

SANDIN V. CONNER AND INTRAPRISON CONFINEMENT: TEN YEARS OF CONFUSION AND HARM IN PRISONER LITIGATION

Abstract: The 1995 United States Supreme Court case of *Sandin v. Conner* dramatically altered how federal courts examine prisoners' procedural due process claims. Prior to *Sandin*, a prison official's act against a prisoner in violation of a specific regulation often gave rise to a liberty interest worthy of procedural due process protection. *Sandin* ended this analysis by stating that the proper inquiry should focus on whether such a violation caused an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." This Note argues that the "atypical and significant" standard, as applied by the majority of the lower courts, has led to harsh results, particularly for prisoners claiming that their assignments to higher levels of intraprisson confinement followed little or no process. Because intraprisson confinement is not representative of the prisoner experience and often harms inmates, courts must recognize such confinements to be the "atypical and significant" experiences that they truly are.

INTRODUCTION

The 1995 case of *Sandin v. Conner* is the most recent United States Supreme Court case to address significantly the legal standards courts apply to prisoners making a claim of deprivation of liberty under the Due Process Clause of the Fourteenth Amendment.¹ For the twenty years prior to *Sandin*, the Supreme Court recognized that a prisoner possessed liberty interests protected by the Due Process Clause if the prisoner could point to a specific state or federally created right that prison officials had violated.² The *Sandin* decision was most influential

¹ See 515 U.S. 472, 483-84 (1995); see also U.S. CONST. amend. XIV, § 1 (No state shall "deprive any person of life, liberty, or property, without due process of law."). Generally, prisoners asserting a violation of their Fourteenth Amendment rights bring suit under Title 42, § 1983 of the U.S. Code, which provides a means for people to seek damages or injunctive relief when their constitutional rights are violated by those acting under color of state law. See 42 U.S.C. § 1983 (2000); see also KAREN M. BLUM & KATHRYN R. URBONYA, FED. JUDICIAL CTR., SECTION 1983 LITIGATION 1 (1998).

² See, e.g., *Hewitt v. Helms*, 459 U.S. 460, 470-72 (1983) (holding inmate acquired a protected liberty interest in remaining in the prison's general population, given the exis-

for ending this method of analysis, by instructing courts not to look toward objective, codified state law to identify what liberty interests a prisoner may possess.³ Instead, the Court stated that the relevant inquiry must focus on the *nature* of the deprivation imposed on a prisoner.⁴ After *Sandin*, regardless of what is stated in a statute or regulation, if the nature of the deprivation does not impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," the prisoner will not have a liberty interest in avoiding the deprivation.⁵ As a consequence, in situations where no liberty interest is found to exist, the process by which such deprivations occur will not be worthy of any procedural due process protection from the courts.⁶

This Note focuses on how the *Sandin* "atypical and significant" standard has negatively affected the ability of prisoners to make liberty interest claims arising from intraprisn sentences to more restrictive confinement, usually involving long-term segregation.⁷ *Sandin* directed lower courts to focus on the nature of the deprivation a prisoner experiences in prison and to compare such a deprivation to what is typical of prison life.⁸ Based on the case's vague language and its explicitly stated policy of deference to prison officials, however, the lower courts have applied *Sandin* in a manner that very much ignores the nature of a prisoner's deprivation as compared to the average prisoner's experience and overlooks the severe harms segregatory confinements cause.⁹ Thus, the majority of post-*Sandin* prisoner liberty interest cases have resulted in findings that sentences to solitary confinement will never raise liberty interests protected by the Due Process Clause.¹⁰

The policy behind such a jurisprudential development is clear.¹¹ Chief Justice William Rehnquist, writing for the *Sandin* Court, stated

tence of Pennsylvania statutes and regulations setting forth strict procedures for confining an inmate to segregation); *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974) (holding that, where a state creates a right and recognizes that it can only be deprived as a result of serious misconduct, a prisoner's interest "is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures . . . required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated").

³ See 515 U.S. at 483-84.

⁴ See *id.* at 481-84.

⁵ See *id.* at 483-84.

⁶ See *id.*

⁷ See *infra* notes 150-233 and accompanying text.

⁸ See 515 U.S. at 484, 486.

⁹ See *infra* notes 234-333 and accompanying text.

¹⁰ See *infra* notes 150-233 and accompanying text.

¹¹ See *Sandin*, 515 U.S. at 481-83.

that the "atypical and significant" standard was necessary to give deference back to prison administrators who for years had been subject to lawsuits any time a prisoner could point to a violation of positive law.¹² He also wrote that the pre-*Sandin* liberty interest analysis had overburdened federal courts with unmeritorious prisoner claims.¹³ Thus, *Sandin* can be seen as calling for both judicial efficiency and restraint in the area of prisoner litigation.¹⁴

However justified the policy behind *Sandin*, the results of the decision in terms of how the federal courts of appeals have applied the case's standard have been disastrous for prisoners.¹⁵ Today, it is clear that prison officials have the power to sentence prisoners to segregatory living arrangements for either punitive or non-punitive reasons, without following any procedural standards whatsoever.¹⁶ State and federal prison guidelines outlining such procedures can be violated without concern: because prisoners possess no liberty interest in staying out of such confinements, courts will rarely if ever examine the constitutionality of the procedures prison officials utilize.¹⁷

¹² See *id.* at 481-84.

¹³ See *id.* at 482-83.

¹⁴ See *id.*

¹⁵ See *infra* notes 150-233 and accompanying text.

¹⁶ See *infra* notes 150-233 and accompanying text.

¹⁷ See *infra* notes 150-233 and accompanying text. Once a court identifies a protected liberty or property interest, it must examine the process that accompanies the deprivation of that interest and decide whether the protected safeguards built into the process are constitutionally adequate. See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569-70, 570 n.7 (1972). Pre-*Sandin*, the U.S. Supreme Court, on two noteworthy occasions, addressed the sufficiency of the procedural safeguards owed prisoners demonstrating viable liberty interests arising out of assignments to intraprison confinement, with the Court making distinctions between the procedures due prisoners sentenced to disciplinary segregation versus those sentenced to non-disciplinary segregation. See *Wolff*, 418 U.S. at 563-67, 571 n.19 (stating that prisoners with protected liberty interests arising out of sentences to disciplinary segregation must be provided with advance written notice of both the charges and the basis for them, an opportunity to call witnesses and present evidence at a hearing, and a written decision and summary of the evidence from the decision-making body); *Hewitt*, 459 U.S. at 475-77 (holding that where a prisoner has a liberty interest arising out of a sentence to non-disciplinary, or "administrative" confinement, the procedures required are less stringent than in a *Wolff*-type setting, with prison officials required to provide "some notice" of the charges and to allow the prisoner "an opportunity to present his views" in an "informal, nonadversary" setting that need not occur before transfer). The *Sandin* Court did not reach a discussion of what procedural safeguards satisfy due process in the intraprison confinement context, however, because the prisoner in *Sandin* failed to assert a liberty interest in the first place. See 515 U.S. at 487. Thus, post-*Sandin*, some courts have questioned whether the disciplinary/non-disciplinary distinction is still a viable one, given that the *Sandin* Court essentially conflated disciplinary and non-disciplinary confinement throughout its liberty interest analysis. See *Koch v. Lewis*, 96 F. Supp. 2d 949,

This Note argues that the lower federal courts have given too much weight to *Sandin*'s stated policy justifications and as a result have largely avoided honest inquiries into typical prison life.¹⁸ These courts make assumptions that the nature of solitary confinement is typical of the everyday prison experience, but rarely do such courts attempt to support such assumptions with objective evidence.¹⁹ In addition, there is almost no discussion in the lower courts as to the harmful psychological effects that indefinite solitary confinement can have on prisoners.²⁰ This lack of discussion demonstrates that the lower federal courts largely have chosen to disregard suggestions that the effects of solitary confinement should be considered significant.²¹

Part I of this Note reviews the history of modern prisoner litigation in the United States, from the mid-twentieth century to *Sandin* in 1995.²² This Part also addresses the major developments in the Supreme Court's Due Process Clause jurisprudence relevant to the prisoners' rights discussion.²³ Part II discusses the *Sandin* decision and examines the case's language, methodology, and policy.²⁴ Part III analyzes how the lower courts have applied the *Sandin* holding in a variety of ways.²⁵ This Part also demonstrates how these differing methodologies have usually led to tough results for prisoners.²⁶ Finally, Part IV discusses why lower courts have failed to apply a true "atypical and significant" standard and argues that a more honest application of *Sandin* would result in courts looking closer both at what is truly representative of the prison experience and at the damaging results of long-term solitary confinement.²⁷

964 (N.D. Cal. 2000) ("[A]fter *Sandin*, distinguishing between disciplinary and administrative actions for purposes of defining the level of process owed a prisoner is problematic, if not inappropriate."); see also 515 U.S. at 486; *infra* notes 135-137 and accompanying text. Other courts have continued to follow pre-*Sandin* precedent in this area. See, e.g., *McClary v. Kelly*, 4 F. Supp. 2d 195, 212-13 (W.D.N.Y. 1998) (stating that *Sandin* "did not revamp the requirements of due process once a liberty interest has been implicated" and analyzing the process due a prisoner assigned to administrative confinement under the standards outlined in *Hewitt*).

¹⁸ See *infra* notes 234-333 and accompanying text.

¹⁹ See *infra* notes 234-333 and accompanying text.

²⁰ See *infra* notes 234-333 and accompanying text.

²¹ See *infra* notes 234-333 and accompanying text.

²² See *infra* notes 28-107 and accompanying text.

²³ See *infra* notes 41-107 and accompanying text.

²⁴ See *infra* notes 108-144 and accompanying text.

²⁵ See *infra* notes 145-233 and accompanying text.

²⁶ See *infra* notes 145-233 and accompanying text.

²⁷ See *infra* notes 234-333 and accompanying text.

I. HISTORY

A. *The Hands-Off Doctrine and the Initial Recognition of Prisoners' Rights*

The ability of prisoners to bring claims in federal courts is a recent development in American history, largely due to the federal judiciary's long-lasting reluctance to recognize a prisoner's right to litigate.²⁸ Until the mid-twentieth century, federal courts handled prisoners and their corresponding claims through the application of the "hands-off doctrine," which viewed the methods prison administrators utilized in managing prisoners as not falling within the jurisdiction of the courts.²⁹ This approach granted absolute deference to prison officials in their operation of the penal system and relegated inmates to the functional equivalent of non-citizens.³⁰ The control of prisoners' lives thus lay in the hands of the executive and legislative branches, unchecked by any significant judicial control.³¹

The United States Supreme Court first recognized a prisoner's right of access to the federal courts in 1941, marking a first step away from an absolutist application of the hands-off doctrine.³² In *Ex parte Hull*, the Court acknowledged a prisoner's right to state a claim in federal court through the filing of a habeas corpus petition alleging illegal custody.³³ The prison officials in *Hull* prevented the plaintiff, a Michigan state prisoner, from filing his habeas petition on numerous occasions.³⁴ The officials argued that a state regulation granted them the authority to determine if legal papers were properly drawn before delivering them to court.³⁵ The Court declared the regulation invalid, ruling that the judiciary alone possessed the authority to decide if a prisoner's legal documents were adequately constructed.³⁶

Hull was the first of a number of cases in which the Supreme Court limited the discretion of prison officials by reversing prison policies, whether based on codified regulations or not, that had the

²⁸ See Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 *Or. L. Rev.* 1229, 1238 (1998).

²⁹ See *id.*

³⁰ See *id.* at 1238-39.

³¹ See *id.* at 1239.

³² See Ira P. Robbins, *The Prisoners' Mail Box and the Evolution of Federal Inmate Rights*, 144 *F.R.D.* 127, 152 (1993); see also Herman, *supra* note 28, at 1239.

³³ See 312 U.S. 546, 549 (1941).

³⁴ *Id.* at 547-48.

³⁵ *Id.*

³⁶ *Id.* at 549.

effect of curbing a prisoner's ability to state a claim in federal court.³⁷ *Hull* and its progeny largely dealt with the constitutional question of whether states could restrict prisoners from accessing the federal courts.³⁸ The Supreme Court responded that such restrictions were unconstitutional, largely relying on the rights inherent in the Habeas Corpus Clause.³⁹ In addition to expanding the right of prisoners to access federal courts throughout the 1950s, 60s, and 70s, this period also saw the Court expanding what types of claims prisoners would be allowed to assert once they had reached the courthouse.⁴⁰

B. Rights Expansion and the Due Process Clause

In 1964, in *Cooper v. Pate*, the U.S. Supreme Court made it possible for prisoner claims to survive that were not dependent on issues arising out of habeas corpus and illegal custody.⁴¹ In *Cooper*, the Court reversed a lower court decision dismissing a prisoner's suit alleging that officials had punished him for his religious beliefs.⁴² At least one scholar has observed that, with *Cooper*, the Court began to indicate that the Constitution accords prisoners, like all people, certain guaranteed rights, and that the judiciary cannot limit the ability of prisoners to vindicate those rights if they are disturbed.⁴³ Following *Cooper*, a "prisoners' rights revolution" ensued in which the Court decided a number of cases expanding the rights that prisoners could assert under the Constitution.⁴⁴ These decisions began to define the constitutional rights of prisoners under the First,⁴⁵

³⁷ See, e.g., *Johnson v. Avery*, 393 U.S. 483, 490 (1969) (invalidating state regulation that restricted legal assistance from other inmates); *Dowd v. United States ex rel. Cook*, 340 U.S. 206, 208-09 (1951) (disallowing state prison officials from preventing an inmate from filing an appeal); cf. *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (reaffirming right of prisoners to have access to legal materials).

³⁸ See *Bounds*, 430 U.S. at 821-22, 828; *Avery*, 393 U.S. at 485-86; *Dowd*, 340 U.S. at 208-09; *Hull*, 312 U.S. at 549.

³⁹ See *Bounds*, 430 U.S. at 821-22, 828; *Avery*, 393 U.S. at 485-87, 490; *Hull*, 312 U.S. at 549. The Habeas Corpus Clause provides: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." U.S. CONST. art. I, § 9, cl. 2.

⁴⁰ See Barbara Belbot, *Where Can a Prisoner Find a Liberty Interest These Days? The Pains of Imprisonment Escalate*, 42 N.Y.L. SCH. L. REV. 1, 1 (1998).

⁴¹ See 378 U.S. 546, 546 (1964) (per curiam).

