THE DECLINE OF NEGATIVE IMPLICATION JURISPRUDENCE: PROCEDURAL FAIRNESS IN PRISON DISCIPLINE AFTER SANDIN v. CONNER

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I. INTRODUCTION

Once the prison gate closes, one enters an authoritarian, "total institution." Courts, however, no longer regard inmates as "slaves of the state." Consequently, inmates can exercise certain enumerated constitutional rights. ¹

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¹ Prisons are "total institutions:"
The central feature of total institutions can be described as a breakdown of the barriers ordinarily separating . . . three spheres of life. First, all aspects of life are conducted in the same place and under the same single authority. Second, each phase of the member's daily activity is carried on in the immediate company of a large batch of others, all of whom are treated alike and required to do the same thing together. Third, all phases of the day's activities are tightly scheduled . . . . Finally, the various enforced activities are brought together into a single rational plan purportedly designed to fulfill the official aims of the institution.

ERVING GOFFMAN, ASYLUMS 6 (1961).

The nature of imprisonment severely constrains the staff's control of inmates. First, control through physical force or the threat thereof is often ineffective. Second, there are few rewards or punishments that can be handed out to inmates that will impact them in a meaningful way. Third, because of the involuntarily nature of imprisonment, inmates are unlikely to respond to appeals to morality or duty. Finally, the very willingness of staff to use their authority is corrupted by several factors, including the social pressures to be a "good Joe" and the dependence on inmates to perform various housekeeping functions. See GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES 48-58 (1958).

Because of these limitations, staff members enlist the support of inmates to achieve "surface" order. See ROBERT G. LEGER & JOHN R. STRATTON, THE SOCIOLOGY OF CORRECTIONS: A BOOK OF READINGS 120 (1977) (identifying three informal patterns of social accommodation: over goods and services, information, and status); Jim Thomas, Some Aspects of Negotiated Order, Loose Coupling and Mesostructure in Maximum Security Prisons, 7 SYMBOLIC INTERACTION 213, 221 (1984) (observing that informal agreements between inmates and staff lead to relaxed rule enforcement).

² Prior to the twentieth century, courts regarded prisoners as "slave[s] of the state" and thus lacking civil rights. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 1024, 1026 (1871). Prisoners would have to await Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944), cert. denied, 325 U.S. 887 (1945), to achieve their modern constitutional status. In ruling that the writ of habeas corpus can be used to challenge conditions of confinement, the Coffin court declared that prisoners possess the same rights as free citizens excepting those incompatible with incarceration. See Coffin, 143 F.2d at 445.

Inmates also enjoy constitutional liberty and its attendant procedural safeguards under the Due Process Clauses of the Fifth and Fourteenth Amendments. While prison staff can lawfully deprive inmates of constitutional liberty, such deprivation must be preceded by “some kind of hearing” to prevent erroneous or arbitrary decisions.

On several occasions during the past three decades, the United States Supreme Court has defined the liberty interests of inmates. The Court’s most recent explication came in the 1994-95 term in Sandin v. Conner. The Court, in an opinion authored by Chief Justice Rehnquist, abandoned the methodology through which the grammatical composition of state prison regulations had become the basis for deriving constitutionally protected liberty interests. In its place, the Court utilized a liberty-defining standard that achieved analytical symmetry at the cost of procedural fairness in the prison’s internal “justice” system.


5. The Due Process Clause of the Fourteenth Amendment provides: “No State shall . . . deprive any person of life, liberty, or property without due process of law . . . .” U.S. CONST. amend. XIV, § 1. The Fifth Amendment includes a similar provision that applies only to actions of the federal government. See Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833). Because the Bill of Rights is not applicable to the states by virtue of the Barron case, state inmates must look to the Fourteenth Amendment for due process protection. Unless otherwise indicated, all references to the Due Process Clause in this Article refer to the Fourteenth Amendment, rather than the Fifth Amendment, because the vast majority of inmates reside in state prisons. See BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1994 at 547 tbl.6.25 (1995) (89,587 federal prisoners compared with 857,359 state prisoners as of Dec. 31, 1993).


10. Id. at 2300-01.

11. Id. Inmates’ lives are regulated by official rules of conduct. Some of these prohibitions are malum in se and mirror criminal offenses, but the great bulk of prohibitions have no counterpart in the criminal law. Prohibitions that do not have criminal counterparts are peculiar to life in total institutions, where prisoners are stripped of their autonomy and subjected to constant surveillance.


Disciplinary procedures come into play when a correctional officer “writes-up” or charges an inmate with a rule violation. Charging is discretionary, with staff overlooking many violations. See id. at 445. The Bureau of Criminal Statistics reported that just over half of all state prisoners faced disciplinary charges dur-
This article critiques the Court's new methodology for identifying inmate liberty interests. Part I reviews earlier methodologies advanced by the Court. Part II summarizes the Sandin decision. Part III explores the implications of the Court's ruling for correctional staff and inmates. Part IV proposes a liberty-defining standard grounded in common law and illustrated by a watershed ruling of England's Court of Appeal. Concluding remarks follow.

II. LIBERTY BEFORE SANDIN V. CONNER

In 1968, inmate Martin Sostre, a jail house lawyer and black activist, spent a year in segregation for activities that his warden viewed as disruptive. Prison officials failed to accord Sostre even rudimentary due process before imposing such harsh discipline. Indeed, prison officials customarily meted out arbiting the course of their confinement. In 1986 there were 1.5 violations per inmate. Males were more likely to be charged than females. A greater percentage of non-Hispanic blacks (57%) faced disciplinary charges than non-Hispanic whites (51%) and Hispanics (47%). Younger inmates had the most disciplinary violations. See JAMES STEPHAN, PRISON RULE VIOLATORS 1-2 (1989).

