 698 (7th Cir. 2009) (quoting Whitford v. Boglino, 63 F.3d 527, 533 (7th Cir. 1995)) (emphasis added).

240. *See* Thomas v. Ramos, 130 F.3d 754 (7th Cir. 1997). Thomas, a prisoner, was housed in disciplinary segregation for seventy days with another cellmate without any access to the prison yard. *Id.* at 757–58.

241. Hardaway v. Meyerhoff, 734 F.3d 740, 744 (7th Cir. 2013).

242. *Id.* at 744. Although Hardaway's six months of administrative confinement was nearly three times longer than the segregation in Thomas, "he was allowed weekly access to the showers and prison yard." *Id.* at 745. "None of the circumstances of Hardaway's confinement come close to the harsh conditions described in Wilkinson . . . [as he] was not deprived of all human contact and was permitted to use the shower and prison yard once every week." *Id.* at 744.

243. *See* Griffin v. Vaughn, 112 F.3d 703, 706–08 (3d Cir. 1997); Jones v. Baker, 155 F.3d 810, 812–13 (6th Cir. 1998); Gaines v. Stenseng, 292 F.3d 1222, 1224–26 (10th Cir. 2002); Aref v. Lynch, 833 F.3d 242, 255 (D.C. Cir. 2016).

244. *See* Carson v. Johnson, 112 F.3d 818, 821 (5th Cir. 1997). Revocation of good time would effectively have increased Wolff's sentence.

can almost never create a liberty interest.[245] This Author does not believe that these judges fail to appreciate that, in many prisons, the only difference between administrative segregation and disciplinary segregation is the factual predicate upon which the solitary confinement is based. The isolation cells used are typically the same for both, as are the governing restrictions and rules.

The Fifth Circuit in *Wilkerson v. Goodwin* digested what it described as the leading circuit court cases, and concluded that a bright-line rule was emerging as to when the duration of solitary confinement was "atypical."[246] The Court observed that "the duration in segregated confinement that courts have found does not give rise to a liberty interest ranges up to two and one-half years."[247] Although *Wilkerson* cited the Second Circuit's *Palmer v. Richards* decision in its discussion of key factors to be considered when analyzing conditions of confinement, it made no mention of *Palmer* or the Second Circuit's conflicting caselaw holding that solitary confinement of 305 days "under normal [solitary confinement] conditions" *requires* procedural due process protections.[248] Because inmate Woodfox had spent an incredible thirty-nine years in solitary confinement—yes, thirty-nine years—the Fifth Circuit's did not have to determine a solitary confinement durational years threshold below which the court will examine whether other conditions of confinement "are sufficiently restrictive so as to constitute an 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'"[249] The Court concluded that, based on "the duration of the solitary confinement, the severity of the restrictions, and their effectively indefinite nature,"[250] and "[v]iewed collectively, there can be no doubt that these conditions are sufficiently severe to give rise to a liberty interest under *Sandin*."[251]

The Court also had to address the defendants' qualified immunity defense. Defendants contended that the Fifth Circuit had assumed in *Wilkerson I*[252]in 2003 "that a liberty interest could not arise from an

245. 65 F.3d 29, 31–32 (5th Cir. 1995).
246. 774 F.3d 845, 855 (5th Cir. 2014) [hereinafter Wilkerson II].
247. *Id*. (emphasis added) (citing Jones v. Baker, 155 F.3d 810, 812–13 (6th Cir. 1998)).
248. 364 F.3d 60 (2d Cir. 2004).
249. *Wilkerson II*, 774 F.3d at 855 (citation omitted). The Court also identified two additional circuit court holdings that found eight years in "administrative custody" was atypical and "deemed sufficient to give rise to a liberty interest." *Id.*
250. *Id.*
251. *Id.* at 856. Albert Woodfox was the inmate in *Wilkerson* whose due process claim was adjudicated. Woodfox had spent an incredible thirty-nine years in solitary confinement. While there were administrative reviews every ninety days, Woodfox contended the reviews were a "sham." *Id.* at 849.
252. Wilkerson v. Stalder, 329 F.3d 431, 435–36 (5th Cir. 2003) [hereinafter *Wilkerson I*].

initial classification, regardless of the duration or indefiniteness of Woodfox's solitary confinement,"[253] and therefore they were immune from liability because their failure to provide him with a due process hearing was objectively reasonable.

