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Eugene Murphy

DUE PROCESS IMPLICATIONS OF PRISON TRANSFERS

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I. INTRODUCTION

One of the several anomalies of prison life is the disparate protection afforded inmates transferred to higher security. Although both punitive and administrative transfers often place the inmate in the same building under almost identical conditions, only disciplinary transfers are generally conceded to give rise to due process protection. The inmate confined in isolation for fifteen days as punishment for misconduct is guaranteed a hearing with advance written notice and the rights to present testimony and receive a written decision.[1] On the other hand, the prisoner confined indefinitely in segregation for supposed administrative reasons has such due process rights only if the state decides to provide them.[2] Consequently, the most severe sentence that can be handed down by a committee hearing a disciplinary charge is not fifteen days in isolation or loss of good time, but rather the vague and foreboding phrase "referred for high security."[3] This article will discuss the background and application of the distinction between the punitive and administrative elements of prison transfers, focusing upon its effects on the due process rights of inmates in Virginia prisons.

II. DECISIONS OF THE UNITED STATES SUPREME COURT

Wolff v. McDonnell[4] was the first Supreme Court case dealing with due process protections in the context of prison disciplinary proceedings. *Wolff* effected the first limitation on the discretion of prison officials in the movement and punishment of inmates charged with institutional infractions by holding that inmates faced with loss of good time credit because of alleged misconduct

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* Attorney with Neighborhood Legal Aid Society, Richmond, Virginia; B.A., University of Massachusetts, 1967; J.D., New York University, 1970.

1. *See* Wolff v. McDonnell, 418 U.S. 539, 564-66 (1974).

2. In Virginia, an order confining an inmate to indefinite segregation is reviewable every 45 to 90 days. VIRGINIA DEP'T OF CORRECTIONS, DIV. GUIDELINES OF ADULT SERVICES No. 823 (VIII)(C)(3) (Nov. 1, 1977) [hereinafter cited as GUIDELINES].

3. *See, e.g, id.* at No. 861 (VI)(H)(5)(b)(i) (Nov. 29, 1977).

4. 418 U.S. 539 (1974).

were entitled to due process protections. The Court recognized that the United States Constitution does not guarantee credit for good behavior in prisons. Yet the Court found that the state had given "the prisoners' interest [in retaining good time credit] . . . real substance . . . embraced within Fourteenth Amendment 'liberty' " by providing a statutory right to good time credit and specifying that it was to be forfeited only for serious misbehavior.[5] The Court reasoned that liberty, like property rights, could not be limited without the procedural protections required by due process,[6] in that "the touchstone of due process is the protection of the individual against arbitrary action of government."[7]

In an important yet often neglected footnote in *Wolff*, the Court noted that "it would be difficult for the purposes of procedural due process to distinguish between the procedures that are required where good time is forfeited and those that must be extended when solitary confinement is at issue."[8] The footnote continued with a caveat, however, that the Court did not intend to suggest "that the [due process] procedures required by today's decision . . . would also be required for the imposition of lesser penalties such as the loss of privileges."[9]

Two years after *Wolff* a Massachusetts inmate argued that he was entitled to due process protections in conjunction with transfer from a medium to a maximum security prison. This argument was rejected in *Meachum v. Fano*[10] because the Court held that a protected "liberty interest" was not implicated in such a transfer.[11] The Court refused at the outset to apply the "grievous loss" test, in view of the Court's ruling in *Board of Regents v. Roth*[12] that it is "not . . . the 'weight' but . . . the *nature* of the interest at stake" that determines whether the requirements of due process apply.[13] Stressing the latitude granted to the state by virtue of a criminal sentence to confinement, the *Meachum* Court also

5. *Id.* at 557.

6. *Id.* at 557-58. The analogy between liberty and property rights has been highlighted in subsequent lower court opinions. *See* Walker v. Hughes, 558 F.2d 1247, 1251 (6th Cir. 1977); Arsbery v. Sielaff, 586 F.2d 37, 46 (8th Cir. 1978).

7. 418 U.S. at 558 (citing Dent v. West Virginia, 129 U.S. 114, 123 (1889)).

