

OBJECTIVE EXPECTATIONS, LIBERTY INTERESTS, AND OFFICIAL DISCRETION: SANDIN V. CONNER CONSIDERED IN LIGHT OF COLORADO INMATES FACING ADMINISTRATIVE SEGREGATION

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I. INTRODUCTION

In Colorado, an entire prison facility, the Colorado State Penitentiary (“Cañon City”), is dedicated to the administrative segregation of prisoners.¹ Administrative segregation is Colorado’s official language for solitary confinement.² In Cañon City, inmates are in administrative segregation twenty-three hours a day.³ Once each day they are permitted, in the strict supervision of guards, to go to a small room equipped with a pull-up bar where they can exercise alone for one hour.⁴ They eat alone in their cells.⁵ They shower alone.⁶ They are not allowed to talk with other inmates.⁷ The terms of their stays at Cañon City are indefinite.⁸ They remain there until the prison authorities determine that they should be reclassified.⁹ But the inmates have

1. *See Warden’s Work*, DENV. POST, Feb. 27, 1994, at C6.

The warden at Colorado’s newest and toughest prison stands 4-foot-11 and weighs 100 pounds. She’s Donice Neal and she presides over 325 workers and 480 of the state’s worst criminals, including three death-row inmates. Neal, 44, heads the Colorado State Penitentiary, classified as an ‘administrative segregation’ facility, which means it’s the strictest of the state prisons. The average sentence for its inmates is 227 years. They are locked up for 23 hours a day in 8-by-10-foot cells.

Id.

2. Interview with Brad Rockwell, Director of Legal Services, Colorado Department of Corrections, in Colorado Springs, Colo. (Nov. 14, 1995).

3. *See* Colo. DOC Reg. 600-2 ¶ IV, at 8.

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

5. Interview with Brad Rockwell, *supra* note 2.

6. *See id.*

7. *See id.*

8. *See* Colo. DOC Reg. 600-2 ¶ 6(o), at 10.

9. *See* Colo. DOC Reg. 600-1 ¶ IV. F (1989). In Colorado, reclassification is the transfer of an inmate from administrative segregation to a prison facility with a different custody level. An inmate’s classification status will be reviewed at least every three months. Colo. DOC Reg. 600-2 ¶ 6(o), at 10 (1981) (“At a minimum, the inmate’s status shall be reviewed by the classification officer or committee every thirty (30) days for the first two (2) months of confinement and every one hundred

no idea how long they will remain in administrative segregation.

For Colorado inmates facing administrative segregation, a major issue is whether they will receive any procedural due process before they are transferred to Cañon City. The Supreme Court has concluded that if inmates have a liberty interest that is protected under the Fourteenth Amendment,¹⁰ they will receive at least some procedural due process.¹¹ In determining whether inmates have protected liberty interests, the Court has generally made two inquiries. First, the Court has asked whether a state has created, with statutory language, an objective expectation that an inmate will not be transferred unless certain events occur, and whether the state has mandated that specific procedures then be followed.¹² The Court has recognized such objective expectations as protected liberty interests.¹³ Second, the Court has looked at whether the change in an inmate's confinement is so great that it exceeds the sentence imposed on him, thus creating an independent protected liberty interest in the inmate.¹⁴ In these instances, the protected liberty interest arises independent of a state's statutory language.¹⁵

A recent decision of the Supreme Court, *Sandin v. Conner*,¹⁶ raises important questions about how courts should determine whether inmates have protected liberty interests. The Court in *Conner* abandoned its method of determining inmates' objective expectations that focused on statutory language.¹⁷ However, the Court did not retreat from its linkage of objective expectations with protected liberty interests.¹⁸

In several decisions that preceded *Conner*, the Court had suggested that inmates' objective expectations may arise from actual penal practices.¹⁹ For example, if a prison routinely accords inmates hearings before transferring them into adminis-

twenty (120) days thereafter.").

10. See U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .").

11. See *infra* Part II.A. The degree of procedural due process may be quite informal. See, e.g., *infra* Part II.D.

12. See *infra* Part II.D.

13. See *infra* Part II.C-D.

14. See *infra* Part II.F.

15. See *id.*

16. *Sandin v. Conner*, 115 S.Ct. 2293, 2297 (1995).

17. See *id.* at 2300.

18. See *infra* Parts II.C., V.A.

19. See *infra* Part II.E-F.

trative segregation, that practice would give inmates the objective expectation that they will not be transferred without a hearing. Courts could recognize that objective expectation as a protected liberty interest that requires procedural protections. However, the Court in *Conner* did not address whether objective expectations can be based on actual penal practices.

For Colorado inmates, the stakes are enormous. Under *Conner*, courts may conclude that objective expectations can only arise from statutory language. They could disregard Colorado's actual practices regarding transfer to administrative segregation²⁰ and hold that Colorado inmates facing transfer to Cañon City are not entitled to any procedural due process. The door would open wide to arbitrary transfers of inmates into administrative segregation, a development that would sharply conflict with the rehabilitative goals of incarceration.²¹

This casenote argues that under *Conner*, Colorado inmates can make three strong claims that they have protected liberty interests in being free from administrative segregation. First, inmates may claim that Colorado's actual penal practices create enforceable objective expectancies in inmates. Second, they may claim that by harming inmates' chances for parole, administrative segregation can exceed the terms of their sentences. Third, inmates may claim that administrative segregation is an *atypical and significant* hardship on them.

Part two of this casenote considers inmates' protected liberty interests in disciplinary proceedings. Part three examines *Conner* and its rejection of the statutory language method on which the Court previously relied in determining whether a state has created a protected liberty interest. Part four of this casenote reviews the procedural rights of Colorado inmates charged with major misconduct. Part five then evaluates the implications of *Conner* for the procedural rights of Colorado inmates who are transferred to administrative segregation.

20. See *infra* Part IV.B.2 (discussing Colorado prison regulations).

21. See *infra* note 120. Of course, incarceration can serve other purposes, including those of incapacitation and punishment.

II. INMATE LIBERTY INTERESTS IN DISCIPLINARY PROCEEDINGS PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Several Supreme Court decisions identify when a state has created a protected liberty interest in an inmate and when an inmate has a protected liberty interest regardless of whether a state has recognized it. As the Court indicated in *Meachum v. Fano*,²² when a state has not created a protected liberty interest and the inmate has no independently protected liberty interest, the state has discretion whether to accord a transferred inmate procedural due process.²³ Thus, these decisions are an important background to *Conner*; they delimit the grounds upon which a Colorado inmate facing administrative segregation can claim that he has a protected liberty interest that warrants procedural due process.

A. *The Minimum Procedural Rights of Inmates Charged with Major Misconduct*

The landmark case addressing these issues is *Wolff v. McDonnell*.²⁴ McDonnell, an inmate in a Nebraska prison, brought a complaint under 42 U.S.C. § 1983.²⁵ He alleged that prison disciplinary procedures that might result in the loss of good-time credits violated the Due Process Clause of the Fourteenth Amendment.²⁶ Under Nebraska's disciplinary scheme, in the event of serious inmate misconduct, officials could withhold an inmate's good-time credits or confine him in a disciplinary cell.²⁷

22. 427 U.S. 215 (1976).

23. See *infra* Part II.B.

24. 418 U.S. 539 (1974).

25. See *id.* at 542. "Every person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States . . . 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 . . ." 42 U.S.C. § 1983 (1994) [hereinafter § 1983]. A prevailing party may be entitled to compensatory damages, injunctive relief, and reasonable attorney's fees. See 42 U.S.C. § 1988 (1994).

26. See *Wolff*, 418 U.S. at 543. Nebraska applied good-time credits to reduce an inmate's sentence; the deprivation of good-time credits affected the length of an inmate's sentence. See *id.* at 547.