The Fifth Circuit pointed out that "the law did not freeze with the decision in *Wilkerson I* in 2003"[254] and that the relevant focus was on the 2010 transfer of Woodfox to the solitary unit at the Wade Correctional Facility. The Fifth Circuit emphasized that the "Supreme Court's 2005 decision in *Wilkinson* made it clear that 'indefinite' placement in 'highly restrictive conditions' implicates a liberty interest, even if that placement is the result of an initial classification."[255] The Fifth Circuit held that defendants had violated "clearly established" law because "[i]n 2010, a reasonable prison official would have been on notice that continuing Woodfox's solitary confinement would give rise to a liberty interest requiring procedural protections."[256] The Court, thus, rejected the qualified immunity defense, reasoning that "[i]n 2010, a reasonable prison official would have been on notice that continuing Woodfox's solitary confinement would give rise to a liberty interest requiring procedural protections."[257]

The *Wilkerson II* case was remanded to determine the adequacy of the periodic review procedures in light of *Wilkinson v. Austin.*[258] But one was left with the firm impression that unless an inmate has experienced solitary confinement in excess of two-and-a-half years and severe hardship comparable to the egregious facts in *Wilkerson II*, he or she has no chance in the Fifth Circuit.

3. The Second Circuit

The Second Circuit represents the minority view and looks to the general population when making the atypicality comparison.[259] In *Sealey v. Giltner*, the Second Circuit rejected Judge Posner's analysis in *Wagner v. Hanks*: "We think *Sandin* does not go so far."[260] Judge Newman, writing for the court in *Sealey*, explained:

253. *Wilkerson II,* 774 F.3d at 858.
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.* at 858–59.
259. The Ninth and perhaps the Fourth Circuit concur. *See* Keenan v. Hall, 83 F.3d 1083, 1089 (9th Cir. 1996) ("The *Sandin* Court seems to suggest that a major difference between the conditions for the general prison population and the segregated population triggers a right to a hearing."); *see also* Beverati v. Smith, 120 F.3d 500, 503 (4th Cir. 1997) (comparing the conditions in administrative segregation versus the conditions in the general prison population).
260. Sealey v. Giltner, 197 F.3d 578, 584 (2d Cir. 1999).

> If an inmate is to be placed in atypical confinement (considering both the conditions and the duration) after being determined, for example, to be a threat to prison safety, he should have some procedural due process surrounding the determination that he poses such a threat. That is the teaching of *Hewitt*, and if *Sandin* had meant to overrule *Hewitt* to the extent of precluding a protected liberty interest for all administrative confinements, we would expect to see more pointed language to that effect.[261]

The Second Circuit's decision in *Palmer v. Richards* provided a helpful synthesis of the circuit's post-*Sandin* caselaw.[262] *Palmer* also gave guidance as to the type of showing of "atypical" conditions that could trigger due process protection when the length of solitary confinement, though longer than the thirty days in *Sandin*, was relatively short. The *Palmer* Court explained that duration and conditions of confinement are "distinct and equally important consideration[s] in determining whether a confinement in SHU rises to the level of 'atypical and severe hardship.'"[263]

Sealey v. Giltner explained the Second Circuit had developed a sliding scale approach: "Both the conditions and their duration must be considered, since especially harsh conditions endured for a brief interval and somewhat harsh conditions endured for a prolonged interval might both be atypical."[264] Unlike *Sandin*, which never attempted to define what constituted "normal solitary confinement," the Second Circuit incorporated the definition used in New York statutes and prison regulations.[265]

While the Second Circuit has not established "a bright-line rule that a certain period of SHU confinement automatically fails to implicate due process rights,"[266] it has developed, on a case-by-case basis, a disposition framework whose foundation is based on the length of solitary confinement. In *Palmer v. Richards*, Judge Katzmann summa-

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261. *Id.* at 585. Chief Justice Rehnquist was quite clear that the Court was not overruling *Hewitt* in *Sandin* footnote five: "[A]bandonment of *Hewitt*'s methodology does not technically require us to overrule any holding of this Court . . . Although it did locate a liberty interest in *Hewitt*, it concluded that due process required no additional procedural guarantees for the inmate." Sandin v. Conner, 515 U.S. 472, 483 n.5 (1995).

262. 364 F.3d 60 (2d Cir. 2004).

263. *Id.* at 64.

264. *Sealey*, 197 F.3d at 586.

265. The *Palmer* Court noted:

> [T]he prisoner is placed in a solitary confinement cell, kept in his cell for 23 hours a day, permitted to exercise in the prison yard for one hour a day, limited to two showers a week, and denied various privileges available to general population prisoners, such as the opportunity to work and obtain out-of-cell schooling. Visitors [are] permitted, but the frequency and duration [is] less than in general population. The number of books allowed in the cell [is] also limited.

Palmer, 364 F.3d at n.3 (citing Colon v. Howard, 215 F.3d 227, 230 (2d Cir. 2000)).