There have been three approaches to staffing disciplinary tribunals. Historically, custody officers adjudicated charges. A more recent approach utilizes both custody and treatment personnel appointed by the warden. A third model consists of a single hearing officer supervised by the commissioner of corrections rather than a particular warden. See generally James E. Robertson, Impartiality and Prison Disciplinary Tribunals, 17 N. ENG. J. ON CRIM. & CIV. CONFINEMENT 301, 326-29 (1991) (hereinafter Robertson, Impartiality) (discussing the several variations of staffing disciplinary bodies). Courts have given correctional authorities wide latitude in determining the composition of disciplinary tribunals. The Supreme Court has acknowledged that tribunals staffed by the prison's own officers face "obvious pressure to resolve a disciplinary dispute in favor of the institution . . . ." Cleavinger v. Saxner, 474 U.S. 193, 204 (1985). Even in the light of such pressure, the Court has not found their use unconstitutional. Wolff v. McDonnell, 418 U.S. 539, 570-71 (1974). A line of cases do forbid institutional employees from hearing charges that they witnessed, wrote-up, investigated, or otherwise had substantial involvement. See, e.g., Malek v. Camp, 822 F.2d 812, 816 (8th Cir. 1987); Adams v. Gunnell, 729 F.2d 362, 370 (5th Cir. 1984); Willoughby v. Luster, 717 F. Supp. 1439, 1441 (D. Nev. 1989).

The Supreme Court, in Wolff v. McDonnell, 418 U.S. 539 (1974), decreed that inmates threatened with deprivation of a major liberty interest are entitled to the following procedural safeguards: (1) notification of the charges no later than twenty-four hours before their adjudication; (2) assistance by a staff member, inmate or some other "counsel substitute" for illiterate defendants or for those persons facing complex accusations; (3) production of witnesses for the accused unless their presence would be "unduly hazardous to institutional safety or correctional goals;" and (4) an explanation of a guilty verdict. Id. at 563-70.


They could do so as long as the federal courts abided by the "hands-off" doctrine, a judicial policy of nonintervention in prison matters.15

Fortunately for inmate Sostre, his segregation occurred during a sea change in the legal status of inmates. By the late 1960s, federal courts had begun to repudiate the "hands-off" doctrine.16 Similarly, the federal district court in

14. As one scholar has stated:
Historically, the management of prison business has been centered around the personal goals and powers of the warden and a deputy warden or principal keeper who served as chief disciplinarian and top security officer. Literature describing early prison wardens presents the image of autocratic, sometimes charismatic figures who commanded the obedience and loyal and rank of file custodians. Until the courts abandoned their hands-off policy, wardens and their deputies held nearly unlimited authority to administer their own system of punishments and rewards.

JAMES FOX, ORGANIZATIONAL AND RACIAL CONFLICT IN MAXIMUM-SECURITY PRISONS 13 (1982) (footnotes omitted). See also Bruce R. Jacob, Prison Discipline and Inmate Rights, 5 HARV. C.R.-C.L. L. REV. 227, 244 (1970) ("There exists an almost complete absence of meaningful procedural protections ... in such hearings."); William D. Wick, Procedural Due Process in Prison Disciplinary Hearings: The Case for Specific Constitutional Requirements, 18 S.D. L. REV. 309, 314 (1973) ("Even if procedures exist, and even if they are followed, the prisoner's chances of receiving a fair hearing are extremely poor. In many instances, a hearing is never held and punishment is imposed by an individual guard.").

During this era, many institutions failed to provide inmates with written disciplinary rules. See Special Project, Behind Closed Doors: An Empirical Inquiry into the Nature of Prison Discipline in Georgia, 8 GA. L. REV. 919, 955 (1974). When written rules were present, many were vague, giving staff the power to define them at their fancy. Wick, supra, at 311. Few, if any, procedural safeguards accompanied the adjudication of alleged offenses. For instance, in Virginia's prisons, disciplinary sanctions were handed out "on the basis of a single, unreviewed report of a guard." Philip J. Hirschkop & Michael A. Milleman, The Unconstitutionality of Prison Life, 55 VA. L. REV. 795, 811 (1969). One commentator wrote of two minute perfunctory ceremonies.

Note, Bargaining in Correctional Institutions: Restructuring the Relationship Between the Inmate and the Prison Authority, 81 YALE L.J. 726, 731 n.16 (1972).

15. See, e.g., Douglas v. Sigler, 386 F.2d 684, 688 (8th Cir. 1967) ("[C]ourts will not interfere with the conduct, management, and disciplinary control of this type of institution except in extreme cases."); United States ex rel. Yaris v. Shaughnessy, 112 F. Supp. 143, 144 (S.D.N.Y. 1953) ("[I]t is unthinkable that the judiciary should take over the operation of ... prisons."); Garcia v. Steele, 193 F.2d 276, 278 (8th Cir. 1951) ("[C]ourts have no supervisory jurisdiction over the conduct of the various institutions ... "); Sarshik v. Sanborn, 470 F.2d 311 (9th Cir. 1973) ("The courts have no function to superintend the treatment of prisoners in the penitentiary, but only to deliver from prison those who are illegally detained there.").

The "hands-off" policy rested on several rationales, including: (1) judges lacked expertise in penal matters; (2) principles of federalism prohibited review of state prison issues by federal judges; (3) judicial review would undermine the authority of correctional staff; and (4) prisoner complaints did not address rights, matters; (2) principles of federalism prohibited review of state prison issues. See, e.g., Daryl R. Fair, The Lower Federal Courts as Constitution-Makers: The Case of Prison Conditions, 7 AM. J. CRIM. L. 119 (1979); Michael S. Feldberg,
Sostre v. Rockefeller swept aside the long established policy of judicial non-involvement to hold that significant punishments, including inmate Sostre's, triggered procedural safeguards.

The Sostre decision foreshadowed the emergence of a liberty-defining standard based on the magnitude of the injury visited upon claimants. In 1970, the Supreme Court held in Goldberg v. Kelly that a "grievous loss" arising from the termination of welfare benefits triggered procedural safeguards. Two years later, the Court in Morrissey v. Brewer held that revocation of a parolee's conditional liberty also "inflicts a 'grievous loss'" and thus merits procedural safeguards. Lower federal courts subsequently applied the grievous loss test directly to prison matters.