⁴² *Id.*

⁴³ See Belbot, *supra* note 40, at 1; see also *Cooper*, 378 U.S. at 546.

⁴⁴ See Belbot, *supra* note 40, at 1-2.

⁴⁵ See *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974) (restricting ability of officials to censor prisoner mail); *Cruz v. Beto*, 405 U.S. 319, 322-23 (1972) (upholding the right to practice religion in prison).

Eighth,⁴⁶ and Fourteenth Amendments.⁴⁷ Although far from putting prisoners on the same level as non-incarcerated citizens, such cases limited the power of the state to control the lives of prisoners.⁴⁸ They also gave back to prisoners the abilities to communicate more freely, to practice religion, to be free from cruel and unusual punishment, and most important to this Note, to receive due process prior to the revocation of their liberty interests while in prison.⁴⁹

The Court came to develop its Fourteenth Amendment jurisprudence in the area of prisoners' rights in the context of the larger due process "revolution" that began in the early 1970s.⁵⁰ Consequently, prior to examining how the courts began to apply the Due Process Clause to prisoners, it is necessary to understand the key legal developments behind the dramatic changes in the Supreme Court's understanding and application of the Fourteenth Amendment in general.⁵¹

1. The Due Process Revolution

Before 1970, due process was constitutionally required only in situations where the government attempted to dispossess a person of one's "rights," consisting of traditional property interests such as money or a house, in addition to certain liberty interests the Bill of Rights protected.⁵² A person facing the withdrawal of such rights was permitted "some kind of hearing," but such procedural protection did not attach to the revocation of what can generally be described as "non-

⁴⁶ See *Hutto v. Finney*, 437 U.S. 678, 687 (1978) (upholding finding that conditions in prison's isolation cells violated prisoner's Eighth Amendment rights); *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976) (holding that the Eighth Amendment "establishes the government's obligation to provide medical care for those whom it is punishing by incarceration").

⁴⁷ See *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974) (holding that where a state creates a right and recognizes that it can only be deprived as a result of serious misconduct, a prisoner's interest "is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures . . . required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated"); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (holding that the revocation of one's status as a parolee gives rise to a liberty interest under the Fourteenth Amendment that must be met by procedural safeguards).

⁴⁸ See generally *Herman*, *supra* note 28, at 1229.

⁴⁹ See *Hutto*, 437 U.S. at 687; *Wolff*, 418 U.S. at 557-58; *Procunier*, 416 U.S. at 408-09; *Cruz*, 405 U.S. at 322-23; *Herman*, *supra* note 28, at 1242-43.

⁵⁰ See Richard J. Pierce, *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1973 (1996).

⁵¹ See *infra* notes 52-70 and accompanying text.

⁵² See *Pierce*, *supra* note 50, at 1974.

traditional" property interests, or "privileges," such as government employment or statutory benefits.⁵³

The U.S. Supreme Court eviscerated this analytical divide in 1970, in *Goldberg v. Kelly*, when the Court applied the Due Process Clause to a situation in which the government revoked an individual's welfare benefits.⁵⁴ The *Goldberg* Court, acknowledging that "[m]uch of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property," stated that welfare benefits are more similar to traditional property interests and less like mere gratuities.⁵⁵ After making these observations, the Court then concluded that due process required a hearing before termination of such benefits.⁵⁶ As the government did not challenge the fact that the withdrawal of benefits called for elements of due process, the Court did not focus on addressing why, specifically, welfare benefits were deserving of such protection.⁵⁷

In 1972, in *Board of Regents of State Colleges v. Roth*, the U.S. Supreme Court clarified the connection between the entitlement to procedural due process protection and non-traditional property and liberty interests.⁵⁸ In *Roth*, the Court rejected the plaintiff's claim that due process required a state university to provide him with a hearing before it decided to discontinue his employment.⁵⁹ The Court noted that the conditions of the plaintiff's employment, along with the relevant state statutes and regulations, did not call for such a hearing.⁶⁰ Thus, the plaintiff lacked a property interest in his position strong enough to compel the university to conduct a hearing before it made its decision.⁶¹ In its analysis, the *Roth* Court cited *Goldberg* for the proposition that property interests encompass more than what was considered property under the common law.⁶² Moreover, the Court stated that, in deciding whether a property interest was worthy of due process protection before its revocation, the Court would look not to one's subjective expectations but to whether the interest arose out of

⁵³ See *id.* (quoting *Wolff*, 418 U.S. at 557-58).

⁵⁴ See 397 U.S. 254, 261-63 (1970); *Pierce*, *supra* note 50, at 1977-78.

⁵⁵ See 397 U.S. at 262 n.8.

⁵⁶ See *id.* at 264.

⁵⁷ See *id.* at 261-63; *Belbot*, *supra* note 40, at 8.

⁵⁸ See 408 U.S. 564, 577-78 (1972).

⁵⁹ *Id.* at 568-69.

⁶⁰ *Id.* at 578.

⁶¹ See *id.*

⁶² See *id.* at 571-72, 576-77.

a specific, codified law.⁶³ The Court suggested that such property interests would be found not in the Constitution, but in existing rules arising from objective sources such as state law.⁶⁴

The *Roth* Court also discussed whether the university violated the plaintiff's liberty interests in a manner requiring due process protection.⁶⁵ The Court reasoned that under the Constitution, liberty interests must be conceived of broadly, indicating that such interests are not limited to what can be found in codified law.⁶⁶ Instead, liberty interests encompass basic freedoms such as the rights to work, to contract, and to practice religion.⁶⁷ Because the *Roth* plaintiff's termination did not damage his ability to procure future employment, the plaintiff had not asserted the violation of a liberty interest requiring due process protection.⁶⁸ Thus, the Court in *Roth* created a basic analytical distinction between liberty and property interests within the context of adjudicating due process claims: property interests, though not limited to traditional, common-law interests, must be based on a real expectation likely tied to objective law, whereas liberty interests will be defined more broadly and involve basic impediments to one's ability to live freely.⁶⁹ Although courts began to apply this developing due process analysis to cases asserting a deprivation of liberty in the prison context, they soon rejected it in favor of a more pragmatic approach that looked to objective law in the adjudication of such claims.⁷⁰

2. Prisoners and the Due Process Clause

In 1972, in *Morrissey v. Brewer*, the U.S. Supreme Court discussed for the first time the liberty interests of convicted prisoners, using the new due process analysis.⁷¹ In *Morrissey*, the police arrested the plaintiff, a parolee, revoked his parole status, and sent him back to prison without a hearing.⁷² The Court addressed the question of whether due process required a hearing before the plaintiff's parolee status could be revoked properly.⁷³ The Court held that the Constitution

⁶³ See *Roth*, 408 U.S. at 576-77.

⁶⁴ See *id.* at 577.

⁶⁵ See *id.* at 573.

⁶⁶ See *id.* at 572.

⁶⁷ See *id.*

⁶⁸ See *Roth*, 408 U.S. at 573-74.

⁶⁹ See *id.* at 572-78.

⁷⁰ See *infra* notes 71-107 and accompanying text.

⁷¹ See 408 U.S. at 481-82.

⁷² *Id.* at 472-73.

⁷³ *Id.* at 472.

required due process protection in such a situation.⁷⁴ In coming to this conclusion, the Court noted that parolees have a liberty interest in remaining free from restraint while abiding lawfully by the terms of their parole, and that parolees put their trust in a "promise," albeit an "implicit" one, that they will remain free while doing so.⁷⁵ Consistent with the *Roth* analysis, the *Morrissey* Court reasoned that this promise did not arise out of state law or codified state regulations defining parole revocation procedures (an approach that, under *Roth*, the Court would apply if the state had revoked one's property interest), but instead arose out of the meaning of liberty within the Due Process Clause itself.⁷⁶ The Court further noted that parolees, unlike incarcerated inmates, lawfully can seek employment and spend unrestricted time with friends and family, rights that factor into one's liberty interests under the Fourteenth Amendment.⁷⁷

Only two years later in 1974, the U.S. Supreme Court in *Wolff v. McDonnell* collapsed *Roth*'s separate property and liberty analyses as applied in the prison context, creating in its wake the "state-created liberty interest doctrine," which for the next twenty years would apply to the majority of cases in which prisoners claimed a violation of a liberty interest without due process.⁷⁸ This development would be both a blessing and a curse for prisoners.⁷⁹ The plaintiff in *Wolff* asserted a challenge to the disciplinary procedures within a Nebraska state prison.⁸⁰ Pursuant to statute, prisoners that behaved adequately would be granted "good-time credits" by the prison, which had the effect of reducing the prisoners' overall term of imprisonment.⁸¹ The prison also had the power to take back awarded credits upon a finding that the inmate was guilty of flagrant misconduct.⁸² The plaintiff in *Wolff* argued that the process set up within the prison that found him guilty of a significant violation, resulting in the forfeiture of his credits and thus the lengthening of his sentence, was constitutionally inadequate under the Due Process Clause of the Fourteenth Amendment.⁸³

⁷⁴ *Id.* at 482.

⁷⁵ *Id.*

⁷⁶ See *Morrissey*, 408 U.S. at 481-82; see also *Roth*, 408 U.S. at 576-78.

⁷⁷ See *Morrissey*, 408 U.S. at 481-82.

⁷⁸ See 418 U.S. at 556-58; Belbot, *supra* note 40, at 14-16; *infra* notes 97-107 and accompanying text.

⁷⁹ See Herman, *supra* note 28, at 1255.

⁸⁰ 418 U.S. at 542-43.

⁸¹ See *id.* at 546 n.6, 546-47.

⁸² *Id.* at 546-47.

⁸³ See *id.* at 553 & n.11.

In deciding whether the plaintiff had indeed asserted the violation of a liberty interest which would then require due process protection, the Court in *Wolff* did not analyze the plaintiff's liberty interest under the broad, amorphous standards seen in *Roth* and *Morrissey*.⁸⁴ Instead, the Court noted that the right to good-time credits was created pursuant to Nebraska state law.⁸⁵ Following this observation, the Court reasoned that because the state established such a right and codified the rule that such credits could only be lost as a result of serious violations, the state had granted the prisoner a liberty interest of "real substance."⁸⁶ Consequently, the plaintiff was deserving of due process sufficient to "insure that the state-created right [was] not arbitrarily abrogated."⁸⁷ By this ruling, the Court made a bold statement that would have a major effect on future prisoner litigation: prisoners have liberty interests created by state law that are equally as deserving of due process protection as those arising from the notion of liberty under the Fourteenth Amendment.⁸⁸

Thus, the Court in *Wolff* defined a prisoner's "liberty" interest by looking to objective state law—just as the Court in *Roth* had done two years earlier when deciding whether the plaintiff had a property interest in the terms of his employment—and ruled that due process protection is required when a state creates such an interest.⁸⁹ Scholars have noted that *Wolff* represented the first time the Court recognized that inmates had procedural rights within a prison and that prison officials could not punish prisoners for infractions of rules without some elements of an evidentiary hearing.⁹⁰ *Wolff*'s state-created liberty interest doctrine both allowed prisoners to challenge the discretionary manner in which prison administrators implemented a variety of decisions and narrowed the ability of officials to issue capricious judgments that could have significant effects on the lives of prisoners.⁹¹

Scholars also observed, however, that *Wolff*'s positivist analysis limited its otherwise broad holding.⁹² *Wolff* held that prisoners deserved due process protection in situations where the state had cre-

⁸⁴ See *id.* at 557–58; see also *supra* notes 58–77 and accompanying text.

⁸⁵ *Wolff*, 418 U.S. at 557.

⁸⁶ See *id.*

⁸⁷ *Id.*

⁸⁸ See *id.* at 558.

⁸⁹ See *id.* at 557–58; see also *Roth*, 408 U.S. at 577–78.

⁹⁰ See Belbot, *supra* note 40, at 1–2, 60; see also Herman, *supra* note 28, at 1244.

⁹¹ See Belbot, *supra* note 40, at 16; Herman, *supra* note 28, at 1244.

⁹² See Herman, *supra* note 28, at 1254–55; see also Belbot, *supra* note 40, at 67.

ated a specific entitlement through its statutes and regulations.⁹³ This reasoning both assisted and hurt prisoners' access to due process.⁹⁴ If prisoners could assert violations of a specific statute or regulation by prison officials, they would not be at the mercy of arbitrary deprivations of their freedoms, regardless of how large or small the freedom being violated.⁹⁵ In contrast, if a specific right had not been created and outlined by the state, courts would rarely find a right to due process, regardless of how severe the punishment or unfair the treatment inflicted.⁹⁶

This paradox for prisoners was exemplified best in *Meachum v. Fano*, a 1976 U.S. Supreme Court case that demonstrated the limits of the protection *Wolff* rendered to prisoners.⁹⁷ In *Meachum*, the Court held that prison officials had the absolute authority to make decisions concerning where to house validly convicted prisoners and when to transfer prisoners from prison to prison, as long as objective law did not grant prisoners rights limiting such official discretion.⁹⁸ The *Meachum* Court reasoned that the relevant liberty interest in *Wolff* arose from a state law, thus ensuring due process to protect against the arbitrary withdrawal of such a right.⁹⁹ In *Meachum*, however, the Court noted that the state had not created a specific right for prison-

⁹³ 418 U.S. at 557-58.

⁹⁴ See Herman, *supra* note 28, at 1254-55.

⁹⁵ See *id.*

⁹⁶ See *id.* at 1255. This is also true because the controlling factor in cases where prisoners claimed violations of their liberty interests was almost always whether a state-created liberty interest existed. Only three prisoner cases decided by the U.S. Supreme Court between *Morrissey* in 1972 and *Sandin v. Conner* in 1995 found that a prisoner's liberty interest arose from the Due Process Clause of the Constitution itself. See *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (holding that the Due Process Clause entitles a prisoner to procedural protection before being treated with anti-psychotic medication against his will); *Vitek v. Jones*, 445 U.S. 480, 487-88 (1980) (holding that the Due Process Clause guarantees a prisoner procedural protection before transfer to a psychiatric hospital); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (applying reasoning of *Morrissey* to the revocation of a prisoner's probation status). Post-*Sandin*, the Court has found only once a prisoner stating a claim asserting a liberty interest arising out of the Due Process Clause. See *Young v. Harper*, 520 U.S. 143, 143-45 (1997) (extending the reasoning of *Morrissey* to the revocation of a prisoner's participation in a preparole conditional supervision program). Thus, *Washington* and *Vitek* are notable for being the only non-probation/parole prisoner cases in which the Court has found the liberties of prisoners arising specifically from the Due Process Clause. See Belbot, *supra* note 40, at 31, 36-37. One commentator has suggested that the Court in *Washington* and *Vitek*, in pulling back from its stance that prisoners have no liberty interests arising from the Constitution itself, may have been influenced by earlier Court decisions acknowledging the rights of non-prisoners to refuse both forced medical treatment and placement in mental institutions. See *id.* at 37.