266. *Id.* at 64 (citation omitted).

rized the caselaw and explained it had created analytical "guidelines" of four durational tiers:[267] the "exceedingly short" duration, the "relatively brief" duration, the "intermediate" or "relatively long" duration, and the "longer than" intermediate duration.[268] However, the Second Circuit explained that it had "explicitly avoided a bright line rule that a certain period of SHU confinement automatically fails to implicate due process rights,"[269] but the court considered the durational parameters of the four tiers to be helpful "guidelines," reflecting its case-by-case approach.[270] It appears the degree of severity of one's confinement will be considered higher when its duration is towards the upper end of a tier's range, and less when the duration approaches the lower end of a tier's range.

> (1) Exceedingly short. "[W]here the period of time spent in SHU was exceedingly short—less than the 30 days that the Sandin plaintiff spent in SHU—and there was no indication that the plaintiff endured unusual SHU conditions," the Court reported "it had affirmed dismissal of prisoners' due process claims."[271] In the Second Circuit, due process claims based on solitary confinement for less than 30 days will fail unless the prisoner can demonstrate "especially harsh conditions [were] endured for a brief interval."
>
> (2) Relatively brief. Solitary confinement with durations between 31 and 100 days fall in the next category: "SHU confinements of fewer than 101 days could constitute atypical and significant hardships if the conditions were more severe than the normal SHU conditions of *Sealey* or a more fully developed record showed that even relatively brief confinements under normal SHU conditions were, in fact, atypical."[272]
>
> (3) Intermediate. "Where the plaintiff was confined for an intermediate duration—between 101 and 305 days—'development of a detailed record' of the conditions of the confinement relative to ordinary prison conditions is required."[273] When the solitary confinement falls in this intermediate range, "a district court must 'make a fact-intensive inquiry,' examining 'the actual circumstances of SHU confinement' in the case before it without relying on its familiarity with SHU conditions in previous cases."[274]
>
> (4) Relatively long. *Colon v. Howard* held when the duration of solitary confinement is 305 days or longer, duration alone is sufficient, *without more*, to trigger due process protection.[275] The Court reasoned: "A confinement longer than an intermediate one, and under "normal SHU conditions," is "a sufficient departure from the ordinary incidents of prison life to require procedural due process protections under *Sandin*."[276]

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267. *Id.* at 64–65.
268. *Id.* at 64–66.
269. *Id.* at 64.
270. *Id.* at 64–65.
271. *Id.* at 65–66 (citation omitted).
272. *Id.* at 65 (citations omitted).
273. *Id.* at 64–65.
274. *Id.* at 65 (citations omitted). Future cases will determine whether the current durational ceiling should be lowered and whether the conditions of must be somewhat more severe than normal.
275. 215 F.3d 227, 232 (2d Cir. 2000).
276. *Palmer*, 364 F.3d at 65 (footnote omitted) (citing *Colon*, 215 F.3d at 231).

4. The Circuit Split

Perhaps the most striking example of circuit inconsistency is the fact that the durational threshold for the Fifth Circuit is at least triple that of the Second Circuit. *Wilkerson*'s threshold has ambiguity—two-and-a-half years, or 913 days—appears to be insufficient in duration to make out a claim. But assuming *arguendo* that is the minimum threshold in the Fifth Circuit, it is nearly triple *Palmer*'s 305-days threshold. The disparity between the two circuits is actually greater, because the Fifth Circuit considers 913 days' duration as sufficient to qualify as a viable claim for due process protection *only* when there is also atypical severity of the confinement conditions. In contrast, the Second Circuit holds due process protections are required if solitary confinement exceeds 305 days under "normal" solitary conditions; no additional evidence of severity or atypicality is required. Although the Fifth Circuit caselaw is incredibly harsh, the reality is that the Second Circuit's more moderate view is also a dramatic departure from the Supreme Court's pre-*Sandin* caselaw.

The federal circuit caselaw confirms that the federal courts grasped the symbolism and new direction of *Sandin* and have imposed an extremely grudging threshold standard that inmates have had to meet in cases where the harshest of prison disciplines has been invoked: solitary confinement. The *Sandin* standard's "atypicality" requirement has a greater resemblance to Eighth Amendment caselaw than to the Due Process cases. The core of my criticism isn't that the *Sandin* test is vague and ambiguous, or that it lacks a nexus to the facts in *Sandin*, or that it has resulted in a myriad of lower court opinions reaching disparate results. It fails on all three of those counts. With regard to the latter count, which is the most serious, the federal circuit courts are disparate only in how high a degree of difficulty they will impose on prisoners claiming a solitary confinement due process violation.