Nonetheless, the Supreme Court ignored the grievous loss test when it first addressed the nature of liberty in prison in the 1974 decision of Wolff v. McDonnell. In Wolff, Nebraska prison officials had stripped an inmate of accumulated good conduct time for his alleged violations of a prison rule. The Court held that the inmate had been deprived of a liberty interest because the state had "created the right to good [conduct] time," a right of "real substance . . . within Fourteenth Amendment liberty . . . ." The Court cryptically attributed its novel analysis to Board of Regents of State Colleges v. Roth, which held that the dismissal of a college professor did not require procedural safeguards unless state law gave him assurance of continued employment.


20. See id. at 263 (quoting Joint Anti-Fascist Refugee Comm'n. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).
22. Id. at 482.

[Good conduct time is] . . . the amount of time deducted from time to be served in prison on a given sentence(s) and/or under correctional agency jurisdiction, at some point after a prisoner's admission to prison, contingent upon good behavior and/or awarded automatically by application of a statute or regulation.

Id.
27. 408 U.S. 564 (1972).
28. See id. at 577.
In the 1976 decision of Meachum v. Fano, the Court further clarified the concept of inmate liberty. Citing Roth, Justice White's majority opinion repudiated the grievous loss test, explaining that "the determining factor is the nature of the interest involved rather than its [own] weight." The Court asserted that the Wolff decision had implicitly discarded the grievous loss test when it looked to state law as the basis of a liberty interest in accruing good conduct time. The Court also contended that the grievous loss test invited judicial oversight of the routine, day-to-day management of state prisons, an outcome deemed "not the business of federal judges."

The Meachum Court postulated that inmate liberty arose from two sources. First, the Due Process Clause provided inmates with a residuum of liberty which protects them from practices and/or conditions that fall outside "the normal limits or range of custody . . . ." Second, states created liberty interests by conditioning the exercise of penal authority "upon the occurrence of specified events." The Court concluded that the respondent's transfer to another, less amenable prison did not transgress a liberty interest arising from either source.

The Court elaborated upon the concept of state-created liberty in its 1983 decision of Hewitt v. Helms. In Hewitt, Pennsylvania prison authorities placed the petitioner in administrative segregation to protect the staff and other inmates. The petitioner asserted that his segregation denied him a liberty interest. Ruling that prison officials had curtailed the petitioner's state-created liberty, the Court, in an opinion by then-Justice Rehnquist, deconstructed a state regulation pertaining to the uses of administrative segregation:

[In this case the Commonwealth [of Pennsylvania] has gone beyond simple procedural guidelines. It has used language of an unmistakably mandatory character, requiring that certain procedures "shall," "will," or "must" be employed and that administrative segregation will not occur

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30. See id. at 223-29.
31. Id. at 224.
32. See id. at 226.
33. Id. at 228-29.
34. Id. at 225.
35. Id. at 226-27.
38. Id. at 463. As used in Hewitt, "administrative segregation" denoted all non-punitive uses of segregated housing, including protective custody. See id. at 463 n.1. See also CORRECTIONAL LAW PROJECT, AMERICAN CORRECTIONAL ASS'N, MODEL CORRECTIONAL RULES AND REGULATIONS 1 (1979).
Administrative segregation is a level of custody into which an inmate may be classified as a result of a determination that he presents a substantial risk to the security or order of the institution, the safety of that inmate or others and, therefore, requires separation from the general institution population and strict supervision in a highly structured, controlled setting.

Id.

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absent specified substantive predicates -viz., "the need for control," or "threat of a serious disturbance."

Later renamed "negative implication jurisprudence," Hewitt's methodology for identifying state-created liberty gained wide acceptance among federal courts in the years separating the Hewitt and Sandin decisions. The resulting case law posited that a liberty interest arose whenever a state directive created the "negative implication" that disciplinary sanctions or other adverse changes in one's confinement would not occur unless "substantive predicates" were satisfied.

III. SANDIN V. CONNER

A. The Facts

Hawaiian prison authorities charged inmate DeMont Conner with violating institutional rules while being strip searched. During his subsequent disciplinary hearing, the hearing officer refused Conner's request to present witnesses and found him guilty of the charged offense. He received a sentence of thirty days in disciplinary segregation.

Inmate Conner later brought a civil rights action under 42 U.S.C. § 1983. Conner's claims included denial of procedural due process at his disciplinary hearing. The federal district court granted summary judgment in favor of the prison authorities. The Ninth Circuit Court of Appeals reversed the district court, concluding that state regulations had granted inmates a liberty interest and remanded the case for a new hearing.

Section 1983 lay dormant until Monroe v. Pape, 365 U.S. 167 (1961), partially overruled by, Monell v. Department of Soc. Serv., 436 U.S. 658, 663 (1978), in which the Court held that misuse of state power could be subject to a federal remedy even when state remedies were not exhausted. Monroe, 365 U.S. at 183. Not until Cooper v. Pate, 378 U.S. 546 (1964), did the Supreme Court hear a § 1983 lawsuit brought by inmates.

40. Id. at 471-72.
42. See, e.g., Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 470 (1989); Board of Pardons v. Allen, 482 U.S. 369, 373-79 (1987); Olim v. Wakinekona, 461 U.S. 238, 249 (1983); Newell v. Brown, 981 F.2d 880, 883 (6th Cir. 1993); Pardo v. Hosier, 946 F.2d 1276, 1281 (7th Cir. 1991); Russ v. Young, 895 F.2d 1149, 1153 (7th Cir. 1990); Knight v. Armontrout, 878 F.2d 1093, 1095 (8th Cir. 1989); McQueen v. Tabah, 839 F.2d 1525, 1527-28 (11th Cir. 1988); Lewis v. Thigpen, 767 F.2d 252, 262 (5th Cir. 1985); Hayes v. Lockhart, 754 F.2d 281, 283 (8th Cir. 1985); Lucas v. Hodges, 730 F.2d 1493, 1502-03 (D.C. Cir. 1984).
44. Sandin, 115 S. Ct. at 2296.
45. Id.
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. Section 1983 lay dormant until Monroe v. Pape, 365 U.S. 167 (1961), partially overruled by, Monell v. Department of Soc. Serv., 436 U.S. 658, 663 (1978), in which the Court held that misuse of state power could be subject to a federal remedy even when state remedies were not exhausted. Monroe, 365 U.S. at 183. Not until Cooper v. Pate, 378 U.S. 546 (1964), did the Supreme Court hear a § 1983 lawsuit brought by inmates.
47. Sandin, 115 S. Ct. at 2296.
48. Id.
interest in not being arbitrarily confined to disciplinary segregation. The court discerned this liberty interest through negative implication jurisprudence. Hawaii's administrative rules contained "explicitly mandatory language" directing prison staff not to convict an inmate of a rules violation unless certain "substantive predicates" were satisfied.