27. See *id.*

The Court in *Wolff* concluded that because the state had created a statutory right to good-time and authorized its deprivation for major misconduct, McDonnell had a substantive liberty interest entitling him "to those minimum procedures . . . required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated."²⁸ The Court held that a prisoner's constitutional rights do not end at the prison gate; a prisoner has some residuum of liberty remaining.²⁹ Thus, the Court in *Wolff* established that a state could create a liberty interest in inmates by establishing an inmate right, for example a right to good-time, and then requiring that an inmate commit major misconduct before officials deprive him of that right.³⁰

However, the Court also held that there must be a "mutual accommodation" between the constitutional interests of an inmate and the "institutional needs" of the state.³¹ It concluded that this mutual accommodation of state and inmate interests could not include highly developed "adversary proceedings typical of the criminal trial."³² To impose such proceedings could escalate tensions between prison staff and inmates and complicate prison officials' use of discipline to further rehabilitative objectives.³³ The Court concluded that only two procedures must be accorded prisoners in conjunction with proceedings that could deprive them of good-time credits: advance written notice of the claimed violation and a written statement by fact finders.³⁴

The Court also held that officials may permit an inmate to call witnesses and present documentary evidence if such actions "will not be unduly hazardous to institutional safety or correctional goals."³⁵ But the Court did not recognize a right to call witnesses.³⁶ It held that an inmate has no right to legal counsel.³⁷

28. *Id.* at 557.

29. *See id.* at 555 ("But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime.").

30. *See id.* at 557. "Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed." *Id.* at 558.

31. *Id.* at 556.

32. *Id.* at 563.

33. *See id.*

34. *See id.*

35. *Id.* at 566.

36. *See id.* "Without the enforceable right to call witnesses and present

It further held that the Fourteenth Amendment requires that disciplinary committees be impartial.³⁸

Finally, in dicta, the Court concluded that inmates have procedural rights in proceedings that lead to solitary confinement.³⁹ Nebraska used the same procedures for disciplinary or solitary confinement as it did for good-time deprivation. Solitary confinement

represents a major change in the conditions of confinement 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. We do not suggest, however, that the procedures required . . . would also be required for the imposition of lesser penalties such as the loss of privileges.⁴⁰

B. Discretion to Transfer Inmates Within a State's Prison System

With its decision in *Wolff*, the Court established that a state could create a liberty interest in inmates which is protected under the Fourteenth Amendment.⁴¹ In *Meachum v. Fano*,⁴² the Court scrutinized the procedural due process rights of an inmate when the state had not created a liberty interest.

Inmate Fano was charged with setting fires in Norfolk, a Massachusetts prison. He received notice of the charges against him and an individual classification hearing. In camera, the Prison Board heard the testimony of Meachum, the superintendent of Norfolk, regarding information that prison informants had given him. The Board allowed Fano to give evidence on his own

documentary evidence, . . . [t]he hearing will thus amount to little more than a swearing contest, with each side telling its version of the facts" *Id.* at 581-82 (Marshall, J., dissenting). Reasoning that cross-examination and confrontation can be hazardous to prison security, the Court concluded that inmates have no right to confront witnesses. *See id.* at 567.

37. *See id.* at 570 ("[W]e are not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings.").

38. *See id.* at 570-71. It found, however, that Nebraska's prison Adjustment Committee was sufficiently impartial to meet the requirements of the Fourteenth Amendment. *See id.*

39. *See id.* at 572 n.19.

40. *Id.*

41. *See supra* note 30 and accompanying text.

42. 427 U.S. 215 (1976).

behalf, but it did not provide him with a copy of a transcript or a summary of Superintendent Meachum's remarks. Officials then transferred Fano to Walpole prison. Fano filed a § 1983 action against Meachum and several other state officials, claiming that his transfer to a less favorable institution without an adequate fact-finding hearing deprived him of liberty without due process.⁴³

The Court distinguished *Wolff* because Nebraska had created a statutory right to good-time credits and conditioned its deprivation on a finding that an inmate was guilty of serious misconduct. In contrast, Massachusetts had not created a right of inmates to remain in a particular prison.⁴⁴ Since Massachusetts had not created a right of inmates to remain free from transfers, its prison officials had broad discretion whether to transfer inmates.⁴⁵

The Court in *Meachum* further held that the Fourteenth Amendment did not by itself protect a prisoner from transfer from one prison to another.⁴⁶ It declined to hold that any change in an inmate's confinement that adversely affects him is sufficient to confer the protection of the Fourteenth Amendment.⁴⁷ Thus, although the conditions at Walpole were less favorable than those at Norfolk, Fano's transfer did not entitle him to procedural protections under the Fourteenth Amendment.⁴⁸ To hold otherwise, the Court concluded, would encroach upon the traditional discretion of prison administrators.⁴⁹

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

44. See *id.* at 226-27. Discretion to "transfer in a wide variety of circumstances is vested in prison officials. The predicate for invoking the protection of the Fourteenth Amendment as construed and applied in *Wolff v. McDonnell* is totally nonexistent in this case." *Id.* at 227.

45. See *id.*

46. See *id.* at 225.

47. See *id.* at 224 ("We reject at the outset the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause.")

48. See also *Olim v. Wakinekona*, 461 U.S. 238 (1983). Inmate Wakinekona was transferred from Hawaii to a California prison. See *id.* Finding that Hawaii's regulations gave prison officials discretion whether to transfer an inmate, the Court held that a Hawaiian inmate has no justifiable expectation that he will be incarcerated in any particular state. See *id.* at 245. Wakinekona's change in confinement was much harsher than Fano's, but the Court concluded that the difference between his transfer and "an intrastate or interstate transfer of a shorter distance is a matter of degree, not of kind." *Id.* at 247-48.

49. See *Meachum*, 427 U.S. at 225.

C. *Inmate Liberty Interests in Parole Hearings*

In *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*,⁵⁰ Nebraska's prison procedures provided that inmates who had served their minimum time less good-time credits were eligible for discretionary parole.⁵¹ A group of inmates denied parole brought a class action under § 1983, claiming that Nebraska's statutes and the Parole Board's procedures denied them procedural due process.⁵² The inmates claimed that all inmates eligible for parole were entitled to formal hearings.⁵³

The inmates argued further that the structure of Nebraska's parole statute and its use of the word "shall" bound the Board to release an inmate unless any one of four conditions was met.⁵⁴ In the absence of these conditions, the statute created a presumption that an inmate would be released.⁵⁵ The Court in *Greenholtz* held "that the expectancy of release provided in this statute is entitled to some measure of constitutional protection."⁵⁶ In other words, the Court concluded that an inmate's expectancy of release was a liberty interest protected under the Fourteenth Amendment.⁵⁷

The Court in *Greenholtz* concluded, however, that the procedural due process provided under the Nebraska statute was

50. 442 U.S. 1 (1979).

51. *See id.* at 4. Nebraska's parole statute required that eligible inmates receive an annual initial parole review hearing. If the Parole Board found that an inmate was a likely candidate for release, then a final hearing would be scheduled for the inmate. *See id.* at 4-5.

52. *See id.* at 3-4. "Apparently, over a 23-month period, there were eight cases with letters of denial that did not include a statement of reasons for the denial. . . . There is nothing to indicate that these inmates could not have received a statement if they had requested one . . ." *Id.* at 5 n.2.

53. *See id.* at 8.

54. *See id.* at 11-12. Any of four conditions would be met if a Nebraska Parole Board concludes (1) that there is a substantial risk that an inmate will not conform to the conditions of his parole, (2) that an inmate's release would promote disrespect for law, (3) that his release would adversely affect prison discipline, or (4) that further incarceration would help an inmate to be a law-abiding citizen on his later release. *See id.* at 11.