IV. A TRAGIC LOSS: THE *SANDIN* DISSENTERS FAILED TO CALL OUT THE CHIEF JUSTICE AND THEREBY MISSED AN OPPORTUNITY TO NEGOTIATE A MIDDLE GROUND RESOLUTION

There was considerable tension in Chief Justice Rehnquist's express embrace of *Wolff* as the touchstone of the Court's new test and its silent rejection of *Wolff*'s pointed instruction that due process protections would apply not only to revocation of good time but also to the imposition of solitary confinement.[277] Due process's applicability to

277. Wolff v. McDonnell, 418 U.S. 539, 571 n.19 (1974).

solitary confinement had been considered settled law,[278] and surely was settled law after *Wright*, *Hughes*, and *Hewitt* had been decided, and had been treated as such by lower courts. The Court's tradition of principled decision-making required that it address existing solitary confinement precedent head-on, as such longstanding precedent warranted. *Stare decisis* requires very careful consideration of precedent before it is overturned, and that clearly did not happen in *Sandin*.[279] The Court cited no precedent for its new test's choice of terminology—that due process only applies when solitary confinement is not only severe but "atypical."[280] There was no mention of "atypicality" in *Morrissey* or *Wolff*. "Atypical" would seem appropriate for a claim under the Eighth Amendment's Cruel and Unusual Punishment Clause, but it is inherently contrary to the traditional fundamental fairness that the Due Process Clause seeks to ensure for all.

Justice Breyer twice referred to the *Sandin* "atypical, severe hardship" test as radical and potentially "chang[ing] prior law radically."[281] However, neither dissent called out the Chief Justice and the majority by explaining that its decision wasn't just a reduction of the process due before an inmate could be placed in solitary confinement, but a total abolition of due process protections in all but extreme cases.[282] The consequence of *Sandin* for the future was not merely a step down in process, that is—replacing the *Wolff* procedural safeguards with the *Greenholtz-Hewitt* nonadversary procedural safeguards. Instead, *Sandin*'s holding meant no due process protections whatsoever except in extreme solitary confinement cases.

Because Conner had been afforded a limited hearing, the full implications of the radical new *Sandin* test were hidden because the Chief Justice's holding didn't forecast its full scope: "We hold, therefore, that neither the Hawaii prison regulation in question, nor the

278. Although *Wolff*'s discussion of solitary confinement technically was dictum because the factual basis for the petitioner's discipline involved revocation of good-time credit (and not the imposition of solitary confinement), it is common for the Court to give guidance in analogous situations. *See id.* at 601 n.9. In *Wolff,* the TCA provision that was the basis for the state-created liberty interest when good time was forfeited also expressly applied when solitary confinement was imposed. It is also true that *Wolff*'s treatment of solitary confinement was in a footnote; however, this Author is unaware that principles stated in a footnote have a diminished status, and certainly not when the Court unequivocally expressed its reasoning and rationale and the vote on this issue was unanimous.

279. Sandin v. Conner, 515 U.S. 472, 484–86 (1995).

280. *Id.* at 483.

281. *Sandin*, 515 U.S. at 496–97 (1995) (Breyer, J., dissenting).

282. Justice Breyer's vague attempt at an explanation totally let the majority off the hook: "If so, its generality threatens the law with uncertainty, for some lower courts may read the majority opinion as offering significantly less protection against deprivation of liberty, while others may find in it an extension of protection to certain 'atypical' hardships that preexisting law would not have covered." *Id.* at 496.

Due Process Clause itself, afforded Conner a protected liberty interest that would entitle him to the procedural protections set forth in *Wolff*."[283] The Court did not decide the case under the *Morrissey* stage two "what process is due" stage. Given the uniformity of solitary confinement due process precedents from *Wolff* through *Hewitt*, it was surprising that *Sandin* was decided at the *Morrissey* stage one: whether Conner's thirty-days solitary confinement disciplinary violation triggered a liberty interest requiring due process protection.[284]

The Court didn't explain that not only was Conner not entitled to the full *Wolff* procedural protections, but *he was entitled to no procedural protections whatsoever*. Indeed, in the Majority's view, Conner had been afforded more process than he was constitutionally entitled by virtue of its new ruling in *Sandin*. The Court didn't explain that its holding would not merely result in a reduction of the process due to Conner and future inmates, but would result in a total abolition of due process protections in all but extreme cases. To restate, what the Court didn't explain was that its new test would foreclose all procedural safeguards in most solitary confinement cases. Unfortunately, neither dissent forced the Chief Justice to acknowledge the sweeping scope of the *Sandin* holding, which allowed *Sandin*'s radical change to largely pass under the radar.