B. The Holding

The Supreme Court in Sandin v. Conner broke with established case law and abandoned Hewitt's grammatically based approach to identifying state-created liberty. Chief Justice Rehnquist, who also wrote for the Court in Hewitt, authored the Court's opinion. The Chief Justice faulted negative implication jurisprudence for "creat[ing] disincentives for [s]tates to codify prison management procedures" in order to avoid burdensome procedural safeguards. Furthermore, the Court blamed negative implication jurisprudence for leading to "the involvement of federal courts in the day-to-day management of prisons [which the Court had sought to avoid in Hewitt]."

The Sandin Court then propounded its own liberty-defining standards. The first standard was a reaffirmation that liberty arises directly from the Due Process Clause to protect inmates from conditions and practices which the Court variously described as "exceeding the sentence in . . . an unexpected manner," "[outside] the expected parameters of the sentence imposed by a court of law," or "[resulting in] a dramatic departure from the basic conditions [of the sentence]." The Court first identified the Due Process Clause as a source of liberty in Meachum. In several subsequent decisions, including Hewitt, the Court reiterated that liberty interests inhere in the Due Process Clause itself, but only twice found those interests to be affected by state action.

The Sandin Court's departure from Hewitt addressed the nature of state-created liberty interests. Whereas Hewitt identified state-created liberty through "substantive predicates" and "mandatory language," the Sandin Court used the "ordinary incidents of prison life" to both limit the boundaries of prison due process and to give symmetry to liberty-defining standards. Having characterized the liberty inhering in the Due Process Clause as a protection from condi-

49. Conner v. Sakai, 15 F.3d 1463, 1463-66 (9th Cir. 1993).
50. See id.
52. Id. at 2299.
53. Id.
54. Id. at 2300-01.
57. See Washington, 494 U.S. at 221-22 (involuntary consumption of psychotropic drugs); Vitek, 445 U.S. at 493-94 (involuntary transfer to mental hospital).
tions and practices that fall outside these “ordinary incidents,””59 the Court delimited state-created liberty to protection against “atypical and significant hardships” found within these “ordinary incidents.”60 Chief Justice Rehnquist added that state-created liberty interests “will be generally limited to freedom from restraint.”61

The Chief Justice next addressed whether inmate Conner’s disciplinary segregation affected liberty created by the Due Process Clause or state law. The Court concluded that all disciplinary sanctions fall within the “expected parameters” of a prison sentence and thus held that inmate Conner’s punishment failed to impinge upon the liberty inhering in the Due Process Clause.62 Since inmate Conner’s disciplinary segregation fell short of imposing an “atypical [and] significant deprivation,”63 the Court found no deprivation of state-created liberty. Chief Justice Rehnquist reached this conclusion after comparing the conditions of inmate Conner’s confinement in disciplinary segregation with three other housing areas at his prison: administrative segregation, protective custody, and the general population.64 While the Court viewed the inmate’s subjective expectations as “provid[ing] some evidence that the conditions suffered were expected within the contour of the actual sentence imposed,” the Court held to an objective standard of what the inmate should have anticipated when imprisoned.65 In inmate Conner’s case, all major forms of non-disciplinary housing imposed restrictions like those in disciplinary segregation.66

Lastly, the Court rejected inmate Conner’s argument that his disciplinary record would diminish the likelihood of being paroled and the realization of the conditional liberty enjoyed by a parolee.67 While Chief Justice Rehnquist acknowledged that disciplinary violations are relevant considerations in parole release, he characterized their impact as “simply too attenuated to invoke the procedural guarantees of the Due Process Clause” given the “myriad of [other] considerations” relevant to such decisions.68

60. Id. at 2300.
61. Id.
62. See id. at 2301.
63. See id.
64. See id. Unlike the Hewitt decision, the Sandin Court drew a distinction between protective custody and administrative segregation. Inmates segregated for their own protection received a protective custody classification. Segregation for all other non-disciplinary purposes was considered administrative segregation. See generally, James E. Robertson, The Constitution in Protective Custody: An Analysis of the Rights of Protective Custody Inmates, 56 U. Chi. L. REV. 91 (1987) (discussing constitutional issues raised by protective custody).
65. Sandin, 115 S. Ct. at 2301 n.9.
66. See id. at 2301.
67. See id. at 2302.
68. Id.
Prior to *Sandin v. Conner*, an inmate accused of disciplinary charges, however minor, stood virtually assured of procedural safeguards because “substantive predicates” and “mandatory language” had become part of the text of disciplinary policy in virtually every state correctional system. Not so after *Sandin*. As illustrated by case law regarding the two most common and severe disciplinary sanctions—segregation and loss of good conduct time—a formerly settled area of law has been turned upside down by the Supreme Court.

### A. Disciplinary Segregation

More than half of all inmates will be charged with a prison rule violation during their term of confinement, and nearly one-third of those charged will be removed to disciplinary segregation. Once placed in the “hole,” inmates will experience a prison within a prison:

- Being locked in solitary means deprivation of associational rights and removal of privileges. Inmates so disciplined may find limited shower and exercise opportunities; food deficient in taste and calories, absence of bedding and toilet facilities; exposure to temperature extremes due to inadequate heat and ventilation; and extensive surveillance of their actions (or the opposite, isolation and neglect) by security personnel.