55. *See id.* at 12.

56. *Id.*

57. But the Court noted that "whether any other state statute provides a protectible [sic] entitlement must be decided on a case-by-case basis." *Id.* This conclusion foreshadowed Justice Marshall's dissenting argument in *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989), that institutional practices can create objective expectations that the Fourteenth Amendment should protect. *See infra* Part II.E.

constitutionally sufficient and that no additional procedures were necessary.⁵⁸ The Court held that the requirement of a final hearing for all eligible inmates "would provide at best a negligible decrease in the risk of error."⁵⁹

D. Mandatory Language and the Absence of Discretion in State Statutes and Regulations: State-created Liberty Interests

In *Wolff* and *Greenholtz*, the Court held that states could create liberty interests in inmates that were protected under the Fourteenth Amendment.⁶⁰ However, neither decision clearly indicated when or how courts should determine that states have created such interests.⁶¹ In *Hewitt v. Helms*,⁶² the Court outlined a method to identify state-created objective expectancies that are protected inmate liberty interests.⁶³

Following a riot in a Pennsylvania prison, prison officials placed inmate Helms in administrative segregation. A Hearing Committee reviewed the evidence against Helms and found him guilty of a misconduct charge. It ordered that he be kept in administrative segregation for six months.⁶⁴ Helms brought suit claiming that his administrative segregation violated his rights under the Due Process Clause of the Fourteenth Amendment. He claimed that Pennsylvania's regulations created a Fourteenth Amendment-protected liberty interest in his remaining in the general prison population. He claimed further that his protected liberty interest entitled him to procedural due process consistent with the requirements of *Wolff*.⁶⁵

58. See *Greenholtz*, 442 U.S. at 15. Nebraska's statute provided that an inmate receive an initial review hearing and then an informal hearing at which he could appear before the Board and present letters on his own behalf. See *id.* at 4.

59. *Id.* at 14. "Since the decision is one that must be made largely on the basis of the inmate's files, this procedure adequately safeguards against serious risks of error and thus satisfies due process." *Id.* at 15. The Court concluded that an inmate in his initial parole hearing could ensure that the Board considered his record and that he could then present any "special considerations" on his own behalf. See *id.*

60. See *supra* Part II.A, C.

61. See *supra* Part II.A, C.

62. 459 U.S. 460 (1983).

63. See *id.*

64. See *id.*

65. See *id.*; see *supra* Part II.A.

Under Pennsylvania regulations, administrative segregation “was something of a catchall” that could be used to protect a prisoner or to hold a prisoner pending his transfer or classification.⁶⁶ The Court in *Hewitt* concluded that an inmate should reasonably expect to receive administrative segregation in the course of his confinement.⁶⁷ The Court held that Pennsylvania’s administrative segregation did not involve a liberty interest that was independently protected by the Fourteenth Amendment.⁶⁸

However, the Court also held that Pennsylvania did create “a protected liberty interest in [Hewitt’s] remaining in the general prison population.”⁶⁹ The Court found that Pennsylvania’s regulations provided that prison officials not place inmates in administrative segregation unless certain “substantive predicates” occurred such as a belief by prison guards that an inmate was a serious threat to other inmates.⁷⁰ When those substantive predicates occurred, Pennsylvania’s regulations mandated that officials then follow specified procedures.⁷¹

Thus, in *Hewitt*, the Court indicated that courts should look closely at the language of prison regulations. This can be described as a two-part test. A court should determine whether regulations required that officials follow specific procedures in conjunction with the administrative segregation of inmates. A court should also determine whether regulations mandated that administrative segregation be conditioned on the occurrence of substantive predicates. If both parts of the test were met, then a state would have created a protected liberty interest: an inmate’s

66. *Hewitt*, 459 U.S. at 468. “It is plain that the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence.” *Id.*

67. *See id.*

68. *See id.*

69. *Id.* at 470-71.

70. “[A]dministrative segregation will not occur absent specified substantive predicates—viz., ‘the need for control,’ or ‘the threat of a serious disturbance.’” *Id.* at 472. “[O]n balance we are persuaded that the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest.” *Id.*

71. *See id.* at 470 n.6.

An inmate may be temporarily confined to Close or Maximum Administrative Custody . . . where it has been determined that there is a threat of a serious disturbance, or a serious threat to the individual or others. The inmate *shall* be notified in writing . . . that he is under investigation. . . . An investigation *shall* begin immediately to determine whether or not a behavior violation has occurred.

Id. (quoting 37 PA. CODE § 94.104(b)(1) (1978)) (emphases added).

expectancy that he would remain in the general population of a prison unless certain events occurred. Therefore, a state would lack discretion in transferring an inmate into administrative segregation.⁷²

However, the Court in *Hewitt* then considered whether Helms received the procedural due process to which his protected liberty interest entitled him.⁷³ The Court concluded that Helms' private interest was not "of great consequence," because officials merely transferred him to a more restrictive situation.⁷⁴ It also found that a detailed adversary proceeding would not have "materially assisted" the State's decision to place Helms in administrative segregation.⁷⁵ The Court concluded that Helms was entitled to an informal non-adversarial evidentiary review;⁷⁶ he thus received the procedural process due him.⁷⁷

E. The Sources of the Inmate Expectancy That Liberty Interests Protect

Greenholtz held that a parole statute could create an expectancy of release that was an enforceable liberty interest under the Fourteenth Amendment.⁷⁸ *Hewitt* identified mandatory statutory language that created enforceable liberty interests in inmates.⁷⁹ In *Kentucky Department of Corrections v. Thompson*,⁸⁰ the Court drew upon *Hewitt* to determine whether visitor regulations that reserved some discretion to officials nonetheless created a liberty

72. See *id.* at 472. Compare *Meachum v. Fano*, 427 U.S. 238 (1983) (Massachusetts regulations were found not to limit the discretion of officials in transferring inmates). See also *supra* Part II.B.

73. See *Hewitt*, 459 U.S. at 473. The Court followed its decision in *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). It weighed Helms's interest in remaining in the general prison population, the State's interest in confining him in administrative segregation, and the value of additional procedural requirements in determining the procedural due process to which Helms was entitled. See *Hewitt*, 459 U.S. at 473.

74. See *Hewitt*, 459 U.S. at 473.

75. See *id.* at 473-74. "In assessing the seriousness of a threat to institutional security, prison administrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates . . . , recent and longstanding relations between prisoners and guards, prisoners *inter se*, and the like." *Id.* at 474.

76. See *id.* at 476.

77. See *id.* at 477.

78. See *supra* Part II.C.

79. See *supra* Part II.D.

80. 490 U.S. 454 (1989).

interest in inmates.⁸¹ The decision is noteworthy less for its application of *Hewitt* than for Justice Marshall's dissent, which raised important questions about the sources of inmates' objective expectations.

In *Thompson*, inmates brought a class action under § 1983 claiming that the state's refusal to let them see certain visitors violated the Due Process Clause of the Fourteenth Amendment.⁸² The Court in *Thompson* first concluded that the Fourteenth Amendment did not protect an unrestricted inmate right to have visitors.⁸³ The Court then applied *Hewitt* to determine whether Kentucky's regulations created a protected liberty interest.⁸⁴ The Court found that Kentucky's regulations did not mandate particular results if substantive predicates were established.⁸⁵ The Court concluded that "[t]he overall effect of the regulations is not such that an inmate can reasonably form an *objective expectation* that a visit would necessarily be allowed absent the occurrence of one of the listed conditions."⁸⁶

In his dissenting opinion, Justice Marshall questioned the Court's exclusive reliance on the language of statutes and regulations to determine the objective expectations of inmates:

Absent concrete evidence that state officials routinely ignore substantive criteria set forth in statutes or regulations . . . it is only proper to assume that the criteria are regularly employed *in practice*, thereby creating legitimate expectations worthy of protection by the Due Process Clause. Common sense suggests that expectations stem from practice as well as from the language of statutes or regulations.⁸⁷

Marshall's suggested approach was to look not only at the language of statutes but at a state's actual penal practices in determining the enforceable objective expectations of inmates.