8. 418 U.S. at 571 n.19.

9. *Id.* at 572 n.19.

10. 427 U.S. 215 (1976).

11. *Id.* at 226-28.

12. 408 U.S. 564 (1972).

13. *Id.* at 570-71 (emphasis in original).

squarely rejected the use of any impact criteria for identifying protected interests: "Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose."[14] The Court distinguished *Wolff* by stating that the interest in being granted good time credit absent misbehavior, at issue in *Wolff*, "had its roots in state law."[15] Since Massachusetts had not provided the prisoner any right to remain in the prison to which he was initially assigned and had not specified that transfer from the initial prison required proof of the specific acts of misconduct, "[t]he predicate for invoking the protection of the Fourteenth Amendment" was "totally nonexistent."[16]

In *Montanye v. Haymes*,[17] decided on the same day as *Meachum*, the Supreme Court reversed the Second Circuit, which in an opinion substantially more limited than that in *Meachum* had excluded administrative transfers from any due process requirements.[18] The Court rejected as overly broad the Second Circuit's holding that "[o]nly disciplinary transfers having substantial adverse impact on the prisoner were to call for procedural [protections]."[19] The Court refused to accept even this limited rule because it was based on impact criteria and because no expectation of not being punitively transferred absent a finding of misconduct existed under state law. Because New York law did not make either administrative or disciplinary transfers "conditional upon or limited to the occurrence of misconduct,"[20] no expectation was found and no hearing required. The Court restated the holding of *Meachum* as also resting on an entitlement basis:

> [N]o Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another with the state, whether with or without a hearing, absent some *right or justifiable expectation rooted in state law* that he will not be transferred except for misbehavior or upon the occurrence of other specified events.[21]

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14. 427 U.S. at 225.
15. *Id.* at 226.
16. *Id.* at 226-27.
17. 427 U.S. 236 (1976).
18. 505 F.2d 977 (1974) (summary judgment in favor of prison officials reversed and remanded because of factual issues related to possible denial of due process).
19. 427 U.S. at 242.
20. *Id.*
21. *Id.* (emphasis added).

Justice Brennan, who dissented in both *Meachum* and *Montanye,* has been critical of the Court's shift from the "grievous loss" or "impact" test to the entitlement test. He has charged that *Meachum* is evidence that the Court "has veered from its promise to recognize that prisoners, too, have liberty interests that cannot be ignored."[22] One commentator has urged that this shift in tests is unresponsive to the "daily realities of prison existence," presenting a " 'formal' conception of legal rules" which, although easier for courts to apply, appear arbitrary to inmates whose most important concerns are beyond the reach of court review.[23] Another commentator believes *Meachum* and *Montanye* constitute the utilization of a modified "hands off" policy of courts faced with prison problems.[24] Under this view, the Court, upon finding itself unable to formulate appropriate standards in light of the complex and countervailing interests involved in prison situations, simply abandoned the problems presented by prisons to the states.[25]

Not all the discussion of the shift to the entitlement view has been critical. The Sixth Circuit in *Walker v. Hughes*[26] praised that change as being more consistent with *Board of Regents v. Roth*[27] and *Morrissey v. Brewer,*[28] which focused on the nature rather than the weight of the individual's interest. The *Walker* court stressed that "the requirement of an entitlement provides an appropriate basis for compromise between the need for the protection of individual interests and the need for government action unhampered by procedural burdens," whereas "[a] standard of grievous loss would interfere more directly with governmental responsibilities."[29]

Two years after *Meachum* and *Montanye,* the Supreme Court in *Enomoto v. Wright*[30] summarily affirmed a three-judge panel decision involving a California class action challenging transfer to administrative segregation. The lower court had initially applied an

22. Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489, 496 (1977).

23. Note, *Two Views of a Prisoner's Right to Due Process: Meachum v. Fano,* 12 HARV. C.R.-C.L. REV. 405, 407, 412-13, 431 (1977).

24. Note, *Involuntary Interprison Transfers of State Prisoners After Meachum v. Fano and Montanye v. Haymes,* 37 OHIO ST. L.J. 845, 880 (1976).