⁹⁷ See *Meachum*, 427 U.S. 215, 226-27 (1976).

⁹⁸ See *id.* at 224-27.

⁹⁹ See *id.* at 226-27.

ers to be free from transfers.¹⁰⁰ Because of this fact, prison officials had the power to transfer prisoners for any purpose without providing the opportunity for a hearing or any other element of due process.¹⁰¹ *Meachum* made clear that, unless a deprivation of liberty within prison could be tied to the Constitution itself, only the loss of a specific state-created liberty interest would entitle a prisoner to protection under the Due Process Clause.¹⁰²

For the twenty years following the *Wolff* decision, the federal judiciary decided prisoner liberty interest claims not by looking at the nature of the deprivation inflicted on the prisoner itself, but by considering whether such an interest had arisen out of statutory language.¹⁰³ Some commentators have argued that the primary result of *Wolff* was a burdensome rise in prisoner litigation, pointing to statistics indicating that since the mid-1970s the number of annual complaints in which prisoners alleged that the government had deprived them of a protected liberty interest without due process increased dramatically.¹⁰⁴ By the 1990s, with prisoners asserting protected "liberty" interests in virtually anything governed by prison rules, from sentences to segregatory confinement,¹⁰⁵ to the form in which one receives

¹⁰⁰ *Id.*

¹⁰¹ *See id.* at 228.

¹⁰² *See* 427 U.S. at 228–29.

¹⁰³ *See, e.g., Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 461, 463–65 (1989) (holding that a close examination of the language of the relevant statutes and regulations did not reveal the existence of a prisoner liberty interest in receiving certain visitors); *Hewitt v. Helms*, 459 U.S. 460, 470–72 (1983) (stating that prisoner possessed liberty interest in remaining out of administrative custody based on "mandatory character" of the language of the relevant state statutes).

¹⁰⁴ *Pierce*, *supra* note 50, at 1979. In 1972, state prisoners filed 3348 civil rights petitions in federal courts. Fred Cheesman et al., *Prisoner Litigation in Relation to Prisoner Population*, CASELOAD HIGHLIGHTS (Nat'l Ctr. for State Courts, Williamsburg, Va.), Sept. 1998, at 4, available at http://www.ncsconline.org/D_Research/csp/Highlights/PrisonerV4No2.pdf. By 1980, this number had risen to 12,395 civil rights petitions filed, and from 1980 to 1995 this number tripled, with more than 40,569 petitions filed in 1995. JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980–2000 3 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfused00.pdf>. This increase in civil rights lawsuits, although impossible without U.S. Supreme Court decisions such as *Wolff*, primarily was due to a corresponding increase in the national prison population. *See id.* (noting that "[b]etween 1980 and 1995, the rate at which State inmates filed civil rights petitions was stable, averaging 40 petitions per 1,000 inmates").

¹⁰⁵ *See Hewitt*, 459 U.S. at 470–71; *Walker v. Bates*, 23 F.3d 652, 655–56 (2d Cir. 1994) (holding prisoner possessed liberty interest in calling a witness during a disciplinary hearing).

prison meals,¹⁰⁶ prisoner civil rights cases, by some estimates, were taking up ten percent of the federal court caseload.¹⁰⁷

II. *SANDIN V. CONNER*

The language-centered approach came to a halt in 1995 with the U.S. Supreme Court's landmark *Sandin v. Conner* decision, which essentially ended the twenty-year application of the state-created liberty interest doctrine.¹⁰⁸ In *Sandin*, a Hawaii state prisoner, DeMont Conner, was placed in disciplinary segregation after being charged with "high misconduct" for using physical interference against a prison guard who was attempting a strip search.¹⁰⁹ At Conner's in-jail hearing, he was denied the opportunity to call several witnesses on his behalf and was sentenced to thirty days in a Special Holding Unit ("SHU").¹¹⁰ As a result of his sentence, Conner spent thirty days in solitary confinement, from which he was allowed out for fifty minutes each day so he could briefly exercise and shower.¹¹¹ Conner subsequently brought a suit asserting that the denial of his ability to call witnesses on his behalf violated his rights under the Due Process Clause.¹¹²

After the United States District Court for the District of Hawaii granted summary judgment for the prison officials, the United States Court of Appeals for the Ninth Circuit reversed, holding that the applicable Hawaii state regulations¹¹³ gave Conner a liberty interest in

¹⁰⁶ See *Burgin v. Nix*, 899 F.2d 733, 734-35 (8th Cir. 1990) (overruling district court decision finding prisoner had liberty interest protected by the Due Process Clause in avoiding being served "sacked" lunches).

¹⁰⁷ ROGER A. HANSON & HENRY W.K. DALEY, BUREAU OF JUSTICE STATISTICS, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS 2 (1994), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ccopaj.pdf>. Civil rights cases brought by prisoners were part of a larger problem involving prisoner litigation—one 1998 report found that one-fifth of all civil cases filed in federal court were brought by prison inmates. Fred Cheesman, II et al., *A Tale of Two Laws: The U.S. Congress Confronts Habeas Corpus Petitions and Section 1983 Lawsuits*, 22 LAW & POLICY 89, 89 (2000).

¹⁰⁸ See 515 U.S. 472, 483-84 (1995); Belbot, *supra* note 40, at 49.

¹⁰⁹ *Id.* at 475 (quoting Haw. Admin. Rule § 17-201-7 (1983)).

¹¹⁰ *Id.* at 475-76. SHUs are separate housing areas within prisons which are designed to hold temporarily inmates who have been separated from the general prison population for either non-punitive or punitive purposes. See RICHARD P. SEITER, CORRECTIONAL ADMINISTRATION: INTEGRATING THEORY AND PRACTICE 242 (2002).

¹¹¹ *Sandin*, 515 U.S. at 494 (Breyer, J., dissenting). Conner remained separated from other inmates and was placed in chains during these brief periods outside the SHU. *Id.* (Breyer, J., dissenting).

¹¹² See *id.* at 476.

¹¹³ See Haw. Admin. Rule § 17-201-18(b)(2) (providing that prison officials must be presented with "substantial evidence" before a finding of guilt).

remaining in the general population.¹¹⁴ Applying the state-created liberty interest doctrine, the Ninth Circuit read the relevant statutory language and noted that the rules "provide[d] explicit standards that fetter[ed] official discretion," concluding that because such language existed, Conner indeed had a liberty interest worthy of due process protection.¹¹⁵ Having found a liberty interest, the court next reasoned that because prison officials had allegedly denied Conner the right to call witnesses in his defense without establishing a legitimate justification for this denial, there was a genuine issue of material fact as to whether the officials had violated Conner's due process rights.¹¹⁶ The Ninth Circuit reversed the District Court and remanded for further findings.¹¹⁷

The U.S. Supreme Court took the case on appeal and dramatically altered how future courts would determine whether a prisoner had asserted a liberty interest deserving of due process protection.¹¹⁸ In doing so, the Court narrowed the definition of what it means to possess a liberty interest within prison walls.¹¹⁹ This narrowing resulted in increased difficulty for future prisoners to assert violations of their liberty interests and survive the summary judgment stage of litigation.¹²⁰

¹¹⁴ See *Conner v. Sakai*, 15 F.3d 1463, 1465-66 (9th Cir. 1993), *rev'd sub nom Sandin v. Conner*, 515 U.S. 472 (1995).

¹¹⁵ See *id.* at 1466.

¹¹⁶ See *id.* at 1467-68.

¹¹⁷ *Id.* at 1471.

¹¹⁸ See *Sandin*, 515 U.S. at 483-84; Michelle C. Ciszak, *Sandin v. Conner: Locking Out Prisoners' Due Process Claims*, 45 CATH. U. L. REV. 1101, 1106-07 (1996).

¹¹⁹ See *Pierce*, *supra* note 50, at 1989.

¹²⁰ See *infra* notes 150-233 and accompanying text. *Sandin* should also be seen as a product of its time, as less than one year after its issuance, Congress enacted the Prison Litigation Reform Act (the "PLRA"), which imposed unique filing fees on prisoner litigants, required prisoners to exhaust administrative remedies prior to filing suit, and limited prisoners' ability to collect damages and attorney's fees. See Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-1377 (1996) (codified in scattered sections of the U.S.C.). Such provisions arose out of concern over the sheer volume of prisoner litigation in the federal court system, much of which was perceived to be frivolous. See Brian J. Ostrom et al., *Congress, Courts, and Corrections: An Empirical Perspective on the Prison Litigation Reform Act*, 78 NOTRE DAME L. REV. 1525, 1525-28 (2003); *supra* notes 103-107 and accompanying text. One commentator suggests that, although concerns over the volume of prisoner litigation were legitimate, the perception that many of these claims were frivolous was unfounded. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1570-75 (2003) (analyzing data and concluding that the belief that the average inmate complaint was illegitimate was simply "incorrect"). Nevertheless, the PLRA severely limited the ability of prisoners to reach federal court, with one recent study concluding that the PLRA caused prisoner claims to drop forty-three percent from 1995 through 2001, despite a twenty-three percent increase in the nationwide prisoner population during the same period. See *id.* at 1559-60.

In *Sandin*, the Supreme Court abandoned the state-created liberty interest doctrine which had focused on statutory language in its determination of the existence of a liberty interest.¹²¹ Chief Justice Rehnquist, writing for the majority, cited three negative effects that had resulted from a focus on language in determining a prisoner's liberty interest.¹²² First, he reasoned that the state-created liberty interest doctrine granted prisoners the power to transform minor claims into questions of a constitutional nature.¹²³ Second, he asserted that a focus on language was an impediment for prison officials seeking to apply reasonable rules to prison life because any such rule could establish a liberty interest, giving rise to claims of violations without due process.¹²⁴ Finally, he contended, the focus on language led to the federal courts becoming unnecessarily intertwined in the daily management of prisons, resulting in the clogged dockets of the federal judiciary.¹²⁵ Thus, the Chief Justice also cited a goal of granting officials greater judicial deference in the running of their prisons.¹²⁶

In summing up the Court's policy concerns with the state-created liberty interest doctrine, Chief Justice Rehnquist stated that the search for "mandatory language in prisoner regulations" had resulted in courts "stray[ing] from the real concerns undergirding the liberty protected by the Due Process Clause."¹²⁷ In response, the Court issued a ruling that attempted to move the analysis of a prisoner's liberty interest away from a focus on the codified language of a state law and to

¹²¹ See 515 U.S. at 483 n.5, 483-84; Belbot, *supra* note 40, at 4. The Court explicitly abandoned the analysis it stated in *Hewitt v. Helms*. *Sandin*, 515 U.S. at 483 n.5, 483-84. In *Hewitt*, the Court indicated that not in all circumstances would the presence of state-codified procedural guidelines lead to the establishment of a liberty interest. See 459 U.S. 460, 469-72 (1983). Where states, however, "used language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed," such mandatory language would inherently lead to a protected liberty interest, regardless of the nature of the deprivation. See *id.*

¹²² See *Sandin*, 515 U.S. at 481-82. Chief Justice Rehnquist was joined by Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas. *Id.* at 473.

¹²³ See *id.* at 481-83.

¹²⁴ See *id.* at 482.

¹²⁵ See *id.* Chief Justice Rehnquist's language foreshadowed vocalized concern from Congress that led to the enactment of the PLRA, which weakened the ability of prisoners to litigate in federal court. See, e.g., 141 CONG. REC. 514, 418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) (stating need for legislation to "bring relief to a civil justice system overburdened by frivolous prisoner lawsuits"); see also *supra* note 120.

¹²⁶ See *Sandin*, 515 U.S. at 482. ("[F]ederal courts ought to afford appropriate deference and flexibility to state [prison] officials trying to manage a volatile environment.").

¹²⁷ See *id.* at 483.

ward the nature of the deprivation the prisoner suffered.¹²⁸ In the future, prison officials only would deprive prisoners of liberty interests the Due Process Clause protected when prison authorities imposed an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."¹²⁹ In *Sandin*, the Court held that the plaintiff's thirty days in solitary confinement did not amount to an atypical or significant hardship.¹³⁰ The Court emphasized that "[d]iscipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law."¹³¹ Thus, the Court reversed the Ninth Circuit, thereby ending the federal judiciary's application of the state-created liberty interest doctrine to prisoner due process claims.¹³²

Unfortunately, in doing so the Court provided little explicit guidance for determining when an "atypical and significant" deprivation has occurred.¹³³ In creating the atypical standard, the Court did make three significant findings, however, shedding some light on its reasoning.¹³⁴ Principally, the Court found that the duration and conditions of the plaintiff's disciplinary confinement largely "mirrored" the duration of confinement and the conditions imposed upon other inmates in administrative confinement¹³⁵ and protective

¹²⁸ See *id.* at 480–84.

¹²⁹ See *id.* at 483–84. Chief Justice Rehnquist wrote that this standard would apply in situations in which the restraints from freedom are not so harmful as to give rise to the Due Process Clause on their own. *Id.* at 484. As noted, however, situations in which the Supreme Court has found prisoner liberty interests directly arising from the Due Process Clause are rare. See *supra* note 96.

¹³⁰ See 515 U.S. at 487.

¹³¹ *Id.* at 485.

¹³² See *id.* at 483–84, 488; Belbot, *supra* note 40, at 4.

¹³³ See Herman, *supra* note 28, at 1257–58; see also Ciszak, *supra* note 118, at 1143–44; Julia M. Glencer, Comment, An "Atypical and Significant" Barrier to Prisoners' Procedural Due Process Claims Based on State-Created Liberty Interests, 100 DICK. L. REV. 861, 914 (1996).

¹³⁴ See *Sandin*, 515 U.S. at 486–87.