Recall that *Sandin* was not a case in which the inmate was completely denied all procedural safeguards. Conner was given notice, afforded an opportunity to speak at his misconduct "hearing," and was allowed to take an internal appeal on which he prevailed as the prison authorities "found the high misconduct charge unsupported and expunged Conner's disciplinary record with respect to that charge."[285] The success of Conner's administrative appeal—of course —did not erase the hardship Conner experienced in solitary confinement while his administrative appeal progressed. He had served the entire thirty-day discipline by the time his appeal was resolved. But all the procedural safeguards that Conner was actually afforded by the Hawaii prison officials would now, under the *Sandin* holding, be matters of grace and no longer constitutionally required in future cases.

As the dissent viewed the case, the fighting issue was at stage two of the *Morrissey-Wolff* due process analysis, the "what process is due" stage: whether, under *Wolff*, the prison authorities were justified in denying Conner's request to call witnesses to testify on his behalf.[286]

283. *Id.* at 487.

284. *Id.* at 485–87.

285. *Id.* at 476.

286. *Wolff* had provided a presumptive right to "call witnesses and present documentary evidence in [the inmate's] defense when permitting [the inmate] to do so will not be unduly hazardous to institutional safety or correctional goals." Wolff v. McDonnell, 418 U.S. 539, 566 (1974) (emphasis added).

The dissenters would have remanded to the district court to hold a hearing and make this determination. The Majority took an entirely different tack, and in doing so ignored the canon of constitutional avoidance, which counsels that federal courts should decline to rule on a constitutional issue if the case can be resolved on other grounds.[287] Instead, the Majority crafted a grudging new due process test that effectively eliminates due process protections except in the most egregious solitary confinement circumstances. Because Conner was afforded a limited hearing, the process provided him tended to hide or disguise the full implications of the Supreme Court's far-reaching ruling.

Let's explain what the Court did *not* do and what other less severe options it had. First, it did *not* hold that while Conner's disciplinary solitary confinement triggered the *Wolff* due process protections under existing law, the notice and limited hearing provided Conner was sufficient to satisfy due process due to the *Wolff* "unduly hazardous to institutional safety or correctional goals" exception. That is, the Court might have held that the Hawaii prison officials' reason for denying Conner's request to call witnesses—based on their unavailability—was justified on the facts, under the *Wolff* exception.

Second, the Court did *not* hold that the Court needed to reconsider "what process was due" in the context of prison discipline involving solitary confinement, using the *Mathews v. Eldridge* balancing test. A more candid approach would have advised that the earlier precedents, beginning with *Wolff* and concluding with *Hewitt*, needed to be revisited because of pressures resulting from an explosion in the nation's prison population in the fifteen years since 1980. In 2005, in *Wilkinson v. Austin*, a case involving due process requirements in a Supermax prison setting, the Court acknowledged that prison management issues had become the dominant factor in its stage two *Mathews* balancing equation. The Court in *Sandin* might have taken a similar approach and determined that, given the much larger prison populations, continued requirement of the *Wolff* procedures, especially hearings that involved witnesses, would put too great a burden on prison management. The proper rebalance might have been the informal, non-adversarial procedures the Court had set forth in *Greenholtz-Hewitt*: notice of the charges; an opportunity to be heard in person; and a written statement of disposition that need not summarize the evidence but demonstrates that the "decisionmaker review[ed] the charges and [ ] evidence against the prisoner."[288]

287. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

288. Hewitt v. Helms, 459 U.S. 460, 476 (1983); *see also* Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1, 15 (1979) (holding that in an informal,

The Court would have had at least two alternative ways to do this. Traditional principles of constitutional litigation would have led the Court to frame its holding, and any generally applicable test it might fashion, and base it on the facts in the case before it.

One alternative would have been for the Court to hold that short-term disciplinary solitary confinement, such as thirty days, triggered a liberty interest under the Constitution and the accompanying due process protections; however, the *Mathews* balancing equation did not require the full *Wolff* due process protections, but only the provision of *Greenholtz-Hewitt* informal, non-adversarial procedures. Since Hawaii did provide notice and an opportunity for Conner to present his case, the Court would dismiss Conner's claim because in fact Conner had been provided procedures that satisfied *Greenholtz-Hewitt*. This approach would have avoided the Court prescribing its sweeping "atypical, significant hardship" test.[289] It would have left in place the *Wolff* procedural protections when solitary confinement was for a longer term than thirty days or was indefinite. The informal, non-adversarial procedures approach would have been a familiar one for Chief Justice Rehnquist, for it was he who wrote the opinion in *Hewitt*. Would any of the dissenters have joined the majority based on this latter approach? I would think so. Hindsight suggests that informal, non-adversarial procedures for solitary confinements of thirty days or less, and *Wolff* procedures for longer term confinements, would have been a far better and more balanced approach than the bleak solitary confinement experience that almost all prisoners have had under *Sandin*.