70. See *Stephan*, *supra* note 11, at 1-2. One commentator asserts that five to ten days is a “typical stay.” *Richard W. Snarr, Introduction to Corrections* 144 (3d ed. 1996). Lengthy periods of segregation can be meted out. For instance, in *Brown v. Nix*, 33 F.3d 951 (8th Cir. 1994), the Eighth Circuit Court of Appeals held that a nine year “term” in segregation for a host of disciplinary infractions did not constitute a denial of substantive due process or a violation of the Eighth Amendment prohibition of cruel and unusual punishment. *Id.* at 954-55. See, e.g., *NEVADA DEP’T OF PRISONS, CODE OF PRISON DISCIPLINE* 48 (May 1, 1993) (up to 36 months segregation for assaulting officer with a weapon); *SOUTH CAROLINA DEP’T OF CORRECTIONS, INMATE GUIDE* 21 (1989) (up to 24 months for assault with a weapon); *WEST VIRGINIA DEP’T OF CORRECTIONS, W.V. PENITENTIARY RULES AND REGULATIONS* 60 (undated) (not less than two years in segregation for Class I violations); *WYOMING STATE PENITENTIARY, INMATE RULES HANDBOOK* 141 (up to 1 year in segregation for major offenses). See generally Correale F. Stevens, Comment, *Punitive Segregation in State Prisons-The Need for Definite Time Limitations*, 76 DICK. L. REV. 125 (1971) (addressing the constitutionality of lengthy confinement in segregation); Kenneth M. Cole III, Note, *Constitutional Status of Solitary Confinement*, 57 CORNELL L. REV. 476 (1972) (same).


Even though being placed in the “hole” is still a dreadful experience, it is much more humane today than in the past. The “hole” in the past had no bed, mattress or light and a drain hole in the center of the floor that was utilized as a toilet. A person placed in this type of “hole” would not see daylight
These hardships are compounded by institutional regulations barring inmates confined to disciplinary segregation from earning good conduct time.\textsuperscript{72}

Given Sandin’s categorical assertion that “[d]iscipline by prison officials... falls within the expected parameters of the sentence imposed by a court of law,”\textsuperscript{73} it is quite unlikely that disciplinary segregation for even an extended period deprives inmates of the liberty inhereing in the Due Process Clause. Two contrasting opinions of the Seventh Circuit Court of Appeals, one before and the other after Sandin, illustrate the adverse impact of the Supreme Court’s new jurisprudence. Prior to Sandin, the Seventh Circuit in Rowe v. DeBruyn\textsuperscript{74} held that a confinement in disciplinary segregation for one year ran afoul of the liberty emanating from the Due Process Clause.\textsuperscript{75} The court reasoned that a year in segregation visited “consequences... that are qualitatively different from the punishment characteristically suffered by a person convicted of [a] crime.”\textsuperscript{76} After Sandin, however, the same court in Whitford v. Boglino\textsuperscript{77} stated that Sandin “calls Rowe’s reasoning into question” in that Justice Rehnquist implied that disciplinary sanctions per se fall “within the expected scope of a prison sentence.”\textsuperscript{78}

Most inmates facing disciplinary segregation will not fare much better under Sandin’s method for identifying state-created liberty. Recall that this method juxtaposes the “duration” and “degree” of segregated confinement with other forms of housing, particularly protective custody and administrative segregation.\textsuperscript{79} The latter share much in common with disciplinary segregation, making it quite unlikely that conditions in disciplinary segregation will be judged “atypical.” Indeed, all three types of segregated housing separate their residents from the general prison population and impose severe restrictions on inmate movement, visitation, work, and programming.\textsuperscript{80}

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\textsuperscript{72} Thus, time spent in segregation is referred to as “dead time.” BENTLEY & CORBETT, supra note 11, at 28.


\textsuperscript{74} 17 F.3d 1047 (7th Cir. 1994).

\textsuperscript{75} See id. at 1053.

\textsuperscript{76} Id. (quoting Vitek v. Jones, 445 U.S. 480, 493 (1980)).

\textsuperscript{77} 63 F.3d 527 (7th Cir. 1995).

\textsuperscript{78} Id. at 533. But the court did leave open the possibility that “extreme terms of segregation” could deprive this type of liberty. Id. The significance of extended periods of segregation on inmate liberty is examined infra notes 90-95 and accompanying text.


\textsuperscript{80} The American Correctional Association warns of the “serious consequences which generally accompany a placement in administrative segregation (e.g., an inmate’s loss of a substantial degree of liberty and the loss of access to most facilities and programs available to the general population) . . . .” CORRECTIONAL LAW PROJECT, supra note 38, at 6. See Robertson, supra note 64, at 125 (discussing similarities and differences between disciplinary segregation and protective custody).
Comparisons between segregation and the general prison population are also unlikely to satisfy the Court’s criteria for state-created liberty. In *Higgason v. Farely*, an inmate juxtaposed these two housing arrangements when complaining about his diminished access to prison programs because of his segregated status. Nonetheless, the court found that he had failed to satisfy the “atypical and significant hardship” test advanced by the Supreme Court.

Not surprisingly, lower federal courts have uniformly held that short stays in segregation are not “atypical” punishments and thus fall outside the protection of state-created liberty. The decision in *Williams v. Ramos* is illustrative. In *Williams*, the inmate-petitioner complained of being confined in disciplinary segregation virtually around-the-clock for nineteen days without most of the amenities given to general population inmates. Nonetheless, the court in *Williams* concluded that he lacked a state-created liberty interest. The court stated, “We do not believe that his catalog of harms greatly exceeds what one could expect from prison life generally . . . .” The *Williams* decision is buttressed by holdings of the Fifth and Seventh Circuit Courts of Appeals that confinement in administrative segregation does not constitute an “atypical and significant” deprivation needed for a state-created liberty interest.