25. *Id.*

26. 558 F.2d 1247, 1251 (1977).

27. 408 U.S. 564 (1972).

28. 408 U.S. 471 (1972).

29. 558 F.2d at 1251.

30. 434 U.S. 1052 (1978), *summarily aff'g* 462 F. Supp. 397 (N.D. Cal. 1976).

impact test, stating that transfer of an inmate to maximum security for administrative as well as disciplinary reasons resulted in "severe impairment of the residuum of liberty which he retains as a prisoner—an impairment which triggers the requirement for due process safeguards."[31] The court attempted to distinguish *Meachum* and *Montanye* by contending that those cases "hold only that some discretionary decisions of prison officials, such as the decision to transfer a prisoner to another institution, do not result in such a substantial invasion of a prisoner's liberty interest as to trigger the need for due process protections."[32] On the other hand, the district court found, the transfer to maximum security involved in *Enomoto* was subject to a more limited discretion on the part of prison officials. Such discretionary restraint was inferred by the court from the regulations of the California Director of Corrections, which provided:

> Inmates must be segregated from others when it is *reasonably* believed that they are a menace to themselves and others or a threat to the security of the institution. Inmates may be segregated for medical, psychiatric, disciplinary, or administrative reasons. *The reason for ordering segregated housing must be clearly documented by the official ordering the action at the time the action is taken.*[33]

On the basis of this rather generally worded directive, the court shifted from an impact to an entitlement basis and determined that "the inmate has an interest, conferred by statewide regulation and protected by due process, in not being confined in maximum security segregation unless he is found, for clearly documented reasons, to come within the standard set by the rules."[34]

The Supreme Court holding that summary decisions constitute a review on the merits and are consequently binding on the lower courts[35] has been substantially limited in recent years.[36] Conse-

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31. Wright v. Enomoto, 462 F. Supp. 397, 402 (N.D. Cal. 1976).

32. *Id.*

33. *Id.* at 403 (quoting RULES AND REGULATIONS OF THE DIRECTOR OF CORRECTIONS, ch. 4, art. 6, § 3330(a) (emphasis added by court)).

34. 462 F. Supp. at 403.

35. Hicks v. Miranda, 422 U.S. 332, 344-45 (1975).

36. Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 182-83 (1979) (precedential value of summary affirmance limited to precise issues necessarily decided); Mandel v. Bradley, 432 U.S. 173, 177-79 (1977) (district court should conduct independent examination of merits of constitutional issue instead of relying upon summary affirmance as controlling precedent).

quently, the precedential value of *Enomoto*, which summarily affirmed a decision apparently inconsistent with *Meachum* and *Montanye*, is uncertain. However, in 1980 the Supreme Court again discussed *Enomoto* as well as *Meachum* and *Montanye*.

Vitek v. Jones[37] involved the transfer of a state inmate to a mental hospital. The Court distinguished *Meachum* and *Montanye* from *Vitek* by stating that "in those cases transfers were discretionary with the prison authorities, and in neither case did the prisoner possess any right or justifiable expectation that he would not be transferred except for misbehavior or upon the occurrence of other specified events."[38] The Court then cited *Enomoto* for the proposition that "state statutes may grant prisoners liberty interests that invoke due process protection when prisoners are transferred to solitary confinement for disciplinary or administrative reasons."[39] The prisoner threatened with transfer to a mental hospital, the Court found, had a similar liberty interest in avoiding such a transfer and thus was entitled to a hearing.[40]

III. Decisions of Lower Federal Courts

The principles developed by the Supreme Court to govern prison transfers have understandably received varying interpretations among lower federal courts. Some circuits have read *Meachum* and *Montanye* to be inapplicable to cases involving disciplinary measures such as confinement or segregation.[41] Others have held that the cases preclude a finding of due process rights even where disciplinary transfers are involved.[42] A split has also developed as to whether section 5003 of Title 18[43] and derivative state statutes,

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37. 445 U.S. 480 (1980).

38. *Id.* at 489.