¹³⁵ "Administrative" or "non-disciplinary" segregation is a prison management term that refers to non-punitive segregation imposed on a prisoner typically due to the prisoner's inability or perceived inability to exist in general population in a nonviolent manner. See Belbot, *supra* note 40, at 40–41. It is thought that a prisoner placed in administrative segregation, although not having committed a disciplinary infraction per se, can be better supervised for the safety of other prisoners and staff. See *id.* The overall duration of a stay in administrative segregation will depend on the decisions of prison officials, ostensibly when the prisoner is no longer considered a threat. See *id.* Conditions in administrative segregation vary, but oftentimes are as harsh as the conditions in disciplinary confinement, where prisoners who have violated specific prison rules are sent. See, e.g., Haw. Admin. Rule §§ 17-201-19(c), -22 (1983) (same SHU used for inmates sentenced to disciplinary confinement and administrative segregation); CRIMINAL JUSTICE INSTITUTE, THE 2001 CORRECTIONS YEARBOOK 39 (2002) [hereinafter CORRECTIONS YEARBOOK] (de-

custody¹³⁶ within the same prison.¹³⁷ Second, the Court noted that general population prisoners in the plaintiff's prison also experienced significant amounts of segregated confinement.¹³⁸ Finally, the Court found that the plaintiff's confinement would not "inevitably affect" the length of his larger sentence in the state prison.¹³⁹

Beyond these observations, however, the majority provided little direction on how future analyses should proceed.¹⁴⁰ Numerous questions remained over how lower courts were to perform similar future procedural due process analyses.¹⁴¹ As Justices Stephen Breyer and Ruth Bader Ginsburg noted in dissent, the "generality" of the standard as espoused by the majority "threaten[ed] the law with uncertainty"¹⁴² and left "consumers of the Court's work at sea, unable to fathom what would constitute an 'atypical, significant deprivation.'"¹⁴³ As could be expected, the lower federal courts initially expressed concerns with the vagueness of the *Sandin* standard and the questions it raised.¹⁴⁴

scribing disciplinary confinement generally as "[s]imilar to Administrative Segregation except inmates are placed for a fixed amount of time as punishment for an infraction of the rules"). Such conditions usually consist of solitary confinement for nearly twenty-four hours a day with none of the privileges and opportunities available to the general prison population. See G. LARRY MAYS & L. THOMAS WINFREE, JR., *CONTEMPORARY CORRECTIONS* 197 (2d ed. 2002). Some critics have voiced concern over administrative segregation, noting the "standardless nature" of how it is imposed and the real possibility of undefined terms of confinement. See Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 561 & n.429 (1997).

¹³⁶ "Protective custody" is a management term some prisons use that refers to non-punitive segregation utilized for prisoners who have been threatened with or have been the victims of physical violence, or who have reputations within the prison as informants, subjecting them to danger. See MAYS & WINFREE, *supra* note 135, at 197. Prisoners in protective custody are placed in maximum-security units and have their privileges revoked in a manner similar to those prisoners in administrative segregation. See *id.*; see also MARY BOSWORTH, *THE U.S. FEDERAL PRISON SYSTEM* 106-07 (2002) (describing that prisoners in federal prison fearing their safety are placed in administrative detention as "protection cases"). Because of the similarity in conditions of both administrative and protective segregation, and the non-punitive nature of both confinements, for purposes of this Note the term "administrative" segregation or confinement includes protective custody status.

¹³⁷ See *Sandin*, 515 U.S. at 486.

¹³⁸ *Id.* Prisoners in general population were held in their cells from twelve to sixteen hours a day. *Id.* at 486 n.8.

¹³⁹ *Id.* at 487.

¹⁴⁰ See *id.* at 486-87.

¹⁴¹ See Herman, *supra* note 28, at 1257-58.

¹⁴² *Sandin*, 515 U.S. at 496 (Breyer, J., dissenting).

¹⁴³ *Id.* at 490 n.2 (Ginsburg, J., dissenting).

¹⁴⁴ See, e.g., *Justice v. Coughlin*, 941 F. Supp. 1312, 1317 (N.D.N.Y. 1996) ("*Sandin* significantly altered the conceptual framework to be employed when a prisoner claims that he or she has been deprived of liberty without due process. . . . [H]owever, the *Sandin*

III. LOWER COURT APPLICATION OF *SANDIN V. CONNER* AND CONFINEMENT

Despite the initial expressions of confusion, the circuit courts of appeals began to apply the "atypical and significant" standard in intraprison confinement cases with more predictable results.¹⁴⁵ The methodologies the courts now employ, however, vary on a number of significant points, with the respective courts drawing on the different factors and policy justifications Chief Justice Rehnquist cited in *Sandin v. Conner*.¹⁴⁶ Such differences are most noticeable, and also become most significant, when the courts attempt to characterize the baseline to which the challenged confinement should be compared in determining whether a prisoner has suffered an atypical and significant hardship.¹⁴⁷ Any clarification of these differences will depend on future U.S. Supreme Court decisions.¹⁴⁸ This Part illustrates some of the more significant differences between the courts of appeals in carrying out their analyses of a prisoner's liberty interest under the standard set forth in *Sandin*.¹⁴⁹

This Part first discusses the Courts of Appeals for the Third, Sixth, and Tenth Circuits' approach, which uses the conditions in a prison's administrative confinement as the principal comparative baseline in the liberty interest analysis, a method that usually results in no liberty interest being found for the prisoner.¹⁵⁰ This Part next looks at the unique methodologies the Courts of Appeals for the Fifth and Seventh Circuits have developed.¹⁵¹ The Fifth Circuit does not engage in a discussion of comparative baselines, and instead focuses solely on whether an intraprison confinement results in an extended prison sentence.¹⁵² The Seventh Circuit utilizes as its comparative baseline the harshest confinement conditions of any state prison within a particular state.¹⁵³ Such analyses will almost never find that a prisoner possesses a liberty

decision does not completely clarify the parameters of prison/due process analysis."); *Knox v. Lanham*, 895 F. Supp. 750, 759 (D. Md. 1995) ("Unfortunately, the application of this new standard . . . is far from clear."), *aff'd*, 76 F.3d 377 (4th Cir. 1996).

¹⁴⁵ See *infra* notes 150–233 and accompanying text.

¹⁴⁶ See *supra* notes 122–139 and accompanying text; *infra* notes 150–233 and accompanying text.

¹⁴⁷ See *infra* notes 150–233 and accompanying text.

¹⁴⁸ See *infra* notes 150–233 and accompanying text.

¹⁴⁹ See *infra* notes 150–233 and accompanying text.

¹⁵⁰ See *infra* notes 161–188 and accompanying text.

¹⁵¹ See *infra* notes 189–202 and accompanying text.

¹⁵² See *infra* notes 189–191 and accompanying text.

¹⁵³ See *infra* notes 192–202 and accompanying text.

interest in a certain level of confinement.¹⁵⁴ Finally, this Part discusses the relatively more lenient approaches found in the Courts of Appeals for the D.C. and Second Circuits, with the D.C. Circuit using "routine" administrative confinement as its baseline, and the Second Circuit considering conditions in both administrative confinement and general population in its analysis.¹⁵⁵ It is in these circuit courts that prisoners have their best chance of making a showing that they possessed a liberty interest in remaining in a prison's general population.¹⁵⁶

Before beginning this discussion, it is important to note why this Part does not address all circuit courts and the district courts under their jurisdiction on an in-depth level.¹⁵⁷ This is because a sizable number of courts, in a manner similar to the Fifth Circuit, do not engage in a discussion of comparative baselines when applying *Sandin* in the context of intraprisson confinement.¹⁵⁸ Unlike the Fifth Circuit, however, these courts generally have less to say in their application of *Sandin*, with decisions that read the case as inevitably leading to the conclusion that intraprisson confinements cannot raise liberty interests.¹⁵⁹ Although these courts generally issue decisions with results similar to those of the Third, Fifth, Sixth, and Seventh Circuit Courts, it is ultimately their

¹⁵⁴ See *infra* notes 189–202 and accompanying text.

¹⁵⁵ See *infra* notes 203–233 and accompanying text.

¹⁵⁶ See *infra* notes 203–233 and accompanying text.

¹⁵⁷ See *infra* notes 158–160 and accompanying text.

¹⁵⁸ See *infra* note 159 and accompanying text.

¹⁵⁹ See, e.g., *Portley-El v. Brill*, 288 F.3d 1063, 1064–66 (8th Cir. 2002) (affirming lower court dismissal of a liberty interest claim arising out of a thirty-day sentence to punitive segregation, stating, "[w]e have consistently held that administrative and disciplinary segregation are not atypical and significant hardships under *Sandin*."); *Henderson v. Hamren*, No. 01-15094, 2002 WL 554457, at *1 (9th Cir. Apr. 8, 2002) ("[F]reedom from administrative segregation does not give rise to a protected liberty interest."); *L'Heureux v. Ashton*, No. 98-1336, 1998 WL 1085692, at *1 (1st Cir. Oct. 13, 1998) (per curiam) (affirming lower court grant of summary judgment against prisoner due process claim arising out of sentence to disciplinary confinement, citing *Sandin*, yet engaging in no discussion of the conditions or duration of confinement); *Rodgers v. Singletary*, 142 F.3d 1252, 1253 (11th Cir. 1998) (stating merely, "[plaintiff] has not shown that he was deprived of a constitutionally protected liberty interest as defined in *Sandin*," in discussing the merits of a prisoner claim arising out of placement in administrative confinement for two months); *May v. Baldwin*, 109 F.3d 557, 565 (9th Cir. 1997) (holding that freedom from administrative segregation does not give rise to a protected liberty interest because it is within the terms of a prisoner's confinement and therefore cannot be considered atypical under *Sandin*); *Hewes v. R.I. Dep't of Corr.*, No. C.A.00-205 S, 2003 WL 751027, at *2 (D.R.I. Feb. 11, 2003) ("[P]laintiff complains of being subject to thirty days punitive segregation for his first offense and ten days for each of the last two offenses. No liberty interest is implicated here."); *Alley v. Angelone*, 962 F. Supp. 827, 833 (E.D. Va. 1997) ("[A]n inmate who is incarcerated subject to a lawful conviction has no liberty interest in being free from placement in segregation.").

minimal discussion as to why *Sandin* should lead to such results that makes it possible to address the analyses of these courts in a more cursory fashion.¹⁶⁰

A. *The Third, Sixth, and Tenth Circuits: Administrative Confinement as the Baseline*

The United States Court of Appeals for the Third Circuit has interpreted *Sandin* as holding that the analysis surrounding the existence of a prisoner's liberty interest invites a comparison between the conditions of the plaintiff's challenged confinement with the conditions of non-disciplinary confinement in the same prison, such as administrative segregation.¹⁶¹ If the differences between such confinements reveal atypical and significant hardships in relation to the ordinary incidents of prisoner life, then a liberty interest will exist.¹⁶² Such a reading focuses on language from *Sandin* stating that the conditions imposed on the plaintiff in that case did not present a "dramatic departure" from his prison experience because the conditions did not vary greatly from those found in non-disciplinary confinement in the same prison.¹⁶³ Such an interpretation is problematic for prisoners because it draws to the forefront language from *Sandin*, which seems to imply that administrative segregation is a normal part of prison life that rarely, if ever, will raise a liberty interest.¹⁶⁴

In 1997, in *Griffin v. Vaughn*, the Third Circuit made a ruling using such reasoning.¹⁶⁵ In that case, the prison officials had placed the plaintiff in administrative confinement for fifteen months, without a hearing, due to suspicion of his involvement in the rape of a female prison guard.¹⁶⁶ The conditions of the assignment consisted of segregation with the exception of one hour a day allowed outside the cell for exercise and enough additional time for three showers a week.¹⁶⁷ The plaintiff sued, asserting the existence of a liberty interest in re-

¹⁶⁰ See *supra* note 159 and accompanying text.

¹⁶¹ See *Shoats v. Horn*, 213 F.3d 140, 143-44 (3d Cir. 2000); *Griffin v. Vaughn*, 112 F.3d 703, 706 (3d Cir. 1997).

¹⁶² See *Shoats*, 213 F.3d at 143-44; *Griffin*, 112 F.3d at 706.

¹⁶³ See 515 U.S. 472, 485-86 (1995).

¹⁶⁴ See *id.*

¹⁶⁵ See 112 F.3d at 706-08.

¹⁶⁶ *Id.* at 705.

¹⁶⁷ *Id.* at 707. Additionally, prisoners in administrative confinement were not allowed television, radios, or phone calls, and were limited to one non-legal visitor a week. *Id.* at 706-07.

maining out of administrative confinement.¹⁶⁸ The court evaluated the conditions of the prisoner's confinement and noted that a wide range of prisoners from general population, under the relevant prison regulations, could be transferred to administrative confinement for a number of non-punitive reasons.¹⁶⁹ The court thus concluded that administrative segregation was an ordinary incident of prison life, because sentenced inmates in the plaintiff's prison may reasonably expect to encounter such confinement as a result of their convictions.¹⁷⁰

The court also stated that the total time faced in confinement could play a factor in a finding of atypicality, but not in the present situation.¹⁷¹ The *Griffin* court made the logical jump that because a variety of prisoners may end up in administrative segregation for a variety of reasons, a stay in administrative segregation for months at a time was "not uncommon."¹⁷² Thus, the plaintiff's stay in non-disciplinary confinement for fifteen months fell "within the expected parameters of the sentence imposed . . . by a court of law" and the plaintiff, because of the non-existence of a liberty interest, was not privy to the protections of procedural due process.¹⁷³

The United States Court of Appeals for the Sixth Circuit has also interpreted post-*Sandin* liberty interest claims in a manner that effectively bars claims arising out of confinement in administrative segregation.¹⁷⁴ The earlier post-*Sandin* decisions from the Circuit do not reveal much analysis, simply citing the policy of deference to prison officials discussed in the *Sandin* decision.¹⁷⁵ In 1998, in *Jones v. Baker*, the Sixth Circuit seemed to step back from that position by pointing out that not every claim arising out of confinement in administrative

¹⁶⁸ *Id.* at 705.

¹⁶⁹ See *Griffin*, 112 F.3d at 707-08.

¹⁷⁰ See *id.*

¹⁷¹ See *id.* at 708-09. More recently, in 2000, the Third Circuit ruled in *Shoats v. Horn* that a prisoner held for eight years in administrative confinement experienced conditions that were atypical enough to create a liberty interest. See 213 F.3d at 144.

¹⁷² See 112 F.3d at 708. The court made this "conclu[sion] with confidence," not citing anything objective as to whether placement in administrative confinement was a common prisoner experience in that particular prison. See *id.*

¹⁷³ See *id.* (quoting *Sandin*, 515 U.S. at 485).