A second alternative would have been for the Court to have held that short-term disciplinary solitary confinement, such as thirty days, was not a severe hardship and did not create a liberty interest arising under the constitution; thus, no due process protections attached to Conner's short-term solitary confinement. Again, the Court would not have prescribed its "atypical, significant hardship" test. Therefore, the Court would not have reached the questions of whether longer term solitary confinements trigger a liberty interest, and, if so, what process would be due. The *Sandin* dissenters would still have taken issue with this latter option being taken because existing precedent, informed by psychological and mental health science, held that solitary confinement is so inhumane that even short-term solitary confinement constitutes a "grievous loss," triggering due process protection. But such a holding would have assured that the *Wolff* procedures were still required when longer periods of solitary confinement were imposed—or at least would have left for future decision whether

non-adversarial hearing the decisionmaker need not "specify the particular 'evidence' . . . on which it rests [its] determination").

289. *See Sandin v. Conner*, 515 U.S. 472, 484 (1995).

lengthier periods of solitary confinement and/or more severe conditions would trigger due process protections.

Hindsight, of course, is twenty-twenty. Perhaps the reason that the dissenters did not press the Majority as to the scope of its holding was astonishment at the breadth of the change; shifting from unanimous Court holdings in *Wolff* and *Hewitt*, and *Hughes*' 6-2 ruling, to *Sandin*'s 5-4 holding that solitary confinement will only trigger due process protections in extreme or egregious cases. But, by not calling out the majority, there were two adverse consequences. First, the full scope and extremely harsh consequences of the *Sandin* "atypical, significant hardship" test was hidden and did not receive the negative public scrutiny it deserved, because Conner had been afforded the basic *Wolff* procedural protections at Conner's disciplinary hearing and eventually succeeded on his internal administrative appeal. Second, an opportunity to negotiate with the majority on any of the above suggested intermediate dispositions was lost. One would think the Chief Justice might have been willing to give some ground in order to obtain a broader consensus for the Court's disposition of the case. Instead, due process protections for solitary confinement went over the abyss into a deep black hole.

Despite *Sandin*'s many ambiguities, the federal circuit courts were quick to recognize that its test had forged new law nullifying the due process rights of prisoners except in extreme cases, and thereby provided the vehicle by which those courts could significantly reduce their prisoner case dockets. The federal circuit courts did not view the factual basis for *Sandin*'s holding—that the imposition of thirty days in disciplinary solitary confinement did not give rise to a constitutional claim entitling an inmate to due process procedural protections—as in any way limiting the scope of *Sandin*'s atypical, severe hardship test. *Sandin*'s law revision, which Justice Breyer characterized as "radical," has proven to be a dramatic departure from existing law. The federal circuits were zealous in their embrace, and it is evident that many judges viewed *Sandin* as liberating.

The Chief Justice pursued a different, uncompromising course intent upon forging what Justice Breyer and the dissenters feared—a radical change in the underlying constitutional law. The Court never forthrightly stated that its holding meant that the prisoner, Conner, was entitled to no due process protections whatsoever—but that is the reality of its holding. The Chief Justice did not explicitly state that the Court would have upheld Conner's solitary confinement even had he been provided no notice, no hearing, no process at all, but that is brutal reality of its holding. The title of this article characterizes *Sandin* as a "hijacking." This may be harsh, but it accurately describes the reality of the Court's ruling—the stealth rationale, the obliviousness

to the inhumanity of solitary confinement, and the total disregard of its own precedent.

The Court employed a howitzer when only surgical instruments were needed. The facts were treated as irrelevant in the Court's rush to return to the "hands off" federal courts' policy preceding *Morrissey* and *Wolff*. The success of Conner's internal appeal demonstrated this was not a minor claim and the importance of fair process. The facts demonstrated how important due process protections are to minimize the risk of an erroneous decision and the wrongful imposition of prison discipline. The Court's stated concern about "squandering judicial recourses" on "minor prison" misconduct matters had nothing to do with the instant case, which prison authorities charged as "high misconduct" with disciplinary segregation up to thirty days. The Court's decision totally blinks the factual reality that, after Conner was confined in solitary for thirty days, the prison authorities "found the high misconduct charge unsupported and expunged Conner's disciplinary record with respect to that charge."[290] Had he been afforded a full and fair hearing at the outset, surely he would have been spared from solitary confinement that, although treated as typical by the *Sandin* Majority, is double the maximum time period that is emerging as the international standard in the twenty-first century.

V. REINVIGORATING DUE PROCESS PROTECTIONS IN THE CONTEXT OF SOLITARY CONFINEMENT

Sandin did not put in question any aspect of the continuing vitality of the landmark *Morrissey v. Brewer* due process ruling in the parole revocation context. Indeed, *Morrissey* was fully embraced and reconfirmed in the Court's unanimous decision in *Young v. Harper*, decided two years after *Sandin*.[291] However, the due process solitary confine-

290. *Id.* at 476.