81. *See id.* Prison officials had discretion whether to allow inmates to receive specific visitors. *See id.*

82. *See id.*

83. *See id.* at 460.

84. *See id.* at 463.

85. *See id.* at 464. A visitor could be excluded if he fell within a category, but he need not be excluded. *See id.*

86. *Id.* at 465 (emphasis added). The Court's decision suggests that to avoid the creation of burdensome liberty interests in inmates, state regulations should reserve discretion to officials in how they proceed.

87. *Id.* at 471 (Marshall, J., dissenting).

Marshall's approach is important because the Court in *Conner* abandoned *Hewitt's* method that analyzed the language of statutes and regulations for substantive predicates and mandatory procedures. Marshall's suggestion that actual penal practices are a legitimate source of objective expectations is one to which the Court returned subsequently.⁸⁸

F. Inmate Liberty Interests Independently Protected Under the Fourteenth Amendment

In the foregoing cases, the Court determined whether a state had created a liberty interest protected under the Fourteenth Amendment.⁸⁹ In each case, the Court held that inmates had liberty interests that were not independently protected by the Due Process Clause of the Fourteenth Amendment.⁹⁰ In *Vitek v. Jones*,⁹¹ however, the Court identified circumstances where inmates had protected liberty interests under the Fourteenth Amendment independent of any state statute or regulation.⁹²

Jones was transferred from a Nebraska state prison to a mental hospital. A Nebraska statute provided that if a physician or psychologist finds that a prisoner "suffers from a mental disease or defect" that cannot be treated properly in prison, the prisoner may be transferred to a mental hospital.⁹³ The Court in *Vitek* held that the Nebraska statute created a protected liberty interest because it led inmates to expect that they would not be transferred without a finding that they were mentally ill.⁹⁴ The Court approved the district court's conclusion that an inmate's "objective expectation, *firmly fixed in state law and official Penal Complex practice* . . . gave Jones a liberty interest. . . . Under [the Court's decisions], this conclusion of the District Court is unexceptionable."⁹⁵ Thus, the Court in *Vitek* recognized objective

88. See *infra* note 95 and accompanying text.

89. See *supra* Part II.A-E.

90. See *supra* Part II.A-E.

91. 445 U.S. 480 (1980).

92. See *id.*

93. See *id.* at 483.

94. See *id.* at 489-90.

95. *Id.* at 489-90 (emphasis added). It is unclear whether both state law and official penal practices are necessary to create objective inmate expectations.

expectations based not only on statutes but on actual penal practice, as Justice Marshall argued in his dissent in *Thompson*.⁹⁶

The Court also held that Jones' involuntary transfer to a mental hospital "implicated a liberty interest protected by the Due Process Clause" that reached beyond Nebraska's statutory scheme.⁹⁷ The Court in *Vitek* concluded that an inmate's criminal conviction and sentencing do not authorize states to subject him to involuntary psychiatric care without giving him additional procedural protections.⁹⁸ The Court emphasized that two exceptional circumstances gave rise to Jones' independently protected liberty interest.⁹⁹ Those circumstances were his involuntary transfer to a mental hospital, and his subjection there to behavioral modification.¹⁰⁰

III. *SANDIN V. CONNER*

In decisions ranging from *Wolff* to *Vitek*, the Court recognized protected inmate liberty interests in two circumstances.¹⁰¹ First, the Court has enforced the procedural due process rights of an inmate where a state has created a liberty interest under the cumbersome framework of *Hewitt*.¹⁰² Second, the Court has recognized a protected, independent inmate liberty interest where there are extraordinary changes of confinement such as the transfer of an inmate to a mental hospital.¹⁰³ The Court in *Wolff*

96. See *supra* note 87 and accompanying text.

97. See *Vitek*, 445 U.S. at 494.

98. See *id.* at 493-94. The Court found that involuntary psychiatric care exceeded the sentence imposed on an inmate; it was "qualitatively different from the punishment characteristically suffered by a person convicted of crime." *Id.* The Court concluded that before subjecting (or transferring) an inmate to involuntary psychiatric care, the state must provide the following procedural protections: a hearing with adequate prior notice, the right to be heard and to present documentary evidence, the right to confront and to present witnesses unless the state makes a finding of good cause why an inmate should not call or confront or cross-examine witnesses, an independent decisionmaker, a written statement of reasons for the transfer, and timely notice of the foregoing rights. See *id.* at 494-96.

99. See *id.* at 494.

100. See *id.* The Court held that "the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that requires procedural protections." *Id.*

101. See *supra* Part II.

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

103. See *Vitek*, 445 U.S. 480.

suggested in dicta that solitary confinement could be a major change in confinement requiring procedural protections.¹⁰⁴ In *Sandin v. Conner*,¹⁰⁵ the Court considered whether administrative segregation itself was such a major change in confinement.¹⁰⁶

Dennis Conner was convicted of murder, kidnapping, robbery and burglary. He was sentenced to thirty years to life in a Hawaiian maximum security prison. In the course of a strip-search and rectal examination, Conner responded with "angry and foul language directed at the officer."¹⁰⁷ The incident led to the filing of three charges of misconduct against Conner. At a hearing, the prison Adjustment Committee refused Conner's request to present witnesses and found him guilty of three charges of misconduct. Conner was sentenced to thirty days disciplinary segregation in a Special Holding Unit for his physical obstruction charge and four hours segregation for each of the two other charges, which he was to serve concurrently with his thirty-day sentence.¹⁰⁸

Conner brought suit against the Adjustment Committee chair and other officials, claiming that the prison officials had violated his rights under the Due Process Clause of the Fourteenth Amendment. The district court granted summary judgment for Hawaii, but the Ninth Circuit Court of Appeals reversed, holding that Conner had a liberty interest in remaining free of disciplinary segregation.¹⁰⁹ The Court of Appeals also found that there was a question of fact as to whether he received all the due process entitled him under *Wolff*.¹¹⁰

However, the Supreme Court, in *Conner*, abandoned the test that it articulated in *Hewitt* to determine whether a state has

104. See *supra* notes 39-40 and accompanying text.

105. 115 S.Ct. 2293 (1995).

106. See *id.*

107. See *id.* at 2295-96. "Eleven days later [Conner] received notice that he had been charged with disciplinary infractions[:] . . . '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." *Id.* at 2296. Hawaii's regulations establish a hierarchy of inmate misconduct. See *id.*

108. See *supra* note 107 regarding the other two charges against Conner.

109. See *Conner v. Sakai*, 15 F.3d 1463 (9th Cir. 1993). "The regulations provide explicit standards that fetter official discretion. . . . [T]he inmate must admit guilt or the prison disciplinary committee must be presented with substantial evidence before the committee may make a finding of guilt." *Id.* at 1466. The court relied on *Hewitt* in finding that the state had created a protected liberty interest. See *id.*

110. See *id.* at 1467.

created a protected liberty interest.¹¹¹ The Court identified two problems with *Hewitt's* approach.¹¹² First, it found that *Hewitt* "creates disincentives for states to codify prison management procedures in the interest of uniform treatment."¹¹³ Second, it concluded that *Hewitt* involves federal courts in "day to day management of prisons, often squandering judicial resources."¹¹⁴

A. *Hewitt Creates Disincentives to Codify Prison Management Procedures*

The *Conner* Court suggested that to protect staff and inmates, prison administrators have favored regulations that confine staff discretion and authority so as to avoid widely disparate outcomes in similar incidents.¹¹⁵ Under *Hewitt*, however, a court could find that prison regulations create enforceable liberty interests in inmates.¹¹⁶ If a state created a liberty interest in inmates, the state would then have the burden of providing inmates with procedural rights. To avoid that burden, states might create as few regulations as possible or give standardless discretion to prison personnel.¹¹⁷

In *Conner*, the Court apparently disregarded the likelihood that prison regulations can create enforceable liberty interests in inmates that benefit both inmates and prison officials.¹¹⁸ Although there are costs in the enforcement of inmates' liberty interests, the benefits may exceed those costs.¹¹⁹ Since an

111. *Sandin v. Conner*, 115 S.Ct. at 2300. "[W]e believe that the search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause." *Id.* However, the Court indicated that it was not "technically" overruling any of its previous decisions. *See id.*; *see also infra* note 124 and accompanying text.