¹⁷⁴ See, e.g., *Mackey v. Dyke*, 111 F.3d 460, 461, 463 (6th Cir. 1997) (stating that inmate who was recommended for release from administrative confinement yet remained in segregation for 117 days due to lack of space in general population did not suffer an "atypical and significant hardship"); *Rimmer-Bey v. Brown*, 62 F.3d 789, 790-91 (6th Cir. 1995) (holding placement in administrative detention does not give rise to a liberty interest such that procedural protections of notice and a hearing are necessary prior to placement).

¹⁷⁵ See *Mackey*, 111 F.3d at 463; *Rimmer-Bey*, 62 F.3d at 790-91.

segregation should automatically fail to raise a liberty interest.¹⁷⁶ The result in *Jones*, however, was similar to the Circuit's earlier decisions: an inmate who was placed in administrative segregation for two-and-a-half years, during which time he was under investigation for a prison-riot murder of a prison guard, did not possess a liberty interest in remaining in general population.¹⁷⁷

The *Jones* court, although taking into consideration the long duration of confinement, highlighted the language from *Sandin* which indicated that a factor to be considered in making a liberty interest determination is whether the confinement would necessarily affect the duration of the prisoner's sentence.¹⁷⁸ The court concluded that in the present case there was no evidence that the segregation would do so.¹⁷⁹ The court also took into account that the prison had a legitimate reason for placing the inmate in confinement.¹⁸⁰ Finally, the court considered that the conditions of segregation were no different than conditions the prison's other inmates held in administrative segregation faced.¹⁸¹ Consistent with the Third Circuit, the Sixth Circuit thus indicated that administrative confinement will rarely lead to a liberty interest.¹⁸²

Finally, the Tenth Circuit Court of Appeals and district courts within its jurisdiction have also interpreted *Sandin* as indicating that courts should look to the conditions of administrative segregation as the proper comparative baseline in a prisoner liberty interest analysis.¹⁸³ Thus, in 2000, the United States District Court for the District of Kansas in *Johnson v. Bureau of Prisons* held that a one-year placement in administrative confinement could not lead to the creation of a liberty

¹⁷⁶ See 155 F.3d 810, 813 (6th Cir. 1998).

¹⁷⁷ See *id.* at 811-13.

¹⁷⁸ See *id.* at 812.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 812-13.

¹⁸¹ *Jones*, 155 F.3d at 813.

¹⁸² See *id.* at 812-13. The concurring judge in *Jones* agreed with the majority view that it is reasonable to assign an inmate to administrative segregation following a prison riot, yet commented that "such confinement for a period of over two and a half years is clearly a rare occurrence." See *id.* at 815 (Gilman, J., concurring). Moreover, the concurring judge argued that the majority decision wrongly assumed that a sentence to administrative segregation is an event typical of prison life. See *id.* at 815-16 (Gilman, J., concurring). Instead, the judge maintained that *Sandin* called for a more nuanced, fact-specific inquiry into the particular nature of the conditions the individual plaintiff faced, which the majority failed to do. See *id.* (Gilman, J., concurring). This is more consistent with the approach the Second Circuit applies. See *infra* notes 214-233 and accompanying text.

¹⁸³ See *Gaines v. Stenseng*, 292 F.3d 1222, 1225-26 (10th Cir. 2002); *Johnson v. Bureau of Prisons*, No. 99-3239-KHV, 2000 WL 574881, at *4 (D. Kan. Apr. 4, 2000).

interest, given that the plaintiff failed to present evidence that the duration or conditions of his confinement were abnormal compared to normal placements in administrative confinement.¹⁸⁴ The court relied on the same logic the Third Circuit employed in *Griffin*, crediting the fact that inmates can be placed in administrative segregation for a variety of reasons.¹⁸⁵

An interesting contrast to *Johnson*, however, can be seen in the Tenth Circuit's recent 2002 decision in *Gaines v. Stenseng*, in which the court reversed and remanded a district court decision dismissing a prisoner's assertion of a liberty interest in avoiding a seventy-five-day sentence to disciplinary segregation.¹⁸⁶ The *Gaines* court stated that the lower court erred by assuming, with little analysis, that seventy-five days in disciplinary confinement was an event typical of prison life.¹⁸⁷ On remand, the circuit court not only instructed the district court to engage in an examination of the typical conditions of confinement in the plaintiff's prison, but also indicated that the responsibility for gathering such information should be shared by the state.¹⁸⁸

B. *The Fifth and Seventh Circuits: No Baseline and Extreme Confinement as the Baseline*

Whereas the Third, Sixth, and Tenth Circuits have used conditions of administrative segregation as the standard for deciding atypicality, thereby issuing rulings indicating that administrative confinement rarely could implicate a liberty interest, the United States Court of Appeals for the Fifth Circuit, at least semantically, has been the toughest on prisoners, stating that disciplinary segregation will never implicate a liberty interest unless it "inevitably" lengthens a prisoner's sentence.¹⁸⁹

¹⁸⁴ See 2000 WL 574881, at *4.

¹⁸⁵ See *Griffin*, 112 F.3d at 708; *Johnson*, 2000 WL 574881, at *4.

¹⁸⁶ 292 F.3d at 1226.

¹⁸⁷ See *id.* at 1225-26.

¹⁸⁸ See *id.*

¹⁸⁹ See *Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997) (quoting *Sandin*, 515 U.S. at 487); see also *supra* notes 161-188 and accompanying text. There are several problems inherent with Chief Justice Rehnquist's observation that Conner's thirty-day sentence to disciplinary confinement would not affect the overall duration of his sentence. See Belbot, *supra* note 40, at 57-58; *infra* notes 190-191 and accompanying text. First, Professor Barbara Belbot offers several reasons why placement in administrative and disciplinary confinement certainly *could* affect a prisoner's sentence, most importantly because parole boards often review such confinements in their decision-making process. See Belbot, *supra* note 40, at 57-58. Second, from an evidentiary perspective, it will be almost impossible for any prisoner to definitively demonstrate to a court how confinement affected a prison sentence, given that paroling authorities can consider sentences to disciplinary

In addition, the Fifth Circuit has drawn from *Sandin* the conclusion that administrative segregation, being an incident of prison life, cannot raise a liberty interest the Fourteenth Amendment protects.¹⁹⁰ Thus, the Fifth Circuit has not engaged in a dialogue of "comparative baselines" and has not given much weight to the duration of the segregatory confinement as a factor in its analysis.¹⁹¹

The United States Court of Appeals for the Seventh Circuit also has interpreted *Sandin* in a manner resulting in particularly restrictive results for prisoners.¹⁹² Like the above circuits, the Seventh Circuit defines the comparative baseline as the conditions of non-disciplinary segregation.¹⁹³ Taking a different approach, however, the Seventh Circuit has ruled that the proper inquiry must examine not simply the conditions of confinement within the particular prison housing the relevant prisoner, but also the confinement conditions within the entire state prison system, including the harshest facility in a particular state's most restrictive prison.¹⁹⁴ Thus, it appears that in the Seventh Circuit, like in the Fifth, no assignment to administrative or disciplinary confinement, even if arbitrarily imposed, will ever raise a liberty interest.¹⁹⁵

confinement in their decision making, but do not have to. *See id.* Finally, because of Chief Justice Rehnquist's observation without much elucidation on that point, future courts will more likely rely on the assumption that stays in administrative and disciplinary confinement will not affect a prisoner's overall sentence. *See infra* notes 190–191 and accompanying text.

¹⁹⁰ *See* *Pichardo v. Kinker*, 73 F.3d 612, 613 (5th Cir. 1996) (dismissing as "frivolous" and "lack[ing] an arguable basis in law or fact" plaintiff's claim that he possessed a liberty interest due to his confinement in administrative segregation); *Orellana v. Kyle*, 65 F.3d 29, 31–32, 32 n.2 (5th Cir. 1995) (stating that, although *Sandin* did not specifically overrule *Hewitt v. Helms*, a case which had found a liberty interest arising from confinement in administrative segregation, it is nonetheless "unlikely" post-*Sandin* that administrative segregation could give rise to a constitutional claim, given that *Sandin* found a severe sentence to disciplinary segregation to be typical of prison and also rejected the positivist liberty interest methodology).

¹⁹¹ *See* *Pichardo*, 73 F.3d at 612–13 (stating nowhere the specific duration of plaintiff's confinement in ruling that placement in administrative confinement does not raise a liberty interest); *see also* *Brown v. Cockrell*, No. 3:01-CV-1090-H, 2002 WL 638584, at *3 (N.D. Tex. Apr. 17, 2002) (holding twenty-two months in administrative confinement does not implicate a liberty interest).

¹⁹² *See* *Wagner v. Hanks*, 128 F.3d 1173, 1175–76 (7th Cir. 1997).

¹⁹³ *See id.*

¹⁹⁴ *See id.*

¹⁹⁵ *See id.* at 1175–77. Judge Richard Posner in *Wagner v. Hanks* assumed that a liberty interest protectible by the Due Process Clause could arise in an extreme and rare situation where the challenged conditions were more severe than confinement conditions in the state's most restrictive prison. *See id.* at 1176–77. Posner also wrote, however, that such a situation would likely invoke the Eighth Amendment. *See id.* Posner's argument is interest-

In 1997, in *Wagner v. Hanks*, Judge Richard Posner reached such a result by first reasoning that the primary factor that concerned the *Sandin* Court was the lack of significant differences between the disciplinary confinement the plaintiff faced in *Sandin* and the non-disciplinary conditions in that prison.¹⁹⁶ Judge Posner took a further logical step by arguing that it would be "arbitrary" to conduct an analysis that both "distinguish[es] between the different parts of the same prison, on the one hand, and the different prisons in the same system, on the other."¹⁹⁷ Moreover, Posner noted that the Supreme Court has held that a transfer of a prisoner from one prison to another does not raise a liberty interest under the Constitution, even when the conditions of confinement are harsher at the subsequent prison.¹⁹⁸ Thus, Posner concluded that the relevant comparison cannot be restricted to conditions in the same prison, unless it is the most protective prison in the state.¹⁹⁹

Posner acknowledged that such an interpretation is "harsh" and that, possibly, it was not "intended" by the Supreme Court.²⁰⁰ Nonetheless, Posner argued that when the Court's transfer cases are viewed in conjunction with *Sandin*, the reasonable conclusion is that a proper examination includes an inquiry into all prison conditions within a particular state.²⁰¹ Posner's reading of *Sandin*, although unique, has not been modified or overruled by the Seventh Circuit, and has been

ing when considered in light of Professor Susan Herman's criticism that *Sandin* has resulted in a situation where providing judicial relief under the Fourteenth Amendment in connection with atypical and significant deprivations of freedom may be no different than providing judicial relief for cruel and unusual punishment. See Herman, *supra* note 28, at 1261.

¹⁹⁶ See 128 F.3d at 1175. In contrast to Posner's acceptance of the Supreme Court's analysis, District Court Judge Milton Shadur's criticism of the Supreme Court's choice to use administrative confinement as a baseline for comparing challenged confinement conditions is worth noting. See *Leslie v. Doyle*, 896 F. Supp. 771, 773 n.4 (N.D. Ill. 1995), *aff'd*, 125 F.3d 1132 (7th Cir. 1997). Judge Shadur's central point is that administrative confinement, far from being an ordinary incident of prison life, for most prisoners is not routine and represents a major departure in the conditions of their confinement. See *id.*

¹⁹⁷ See *Wagner*, 128 F.3d at 1175.

¹⁹⁸ See *id.* (citing *Olim v. Wakinekona*, 461 U.S. 238, 247-48 (1983); *Montanye v. Haymes*, 427 U.S. 236, 242 (1976); *Meachum v. Fano*, 427 U.S. 215, 225 (1976)).

¹⁹⁹ See *id.*

²⁰⁰ *Id.* at 1176. Posner stated that the question of whether the relevant comparison group encompasses additional prisons was not addressed in *Sandin* because in that case the plaintiff was already housed in the most restrictive prison in the state. See *id.*

²⁰¹ See *id.* at 1175-76. Posner noted that, although the *Sandin* Court "cited the transfer cases with approval," the Court "did not draw the logical inference and may not have intended to push its approach to its logical extreme." *Id.* at 1176. Posner further added, "we would welcome clarification of the issue by the Court" as to whether the comparison group includes other prisons, including those in other states. *Id.*

applied on several occasions to deny prisoners due process protection in sentences to both administrative and disciplinary confinement.²⁰²

C. The D.C. Circuit and Second Circuit: "Routine" Administrative Confinement and Both Administrative Confinement and General Population as the Baseline

The United States Court of Appeals for the District of Columbia, like the Third, Sixth, and Tenth Circuits, uses conditions of administrative confinement as the baseline for a comparison of challenged conditions of confinement.²⁰³ It also agrees with those circuits that, post-*Sandin*, administrative confinement should be viewed as an instrument of prison management incidental to prison life.²⁰⁴ Unlike the above circuits, however, the D.C. Circuit has not concluded that such an understanding will necessarily preclude a liberty interest claim from arising out of administrative segregation, because the relevant comparison a court must make is to confinement that prison officials "routinely impose on inmates serving similar sentences."²⁰⁵ The implication is that administrative confinement could establish impairment of a liberty interest if a prisoner was confined in administrative confinement under conditions or for a duration more adverse than those "routinely imposed" on inmates serving sentences of a similar length.²⁰⁶

In 1999, in *Hatch v. District of Columbia*, the D.C. Circuit reversed a decision by the United States District Court for the District of Columbia that had found that a prisoner, under *Sandin*, could not assert a liberty interest against spending seven months in administrative segregation.²⁰⁷ Noting that administrative segregation would usually be a normal part of prison life, the court nonetheless indicated that *Sandin* did not dictate this to be a bright-line rule.²⁰⁸ Instead, the court drew on language from *Sandin* that noted first that the prisoner's

²⁰² See *Whitford v. Boglino*, No. 97-3715, 1999 WL 828598, at *2-3 (7th Cir. Oct. 13, 1999) (holding that a three-week placement in disciplinary segregation unit that was "excessively hot, dirty, and constantly illuminated" did not give rise to a liberty interest); *Luczak v. Cooper*, No. 98 C 6807, 1999 WL 91893, at *2-3 (N.D. Ill. Feb. 11, 1999) (holding fifty-nine days in disciplinary segregation did not give rise to a liberty interest); *Henard v. Newkirk*, 987 F. Supp. 691, 693 (N.D. Ind. 1997) (concluding one year in disciplinary segregation did not give rise to a liberty interest).