Federal courts are thus far divided over the impact of exceptionally long periods of segregated confinement on state-created liberty. In *Carter v. Carriero*, the trial court rejected the plaintiff’s contention that a disciplinary penalty of 270 days in segregation constituted an “atypical and significant hardship.” The court explained that the plaintiff could have been confined in administrative segregation for an equally long period and under similar conditions.


penalty of 376 days in segregation must be accompanied by due process safeguards. Without further explanation, the trial judge decreed, "[P]laintiff has sufficiently alleged a [state-created] liberty interest, even under the new light of Sandin."

B. Good Conduct Time

Many inmates are charged with rule violations that typically call for the loss of some good conduct time. Indeed, major offenses can result in the forfeiture of months, if not years, of accumulated good conduct time. Inmates most fear this sanction because it extends their incarceration. Nonetheless, good conduct time cannot be counted among the liberty interests arising directly from the Due Process Clause. Providing no explanation other than a citation to Wolff v. McDonnell, the Sandin Court categorically stated that "the Due Process Clause itself does not create a liberty interest in credit for good behavior . . . ."

On the other hand, depriving inmates of earned good conduct time invariably extends a prison stay and thus impacts "freedom from restraint," the touchstone of state-created liberty under Sandin. Furthermore, a reading of Wolff suggests that a state-created liberty interest in accumulated good conduct time arises whenever state law authorizes its deprivation for misconduct.

94. See id. at 431.
95. Id.
96. See STEPHAN, supra note 11, at 1, 7 (explaining that of the 1.5 reported violations per inmate, 25% of the sanctions are loss of good conduct time).
97. There are no empirical studies revealing the average or median amount of good time that is lost by virtue of disciplinary misconduct. Some sanctions can be severe: Rideau and Wikberg tell of a Louisiana inmate who lost twenty-eight years of good conduct time following a prison escape! See WILBERT RIDEAU & RON WIKBERG, LIFE SENTENCES 115 (1992).

Prison regulations typically provide disciplinary officers with considerable discretion in determining the amount of good conduct time that is to be taken. See, e.g., ALABAMA DEP'T OF CORRECTIONS, ADMIN. REG. 403, ANNEX B, DISCIPLINARY HEARING PROCEDURES FOR MAJOR AND MINOR VIOLATIONS 1 (June 17, 1992) (up to all earned good time); ARIZONA DEP'T OF CORRECTIONS, RULES OF DISCIPLINE, Appendix A (March 1986) (loss of all good conduct time recommended for most serious offenses); COLORADO DEP'T OF CORRECTIONS, CODE OF PENAL DISCIPLINE 41 (rev. ed. 1984) (up to 45 days for most serious offenses); DELAWARE DEP'T OF CORRECTIONS, BUREAU OF PRISONS, PROCEDURE MANUAL: RULES OF CONDUCT, Procedure No. 4.2, 15-16 (Nov. 23, 1992) (up to all good time for major offenses); KANSAS DEP'T OF CORRECTIONS, INMATE RULE BOOK, 44-12-301, 29 (April 20, 1992) (up to 6 months loss of good time for most serious offenses); NEVADA DEP'T OF PRISONS, CODE OF PENAL DISCIPLINE 47 (May 1, 1993) (120 or more days for major violations); NEW HAMPSHIRE STATE PRISON, MANUAL FOR THE GUIDANCE OF INMATES 58 (1992) (no more than 100 days); SOUTH CAROLINA DEP'T OF CORRECTIONS, INMATE GUIDE 21 (1989) (forfeiture of all good time for murder and voluntary manslaughter); VIRGINIA DEP'T OF CORRECTIONS, DIVISION OF INSTITUTIONS, DIVISION OPERATING PROCEDURE 861, INMATE DISCIPLINE 10 (April 1, 1992) (up to 90 days).

98. See Jacob & Sharma, supra note 11, at 11.
99. 115 S. Ct. 2293, 2297 (1995). Pre-Sandin case law had reached the same conclusion regarding the impact of losing good time on liberty emanating directly from the Due Process Clause. See, e.g., Lyon v. Farrier, 727 F.2d 766, 768 (8th Cir. 1984); Dudley v. Stewart, 724 F.2d 1493, 1495 (11th Cir. 1984); Bills v. Henderson, 446 F. Supp. 967, 973 (E.D. Tenn. 1978).
100. Sandin, 115 S. Ct. at 2300.
ingly, the Tenth Circuit Court of Appeals in *Mitchell v. Maynard* observed that "[i]t is well settled that an inmate's liberty interest in his *earned* good time cannot be denied" without the minimal safeguards afforded by the Due Process Clause of the Fourteenth Amendment."

However, no procedural safeguards are needed when a disciplinary sanction merely precludes the opportunity to earn good conduct time. The decision in *Luken v. Scott* is illustrative. In *Luken*, prison officials placed the appellant in administrative segregation which prevented him from accumulating the good conduct time needed to be eligible for parole release. The appellant argued that segregated confinement would ultimately deny him state-created liberty by delaying his release from prison via parole. The Fifth Circuit disagreed, observing that the opportunity to acquire good conduct time does not inevitably lead to its accumulation given the vagaries of inmate conduct. The court found support for its position in Justice Rehnquist's majority opinion in *Sandin* by stating:

In *Sandin*, the [Supreme] Court rejected a similar argument, noting that [inmate] Conner's confinement in disciplinary segregation would not "inevitably" affect the duration of his sentence since the decision to release a prisoner on parole "rests on a myriad of considerations." Indeed, the Court concluded that the possibility that Conner's confinement in disciplinary segregation would affect when he was ultimately released from prison "is simply too attenuated to invoke the procedural guarantees of the Due Process Clause."

V. COMMON LAW LIBERTY AND *SANDIN*

Justice Story, writing about English common law, observed that "[o]ur ancestors brought with them its general principles, and claimed it as their birthright . . . ." Indeed, in many respects the American Revolution was a conservative revolution fought to preserve the common law and the rights it postulated:

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102. 80 F.3d 1433 (10th Cir. 1996).
104. See Higgason v. Farley, 83 F.3d 807, 809-10 (7th Cir. 1996); Luken v. Scott, 71 F.3d 192, 193 (5th Cir. 1995).
105. 71 F.3d 192 (5th Cir. 1995).
106. See id. at 192-93.
107. See id. at 193.
108. See id.
It was . . . the birthright of free men, a precious inheritance, perverted by the British under George III, but still a vital reality. One rhetorical pillar of the men of 1776 was that common law embodied fundamental norms of natural law. The first Continental Congress, in 1776, adopted a Declaration of Rights; it declared that the colonies were "entitled to the common law of England" . . . .