112. *See Conner*, 115 S.Ct. at 2299; *see also supra* Part II.D.

113. *Id.*

114. *Id.*

115. *See id.* "Such guidelines . . . also aspire to instruct subordinate employees how to exercise discretion vested by the State in the warden, and to confine the authority of prison personnel in order to avoid widely different treatment of similar incidents." *Id.* at 2299.

116. *See id.* at 2298. "[S]ince *Hewitt*, the Court has wrestled with the language of intricate, often rather routine prison guidelines to determine whether mandatory language and substantive predicates created an enforceable expectation that the state would produce a particular outcome with respect to the prisoner's conditions of confinement." *Id.*

117. *See id.* at 2299.

118. *See id.* at 2293.

119. *See Wolff v. McDonnell*, 418 U.S. 539 (1974).

important goal of prison is to rehabilitate inmates, it is surely appropriate to treat inmates in a fair, even, and consistent manner.¹²⁰

B. Hewitt Invites Federal Court Management of State Prisons

The Court in *Conner* found that "the *Hewitt* approach 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."¹²¹ The Court apparently assumed that if inmates did not have protected liberty interests, federal courts would have less involvement in the quotidian management of prisons.¹²² Although the Court repudiated *Hewitt's* test for state-created liberty interests, it declined to overrule its previous decisions that addressed liberty interests in inmates.¹²³ "Such

[T]he orderly care with which decisions are made by the prison authority is intimately related to the level of respect with which prisoners regard that authority. There is nothing more corrosive to the fabric of a public institution such as a prison than a feeling among those whom it contains that they are being treated unfairly.

Id. at 588 (Marshall, J., dissenting) (quoting with favor *Palmigiano v. Baxter*, 487 F.2d 1280, 1283 (1st Cir. 1973)).

120. See *Meachum v. Fano*, 427 U.S. 215, 233 n.6 (1976) (Stevens, J., dissenting).

Denying offenders any chance to challenge arbitrary assertions of power by correctional officials, and barring them from legitimate opportunities such as employment, are inconsistent with the correctional goal of rehabilitation, which emphasizes the need to instill respect for and willingness to cooperate with society and to help the offender assume the role of a normal citizen.

Id. (quoting THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 83 (1967)).

121. *Conner*, 115 S.Ct. at 2299. However, in allowing inmates to contest arbitrary state prison actions, *Hewitt* may have furthered the goal of rehabilitation. If rehabilitation has public value, the public may benefit from the commitment of judicial resources that *Hewitt* has occasioned.

122. See *id.* It is unclear that abandoning *Hewitt* would diminish federal court involvement in "day to day" prison management. The Court in *Conner* noted that [p]risoners 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.

Id. at 2302 n.11.

123. See *id.* at 2300 n.5.

abandonment of *Hewitt's* methodology does not technically require us to overrule any holding of this Court."¹²⁴

C. *Atypical and Significant Hardships*

While rejecting the approach of *Hewitt*, the Court in *Conner* held that states may create enforceable liberty interests in inmates.¹²⁵ However, the Court held that such liberty interests will generally be limited to freedom from restraint under certain circumstances. A liberty interest will be recognized if, while not unexpectedly exceeding the sentence so as to "give rise to protection by the Due Process Clause of its own force,"¹²⁶ the objectionable restraint imposes "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."¹²⁷

Applying this test to the facts of *Conner*, the Court held that *Conner's* disciplinary segregation did not unexpectedly exceed his sentence. The Court found that his disciplinary segregation "mirrored those conditions imposed upon inmates in administrative segregation and protective custody."¹²⁸ Conditions in the prison entailed considerable lockdown time even for the general inmate population.¹²⁹ "Thus, *Conner's* confinement did not exceed similar, but totally discretionary confinement in either duration or degree of restriction."¹³⁰

The Court further concluded that *Conner's* confinement was not an "atypical, significant deprivation" by which a state could create a liberty interest.¹³¹ The state's actions, placing him in segregated confinement for thirty days, "did not work a major

124. *Id.* The Court noted further that while it did locate a liberty interest in inmate *Hewitt*, it concluded that due process required no additional procedural guarantees for the inmate. "As such, its answer to the anterior question of whether the inmate possessed a liberty interest at all was unnecessary to the disposition of the case. Our decision today only abandons an approach that in practice is difficult to administer and which produces anomalous results." *Id.*

125. *See id.* at 2300 ("[W]e recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause.").

126. *Id.*

127. *Id.*

128. *Id.* at 2301.

129. *See id.*

130. *Id.*

131. *Id.*

disruption in his environment."¹³² The Court also found that the length of Conner's sentence would not be affected by his disciplinary confinement.¹³³ Nor would it necessarily affect his chances for parole.¹³⁴

IV. PROCEDURAL RIGHTS OF COLORADO INMATES CHARGED WITH MAJOR MISCONDUCT AND SUBJECT TO ADMINISTRATIVE SEGREGATION

Under Colorado prison regulations, inmates charged with serious misconduct have the procedural due process rights that the Court noted in *Wolff*.¹³⁵ However, because Colorado prison regulations accord officials discretion to transfer inmates, prisoners have no state-created liberty interest in remaining in the general prison population, as in *Meachum*.¹³⁶ Thus, Colorado prison regulations clearly show the influence of the Court's principal procedural due process decisions that preceded *Conner*.¹³⁷

A. *Federal and Colorado Decisions on Colorado Prison Transfers*

The major federal decision on Colorado inmate rights is *Marionaux v. Colorado State Penitentiary*.¹³⁸ Following a work stoppage, prison officials locked all prisoners in their cells and transferred twenty-one inmates to a different cellhouse without a hearing. Three inmates then brought a class action under § 1983 claiming, in part, that the transfer of twenty-one inmates denied them their rights to procedural due process under the Fourteenth Amendment.¹³⁹

The court in *Marionaux* found that Colorado's prison regulations "clearly state that an inmate may not be regressively

132. *Id.*

133. *See id.* at 2302.

134. *See id.* ("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, Haw. Rev. Stat. §§ 353-68, 353-69 (1985), even though misconduct is by regulation a relevant consideration.").

135. *See supra* Part II.A.

136. *See supra* Part II.B.

137. *See supra* Part II.

138. 465 F. Supp. 1245 (D. Colo. 1979).