²⁰³ See *Hatch v. District of Columbia*, 184 F.3d 846, 856 (D.C. Cir. 1999).

²⁰⁴ See *id.*

²⁰⁵ See *id.* (emphasis added).

²⁰⁶ See *id.*

²⁰⁷ See *id.* at 847-49.

²⁰⁸ See *Hatch*, 184 F.3d at 858.

confinement in that case was neither more restrictive nor of a greater duration than similar confinement in the prison and second, that the inmate's thirty-day sentence to disciplinary segregation "was within the range of confinement to be normally expected for one serving an indeterminate term of 30 years to life."²⁰⁹ Surmising from this language that the appropriate analysis depends on the characteristics of the actual sentence imposed, the *Hatch* court concluded that atypicality depends not only on the conditions of confinement, including duration, but notably, whether it is normally inflicted on other prisoners serving sentences of similar lengths, regardless of whether the sentence is deemed punitive or administrative.²¹⁰

The D.C. Circuit thus indicated that courts in the future should undertake fact-specific inquiries into the particulars of a prisoner's confinement.²¹¹ The goal of such an inquiry should be to answer whether the dissimilarities between the conditions of the confinement and the conditions routinely imposed on prisoners in comparable segregation, including the regular conditions of administrative segregation, are significant enough to amount to atypical and significant hardships.²¹² The *Hatch* court remanded for such an inquiry.²¹³

Although the D.C. Circuit provides more protection to prisoners than do the previously discussed circuits, prisoners have found the greatest post-*Sandin* protection in the Second Circuit and in the district courts that follow Second Circuit precedent.²¹⁴ In that circuit, in determining whether segregatory conditions bring about atypical and

²⁰⁹ See *id.* at 856 (quoting *Sandin*, 515 U.S. at 487).

²¹⁰ See *id.*

²¹¹ See *id.* at 858.

²¹² See *id.* The court generally disagreed with the methodology the Seventh Circuit employed, stating that the only time the relevant inquiry would take into consideration more restrictive conditions at other prisons would be if and when it could be shown first, that inmates similar to the plaintiff are likely to be transferred to other prisons, and second, that once transferred, they will encounter such restrictive conditions. See *id.* at 857.

²¹³ *Hatch*, 184 F.3d at 858. *Hatch* soon was followed by a case under the jurisdiction of the D.C. Circuit involving a prisoner alleging liberty interests arising from placement in administrative segregation. *Brown v. District of Columbia*, 66 F. Supp. 2d 41, 45-46 (D.D.C. 1999). There, the district court employed the standards discussed in *Hatch*. *Id.* |

²¹⁴ See *Colon v. Howard*, 215 F.3d 227, 230-31 (2d Cir. 2000) (holding that placement in a SHU for 305 days consisting of twenty-three-hour-a-day solitary confinement was a "sufficient departure from the ordinary incidents of prison life to require procedural due process"); *Welch v. Bartlett*, 196 F.3d 389, 394 (2d Cir. 1999) (remanding for inquiry as to whether ninety-day sentence to segregatory confinement was an atypical and significant deprivation); *McClary v. Kelly*, 4 F. Supp. 2d 195, 210-11 (W.D.N.Y. 1998) (holding that four-year assignment in administrative confinement was "unusual" when compared with normal prison life).

significant hardships, the courts have called for fact-specific examinations that carefully weigh the duration of the segregation and compare the challenged confinement with conditions both in administrative confinement and in the general prison population.²¹⁵

For example, in 1997, in *Brooks v. DiFasi*, the United States Court of Appeals for the Second Circuit reversed and remanded for further fact-finding a lower court ruling dismissing a prisoner suit that had asserted a liberty interest arising from being sentenced to disciplinary confinement for 180 days.²¹⁶ The *Brooks* court commented that the lower court erred in its conclusion that such a confinement could not impose an atypical hardship under *Sandin* because New York prison regulations describing disciplinary and non-disciplinary segregation contain only minor differences, with both allowing for long periods of prisoner isolation.²¹⁷ Instead, the *Brooks* court stated that comparing disciplinary and non-disciplinary confinement was only part of a *Sandin* examination.²¹⁸ The court noted that the *Sandin* decision also called for an inquiry into the conditions of the challenged segregation compared with prison conditions in general population, in addition to examinations of the duration of confinement and the effect such confinement would have on a prisoner's sentence.²¹⁹ Moreover, the *Brooks* court commented that putting too much emphasis on what state regulations proscribed to be the proper conditions for segregated living, as the lower court had done, would rarely be useful, as the focus must not be on hypothetical conditions, but on the actual challenged conditions at hand.²²⁰ *Brooks* is just one example of the Second Circuit's remanding of cases for factual findings as to the nature and duration of the challenged confinement.²²¹

Consistent with such an approach, the Second Circuit has rejected any interpretation of *Sandin* that concludes that the Court established a per se rule that disciplinary confinement, or even administrative confinement, will never give rise to a liberty interest.²²² As the Second

²¹⁵ See, e.g., *Arce v. Walker*, 139 F.3d 329, 336–37 (2d Cir. 1998); *Brooks v. DiFasi*, 112 F.3d 46, 48–49 (2d Cir. 1997).

²¹⁶ 112 F.3d at 47.

²¹⁷ See *id.* at 48–49.

²¹⁸ See *id.* at 49.

²¹⁹ See *id.* at 48–49.

²²⁰ See *id.* at 49.

²²¹ See, e.g., *Welch*, 196 F.3d at 394–95; *Brooks*, 112 F.3d at 49; *Miller v. Selsky*, 111 F.3d 7, 8–9 (2d Cir. 1997) (remanding for examination as to whether 125-day disciplinary confinement was an atypical and significant hardship).

²²² See *Sealey v. Giltner*, 197 F.3d 578, 584–85 (2d Cir. 1999); *Miller*, 111 F.3d at 9.

Circuit indicated in 1999 in *Sealey v. Giltner*, all confinements require the necessary factual analysis into atypicality.²²³ The *Sealey* court added that if *Sandin* had meant to foreclose protected liberty interests from arising out of all administrative confinements, "we would expect to see more pointed language to that effect."²²⁴ Such language contradicts the positions the majority of other federal courts have taken.²²⁵

The Second Circuit's most recent cases have looked closely at the duration of confinement and, given the facts, have not hesitated to find atypicality.²²⁶ Although the Circuit has not established a bright-line rule as to how many days will necessitate such a finding,²²⁷ the Circuit is by far the most liberal in its treatment of prisoners: confinements of 180 and 305 days have been found to create liberty interests under *Sandin*, and a confinement of only 90 days was remanded for further factfinding.²²⁸ The longest confinement not to have been found to create a liberty interest is 101 days,²²⁹ although a later Second Circuit decision emphasized that even that length might qualify as atypical.²³⁰

Although duration has been a significant factor in the Second Circuit's analysis, the court repeatedly acknowledges that the proper inquiry requires an examination into both the duration and the conditions of confinement.²³¹ Recent case law indicates that a plaintiff in the Second Circuit will likely survive a motion to dismiss if there is evidence of segregation for a duration that a judge considers unrea-

²²³ See 197 F.3d at 585-86.

²²⁴ *Id.* at 585.

²²⁵ See *supra* notes 161-202 and accompanying text.

²²⁶ See *infra* notes 227-233 and accompanying text.

²²⁷ See *Colon*, 215 F.3d at 232-34; *id.* at 235-37 (Walker, J., concurring). In *Colon*, Judge Jon Newman, writing for the majority, and Judge John Walker, writing in concurrence, disagreed over whether the Circuit should adopt a "bright-line rule" as to how long a confinement must be before a liberty interest is created, with Judge Newman proposing 180 days and Judge Walker rejecting such an approach and instead advocating a case by case factual approach. See *id.* at 232-34; *id.* at 235-37 (Walker, J., concurring). The Circuit has not adopted Judge Newman's per se rule, but case law from the Circuit has indicated that confinements over 100 days are almost always presumptively atypical. See *infra* notes 228-233 and accompanying text.

²²⁸ See *Colon*, 215 F.3d at 230-31 (305 days); *Kalwasinski v. Morse*, 201 F.3d 103, 105-06, 108 (2d Cir. 1999) (180 days); *Welch*, 196 F.3d at 394 (90 days).

²²⁹ See *Sealey*, 197 F.3d at 589-90.

²³⁰ See *Colon*, 215 F.3d at 232 n.5 (suggesting confinement of less than 101 days could be found to qualify as "atypical and severe" under a more fully developed record). The *Colon* court furthermore explicitly instructed district courts to develop detailed factual records in cases asserting confinements of between 101 and 305 days. See *id.* at 232.

²³¹ See *Sealey*, 197 F.3d at 586 ("[E]specially harsh conditions endured for a brief interval and somewhat harsh conditions endured for a prolonged interval might both be atypical."); *Welch*, 196 F.3d at 393.

sonable.²³² Nevertheless, the eventual outcome will depend on the particular characteristics of the segregation at issue, in which duration of confinement will make up only part of the analysis.²³³

IV. THE ILLOGICAL RESULTS AND HARMFUL EFFECTS OF *SANDIN V. CONNER*'S APPLICATION IN THE LOWER FEDERAL COURTS

Prior to the development of significant post-*Sandin* case law, the *Sandin v. Conner* decision was criticized on a number of levels.²³⁴ To some, the case represented a sacrifice of prisoners' rights in the name of judicial efficiency.²³⁵ Others asserted that *Sandin* inevitably invited situations whereby prison officials could segregate inmates for no legitimate reason whatsoever, perhaps for malicious reasons or because of an official's personal biases.²³⁶ It would be difficult for federal courts to consider meaningfully such claims, even when state statutes existed that explicitly prohibited such segregation.²³⁷ One critic voiced concerns that *Sandin* would force federal courts to view any prisoner-filed due process claim as presumptively suspect.²³⁸

Others noted that *Sandin* represented in many ways the return of the "hands-off" doctrine to the federal judiciary because state law could no longer give rise to constitutional safeguards, regardless of how arbitrarily it was applied, unless it imposed an atypical and significant hardship on an inmate.²³⁹ As a result, *Sandin* effectively weakened the liberty

²³² See, e.g., *Tellier v. Fields*, 280 F.3d 69, 80 (2d Cir. 2000) (denying prison official's motion to dismiss prisoner's complaint alleging confinement of 514 days).

²³³ See *id.*

²³⁴ See generally Belbot, *supra* note 40, at 4–6, 67–69; Herman, *supra* note 28, at 1252, 1257–58.

²³⁵ See Herman, *supra* note 28, at 1252.

²³⁶ See *Leslie v. Doyle*, 896 F. Supp. 771, 773–74 (N.D. Ill. 1995). Specifically, Judge Shadur noted that:

[T]he consequence of taking *Sandin* at its word . . . is to arm prison authorities, who have heretofore possessed uncircumscribed powers over the inmates within their custody only to a limited extent, with now-unrestrained power to punish those inmates by arbitrary reassignment to the meaningfully more restrictive environment of segregated confinement. And it appears that can be done by a correctional official for no reason at all—even out of sheer vindictiveness—because the absence of due process means nothing in terms of a Section 1983 claim unless the inmate's liberty interest has been infringed.

Id.

²³⁷ See Herman, *supra* note 28, at 1252.

²³⁸ See *id.*

²³⁹ See Belbot, *supra* note 40, at 4–6; see also Philip W. Sbaratta, Note, *Sandin v. Conner: The Supreme Court's Narrowing of Prisoners' Due Process and the Missed Opportunity to Discover*

interest doctrine by ensuring that most codified rights relating to prisoners would never be enforced through the application of viable procedural mandates.²⁴⁰ Instead, *Sandin* transformed such mandates into mere "guidelines for official conduct," which prison officials could choose to ignore with little consequence.²⁴¹ Because the U.S. Supreme Court abandoned the state-created liberty interest doctrine and refocused the analysis on the nature of the harm suffered, one critic accused it of basing its definition of what represents a sufficient harm to implement due process on "at best . . . an uninformed and naive understanding of prison life, or, at worst . . . a mean-spirited attitude that panders to society's less noble instincts."²⁴² The overriding concern expressed was that such an understanding, as expressed in *Sandin*, would end the judiciary's ability to hear even meritorious Fourteenth Amendment inmate claims.²⁴³

Such concerns have largely become a reality.²⁴⁴ In *Sandin*, Chief Justice Rehnquist issued a call for greater judicial efficiency in the realm of federal prisoner litigation.²⁴⁵ In the years since, this call has been answered: with the exception of cases brought in the Second Circuit, it is rare to find a case asserting a liberty interest in avoiding intraprison confinement that survived summary judgment.²⁴⁶ In addition, these cases reveal findings of fact supporting the critics' prediction that *Sandin* would lead to situations in which prison officials could send prisoners to confinement for no justifiable reason without any judicial oversight.²⁴⁷

True Liberty, 81 CORNELL L. REV. 744, 787 (1996) ("*Sandin v. Conner* has brought prison context procedural due process back full circle to its pre-*Goldberg* era position.").

²⁴⁰ See Belbot, *supra* note 40, at 6.

²⁴¹ *Id.*

²⁴² *Id.* at 69.

²⁴³ See *id.* at 68.

²⁴⁴ See *supra* notes 150–233 and accompanying text.

²⁴⁵ See 515 U.S. 472, 482 (1995).

²⁴⁶ See *supra* notes 150–233 and accompanying text. Although stating a claim as a prisoner is easiest, relatively, in the Second Circuit, successfully doing so is still clearly a difficult task. See Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 343–44 (2003) (analyzing a sample group of pro se civil rights litigation filed in the Southern District of New York between 1995 and 1999 and stating that *Sandin* was one of the most frequently cited cases leading to a dismissal for failure to state a claim); see also *supra* note 120 and accompanying text.