39. *Id.*

40. *Id.* at 489-90.

41. *See* Aikens v. Lash, 547 F.2d 372, 373 (7th Cir. 1976) (per curiam); Bruce v. Wade, 537 F.2d 850, 854 n.9 (5th Cir. 1976). The Fifth Circuit has stated that "[p]lacing a prisoner in disciplinary confinement clearly affects the prisoner's liberty interest . . . and thus invokes the protections of the due process clause." Parker v. Cook, 642 F.2d 865, 873 (5th Cir. 1981) (due process protection applied only to state-created liberty interests).

42. *See* Hohman v. Hogan, 597 F.2d 490, 492 (2d Cir. 1979) (per curiam) (inmate transferred to segregated confinement for two weeks); Twyman v. Crisp, 584 F.2d 352, 356 (10th Cir. 1978) (transfer to maximum custody held to be within discretion of prison officials).

43. 18 U.S.C. § 5003 (1976), which provides in part:

> (a) The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in

which permit transfer of state prisoners to federal institutions if they need specialized treatment, create an expectation that no transfer will be made without a showing of such need.[44]

Most courts, in determining whether due process protections attach, have looked beyond the label given to the transfer and sought an expectation that the transfer is conditioned on certain acts or circumstances of the inmate. Where federal prisoners are concerned, some courts have interpreted section 4082 of Title 18[45] to give complete discretion to the Attorney General to transfer these federal inmates, obviating any expectation for a hearing.[46] Other courts have found an expectation to be embodied in federal prison regulations[47] or even policy statements.[48] In addressing due process issues raised by *state* prisoners, circuit courts have found no expectation of non-transfer in Oklahoma,[49] Vermont,[50] Massachusetts,[51] New Jersey,[52] and Florida.[53]

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the courts of such State or Territory. . . .

44. For cases finding no expectation, see Beshaw v. Fenton, 635 F.2d 239 (3d Cir. 1980); Ali v. Gibson, 631 F.2d 1126 (3d Cir. 1980) (based on a Virgin Islands statute); Sisbarro v. Warden, 592 F.2d 1 (1st Cir. 1979); Cofone v. Manson, 594 F.2d 934 (2d Cir. 1979) (based on Connecticut statutes). For cases finding an expectation that showing of special need must be made, see Anthony v. Wilkinson, 637 F.2d 1130 (7th Cir. 1980); Lono v. Fenton, 581 F.2d 645 (7th Cir. 1978).

45. 18 U.S.C. § 4082 (1976), which provides in part:

(b) The Attorney General may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether maintained by the Federal Government or otherwise, and whether within or without the judicial district in which the person was convicted, and may at any time transfer a person from one place of confinement to another.

46. Pugliese v. Nelson, 617 F.2d 916 (2d Cir. 1980); Beck v. Wilkes, 589 F.2d 901 (5th Cir. 1979). The Attorney General's authority has been delegated to the Bureau of Prisons. 28 C.F.R. §§ 50.95 to -.96 (1979).

47. Bono v. Saxbe, 620 F.2d 609 (7th Cir. 1980).

48. Walker v. Hughes, 558 F.2d 1247 (6th Cir. 1977).

49. Twyman v. Crisp, 584 F.2d 352 (10th Cir. 1978) (transfer from minimum to maximum security custody).

50. Hohman v. Hogan, 597 F.2d 490 (2d Cir. 1979) (transfer to segregated confinement in the maximum security wing of a second facility).

51. Daigle v. Hall, 564 F.2d 884 (1st Cir. 1977) (transfer from general population to departmental segregation).

52. Gibson v. Lynch, 652 F.2d 348 (3d Cir. 1981) (initial assignment to isolation).

53. Franklin v. Fortner, 541 F.2d 494 (5th Cir. 1976) (transfer from minimum-medium security to maximum security). In 1980, however, the Fifth Circuit limited *Franklin's* holding of no expectation to the statutes and regulations discussed in that case. Mitchell v. Hicks, 614 F.2d 1016, 1019 (5th Cir. 1980). In Parker v. Cook, 642 F.2d 865, 875 (5th Cir. 1981), the court affirmed a decision that a transfer to disciplinary segregation could not be labeled administrative to take it out of the *Wolff* due process requirement.