Accordingly, the original meaning given the liberty protected by the due process provisions of the Fifth and Fourteenth Amendments mirrored the common law notion of liberty. Charles Shattuck, in his seminal article on liberty's "true scope and meaning," concluded that the Due Process Clauses are "mere copies of the thirty-ninth article of the Magna Carta . . . ." Citing Blackstone, he observed that "liberty" in the Magna Carta meant "freedom from restraint of the person." Imprisonment has changed drastically since Blackstone's time when prisons operated as semi-private institutions, with inmates paying fees to their jailers. In particular, "[l]ittle attempt was made to regulate the day-to-day life of prisoners at this time . . . . Prisoners were, with few exceptions, allowed to wander freely within the prison and could spend the day in idle pursuits as they wished." Hence, when eighteenth-century inmates lost their common law liberty, they experienced only limited restrictions. Thus, their extensive freedom of movement can hardly be compared to the major restraints that modern inmates face when segregated for disciplinary reasons.

The Sandin Court implicitly modeled constitutional liberty on its common law counterpart when it observed that liberty interests "will be generally limited to freedom from restraint . . . ." The Court's mistake came not in embracing the common law definition of liberty but in its failure to apply it in a manner consistent with what one English commentator called the "liberal and individualistic bias of the common law . . . ." This "bias" calls for a broad reading of "freedom from restraint" in institutional settings: a lawful conviction should permit only those restraints on liberty consistent with mass living and essential custodial functions affecting general population inmates.

111. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 95 (1973). See also MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 5 (1977) (noting the "persistent appeals to the common law in the constitutional struggles leading up to the American revolution").
113. Id. at 195.
114. Id. See also Charles Warren, The New "Liberty" Under the Fourteenth Amendment, 39 HARV. L. REV. 431, 440 (1926) ("[L]iberty" found in Due Process Clauses embraced common law definition of liberty, i.e., "the right to have one's person free from physical restraint").
116. HARDING, supra note 115, at 91. See also J. M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660-1800, at 291 (1986) ("The absence of minute control over the daily lives of prisoners . . . .").
119. People go to prison as punishment, not for punishment. Consequently, sentencing in general and
restrictions, including disciplinary segregation and loss of good conduct time, threaten this residuum of liberty.

The approach taken by English courts is enlightening. They, too, once practiced a "hands-off" policy. But in R. v. Hull Prison Bd. of Visitors, ex parte St. Germain, the Court of Appeal led English courts into a new era. Like the Sandin decision, the St. Germain case addressed whether an inmate accused of a prison rule violation is entitled to procedural safeguards. Lord Justice Shaw's influential opinion posited that inmates, despite their convictions and incarceration, retained common law "residuary rights" worthy of judicial protection. A subsequent ruling by a lower, divisional court delineated trial-type procedures arising from natural justice, the English common law counterpart of due process, which must precede deprivations of liberty.

V. CONCLUSION

Early commentary on negative implication jurisprudence argued that anchoring state-created liberty on "substantive predicates" and "mandatory language" created a perverse incentive for departments of corrections to jettison incarceration specifically should be guided by the presumption that government should pursue its penal objectives in a manner that imposes the least restrictions on constitutional rights. As Professor Fogel writes, "All the rights accorded free citizens consistent with mass living and the execution of a sentence restricting freedom of movement should follow a prisoner into prison." DAVID FOGEL, "... WE ARE LIVING PROOF ..." 33 (2d ed. 1979). See Richard G. Singer, Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative as Applied to Sentencing Determinations, 58 CORNELL L. REV. 51 (1972) (doctrine of least restrictive alternative as it applies to sentencing). See generally Robert M. Bastress, Jr., Note, The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria, 27 VAND. L. REV. 971 (1974) (exploring how the doctrine of least restrictions applies to legislation).

120. See Becker v. Home Office, 2 All E.R. 676, 682 (C.A. 1972) ("If the courts were to entertain actions by disgruntled prisoners, the [prison] governor's life would be made intolerable."); Arbon v. Anderson, 1 All E.R. 154, 156-57 (K.B. 1943) ("It would be fatal to all discipline in prison if the governors and warders had to perform their duty always with the fear of an action . . . ."). 121. 1 All E.R. 701 (C.A. 1979).

122. Writing in 1993, two English commentators concluded that "[t]here has been a complete overhaul of the prison disciplinary system [since the demise of the 'hands-off' policy of English courts]." STEPHEN LIVINGSTONE & TIM OWEN, PRISON LAW 308 (1993) (examining rights of inmates in England). These commentators also suggest that judicial intervention in England, as in the United States, spurred the growth of a bureaucratic model of prison management practice. Id. at 309. See generally James E. Robertson, Prison Litigation in England, 26 CRIM. L. BULL. 246 (1990) (overview of English prison law).

123. See St. Germain, 1 All E.R. at 702.

124. See id. at 716 (Shaw, L.J.).


The expansion of prisoners' rights in England, like the United States, has been piecemeal and at a halting pace. See, e.g., Hague v. Deputy Governor of Parkhurst Prison, 3 All E.R. 733, 746 (H.L. 1991) (confinement under "intolerable conditions" does not present an action for false imprisonment); R. v. Parole Bd., 3 All E.R. 828, 828-29 (Div'1 Ct. 1990) (denial of parole does not require giving of reasons to applicant).