291. Young v. Harper, 520 U.S. 143, 152–53 (1997). Oklahoma "operated two programs under which inmates were conditionally released from prison before the expiration of their sentences. One was parole, the other "Preparole Conditional Supervision Program." *Id.* at 145. The latter program was in effect whenever the prison population exceeded 95% of capacity. After reviewing Ernest Harper's criminal record and prison conduct, the parole board recommended him for parole and released him from prison under the Conditional Program. Harper found housing and obtained and maintained a job, and "lived a life generally free of the incidents of imprisonment" for five months. *Id.* at 148. Then the Governor denied Harper's parole. He was told to report back to prison, which he did.

Harper challenged "his summary return to prison" as a deprivation of liberty without due process per *Morrissey*. The State contended that Harper's reincarceration was nothing more than a transfer to a higher degree of confinement, and therefore was permissible under *Meachum* without a due process hearing requirement. *Id.*

Justice Clarence Thomas wrote for the unanimous *Harper* Court: "The essence of parole is release from prison, before the completion of sentence, on the

ment caselaw that *Sandin* spawned has resulted in the radical law change governing internal prison discipline that Justice Breyer feared. The record is clear that *Sandin*, as construed by the federal circuit courts, essentially eliminated due process protection in the imposition of solitary confinement in all but the most extreme cases.

Yes, there was a consensus on the Court that the lower federal courts had misconstrued its precedent and as a result their attention had sometimes been diverted to minor disputes. As Justice Breyer explained, only a minor course correction was needed, not major surgery. Indeed, although none of the Justices mentioned it, congressional legislative reform was on the horizon, and the legislative process would have allowed congressional hearings with all the stakeholders at the table. Legislative reform permits a more comprehensive solution, and it also enables incremental improvement by tweaking the initial legislative product based on experience and feedback. Appellate adjudication, especially when it results in constitutional rules, does not permit such a comprehensive approach, and is typically confined to the facts of specific cases and the litigation strategies of the parties. Because of deference to precedent and the doctrine of *stare decisis*, it is more difficult to correct mistakes that have been blazoned into constitutional law.

We now know Congress did enact the Prison Litigation Reform Act (PLRA) in 1996, one year after *Sandin*, and that legislation comprehensively addressed concerns regarding the purported "flood" of frivolous prisoners' litigation faced by the courts. There are many, including this Author, who believe the PLRA went way too far—virtually a scorched earth approach to the problem. But legislation clearly was the preferred way to reform prisoner litigation excesses. Distorting constitutional law, especially its fundamental law of due process, was not. The PLRA, thus, provides important context that wasn't present when the Court forged *Sandin* in 1995, but its omnipresence will continue to ensure that prisoners won't flood the federal courts with litigation if due process protections are restored to solitary confinement cases by Court ruling or legislative action.

In the final footnote eleven to his *Sandin* opinion Chief Justice Rehnquist issued what was purported to be an assurance, but could also be viewed as a challenge:

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condition that the prisoner abide by certain rules during the balance of the sentence." *Id.* at 147 (quoting Morrissey v. Brewer, 408 U.S. 471, 477 (1972)). The *Harper* Court held that Oklahoma's pre-parole conditional supervision program was sufficiently similar to parole to require the *Morrissey* due process protections: "The fact that "participation in the [pre-parole] Program was ordered by the Board [of Parole], while the Governor conferred parole" was held an insignificant difference "from parole as we described it in *Morrissey*." *Id.* at 152 (quoting *Morrissey,* 408 U.S. at 477–78 (1972)).

> Prisoners such as Conner, of course, retain other protection from arbitrary state action even within the expected conditions of confinement. They may invoke the First and Eighth Amendments and the Equal Protection Clause of the Fourteenth Amendment where appropriate, and may draw upon internal prison grievance procedures and state judicial review where available.[292]

Footnote eleven leaves no doubt that the Court appreciated that its ruling meant that the federal courts would be significantly curtailing prisoners' due process protections. No doubt inmates and prisoners' rights advocates found its assurance that inmates were not completely without protection from arbitrary prison discipline of little solace. Although footnote eleven was quite vague about the state judicial review it referenced, hopefully it will serve as a reminder to prisoners and their advocates that federal constitutional law sets the minimum floor in terms of individual rights and those rights can be bolstered by state supreme courts construing their state constitutions, by legislatures, at the state or federal level, and—on the ground—by state departments of corrections and prison administration.[293]

I will take up the Chief Justice's challenge and will write a third Article, *Reinvigorating Due Process Protections in the Context of Solitary Confinement Starts with Reforming Sandin & Wilkinson*. I will urge the Court to overrule *Sandin* and will explore how that can be done given *stare decisis* principles. As a fallback, I will suggest the damage done by *Sandin* can be significantly minimized by the Court limiting the *Sandin* holding to its facts and dispatching with the "atypical, severe hardship" test. Various options on how this might be done will be explored.