Gibson v. Lynch,[54] which found no right to a hearing in New Jersey, demonstrates the free hand that such an interpretation gives to prison administrators. The inmate in this case had been guilty of no infraction in prison and had demonstrated no need for solitary confinement, but he was nevertheless assigned to solitary during his first ninety days in prison,[55] ostensibly because of overcrowding in the New Jersey facilities. Even though New Jersey prison regulations prohibited assigning an inmate to solitary for more than thirty days, the Third Circuit nevertheless concluded that these regulations had given rise to no expectation that an articulated reason and a pre-assignment hearing would be given before the inmate spent *ninety* days in solitary confinement.[56]

Other circuits, however, have found that an expectation of non-transfer, absent specified reasons for the transfer, does arise out of California[57] and Delaware[58] statutes; Pennsylvania,[59] New York,[60] Illinois,[61] Puerto Rico,[62] and Tennessee[63] regulations; and Illinois prison practices.[64] Although courts differ in their interpretations of non-transfer expectations, the circuits have been consistent, however, in holding that a transfer made in retaliation for exercise of first amendment rights violates the United States Constitution.[65]

IV. Fourth Circuit Decisions

The Fourth Circuit has consistently applied *Meachum* and *Montanye* to preclude a need for pre-transfer due process protections. The first decisions on the issue, which were rendered in pro

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54. 652 F.2d 348 (3d Cir. 1981).

55. The inmate had been sentenced for three to five years in prison for possession of a stolen vehicle. His environment while in maximum security isolation included meals from a cart in his cell; six recreation periods in three months; no radio or television; denial of personal access to the prison library, community religious services, work or vocational training, and regular yard recreation; and denial of entry into the general prison population. *Id.* at 350-51.

56. *Id.* at 355.

57. Johnson v. Duffy, 588 F.2d 740 (9th Cir. 1978).

58. Winsett v. McGinnes, 617 F.2d 996 (3d Cir. 1980).

59. Helms v. Hewitt, 655 F.2d 487 (3d Cir. 1981).

60. McKinnon v. Patterson, 568 F.2d 930 (2d Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978).

61. Stringer v. Rowe, 616 F.2d 993 (7th Cir. 1980).

62. Garcia v. DeBatista, 642 F.2d 11 (1st Cir. 1981).

63. Bills v. Henderson, 631 F.2d 1287 (6th Cir. 1980).

64. Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978).

65. *See, e.g.*, Buise v. Hudkins, 584 F.2d 223 (7th Cir. 1978); Haymes v. Montanye, 547 F.2d 188 (2d Cir. 1976), *cert. denied*, 431 U.S. 967 (1977).

se litigation, did not address the matter of expectations created by statutes or regulations.[66] In a recent decision, the Fourth Circuit held that a North Carolina inmate had no expectation that a transfer to a lower custody institution would be granted after a substantial period of consistent good behavior.[67]

The District Court for the Eastern District of Virginia, on the other hand, has on several occasions found an expectation of due process protections arising from guidelines issued by the Virginia Department of Corrections.[68] These guidelines grant several procedural protections to an inmate faced with transfer to another prison[69] or to segregation within the same prison.[70] One guideline[71] delineates the requirements for transfer to Mecklenburg Correctional Center, a long-term segregation facility designated to house inmates who are guilty of specific enumerated offenses or who require high security protective custody. The Eastern District has interpreted this last guideline to establish an expectation that an inmate would not be transferred to Mecklenburg except in one of these two circumstances.[72] Further, in *Lamb v. Hutto*[73] the district court concluded that since a pre-transfer hearing conforming to published procedural standards was given as a standard practice in Virginia, the state inmate had a justifiable expectation of such a hearing before transfer to Mecklenburg.[74]

In 1981, the Fourth Circuit decided in *Gorham v. Hutto*[75] that

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66. Russell v. Oliver, 552 F.2d 115 (4th Cir. 1977); Cale v. Paderick, 546 F.2d 577 (4th Cir. 1976); Cooper v. Riddle, 540 F.2d 731 (4th Cir. 1976).