126. See H. W. R. WADE, ADMINISTRATIVE LAW 13 (5th ed. 1982) ("Natural justice plays the same part in British law as does 'due process of law' in the Constitution . . . ."); Bernard Schwartz, Administrative Procedure and Natural Law, 28 NOTRE DAME L. REV. 169, 191 (1953) ("Liberation is thus seen to depend upon certain unwritten legal principles, which are required by man's sense of fair play . . . .").
administrative regulations that limited the discretionary power of line staff.\textsuperscript{127} However, this did not come to pass. A review of disciplinary policies\textsuperscript{128} revealed the dominance of what Max Weber called bureaucratic, rational law—"explicit, abstract, intellectually calculable rules and procedure."\textsuperscript{129} In turn, pre-\textit{Sandin} case law identified abundant state-created liberty interests amid statutes,\textsuperscript{130} prison rules,\textsuperscript{131} prison manuals,\textsuperscript{132} and inmate handbooks.\textsuperscript{133}

Despite Hewitt's articulated policy of deference to prison staff,\textsuperscript{134} negative implication jurisprudence had the unintended effect of expanding prison due process to include a host of matters once considered outside the scope of judicial review. The Supreme Court's decision in \textit{Sandin v. Conner} attempted to reverse this process. Indeed, Chief Justice Rehnquist's majority opinion in \textit{Sandin} exemplifies purposive, instrumentalist jurisprudence that has long been the bane of conservative jurists.\textsuperscript{135} The Chief Justice redefined the nature of state-created liberty interests with one purpose in mind—to lessen judicial involvement in our overcrowded and violent state prison systems by placing major disciplinary sanctions largely outside the reach of procedural safeguards.\textsuperscript{136}

The Court's decision in \textit{Sandin} is misguided. There is no empirical evidence that procedural safeguards harm prison discipline.\textsuperscript{137} In fact, procedural

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\item \textsuperscript{127} See Frank I. Michelman, \textit{Formal and Associational Aims of Procedural Due Process, in DUE PROCESS} 126, 134 (J. Pennock & J. Chapman eds., 1977) ("A procedural due process right so derived might seem to carry the seeds of its own destruction . . .").
\item \textsuperscript{128} See Robertson, \textit{ supra} note 69, at 1351.
\item \textsuperscript{129} \textit{JAMES M. INVERARITY} ET AL., \textit{LAW AND SOCIETY} 104-06 (1983). Correctional agencies have experienced extensive bureaucratization since the decline of the "hands-off" policy. In large measure, bureaucratization was a response to inmate lawsuits. Professor Jacobs writes that "[l]itigation created pressures to establish rational operating procedures, to clarify lines of authority, and to focus responsibility." See \textit{JAMES B. JACOBS, NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT} 54 (1983). Similarly, Hawkins and Alpert observe: "Providing due process to prisoners contributed to the bureaucratization of the prison." \textit{HAWKINS & ALPERT, supra} note 71, at 430. Previously, wardens ran their prisons like fiefdoms. \textit{Fox, supra} note 14, at 13. James B. Jacob's social history of Illinois' Stateville Prison remains the seminal examination of the various phases of prison administration during this century. See \textit{JAMES B. JACOBS, STATEVILLE} (1977). For a study of contemporary variations in prison management, see \textit{JOHN J. DIULIO, JR., GOVERNING PRISONS} (1987). Nonetheless, prisons are not free of arbitrariness. See Babcock, \textit{ supra} note 11, at 1014 ("[A]lthough some of the discretion of prison staff has been restricted, a great deal of arbitrariness and discretion still exists . . .").
\item \textsuperscript{132} See \textit{Gurule v. Wilson}, 635 F.2d 782, 785 (10th Cir. 1980).
\item \textsuperscript{133} See \textit{Lewis v. Thigpen}, 767 F.2d 252, 262 (5th Cir. 1985).
\item \textsuperscript{134} 459 U.S. at 472 ("Prison administrators . . . should be accorded wide-ranging deference . . .") (quoting \textit{Bell v. Wolfish}, 441 U.S. 256, 247 (1979)).
\item \textsuperscript{135} See \textit{Hans A. Linde, Judges, Critics and the Realist Tradition}, 82 \textit{YALE L.J.} 227, 228-29 (1972) (Instrumentalism evaluates judicial decision-making by "success in effectuating a socially desirable outcome . . ."). Instrumentalism can be contrasted to what Professor Dworkin called arguments of principle: "I call a 'principle' a standard that is to be observed, not because it will advance or secure and economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality." \textit{RONALD DWORKIN, TAKING RIGHTS SERIOUSLY} 22 (1978).
\item \textsuperscript{137} The impact of judicial intervention in prisons is much debated. Engel and Rothman argue that judicial intervention and the expansion of prisoners' rights has been disruptive of institutional order, endangering both staff and inmates. See Kathleen Engel & Stanley Rothman, \textit{The Paradox of Prison Reform: Rehabilitation, Prisoners' Rights, and Violence}, 7 \textit{HARV. J. L. & PUB. POL'Y} 413, 430-33 (1984). But their analysis is
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safeguards historically have exercised a salutary effect on the administration of criminal justice. In their absence, government decision-makers have often underestimated the importance of fairness as a foundation for social order.

less than convincing. See Malcolm M. Feeley & Roger A. Hanson, The Impact of Judicial Intervention on Prisons and Jails: A Framework for Analysis and a Review of the Literature, in COURTS, CORRECTIONS, AND THE CONSTITUTION 12, 19 (John J. DiIulio, Jr. ed., 1990) ("[W]e need a much more fine-grained analysis before we can draw the type of casual connections Engel and Rothman make in their article.") (footnote omitted). But one cannot dispute that the advent of prisoners' rights has introduced bureaucratic management into prison management. See JAMES B. JACOBS, NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT 54-55 (1983) ("Litigation created pressures to establish rational operating procedures, to clarify lines of authority, and to focus responsibility."). See generally WAYNE N. WELSH, COUNTIES IN COURT (1995) (judicial intervention in California's jails); LARRY W. YACKLE, REFORM AND REGRET (1989) (judicial intervention in Alabama's prisons).


138. See CORRECTIONAL LAW PROJECT, supra note 38, at 26 ("The fairness of prison discipline, not only in actuality but as perceived by the prison population, is essential in preventing unrest and maintaining harmony within an institution.").