139. *See id.*

classified at the whim of prison officials nor as ad hoc punishment for alleged troublemakers."¹⁴⁰ As in *Wolff*, the court held that Colorado had created a liberty interest in the inmates and therefore the inmates were entitled to a hearing with certain procedural rights.¹⁴¹ Because the inmates did not receive a hearing prior to transfer, the district court concluded that they had not received required due process.¹⁴²

However, perhaps in response to Colorado's revision of its prison regulations, subsequent Colorado decisions have held that inmates do not have protected liberty interests in remaining in a particular prison.¹⁴³ In *Kinney v. Young*,¹⁴⁴ Colorado relied on *Meachum* in holding that inmate Kinney did not have a liberty interest in remaining in the first facility to which he was assigned.¹⁴⁵ In *Deason v. Kautzky*,¹⁴⁶ Colorado ruled that inmates have no constitutional right to remain in a particular prison.¹⁴⁷

Federal courts have also concluded that Colorado prison officials have discretion to transfer inmates, and that Colorado inmates do not have a protected liberty interest in remaining at a particular facility or at a certain level of custody classification. In *Templeman v. Gunther*,¹⁴⁸ inmate Templeman was reclassified, or transferred, from maximum security to administrative segregation.¹⁴⁹ Templeman claimed that Colorado prison regulations limited official discretion to transfer him.¹⁵⁰ The court concluded that Colorado had preserved its discretion to transfer

140. *Id.* at 1248.

141. *See id.*; *see also supra* Part II.A.

142. *See Marioneaux*, 465 F. Supp. at 1248.

143. Following *Marioneaux*, Colorado promulgated its Code of Penal Discipline in 1981, which defers to Department of Corrections Regulations 600-1 and 600-2 for inmate classifications. Colo. DOC Reg. 203-1 ¶ 5(c)(1) (1984). Those regulations reserve discretion in officials regarding inmate classifications. Colo. DOC Reg. 600-1 (1989); Colo. DOC Reg. 600-2 (1981).

144. 689 P.2d 614 (Colo. 1984).

145. *See id.* at 617; *supra* Part II.B.

146. 786 P.2d 420 (Colo. 1990).

147. *See id.* at 422.

148. 16 F.3d 367 (10th Cir. 1994).

149. *See id.* Reclassification and transfer have the same practical effect for Colorado inmates. *See infra* note 165.

150. *See Templeman*, 16 F.3d at 369. Colorado prison regulations identified "incurability" factors that officials could consider in reclassifying inmates. *Id.* However, officials also could consider "[a]ny other reasons of similar magnitude deemed sufficient . . ." *Id.* (alteration in original) (quoting Colo. DOC Reg. 600-2 ¶ 6(a)(1)(g) (1989)).

inmates; therefore, it did not create a liberty interest in inmates.¹⁵¹

B. Colorado Regulations for Inmate Transfers

1. Code of Penal Discipline

All inmates in Colorado's Department of Corrections are subject to the Code of Penal Discipline ("Code").¹⁵² It establishes inmates' procedural rights in disciplinary procedures.¹⁵³

The Code follows the procedural requirements that *Wolff* identified for inmates facing discipline for major misconduct.¹⁵⁴ Prison officials must give an inmate charged with major misconduct written notice of his charges not less than twenty-four hours before a disciplinary hearing.¹⁵⁵ The Hearing Board must be impartial.¹⁵⁶ An inmate may speak on his own behalf at the hearing.¹⁵⁷ An inmate can require the attendance of witnesses, but no witness can be forced to testify.¹⁵⁸ Hearing Officers can receive testimony in private if they find that public testimony would endanger the witness.¹⁵⁹ The Code does not explicitly bar an inmate from having legal counsel in disciplinary hearings.¹⁶⁰ If an inmate is charged with serious misconduct, he may be represented by prison staff or another inmate.¹⁶¹ If an inmate is found guilty of misconduct, the Hearing Board will state for the record the reasons for its decision.¹⁶²

151. *See id.* at 367.

152. *See* Colo. DOC Reg. 150-1 ¶ II, at 1 (1995).

153. *See id.*

154. *See supra* Part II.A.

155. *See* Colo. DOC Reg. 150-1 ¶ IV(E)(4)(d) (1995).

156. *See id.* ¶ IV(E)(1)(c).

157. *See id.* ¶ IV(E)(4)(m)(1)(a).

158. *See id.* ¶ IV(E)(4)(j)(1).

159. *See id.* ¶ IV(E)(4)(k)(1). Therefore an inmate can be denied any opportunity to confront witnesses.

160. *See id.* ¶ IV(E)(4)(m)(2)(a). "Inmates may request representation at the time of Service of Notice of Charges." *Id.* However, Colorado's previous code expressly denied inmates the right to legal counsel in disciplinary hearings. *See* Colo. DOC Reg. 203-1 ¶ 7(g)(2) (1984).

161. *See* Colo. DOC Reg. 150-1 ¶ IV(E)(4)(m)(2)(c) (1995).

162. *See id.* ¶ IV(E)(4)(o)(2).

2. Administrative Segregation

Inmates who are transferred to administrative segregation are subject to different regulations than those of the Code.¹⁶³ When an inmate is charged with misconduct and the Hearing Officer or Board recommends his transfer to Cañon City, he appears before a Classification Committee.¹⁶⁴ Each prison facility has a Classification Committee ("Committee") with authority to reclassify inmates.¹⁶⁵ In reclassifying an inmate to administrative segregation,¹⁶⁶ the Committee may rely on "incurribility factors."¹⁶⁷ However, the incurribility factors do not limit the discretion of a Committee in deciding whether to transfer or reclassify an inmate.¹⁶⁸ The Committee is not bound by the recommendations of the Hearing Board; it "may convene a separate proceeding . . . to determine whether the inmate should be placed or remain in administrative segregation."¹⁶⁹ Thus Colorado's administrative segregation procedures lack the "substantive predicates" and mandated procedures that would

163. See *id.* ¶IV(B)(3)(a). "All decisions relating to inmate classification . . . and placement in administrative segregation shall be made in accordance with DOC Regulations 600-1 and 600-2." *Id.* Prison officials have statutory authority to transfer inmates. See COLO. REV. STAT. § 17-1-105 (1986).

164. See Colo. DOC Reg. 600-2 ¶ 6(c) (1981).

165. See Colo. DOC Reg. 600-1 ¶ III, at 2 (1989). Colorado inmates are initially classified "at facilities of the lowest custody level while balancing the safety of the general public, safety of staff and other inmates, and the programmatic needs of the offender." *Id.* ¶ I, at 1. Reclassification of an inmate, then, is a determination in part that he should be assigned to a facility with a different level of custody. See *id.*

166. "Administrative segregation shall refer to the confinement of an inmate in the most secure, controlled environment available, including but not limited to, facilities operated by the Department of Corrections and county jails, for the purpose of protecting the security of the facility, staff, inmates and the public." Colo. DOC Reg. 600-2 ¶ 4, at 2 (1981).

167. *Id.* ¶ 6(a), at 4. The incurribility factors include:

- (a) If an inmate's conduct poses a serious threat to the security of a facility; and/or
- (b) To prevent imminent injury to an inmate or to an employee; and/or
- (c) To contain or prevent or quell a riot; and/or
- (d) To prevent serious property damage; and/or
- (e) To prevent escape; and/or
- (f) If an inmate conspires to introduce contraband which poses a serious threat to the security of the facility; and/or
- (g) Any other reasons of similar magnitude deemed sufficient by the classification officer or committee.

Id. (emphasis added).

168. See *id.* For Colorado inmates, transfer and reclassification have the same practical effect.

169. *Id.* ¶ 6(c) (emphasis added).

have created a protected liberty interest under *Hewitt's* approach.¹⁷⁰

V. *CONNER* AND COLORADO INMATE TRANSFERS TO ADMINISTRATIVE SEGREGATION

The interpretation of *Conner* is crucial to inmates facing transfer to Cañon City and administrative segregation. *Conner* could readily be interpreted to afford no procedural protections to an inmate transferred to Cañon City.¹⁷¹ Under Colorado prison regulations, prison officials already have discretion to transfer inmates.¹⁷² *Conner* could be further interpreted to mean that a Colorado inmate's administrative segregation is not an "atypical and significant" hardship.¹⁷³ Consequently, with certain inmates, Colorado prison officials might abandon the discretionary procedural due process that they usually accord inmates in administrative segregation hearings.¹⁷⁴

Following an accusation of misconduct, a Committee could then meet without notice to an inmate, deliberate without hearing from him, and transfer him without giving him any explanation of its reasons. In this extreme scenario, the potential for arbitrary transfers would be substantially increased.