²⁴⁷ See *Rodgers v. Singletary*, 142 F.3d 1252, 1252–53 (11th Cir. 1998) (affirming summary judgment dismissal of prisoner claim asserting a liberty interest arising out of a two-month placement in administrative segregation, with plaintiff alleging placement resulted from his request for a sanitary dining table); *Wilson v. Harper*, 949 F. Supp. 714, 715, 720,

It is noteworthy and perhaps a little ironic that such consistently harsh results arose out of a decision that failed to direct how courts should analyze prisoner liberty interest claims.²⁴⁸ Because of this confusion, it appears that most courts have relied in their decision making on the principle of deference to prison officials discussed in *Sandin*, essentially giving the benefit of the doubt to such officials.²⁴⁹ Thus, in most courts across the country, placement in administrative and disciplinary confinement, regardless of the reason, cannot raise a liberty interest for a prisoner.²⁵⁰

It is unclear whether this result was the *Sandin* Court's intention.²⁵¹ One indication that this in fact was the intended result was that Chief Justice Rehnquist used administrative confinement as the principal comparative baseline in the Court's examination of the plaintiff's confinement.²⁵² Such a comparison implies that sentences to solitary confinement for twenty-three hours a day for indefinite time periods will always be "typical" incidents not resulting in "significant" deprivations for the prisoner.²⁵³ The Court's discussion of the factors surrounding the plaintiff's particular confinement, including a comparison to the conditions in general population, however, indicates a rejection of any per se rules.²⁵⁴ It is the lack of description as to how the factors should interplay in future decisions, or even if such factors should be considered in future situations at all, that has caused the lower courts to develop such differing methodologies, the majority of which result in finding no liberty interest for the plaintiff.²⁵⁵

Only the D.C. Circuit and the Second Circuit have developed consistent case law out of the *Sandin* decision that performs a more in-depth factual analysis of the circumstances surrounding a plaintiff's confinement.²⁵⁶ Drawing on language that discussed the factors sur-

723 (S.D. Iowa 1996) (dismissing prisoner liberty interest claim arising out of eleven months in segregated confinement, despite defendants "conced[ing] there was no evidence to support the disciplinary decision."); *Leslie*, 896 F. Supp. at 772, 774 (dismissing on summary judgment prisoner claim asserting liberty interest arising out of placement in segregated confinement, despite finding that prison superintendent "had gratuitously placed [plaintiff] in segregative confinement for no reason at all").

²⁴⁸ See *supra* notes 133-144 and accompanying text.

²⁴⁹ See *supra* notes 161-202 and accompanying text.

²⁵⁰ See *supra* notes 161-202 and accompanying text.

²⁵¹ See *infra* notes 252-255 and accompanying text.

²⁵² See *Sandin*, 515 U.S. at 486.

²⁵³ See *id.*

²⁵⁴ See *id.* at 486-87.

²⁵⁵ See *supra* notes 150-233 and accompanying text.

²⁵⁶ See *supra* notes 203-233 and accompanying text.

rounding the *Sandin* plaintiff's segregation, these circuits have held that *Sandin* in fact should be read as calling for a case by case inquiry that examines the duration of confinement, whether the confinement affects the prisoner's overall sentence, and most significantly, the conditions in both administrative confinement and the prison's general population.²⁵⁷ It is nevertheless arguable that, from a textual viewpoint, the D.C. and Second Circuits, no more than the other circuits, are not following the true intent of the *Sandin* Court, as that decision at no point outlined a direction for future courts to proceed with factual analyses.²⁵⁸

Putting aside the problem of the true intent of *Sandin* for a moment, it is worth pointing out the dramatic differences that occur when adjudicating a prisoner's due process claim in a jurisdiction that utilizes administrative confinement as the proper comparative baseline and a jurisdiction that does not.²⁵⁹ In 1997, in *Griffin v. Vaughn*, the U.S. Court of Appeals for the Third Circuit, in rejecting the claim that a prisoner possessed a liberty interest against being placed in administrative confinement for fifteen months, cited *Sandin* for the principle that administrative confinement should be the comparative baseline in making liberty interest analyses.²⁶⁰ The *Griffin* court pointed to nothing objective to support its reasoning that administrative confinement was typical of prison life based on the frequency of its application in that particular prison.²⁶¹ Instead, the court made more explicit what the *Sandin* Court had not: that typicality can be inferred if such confinement is used by prison officials for a wide range of prison goals, regardless of how often it is applied.²⁶² The *Griffin* court essentially approved of how administrative confinement, as dictated in the state regulations, could be applied in a variety of ways, and, because of this approval, "conclude[d] with confidence" that many months in administrative confinement were "not uncommon."²⁶³ Although the court dis-

²⁵⁷ See *supra* notes 203-233 and accompanying text.

²⁵⁸ See 515 U.S. at 485-87.

²⁵⁹ See *infra* notes 260-271 and accompanying text.

²⁶⁰ See *Griffin*, 112 F.3d 703, 706 (3d Cir. 1997).

²⁶¹ See *id.* at 703-09.

²⁶² See *id.* at 708.

²⁶³ See *id.* It is ironic that the *Griffin* court cited *Sandin*, which instructed courts to focus on harm and not the language of codified law, and proceeded to infer "typicality" from a facial reading of state regulations listing the various ways administrative confinement could be applied. See *id.* Consistent with the *Sandin* Court, however, the *Griffin* court did not consider objectively if fifteen months of detention was atypical compared to the average prison experience or the average placement in administrative confinement. See *id.* at 703-09.

cussed the conditions within administrative confinement, it made no attempt to highlight the differences between these conditions and the conditions in general population.²⁶⁴

The U.S. Court of Appeals for the Second Circuit decision in 1999 in *Welch v. Bartlett* takes an opposite approach, and the differing results are glaringly apparent.²⁶⁵ Faced with a prisoner's appeal of a district court's grant of summary judgment to prison officials based on a liberty interest claim arising out of ninety days spent in disciplinary confinement, the *Welch* court vacated and remanded for further factfinding.²⁶⁶ Essentially, the *Welch* court expressed that it needed more information about whether it was typical for inmates *not* being disciplined (i.e., in administrative confinement and in general population) to spend similar periods in similar circumstances within that prison.²⁶⁷ The district court in *Welch* actually made objective findings as to the length of the plaintiff's confinement sentence compared to the length of a typical sentence within that prison, and ruled that a ninety-day sentence was not atypical.²⁶⁸ On review, however, the Second Circuit concluded that the lower court erred by failing to take into account the typicality of a ninety-day sentence as compared to the types and frequencies of sentences imposed on prisoners not only receiving disciplinary sentences, but also on prisoners in administrative confinement and general population.²⁶⁹ Thus, the *Welch* court reaffirmed the Second Circuit's interpretation that the central teaching of *Sandin* was an analysis that calls for an evaluation of conditions in both administrative confinement and general population.²⁷⁰ The above comparison indicates that, if the *Welch* plaintiff had brought his claim in the Third Circuit, the likely result would have been summary judgment for the prison officials, whereas if the *Griffin* plaintiff had pleaded in the Second Circuit, the likely result would have been at least a remand, with a probable finding of a liberty interest.²⁷¹

Although the vagaries of the *Sandin* decision make it impossible to know how the Supreme Court intended for future due process analyses to proceed, there is nothing explicit in the decision that indi-

²⁶⁴ See *id.* at 706-07.

²⁶⁵ See 196 F.3d 389, 394-95 (2d Cir. 1999); *infra* notes 266-271 and accompanying text.

²⁶⁶ See 196 F.3d at 394-95.

²⁶⁷ See *id.* at 393-94.

²⁶⁸ *Id.* at 392.

²⁶⁹ See *id.* at 394.

²⁷⁰ See *id.* at 393-94.

²⁷¹ See *supra* notes 260-270 and accompanying text.

cates that an extremely narrow interpretation of liberty interests was intended.²⁷² In addition, the Court failed to indicate how much weight future courts should attribute to conditions in administrative confinement, as compared to conditions in general population or to the effect a sentence might have on an inmate's overall duration in prison.²⁷³ Perhaps, then, criticism should be shared both by the Supreme Court for not clarifying its terms and by the majority of lower federal courts, which have restricted the liberties of inmates inappropriately.²⁷⁴ Such courts have either concluded that, post-*Sandin*, administrative confinement cannot lead to a liberty interest, or that *Sandin* calls for an analysis which accepts that the challenged conditions of confinement should be compared to conditions in administrative confinement alone.²⁷⁵ Such an analysis will only in exceptional circumstances find that placement in confinement imposes a meaningful impairment of prisoners' liberty interests.²⁷⁶ First, the conditions of disciplinary confinement are usually similar to, if not the same as, conditions in administrative segregation.²⁷⁷ Second, Chief Justice Rehnquist's language implied that administrative segregation is normal.²⁷⁸ Logically, then, neither a sentence to disciplinary confinement nor placement in administrative segregation could be atypical, thereby raising a liberty interest.²⁷⁹

The use of administrative confinement as an indicator of what is typical of prison life, or as a comparative baseline in a *Sandin* analysis, is suspect for two reasons.²⁸⁰ First, a sentence to segregatory confinement is not typical of the normal inmate experience.²⁸¹ Second, the effects of multiple hours in isolated confinement should not

²⁷² See *supra* notes 133-144 and accompanying text.

²⁷³ See *Sandin*, 515 U.S. at 486-87.

²⁷⁴ See *supra* notes 150-233 and accompanying text.

²⁷⁵ See *supra* notes 150-233 and accompanying text.

²⁷⁶ See *infra* notes 277-279 and accompanying text.

²⁷⁷ See CORRECTIONS YEARBOOK, *supra* note 135, at 39 (national survey describing that inmates in administrative segregation "are kept separate from other inmates, their movement from place to place within an institution is usually restricted, their privileges are restricted, and higher levels of security procedures are used to manage them," and describing disciplinary segregation as "similar to Administrative Segregation except inmates are placed for a fixed amount of time").

²⁷⁸ See *Sandin*, 515 U.S. at 486.

²⁷⁹ See *supra* notes 277-278 and accompanying text.

²⁸⁰ See *infra* notes 281-282 and accompanying text.

²⁸¹ See *infra* notes 284-313 and accompanying text.

be considered "[in]significant."²⁸² This Note next discusses each of these arguments separately.²⁸³

A. Typicality

Both the Supreme Court's implication and lower court holdings that administrative confinement is typical of prison life should be criticized first from an evidentiary viewpoint.²⁸⁴ The *Sandin* Court failed to present any objective findings describing how often such confinement was imposed or what percentage of Hawaii prisoners were placed in administrative segregation during their sentences.²⁸⁵ On the contrary, Chief Justice Rehnquist said little about administrative confinement.²⁸⁶ It is arguable that, given *Sandin's* overall policy of providing greater institutional flexibility to prison officials, the Court used administrative segregation as its principal comparative baseline because administrative confinement is a tool such officials utilize for many necessary non-punitive purposes.²⁸⁷ This type of reasoning, however, does not rely on what is objectively typical of the prisoner's experience, but what the Court envisioned as typical based on its vision of a well-run prison.²⁸⁸ Like the *Sandin* Court, most subsequent courts have also avoided an inquiry into what is objectively typical in a given prisoner's prison.²⁸⁹ But that analysis begs the question: Does the simple fact that officials can use administrative confinement for a variety of purposes make such confinement exemplary of the average prisoner's experience?²⁹⁰

The use of administrative confinement as a marker of what is typical of prison life is also suspect because, to the contrary, a brief investigation suggests that general-population conditions, not conditions in administrative confinement, truly represent typical prison life.²⁹¹ Such an investigation indicates that if *Sandin* is to be followed

²⁸² See *infra* notes 314–333 and accompanying text.

²⁸³ See *infra* notes 284–333 and accompanying text.

²⁸⁴ See *infra* notes 285–290 and accompanying text.

²⁸⁵ See 515 U.S. at 472–88.

²⁸⁶ See *id.*; see also *Hatch v. District of Columbia*, 184 F.3d 846, 855 (D.C. Cir. 1999) ("To be sure, *Sandin* nowhere directly explains why it used administrative segregation as the comparative baseline.").

²⁸⁷ See 515 U.S. at 482–83.

²⁸⁸ See *id.*

²⁸⁹ See *supra* notes 161–202 and accompanying text.

²⁹⁰ See *supra* notes 161–202 and accompanying text.

²⁹¹ See *infra* notes 293–313 and accompanying text.

from an objective perspective, any due process analysis needs to incorporate conditions of the general population.²⁹²

It is concededly difficult to state conclusively the likelihood of the "average" prisoner being placed in administrative segregation during a sentence to prison, largely because only a minority of prisons collects data recording events of prisoner misconduct, and an even smaller number maintains data indicating the prison's response to such behavior.²⁹³ There is data, however, that supports the notion that segregatory confinement is not the norm for a regular prisoner.²⁹⁴ One recent national survey of state prisons found that the average percentage of inmates housed in non-punitive confinement on a given day was approximately four percent.²⁹⁵ Another study from 1995 reported that less than one percent of prisoners held in federal jails and prisons were found residing in segregation.²⁹⁶ Although these studies do not tell us what percentage of the average prison population passes through these more restrictive placements in a given sentence, the simple fact that most prisons are not dominated by restrictive confinements supports the proposition that the majority of prisoners spend their lives in prison in conditions that resemble the general population.²⁹⁷ If non-punitive segregation is what is typical of prison life, one would expect the numbers from these studies to be much larger.²⁹⁸

Webster's New World Dictionary defines "atypical" as "not characteristic; abnormal."²⁹⁹ If one accepts the argument that conditions in general population are, from an objective viewpoint, typical of the everyday prison existence, then placement in administrative confinement certainly meets this definition.³⁰⁰ Such placements resemble "prisons within a prison," with near-total solitary confinement, oftentimes for

²⁹² See *infra* notes 293-313 and accompanying text.

²⁹³ See BUREAU OF JUSTICE STATISTICS, STATE AND FEDERAL CORRECTIONS INFORMATION SYSTEMS 40-41 (1998).

²⁹⁴ See CORRECTIONS YEARBOOK, *supra* note 135, at 38-39; MAYS & WINFREE, *supra* note 135, at 206 n.30.

²⁹⁵ See CORRECTIONS YEARBOOK, *supra* note 135, at 38-39. The survey has been conducted since 1994, using data representing conditions on January 1 of a given year. *Id.*

²⁹⁶ See MAYS & WINFREE, *supra* note 135, at 206 n.30.

²⁹⁷ See CORRECTIONS YEARBOOK, *supra* note 135, at 38-39; MAYS & WINFREE, *supra* note 135, at 206 n.30.

²⁹⁸ See CORRECTIONS YEARBOOK, *supra* note 135, at 38-39; MAYS & WINFREE, *supra* note 135, at 206 n.30.

²⁹⁹ WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 90 (2d ed. 1980).