67. Wetzel v. Edwards, 635 F.2d 283 (4th Cir. 1980).

68. *See, e.g.*, Shah v. Mitchell, No. 80-0100-R (E.D. Va. April 23, 1981); Lamb v. Hutto, 467 F. Supp. 562 (E.D. Va. 1979).

69. GUIDELINES, *supra* note 2, at No. 825 (Oct. 15, 1977), No. 821 (IX)(B) (Sept. 1, 1977).

70. *Id.* at No. 821 (IX)(B) (Sept. 1, 1977).

71. *Id.* at No. 825 (VI)(K) (July 12, 1979).

72. Crowell v. Landon, No. 79-0949-R (E.D. Va. Feb. 26, 1980). *But see* note 75 *infra*.

73. 467 F. Supp. 562 (E.D. Va. 1979).

74. *Id.* at 566. Judge Merhige, who decided *Lamb*, subsequently held in Bukhari v. Hutto, 487 F. Supp. 1162 (E.D. Va. 1980), that due process did not attach to decisions to continue an inmate in "C" custody (the highest level of custody for general population inmates in Virginia). Citing Cooper v. Riddle, 540 F.2d 731 (4th Cir. 1976) and *Meachum*, Judge Merhige stated that "decisions to transfer prisoners from one institution to another or to reclassify prisoners have been held outside the scope of the due process clause." 487 F. Supp. at 1168.

75. No. 81-6020 (4th Cir. Dec. 3, 1981). In Tuller v. Hutto, No. 80-6716, slip op. at 2 (4th Cir. Feb. 2, 1982), the Fourth Circuit in a per curiam opinion cited *Gorham* for the proposition that transfers to Mecklenburg "do not involve a constitutionally protected liberty interest." The court held that a transfer from general population to solitary confinement "was within the discretion of the prison officials and did not infringe on constitutionally protected

"prison policy guidelines are not a sufficient basis for affording state prisoners a liberty interest in not being transferred to other prison institutions within the same state."[76] The inmates involved had all been transferred to Mecklenburg after hearings allegedly not in compliance with Guideline 821, which delineates the procedural protections provided an inmate who is subject to reclassification for transfer or other purposes.[77] The court did not discuss Guideline 825, which governs transfers to Mecklenburg and other institutions.[78] Consequently, the holding was limited to the issue of whether setting forth procedural protections created an expectation that such protections would be provided before transfer. As the dissent noted, the court's holding appears to be inconsistent with case law, *Enomoto* in particular.[79]

On the same day that *Gorham* was decided, another panel ruled in *Ward v. Johnson*[80] that an eight-day loss of privileges had been improperly imposed because of failure to call the inmate's witnesses in violation of Guideline 861, which governs disciplinary proceedings.[81] Although lost privileges would not ordinarily require due process protections, the court determined that the test set forth in *Wolff* "is the severity of the potential punishment and not the actual punishment."[82]

V. Virginia Applications

Taken together, the cases arising within the Fourth Circuit indicate that an inmate faced with transfer to segregated confinement at Mecklenburg which may extend for a year or more has no due process rights, while the inmate faced with transfer from segregation to isolation for fifteen days, only a slight difference in conditions at Mecklenburg, has a constitutional right to a full hearing. A recent change in the method of computing good time credit in Virginia makes this distinction even less tenable. Inmates sentenced after July 1, 1981, and those sentenced before that date who so elect, will have their time calculated under the good conduct allow-

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rights." *Id.*

76. No. 81-6020, slip op. at 6 (4th Cir. Dec. 3, 1981).
77. Guidelines, *supra* note 2, at No. 821 (Sept. 1, 1977).
78. *Id.* at No. 825 (Oct. 5, 1977).
79. No. 81-6020, slip op. at 12-13 (4th Cir. Dec. 3, 1981).
80. No. 79-6304 (4th Cir. Dec. 3, 1981).
81. Guidelines, *supra* note 2, at No. 861 (Nov. 29, 1977).
82. No. 79-6304, slip op. at 9 (4th Cir. Dec. 3, 1981).