However, *Conner* suggests three important grounds upon which a Colorado inmate could claim that a transfer without procedural protections would violate his rights under the Fourteenth Amendment.¹⁷⁵ First, Colorado has created an enforceable liberty interest in an inmate.¹⁷⁶ Second, an inmate's administrative segregation unexpectedly exceeds his sentence.¹⁷⁷ Third, the new confinement imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."¹⁷⁸

170. See *supra* Part II.D.

171. See *Sandin v. Conner*, 115 S.Ct. 2293 (1995).

172. See *supra* Part IV.B.2.

173. See *supra* text accompanying note 127.

174. See *supra* Part IV.B.2.

175. See *Conner*, 115 S.Ct. 2293.

176. See *id.* at 2300. The Court indicated that states may create such interests.

See *id.*

177. See *id.*

178. *Id.*

A. *Whether Colorado Has Created an Enforceable Liberty Interest in Inmates Facing Transfer to Administrative Segregation*

Following the *Conner* Court's rejection of *Hewitt's* standard to determine whether a state has created a liberty interest, it is unclear what standard should succeed that of *Hewitt*.¹⁷⁹ The Court in *Conner* favorably cited *Board of Pardons v. Allen* as an instance where a state has created enforceable liberty interests in inmates.¹⁸⁰ In *Allen*, Montana inmates challenged their denial of parole under a parole statute. Guided by its determination of protected liberty interests in *Greenholtz*,¹⁸¹ the Court in *Allen* held that Montana's statute created a protected liberty interest in parole release.¹⁸²

Although *Allen* followed *Greenholtz's* approach to determining liberty interests in inmates, its implications for Colorado are ambiguous because *Greenholtz's* approach closely resembles the test in *Hewitt* that the Court rejected in *Conner*. Thus, there are two possible readings of the *Conner* Court's citation of *Allen* that are in tension with each other. First, courts should use the *Greenholtz* method for determining state-created liberty interests.¹⁸³ This reading is doubtful because the *Conner* Court rejected *Hewitt's* test. Second, courts should take a broader view of state-created interests than an examination of statutory language alone would allow.¹⁸⁴ This broad view of state-created liberty interests would include not only statutory language but actual penal practices that in themselves can create enforceable objective expectancies in inmates.¹⁸⁵

Under this second reading of the *Conner* Court's citation of *Allen*, a court would consider language in several Supreme Court decisions that strongly suggests an expansive view of state-

179. See *supra* Part III.

180. *Conner*, 115 S.Ct. at 2300 (citing *Board of Pardons v. Allen*, 482 U.S. 369 (1987)).

181. See *supra* Part II.C. *Greenholtz* held that a parole statute could create an expectancy of release that is an enforceable liberty interest. See *id.*

182. See *Allen*, 482 U.S. at 376.

183. See *id.* at 373 ("To decide whether the Montana statute also gives rise to a constitutionally protected liberty interest, we scrutinize it under the standards set forth in *Greenholtz*.").

184. See *id.* at 373 n.3.

185. See *supra* text accompanying note 87.

created liberty interests.¹⁸⁶ In *Allen*, the Court implied that in the future it might consider a broad construction of state-created liberty interests since “[t]here is far more to liberty than interests conferred by language in state statutes. Four members of this Court are of the view that the existence of a liberty interest in parole release is not solely a function of the wording of the governing statute.”¹⁸⁷ The Court’s observations are congruent with Justice Marshall’s dissent in *Thompson*, where he insisted that “expectations stem from practice as well as from the language of statutes or regulations.”¹⁸⁸ In *Vitek*, moreover, the Court approved a district court’s conclusion that an inmate’s “objective expectation, firmly fixed in state law and official Penal Complex practice,” could constitute an enforceable liberty interest.¹⁸⁹

Thus, under the second suggested reading, a court would determine whether the penal practices of Colorado create enforceable “objective expectations” in inmates.¹⁹⁰ If an inmate demonstrated that Colorado customarily followed its disciplinary procedures, a court could hold that Colorado had created a protected liberty interest in inmates.¹⁹¹

B. Whether Administrative Segregation Unexpectedly Exceeds the Terms of an Inmate’s Sentence

Under *Conner*, a Colorado inmate may claim that his administrative segregation unexpectedly exceeds the terms of his sentence.¹⁹² The Court in *Conner* mentions two examples of restraints that unexpectedly exceed the terms of a sentence: transfers to mental hospitals for involuntary psychiatric treatment and forcible administration of antipsychotic drugs.¹⁹³ *Vitek*

186. See *Allen*, 482 U.S. at 373; see also *supra* Part II.E-F.

187. *Allen*, 482 U.S. at 373 n.3 (citations omitted).

188. See *Kentucky Dep’t of Corrections v. Thompson*, 490 U.S. 454, 471 (1989) (Marshall, J., dissenting).

189. See *supra* notes 95-96 and accompanying text.

190. Cf. *Allen*, 482 U.S. at 373 n.3. Colorado regulations provide procedural protections in administrative segregation hearings. See Colo. DOC Reg. 600-2 ¶ 6(c)-(h), at 5-6 (1981). To the extent that Colorado has followed its procedural administrative segregation regulations, Colorado inmates may argue that their objective expectations regarding administrative segregation are enforceable liberty interests.

191. See *supra* Part II.E-F.

192. See *Sandin v. Conner*, 115 S. Ct. 2293 (1995).

193. See *id.* at 2300.

illustrates the Court's concerns with restraints that exceed the sentences imposed on inmates.¹⁹⁴ The Court in *Vitek* concluded that "the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification . . . [were] deprivations of liberty [requiring] procedural protections."¹⁹⁵

Under *Conner* and *Vitek*, then, a Colorado inmate would need to demonstrate that there are "stigmatizing consequences" to his transfer to Cañon City.¹⁹⁶ For example, upon an inmate's eventual reclassification or transfer back to Colorado's general inmate population, he would bear the stigma of being an incorrigible inmate.¹⁹⁷ An inmate's stigma as an incorrigible could adversely color his relations with other inmates, prison guards, and even parole boards. If the stigmatizing consequences of administrative segregation affected an inmate's parole chances, a court could find that his administrative segregation exceeded the terms of his sentence.

The Court in *Conner* found that Dennis Conner's stay of thirty days in administrative segregation did not clearly affect the duration of his sentence.¹⁹⁸ The Court concluded that "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."¹⁹⁹ However, administrative segregation can influence the duration of a sentence despite the absence of an explicit requirement that parole boards consider it.

Colorado prison and parole regulations strongly suggest that Parole Boards carefully consider inmate misconduct. Parole Boards may review an inmate's case history and records.²⁰⁰ If a Parole Board grants parole to an inmate, his release is conditioned on his good conduct "between the date of issuance of the

194. See *supra* Part II.F.

195. *Vitek v. Jones*, 445 U.S. 480, 494 (1980).

196. See *supra* Parts II.F, III.

197. See *supra* note 167.

198. See *Conner*, 115 S. Ct. at 2302 ("Nor does Conner's situation present a case where the State's action will inevitably affect the duration of his sentence. . . . The chance that a finding of misconduct will alter the balance is simply too attenuated to invoke the procedural guarantees of the Due Process Clause.").