The *Sandin* Court turned its back on two decades of precedent, dispatching it with a dismissive sentence. Would not the following observation of Chief Justice Roberts be directly on point and provide the compass for reconsideration of *Sandin*?:

> Stare decisis principles also determine how we handle a decision that itself departed from the cases that came before it. In those instances, "remaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of stare decisis than would following" the recent departure.[294]

To what extent does the Court's overruling of *Roe v. Wade* affect stare decisis jurisprudence?[295]

Reinvigorating Due Process will take a deep dive into the Supreme Court's only other venture into the thicket that is due process in the

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292. *Sandin*, 515 U.S. at 487 n.11.

293. See Russell E. Lovell, II, *Reinvigorating Due Process Protections in the Context of Solitary Confinement Starts with Reforming Sandin & Wilkinson* (forthcoming 2022).

294. June Med. Servs. v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, J., concurring) ("The legal doctrine of stare decisis requires us, absent special circumstances, to treat like cases alike.").

295. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

context of solitary confinement: *Wilkinson v. Austin*.[296] *Sandin* and *Wilkinson* can be viewed as bookends, with Sandin representing what a 5-4 divided Court characterized as "typical" solitary confinement, short in duration at 30 days, and which *Sandin* held did not trigger due process protection. *Wilkinson* was a unanimous Court that found that due process protection was required before a prisoner could be assigned to the "atypical solitary"confinement at a brand new Ohio Supermax prison where every prisoner experienced "extreme isolation" for an indefinite period of time, with no chance of parole. However, the *Wilkinson* Court's resolution of the second stage of the *Morrissey-Wolff* "process due" analysis was an absolute train wreck. Despite the district court's uncontested findings of a pattern and practice of constitutional violations over four years, the Supreme Court nonetheless upheld a last-ditch policy promulgated by the State while the trial was underway—a policy which post-trial was found never to have been implemented at which the State then contended that despite the assurances it gave the Court at oral argument, it need not implement. Intrigued?

Reform is definitely not limited to the Supreme Court. Springing from the suggestions in *Sandin*'s footnote eleven, the article will also explore the state constitutional law approach that recognizes the Federal constitution's protections provide a floor, and not a ceiling on individual rights. State supreme courts, under their independent authority to construe the due process clauses of their constitutions, can provide their residents, and those visiting their states, with greater protections.

Legislative reform, similar to the Nebraska Treatment & Corrections Act of 1969, may be the most likely systemic option at this historical moment. There have been exciting developments in the past half dozen years since the adoption of the Mandela Rules by the United Nations General Assembly in 2015. The pendulum has begun to swing back in favor of prisoner rights in the public policy and legislative arenas. Among the Mandela Rules is a prohibition of "solitary confinement for a time period in excess of 15 consecutive days,"[297] a position since embraced by the National Commission on Correctional Health[298] and the State of New York. New York's Humane Alternatives to Solitary Confinement (HALT) Act, which was signed into law

296. Wilkinson v. Austin, 545 U.S. 209 (2005).

297. G.A. Res. 70/175, at 16–17 (Dec. 17, 2015).

298. *New Position Statement Provides Guidance on Solitary Confinement*, NAT'L COMM'N ON CORR. HEALTH CARE, (Apr. 19, 2016) https://www.ncchc.org/solitary-confinement-position-statement [https://perma.cc/W6NE-32H5]; *see also* American Bar Association Resolution 108A, (2018) https://www.americanbar.org/content/dam/aba/directories/policy/2018-midyear/2018-mm-108a.pdf [https://perma.cc/A2SZ-RKCV] (urging enactment of laws ensuring that "solitary confinement . . . typically [does not] exceed 15 consecutive days.").

in April 2021,[299] restricted the use of segregated confinement for all incarcerated persons to fifteen days. What a dramatic contrast to the federal courts' post-*Sandin* caselaw! Significant legislative limitations on solitary confinement have occurred in more than a dozen states, including Nebraska,[300] since 2015. So, yes, legislative reform must be considered a promising alternative.

299. *See Senate Passes the 'HALT' Solitary Confinement Act*, N.Y. STATE SEN. (Mar. 18, 2021) https://www.nysenate.gov/newsroom/press-releases/senate-passes-halt-solitary-confinement-act [https://perma.cc/U59L-9DC4].

300. NEB. REV. STAT. § 83-173.03 (Cum. Supp. 2020).