ance system.[83] Instead of the previous general rule of ten days of good time credit for every twenty days served, a prisoner can now earn from zero to thirty days of good time credit for every thirty days served, depending upon the class in which he is placed. Specifically, an inmate who has been placed in isolation or segregation for disciplinary reasons is in Class IV and earns *no* good time credit.[84] He must continue in that class for at least ninety days.[85] The inmate transferred to Mecklenburg because of behavioral problems is also reduced to Class IV.[86] Thus a sentence to either disciplinary or administrative segregation precludes an inmate from earning good time credit, and he loses the right to gain any reduction in the length of his sentence while in such confinement. It would appear that if the loss of good time entitles an inmate to due process protection,[87] loss of the potential for earning such credit should have a similar effect. Under this close analysis the distinction between administrative and disciplinary confinement as a basis for determining due process application breaks down and cannot properly support such disparate treatment of prison transfers. Yet in practice the distinction remains.

The case law initiated by *Meachum* and *Montanye* has in many instances put the decision most important to the inmate—that of his physical status in confinement—beyond judicial review, not because the courts have carefully determined that any impact or injury to the inmate caused by the action is slight, but because state authorities have granted themselves unfettered discretion to make these decisions. This administrative power over the rights of other men appears all the more inequitable when one considers the following remarks of Justice Harshbarger of the West Virginia Supreme Court:

> Our federal and state constitutions do not *give* liberty to people: they protect a free people from deprivation of their God-given freedom by governments. The entitlement to liberty and freedom must follow every citizen from birth to death, however mean or degenerate he may be viewed by his government or his peers at any given time along the way.

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83. VA. CODE ANN. § 53-209.1 to -209.5 (Cum. Supp. 1981); GUIDELINES, *supra* note 2, at No. 806 (VIII)(A) (July 1, 1981).

84. GUIDELINES, *surpa* note 2, at No. 806 (VIII)(H)(1), (2) (July 1, 1981).

85. *Id.* at No. 806 (VIII)(H)(2)(a) (July 1, 1981).

86. *Id.* at No. 806 (VIII)(H)(5) (July 1, 1981).

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

> And so, the physical deprivation of his liberty must at every stage carry the burden upon the state to overcome the great presumption that he is a free man. His constitutional rights follow him into prison, or mental hospital, or military servitude, or wherever he is forced by the government to be.
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> Therefore, although it is true that restrictions upon liberty are implicit in the penal system, each must be imposed reluctantly; and new ones, with due process of law.[88]

In his dissent in *Meachum,* Justice Stevens discussed the majority's analysis that the liberty interest must be based on constitutional or state law.

> If a man were a creature of the State, the analysis would be correct. But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. . . . Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.
>
> I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations.[89]

After determining that the deprivation of liberty imposed upon inmates was not total but merely partial, he concluded by discussing the legal status of incarcerated inmates: "It is unquestionably within the power of the state to change that status abruptly and adversely; but if the change is sufficiently grievous, it may not be imposed arbitrarily. In such case due process must be afforded."[90]

VI. Conclusion

That the Supreme Court should experience real difficulty and consequent reluctance in dealing with prison problems is not surprising. The judicial system is not presently provided with the equipment and personnel to analyze in detail all correctional

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88. Watson v. Whyte, ___ W. Va. ___, ___, 245 S.E.2d 916, 918 (1978) (emphasis in original).

89. Meachum v. Fano, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting).

90. *Id.* at 234.

problems. Yet for the Court to abandon those persons most in need of due process protections, instead of adapting to deal with the challenges before the Court, is a clear warning of the fragility of all constitutional rights. As the law now stands, a prisoner may be locked in a cage for years at the whim of prison officials. The inability to prevent losing the slight residue of freedom left to a prison inmate constitutes a clear failure of the legal system. Those limited freedoms are all the more important and valuable to the inmate because he has so few. They deserve a special and careful protection.