199. *Id.*

200. See 8 COLO. CODE REGS. § 1503-1 ¶ 6.6 (1996).

order and the [inmate's actual] release on parole."²⁰¹ Further, Colorado's administrative segregation regulations provide that if a Committee's decision to administratively segregate an inmate is reversed on appeal, the Committee's decision will be expunged from the inmate's record.²⁰² Construed together these regulations show that misconduct is an important consideration in a Parole Board's decision whether to grant parole. Therefore, in Colorado, transfers to administrative segregation may be considered by Parole Boards and may indeed exceed the terms of an inmate's sentence.²⁰³

If an inmate endured extended confinement at Cañon City, his stay would deepen the stigmatizing consequences of his administrative segregation. An inmate could, in fact, stay indefinitely at Cañon City. Colorado regulations requiring review of inmates in administrative segregation contemplate stays in excess of several months.²⁰⁴ In contrast, Dennis Conner's administrative segregation lasted only thirty days.²⁰⁵ Thus, Colorado inmates transferred to Cañon City can argue persuasively that the stigmatizing effects of their administrative segregation will harm their chances for parole and therefore exceed the terms of their original sentence.²⁰⁶

C. *Whether Confinement in Cañon City Is an Atypical and Significant Hardship*

Finally, and most powerfully, a Colorado inmate could claim that his administrative segregation in Cañon City is an atypical

201. *Id.* ¶ 7.1.

202. *See* Colo. DOC Reg. 600-2 ¶ 6(n) (1981).

203. In Colorado, a court could find that the chance that administrative segregation will affect parole is not in fact "too attenuated." *But see Conner*, 115 S. Ct. at 2302.

204. *See supra* note 9.

205. *See Sandin v. Conner*, 115 S. Ct. 2293, 2302 (1995).

206. The Court in *Vitek* did not specify whether an inmate claiming an independent protected liberty interest must demonstrate that his change in confinement includes *both* stigmatizing consequences and forced behavioral modification. *See supra* note 100 and accompanying text. The Court concluded that they are the "kind of deprivations of liberty that require[] procedural protections." *Vitek v. Jones*, 445 U.S. 480, 494 (1980). That conclusion suggests that an inmate can have a protected liberty interest in avoiding either stigmatizing consequences or forced behavioral modification. Further, the two circumstances are not mutually exclusive; thus, stigmatizing consequences can surely accompany forced behavioral modifications.

and significant hardship, and therefore that he has a protected liberty interest in remaining free from administrative segregation.²⁰⁷ He could distinguish the circumstances of Colorado's administrative segregation from those that the Court in *Conner* analyzed. He could also cite *Wolff's* conclusion, in dicta, that solitary confinement is "a major change in the conditions of confinement."²⁰⁸

Although Dennis Conner's disciplinary segregation was solitary confinement, the Court in *Conner* held that it was not an atypical and significant deprivation in which a state might create a protected liberty interest.²⁰⁹ The Court found that Conner's confinement "mirrored those conditions imposed upon inmates in administrative segregation and protective custody."²¹⁰ It also found that Conner's confinement "did not exceed similar, but totally discretionary confinement in either duration or degree of restriction."²¹¹ The Court further found that Conner's disciplinary segregation did not effect a "major disruption in his environment."²¹²

The *Conner* Court's analysis of disciplinary confinement therefore suggests three considerations that bear on whether a Colorado inmate has a protected liberty interest in remaining free from administrative segregation. First, a court may consider whether an inmate's confinement in Cañon City "mirrors" that of inmates in other kinds of segregation.²¹³ Second, a court may consider whether the inmate's confinement in Cañon City exceeds that of other inmates in similar but discretionary confinement in its degree of physical restriction.²¹⁴ And third, a court may determine whether the inmate's Cañon City confinement works a "major disruption in his environment."²¹⁵

These considerations suggest that Colorado's administrative segregation is indeed an atypical and significant change in an inmate's confinement. First, Cañon City does not "mirror" the

207. See *Conner*, 115 S. Ct. at 2300.

208. *Wolff v. McDonnell*, 418 U.S. 539, 572 n.19 (1974).

209. See *Conner*, 115 S. Ct. at 2301.

210. *Id.* ("This case, though concededly punitive, does not present a dramatic departure from the basic conditions of Conner's indeterminate sentence.")

211. *Id.*

212. *Id.*

213. *Id.*

214. See *id.*

215. *Id.*

confinement of other inmates. It is the most extreme confinement to which a Colorado inmate may be subject; it is unique.²¹⁶ Second, Cañon City is substantially more restrictive physically than other penal confinements in Colorado.²¹⁷ And third, a court may find that administrative segregation in Cañon City is a "major disruption"²¹⁸ because it is such a dramatic change for an inmate.

This third, or last, consideration is ambiguous, however, because the Court in *Conner* did not define "major disruption."²¹⁹ The Court found that thirty days in disciplinary segregation was not a major disruption in inmate Conner's environment.²²⁰ However, a court might view a longer confinement of eight, twelve, or more months as a major disruption of an inmate's environment. Colorado prison regulations allow for the indefinite confinement of inmates at Cañon City. Thus, the risk of a major disruption accompanies any transfer of an inmate to Cañon City. Courts may therefore conclude that Colorado inmates have a protected liberty interest in being free from major disruptions in their confinement.

VI. CONCLUSION

Despite its narrowed recognition of liberty interests for Colorado inmates facing administrative segregation, *Conner* may promote constructive judicial review of inmates' Due Process claims. Under *Conner*, an inmate transferred to Cañon City may realistically claim that his solitary confinement is an atypical and significant hardship. He may also plausibly claim that his administrative segregation unexpectedly exceeds the terms of his sentence; its stigmatizing consequences will adversely affect his chances for parole and the length of his sentence.

216. The severity of administrative segregation can be illustrated in a comparison with the next most severe level of security, that of maximum security. Inmates in maximum security can work within their facilities and they can have contacts with other inmates. Inmates in administrative segregation may not work and they may not have contact with other inmates. Interview with Brad Rockwell, *supra* note 2.

217. See Colo. DOC Reg. 600-1 ¶ IV, at 7-9 (1989). Inmates, for example, are locked up 23 hours a day.

218. Cf. *Sandin v. Conner*, 115 S. Ct. 2293, 2301 (1995).

219. *Id.*

220. See *id.*

Conner should also encourage courts to reevaluate the source of inmates' objective expectations that give rise to enforceable liberty interests. Since *Conner* repudiated *Hewitt's* statutory approach to determining protected liberty interests, an important question arises: how should courts discern inmates' legitimate objective expectations? In *Conner*, the Court did not overrule its prior decisions suggesting that the actual penal practices of prisons are a legitimate basis for the determination of such expectations. Thus under *Conner*, a Colorado inmate may claim that Colorado's actual administrative segregation practices have created an objective expectation that he will not be transferred to Cañon City without a hearing.

Of course, Colorado could alter its administrative segregation practices to capture the full implication of federal and Colorado decisions holding that Colorado has discretion to transfer its inmates.²²¹ Colorado could insist that it can arbitrarily transfer inmates into administrative segregation without according them hearings. Colorado inmates would then be subject to transfers without notice, explanation, or opportunity to defend themselves.

As *Wolff* found, however, states have powerful interests in protecting not only prison officials but also inmates:

But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections There is no iron curtain drawn between the Constitution and the prisons of this country. . . . [Prisoners] may not be deprived of life, liberty, or property without due process of law.²²²

It seems likely that Colorado has incorporated *Wolff's* procedural requirements into its administrative segregation proceedings because they complement Colorado's prison objectives.²²³ One may hope that courts remain sensitive to the risks of arbitrary punishment and to the fine balance between inmate rights and institutional requirements that *Wolff* recognized.²²⁴

221. See *supra* Part IV.A.

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

223. See *supra* Parts II.A, IV.B.

224. See *Wolff*, 418 U.S. 539.