³⁰⁰ See MAYS & WINFREE, *supra* note 135, at 197-98.

twenty-three hours a day.³⁰¹ Prisoners in administrative confinement cannot work and have minimal access to educational opportunities or other privileges available to prisoners in general population.³⁰² When allowed to leave their cells for bathing and exercise, such prisoners must be escorted by prison guards while handcuffed and shackled.³⁰³ In *Sandin*, Justice Breyer, in his dissent, noted that, absent Conner's disciplinary sentence, he, like the other general population prisoners, would have "left his cell and worked, taken classes, or mingled with others for eight hours each day."³⁰⁴ Instead, Conner found himself in a situation where he could leave his cell for fifty minutes each day and could talk to no one.³⁰⁵ Such a sentence surely marked a change that was uncharacteristic or abnormal when compared to what Conner experienced in general population.³⁰⁶

The fundamental distinction between conditions in segregation and conditions in general population becomes more apparent when faced with the fact that the conditions in Hawaii's punitive and non-punitive segregatory cells were almost identical.³⁰⁷ The same SHU housed prisoners sentenced both to disciplinary confinement and to administrative segregation, and the Court noted that substantially similar conditions applied to prisoners placed in either status.³⁰⁸ In addition, inmates housed in administrative confinement experienced largely indistinguishable privilege revocations as compared to the prisoners sentenced to disciplinary segregation.³⁰⁹ This similarity between the conditions in disciplinary segregation and administrative confinement is also present in most other prisons across the nation.³¹⁰ This demonstrates that life in general population, not placement in segregation, is a better barometer of what is typical of a prisoner's experience.³¹¹ In actuality, the differences between the lack of liberty afforded to *all* segregated inmates, regardless of the purpose, and

³⁰¹ See *id.*

³⁰² *Id.* at 197.

³⁰³ *Id.* at 198.

³⁰⁴ 515 U.S. at 494 (Breyer, J., dissenting).

³⁰⁵ See *id.* (Breyer, J., dissenting).

³⁰⁶ See *id.* (Breyer, J., dissenting).

³⁰⁷ See *id.* at 476 n.2, 486.

³⁰⁸ *Id.* at 476 n.2.

³⁰⁹ *Sandin*, 515 U.S. at 476 n.2. Prisoners in administrative segregation received "one extra phone call and one extra visiting privilege" as compared with prisoners held in disciplinary confinement. *Id.*

³¹⁰ See CORRECTIONS YEARBOOK, *supra* note 135, at 39.

³¹¹ See *supra* notes 299-310 and accompanying text.

what is afforded to those in general population, are very substantial.³¹² Viewing these differences, it is indeed "ironic" that the Supreme Court's primary comparison in deciding what is typical requires (or has been interpreted as requiring) a comparison between the confinement at issue and a prison's administrative confinement.³¹³

B. Significance

By primarily emphasizing the similarities between administrative and disciplinary confinement, the *Sandin* Court concluded that a sentence to disciplinary confinement did not produce a significant disruption in the plaintiff's overall experience in prison.³¹⁴ Most courts interpreting the *Sandin* decision have not addressed whether the effects of solitary confinement should be considered significant enough to raise Due Process Clause protection for a prisoner.³¹⁵ One commentator has noted that such an approach will necessarily invite a merging of Eighth and Fourteenth Amendment analyses as applied to prisoners.³¹⁶ The inattention to the word "significant" is unfortunate for two reasons, both of which demonstrate why placement in confinement should not be considered an insignificant event.³¹⁷ The first reason relates specifically to how a sentence to disciplinary confinement as compared to administrative confinement can uniquely and powerfully transform one's overall prison experience,³¹⁸ whereas the second reason relates to the debilitating and harmful effects inherent in any sentence to solitary confinement.³¹⁹

³¹² See *supra* notes 299-310 and accompanying text.

³¹³ The U.S. District Court for the Northern District of Illinois mentioned this irony in 1995 in *Leslie v. Doyle*:

It is ironic that the Court's principal comparison is between prisoners in disciplinary segregation and those in administrative segregation . . . rather than a comparison with the vast majority of the inmates, who make up what is most commonly called the "general population" and who are not subjected to anything resembling the constraints imposed on prisoners in the segregation units. . . . [T]he differences between the lack of liberty afforded to segregated inmates and what is afforded to those in general population are very substantial

896 F. Supp. at 773 n.4.

³¹⁴ See 515 U.S. at 486.

³¹⁵ See *supra* notes 150-233 and accompanying text.

³¹⁶ See Herman, *supra* note 28, at 1261.

³¹⁷ See *infra* notes 318-329 and accompanying text.

³¹⁸ See *infra* notes 320-324 and accompanying text.

³¹⁹ See *infra* notes 325-329 and accompanying text.

First, a conclusion that a sentence to disciplinary confinement produces insignificant deprivations of a prisoner's liberty should be criticized for ignoring the considerable dissimilarities between administrative and punitive confinement in terms of the effects each respective sentence may have on a prisoner's existence in prison.³²⁰ In contrast to administrative confinement, a sentence to disciplinary segregation based on a finding of misconduct can potentially lessen a prisoner's chance of parole.³²¹ Moreover, a sentence to disciplinary confinement can negatively affect a prisoner's privileges, such as in-prison employment, transfer requests, work release, and furlough opportunities.³²² Only by looking beyond these facts could the Court draw the conclusion that a sentence to disciplinary confinement did not cause a "major disruption" in the plaintiff's prison environment.³²³ Dismissing a sentence to disciplinary confinement as insignificant glances over the truth that such a sentence meaningfully touches all aspects of a prisoner's life.³²⁴

Second, and perhaps more important, is the devastating harm that prolonged solitary confinement can have on prisoners.³²⁵ Studies on the secondary effects of isolation housing on prisoners reveal evidence of increased psychiatric complaints, suicide, self-mutilation, and violence toward others, along with a variety of harmful psychological effects.³²⁶ A recent survey of the conditions of confinement within New York state prisons revealed that officials at one prison were worried about a "phenomenon" they described as "toxic SHU syndrome"—the debilitating psychological effects prisoners experienced from living for years in isolation.³²⁷ One inmate who spent two years in solitary confinement for drug use told the New York state examiners:

³²⁰ See Belbot, *supra* note 40, at 59.

³²¹ See *id.* at 57–58; see also *Sandin*, 515 U.S. 472 at 489 (Ginsburg, J., dissenting); Haw. Admin. Rule § 23-700-93(b) (1983) (providing that sentences to disciplinary confinement are taken into account in parole decisions).

³²² See Belbot, *supra* note 40, at 59–60.

³²³ See *Sandin*, 515 U.S. at 486; Belbot, *supra* note 40, at 59–60.

³²⁴ See Belbot, *supra* note 40, at 59–60.

³²⁵ See *infra* notes 326–329 and accompanying text.

³²⁶ See Haney & Lynch, *supra* note 135, at 529–30 ("Direct studies of the effects of prison isolation have documented a wide range of harmful psychological effects, including increases in negative attitudes and affect, insomnia, anxiety, panic, withdrawal, hypersensitivity, ruminations, cognitive dysfunction, hallucinations, loss of control, aggression, rage, paranoia, hopelessness, lethargy, depression, emotional breakdowns, self-mutilation, and suicidal impulses.").

³²⁷ See CORRECTION ASSOCIATION OF NEW YORK, STATE OF THE PRISONS: CONDITIONS OF CONFINEMENT IN TWENTY-FIVE CORRECTIONAL FACILITIES 14 (2002).

It is hard for people on the outside to understand the absolute despondency that begins to invade your spirit after being confined in a cage like an animal, when a deeper part of you knows that this isn't why you were born—it wasn't what you were meant to be. After months of deprivation and isolation in the hole, the one thing that's easiest to lose is your humanity. You have to distance yourself from your feelings, because to feel means to hurt, and hurting is what you've been running from all along. It leaves you walking through life like a zombie. Everything becomes empty and meaningless.³²⁸

Describing the effects of sustained isolation as "emotionally, physically, and psychologically destructive," Human Rights Watch has concluded that "state and federal corrections departments are operating facilities in ways that violate basic human rights."³²⁹

Prior to *Sandin*, the U.S. Supreme Court in 1974 in *Wolff v. McDonnell* indicated that the imposition of solitary confinement was a significant enough event in a prisoner's life to require due process protection.³³⁰ Since *Sandin* and its failure to discuss the effects of solitary confinement, however, the lower courts have also largely ignored such concerns in their Fourteenth Amendment prisoner discussions.³³¹ It is the rare exception when the effects of such confinement are considered during a *Sandin* analysis, with most of these examples coming from courts establishing or following Second Circuit precedent.³³² Given the demonstrated effects of such confinement, it is sur-

³²⁸ *Id.* at 15–16.

³²⁹ See *Out of Sight: Super-Maximum Security Confinement in the United States*, HUM. RTS. WATCH, Feb. 1, 2000, at 1, available at http://www.hrw.org/reports/2000/supermax/Sprnux002.hum#P40_391.

³³⁰ See 418 U.S. 539, 571 n.19 (1974); see also *supra* note 17.

³³¹ See *supra* notes 150–233 and accompanying text.

³³² For example, the U.S. Court of Appeals for the Second Circuit in 2000 in *Colon v. Howard* concluded that 305 days in disciplinary confinement raised a liberty interest. 215 F.3d 227, 232 (2d Cir. 2000). The court stated:

Since we can anticipate continuing litigation in this area as the *Sandin* standard is given further content, we think it appropriate to advise the district courts of this Circuit that in cases challenging SHU confinements of durations within the range bracketed by 101 days and 305 days, development of a detailed record will assist appellate review. For instance, the parties might present evidence of the psychological effects of prolonged confinement in isolation and the precise frequency of SHU confinements of varying durations.

Id.; see also *Lee v. Coughlin*, 26 F. Supp. 2d 615, 637 (S.D.N.Y. 1998) (crediting testimony of doctor who testified that prisoners exposed to periods of solitary confinement "inevitably suffer severe psychological pain" and holding that a prisoner's placement in disciplinary

prising that most courts have been reluctant to view such sentences as effecting significant harms on prisoners.³³³

CONCLUSION

The U.S. Supreme Court's decision in *Sandin v. Conner* to direct prisoner liberty interest analyses away from positive law and toward an approach that focuses on the nature of the deprivation suffered by the prisoner was in some ways a helpful development. Prior to *Sandin*,

confinement for 376 days gave rise to a liberty interest). Likewise, in 1998 in *McClary v. Kelly*, the U.S. District Court for the Western District of New York held that a prisoner's placement in administrative confinement for over four years created a liberty interest, stating:

For purposes of *Sandin*, this Court need not and will not decide whether a specific, independent psychiatric "syndrome" exists with respect to the psychopathological effects of prolonged SHU confinement. A conclusion, however, that prolonged isolation from social and environmental stimulation increases the risk of developing mental illness does not strike this Court as rocket science.

4 F. Supp. 2d 195, 208, 210–11 (W.D.N.Y. 1998).

³³³ See *supra* notes 150–233 and accompanying text. Perhaps the next major test for *Sandin* in the intraprison confinement context will come in a challenge to so-called "supermax" prisons, which are free standing, super-security prisons designed to hold a state's most dangerous prisoners and which presently exist in at least thirty-four states. See Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 CRIME & JUST. 385, 387–88 (2001). Sentences at supermaxes are notable for their "long-term, indefinite" periods of confinement that are "measured in years rather than in months" and consist of "nearly complete isolation and deprivation of environmental stimuli," including the almost total absence of organized activities. *Id.* at 388–90. Applying a *Sandin* analysis to placement in such a setting is theoretically problematic, as many supermaxes do not consist of classified living arrangements such as "administrative confinement," "disciplinary segregation," or "general population." See *id.* at 388; *supra* notes 135–139 and accompanying text. In addition, because many inmates have been transferred initially to supermaxes from lower-security prisons, most prisoner claims so far have focused on challenging such transfers; thus, many courts hearing such claims have refused to enter into even a cursory discussion of *Sandin*, given that it is established law that interprison transfers cannot raise liberty interests. See, e.g., *Horton v. Thompson*, No. 02-C-0470-C, 2002 WL 32350051, at *4 (W.D. Wis. Apr. 1, 2002) (quoting *Meachum v. Fano*, 427 U.S. 215, 225 (1976)). One court has recently held, however, in a class-action prisoner suit, that the conditions at an Ohio state supermax were atypical and significant, noting that the prisoners there were held in twenty-three-hour-a-day solitary confinement with almost a complete lack of human contact, with the vast majority of inmates at the prison housed in such a situation for a minimum of at least two years. See *Austin v. Wilkinson*, 189 F. Supp. 2d 719, 740–42 (N.D. Ohio 2002). The *Austin* court issued its ruling after finding that such conditions were dramatically more severe than the conditions most prisoners held in Ohio's other high-security prisons faced. See *id.* Given the existence of a liberty interest, the court then ruled that the process of both sending prisoners to, and keeping them at, the supermax violated the Due Process Clause. See *id.* at 747–49. The case is currently on appeal before the Sixth Circuit Court of Appeals. See Am. Civil Liberties Union of Ohio, *Litigation Docket: Prison Conditions & Policies* (Oct. 13, 2003), at <http://www.acluohio.org/docket/docket.htm#pc>.

federal courts became overburdened with prisoner litigation due to both the rising number of prisoners and *Wolff v. McDonnell's* focus on rights inherent in positive law. Thus, on one level the *Sandin* decision can be seen as addressing a need for a method by which courts could dismiss the more dubious prisoner Fourteenth Amendment claims before they took up valuable judicial resources. In the area of intra-prison confinements, however, *Sandin* has resulted in extreme results: presently, in most federal courts there is no due process protection available for prisoners who are placed in solitary confinement, often for indefinite periods, after being accused of breaking prison rules or being classified as dangerous by prison officials. Because such assignments are not typical of the everyday prison experience and because solitary confinement has been shown to cause severe psychological damage to those who experience it, the *Sandin* "atypical and significant" standard should not preclude courts from examining whether such prisoners received a minimum of due process in their intraprisson sentence. An approach that objectively takes into consideration what is typical of the overall prison experience and seriously considers the harms of solitary confinement is both more faithful to the language of *Sandin* and assures that those who face such confinement are placed there with a modicum of fairness. Such an approach would continue to prevent frivolous claims from surviving the motion to dismiss and, at the same time, would ensure that prison officials are not administering sentences to segregatory confinement in their prisons arbitrarily.

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